

# INTERTRIBAL TRANSPORTATION ASSOCIATION (ITA)

**Senate Committee on Indian Affairs**  
Oversight Hearing on Tribal Transportation

*"Paving the Way for Jobs, Infrastructure, and Safety in Native  
Communities"*



September 15, 2011

Hand Delivered.

628 Dirksen Senate Office Building  
Washington, DC 20510

\*\*Delivered via Email\*\*

September 13, 2011

Senate Committee on Indian Affairs  
Honorable Daniel K. Akaka, Chairman.  
838 Hart Senate Office Building  
Washington, D.C. 20510

**Re: Tribal Transportation Issues:**

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Thank you for this opportunity to provide testimony today.

On behalf of the Intertribal Transportation Association (ITA), Executive Committee and Member Tribes we formally submit these written comments at the Senate Committee of Indian Affairs (SCAI), Hearing today.

ITA's involvement with NCAI, and our involvement in the development of the National Tribal Leadership Paper on Tribal Transportation (White Paper), is in line with our Strategic Plan Objectives. Since ITA inception (*circa 1993*), one of the goals was to partner with organizations to assist in getting the tribes voices heard. I believe we have accomplished this over the last four years, without this partnership I don't think we would have developed such a comprehensive document.

We must show unity to the furthest extent possible, there is strength in numbers, there will always be issues we have differences on, however let us show unity on the big issues that will help us prosper as a Nation, as a family.

We have for many years viewed the Indian Reservation Roads (IRR), Program as a Jobs Program at the local reservation level. Each year our construction crews employ many enrolled members which supports their families not only during the construction months but year round.

This is why were pleased to hear in the President's speech of his plan for job creation to reinvigorate the economy.

We support the rebuilding our deficient roads and bridges. There is no shortage of these roads on reservations across the nation.

We support the "American Jobs Act."

Moving Ahead for Progress in the 21st Century (MAP-21):

The Senate Environment and Public Works Committee (EPW): released an bipartisan outline titled, Moving Ahead for Progress in the 21st Century, or MAP-21 in mid-July. The bill supports is a 2 year reauthorization with a total cost of \$109 billion or \$54.5 billion a year. There is still the issue of how to pay for this bill, and it will be up to the Senate Finance Committee to figure this out, and as mentioned numerous times raising the gas tax is not an option.

We support President Obama’s jobs bill and the benefit it will have for Indian Country.

**Areas that can be addressed during the reauthorization process. The identified items are as follows:**

Key points that address needed improvements to tribal transportation.

- 1) Fund the IRR Program with annual 50 million dollars increases starting at 800 million in FY-12 and increasing annually reaching 1,050,000,000 in FY-16 and restore the obligation limitation deduction exemption that existed for the IRR Program under ISTEA.
- 2) Increase funding for BIA Road Maintenance Program to at least 150 million annually
- 3) Increase FTA’s Tribal transit Grant Program to:

FY 2012:	\$35,000,000
FY 2013:	\$45,000,000
FY 2014:	\$55,000,000
FY 2015:	\$65,000,000
FY 2016:	\$75,000,000

- 4) Increase funding for IRR Bridge Program to:

FY 2012:	\$75,000,000
FY 2013:	\$87,500,000
FY 2014:	\$100,000,000
FY 2015:	\$100,000,000
FY 2016:	\$100,000,000

- 5) Enforce the statutory requirement in SAFETEA-LU which mandates the BIA to make IRR Program funds “immediately available” for Tribes within 30 days of the BIA’s receipt of funds from FHWA.
- 6) Simplify the award process by which Federal transportation funds are distributed to Tribes by creating uniform grant eligibility, application, and administration criteria
- 7) Develop model funding agreements for use by DOI and DOT to facilitate the efficient transfer of transportation funding and program authority to the Tribes.
- 8) Increase the number of DOT Programs which Tribes may participate in as direct funding recipients from the Federal government, rather than as sub recipients through the States.

