

MENDING THE “BROKEN PROMISE” OF INFRASTRUCTURE INVESTMENT IN INDIAN COUNTRY

HOUSE WAYS AND MEANS COMMITTEE

TESTIMONY OF GOVERNOR STEPHEN ROE LEWIS
GILA RIVER INDIAN COMMUNITY

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Chairman Neal, Ranking Member Brady and members of the Committee, thank you for the opportunity to submit testimony on behalf of the Gila River Indian Community (“Community”) regarding the critical need for infrastructure investment in Indian Country and the role that your Committee might play in meeting it. Infrastructure investment is absolutely critical for our entire country, but nowhere more than on Reservations across the country.

As with most other forms of investment, Indian Country has been overlooked and forgotten when it comes to infrastructure, not just roads and broadband, but even in government buildings and other tribal government infrastructure, which are the backbone of tribal government. Most States and local governments take this for granted, but not so in Indian Country, where we depend on federal funding that has never come. We welcome the opportunity to be able to provide examples of the significant infrastructure need across Indian Country and provide recommendations on how Congress can leverage the tax code to make such infrastructure a reality.

Background

The United States’ unique trust relationship with Tribal Nations obligates the federal government to promote tribal self-government, support the general well-being of tribes and villages, and protect tribal lands and resources. Despite these obligations, the federal government’s investment in Indian Country infrastructure, or rather significant *lack of* investment in Indian Country infrastructure, has created a long-standing and systemic problem that must be addressed. Numerous reports, hearings, studies and articles have looked at the state of infrastructure in Indian Country and all have conclusively determined that the unmet infrastructure needs for water, energy, housing, transportation, health care, education, government, law enforcement, and broadband, have created an economic and government service chasm between Tribal Nations and the rest of the United States.¹

¹ See e.g., Broken Promises, Broken Schools: Report of the No Child Left Behind School Facilities and Construction Negotiated Rulemaking Committee, Bureau of Indian Affairs (Dec. 2011) at 9, *available at* <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-025523.pdf> (“Multiple studies have found significant links between inadequate facility conditions and poor performance for students and teachers.”); GAO-15-121, Bureau of Indian Education Needs to Improve Oversight of School Spending, U.S. Government Accountability Office (“GAO”) (Nov. 2014) *available at* <http://www.gao.gov/assets/670/666890.pdf>; Investing in Tribal

In 2018, the United States Commission on Civil Rights released a comprehensive briefing report entitled *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (“2018 Broken Promises Report”), that updated the Commission’s previous 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (“2003 Report”).² The 2018 Broken Promises Report evaluated budgets and spending of federal agencies that sponsor Native American programs, including the Departments of Health and Human Services, the Interior, Housing and Urban Development, Justice, and Education.³ Sadly, the 2018 Broken Promises Report determined that little progress had been made since the 2003 Report and that a serious crisis still exists in Indian Country.

The 2018 Broken Promises Report contained over 300 pages of analysis and found that:

Federal programs designed to support the social and economic wellbeing of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.⁴

In her introductory letter of the 2018 Broken Promises Report, the Chair of the U.S. Commission on Civil Rights stated that:

The federal government has also failed to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, making monitoring of federal spending to meet its trust responsibility difficult. Tribal nations are distinctive sovereigns that have a special government-to-

Governments: An Analysis of Impact and Remaining Need Under the American Recovery and Reinvestment Act, National Congress of American Indians (Mar. 2010) at 8-9, *available at* <https://www.ncai.org/resources/ncai-publications/investingintribalgovernmentsananalysisoffarra.pdf>; The 2016 Indian Health Service and Tribal Health Care Facilities’ Needs Assessment Report to Congress, Indian Health Service (2016) at 4, *available at* https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/RepCong_2016/IHSRTC_on_FacilitiesNeedsAssessmentReport.pdf; Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems, Department of Justice and Department of Interior (Aug. 2011) at 2, *available at* <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf>; Audit of the Office of Justice Programs’ Tribal Justice Systems Infrastructure Program, Office of the Inspector General, U.S. Dep’t of Justice (Jan. 2017) at 2, *available at* <https://oig.justice.gov/reports/2017/a1710.pdf>; GAO-18-309, Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination on Tribal Projects, GAO (May 2018) at 16-31, 43-47, *available at* <https://www.gao.gov/assets/gao-18-309.pdf>; Drinking Water Infrastructure Needs Survey and Assessment, Fifth Report to Congress, U.S. Environmental Protection Agency (Apr. 2013) at 29-31, *available at* <https://www.epa.gov/sites/production/files/2015-07/documents/epa816r13006.pdf>; Tribal Infrastructure, Investing in Indian Country For a Stronger America, National Congress of American Indians (2017), *available at* <https://www.ncai.org/NAI-InfrastructureReport-FINAL.pdf>.

