

# **NATIONAL TRIBAL LEADERSHIP PAPER ON TRIBAL TRANSPORTATION PRIORITIES**

**FACILITATED BY THE NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI)  
AND THE INTERTRIBAL TRANSPORTATION ASSOCIATION (ITA)**

## **JOINT TASK FORCE ON TRIBAL TRANSPORTATION**

### **DEVELOPMENT OF TRIBAL LEADERSHIP POSITION ON SAFETEA-LU REAUTHORIZATION**

Every five or six years Congress prepares transportation legislation to reauthorize the United States Department of Transportation (USDOT) to distribute billions of dollars of highway, transit and other transportation-related funding to federal, Tribal, state and local transportation departments and agencies. 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 in the highway reauthorization legislation. 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 \$275 million for Fiscal Year 2004 to \$450 million for Fiscal Year 2009. SAFETEA-LU will expire on September 30, 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 the Intertribal Transportation Association (ITA). NCAI and ITA have therefore established a Joint Task Force on Tribal Transportation to ensure that the next highway reauthorization bill builds upon the progress made in SAFETEA-LU.

The Joint Task Force is now working with Tribal leaders and Tribal transportation experts to develop a comprehensive list of Tribal transportation priorities that have broad support across Indian Country. Once a package of legislative proposals has been developed by the Task Force and endorsed by NCAI and ITA leaders, the Joint Task Force will work with members of Congress, the Administration, State Departments of Transportation and other transportation interest and advocacy groups to obtain broad support for its proposals. Throughout this process, the Joint Task Force will keep the NCAI and ITA leadership 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 transportation infrastructure that permits safe travel and promotes economic expansion. Connecting people within Tribal communities and connecting 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 these roads, bridges and transit systems jeopardizes the health, safety, security and economic well-being of our Tribal members and the traveling public. Tribal

roads 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.

Funding for the Indian Reservation Roads (IRR) Program and other Tribal transportation programs is authorized every five to six years through federal highway reauthorization legislation. These highway reauthorization laws operate on a five to six year funding cycle and authorize the appropriation of hundreds of billions of dollars in transportation funding for State, Federal and Tribal transportation and transit programs from the Highway Trust Fund. Unfortunately, the Highway Trust Fund is now badly underfunded because current Federal gas tax receipts are insufficient to pay for the SAFETEA-LU-authorized transportation funding increases. The White House and other transportation analysts estimate that the Highway Account of the Highway Trust Fund will suffer a \$4.3 billion shortfall in the FY 2009 funds needed to pay for all federal highway programs at the level promised by SAFETEA-LU. The Highway Trust Fund shortfall is projected to get worse as gas prices increase and drivers continue to switch to more fuel efficient vehicles. Without an immediate and substantial increase in Highway Trust Fund revenues, the American Road & Transportation Builders Association (ARTBA) estimates that the Federal transportation investment could be cut by 40% percent in FY 2009 alone. If left uncorrected, this could mean a disastrous cut in Tribal transportation funding as well. The National Surface Transportation Policy and Revenue Commission, which was created by SAFETEA-LU, as well as other transportation organizations such as ARTBA, have put forward a number of proposals to address the long-term funding needs for infrastructure in the U.S., including raising the gas tax, assessing user taxes based on vehicle miles traveled, increased use of toll roads, and encouraging the construction of roads by public-private partnerships. The Task Force recommends that Tribal leaders study these reports and develop a unified position on these funding proposals to ensure that Tribal interests are protected in any funding solution.

By joining together to seek increased Tribal transportation funding and program improvements in the next highway reauthorization legislation, Indian Tribes and Tribal organizations can help lay the groundwork for stronger Tribal governments and more prosperous Tribal economies. If Tribal leaders do not seize this opportunity, Tribal roads and bridges will continue to deteriorate, risking the lives of our Tribal members and other system users, impeding the growth of Tribal economies and limiting the progress of Tribal governments. The NCAI/ITA Joint Task Force on Transportation 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 members and the traveling public.

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## **KEY RECOMMENDATIONS:**

**I. INCREASE FUNDING FOR EXISTING TRIBAL TRANSPORTATION PROGRAMS TO ADDRESS CHRONIC UNMET NEEDS AND KEEP UP WITH INFLATION.** U.S. Transportation and Interior Department officials have recognized that transportation systems serving Tribal communities suffer from a nearly \$40 billion construction backlog. An equaling appalling deferred maintenance backlog exists for Tribal transportation facilities. Rising construction inflation rates continue to erode the purchasing power of the limited federal funds currently provided to the IRR Program and other Tribal transportation programs. Well-built Tribal roads and bridges fall into disrepair and require costly reconstruction years before the end of their design life due to a lack of more cost-effective maintenance funding. By any measure, Tribal transportation programs remain severely underfunded

and, with inflation, the construction and maintenance funding backlog will only get worse without significant funding increases during the next highway reauthorization period.

