

**Testimony of Head Councilman Joe Garcia, Ohkay Owingeh
Co-Chair of the NCAI-ITA Tribal Transportation Task Force
Tribal Co-Chair of the Tribal Transportation Self-Governance Program
Negotiated Rulemaking Committee**

**Senate Committee on Indian Affairs
Oversight Hearing on
“Enhancing Tribal Self-Governance and Safety of Indian Roads”**

April 3, 2019

Thank you Chairman Hoeven and Vice-Chairman Udall and members of the Committee for the opportunity to provide testimony on the importance of surface transportation infrastructure for Indian Country. My name is Joe Garcia, and I am Head Councilman and former three term Governor of Ohkay Owingeh, a co-chair of the National Congress of American Indians-Intertribal Transportation Association Tribal Transportation Task Force, a former two term President of NCAI, and Tribal Co-Chair of the Tribal Transportation Self-Governance Program Negotiated Rulemaking Committee. I look forward to working with the members of this Committee and other members of Congress to ensure that federal transportation policies, including the next surface transportation reauthorization, honor the federal government’s treaty and trust responsibilities to tribal nations.

Indian Country and Transportation Infrastructure

There are 573 sovereign tribal nations with a formal nation-to-nation relationship with the United States. Two hundred and twenty-nine tribal nations are located in Alaska, while 344 are located in 34 other states. The total land mass under American Indian or Alaska Native jurisdiction is about 100 million acres, which would make Indian Country the fourth-largest state geographically in the U.S. Additionally, there are twelve tribal nations that have a larger land base than the state of Delaware, and the Navajo Nation alone would be the 42nd-largest state. According to the 2010 Census, 5.2 million people identified as American Indian/Alaska Native (AI/AN) alone or in combination with other races, which would make Indian Country the 22nd most populous state.

Like all other governments, tribal nations strive to provide the necessary foundations for supporting the building of strong economies and ensuring the health and wellbeing of their citizens. To this end, tribal nations construct, improve, and maintain transportation infrastructure and facilities that are used by tribal citizens and non-tribal citizens alike. Having safe, well-maintained tribal roads, bridges, and adequate public transportation is vital to public safety and commerce in tribal communities and benefits tribal citizens and those living in and around Indian Country.

According to the most recent National Tribal Transportation Facility Inventory (NTTFI), there are approximately 161,000 miles of roads and trails in Indian Country eligible for federal funding. Of those, tribal nations own and maintain 13,650 miles of roads and trails, of which only 1,000 (or 7.3 percent) are paved (the other 12,650 miles are gravel, earth, or primitive). Of the 29,400 miles owned and maintained by the Bureau of Indian Affairs (BIA), 75 percent are gravel, earth, or primitive. Altogether, the 42,000 miles of roads in Indian Country are still among the most

underdeveloped, unsafe, and poorly maintained road networks in the nation, even though they are the primary means of access to American Indian and Alaska Native communities by Native and non-Native residents and visitors.

Lack of Federal Resources and Data

There is great need for additional surface transportation funding and data in Indian Country. In December of 2018, the U.S. Commission on Civil Rights (USCCR) released its report, titled *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, as an update to its 2003 *A Quiet Crisis* report.¹ The *Broken Promises* report emphasizes federal underinvestment in transportation and other infrastructure in Indian Country and discusses how the lack of investment causes significant safety concerns, interrupts the provision of tribal government services, and affects the overall health of tribal economies.² In addition to the chronic underinvestment in the physical infrastructure of tribal communities, the USCCR goes on to highlight the “severe lack of public transportation in Indian Country.”³

Additionally, the BIA recently conducted a road maintenance survey that found that the total dollar value of deferred road maintenance for surveyed stakeholders is estimated at \$498 million. The survey also found that more funding was the number one priority of stakeholders, followed by equipment needs.⁴ Data indicated that tribal nations are using Tribal Transportation Program (TTP) funds that could otherwise be used for road construction or improvement to backfill unmet road maintenance needs. The survey estimated that the expenditures for road maintenance in FY 2017 were more than double the allocated amount of funding for the BIA Road Maintenance program in FY 2017.⁵ Borrowing funds from vital programs to backfill underfunded programs results in a drag on the construction, maintenance, and overall safety of roads throughout Indian Country.