² *A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country*, U.S. Commission on Civil Rights (July 2018) (“2003 Report”), *available at* <https://www.usccr.gov/pubs/na0703/na0204.pdf>.

³ *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, U.S. Commission on Civil Rights (Dec. 2018) (“2018 Broken Promises Report”) at 6, 203-214, *available at* <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.

⁴ *Id.* at 6.

government relationship with the United States. Unequal treatment of tribal governments and lack of full recognition of the sovereign status of tribal governments by state and federal governments, laws, and policies diminish tribal self-determination and negatively impact criminal justice, health, education, housing and economic outcomes for Native Americans.⁵

The Chair echoed the 2018 Broken Promises Report's key recommendations:

The United States expects all nations to live up to their treaty obligations; it should live up to its own. Congress should honor the federal government's trust obligations and pass a spending package to fully address unmet needs, targeting the most critical needs for immediate investment. This spending package should also address the funding necessary for the buildout of unmet essential utilities and core infrastructure needs in Indian Country such as electricity, water, telecommunications, and roads. Congress should ensure that these funds are available and accessible to all tribal governments on an equitable need basis.⁶

The 2018 Broken Promises Report and countless other studies and reports confirm that the link between critical infrastructures is directly tied to the health, education, public safety, environmental quality, and business development that promotes a cycle of social and economic prosperity in Indian Country.⁷ Anyone that steps foot on an Indian Reservation will immediately see the lack of paved roads, rundown housing conditions, dilapidated schools, tribal justice facilities and other government buildings, and limited healthcare facilities. These vast and severe infrastructure needs directly impact the health and well-being of our tribal members, and further sustain the cycle of poverty that is rampant across Indian Country.

Indian Country's infrastructure needs create a devastating ripple effect that must be stopped. The solution to addressing Indian Country infrastructure needs, includes among others: addressing rundown schools to create a positive learning environment for our tribal youth; building state-of-the-art criminal justice facilities to tackle high rates of crime and victimization amongst our women and children; focusing on road and utility infrastructure that enables tribes to promote new business opportunities on tribal land that result in much-needed jobs and economic development; and addressing clean-drinking water and vital health care facilities to foster the basic human right to water and healthcare.

Sovereign nations and tribal leaderships are best suited to assess and address our own tribal infrastructure needs. However, we need the support and tools to be truly successful, most critically in the form of increased funding, tax authority, and investment opportunities from the

⁵ Letter from Catherine E. Lhamon, Chair, U.S. Commission on Civil Rights to President Donald J. Trump, Vice President Mike Pence, and Speaker of the House Paul Ryan ("Lhamon Letter") (Dec. 20, 2018) at 2 (included at the beginning of the 2018 Broken Promises Report).

⁶ Lhamon Letter at 2; 2018 Broken Promises Report at 214-219.

⁷ See e.g. 2018 Broken Promises Report at 205.

federal government. Accordingly, we set forth below, examples of infrastructure investment that we strongly support as viable options to directly improve infrastructure and help solve the problems the Community has encountered when we have attempted to access existing federal financing, whether that is New Markets Tax Credits, or otherwise. We also recommend that Congress amend the existing tax authority of Tribal Nations to empower them to fully leverage federal funding to benefit Indian Country infrastructure.

New Market Tax Credit Incentive for Infrastructure Investment in Indian Country

One of the federal financing incentives that could help spur infrastructure development and economic growth in Indian Country is the New Markets Tax Credit (“NMTC”). The NMTC program was established by Congress in 2000 to encourage investments in projects located in low-income communities by providing tax incentives to private investors if they provide much-needed capital and credit in areas that have little or no banking access. The program has been highly effective with data showing that through September of 2020, \$60 billion in NMTC investments were made in businesses which was used to leverage nearly \$110 billion in total project financing to over 7,000 projects.⁸

