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AMENDING THE INDIAN RESERVATION ROADS PROGRAM

SEPTEMBER 11, 2000.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2283]

The Committee on Indian Affairs, to which was referred the bill (S. 2283) to provide amendments to the Indian Reservation Roads (IRR) program, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSES

The purpose of S. 2283, the Indian Tribal Surface Transportation Act of 2000, is to provide technical amendments to the IRR program that is administered pursuant to the Transportation Equity Act for the 21st Century (TEA–21, or "the Act"), P.L. 105–178 (codified at 23 U.S.C.) to improve the delivery of road and bridge assistance to Indian tribes in a manner that recognizes the right of tribal self-determination and self-governance, and for other purposes.

BACKGROUND

On June 9, 1998, Congress enacted TEA–21 to authorize Federal surface transportation programs for highways, highway safety, transit and other surface transportation programs. TEA–21 authorizes Federal surface transportation for the six-year period of October 1, 1997 through September 20, 2003, and builds upon the programs and policies of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), P.L. 102–240 (codified in various sections of 23 U.S.C., 49 U.S.C., and other titles of U.S.C.).

Moreover, the Act expands ISTEA's emphasis on flexibility and local decisionmaking in surface transportation planning and devel-

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opment.[1] Over its six-year period, the Act dedicates $218 billion in investment for surface transportation. The goals of TEA–21 are to improve highways, increase highway safety, protect the environment, and increase economic growth.

In 1997, Indian specific amendments to the Act were offered by Chairman Campbell and Vice-Chairman Inouye to authorize Indian tribes to contract for "all funds" made available under the Act, and to require the Secretary of Interior to institute negotiated rulemaking procedures to implement key elements of the Act, including the development of a new funding formula.

Under § 1115 of the Act, the IRR program is incorporated under the Federal Land Highways Program (FLHP). The FLHP provides funding for public roads and transit facilities serving Federal and Indian lands. There are two components of the FLHP that significantly impact Indian lands, including Alaska Native lands. First, Indian tribes are eligible to receive benefits from the IRR program for the survey, improvement, construction, and maintenance of roads that provide access to and from Indian lands. Second, the Indian Reservation Road Bridge Program (IRRBP) designates a minimum of $13 million a year for the rehabilitation and replacement of deficient bridges on Indian lands.[2] Under IRR, tribes may choose to administer their IRR programs pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93–638 (25 U.S.C. §§ 450 et seq).[3]

The IRR program, including the IRRBP, is jointly administered by both the Bureau of Indian Affairs (BIA) and the Federal Highway Administration (FHWA). In Native communities, the IRR program is intended to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands and communities for Native American visitors, recreationists, resource users and others while contributing to economic development, self-determination, and employment of Native Americans. Under the Act, the authorized level of funding for the IRR program was $225 million in 1998 and $275 million for each year from 1999–2003 for a six-year total of $1.6 billion for the IRR program.

THE NEED FOR IMPROVED RESERVATION ROADS

There are 561 Federally recognized Indian tribes with Indian land representing roughly 56 million acres within the United States in the lower 48 states and 44 million acres in the State of Alaska. The IRR transportation system provides access to and from Indian lands and communities. Due to the geographic remoteness and often difficult terrain of Indian lands, the IRR system represents one of the most rudimentary transportation systems in the United States. Despite the fact that much of the IRR system is unpaved and in poor condition, more than 2 billion vehicle miles are traveled annually on this transportation network.

There is an enormous and largely unmet need for transportation infrastructure on Indian lands throughout the country. Available

[1] S. Rep. No. 106–226, at 1 (2000).

[2] Previously, the IRRBP was a separate set-aside from outside the IRR program funding. Under TEA–21, the IRRBP now sets aside a minimum of $13 million annually from the IRR budget.

[3] According to the Bureau of Indian Affairs (BIA), anywhere from ⅓ to ½ of the IRR programs are administered under P.L. 93–638 contracts.

information indicates that there is an estimated $6.8 billion backlog of needed transportation improvements in Indian country.[4] Poor transportation infrastructure has a devastating impact on Indian emergency services, law enforcement capabilities, and economic development. Moreover, with roads and bridges in unsafe condition, the annual fatality rate on the IRR system is more than four times that of the national average.[5]

Over 66% of the IRR system is unimproved earth and gravel while approximately 26%[6] of the IRR bridges are deficient. Approximately 50,000 miles of roads serve Indian reservations and lands. Of these BIA roads comprise 23,000 miles, and Federal, State and local public roads comprise some 25,600 miles.

