

**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  
June 4, 2003

Hearing on Proposals to Amend the Indian Reservation Roads Program

S. 281, the Indian Tribal Surface Transportation Improvement Act of 2003

And

S. 725, the Tribal Transportation Program Improvement Act of 2003

And

S. 1122, the Tribal Transportation Program Improvement Act of 2003

Good morning, Mr. Chairman, Mr. Vice Chairman, and Members of this Committee. My name is James Garrigan, Transportation Planner of the Red Lake Band of Chippewa Indians.

On behalf of our Chairman, the Honorable William G. King, and the Tribal Council, I thank you and other distinguished members of the Committee for this opportunity to provide testimony concerning proposed amendments to the Indian Reservation Roads Program as contemplated under Senate Bills S. 281 and S. 725. Also, although only recently introduced and referred to the Committee, I would like to take this opportunity to provide the Committee with some initial feedback on S. 1122 as well.

On behalf of Red Lake Tribal Council, and the people they represent who reside on the Red Lake Indian Reservation in northern Minnesota, we respectfully submit that the Federal Lands Highway Program and the Indian Reservation Roads Program represent for us a major avenue through which the United States government fulfills some of its trust responsibilities and honors its obligations to the Red Lake Band of Chippewa 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 Indian Nations throughout Indian Country.

*Background on the Red Lake Indian Reservation*

Compared to other tribes, Red Lake is a medium-sized Tribe with more than 9,500 members, most of 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 4%, ours remains at an outrageously high level of 60%. The lack of adequate transportation facilities, transit options, communications, and other necessary infrastructure continues to significantly impair our Reservation economic development and job opportunities.

*Red Lake's Involvement in the Indian Reservation Roads Program  
and the Negotiated Rule Making Process*

The Red Lake Band of Chippewa has always been at the forefront in national transportation matters as they relate to the Indian reservations. This is evidenced by our participation in successful lobbying efforts six years ago to ensure that TEA-21 and Title 23 of the United States Code afforded Indian tribes the opportunity to assume and administer the Indian Reservation Roads ("IRR") Program pursuant to the Indian Self-Determination and Education Assistance Act. We also were one of the first Tribes in the Nation to successfully negotiate with the U.S. Department of the Interior our assumption and administration of the IRR Program under a Self-Governance Agreement pursuant to this authority. The legislative reform effort by Congress six years ago was aimed at removing many obstacles that hampered tribes in the past in their attempts to administer the IRR Program under Self-Determination or Self-Governance Agreements.

Following the enactment of TEA-21, I was personally involved in the legislatively-mandated negotiated rule making process for the IRR Program. While I appreciated the opportunity to represent the Tribal Caucus as a Tribal Co-Chair of the Federal-Tribal Negotiated Rulemaking Committee, I was disappointed with what I, along with a majority of the tribal representatives on the Committee, viewed as a blatant disregard for Congressional intent by the federal representatives on the Committee.

From the beginning, the Bureau of Indian Affairs ("BIA") ignored the deadlines mandated by TEA-21 and failed to form the Negotiated Rulemaking Committee and provide for an initial meeting of the Committee until just a handful of days before the arrival of the statutory deadline to produce proposed regulations. While the Committee's Tribal Caucus met every challenge and every imposed deadline, the BIA delayed the Committee process for months at every juncture. Because of the long delays by the BIA, the tribes felt that they did not have sufficient time to properly negotiate key items that are important to the tribes. As a result, there are 13 major disagreement items that did not get properly addressed. Although this was supposed to be a tribally driven process, it was far from it. The proposed rule was published with the federal language in place on the disagreement items and it appears that the final rule will be published

likewise. Many Tribal Caucus Committee members feel that because of this, the entire negotiated rulemaking process was a travesty. It now appears that the BIA is blaming the tribes for the delays.

As we testified at a previous hearing before this Senate Committee, the pattern of conduct of the BIA throughout the negotiated rule making process remained unchanged through successive administrations. We found the past five years to be most disheartening, because it appears that the federal bureaucracy has thus far prevailed in thwarting full tribal assumption of the administration of the IRR Program. Real and meaningful reform of the IRR Program will be accomplished only through detailed legislative mandates and direct and active congressional oversight and involvement in its implementation.

