

**TESTIMONY OF
LORETTA BULLARD, PRESIDENT OF KAWERAK, INC.
BEFORE THE
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

JUNE 4, 2003

Thank you Senator Campbell, Senator Murkowski and members of the committee for the opportunity to testify. My name is Loretta Bullard and I am President of Kawerak, Inc. Kawerak is a regional Native non-profit corporation and consortium of 20 federally recognized tribes in the Bering Straits Region of northwestern Alaska. I also serve on the Alaska Federation of Natives Board of Directors.

Thank you for giving us this opportunity to present our needs and recommendations. We're pleased that Congress is focusing attention on Native American transportation issues.

Kawerak is one of the few tribal organizations nationally – and the only tribal consortium – which has contracted to perform the entire Bureau of Indian Affairs "Indian Reservation Roads" (IRR) program under the Indian Self-Determination and Education Assistance Act. There is a distinct difference between contracting to construct a particular Transportation project and compacting to provide the entire IRR Program. Basically, when you compact the entire program, the compactor is responsible for the full spectrum of the program, from planning, inventory and long-term transportation plan development, to project selection, design, scheduling and construction. Kawerak contracted the entire IRR program in 2001. Effective in 2003, we rolled the IRR program into our self-governance compact.

I served as one of Alaska's tribal representatives to the national negotiated Rule-making Committee for the IRR program. This committee was tasked to develop program rules and a funding formula. We just completed the final meeting in late March, 2003 and anticipate the final regulations will be published in time for the FY 04 BIA IRR fund distribution.

Alaska's ground transportation system is very undeveloped in comparison to the rest of the United States. Most villages in rural Alaska are not connected to the highway system. By noting this, however, we are not suggesting that the leading transportation need in rural Alaska is for large-scale connecting routes between villages (though the need may exist in some areas). Rather, we see the greatest need in the area of basic infrastructure development at the village level.

Many rural Alaska village streets are no more than unimproved dirt paths, and are third world compared to similarly sized communities in the Lower 48 states. Virtually any development a village wants to do, whether it is new housing units, a new landfill, or bulk fuel tanks, access to a water source, a new sanitation lagoon or gravel site, requires road development. Unimproved village streets with no winter snow removal – not

uncommon in our smaller villages – turn into impassable quagmires during the spring. Once the roads/beaten paths dry out, the mud turns to dust. Dust from traffic on gravel and unimproved streets fouls subsistence meat racks, berries and other vegetation and is a major health hazard for children and the elderly in many of our villages. I have attached photos of “streets” in our villages – just to give you a sense of what is actually on the ground in rural Alaska.

Because there are no roads between communities, snow machines are routinely used for inter-village long distance winter travel. There is a huge need in Alaska for winter trail staking. Each year lives are lost due to snow machiners simply losing the trail, falling through river or sea ice, or freezing to death in arctic blizzard conditions.

Unfortunately, our small city governments have little tax base and our tribal governments have none at all. Capital improvements are dependent on outside funding. Village road projects are rarely constructed by the State DOT, because in many instances, villages are not able to meet the match requirement.

IRR funding, when it is available, is an ideal funding source for village Alaska because it can be used for a local match to leverage other funding sources. IRR funds and projects can also be administered through Indian Self-Determination Act contracts, which means that Native hire rules apply and the project can be run locally. However, there are many unresolved problems with the IRR program, not the least of which is insufficient funding and unequal access to the program.

The IRR Negotiated Rulemaking Committee worked very hard to develop rules that would correct some of the problems in the program, including inventory problems. However, we were not able to address all the problems in the negotiated rule-making process. On behalf of Kawerak and the Alaska Federation of Natives, we respectfully request your assistance to help our villages develop local infrastructure and to literally get us out of the mud and into the 21st century. Following are our recommendations.

Indian Reservation Roads Issues

S. 1122, S.725, S. 281

While this hearing is being held to solicit recommendations and comments on S.725 and S.281, I will also speak to the NCAI draft bill and S. 1122, the most recent bill introduced in the Senate addressing Tribal Transportation Issues. We commend Senator Bingaman, Senator Johnson, Senator Campbell, other sponsoring Senators and their staff, for the work they've done in order to introduce bills S. 725 and S. 1122.

To start, we wanted to express our support for the language contained in the NCAI draft bill, which would change the name of the Indian Reservation Roads Program throughout title 23, to the Tribal Transportation Program. This would better reflect the broad scope of the program.

Appropriations. Kawerak strongly supports increasing the national IRR appropriation as outlined in S. 1122 including the set-aside for maintenance within the larger appropriation.