Of the BIA roads only 34% are paved and rated in "good condition." The remaining roads are either paved and in fair or poor condition, or unpaved. The result is that unpaved and weather-compromised roads regularly become muddy and are washed-out in severe weather conditions.

In the history of the IRR program, reservation roads have never received the level of funding needed to bring them on par with non-IRR roads and bridges. Although reservation roads compose 2.63% of the Federal Aid Highway Program, no less than 1% of this Federal aid has been allocated to Indian roads. If the IRR program were to receive 2.63% of TEA–21 funding, then the IRR program would be authorized and fully funded at $4.7 billion over the 1998–2003 period, as opposed to the current authorized amount of $1.6 billion.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The short title of this bill is the Indian Tribal Surface Transportation Act of 2000.

Section 2. Amendments relating to Indian tribes

a. Obligation Limitation. This section would amend TEA–21 and remove application of obligation limitation from the IRR program to ensure the full appropriation of Congress' authorized amount. Although the Act authorizes $1.6 billion for the IRR program, application of the obligation limitation has already deducted approximately $122 million from the IRR program for FY 1998–2001. Eventually, the imposition of the obligation limitation will result in a loss of over $192 million to the IRR program.[7]

Under section 1102 of TEA–21, there is an automatic percentage deducted from the Federal Aid Highway Programs, including the

[4] 1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance, Report to Congress, United States Department of Transportation, May 2000 (Appendix E–8). The estimated backlog of $6.8 billion is somewhat understated, because it only takes into account the roads that are in the BIA's inventory. The inventory is not completely up-to-date, because some tribes and/or regions have not updated their inventory during TEA–21.

[5] Id.

[6] The average was determined by analyzing that approximately 23 percent of the 779 bridges owned by the BIA are deemed deficient while 27% of the 3,006 state and locally owned non-BIA bridges are also deemed deficient. Indian Tribal Surface Transportation Act of 2000: Legislative Hearing on S. 2283 Before the Senate Committee on Indian Affairs, 106th Congress (2000) (statement of Kenneth Wykle, Administrator, Federal Highway Administration, Department of Transportation).

[7] *Id.*

IRR program.[8] The percentage of funds that is deducted from the Federal Aid Highway and Highway Safety Construction Program acts as a ceiling on the obligation contract authority. This ceiling controls highway program spending in response to economic and budgetary conditions.

The intent of the obligation limitation provision is to give states control for some of the designated Federal roads that are located within state lands. Although the excess percentage of obligated funds is redistributed to certain Federal programs and to states, the IRR program is not eligible under TEA–21 to benefit from the redistribution of unused obligated authority.[9] Thus, the percentage of funds that are withheld from the IRR program by the obligation limitation are not reinvested into Indian and Alaska Native communities and instead are redistributed to states or other eligible recipients. The effects of this obligation limitation are harmful to tribes who have limited resources and among the worst transportation infrastructure in the nation.

Under ISTEA, Federal aid highways and Indian roads were not subject to this obligation limitation. This amendment would return the IRR program to the same position it occupied under ISTEA.[10]

b. Pilot Project. Currently, the IRR program is administered by the BIA, the FHWA, and tribal transportation departments. With three agencies administering the program, inefficiencies and duplicative procedures exist. This section provides for development of a pilot program pursuant to the ISDEAA model where twelve (12) tribes are authorized to directly contract with the FHWA, removing the BIA as an intermediary from the IRR process.

The FHWA's core competency is the administration of the Federal highway program. This pilot program promotes efficiency in the administration of the IRR program and also encourages Indian self-determination. Moreover, the pilot program is consistent with the principles of both ISTEA and TEA–21 of increased state and local flexibility and decisionmaking. Just as local authorities are deemed to know best the needs of their communities, so are tribal governments.

The 12 tribes selected to participate in the pilot program will be chosen on a geographical basis representing the various regions of the country. The Committee's intent is to have broad-based participation in the pilot program. As long as there are eligible applicants from each of the BIA's twelve regions, at least one tribe and/or consortia from each of the BIA's regions should be selected to participate.

