

TESTIMONY OF DON KASHEVAROFF
PRESIDENT OF THE SELDOVIA VILLAGE TRIBE

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

July 12, 2007

OVERSIGHT HEARING ON TRANSPORTATION ISSUES

Good morning Chairman Dorgan and Members of the Committee on Indian Affairs. It is an honor to appear before you this morning. My name is Don Kashevaroff and I am President of the Seldovia Village Tribe located on Kachemak Bay on the Kenai Peninsula in Southcentral Alaska. I also chair the Seldovia Native Association, Inc., an ANCSA corporation with land, resource and tourism ventures. While this is my first opportunity to testify on tribal transportation matters, I have testified before this Committee on the Indian Health Care Improvement Act in my capacity as Chairman and President of the Alaska Native Tribal Health Consortium, which provides health, sanitation and health facilities and other services for 125,000 Alaska Natives. I also chair the IHS Tribal Self Governance Advisory Committee and co-chair the IHS National Budget Formulation Committee.

I regret the circumstances under which this hearing was postponed. Please allow me to express my condolences to the family of Senator Thomas, his friends, colleagues and staff. We recognize and appreciate his service to his state and to the nation.

The transportation needs of our communities are vast. The resources available, while growing, fall far short of what is necessary. Fortunately, over the past 30 years of implementation of the Indian Self-Determination Act and nearly two decades of Self-Governance, we have learned that by placing responsibility for addressing those needs in the hands of Alaska Native and American Indian tribal governments we can stretch those dollars to provide exceptional services with limited resources.

The Seldovia Village Tribe has assumed the Indian Reservation Roads (IRR) Program under its self-governance agreement with the Secretary of Interior. We took this step based on a conclusion we reached after many years of health care administration: self-governance works. Under self-governance, Seldovia reformulated the way health care was being delivered. We were aware of our community needs and fine tuned our programs by listening carefully to community concerns. We make funding go further by tailoring services to the unique conditions of our small rural Alaska community. By proper design, we provide needed services locally using innovative approaches sustained by diversifying the resources available to our programs – for instance, not just IHS, but other federal agencies, state agencies and private partners. The result has been better care for our members and for non-Native residents of our region.

Using the program design skills Seldovia has developed in the health field, we have developed a transportation program suited to the unique circumstances of our community and the Kachemak Bay region. This experience has culminated in the development of a land and water based transportation system. In addition to the IRR Program for roads, Seldovia has designed the Kachemak Bay Ferry Program and through numerous discussions with State and local transportation departments, with our congressional delegation and with the FHWA and BIA, we have developed a transportation program that will benefit not only the Seldovia Village Tribe but also the entire region. We believe the process will provide lessons that will benefit tribes nationwide.

First, let me offer some context. Seldovia is located on the Southern end of Kachemak Bay and does not have road access to the state highway system. We currently access the state road system via the twice weekly State Marine Highway Ferry to the town of Homer (service in winter months is once a week). In this respect we have limited access to the hospital, medical clinics, pharmacies, college, and other services available in Homer. Freight costs for food are excessive. If you visit the area, the rich natural resources suggest economic opportunity. Unmet transportation needs, however, undermine viability of economic development.

To offer economic opportunity, access to jobs, and to provide for public health and safety and tourism, we decided to design and construct a daily ferry. The Kachemak Bay Ferry Program will not be used to carry hundreds of cars or require a large crew with the high cost of operation associated with the state highway system ferries. Rather, a smaller ferry providing daily freight and passenger service to five underserved communities will be administered under the Seldovia Ferry Authority and operated by a four member crew to provide frequent and affordable access between communities.

As we learned through our direct administration of our health programs, effective transportation service delivery depends upon the ability to build a solid system from diverse resources. In the transportation arena, this calls for using our IRR Program funds for appropriate road improvements related to the ferry system. Meanwhile, we have sought and obtained funding from other federal transportation programs, including the Public Land Discretionary Program, the Ferry Boat Discretionary Fund, and SAFETEA-LU High Priority Projects.