- 9) Establish a Federal Lands Highway Safety Program for Indian reservation roads, establish a tribal set aside for the High Risk Rural Road Program, Increase funding to the TTAP's to at least 2.5 million annually.
- 10) Promote the use of innovative financing techniques in standard Indian Self-Determination contracts and self governance agreements to provide tribes with better tools to reduce their road construction backlog.
- 11) Carry out Right of Way reform in Indian Country to reduce costs and expedite the design, construction and reconstruction of Tribal roads and bridges .

## **Indian Reservation Roads (IRR), Issue:**

Various Tribal Organizations such as Council of Large Land Based Tribes, MT-WY Tribal Leaders Council, Transportation Sub-committee, & the Great Plains Tribal Chairman's Association have voiced their view on several issues/concerns regarding the implementation of Question #10 of 25 CFR Part 170, Subpart C, Indian Reservation Roads Program over the last several years (since 2006).

ITA has membership from small, medium and large tribes, therefore we have been very careful in our comments, we would however like to offer our assistance in this matter in the way of facilitating meetings to come up with solutions to the matter. This also falls within our Strategic Plan.

The large land based and rural tribes are losing millions of dollars because the BIA is misinterpreting the provisions of SAFETEA-LU. Dollars continue to hemorrhage from our reservations and people to those BIA Regions that have included countless miles of state and county roads. With this, the IRR program has become a program dominated by state and county roads within the inventory that drives the funding formula.

Over the past four years Large Land Based Tribes have expressed their concerns with regard to the "uncontrolled implementation" of the IRR Inventory system due to a misapplication and/or erroneous interpretation of 25 CFR 170 on numerous occasions with little or no response. This correspondence also included language which provided recommended solutions to the misapplication of the regulations.

This has proven to be detrimental to large land based tribes. There are critical issues the BIA and FHWA must address in order to arrest the uncontrolled implementation of inventory data that is allowing non-BIA and non-Tribal roads to generate enormous formula amounts.

Tribes have been told the only way to fix the problem is when reauthorization of the Federal Highway Bill is being considered.

## **THE TIME IS NOW.**

Tribes have been very frustrated in attempting to get some action, much less even a response to our concerns. The issue of uncontrolled inventory updates, the issue remains urgent to large land

based tribes since they deal with massive on-reservation vehicular transportation needs. Needs arise from tribal and BIA roads, and meeting them **relies primarily on IRR funding**. The **geographic isolation** of most large land based tribes prohibit them from competing in a system of adding Interstates/NHS highways, State and County roads onto the IRR system just to reap the inflated formula amounts. Also most large land based tribes' priorities are not others' interstate or state roads, but the very roads they must travel to get the basic medical and educational services. On the BIA system alone, there is a documented backlog of \$13 Billion just to improve the system to a safe and adequate standard. At present funding levels, and without further deterioration of the system, it would take 28 years to address this need. Allowing State and County roads into the IRR system simply to generate funding is siphoning off critical road construction funding for tribes whose only source of funding is the IRR program.

The direct nature of the Tribes comments is a reflection of the frustration the tribes have experienced over the last several years attempting to elevate this issue, however it is in no way intended as an indictment of any tribal entity or of the BIA/FHWA itself. In fact we are confident that this problem can be solved and that 25 CFR 170 is workable regulation.

Increased IRR funding three and four fold by inappropriately applying the regulations regarding generation of funding on state, county, and proposed routes that have been added to the IRR Inventory.

**The core issues** regarding the uncontrolled implementation of the IRR Inventory. The heart of this issue is threefold and includes; **relaxing the protocol which requires minimum attachments supporting each update; inconsistent interpretation of the Program regulations at 25 CFR 170 and in defining an "Indian Reservation Road"; and allowing an uncontrolled expansion of the IRR system.**

### **Solution:**

Minimum Attachments must be required. Explicitly defined Attachments were originally required in the IRR road inventory update process to substantiate each request. These requirements provide a fundamental tool to the BIA for quality assurance of each update. In order to concur with a recommended update, BIA officials must at least be assured that the facility exists (section photo), that the documented physical attributes of the facility are accurately reflected in the database (representative section photo), that facility ownership is confirmed and post-improvement maintenance responsibility is acknowledged (MOA Owner Agreement), and that each facility is incorporated into the tribal Long Range Transportation Plan (LRTP). It is inconceivable to think that waiving the requirement of these fundamental tools results in an adequate, representative IRR database. In fact, this measure is counterproductive, at the least requiring more in-depth, time-consuming inquiries at the Regional/BIADOT level, or, more likely, simply disregarding the confirmation process and approving unverified records.