Although NMTC are targeted towards low-income areas, Indian Country has largely been left out of these investments despite having the highest rates of poverty based on data from the 2018 United States Census which shows the poverty rate for Native Americans at 25.4% compared to rates of 20.8% for Black or African Americans, 17.6% for Hispanics, and 8.1% for the White population.⁹ Similarly, the 2018 Bureau of Labor Statistics data shows the unemployment rate for American Indians at 6.6% with a 55.6% employment-to-population ratio.¹⁰ According to the Tax Policy Center, tribal entities only received 0.4% of NMTC investments from 2003 to 2016.¹¹

It is necessary to look no further than the impacts of the COVID-19 pandemic on Indian Country to see the devastating impact that systematic federal underfunding for infrastructure projects, and lack of access to capital has had on tribal communities. According to the Centers for Disease Control and Prevention (“CDC”), American Indian or Alaska Native persons (Non-Hispanic persons) had the following rate ratios as compared to White, Non-Hispanic persons: 1.6 times the number of COVID-19 cases, 3.5 times the hospitalizations, and 2.4 times the deaths.¹² The hospitalization and death ratio rates for American Indian or Alaska Native, Non-Hispanic persons as compared to White, Non-Hispanic persons are the highest of any racial or ethnic

⁸ Fact Sheet: The New Markets Tax Credit (NMTC) Extension Act, New Markets Tax Credit Coalition, available at <https://nmtccoalition.org/wp-content/uploads/NMTC-Fact-Sheet.pdf>.

⁹ Racial Wealth Snapshot: American Indians/ Native Americans, National Community Reinvestment Coalition (Nov. 18, 2019), available at <https://ncrc.org/racial-wealth-snapshot-american-indians-native-americans/#:~:text=Poverty%20Rates,American%20poverty%20rate%20was%2020.8%25>.

¹⁰ *Id.*

¹¹ What is the New Markets Tax Credit and how does it work? Tax Policy Center Briefing Book, Tax Policy Center (Jan. 2021), available at <https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work>.

¹² Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity, Centers for Disease Control and Prevention (Apr. 23, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>.

group.¹³ The CDC stated that, “[r]ace and ethnicity are markers for underlying conditions that affect health including socioeconomic status, access to health care, and exposure to the virus related to occupation . . .”¹⁴

According to a report issued on March 4, 2021, by the Federal Reserve Bank of Minneapolis, “decades of underdevelopment, including that of key public infrastructure like water and healthcare, has created outsized consequences for our tribal communities and institutions.”¹⁵ The report states that a key issue in the outsized impact of COVID-19 in Indian Country is derived from flat federal funding and underdeveloped infrastructure:

Native American households on reservations are more than three times as likely as households overall to lack complete indoor plumbing. Native households on reservations are twice as likely to live in overcrowded housing than households overall. Less than half of households in Indian Country have access to high-speed Internet service. Modern infrastructure and government services—like education, public health, clean water, broadband Internet, and transportation—are expensive for any government to provide. Yet the hurdle is particularly high for tribal governments, because the revenues available to them are unpredictable and inadequate to meet the long-term needs of their communities. As a result, much of Indian Country is more susceptible to both economic shocks and major crises such as the COVID-19 pandemic. The weakness of tribal public infrastructure, revealed through the pandemic, results not from a lack of willingness or capacity within tribal governments but rather from structural barriers that limit tribes’ ability to generate or access predictable and sufficient revenues.¹⁶

The impact of COVID-19 highlighted the critical infrastructure needs that have plagued Indian Country for decades, especially with respect to key tribal facilities such as health care facilities, schools, law enforcement centers, housing, water sanitation, roads and bridges, and tribal governmental offices.

As highlighted above, the federal government has a trust responsibility to work on a Nation-to-Nation basis with tribal governments. Yet, systematic underfunding of federal construction, maintenance, and infrastructure projects, along with a lack of access to other federal instruments intended to meet the needs of Indian Country such as NMTCs, has left Indian

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Structural Barriers to Tribal Revenues Leave Indian Country Vulnerable to COVID-19 Pandemic, Federal Reserve Bank of Minneapolis (Mar. 4, 2021), *available at* <https://www.minneapolisfed.org/article/2021/structural-barriers-to-tribal-revenues-leave-indian-country-vulnerable-to-covid-19-pandemic>.

¹⁶ *Id.*

Country with aged, unsafe, overcrowded, and inadequate infrastructure for schools, water delivery, transportation, housing, tribal governmental buildings, and law enforcement buildings.

Gila River Indian Community Experience with New Markets Tax Credits

The Community has long sought federal appropriations and federal financing to address the infrastructure needs on our Reservation. Recent school construction projects illustrate the Community's experience with federal appropriations and highlight the Community's inability to obtain NMTCs.

