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LAND ISSUES

Carcieri Fix Talking Points

- The U.S. Supreme Court's 2009 decision in *Carcieri v. Salazar* reversed the long-standing federal process of placing land into trust for Indian Tribes, by sharply limiting the Department of Interior's authority to take land into trust only for Tribes "under federal jurisdiction" in 1934, an undefined status that is generating a wave of costly litigation. Since 1934, Republican and Democratic administrations alike have interpreted the Indian Reorganization Act (IRA) to authorize the Department of Interior (DOI) to place land into trust for all federally recognized Tribes.

- For 75 years, DOI has restored Tribal lands through trust acquisitions to enable Tribes to build schools, health clinics, hospitals, housing, and provide other essential services to Tribal members. DOI has approved trust acquisitions for approximately 5 million acres of former Tribal homelands, far short of the more than 100 million acres lost through Federal policies of removal, allotment, and assimilation.

- *Carcieri* is causing economic chaos in Indian country. The Tribal land base is a core aspect of Tribal sovereignty and represents the foundation of Tribal economies. Legal challenges to Indian land holdings acquired under the IRA threaten Tribal businesses, reservation contracts and loans, and discourage businesses from investing in Tribal economies and essential Tribal government infrastructure projects, including housing projects and schools.

- *Carcieri* has created two classes of Tribes. Those "under federal jurisdiction" in 1934 and those that were not. This has caused unequal treatment of federally recognized Tribes, which is contrary to federal law.

- The *Carcieri* decision raises significant concerns and questions about public safety and criminal jurisdiction on Indian reservations, opening the door for challenging hundreds of federal court convictions that were based on the fact that the crime occurred on Indian lands.

- Because taking land into trust for gaming purposes is subject to the provisions of the Indian Gaming Regulatory Act, the *Carcieri* Fix legislation, which amends the Indian Reorganization Act by restoring the Secretary of the Interior's authority to take land into trust for any federally recognized Tribe, would have little impact on those acquisitions.

- The confusion created by the *Carcieri* decision has spawned a growing number of legal disputes over proposed and existing trust acquisitions in which the United States, at taxpayer expense, is a defendant. More than 15 such federal lawsuits already exist. Addressing *Carcieri* through legislative action comes at NO COST to taxpayers and promotes economic development and self-sufficiency in Indian Country.

- Big Lagoon Rancheria v. State of California – Another Staggering Blow to the Stability of Indian Trust Lands: On January 21, 2014, a split panel of the Ninth Circuit, relying on the Supreme Court's decision in *Carcieri v. Salazar*, held that the State of California was under no obligation to enter into negotiations for a compact with the Big Lagoon Rancheria (the "Tribe"). The Circuit Court based this holding on the ground that the land upon which the Tribe proposed to conduct gaming was unlawfully taken into trust in 1994, nearly twenty years ago, because the Tribe was not "under federal jurisdiction" in 1934. Typically, a party would have no more than six years to challenge a land into trust acquisition. This decision, which changed the test for determining the statute of limitations, is already being used in other cases around the country to attack Tribal land holdings, raising the possibility that many Tribal lands that have been held in trust for decades could be taken out of trust status. This would dramatically magnify the economic, jurisdictional and other issues already described above.

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January 24, 2014

Supreme Court's *Carcieri* Case Continues to Wreak Havoc on Federal Indian Law

Misguided Ninth Circuit Decision in *Big Lagoon Rancheria v. California*

On Tuesday, January 21, a three-judge panel of the Ninth Circuit Court of Appeals issued its opinion in *Big Lagoon Rancheria v. California*. In a 2 – 1 decision, the court turned what began as an Indian Gaming Regulatory Act (IGRA) bad faith negotiation lawsuit between the Big Lagoon Rancheria (Tribe) and the state of California (State) into a *Carcieri*-related decision that has may adversely impact Indian tribes nationwide.

In holding that California has no obligation under IGRA to negotiate in good faith with the Big Lagoon Rancheria, the court reasoned that the Tribe did not have jurisdiction over the eleven-acre trust land parcel on which it sought to conduct gaming operations. The court reached this holding despite the fact that the United States placed the eleven-acre parcel into trust under the Indian Reorganization Act (IRA) in 1994 – nearly twenty years before the panel issued its opinion.

There is some hope that the Ninth Circuit will review and reverse this misguided opinion *en banc* (a hearing at which at least eleven judges in the Ninth Circuit would reevaluate the merits of the case). But, the decision is yet another indication that Indian country must strongly urge the Congress and the Administration to permanently address the Supreme Court's 2009 decision in *Carcieri v. Salazar*. In *Carcieri*, the Supreme Court held that the Secretary of the Interior, under the IRA, did not have authority to place land into trust for a tribe that was not "under federal jurisdiction" in 1934, the year that Congress passed the IRA.

Background

This case stems from failed compact negotiations between the Tribe and the State that date back to 1998. The Tribe brought suit under IGRA, alleging that the State failed to negotiate a Class III gaming compact in good faith.

During this first round of litigation, the Tribe continued negotiations with the State and preliminarily agreed to conduct gaming on lands off of the Tribe's existing reservation in Barstow, CA. Big Lagoon and the State reached a settlement, and the lawsuit was dismissed without prejudice. However, the negotiated settlement was never finalized as California's legislature failed to approve its terms.

In 2007, the Tribe contacted the State, formally requesting new negotiations to conduct Class III gaming on the Tribe's reservation, which consists of two parcels of land in Northern California. One parcel, consisting of nine acres, was acquired by the United States for the Tribe in 1918. The United States placed the other eleven-acre parcel of land into trust for the Tribe in 1994.

The State refused to negotiate a Class III gaming compact on the Tribe's eleven -acre parcel, but offered to compact for limited gaming on the nine-acre parcel. The State also made revenue sharing demands coupled with a 50-mile exclusivity agreement. The State also demanded that the Tribe comply with a list of environmental mitigation measures. Unsatisfied with the last round of negotiations, the Tribe again filed an IGRA bad faith negotiation suit against the State in 2009.

District Court Ruling

In its response to the 2009 suit, the State argued that California did not have to negotiate in good faith with the Tribe because the Tribe was "not eligible to be a beneficiary of a trust conveyance [under the IRA] and, thus, was never entitled to a beneficial interest in that land." The State added that "[i]t is against the public interest to allow gaming on land that . . . the United States unlawfully acquired in trust for [Big Lagoon]." Citing *Carcieri*, the State argued that the eleven-acre parcel was "not 'Indian lands' eligible for gaming under IGRA," because Big Lagoon was not a tribe under federal jurisdiction in 1934.

The district court dismissed the State's *Carcieri* arguments, noting that the status of the trust parcel was an issue separate from the State's obligation to negotiate in good faith. The district court reasoned that the State could not rely on *Carcieri* as evidence of its good faith because the case post-dated the negotiations: "The State cannot establish that it negotiated in good faith through a *post hoc* rationalization of its actions."

The district court granted the Tribe's motion for summary judgment, holding that the State failed to negotiate in good faith under IGRA. The district court specifically pointed to the State's nonnegotiable insistence on revenue sharing and environmental mitigation as bad faith actions. The court ordered the parties to either conclude a compact within 60 days or to submit their respective proposals to a court-appointed mediator. Both the State and Big Lagoon appealed.

Circuit Court Ruling

The Ninth Circuit's analysis was based upon answering three questions: (1) Must a tribe have jurisdiction over "Indian lands" to compel negotiations?; (2) Has the State waived the "Indian lands" requirement?; and (3) is the eleven-acre parcel "Indian lands"?

1. Must a tribe have jurisdiction over "Indian lands" to compel negotiations?

The court answered "yes" to this question, holding that "a state need not negotiate with a tribe under IGRA unless the tribe has jurisdiction over Indian lands. As a corollary, jurisdiction over Indian lands is a prerequisite to a suit to compel negotiation under IGRA." (This "corollary" view conflicts with past practice permitting tribes to negotiate compacts with states – without trust lands.) The court looked to IGRA's good faith compacting provision, which states:

> "Any Indian tribe ***having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted***, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."

The court reasoned that the "plain meaning" of above-highlighted provision is that a tribe may only request negotiations to conduct gaming on specific Indian land over which the tribe has jurisdiction."

2. Has the State waived the "Indian lands" requirement?

Moving to the second question, the court looked to whether the State had waived the "Indian lands" pre-requisite to compel negotiation. On this question, the Tribe pointed out that the State engaged in negotiations for almost ten years without ever challenging the status of the Tribe's lands. The Tribe also argued that the State conceded that its lands were "Indian lands," admitting in prior filings that "[t]he United States considers [Big Lagoon] to be the trust beneficiary of certain lands the federal government owns in Humboldt County, California."

The court disagreed with the Tribe. It pointed to the State's allegation that "Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to 25 U.S.C. 465 [the IRA]." The court found that this was a "clear invocation of *Carcieri*" on the part of the State.

3. Is the eleven-acre parcel "Indian lands"?

This final question was the meat of the opinion. Here, the court ultimately held that the Tribe was not "under federal jurisdiction in 1934," and, thus, its eleven-acre parcel, placed in trust in 1994, cannot be considered "Indian lands" under IGRA based upon *Carcieri*.

The Tribe's lands were placed into trust in 1994. Thus, the Tribe argued that the State's *Carcieri* claim is barred, under *Patchak*, under the six-year statute of limitation imposed by the Administrative Procedures Act (APA). The court rejected this argument, finding instead that "'administrative actions taken in violation of statutory authorization or requirement are of no effect….' The law treats an unauthorized agency action as if it never existed."

The court then moved on to conduct its own *Carcieri* analysis, ignoring the guidance and factors issued in a variety of *Carcieri* Records of Decision issued by the Department of the Interior in the five years since the *Carcieri* decision.

The court focused on two facts. First, the court weighed what it called a fact— that the Tribe's membership cannot be directly traced to ancestors of the Indians that lived on the 1918 nine-acre parcel of land – heavily against the Tribe. The court stated that, "There was no family or other group on what is now the Big Lagoon Rancheria in 1934. The central purpose of the IRA was to give '[a]ny Indian tribe, or tribes, residing on the same reservation . . . the right to organize for its common welfare.' Since no one resided on what is now the rancheria, there was no group to organize."

Here the court ignored the true undisputed fact, conceded by the State, that the Tribe's eleven-acre parcel of trust land are part of the Big Lagoon Reservation and, thus, Indian lands for purposes of IGRA.

Second, the court found that "the absence of Big Lagoon from the 258-tribe list [the 1947 Hass Report] was not an intentional or inadvertent omission; it was a reflection of reality."

What is clear here is that the two-judge majority has little knowledge of the history of Indian affairs or the fact that the U.S. never claimed to hold an exhaustive list of Indian Tribes, tribal governments "under federal jurisdiction," or "federally recognized tribes" – at least until the 1994 Tribal List Act

mandated such a listing. Despite this reality, these two facts combined to lead the court to conclude that the Tribe was not under federal jurisdiction in 1934.

Outcome

The case is clearly a blow to the Tribe and to all of Indian country. It not only sets negative precedent with regard to the application of IGRA's good faith negotiation requirement but it also will serve to encourage litigants seeking to undermine tribal sovereignty and/or the status of trust lands to assert *Carcieri-related claims* in all lawsuits involving federal laws or federal actions relating to Indian lands.

In addition, the Ninth Circuit has effectively created a new and higher bar under the *Carcieri* decision – one that includes factors such as residency on the questioned Indian lands, the tribe's inclusion on the 1947 Haas Report, and interactions with the BIA involving the specific parcel.

In a footnote, the court conceded that nothing in the decision impacted the trust status of the Tribe's 1994 parcel, outside of the "the parties' respective rights under IGRA." The court denied the State's request to remand the case to directly challenge the trust status of the Tribe's lands. This provides little concession to Indian country.

Next Steps – En Banc Appeal

As noted above, this case may be reviewed *en banc*. The split majority opinion was written by a Senior U.S. District Judge visiting from the Eastern District of New York and joined in by a Senior Ninth Circuit Judge. "Senior status" is a form of semi-retirement for federal court judges. The third judge on the panel, Circuit Judge Rawlinson, the only active judge on the panel, issued a strong dissent. While *en banc* review is granted in rare or exceptional cases, these circumstances and the importance of this case may weigh in favor of *en banc* review.

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November 22, 2013

GENERAL MEMORANDUM 13-104

BIA Releases "*Patchak* Patch": Final Rule on Land-Into-Trust Appeals

On November 13, 2013, the Bureau of Indian Affairs (BIA) issued the Final Rule amending its land-into-trust regulations at 25 C.F.R. Part 151 in response to the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) (the "Patchak" decision). In *Patchak*, the Supreme Court held that the Quiet Title Act did not prevent challenges to the trust status of land after lands had been taken into trust. Prior to that decision, the prevailing view was that the Quiet Title Act precluded judicial review of decisions by the United States to take land into trust after the land had been taken into trust. As a result in 1996, the Department of Interior (Department) had revised its Part 151 regulations to provide potential challengers a 30-day window to bring a lawsuit after the Department decided to take land into trust but before actually taking the land into trust.

In *Patchak*, the Supreme Court held that the Quiet Title Act was no bar to bringing a challenge to a fee-to-trust decision after lands had been taken into trust when the challenger did not actually claim title to the land at issue. The Court held that fee-to-trust decisions were subject to challenges under the Administrative Procedure Act (APA), which raised the concern that land-into-trust decisions could be challenged for up to six years after lands had been taken into trust.

Hence, after the *Patchak* decision, there is no longer any need for the Department to delay taking land into trust for 30 days. The Final Rule is designed to reflect this and amends the Part 151 regulations so as to delete the 30-day waiting period. The Final Rule provides that the Secretary shall complete the trust acquisition immediately after the decision to take land in trust is final for the Department.

The Final Rule will differentiate between two types of land-into-trust decisions: those made at the Secretary or Assistant Secretary level, and those made by other BIA officials (e.g., Area Directors). Decisions made by the Assistant Secretary are final as of the date of decision. When the Assistant Secretary approves an application, the land will be taken in trust immediately at that time, and any challengers will have the right to go to federal court to sue under the APA. At a tribal leader meeting on November 12, 2013, Assistant Secretary – Indian Affairs Kevin Washburn indicated that he would decide appeals involving any decisions appealed to the Interior Board of Indian Appeals (IBIA) involving more than 200 acres.

Decisions made by other BIA officials are not final agency action that can be appealed in federal court until all administrative remedies have been exhausted or the time for filing a notice of appeal has passed and no appeal has been filed. Under the Final Rule, a decision made by other BIA officials must be challenged, if at all, within 30 days by filing an appeal to the IBIA. If there is no challenger within that time, the decision becomes final, the land is then taken into trust, and any challenge after the 30-day period is deemed to be improper due to a failure to exhaust administrative remedies. If a challenger does appeal within the 30-day period, the normal IBIA process will apply. If the challenger is successful, the land will not be taken into trust. If the challenger is not successful, then the land will be taken into trust immediately after the IBIA process is complete. Only then will the challenger have the right to challenge the decision in federal court under the APA.

The BIA accepted many suggestions submitted by tribes, improving the rule from its proposed form. However, many changes suggested that would limit the time the BIA can take to decide appeals, to further improve or circumvent the IBIA process, or to otherwise accelerate the land-into-trust process were rejected. The BIA did not accept any of the suggestions by the many state and local governments or non-Indian advocacy groups who responded disfavorably to the Rule.

The Rule will go into effect on December 13, 2013, and may be found at: http://www.gpo.gov/fdsys/pkg/FR-2013-11-13/pdf/2013-26844.pdf.

If we may be of further assistance regarding the land-into-trust process or if you would like further information about this rule, please contact us at the information below.

# # #

Inquiries may be directed to:
Elliott Milhollin (emilhollin@hobbsstraus.com or 202-822-8282)
Adam Bailey (abailey@hobbsstraus.com or 916-442-9444)

113TH CONGRESS
2D SESSION

S. 2188

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

IN THE SENATE OF THE UNITED STATES

MARCH 31, 2014

Mr. TESTER (for himself, Mr. MORAN, Mr. UDALL of New Mexico, Mr. BEGICH, Ms. HEITKAMP, Mrs. MURRAY, Mr. HEINRICH, and Mr. WALSH) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. REAFFIRMATION OF AUTHORITY.

(a) MODIFICATION.—

(1) IN GENERAL.—The first sentence of section 19 of the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act'') (25 U.S.C. 479), is amended—

(A) by striking ''The term'' and inserting ''Effective beginning on June 18, 1934, the term''; and

(B) by striking ''any recognized Indian tribe now under Federal jurisdiction'' and inserting ''any federally recognized Indian tribe''.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect as if included in the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act'') (25 U.S.C. 479), on the date of enactment of that Act.

(b) RATIFICATION AND CONFIRMATION OF ACTIONS.—Any action taken by the Secretary of the Interior pursuant to the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act'') (25 U.S.C. 461 et seq.), for any Indian tribe that was federally recognized on the date of that action is ratified and confirmed, to the extent such action is subjected to challenge based on whether the Indian tribe was federally recognized or under Federal jurisdiction on June 18, 1934, as if the action had, by prior Act of Congress, been specifically authorized and directed.

(c) EFFECT ON OTHER LAWS.—

(1) IN GENERAL.—Nothing in this section or the amendments made by this section shall affect—

(A) the application or effect of any Federal law other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as amended by subsection (a); or

(B) any limitation on the authority of the Secretary of the Interior under any Federal law or regulation other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as so amended.

(2) REFERENCES IN OTHER LAWS.—An express reference to the Act of June 18, 1934 (25 U.S.C. 461 et seq.), contained in any other Federal law shall be considered to be a reference to that Act as amended by subsection (a).

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113TH CONGRESS
1ST SESSION

H. R. 279

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 15, 2013

Mr. COLE introduced the following bill; which was referred to the Committee on Natural Resources

---

A BILL

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AUTHORITY REAFFIRMED.

(a) REAFFIRMATION.—Section 19 of the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act''; 25 U.S.C. 479), is amended—

(1) in the first sentence—

(A) by striking ''The term'' and inserting ''Effective beginning on June 18, 1934, the term''; and

(B) by striking ''any recognized Indian tribe now under Federal jurisdiction'' and inserting ''any federally recognized Indian tribe''; and

(2) by striking the third sentence and inserting the following: ''In said sections, the term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.''.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect as if included in the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act''; 25 U.S.C. 479), on the date of enactment of that Act.

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113TH CONGRESS
1ST SESSION

H. R. 666

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 13, 2013

Mr. MARKEY (for himself, Ms. HANABUSA, Mr. BEN RAY LUJÁN of New Mexico, Mr. GRIJALVA, Mr. KILDEE, Mr. PALLONE, Ms. MOORE, Mr. BECERRA, Ms. TSONGAS, Mr. FALEOMAVAEGA, and Ms. MCCOLLUM) introduced the following bill; which was referred to the Committee on Natural Resources

---

A BILL

To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. REAFFIRMATION OF AUTHORITY.

(a) MODIFICATION.—

(1) IN GENERAL.—The first sentence of section 19 of the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act''; 25 U.S.C. 479), is amended—

(A) by striking ''The term'' and inserting ''Effective beginning on June 18, 1934, the term''; and

(B) by striking ''any recognized Indian tribe now under Federal jurisdiction'' and inserting ''any federally recognized Indian tribe''.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect as if included in the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act''; 25 U.S.C. 479), on the date of the enactment of that Act.

(b) RATIFICATION AND CONFIRMATION OF ACTIONS.—Any action taken by the Secretary of the Interior pursuant to the Act of June 18, 1934 (commonly known as the ''Indian Reorganization Act''; 25 U.S.C. 461 et seq.), for any Indian tribe that was federally recognized on that date of the action is ratified and confirmed, to the extent such action is subjected to challenge based on whether the Indian tribe was federally recognized or under Federal jurisdiction on June 18, 1934, ratified and confirmed as fully to all intents and purposes as if the action had, by prior Act of Congress, been specifically authorized and directed.

(c) EFFECT ON OTHER LAWS.—

(1) IN GENERAL.—Nothing in this section or the amendments made by this section shall affect—

(A) the application or effect of any Federal law other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as amended by subsection (a) of this section; or

(B) any limitation on the authority of the Secretary of the Interior under any Federal law or regulation other than the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as so amended.

(2) REFERENCES IN OTHER LAWS.—An express reference to the Act of June 18, 1934 (25 U.S.C. 461 et seq.), contained in any other Federal law shall be considered to be a reference to that Act as amended by subsection (a) of this Act.

○

March 7, 2014

The Honorable John Tester
Senate Committee on Indian Affairs
706 Hart Senate Office Building
Washington, D.C. 20510-2604

The Honorable John Barrasso
Senate Committee on Indian Affairs
307 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Doc Hastings
House Committee on Natural Resources
1203 Longworth House Office Building
Washington, D.C. 20515

The Honorable Peter DeFazio
House Committee on Natural Resources
2108 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Don Young
House Subcommittee on Indian and Alaska Native Affairs
2314 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Colleen Hanabusa
House Subcommittee on Indian and Alaska Native Affairs
238 Cannon House Office Building
Washington, D.C. 20515

Re: Need for Swift Enactment of *Carcieri* Fix Legislation

Dear Chairman Tester, Vice Chairman Barrasso, Chairman Hastings, Ranking Member DeFazio, Chairman Young, and Ranking Member Hanabusa:

Our undersigned Tribal organizations have come together to make this joint petition to the Senate Indian Affairs Committee and the House Natural Resources Committee and Subcommittee on Indian and Alaska Native Affairs urging that you work with us to ensure swift enactment of legislation to address the Supreme Court's misguided decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Indian Tribes across the country are suffering significant direct negative economic, community, and cultural impacts from this decision and these impacts are increasing exponentially with each day that the Court's decision is not addressed by Congress.

We thank Rep. Tom Cole, now Senator Ed Markey, and Rep. Colleen Hanabusa for introducing H.R. 279 and H.R. 666, respectively, in the 113th Congress to remedy this situation. These bills enjoy bi-partisan support. Further, these proposals are not only budget neutral but also will save the federal government money that is currently being expended to defend itself from mushrooming litigation. The House passed *Carcieri* language as part of the year-long Fiscal Year 2011 Continuing Resolution, which the Senate unfortunately did not pass.

Congress enacted the Indian Reorganization Act (IRA) in 1934 in response to devastating federal policies that resulted in a loss of millions of acres of Tribal lands. An overarching goal of the IRA was to restore and protect Tribal homelands so that Tribes would prosper both politically and economically. Up to the time of the *Carcieri* decision, the Department of the Interior consistently construed the IRA to authorize the Secretary of Interior to place land into trust for any Tribe so long as that Tribe was federally recognized at the time of the trust application. We simply seek legislation that restores the s*tatus quo ante*.

The ability of Tribes, working with the Secretary, to have land taken into trust is central to both Tribal sovereignty and the Federal trust responsibility. Moreover, it is the foundation of Tribal efforts to strengthen our self-determination and to ensure that we protect our cultural identities. Pursuant to the IRA and in furtherance of the Federal government's policy of Tribal self-determination, DOI for over 75 years has assisted Tribal governments in placing land into trust, enabling Tribes to rebuild their homelands to provide essential governmental services through the construction of schools, health clinics, hospitals, Head Start centers, elder centers, veterans centers, housing, and community centers. The IRA's trust acquisition provisions have also assisted Tribes in protecting their traditions, cultures, and customs. Tribal trust acquisitions also play a significant role in Tribal economic development, as well as job and wealth creation in Tribal communities and surrounding non-Indian communities.

In *Carcieri*, the Supreme Court construed the IRA to limit the Secretary's authority to place land into trust to only those Tribes that were "under federal jurisdiction" as of 1934. This ruling jeopardizes the ability for all federally recognized Tribes to rebuild their communities and provide critical programs. The legal ambiguities resulting from *Carcieri* have further delayed the already severely backlogged land-into-trust process. The decision also raises significant safety concerns, as it opens the door to challenging criminal convictions for crimes that occurred on Indian land. Further, *Carcieri* has generated – and will continue to generate if unaddressed – considerable legal disputes over proposed and existing trust acquisitions in which the United States, at taxpayer expense, is a defendant.

We thank you for your efforts thus far on this matter and look forward to continuing our work together on passage of this critical legislation.

