



NATIONAL CONGRESS OF AMERICAN INDIANS

**TESTIMONY OF
THE NATIONAL CONGRESS OF AMERICAN INDIANS**

**BEFORE THE HOUSE SUBCOMMITTEE
ON INDIAN, INSULAR, AND ALASKA NATIVE AFFAIRS**

**OVERSIGHT HEARING ON
“IMPROVING AND EXPANDING INFRASTRUCTURE
IN TRIBAL AND INSULAR COMMUNITIES”**

MARCH 9, 2017

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On behalf of the National Congress of American Indians (NCAI), thank you to the opportunity to provide testimony on “Improving and Expanding Infrastructure in Tribal and Insular Communities.” NCAI is the oldest and largest national tribal organization in the United States that is dedicated to protecting the rights of tribal governments to achieve self-determination and self-sufficiency. As such NCAI looks forward to working with Chairman LaMalfa, Ranking Member Torres and members of this Committee to address the infrastructure needs of Indian Country, and we look forward to working with you to address tribal policy in the 115th Congress.

There is growing support to address the vast infrastructure needs in the United States, and it is vital that tribes are part of any infrastructure plan that is proposed by Congress of the Administration. NCAI has prepared a report detailing many of the infrastructure needs of Indian Country, “Tribal Infrastructure – Investing in Indian Country for a Stronger America.” This report (attached) is intended as a resource to Congress and the Administration as the federal government undertakes legislation to address the infrastructure needs in Indian Country.

For Indian tribes across the country, there is no more important issue than providing for tribal citizens and tribal communities. To do that, tribal governments require investment in infrastructure which will not only provide the basic services to tribal citizens, such as water, housing, safe roads, healthcare facilities and schools, but also the opportunity to attract jobs and economic development on tribal lands. Indian Country is poised to partner with the federal government on any legislative or administrative efforts and seeks to do so as a governmental partner, keeping in mind the following:

Tribal Nations are governments: As recognized by the U.S. Constitution, Tribal Nations are part of the original American family of governments, possessing a legal and political status equivalent to that of state governments and foreign nations. Today, the inherent sovereignty of Tribal Nations is exercised by 21st Century Tribal governments that are full-fledged governments in every sense of the word. They are determining their own citizenship, establishing and enforcing criminal and civil laws on their lands, administering justice, taxing, licensing, and regulating, among many other functions. They are providing a wide range of governmental services, from education to healthcare to environmental protection. Like other governments, Tribal governments recognize and accept the fundamental responsibilities of governance – with building and maintaining the vital infrastructure upon which their constituents rely among the most critical responsibilities. As governments, Tribal Nations need and deserve to be at the decision-making table when it comes to developing and implementing an infrastructure investment plan for the nation. They deserve to be at the table because they have the capacity, experience, and know-how to craft, inform, and execute solutions to the infrastructure challenges facing their communities and those of their neighbors.

Indian Country's infrastructure needs are acute and longstanding: The infrastructure crisis facing Indian Country is not a recent phenomenon. For generations, the federal government – despite abiding trust and treaty obligations – has substantially under-invested in Indian Country's infrastructure, evident in the breadth and severity of its unmet infrastructure needs as compared to the rest of the nation (see the following sections for details). In 2009, as one indication, a contingent of U.S. Senators penned a letter to the Administration citing a \$50 billion unmet need for infrastructure on Indian reservations. The number of “shovel ready” infrastructure projects in Indian Country remains too many to count, and many of those have been that way for years if not decades. This chronic underinvestment and the growing backlog of critical infrastructure projects not only negatively impacts the social, physical, and mental wellbeing of Tribal and neighboring communities, it hampers the ability of Tribal Nations to fully leverage their economic potential and the ability of their citizens to fully participate in the American economy. The more than \$3 billion in funding designated for Indian Country by the American Recovery and Reinvestment Act supported important first steps in addressing Tribal Nations' needs for justice infrastructure, health facilities, roads projects, water systems development, and other vital infrastructure projects, but collectively they amounted to a “drop in the bucket” of what it will take to energize self-determined, sustainable community development and economic opportunity in Tribal communities.

