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BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON S. 2283

June 28, 2000

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today to provide you with the Administration's views on S. 2283, the "Indian Tribal Surface Transportation Act of 2000"and its impact on the current Indian Reservation Roads (IRR) program as jointly administered by the Bureau of Indian Affairs (BIA) and the Federal Highway Administration (FHWA). The Administration strongly opposes S. 2283.

HISTORY

The IRR program was established on May 26, 1928, by Public Law 520, 25 U.S.C. 318(a). The partnership with the BIA and the FHWA began in 1930 when the Secretary of Agriculture was authorized to cooperate with the state highway agencies and the Department of the Interior (Interior) in the survey, construction, reconstruction, and maintenance of Indian reservation roads serving Indian lands.

The first Memorandum of Agreement between the BIA and the FHWA was executed in 1948. In 1958, the laws relative to highways were revised, codified, and reenacted as Title 23, U.S.C. by Public Law 85-767. The new title contained a definition of IRR and bridges and a section devoted to Indian reservation roads.

Since the passage of the Surface Transportation Assistance Act of 1982 (Public Law 97-424), which incorporated the Indian Reservation Roads program into the Federal Lands Highway Program (FLHP) and provided funding from the Highway Trust Fund, the IRR program has enjoyed an expanded partnership with the FHWA and increased transportation opportunities for Indian tribal governments.

With the enactment of the TEA-21, the program changed to include a Nationwide Priority Program for improving IRR deficient bridges, and negotiated rulemaking with Indian tribal governments required for IRR program procedures and the "relative need" funding formula.

INDIAN RESERVATION ROADS PROGRAM

The IRR program is authorized under the FLHP, 23 U.S.C. 204. The use of IRR funds is also defined in 23 U.S.C. 204. The authorized funding level by TEA-21 is $275 million for each of fiscal years 1999 through 2003. The program is jointly administered by the BIA Division of Transportation (BIADOT) and the Federal Lands Highway (FLH) of the FHWA.

The purpose of the IRR program is to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands and communities for Native Americans, visitors, recreationists, resource users and others while contributing to economic development, self-determination, and employment of Native Americans.

Currently, the IRR system consists of approximately 41,430 kilometers (25,700 miles) of BIA and tribally owned roads and 41,270 kilometers (25,600 miles) of state, county and local government public roads with one (1) ferry boat operation (Inchelium-Gifford Ferry of Washington).

From the $275 million yearly authorization, the FHWA reserves up to 1.5 percent for their administration of the funds. The BIADOT and the FLH develop a plan for using the remaining funds. This plan includes operating expenses for the Federal Lands Highway Coordinated Technology Implementation Program (CTIP); the Local Technical Assistance Program {LTAP) centers for tribal governments; and BIA administration (not to exceed 6 percent, as authorized in the annual Interior Appropriations Act since 1984). The BIADOT administers transportation planning studies for the reservations, bridge inspections, and the updating of the road inventory. In addition, activities such as public outreach to tribes and the negotiated rulemaking are funded and managed by the BIA. An additional 2 percent of the IRR funds are set-aside for transportation planning by tribal governments.

TRANSPORTATION EQUITY ACT {TEA-21) REGULATORY NEGOTIATIONS

Beginning in March 1999, the Secretary of the Interior (Secretary) established a negotiated rulemaking committee to begin developing program procedures and a funding formula for the IRR program. To date, approximately 14 meetings have been held in at various locations around the country. The committee is composed of 29 tribal representatives and 13 representatives of the federal government. In addition to completing work on the regulations and the formula, the committee is also tasked with providing a mechanism to distribute funding in FY 2000.

TEA-21 funding in FY 2000 could not be distributed without an authorized funding formula. In addition, approximately $18.3 million were provided by the FY 2000 Department of Transportation Appropriations Act. As part of this committee consensus to distribute the critically needed funding to projects and awaiting tribal transportation needs, the committee made recommendations to the Secretary on the distribution of FY 2000 funding. They recommended a mechanism to distribute the additional $18.3 million to the tribes with inadequate transportation planning and to reservations with deficient IRR bridges. Following this direction the Secretary published a Notice for public comment recommending that the FY 2000 IRR funding be distributed in accordance with the Relative Needs allocation formula. As an emergency measure, one half of the FY 2000 funds were distributed upon publication of the temporary rule of February 15, 2000. After receiving and reviewing comments from this first notice the Secretary published a second temporary rule to distribute the remaining FY 2000 IRR funds. The second rule also addressed and corrected the distribution data affecting two states in which no data was provided.

The goal of the committee is to complete the regulations by the end of this calendar year. Adjustments will need to be made on the implementation of the rules and the funding formula. The committee has made noticeable progress in the last 6 months.

CONCERNS WITH S. 2283

S. 2283 proposes the following additions and changes to Title 23, Highways. First, the bill proposes to make the IRR program an exception to the obligation ceiling. In fiscal years 1998, 1999 and 2000, approximately $91 million of the IRR contract authority affected by this provision was not available for the IRR program. The BIA is in favor of any provisions that will provide 100 percent obligation limitation for the IRR program, as was the case since 1983 when the IRR program became part of the Federal Land Highway program until the enactment of TEA-21. The

impact to the program has been such that since the enactment of TEA-21, approximately XXXX.XX more miles of improved earth roads or XXXX.XX more miles of paved surface roads could have been constructed based on the approved Transportation Improvement Program (TIP). This impact to tribal projects is that XXX more tribes could have had their projects funded through the end of FY 1999.

