

HOUSE INTERIOR APPROPRIATIONS COMMITTEE
TESTIMONY OF GOVERNOR STEPHEN ROE LEWIS
GILA RIVER INDIAN COMMUNITY

March 8, 2023

Chairwoman Simpson and Ranking Member Pingree, thank you for the opportunity to submit testimony on behalf of the Gila River Indian Community (“Community”). The Community’s testimony includes two requests: 1) making funding for the section 105(l) leasing program mandatory; and 2) a minimum amount of \$3.0 million in the Department of the Interior’s fiscal year 2022 budget for the Bureau of Indian Affairs Trust – Real Estate Services program designated to carry out the implementation of Public Law 115-350 – the “Gila River Indian Community Federal Rights-of-Way, Easements and Boundary Clarification Act.”

Mandatory Funding for the Indian Self-Determination and Education Assistance Act, Section 105(l) Lease Program

Background on 105(l) lease program

The Indian Self-Determination Education and Assistance Act (ISDEAA), at 25 U.S.C. § 5324(l) mandates that the Secretary of the Interior or Health and Human Services enter into a lease, commonly referred to as a “105(l) lease”, with a Tribe or Tribal organization for a facility used for the administration and delivery of ISDEAA services and further mandates that the Secretary reasonably compensate the Tribe for the use of the facility.¹ Compensation for a 105(l) lease is calculated based on federal regulations that provide three different lease compensation methods: (1) fair market rental; (2) cost elements; or (3) a combination of fair market rental and the cost elements (as long as they are not duplicative).²

The Indian Health Service (“IHS”) has been entering into 105(l) leases with Tribes for a number of years while Interior only recently began receiving applications to enter into 105(l) leases with Tribes. In fact, the Gila River Indian Community (“Community”) was the first Tribe to enter into a 105(l) lease with Interior.

The Community was encouraged to pursue this statutory authority based on what all parties – the Administration, Congress, and Tribes agreed has been a long-term problem in Indian education – how to meet the school construction needs within the Bureau of Indian Education (“BIE”) system given federal budgetary constraints. For many years, Congress heard about the substandard conditions at many BIE schools, some initially built over 100 years ago, and the negative impact these school conditions have on the education of Native youth. Under current funding levels, it

¹ The statutory language specifically provides:

(1) Upon the request of an Indian tribe or tribal organization, the Secretary *shall* enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this chapter.

(2) The Secretary *shall* compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable. (emphasis added)

² 25 C.F.R. Part 900, Subpart H.

would take over 60 years, or another three generations of students before the current backlog could be eradicated.

While congressional appropriators responded by increasing school construction funding where possible, it was well-known that periodic funding increases alone would not be sufficient to address this long-standing issue. Several years ago, the House Interior Appropriations Subcommittee challenged the Administration and Indian Country to work together to bring innovative solutions to the school construction backlog. In 2019, Interior and the Community heeded that call and proposed a school construction/leaseback program.

Community's School Construction/105(l) Leaseback

The construction/leaseback program in the BIE school context worked as follows: the Community agreed to construct the school using its own funds and upon completion, leased the school facility back to Interior through a negotiated 105(l) lease, using the 25 C.F.R. Part 900 regulations to calculate the lease compensation. The Community was able to complete construction in a little over a year, under budget and for less than the amount Interior would have spent to replace the school had it gone through the school construction replacement process. Another added benefit is that schools like the Community's school that were on the BIE replacement list will no longer be vying for the school replacement list, creating space in the budget for other schools in the BIE system.

Since the successful completion of the first school, the Community has constructed a second school – the Casa Blanca Community School which opened in August of 2021. It should be noted, that the 105(l) program can be used for any type of infrastructure that houses programs that are subject to ISDEAA contracts or compacts, and the Community is now in the process of constructed a new law enforcement facility which is expected to be completed by the end of this year. This new facility will finally provide an adequate facility for our Gila River Police Department – a facility that has been needed for over thirty years.

Benefits of the 105(l) Lease Program

The 105(l) lease program has enormous potential for all Tribes that are in need of new government buildings and infrastructure. It would be of use for any self-governance function that a Tribe has taken on, allowing the Tribe to modernize its buildings and other infrastructure without any need for a massive new spending bill or authorization. For any Tribe that is not looking to construct a new building, the program is equally useful because the revenue from a 105(l) lease on existing facilities providing self-governance programs goes directly to the Tribe's general fund and can be used to fund any and all Tribal government services or functions which serves to address the historic underfunding of tribal programs.

Congressional Support for 105(l) Expansion

Recognizing the importance and need for 105(l) leases, the program has grown from funding for our pilot program to construct the first school, to programmatic funding, and then in the 2021 Omnibus Appropriations bill Congress passed statutory appropriations language that creates a new indefinite spending account, similar to Contract Support Costs, whereby "such sums as may be necessary" are authorized to be appropriated on an annual basis for Tribal Leases. This new budget line-item for Tribal Leases at both Interior and IHS established more secure funding for the program and ensures that IHS and Interior will not be forced to reprogram funding from other important Tribal programs in any given fiscal year.