Tribal governments prove that local decision-making and solutions work best: An extensive body of research built over the past three decades concludes that Tribal self-determination/self-governance is a successful policy which allows tribes the ability to meet the needs of tribal citizens through local decision making. Tribal governments know best the nature and intricacies of the particular challenges their communities face, and are best-positioned and best-equipped to make innovative decisions that address the needs of tribal communities. As President Ronald Reagan astutely recognized in 1988, “Tribes need the freedom to spend the money available to them, to create a better quality of life and meet their needs as they define them. Tribes must make those decisions, not the federal government.” Tribal governments also boast a growing track record of partnering with other surrounding governments (state, county, municipal) to construct and enact

solutions aimed at addressing shared community challenges, from healthcare to law enforcement to public transit.

Much of Indian Country is an integral part of rural America: Rural America faces its own distinct and often daunting infrastructure challenges – from existing infrastructure (telecommunications, transportation, water and energy infrastructure, etc.) that has long since fallen into disrepair to the pressing need to develop the tech-driven infrastructure necessary to make rural areas economically viable now and in the future. Compounding these challenges are the high costs of addressing them as compared to more densely populated areas. What’s more, the vast majority of this country’s land area (72 percent) is rural. Meanwhile, Indian lands – totaling more than 100 million acres spread across 34 states – are predominantly rural, inextricably linking the state and fate of Indian Country’s infrastructure with that of the rest of rural America. For any infrastructure investment plan to be truly national, it will need to assess and account for the particular and often shared infrastructure needs of rural communities – both Native and non-Native. It must also draw on the innovative infrastructure development fixes that Tribal and other governments that serve rural geographies together have forged – including the growing number involving intergovernmental and public-private partnerships – for they offer important lessons for how to undertake such development elsewhere.

Tribal Nations have proven success in innovative solutions to infrastructure needs: In the 1960s, rural Neshoba County in Mississippi – home to the Mississippi Band of Choctaw Indians – was one of the most economically impoverished areas in the United States. The infrastructure was undeveloped with most houses in substandard condition, nine in ten had no indoor plumbing, and a third had no electricity. Seeking to uplift its community, the Band embarked on creating a diversified, sustainable economy, appropriately targeting the strategic building of its physical infrastructure as a critical first order of business. Fifty years later, the Band has not only transformed its reservation’s quality of life, it has become a major economic engine in its part of the state, employing thousands of Natives and non-Natives through its suite of Band-owned enterprises. A growing number of other Tribal Nations are authoring equally impressive stories of community revitalization and local and regional economic success empowered by strategic investments in infrastructure development. From the Citizen Potawatomi Nation’s Iron Horse Industrial Park to the Tulalip Tribes’ state-of-the-art waste water treatment facility to Ohkay Owingeh’s Tsigu Bugeh Village, Tribal Nations across the country are turning Tribal, federal and other investments in their infrastructure into lasting economic and social benefits for Native people and other local residents who rely on said infrastructure to support a good quality of life.

However, there still remains great need for infrastructure investment in Indian Country. The following chart estimates unmet needs for some of the major infrastructure projects in Indian Country along with details regarding each of these programs:

Estimates of Unmet Needs for Infrastructure in Indian Country

in billions of dollars	Construction Backlogs	Deferred Maintenance
IHS Health Care Facilities, New and Replacement Cost	10.3	
IHS Sanitation Facilities Construction backlog	2.5	
IHS Maintenance & Improvement deferred maintenance backlog		0.5
IHS Workforce Staff Quarters, new and replacement units	0.4409	
BIE to replace or rehabilitate the 68 worst schools	1.3	
BIE Deferred Maintenance Backlog		0.3889
BIA Safety of Dams Deferred Maintenance		0.556
BIA Irrigation Program – Rehabilitation Deferred Maintenance		0.567
BIA Roads Maintenance Deferred Maintenance Backlog		0.289
Indian Housing, additional 68,000 housing units	33	
Construction of Tribal Multi-Justice Centers and Detention Facilities	0.21189	
Total	47.8	2.3

Indian Health Service Health Care Facilities, New and Replacement Cost: \$10.3 billion

- Estimated costs to construct the needed additional 18 million ft² of new and replacement space totaled \$10.3 billion in 2016.
- Existing space in IHS facilities (14 million ft²) is substantially less than required (~27 million ft²) for the 2015 AI/AN user-population. Insufficient capacity and resources severely restrict health care services that can be provided. An additional 4.7 million ft² is becoming outdated and should be replaced. Unless these needs are addressed, the growing AI/AN population and gradual deterioration of older space will further expand the need.
- At the existing replacement rate, a new 2016 facility would not be replaced for 400 years.
- Of the U.S. annual health expenditures, about 5% are investments in health care facility construction. In 2013, \$118 billion investment in health care facility construction equaled about \$374 per capita. IHS health care facility construction appropriation of \$77 million is about \$35 per AI/AN. Thus the US per capita annual investment in health care facility construction is over 10 times the amount for IHS healthcare facility construction per capita.