The Joint Task Force therefore seeks fair and reasonable funding increases that are based upon the actual transportation needs of all Indian Tribes, while also taking into account the limited funds available in the Highway Trust Fund and the proportion of IRR Program roads and bridges on the National Highway System. The Task Force recommends that annual funding for the IRR Program and other Tribal transportation programs be increased so that Tribal governments can continue to make headway in addressing the large unmet transportation needs of Indian Country. To that end, the Task Force proposes that Congress:

- Increase Funding for the IRR Program to \$800 million for FY 2010 with stepped increases of \$50 million for every year thereafter to \$1,050,000,000. ( 1 billion, 50 million) in FY 2015
- Reset the Obligation Limitation to 100% for the IRR Program;
- Establish \$50,000 as the annual minimum IRR Program funding allocation for all Indian Tribes; this minimum funding would be calculated after Tribes receive their IRR Tribal Share, 2% planning funds and the PAF (Population Adjustment Factor) Funding.
- Increase funding for the Tribal Transit Program to \$35 million for FY 2010 with stepped increases of \$10 million for every year thereafter to \$85 million and make Tribal Technical Assistance Programs (TTAPs) and Tribal governments directly eligible as grant recipients of the Rural Transportation Assistance Program (RTAP) at the funding level of at least \$1 million annually;
- Increase funding for the IRR Bridge Program to \$75 million in FY 2010 with step increases of 5 million for every year thereafter to 100 million.

**II. CREATE A NEW TRIBAL TRANSPORTATION SAFETY PROGRAM AND PROVIDE TRIBAL FUNDING SET ASIDES WITHIN THE HIGH RISK RURAL ROAD PROGRAM.** Native Americans suffer injury and death driving and walking along reservation roadways at rates far above the national average. 5,962 fatal motor vehicle crashes were reported on Indian reservation roads between 1975 and 2002 with 7,093 lives lost. The trend is on the increase, up nearly 25% to over 284 lives lost per year in the last five years of study. While the number of fatal crashes in the nation during the study period declined 2.2 percent, the number of fatal motor vehicle crashes per year on Indian reservations increased 52.5 percent. American Indians also have the highest rates of pedestrian injury and death per capita of any racial or ethnic group in the United States. These statistics are shocking and cry out for major changes in Federal transportation safety programs serving Indian country.

During the Congress' deliberations over SAFETEA-LU, the first NCAI Highway Reauthorization Task Force sought to establish a Tribal funding set aside from within the newly created High Risk Rural Road Program, and it also supported the Bush Administration's proposal to establish a Federal Lands Highways Safety Program to provide highway safety funding funded to several Federal land management agencies including the BIA.

The Joint Task Force on Tribal Transportation renews these recommendations and proposes that Congress establish a 2% Tribal funding set aside within the High Risk Rural Roads Program, and create a new Tribal Traffic Safety Program within the FHWA-Federal Lands Highways office and

within NHTSA, each funded at \$50 million annually to dramatically reduce the incidence of death and injury on America's Indian reservation roads. The creation of these new programs would do much to combat the safety design flaws and behavioral problems that contribute to the high rates of death and injury on Indian reservation roads.

- Establish a 2% Tribal funding set aside from the High Risk Rural Roads Program;
- Create a FHWA-Federal Lands Highway Tribal Safety Program funded at \$50 million annually to address the roadway structural and design flaws that contribute to death and injury on Tribal transportation systems, as well as allow for Tribal Safety Planning Grants from these funds;
- Create a NHTSA Tribal Safety Program funded at \$50 million annually to address the driver and pedestrian behavioral issues that contribute to death and injury on Tribal transportation systems.

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### **III. ADDRESS THE DANGEROUS INDIAN RESERVATION ROAD AND BRIDGE DEFERRED MAINTENANCE BACKLOG TO PROTECT PUBLIC HEALTH AND SAFETY AND THE TAXPAYER INVESTMENT IN THESE FEDERALLY-FUNDED TRANSPORTATION FACILITIES**

The lack of adequate maintenance funding for Tribal roads and bridges is dangerous, shortsighted and financially wasteful because it contributes to highway fatalities and fails to protect these valuable taxpayer-funded infrastructure investments. The Interior Department's repeated failure to adequately budget for the BIA Road Maintenance Program is also contrary to the express Congressional mandate in SAFETEA-LU, which authorized Tribal governments to spend up to 25% their IRR Program dollars for maintenance purposes, but also required that:

“The Bureau of Indian Affairs shall continue to retain primary responsibility, including annual funding request responsibility, for road maintenance programs on Indian reservations. The Secretary [of Transportation] shall ensure that [IRR Program] funding made available . . . for maintenance of Indian reservation roads for each fiscal year is supplementary to and not in lieu of any obligation of funds by the Bureau of Indian Affairs for road maintenance programs on Indian reservations.”