### *Red Lake's Position on Proposed Amendments*

The Federal Lands Highway Program provides funding for a coordinated program of public roads that serve Federal land transportation needs. The Federal Lands Highway Program funds five categories of roads, including Indian Reservation Roads. The IRR Program is administered cooperatively by the Federal Highway Administration ("FHWA"), the BIA, and the Indian tribes that have self-determination contracts and self-governance funding agreements in place for the administration of IRR Program functions and funds. For many Indian tribes, the IRR Program is the sole source of funding through which the local Indian communities receive critically needed transportation improvements to facilitate better access to jobs, health services, and educational and economic development opportunities.

Again, despite the tribal reform language that exists in TEA-21, we believe it is necessary for the Congress to even more explicitly mandate that the federal roads bureaucracy facilitate the complete transfer of all authority and responsibility for the administration of the IRR Program to those tribes so requesting, and to legislatively enforce full tribal autonomy in the operation of programs formerly operated by the United States government. Unless the Congress does this by statute, certain federal offices will never appreciate, and Indian tribes will never realize, the true meaning of Tribal Self-Determination and Self-Governance.

The Red Lake Tribal Council is in general favor of S. 281 and S. 725 and offers the following testimony on the provisions of the proposed amendments along with some suggestions for improvement.

### *S. 281, The Indian Tribal Surface Transportation Improvement Act of 2003*

This bill contains provisions which, hopefully, will finally achieve what Congress has intended for Indian tribes since the enactment of the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638 in 1975: curbing the BIA bureaucracy and supporting

tribal autonomy. Passage of this bill would stop the loss of IRR Program authority that resulted with the application of the obligation limitation to IRR Program funds for the first time in 1998 under TEA-21. Through the obligation limitation, and the Secretary of Transportation's "distribution of obligation authority" for amounts authorized for the IRR Program under TEA-21, the amount of funding identified in TEA-21 for the IRR Program did not come to fruition—it was reduced and redirected for other purposes. S. 281 would also allow tribes to deal directly with the FHWA on a government-to-government basis without the unnecessarily heavy-handed and financially wasteful oversight of the BIA. Despite the clear direction from Congress in the 1994 amendments to the ISDEAA and the clear language in TEA-21, the BIA continues to create obstacles that prevent tribes from full autonomy when it comes to operating the IRR Program under P.L. 93-638, as amended.

### **OBLIGATION LIMITATION**

While Red Lake and all Indian tribes throughout the country appreciate the increased funding for the IRR Program that Congress made available under TEA-21, the Program is still critically under-funded. The application of the obligation limitation requirement to these funds off-set much of the benefit Indian tribes were to receive through the increased funding. Passage of this bill would help ensure that all funding allocated for the IRR Program remains available for distribution to Indian tribes—a goal that Red Lake fully endorses.

We note, however, that the approach taken in the bill is to amend TEA-21, which we understand will expire at the close of fiscal year 2003. For this reason, and because the next transportation authorization cycle covers fiscal years 2004 through 2009, it is possible that the effect of the bill would be temporary or perhaps even negated upon the expiration of TEA-21. We, therefore, recommend that the Committee consider the addition of "stand alone" language to Title 23 of the United States Code that would have the intended effect and we would be happy to work with the Committee in crafting this language.

### **DEMONSTRATION PROJECT**

The Red Lake Band of Chippewa Indians has been a strong advocate for Indian tribes having a direct relationship with the FHWA. S. 281 would provide a vehicle to make this happen under a "Demonstration Project". The Red Lake Band has also been at the forefront in demonstrating that Indian tribes can deliver on programs that Congress has provided to further promote Self-Determination and Self-Governance of Indian tribes. Red Lake was one of the first tribes in the Nation to assume the entire IRR Program under Title IV of P.L. 93-638, as amended, and the documented success of this program serves as a model for other tribes to follow. Red Lake will also be at the forefront in demonstrating that Indian tribes can independently co-exist with the FHWA in the administration of the IRR Program without the involvement of the BIA.

We respectfully request that the Committee consider eliminating the requirement in the current draft that Indian tribes undergo a “planning phase.” The legal and budgetary research that was appropriate a decade ago when the broader self-governance demonstration program under Title III of the ISDEAA was enacted, no longer appears to be needed in the IRR context and would divert critically-short IRR funds for unnecessary “planning grants” for this “planning phase.”

