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TESTIMONY OF THE RED LAKE BAND OF CHIPPEWA INDIANS
PRESENTED BY JAMES GARRIGAN, TRANSPORTATION PLANNER

RED LAKE BAND OF CHIPPEWA INDIANS

Before the U.S. Senate Committee on Indian Affairs
July 12, 2007

Oversight Hearing on Transportation Issues in Indian Country

Introduction

Good morning, Mr. Chairman and members of this Committee. My name is James Garrigan, Transportation Planner for the Red Lake Band of Chippewa Indians. I am also a member of the Indian Reservation Roads Coordinating Committee formed by various Indian Tribes to help shape federal policy and practice in this area.

On behalf of our Chairman, the Honorable Floyd Jourdain, and the Tribal Council of the Red Lake Band of Chippewa Indians, I wish to convey our sadness at the loss of Senator Thomas last month and our sympathy to his family and colleagues here. He was a great friend of Indian Tribes and will be missed.

On behalf of Chairman Jourdain, the Red Lake Tribal Council, and the people they represent who reside on the Red Lake Indian Reservation in Northern Minnesota, I thank you for this opportunity to provide testimony concerning Transportation Issues in Indian Country.

The Federal Lands Highway Program and the Indian Reservation Roads Program represents for us a major avenue through which the United States Government fulfills its trust responsibilities and honors its obligations to the Red Lake Band and to other Indian Tribes. This program is vital to the well being of all Native people living on or near Indian lands throughout the United States. Because of its great importance, reform of the Indian Reservation Roads Program has become a top legislative priority for many Indian Tribes.

Background on the Red Lake Indian Reservation

Compared to other Tribes, Red Lake is a medium-sized Tribe with more than 9,500 enrolled members, most whom live on our Reservation. The Red Lake Indian Reservation is located in a rural area within the boundaries of the State of Minnesota. Our Reservation has over 840,000 acres of tribal land and water held in trust for our Tribe by the United States. While over time it has been diminished from its original 15 million acres, our Reservation has never been broken apart or allotted to individuals and lost to non-Indians. Nor has our Reservation ever been subjected to the criminal or civil jurisdiction of the State of Minnesota. Consequently, our Tribal Government has a large land area over which our Tribe exercises full and exclusive governmental authority and control in conjunction with the United States. At the same time, due in part to our location far from centers of population and commerce, we have few jobs available on our Reservation. While the unemployment rate in Minnesota is only at 4%, unemployment on our Reservation remains at an outrageously high level of 74%. The lack of adequate transportation facilities, communications, and other necessary infrastructure continues to significantly impair economic development and job opportunities.

The IRR Program and the Indian Self-Determination and Education Assistance Act

The Red Lake Band of Chippewa has long been at the forefront in efforts to reform federal transportation programs to better serve the needs of Indian reservations and communities. Although great strides have been made in improving the IRR program under TEA-21 and SAFETEA-LU, several issues have arisen that are negatively affecting the full implementation of the provisions of these Acts as intended by Congress.

Nine years ago Red Lake led tribal lobbying efforts to shape TEA-21 to allow Indian Tribes greater opportunity to assume and administer the Indian Reservation Roads (“IRR”) Program pursuant to the Indian Self-Determination and Education Assistance Act (“ISDEAA” or “P.L. 93-638”). The tribal TEA-21 reform effort aimed at removing many obstacles that hampered past attempts by Tribes to administer the IRR Program under P.L. 93-638 Self-Determination or Self-Governance Agreements. In response, Congress added express language to TEA-21 authorizing Tribes to assume all roads programs, functions, services and activities under P.L. 93-638 agreements. But this congressional intent was thwarted by a Bureau of Indian Affairs (“BIA”) engineering bureaucracy reluctant to transfer operational power and responsibility to Tribes. I know this for a fact. In a previous life, I worked within the BIA bureaucracy. I left it to go work for my Tribe. There was no good reason why my Tribe and tribal staff could not do what the BIA and BIA staff had done. But trying to pull that money out of the BIA bureaucracy was an exercise in futility for years.

The Wasteful “Six Percent” Problem

For years, the BIA leadership persuaded congressional appropriators to add a rider to annual funding bills that reserved 6% of the Indian roads/bridges appropriations for BIA administrative and programmatic expenses. Increasingly, more and more Tribes like Red Lake argued that the BIA activities being paid for with these 6% funds were duplicative and unnecessary, and were siphoning off dollars to support a federal bureaucracy rather than to construct roads critically needed on Indian reservations.

