

NATIONAL TRIBAL LEADERSHIP PAPER ON TRIBAL TRANSPORTATION POLICY

**FACILITATED BY THE NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI)
AND THE INTERTRIBAL TRANSPORTATION ASSOCIATION (ITA)
JOINT TASK FORCE ON TRANSPORTATION.**

DEVELOPMENT OF TRIBAL LEADERSHIP POSITION ON SAFETEA-LU REAUTHORIZATION

Every four to six years Congress prepares transportation legislation to reauthorize the United States Department of Transportation (USDOT) to distribute over *\$286 billion* in highway, transit and other transportation-related funding to federal, tribal, state and local transportation departments. In preparation for the most recent reauthorization process, which began in 2002 and led to the passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, Tribal leaders joined together to form the NCAI Task Force on Transportation to advocate for Tribal transportation priorities. As a result of these efforts, SAFETEA-LU included several significant Tribally-beneficial provisions, and the funding allocated to the Indian Reservation Roads (IRR) Program increased from \$ 270 million for Fiscal Year 2004 to \$450 million for Fiscal Year 2009. SAFETEA-LU will expire in FY 2009. Because a safe and efficient infrastructure has great importance to Indian nations and Indian people, SAFETEA-LU reauthorization is a top legislative priority of the National Congress of American Indians (NCAI) and ITA. NCAI and ITA has therefore established the Joint Task Force to ensure that the next highway reauthorization bill builds upon the progress made in SAFETEA-LU.

In cooperation with the ITA, and NCAI the Task Force will work with Tribal leaders and Tribal transportation officials to develop a list of Tribal transportation priorities that has broad support across Indian Country. Once a package of proposals has been developed by the Task Force and endorsed by NCAI and ITA the Task Force will work with members of Congress, the Administration, State Departments of Transportation and other transportation interest groups to obtain support for its proposals. Throughout this process, the Task Force will keep the NCAI Executive Board and ITA Executive Board informed of on-going developments as the Task Force works to promote the legislative proposals endorsed by NCAI and ITA for inclusion in Congress' reauthorization of SAFETEA-LU.

BACKGROUND ON SAFETEA-LU REAUTHORIZATION

To build strong tribal nations, Indian tribes must build a transportation infrastructure that permits safe travel and promotes economic expansion. Connecting people within tribal communities and tribal communities to the surrounding area means greater economic development and improved delivery of tribal government services. Yet many Indian reservation roads and bridges are known more for their impassible condition than for their use as a safe means of transportation. The poor condition of many tribal roads and bridges jeopardizes the health, safety, security and economic well-being of our tribal members. Tribal road and bridges are often in such disrepair that children are prevented from attending school, sick and injured people are prevented from reaching hospitals and emergency responders are delayed in providing timely assistance to people in need.

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The Indian Reservation Roads (IRR) Program and other tribal transportation programs are funded from federal transportation reauthorization acts. By working to improve the content of the next reauthorization bill, Indian tribes can help improve their tribal transportation infrastructure. If Indian tribes do not seize this opportunity, tribal roads and bridges will continue to deteriorate, risking the lives of our tribal members and limiting the progress of our tribal governments.

TRIBAL TRANSPORTATION PRIORITIES FOR SAFETEA-LU REAUTHORIZATION

The NCAI/ITA SAFETEA-LU Joint Task Force has developed recommendations for legislative amendments and policy proposals to increase transportation funding for tribes and better promote and protect the sovereignty interests of American Indians and Alaska Natives in the delivery of transportation services to their tribal membership.

The Task Force recommends that annual funding for the IRR Program and other tribal transportation programs be calculated by identifying the actual transportation needs of all Indian tribes and spreading this unmet needs cost over the years of the next reauthorization, taking into account the actual funds available in the Highway Trust Fund and the proportion of IRR roads and bridges on the national highway system. As trustee for Indian tribes, the Bureau of Indian Affairs (BIA) must provide technical support, data and other assistance to tribal governments in this effort since many Tribes may have insufficient planning funds to perform this vital needs assessment before the next reauthorization.

