



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

B-164497

May 3, 1978

The Honorable Pete V. Domenici
United States Senate

Dear Senator Domenici:

This is in response to your request for our opinion on certain aspects of the Indian Reservation Roads and Bridges program which you indicate will be the subject of hearings to be held by the Subcommittee on Transportation of the Senate Committee on Environment and Public Works.

You explained the context of the Subcommittee's problem as follows:

"In every Federal-Aid Highway Act since 1956, when the biennial series began, there has been contract authorization (in dollars) for 'Indian reservation roads and bridges,' funded subsequently by liquidating cash in the Department of Interior Appropriation Acts.

"For FY 1977 the Bureau of Indian Affairs submitted, as part of the President's budget, an appropriation request for Indian reservation roads and bridges which requested liquidating cash under the authority of 23 U.S.C. 203 as amended by the Federal-Aid Highway Amendments of 1974, and additional appropriations under the authority of 25 U.S.C. 318a to make up the difference to the program level. The Congress subsequently appropriated the program total in two parts (P.L. 94-373), one under the authority of Title 23, the other under the authority of Title 25. As I understand it, this necessitated keeping two sets of books in the Bureau of Indian Affairs to avoid commingling the funds. The reason cited for invoking Title 25 in the House Report (No. 94-1218, p. 29), dated June 8, 1976, was that further contract authority for the program contained in the renewal of the Federal-Aid Highway Act was not yet enacted into law (although the Federal-Aid Highway Act of 1976 had become law on May 5, 1976).

"The following year, well after the enactment of the Federal-Aid Highway Act of 1977, the Bureau of Indian Affairs submitted, as part of the President's budget for FY 78, an appropriation request for Indian reservation roads and bridges which included liquidating cash for prior years' obligations under the authority of 23 U.S.C. 203, and new FY 78 budget authority was requested as appropriations under the authority of 23 U.S.C. 203 and 25 U.S.C. 318a simultaneously. The Congress subsequently appropriated the amounts as requested (P.L. 95-74). The Bureau of Indian Affairs has assumed that Title 23 and Title 25 funds may now be commingled in spite of a Department of Interior Solicitor's opinion that they may not.

"The Bureau of Indian Affairs has recently once more submitted, as part of the President's budget for FY 1979, an appropriation request for Indian reservation roads and bridges, i.e., road construction which includes a request for liquidating cash for prior years' obligations under the authority of 23 U.S.C. 203, and a request for a new FY 1979 budget authority as an appropriation under the authority of 23 U.S.C. 203 and 25 U.S.C. 318a simultaneously."

Since you feel that the two sections are "mutually exclusive," you ask first:

"Is it proper to cite both 23 U.S.C. 203 and 25 U.S.C. 318a simultaneously as authorities to appropriate funds for Indian reservation roads and bridges?"

25 U.S.C. 318a provides:

"Appropriations are hereby authorized out of any money in the Treasury not otherwise appropriated for material, equipment, supervision and engineering, and the employment of Indian labor in the survey, improvement, construction, and maintenance of Indian reservation roads not eligible to Government aid under the Federal Highway Act and for which no other appropriation is available, under such rules and regulations as may be prescribed by the Secretary of the Interior."

The origin of the provision is the Act of May 26, 1928, entitled "An Act to Authorize an Appropriation for Roads on Indian Reservations," chapter 756, 45 Stat. 750, 70th Cong., 1st Sess. It stemmed from a recommendation from the Secretary of Interior at that time that proposed legislation, then being considered by the Congress, to provide additional authorizations for construction of roads under the Federal Highway Act, was not necessary since "ample provision" for cooperative Federal-aid highways had already been made. He pointed out, however:

"* * * practically the reservations need improved roads to connect the various Indian communities with the main Federal-aid highways. Such roads, not being on the approved 7 per cent system, are not eligible to [receive] Government aid under the Federal Highway Act. We have had no regular appropriation for road work on the Indian reservations in the past. * * *"

He then recommended the legislative authorization which became 25 U.S.C. 318a, supra, for appropriations specifically for Indian reservation roads which were not eligible for Government aid under the Federal Highway Act or any other act. For the next 28 years, 25 U.S.C. 318a was cited as the authority for appropriations for Indian roads.

