

Resolution No. 2002-14

**A RESOLUTION IN RESPONSE TO THE NOTICE OF PROPOSED
RULEMAKING FOR THE INDIAN RESERVATION ROADS
PROGRAM
PUBLISHED AUGUST 7, 2002**

WHEREAS, the Inter-tribal Council of the Five Civilized Tribes is an organization which united the Tribal governments of the Muscogee (Creek), Seminole, Cherokee, Choctaw, and Chickasaw Nations, representing over 450,000 tribal members throughout the United States; and,

WHEREAS, the Five Civilized Tribes of Oklahoma are responsible for providing for the health, education, and general welfare of their respective constituencies; and,

WHEREAS, this responsibility includes the provision of safe and adequate transportation systems within service areas of the Five Civilized Tribes; and,

WHEREAS, the Inter-tribal Council (ITC) is familiar with the Transportation Equity Act for the 21st Century (TEA-21) which expands the use of and fully subjects all Indian Reservation Road (IRR) funding to the Indian Self-Determination and Education Assistance Act (ISDEAA); and,

WHEREAS, section 1115 of TEA-21 requires that the federal government enter into a negotiated rulemaking with tribal governments for the purpose of developing a new funding formula and regulations for the IRR program; and,

WHEREAS, the ITC is aware that the Bureau of Indian Affairs (BIA) published the notice of proposed rulemaking for the IRR program on August 7, 2002; and,

WHEREAS, the ITC has completed its review of the proposed rulemaking and hereby issues the following position:

Regarding Subpart A – General Provisions and Definitions:

1. That the term “should” in §170.3(d) be replaced with “shall” in reference to the government’s policy for the IRR program. The federal government is obligated to interpret laws and regulations in a manner that facilitates Indian self-determination and tribal rights to self-government.

Regarding Subpart B – IRR Program Policy and Eligibility:

1. That the eligibility list in §170.114 and subsequent appendix A be revised to include “equipment purchases” and “indirect cost for non-construction activities” as allowable uses of IRR program funding.
2. That the reference to the Federal Highway Administration (FHWA) be removed from §170.116, which would give the Secretary of the Interior full discretion to make eligibility determinations for proposed new uses of IRR program funding. This will avoid inconsistent decisions between the two agencies and would remove the proposed limitations on tribal redesign authority and the appeals processes available under the ISDEAA.

Regarding Subpart C – IRR Program Funding:

1. That the clause “and agrees to maintain the completed project under 23 U.S.C. Section 116” be removed from §170.276(c) because it would create an un-funded mandate for states, counties, and municipalities. The federal government does not provide funding to these agencies for maintaining IRR roads and bridges.
2. That the term “all IRR routes” in §170.294(c) be replaced with “additional IRR routes at an annual growth rate of 2% per year at the BIA regional level.” This would give each tribe an equal opportunity to add roads to the system for funding purposes.

Regarding Subpart D – Planning, Design, and Construction of IRR Facilities:

1. That the reference to an annual update of the IRR Transportation Improvement Program (TIP) in §§170.420 and 170.433 be amended to include quarterly updates or as otherwise requested by tribal governments. Indian tribes should not have to wait an entire fiscal year for TIP approval, which is the official instrument that grants expenditure authority for IRR construction projects.
2. That the language in §170.480 requiring a tribe to meet the definition of a state and a separate stewardship agreement with the Secretary of Transportation in order to assume the approval function

for plans, specifications, and estimates (PS&E's) be stricken from the rule completely. The IRR program is clearly transferred to the Secretary of the Interior and thus the assumption of all functions including responsibility for PS&E approval is subject to tribal contracts and agreements under the ISDEAA.