When Congress drafted SAFETEA-LU, it adopted most of the provisions sought by tribal leaders. But unknown to the Tribes, the BIA quietly persuaded the Senate to add in Section 1119(e) a new provision, codified at 23 U.S.C. 202(d)(2)(F)(i), which allocates \$20 million for FY 2006, \$22 million for FY 2007, \$24.5 million for FY 2008, and \$27 million for FY 2009 to the BIA "for program management and oversight and project-related administrative expenses." This is nearly 6% of the Indian roads funds. The BIA cannot justify continuing to consume these funds in an era of self-determination and self-governance. The BIA workload should be going down, not rising. We ask that this Committee work to repeal that subparagraph (F)(i) as soon as possible.

Red Lake has steadily bargained year after year, successfully taking more and more of its 6% money back from the BIA. But Red Lake is only one of a handful of Indian Tribes who have succeeded in obtaining nearly 100% of their funding from the BIA. Most other Tribes continue to see their roads and bridges project and program funding reduced by 6% or more to fund the BIA bureaucracy and unnecessarily duplicated services. This *carte blanche* funding guarantee for the BIA bureaucracy should be stripped out of the law and forever banned. It serves no public policy purpose and cannot be justified on grounds of anything other than the status quo and avoiding necessary reorganization and restructuring of the BIA bureaucracy.

Need to Move the Money

Red Lake and other Tribes who initially assumed the IRR program under Self-Governance worked closely with Interior’s Office of Self-Governance to design a financial system that provided Tribes with an efficient way to track their revenues and expenditures of IRR funds. This system worked exceptionally well. Tribes entered and tracked expenditures, and were able to efficiently prepare financial reports in real time on a project by project basis. This system gave both tribal and federal officials useful monitoring and management information. Inexplicably, the BIA two years ago deemed this system unacceptable. It directed the OSG to stop using it and the BIA then reassumed all financial reporting responsibilities through its Federal Finance System (FFS). Since then Tribes no longer have the same degree of access to the roads finance system nor do they receive regular financial reports.

Indian Reservation Roads Inventory and Its Impact on Funding

Under the negotiated rule making process required by TEA-21, Indian Tribes and the federal agencies negotiated new rules (25 CFR 170) by which the IRR program would operate. These rules provide the process by which Tribes and the BIA update the inventory of roads and bridges on the IRR system. The negotiated rulemaking process took four and one half years to complete and it took the BIA another two and one half years to publish a final rule. Upon publication of the final rule, we were dismayed to discover that the BIA unilaterally left out or changed critical language affecting the inventory that was included in the proposed rule. The BIA has never explained why it decided, without consultation or involvement of the Tribes, to remove or change regulatory provisions proposed by the tribal negotiation team that would improve the integrity of the inventory system.

The final rules allow Tribes to include State and County roads in their inventory if the routes are located within or provide primary access to Reservations or Indian lands. The proposed rules negotiated by Tribes likewise allowed these routes to be included in the inventory, but did not include these routes in the cost to improve calculations. The proposed rule asked the question – “*Which Roads Are Included in the Cost to Improve Calculations?*” The answer was very specific – “*Existing or proposed roads in the BIA system which are considered to have a construction need by Indian tribes are included in the cost to improve calculations. Tribes must adhere to certain guidelines in the selection of those roads. Those roads must: 1. be on the Indian Reservation Road system; 2. not belong to or be the responsibility of other governments (i.e. States or counties)...*” BIA removed this language from the final rule and the BIA is now allowing Tribes to include Interstate Highways, National Highway System roads, State and County roads that are in the inventory to generate tribal shares of IRR funding at the same cost to improve rates that fund roads that are the sole responsibility of the BIA.

It is our understanding that the Indian Reservation Roads Program was established by Congress primarily to fund the construction of roads and bridges on Indian reservations due to the fact that these roads and bridges are considered Federal Roads and it is the Federal Government’s responsibility to construct and maintain these facilities on Indian reservations. We believe that the IRR program should primarily address the construction and improvement needs of roads that are located within or provide primary access to Indian lands and that are not eligible for other Federal, State, or County funding sources. The final rule makes a lot more Federal, State and County supported roads eligible for IRR funding, if an Indian Tribe timely submits the data information required to place a highway on the IRR inventory system. While Congress and the Administration have substantially increased IRR funding, the number of roads that are eligible for funding has been increased at the same time. Some of these roads are eligible for substantial sources of other funding. As a result, roads for which the only source of funding is IRR funding are receiving a smaller slice of the bigger funding pie. This is compounded by the fact that many Tribes have yet to submit their expanded inventory data under the final rules; meanwhile, other Tribes have added their expanded data. The result is that those Tribes with expanded inventory data realize an increase in their relative share of IRR roads funding while those Tribes who lag behind in data entry suffer a drop in funding.