While Seldovia has been successful in designing an innovative program responsive to our local needs and in obtaining support from federal, state and local authorities, inefficiencies in the federal bureaucratic system for delivering program funds have caused setbacks in achieving our planned outcomes. Let me briefly mention some of these and offer some recommendations to the Committee.

The Need for Mechanisms through which FHWA and other DOT agencies may provide funding to Indian Tribes

For more than two years now, the BIA and FHWA have been unable to deliver \$3.7 million in funding vitally needed for our ferry construction program. This experience shows not only flaws

in BIA and FHWA administrative systems for delivering program funds but also that tribes' options for receiving federal transportation funds are limited when the funding comes from outside the IRR Program. Seldovia had been awarded FY 2005 funding under the Federal Lands Highway Discretionary program. Yet, FHWA could not issue the funding directly to Seldovia, rather these funds could be transferred to Seldovia only through the State of Alaska or through BIA.

Seldovia opted for BIA, given that we had an existing self-governance agreement with BIA in place, which included the IRR Program. FHWA notified BIA of funding availability for the Kachemak Bay Ferry project and several other tribal projects on June 24, 2005. Seldovia prepared our self-governance ferry addendum and on November 10, 2005, requested negotiations, which were held on December 1, 2005. The agreement was not finalized, however, until August 30, 2006. With the fiscal year coming to a close, BIA, rather than transferring all ferry funds allocated to Seldovia in accordance with that addendum, returned those funds to FHWA. In order to have those funds transferred, Seldovia sent *five* letters to BIA and FHWA since January 16, 2007, has held frequent face-to-face, telephonic and email exchanges with federal officials, and has had to negotiate a new ferry addendum, which was not signed until July 2, 2007.

We have been assured that these funds will be transferred in the coming days. Since May 2007, when OSG Director Sharee Freeman became directly involved in reviewing Seldovia's documents, the process has showed some improvement but much more needs to be done. These delays are unacceptable and should not be tolerated. Just counting the period since the Ferry Addendum was signed last August, Seldovia has been deprived of nearly a year's worth of interest, let alone the lost opportunities to advance efforts in the construction process. I have been assured by other tribes in Alaska and other self-governance tribes, as well as those tribes that were awarded Public Lands Highway Discretionary Funds that these delays are not unique to the Seldovia ferry.

Recommendation: Seldovia Village Tribe believes that legislation must be enacted as soon as possible that clearly and unambiguously authorizes DOT agencies, including FHWA to enter into ISDEAA agreements – including compacts of self-governance - for the direct transfer of funding to tribes. I discuss this recommendation in more detail below.

Failure to Meet 30-day Deadline for the Distribution of IRR Program Funds and the Need to Adopt Self-Governance Amendments containing Final Offer provisions.

The extensive delays in distributing federal transportation funding are not limited to the ferry project. Seldovia has still not received our FY 2007 IRR Program funding, nor have most other tribes that have assumed the program under Self-Governance agreements even though, by statute, BIA has 30-days from the time funds become available from the FHWA to distribute those funds to tribes. This year, that 30-day deadline expired in mid-May. Now, 90 days later, tribes are still waiting for our IRR funds.

For tribes carrying out IRR Program activities under self-governance agreements, these delays may come to an end soon. For those tribes carrying out IRR Program activities under self-determination contracts, however, further delays are expected. I refer the Committee to the testimony of Pete Red Tomahawk, which thoroughly addresses those self-determination contract issues.

At a symptomatic level, the problem for self-governance tribes stems from agency mishandling and delays with the so-called "template" agreements. The problem, however, goes deeper: to the inadequacy of the negotiating process that BIA has implemented under Title IV of the Indian Self-Determination Act. But first, let me address the IRR "template" issue.

At the request of the Self-Governance Advisory Committee (SGAC) and upon agreement of Acting Assistant Secretary Jim Cason during the annual self-governance conference in May 2006, a federal-tribal workgroup formed to prepare a "template" FY 2007 IRR Program Addendum that would guide federal and tribal negotiators on terms for assuming the IRR Program under tribes' self-governance funding agreements.