The IRR program is seriously under-funded. The BIA's data identifies the IRR construction need across the country at \$10.8 billion, yet under TEA-21, the IRR authorization level was \$275 million annually. It would take about 40 years to meet the need at that rate.

Poor maintenance of IRR routes is a critical problem. Both Federal Lands Highways and BIA have a responsibility to ensure that projects constructed with IRR funds are adequately maintained. On most IRR facilities, the responsible party for maintenance is the BIA. But the BIA road maintenance program is funded nationally at only \$26-27 million per year. In Alaska very few communities even have access to these maintenance funds. Road Maintenance is in the Tribal Priority Allocation (TPA) part of the DOI budget, which means that it is effectively buried within the overall BIA budget.

Obviously, the construction need for IRR roads is never going to go down if they are not being adequately maintained. Nationally the IRR construction program, which should be at least partially for new road construction, ends up being spent on reconstruction projects that would not be necessary if maintenance was adequate. It is for this reason that we support increases targeted specifically for maintenance.

We are very supportive of the language contained in S. 1122 and S. 725 that would except the IRR program from the obligation limitation and restore the IRR Program to 100% of funding.

We encourage Congress to go with the language proposed in the NCAI draft bill that would provide \$50 million dollars annually for a bridge program. Just in the Bering Straits Region, we've identified 3 bridges that need replacement or major repairs. \$15 million dollars isn't enough funding to address the bridge planning, engineering and construction needs on the IRR system. Current IRR bridge program is a \$13 million take-down from IRR construction programs and funding can't be used for design. The technical correction that would allow expenditures on design is very important.

We wanted to speak to language contained in S. 725, Section 3(d)(5)(A-B) that would require the Secretary to verify the existence of all roads that are part of the IRR system and to distribute funds based only on those roads. We oppose this language. Not so much the language verifying the existence of roads, but the language that directs IRR funds to be distributed based only on the roads currently existing. Under this scenario, those reservations/tribal communities with extensive roads would receive all the funds. Those communities without roads (but who badly need them) would receive little if any funding. This provision would just lock in place all the historic inequities in the way the BIA has allocated roads funding.

We encourage Congress to go with the language contained in the NCAI draft bill that would establish a \$35,000 base per tribe for Tribal Transportation Planning and bump the 2% planning allocation to 4%. Using our Bering Straits Region Tribes as an example, we were notified in March of 2002 that our tribes were eligible to apply for \$1,125 as their share of the 2% planning funds. Even if the allocation were bumped to 5%, their annual allocation of transportation planning funds would only increase to \$2,812.50. This simply is not enough funding to do comprehensive transportation planning. Increasing the planning allocation to 5%, by itself, doesn't make planning funds available to under-served tribes, because planning funds are allocated based on a % of a region's construction funds.

We strongly support the language contained in S 1122, the NCAI draft bill, S. 281 and S.725, all of which would:

- Establish a pilot program to enable tribal contractors to contract directly with the Federal Highways Administration rather than through BIA. We strongly support this, simply because it would eliminate a "middle man" and reduce the bureaucratic processes necessary to get things done.
- Clarify that the IRR program is fully subject to PL 93-638 contracting on the same basis as other BIA programs. This should not be necessary after TEA-21, but it still is because the BIA continues to take the policy position that it can simply label certain functions as beyond the reach of PL 93-638 contracting without going through the analysis of whether the activity in question really has to be performed by a federal employee. Normally under PL 93-638, a function or activity of the BIA is subject to tribal contracting unless it is inherently federal for constitutional or statutory reasons.

Of the bills introduced thus far in Congress, in my estimation, S. 1122 is the most thorough in addressing the broad range of Tribal Transportation issues. We are very supportive of the language contained in Sections 104 & 105 of S. 1122 bill with one exception - noted below. We support the language that:

- authorizes advance funding for construction activities;
- authorizes tribes to directly submit ERFO requests to the Secretary of Transportation;
- requires states to consult with affected Tribes to determine interest in performing federal aid projects, allows for agreements whereby funds could be made available to the tribes to do the work under the ISDEAA at 100% federal share;
- makes clear tribes may assume responsibilities for all non-inherently federal PFSA's and provides for avenues of appeal;
- clarifies that normal 638 rules regarding advance payment and use of savings apply to IRR funds under 638 contract;
- allows tribes to assume PS&E approval authority without necessarily having separate stewardship agreement with FHWA;

- authorizes up to \$10 million be spent out of Highway Trust funds to meet the contract support needs of Indian Tribes when contracting to provide the Secretary's responsibilities and obligations and directs the Secretary to report on funds made available for that purpose.
- makes clear that the Secretary shall not deduct administrative expenses incurred by BIA relating to individual projects – from funds made available to Tribes for Tribal Transportation purposes;
- creates a Deputy Assistant Secretary for Tribal Government Affairs in the Office of the Secretary of Transportation, defines the Deputy Assistant Secretary's responsibilities and provides for Secretarial appointment.