Sincerely,

Brian Cladoosby, President
National Congress of American Indians

Brian Patterson, President
United South and Eastern Tribes

Kevin J. Allis, Executive Director
Native American Contractors Association

Mark Romero, Chairman
CATG Board of Directors

Fawn Sharp, President
Affiliated Tribes of Northwest Indians

Cathy Abramson, Chairwoman
National Indian Health Board

Cheryl A. Causley, Chairperson
Native American Indian Housing Council

W. Ron Allen, Chairman
Self-Governance Communication & Education Tribal Consortium

Jacki Haight, President
National Indian Head Start Directors Association

Gary Davis, President
National Center for American Indian Enterprise Development, NCAIED

Michele Stanley, President
Midwest Alliance of Sovereign Tribes

LaDonna Harris, President
Americans for Indian Opportunity

Michael E. Roberts, President
First Nations Development Institute

Ben Shelly, President
Navajo Nation

Julie Kitka, President
Alaska Federation of Natives

Dr. Heather Shotton, President
National Indian Education Association

Terry Rambler, President
Inter Tribal Council of Arizona

Bill Lomax, President
Native American Finance Officers Association

Ryan Wilson, President
National Alliance to Save Native Languages

Harlan Beaulieu, President
Intertribal Agriculture Council

Tex Hall
Co-Chairman, COLT
Chairman, Great Plains Tribal Chairman Association

John E. Echohawk, Executive Director
Native American Rights Fund

Robert "Tim" Coulter, Executive Director
Indian Law Resource Center

Cris Stainbrook, President
Indian Land Tenure Foundation

Melbert "Moke" Eaglefeathers, President
National Council of Urban Indian Health

Robert Smith, Chairman of the Board
Southern California Tribal Chairmen's Association

Lynn Valbuena, Chairwoman
Tribal Alliance of Sovereign Indian Nations

Ernie Stevens, Jr., Chairman
National Indian Gaming Association

Ivan Posey, Chairman
Montana-Wyoming Tribal Leaders Council

Native American Rights Fund

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Erin C. Dougherty
Matthew L. Newman

Website: www.narf.org

MEMORANDUM

TO: United South and Eastern Tribes

FROM: Richard Guest, Staff Attorney, Native American Rights Fund

RE: May 2014 Update of Litigation in the Wake of the U.S. Supreme Court's Decision in *Carcieri v. Salazar*

U.S. Supreme Court:

***Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak* (Nos. 11-246 and 11-247)** – On June 18, 2012, the Court announced its decision and held: (1) Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA; and (2) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has prudential standing to bring a *Carcieri* challenge to a land-in-trust acquisition. In an opinion authored by Justice Kagan, the Court (8-1) found that the APA generally waives the immunity of the United States from any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under the color of legal authority." 5 U.S.C. § 702. According to the Court, Patchak's *Carcieri* claim fits within this waiver of immunity.

In her dissent, Justice Sotomayor states: "After today, any person may sue under the APA to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land." Justice Sotomayor points out that the Court's decision works against the one of the primary goals of the IRA—new economic development and financial investment in Indian country. Now, trust land acquisitions for the benefit of Indian tribes will be subject to judicial challenge under the APA's six-year statute of limitations—not the 30-day period provided for under the regulations—substantially constraining the ability of all Indian tribes to acquire and develop lands. NCAI and many tribes worked with the Department of Interior on proposed amendments to 25 CFR 151.12(b) to require land to trust opponents to exhaust

administrative remedies within 30 days, which will alleviate some of the harms caused by the Patchak decision. After an extended review and comment period, the proposed rule was finalized by the Department on November 13, 2013. See 78 Fed. Reg. 67928 (November 13, 2013).

U.S. Courts of Appeals

***Big Lagoon Rancheria v. State of California* (9th Cir. No. 10-17803) –** On January 21, 2014, in a 2-1 decision, the U.S. Court of Appeals for the Ninth Circuit reversed the district court order which had granted summary judgment in favor of the Big Lagoon Rancheria in its bad faith lawsuit against the State of California under the Indian Gaming Regulatory Act (IGRA). At the district court, the State attempted to demonstrate good faith by arguing *Carcieri*—its need to preserve the public interest by keeping a gaming facility from being located on lands unlawfully acquired by the Secretary of the Interior for a tribe that was not "under Federal jurisdiction" in 1934. The district court characterized the argument as a *post hoc* rationalization by the State of its actions which were concluded four months prior to the Court's decision in *Carcieri*.

However, on appeal the majority held that a tribe must have jurisdiction over "Indian lands" in order to file suit to compel negotiations under IGRA. Specifically, the tribe must have jurisdiction over the Indian lands upon which the gaming activity is to be conducted. In its view—based on an incomplete factual and historical record developed through briefing on cross-motions for summary judgment—the majority found that the eleven-acre parcel taken into trust by the United States in 1994 were not "Indian lands" since Big Lagoon was not a tribe "under Federal jurisdiction" in 1934. Therefore, the State is under no obligation to negotiate in good faith with Big Lagoon. The dissent argued that the eleven-acre parcel was Indian lands under IGRA based on precedent within the Ninth Circuit, and that the State could not collaterally attack the status as trust lands years after its administrative and legal remedies had expired.

On March 6, 2014, the Big Lagoon Rancheria filed its petition for rehearing/rehearing en banc. The Ninth Circuit immediately requested a response from the State of California which was filed on April 2, 2014. The Tribal Supreme Court Project, working with the attorneys for Big Lagoon, coordinated the preparation and submission of the NCAI, USET and Navajo Nation Amicus Brief, the California Indian Legal Services and California Association of Tribal Governments letter brief and the Amicus Brief of the United States which were all filed on March 18, 2014. On April 14, 2014, Big Lagoon filed its citation of supplemental authorities, citing the decision by the U.S. District Court for the Middle District of Alabama in *Alabama v. PCI Gaming (Poarch Band)* which rejected the Ninth Circuit panel's reasoning and holding in *Big Lagoon*.

***Butte County v. Hogen*, (DC Cir. No. 09-5179):** On January 24, 2014, Kevin Washburn, Assistant-Secretary–Indian Affairs, issued the Record of Decision (ROD) in relation to the application submitted by the Mechoopda Tribe of Chico Rancheria to acquire 626.55 acres of land located in Butte County California in trust under Section 5 of the Indian Reorganization Act (IRA). *See* 79 Fed. Reg. 6917. Back on July 13, 2010, the U.S. Court of Appeals for the D.C. Circuit had issued its opinion setting aside the Secretary's initial decision to take the land in trust and remanded the case to the Department of the Interior to address the "new" information

provided by Butte County in relation to the Department's restored tribe/restored lands determination under the Indian Gaming Regulatory Act (IGRA).

In addition to its determination that the Tribe qualifies as a "restored tribe" and that the trust lands qualify as "restored lands" under IGRA, the Department applied its two-part inquiry developed after *Carcieri* to determine that the Mechoopda Tribe was "under Federal jurisdiction" in 1934. *See* ROD at 28-37. On February 28, 2014, the United States filed a notice of its compliance with the remand order in the U.S. District Court for the District of Colombia (Case No. 1:08-cv-00519).

U.S. District Courts:

***Jamul Action Committee v. Stevens* (ED-CA No. 2:13-cv-01920):** On September 15, 2013, the Jamul Action Committee (JAC), a non-profit organization of citizens living in and around the rural unincorporated town of Jamul, California, filed a complaint against the National Indian Gaming Commission (NIGC) and the Department of the Interior (DOI) challenging the Indian lands determination issued by the NIGC on April 10, 2013, on behalf of the Jamul Indian Village. In their complaint, the plaintiffs allege that, under *Carcieri,* the Secretary of the Interior is without authority to take land in trust for the Jamul Indian Village which was neither recognized nor under federal jurisdiction in 1934. On February 27, 2014, the JAC filed its First Amended Complaint. On March 17, 2014, the United States filed its Motion to Dismiss. On April 24, 2014, the Jamul Indian Village filed a Motion for Leave to file an Amicus Brief. A motions hearing has been scheduled for May 23, 2014.

***State of Alabama v. Poarch Band of Creek Indians* (MD-AL No. 2:13-CV-00178):** On July 22, 2013, the Poarch Band of Creek Indians filed their reply to the response filed by the State of Alabama to the Tribe's Motion to Dismiss the first amended complaint based on tribal sovereign immunity. This action was removed from state court to federal court wherein the State of Alabama is asking the court to declare tribal gaming a "public nuisance" and to permanently enjoin the tribe from operating its gaming operations. Within their complaint, the state alleges that the tribe's casinos are not properly located on "Indian Lands" as required under IGRA. Based on the Supreme Court's decision in *Carcieri*, the state alleges that the Secretary of the Interior was without authority to take the lands in trust since the Poarch Band was neither recognized or under federal jurisdiction in 1934. On June 5, 2013, the United States filed an amicus brief in support of the Tribe's Motion to Dismiss, and on July 3, 2013, the State of Michigan filed an amicus brief in support of Alabama. On January 24, 2014, the State of Alabama filed its Supplemental Authority citing the Ninth Circuit's decision in *Big Lagoon v. State of California*. Both the U.S. and the Tribe have filed their responses to the Supplemental Authority. On April 10, 2014, the District Court issued its Memorandum Opinion and Order granting the Tribe's Motion to Dismiss. The court rejected all of the State's original arguments, and soundly rejected the Ninth Circuit's reasoning in the *Big Lagoon* case. On May 5, 2014, the State filed its Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit.

***Cherokee Nation v. Jewell* (ND-OK No. 12-493)**: On August 12, 2013, U.S. District Court for the Northern District of Oklahoma granted the Cherokee Nation's motion for a preliminary injunction to prevent the Department of the Interior from taking 2.03 acres of land in trust for the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB). The Cherokee Nation had filed suit challenging the Department of the Interior's July 30, 2012 decision to acquire the parcel in trust, asserting that because "UKB was not federally recognized until 1946, the Secretary cannot . . . accept the [land] into trust under *Carcieri*." The UKB intervened and sought a stay of the order which was denied by the district court. The Department of the Interior and the UKB sought a stay of the order granting the preliminary injunction from the U.S. Court of Appeals for the Tenth Circuit which was denied on August 26, 2013. On December 11, 2013, the parties filed a joint motion to expedite briefing which was granted. The Cherokee Nation filed its opening brief on December 11, 2013, and the United States filed its response brief on January 3, 2014, and Cherokee Nation filed its reply brief due on January 17, 2014. Due to scheduling conflicts, a hearing on the merits is now set for July 25, 2014.

***County of Amador v. Salazar* (ED-CA No. 2:12-cv-01710) and *No Casino in Plymouth and Citizens Equal Rights Alliance v. Salazar* (ED-CA No. 2:12-cv-1748):** On June 27, 2012, the County of Amador filed a suit for declaratory and injunctive relief in the U.S. District Court for the Eastern District of California against the Department of the Interior challenging the May 24, 2012 Record of Decision (ROD) taking 228 acres of land in to trust for the benefit of the Ione Band of Miwok Indians. On June 29, 2012, No Casino in Plymouth and Citizens Equal Rights Alliance filed a suit against the Department also challenging the ROD. On July 24, 2012, a case related order was issued and both actions were assigned to a Judge Mendez, and then reassigned to Judge Nunley. Among their many claims, the plaintiffs contend that the Secretary is without authority under *Carcieri* to take land in trust for the Ione Band of Miwok Indians since the tribe did not exist as a "recognized Indian tribe" in 1934 and were not "under federal jurisdiction" in 1934. On September 12, 2013, the U.S. District Court for the Eastern District of California granted the Ione Band of Miwok Indians' motion to intervene, and the tribe filed its answer on November 27, 2103. On January 24, 2014, the court issued its Pretrial Scheduling Order, and the Plaintiffs filed their Motion for Summary Judgment on May 1, 2014. The U.S. and Tribe must file their combined Opposition and Cross-Motion for Summary Judgment by June 26, 2014.

***Confederated Tribes of Grand Ronde, Clark County, et al., v. Jewell* (DC-DC No. 13-cv-00849 and 13-cv-00850):** On June 6, 2013, the Confederated Tribes of Grand Ronde and Clark County both filed new complaints against the United States Department of the Interior which have been consolidated. The complaints include allegations that the Department's May 2013 ROD decision is arbitrary and capricious based on *Carcier*i, among other things. On August 13, 2013, the court granted the Cowlitz Tribe's motion to intervene. The consolidated cases are assigned to Judge Rothstein, and both the government and the plaintiffs have agreed to an expedited briefing schedule in exchange for a limited self-stay of the trust acquisition (until March 31, 2014). On September 23, 2013, motions for summary judgment were filed by Grand Ronde and Clark County. Responses and cross-motions by the Department and the Cowlitz Tribe were filed on November 6, 2013. Plaintiffs' opposition and reply briefs were filed on December 11, 2013, and the U.S. and Tribe filed their reply briefs on January 29, 2014. On February 24, 2014, the court issued its order granting the motions seeking leave to file amicus briefs. The Chinook Nation

filed an amicus brief in support of the plaintiffs. The Jamestown S'Klallam Tribe and USET, the Samish Indian Nation, and the Confederated Tribes of the Warm Springs Reservation filed amicus briefs in support of the defendants. On May 7, 2014, the Cowlitz Tribe filed a motion requesting a status conference.

Background: On January 31, 2011, Clark County, City of Vancouver, Citizens Against Reservation Shopping, various non-Indian gaming enterprises and a number of individual landowners filed suit in the against the Department of the Interior and the National Indian Gaming Commission challenging the Record of Decision ("ROD") issued by the Department of the Interior to acquire land in trust for the benefit of the Cowlitz Indian Tribe (the "Cowlitz Parcel"). On February 1, 2011, the Confederated Tribes of the Grande Ronde Community of Oregon filed a separate suit against the Department of the Interior also challenging the ROD. The Clark County complaint stated that "the Cowlitz Tribe was neither federally recognized nor under federal jurisdiction in June 1934." Therefore, under the Supreme Court's holding in *Carcieri,* the Secretary does not have authority to take lands in trust for the Tribe and does not have the authority to proclaim such land as the Tribe's reservation. Grande Ronde challenged the trust land acquisition alleging that the Cowlitz Tribe was neither "recognized" nor "under federal jurisdiction" in 1934 as required by the IRA. The Cowlitz Tribe successfully intervened in both cases.

On June 20, 2012, Clark County, *et al.*, and Grande Ronde each filed their motion for summary judgment. On July 19, 2012, the United States filed a motion to stay and a motion to remand the case back to the Department for reconsideration of the ROD in light of information provided by the plaintiffs in connection with their summary judgment motions. On August 29, 2012, the court denied the motions of the United States finding that "[n]either a remand nor a stay…is necessary to enable the federal defendants to review and reconsider the [ROD]." Instead, the court simply extended the deadline for the Department and the Tribe to file their responses to the summary judgment motions which are now due on October 5, 2012. On October 1, 2012, the Department issued a "Notice of Filing Supplemental ROD" which incorporated a "Revised Initial Reservation Opinion" which set forth the Secretary's reasons for determining that the Cowlitz Parcel qualifies as the Tribe's initial reservation.

On March 13, 2013, the U.S. District Court for the District of Colombia issued an order dismissing these cases. In its order, the court denied the plaintiffs' motions to strike the Supplemental ROD, remanded the action to the Department with instructions to rescind the 2010 ROD, and required the Department to issue a new ROD within sixty (60) days. On May 8, 2013, the Department published notice in the Federal Register of the April 22, 2013 decision of the Assistant Secretary—Indian Affairs to rescind the 2010 ROD and to issue a new ROD announcing the decision "to acquire in trust approximately 151.87 acres of land in trust for the Cowlitz Indian Tribe and issue a reservation proclamation under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465 and 467. We have determined that the Cowlitz Indian Tribe's request meets the requirements of the Indian Gaming Regulatory Act's ''initial reservation'' exception, 25 U.S.C. 2719(b)(1)(B)(ii), to the general prohibition contained in 25 U.S.C. 2719(a) on gaming on lands acquired in trust after October 17, 1988. The land is located in Clark County, Washington, and will be used for gaming and other purposes."

***State of New York, et al. v. Salazar, et al.*, (ND-NY No. 6:08-CV-00644)*; City of Oneida v. Salazar, et al.*, (No. 5:08-CV-00648)*; Upstate Citizens for Equality, Inc., et al. v. United States of America, et al.*, (No. 5:08-CV-00633)*; Town of Verona, et al. v. Salazar, et al.*, (No. 6:08-CV-00647)*; and Central New York Fair Business Association, et al., v. Salazar, et al., No.* (ND-NY No. 6:08-cv-660):** On May 16, 2013, Governor Cuomo announced that the State of New York and the Oneida Nation had reached a broad settlement agreement that would resolve the litigation, along with a number of other matters. However, on June 12, 2013, the Cayuga Nation filed a motion to intervene in the federal district court to challenge the settlement agreement, primarily on the grounds that its geographic exclusivity provision violates its rights under federal law. By order dated August 9, 2013, the court granted the Nation's motion to intervene "for the sole purpose of permitting it to lodge objections to the parties settlement agreement; and that neither the intervention of the Cayuga Indian Nation, nor any of its objections to the proposed settlement agreement shall preclude the approval of such agreement if the court otherwise finds it acceptable." On September 25, 2013, the Stockbridge Munsee Band filed its motion to intervene, claiming an ownership interest in some of the lands that are the subject of the settlement agreement. On December 12, 2013, counsel for the Oneida Nation filed a joint letter motion informing the court that the parties had reached settlement and that all the parties (including the United States) had executed a Rule 41 stipulation of dismissal. On December 20, 2013, the Cayuga Indian Nation filed its response to the joint letter, and the parties filed their briefs in opposition to the motion to intervene filed by the Stockbridge Munsee Band. On March 4, 2014, the U.S. District Court for the Northern District of New York issued an order dismissing the various motions to intervene and approving the Settlement Agreement which resolves both the trust litigation in the lower court and the tax foreclosure litigation pending before the U.S. Supreme Court.

Background**:** On September 24, 2012, the U.S. District Court for the Northern District of New York issued a remand order in these five related cases which challenge May 2008 Record of Decision (2008 ROD) of the Department of the Interior to take approximately 13,000 acres of land in trust for the Oneida Indian Nation. The court remanded the 2008 ROD to the Department of Interior to further develop the record on whether the Department of Interior has statutory authority to take this land into trust pursuant to the Indian Reorganization Act (IRA). The court stated:

> In *Carcieri v. Salazar*, the Supreme Court concluded that the IRA limits DOI's trust authority to tribes that were federally recognized and under federal jurisdiction when the IRA was enacted in 1934. That is, the operative question for a court or the Agency in determining whether trust authority may properly be exercised is whether the tribe in question was federally recognized and under federal jurisdiction in 1934 – not whether the tribe was federally recognized and under federal jurisdiction at the time of the trust decision.
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> *Carcieri* is undoubtedly the law of the land, and the Court is bound by the Supreme Court's interpretation of the IRA therein and must ultimately assess DOI's ROD through this interpretive lens. On remand, therefore, the Court

> instructs DOI to assemble a record on the *Carcieri* issue and to consider this question in issuing a final ROD. Further, as addressed *infra* in the Court's discussion of the bias issue, DOI should be mindful of the paramount need for impartiality going forward.
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> Second, as to [the U.S. and the Tribe's] arguments that remand would be futile because the *Carcieri* issue is clear as a matter of law and that DOI could not possibly find otherwise, the Court remains unconvinced. By this stage in the litigation, much ink has been spilled by the parties on the historical relationship between the OIN, the federal government, and the ownership and inhabitation of large swaths of land in central New York.
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> Based upon the record before the Court and the daunting task of excavating and explicating historical understanding that the Court has undertaken, however, the Court is not convinced that the correct path is so obvious, that the *Carcieri* issue is so clearly resolved, or that any analysis so clearly favors [the U.S. and the Tribe] as to make a remand to the Agency an "idle and useless formality." [citations omitted].

State Courts:

***Rape v. Poarch Band of Creek Indians* (No. 1111250):** On April 17, 2013, the Poarch Band of Creek Indians filed their response brief in a case pending before the Alabama Supreme Court on the question of tribal sovereign immunity from suit in an action brought by Mr. Rape over the malfunction of a slot machine at the tribe's casino. The Alabama Attorney General had filed an amicus brief in support of Mr. Rape making collateral arguments challenging sovereign immunity on the basis that the Poarch Band lacks proper federal recognition since only Congress has this authority, not federal agencies and that, under *Carcieri*, the federal government lacked authority to take lands in trust for the tribe. The National Congress of American Indians (NCAI) and the United South and Eastern Tribes (USET) filed an amicus brief in support of the Poarch Band. At present, all briefs and supplemental authorities have been submitted to the Alabama Supreme Court.

***Harrison v. Poarch Band of Creek Indians* (No. 1130168):** On May 13, 2014, the Poarch Band of Creek Indians filed their response brief in another petition pending before the Alabama Supreme Court on the question tribal sovereign immunity. In this action, the plaintiff is seeking money damages against the Tribe under the Alabama Dram Shop Act. The *Carcieri* claims are identical to the claims brought by Mr. Rape in his action with the addition of arguments relying on the Ninth Circuit's decision in *Big Lagoon*. NCAI and USET filed a joint amicus brief in support of the Poarch Band.

Interior Board of Indian Appeals:

State of New York, Franklin County, New York, and Town of Fort Covington, New York v. Acting Eastern Regional Director (IBIA Nos. 12-006, 12-010): The State of New York and County and Town of Fort Covington filed an administrative appeal of the Notice of Decision issued by the Acting Eastern Regional Director for the Bureau of Indian Affairs to take 39 acres of land into trust for the benefit of the St. Regis Mohawk Tribe of New York. The 39-acre parcel is currently being used for a solid waste transfer station, and the application states that the property would continue to be used for this purpose. Although the St. Regis Mohawk Tribe is on the 1947 Haas list as a Tribe that voted to "opt out" of the provisions of the IRA, the Appellants argue that the Tribe was under State rather than Federal jurisdiction in 1934 and that the Supreme Court's decision in *Carcieri* therefore deprives the Secretary of authority to take land into trust for the Tribe under the authority of the IRA. The Appellant Town and County filed their revised opening brief on April 13, 2012. The BIA and Tribe filed their response briefs on June 15, 2012. The Appellant Town and County filed their response brief on July 13, 2012. No further briefing is expected on this matter before the IBIA.

***Village of Hobart v. Bureau of Indian Affairs* (IBIA Nos. 10-091, 10-092, 10-107, 10-131, 11-002, 11058, 11-083):** On May 9, 2013, the Interior Board of Indian Appeals issued its order in the consolidated administrative appeal of the Village of Hobart, Wisconsin to the Notice of Decision issued by the Regional Office of the Bureau of Indian Affairs of its intent to take several parcels of land into trust for the benefit of the Oneida Tribe of Indians of Wisconsin (57 IBIA 4). In spite of the fact that the Oneida Tribe is on the 1947 Haas list, the Village of Hobart argued that the Tribe was not "under federal jurisdiction" because their reservation was disestablished. In rejecting this argument, the IBIA determined the Oneida Tribe was under federal jurisdiction in 1934 based upon the fact the Tribe voted on application of IRA to the Tribe in 1934 and appears on the Haas List, the fact the United States held parcels of land in trust for the Tribe and tribal members in 1934, and the overall history of relations between the Tribe and the federal government. The IBIA remanded with instructions for the Regional Director to specifically address the village's claims regarding jurisdictional disputes, loss of tax revenues, and other concerns.

***Thurston County v. Great Plains Regional Director* (IBIA Nos. 11-031, 11-084, 11-085, 11-086, 11-087, 11-095, 11-096):** Thurston County, Nebraska, had filed an administrative appeal of the Notice of Decision filed by the Regional Director of the Bureau of Indian Affairs of its intent to take several parcels of land in trust for the benefit of the Winnebago Tribe of Nebraska. In spite of the fact that the Winnebago Tribe is on the 1947 Haas List and the fact that the Tribe has been located at all times since 1865 on reservation lands purchased by the United States, Thurston County argues that the Tribe was not "under federal jurisdiction" in 1934. On December 18, 2012, the IBIA issued its decision declining to consider the county's *Carcieri*-based arguments for failure to timely raise them before the Regional Director and raising them for the first time on appeal (56 IBIA 62). However, the IBIA vacated and remanded the decision to take certain parcels of land in trust on other grounds.

***Preservation of Los Olivos v. Department of the Interior*, (IBIA No. 12-140; 12-141; 12-148):** Several parties filed Notices of Appeal with the IBIA challenging the Regional Director's June 13, 2012 Notice of Decision to take land in trust of the Santa Ynez Band of Chumash Mission Indians. The Notice of Decision advised potential appellants that any appeal must be filed with the IBIA within 30 days of receipt, and included the contact information and requirements for filing an appeal with the IBIA. On July 30, 2012, the IBIA received copies of Notices of Appeal from "No More Slots" and "Santa Ynez Valley Concerned Citizens." On August 8, 2012, the IBIA issued an order directing these parties to show cause, on or before September 10, 2012, why their appeals should not be dismissed as untimely. On August 16, 2012, the IBIA received a Notice of Appeal from "Preservation of Los Olivos" and "Preservation of Santa Ynez" ("POLO/POSY"). On August 21, 2012, the IBIA also ordered POLO/POSY to show cause, on or before September 20, 2012, why their appeal should not be dismissed as untimely. On March 18, 2013, the IBIA issued its order holding: "None of the Appellants filed an appeal with the Board within the 30-day deadline, which is jurisdictional, and therefore we dismiss the appeals." 56 IBIA 233.

Background: On July 9, 2008, the U.S. District Court for the Central District of California remanded this case to the Interior Board of Indian Appeals (CA-CD No. 06-1502). The original case involved a challenge brought by two citizen groups from the Santa Ynez Valley to the IBIA's decision that the groups lacked standing to challenge the Department's decision in 2005 to take land in trust for the benefit of the Santa Ynez Band of Chumash Mission Indians (IBIA No. 05-050-1). In short, the district court vacated the IBIA order and remanded the case to the IBIA, requiring the IBIA to specifically "articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."