In May 2017, the U.S. Government Accountability Office (GAO) conducted a study on tribal transportation data, road management, and student attendance. GAO found that the NTTFI and Deferred Maintenance Reporting (DMR) systems contain incomplete and inconsistent road description and condition data that affect program efficiency and delivery. As a result, reports and budget submissions that rely on these datasets “may not accurately reflect road conditions or maintenance needs and associated costs...inhibit[ing] the ability of Congress” and the appropriate bureaus, offices, and agencies to make better-informed decisions about priorities and the transportation system as a whole.⁶

GAO also identified the significant practical impacts of poor tribal road conditions. The report concluded that road conditions on tribal lands pose challenges “in connecting people to education,

¹ U.S. Commission on Civil Rights, *Broken Promises: Continued Federal Funding Shortfall for Native Americans*, <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>

² *Id.*

³ *Id.*, citing U.S. Senator Byron L. Dorgan, Testimony before the Senate Committee on Indian Affairs, July 12, 2007, <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg37860/html/CHRG-110shrg37860.htm>

⁴ Tribal/Interior Budget Council, Roads Maintenance Subcommittee Presentation, November 15, 2018. [http://www.ncai.org/TIBC-Nov201 ROADS Subcmte Preso.pdf](http://www.ncai.org/TIBC-Nov201%20ROADS%20Subcmte%20Preso.pdf)

⁵ *Id.*

⁶ U.S. Government Accountability Office, *Tribal Transportation: Better Data Could Improve Road Management and Inform Indian Student Attendance Strategies*, GAO-17-432, p. 47 (May 22, 2017).

employment, healthcare, and other essential services,” which are magnified during adverse weather due to remoteness and existing road conditions.⁷ Additionally, GAO concluded that road conditions do affect student attendance⁸ and rough road conditions can increase maintenance needs for school vehicles.⁹

The lack of consistent transportation data also extends to crash statistics in Indian Country that, in turn, affect the ability to make better-informed decisions and allocate resources to address road safety. As a requirement of the Fixing America’s Surface Transportation Act (FAST Act), the Federal Highway Administration (FHWA) produced a report on safety data collected in Indian Country. The purpose of this report was to “improve the collection and sharing of data of crashes on Indian reservations” and to “develop data that Indian tribes can use to recover damages to tribal property caused by motorists.”¹⁰ FHWA’s report found that databases at the state and federal level that drive programmatic decisions are incomplete in tribal areas.¹¹ In its report, FHWA states that “[i]mproved collection and sharing of safety data, especially crash reports, in tribal areas would facilitate more effective transportation safety planning and would afford Tribes improved access to State and Federal funding opportunities to address transportation safety problems.”¹²

Road Safety in Indian Country

Road safety remains a top priority for Indian Country and Congress must provide additional funding and resources to address road safety and behavioral issues that contribute to high rates of death and injury in Indian Country. According to FHWA, motor vehicle crashes caused an average of 655 fatalities each year in tribal areas.¹³ Motor vehicle crashes are the leading cause of unintentional injury death for AI/ANs under the age of 20.¹⁴ Additionally, motor vehicle-related death rates for AI/ANs ages 20 and older are more than twice that of non-Hispanic whites, and AI/AN infants have a motor vehicle death rate that is eight times higher than that of non-Hispanic whites.¹⁵

Despite these startling statistics, there is significant underfunding for tribal road safety, especially when compared to state funding. In FY 2018, State Departments of Transportation shared \$2.23 billion from the Highway Safety Improvement Program (HSIP) (23 U.S.C. § 402) under an allocation formula.¹⁶ By comparison, tribal nations must compete for discretionary and competitive highway safety grants under BIA’s Indian Highway Safety Program (IHSP), 23 U.S.C. § 402 (2% of State apportionment); and the Tribal Transportation Program Safety Program, 23

⁷ *Id.*

⁸ *Id.*

⁹ U.S. Government Accountability Office, *Highlights of GAO-17-432*, <https://www.gao.gov/products/GAO-17-423>

¹⁰ Pub. L. 114-94 § 1117(b)(2)(B).

¹¹ Federal Highway Administration, Report to Congress on Tribal Governments & Transportation Safety Data, p. 20, <https://flh.fhwa.dot.gov/programs/ttp/safety/documents/2016-tribal-governments-safety-data.pdf>

¹² *Id.*, p. 7.