That workgroup submitted a proposed template for agency review a year ago, in July 2006. The BIA provided a marked up version to the workgroup in January 2007. After review by the workgroup and IRR Program Coordinating Committee workgroups, and discussions with federal officials, a revised workgroup version was produced in late March with the intent of producing a final version during the Coordinating Committee meeting in April 2007. During the April 23, 2007 meeting of the workgroup and BIA officials, the BIA rejected not only the tribal changes in the March 2007 draft, but reversed itself on several of its own positions from its January 2007 comments. A final "template" agreement was not approved and circulated by the agency until May 31, 2007.

The delays in the "template" process should be of concern to this Committee, to tribes and the agencies. More disconcerting, however, is how this "template" process has turned the Indian Self-Determination Act on its head. For FY 2007, Seldovia and many other tribes sought only to renew their funding agreements from prior years, without material changes to the scope or funding of the program. Indeed, when tribes submitted proposed FY 2007 IRR Addenda with all terms identical to their executed FY 2006 Addenda (except the calendar dates), they were advised by agency representatives that those proposals would be delayed (if accepted). They were instructed to resubmit new Addenda based on the "template".

Rather than providing negotiating guidance, the "template" became a set of non-negotiable terms and a format binding on all tribes. Renewal of agreements previously reached by the United States and the Seldovia Village Tribe under the Indian Self-Determination Act through government-to-government negotiations was rejected outright. Faced with the threat that the agency would delay yet again the distribution of IRR Program funding on which our program depends, we adopted the terms and format of the FY 2007 Addendum.

Recommendation. The process failures of the FY 2007 IRR Addendum provides further evidence as to why this Committee needs to enact up the amendments to Title IV of the ISDEAA as rapidly as possible. Among other things those amendments include Final Offer provisions that will provide tribes with the option of making a final offer in negotiations that the agency must respond to within a specific timeframe or have the final offer deemed approved. As the development of "template" agreements this year has demonstrated, tribes need legislative mechanisms to ensure that Congress' intentions in the ISDEAA are properly carried out in the face of federal intransigence and delay.

FHWA Program Agreements, the ISDEAA, and the Need to Expand the ISDEAA to Other DOT Agencies

The Committee has long been aware of the BIA's problems administering the IRR Program in accordance with the ISDEAA. In 1998 Congress clarified the applicability of the ISDEAA to the IRR Program. SAFETEA-LU also went one step further and authorized FHWA to enter into direct agreements with tribes "in accordance with the ISDEAA." This language reflects Congress' intent for tribes to have the discretion to assume IRR Program and funding directly from the FHWA without having to proceed through BIA utilizing the provisions of the ISDEAA. Unfortunately FHWA has not read this provision in this manner and has only agreed to agreements with Tribes that do not include many of the core concepts that the ISDEAA addresses.

First, let me talk about some tribe's success in contracting directly with the FHWA. As Pete Red Tomahawk's testimony stresses and as the Chickaloon Village in Alaska has explained to me, entering into a relationship directly with the FHWA can be positive. Indeed, although both tribes' IRR Program funding distribution is from the same pool of funds authorized, appropriated and allocated by formula under the IRR Program regulations, unlike those of us working with the BIA, tribes with FHWA agreements apparently receive their funds in a timely manner.

However, the contracts that these tribes have entered into come with serious disadvantages from my perspective: they include footnotes indicating FHWA does not interpret the SAFETEA-LU-authorized agreements to incorporate important ISDEAA terms intended to enable tribes to make their share of federal funding go further. Indeed, those footnotes express FHWA's interpretation that its IRR Program Agreements are *not* Indian Self-Determination Act agreements. This FHWA position raises a number of significant concerns. For example, an immediate concern for a program whose primary purpose is roads construction, this interpretation, if correct, will jeopardize applicability of the Federal Tort Claims Act (FTCA), which Congress extended to tribes and their employees carrying out ISDEAA Agreements.