Then on June 29, 1956, the First Biennial Federal-Aid Highway Act was enacted, authorizing appropriations for the construction, improvement, and maintenance of Indian reservation roads and bridges to provide access to Indian reservations and Indian lands "under the provisions of the Act approved May 26, 1928 (45 Stat. 750) * * *." Public Law No. 627, 70 Stat. 376. A similar provision appears in the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, April 16, 1958, 72 Stat. 93.

On August 27, 1958, all of the various permanent provisions of past Federal highway laws, substantive provisions contained in appropriation acts, and language appearing in annual and biannual authorization acts were "revised, codified and reenacted" into positive law, as title 23, United States Code "Highways," by Pub. L. No. 85-767, 72 Stat. 885. For the next 19 years, only title 23 provisions were cited as authority for Indian road and bridge projects and chapter 756 of the Act of May 26, 1928, 25 U.S.C. 318a, dropped into disuse.

Section 101(a) of title 23 provides that:

"The term 'Indian reservation roads and bridges' means roads and bridges that are located within an Indian reservation or that provide access to an Indian reservation or Indian land, and that are jointly designated by

the Secretary of the Interior and the Secretary [of Commerce] as part of the Indian Bureau road system."

In 1974, the Congress further expanded the purposes for which highway contract authority and appropriations for Indian reservation roads and bridges could be used. Public Law No. 93-643, January 4, 1975, 88 Stat. 2281, amended the definition of the term "Indian reservation roads and bridges" in 23 U.S.C. 101(a) to include roads and bridges in the Federal-aid highway system as well as those in the Indian Bureau road system.

With this amendment, all kinds of Indian roads and bridges are covered under the Federal-Aid Highway Act provisions of title 23. Since 25 U.S.C. 318a applies only to projects which are not eligible for funding under the Federal-Aid Highway Act or other legislation, and there are no longer any such projects, the authority in 25 U.S.C. 318a no longer serves a functional purpose.

On the other hand, we know of no legal impediment if the Congress cites 25 U.S.C. 318a and 23 U.S.C. 203 simultaneously as authority for an Indian roads and bridges appropriation. While 25 U.S.C. 318a is presently inoperative, its citation is at worst merely surplusage and its inclusion in no way invalidates the appropriation authority in 23 U.S.C. 203.

In answer to your fourth question, 25 U.S.C. 318a authorizes appropriations for specific purposes in connection with Indian reservation roads "not eligible to [receive] Government aid under the Federal Highway Act and for which no other appropriation is available." In our opinion 25 U.S.C. 318a does not contemplate that the Department of the Interior (Bureau of Indian Affairs) would request funds under the appropriation authorization authority of that section if the roads and bridges for which funds are requested would be eligible for aid under title 23.

In answer to your second question, we cannot characterize 25 U.S.C. 318a as having been "superseded" by 23 U.S.C. 208(c) even though, as stated above, there is at present no use for the title 25 authority. As long as the provision remains on the books, it could again become functional if some future Federal-Aid Highway Act revision left some portion of Indian reservation roads and bridges uncovered.

Your letter suggests that pages 83 and 117 of H.R. Rept. No. 1938, 85th Cong., 2nd Sess., on H.R. 12776, which later became Pub. L. No. 85-767, the Act that codified title 23, supports your belief that the 1928 authority was intended to be repealed. Page 83 of the report

shows the source in prior law for section 208(a) as "1956 Act, sec. 104(c), part," and "1958 Act, sec. 4(c), part." Those sections in turn, refer back to the provisions of chapter 756, which was the appropriation authorization of the 1928 Act, 25 U.S.C. 318a.