The Community is a 583.7 square mile Reservation located South of Phoenix, Arizona. In many cases, the Community's infrastructure dates back to a relationship with the United States that spans hundreds of years. For example, the Community has three Bureau of Indian Education ("BIE") schools on the Reservation, the Blackwater Community School, Gila Crossing Community School, and Casa Blanca Community School. Each of these three schools are tribally-run pursuant to a contract/compact entered into between the Community's government and the Department of the Interior ("Department") under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), which encourages tribal governments to take over programs previously run by the federal government.

These "self-governance" programs allow tribes to make local decisions that are in the best interest of their communities and also create jobs and build capacity within their communities. Over the years, the Community has taken over federal programs for transportation, social services, education, law enforcement, the tribal court, and many other programs. However, the requirement to provide adequate infrastructure to carry out those programs remains with the federal government in accordance with Section 105(l) of the ISDEAA and the trust responsibility.

The Community's three BIE schools were all overcrowded and in poor condition, but only the Blackwater Community School was on the Department's list of schools to be replaced, despite the other two schools being initially constructed over 100 years ago. Over the years, the school space was supplemented with mobile trailers and other add-ons, but the schools were still overcrowded, in poor condition, and not conducive to a quality education. It is estimated that the current backlog of school construction needs at the Department would take approximately 60 years to address.

The Community decided to pilot a program based on comments by the Interior Appropriations Chair that it would take Congress, tribal leaders, and the Department to come up with an innovative approach to address the construction backlog since appropriations had not kept up with the demand. The Community provided an innovative solution to the school construction issue using the Section 105(l) provision in ISDEAA that requires the Secretary (on behalf of the Department) to provide adequate facilities if a tribal government takes over the federal government's responsibility to perform federal programs. The Community established a program whereby the Community would construct the school – in this case the Gila Crossing Community School – and lease the school back to the Department in accordance with Section 105(l) of ISDEAA. In testimony before House Interior Appropriations in 2019, the Community articulated its plan to seek appropriations to cover the lease payments for the school and also

stated that the Community would use NMTCs to help with the construction costs of the new school.

By 2020, it became clear that the Community would not be able to access NMTCs, because the timing of the project and need to secure appropriations was out of sync with the NMTC cycle. In our 2020 testimony before House Interior Appropriations, we again articulated the need to provide access to NMTCs to tribal governments so this construction/leaseback program could be replicated throughout Indian Country. Our projection was that if NMTCs could be used for these types of projects, the federal government would save up to 20% on each of these construction projects, thereby stretching the federal dollar farther to allow for additional infrastructure projects. We encouraged the appropriators to support the 2020 tribal tax priorities that were the subject of this Committee's hearing in 2020, as access to NMTCs would complement the anticipated growth of the Section 105(l) program at the Department and allow other tribal governments to address their infrastructure needs.

The Community has continued to grow the Section 105(l) program at the Department. We are now near completion on our second school and in the process of finalizing leases for other existing infrastructures used to carry out federal programs. Since our initial appropriation for the Section 105(l) pilot program, we have advocated for, and obtained, indefinite appropriations for this program and we are now working to secure mandatory appropriations, as this program is critical to help address the infrastructure needs in Indian Country. In fact, the Section 105(l) program in conjunction with NMTC, as well as a tribal infrastructure investment in the next infrastructure bill, can address not only the immediate infrastructure needs of Indian Country, but also solve the infrastructure gaps that have persisted for decades, as highlighted by the pandemic.

The Community has utilized its Section 105(l) lease funding to create a tribal infrastructure fund that will be used to pay the debt service for other infrastructure needs within the Community. For example, the Community will pool the lease funding received from the Department and utilize that to secure funding for other infrastructure needs within the Community. Again, this plan may be maximized utilizing NMTCs or other tax-exempt federal financing, and would in a number of years, address the infrastructure backlog throughout the entire Community. This program is replicable throughout Indian Country, if the right federal financing tools are available to tribal governments. But, to use NMTCs to boost this kind of innovative effort, there must be some legislative changes.