Sanitation Facilities Construction backlog: over \$2.5 billion

- A recent cost benefit analysis indicated that, for every dollar IHS spends on sanitation facilities to serve eligible existing homes, at least a twentyfold return in health benefits is achieved.
- Projects are cooperatively developed and transferred to Tribes who assume responsibility for the operation of safe water, wastewater, and solid waste systems, and related support facilities. The SFC program receives funds for three types of projects:

- Water, Wastewater, and Solid Waste facilities for Existing Homes and/or Communities,
 - Water, Wastewater, and Solid Waste facilities for New Homes and/or New Communities, and
 - Special or Emergency projects. The sanitation project need is almost \$2.5 billion, including almost 14,000 AI/AN homes without potable water.
- With inflation, new environmental requirements, and population growth, the current sanitation appropriations are not reducing the backlog.

IHS Maintenance and Improvement deferred maintenance, alteration and repair backlog: \$500 million

- In 2015, the maintenance budget (\$53.6 million) was sufficient to cover only 77 percent of maintenance needs arising annually even with deferring needed improvements to outdated space. The reported backlog of deferred maintenance, alteration and repair as of the end of year 2015 was approaching \$500 million.

IHS Workforce Staff Quarters: \$440.9 million needed for new and replacement units

- Staff Quarters unmet need at existing healthcare sites is \$440.9 million. 1100 units are needed to staff IHS and Tribal health care facilities (recruit and retain health professionals).

Bureau of Indian Education

Need: \$1.3 billion to replace or rehabilitate the 68 worst schools

BIE Deferred Maintenance Backlog: \$388.9 million

- The 2010 estimate for upgrading BIE schools in poor condition to satisfactory condition was \$1.3 billion.
- At the end of FY 2015, BIA has 82 schools in “good” condition, 46 in “fair” condition and 55 in “poor” condition with an overall average of building conditions at “fair” as measured by the Facilities Condition Index. This means the majority of BIE schools (approximately 55 percent) are in either poor or fair condition.

BIA Safety of Dams

Deferred Maintenance: \$556 million

- The Bureau of Indian Affairs (BIA) currently lists 31 high- or significant-hazard dams; fund the High-Hazard Indian Dam Safety Deferred Maintenance Fund authorized at \$22.75 million annually for FY 2017-2023; fund the Low-Hazard Indian Dam Safety Deferred Maintenance Fund authorized at \$10 million annually for FY 2017-2023.

BIA Irrigation Program – Rehabilitation

Deferred Maintenance: \$576 million

- The BIA Irrigation Program provides irrigation water to 17 projects spanning over 780,000 acres. Among other things, this water helps with the production of over \$300 million a year in gross crop revenues. However, most of these projects are nearly 100 years old, reached or exceeded their useful lifespan, were never fully completed, and/or have extreme deferred maintenance.

BIA Roads Maintenance Deferred Maintenance Backlog: \$289 million*

* Not including Tribal roads

- The BIA has maintenance responsibility for approximately 29,000 miles of roads and 900+ bridges. The road mileage consists of 7,150 miles of paved, 4,720 miles of gravel, and 17,130 miles of unimproved and earth surface roads. The total public road network serving Indian Country is 140,000+ miles according to the National Tribal Transportation Facility Inventory. The Office of Indian Services Division of Transportation in Washington, DC provides oversight and distribution for the annual maintenance program.

Indian Housing Block Grant needs additional 68,000 housing units (cost): \$33 billion

- A recent report stated it would take approximately 33,000 new units to alleviate overcrowding and additional 35,000 to replace existing housing units which are in grave condition. To meet the total need of approximately 68,000 housing units (new and replacement), with the average development cost of a three-bedroom home, the total cost is in excess of \$33 billion.