23 U.S.C. §204(c), as amended.

Unfortunately, contrary to Congressional intent in SAFETEA-LU, as funding for the IRR Program has gone up under SAFETEA-LU, Interior Department budget requests to Congress have actually proposed reduced funding for the BIA Road Maintenance Program. The BIA Road Maintenance Program is so poorly funded currently that there are not even sufficient funds to address road maintenance emergencies that create life threatening risks to Tribal members and other system users. Every BIA Regional office has reported that they have faced major road and bridge maintenance emergencies but have lacked the financial resources to respond to them effectively. As Senate Indian Affairs Committee Chairman Byron Dorgan explained at a recent Senate hearing, “the lack of adequate road maintenance funding unnecessarily puts lives at risks and contributes to the discouraging on too many Indian reservations and Tribal communities that Indian people must just learn to live with “third world” levels of transportation infrastructure.”

As Tribal governments and the Federal government invest millions of taxpayer dollars to build and reconstruct roads in Indian country, it is economically foolish not to spend the relatively

small sums needed to adequately maintain these routes to extend their useful design life. If *pennies* are spent on road maintenance, *dollars* will be saved on road reconstruction, and many more dollars will be saved on the societal costs of traffic fatalities and injuries.

As far back as 2003, the BIA formally acknowledged that at least \$120 million per year was needed to maintain BIA-owned roads and bridges to an adequate standard. See TEA-21 Reauthorization Resource Paper, BIA (May 2003), p. 32. This same BIA Report concluded that \$50 million per year was needed for bridge rehabilitation and replacement. These costs have risen sharply in the past five years due to high construction cost inflation, but the Interior Department has requested only \$25 to \$26 million annually in Department of Interior appropriations for the BIA Road Maintenance Program. And proposes to cut the funding to 13 Million in FY 2009

In order to address this problem, the Joint Task Force recommends two strategies:

- Encourage Tribal Leaders, Interior Department and Office of Management and Budget (OMB) officials to support an annual budget request to Congress of at least \$150 million annually for the BIA Road Maintenance Program;
- Change the current cap for maintenance from the IRR Program to be not more than 25% of funds may be used for maintenance or \$500,000.00 whichever is greater.
- If this Interior Department funding level is not reached prior to the reauthorization of SAFETEA-LU, request that Congress authorize an additional \$100 million annually for the IRR Program to augment the shortfalls in the BIA Road Maintenance Program;

**IV. EXTEND THE INDIAN SELF-DETERMINATION ACT TO THE DEPARTMENT OF TRANSPORTATION AND ITS MODAL ADMINISTRATIONS AND MAKE EXISTING TRANSPORTATION PROGRAMS MORE ACCESSIBLE TO TRIBAL GOVERNMENTS.** One of the biggest barriers to efficient and cost-effective transportation infrastructure development in Indian Country is the myriad, complex, and often conflicting grant conditions and contract requirements that are tied to various Federal, State, local and even Tribal funding sources. Tribal economic development and transportation infrastructure improvements depend on the development of simplified, uniform funding agreements that respect Tribal sovereignty and are well-tailored to the unique legal status of Tribal governments.

Many Federal funding award documents have been developed with States or private grant recipients, rather than Tribal governments, in mind. For example, many FHWA, FTA and NTHSA grant agreements apply the Disadvantaged Business Enterprise (DBE) regulations to all grant recipients, including Tribal grant recipients. But these and other Department regulations conflict with standard Native preference principles and indirectly apply a Federal civil rights law on Tribal governments despite Congress's decision long ago to expressly exempt Tribal governments from the coverage of this law. These regulations also require Tribes to adopt and implement State-based DBE certification programs within Tribal jurisdictions. Tribal governments often rightly refuse to accept State grant funding when it comes with such objectionable conditions. Thus, the lack of a simple, uniform and tribally appropriate funding agreement prevents hundreds of millions of dollars in available Federal and State transportation funds from reaching Tribal populations who could greatly benefit from these funds.

In addition, most Tribal governments do not have sufficient staff or resources to negotiate different terms and conditions to make these agreements more compatible with Tribal-specific legal and policy considerations. Nor do Tribal governments have the staff to administer a wide range of disparate contract and grant conditions. By extending the Indian Self-Determination Act and its terms for negotiation and implementation of funding agreements combined with the other program improvements outlined below will help develop more successful Tribal transportation departments, reduce wasteful transaction costs and permit Tribes to focus their limited funding resources on more productive transportation infrastructure, maintenance and traffic safety improvement efforts.