When Congress enacted Section 1115 (k) of P.L. 105-178 (TEA-21), we believe it intended that non-BIA or non-Tribal roads within or accessing an Indian reservation were to be included in the Indian Reservation Road Inventory to generate only part of the funding needed to improve those roads. Otherwise, the County, State and other Federal highway budgets would get a windfall. The law is quite specific: "... [F]unds authorized to be appropriated to carry out the *Federal lands highways program under section 204* may be used to pay the non-Federal share of the cost of any project that is funded under section 104 and that provides access to or within Federal or Indian lands." 23 USC 120(k). We believe this means IRR funds can only be used to pay the non-Federal share on a state or county route if it is project funded under 23 U.S.C. 104 and that it is a designated IRR project.

The unilateral BIA decision on the final rule favors those tribes who are located near urban areas, where transportation needs are the shared responsibility of tribes and their neighboring governments and where the Indians are overwhelmingly out-numbered by non-Indian users of these roads. The BIA system for on reservation roads has a documented construction backlog of thirteen billion dollars. In the face of that need, the BIA's unilateral final rule has the result of siphoning off scarce IRR dollars from areas where the greatest need exists.

Rural Tribes, including large land-based Tribes, have expressed their concerns in writing to the BIA and the IRR Coordinating Committee regarding changes to the final rule that have altered the intent of the negotiated rulemaking process. To date, they have received no responses addressing their concerns.

Need for a Tribal Transportation Facility Inventory That is Truly "Comprehensive"

The Federal Highway Administration (FHWA) has failed to meet the intent of Section 1119(f) of SAFETEA-LU regarding the conduct of a "comprehensive" National Tribal Transportation Facility Inventory. Despite the mandatory nature of this statutory requirement, FHWA has decided to conduct merely a "windshield survey" sampling of IRR roads. This approach and methodology falls far short of the statutory requirement. We urge the Congress to insist that FHWA complete a "comprehensive" inventory of the IRR system as intended.

Road Maintenance

Protection of the investment in any type of infrastructure requires proper maintenance. Historically, the IRR maintenance system has been chronically under-funded which has caused safety hazards and premature failure of many roads on the IRR system. Roads usually have a 20 year design life but, because of inadequate maintenance, many of the IRR system roads last only about half of their design life and have to be reconstructed much sooner. The BIA is responsible for maintaining IRR system roads; however the funding BIA provides is approximately 25% of what is required to properly maintain the system. The IRR maintenance situation has become

even more critical with the increase of IRR funding through SAFETEA-LU. While IRR construction funding is increasing, BIA road maintenance funding is declining.

The BIA receives approximately \$25 million per year as part of its lump sum appropriation for IRR road maintenance activities. BIA now estimates that \$120 million per year is actually what is needed to properly maintain roads on the BIA system. At present levels, the BIA spends less than \$500 in maintenance funding per mile; most state transportation departments spend approximately \$4,000 to \$5,000 per mile each year on maintenance of state roads. Of course, states receive highway taxes based upon the sale of gasoline within that state. While users of tribal roads pay these same state highway fuel taxes, tribal roads receive little or no benefit from state fuel taxes. Tribes are unable to impose gas taxes in addition to, or in lieu of, those imposed by the surrounding states.

The only practical solution we see for this problem is that since the roads on the BIA system are considered Federal roads, the BIA road maintenance program should be provided extra funds out of the Highway Trust Fund as are other Federal Lands Highway Programs roads.

Red Lake Decision to Stay with BIA/OSG and Postpone FHWA Agreement

After much deliberation in 2006, Red Lake decided not to contract directly with Federal Lands Highway Administration for our 2007 roads program. As you know, one of the signature reforms in SAFETEA-LU was express authority for Tribes to choose to by-pass the BIA and contract directly with FHWA. We negotiated with FHWA staff but at the end decided to defer the decision to a later year because of several issues. We were unable to negotiate agreement language to our satisfaction by the time we needed to conclude an agreement for 2007 without causing disruptions to our program. FHWA had only a draft agreement and appeared to be requiring a uniformity that subjected any proposed change to broad review with every other tribe actually or potentially in negotiation. FHWA and BIA had not yet persuaded us the two federal agencies had worked out an efficient process by which the funds due Red Lake would be identified and transferred to Red Lake; we did not want to risk missing a construction season because of late or disrupted new funding streams. At the same time, it appeared from statements made by then Acting Assistant Secretary Jim Cason, that BIA would move the financial management authority for self-governance roads programs back under the Office of Self Governance and utilize the financial management and reporting system that Red Lake and other Tribes had developed. This system expedites the transfer of funds and gives us the ability to enter program expenditures by project, making tracking and reporting expenditures much more easy and useful.