### **SAFETY INCENTIVE GRANTS**

The Red Lake Band strongly supports the “Safety Incentive Grants” section of the bill. Injury and death rates related to highway crashes on Indian reservations are the highest in the Nation. The inclusion of Indian tribes as eligible to receive allocations on the same basis as States to promote increased seat belt use under section 157 of Title 23 and to assist Indian communities in the prevention of the operation of motor vehicles by intoxicated persons under section 163 of Title 23, will go a long way in preventing unnecessary injury and death on reservation roads. This bill would assist in long overdue reservation education on seat belt use and the prevention of the operation of motor vehicles by intoxicated persons.

### **COMMERCIAL VEHICLE DRIVER TRAINING PROGRAM**

The Red Lake Reservation is located far from centers of population and commerce and has relatively few jobs available in our community. Our 60% Reservation unemployment rate far exceeds the 4% State-wide rate. While the Commercial Vehicle Driving Training Program may foster and promote job creation and economic opportunities for Native Americans who are interested in commercial vehicle driving careers in other areas of the country, we fail to see where it will ease our unemployment dilemma. We feel that increased funding for road and bridge construction on Indian reservations will go a lot farther in easing excessive unemployment rates in Indian country.

#### **S. 725, The Tribal Transportation Program Improvement Act of 2003**

While the provisions of this bill closely mirror the provisions of S. 281, we feel that the above testimony serves both bills with the exception of the funding schedules as proposed in Section 3, and the Indian Reservation Rural Transit Program in Section 6, of S. 725.

### **AUTHORIZATIONS OF APPROPRIATIONS**

The Red Lake Band strongly supports the provisions of this bill that would increase the amount of funding available for the IRR Program. We feel that increasing the funding for the IRR Program to \$500 million annually and removing the reduction in IRR Program funding resulting from the application of the obligation limitation will provide greater opportunities for

jobs on Indian Reservations. The inclusion of planning and engineering as permissible uses of bridge set-aside funding will also allow more tribes to participate in the bridge rehabilitation and replacement program, and to tackle the backlog of deficient bridges. Under the present structure of the TEA-21 bridge program, many smaller tribes cannot participate because they do not have the resources to plan and design deficient bridges on their reservations.

### **TRIBAL TRANSPORTATION SAFETY PROGRAM**

While this portion mirrors S. 281, the Red Lake Band supports the funding level increases incorporated in S. 725.

### **INDIAN RESERVATION RURAL TRANSIT PROGRAM**

Transportation of Indian people, who do not have access to other modes of transportation to get to work, commerce, recreation, or health care facilities, is of vital concern to most tribal governments. Tribes do not receive funding from the Federal Transit Authority and funding for transit systems on Indian reservations has to come from either a state transit program or IRR construction funds. Historically, tribes have not been too successful in obtaining state transit funds when competing with cities, counties and other public entities. Using funds from the IRR Program sharply reduces the already scarce IRR road construction funds. The Red Lake Band is the only Tribe in Minnesota that operates a Transit Program. While this program is quite successful, our service is limited because of the above reasons. Implementation of this bill would allow expanded transit service as well as provide more employment to Band members.

### **S. 1122, The Tribal Transportation Program Improvement Act of 2003**

This bill contains several provisions that closely mirror those included in S. 281 and S. 725. However, in the short period of time between the introduction of S. 1122 and the development of this testimony, the Red Lake Band has not had an adequate opportunity to fully analyze and assess S. 1122. Our initial impression, however, is that S. 1122 touches upon a variety of transportation issues that are important to Indian country, but requires further refinement to ensure that the successful gains in Indian program administration are not adversely impacted unintentionally. Here are some of our initial concerns:

- *Road maintenance.* The Red Lake Band supports the need for sufficient funding for road maintenance activities and believes that the amount identified in S. 1122 for this purpose would be beneficial to Indian country. However, we would not support the use of IRR Program funds for road maintenance activities if such use would reduce the

total amount of IRR Program funding available for construction below the \$275 million level currently available under TEA-21.