- Authorize the Secretary of Transportation to enter into funding agreements under the ISDEAA for all Federal transportation programs serving Tribal program beneficiaries;
- 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.
- Authorize the Secretary of Transportation to receive and award State-administered transportation programs funds (such as Federal-Aid project funds) directly to Tribes through the ISDEAA;
- Increase funding to the Tribal Technical Assistance Programs (TTAPs) to; \$4.2 million annually fully fund each TTAP Center at 100% federal share. Create additional TTAPs for each BIA region and require the Department of Transportation, FHWA Office of Professional and Corporate Development to consult with Tribal transportation officials, & Tribal leaders with respect to the selection of TTAP award recipients, and oversight of the agreements;
- Authorize The Department of the Interior to include in IRR Program Self Determination Contracts and Self-Governance Compacts provisions that facilitate Tribal governments' use of Debt Financing Instruments
- Amend the IRR Bridge Program to authorize the use of funds for the construction and design of new bridges and other similar structures;
- Require the BIA to update and computerize right-of-way documentation for IRR Program routes and support Tribal corridor management practices. Fund this provision at 10 million annually to investigate and complete ROW records
- Clarify that State Departments of Transportation may recognize and abide by Tribal Employment Rights Ordinances on Federal-Aid projects located on or near Indian reservations and Tribal lands.
- Establish a Tribal Infrastructure Bank with an initial capital investment of \$10 million per year for five years.

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## **ADDITIONAL JUSTIFICATION FOR KEY RECOMMENDATIONS**

### **I. INCREASE FUNDING FOR EXISTING TRIBAL TRANSPORTATION PROGRAMS TO ADDRESS CHRONIC UNMET NEEDS AND KEEP UP WITH INFLATION.**

**1. Increase Funding for the Indian Reservation Roads (IRR) Program:** According to recent BIA data, the IRR system includes over 101,000 miles of roads and bridges. According to this data, the total IRR system has a construction need of over \$40 billion. Although these roads represent 9.18% of the combined total of Federal-Aid Highways and federally-owned roads, 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. To keep pace with this huge unmet need and inflation the IRR Program needs to be funded at approximately 6 billion annually. 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 \$ 800 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. Reset the Obligation Limitation to 100% for the IRR Program:** The obligation limitation diverts millions of dollars from the IRR Program. The Task Force recommends that Congress reset the obligation limitation to 100% as it had existed for the IRR Program under the Inter-modal Surface Transportation Efficiency Act of 1991 (ISTEA), and as the U.S. Department of Transportation recommended in its proposed SAFETEA-LU legislation.

**3. 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. This minimum funding would be calculated after Tribes receive their IRR Tribal Share, 2% planning funds and the PAF (Population Adjustment Factor) Funding. These funds would be available to be spent for any purpose allowable under the IRR Program, including maintenance activities. This position is consistent with the NCAI Resolution passed at the annual meeting that took place in Sacramento in November 2006.

**4. 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 to \$35 million for FY2010 with stepped increases of \$10 million for every year thereafter to \$85 million. Raise the cap for Transit Planning Grants to \$50,000. Allow Tribes to contract with FTA for the Tribal Transit Grant awards using ISDEAA agreements in order to ensure the more FTA funds are used to provide actual transit services and less money is used in unproductive grants management administration.

As Tribal transit systems continue to grow and flourish, Tribal governments and regional TTAPs need additional funding to provide training and technical assistance to Tribal leaders and transit officials. Under SAFETEA-LU, Congress now provides roughly \$9 million annually to State governments to provide research, training and technical assistance services to rural transit programs, but almost none of these training resources find their way to Indian country. As has been proven by the early success of the Tribal Transit Program, the best way to ensure that Tribal governments receive a fair share of these Federal resources is to make Tribal governments eligible as direct recipients of these funds. Given their close working relationship with Tribes and their proven training expertise in Tribal transportation matter, it is also sensible to route some of these RTAP funds to the existing TTAP centers to provide rural transit training and technical assistance to Tribal transit officials.

**5. IRR Bridge Program:** In the wake of the Interstate 35 bridge collapse in Minneapolis, Minnesota, the consequences of failing to rehabilitate deficient bridges has become tragically clear. To address these deficiencies and to enable the construction of new IRR bridges when necessary, the Joint Task Force recommends that Congress increase funding for the IRR Bridge Program to at least \$50 million annually.

According to FHWA statistics from 2003, approximately 1,069 of 4,400 IRR Program bridges received a “deficient” inspection rating. Thus, roughly one in every four IRR bridges were structurally deficient, meaning that they were restricted to light vehicles only, were closed to all traffic, or required immediate rehabilitation to remain open. In 2003, the average age for IRR bridges exceeded 40 years. As FHWA noted, “as the IRR bridge infrastructures become older, the propensity to become deficient increases.” 68 Fed. Reg. 24642-24643 (May 8, 2003). The number of structurally deficient IRR bridges has certainly only increased over the last five years.