On February 8, 2010, the citizen groups filed their opening brief before the IBIA, not only addressing the issue of standing, but arguing on the merits that the Secretary does not have authority to take land in trust for the Tribe. The groups argue that the Supreme Court's decision in *Carcieri* "dramatically changed the legal landscape with respect to the power and the authority of the Secretary of the Interior and the BIA to take land into federal trust for Indian tribes." The groups provided exhibits—including a 1937 list which references "Santa Ynez" as having a reservation/Rancheria, but does not reference a particular "tribe"—all of which they allege lead "to the conclusion that the Santa Ynez Band was not a tribe under federal jurisdiction in 1934." On May 17, 2010, at the request of the Regional Director, the IBIA partially vacated its 2005 decision and remanded a single issue—whether BIA has authority to accept land in trust for the tribe under *Carcieri*.

On May 23, 2012, the Associate Solicitor for the Division of Indian Affairs signed an opinion confirming that neither *Carcieri* nor *Office of Hawaiian Affairs* limits the Secretary's authority to acquire land in trust for Santa Ynez. Under Federal jurisdiction was demonstrated by establishment of the Reservation in 1906, IRA vote in 1934, and BIA Census in 1934. On June 13, 2012, the Regional Director affirmed the original 2005 trust acquisition decision on the basis that *Carcieri* did not limit the Secretary's authority to acquire land in trust.

***California Coastal Commission and Governor Arnold Schwarzenegger v. Pacific Regional Director, Bureau of Indian Affairs* (IBIA Nos. 10-023, 10-024):** The Coastal Commission and Governor ("Appellants") filed an appeal to the October 2, 2009 decision of the Pacific Regional Director to take a 5-acre parcel in Humboldt County in trust for the Big Lagoon Rancheria. In their appeal, the Appellants refer to the U.S. Supreme Court's decision in *Carcieri* and allege that the Big Lagoon Rancheria was not under federal jurisdiction in 1934 and, therefore, the Secretary lacks authority to take lands in trust for the Tribe.

On January 28, 2010, the Assistant Regional Solicitor filed a Motion For Remand of Decision to BIA Regional Director, based on the January 27, 2010 memorandum of the Assistant Secretary of Indian Affairs. The Assistant Secretary directed the Regional Director to request a remand "from the IBIA for the purpose of applying the holding of *Carcieri v. Salazar* to your decision and to determine whether Big Lagoon was under Federal Jurisdiction in 1934." On February 19, 2010, the IBIA reversed the Regional Director's decision and remanded the whole decision back to the BIA (51 IBIA 141).

***Miami-Dade County v. Acting Eastern Regional Director, Bureau of Indian Affairs* (IBIA No.12-152):** Miami-Dade County appealed a July 27, 2012 decision by the Regional Director to approve the acceptance of 229.3 acres of land in trust for the Miccosukee Indian Tribe of Florida. After the county filed its opening brief, the Regional Director filed a request for a remand to allow him to address compliance with NEPA and the BIA's authority to accept land in trust with the framework set forth in *Carcieri.* On July 10, 2013, the IBIA issued its order vacating the decision and remanding the case to the Regional Director to consider the *Carcieri* issue and other arguments raised by the County (57 IBIA 192).

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USET Proposals for Tribal Tax Reform

I. Introduction

The United South and Eastern Tribes, Inc. (USET) calls upon the United States Congress to amend the Internal Revenue Code to ensure that federal tax law treats Indian Tribes in a manner consistent with their governmental status, as reflected under the U.S. Constitution and numerous federal laws, treaties and federal court decisions. Indian Tribes have a governmental structure, and have the power and responsibility to enact civil and criminal laws regulating the conduct and affairs of their members and reservations. They operate and fund courts of law, police forces and fire departments. They provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Like states and local governments, Tribes--as political bodies--are not subject to income tax under the Code.

The non-taxable status of Tribal governments should be maintained in any version of federal tax reform considered by the Congress as a matter of governmental fairness and parity. Improvements in the Tax Code are also vitally needed to **align federal tax policy with the critical federal policy objectives of Tribal self-determination, Tribal economic growth and self-sufficiency and the promotion of strong Tribal governments on equal footing with other sovereigns within the federal system**. USET's tax policy proposals advance these objectives in a manner that will promote economic growth, foster Tax Code fairness by eliminating additional burdens on Tribal governments and further important federal policy interests.

Tax policy fairness toward Tribal governments and the promotion of economic growth are of central importance in Indian Country. Tribal governments must stimulate reservation-based economic growth to generate the level of revenue needed to deliver vital programs and services within their territories. While Tribal governments carry out responsibilities in their communities that are similar in many respects to those of states and local governments; Tribal governments are not able to rely on a robust tax base for revenue. Instead, Tribal governments rely on revenue generated from economic development to meet and supplement vital programs and services. This makes clear that Congress must create reliable and effective federal tax policy to firmly support Tribal governance while protecting the ability of Tribes to generate and retain the full use of Tribal revenue.

Tribal governments also have responsibilities that are distinct from those of other sovereigns. Tribes and their elected representatives have the added responsibility of ensuring they have the revenue needed to fulfill responsibilities to maintain Tribal language, culture, and ceremonies. Preservation and restoration of Tribal culture remains a significant federal policy objective that seeks

to reverse damage caused by the former federal policy of Indian Assimilation, which forbade the practice of Native ceremonies and use of Native languages.

USET's tax reform proposals, as set forth below, are guided by these important policy objectives. USET calls on the Congressional tax writing committees to incorporate these proposals into tax reform or other tax legislation in order to develop a Tax Code that:

- encourages private investment and stimulates business activities in Indian Country;
- provides Tribes with full access to government financing tools;
- respects elected leader decision-making with regard to determining the well-being of Tribal citizens, including advancing and protecting social, cultural and ceremonial practices;
- advances the ability of Tribes to build an economic base and create employment opportunities;
- promotes certainty of jurisdiction, certainty to the capital markets, and certainty in tax policy to sustain economic growth and foster economic partnerships.

II. USET's Tax Reform Proposals

A. ADVANCE IMPORTANT FEDERAL POLICY

1. Respect and Promote Tribal Self-Determination through application of the General Welfare Exclusion for Tribal Government-Provided General Welfare Benefits

Current Law: Both the IRS and the courts have defined income broadly, limiting exclusions to those specified in the Tax Code. Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 acknowledges more than three dozen types of benefits/payments as "items specifically excluded from gross income." The Tax Code is silent on the issue of whether the programs and services that Tribal governments provide to Tribal citizens are subject to federal income tax. In this context, the IRS has employed an administrative practice, known as the General Welfare Exclusion ("GWE"), which excludes benefits and payments to individuals from federal income taxation when those benefits and payments are made pursuant to a governmental program serving the general welfare. On December 5, 2012, the IRS issued Notice 2012-75 ("Draft Guidance"), which recognizes the right of Tribal governments to provide certain programs and services to their members on a tax-free basis consistent with the GWE.

Change is Needed to Promote Tribal Self-Determination: While the Draft Guidance is a positive step, it is not permanent and the IRS retains subjective authority to set Tribal tax policy on an *ad hoc* basis without reference to the Federal Government's legal, treaty, trust, and statutory obligations to Indian Tribes. Congress addressed a related general welfare policy issue in prior legislation to clarify that Tribal government-provided health insurance and related benefits are exempt from federal income taxation.

Proposal: Like the recent Tribal health benefits amendment, Congress should amend Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 to accomplish the following:

(1) Clarify that payments, programs and services provided by Tribal governments for the general welfare of their people are excluded from federal income tax;
(2) Clarify that benefits that are items of cultural significance, reimbursement of costs, or cash honoraria provided by Tribal governments for cultural purposes or participation in cultural events shall not represent a compensation for services and shall be excluded from federal income tax;
(3) Establish National and Regional Tribal Advisory Committees within the Department of the Treasury to advise the Secretary on matters of Indian tax policy and to assist in the implementation of this amendment to the Code.
(4) Clarify that non-gaming per capita payments shall not be subject to federal income tax;
(5) Clarify that Tribal laws and Tribal decision-making shall be given deference when interpreting and implementing this change in the Code;
(6) Suspend all audits pertaining Tribal government provided benefits and services until this amendment to the Code is enacted and implemented; IRS field agents' education and training is completed to assist IRS personnel to carry out their duties consistent with principles of federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian Tribes; Tribal financial officers are provided technical assistance for the purpose of implementing this amendment; and IRS is provided the express authority to waive penalties and interest imposed under the Code pertaining to benefits and services provided by Tribal governments.

2. Establish a Tribal Advisory Committee (TAC) within Treasury to advise the Secretary on matters of Indian taxation

Current law: There is no formal Tribal advisory committee within Treasury or IRS regarding matters of Indian taxation.

Reasons for creating a new Advisory Committee: In recent years, Indian Tribal governments and the Internal Revenue Service have disagreed on several issues concerning when tax liability attaches to Tribal payments, or benefits, provided to their citizens. A Tribal tax policy advisory body would assist Treasury and IRS in ensuring that treaty rights and principles of self-determination and self-governance are properly balanced with the IRS' internal policies and to provide orientation for the conduct of consultation with Indian Tribes in accordance with Executive Order 13175.

Proposal: USET recommends the creation of a Tribal advisory committee made up of Tribal leaders with the support of a Tribal technical work group to address a broad range of Tribal taxation matters that would complement, but not substitute for Tribal consultation. We call on Congress to establish an observer role in this advisory body for the Assistant Secretary for Indian Affairs (AS-IA) in order to

provide guidance to IRS and Treasury as to tax policy issues that directly affect the trust relationship between Tribes and the United States.

B. HELP GROW THE ECONOMY

The following Tax Code modifications and extensions would help grow the economy.

1. Immunize Tribe-to-Tribe Commerce and Investment from Taxation

Current law: Historically, Indian nations and Tribes engaged in inter-tribal trade relations that were not subject to taxation. Now that Indian territories are surrounded by state jurisdictions, states have recently begun to levy their taxes and impose their regulations on commerce taking place exclusively between two locations in Indian Country.

Change will enhance economic growth: Indian people have numerous opportunities to work together to create jobs and investment opportunities. Some Tribes have lands and natural resources to develop, but lack capital and expertise. Other Tribes have capital and expertise but limited lands and resources.

Proposal: Congress can stimulate job creation and development in Indian Country by prohibiting state taxation and regulation of Tribe-to-Tribe commerce and investment where the economic activity takes place on Indian lands.

2. Establish Tribal Empowerment Zones in Indian Country

Current Law: For many years, annual legislation ("tax extenders") has included provisions intended to promote investment on Indian lands (such as the Accelerated Depreciation and the Indian Employment Tax Credits). Congress has also enacted the Native American Business Development, Trade, Promotion and Tourism Act, which contains provisions intended to revitalize economically and physically distressed Native American Economies and promote private investment in Indian Country economies to stimulate job creation and foster economic self-sufficiency and political self-determination. 25 U.S.C. §§ 4301-4307 (Title 25, Chapter 44, U.S. Code). Additionally, in the past Congress has legislated tax credits for business investment and hiring in low-income, distressed communities known as "Empowerment Zones" tax credits. Today, the White House has launched its "Promise Zones" initiative for revitalizing communities (by increasing economic activity, creating jobs, improving education, enhancing access to housing and reducing crime). Pursuant to this Promise Zones initiative, the President has proposed cutting taxes on hiring and investment based the previously existing program of "Empowerment Zones" tax credits.

Change will enhance economic growth: Existing Code provisions to incentivize investment in Indian Country have had limited effectiveness. These provisions have been temporary or short-term measures that were never made permanent and the procedures to utilize them have been complex

enough as to require significant upfront investment by Tribes, such as retaining outside attorneys, accountants and consultants). A more straightforward, long-term and practical approach is needed to stimulate new economic investment incentives on Tribal lands. Additionally, the White House Promise Zone initiative involves only a few selected communities and its incentives are not targeted to the specific obstacles faced in Tribal communities. While Promise Zones provide a degree of federal tax immunity, Tribes are burdened by state taxation that siphons revenues from Tribal economic development activity on reservation lands.

Proposal: Congress should restore the treaty-recognized status of Tribal lands as being immune from all federal and state taxation. To initiate this approach, Congress should establish a Tribal Empowerment Zone Demonstration Project including the following elements:

- 50 Tribal Empowerment Zones established throughout Indian Country
    - Select 25 of the most economically challenged Tribes
    - Select 25 of the most successful entrepreneurial Tribes
- Prohibit federal or state taxes of any kind within the zone
- Establish a ten-year demonstration project period

3. Create Tax Credits for Federal Income Tax Paid

Current law: Indian Tribal governments are service providers that must generate revenue to sustain government operations and deliver needed services. Unlike other governments, Indian Tribes have no tax base to rely upon for that revenue. As a result, Tribes rely heavily upon federal grants and economic development programs to finance governmental activities. With the federal budget out of balance, Tribes risk further cutbacks of federal funds. Meanwhile, individual members of Indian Tribes are subject to the federal income tax.

Change will enhance economic growth: In the face of federal budget cuts, Tribes need a reliable revenue stream to provide adequate health care, law enforcement, infrastructure improvement, and other governmental services. In addition to the creation of Tribal government jobs, the enhancement of Tribal governance capacity and effective service delivery are prerequisites to attracting business and investment to Indian Country. Although Tribes provide many fundamental services, such as health care, to their members as well as to non-Indians residing within or near reservation boundaries, Tribal capacity to serve all residents of our territories depends upon Tribal ability to generate the revenues needed to complement limited federal program funding.

Proposal: Congress should develop Tax Code provisions allowing for the federal income taxes generated by Tribal citizens to be credited back to the Tribal government. This could be achieved by crediting taxes paid to the Tribal government or by authorizing deductions for donations made to a Tribal government. This proposal would preserve wealth generated on Tribal lands and provide for reinvestment of those dollars to support Tribal government operations and create an infrastructure and services platform for economic development.

4. Eliminate Double (State-Tribal) Taxation

Current law: As noted above, Indian Tribal governments are service providers that must generate revenue to sustain government operations and deliver needed services. Yet, unlike other governments, Indian Tribes lack a tax base to rely upon for that revenue. Under Supreme Court jurisprudence, both Tribes and states may tax non-Tribal members doing business in Indian country.

Change is needed to promote economic growth: The double taxation scenario stifles economic development on Indian reservations. In order to avoid this chilling effect of dual taxation, Tribes often refrain from levying the Tribal tax in order to attract and retain non-Indian businesses for its employment benefits. The tax revenues generated from these on-reservation business activities, however, are transferred out of Indian Country and into state and local government coffers where they are used to serve other non-Indian populations.

Proposal: Congress should restore tax fairness between states and Tribes by assuring that Tribes are able to collect tax revenues attributable to economic development activity taking place within Tribal jurisdictions. This could be achieved through a statutory preemption of state and local government taxation on Indian lands. This statutory clarification would provide certainty of jurisdiction that would facilitate greater investment by non-members in businesses within Indian Country. This would also restore tax equity by prohibiting the anomaly of extraterritorial taxation by state and local governments of activities on Indians lands where states and local governments provide no services. The change would also provide Tribes with the ability to diversify their revenue base.

Congress has enacted terms to preempt state and local taxation of on reservation activities in the context of Indian gaming. Under IGRA, states and local governments may not impose taxes or fees on a Tribe's Indian gaming activities. To accommodate state and local government interests in receiving compensation for actual services they provide, reimbursement of such costs is permitted. The Coalition of Large Tribes (COLT) has proposed preemption of state and local taxes on energy development activities modeled on the IGRA approach. USET supports the COLT proposal, but urges Congress to statutorily preempt state and local government taxation on economic development activities in Indian Country more broadly than energy development.

USET also proposes that the Market Fairness Act or other federal legislation governing the ability of states to impose sales taxes on internet and other remote sales should clearly authorize that Tribes may collect taxes on internet sales in their territories and that where a Tribal tax applies, the state sales tax does not. Such terms are necessary to prevent dual taxation of remote sales in Indian Country.

5. Permanently Extend the Simplified Indian Employment Tax Credit.

Current law: The Indian Employment Tax Credit (Section 45A) provides a 20 percent credit against income tax liability to employers for up to $20,000 of qualified wages and qualified employee health insurance costs paid or incurred by the employer for services performed by qualified employees. A

"qualified employee" is an employee who is an enrolled member (or the spouse of an enrolled member) of an Indian Tribe, who performs substantially all of the services within an Indian reservation, and whose principal place of abode while performing such services is on or near the reservation in which the services are performed. The credit is due to expire for taxable years beginning after December 31, 2013.

Change will help grow the economy: The current provision has not been utilized to its full potential due to the uncertainty associated with the short-term and limited nature of the provision. By making the credit permanent, businesses and industry can build the credit into its planning processes and see longer-term advantage to employing Tribal members in Indian Country.

Proposal: Permanently extend the Indian employment credit and modify the base year from 1993 to the average of qualified wages and health insurance costs for the two tax years prior to the current year. This proposal is consistent with the legislative changes proposed in the Obama Administration's Fiscal Year 2014 budget. See *General Explanation of the Administration's Fiscal Year 2014 Revenue Proposals*, p. 14 (available at http://www.treasury.gov/resource-center/tax-policy/Documents/General- Explanations-FY2014.pdf). In addition, consider making the credit available to nonprofit and governmental employers by allowing the credit to offset employers' on-reservation payroll tax liabilities.

6. Permanently Extend the New Markets Tax Credit with a Tribal Set Aside.

Current law: The New Markets Tax Credit (NMTC) is a 39-percent credit for equity investments in a qualified community development entity (CDE) held for a period of seven years. A qualified CDE is any domestic corporation or partnership: (1) whose primary mission is serving or providing investment capital for low-income communities or low-income persons; (2) that maintains accountability to residents of low-income communities by their representation on governing or advisory boards to the CDE; and (3) that is certified by the Treasury as being a qualified CDE. Treasury is authorized to designate targeted populations, including members of an Indian Tribe, as low-income communities even if they do not meet the statistical tests that generally apply if they lack adequate access to loans or equity investments. The NMTC was extended by the American Taxpayer Relief Act of 2012 through 2013.

Reason change will promote economic growth: The current provision has not been utilized to its full potential due to the uncertainty associated with the short-term and limited nature of the provision.

Proposal: Permanently extend the NMTC, would increase the annual credit allocation amount to $5 billion a year; in addition, provide that 3 percent or $150 million of each year's allocation be set aside for Indian Tribes, Tribal entities and organizations established to primarily benefit Indian reservation communities.

7. Extend Energy Production Grants, plus Clean Renewable Energy Bonds.

Current law: The Tax Code provides production tax credits (PTCs) for renewable energy facilities constructed before the end of 2013. Section 45 of the IRC provides PTCs for wind, biomass, geothermal, landfill gas, trash, qualified hydropower, and marine and hydrokinetic projects that generate electricity. Current law also provides an investment tax credit for energy property, which includes (1) property that is part of a facility that, but for the election to claim an investment tax credit, would qualify for a production tax credit; and (2) certain other listed property (including solar energy property). In addition, current law also provides grants for certain energy property on which construction began in 2009, 2010, or 2011.

Reasons for Change: Currently the tax credits are unusable because Tribal governments do not pay taxes. As a result, renewable energy projects do not occur on Indian lands.

Proposal: Permanently extend the PTC for renewable energy property and make it refundable in a way that Tribal governments can utilize the credit even though they have no income tax liability to offset. In addition, explore extending the expired provisions for Clean Renewable Energy Bonds, with a Tribal government set-aside.

8. Extend the Indian Country Coal Production Tax Credit

Current law: Under the 2005 Energy Policy Act, coal produced on land owned by an Indian Tribe qualifies for a production tax credit equivalent to $2 per ton through 2012. The American Taxpayer Relief Act extended the tax credit through 2013.

Change will promote economic growth: Production of coal on Indian lands is a long-term endeavor. Absent a longer-term period for the realization of the tax credit, private industry will be reluctant to partner with Tribes for the development of coal.

Proposal: Extend the coal production tax credit at least through 2020.

C. PROMOTE TAX FAIRNESS

1. Eliminate Special Restrictions on Tribal Government Debt

Current law: Indian Tribal governments are generally permitted to issue tax-exempt bonds only to finance facilities that serve an "essential governmental function."[1] Such a requirement is not imposed on municipal debt. In addition, Tribes (unlike states) are generally prohibited from issuing private activity bonds.

Change will promote tax fairness: Under the current provisions, Tribal governments are limited to using tax-exempt financing only for certain government functions, such as roads, schools and sewage systems, while state and local government may use bonds to finance a much wider variety of government-sponsored job-creating projects (*e.g.*, convention centers, tourist accommodations and public recreational facilities including golf courses, energy production and distribution facilities, parking structures and transportation projects). Both Congress and the Administration have recognized that current law is unfair, unworkable and in need of correction.

Proposal. Repeal the essential government function test and the general prohibition on Tribal private activity bonds. With regard to the private activity bonds, develop a customized formula to determine the volume cap on private activity bonds issued by Indian Tribal governments. A national Tribal bond volume cap could be based on the greater of either: the minimum state volume cap, or the total population of all Tribes. The national bond cap could then be allocated among all Tribal issuers planning to issue private activity bonds in a given year under procedures developed and administered by Treasury. Other than the special calculation of volume cap, private activity bonds issued by Tribal governments would be subject to the same restrictions that apply to private activity bonds issued by other governments (*e.g.*, the prohibition on using such bonds to finance skyboxes, airplanes, gambling facilities, health club facilities and liquor stores). Similarly, governmental bonds issued by Tribes would be subject to the same restrictions and rules applicable to other governmental bonds.

[1] *See*, 25 U.S.C. 7871(c).

2. Provide Parity in Treatment of Tribal Government Pensions

Current law: Tribal government benefits plans are not treated the same as state and local pension plans. Tribal plans are not treated as "governmental plans" unless all of the employees in the plan are substantially engaged in "essential governmental" functions, and not commercial activities.

Change promotes tax fairness: The current law's limitation to "essential governmental" functions is an unfair and unworkable standard. Tribal governments are unable to utilize the cost efficiencies intended in the law and, indeed, based on IRS interpretations, have largely avoided utilizing governmental plans because of the increased administrative burdens and costs.

Proposal: Equalize the treatment of Tribal pension plans to that of state and local plans. Equal treatment could be achieved by amending the Internal Revenue Code in the following ways: (1) delete the special limitations applicable to Tribal plans that are not imposed on state and local governmental plans (e.g., that all employees be engaged in "essential governmental functions"); (2) add the same distributions rights for Tribal public safety employees that are available to state and local public safety employees; (3) confirm that pension plans may honor Tribal court domestic relations orders that meet the same standards as state court orders; (4) grandfather Tribal "457" plans that otherwise comply with the Code and were established before [2006], and (5) adopt the same employment tax rules for Tribal deferred compensation plans that apply to state and local plans. These Code amendments would provide government fairness between Indian Tribal plans and other government plans.

3. Ensure Social Eligibility for Tribal Council Members

Current law: The IRS does not consider payment to Tribal council members as wages. As a result Tribes are exempt from making FICA payments for Tribal council members. Yet, unlike other government benefit programs exempt from mandatory participation in FICA, Tribal council members are not permitted to opt-in by making payments for FICA provisions.

Change is needed to promote fairness: In the past Tribal council service constituted part-time duties that may have generate modest stipends. Today, Tribal council members serve on a full-time basis, which precludes them from undertaking other employment. Yet, they have been denied the right to participate in the social security program in a manner consistent with that of other government legislators.

Proposal: A Code provision should establish that Tribes may opt to pay into the social security system in order for Tribal council members to secure this level of protection for themselves and their families.

4. Provide for Equitable Application of the Adoption Tax Credit

Current law: Taxpayers that adopt children with special needs are eligible for an increased tax credit for qualified adoption expenses. However, if a Tribal court -- instead of a state court -- makes the "special needs determination," the prospective adoptive parents cannot access the tax credit.

Proposal: Place Tribal court determinations as to the "special needs" of children on equal footing with similar determinations made in state court for purposes of the Code Section 23 adoption tax credit. This proposal is consistent with the legislative changes proposed in the Obama Administration's Fiscal Year 2014 budget. See *General Explanation of the Administration's Fiscal Year 2014 Revenue Proposals*, p. 214 (available at http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf). Recognizing Tribal court determinations also would align IRS tax policy with the policies codified in the Indian Child Welfare Act.

5. Equip Tribal Child Support Enforcement Agencies with the Same Policy Tools and Incentives that Are Available to State-run Entities

Current law: The Social Security Act allows Indian Tribal governments to establish Child Support Enforcement Agencies. Currently, there are more than 50 of these agencies throughout Indian Country. However, Tribal Child Support Enforcement Agencies do not have all the powers of similar State-run organizations.

Change would promote fairness and program effectiveness: Tribal Child Support Enforcement Agencies do not have (1) access to parent locator databases, or (2) the authority under the Code to

withhold past-due child support payments from the federal income tax returns of parents with past-due obligations. These two enforcement mechanisms are critical to improving the services provided by Tribal child support enforcement agencies.

Proposal: Amend the Social Security Act and the Internal Revenue Code to permit child support enforcement agencies to offset tax refunds for past-due payments and to access the same parent locator database available to State child support agencies.