While the Community is far along in its use of the construction/leaseback program at the Department, tribal innovation in partnership with Congress and the federal agencies is what will be required to address the infrastructure deficits found throughout Indian Country. Moreover, while the Community was able to access other sources of funding to construct our two schools, other tribes may need to rely on the mandatory funding from the Section 105(l) program and access to NMTCs to complete such projects. Both programs are intended to be accessible to Tribal Nations, but to date, the Department of the Treasury has not placed a priority on ensuring access to NMTCs for Indian Country – despite the federal government's trust responsibility and Congress' intention that the NMTCs be used in low-income and underbanked Communities.

Recommendations

Many of the federal responses to infrastructure needs in the United States rely on two things: (i) a tax base to leverage federal funding and (ii) access to other financing instruments. However, tribal governments do not have a tax base to draw on, and tribal communities have been largely left out of federal financing instruments and programs for large-scale federal infrastructure projects.

The Community urges and recommends Congress to consider several key mechanisms for ensuring that tribal infrastructure needs are met, now and well into the future:

- 1) Provide a tribal set-aside for NMTCs. The federal government has a trust responsibility to tribal governments, and Congress intended the NMTC federal program to provide access to capital otherwise unavailable in low-income communities. Yet, this federal program only distributed 0.4% of New Markets Tax Credits to tribal entities from 2003 to 2016.¹⁷ A tribal set aside of at least five percent (5%) will ensure that tribal projects have dedicated funding and will also alleviate concerns from the CDFI Fund that tribal entities do not have a track record, cannot show capacity, and are outside of the cycle of other projects.
- 2) Authorize the allocation of NMTCs to infrastructure funds, not just specific projects, at least in Indian Country. The Community's experience with NMTCs was not productive for many reasons, but primarily due to the timing for allocations being made. The set-aside recommended above may help to iron out that difficulty somewhat, but we also recommend that you consider authorizing the allocation of NMTCs directly to infrastructure funds making investments in Indian Country and not just to specific projects. This would not only eliminate the timing issue for project development in Indian Country, which for our projects went too fast, but for many others, go too slowly. It would also create incentives for tribes to set up infrastructure funds like ours, using Section 105(l) revenues to do so, and also for private investment as well. Based on our experience, such a change could galvanize and accelerate infrastructure investment across Indian Country and bring real change, not just incremental nibbling away at a huge problem.
- 3) Provide mandatory funding for the Section 105(l) Program within the ISDEAA. Although this program is addressed through Interior Appropriations, it is a clear companion to ensuring that tribal governments seeking federal financing through NMTCs and other financing tools have dedicated resources to secure investments in infrastructure projects. Many tribes do not have the access to capital that the Community has the good fortune to have. Indefinite appropriations status for Section 105(l) leases has substantially improved the certainty of federal funding available through this mechanism, which allows it to be used to securitize borrowing for future infrastructure investments, but making the payments mandatory would improve the credit quality of funds

¹⁷ What is the New Markets Tax Credit and how does it work? Tax Policy Center Briefing Book, Tax Policy Center (Jan. 2021), available at <https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work>.

capitalized by these lease payments and significantly enhance our ability to borrow against it, or our ability to securitize these payments. Making Section 105(l) lease payments, a mandatory appropriation, rather than a discretionary one as it is today, would relieve budgetary pressure on the discretionary budget allocations that pay for Section 105(l) leases, reduce borrowing costs, and provide more assurance to lenders in this new area of potential investment. The combination of access to NMTC and dedicated funding for tribal infrastructure through the Section 105(l) program will create a long-term, sustainable solution to the infrastructure needs in Indian Country and help address the widening gap created by decades of underfunding and lack of access to capital.

- 4) Provide a dedicated tribal infrastructure fund in any infrastructure legislation contemplated by Congress. This Committee was instrumental in supporting tribal governmental COVID-19-relief funding in the American Rescue Plan Act. That funding will see tribal governments through the pandemic and begin to address the infrastructure deficits that led to Indian Country having the highest rates of hospitalization and death during the pandemic. But the infrastructure needs throughout Indian Country run in the tens of billions of dollars due to lack of investment, and in many cases, as in the Community, the infrastructure was built in the early part of the 19th century. A large tribal infrastructure pool in the next infrastructure bill would address many of the costly infrastructure needs throughout Indian Country.

Conclusion

Thank you for the opportunity to provide this testimony to the Ways and Means Committee as you consider how to increase infrastructure investments in Indian Country. I hope the example of how the Community approaches infrastructure development is instructive, along with our inability to attract NMTCs for our infrastructure projects. The Community is happy to assist this Committee, appropriators, and other tribes as we all work together to ensure the infrastructure needs of Indian Country are met.