TESTIMONY OF PAT RAGSDALE
DIRECTOR OF GOVERNMENT SERVICES FOR THE CHEROKEE NATION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON S. 2283
A BILL TO AMEND
THE TRANSPORTATION EQUITY ACT FOR THE 21st CENTURY
June 28, 2000

Good morning Mr. Chairman and Members of the Committee, my name is Pat Ragsdale, and I am the Director of Government Services for the Cherokee Nation. I appear here at the request of Principal Chief Chad Smith to deliver the Cherokee Nation's strong support for S. 2283, the Indian Tribal Surface Transportation Act of 2000. With me are Cherokee Councilman Jackie Bob Martin, who also is Chairman of the Tribal Resources Committee and Melanie Knight, our Self-Governance Administrator for the Nation.

The Cherokee Nation represents over 213,000 tribal citizens, nearly half of whom live within our 7,000 square mile jurisdictional area. The Cherokee Nation has long been recognized as a leader in the tribal effort to reform the Indian Reservation Roads (IRR) program – to make it more efficient and more responsive to the needs of all tribal people across this country. The Cherokee Nation is proud to be one of only two tribes in the country to have successfully completed negotiations with the BIA and the Office of Self-Governance for a demonstration to apply self-governance principles to the IRR program.

Along with the Red Lake Band of Chippewa Indians, the Cherokee Nation spent six years – and dedicated significant financial resources – first conceiving of the idea of an IRR Self-Governance Demonstration Project, and then working with the BIA and the Federal Lands Highway program to make our vision a reality. We spent years in meetings, discussions and negotiations with BIA and Federal Lands Highway officials simply to get these federal agencies to do what we believe the law clearly required them to do all along: provide tribes with their fair share of the federal resources and the authority necessary to administer the IRR program directly for the benefit of their own members. In doing so, we never asked for more than our share, and we never sought to remove the BIA or the Federal Lands Highway program from their proper role as partners with the tribes or as overseers of the larger IRR program.

In fact, Cherokee Nation has been successfully operating the IRR program since 1994 as part of its self-governance agreement, despite the BIA's unwillingness to extend the

attributes of self-governance to the IRR program that all of our other programs flourish under. Although we believed the existing legislation in 1994 authorized the IRR program to be a full partner in the self-governance initiative and that a demonstration was not necessary, we worked to address BIA's resistance and to provide some level of comfort by pursuing a demonstration concept.

Despite all our best efforts, and despite six years of constant pushing by the tribes and by Congress, I regret to report that some key people in the BIA and the Federal Lands Highway program still refuse to accept the basic principles of tribal self-determination and self-governance when it comes to the IRR program. For this reason, the Cherokee Nation supports prompt enactment of S. 2283.

The Cherokee Nation applauds this Committee's effort to ensure that the many positive benefits of the Indian Self-Determination Act apply with full force to the IRR program. The President, Secretary Babbitt, Secretary Slater, and Congress, including this Committee, have all recognized that the federal policy of tribal self-determination and self-governance has been the most successful federal Indian policy in our Nation's history. Congress has an important role to play in protecting and preserving these policies in the face of often strong resistance within the federal bureaucracy.

Twenty-five years ago the Cherokee Nation began the process of self-determination contracting to operate BIA programs to streamline, redesign and enhance federal services for our people. Today we have a self-governance compact under which we operate virtually all of the federal government's Indian programs serving our people, including – as of two months ago – the IRR program. As a result of our vision and our determination, the Cherokee Nation has succeeded in substantially reducing the federal bureaucracy, enhancing local control and making vast improvements in the efficiency of these programs for the benefit of our people.

We strongly support the provisions of S. 2283 to continue this important effort. These amendments benefit not only the tribes, but the BIA and the Federal Lands Highway program as well. These federal agencies will become stronger, not weaker, once they stop resisting Indian tribes' natural desire to govern themselves and start figuring out ways to become true partners, strong advocates and helpful resources for all tribes.

Let me now speak briefly to the importance of each of the bill's provisions:

Obligation Limitation

First, the obligation limitation issue. It has been said that "great nations, like great men, keep their promises." As I see it, S. 2283 simply allows Congress to fulfill the promises it made to tribal leaders in passing TEA-21, working hard to increase the IRR budget to $225 million in the first year and then to $275 million per year thereafter through FY 2003. Unfortunately, a little noticed provision placing an obligation limitation on the IRR program has resulted in the transfer of funds intended for IRR to the 50 states – a total of $24.2 million in FY 1998, $31.7 million in FY 1999 and $34.9 million in FY 2000. This represents a change in policy. In all previous enacting legislation since 1982, federal funds intended for IRR programs were used only for IRR purposes. Only in TEA-21 was this changed due to the application of the obligation limitation to Federal Lands Highways and the IRR program.

The members of this Committee are well aware that the IRR program is woefully underfunded, both for construction and for maintenance. It has been estimated that at least $7.2 billion dollars is needed to eliminate the *current* road construction and maintenance backlogs in Indian country. While the restoration of the full $275 million IRR appropriation for these last few years until FY 2003 is only a small step, it is an appropriate and honorable step in the right direction.