Based on statistics maintained by FHWA, the average cost to replace or rehabilitate a deficient IRR Bridge from 1999 to 2003 averaged \$500,000. If the average cost for preliminary planning and design and environmental costs is 10% of this amount, the IRR Bridge Program would require more than \$595 million to rehabilitate or replace the 1,069 deficient bridges, without including any funding to inspect IRR Bridges at least once every two years as is mandated by law. If the average bridge inspection cost is \$1,000, another \$4.4 million is required every other year (\$2.2 million/annually) to provide routine bridge inspections to determine the structural integrity of aging IRR Bridges. This cost further reduces the funds available under the IRR Bridge Program to pay the costs to design and reconstruct deficient bridges as is currently permitted. These grim statistics more than justify an increase in IRR Bridge Program funding to at least \$75 million in the first year of the authorization with 5 million in step increase thereafter..

## **II. CREATE A NEW TRIBAL TRANSPORTATION SAFETY PROGRAM AND PROVIDE TRIBAL FUNDING SET ASIDES WITHIN THE HIGH RISK RURAL ROAD PROGRAM**

The U.S. Department of Transportation has made transportation safety its highest priority. The Secretary of Transportation has mandated that the Department reach its safety goal to reduce the national traffic fatality rate to no more than 1.0 fatality per 100 million vehicle miles traveled by the end of 2008. While this is a laudable goal, so far, Congress and the Administration have failed to provide significant funding resources to address the Nation’s single greatest traffic safety problem – the tragically high rate of traffic death and injuries in Indian country. If Tribal governments and their Federal and State partners are to reverse the disproportionately high rate of traffic fatalities and injuries

among Native Americans, Congress and the Administration will need to direct much more funding to combat the many factors that contribute to highway accidents in Indian country.

Under SAFETEA-LU, Congress authorized \$1.275 billion in FY 2008 alone for the State administered High Risk Rural Road Program and authorized nearly \$700 million for the NHTSA administered Highway Safety Programs. Tribal governments have been virtually ignored in these safety programs and very little funding ever makes it to Tribal communities. While SAFETEA-LU increased the Section 402 funding set aside for NHTSA Highway Safety Programs for which the Bureau of Indian Affairs was eligible from  $\frac{3}{4}$  of one percent to two percent annually, this increase still provides less than \$5 million dollars annually for all 564 federally recognized Indian Tribes to address the ever growing traffic safety crisis in Indian country. This is simply not enough given the appalling statistics.

Motor vehicle injuries are the leading cause of death for Native Americans ages 1-34, and the third leading cause overall for Native Americans;<sup>1</sup>

- Native Americans in South Dakota are three times more likely to be killed in a motor vehicle accidents than the rest the of State's non-Native population; from 2001 to 2005, over 25% of individuals who lost their lives in traffic accidents in South Dakota were Native American even though Native Americans comprise only 8.3% of the State's population;<sup>2</sup>
- According to estimates by the National Safety Council, the economic cost in 2005 for each fatality in terms of lost wages, medical expenses, administrative expenses, motor vehicle and property damage, and employer costs, exceeded \$1.14 million for each life lost and over \$50,000 for every person injured.;<sup>3</sup>
- 76% of Indian and Alaska Native fatalities were not seat belt or child safety seat restrained compared to 68% nationally;<sup>4</sup>
- Since 1982, 65% of fatal crashes occurring on Indian reservations were alcohol related compared to 47% nationwide.<sup>5</sup>

The Joint Task Force's program and funding proposals, as outlined above, are a long-overdue first step toward addressing and eliminating this national tragedy.

### **III: ADDRESS THE DANGEROUS INDIAN RESERVATION ROAD AND BRIDGE DEFERRED MAINTENANCE BACKLOG TO PROTECT PUBLIC HEALTH AND SAFETY AND PROTECT THE TAXPAYER INVESTMENT IN THESE FEDERALLY-FUNDED TRANSPORTATION FACILITIES**

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<sup>1</sup> "Safety Belt Use Estimate for Native American Tribal Reservations," National Highway Traffic Safety Administration, DOT HS 809 921, Final Report, October 2005, p. 1.

<sup>2</sup> "Improving Motor Vehicle Crash Reporting on Nine South Dakota Indian Reservations," South Dakota Department of Transportation, June 2007.

<sup>3</sup> "North Dakota Vehicle Crash Facts for 2005," North Dakota Department of Transportation, Crash Facts ([www.nd.gov/dot/dlts.html](http://www.nd.gov/dot/dlts.html)).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, p. 2.