6. Promote Parity in the Health Care Professionals Loan Repayment Exclusion

Current law: Loan amounts forgiven or repaid on an individual's behalf generally are considered taxable income. However, certain forgiven or cancelled student loan debt is excluded from income, including debt repaid under the National Health Service Corp ("NHSC") Loan Repayment Program. The Indian Health Service ("IHS") Health Professions Loan Forgiveness Program is very similar to the NHSC Loan Repayment Program. Under both programs, dentists, physicians, and nurses provide health care services to underserved populations in exchange for loan repayment assistance. However, the IHS Health Professions Loan Forgiveness Program does not enjoy the same preferential tax treatment as the NHSC program.

Proposal: Amend the Internal Revenue Code to provide health care professionals who receive student loan repayments from IHS the same tax-free status enjoyed by those who receive NHSC loan repayments. This proposal is consistent with the legislative changes proposed in the Obama Administration's Fiscal Year 2014 budget. See *General Explanation of the Administration's Fiscal Year 2014 Revenue Proposals*, p. 132 (available at http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf).

7. Eliminate Excessive Bureaucracy in Medicaid Electronic Health Record (EHR) Incentive Payments that are Assigned to the Tribal Health Care Facilities

Current law: The Indian Health Service (IHS) has provided written guidance to the Internal Revenue Service clarifying that payments made to IHS health care professionals under the Medicaid Electronic Health Record (EHR) Incentive Payment Program should not be considered taxable income to them because they are required by their employment to assign such payments to the IHS. Yet, when health care professionals serving in Tribal health care facilities pursuant to Indian Self-Determination Act agreements with agreements with the IHS receive EHR incentive payments and assign those payments to the Tribal health facility, the Tribal health care professional is issued a 1099 form and then must issue a 1099 to the Tribal health facility to report the assignment of the payment to the health facility.

Proposal: Congress should require IRS to confirm that where a health care professional is required by law to assign the payment to IHS, or required by contract to assign the payment to a Tribal health facility, they are in fact acting as an agent and conduit of another and are unable to keep the payment,

thereby making the payment non-taxable to them. IRS should also confirm that in the event of such assignments, there is no need for the health care professionals to issue a 1099 to the health care facility.

8. Exempt Tribal Government Distributions from the Kiddie Tax

Current law: Unearned income in excess of $1,900 of children under age 19, or of young adults age 19-24 who are full-time students, is taxed at the parent's marginal rate, if that rate is higher than what the child would otherwise pay. The purpose of this "kiddie tax" is to address instances of intergenerational income shifting, where a family would historically save large amounts of money by transferring highly appreciated investments to their children who enjoy a lower tax bracket.

Reason for Change: Unfortunately, however, the kiddie tax, as codified in Code Section 1(g), burdens many Tribal minors and young adults with a higher tax rate on Tribal distributions, including minors' trust distributions. The kiddie tax also may create a disincentive for some young Tribal members with respect to the pursuit of higher education.

Proposal: Amend Code Section 1(g) to exempt Tribal government distributions (whether derived from gaming or other Tribal revenue sources) from the kiddie tax.

Tribal General Welfare Exclusion Act

Summary

Historical Background

The U.S. Constitution recognizes Indian tribes as sovereign nations. Specifically, the Treaty, Commerce, and Supremacy clauses mandate a bilateral government-to-government relationship between Indian tribes and the United States. The Constitution further recognizes tribal citizens as "Indians not taxed" who are subject to tribal government jurisdiction in the original Apportionment Clause and the 14th Amendment.

Through treaties, statutes, and executive orders, the United States reserved Indian reservations and lands as permanent homelands for Indian tribes and their members. Vested with sovereign authority over their members and their territory, Indian tribes are entitled to self-determination and self-governance as set forth in the Indian Self-Determination Act of 1975, the Self-Governance Act, and other federal laws.

In 1924, Congress granted citizenship to non-citizen Indians through the Indian Citizenship Act, which stipulated that citizenship does not impair an Indian's right to tribal or other property. Congress thereby preserved tribal government relations with tribal citizens as a fundamental tenet of dual citizenship for tribal citizens.

Under reserved powers of tribal self-government, Indian tribes have the right and the duty to provide government programs and services to tribal citizens as assisted and supported by the United States. Moreover, Indian tribes have the right and the duty to strive to make Indian reservations and lands "livable" permanent homelands for tribal citizens through programs and services that promote the "general welfare" of tribal communities.

Reforms Needed

Federal and state governments are charged with providing for the general welfare of their citizens. In doing so, they have exempted general welfare programs from taxation, an exception known as a "general welfare exclusion." The Internal Revenue Service (IRS) excludes a broad array of government services including, but not limited to, education, public safety, court system, social services, public works, health services, housing authority, parks and recreation, cultural resources, and museums.

Through treaties, statutes, and executive orders, the United States was obligated to provide for the general welfare of tribes in exchange for hundreds of millions of acres of their land. Unfortunately, the federal government has fallen short of its obligations. Many tribal governments have been forced to bridge the gap and provide for the general welfare of their people and communities through tribal governmental programs, services, and benefits.

The IRS has recently challenged tribal general welfare programs, many of which are nearly identical to tax-exempt programs provided by federal and state governments. It has conducted audits and examinations that seek to tax government programs, services, and benefits provided to tribal citizens. These include, but are not limited to, healthcare, education, housing, eldercare, emergency assistance, cultural programs, burial assistance, and legal aid. Concerns have been raised that the IRS may not support or even fully understand tribes' unique status and their government-to-government relationship with the United States.

In Notice 2012-75 (now pending final review), the IRS produced draft guidance on the application of the "general welfare exclusion" to Indian nations and their citizens. While this is seen as a positive development, it falls short of the clear legal authority to properly recognize tribal self-governance and their general welfare activities. To this point, the IRS's narrow interpretation of general welfare has deterred tribal efforts to improve their members' quality of life.

An accurate definition and interpretation of general welfare can have far-reaching impacts on tribal programs and those they serve. Therefore, Congress must ensure that the IRS understands and respects the unique government-to-government relationship of sovereign tribal nations. Clear Congressional guidance on general welfare is needed to ensure tribal governments are not impeded in their provision of vital social and welfare programs that improve their members' lives. In doing so, Congress can ensure that the United States' federal trust responsibilities are completely and fairly fulfilled.

Summary of the Act

The Tribal General Welfare Exclusion Act mandates that tribal government programs, services, and benefits authorized or administered by tribes for tribal citizens, spouses, and dependents be excluded from income as a "general welfare exclusion."

The Act clarifies that items of cultural significance or cash honoraria provided by tribal governments to tribal citizens for cultural purposes or cultural events shall not represent compensation for services.

The Act directs the Secretary of the Treasury to require education and training of IRS field agents on federal Indian law as well as on the federal government's unique legal treaty and trust relationship with Indian tribal governments. It further directs the Secretary to provide for training and technical assistance to tribal financial officers about implementation of this Act.

The Act establishes a national Tribal Advisory Committee within the Department of the Treasury to advise the Secretary of the Treasury on matters of Indian tax policy. Comprising seven members serving four-year terms, the committee shall include three members appointed by the Secretary, two appointed by the Chairman and Ranking Member of the Ways and Means Committee, and two appointed by the Chairman and Ranking Member of the Senate Finance Committee.

The Act temporarily suspends all general welfare audits and examinations of Indian tribal governments and members until the education and training measures prescribed in the Act are completed.

The Act authorizes the Secretary to waive any penalties or interest imposed on any Indian tribal governments or members in cases of general welfare.

The Tribal General Welfare Exclusion Act directs the Secretary that any ambiguities in applying this Act shall be resolved in favor of Indian tribal governments, and that deference shall be given to tribal governments for the programs administered and authorized by the tribe to benefit the general welfare.

United States Senate

November 14, 2013

Support Fair Tax Treatment for Tribal Governments

Dear Colleague:

We invite you to cosponsor S. 1507, the Tribal General Welfare Exclusion Act. This legislation would clarify the tax treatment of general welfare benefits provided by Indian tribes by recognizing that tribes, as sovereign nations, have the inherent right to provide tax-exempt government programs and services to their tribal citizens.

Local and state governments throughout the United States frequently provide support to those who need assistance, but the people receiving that assistance are not taxed by the Internal Revenue Service (IRS) for those benefits. For years, the IRS has audited Indian tribes, which provide health care, education, housing, or legal aid to those in need. The Tribal General Welfare Exclusion Act provides needed clarification to ensure tribal government programs, services and benefits authorized or administered by tribes for tribal citizens, spouses and dependents are excluded from income for tax purposes. The bill will bring parity to the tax treatment of Indian tribes by recognizing as sovereign nations they are responsible for making sure their government programs and services best fit the needs of their citizens, just as other local governments across the country do.

The U.S. Chamber of Commerce and the National Congress of American Indians support our efforts to clarify the tax status of these tribal government programs, and the bill has been scored by the Joint Committee on Taxation as having a "negligible" impact on revenue. If you or your staff would like more information on the bill, or would like to cosponsor, please contact Nathan Heiman with Senator Moran at 4-6521 or Nathan_Heiman@moran.senate.gov or Alison Grigonis with Senator Heitkamp at 4-2043 or Alison_Grigonis@heitkamp.senate.gov.

Sincerely,

Jerry Moran

JERRY MORAN
United States Senate

Heidi Heitkamp

HEIDI HEITKAMP
United States Senate

From: e-Dear Colleague
Sent: Monday, January 27, 2014 5:37 PM
To: E-DEARCOLL_ISSUES_G-Z_0000@ls2.house.gov
Subject: NaturalResources, Taxes: Dear Colleague: Co-sponsor Bi-Partisan Legislation: Help Indian Tribes Improve the Quality of Life in their Communities

Co-sponsor Bi-Partisan Legislation: Help Indian Tribes Improve the Quality of Life in their Communities

From: The Honorable Tom Cole Sent By:
stratton.edwards@mail.house.gov Bill: H.R. 3043 Date: 1/27/2014
Co-sponsor Bi-Partisan Legislation: Help Indian Tribes Improve the Quality of Life in their Communities

Dear Colleague:

As Co-chairs of the Congressional Native American Caucus, we write to urge you to cosponsor H.R. 3043 introduced by Representatives Devin Nunes and Ron Kind. This bi-partisan bill is known as The Tribal General Welfare Exclusion Act and it clarifies the tax status for support a Tribe provides its members as general welfare. The Joint Committee on Taxation has determined the bill would have a negligible revenue impact on the budget.

Indian Tribes have always provided services to their members as part of their inherent responsibility to support and advance the general welfare of their members. In recent times, for example, these activities have included assistance in areas of housing, education and transportation.

Within the last several years, the Internal Revenue Service (IRS) began evaluating the type and scope of Tribal programs in this area, second-guessing which activities would be considered to fall under the General Welfare Exclusion. Two aspects of these actions were particularly objectionable to Tribes across the nation. First, the core concept of Tribal sovereignty respects the rights of Tribes to decide what programs are needed by their members, just as the law protects the rights of States to determine what is in the best interest of their citizens. These decisions are made by the elected leaders of the Tribes under the guidelines of the General Welfare Exclusion. Tribal Nations should not serve beneath the governing thumb of IRS field agents. Secondly, the decisions made by field agents on the General Welfare Exclusion were inconsistent and arbitrary. Activities allowed in one audit would be challenged in another.

In December, 2012 the IRS took an important step to set ground rules for its agents in this area by publishing subregulatory guidance. For obvious reasons, however, the guidance does not provide Tribal Nations the certainty they deserve that Tribal actions taken in support of their people will be respected into the future. Guidance

given can easily be changed. The Nunes - Kind bill, H.R. 3043, will provide clarity and certainty in federal law regarding the Tribes' role, and they deserve no less. The bill should also make it easier for the IRS to administer the law, by providing statutory guidance.

Recently, 24 tribal organizations sent a letter urging the House Ways & Means Committee to take up this important legislation. We encourage you to read their attached letter, and join these leaders throughout Indian Country in supporting this legislation. Again, we urge you to co-sponsor H.R. 3043 by contacting Damon Nelson with Representative Nunes.

Thank you for your consideration of this request.

Sincerely,

Tom Cole
Member of Congress

Betty McCollum
Member of Congress

September 9, 2013

The Honorable Max Baucus, Chairman
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Orrin Hatch, Ranking Member
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dave Camp, Chairman
House Committee on Ways and Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Sander Levin, Ranking Member
House Committee on Ways and Means
1106 Longworth House Office Building
Washington, DC 20515

Re: Support for HR 3043 & S 1507/Tribal General Welfare Exclusion Act

Dear Chairman Baucus, Ranking Member Hatch, Chairman Camp, and Ranking Member Levin:

Our undersigned Tribal organizations have come together to urge the House Ways & Means Committee and the Senate Finance Committee to pass legislation to amend the Internal Revenue Code (Code) to make clear that the benefits and services provided by tribal governments for the general welfare of their people are not subject to federal income tax.

We thank Rep. Devin Nunes for introducing H.R. 3043 the "Tribal General Welfare Exclusion Act", and Senators Jerry Moran and Heidi Heitkamp for introducing the Senate companion bill S. 1507, both of which enjoy bi-partisan support. We are also pleased that the Senate Finance Committee included the General Welfare Exclusion (GWE) proposal in its tax reform option paper titled, "Economic and Community Development". In addition, various tribal comments were submitted to the House Ways & Means Committee urging enactment of GWE legislation as part of comprehensive tax reform. To demonstrate the broad support of Indian country for these efforts, tribes and tribal organizations across the country have adopted resolutions urging Congress to pass broad GWE legislation.

This change in the Code would align federal tax law with federal Indian law and policy, which include: (1) the U.S. treaty and trust obligations to Indians; (2) the U.S. Constitution's acknowledgment of Indian tribes as governments; and (3) the longstanding federal policy supporting tribal self-determination by respecting decisions of tribal governments to address the needs of their own communities.

Moreover, this legislation will help address the IRS' targeted audits in Indian country that have undermined the clarity of the Service's longstanding administrative doctrine that has concluded that benefits provided by tribal governments to their citizens for the promotion of the general welfare are not included in the recipient's income and are therefore not taxable. Even though the Code is silent on this issue, the IRS continues to conduct arbitrary and pervasive audits. The Treasury Inspector General for Tax Administration released a report on January 28, 2013 (Reference no. 2013-10-018), confirming tribal claims that the IRS has targeted tribal governments through the Abuse Detection and Prevention Teams of the Indian Tribal Governments office of the IRS and concluded that this effort has yielded few measurable results.

Congress passed a similar general welfare measure in the Indian Health Care Improvement Act of 2010, which clarified that health benefits provided by tribal governments are excluded from federal income tax. Like the recent tribal health benefits tax exclusion provision, we urge you to amend the Code to do the following:

(1) Clarify that payments, programs or services provided by tribal governments for the general welfare of their people are excluded from federal income tax;

(2) Clarify that benefits that are items of cultural significance, reimbursement of costs, or cash honoraria provided by tribal governments for cultural purposes or participation in cultural events shall not represent compensation for services and shall be excluded from federal income tax;

(3) Establish a Tribal Advisory Committee within the Department of the Treasury to advise the Secretary on matters of Indian tax policy and to assist in implementation of this amendment to the Code;

(4) Clarify that tribal laws and tribal decision-making shall be given deference when interpreting and implementing this change to the Code;

(5) Suspend all audits pertaining to tribal government provided benefits and services until this amendment to the Code is enacted and implemented;

(6) Require education and training of all IRS field agents acting in Indian Country about principles of federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian tribes;

(7) Require IRS agents to provide technical assistance to tribal financial officers for the purpose of implementing this amendment; and

(8) Expressly provide the Secretary of the Treasury with authority to waive penalties and interest imposed under the Code pertaining to benefits and services provided by tribal governments.

These provisions are included in H.R. 3043 and S. 1507. We stand united behind these reforms. Many other tribes and tribal organizations also support these needed changes to the Code. Thank you for your efforts thus far on this matter and we look forward to continuing our work together on passage of GWE legislation.

Sincerely,

Brian Patterson, President
United South and Eastern Tribes

Mark Romero, Chairman
CATG Board of Directors

Dr. Heather Shotton, President
National Indian Education Association

Bill Lomax, President
Native American Finance Officers Association

Michele Stanley, President
Midwest Alliance of Sovereign Tribes

Julie Kitka, President
Alaska Federation of Natives

Cris Stainbrook, President
Indian Land Tenure Foundation

Ernie Stevens, Jr., Chairman
National Indian Gaming Association

Tex Hall
Co-Chairman, COLT
Chairman, Great Plains Tribal Chairman Association

Gary Davis, President
National Center for American Indian Enterprise Development, NCAIED

Delice Calcote, Executive Director
Alaska Inter-Tribal Council

Terry Rambler, President
Inter Tribal Council of Arizona

LaDonna Harris, President
Americans for Indian Opportunity

Jefferson Keel, President
National Congress of American Indians

Harlan Beaulieu, President
Intertribal Agriculture Council

Cathy Abramson, Chairwoman
National Indian Health Board

Fawn Sharp, President
Affiliated Tribes of Northwest Indians

Robert Smith, Chairman of the Board
Southern California Tribal Chairmen's Association

W. Ron Allen, Chairman
Self-Governance Communication & Education Tribal Consortium

George Thurman, Chairman
United Indian Nations of Oklahoma, Kansas & Texas

Ivan Posey, Chairman
Montana-Wyoming Tribal Leaders Council

Larry Romanelli, President
United Tribes of Michigan

L. John Lufkins, Executive Director
Inter-Tribal Council of MI, Inc.

United South and Eastern Tribes, Inc.

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USET Talking Points

Federal Tax Treatment of Per Capita Distributions of Trust Resources

Treasury/IRS Phone Consultation, January 27, 2014 (2:30pm Eastern Time)

Issue: The Secretary of the Interior and many Tribes provide their enrolled members with modest per capita distributions of revenue generated from the development or utilization of trust assets and resources. These trust per capita payments have generally been considered by Tribes, the Department of Interior and by the United States Congress as excluded from taxation by federal or state governments. The IRS Northwest Field Office, however, asserted that it views per capital distributions of revenues from Tribal timber sales as taxable income to the Tribal members receiving distributions. Tribes have demanded that IRS consult with Tribes to develop procedures to clarify that these per capita distributions of income from trust resource development are not taxable.

Background: The IRS issued Notice 12-60 in September, 2012, to clarify that per capita payments from the settlement of *Tribal trust fund mismanagement cases* is not considered income and is not taxable, but neither that guidance nor any other written guidance from the IRS has addressed the taxability of per capita payments to Tribal members arising from the development or use of *trust resources*. In 2012, the Senate Indian Affairs Committee and the House Subcommittee on Indian and Native Alaskan Affairs held hearings on this issue.

During the House Subcommittee hearing the IRS testified that the "legal reasoning" of IRS Notice 12-60 declaring that the per capita distributions of recent Tribal trust claim settlements are non-taxable would also apply to trust per capita payments under the 1983 Per Capita Act. The Committees called on the IRS to issue published guidance to clarify that Tribal trust per capita payments are not taxable. In presentations to Tribal representatives, the IRS has insisted that developing and issuing guidance on the per capita trust issue was a top priority. To date, however, IRS has not issued such guidance in either draft or final form.

Key Points to Raise during the Consultation:

1) IRS and Treasury must publish written, permanent guidance that clarifies that trust resource income is not taxable.
2) In doing so, IRS and Treasury must engage in meaningful government-to-government consultation with Tribes, including the opportunity for Tribes to review and comment on draft or interim guidance.
3) IRS and Treasury must defer to the Department of Interior and respect he delegated authority of the Assistant Secretary for Indian Affairs regarding the administration of trust resources.

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USET Resolution No. 2014:006

URGING CLARIFICATION THAT TRUST PER CAPITA PAYMENTS ARE NOT TAXABLE INCOME

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, some member Tribes of USET have provided and continue to provide their enrolled members with modest per capita distributions of revenue ("trust per capita payments") generated from the development or utilization of Tribal trust resources; and

WHEREAS, such trust per capita payments have always been regarded by USET member Tribes, the Department of Interior (DOI), and by the United States (U.S.) Congress as excluded from taxation by federal or state governments; and

WHEREAS, at least one field office of the Internal Revenue Service (IRS) has asserted to Tribes that it views such trust per capita payments as taxable income to the recipient Tribal members; and

WHEREAS, Tribes and Tribal organizations requested consultation with the U.S. Treasury and the DOI regarding this taxation effort in conflict with longstanding policy and practice and which constitutes a shift in IRS policy requiring meaningful consultation with the affected Tribes, on a government-to-government basis, as mandated by Executive Order No. 13175; and

WHEREAS, the IRS issued Notice 12-60 in September, 2012, to clarify per capita payments from the settlement of Tribal trust fund mismanagement cases are not considered income and are not taxable, but did not address the taxability of per capita payments to Tribal members arising from the development or use of trust resources; and

WHEREAS, congressional hearings on the IRS's efforts to tax Tribal trust per capita payments were held in the Senate Committee on Indian Affairs in June, 2012, and in the House Resources Committee's Subcommittee on Indian and Native Alaskan Affairs in September, 2012, with Committee members on a bi-partisan basis strongly urging the IRS to immediately issue published guidance to clarify that Tribal trust per capita payments are not taxable; and

WHEREAS, the IRS testified during the September, 2012, House Subcommittee hearing that the "legal reasoning" of the Treasury Department's September 2012 Notice of Guidance No. 2012-60 declaring that the per capita distributions of recent Tribal trust claim settlements are non-taxable would also apply to trust per capita payments under the 1983 Per Capita Act (Public Law 98-64); and

WHEREAS, the Per Capita Act establishes statutory obligations upon the DOI, and the Assistant Secretary for Indian Affairs has also indicated his commitment to inter-agency dialogue with Treasury on specific tax matters as they arise; and

WHEREAS, IRS and Treasury officials have stated in meetings with USET member Tribes and USET representatives that the publication of written guidance on the trust per capita tax rules would be a priority for 2013, yet no such guidance has been shared in either a draft or final form; and

WHEREAS, in December 2010, the U.S. recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it

RESOLVED the USET Board of Directors calls upon the United States Internal Revenue Service and the Department of Treasury to immediately provide USET and affected Tribes with a discussion draft of the proposed official guidance that would establish a permanent policy clarifying that Tribal trust per capita payments are non-taxable and are subject to the income exclusions set out in the 1983 Per Capita Act; and, be it further

RESOLVED the USET Board of Directors urges the United States Internal Revenue Service, the Department of Treasury, to fulfill its commitment to provide clarifying guidance that trust per capita payments are not taxable; and, be it further

RESOLVED that USET calls upon the Assistant Secretary for Indian Affairs, in recognition of his delegated authority for the administration of trust resources, to urge the United States Internal Revenue Service, and the Department of Treasury to expedite final guidance on the non-taxability of trust per capita payments.

CERTIFICATION

This resolution was duly passed at the USET Annual Meeting, at which a quorum was present, in Cherokee, NC, on Thursday, October 31, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"

United South and Eastern Tribes, Inc.