It should be noted that it is section 208(a) which contains an authorization to use funds available for Indian reservation roads and bridges to construct and improve them, rather than section 208(c). At the time of the codification, section 208(c) was concerned only with employment of Indian labor. This provision now appears at 23 U.S.C. 208(d); section 208(c) now relates to apportionment of State funds under another section of the act. Part of the confusion may have been caused by a table of distribution and placement of sections of existing law in the new title 23, which appeared at page 117 of the report. The table shows the following:

Existing law	Merged into, amended or repealed by--	New Title 23
***	***	***
Authorization of May 26, 1928 (45 Stat. 755, p. 750).	Executed
Appropriations for Roads on Indian Reservations Author- ized May 26, 1928 (45 Stat. 756, p. 750).	Sec. 4(c), 1958 Act ...	208(c)"

You ask, in your fifth question:

"Was the wrong chapter of 45 Stat. 750 repealed by the codification of Title 23 (P.L. 85-767; 72 Stat. 919, Section 2, Item 10)? That is, should not 45 Stat. Chapter 756, page 750, have been repealed instead of, or in addition to 45 Stat. Chapter 755, page 750
* * *"

We do not think so. Section 2 of Pub. L. No. 85-767, supra, contained a list of 40 statutes, all or part of which were repealed by the codification of title 23. There is no express repeal of chapter 756, which was codified as 25 U.S.C. 318a. There is, however, an express repeal of chapter 755, which was enacted on the same day as chapter 756

and which provided appropriation authority for construction of rural post roads, forest roads and trails for the fiscal years ending June 30, 1930 and June 30, 1931. Chapter 755, as the table shows, was considered to be "executed." It seems clear, therefore, that chapter 755 was repealed intentionally as being obsolete. We have no basis to believe that it was intended to repeal chapter 756 instead of chapter 755. Chapter 756 specifically authorized appropriations for roads on Indian reservations. The essence of this act was incorporated, in effect, into the aforementioned provisions of title 23 of the United States Code, but neither the language nor the legislative history of Pub. L. No. 85-767, supra, indicate a specific intention to revoke chapter 756.

Your third question is concerned with accounting for funds appropriated simultaneously under the authorities of both 23 U.S.C. 203 and 25 U.S.C. 318a. You indicate that for fiscal year 1977, the Bureau of Indian Affairs kept two sets of books to avoid commingling title 23 (Highways) and title 25 (Indians) funds. Additionally, you state that the Bureau of Indian Affairs, despite a Department of the Interior Solicitor's opinion to the contrary, assumes that title 23 and title 25 funds may now be commingled.

The Solicitor's opinion to you which you refer concerning the commingling of title 23 and title 25 funds apparently was rendered in regard to Interior's fiscal year 1977 appropriations. In that act \$39,075,000 was appropriated for construction of roads pursuant to 25 U.S.C. 318a, and \$36,795,000 was appropriated for liquidation of obligations incurred pursuant to 23 U.S.C. 203. Since the two appropriations were for different purposes (i.e., the first for construction of roads pursuant to title 25 and the second for liquidation of obligations incurred pursuant to title 23) it was necessary to account for each appropriation separately. However, the Department of the Interior and related agencies appropriation, fiscal year 1978, 91 Stat. 285, 293, Pub. L. No. 95-74, reads, in pertinent part, as follows:

"* * * for construction of roads and bridges pursuant to authority contained in 23 U.S.C. 203 and 25 U.S.C. 13, 318a, \$75,335,000, to remain available until expended."

It is clear from the above language that the total amount of the appropriation may be expended for 23 U.S.C. 203 purposes, for 25 U.S.C. 13 purposes or for 25 U.S.C. 318a purposes. That is to say that since the full amount of the appropriation is available to construct roads and bridges under the authority of any of the three code sections cited above there would be no requirement that the funds be segregated or

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separately accounted for. All Interior would have to show was that the total expenditures from the fiscal year 1978 appropriation were for any of the purposes authorized by the code sections cited therein. Your third question is answered accordingly.

Sincerely yours,

R. F. Killam
Deputy Comptroller General
of the United States