The BIA Road Maintenance Program remains terribly underfunded. In 2003, the BIA estimated that the annual cost to maintain BIA-owned roads was approximately \$120 million. Other authorities estimate that the true annual maintenance needs of Tribes are much higher, based on the growing number of Tribal and BIA road miles in the IRR Program inventory and the increasing costs of maintaining these roads. This \$120 million annual maintenance need is only the amount of funds needed to keep up with current road maintenance needs and does not include any of the funds required to address the huge backlog of BIA deferred maintenance projects. And yet, for FY 2008, the Interior Department requested only \$26 million for the entire BIA Road Maintenance Program, a funding decrease from past years and less than 1/10 of the funding per lane-mile that States typically have available to maintain their roadways in a safe condition.

One concrete example of the Tribal maintenance funding crisis should suffice to make the point. In January 2007, the Indian Reservation Roads Coordinating Committee provided BIA officials with objective statistics from the Caterpillar Performance Handbook (1999) showing that the typical 5-year cycle maintenance costs for a gravel road – the predominant road type in Indian country – is \$4,160 per year per road mile for grading, resurfacing, and re-graveling. If Congress were to appropriate only enough funds to cover the 1999 estimate of \$4,160 for the 34,885.3 miles of BIA- and Tribally-owned routes now included in the IRR Program Inventory, made no adjustment for inflation, and excluded any funding for routes owned by States and other local governments providing access to Tribal communities, the Road Maintenance Program budget would be \$145 million for FY 2008 alone. It is therefore plain that at the current funding level, Tribal roads and bridges will continue to deteriorate years before their time, resulting in many entirely avoidable traffic deaths and injuries.

#### **IV. EXTEND THE INDIAN SELF-DETERMINATION ACT TO THE DEPARTMENT OF TRANSPORTATION AND ITS MODAL ADMINISTRATIONS AND MAKE EXISTING TRANSPORTATION PROGRAMS MORE ACCESSIBLE TO TRIBAL GOVERNMENTS.**

To assure the maximum program benefits of federal transportation funding by reducing transaction costs, the ISDEAA should be extended to all Federal transportation programs serving tribes – including programs administered by FHWA, FHWA-FLH, FTA, NHTSA and other Federal transportation agencies. Through the ISDEAA, Congress recognized the need and benefit of model self-determination agreements to facilitate negotiations and provide for uniform reporting. In Section 108 of the Indian Self-Determination and Education Assistance Act (ISDEAA), Congress created by statute a model contract that was specifically drafted to eliminate counterproductive bureaucratic practices and to improve Tribal administration of these Federal programs. Under these model agreements, Tribes may receive and administer funds for all BIA and Indian Health Service (IHS) programs using a single streamlined, Tribally-appropriate agreement. This allows Tribal governments to adopt uniform and more cost-effective accounting, management, and procurement systems to successfully operate these programs. For example, by submitting just a single agency audit for all covered programs and utilizing the same procurement and financial management procedures, Tribal governments are able to spend less money on program administration and more money providing direct services to program beneficiaries.

The ISDEAA should be extended to all Tribal transportation programs and funding agencies within the U.S. Department of Transportation and appropriate model agreements should be developed for their use. Currently Tribal governments, the Federal government and State governments expend far too much time, money and effort trying to deliver transportation services through multiple grants, contracts and funding agreements, many of which contain confusing and

conflicting terms and conditions. NCAI Resolution DEN-07-065 urges the creation of a Tribal Transportation Self-Governance Program within the Department of Transportation and supports "the right and prerogative of any tribal government to enter into ISDEAA agreement under Title I or Title IV of the ISDEAA." Extending the ISDEAA to the Department of Transportation and its modal administrations will streamline the negotiation, execution and implementation of grant, contract and funding agreements for federal transportation program funding available to tribes and more effectively target program dollars to the improvement of our nation's transportation system. The extension of the ISDEAA to the Department of Transportation will provide an additional option for transferring funding to Tribes. The Task Force supports the funding vehicles that the DOT has already developed under existing law and affirms the Department's ongoing efforts to develop additional Tribally-appropriate transfer agreements.

**1. Authorize the Secretary of Transportation to enter into funding agreements under the ISDEAA and, upon request of a tribe, require the ISDEAA to govern any funds made available to tribes through this authorization from any Federal transportation program serving Tribal program beneficiaries:** To improve program efficiencies and streamline Tribal access to transportation dollars, the Joint Task Force recommends that the Secretary of Transportation be authorized to enter into Self-Determination and Self-Governance agreements under the ISDEAA with respect to all Tribal transportation programs, including the Tribal Scenic Byways and the Tribal Transit Programs, that are administered by the Department of Transportation and its modal administrations.