As Seldovia's experience with the Kachemak Bay Ferry program has shown, tribal transportation needs and opportunities extend well beyond the IRR program. Tribes need the clear ability to rely on the ISDEAA to contract or compact directly with DOT-agencies, including, for example, the Federal Lands Highway Program (FLH), Federal Transit Administration (FTA), National Highway Traffic Safety Administration (NHTSA), and Federal Aviation Administration (FAA).

Recommendation. Congress needs to enact legislation that makes it absolutely clear that tribes can utilize the ISDEAA as a vehicle to contract or compact directly with all DOT agencies.

The Need for IRR Program Funding Formula Data to Accurately Reflect Need

A. Inventory Data for IRR Routes Eligible to Generate Funding

Indian Reservation Roads are public roads located within or providing access to Indian reservations or "Indian and Alaska Native villages, groups or communities in which Indians and Alaska Natives reside."¹ The Bureau of Indian Affairs (BIA) maintains a national database of such routes, the "IRR Inventory," which is used for the allocation of IRR funds and also determines where IRR funds can be used. State and county-owned roads comprise the majority of road miles within the IRR system. Indeed, over the past two years, the significant expansion of the IRR inventory has been fueled by the addition of state and county road miles at a substantially greater rate than that of Bureau of Indian Affairs (BIA) and tribal routes.²

By statute, all IRR Program funds must be allocated to tribes in accordance with the funding formula established by regulation. 23 U.S.C. § 202(d)(2)(A). The Final Rule implementing the IRR Program established the statutorily-mandated formula that must be used to allocate IRR Program funds among tribes. *See* 25 C.F.R. Part 170, Subpart C.

The funding formula adopted in the IRR Program Final Rule reflected Congress's intent that the funding distribution method "balance the interests of *all* tribes and enable *all* tribes to participate in the IRR Program."³ That balancing of interests called for avoiding substantial reallocations from the larger tribes while still addressing the central problem that had historically left smaller tribes out of the program: that the prior formula distributed funds based on an inventory limited to roads built and owned by the BIA.⁴ The new formula broadened tribal participation by allowing the inclusion of state, county, and municipally-owned IRR-eligible facilities in the inventory so that "actual IRR transportation needs [may] be counted for funding purposes."⁵ Alaska's tribes promoted this change in the funding formula and were among the new formula's intended beneficiaries.

¹ *See* 23 U.S.C. § 101(a)(12); *see also* 25 C.F.R. § 170.5 [69 Fed. Reg. 43090, 43106 (2004)].

² *See* 69 Fed. Reg. 43,090 (2004) (stating that the IRR system is comprised of 25,000 miles of BIA and tribal roads, and 38,000 miles of state, county and local government roads). During the Alaska Tribal Transportation Conference in October 2006, BIA Division of Transportation Engineer Sheldon Kipp reported that the FY 2006 IRR consisted of 32,000 miles of BIA and tribal roads and 53,000 miles of state and county roads.

³ Indian Reservation Roads, Proposed Rule, 67 Fed Reg. 51328, 51333 (2002) (emphasis added).

⁴ Although this limitation to BIA-owned roads was BIA policy, in Alaska some state routes were included in the IRR Inventory prior to the Final Rule, and are still in the inventory. This was due to an appropriations rider by which Congress required the BIA to use its 1993 "Juneau Area Plan," a planning document, as the basis for the Alaska IRR Inventory. The Area Plan included projects identified by the tribes regardless of ownership. State routes included in the inventory at that time were simply treated as BIA routes.

⁵ 67 Fed. Reg. at 51333-34.