**It is also recommended** that surface condition ratings be supplemented by a wearing surface calculation worksheet along with representative photo to verify published indices. Being

somewhat subjective by nature, backup documentation will result in more accurate, objective results in incorporating SCI into the crucial CTC calculation.

An Indian Reservation Road “providing access to an Indian reservation or Indian trust land” must be interpreted consistently. Vague, inconsistent interpretations of IRR roads have resulted in gross misrepresentation of the relative need across Indian country. Refining the regulations did not redefine the definition. We recommend that federal officials provide written guidance and direction in defining precisely what qualifies as an IRR and provide training to all BIA Regional Road Engineers and BIA/DOT personnel to ensure uniformity and consistency in the interpretation and application of the update process.

Many reservations possess a network of tribal roads which provide public rural local access to remote tribal lands within the exterior boundaries of the reservation. These routes are included on the IRR system as construction need miles to support the economic development of large land based tribes. In order to promote tribal self determination through economic development as it was intended, these facilities must be enhanced. Contesting, or otherwise rejecting these routes from inclusion as a Rural Local road, regardless of the surface type, prevents the LLBT’s from quantifying their relative need, which is ultimately reflected in the distribution of Program funds.

Large land based tribes are generally located in remote/rural areas in which a majority of the public access roads are BIA or tribally owned. In order to enhance public health and safety on these facilities, we are solely reliant on IRR Program funds. As funds are shifted to roads owned by state and local governments, the trust responsibility of the federal government is severely compromised, in turn jeopardizing the general health and welfare of the traveling public on these facilities.

There are thousands of miles of non-BIA/Tribal routes on the IRR inventory that are not in compliance with 25 CFR 170. By regulation, at 25 CFR 170 Appendix C to Subpart C, under no circumstances should any non-BIA/Tribal route generate 100% funding. Likewise, National Highway System/Interstate highways should never generate funding. County-owned facilities which meet the precisely established criteria (as recommended above) of an IRR road shall generate at the federal sliding scale percentage, however state-owned facilities, which meet the precisely established criteria of an IRR road, shall not generate funding unless a project exists for said route, and then only at the non-federal share until construction of the facility.

NonBIA/Tribal roads, particularly state-owned roads, are adequately maintained and funded through 23 USC and state-owned roads were never intended to be included in ascertaining the relative need of Indian tribes.

The IRR Inventory has experienced an unprecedented growth rate in the past 3 years. Of particular significance is the expansion of the very definition of an IRR road. Inconsistent determinations of IRR eligible facilities have resulted in a skewed system which is detrimental to those tribes who rely solely on the IRR Program to address public health and safety on public roads within Indian reservations. BIA must limit the growth rate of the Program to a respectable, realistic level.

Proposed roads have had a major impact on the funding distributions in the IRR Program. These forever funded facilities include numerous miles which will never be built, but are simply added to the database to generate funding. A well-established justification in the LRTP must be submitted with each update to assure that these proposed roads are in fact included in the future development plans of the respective tribe(s) as a project. Further, proposed roads should only generate funding for up to five years, at which time inactivity results in CTC = 0 VMT = 0.

In order to assure that Road Inventory Field Data System (RIFDS) records portray the spirit and character of the IRR Program, a review team consisting preferably of tribal officials or an outside, impartial review team should be employed to assess the interpretation of BIADOT and assure each submitted record lies within the scope of the regulations.