¹³ Federal Highway Administration, Transportation Safety in Tribal Areas, FHWA-HRT-18-004, Vol. 82 No. 2, <https://www.fhwa.dot.gov/publications/publicroads/18summer/02.cfm>

¹⁴ CDC, *Tribal Road Safety: Get the Facts*, <https://www.cdc.gov/motorvehiclesafety/native/factsheet.html>

¹⁵ *Id.*

¹⁶ Federal Highway Administration, *Distribution of Highway Safety Improvement Program (HSIP) Funds Apportioned for FY 2018*, https://www.fhwa.dot.gov/legregs/directives/notices/n4510824/n4510824_t12.cfm

U.S.C. § 202(e) (2% set-aside of annual TTP allocation). In FY 2018, tribal nations competed for \$8.89 million in TTP safety grants and had access to \$5.2 million from BIA's Indian Highway Safety Program (IHSP). Despite motor vehicle fatalities occurring throughout Indian Country, only a select few tribal nations receive federal safety funds to address behavioral issues that factor into roadway accidents, injuries, and fatalities (DUI, seat belt use, child safety restraints, etc.) and to make highway safety improvements.

Tribal Transportation Program

TTP oversees approximately 161,000 miles of roads and trails in Indian Country, which are owned by the BIA, tribal nations, states, and counties, in order to provide safe and adequate transportation systems. These roadways and trails serve as the primary transportation thoroughfares for residents of and visitors to AI/AN communities, and funding for TTP is essential to safe and reliable road systems across Indian Country.

TTP is funded from the Highway Trust Fund and allocated through a statutory formula. As such, this important source of funding for Indian Country roads will be greatly impacted by the potential future insolvency of the Highway Trust Fund. Currently, several pilot projects are underway to examine alternatives to an increase in the federal fuel tax. As Congress considers how to address the future insolvency of the Fund, it must uphold its treaty and trust responsibilities by ensuring that any solution provides a stable, adequate source of funding for tribal transportation infrastructure and does not impose undue financial burdens on those living in Indian Country, which is largely rural.

The last surface transportation reauthorization, the FAST Act, authorized TTP funding starting at \$465 million in FY 2016 and increases funding at \$10 million per year through FY 2020 with a final year level of \$505 million. In light of the significant unmet need as evidenced by recent reports, Congress must support and enhance funding for this program in the next surface transportation reauthorization so that tribal nations can provide safe and acceptable transportation systems in Indian Country. Enhancements should include a significant increase to the overall authorization level for the initial year and larger step increases for each year that follows.

Tribal Transit Program Funding

The Public Transportation in Indian Reservations Program (Tribal Transit Program) enables tribal nations to use transit program funding for capital, operating, planning, and administrative expenses for public transit projects to meet the needs of public transportation in rural tribal communities. The Tribal Transit Program is a successful program for tribal nations to serve the community, including elders, those with disabilities, and Native youth; however, this program suffers from the same underinvestment that limits other transportation programs that benefit Indian Country.

The Tribal Transit Program is authorized by section 5311(j) of the FAST Act and currently consists of \$30 million in formula funding and \$5 million in competitive grant funding.¹⁷ This program is critical to meeting the growing needs of tribal communities. Congress must support and enhance

¹⁷ Federal Transit Administration, *Public Transportation on Indian Reservations Program; Tribal Transit Program*, <https://www.transit.dot.gov/tribal-transit>

funding for the Tribal Transit Program in the next surface transportation reauthorization. Enhancements to this program should include an increase in formula funding levels and adoption of step increases in funding levels, similar to those found in the FAST Act for TTP funding. Step increases for the Tribal Transit Program should be greater than \$10 million per year to address the severe underinvestment in public transit in Indian Country.

Access to Transportation Program Funding

Several transportation and transit programs that provide funding to tribal nations consist of a formula funding component and a competitive grant component, while other funding opportunities are offered solely through competitive grant models that require tribal nations to compete against non-tribal applicants. Formula funding methods are generally preferable as they provide certainty for the planning and financing required to complete transportation construction, improvement, and maintenance projects. Competitive grants, on the other hand, are not as conducive to planning and require labor input and other planning expenses that may never be recovered even where a tribal applicant receives grant funding.