- *Project vs. Program.* The Red Lake Band supports bill language that promotes full application of the ISDEAA to the IRR Program. However, the language currently employed in S. 1122 appears to indicate that tribes may only assume individual IRR *projects*, rather than also assume IRR Program administration.
- *IRR Bridge Construction Funding.* The Red Lake Band fully supports an increase in the amount of funding available for bridge construction activities. However, language in S. 1122 would appear to require the Secretary of Transportation to allocate this funding “in amounts directly proportional to the actual need of each Indian reservation, as determined by the Secretary” based on certain factors. Bridge deficiency is relative from bridge to bridge and this language could have the unintended consequence of allocating bridge funding to reservations with more bridges and away from reservations with the most deficient bridges.
- *Inherently Federal Functions.* The Red Lake Band fully supports simplifying the administration of the IRR Program, but doubts whether a provision giving the Secretary of Transportation the sole authority to determine whether an IRR function is inherently federal would be productive. The BIA and FHWA federal representatives’ approach during the TEA-21 Negotiated Rule Making Committee process was to unilaterally “declare” without supporting legal analysis—and over the strong objection of the Tribes—that certain functions were “inherently Federal” and thus not available for tribal assumption under the ISDEAA by rule. This will be given effect in the TEA-21 final rule and would have the effect under S. 1122 of allowing what should be a pro-self-determination provision to be interpreted by the agencies in a manner that is inconsistent with the congressional intent in enacting the ISDEAA.

#### *A Tribal Procurement Contracting Proposal*

The Red Lake Band would also like to take this opportunity to propose to the Committee for its consideration as part of the IRR Program amendments language that we believe would help to foster economic development in Indian country through the federal procurement process. While a number of Indian tribes receive IRR services either directly from federal employees to tribes or through contracts and agreements with Indian tribes under the ISDEAA authority, the BIA continues to use a substantial portion of the IRR funding to procure IRR-related services from non-tribal contractors located far from Indian communities. As a result, the full benefit of this federal funding often eludes tribal communities because “outside contractors” deliver the required benefit or product on-reservation but conduct most of their economic activity off-reservation so that little if any ancillary benefit is derived by tribal economies.

If a beneficiary tribe chooses not to contract under the ISDEAA to carry out an IRR program or function, and BIA chooses not to provide the program or function through “direct services” (delivered by federal employees), then BIA procures the deliverable from a private sector company, typically located in an urban setting far from tribal economies. The economics of tribal communities would receive far greater benefit if federal-Indian appropriations like those of the IRR Program were all spent within tribal communities by tribal operations.

Increasing numbers of Indian tribes have established service delivery, construction, and engineering organizations as arms or departments of their tribal governments. For example, the Red Lake Band of Chippewa Indians has a robust Tribal Engineering Department that actively solicits federal contracting activity throughout Indian country. The ISDEAA as well as the IRR program authority should be amended to *require* BIA to contract with tribally owned and controlled organizations who apply to do the work when a beneficiary tribe chooses not to contract for itself and the BIA chooses to procure the deliverable from outside the BIA.

This proposal could be implemented either through amending the ISDEAA provisions found in Title 25 of the United States Code or in amending Title 23 of the United States Code. The language would provide as follows:

FOSTERING TRIBAL PROCUREMENT CONTRACTING  
AND RESERVATION DEVELOPMENT—.

(a) Upon the written request of an Indian tribe to provide certain services or deliverables which the Secretary of the Interior would otherwise procure from a private sector entity, and absent a request to contract those services or deliverables pursuant to 25 U.S.C. 450f made by the tribe or tribes to be directly benefited by said services or deliverables, the Secretary of the Interior is directed to contract for such services or deliverables through the requesting Indian tribe pursuant to 25 U.S.C. 450f, Provided, That the requesting tribe assures the Secretary that the principal beneficiary of the contracted services remains the tribe or tribes originally intended to benefit from the services or deliverables.

(b) The requesting tribe shall enjoy no less than the same rights and privileges in executing and administering the contract as would the beneficiary tribe if the beneficiary tribe exercised its rights to contract for these services or deliverables under 25 U.S.C. 450f. If at any time the beneficiary tribe (or tribes) seeks to contract services or deliverables being provided by the requesting tribe, the beneficiary tribe (or tribes) shall give the requesting tribe and the Secretary of the Interior no less than 180 days notice.



We believe that this provision would enable Indian country to more fully benefit from federal program funds.

We would also like to take this opportunity to provide the Committee with specific language covering several of the issues we have touched upon. To this end, we are attaching proposed language to this testimony. This language also incorporates our tribal procurement contracting proposal.

Thank you for inviting the Red Lake Band to present this testimony to the Committee today. The Red Lake Band and its staff have been working with many of the other tribes from around Indian Country and we believe our testimony to be largely representative of their concerns as well.

And special thanks to you, Senator Campbell, and to your able staff, for your long and steadfast leadership in attempting to increase congressional scrutiny of the federal roads bureaucracy and your consistently strong support for legislative reform of the IRR Program. Many people in Indian country know of your work on their behalf and are very appreciative of it.