



U.S. Department
of Transportation
**Federal Highway
Administration**

Side: 7729
Memorandum

Subject: Federal-Aid Projects Within
Indian Reservations

Date: FEB 18 1988

From: Director, Office of Highway
Operations
Washington, D.C. 20590

Reply to
Attn. of:

HHO-32

To: Regional Federal Highway Administrators
Regions 1-9

We recently received an inquiry from Region 10 concerning Tribal Employment Rights Offices (TERO) issues relative to Federal-aid projects within Indian reservations. The inquiry covered TERO fees or taxes on projects that are only partly within the reservation boundaries and TERO fee or tax assessments exceeding 1 percent of the total contract amount. Region 10 also asked about situations where a tribe refuses to establish firm employment goals and/or TERO fees before bid letting.

Because these same issues may be a concern in other States, I am attaching a copy of Mr. Farris' February 11 reply. I think you may find it helpful in dealing with similar situations.

If you have any questions about these issues, please feel free to contact Mr. William A. Weseman, Chief of the Construction and Maintenance Division (366-0392), or me (366-0341).


David S. Gendell

Attachment

FHWA:HNG-1:RWeingroff:rw:6-4856:02/17/88
RE: 880120-023
cc: HOA-1, HOA-2, HOA-3, HOA-3(ES)
HOA-JT, HCC-1, HCC-50, HCR-1, HHO-30

Reader HHO-1
~~Reader HHO-32~~
Chron HHO-32
Official File 3218

Reader 3218
Mr. Rockne HHO-32
HRA-010



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Washington, D.C. 20590

Subject: Federal-Aid Projects within
Indian Reservations (Your
Memorandum of January 12)

Date February 11, 1988

From: Deputy Administrator

Reply to
Attn of: HHO-32

To: Mr. M. Eldon Green
Regional Administrator (HRC-010)
Portland, Oregon

We have reviewed your memorandum on administration of Federal-aid projects within Indian reservations. You asked three questions that have been raised in Region 10 States.

I am attaching a copy of Mr. Barnhart's memoranda of May 8 and October 6, 1987. They contain our policy on Indian employment preference. My comments on the issues you raised will be in the context of these memoranda.

The first two issues involve imposition of a TERO tax on the value of the contract:

- (1) Can the tribe impose a TERO fee or tax on the full contract amount when the project is only partially within the reservation boundaries?
- (2) What is the Federal Government's policy with regard to Federal-aid participation when the TERO fee exceeds 1 percent of the total contract amount?

Mr. Barnhart's October 6 memorandum did not dictate a Federal policy on this subject. Rather, we have chosen to accept each State's policy as long as it does not discriminate or otherwise single out Federal-aid highway construction contracts for special or different TERO tax treatment.

Indian tribes have sovereignty to regulate and tax activities within their reservations unless they are specifically divested of their authority by Federal law. We do not know of any Federal laws that place express limits on the TERO programs. In fact, Section 122 of the 1987 STURAA recognizes the right of Indian employment preference in the Federal-aid highway program. Moreover, the Senate Committee report on the act encouraged the Secretary to cooperate in implementing a TERO tax requirement.

Although the tribes have the authority to impose the tax, we have the responsibility to ensure it does not discriminate against Federal-aid projects. Therefore, a tribe may impose a TERO tax on the full contract amount of a

Federal-aid project when the project is not wholly within the reservation boundaries if this is accepted State policy for non-Federal-aid projects as well. However, in instances where tribes attempt to apply their taxing authority in a disproportionate manner, the Division Office should work with the State to ensure project limits are established that keep such applications to a minimum.

We do not have a Federal policy on TERO taxes exceeding 1 percent of the total contract amount. The same Senate report mentioned a 1-percent cap, but the limitation was not included in the statute. As you noted, the committee report " . . . has no legal force or affect standing alone" to regulate the Indian tribe's sovereign authority. Therefore, the tax may exceed 1 percent. Our concern is to ensure that the same rate imposed on Federal-aid projects is imposed on other projects.

You also asked about tribal employment practices:

- (3) What can the State and Federal Government do if the tribe refuses to agree to establish firm employment goals and/or TERO fees prior to bid letting?


Mr. Barnhart's October 6 memorandum set the tone for implementation of Indian employment preference on Federal-aid projects. States and Indian tribes must work together to establish reasonable and mutually acceptable goals as well as requirements for achieving them. These goals and requirements must be added as an integral part of the contract.

We agree with you that on projects subject to Indian preference, the lack of an agreement before award can lead to substantial conflicts. It can also lead to additional unanticipated cost for the contractor. For these reasons we believe that before the FHWA authorizes advertisement of a contract, agreements on these important items must be reached and the requirements placed on the contractor clearly set forth in the bidding proposal.

As with many provisions of the 1987 STURAA, Section 122 has taken us into a new area. Although we have tried to implement this provision smoothly, we recognize that some areas may require refinement. You may be right that eventually, congressional action may be needed. For now, though, we think it best to continue under present law and implementation, giving the States some latitude to resolve issues as they arise.

I hope my comments will allow you to resolve the questions that have come up in Region 10. Please let me know if you need additional information. In addition, please keep us informed if further problems arise.