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USET Resolution No. 2013:030

SUPPORT FOR LEGISLATION TO AMEND THE INTERNAL REVENUE CODE TO RESPECT SOVEREIGNTY OF TRIBAL GOVERNMENTS TO PROTECT AND PROMOTE GENERAL WELFARE OF THEIR CITIZENS

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, the U.S. Government has a unique government-to-government relationship with Indian Tribes and has a legal and moral responsibility to respect and honor Tribal sovereignty as Tribal governments fulfill their roles in protecting and promoting the general welfare of their Tribal citizens to address economic, social, cultural, and community needs; and

WHEREAS, Indian Tribes are sovereigns that pre-date the United States with prior and treaty protected rights to self-government and to our Indian lands; and

WHEREAS, the Constitution of the United States, through the Treaty, Commerce, Supremacy, and Apportionment Clauses and the 14th Amendment recognize the sovereign status of Indian Tribes as separate nations established prior to the United States; and

WHEREAS, the United States undertook many treaty obligations in exchange for the cession and taking of hundreds of millions of acres of Tribal homelands, yet the Federal Government has fallen far short in meeting and funding these solemn obligations; and

WHEREAS, some Tribal governments, tired of waiting on the U.S. to meet its treaty and statutory obligations, have taken it upon themselves to provide for the general needs of their communities through Tribal services and programs; and

WHEREAS, the Internal Revenue Service (IRS), instead of fostering these acts of Indian self-determination, are targeting Tribal governments for audits and examinations, seeking to tax the benefits provided to Tribal citizens by Tribal governments; and

WHEREAS, the Treasury Inspector General for Tax Administration released a report on January 28, 2013, Reference Number 2013-10-018, confirming Tribal claims that the IRS has increasingly targeted Indian Tribes in recent years through the efforts of the Abuse Detection and Prevention Team (ADAPT) program to combat fraud and abuse in Indian Country, and concluding that the ADAPT program has yielded de minimis results; and

WHEREAS, the IRS is violating Tribal treaty rights, federal policies supporting Indian Self-Determination, and provisions in the U.S. Constitution that acknowledge Tribes as separate sovereigns, not subject to taxation; and

WHEREAS, the Internal Revenue Code Section 61 states that, except as otherwise provided, gross income includes all income from whatever source derived, and the IRS and federal courts have consistently held that payments made under similar social benefit programs for the promotion of general welfare are not includable in gross income; and

WHEREAS, the General Welfare Exclusion (GWE) Doctrine provides a common law (or statutory interpretation by implication) exclusion for government social welfare programs; however, implementation of the GWE is based upon subjective decision-making and is difficult to apply; and

WHEREAS, the IRS developed Notice 2012-75, which recognizes the right of Tribal governments to provide certain programs and services to their citizens on a tax-free basis consistent with the GWE; and

WHEREAS, the IRS retains a significant amount of subjective authority under Notice 2012-75 to set Tribal tax policy on an *ad hoc* basis without adequate acknowledgment of the Federal Government's legal, treaty, trust, and statutory obligations to Indian Tribes; and

WHEREAS, Notice 2012-75 is not permanent law, includes significant ambiguities that will subject Tribes to inconsistent and increased enforcement actions by the IRS, and does not address Tribal treaty rights or unfunded federal programs and services established by federal laws to meet federal obligations; and

WHEREAS, Notice 2012-75 would force Indian Tribes to forever alter their deep rooted traditional ways of life and cultural practices of providing for the social, economic, religious, and other needs of their citizens as done since time immemorial in order to comply with Notice requirements, such as written guidelines, that are antithetical with the traditional and cultural practices of Indian Tribes; and

WHEREAS, despite the fact that Notice 2012-75 is a draft pending additional Tribal government comment, the IRS has continued to target Tribal government-provided general welfare benefits on a broad scale across the country; and

WHEREAS, Tribes across the country have urged the IRS to take immediate steps to stop targeted audits and enforcement actions and instead focus on compliance efforts to train IRS staff and field agents about the Federal Government's unique obligations to Tribes as well as the federal policy of Tribal self-determination and provide training to Tribal financial officials for the purpose of implementing Notice 2012-75 but the IRS has rejected these requests; and

WHEREAS, Congress provided a recent example of amending the Internal Revenue Code in 2010 to address a related general welfare policy issue to clarify that Tribal government-provided health insurance and related benefits are excluded from federal income taxation; therefore, be it

RESOLVED the USET Board of Directors calls upon the U.S. Congress to amend the Internal Revenue Code to clarify that Tribal government-provided programs or services authorized or administered by them or authorized or administered under federal law for benefits for American Indians because of their governmental status as American Indians are excluded from gross income for federal tax purposes; and, be it further

RESOLVED the USET Board of Directors calls upon the U.S. Congress to clarify that certain benefits that are items of cultural significance or cash honoraria provided to Tribal citizens shall not represent compensation for services and shall be eligible for exclusion from income; and, be it further

RESOLVED the USET Board of Directors calls upon the U.S. Congress to establish by law regional Tribal Advisory Committees (TAC's) within the Department of the Treasury to advise the Secretary on matters of Indian taxation; and, be it further

RESOLVED the USET Board of Directors calls upon the U.S. Congress to enact a moratorium to halt compliance and enforcement actions by the Internal Revenue Service pertaining to Tribal government-provided benefits at least until Notice 2012-75 is final and there is proper training of Internal Revenue Service personnel given the Internal Revenue Service has refused requests of Tribes to do so; require a more rigorous and accountable training and education program by which Internal Revenue Service field agents carry out their functions consistent with principles of federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian Tribes; and orient the training of Internal Revenue Service field agents so they have the knowledge, skills and abilities to provide training and technical assistance to Tribal financial officers for the purpose of implementing this amendment.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Niagara Falls, New York, on Thursday, May 16, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

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USET Resolution No. 2013:010

INTERNAL REVENUE SERVICE INTERFERENCE WITH TRIBAL GOVERNMENT RIGHT TO PROVIDE MEMBERS WITH TAX-FREE PROGRAM BENEFITS FOR THE GENERAL WELFARE

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, the regulatory authority of Tribes over their citizens and territories flows from the Tribes' preexisting inherent sovereignty that has been recognized by the U.S. Constitution, legislation, treaties, judicial decisions and administrative practice; and

WHEREAS, Tribal governments provide their citizens with a broad range of economic, social, cultural, educational and health benefits through programs to foster the general welfare of the Tribal community; and

WHEREAS, the Internal Revenue Service (IRS) has subjected Tribal governments to an inordinate amount of audit activity, primarily in the form of information return and employment tax examinations; and

WHEREAS, Congress, in response to improper IRS attempts to tax Tribal health benefits, enacted Section 139D to the Tax Code by Section 9021 of the Patient Protection and Affordable Care Act (PPACA) clarifying that the value of a broad range of Indian Health Care benefits received by Tribal members are excluded from gross income and therefore not taxable; and

WHEREAS, the IRS has subsequently issued internal guidance interpreting non-prescription drug benefits to be outside the scope of non-taxable Indian Health Care benefits in contravention with the letter, intent and spirit of Section 139D of the Tax Code; and

WHEREAS, Tribal governments have engaged congressional oversight committees with respect to IRS audit practices and inconsistency regarding tax treatment of Tribal general welfare program benefits; and

WHEREAS, a consultation process with the Department of the Treasury and the IRS regarding Tribal government authority to provide their members with tax-free benefits pursuant to general welfare programs resulted in the publication of IRS Notice 2012-75, which sets forth a new draft revenue procedure for the tax-free treatment of benefits provided to Tribal members under Tribal general welfare programs and establishes mechanisms to shield from taxation any compensation received from the performance of Tribal cultural heritage activities and participation in cultural education programs; and

WHEREAS, the comment period for the draft revenue procedure under Notice 2012-75 ends on June 3, 2013; therefore, be it

RESOLVED the USET Board of Directors urges the Internal Revenue Service to suspend audits and examinations in order to continue consultation with Tribes to finalize the new revenue procedure for the tax-free treatment of benefits provided to Tribal members under Tribal general welfare programs and to develop and implement training programs for Internal Revenue Service employees on the new revenue procedure and to build proper understanding of Tribal sovereignty and authority under the constitution and federal law; and, be it further

RESOLVED the USET Board of Directors calls upon the Internal Revenue Service to retract its exceedingly narrow and illogical interpretation that non-prescription drug benefits fall outside the scope of Indian Health Benefits under Section 139D of the Tax Code; and, be it further

RESOLVED the USET Board of Directors expresses a firm commitment that USET Member Tribes and USET staff will continue working with Tribes, intertribal organizations, congressional committees and executive agencies to advance Tribal tax policy priorities, including clarification of the authority of Tribal governments to provide their members with tax-free economic, social, cultural, educational and health benefits through programs to foster the general welfare of the Tribal community.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 7, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

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BUDGET

Federal Budget for Indian Programs

The Trust Responsibility requires that Federal Budget Obligations to Tribes should be Mandatory in Nature. As a 1977 U.S. Congress/American Indian Policy Review Commission Report stated:

> The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

Regrettably, Federal Indian programs are rarely funded to the level necessary to achieve their intended purposes.

Sequestration – Disproportionate Impact on Tribes: Enactment of the Budget Control Act of 2011 without Tribal consultation violated the Federal Trust Responsibility. Because of the trust responsibility, Indian tribes are in a closer relationship with the Federal government than nearly all other communities. As a result, they are disproportionately and devastatingly affected by Sequestration. Notably, the Indian Health Service was not exempted from sequestration, even though other Federal health care systems were.

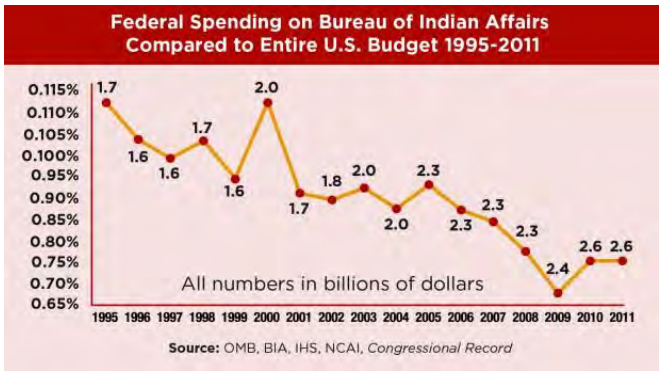
<u>Action request:</u> Ensure that future funding measures, exempt Indian programs from the current and future cuts of Sequestration, as well as any additional cuts or rescissions that seek to reduce the deficit.

Inflation and the Budget for Federal Indian Programs. From FY 2002 through FY 2008, despite annual increases, after taking into account the affect of inflation, most Federal domestic programs, including the Indian programs, saw a purchase power decrease of <u>approximately 14%</u>. The budget increase in FY 2009, including ARRA funding, was approximately enough to make up for this effective cut and bring the purchase power of Indian programs back to FY 2002 levels, but in the intervening 12 years, Indian country needs have grown substantially. And, of course, the FY 2002 levels were inadequate to address the needs of Indian country or to fulfill the Federal government's trust obligation.

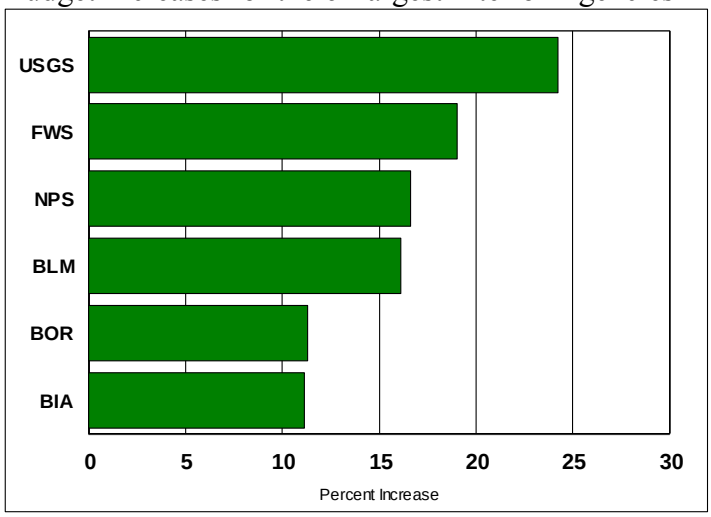
Federal Indian programs should be consistently funded at a rate that exceeds the rate of inflation in order to achieve real progress in closing the services gap for Natives.

Historic Patterns in Indian Program Funding

In a very real way, the budget of the United States government reflects the values of the American people. Courtesy of the National Congress of American Indians (NCAI), set forth below is a chart that depicts the percentage of the Federal budget dedicated to funding the BIA. As you can see, as a percentage of the overall budget, the BIA budget has declined from .115% in FY 1995 to .075% (correcting chart typo) in FY 2011, approximately a one-third decline as a percentage of the overall budget (despite a small bump up in FY 2010). Below that chart is another which demonstrates that over the last ten years, when funding increases have come to the Department of the Interior they have been greater for other major agencies within the Department than for the Bureau of Indian Affairs.



Budget Increases for the 6 Largest Interior Agencies FY2004 to FY 2014



USET recognizes that in challenging times, all Americans must be called upon to sacrifice for the common good of all. USET suggests, however, that when it comes to sacrificing for the good of all Americans, the historic record demonstrates that nobody has sacrificed more than Native Americans.

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January 10, 2014

GENERAL MEMORANDUM 14-003

Congress Likely to Pass Short-Term FY 2014 Continuing Resolution While Working on FY 2014 Omnibus; President's FY 2015 Budget Likely to Be Delayed

FY 2014 Omnibus Delayed. After Congress agreed to topline spending levels for FY 2014 and FY 2015[1], Appropriations Committee Members have turned in earnest to crafting individual appropriations bills to be put into an Omnibus appropriations bill for the remainder of FY 2014. The current Continuing Resolution (CR) will expire on January 15, 2014. Reportedly, Members of Congress have reached agreement on, but not released the text of, six of the twelve appropriations bills and have nearly reached agreement on two more; however, disagreements over policy riders in the other four bills have slowed the process. Among the bills with unresolved policy issues are Interior, Environment and Related Agencies and Labor, Health and Human Services, Education and Related Agencies. Because of these delays, House Appropriations Chairman Rodgers (R-KY) filed a three-day clean CR bill which would push the CR expiration date through January 18 and provide Appropriations Committee Members and their staff additional time to come to an agreement on the other six bills. We now expect to see the text of the Omnibus on either January 12 or 13.

FY 2015 Budget Request Likely to Be Delayed. Reportedly, the President's FY 2015 Budget Request will be delayed by a month. By statute, the budget request is due to Congress on the first Monday of February but the government shutdown in October of 2013 and delays in completing the FY 2014 Omnibus have delayed the formulation of the President's FY 2015 Budget Request.

We will continue to follow and report on the FY 2014 and FY 2015 appropriations process. Please let us know if we may provide additional information regarding this matter.

# # #

Inquiries may be directed to:
Karen Funk (kfunk@hobbsstraus.com)
Moriah O'Brien (mobrien@hobbsstraus.com)

[1] See our General Memoranda 13-111 of December 16, 2013 and 13-112 of December 19, 2013.

NCAI BROADCAST
NEWS & UPDATES FOR INDIAN COUNTRY
National Congress of American Indians

January 15, 2014

FY 2014 Omnibus Restores Some Funds to Tribal Programs

Bill Rejects Contract Support Costs Caps Proposal

House and Senate negotiators released a $1.012 trillion FY 2014 Omnibus spending bill (HR 3547) on January 13, 2014 that provides directives for all 12 appropriations bills, including the Interior-Environment bill, which provides funding for the Bureau of Indian Affairs and the Indian Health Service. The Senate cleared a three-day continuing resolution (H J Res 106) today to keep the government open through January 18. The current continuing resolution (PL 113-46) expires Wednesday and federal agencies require a stopgap bill to avoid a shutdown. Throughout the last year, tribes have urged policy-makers to undo sequester reductions and avoid cutting even more deeply from key domestic investments, which include the solemn duty to fund the trust responsibility. The Murray-Ryan budget agreement reached in December (PL 113-67) partially replaces sequestration.

A majority of tribal trust and treaty promises are funded in the domestic discretionary budget in the following appropriations bills:

- Interior-Environment: Bureau of Indian Affairs /Bureau of Indian Education, Indian Health Service
- Labor-Health and Human Services-Education: Department of Health and Human Services, Administration for Children and Families, Department of Education
- Commerce-Justice-Science: Department of Justice: Office of Justice Programs, State and Local Law Enforcement, Office of Violence Against Women, Community Oriented Policing Services
- Transportation, Housing: Housing and Urban Development, Indian Housing Block Grant, Indian Community Development Block Grant

The House passed the FY 2014 Omnibus bill today, 359-67, and the Senate is expected to clear it later in the week. The Omnibus does not include any continuing resolutions, the first

time in many years for the Departments of the Interior and Health and Human Services. This analysis (here is the full NCAI analysis) includes updates on many tribal programs addressed in the FY 2014 Omnibus bill.

Highlights

Contract Support Costs: Significantly, the Omnibus explanatory text (p. 19) states that "the agreement does not include statutory language carried in previous years that limits the amount available in any given fiscal year for the payment of contract support costs, nor does it include the proposal put forth in the Administration's FY 2014 budget request that would place a cap on the contract support cost amounts available for each tribal contract or compact. That proposal was developed without tribal consultation and the Committees heard from numerous Tribes voicing their strong opposition."

Bureau of Indian Affairs: The Omnibus would provide $2.531 billion for the BIA and BIE, $18 million over the FY 2013 enacted level (pre-sequester and across-the-board rescissions). The Omnibus level is $142 million over the post-sequester and post rescission FY 2013 level. The Omnibus level is the same as the FY 2012 enacted level.

Indian Health Service: The legislation funds the Indian Health Service at $4.3 billion - $78 million above the FY 2013 enacted level (pre-sequester and pre-rescission levels).

Health and Human Services: After taking reductions under sequestration, early childhood education initiatives received significant increases in the Omnibus. The bill provides $8.6 billion for Head Start.

Division G - Department of the Interior, Environment, and Related Agencies Appropriations Act

The House Appropriations press release notes that the "bill helps to meet the nation's treaty obligations to American Indians and Alaska Natives by providing funding for health care, law enforcement, and education. The legislation funds the Indian Health Service at $4.3 billion - $78 million above the fiscal year 2013 enacted level - and the Bureau of Indian Affairs and Education at $2.5 billion - $18 million above the fiscal year 2013 enacted level."

Bureau of Indian Affairs

The Omnibus would provide $2.5 billion for the BIA and BIE, $18 million over the FY 2013 enacted level (pre-sequester and before across-the-board rescissions). The Omnibus level is $142 million over the post-sequester and post-rescission FY 2013 level. The Omnibus level is the same as the FY 2012 enacted level.

(Dollars in millions)	FY14 Request	FY14 Omnibus	Bill vs. Request	Bill vs. FY13, no sequester	Bill vs. FY13, w/ sequester

Operation of Indian Programs	2,183.8	2,378.8	195.0	11.0	134.9
(Welfare assistance)	74.8	74.8	0.0	0.0	3.9
(Forward-funded education)	596.2	591.2	-5.0	1.8	32.6
Contract support	230.0	--	-230.0	--	--
Indian self-determination fund	1.0	--	-1.0	--	--
Construction					
Education	52.3	55.3	3.0	2.4	2.5
Public safety and justice	11.3	11.3	0.0	0.0	0.0
Resources management	32.8	32.8	0.0	0.0	0.1
General administration	10.8	10.8	0.0	1.8	1.8
Total construction	107.1	110.1	3.0	4.2	4.4
Indian guaranteed loan program	5.0	6.7	1.7	-0.4	0
Total BIA and BIE	2,562.6	2,531.3	-31.3	17.7	142.2

Contract Support Costs

The Joint Explanatory Statement for Division G includes directions to the Department of Interior (as well as Health and Human Services in the IHS section) on contract support costs.

Contract Support Costs.- The agreement does not include statutory language carried in prior year appropriations bills, which limited the amount available in any given fiscal year for the payment of contract support costs, nor does it include the proposal put forth in the Administration's fiscal year 2014 budget request that would place a cap on the contract support cost amounts available for each tribal contract or compact. That proposal was developed without tribal consultation and the Committees heard from numerous Tribes voicing their strong opposition.

Instead, the question of contract support cost amounts to be paid from within the fiscal year 2014 appropriation is remanded back to the agencies to resolve, while the underlying contradictions in current law remain to be addressed by the House and Senate committees of jurisdiction. Until such matters are resolved, the House and Senate Committees on Appropriations are in the untenable position of appropriating discretionary funds for the payment of any legally obligated contract support costs.

Typically obligations of this nature are addressed through mandatory spending, but in this case since they fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs. The Committees therefore direct the Department of the Interior and the Department of Health and Human Services to consult with the Tribes and work with the House and Senate committees of jurisdiction, the Office of Management and Budget, and the Committees on Appropriations to formulate long-term accounting, budget, and legislative strategies to address the situation. In the Committees' view, each Department's solution should consider a standardized approach that streamlines the contract negotiation process, provides consistent and clear cost categories, and ensures efficient and timely cost documentation for the Departments and the Tribes. Within 120

days of enactment of this Act, the Departments shall develop work plans and announce consultation with Tribes on this issue.

Indian Health Service

The bill would provide $4.4 billion for the Indian Health Service (IHS), which is about $78 million over the FY2013 level (before sequestration and rescissions). The Omnibus IHS level is about $304 million above the FY 2013 post-sequestration and post-rescission levels. The agreement provides funding for contract support costs in accordance with the Salazar v. Ramah Navajo Chapter Supreme Court decision.

(in millions)	FY13 post sequester	FY14 Request	FY14 Omnibus	Bill vs. Request	Bill vs FY13 no sequester	Bill vs FY13 w/ sequester
Indian Health Services	3,712.6	3,505.3	3,982.8	477.5	68.2	270.2
(Purchased/referred care)	801.3	878.6	878.6	0.0	---	77.3
(Loan repayment)	34.1	36.0	36.0	0.0	---	1.9
Contract support	---	477.2	---	---	---	---
Maintenance and improvement	50.9	53.7	53.6	-0.1	---	2.7
Sanitation facilities construction	75.4	79.6	79.4	-159.0	---	4.0
Health care facilities construction	77.2	85.0	85.0	0.0	---	7.8
Facilities and environmental health support	193.6	207.2	211.1	3.8	---	17.5
Equipment	21.4	22.6	22.5	-45.0	---	1.1
total facilities	41.9	448.1	451.7	3.5	---	409.8
TOTAL, INDIAN HEALTH SERVICE	4,130.8	4,430.6	4,434.5	3,878.0	78.3	303.7

The Joint Explanatory text for IHS refers to the contract support costs discussion under "Bureau of Indian Affairs and Bureau of Indian Education, Operation of Indian Programs." Moreover, the IHS is directed to submit an operating plan to the Committees within 30 days of enactment of this Act displaying funding allocations to the activity level.

For the full analysis of the FY 2014 Omnibus, see this NCAI report which covers many other agencies.

***NCAI Contact Information**: Amber Ebarb, Budget & Policy Analyst - aebarb@ncai.org*

National Indian Health Board

January 17, 2013

FY 2014 Omnibus and the impact on Indian Health

On January 16, 2014, Congress passed the FY 2014 appropriations bill. This legislation, also known as an "omnibus," reverses sequestration for FY 2014 discretionary spending[1] and provides funding for most of the federal government through September 30, 2014. You can view the entire bill here.

The bill funds most government agencies, including those that are responsible for fulfilling the federal trust responsibility such as, the Indian Health Service (IHS), the Bureau of Indian Affairs (BIA), and the Bureau of Indian Education (BIE). The measure spends $1.012 trillion overall. This legislation is important because it is the first time in several years that Congress has passed a full appropriations measure for many Indian programs. In recent years, Tribal spending programs depended on "continuing resolutions" which did not allow legislators to adjust spending priorities from year to year. The House of Representatives on Wednesday by a margin of 359 to 67 and the Senate on Thursday by 72 to 26. Click here to see how your Representative[2] voted, and here to see how your Senators voted.

Indian Health Service (Located in Division G Department of the Interior, Environment, and Related Agencies Appropriations Act - FY 2014 omnibus)

Programs serving Indian Country fared relatively well in the legislation, considering that the legislation contained many cuts to other programs. IHS received **$4.4 billion** for FY 2014. This is about $78 million more than was appropriated to IHS before automatic sequestration and rescissions in FY 2013, which cut $220 million from IHS. This includes **$878 million** for Purchased/ Referred Care (formally Contract Health Services) and **$36 million** for the Loan Repayment Program. Interestingly, the legislation also did not contain many exact funding amounts for many specific IHS accounts, but gave most authority to the IHS to distribute. The main reason for this was to allow the agency to use funds to resolve issues surrounding Contract Support Costs. IHS will have the authority to move funds between most accounts as necessary to fund the functions of IHS and determine which funds should go to Contract Support vs. other accounts.

[1] Discretionary spending is funding that Congress pass every year through the appropriations process. On the other hand "mandatory spending" is funding that is authorized as soon as Congress passes a law creating or renewing the program. Most of Indian Health Service funding is "discretionary." However, the Special Diabetes Program for Indians (SDPI) is "mandatory" spending. That program was not affected by the FY 2014 omnibus. For funding to continue for SDPI, it must be renewed by Congress before September 30, 2014.

[2] You can find your Representative by visiting www.house.gov and typing in your zip code.

While the funding for IHS is not even close to the amount needed that fully fund the IHS, these additional funds are a positive step forward to achieving meaningful increases for the delivery of health in Indian Country. NIHB will continue to work with Congress in the next year to ensure that IHS and other Tribal programs receive the funding pursuant to the Federal Trust Responsibility. NIHB will also continue to educate the Administration about Tribal health priorities as they develop the budget request for FY 2015.

FY 2014 Indian Health Service Funding (in millions)						
Account	**FY 2012 Appropriated**	**FY 2013 Pre-Sequester Appropriated**	**FY 2013 Post-Sequester Appropriated**	**FY 2014 President's Request**	**FY 2014 Omnibus Appropriations Law**	**Difference between President Request and Omnibus**
INDIAN HEALTH SERVICES	$3,866.181	$3,906.77	$3,712.278	$3,505.293	$3,982.842	$477.50
Purchased/ Referred Care[3]	$843.575	$843.237	$801.258	$878.575	$878.575	--
Loan Repayment	$35.942	$35.928	$34.139	$36	$36	--
Contract Support	$471.437	$471.249	$447.788	$477.205	--	--
Indian Health Facilities						
Maintenance and improvement	$53.721	$53.614	$50.919	$53.721	$53.614	-$0.107
Sanitation facilities construction	$79.582	$79.423	$75.431	$79.582	$79.423	-$0.159
Health care facilities construction	$85.048	$81.326	$77.238	$85.048	$85.048	--
Facilities and environmental health support	$199.413	$203.823	$193.578	$207.206	$211.051	+$3.845
Equipment	$22.582	$22.537	$21.404	$22.582	$22.537	-$0.045
TOTAL FACILITIES	$440.346	$440.722	$418.570	$448.139	$451.673	$3.534
TOTAL IHS DISCRETIONARY BUDGET AUTHORITY	$4,306.528	$4,347.492	$4,130.847	$4,430.637	$4,434.515	+$3.878

Contract Support Costs

The Joint Explanatory Statement containing many of the policy measures for Indian Country can be found here. The statement includes additional information about Contract Support Costs (CSC). Congress rejected the Administration's proposal to place individual caps on each Tribal contract or compact. The statement says, "That proposal was developed without tribal consultation and the Committees heard from numerous Tribes voicing their strong opposition." The bill also does not include language that was in previous appropriations bills that limited the amount available to pay CSC in any year. "Instead," the statement says, "the question of contract support cost amounts to be paid from within the fiscal year 2014 appropriation is remanded back to the agencies to resolve," and notes that the appropriate House and Senate Committees should consider a long-term solutions.