**2. 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 agreements.

**3. Tribal Technical Assistance Program: Tribal Technical Assistance Program:** The TTAPs provide much needed technical assistance and training to Tribal Governments that are increasingly entering into Self-Determination Contracts and Self-Governance Compacts with the BIA and into Program Agreements with FHWA-FLH to administer the IRR Programs that serve their reservations. To ensure that as additional Tribes are able to develop the capacity to provide this vital governmental service to the public, the Task Force recommends that funding for the TTAPs be increased to at least \$ 4.2 million annually for 12 TTAP Centers, one per BIA region, to increase technical training and promote awareness in Indian country of "best practices" in Transportation Program implementation including management and compliance, self-determination contracting and compacting under ISDEAA, transportation planning and policy development, construction (project development, construction, project closeout), maintenance, and safety for both the system and users.

Maintain the autonomy and efficient operation of TTAP Centers by specifying that oversight of TTAP Cooperative Agreements shall be solely through the FHWA Office of Corporate and Professional Development, as are state LTAP Centers. Require an open and competitive process for re-contracting that includes Tribal officials on the selection panels.

To ensure that the TTAPs are able to meet the increased demand for their services as additional Tribes assume responsibility for administering their transportation programs, the Task Force requests that Congress require the Department of Transportation to establish a Tribal Technical Assistance Program (TTAP) for each of the twelve BIA Regions. The Task Force also recommends that the Department of Transportation be required, when selecting TTAP award recipients, to consult with and work collaboratively with Tribal leaders and transportation officials in the re-contracting process. To this end, the Task Force requests that Congress require the Department of Transportation to establish of a TTAP selection committee of Federal and Tribal representatives for each Region and authorize each committee to select the award recipient for its Region from the proposals of eligible TTAP applicants, and provide some oversight of the recipient

Finally, to ensure that Tribal leaders and transportation officials have ongoing input into the services the TTAPs provide, the Task Force requests that Congress require the Department of Transportation to solicit annually the views of Tribal leaders and transportation officials with respect to the performance of their Region's TTAP. Competing oversight attempts by BIA, FHWA-FLHO, FHWA Office of Planning, and the FHWA Office of Corporate and Professional Development have caused confusion for the existing TTAP Centers in the past to the disservice of Tribal governments. Make clear that oversight of the Centers occurs solely through the FHWA Office of Professional and Corporate Development in consultation with Tribal governments. Structure funding such that the Centers are fully funded by a 100% federal share without local matching, and distributed from the Highway Trust Fund and administered solely by FHWA-OPCD similar to state LTAP centers, NHI, and University Transportation Centers.

**4. Include Flexible Financing provisions in ISDEA Agreements:** In an era of rapidly rising construction costs and relatively low capital financing interest rates, the use of flexible financing techniques to advance the construction of Tribal transportation projects may make great economic sense for some Tribes. While a few Tribes have already been able to take advantage of flexible financing, the Department of the Interior's current policy requiring Tribes to negotiate separate, project-specific flexible financing agreements is unnecessarily costly and inefficient. The U.S. Department of Transportation has included favorable flexible financing terms in its IRR Program Agreements, but the Interior Solicitor's office has taken the position that the Interior Department is not legally authorized to include identical flexible financing provisions in ISDEAA contracts and compacts. The use of flexible financing instruments helps Tribes improve efficiencies in the construction of roads and mitigates the negative effects of skyrocketing inflation on the costs of road construction. Although the Joint Task Force believes that the Department of the Interior already has sufficient legal authority to include "financing-friendly" provisions in ISDEAA contracts and compacts, the Task Force requests that Congress expressly authorize the Secretary of the Interior to include such provisions – for example provisions that authorize the electronic transfer of IRR Program funds directly from the BIA to creditor institutions where the Tribe approves such transfers – in ISDEAA contracts and compacts, at the request of the Tribal government.

**5. Authorize the use of IRR Bridge Program Funds for the Design and Construction of New Bridges:** The costs of constructing new bridges is prohibitively expensive for nearly all Tribes, very few of which receive more than a few million dollars annually under the IRR Program, and the

vast majority of which receive far less than \$1 million annually. The combination of existing deficient bridges with the inability of Tribal Governments to construct new bridges has led to dangerous conditions for many Indian Tribes. The Task Force therefore requests that Congress authorize the use of IRR Bridge Program funds for the Construction of New Bridges and similar structures (e.g. fish passage culverts) whose design and cost greatly exceeds the per foot cost of the adjacent road profile.