2 Attachments

For  Robert E. Farris



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Washington, D.C. 20590

Subject: Section 122, Surface Transportation and Uniform
Relocation Assistance Act of 1987--Indian
Employment Preference

Date: **OCT 6 1987**

From: Federal Highway Administrator

Reply to
Attn. of: **HHD-32**

To: Regional Federal Highway Administrators

My memorandum of May 8, 1987, copy attached, advised you of the enactment of an Indian employment preference provision as a part of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987. Subsequent to issuance of this memorandum, we have received several requests for a more complete clarification of FHWA's policy. It is the intent of this memorandum to provide such clarification.

Historically, FHWA's primary function has been to assist State highway agencies in the construction of highways and bridges. In fulfilling its responsibility, FHWA has diligently attempted to implement the provisions of Title 23 U.S.C., as amended, strictly within the statutory limitations of Title 23. My memorandum of February 1, 1985, was issued in order to resolve problems which had arisen regarding interpretations of Indian preference, to distinguish between reservation roads in the jurisdiction of the Bureau of Indian Affairs whereon Indian preference was clearly permissible by law, and Federal-aid highway projects which I believed were subject to the nondiscrimination provisions of Title 23. The memorandum, however, did not resolve the controversies.

Enactment of the STURAA of 1987 which includes Section 122, now concludes any debate regarding the applicability of Indian employment preference on Federal-aid highway projects. Simply stated, Section 122 amends the antidiscrimination provisions contained in Title 23 U.S.C. 140 to make them consistent with certain provisions of Title VII of the Civil Rights Act of 1964, and thus Indian employment preference as later defined in this memorandum can be applied to Federal-aid highway projects by the States. Accordingly, the FHWA field offices should encourage States to meet with Indian tribes and their Tribal Employment Rights Offices (TERO's) to develop contract provisions for Federal-aid highway projects which will promote employment opportunities for Indians.

States and tribal representatives should identify employment opportunities in advance on appropriate Federal-aid projects. They should determine reasonable overall employment goals for Indians, establish clearly the acceptable requirements which can be used to achieve such goals, and make them an integral part of contract and proposal documents.

To develop a workable and acceptable project Indian employment goal, the State should confer with tribal representatives during project development. In setting the goal, consideration should be given to the availability of skilled and unskilled Indian resources, the type of contract, and the potential employment requirements of the contractor in addition to its core-crew. Once established, the goal should only be changed by the State after consultation with the Indian tribal representative and the contractor and after consideration of good faith efforts to achieve the original goal. Sanctions for failure to meet the employment goal should be determined in advance and be made a part of the contract to facilitate enforcement.

In order to assure a consistent application of Section 122, several significant items must be clarified:

1. Federal-aid projects eligible for Indian employment preference consideration are those projects which are (a) otherwise eligible for funding in whole or in part with Federal-aid highway funds and (b) located on roads within or providing access to an Indian reservation or other Indian lands as defined under the term "Indian reservation roads" in Section 101 of Title 23 and regulations issued thereunder. The terminus of a road "providing access to" is that point at which it intersects with a road functionally classified as a collector or higher classification (outside the reservation boundary) in both urban and rural areas. In the case of an Interstate highway, the terminus is the first interchange outside the reservation.
2. Indians eligible for employment preference are those living on or near a reservation or Indian lands (as defined above). Indian preference is to be applied without regard to tribal affiliation or place of enrollment. Indians already hired by a contractor should be included as part of the contractor's core-crew. In no instance should a contractor be compelled to layoff or terminate a core-crew employee to meet a preference goal.
3. The TERO Tax--Many tribes have established a tax which is applied to contracts for projects performed on the reservation. The proceeds are used by the tribes to fund job referral, counseling, liaison, and other services relating to the employment of Indians. It has been FHWA's longstanding policy to participate in State and local taxes which do not discriminate or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. Thus, if the TERO tax rate on Federal-aid highway contracts is the same as imposed on other projects, such costs are eligible for Federal-aid reimbursement.
4. Indian Contractor Preference--The language of Section 122 and the legislative history make it clear that the singular intent of the new amendment is to permit and encourage Indian preference in employment on Indian reservation roads. The only contracting preference which can be recognized in a Federal-aid highway contract is that authorized by disadvantaged business enterprise (DBE) statutory provisions (Section 105(f) of the 1982 Surface

Transportation Assistance Act and Section 106(c) of the 1987 STURAA) and regulations issued thereunder. Under DBE regulations, Native Americans, which include American Indians, are rebuttably presumed to be socially and economically disadvantaged. Thus, Indian owned businesses are eligible for DBE certification by the State and once certified may be given equal preference with other certified DBE's to fulfill goals on Federal-aid projects. The availability of certified Indian owned businesses should be considered in setting contract DBE goals.

The issues addressed herein, coupled with the information contained in our earlier May 8 memorandum, should provide the guidance necessary to assure that FHWA policy relative to Indian employment preference is applied uniformly within the parameters of Section 122. Please see that States and Indian tribal governments are made aware of this additional policy guidance.



R. A. Barnhart

Attachment

Archived