The language in this provision clarifies that funding for those tribes participating in the pilot program will be based on the national funding formula implemented under TEA–21 section 1115(b). In addition to the formula monies, all tribes participating in this

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[8] Because the Federal transportation program requires multiple-year authorizations and availability of funds, both ISTEA and TEA–21 have contract authority for multiple years and are not subject to the annual appropriations process. To ensure that this multi-year funding is consistent with national budget policy, TEA–21 imposes an obligation ceiling to withhold a certain percentage of Federal Aid Highway Program monies.

[9] Under 1102(d), states or programs that are unable to obligate their share of the obligation ceiling are able to transfer their unused funds to other states and certain Federal programs that are able to obligate more than their initial share of the obligation limitation funds.

[10] This amendment will fully fund the IRR program by assigning it to § 1102(c)(1) that sets aside certain programs, such as the Highway Use Tax Evasion Program and the Bureau of Transportation Statistics, before distribution of the obligation limitation.

pilot program will receive any monies that the BIA may have withdrawn under their 6 percent authority.[11] Because the pilot program tribes are directly contracting with the FHWA, the BIA may not deduct any administrative or projected-related funds from monies that the pilot program tribes are awarded.

The candidates in the applicant pool must also demonstrate financial stability and financial management capability for 3 years prior to applying to participate in the demonstration program. If a tribal consortium has not been in operation for 3 years, then the consortium must meet the audit requirements for the period during its operation, and each member of the consortium must also meet the audit requirements for the year(s) prior to joining the consortium to equate the required 3 year period.

c. Administration. The FY1999 and FY2000 Omnibus Appropriations Acts and the FY2001 Senate Interior appropriations bill states, "that not to exceed 6 percent of the contract authority available to the Bureau of Indian Affairs from the Federal Highway Trust Fund may be used to cover the road program management costs of the Bureau."

The BIA has taken the position that it may not only withhold up to 6 percent of IRR funding for the overall administration of the IRR program, but that it may also withhold an additional amount of funding to perform project-related administrative activities. By creating this superficial distinction between the 6 percent withholding and "project-related" administrative funds, the BIA has exceeded the 6 percent authority that Congress provided. Because the BIA has not demonstrated that it has or can increase value to the IRR program to Congress' satisfaction, the agency's access to and use of the IRR funds for administrative and project-related purpose must be strictly circumscribed.

Accordingly, the bill explicitly states that the BIA may not exceed 6 percent of TEA–21 funding for administrative costs relating to the IRR program and individual projects. This language is intended to ensure that the IRR monies are distributed to tribes and benefit Indian communities. Testimony provided to the Committee suggests that when the BIA withholds 6 percent for administrative costs and then additional percentages for individual project-related costs, the administrative activities funded are often duplicative and unnecessary. Indian communities are not benefitted when IRR money remains at BIA headquarters or even BIA regional offices for such functions. Eventually, the BIA's administrative costs and project-related costs should be reduced as more tribes participate in P.L. 93–638 contracting or self-governance compacting in IRR programs.

The amendment also clarifies that all IRR funds (including TEA–21 funding for roads and bridges) are available to Indian tribes that are willing and able to assume the administration of their IRR program through ISDEAA contracts. TEA–21's section 1115 clearly states:

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[11] In recent years the annual appropriations acts have provided the BIA with authority to absorb up to 6 percent of IRR funding for the "administration" of the IRR program. The FY1999 and FY2000 Omnibus Appropriations Acts and the FY2001 Senate Interior appropriations bill states, "that not to exceed 6 percent of the contract authority available to the Bureau of Indian Affairs from the Federal Highway Trust Fund may be used to cover the road program management costs of the Bureau."

> * * * *all funds* [emphasis added] made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads * * * shall be made available, upon the request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning research, engineering, and construction in accordance with the Indian Self-Determination and Education Assistance Act.

Despite the lack of ambiguity in TEA–21, the BIA continues to stall on tribal requests made under ISDEAA to enlarge the pool of tribes who are participating in P.L. 93–638 direct contracting or self-governance compacting. Accordingly, the amendment reaffirms congressional intent that all funds shall be made available to tribes who request and are qualified to use P.L. 93–638 contracting and self-governance compacting for their IRR program.