Additionally, competitive grant models can fail to address the unique needs of tribal communities, and their requirements often leave tribal nations effectively ineligible for programs where Congress intends tribal nation eligibility. Competitive grants with large dollar thresholds for project proposals effectively bar many tribal nations with shovel-ready projects from programs for which they otherwise appear eligible. Conversely, the complete absence of transportation infrastructure in certain tribal communities generates much larger project funding needs. In these circumstances, matching requirements can prohibit tribal nations from having meaningful access to these competitive grant opportunities.

To help address the significant transportation needs in Indian Country, Congress should eliminate matching requirements for tribal applicants, provide significant tribal set-asides from national surface transportation programs, and ensure the application and programmatic requirements account for the unique needs of and circumstances in Indian Country.

Tribal Technical Assistance Program

The Tribal Technical Assistance Program (TTAP) is the only program for tribal nations to build capacity through training and technical assistance from experts who oversee and construct highways and roads in tribal communities. In Fall 2016, FHWA announced the restructuring of the TTAP and eliminated the seven TTAPs around the country that served all 573 federally-recognized tribal nations. In December 2017, the FHWA announced a two-year pilot program and centralized the TTAP at the University of Virginia, Center for Transportation Studies (CTS) in Virginia. The entire restructuring proceeded without proper tribal consultation, which is very concerning. The program remains an important resource to improve the technical expertise of tribal transportation officials. Accordingly, Congress should provide a \$5 million increase in TTAP funding.

Bureau of Indian Affairs Road Maintenance Program

Another federal transportation program that is vital to infrastructure in Indian Country is the BIA Road Maintenance Program, which is funded and authorized under the Department of the Interior. The BIA Road Maintenance Program covers the approximately 29,400 miles of BIA owned roads in Indian Country, including 900 bridges. As part of a recent survey conducted by the BIA, the deferred maintenance backlog throughout Indian Country is estimated in excess of \$490 million. In FY 2018, Congress appropriated \$34.6 million for BIA road maintenance and this funding level has remained roughly the same for several consecutive fiscal years, even though maintenance needs continue to increase. Congress should increase funding levels to at least \$50 million in FY 2020 to address the BIA roads maintenance backlog.

Tribal Self-Governance at the Department of Transportation

Over the past two decades, Congress has recognized that tribal communities have significant and unique transportation needs. Congress also has recognized that tribal governments are most effective in determining how to meet those needs. Congress has made additional federal transportation programs directly available to tribal nations and has expanded tribal authority and flexibility with respect to the administration of those programs. Most significantly, in the FAST Act Congress created the Tribal Transportation Self-Governance Program, which extends the Indian Self-Determination and Education Assistance Act to the U.S. Department of Transportation (DOT). The Indian Self-Determination and Education Assistance Act already has proven that federal funds are used most effectively and efficiently when administered at the local level by tribal nations themselves. Through this extension of Self-Governance to the DOT, tribal nations will be able to obtain all of their transportation funds (including not only their TTP funds, but also transit, federal-aid, and other DOT funds) under a single DOT self-governance agreement. Authorizing tribal nations to use these Self-Governance funding agreements for all their transportation activities means that the administrative procedures associated with the various DOT programs will be streamlined, resulting in a faster project delivery timeline. This means that tribal nations will be getting safe and reliable transportation infrastructure on the ground and into operation faster with more cost effectiveness than ever before.

Tribal nations and DOT representatives are engaged in a negotiated rulemaking to put this important program into operation. I am the Co-Chair of that rulemaking committee. Though there have been several delays on the federal side (including the recent government shutdown), the tribal and federal members of our joint negotiated rulemaking committee are aiming to finalize substantive negotiations on a draft rule over the next several months.

In our most recent meeting, the federal and tribal committee members have been able to identify their respective goals and intents with regard to the rule. The Committee aims to review drafts of substantive language in its next meeting in June. Our shared goal is to have a draft rule for public comment out by Fall 2019 and that the Committee will reconvene to review comments and finalize the rule by this time next year.

DOT has recognized the need to streamline programs and requirements under Self-Governance, and we have urged the Department to understand Congress' expansion of Self-Governance to DOT

as a directive for DOT to use its authority to maximize tribal flexibility and decision-making. I ask that this Committee urge DOT to do the same.

Conclusion

Thank you again for the opportunity to testify at this important oversight hearing. Safe and reliable transportation infrastructure is vital to the enhancement of tribal economic development and to the wellbeing of tribal communities and surrounding non-tribal areas. I look forward to working with this Committee to ensure the next surface transportation reauthorization bill will improve the lives of tribal citizens across Indian Country.