All transportation issues identified by the task force are vital to Indian Country. However, the tribal leadership must prioritize the task force's legislative proposals to ensure that the most urgent needs of all Indian nations are met. The legislative proposals set out below are listed in the order of each issue's importance to the Task Force. Our goal is to develop a unified national tribal position for the SAFETEA-LU reauthorization to carry these priorities forward.

KEY RECOMMENDATIONS:

The Task Force, has developed the following tentative list of Tribal transportation priorities. For the next several months, we will be actively seeking the input of Tribal leaders and tribal transportation officials to refine, modify, and revise this list to ensure that it accurately reflects the needs and priorities of Indian Tribes across the country. The Task Force hopes to present a finalized list of Tribal transportation priorities at the NCAI Mid-Year Conference in June, 2008 for approval by NCAI.

- 1. Increase Funding for the Indian Reservation Roads (IRR) Program:** According to recent BIA data, the IRR system includes over 101,753.9 miles of roads and 536,293 feet of bridges. According to this data, the total IRR system has a construction need of \$39,897,696,000. Although these roads represent 9.18% of the combined total of Federal-Aid Highways and

federally-owned roads,¹ the IRR Program receives only 1.4% of funds authorized to be appropriated under section 101(a) of Title I of SAFETEA-LU.

The Task Force carefully considered whether to recommend that the highway reauthorization bill fund the IRR Program at a level commensurate with the percentage it represents of Federal-Aid and federally-owned routes. However, the Task Force is mindful that the Highway Trust Fund – which is the source of funding for these roads – is predicted to suffer severe shortfalls by FY 2009. We concluded that asking Congress to fund the IRR Program at 9% of the total funds authorized for Federal-Aid and federally-owned highways was not only unrealistic in light of the likely funding shortfall, but also ran the risk of seeming unreasonable to our supporters in Congress. Therefore, to ensure that Congress sees our request for funding as both reasonable and serious, we have concluded that a better strategy is to ask for more modest funding increases.

The Task Force therefore recommends that the highway reauthorization bill fund the IRR Program at \$ 500 million for FY 2010 with stepped increases of \$ 50 million for every year thereafter. Although these increases will not bring the funding for the IRR Program into parity with funding for Federal-Aid and Federally-owned routes, these increases will allow Tribes to continue to make modest headway into addressing the large unmet transportation needs of Indian Country.

2. Restore the Obligation Limitation Deduction Exemption to the IRR Program: The obligation limitation deduction diverts millions of dollars from the IRR Program. The Task Force recommends that Congress restore the obligation limitation deduction exemption that existed for the IRR Program under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The Task Force recommends that if the obligation limitation exemption is not restored to the IRR Program, that Congress expand redistribution authority to include the IRR Program so that much needed IRR Program funds are no longer diverted to States during the August redistribution.

3. Address the Bureau of Indian Affairs' (BIA) Failure to Adequately Fund the BIA Road Maintenance Program and Augment funding for the BIA Road Maintenance Program with funds from the Highway Trust Fund: The BIA Road Maintenance Program, which is funded by appropriations for the Department of the Interior, is terribly underfunded. In 2003, the BIA estimated that the annual cost to maintain BIA-owned Roads and Bridges was approximately \$ 120 million. Other authorities estimate that the real annual maintenance needs of Tribes are much higher, based on the number of miles Tribes need to maintain and the average cost per mile to maintain those roads. This estimated annual cost does not include any costs associated with addressing the huge backlog of unmet maintenance needs. And yet, for FY 2008, the Administration requested only \$ 26 million for the BIA Road Maintenance Program, less than 1/10 of the funding per lane / mile that States have available to maintain their roadways. This funding inequity causes tribal roads and bridges to deteriorate years before their time. As a result, transportation routes in Indian Country are woefully under-maintained and in third-world condition. The poor condition of these routes is a significant cause of their extremely poor safety