Now under the IRR Program regulations, formula data with respect to roads owned by public authorities other than the BIA or tribes are computed only at the local matching share rate (for Alaska, nine percent, 9%).⁶ However, the IRR regulations explicitly offer an exception whereby inventory data from non-tribal, non-BIA-owned routes may be counted at their full (100%) value: when a "public authority responsible for maintenance of the facility provides certification of its maintenance responsibility and its inability to provide funding for the project."⁷ State certification is not required for a tribe to include a state-owned route in the IRR inventory for the purpose of generating funding at the non-federal matching rate. However, the state must provide certification of maintenance responsibility and the inability to fund a project if a state-owned route is to be computed at 100% of its cost to construct (CTC) and usage (Vehicle Miles Traveled, VMT).

State governments and their transportation departments have recognized that by certifying their inability to provide funding for IRR-eligible roads in their respective states the IRR Program can generate more funding overall for transportation improvements in that state. As a result, many states routinely submit statements, letters or enter into agreements certifying such routes for the IRR inventory that generate funding at the 100% level. The State of Alaska has refused to do this, thereby limiting the ability of tribes to add state routes to their inventory for the purpose of generating funds. The State's approach is prejudicial to the tribes, adversely affects overall levels of transportation funding available to Alaska and undermines the intent of the IRR Program regulations. This year, Alaska has agreed to provide certification, but it is not yet clear whether BIA has accepted the form of certification Alaska has provided.

Recommendation. The Committee should encourage BIA to promote an equitable approach to resolving this Alaska certification issue in a manner consistent with the terms of the IRR Program regulations.

B. Population Data

Through negotiated rulemaking, tribes and the federal government agreed to an equitable funding formula that would enable all tribes to participate in the IRR Program. The fairness of that formula, however, depends upon the accuracy of the data used to calculate relative need. As the BIA and FHWA contemplate revisions to the IRR Program regulations, mechanisms, including the data appeals process need to be established to ensure accuracy of data underlying the funding formula.

For Alaska tribes, the funding formula's population component is inherently inaccurate due to its use of the American Indian and Alaska Native Service Population (developed by the Department of Housing and Urban Development (HUD)). In Alaska, HUD uses "Alaska Native Village Statistical Area" to determine a tribe's service population. Yet, a tribe or the BIA may provide housing services to members beyond that "statistical area" (as the Supreme Court addressed in

⁶ See 25 C.F.R. Part 170, Subpart C, Appendix C(10); see also 25 C.F.R. § 170.223 (noting that Subpart C explains how the formula is derived and applied).

⁷ 25 C.F.R. Part 170, Subpart C, Appendix C(10)(3).

Morton v. Ruiz, Indians living in an Indian community near a reservation are eligible for BIA social service programs). Seldovia's Compact with the Secretary of Interior defines our tribe's "Near Reservation Service Area" to include our members in the Town of Homer as well as Seldovia and outlying areas. HUD, however, has refused to count these members as part of our Tribe's service population, and rejected our formal administrative appeal to correct that population count. In rejecting our appeal, HUD chose not to accept the terms of our self-governance funding agreement as adequate to establish a "near-reservation" service area for purposes of the NAHASDA formula regulations. Rather, HUD issued a determination that the entire state is a service area, and that since there are no "reservations" in Alaska, Seldovia is a tribe without a reservation. Thus, our near-reservation service area, though recognized by Compact, does not exist for HUD.

Furthermore, the data appeals provisions of the IRR Program regulations (25 C.F.R. 170.231) contain several drafting problems that have undermined the intent and the utility of this appeals process. The drafting flaws in these sections of the regulations have been identified by the IRR Program Coordinating Committee and a federal BIA workgroup as requiring technical correction. Such a correction will not likely be in place for another year or more.

Recommendation. Congress must exercise oversight authority to assure that the formula data used to allocate IRR Program funding are accurate. Congress should ensure that IRR Program regulation revisions correct the unfair use of HUD data to determine tribal population and that data appeal provisions provide appropriate procedures that allow tribes to correct inaccurate data contained in the IRR Program inventory in a timely manner.

Conclusion

I hope my comments this morning lead to productive action to improve the delivery of transportation services to Alaska Native and American Indian communities. I welcome your questions and look forward to continuing to work with you on these critical issues.