Need for Mandatory Funding for Mandatory Authority

Congress and the Administration can and should go one step further to ensure that the full potential of this program can be reached by making the 105(l) leases mandatory funding. Given the Court cases³ surrounding the 105(l) statutory mandatory authority, Congress views 105(l) leases as an “entitlement” program, however, it is an anomaly, in that the funding comes out of the Interior bill’s discretionary funding rather than mandatory funding. Moving the Tribal Leases to mandatory funding would enable more tribes to attract capital to undertake the construction of new facilities, and ensure that the program is treated as mandatory spending consistent with the statute.

We recommend that the Interior Appropriations Committee include the 105(l) in its FY 2022 budget request as a mandatory funding obligation, rather than as a program funded out of the Interior bill’s discretionary funding.

Need to Ensure 105(l) Lease Program Support as Priority Program at Interior

As the program has continued to grow, tribes from all across Indian Country have submitted requests to enter into the 105(l) lease program for existing tribal buildings and in anticipation of constructing new buildings. In the past year there has been a dramatic increase in the number of lease requests submitted. Tribes should be encouraged to pursue 105(l) leases with Interior and IHS as one means of fulfilling the intent of the Indian Self-Determination and Education Assistance Act and the funding mechanism for this program should reflect its mandatory nature.

Implementation of the “Gila River Indian Community Federal Rights-of-Way, Easements and Boundary Clarification Act”

Background

On December 21, 2018, the Gila River Indian Community Federal Rights-of-Way, Easements and Boundary Clarification Act (“Act”) was signed into law. The Act enabled the Community to obtain the full benefits of a settlement the Community reached with the United States resolving federal litigation that originated in 2006. Part of the 2006 litigation included, among other things, a reconciliation of the Community’s non-monetary trust assets for the alleged mismanagement of these resources by the United States.

Implementation of the Act

The Act mandates surveys and publication of all federal rights of all rights-of-way on the Community’s Reservation within six (6) years of date of enactment of the law. The Act also authorizes the Bureau of Indian Affairs to contract for the survey of all Federal rights-of-way to the Community or a third party.

Sec. 8. Survey.

- (a) Completion and Publication. – Not later than 6 years after the date of enactment

³ See *Maniilaq Association v. Burwell* 72 F. Supp. 3d 227 (D.D.C. 2014) (“Maniilaq I”) (established that a 105(l) lease may be incorporated into an ISDEAA funding agreement and submitted as a final offer); *see also*; *Maniilaq Association v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016) (“Maniilaq II”) (ordering the Indian Health Service (IHS) to enter into a 105(l) and must compensate the tribe for reasonable facility expenses).

of this Act, the Bureau of Indian Affairs shall undertake and complete a survey of each of the Federal rights-of-way established under this Act...

- (b) Contract – The Bureau of Indian Affairs is authorized, subject to appropriations, to contract for the survey of all Federal rights-of-way established pursuant to this Act to the Community or a third party.

Since appropriations were awarded in fiscal year 2020, the Community amended its Multi-Year Funding Agreement (MFA) with the Bureau of Indian Affairs, pursuant to Title IV (Tribal Self-Governance) of the Indian Self Determination and Education Assistance Act (Public Law 93-638, as amended). The Amendment allows Community to perform the required surveying of all rights-of-ways across the Reservation including those related to roadways, canals, power lines, and other projects constructed for the benefit of the Community or its members. This is an important component of ensuring the work is completed in a timely and efficient manner because the Community has the capacity to complete the work within the timeframe allotted, is familiar with the roadways, canals, and utilities that need to be surveyed, and can devote the resources necessary to ensure completion within the timeframe dictated by Congress. However, funding to implement the Act has not followed.

Funding Justification:

Following the Settlement Agreement, and in anticipation of legislation being enacted, the Community had a Cost Assessment prepared to determine the overall cost of the surveying project to the Bureau of Indian Affairs. That Cost Assessment was completed in 2015 and envisioned surveying approximately 300 miles of roadways, nearly 200 canals and nearly 300 power lines to ensure all of the rights-of-ways are surveyed and recorded. Based on the 2015 estimate, adjusted for inflation, the anticipated total cost of the surveying project would be \$15,533,348 plus \$150,000 annually for support from the Bureau of Indian Affairs region in the form of documentation and processing of the Federal rights-of-ways.

To date, only \$1 million has been appropriated (in fiscal year 2020 and in fiscal year 2023) leaving approximately \$14.5 million of work to be conducted. While it is clear that the work will not be completed within the six years contemplated in the Act, unless full funding is provided, the Community requests \$3,000,000 in fiscal year 2024 in order to make serious progress on the surveying work. Alternatively, full funding could be provided which would allow the Community to perform the work and fulfill the mandates under the Trust Settlement Act.

Conclusion

The Community appreciates the efforts and support of Congress in funding the pilot project to show how the 105(l) program can benefit not only the Community but all of Indian Country. The next step is to make that program accessible for all tribes and break through the infrastructure backlogs throughout Indian Country by making the funding mandatory. We also hope this Committee will help to ensure that the last step in the Community's Trust Accounting settlement with the United States is funded so the program can be completed within the six-year timeframe contemplated by Congress when it passed the legislation.