Section 106 ss.326 of S. 1122 requires the Secretaries to establish a joint IRR Coordinating Committee to help assist the Secretary(ies) in carrying out the goals and purposes of the this title and the IRR Program. We recommend that this section be amended to give the IRR Coordinating Committee some “teeth” to help address ongoing issues - beyond being purely advisory. Over the years, we've brought numerous IRR related concerns to BIA DOT or the office of the Assistant Secretary for Indian Affairs, and had very little response. It's a black hole. Because transportation issues are complicated, we've found the powers that be in BIA - do not give the systems issues the time and attention necessary to fix the system. The problem with being advisory, is staff within the Department are free to ignore advice

We support Section 107 though we suggest the language be tweaked in order to identify a date by which the negotiated rule-making committee be established and then provide the committee 20 months from that date to develop the draft regulations. The current language states that the Secretarial authority to promulgate regulation expires 20 months after passage - the concern being that if the committee is not pulled together timely, members would have very limited time to develop draft regulations.

We oppose the language in section 104 (h)(3)(B) of S. 1122 that would require quarterly IRR TIP updates. We recommend that the language be tweaked to require TIP updates annually – or more often if necessary. Our concern is that the requirement for quarterly updates will be passed on to the tribal contractors.

We support the language contained in Section 201 of S. 1122 that would set in place a process for designating tribal scenic byways for inclusion in the registry of National Scenic Byways or All-American Roads and authorize tribes to administer Tribal Scenic Byway grants under the ISDEAA. There is however, an inconsistency in the definition of tribes in Alaska in Section 201 and Sections 202-203 of this draft bill. In Section 201, Alaska Native villages are defined as in the Alaska Native Claims Settlement Act – whereas in Sections 202-203, Indian tribes are as defined in the ISDEAA.

We oppose the language contained in S. 1122, sections 202 and 203, that directs the Secretary to make competitive grants available - to establish Tribal Transportation Safety Programs and Indian Reservation Rural Transit Programs – only to those tribes on

Indian Reservations or who have land under the jurisdiction of the tribe. The language as presently drafted, could be interpreted to exclude Alaska Tribes from participating. We definitely have safety issues that we would like addressed.

We encourage this committee to go with the language as contained in the NCAI draft bill which states that “the Secretary of Transportation shall establish and carry out a program to provide grants to Indian Tribes and tribal organizations to establish tribal transportation safety programs (and Tribal Transit Programs) on Indian reservations and other tribal communities.”

Alaska Specific Issues

Inventory Issues

One of the major problems with the existing IRR program is that the funding formula used to distribute funds nationally is based primarily on an inventory of IRR routes, and the inventory has gaping holes. For Alaska villages, a true inventory has never been prepared. Alaska's “inventory” comes from a 1993 BIA Area Plan, which was a planning document compiled from project requests submitted by the villages. At the time, the villages were told to identify one needed project. About 70 villages were not even included in the 1993 Area Plan. In addition to missing entire Native communities, the BIA's inventory data has other flaws such as simply not having complete or current construction cost data for large parts of Alaska.

We were not able to reach consensus at Negotiated Rule-making on major changes to the IRR funding formula, but one of our successes was that for the years FY 2000 through 2002, additional funds were made available to tribes for planning, capacity building, and related transportation activities. This was \$32,500 per tribe in 2000 and \$35,000 in 2001 and 2002. The Reg-Neg committee felt this would help level the playing field in preparation for the new federal highway reauthorization bill. There are many, many tribes in Alaska and in the lower 48 who have never had the resources to develop a true inventory or a long-range transportation plan. The BIA inventory is particularly important as it drives funding. Prior to this allocation, Alaska Native Villages received less than \$3,000 per year to do transportation planning from the 2% Tribal Transportation Planning funding pool, which wasn't enough to do much of anything.

This influx of funding meant our villages were finally able to begin participating in the IRR program - most villages that received the funds used them to develop their first true inventory of roads and transportation needs. Kawerak did this collectively for 19 of our 20 villages, but many other villages hired consultants or did the work themselves. By our count 189 tribes in Alaska - either individually or through their regional non-profit - contracted to develop the inventory updates and long term transportation plans.