Construction of Tribal Multi-Justice Centers and Detention Facilities

Unmet Need: \$211,898,628 (as of FY 2011)

Prioritization of Infrastructure Projects: As is detailed above, the need for infrastructure development in Indian Country is great. The lack of sufficient funding has created backlogs that in many cases will take decades or longer to clear. The existing process Priority In many cases, existing processes at the federal agencies determine how projects are prioritized especially in the case of schools, and health clinics.

How IHS Uses and Distributes Health Care Facilities Construction (HCFC) Funds. In the late 1980s Congress directed IHS to develop the HCFC priority system. The system was implemented in the early 1990s with 27 projects on the initial list. Most projects are major capital investments exceeding annual HCFC funding resulting in projects being funded over several fiscal years. Projects are funded in phases according to acquisition, engineering, and project management requirements. Portions or phases of several projects are funded during a given fiscal year. This allows several projects to move forward simultaneously and helps distribute the funds geographically benefiting more than one Area.

There are separate lists for facility types, for instance, Inpatient, Outpatient, Youth Regional Treatment Facilities or Staff Housing. Budget documents identify the specific projects off the grandfathered HCFC List, the phases and the estimated costs for that fiscal year. There are 13 remaining facility projects on the “grandfathered Priority List” with a current estimated completion cost of \$2.1 billion. Once those 13 projects are funded, the remaining \$8 billion can be funded with a revised priority system that will periodically generate updated lists.

The current “Grandfathered” HCFC Priority List consists of the following sites:

- Gila River PIMC SE ACC, AZ
- Salt River PIMC NE ACC
- PIMC Central Hospital & ACC
- Whiteriver, AZ
- Gallup, NM
- Ft. Yuma, AZ
- Rapid City, SD
- Winslow-Dilkon, AZ
- Alamo Navajo, NM

- Pueblo Pintado, NM
- Bodaway Gap, AZ
- Albuquerque West
- Albuquerque Central
- Sells, AZ

Bureau of Indian Education Construction List. The BIA Education Construction Program reconstructs and rehabilitates BIE schools and dormitories. There are 183 BIE schools and dormitories in 23 states, and serve approximately 48,000 students from K through 12th grade. In addition, BIE owns and operates two post-secondary institutions. The Facilities Condition Index is a system used by the BIA to calculate, manage and develop constructions plans for repair and rehabilitation of school facilities. In FY 2015, there were 82 schools that were considered in good condition, 46 in fair condition, and 55 in poor condition. It would take approximately \$388 million in deferred maintenance to bring the schools up to good conditions.

For Fiscal Year (FY) 2016, the National Review Committee identified the ten schools listed below and invited those schools to present at a public meeting in February 2016, in Albuquerque, New Mexico.

- Blackwater Community School
- Chichiltah-Jones Ranch Community School
- Crystal Boarding School
- Dzilh-Na-O-Dith-Hle Community School
- Greasewood Springs Community School
- Laguna Elementary School
- Lukachukai Community School
- Quileute Tribal School
- T'iis Nazbas Community School
- Tonalea Redlake Elementary School

Improving Infrastructure Permitting Processes to Consult With Indian Tribes and Gain Consent. As Congress and the Administration consider large-scale infrastructure projects across the United States, tribal lands and natural resources will inevitably be impacted. Because tribal lands and natural resources are a primary source of economic activity for Tribal communities it is imperative that tribal governments are part of the planning process when those projects are located on, or near, reservation or on ancestral lands.

Tribal Nations should be included in infrastructure decision-making from the very earliest stages, including being involved in key decisions regarding priorities for development and tribes should also be included in any discussions regarding particular projects. For instance, as soon as Federal agencies are discussing projects with private parties or state governments, they should also be talking to Tribal Nations. Early consultation ensures that problems are identified and resolved in a timely fashion, preventing costly delays down the line.

An important part of addressing the Nation-to-Nation relationship is, in the context of infrastructure decision-making, the need for responsible economic development, with a specific focus on how Tribes can benefit from infrastructure development. Based on the input from Tribal leaders across

Indian Country, NCAI developed a set of Principles and Best Practices for Infrastructure Permitting Relating to Tribal Nations and the Federal Trust Responsibility that we believe can fit into the existing regulatory framework.

For any project affecting Tribal lands, waters, treaty rights, or sacred spaces, at the outset the United States must expressly consider the following five principles: (1) recognition of Tribal sovereignty; (2) respect for treaty rights; (3) compliance with the Federal trust responsibility, including seeking Tribal informed consent; (4) upholding all statutory obligations; and (5) ensuring environmental justice. How these principles were addressed should be reflected in the written record for any decision.