3. That the language in §170.481 requiring the Secretary to conduct health and safety reviews of all tribally approved PS&E's be stricken from the rule completely. The ISDEAA requires that proper health and safety standards be included in the tribal agreement but does not indicate in any way that the Secretary must perform this function.
4. That the reference to a "project audit" in §170.485 be removed completely. Furthermore, that the language referring to "close reports" in §§170.484-491 be amended to identify who prepares the closeout report only. As proposed in the regulation, these sections violate the single-agency audit, annual trust evaluation, and reporting requirements of the ISDEAA.
5. That the language in §170.501 be amended to make the content of right-of-way easement documents uniform whether the land in question is in trust, restricted, or fee simple. Furthermore, that the language in §170.502 be amended to reflect the party who must consent to the granting of a right-of-way depends upon the status of the land in question. The government's reliance upon 25 CFR part 169 does not address fee simple lands nor does it reflect situations where a tribe is the applicant, or has statutory to grant rights-of-way without Secretarial approval.

Regarding Subpart E – Service Delivery for IRR:

1. That all references to contractible and non-contractible functions in §§170.600-608 be stricken from the rule and replaced with a mechanism requiring the federal government to negotiate for the inclusion of all IRR programs, services, functions, and activities that may be legally transferred to an Indian tribe through a self-determination contract or self-governance agreement. The negotiation process shall also determine the tribal share of IRR funds for supportive and administrative functions.
2. That the advance payment language in §§170.614-618 be amended to provide full lump advance payments for executed contracts and agreements of which the amount shall be based on a tribe's pro-rata share of the IRR program.
3. That the reference to 25 U.S.C. Section 450e-2 regarding the use of savings in §170.620 be stricken from rule and replaced with the

savings provisions identified in the ISDEAA. The federal position on 25 U.S.C. Section 450e-2 is completely unreasonable and eliminates the opportunity for tribes to retain their rightful share of IRR funding. The ISDEAA and subsequent regulations are most clear in that savings are to be carried over to provide additional services to which the funds were appropriated.

4. That the language in §170.633 which refers specifically to 25 CFR part 1000, subpart K, be amended to include all of 25 CFR part 1000 for IRR programs assumed by a self-governance tribe. Furthermore, that the language in §170.634 indicating how projects and activities are included in a self-governance agreement be stricken from rule completely. By statute, all programs, services, functions, and activities are fully subject to negotiation and thus it is entirely inappropriate to include provisions in this regulation that would impose non-negotiable requirements for tribal assumption of the IRR program.
5. That the language referring to contract support funding in §§170.635-636 be amended to reflect that contract support funds are available for IRR program activities performed under self-determination contracts and self-governance agreements. As matter of law, the Interior Department is required to make contract support funding available for all such contracts and agreements in accordance with §106(a) and §403 of the ISDEAA, regardless of program origin.

Regarding Subpart F – Program Oversight and Accountability:

1. That the language referring to stewardship agreements in §170.703 be corrected to identify that a self-determination contract or self-governance agreement may serve as a stewardship agreement for assuming PS&E approval authority unless a tribe chooses to enter into a separate stewardship agreement for the same. Furthermore, that the language referring to the contents of a stewardship agreement in §170.704 be stricken from the rule completely. The additional restrictions and bureaucratic control limits the tribal negotiation process and redesign authorities available under the ISDEAA.

Regarding Subpart H – Miscellaneous:

1. That the arbitration provisions identified in §170.941 be amended to include the Alternative Dispute Resolution Act (5 U.S.C.) within the context of construction activities. This is not to limit tribal authority regarding the Contracts Disputes Act or other dispute resolution methods authorized by the ISDEAA, but instead an alternative approach to avoid costly litigation.

NOW THEREFORE BE IT RESOLVED that the Inter-tribal Council of the Five Civilized Tribes strongly urges the Assistant Secretary of Indian Affairs to promptly reconvene the negotiated rulemaking committee and to adopt the above position in the final rules for the IRR program.

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CERTIFICATION

The foregoing resolution was adopted by the Inter-tribal Council of the Five Civilized Tribes at a regularly scheduled meeting in Okmulgee, Oklahoma on this 11th day of October, 2002, by a vote of _____yea; _____nay; and _____abstaining.

Bill Anoatubby, Governor
Chickasaw Nation

Chad Smith, Principal Chief
Cherokee Nation

Jerry Haney, Principal Chief
Seminole Nation of Oklahoma

Gregory E. Pyle, Chief
Choctaw Nation of Oklahoma

Perry Beaver, Principal Chief
Muscogee (Creek) Nation