Indian tribes throughout the country, the National Congress of American Indians, the Intertribal Transportation Association, and regional tribal organizations all strongly support this provision (as well as the other provisions in S. 2283). Joining us in this effort are the States of California, New Mexico, Washington, Utah, North Dakota and South Dakota. Each of these states has sent letters to their Congressional delegations strongly supporting the elimination of the obligation limitation deduction to the IRR program. We ask that those letters, which I understand Committee staff have received, be made a part of this record. I am not aware of *any* State that is on record opposing this legislation. The Cherokee Nation therefore urges the Committee to enable Congress to fulfill the promises it made to the Indian people in TEA-21.

Six Percent Administrative Funding

Next, the six percent administrative funding issue. The need for this provision is nowhere better illustrated than in the experience of the Red Lake Band and the Cherokee Nation in our recent self-governance negotiations.

TEA-21 was meant to clarify that the IRR program is just like other federal programs serving Indian tribes, and is equally subject to the contracting, compacting and funding mandates set forth in the Indian Self-Determination Act. Except for a few "inherently federal functions" retained by the Secretary, tribal governments may therefore choose to compact for all, or any portion, of the IRR program in their area.

Compacting tribes are also legally entitled to receive their fair share of IRR direct program and administrative funding. This is clear in existing law, which provides that "*all funds* received under [Title 23] for Indian reservation roads and highway bridges . . . shall be made available" to tribal governments upon their request for contracts and compacts. 23 U.S.C. § 202(d)(3)(A). Subsection (B) of the same provision further clarifies that this payment obligation includes funds for "supportive administrative functions that are otherwise contractible." *Id*.

Based on these Congressional mandates, the Cherokee Nation and the Red Lake Band attempted to engage in good faith, government-to-government negotiations with the BIA and the Office of Self-Governance to determine the actual costs associated with the administrative functions the tribes were assuming, as well as the costs of those functions that the BIA would retain.

Those efforts met stiff resistance, and our tribal negotiators soon learned that the BIA intended to retain *all* the 6% funds – even those funds associated with Red Lake and Cherokee's own IRR administrative functions. We also learned that the BIA intended to retain additional IRR construction funds to pay for so-called "project-related" administrative costs. The BIA negotiators flatly told us this issue " was off the table" and would not even be discussed.

During negotiations, we learned that the BIA has historically funded its administrative costs using *both* IRR construction funds *and* the 6% administrative funds. The BIA explained that neither source of administrative funding was available to contracting tribes. The BIA made clear that it did not intend to disturb this historic system, notwithstanding the clear funding mandates of TEA-21 and the Indian Self-Determination Act.

Our tribal negotiators explained at length that self-determination and self-governance tribes are legally entitled to a fair share of the 6% funds. The Cherokee Nation even demonstrated its willingness to leave a generous amount of administrative funding with the BIA to allow it to carry out its own retained administrative functions. In fact, we offered to let the BIA retain more than $125,000 of the Cherokee Nation's share of the IRR allocation – the equivalent of two full-time BIA employees. This amount was certainly more than the

BIA actually needed to avoid any negative impacts on its overall IRR operations or on it services to other Indian tribes. But, the BIA flatly refused to budge.

The legislative history of TEA-21 makes clear that these provisions were specifically passed to assure that the IRR program is subject to the same self-determination funding mandates as all other tribal programs, including access to agency administrative funds.

Tribal negotiators also pointed out that Congress only earmarked *up to* six percent of the annual IRR program budget for IRR program administration. Specifically, the FY 2000 Interior Appropriations Act provides that "not to exceed 6 percent" of the total IRR appropriation "may be used to cover the road program management costs of the Bureau." This appropriation earmark establishes a funding ceiling, not a floor. Nor does it *guarantee* the BIA a flat 6 percent to administer the IRR program, without regard to its actual and justifiable costs. Nor does it excuse the BIA's refusal to negotiate with the tribes for a fair share of 6% funding.

We also pointed out that BIA's historical practice of using both the 6% funds for IRR program administration plus an additional, *unknown* amount of construction funds for project-related administrative costs, is a violation of the "purpose" restriction contained in the 6% appropriation earmark. As pointed out by our legal counsel, this practice violates basic appropriations law because federal agencies may only use appropriated funds for the particular purposes identified by Congress.[1]

Despite months of negotiation to overcome this impasse, the BIA never retreated from its position. Indeed, it continues to hold fast to this position in the ongoing TEA-21 Negotiated Rulemaking process.

Indian tribes should not have to engage in lengthy and expensive litigation to vindicate

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[1] See 31 U.S.C. § 1301 ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). As explained in the GAO-"published treatise Principles of Federal Appropriations Law, an "appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object." Moreover, "the fact that an appropriation is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation." See 20 Comp. Gen. 739 (1941).

their legal rights. The " 6%" provisions in S. 2283 are needed to once again *make absolutely clear* that Congress intends for these 6 percent administrative funds to be appropriately shared with Indian tribes.