**6. Require the BIA to update documentation of rights-of-way and support Tribal corridor management programs:** The BIA has, in many cases, failed to maintain adequate records of rights-of-way the BIA acquired, disposed of, or otherwise transferred long ago for IRR routes. When Tribes seek to improve existing routes, they are often forced to undertake time-consuming and costly efforts to acquire or establish rights-of-way for those routes. To address this situation, the Task Force requests that Congress require the BIA to provide Tribes with documentation of enforceable rights-of-way for all IRR routes included on the Tribe's Priority List (25 CFR §170.420) or Transportation Improvement Program (25 CFR §170.421) within four months of the Tribe's submittal to the BIA. The Task Force further recommends that if the BIA is unable to locate documentation of ownership of enforceable rights-of-way for any such route, Congress require the BIA to obtain, at its own expense, by purchase or otherwise, any right-of-way necessary to support the ongoing use of the route.

The Interior Department should also be required to undertake a new initiative to catalogue, organize, update, and computerize its right-of-way records. An amount of 10 million annually should be appropriated so that the BIA can carry out this function. It should make these records available to Tribal governments in a commonly used mapping format requested by the Tribe. The Interior Department should also be more aware and protective of Tribal jurisdictional interests in the right-of-way acquisition and transfer process, in light of the U.S. Supreme Court decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and subsequent cases.

The Federal government should also work closely with Tribes that wish to implement a proactive program of "corridor management." Through "corridor management," Tribally-preferred corridors for transportation and other infrastructure elements – such as roads, electrical lines, water lines, sewer lines, telephone, cable among others – can be planned well in advance of development. In some instances, the easements for these corridors may be obtained in advance. Corridor management encourages Tribal governments to think proactively about how they envision future development to occur on their reservations as well as minimize the potential risks associated with inadvertent discoveries of cultural resources or historic properties. Through corridor management, rights-of-way for infrastructure development can be obtained in a unified manner, speeding up design and construction once a specific project is authorized and funded. The Federal government should be an active and supportive partner in providing technical assistance to Tribes that wish to apply the principles of corridor management to their transportation programs and community development.

**7. Clarify that State Departments of Transportation may recognize and abide by Tribal Employment Rights Ordinances on Federal-Aid projects located on or near Indian reservations and Tribal lands:** 23 U.S.C. 140(d) provides that "States may implement a preference for employment of Indians on [Federal-Aid] projects . . . near Indian reservations." Based on this provision, FHWA has long followed a policy that allowed State Transportation Departments and State contractors working on Federal-Aid projects on or near Indian reservations to comply with reasonable Tribal Employment Rights Ordinances (TERO) and pay non-excessive TERO fees to Tribal governments, much as they pay other types of taxes and fees to local governments.

In recent years, however, States such as California have begun to question whether they had the legal authority to continue applying this reasonable TERO policy as a matter of State law, and some States have begun to reject the application of TERO rules and fees on their State Federal-Aid projects. At the same time, State officials with the California transportation department known as “Caltrans” have informed Tribal leaders at national transportation meetings that they would much prefer to continue complying with the previous Caltrans TERO policy, if only Federal and State law would allow them to do so. Therefore, the Joint Task Force recommends that Congress clarify that the Federal law permitting States to respect TERO ordinances for Federal-Aid projects located on or near Indian reservations is paramount and preempts any conflicting State law to the contrary. Given the political sensitivity of this issue, the Joint Task Force also recommends that Tribal leaders work with their State counterparts to encourage Caltrans and any other State transportation departments affected by this problem to support this legislative initiative and take the lead in Congress in order to give State transportation departments and polity maker’s maximum flexibility on this issue.

**8. Establish a Tribal Infrastructure Bank with an initial capital investment of \$10 million per year for five years.** Section 350 of the National Highway System Designation Act of 1995, Public Law 104-59, authorized the U.S. Department of Transportation to establish the State Infrastructure Bank (SIB) Pilot Program. A SIB is a revolving fund mechanism for financing a wide variety of highway and transit projects through loans and credit enhancement. SIBs were designed to complement traditional Federal-aid highway and transit grants by providing States increased flexibility for financing infrastructure investments. Under the initial SIB Pilot Program, ten states were authorized to establish SIBs. In 1996 Congress passed supplemental SIB legislation as part of the DOT Fiscal Year (FY) 1997 Appropriations Act that enabled additional qualified states to participate in the SIB pilot program. This legislation included a \$150 million General Fund appropriation for SIB capitalization. Since then, Congress has continued to support the SIB program, and specifically reauthorized it in SAFETEA-LU. See SAFETEA-LU, at Sec. 1602.

The Joint Task Force recommends the establishment of a Tribal Infrastructure Bank (TIB) Pilot Program under which Tribes would be eligible to obtain infrastructure funds in the form of capital investments for use on authorized transportation projects. The TIB would operate much like the SIBs. The TIB would be initially funded with Federal start-up capital, with the goal of becoming self-sufficient through its capital lending program. Tribes would be eligible to leverage their IRR program and other Federal transportation funds to obtain financing from the TIB at reasonable rates as one preferred method of the flexible financing techniques described above. Loans from the TIB shall not exceed a 20 year period.

## **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.