[3] Also called "Contract Health Services"

Finally, the bill's explanatory statement directs the Departments of Interior and Health and Human Services to consult with Tribes, the relevant Congressional committees and the Office of Management and Budget to "formulate long-term accounting, budget, and legislative strategies to address the situation." Congress also directs the agencies to develop a consultation plan on this issue within 120 days of the passage of the omnibus. Within 30 days, the omnibus directs the IHS to submit an operating plan to the Appropriations Committees within 30 days of passage. This plan must display funding allocations to the activity level.

While the future remains unclear on CSC, the decision to put the CSC back into the hands of the IHS and the Congressional Committees of jurisdiction means that the Congress feels strongly that there should be robust debate on the future of CSC. Additionally, the IHS has clear direction from Congress that it would like CSC to be resolved promptly and with full consultation from Tribes. This language does not resolve the most important aspect of this debate, which is full funding of the CSC shortfall.[4] NIHB has learned from Congressional staff that this provision was the subject of significant debate during the omnibus negotiations, and the compromise language is intended to follow requests made from Tribes and Tribal organizations over the course of the last year.

Other policy measures for IHS

Staffing Costs for new and expanded facilities: The omnibus funds staffing costs at new or expanded health care facilities. These funds are for facilities on the Health Care Facilities Construction Priority System and the Joint Venture Construction Programs that are newly opened in FY 2013 or that open in FY 2014.

Dental Health: The FY 2014 spending agreement also contains funding for the early childhood caries initiative. The statement encourages IHS to work with the Bureau of Indian Education in order to increase preventative dental care for children. The Committee also directs the IHS to complete the transition to electronic dental records. The Committee requests that the IHS "explore" the creation of a "centralized credentialing system to address workforce needs…and consider a credentialing of dentists…"

Urban Indian Health: Congress continues to expressly support urban Indian health grants, and recognizes the disparity in funding urban Indians. However, they do not appropriate a specific amount for this program.

Coordinated health care far American Indian and Alaska Native veterans: The Joint Explanatory statement also contains language to address issues outlined in a report by the Government Accountability Office (GAO) (released April 26, 2013) regarding the memorandum of understanding (MOU) between the IHS and the Veterans' Administration (VA) for the provision of health care to Native veterans. The GAO report found that the performance metrics developed to assess the MOU's implementation do not give the full flexibility of the VA and IHS personnel to make decisions relating to modification of their programs and activities. The agencies are encouraged by Congress to make the recommendations contained in the GAO report and provide recommendations by March 1, 2014. You can read the full GAO report here.

[4] Last year, the IHS Tribal Budget formulation Workgroup estimated this shortfall at $90 million.

Other Government Programs affecting health care delivery for American Indians and Alaska Natives

Administration for Child and Families

- Head Start received **$8.6 billion**, which is a $1.025 billion increase. According to the summary from the Senate Appropriations Committee, "This increase restores cuts from sequestration and on top of that supports an approximately 1.3% cost of living adjustment for all current grantees." The explanatory statement also says that **3 percent** of these funds will be reserved for Indian Head Start programs.
- Low Income Home Energy Assistance Program (LIHEAP) received **$3.425 billion** which is a $169 million increase, and $404.5 million above the President's request.
- Community Services Block Grant received **$709.6 million** which is $359.80 million above the President's request and $20 million more than the FY 2013 enacted amount.
- Native American Programs received **$46.5 million** in FY 2014. This is $2.1 million less than the President's request and $1 million above the FY 2013 enacted amount.
- Family violence Prevention/ Women's Shelters received $133.5 million which is $1.5 million less than the President's request.

Substance Abuse and Mental Health Services (SAMSHA)

- Tribal Behavioral Health Grants received **$5 million**
    - The Appropriations Committee provided the following information about these funds: "In order to address the high incidence of substance abuse and suicide in American Indian/ Alaska Native [AI/AN] populations, the Committee recommends $5,000,000 for competitively awarded grants targeting tribal entities with the highest rates of suicide per capita over the past 10 years. The Committee expects funds to be used for effective and promising strategies that address the problems of substance abuse and suicide and promote mental health among AI/AN young people" (Senate Report 113-71, p. 113).
- AI/AN Suicide Prevention Initiative received **$2.94 million.**
    - $145,000 above FY 2013 operating level, and is the same amount as the FY 2012 level
- Garrett Lee Smith Youth Suicide Prevention – State and Tribal Youth Suicide Prevention Grants received $29.7 million in the omnibus appropriations bill with additional funding to be provided by the Prevention and Public Health Fund (a mandatory spending account).

If you have any questions on the omnibus or FY 2014 spending please contact, Caitrin Shuy, Manager of Congressional Relations at cshuy@nihb.org or (202) 507-4085.

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USET Resolution No. 2014:011

NECESSARY CHANGES TO FEDERAL BUDGET LAW AND POLICY TO PROTECT FEDERAL INDIAN PROGRAMS AND IN FULFILLMENT OF THE FEDERAL TRUST RESPONSIBILITY

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, Indian Tribes hold a unique status in the United States with the rights and benefits of sovereign nations; and

WHEREAS, this relationship has its underpinnings in the U.S. Constitution, specifically, the Indian Commerce Clause, the Treaty Clause and the Supremacy Clause, and in numerous treaties, laws and other agreements and understandings between the U.S. and Indian Tribes; and

WHEREAS, in furtherance of the federal trust responsibility, the federal government funds a number of programs through various federal departments including but not limited to Interior, Health and Human Services, Justice, and Agriculture, that either directly, or in some cases through contracts or compacts with Tribes and Tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), provide critically needed services to Indian Country; and

WHEREAS, in recent years, federal appropriation bills have not been enacted in a timely manner, and have been subject to sequestration and other budget reductions that have severely and unfairly impacted the effectiveness of the programs that serve Indian Country, as well as disrupted the ability of Tribal governments to address the needs of Tribal communities in violation of the federal trust responsibility; and

WHEREAS, there are a number of changes needed to federal budget law and policy to address and mitigate the violations of the federal trust responsibility, including:

- Holding federal Indian programs harmless from the effects of sequestration and other efforts to cut federal Indian programs to address national budget issues;
- Assuring that multi-year federal budget resolutions provide for revenue and spending levels that permit the Appropriations Committees to adequately fund Indian programs, while assuring sufficient revenue to support these federal obligations;
- Implementing alternative funding arrangements that would mitigate the effects of disruptions in the budget process including, for example, a two-year funding cycle, advance appropriations, or forward funding;
- Treating federal Indian program funding as mandatory rather than discretionary funding;

- Fully funding contract support costs as required by the Supreme Court in *Salazar v. Ramah Navajo Chapter*, with no legislative or contractual provisions that would undermine the Supreme Court's holding or that would otherwise erode the federal commitment to pay these costs;
- Requiring the Office of Management and Budget to meet regularly with Tribal leadership to discuss Indian country needs and federal funding levels; and

WHEREAS, in December 2010, the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it

RESOLVED the USET Board of Directors strongly urges the Administration and the Congress to comprehensively amend federal budget law and policy to implement the recommendations set forth above in fulfillment of the federal trust responsibility and in support of adequate and stable Federal Indian program funding.

CERTIFICATION

This resolution was duly passed at the USET Annual Meeting, at which a quorum was present, in Cherokee, NC on Thursday, October 31, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"

United South and Eastern Tribes, Inc.

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USET Resolution No. 2013:042

URGING THE EXEMPTION OF THE INDIAN HEALTH SERVICE FROM SEQUESTRATION

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, since the formation of the Union, the United States (U.S.) has recognized Indian Tribes as sovereign nations; and

WHEREAS, a unique government-to-government relationship exists between Indian Tribes and the Federal Government and is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes; and

WHEREAS, although the trust relationship requires the Federal Government to provide for the health and welfare of Tribal nations, the Indian Health Service (IHS) remains chronically underfunded, and American Indians and Alaska Natives suffer from among the lowest health status nationally; and

WHEREAS, on August 2, 2011, President Barack Obama signed into law the Budget Control Act (BCA) of 2011; and

WHEREAS, the BCA imposed caps on discretionary appropriations for Fiscal Year 2012 and created a Joint Select Committee on Deficit Reduction (Joint Committee) tasked with devising a plan to reduce the national deficit by an additional $1.5 trillion over the next ten years; and

WHEREAS, the failure of the Joint Committee and a subsequent lack of Congressional action resulted in the inexact application of 5.2% in across-the-board cuts, known as Sequestration, to nearly all Fiscal Year 2013 discretionary spending accounts, including the IHS; and

WHEREAS, the cuts of Sequestration will devastate the operation and implementation of planned health programs, resulting in an estimated 3,000 fewer inpatient admissions and 804,000 outpatient admissions throughout the Indian Health System; and

WHEREAS, other patient care and assistance programs have been statutorily exempted in full from Sequestration, including the Veterans Administration (VA) medical accounts, Child Nutrition Program, Child Care Block Grants, Grants to States for Medicaid, Social Security Insurance, Social Security, Medicare benefits and the Temporary Assistance for Needy Families (TANF), making IHS the only non-exempt provider of direct care; and

WHEREAS, exempting the IHS from Sequestration will save the lives of American Indians and Alaska Natives across the nation, and reflect an effort to uphold the federal trust responsibility; and

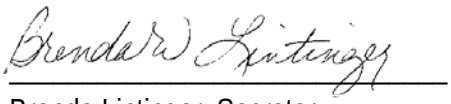
WHEREAS, in December 2010 the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it

RESOLVED the USET Board of Directors urges Congress to immediately pass an amendment to the Budget Control Act exempting the Indian Health Service services and facilities budgets from these devastating cuts, or enact legislation to meet the deficit reduction requirements of the Deficit Control Act via a combination of responsible budget cuts and revenue-raising measures while protecting the Indian Health Service budget.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Niagara Falls, NY, on Friday, May 17, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.



Brenda Lintinger, Secretary
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USET Resolution No. 2013:045

REQUEST THAT THE ADMINISTRATION RESOLVE CONTRACT SUPPORT COSTS CLAIMS, WITHDRAW ITS PROPOSAL TO LIMIT CONTRACT SUPPORT COSTS IN ITS FY 2014 BUDGET, AND SUPPORT FULL CONTRACT SUPPORT COSTS FUNDING

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, the Indian Self Determination and Education Assistance Act states that the United States is obligated to support Indian self-determination, and the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) often state they are similarly committed to this goal; and

WHEREAS, Congress finds that contracts and compacts under the Indian Self-Determination and Self-Governance programs are an effective means of implementing the Federal policy of government-to-government relations that strengthen the policy of Indian self-determination; and

WHEREAS, in recognition of their trust responsibility to Tribes, the IHS and the BIA enter into such contracts and compacts to promote self-determination and to better serve American Indians and Alaska Native peoples; and

WHEREAS, despite this responsibility, the IHS and BIA fail every year to request full funding for contract support costs (CSC) that enable Tribal contractors to fully carry out their contract responsibilities, and each year Congress fails to appropriate the full amount of CSC owed to Tribal contractors; and

WHEREAS, the U.S. Supreme Court held in *Salazar v. Ramah Navajo Chapter* that the federal government is responsible for paying all CSC owed to Tribal contractors, even if Congress does not appropriate enough funding to cover the full amount of CSC owed to all contractors; and

WHEREAS, as a result of this decision, Tribal contractors have presented their claims for full CSC funding from past years to the government, or have filed similar claims in federal court under the Contract Disputes Act in hopes of resolving these claims with the agency; and

WHEREAS, instead of requesting full funding for CSC in its FY 2014 budget to prevent similar claims going forward, the Obama Administration submitted a proposal to cap CSC funding on a contractor-by-contractor basis that will prevent Tribes from filing Contract Dispute Act claims or otherwise recovering the full amount of CSC owed; and

WHEREAS, the Obama Administration has submitted this unjust plan to Congress without any consultation with Tribes, in violation of its own stated policies and executive orders; and

WHEREAS, Indian Tribes have been unanimous and adamant in their opposition to the proposal to cap CSC funding or to eliminate a contractor's right to recovery; and,

WHEREAS, in December 2010 the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it

RESOLVED the USET Board of Directors calls upon the Obama Administration, the Bureau of Indian Affairs, and the Indian Health Service to move swiftly to settle or otherwise resolve all outstanding contract support costs claims from prior years; and, be it further

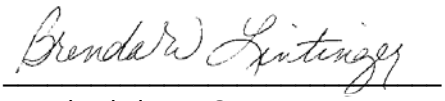
RESOLVED the USET Board of Directors calls upon the Obama Administration, the Bureau of Indian Affairs, and the Indian Health Service to formally withdraw the Administration's FY 2014 budget proposal regarding contract support costs owed to Tribal contractors, and to communicate the same to the Budget and Appropriations Committees of the U.S. Congress; and, be it further

RESOLVED the USET Board of Directors calls upon the Obama Administration, the Bureau of Indian Affairs, and the Indian Health Service to propose full funding for contract support costs in FY 2014 and each year thereafter, and to communicate the same to the Budget and Appropriations Committees of the U.S. Congress.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Niagara Falls, NY, on Friday, May 17, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.



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USET Resolution No. 2013:046

SUPPORT FOR ALTERNATIVE FUNDING OPTIONS FOR THE INDIAN HEALTH SERVICE

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, since the formation of the Union, the United States (U.S.) has recognized Indian Tribes as sovereign nations; and

WHEREAS, a unique government-to-government relationship exists between Indian Tribes and the Federal Government and is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes; and

WHEREAS, although the trust relationship requires the federal government to provide for the health and welfare of Tribal nations, the Indian Health Service (IHS) remains chronically underfunded, and American Indians and Alaska Natives suffer from among the lowest health status nationally; and

WHEREAS, since Fiscal Year 1998, appropriated funds for the provision of health care to American Indians and Alaska Natives through IHS and Tribal providers have been released after the beginning of the new fiscal year; and

WHEREAS, the delay in receipt of funds has most often been caused by a Congressional failure to enact prompt appropriations legislation; and

WHEREAS, late funding has severely hindered Tribal and IHS health care providers' budgeting, recruitment, retention, provision of services, facility maintenance, and construction efforts; and

WHEREAS, identified budgetary solutions to this failure to uphold the federal trust responsibility include a two-year funding cycle, advance appropriations, and forward funding for the IHS; and

WHEREAS, Congress has recognized the difficulties inherent in the provision of direct health care that relies on the appropriations process and traditional funding cycle through enactment of the *Veterans Health Care Budget Reform and Transparency Act of 2009 (PL 111-81),* which authorized advance appropriations for Veterans Administration (VA) medical care programs; and

WHEREAS, Congress has, pursuant to the authorization in the Veterans Health Care Budget Reform and Transparency Act, appropriated beginning with FY 2010, advance appropriations for the VA medical care accounts; and

WHEREAS, as the only other federally funded provider of direct health care, IHS should be afforded the same budgetary certainty and protections extended to the VA; and

WHEREAS, in December 2010 the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it

RESOLVED the USET Board of Directors calls upon the U.S. Congress to bring certainty and stability to the Indian Health Service budget by authorizing and appropriating funding for a two-year funding cycle, advance appropriations, or forward funding for the Indian Health Service.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Niagara Falls, NY, on Friday, May 17, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"

United South and Eastern Tribes, Inc.

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USET Resolution No. 2013:28

URGING CONGRESS TO HONOR THE TRUST RESPONSIBILITY BY HOLDING HARMLESS FEDERAL INDIAN PROGRAMS FROM THE EFFECTS OF SEQUESTRATION

WHEREAS, United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-six (26) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and

WHEREAS, the automatic across-the-board cuts of certain domestic and defense discretionary programs, including federal Indian programs, provided for under the Budget Control Act of 2011, as amended, are scheduled to go into effect on March 1, 2013; and

WHEREAS, the Office of Management and Budget has reported that cuts for Fiscal Year 2013 for federal Indian Programs, including the Indian Health Service, could be as high as 8.2 percent; and

WHEREAS, federal Indian program funding is not discretionary funding, but rather is a funding obligation of the United States to Tribes based on the trust obligation, treaties, laws, court cases and many other commitments; and

WHEREAS, notwithstanding its obligation, the United States has always underfunded federal Indian programs; and

WHEREAS, the effects of sequestration would devastate Tribes and Native communities, which are more reliant on federal resources than most communities and which suffer from higher rates of poverty; and

WHEREAS, as Tribes have contributed more to the well-being of the United States through enormous land cessions, often under duress, the most appropriate policy would be for federal Indian programs to receive an increase that factors in inflation and population growth and should be exempted from sequestration; and

WHEREAS, the budget situation is so dire that the USET board deems it appropriate in the national interest to not seek an increase in federal funding to Indian programs, but still believes that these programs should be held harmless from sequestration; therefore, be it

RESOLVED the USET Board of Directors urges both parties in Congress to come together in a spirit of compromise, as well as joint commitment to fiscal responsibility, to develop a budget revenue and expenditure plan that will assure the long-term prosperity of America, while meeting the federal government's obligations to Tribes; and, be it further

RESOLVED the USET Board of Directors urges Congress to uphold the trust responsibility and recognize the long-term contributions of Tribes and Native peoples to America's success by holding federal Indian programs harmless from sequestration.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 7, 2013.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Brenda Lintinger, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"

TRUST REFORM

This was duly passed at the USET Annual Meeting on Thursday, October 11, 2012 by the USET Board of Directors

Advancing the Trust Responsibility
Bold Concepts for a Fairer and More Prosperous Future
For Indian Country

Introduction. In response to widespread dissatisfaction in Indian Country with the Federal government's implementation of the trust responsibility and the resulting impact on Tribal sovereignty, USET has been exploring the idea of a fundamental review of the Federal trust responsibility, as well as its impact on Tribal sovereignty, with the intent of building a new framework for Tribal-Federal relations that provides Tribes with an equal say in the defining of that relationship, instead of it almost entirely being defined by the Federal government. This analysis starts from the conclusion that the defects in the trust responsibility are systematic in nature and therefore must be addressed at the systematic level.

In a prior document, USET staff presented to the USET Board key questions that need to be addressed to advance a new framework for the trust responsibility and Tribal sovereignty. That document proposed some conceptual answers to those questions. In this document, those answers are made more specific.

It should be noted that any attempt to define the actual, real-world scope of tribal sovereignty and the trust responsibility faces the dilemma that once defined in such a precise way, it would be difficult to expand those definitions. On the other hand, the fact that the scope of these two doctrines remains ambiguous is one of the reasons why the Federal government is able to provide far less support for tribal sovereignty and for fulfillment of the trust responsibility than Indian Country believes these doctrines require.

---

1. **What should Tribal sovereignty look like?** Among Tribal Nations there is a wide range of sovereign authority, with some Tribes exercising substantial (although not total) sovereign powers over their lands and peoples, while others operate with an authority that is more like a municipal government, subject to substantial state control and dominance. Even for those Tribes that exercise the maximum amount of Tribal sovereignty, that sovereignty is limited compared to the authority of other sovereigns, such as the federal and state governments. For example, Tribes have very limited jurisdiction over non-Indians that come onto Tribal lands, even though the federal government, states and even cities exercise virtually full jurisdiction when non-citizens come within their territorial limits.

    - **Self-Governance – More Than Just Control of Federal Dollars.** In Indian law, "self-governance" is principally used to refer to those Tribes that have chosen to assume control of, and the authority to, reallocate certain Federal program dollars.

However, true self-governance, like true sovereignty, is running one's own affairs, free of unwarranted state and federal interference.

- **Jurisdictional Authority – Equivalency with Other Sovereigns.** Within their boundaries, tribes should have jurisdictional authority comparable to what the states enjoy, and even the Federal government. This means both legislative jurisdiction (lawmaking) and adjudicative jurisdiction (jurisdiction of the tribal court system over criminal and civil matters). To the extent that not every tribe has the funding or the developed governmental entities to implement a mature jurisdictional system, than some accommodation should be made for a rational transition as tribes are able and interested in assuming these powers.

- **Exclusion of Other Sovereign Authority - State and Local Jurisdiction Stops at the Reservation Boundary.** So, for example, there should be no state taxation of tribally related activities on tribal lands. Just as one state cannot generally tax activities in another state, no state should be able to tax activities, including non-Indian activities, within Tribal boundaries. The federal government's authority should also be curtailed within Tribal boundaries, meaning that the federal government's power is not necessarily "plenary," but to the extent it is not, the remaining power is with the Tribe and not with the state.

- **Control over Education of Tribal Students**. Tribes should be able to assume, at their option, complete control over the public and federal education systems that operate on their lands and play a major role in the curriculum for other schools on or near their lands serving Native students. Tribes should have greater control over the education of their students with Federal support for a stronger emphasis on Tribal culture and language.

2. **What should the trust responsibility look like?** One of the paradoxes of Indian law and policy is that the trust responsibility is the source of much Federal authority to act in Indian affairs, even to the detriment of Tribal sovereignty. Despite this paradox, the trust responsibility is a key component of Federal Indian law and an important safeguard in warding off intrusions by state governments. At a minimum the trust responsibility should provide that the Federal government has a *tribally enforceable* obligation to ensure that reservations are habitable by today's standards, including that they have decent schools, hospitals, public safety and infrastructure and that Tribal governments are empowered to create an environment hospitable to economic development.

    - **Federal Funding for Indian Programs Should Meet Actual Need.** Federal funding levels should support decent schools, hospitals, public safety, social services, housing, roads and other infrastructure. For example, the IHS is funded at 60% of need; it should be funded at 100% of need.

    - **Federal funding of Indian programs Should be Treated as Entitlement, not Discretionary, Funding.** Indian program funding should not be subject to the

arbitrariness of the regular appropriations process but, rather, should reflect that it is the fulfillment of a federal legal obligation. Such funding should also go directly to Indian Country and not pass through the States;

- **All Federal programs should be contractible or compactible.** Indian Country has prospered when the federal government has stopped its paternal practices, such as through 638 contracting and "self-governance" compacting. These programs should be expanded to all federal Indian programs.

- **Trust responsibility should be based on Federal legal obligations and not dependent on the economic status of a tribe (i.e., no means testing), although tribes, at their own option, could opt out of Federal programs.** The trust responsibility should not vary depending on whether a Tribe is doing better or worse. It is not an economic indicator, but rather a fundamental obligation of the United States. However, the trust responsibility should support Tribal empowerment and self-sufficiency so that Tribe's may achieve economic sustainability.

- **Each Tribe should be empowered to negotiate the details of the application of the trust responsibility with the Federal government as best meets the need of that tribe.** There is wide variability among Tribes and what they seek out of the government-to-government relationship with the United States. Each Tribe should be able to negotiate the details of the application of the trust responsibility to it.

- **Tribal Congressional Delegate.** Several treaties provide for a tribal representative in the Congress, though there is not one. Such a representative should have a status no less than that enjoyed by delegates from Puerto Rico and the District of Columbia. Having a congressional delegate should not diminish the representative obligations of members of Congress with Indian constituents and should not undermine the ability of the Indian Affairs committees to do their work.

- **Land Reform.** There are a wide range of improvements that could be made to the status of Indian lands. For example, there should be a strong presumption in favor of land going back into trust at the request of a Tribe, especially given that Indian land was effectively stolen and the current process takes years, with the states and counties seeking veto power. In general, tribal land rights and control should be strongly enhanced, including tribal ability to move land into restricted fee status. See generally, the recommendations of the Indian Land Tenure Foundation. Land reform includes, along with jurisdiction, the authority of Tribes to protect their natural resources.

- **Implementation of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples.** Although the United States claims that it already has implemented the provisions of UNDRIP, most Tribal leaders would disagree.

- **Limitation of state involvement in Federal and Tribal actions to a right of consultation not a veto power.** State governments constantly seek a veto power over Indian affairs. Rather than a veto power, state governments should be provided a right of consultation, and no more.

- **Cabinet-Level Position.** The position of Assistant Secretary of Indian Affairs should be elevated to a Cabinet-level position within the Administration, with the authority to report directly to the President. Ambassadorial status should be accorded to federal representatives to Indian Country and Indian Country representatives to the federal government.

- **Tribes Should not Just have Consultation Rights, but Approval Rights over Federal Actions Impacting Tribes.** In addressing Federal actions that affect Tribes, Tribes should not only be consulted, but in many cases have the right to approve or disapprove those actions.

- **Expanded Protection of Off-Reservation Resources.** Tribal resources found off Tribal lands, such as sacred places, should be accorded protections consistent with Tribal values.

3. **How we get there – Tribal Excellence in Government.** Many of these goals would be difficult to achieve in the current environment. As Tribes seek recognition of their sovereign rights, others resist, deeming Tribal sovereignty a threat to their own power or sovereignty. Therefore, it is important to demonstrate that stronger and more effective Tribal governments are not only good for Tribes, but also good for surrounding communities, the states within which the Tribes reside, and the United States, as a whole. There is already substantial evidence, assembled by such entities as the Harvard Project on American Indian Economic Development, that empowering Tribal governments leads to economic success, providing many benefits to surrounding communities. In some cases, especially where Tribes have assumed an important governmental or social function (e.g., creating jobs, providing fire, police and emergency services, etc.), this has been recognized by the impacted non-Indian communities.