Moreover, the language clearly states that if a tribe assumes responsibility for the administration of their IRR programs under P.L. 93–638 or the self-governance pilot program, the BIA cannot withhold 6 percent of the funding or any percentage for project-related costs for road programs, functions, services, or activities that the Indian tribe has now assumed. Tribes that are operating IRR programs under P.L. 93–638 contracting or the self-governance pilot program do not need the BIA's "administrative services." This amendment is needed to remedy the current situation where the BIA no longer administers IRR programs for contracting tribes, yet continues to deduct both 6 percent and project-related funds for administrative costs. If a tribe is administering the IRR program, then the tribe should receive all of the funds which the BIA previously used to perform the same functions.

Health and Safety. Finally, the bill allows tribes the option to independently meet the statutorily required Health and Safety Standards without the additional requirements of BIA oversight but only if the tribe: (1) agrees in its contract to meet industry standards, (2) has had a licensed engineer review and certify the plans and specifications, and (3) has sent a copy of the certification to the BIA.

Currently, the BIA will not permit an Indian tribe to begin construction on an IRR project until after the BIA has reviewed and approved the plans, specifications and estimates (PS&E's) for the project to ensure that construction of the project will not jeopardize public health and safety. However, providing tribes flexibility in meeting health and safety standards will not limit the ability of the BIA or FHWA to ensure that the IRR roads and bridges are built safely and efficiently. The BIA will retain its monitoring and final inspection authorities as currently permitted under law.[12] Finally, the requirements of the Single Audit Act (31 U.S.C. § 7501 et seq.) will provide additional means to ensure compliance and subject the non-complaint tribe to the usual single audit penalties.[13]

The amendment is needed because the current BIA review process creates substantial delay, with tribes often forced to wait an en-

[12] See 25 U.S.C. § 458cc(e)(1); 25 C.F.R. § 900.131.

[13] Under the Single Audit Act, an auditor spot checks contractual commitments, such as an Indian tribe's commitment to adhere to industry standards. By reviewing and analyzing the construction documents and other supportive work papers, the auditor will ensure that the tribe is in compliance with the contract.

tire construction period for the BIA to review the PS&E's that were submitted by tribes who have either a licensed engineer on staff or retained on contract. Retaining a bureaucratic check on every detail of IRR planning and construction is unnecessary and creates redundancy and inefficiency. Moreover, this amendment is consistent with ISTEA and TEA–21's policies of increasing local and state flexibility and decision-making by authorizing tribes to begin their construction projects without unreasonable delay that exists from bureaucratic delay. By promoting efficiency, limited IRR funding can be better managed and budgeted.

LEGISLATIVE HISTORY

The Indian Tribal Surface Transportation Act of 2000 (S. 2283) was introduced on March 23, 2000, by Senator Campbell, for himself, and for Senator Inouye and Senator Johnson. S. 2283 was referred to the Committee on Indian Affairs and a legislative hearing was held on the bill on June 28, 2000. On July 26, 2000, the Committee on Indian Affairs convened a business meeting to consider S. 2283 and other measures that had been referred to it, and on that date, the Committee unanimously reported a substitute amendment to S. 2283.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On July 26, 2000, the Committee on Indian Affairs, in an open business session, adopted an amendment-in-the-nature of a substitute to S. 2283 by voice vote and ordered the bill, as amended, reported favorably to the full Senate.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 2283 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 31, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2283, the Indian Tribal Surface Transportation Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is James O'Keeffe.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 2283—Indian Tribal Surface Transportation Act of 2000

S. 2283 would modify the Indian Reservation Roads (IRR) program within the Department of Transportation's (DOT's) Federal-Aid Highways program. CBO estimates that implementing the bill would not have a significant impact on the federal budget. The bill

would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 2283 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 2283 would set the obligation limitation for the IRR program equal to the contract authority available for this program. (Contract authority is a mandatory form of budget authority, its use under the federal-aid program is generally controlled by obligation limitations contained in appropriation acts.) Under current law, the obligation limitation for the IRR program would be lower than the contract authority for this program. For 2000, the IRR contract authority is $289 million and the obligation limitation for this program is $254 million. S. 2283 would not change the total amount of contract authority, or the overall obligation limitation for the federal-aid program. Consequently, any increase in spending for the IRR program under this bill would be offset by reduced spending on other federal-aid activities.