Second, S. 2283 proposes to establish a pilot program within the FHWA-FLH program. We currently have two pilot projects initiated under the Office of Self-Governance. These demonstration projects were advanced as pilots to assist the participating tribes in fully implementing provisions of the law in the absence of revised regulations for the IRR program (25 CFR 170) which are currently being addressed in the negotiated rulemaking. We have participated with the FHWA in the negotiations of these pilots. The establishment of direct pilots, as proposed by S. 2283, with FHWA does not address the involvement of the facility owner. In the case of the IRR, approximately one half of the IRR system is 'owned' by the United States. As the facility owner, the responsibility for these systems remains with the BIA, not the FHWA or the tribes. For non-BIA systems on the IRR, a similar condition exists wherein the local public authority will be responsible for those roads. As the responsible "facility owner'', it becomes necessary that those functions associated with each agencies approvals such as the environmental and historic preservation documents as well as approval of the plans, specifications and estimates be reviewed and approved by the owner.

The use of these roads are not exclusive to tribes, they are public roads. As a local public authority, tribes can plan, participate and prioritize projects with the other public authorities, but the final approval of road improvements remains with the facility owner. This view of project involvement and the approval of improvements is shared by the FHWA. It is not clear what the Secretary's Trust Responsibility is in the FHWA pilots.

Third, S. 2283 proposes to limit the amount of funding available for the BIA to perform all program management and project functions within the amount available as "not to exceed 6 percent of the contract authority available from the Highway Trust Fund".

During the debate regarding TEA-21, the states argued that they should be given the flexibility to spend some of the trust fund money for management costs. The states argued that in 1994 they spent an amount comparable to about 5.5 percent of their own state funds managing all Highway Trust funded programs. In response to arguments, when Congress enacted TEA-21, it decided to go beyond the appropriations process and create a permanent fix in Section 302 of Title 23 which addresses management costs for states and agencies.

To limit the BIA or any highway agency to a fixed amount like 6 percent will impact the delivery of services provided by the program management arm as well as the engineering (preconstruction and construction) arm of the BIA to projects not contracted by tribes under the Indian Self-Determination and Education Assistance Act, as amended. The recent passage of TEA-21 also repealed the long standing provision in 23 U.S.C. 106(c) which limited the amount of construction engineering to 15 percent of the construction costs. Since 1994, we have found that the average cost per year of engineering alone on both contracted functions as well as within the BIA transportation workforce, that the cost of preconstruction engineering (PE) and construction engineering (CE) associated with individual projects were about 20.5 percent combined (13 percent for PE and 7.5 percent for CE). We are opposed to any provision that limits the amount of funding for program management; and project related preconstruction and construction engineering costs to a fixed amount of 6 percent.

Our final concern with S. 2283 is language within Section 2 (c) which proposes that an Indian tribe or tribal organization may advance a project to construction if the tribe provides assurances that the construction will meet or exceed proper health and safety standards. Under Section 403(e)(2)of the Act it states "In all construction projects performed pursuant to this title, the Secretary shall ensure that proper health and safety standards are provided in the funding agreement".

Mr. Chairman, I would like to take a few minutes to relate some Tribal views we've heard from several negotiated rulemaking meetings. One view is that the Secretary may carry out his Existing responsibility under Section 403(e)(2) of the Act by delegating this health and safety responsibility to the tribes. The difficulty with this view is that the Secretary cannot ensure health and safety since the tribe is performing the health and safety function and the Secretary is not monitoring performance during the design and construction process. Thus, under this scenario, the Secretary has no responsibility for the outcome of the construction project involved during the design and construction process.

A second view, as reflected in S. 2283, is that the tribe will provide health and safety assurances, for the construction, in the plans and specifications and that the plans are approved by a licensed professional engineer. This only covers the health and safety prior to actual construction. It also appears to eliminate the Secretary's health and safety responsibility during the actual construction process and does not provide authority for the Secretary to (1) monitor the construction process to ensure that health and safety standards are met; (2) ensure before construction begins the adequacy of the tribal inspection system, including licensed engineers; (3) review major change orders to ensure that a safe facility is constructed; (4) if necessary decline proposals that are unsafe or suspend construction that does not meet health and safety standards until corrective measures are proposed; and, if necessary, (5) decline major change orders that do not meet health and safety requirements.

Either of these views assumes that the Secretary can ensure health and safety without any authoritative involvement in the design and construction of the project. It would be unfair and unreasonable to assume that the Secretary has a trust or any other responsibility for safe construction under either of these approaches. We are also concerned that the Secretary would not have the ability to (1) identify construction that does not meet the plan or specification requirements, which may result in an unsafe or poorly constructed facility that would require removal (demolition) or major reconstruction, and (2) to identify hazards that could subject construction workers and the traveling public to unsafe conditions during actual construction.

Another view is that the ability of ensuring health and safety is covered under the government's trust responsibility. Any statutory amendment giving total control of construction to the tribes, as in S. 2283, should clearly provide that the United States has no trust or any other responsibility for the outcomes of the construction. Otherwise, S. 2283 should be amended to allow the Secretary authority to monitor construction, similar to Section 403(e)(2) of the Act.

Furthermore, the health and safety provisions of S. 2283 appears to change Title I, which applies to hospital construction for the Indian Health Service, irrigation projects for the Bureau of Reclamation, school construction for the BIA and dam safety construction, among others. This would appear to remove Secretarial monitoring for health and safety for all Title I and Title IV construction, as well.

CONCLUSION

In conclusion, whereas the Administration can and does support the first provision to provide I00 percent obligation limitation to the IRR program and consequently the badly needed transportation improvements of the tribal governments as well as the traveling public. We cannot support the three provisions of S. 2283 that would limit the ability of the BIA to adequately meet its responsibility for the proper management, design and construction of Indian reservation roads. This concludes my prepared statement. I will be happy to answer any questions you may have.