Health and Safety Provisions

The Cherokee Nation also strongly supports the health and safety provisions in S. 2283. We understand that minor wording changes have been made to the original bill to clarify that this amendment is intended *to authorize* tribes to obtain their own independent review of road construction " plans, specifications, and estimates" (PS&Es), using appropriate licensed professionals. Again, the Cherokee Nation's own experiences during the IRR self-governance negotiations demonstrate the need for this amendment.

During our negotiations, the Cherokee Nation agreed to abide by strict engineering and construction standards in operating the IRR program, including a second-level review of PS&Es by an "independent and appropriately licensed" engineer. We further agreed to provide copies of the PS&Es to the BIA Regional office and other local transportation officials for their review. We also agreed to several "public health and safety" provisions that would allow the federal government a continuing role in monitoring our tribal IRR program and would even permit it to halt construction activities upon a finding that continued work would seriously jeopardize public health and safety. The TEA-21 Negotiated Rulemaking Committee is also developing regulations which preserve the BIA's legitimate role in protecting public health and safety.

Despite all these agreements on our part, BIA officials *still* did not want to allow tribes to perform their own PS&E approvals. BIA Regional Roads officials took this position even though the BIA's own approvals of PS&Es are often contracted out to private engineering firms or done by BIA officials who are not themselves licensed engineers. Only after months of difficult negotiations did the BIA reluctantly agree to the Cherokee Nation's proposal. However, BIA and Federal Lands Highway officials made clear that this agreement was an exceptional case, limited to the IRR Self-Governance Demonstration Project – although applications to the Federal Highway Administration to delegate this approval function to entities other than tribes are approved on a regular basis. In the TEA-21

Negotiated-Rulemaking process, the BIA and Federal Lands Highway negotiators are once again opposing this idea.

In our view, the real reason for the BIA's intransigence on this issue is not public health and safety, but rather its desire to maintain a bureaucratic check on the IRR planning, design and construction process. After all, both the Red Lake Band and the Cherokee Nation readily agreed to make these PS&Es available to the BIA regional roads engineers for them to study and review.

Under our negotiated system and under S. 2283, the BIA continues to have every opportunity to identify any design problem that might impact public health and safety. We made it clear in negotiations that the tribes would obviously welcome and act on any BIA information about potential design defects. After all, Cherokee families, our children and our Elders are the ones who will drive on these IRR roads. The Cherokee Nation takes great pride in constructing and maintaining the IRR road system in our area just as well as, if not much better, than any federal agency or private contractor ever could.

Our desire for PS&E approval authority is driven by our desire to gain greater control over the IRR construction process so that we can make the program more efficient and more responsive to the needs of our tribal members. Without the ability to approve our own PS&Es, Indian tribes must often wait months – and sometimes even entire construction seasons – for BIA approval. There is nothing tribes can do but complain and wait. Under the system we negotiated and under S. 2283, tribes will have the ability to take control of the process and ensure that the review and approvals are done promptly. At the same time, no licensed professional is going to risk a professional career by doing slipshod work or by approving PS&Es that are deficient, merely to please a tribal client.

Department of Transportation Pilot Project

Finally, the Cherokee Nation wishes to express its strong support for the DOT "pilot program" provisions in S. 2283. While the Cherokee Nation still has to consider whether it wants to participate in this pilot program given our new IRR self-governance agreement, this demonstration project will provide opportunities for other Indian tribes to gain greater control over the IRR program in their area. This, in turn, will eliminate the middleman, reduce duplicative administrative costs and make the entire IRR program more efficient.

We must be clear that while we support this pilot program, we *do not* support the transfer of the entire IRR program back to the Department of Transportation. The Cherokee Nation believes that Indian people are best served by a strong and vital BIA, the federal

agency most responsible for and most experienced in maintaining the federal government's trust obligations toward Indian tribes.

The Cherokee Nation looks forward to the day when it can come to this Committee with nothing but glowing reports about a true partnership between the BIA and Indian tribes operating self-determination and self-governance programs. In some areas, the BIA is indeed moving closer to this goal. But our experience in the IRR self-governance negotiations makes it clear that the BIA still has a long way to go before that can be said here. We therefore believe it is essential that tribes be given the option of contracting and compacting directly with the Federal Lands Highway program to perform these IRR activities.

Conclusion

Like other self-determination and self-governance tribes, the Cherokee Nation has for many years run IHS health clinics, administered child protection services and justice programs, and operated federal housing programs, among many other programs. We have constructed health clinics and other facilities. When TEA-21 was passed, Congress made it absolutely clear that there is nothing special or different about the IRR program that would suggest that tribes cannot be trusted to act prudently when building or maintaining our roads, tasks the Nation has been successfully conducting since 1994. In introducing this bill, Chairman Campbell explained that "for Indian communities, an efficient federal roads financing and construction system holds the key to healthier economies and higher standards of living for their members." S. 2283 furthers and strengthens Congress' historic self-determination, self-governance and tribal transportation policies. It should become law.

Thank you Mr. Chairman and Members of the Committee for the opportunity to testify in strong support of this important legislation.