The CBO staff contact is James O'Keeffe. This estimate was approved by Peter H. Fontaine, Deputy Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The Committee has concluded that enactment of S. 2283 will create only de minimis regulatory or paperwork burdens.

EXECUTIVE COMMUNICATIONS

The Committee has received a letter from the Department of Interior commenting on S. 2283, dated July 11, 2000. This letter is set forth below.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, July 11, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of the Interior 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 Department opposes S. 2283.

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.

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 was $225 million in 1998 and $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 year 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.

Beginning in March 1999, the Secretary of the Interior (Secretary) established a negotiated rulemakng committee to begin developing procedures and a funding formula for the IRR program. To date, approximately 14 meetings have been held 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 $18.4 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 on June 16, 2000, 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 publish a Notice of Proposed Rulemaking 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.

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 was affected by the obligation limitation and was not available for the IRR program. The BIA is in favor of a provision that will provide 100 percent obligation limitation for the IRR program, as was the case between fiscal years 1983 and 1987 when the IRR program became part of the Federal Land Highway program until the enactment of TEA–21. The FY 2001 President's Budget proposed to provide the IRR program with 100 percent obligation limitation. However, we oppose making this program mandatory. The impact to the program has been such that since the enactment of TEA–21, approximately 341 more miles of improved earth roads or 270 more miles of paved surface roads could have been constructed based on the approved Transportation Improvement Program (TIP). The impact upon tribal projects is that approximately 169 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 to 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 abundance of revised regulations for the IRR program (25 CFR 70) 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 IR, a similar condition exists wherein the local public authority will be responsible for those roads. As the responsible "facility owner", it is necessary for the BIA to review and approve the performance of functions such as the environmental and historic preservation activities as well as approval of the plans, specifications and the engineer's estimate.

The use of these roads is 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, such as 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, was 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".

The Department would like to relate some Tribal views we have 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. However, this only covers 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 license 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 (5) if necessary, 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 to 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 outcome 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 appear 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.

In conclusion, the Department can and does support providing 100 percent obligation limitation to the IRR program as was proposed in the President's FY 2001 budget. However, the Department does not support the first provision that would make the program mandatory. We do not support the three provisions of S. 2283 that

would limit the ability of the BIA to meet its responsibility adequately for the proper management, design and construction of Indian reservation roads.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

KEVIN GOVER,
Assistant Secretary for Indian Affairs.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill are required to be set out in the accompanying Committee report. The Committee finds that enactment of S. 2283 will result in the following changes to 23 U.S.C. §§ 101 et seq., with existing language which is to be deleted in bolded brackets and new language to be added in italic:

23 U.S.C. 104 (notes)

OBLIGATION CEILING

(c) DISTRIBUTION OF OBLIGATION AUTHORITY.—For each of fiscal years 1998 through 2003, the Secretary shall—

(1) not distribute obligation authority provided by subsection (a) [of this note] for such fiscal year for amounts authorized for administrative expenses and programs funded from the administrative takedown authorized by section 104(a) of title 23, United States **[**Code**]** [subsec. (a) of this section], **[**and**]** *Code,* amounts authorized for the highway use tax evasion program and the Bureau of Transportation Statistics*, and for each of fiscal years 2001 through 2003, amounts authorized for Indian reservation roads under section 204 of title 23, United States Code;*

23 U.S.C. 202(d)(3)

(d)(3) CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES.—

(A) IN GENERAL.—Notwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy directive, all funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the costs of programs, services, functions, and activities, or portions thereof, that are specifically or functionally related to the cost of planning, research, engineering, and construction of any highway, road, bridge, parkway, or transit facility that provides access to or is located within the reservation or community of an Indian tribe shall be made available, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning, research, engineering, and construction in accordance with the Indian Self-Determination and Education Assistance Act.

(B) EXCLUSION OF AGENCY PARTICIPATION.—Funds for programs, functions, services, or activities, or portions thereof, in-

cluding supportive administrative functions that are otherwise contractible to which subparagraph (A) applies, shall be paid in accordance with subparagraph (A) without regard to the organizational level at which the Department of the Interior that has previously carried out such programs, functions, services, or activities.