In accordance with 25 CFR 170.444(f), the BIA provides each tribe with copies of the Relative Need Distribution Factor (RNDF) distribution percentages by August 15 of each year. Providing this information allows tribes to plan and prepare the IRR Program for the upcoming fiscal year, including preparing budgets and funding Agreements; procuring materials, equipment, and manpower for upcoming projects; and identifying projects to be including onto the Tribal Transportation Improvement Program (TTIP). However, the FY 2008 distribution percentages were not published until July 2008. This situation creates an extreme burden on the tribes in their efforts to deliver an efficient, productive Program from year to year.

### **Issue:**

Another concern which is directly related to the funding issues, is the BIA DOT review and approval of RIFDS records. The Program regulations, at 25 CFR 170.444, explicate the process by which the IRR inventory is updated. In order to provide the RNDF distribution percentages by August 15<sup>th</sup>.

### **Solution:**

Action must be taken on the inventory update submittals, i.e. they must be approved or rejected, and discharged within this timeframe. There has been no consistency in this process since the promulgation of the Final Rule in 2004. Communication is obviously the missing element in delivering this process with efficiency and accuracy, particularly in providing feedback to the Regional offices regarding the records submitted by the tribes. The BIA must correct this process and take action on RIFDS records in order that these overriding issues do not continue to trickle down to the tribal programs, hindering our abilities to function efficiently and productively.

The Montana/Wyoming Tribal Leaders Council have identified many issues and shared with Mike Black, Director Of The Bureau Of Indian Affairs on April 30,2010

Regulations governing the Indian Reservation Roads program are having a negative effect on how funding is calculated for Land Based Tribes and Tribes seek to rectify those issues through the administrative process. Issues that were brought to Mr. Black's attention were as follows:

- **Bogus data being allowed into the IRR inventory:**

Surface Condition Ratings require a visual inspection of the road surfaces and a mathematical calculation to determine the Pavement Condition Index (PCI). many of the paved surfaces of roads owned by Agencies other than the BIA or Tribes are given a rating of exactly 60 or below. It is theoretically impossible to derive a pavement rating of 60 when applying the many components of field data that must be considered in the calculation of the pavement rating.

Field observations of surface conditions were not conducted and actual calculations were not made on thousands of miles included in the IRR inventory.

### **Solution:**

All non-BIA system roads included in the IRR inventory be reviewed for accuracy and all routes that do not have evidence of an actual computation of the PCI be removed from the system.

- **Tribes are allowed to include roads in the inventory that are not located within or provide access to the reservation or trust lands.**

25 CFR 170.5 defines an Indian Reservation Road as *“a public road that is located within or provides access to an Indian reservation or Indian trust land, or restricted Indian land that is not subject to fee title alienation without the approval of the Federal government, or Indian or Alaska Native Villages, groups, or communities in which Indians and Alaska Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.”*

The BIA is allowing tribes to include State (including Federal Highway System roads) and County roads into their IRR inventory that are not located within nor do they provide access to the reservation or trust lands. In several cases, these routes are allowed to generate IRR funding at 100 percent.

It is our understanding that a road that provides access to an Indian reservation or trust lands must physically connect to the reservation or trust land. We know of a Region that is allowing State and County roads into the system that are 10 to 15 miles away from the reservation.

We are requesting that all routes that do not physically connect to the Reservation or Trust lands be removed from the system.

- **Certain Tribes are allowed to generate funding on State and County roads included in the inventory without evidence that a project will ever be constructed on the route.**

The 3<sup>rd</sup> category of Question 10 of Appendix C to Subpart C, 25 CFR 170, stipulates that *“The facility is eligible for funding for construction or reconstruction with Federal funds, however, the Public Authority responsible for maintenance of the facility provides certification of maintenance responsibility and its inability to provide funding for the Project.”*

23 USC 101(a) definition of a project is as follows: *The term “project” means and undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion so constructed or any other undertaking eligible for assistance under this title.”*

The same Section defines Construction as follows: *The term “Construction” means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a highway.*

There are thousands of miles of roads owned by others (States and Counties) that are included into IRR inventory and generating funding, (many miles generating at 100%) without any evidence that a project or any type of construction is planned on the route. The BIA is encouraging and allowing tribes to include routes owned by others into the IRR inventory only to generate funding.