We also recommend that the federal government implement the following seven best practices: (1) regional mapping and Tribal impact evaluation; (2) consultation in early planning and coordination; (3) early, adequate notice and open information sharing; (4) funding for Tribal participation in processes; (5) training for agencies to improve understandings of Tribal Nations; (6) creation of Tribal impact statements and a Trust Responsibility Compliance Officer; and (7) evaluation of cumulative impacts and regional environmental impacts.

Infrastructure permitting must respect the federal responsibilities to Tribal Nations who continue to struggle to protect their lands, resources, sacred sites, and cultures in processes that too frequently authorize projects despite their threats to these Nations. Time invested early to identify a project site that avoids ecologically or culturally sensitive areas can lead to a more efficient process and shorter overall project timeframes, and can even avoid the need for Federal reviews, approvals, or licenses pertaining to those resources. Similarly, project planning and the submitted proposal should reflect the results of early consultations with tribal leaders to ensure the proposed project accounts for tribal perspectives and needs up front.

Streamlining Regulatory Processes. Tribal Nations have also consistently requested that the federal government modernize outdated regulations and statutes to provide them with more flexibility and the option of greater control over decision-making and self-governance, the ability to be more responsive to the needs of their citizens, and to bolster economic development in Indian Country. The trust relationship and responsibility must be modernized to be consistent with self-determination and rooted in inherent sovereign authority to create a 21st Century trust for 21st Century Tribes.

The first step in this process will be to nominate an Under Secretary for Indian Affairs, and implement the Indian Trust Asset Management Reform Act. Last year Congress passed an important new law authorizing the Secretary of the Interior to establish an Under Secretary for Indian Affairs. When established, the Under Secretary will report directly to the Secretary and serve as a cross-agency advocate for Indian country to ensure that all agencies and bureaus within the Department work together efficiently on tribal issues and implement policies that consider their trust obligations to Indian tribes. The position will address a major issue that has been raised in every significant study of trust management at Interior: the lack of clear lines of authority and responsibility to ensure accountability for trust reform efforts by the various divisions of the Department of Interior.

We also urge that the Department of Interior consider working with tribal leaders to adopt many of the latest innovations in streamlining approvals for tribal projects. For major projects, the agency should develop a Coordinated Project Plan in consultation with the tribal applicant. This plan must

designate a lead federal agency for project approval, to avoid the problems of stovepiping that so frequently cause approvals to bog down. Federal permitting and review processes must rely upon early and active consultation with tribal governments to schedule the necessary permits and approvals, set deadlines with oversight, avoid conflicts or duplication of effort, resolve concerns, and allow for concurrent rather than sequential reviews.

Innovation in Financing of Infrastructure Projects in Indian Country. As a primary matter, we urge that tribal governments must be fully and proportionally included in the direct funding for any infrastructure package. These dollars are a sound investment in development in rural America, and also a part of the federal trust responsibility to Indian tribes.

If funding is derived from tax incentives, we urge that tribal government be fully included and eligible. Tribal Governments should be provided with direct access to federal tax credit programs such as the New Markets and Low Income Housing Tax Credit programs – among other federal incentives, which will help spur public-private partnerships to rebuild Indian Country infrastructure.

We urge Congress to consider the urgent and continuing need for economic development on Indian reservations in the context of the Indian Employment Tax Credit and Accelerated Depreciation for on-reservation business infrastructure. Both expired on December 31, 2016. Congress should make both tax incentives permanent so employers can rely on the incentives when planning to locate their business on tribal lands.

Congress should also empower Tribal Governments to access tax-exempt bond markets. Currently, tribes may only use tax-exempt bonds for “essential government functions.” The IRS has interpreted this provision to exclude economic development as a governmental function, while state and local governments frequently use tax-exempt financing for development projects. This unnecessarily prevents tribes from securing the funding needed to revitalize their communities.

CONCLUSION

Investing in Indian Country’s infrastructure furthers Tribal self-governance and self-determination by acknowledging Tribal governmental parity and the federal trust responsibility. For any national infrastructure investment plan to be effective, it will need to emerge from the concerted, coordinated efforts of all governmental players, including tribal governments.