However, very little of this work product has actually been accepted by the BIA. Once inventory updates began to be submitted to BIA on a large scale, we found that the

BIA was applying a "2%" limit to inventory increases. Having made funds available specifically for inventory updates and transportation planning activities, the BIA DOT applied a 10 year old policy to accept only 2% of the submitted inventory increases, calculated annually on a per BIA Region basis. In Alaska we were limited to 365 miles in the 2001 update (2% accumulated from 1993), and since then, it is about 45 miles per year.

Further, many of the inventory submittals made were simply not acted upon or were returned for various reasons. Imagine the frustration of the villages in Alaska that used these funds to update their inventories - as they were supposed to - only to learn after months of waiting that their inventory submissions had not even been processed.

We've found the inventory updating process to be a nightmare. BIADOT has changed the rules every year, and has imposed requirements over and above what's contained in their own guidance manuals. Kawerak and many other tribes in Alaska were doing inventory updates pursuant to P.L. 93-638 contracts, and our contracts referenced the required documents, in essence the 57 BIAM. We have checked the BIAM, and many of the requirements applied in 2003 are simply not in the 57 BIAM, nor are they consistent with the negotiated rule. Kawerak first learned of changes to rules for the 2003 submittals a little more than a month before the June 1 deadline, after we had already done most of the work. Changes in policy cannot arbitrarily be imposed upon PL 93-638 contractors/compactors, yet Kawerak and many tribes in Alaska essentially have had to redo the same work over and over again to get the routes into the system – and in many cases have still not succeeded.

There are serious legal and contracting problems with BIADOT's process. The 2003 submittals are extremely important, since they are likely to form a base year for funding under the new highway reauthorization act.

I will give one example of the problem. The latest Road Inventory Certification Checklist purports to require that a tribe have an approved Long Range Transportation Plan (LRTP) in effect before inventory changes are made. This is inconsistent with the FHWA tribal transportation planning guide, the BIAM, and the proposed regulations. Developing the inventory is part of the LRTP; having a full-blown LRTP has never been a prerequisite to submitting inventory updates. Logically, a tribe needs to identify its basic existing inventory before it can develop a meaningful long- range plan.

The current formula and inventory system is based on an implicit BIA policy decision made more than 10 years ago which concluded the basic BIA road system had already been built and that future IRR funds would be used to improve the existing system. The system was defined as a "BIA" system rather a tribal system. The premise was false, since many Alaska villages had never received IRR funding or construction at all, much less had their basic road needs identified or addressed. Alaska Native village were just as eligible by law for IRR services as any tribe in the Lower 48 states, but had barely been served at all. We are concerned that, while we specifically excluded incorporating the 2% policy into the draft IRR regulations, BIA will continue to apply the

policy, therefore, limiting Alaska to receiving funds based on an extremely incomplete and inaccurate inventory.

We encourage Congress to enact language that would direct the BIA to include Alaska village streets and primary access routes in the BIA inventory, with a limitation on access routes such that only the route segments within the village corporation boundaries be included. We believe this is necessary to put Alaska on an equal footing with tribes in other areas. In the Lower 48 states, the basic inventory of most tribes has been developed. In Alaska it was not – and the application of the 2% policy, limit unfairly limits our villages to a miniscule representation of actual need.

Because Alaska is such a huge state, with varying climates, topography, cost to construct, we would like to see regional tribal transportation authorities developed. We would like to see a bill pass Congress that would:

- Establish Native transportation authorities in each of the 12 ANCSA regions, which could be the existing regional for profit or non-profit corporations or a new regional tribal entity. The regional transportation authorities would develop regional transportation plans and prioritize projects;
- Establish a statewide Native transportation commission made up of appointees from each of the regional transportation authorities that would determine funding allocations among the regions and coordinate transportation planning among the regions and other government entities;
- Make funds available to be administered by FHWA, but subject to PL 93-638 contracting rules, which would include Native hire, the ability to match funds, etc.
- Authorize up to 15% of funds for construction projects could be retained for future maintenance.

Although the creation of regional transportation authorities and a statewide commission may seem cumbersome, we feel that this is a realistic balance between the need to spread funding to different parts of the state, the huge size and differing topography and climate of the state, the need to preserve local control and decision-making, while still effectively prioritizing funds and retaining economies of scale.

In conclusion, thank you for the opportunity to testify. If we can further explain our recommendations, please feel free to call on us at any time. Thank you.