We are requesting that all non-BIA system routes that do not have a project agreement in place with the owning agency be removed from the system.

- **Some Tribes are allowed to generate funds over and above the local match /non-Federal Federal share amount.**

Tribes in certain Regions are allowed to generate IRR funding at 100% on State and County routes. On approved projects, tribes can coop a project with another Public Authority, however the funding they provide for the project is limited to the non-Federal share or local match.

23 U.S.C. states: *“Before approving as a project on an Indian reservation road any project eligible for funds apportioned under section 104 or section 144 of this title in a State, the secretary must determine that the obligation of funds for such project is supplementary to and not in lieu of the obligation, for obligation of funds for such project is supplementary to and not in lieu of the obligation, for projects on Indian reservation roads, of a fair and equitable share of funds apportioned to such State under section 104 of this title”*

We are requesting that all non-BIA routes that are generating IRR funds over and above the non-Federal share be removed from the system.

- **Other Issues**

We are also requesting to begin start a dialog on the following issues:

- Definition of Access
- Definition of Indian Reservation Road
- Legality of Question 10
- Definition of Project
- Proposed Roads
- Road Maintenance
- Establishment of and Inventory Oversight Committee
- Comprehensive Inventory by Federal Highway Administration

On June 3-4, 2009 I was honored to attend several meetings in our nation's capitol with a delegation of tribal leaders from the Rocky Mountain Region.

As we were leaving the US Capitol Building and walking through the Rotunda I couldn't help but to think about the history of the United States. More specifically the history of the Native American relative to transportation as many of the highways that exist to this day are built over the path of a hunting trail or path the Native American traveled. This gave me a renewed strength to advocate for the interest of the ITA Executive Committee and member tribes. I believe these DC trips were beneficial for ITA and our member tribes.

It was with the people in mind that ITA was formed on that blustery day in May of 1993 in Polson, Mt. Formed so we may go forth into the future with one thought in mind, with one ideal in mind, and with service to the people in our heart.

I think we can all agree that to build strong tribal nations, Indian tribes must build a transportation infrastructure that permits safe travel and promotes economic expansion. Connecting people within tribal communities and tribal communities to the surrounding area means greater economic development and improved delivery of tribal government services. Yet many Indian reservation roads and bridges are known more for their impassable condition than for their use as a safe means of transportation. The poor condition of many tribal roads and bridges jeopardizes the health, safety, security and economic well-being of our tribal members. Tribal roads and bridges are often in such disrepair that children are prevented from attending school, sick and injured people are prevented from reaching hospitals and emergency responders are delayed in providing timely assistance to people in need.

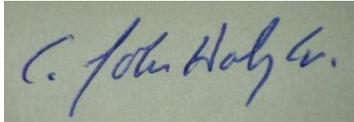
It is with that thought in mind that we must move on and be persistent in our efforts to continue the educational process for our people.

The SCAI timely leadership can help Tribes expand on the gains that have been made in the transportation arena. We look forward to working with you and your staff to continue improving the quality of transportation infrastructure for the benefit of our Tribal members and our surrounding communities.

I thank you for this opportunity to submit these written comments.

The Intertribal Transportation Association (ITA), and Member Tribes look forward to supporting the process to resolve this challenge. If there are any questions regarding this, please direct them to Mr. C. "John" Healy Sr., President, Intertribal Transportation Association (ITA), at (406) 353-8469 or Mr. John P. Smith, Acting Interim Executive Director, Intertribal Transportation Association (ITA), at (307) 335-7669, Thank you.

Sincerely,

A rectangular box containing a handwritten signature in blue ink that reads "C. John Healy Sr.".

C. "John" Healy Sr., President,  
Intertribal Transportation Association (ITA).

Attachments:

Cc: Senator Jon Tester (D-MT)  
Larry Echohawk, Assistant Secretary of Indian Affairs,  
U.S. Department of the Interior, Bureau of Indian Affairs.  
John Baxter, Associate Administrator, Federal Lands Highway.  
Federal Highway Administration.  
National Congress of American Indians (NCAI).  
Intertribal Transportation Association (ITA), Executive Committee.