¹ Data on Federal-Aid road miles and federally owned road miles for FY 2005 available at http://www.fhwa.dot.gov/policy/ohim/hs05/roadway_extent.htm.

record. In response to the dire condition of IRR routes and the BIA's failure to meet its maintenance obligations, and to better protect the lives of members of the public traveling on IRR routes from the risks associated with poorly maintained routes, the Task Force recommends:

- a. That Congress require the BIA to meet its obligation to maintain IRR routes on which federal highway trust fund dollars have been expended; and
- b. That Congress authorize \$100 million annually from the Highway Trust Fund for maintenance of IRR routes; and

4. Increase the Set-Aside for the Indian Highway Safety Program to 4.5% of the funds appropriated for Highway Safety Programs of the Department of Transportation:

SAFETEA-LU requires that at least two percent of funds appropriated for Highway Safety Programs be set aside for the Secretary of the Interior. SAFETEA-LU § 2002(c)(2). Ninety-five percent of the funds apportioned to the Secretary of the Interior are required, by statute, to be "expended by Indian tribes to carry out highway safety programs within their jurisdictions." 23 U.S.C. § 402(i)(2). The administration of this program has historically been unresponsive to Tribal needs and has not complied with the requirement that *95% of the funds are to be available for expenditure by Tribes* to carry out highway safety programs. The Reauthorization Task Force recommends increasing the set-aside for this program to 4.5%.

5. Minimum Transportation Funding: The first step to proper transportation program operation is to establish a minimum base funding level for all Tribes. The Task Force recommends that this minimum level be established at \$50,000 per Tribe. These funds would be available to be spent for any purpose allowable under the IRR Program, including the 25% allowable for maintenance activities. This position is consistent with the NCAI Resolution passed at the annual meeting that took place in Sacramento in November of 2006

6. Tribal Transit: In its initial years, the Tribal Transit Program has been highly successful and, in the first year of operation, awarded transit funding to 63 Tribes. This program brings badly needed transit services to Indian Country so that Tribes can provide increased access to employment, health services and business opportunities for Tribal members. The funding awarded thus far has, however, barely scratched the surface of transit needs in Indian Country. To address these needs, the Task Force recommends that funding for the Tribal Transit Grant Program be increased by \$ 10 million annually from \$25 million for FY 2010 to \$75 million for FY 2014.

7. Simplify the award process by which Federal transportation funds are distributed to Indian Tribes by creating uniform grant eligibility, application and administration criteria and establish that the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638 (1975) (codified as amended at 25 U.S.C. § 450 et seq.) applies to all grants and contracts administered by the Department of Transportation.

8. Increase the number of Department of Transportation programs which Tribes may participate in as direct funding recipients from the Federal government rather than as sub-recipients through the States : Tribes are eligible sub recipients of many State formula grant

programs, such as the Safe Routes to Schools to Schools Program, and the Highways for Life Program authorized under Title 23 of the U.S. Code. Tribes are also eligible sub recipients of several transit grants, such as Job Access and Reverse Commute grants and Formula Grants for Special Needs of Elderly Individuals and Individuals with Disabilities under Title 49 of the U.S. Code. In order to receive these grant funds, however, Tribes must enter into agreements with the State Departments of Transportation that administer these federal grant programs. These agreements are often ill-suited to Tribal governments, do not take into account the unique government-to-government relationship between States and Tribes, and impose inappropriate legal and administrative burdens on Tribes. The Task Force recommends that Congress authorize the Department of Transportation to award such grant funds directly to Tribes by way of ISDEAA contracts.