(C) FEDERAL LANDS HIGHWAY PROGRAM DEMONSTRATION PROJECT.—

(i) IN GENERAL.—The Secretary shall establish a demonstration project under which all funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads are provided for in subparagraph (A), shall be made available, upon request of the Indian tribal government involved, to the Indian tribal government for contracts and agreements for the planning, research, engineering, and construction described in such subparagraph in accordance with the Indian Self-Determination and Education Assistance Act.

(ii) EXCLUSION OF AGENCY PARTICIPATION.—In accordance with subparagraph (B), all funds for Indian reservation roads and for highway bridges located on Indian reservation roads to which clause (I) applies, shall be paid without regard to the organizational level at which the Federal lands highway program has previously carried out the programs, functions, services, or activities involved.

(iii) SELECTION OF PARTICIPATING TRIBES.—

(I) PARTICIPANTS.—

(aa) IN GENERAL.—The Secretary shall select 12 geographically diverse Indian tribes in each fiscal year from the applicant pool described in subclause (II) to participate in the demonstration project carried out under clause (I).

(bb) CONSORTIA.—Two or more Indian tribes that are otherwise eligible to participate in a program or activity to which this title applies may form a consortium to be considered as a single tribe for purposes of becoming part of the applicant pool under subclause (II).

(cc) FUNDING.—An Indian tribe participating in the pilot program under this subparagraph shall receive funding in an amount equivalent to the funding that such tribe would otherwise receive pursuant to the funding formula established under section 1115(b) of the Transportation Equity Act for the 21st Century, plus an additional percentage of such amount, such additional percentage to be equivalent to the percentage of funds withheld during the fiscal year involved for the road program management costs of the Bureau of Indian Affairs under section 202(f)(1) of title 23, United States Code.

(II) APPLICANT POOL.—The applicant pool described in this subclause shall consist of each Indian tribe (or consortium) that—

(aa) has successfully completed the planning phase described in subclause (III);

(bb) has requested participation in the demonstration project under this subparagraph through the adoption of a resolution and other official action by the tribal governing body; and

(cc) has, during the 3-fiscal year period immediately preceding the fiscal year for which participation under this subparagraph is being requested, demonstrated financial stability and financial management capability through a showing of no material audit exceptions by the Indian tribe during such period.

(III) CRITERIA FOR DETERMINING FINANCIAL STABILITY AND FINANCIAL MANAGEMENT CAPACITY.—For purposes of this subparagraph, evidence that, during the 3-year period referred to in subclause (II)(cc), an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability.

(IV) PLANNING PHASE.—An Indian tribe (or consortium) requesting participation in the project under this subparagraph shall complete a planning phase that shall include legal and budgetary research and internal tribal government and organization preparation. The tribe (or consortium) shall be eligible to receive a grant under this subclause to plan and negotiate participation in such project.

23 U.S.C. 202

(f) INDIAN RESERVATION ROAD, ADMINISTRATION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, not to exceed 6 percent of the contract authority amounts made available from the Highway Trust Fund to the Bureau of Indian Affairs shall be used to pay the administrative expenses of the Bureau for the Indian reservation roads program and the administrative expenses related to individual projects that are associated with such program. Such administrative funds shall be made available to an Indian tribal government, upon the request of the government, to be used for the associated administrative functions assumed by the Indian tribe under contracts and agreements entered into pursuant to the Indian Self-Determination and Education Assistance Act.

(2) HEALTH AND SAFETY ASSURANCES.—Notwithstanding any other provision of law, an Indian tribe or tribal organization may commence road and bridge construction that under the Transportation Equity Act for the 21st Century (25 U.S.C. 104) that is funded through a contract or agreement under the Indian Self-Determination and Education Assistance Act so long as the Indian tribe or tribal organization has—

(A) provided assurances in the contract or agreement that the construction will meet or exceed proper health and safety standards;

(B) obtained the advance review of the plans and specifications from a licensed professional who has certified that the plans and specifications meet or exceed the proper health and safety standards; and

(C) provided a copy of the certification under subparagraph (B) to the Bureau of Indian Affairs.

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