Moreover, the Department of Transportation still has not appointed the Deputy Assistant Secretary for Tribal Government Affairs that the SAFETEA-LU Act requires to be established by the President within the Office of the Secretary. This new office is supposed to "plan, coordinate, and implement the Department of Transportation policy and programs serving Indian tribes and tribal organizations and to coordinate tribal transportation programs and activities in all offices and administrations of the Department and to be a participant in any negotiated rulemaking relating to, or having an impact on, projects, programs, or funding associated with

the tribal transportation program." The Administration's failure to timely fill this FHWA position has given the Red Lake Band pause about establishing a direct relationship with that agency. We choose to avoid any possible entanglement which might disrupt our own administration of our tribal roads program.

All this is to explain why we did not jump in 2007 to contract directly with FHWA. Red Lake remains very interested in doing so in the future.

Tribal Success Stories

Operating the IRR Program under Self-Governance. The Red Lake Band will soon be entering its tenth year of operating the IRR program under Title IV of P.L. 93-638, the Self-Governance Act. Self-governance has provided the Tribe the ability to deal with State agencies on a government to government basis and to leverage funding for projects that are of mutual interest to both the Tribe and the State. After years of expensive and strenuous negotiating, we can now say we've reduced the BIA administrative funding holdback to nearly zero. During this time, of course, we have been doing all of the work. The Tribe makes the day to day decisions in all phases of the program including review and approval of construction plans, specification and estimate of road construction projects. The Tribe uses its own procurement guidelines in contracting construction projects from the letting of bids, negotiating contracts, to close out of projects. Our relationships with Minnesota Department of Transportation have improved to the point where the State has enacted special legislation to contract directly with all Tribes in the State. The Tribe has also been successful in collaborating with other Federal agencies including working with the Department of Defense, HUD and the Tribe's own construction company to complete a \$10 million Walking Shield housing development project which resulted in over 50 homes for tribal members on our Reservation. Our flexible authority under self-governance permitted us to apply some of our roads funding to develop roads for this tribal priority project. We are thankful that the Congress has recognized that Tribes are very capable of operating their own programs for the benefit of their people without the BIA bureaucracy.

Tribal Transit. Many tribal governments place a high priority on building transit systems that can transport their members who do not have access to cars to get to work, commerce, recreation, or healthcare facilities. Thanks to SAFETEA-LU, Tribes recently became eligible to receive direct grants from the Federal Transit Administration (FTA) for the operation of public transit programs to serve Indian Reservations. While the new program is small compared to other transit programs, Red Lake is grateful to be selected to participate in the first ever direct grant to Indian Tribes and will continue to work to expand this program for the benefit of others. Since 2001, the Red Lake Band has been operating a Public Transit program funded with FTA grants through the Minnesota Department of Transportation and supplemented with IRR funds. This program started with one, 20-passenger, transit bus and now has expanded to four busses. We were recently notified that we were awarded a direct grant from the FTA in the amount of \$198,000. These funds will be used to replace the IRR program funds that we sorely need to address the backlog of road construction needs on our Reservation.

Flexible Financing. The Red Lake Band of Chippewa was among the first Tribes to utilize the authority granted by TEA-21 and 25 CFR 170.300 to secure a short term loan from a commercial lending agency to complete a high priority roads project on our Reservation. We closed on the loan last year. That enabled us to complete our project and immediately meet an urgent need on the Reservation. Because we kept it a short-term loan, we did not encounter some of the complications other Tribes experienced. The loan will be paid back with IRR funding from within the years authorized under SAFETEA-LU.

Conclusions

On behalf of the Red Lake Band, I thank the Committee for its attention to and support for the Indian reservation roads program. We have attempted to provide the Committee with a few examples of what Tribes can do for themselves when federal law is reformed to give us the opportunity and authority. We thank this Committee for its support in our endeavors over the years to become self sufficient and self-governing and we look forward to working closely with this Committee in the future to further the cause of tribal self-governance, self-sufficiency, and the preservation of the government-to-government and sacred trust relationship owed to us. Thank you for inviting the Red Lake Band to present this testimony. If we can answer any questions, now or at some future date, please do not hesitate to ask.

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