9. Changes to the Tribal Technical Assistance Program:

- a. Increase funding to the Tribal Transportation Assistance Programs (TTAPs) to at least \$2.5 million annually to increase technical training and promote awareness in Indian country of "best practices" in Transportation Program implementation including management and compliance, transportation planning, construction (project development, construction, project closeout), maintenance, and Safety-both system and user;
- b. The Task Force recommends that each Region have their own TTAP Center
- c. The Task Force recommends that Congress provide by statute that the regulations at 25 C.F.R. § 170.161-171, including the requirement that Tribes be included on the TTAP selection committee, are binding upon the FHWA notwithstanding the statement in 25 C.F.R. § 161 that the regulations are for informational purposes only.
- d. Assessment: Annually the FHWA will acquire information from the tribes within the respective TTAPs service area to assess the implementation by the TTAP

10. Promote the use of innovative financing techniques in standard Indian Self-Determination contracts and self-governance agreements to provide tribal governments with better tools to reduce their road construction backlog.

11. Carry out right-of-way reform in Indian country to reduce costs and expedite the design, construction and reconstruction of tribal roads and bridges.

12. IRR Bridge Program: Fund the IRR Bridge Program at \$200 million annually from the Highway Trust Fund. Expand the authorized use of IRR bridge program funds to include new bridges. Current funding at 14 million additional funding at step amounts (discussion on amounts) additional language to be added.

13. Population: The population element in the IRR Program funding formula currently uses population figures derived from the NAHASDA Program. These figures are generally believed to be inaccurate. To protect the fairness of the funding formula and to ensure that it is implemented as it was intended, the Task Force recommends that Tribal leaders consider other available sources for population figures (Tribal Census, IHS, BIA Labor Force Report) and that these sources be adopted by statute. (more research needed possible Regulatory Issue)

IMPLEMENTATION OF SAFETEA-LU

In addition to the legal changes the Task Force discussed above, the Task Force notes that there have been implementation problems with some of the advances in SAFETEA-LU. The Task Force recommends that Congress:

1. Urge the BIA to rectify its continued failure to comply with SAFETEA-LU's 30-day payment mandate.
2. Urge the BIA to promptly approve the model Self-Determination Contract and Annual Funding Agreement for the IRR Program. Although SAFETEA-LU was enacted over two years ago, in August of 2005, the BIA has yet to approve such a model. This failure means that Tribes are being forced to use outdated, overly burdensome ISDA contracts that do not reflect many of the hard won improvements to the IRR Program that Tribes negotiated with BIA and FHWA in the 2004 IRR Program regulations and that Congress included in SAFETEA-LU. The failure to adopt such a model has also contributed to the BIA's ongoing inability to comply with the 30-day payment mandate.
3. Encourage the President to fill the position of Deputy Assistant Secretary for Tribal Government Affairs established under SAFTEA-LU.
4. Enforce the statutory requirement in SAFETEA-LU that the BIA must make IRR Program funds "immediately available" for the use of Indian Tribes within 30 days of the BIA's receipt of the funds from the FHWA.
5. SAFETEA-LU required that the FHWA working in cooperation with the BIA was to complete a comprehensive national transportation facility Inventory and report back to Congress within two-years. To date, FHWA has not met this obligation. Moreover, there has been little consultation with There has been little consultation with Tribes on what the law required and what FHWA needed to accomplish. We believe:
 - a. The comprehensive national transportation facility inventory called out in SAFETEA-LU is the same Inventory used to calculate the tribes' Relative Need

Distribution Factor within the Tribal Transportation Allocation Methodology, they are one in the same.

- b. It is vital that FHWA and the BIA work with the Tribes to assure that the data in the IRR Transportation Facility Inventory is accurate, and that all tribally identified transportation needs are reflected
- c. The BIA and FHWA need to work with the tribes to assure that any transportation facilities identified by the respective tribe during the current year are added to the IRR Inventory for funding distribution calculations in the following year. This means easing the burden of excessive documentation for adding routes to the IRR Inventory

CONCLUSION

Indian tribal governments and tribal transportation organizations are better positioned than ever before to help shape the SAFETEA-LU reauthorization legislation in ways that greatly benefit the long-term interests of Indian tribes and their tribal members. The SAFETEA-LU reauthorization effort will be difficult given the many competing interest groups involved, but by working together, Indian tribes can speak in a single, powerful voice before Congress and the Administration to ensure that we accomplish this important task.