    - **Formation of a Joint Tribal-Federal Commission.** Historically, major changes in Indian law and policy have often been guided by a Federal report assessing the status of Native communities and making proposals that laid out a blueprint for future action. For example, the Merriam Report of 1928 led directly to passage of the Indian Reorganization Act of 1934, and American Indian Policy Review Commission report, submitted to Congress in 1977, laid the groundwork for much legislation that followed. A new era for Indian Tribes should begin with the establishment of a joint Federal-Tribal commission to define a new Tribal sovereignty and trust framework. In support of such a joint commission, Indian country needs to do further intellectual work, through consultation with leading scholars, development of a "think tank", and engagement with Congress through

hearings and roundtables with key Congressional committees on the three questions set forth above.

- **Issuance of a Report.** The Commission would be tasked with the issuance of a Tribal-Federal report on the future of the trust responsibility and Tribal sovereignty that would serve as a framework for legislative and policy changes in the coming years.

Conclusion. USET seeks to define a path for advancing Tribal sovereignty and the trust responsibility in the 21st Century through the articulation of a clear and rational vision of what they should look like and in a form that can be broadly supported across the political spectrum. USET welcomes the further comments of its Board and supporters in achieving this end.

EXECUTIVE SUMMARY

On December 8, 2009 Interior Secretary Ken Salazar established the Secretarial Commission on Indian Trust Administration and Reform by Secretarial Order No. 3292. The Secretary's action was part of the Administration's $3.4 billion Cobell Settlement. Secretary Salazar signed the Commission Charter in July 2011 and kicked off a 30-day period for nominations on five individuals to serve as Commission members and public input on its proposed charter. Commission members were selected for their collective experience and expertise in trust management, financial management, asset management, natural resource management, and federal agency operations and budgets, as well as experience as Individual Indian Money (IIM) account holders in Indian Country. They were selected in accordance with the Federal Advisory Committee Act (FACA), and serve without compensation. Secretary Salazar's Order states that there needed to be:

> *a thorough evaluation of the existing management and administration of the trust administration system to support a reasoned and factually based set of options for potential management improvements. It also requires a review of the manner in which the Department audits the management of the trust administration system, including the possible need for audits of management of trust assets.*

In addition, the Secretary encouraged the Commission at its first meeting to be creative and to review all aspects of the federal-tribal relationship and to suggest reforms by Congress or Administrative action. The Commission has completed its work and files this Report to guide improvement of the federal-tribal relationship and fulfillment of federal trust obligations. Of course, the Commission only makes recommendations and any follow-through on the part of Congress and the Administration must be done in concert and consultation with the affected tribes and individual trust beneficiaries.

Over the past two years, the Commission held a series of public hearings at various locations and also over the internet through "webinars." A tremendous

amount of information was collected through written and oral testimony, and the Secretary engaged a private contractor to review the day-to-day trust administration system (TAS) functions carried out through the Assistant Secretary – Indian Affairs, Office of the Special Trustee for American Indians (OST), Bureau of Indian Affairs, and other Interior agencies. Nearly every commentator had some level of criticism of the manner in which the federal government (including Congress) carries out federal trust obligations to Indian Nations and individual Indians. To be sure, many also praised individual programs and reform efforts that have been underway for some time.

The overall theme presented to the Commission is that the federal government as a whole needs more firm direction as to what the trust responsibility is, and that it is an obligation to be carried out by every federal agency exercising authority affecting Indian interests – not just the Bureau of Indian Affairs and the agencies within the Department of the Interior. There is a sense that some federal agencies are often doing the "bare minimum" through insincere or non-existent consultations to comply with existing Executive and Secretarial Orders associated with the United States trust obligations. This attitude within parts of the federal government appears to be premised on very narrow interpretations of the federal trust responsibility in some United States Supreme Court cases involving damages claims against the United States. The Commission agrees with the many commentators who pointed out that the fiduciary obligations of the United States should not be guided by the standards employed in the damages cases. Rather, when considering administrative actions that affect tribal interests, federal agencies should act in a manner that is respectful and protective of tribal interests in sovereignty and natural resources, as well as treaty rights. Section II expands on this discussion and makes recommendations regarding the definition of the trust responsibility and its enforcement. Sections III and V of the Report covers issues related to litigation and associated conflicts of interest.

The most particularized recommendations are contained in Section IV, Financial Administration and the Office of the Special Trustee. We briefly highlight

those recommendations because of the legislative requirement that the Secretary and Congress consider a recommendation regarding the sunset of the OST within two years of receipt of this Report. Aside from the general nature of the trust responsibility, this is the area that received the most public attention. In keeping with the final report delivered to the Commission in September 2013 by Grant Thornton, the management consultant hired in accordance with Secretarial Order 3292, the Commission suggests sweeping reforms in the Trust Administration System (TAS)– some of which may only be carried out through congressional action.

> The Office of Special Trustee (OST) is tasked with establishing management practices that carry out these responsibilities in a "unified manner," and ensuring that "reforms of the policies, practices, procedures, and systems of [BIA, BLM, and ONRR], which carry out such trust responsibilities, are effective, consistent and integrated." As discussed in the baseline and assessment phases of the *Comprehensive Assessment,* it is clear that while the inherent functions of OST must remain intact, TAS (including OST) struggles to provide trust services that are "effective, consistent, and integrated" across DOI bureaus/offices. To address this disparity in quality and effectiveness of services provided across regions, bureaus, and offices, the recommended future organization consolidates BIA Trust Services, OST, and trust-related responsibilities from AS-IA, BLM and ONRR into ITAC [an independent agency located within the Department of the Interior]. Consolidation of trust services under one independent commission centralizes management and administration of trust assets and operations.[1]

The Commission is convinced that sweeping reforms are necessary. The final recommendations are presented as structural, managerial, or procedural fixes. Most sweeping is the proposal for the establishment of a five-member independent Commission housed within the Department of the Interior (DOI) to carry out all trust-related functions. This structural recommendation is in keeping with the spirit of the 1977 recommendation from the American Indian Policy Review Commission that called for a Cabinet level Department of Indian Affairs, which has yet to be realized. Meaningful independent stature for carrying out the trust responsibility of Indian affairs is key in avoiding repeated systematic problems that led to the formation of this and prior Commissions.

[1] Trust Administration System, Department of the Interior, Final Trust Recommendations Report, developed by Grant Thornton LLP, submitted to the Commission on September 6, 2013.

The Commission's report includes procedural recommendations that would allow TAS to make process-level fixes within current areas of bureau/office-level ownership, and/or in the existing governance structure (e.g., funds management, information technology, land ownership and protection) without the need for congressional action. Many could be undertaken immediately and are described in a "Top 20 Recommendations" document attached to Report and dated November 7, 2013.

Section V of the Report covers somewhat unique features of probate, appraisals, and Alaska.

The Commission encourages the Department to carefully study this Report and engage in consultation with Indian tribes regarding the issues raised and the recommendations. There are two overarching matters that are critical to implementation of the recommendations made in this Report. First, any system is only as good as the people who carry out its functions, and we have met with many great employees within the Department who are committed to fulfilling the federal government's trust obligations to Indian tribes and people. It is critical that the Department work to retain these employees and recruit a new generation of dedicated staff to carry out the Department's obligations. Second, great employees and great ideas are not enough. Many of the problems the Commission learned of were not the result of bad intentions or bad policies. Rather, they were the product of inadequate staffing, which in turn was caused by inadequate funding. The Commission believes that many of the trust functions are so critical that funding should be moved from the discretionary category to nondiscretionary. There is never an easy time to undertake such a task but the Commission believes that the Administration should consult with Indian country on a gradual shift in the direction of nondiscretionary allocation of funds for trust management obligations.

.....

(Original Signature of Member)

113TH CONGRESS
1ST SESSION

H. R. _____

To establish the American Indian Trust Review Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOSAR introduced the following bill; which was referred to the Committee on _____

A BILL

To establish the American Indian Trust Review Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''American Indian Trust Responsibility Review Act of 2013''.

SEC. 2. CONGRESSIONAL FINDINGS.

After careful review of the Federal Government's trust relationship with federally recognized Indian tribes, Congress finds as follows:

(1) The Final Report of the American Indian Policy Review Committee, published in 1977, made a number of recommendations regarding the United States' administration of its trust relationship with federally recognized Indian tribes and their members, many of which have not been implemented.

(2) There has been no general, comprehensive review of the United States' trust relationship with federally recognized American Indian tribes since the publication of the Final Report of the American Indian Policy Review Committee.

(3) The trust relationship has eroded over time and there is a clear need to re-examine the administration of the Federal Government's constitutional trust responsibility.

(4) The duties administered by Federal agencies charged with protecting federally recognized Indian resources and providing services often conflict with other duties discharged by the same or separate Federal agencies and departments and it is the beneficiaries of the trust relationship that suffer as a result.

(5) In carrying out its trust responsibilities to federally recognized Indian tribes and their members, it is crucial that Congress have the benefit of

a review of the United States' trust relationship with federally recognized Indian Tribes and seek a course of action to better administer the trust relationship.

SEC. 3. DECLARATION.

Congress declares that it is timely and essential to conduct a review of the current state of the United States' unique trust relationship with federally recognized Indian tribes and their members in order to better administer constitutional trust responsibilities and make necessary revisions in relevant policies for the benefit of American Indian people.

SEC. 4. ESTABLISHMENT OF THE AMERICAN INDIAN TRUST REVIEW COMMISSION.

(a) ESTABLISHMENT.—In order to carry out the purposes of this Act, there is hereby established the American Indian Trust Review Commission, hereinafter referred to as the ''Commission''.

(b) MEMBERSHIP.—

(1) COMPOSITION.—The Commission shall be composed of 12 members, of whom—

(A) 4 shall be appointed by the President, in consultation with the Attorney General and the Secretary of the Interior;

(B) 3 shall be appointed by the Speaker of the House of Representatives, in consultation

with the Chairperson of the Committee Natural Resources of the House of Representatives;

(C) 1 shall be appointed by the Minority Leader of the House of Representatives, in consultation with the Ranking Member of the Committee on Natural Resources of the House of Representatives;

(D) 3 shall be appointed by the Majority Leader of the Senate, in consultation with the Chairperson of the Committee on Indian Affairs; and

(E) 1 shall be appointed by the Minority Leader of the Senate, in consultation with the Vice Chairperson of the Committee on Indian Affairs.

(2) DIVERSITY OF QUALIFICATIONS.—In making appointments to the Commission, every effort shall be made to select individuals whose qualifications are not already represented by other members of the Commission.

(3) TERM.—Each member shall be appointed for the life of the Commission.

(4) TIME FOR INITIAL APPOINTMENTS.—The appointment of the members of the Commission

shall be made no later than 60 days after the date of enactment of this Act.

(c) COMMISSION ORGANIZATION.—At its organizational meeting, the members of the Commission appointed pursuant to subsection (b)(1) of this section shall elect from their members, a Chairman and Vice Chairman immediately thereafter.

(d) VACANCIES.—Vacancies in the membership of the Commission shall not affect the power of the remaining members to execute the functions of the Commission and shall be filled in the same manner as in the case of the original appointment of the member whose seat is vacated.

(e) QUORUM.—Eight members of the Commission shall constitute a quorum, but a smaller number, as determined by the Commission, may conduct hearings.

SEC. 5. DUTIES OF THE COMMISSION.

The Commission shall conduct a comprehensive investigation and study of the unique trust relationship between the United States and federally recognized American Indian tribes. The study shall include—

(1) a study and analysis of the Constitution, and relevant treaties, statutes, judicial interpretations, and Executive Orders to determine the attributes of the unique trust relationship between the Federal Government, and federally recognized In-

dian tribes and the land and other resources they possess;

(2) a review of the policies, practices, and structure of the Federal agencies charged with protecting Indian resources and providing services to Indians;

(3) a management study of the Bureau of Indian Affairs and its ability to discharge its trust responsibilities without conflicting with the duties of other Federal agencies and departments;

(4) a compilation, collection, and analysis of data necessary to understand the extent of the needs of federally recognized Indian tribes, including the adequacy of educational systems, health care, public safety, and infrastructure;

(5) the feasibility of creating high-level positions within the Executive Branch to provide federally recognized Indian tribes with maximum participation in policy formation and program development, and the viability of a mechanism to ensure the continuation of critical programs for federally recognized Indian tribes;

(6) an examination of the appropriate role of State and local governments involvement in actions that permit government and public input and the degree to which the Federal Government can ade-

quately balance those interests without conflicting with its trust responsibilities towards federally recognized Indian tribes; and

(7) the recommendations of such modification of existing laws, procedures, regulations, policies, and practices as will, in the judgment of the Commission, best serve to carry out the policy and declarations of the purposes of the Commission.

SEC. 6. POWERS OF THE COMMISSION.

(a) COMMISSION RULES.—The Commission may make rules respecting its organization and procedures, as it deems necessary, except that no recommendations shall be reported from the Commission unless a majority of the Commission assents.

(b) POWERS.—

(1) HEARINGS.—

(A) IN GENERAL.—The Commission may hold hearings, meet, act, take testimony, and receive evidence as the Commission considers to be advisable to carry out the duties of the Commission under this Act.

(B) PUBLIC REQUIREMENT.—The hearings of the Commission shall be open to the public.

(C) PREFERENCE.—When considering hearing witnesses, the Commission shall exer-

cise a preference to invite elected officials from a federally recognized Indian tribe before seeking participation from any other tribal organization.

(c) INFORMATION FROM FEDERAL, TRIBAL, AND STATE AGENCIES.—

(1) IN GENERAL.—The Commission may secure directly from a Federal agency such information as the Commission considers to be necessary to carry out this Act.

(2) TRIBAL AND STATE AGENCIES.—The Commission may request the head of any tribal or State agency to provide the Commission such information as the Commission considers necessary to carry out this Act.

SEC. 7. COMMISSION PERSONNEL MATTERS.

(a) TRAVEL EXPENSES.—The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(b) STAFF.—

(1) IN GENERAL.—The Chairperson of the Commission may—

(A) without regard to the civil service laws and regulations, appoint and terminate an executive director and such other additional personnel as may be necessary to enable the Commission to perform its duties; and

(B) fix the compensation of the executive director and other personnel without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

(2) EXECUTIVE DIRECTOR SUBJECT TO CONFIRMATION.—The employment of an executive director shall be subject to confirmation by the Commission.

(c) DETAIL OF GOVERNMENT EMPLOYEES.—At the discretion of the relevant agency, any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(d) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.—The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

SEC. 8. REPORT OF THE COMMISSION.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the President and Congress a report that contains—

(1) a detailed statement of findings and conclusions of the Commission; and

(2) the recommendations of the Commission for such legislative and administrative actions as the Commission considers appropriate.

(b) EXTENSION.—The President may extend the date on which the report required by paragraph (1) shall be submitted by 1 year.

(c) ONLINE ACCESS.—The Commission shall make the report required by paragraph (1) publically available on the website of the Department of the Interior.

SEC. 9. NONAPPPLICABILITY OF THE FACA.

The Federal Advisory Committee Act (5 U.S.C. App. 2) shall not apply to the Commission.

SEC. 10. TERMINATION OF THE COMMISSION.

The Commission shall terminate 30 days after the Commission submits its report under section 7

HEALTH

Health Talking Points for USET Impact Week 2014

Advance Appropriations for IHS

- Delayed federal appropriations are adversely impacting the ability of an already severely underfunded Indian Health Service (IHS) to provide health care to American Indians and Alaska Natives. IHS and Tribal programs are continually faced with difficulty in budgeting, program planning, and staff recruitment and retention due to unreliable funding.
- Funding is most often delayed due to Congress' inability to enact timely appropriations legislation.
- Congress has already recognized the negative impacts the current appropriations process has had on the only other agency responsible for the provision of direct health care: the Veterans Administration (VA).
- The 111th Congress passed the Veterans Health Care Budget Reform and Transparency Act of 2009 (PL 111-81), which authorized advance appropriations for Veterans Administration (VA) medical care programs.
- Bipartisan legislation has been introduced in both chambers of Congress that would provide this necessary and desperately needed protection to the Indian Health Service's budget accounts.
- **ASK:** Congress must provide Indian Health Programs with the same certainty offered to the VA, and enact advance appropriations for IHS. Ask Members of Congress to stand with Tribal Health programs and co-sponsor H.R. 3229 (House) or S. 1570 (Senate).

Contract Support Costs

- For years, the Indian Health Service (IHS) has failed to request the full amount of funding required to support the fulfillment contracts under the Indian Self-Determination and Education Assistance Act. Likewise, Congress has failed to fully fund Contract Support Costs (CSC) in appropriations to the IHS.
- A 2012 Supreme Court decision, *Salazar v. Ramah Navajo Chapter*, held that that the federal government is responsible for paying all CSC owed to Tribal contractors, even if Congress does not appropriate enough funding to cover the full amount of CSC owed to all contractors.
- As a result, Tribes are moving to settle past claims with the IHS.
- Although the Obama Administration submitted a proposal in its Fiscal Year (FY) 2014 Budget Request to cap CSC funding on a contractor-by-contractor basis, Congress rightly rejected this proposal and instead removed the caps on aggregate CSC spending that had been imposed in recent years, making CSC payable from each agency's appropriation in the *FY 2014 Consolidated Appropriations Act*.
- Congress also directed the IHS and BIA "to consult with the Tribes and work with the House and Senate committees of jurisdictions, the Office of Management and Budget, and the Committees on Appropriations to formulate a long-term accounting, budget and legislative strategy" to address CSC funding.
- **ASK:** Thank Members of Congress for defending the rights of Tribal contractors and request continued oversight of BIA and IHS as they consult with Tribes on a long-term solution to CSC funding.

Medicare-Like Rates for Non-Hospital Services

- On April 11, 2013, the Government Accountability Office (GAO) released a report finding that IHS and Tribal Contract Health Service (CHS) programs routinely pay full billed charges for the non-hospital services purchased on behalf of their patients. This is up to 70% more than that which is paid by any other entity, including federal agencies, Medicare, Medicaid, and private insurers.
- Other federal providers of direct healthcare, the Department of Veterans Affairs and the Department of Defense, have implemented a Medicare-Like rate cap on reimbursement for all non-hospital services.
- The GAO report concluded that IHS and Tribal CHS programs could have saved an estimated $126.4 million in 2010 had reimbursements been capped at Medicare-Like Rates. It further recommended Congressional action to impose, "a cap on payments for physician and other non-hospital services made through IHS's CHS program that is consistent with the rate paid by other federal agencies."
- USET is part of a coalition of Tribes and Tribal organizations working to introduce legislation that will cap CHS reimbursement at Medicare-Like Rates. It will ensure continued access to care, allow for Tribal consultation as it is implemented by regulation, is budget neutral, and would bring IHS in line with other federal agencies who already cap the rate they pay for non-hospital services.
- **ASK:** Urge Members of Congress to introduce and support Medicare-Like Rates legislation. In an era of reduced and delayed IHS appropriations, this legislation will allow precious CHS dollars to purchase more and better care for our Tribal citizens.

Special Diabetes Program for Indians

- Funding for the Special Diabetes Program for Indians (SDPI) is set to expire September 30, 2014. Diabetes remains a serious problem for American Indians and Alaska Natives (AI/AN), with 16% afflicted nationally and 23% in the Nashville IHS Area alone. AI/ANs are 3 times more likely to die from diabetes than the U.S. general population.
- Over the last 10 years, SDPI has made real progress in the prevention and management of Type-2 diabetes. In the Nashville Area, average blood sugar has been reduced 19%, blood pressure management has increased 18%, and the control of LDL ("bad") cholesterol has increased by 53%.
- SDPI must be reauthorized this year in order to continue to make progress on the disproportionately high incidence of diabetes in Indian Country.
- On December 12, 2013, the Senate Finance Committee approved legislation reauthorizing the Special Diabetes Program for Indians (SDPI) as a part of The SGR Repeal and Medicare Beneficiary Access Improvement Act of 2013. Along with a permanent repeal of the "Sustainable Growth Rate (SGR)," otherwise known as the "Doc Fix," the legislation reauthorizes SDPI at $150 million a year for the next 5 years through Fiscal Year 2019.
- **ASK:** Urge Members of Congress, especially members of the House Ways and Means and Energy and Commerce Committees, to ensure any SGR repeal legislation contains a 5-year reauthorization of SDPI.

Purpose: To amend title XVIII of the Social Security Act to provide for a limitation on the charges for contract health services provided to Indians by Medicare providers.

At the end of title ____, add the following:

Sec. _____. **LIMITATION ON CHARGES FOR CONTRACT HEALTH SERVICES PROVIDED TO INDIANS BY MEDICARE PROVIDERS.**

(a) ALL PROVIDERS OF SERVICES. –

(1) IN GENERAL.—Section 1866(a)(1)(U) of the Social Security Act (42 U.S.C. 1395cc(a)(1)(U)) is amended by striking "in the case of hospitals which furnish inpatient hospital services for which payment may be made under this title," in the matter preceding clause (i).

(2) Regulations. The regulations published by the Secretary on June 4, 2007 at 72 Fed. Reg. 30706, *et seq.* with regard to hospitals which furnish inpatient hospital services regarding admission practices, payment methodology, and rates of payment (including the acceptance of no more than such payment rate as payment in full for such items and services) shall remain in effect.

(3) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to Medicare participation agreements in effect (or entered into) on or after the date that is 90 days after the date of enactment of this Act.

(b) ALL SUPPLIERS.—

(1) IN GENERAL.—Section 1834 of the Social Security Act (42 U.S.C. 1395m) is amended by adding at the end the following new subsection:

"(p) LIMITATION ON CHARGES FOR CONTRACT HEALTH SERVICES PROVIDED TO INDIANS BY SUPPLIERS.—No payment may be made under this title for an item or service furnished by a supplier (as defined in section 1861(d)) unless the supplier agrees (pursuant to a process established by the Secretary) to be a participating provider of medical and other health services both—

"(1) under the contract health services program funded by the Indian Health Service and operated by the Indian Health Service, an Indian tribe, or tribal organization (as those terms are defined in section 4 of the Indian Health Care Improvement Act), with respect to items and services that are covered under such program and furnished to an individual eligible for such items and services under such program; and

"(2) under any program funded by the Indian Health Service and operated by an urban Indian organization with respect to the purchase of items and services for an eligible urban Indian (as those terms are defined in such section 4),

in accordance with regulations promulgated by the Secretary regarding payment methodology and rates of payment (including the acceptance of no more than such payment rate as payment in full for such items and services).".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to items and services furnished on or after the date that is 90 days after the date of enactment of this Act.

PROPOSAL – EXTEND THE MEDICARE-LIKE RATE CAP ON CHS REFERRALS TO ALL MEDICARE PARTICIPATING PROVIDERS AND SUPPLIERS

The Indian Health System Overpays for Non-Hospital Services

The Indian Health Service (IHS), Indian tribes and tribal organizations currently cap the rates they will pay for hospital services to what the Medicare program would pay for the same service (the "Medicare-Like Rate"). Currently, this Medicare-Like Rate cap applies only to hospital services, which represent only a fraction of the services provided through the CHS system.

Contract Health Service (CHS) programs continue to routinely pay full billed charges for non-hospital services, including physician services. The CHS program may be the only plan in the Federal Government that does so. Neither the Department of Defense nor the VA pay full billed charges for health care from outside providers. Nor do insurance companies, including those with whom the federal government has negotiated favorable rates through the Federal Employee Health Benefits program. Full billed charges can widely vary from provider to provider, and often vastly exceed what Medicare would pay. As widely reported, the Center for Medicare and Medicaid Services recently released hospital pricing data that demonstrates that the full billed charges for hospital services are often many multiples of the rates Medicare would pay for the same services.[1]

On April 11, 2013, the Government Accountability Office (GAO) issued a groundbreaking report that concluded that the IHS CHS program routinely pays full billed charges for non-hospital services, resulting in needless waste of scarce CHS program dollars.[2] The GAO Report concludes that expanding the Medicare-Like Rate Cap to cover all services purchased under the CHS program would result in hundreds of millions of dollars in savings to Contract Health Service programs across the country. The GAO Report notes that the Department of Veterans' Affairs has already implemented a Medicare-Like Rate for the services it contracts for outside the VA system, and recommends that Congress enact legislation that would allow the IHS to do the same. Implementing a Medicare-Like Rate on all non-hospital services is budget neutral, and would greatly increase the level of care that Indian health programs are able to provide to American Indians and Alaska Natives at no additional cost to the government.

The Medicare-Like Rate Cap Currently Applies Only to Hospital Services

In 2003, Congress amended the Medicare law to authorize the Secretary of Health and Human Services to establish a rate cap on the amount hospitals may charge IHS and tribal health programs for care purchased from hospitals under the CHS program. The amendment was modeled on existing laws that granted the VA and DOD similar authority. In 2007, the Secretary

[1] http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/index.html.

[2] Indian Health Service: Capping Payment Rates for Nonhospital Services Could Save Millions of Dollars for Contract Health Services. GAO-13-272.

issued regulations which established a Medicare-Like Rate cap for CHS services, but it applied only to hospital services.

The GAO and HHS Recommend Extending the Medicare-Like Rate Cap to All Services

The Government Accountability Office (GAO) recently examined the CHS program, and concluded that the Medicare-Like Rate Cap should be expanded to cover all services purchased under the CHS program. In a report issued April 11, 2013, the GAO concluded that "Congress should consider imposing a cap on payments for physician and other nonhospital services made through IHS's CHS program that is consistent with the rate paid by other federal agencies." The Department of Health and Human Services (HHS) has reviewed the report and concurs with GAO's conclusions and recommendations.

The GAO Report found that the vast majority of IHS's federal CHS program payments were made at non-negotiated rates, and that these rates cost on average nearly 70 percent more than negotiated rates. GAO found that federal CHS programs paid non-contracted physicians two and half times more than what it estimates Medicare would have paid for the same services.

The GAO Report looked only at data it compiled from CHS programs run by the IHS. It did not look at the entire CHS program, which includes both the IHS and Tribal programs operating under the Indian Self-Determination and Education Assistance Act.

The GAO concluded that IHS CHS programs paid two times more than they would have paid with a Medicare-Like Rate in place, and that the IHS CHS program alone would have saved an estimated $31.7 million annually if Medicare-Like Rates applied to non-hospital services. These savings would result in IHS being able to provide approximately 253,000 additional physician services annually.

Although the GAO estimates are likely quite conservative, the GAO estimates that tribal CHS programs could have saved an additional $68.2 million for services provided in 2010 alone. GAO estimates that tribal and federal CHS programs combined could have saved $126.4 million in 2010 alone if Medicare-Like Rates had been in place for non-hospital services.

Using even these conservative estimates, the expansion of the Medicare-Like Rate Cap from 2010 to the present would have resulted in hundreds of millions in new federal health care resources being made available to American Indians and Alaska Natives.

The Proposed Legislation Directs the Secretary to Expand the Medicare-Like Rates Cap

The proposed legislation would amend Section 1866 of the Social Security Act to expand application of the Medicare-Like Rate Cap. It would direct the Secretary to issue new regulations to establish a payment rate cap applicable to medical and other health services in addition to the current law's cap on services provided by hospitals. It would make the Medicare-Like Rate cap apply to all Medicare-participating providers and suppliers. This would include physicians, anesthesiology assistants, nurse practitioners, ambulance services, air and ground transport, specialists, renal dialysis, x-ray technicians, independent diagnostic test facilities,

independent clinical laboratories, clinics, physical therapists, and the like. At the same time, it would preserve existing regulations that impose a Medicare-like Rate cap for services provided by hospitals.

The Proposed Legislation is Designed to Ensure Continued Access to Care

The GAO report concluded that any expansion of Medicare-Like Rates to non-hospital services would need to ensure that Indians have continued access to health care providers. The proposed legislation helps to ensure continued access to providers by making it a requirement for all Medicare-participating providers and suppliers, including physicians, to accept the rates of payment set by the Secretary as payment in full as a condition of receiving Medicare payments.

Under the proposed legislation, if a provider or supplier refused to accept that rate of payment, they would no longer be eligible to receive any Medicare payments. However, any provider or supplier would be free to reject that rate and no longer participate in Medicare.

The proposed legislation calls for the Secretary to develop new regulations to set the actual rate of payment, which is expected to be the Medicare-Like Rate. Any new regulations would be subject to tribal consultation and notice and comment rulemaking. One option to be considered would be to develop a process modeled on the VA's regulations, which allows for a higher rate than the Medicare-Like Rate to be used when necessary to ensure continued access to providers.

The proposed legislation is likely to have a minimal impact on existing providers and suppliers. Indians make up less than one to two percent of the total demand for care nationally. As the GAO report points out, most providers and suppliers already participate in Medicare, and are used to paying Medicare rates for services.

The Proposed Legislation is Budget Neutral and Consistent with Federal Policy

The proposed legislation could result in hundreds of millions of dollars in savings being made available to the IHS and Tribal and urban Indian health care facilities at no cost to the government. The legislation is budget neutral. The cost savings it would produce will be critical in coming years, as IHS is not subject to any cap on Budget Sequestration.

These cost savings would allow tribal health care programs to change their present level of care to a more favorable level of care, and treat lower priority cases early, before they develop into more serious problems. This, in turn, would result in significant cost savings not accounted for in the GAO's estimates, and dramatically improve health outcomes for one of the most at-risk populations in the United States.

Finally, expanding the Medicare-Like Rate Cap would bring IHS billing and payment policy in line with other federal agencies, such as VA and DOD, which already impose a Medicare-equivalent rate for non-hospital services.

United South and Eastern Tribes, Inc.

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REAUTHORIZE THE SPECIAL DIABETES PROGRAM FOR INDIANS

October 2013

What is the Special Diabetes Program for Indians (SDPI)?

In response to the disproportionately high rate of type 2 diabetes in American Indians and Alaska Native (AI/AN) communities, Congress passed the Balanced Budget Act in 1997 establishing the SDPI as a grant program for the prevention and treatment of diabetes at a funding level of $30 million per year for five years. After extensive Tribal consultation, the Indian Health Service (IHS) distributed the funding to over 300 IHS, Tribal and Urban AI/AN health programs. In 2001, Congress increased the amount of SDPI funding to $100 million per year, and then again increased it to $150 million per year from 2004-2010, which was then extended for an additional 3 years through Fiscal Year (FY) 2013. In early 2013, SDPI was extended for an additional year through FY 2014. Currently, SDPI funds allow 404 grant programs to operate, serving nearly all federally-recognized Tribes across the United States.

The SDPI funds have enhanced diabetes care and education in AI/AN communities, establishing innovative and culturally appropriate strategies to combat the diabetes epidemic. As a result, the program has been immensely successful in reducing costly complications and the incidence of the disease itself.

Why is it necessary to reauthorize the SDPI?

The Federal Government has a trust responsibility to provide for the health and welfare of AI/ANs, and must continue to address major health disparities in Indian Country. Reauthorization of the SDPI will help the Indian Health System continue to build a strong foundation for a diabetes-free future for AI/ANs.

Results from the SDPI programs offer hope for prevention since there is still no cure for diabetes. Positive outcomes, such as improvements in control of blood glucose, blood pressure, LDL Cholesterol and triglycerides are attainable. Many important lessons have been learned that will benefit all people affected by diabetes.

Loss of funding would be devastating and even more costly because all of the gains made through the program will be lost. The costs of diabetes and its complications will increase again for Tribal communities and the federal government, and precious jobs created by this program will be lost, perhaps forever.

Fast Facts:

Type 2 Diabetes is a serious problem in AI/ANs

- AI/ANs in general have the highest age-adjusted prevalence of diabetes among all U.S. racial and ethnic groups , with 11.4% afflicted nationally and 22.6% in the Nashville IHS Area alone.
- AI/AN mortality from diabetes is 1.6 times higher than the general U.S. population.

SDPI has made real progress in the prevention and management of type 2 diabetes

- Between 2003 and 2012, SDPI programs in the Nashville Area:
  - Increased the number of patients with a blood sugar (a1C) level of <7 (in control) by 13%;
  - Increased the management of blood pressure (below 140/90) by 5%;
  - And improved control of LDL (“bad”) cholesterol by 46%.

SDPI is a good investment

- Care for those with diabetes costs the Indian Health System 2.3 times more than care for those without. Prevention and management of type 2 diabetes translates to major savings in federal dollars.

SDPI must be reauthorized this Congress

- Any interruption in funding to SDPI will result in a devastating loss of qualified program staff and thousands of good jobs in Indian Country.

2013 Tribal Self-Governance Strategy Session

"Honoring the Treaties & Trust: Moving Self-Governance Forward"

DATE:
October 30-31, 2013

MEETING and LODGING LOCATION:
Four Points by Sheraton Washington DC Downtown
1201 K Street, NW
Washington, DC 20005
Telephone: (202) 289-7600

KEY ISSUE: IHS ADVANCE APPROPRIATIONS

Summary of Issue:

Since FY 1998 there has been only one year (FY 2006) when the Interior, Environment and Related Agencies budget, which contains the funding for Indian Health Service (IHS), has been enacted by the beginning of the fiscal year. Late funding provides significant challenges to tribes and IHS provider budgeting, recruitment, retention, provision of services, facility maintenance and construction efforts. Providing sufficient, timely, and predictable funding is needed to ensure the federal government meets its obligation to provide health care for American Indian and Alaska Native people.

An advance appropriation is funding that becomes available one year or more *after* the year of the appropriations act in which it is contained. For instance, if FY 2015 advance appropriations for the IHS were included in the FY 2014 Interior, Environment and Related Agencies Appropriations Act, those advance appropriations would not be counted against the FY 2014 Interior Appropriations Subcommittee's funding allocation but rather would be counted against its FY 2015 allocation. It would also be counted against the ceiling in the FY 2015 Budget Resolution, not the FY 2014 Budget Resolution.[1]

On October 1, 2013, Representative Don Young of Alaska (for himself and Rep. Ray Lujan of New Mexico) introduced the "Indian Health Service Advance Appropriations Act of 2013" (H.R. 3229) to amend the Indian Health Care Improvement Act authorizing advance appropriations for the IHS by providing 2-fiscal-year budget authority. On October 10, Senator Lisa Murkowski of Alaska (for herself and Sen. Mark Begich, Sen. Brian Schatz, and Sen. Tom Udall) introduced companion legislation on the Senate side (S. 1570).

Objectives/Goals:

To begin an advanced appropriations cycle there must be an initial transition appropriation which contains (1) an appropriation for the year in which the bill was enacted (for instance, FY 2014) and (2) an advance appropriation for the following year (FY 2015). Thereafter, Congress can revert to appropriations containing only one year advance funding. If IHS funding was on an advance appropriations cycle, tribal health care providers, as well as the IHS, would know the funding a year earlier than is currently the case and would not be subject to Continuing Resolutions.

[1] A Budget Resolution includes, among other things, spending limits for discretionary spending for the upcoming fiscal year and at least five ensuing fiscal years. It does not have the effect of law but its aggregate spending allocations, including limitations on the amount of advance appropriations, are enforceable through points of order and other procedural mechanisms.

With the recent introduction of H.R. 3229 and companion S. 1570, the primary advocacy strategy for tribes and tribal organizations requires additional Members of Congress to cosponsor the introduced legislation.

Strategy & Actions:

After Rep. Young and Sen. Murkowski introduced the bill in their respective chambers, enacting advance appropriation legislation for the IHS requires the following steps:

1. Work with other Members of Congress to cosponsor the introduced legislation

On the House side, the introduced bill was referred to the House Energy and Commerce, Natural Resources, and Budget Committee for consideration, so tribal efforts must focus on gaining the support of these committee members. Beyond the membership of the three referenced committees, tribes and tribal organizations should encourage their local Representative to cosponsor this legislation. Regarding the House Committees, the specific actions from each committee are outlined below along with a similar process on the relevant Senate side Committees.

On the Senate side, Senator Maria Cantwell, Chairwoman of the Senate Committee on Indian Affairs has expressed interest in this effort as well, but wants to hear from Indian Country. Additionally, the Senate Budget Committee will play a key role in getting this legislation passed in the Senate. It will be important that both these committees and their members receive letters of support from tribes and tribal organizations.

2. Budget Committee: Inclusion of IHS Advance Appropriations in a Budget Resolution

House and Senate budget resolutions, which are under the jurisdiction of the Budget Committees, are not signed into law but rather express the views of the House and Senate on overall spending, revenue, deficits and debt. Of significance is that in most years since 2003, the Budget Resolution limits how much—and for what purpose—advance appropriations may be made. Because the Budget Resolution often sets a cap on advance appropriations it is important to include the Indian Health Services and the Indian Health Facilities appropriations accounts in the list of advance appropriations which are authorized by the Budget Resolution. Otherwise, advance appropriations would be subject to a point of order objection.

We would want language added to include the IHS advance appropriations in this list of exceptions.

3. House Energy and Commerce & Natural Resources Committee: Enactment of the Advance Appropriations in the Interior, Environment and Related Agencies Appropriations Bill, Initially for a Transition Year and Thereafter as an Advance Appropriation Each Year

While the Appropriations Committee oversees funding for federal agencies, the House Natural Resources Committee and House Energy and Commerce Committees have jurisdiction over policy issues, including language. Achieving IHS advanced appropriations would require new legislative language for the Interior,

Environment and Related Appropriations Act providing for advance appropriations for the Indian Health Services and the Indian Health Facilities accounts.

Similar language could be added to the introductory language of the Indian Health Facilities appropriation whose funds are available until expended. For fiscal years after the transition year, only the advance appropriation would be provided in both appropriation accounts**.**

It's also important to not that the Veterans Administration (VA) achieved advance appropriations in 2009 for its health programs. At the time, the nonpartisan Congressional Budget Office said that the bill would not affect spending or revenue. As recently as August 1, 2013, the House Committee on Veterans' Affairs passed a bill to expand advance appropriations for the VA (H.R. 813) by voice vote.

SAMPLE LETTER

Sent via email rene.joseph@ihs.gov (Optional to send original via USPS)

[Date]

Dr. Yvette Roubideaux, Director
Indian Health Service
Department of Health and Human Services
The Reyes Building
801 Thompson Ave., Suite 400
Rockville, MD 20852

RE: IHS Advance Appropriation

Dear Dr. Roubideaux:

Budget security is critical to the effective and efficient delivery of health care for American Indians and Alaska Native people. Since Fiscal Year (FY) 1998, appropriated funds for medical services and facilities through IHS have only been provided before the commencement of the new fiscal year once. Late funding has resulted in significant challenges to tribal and IHS programs in the areas of budgeting, recruitment and retention, provision of services, facility maintenance and construction efforts.

Although the IHS budget has increased by 29% since 2008, the increase barely meets the non-medical inflation rates and not sufficient for medial inflation. When across the board budget rescissions and sequestration are taken into account, IHS has lost $240 million since FY 2011. Compound this with the challenges associated with receiving appropriations late in the fiscal years, a solution is needed to address this erosion of funding and protect the health of American Indian and Alaska Native people.

As you are aware, an advance appropriation is funding that becomes available one year or more *after* the year of the appropriations act in which it is contained. On October 1, 2013, Representative Don Young of Alaska (for himself and Rep. Ray Lujan of New Mexico) introduced the 'Indian Health Service Advance Appropriations Act of 2013' (H.R. 3229) bill to amend the Indian Health Care Improvement Act authorizing advance appropriations for the IHS by providing 2-fiscal-year budget authority in FY 2015. On October 10, Senator Lisa Murkowski (on behalf of herself, Sen. Mark Begich, Sen. Brian Schatz, and Sen. Tom Udall) introduced companion legislation in the Senate. If FY 2015 advance appropriations for the IHS were included in the FY 2014 Interior, Environment and Related Agencies Appropriations Act, those advance appropriations would not be counted against the FY 2014 Interior Appropriations Subcommittee's funding allocation but rather would be counted against its FY 2015 allocation. It would also be counted against the ceiling in the FY 2015 Budget Resolution, not the FY 2014 Budget Resolution.

Although advance appropriations would not entirely mitigate the effect of rescissions, it would provide a new level of predictability in funding and stabilize administration of Indian health programs. Beyond this point, there are certain IHS accounts where advance appropriations could pose operational challenges. For instance, Contract Support Costs (CSC) represent an area that relies on both predictions on future spending as well as a reconciliation process of expended CSC funds. While adjustments can be made through an auditing process, tribes and IHS can make the decision to exclude certain accounts from advance funding.

Healthcare services directly administered by the federal government, such as the Department of Veterans Affairs, are funded by advance appropriations to minimize the impact of late and, at times, inadequate budgets. The decision of Congress to enact advance appropriations for the VA medical program provides a compelling argument for the effectiveness of advance funding a federally-administered health program which could easily be applied to the IHS. Beyond the efficiency inherent to advance appropriations, providing timely and predictable funding helps to ensure the federal government's Trust responsibility if carried out.

We hope that you are willing to support and engage in a dialogue about an advance appropriation for the IHS budget. Thank you in advance for your attention to this matter. Please do not hesitate to contact me with any questions or if additional information can be provided.

Sincerely,
[Xxx, Yyy]

SAMPLE LETTER

[Suggest sending via fax]

[Date]

The Honorable [Senator/Representative]
[Insert Address]
Washington, DC

RE: ***Support the*** **"Indian Health Service Advance Appropriations Act of 2013"**

Dear [Senator/Representative]:

On behalf of [Tribe or Tribal organization], I strongly urge your support in cosponsoring the recently introduced bill - **"Indian Health Service Advance Appropriations Act of 2013" (H.R. 3229/ S. 1570) -** to allow advance appropriations for the Indian Health Service (IHS) in order to provide timely and predictable funding to administer health programs and services to American Indian and Alaska Native people.

Since Fiscal Year 1998, appropriated funds for medical services and facilities through IHS have only been provided before the commencement of the new fiscal year once. Late funding has resulted in significant challenges to tribal and IHS programs in the areas of budgeting, recruitment and retention, provision of services, and facility maintenance and construction efforts, among other areas.

On October 1, 2013, Representative Don Young - AK (on behalf of himself and Representative Ben Ray Lujan - NM) introduced H.R. 3229, to amend the Indian Health Care Improvement Act authorizing advance appropriations for the IHS by providing 2-fiscal-year budget authority in FY 2015. On October 10, Senator Lisa Murkowski - AK (on behalf of herself, Senators Mark Begich - AK, Brian Schatz -HI, and Tom Udall - NM) introduced S. 1570, companion legislation in the Senate. In introducing this bill, a significant step forward has been made in providing the assurance and stability needed in administering healthcare services for our people.

Healthcare services directly administered by the federal government, such as the Department of Veterans Affairs (VA), are funded by advance appropriations to minimize the impact of late and, at times, inadequate budgets. The decision of Congress to enact advance appropriations for the VA medical program provides a compelling argument for the effectiveness of advance funding a federally administered health program, which could easily be applied to the IHS. Beyond the efficiency inherent to advance appropriations, providing timely and predictable funding helps ensure the federal government's Trust responsibility if carried out.

On behalf of [Tribe or Tribal organization], I strongly urge you to support this necessary legislation and add your name in cosponsoring the bill moving forward. Thank you for your time and please do not hesitate to contact me with any questions or if additional information can be provided.

Sincerely,

[Xxx, Yyy]

National Indian Health Board

October 14, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Withdraw the proposal to cap Contract Support Costs for Tribal contracts and promptly resolve all past claims

Dear Mr. President:

Our undersigned Tribal organizations have come together to voice our strong opposition to any Administrative proposal to cap Contract Support Cost (CSC) payments to Tribal Nations, and to urge that all past CSC claims be resolved promptly. Unlike virtually every other government contractor, we are being unfairly asked to accept less for our work. We insist that the Administration's proposal to cap CSC payments be withdrawn and request that the Administration engage in meaningful consultation with Tribes and Tribal organizations to arrive at a method of funding future CSC that respects and promotes Tribal self-determination and honors the federal government's trust responsibilities and obligations.

Most recently, in Salazar v. Ramah Navajo Chapter, the Supreme Court ruled favorably on the issue of Contract Support Costs for Tribes, holding that the United States is required to pay CSC in full. Following this decision, this Administration has continued to request insufficient funding for CSC. It is inappropriate for the Administration to attempt to set a cap in appropriations in an effort to limit federal agencies' liability to fully fund tribal CSC entitlements. Additionally, the proposal to cap CSC funding on a contractor-by-contractor basis will prevent Tribes from filing Contract Dispute Act claims or otherwise recovering the full amount of CSC owed. No other government contractor is treated in this manner.

Despite universal objection from Tribes and Tribal organizations, no steps have been taken to withdraw this proposal from the President's FY 2014 Budget request. Minimal effort has been made to engage with Tribes in order to come to an agreement that would replace this approach; an approach that both undermines the trust responsibility and disrespects our government to government relationship.

In contrast to this Administration's support for Indian Self-Determination, its CSC proposal effectively robs Tribal Nations of the funding necessary to operate current programs and services. As a consequence, we will be forced to divert direct program dollars in order to cover the CSC shortfall. We depend on these essential services; health care, public safety, road maintenance, social services, and countless others for the over health and well-being of our communities. Depriving us of the ability to seek "monetary damages" when our contracts are underpaid, and to deal with us as 'second-class' contractors, is a direct violation of the Government's trust obligations and the decades' old, bipartisan national policy of empowering Indian Tribes. Overall we deserve equality and to be paid in full for our work to fulfill the United States' trust responsibility.

We respectfully request that the Administration withdraw its contract support cost proposal in the President's FY2014 Budget Request and notify Congress to ensure that it does not appear in any FY 2014 appropriations language. Additionally, we urge the Administration to meaningfully seek settlement of the hundreds of pending CSC claims that Tribes and Tribal organizations have filed against the Indian Health Service, Bureau of Indian Affairs and Bureau of Indian Education for past unpaid CSC. Tribes and Tribal organizations are facing severe financial shortfalls because of reduced appropriations and these settlement funds would help them to continue to provide adequate services to their citizens.

On behalf of the undersigned Tribal organizations, we thank you for the serious consideration of our recommendations and look forward to our continued collaboration to deliver the federal trust responsibility to our nation's first people.

Sincerely,

Brian Patterson, President
United South and Eastern Tribes

Cathy Abramson, Chairwoman
National Indian Health Board

Aaron A. Payment, Chairman
Sault Ste. Marie Tribe of Chippewa Indians

Dr. Heather Shotton, President
National Indian Education Association

Tex Hall
Co-Chairman, COLT
Chairman, Great Plains Tribal Chairman Association

Fawn Sharp, President
Affiliated Tribes of Northwest Indians

Delice Calcote, Executive Director
Alaska Inter-Tribal Council

Kevin J. Allis, Executive Director
Native American Contractors Association

Mark Romero, Chairman
CATG Board of Directors

W. Ron Allen, Chairman, CEO
Self-Governance Communication & Education Tribal Consortium

Andy C. Joseph, Jr., Chairman
Northwest Portland Area Indian Health Board

Larry Romanelli, President
United Tribes of Michigan

Mark LeBeau, PhD, Executive Director
California Rural Indian Health Board

Lincoln A. Bean, Sr., Chairman
Alaska Native Health Board

Inter-Tribal Council of Michigan, Inc.

Ivan Posey, Chairman
Montana-Wyoming Tribal Leaders Council

Diana Autaubo, Chairperson
Oklahoma City Area Inter-Tribal Health Board

Lewis Taylor, Chairman
St. Croix Chippewa Indians of Wisconsin

Michael Allen, Sr., Executive Director
Great Lakes Inter-Tribal Council

Terry Rambler, President
Inter-Tribal Council of Arizona

Thomas E. SnowBall, Sr., Treasurer
Winnebago Tribe of Nebraska

Jefferson Keel, President
National Congress of American Indians

Bill Lomax, President
Native American Finance Officer Association

Jerilyn Church, MSW, Chief Executive Officer
Great Plains Tribal Chairmen's Health Board

November 6, 2013

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Mr. President:

We write in advance of the upcoming Tribal Leaders Conference to convey our deep concern over the Administration's reaction to the June 2012 Supreme Court decisions in the Ramah and Arctic Slope tribal contracting cases, and to respectfully urge you to take immediate corrective action so that justice can finally be done for hundreds of Indian Tribes and tribal contractors who were the victims of massive contract breaches by the United States.

In June 2012—more than 16 months ago—the Supreme Court rejected the Government's defense to these breach of contract claims, and ruled that the Government acted illegally in failing to pay Tribes and tribal contractors the full contract price due under their Indian Self-Determination Act contracts. This breach covers thousands of contracts by the BIA and IHS extending back over more than 20 years.

But rather than acting quickly to resolve these claims and to make amends to Tribes and tribal contractors who have had to litigate their claims every step of the way, the agencies have instead engaged in renewed dilatory tactics which only further delay justice and further burden Tribes with slow, expensive and unnecessary accounting battles.

We address these precise problems in the Administration's approach.

First, the Bureau of Indian Affairs and the Indian Health Service have failed to promptly settle all outstanding historic claims over unpaid contract support costs.

This failure is stunning, since the BIA and IHS regularly reported to Congress on the precise extent of the agencies' annual underpayments. The IHS even reported those annual underpayments by individual Tribe. Despite years of contemporaneous data documenting the Government's underpayments, the agencies have launched a campaign to re-audit all contracts, to re-calculate new indirect cost rates, to retroactively create new accounting rules, and to essentially convert fixed-price tribal contracts into cost-reimbursable contracts, all in an effort to laboriously re-determine the amount of underpayments on a Tribe-by-Tribe and year-by-year basis. The result: in 16 months IHS has settled 16 out of roughly 1,600 claims—just one percent of all the outstanding claims against IHS. For its part, the BIA has yet to even begin to re-audit a sample of the 9,000 contracts that were underpaid by the agency, an exercise that could push off any settlement for years.

The time for delay is over. The Supreme Court has spoken. It has declared that the agencies acted illegally when they failed to fully pay each Tribe's contract. Given the wealth of available data about the underpayments compiled by the agencies themselves, settlement of all cases should have taken but a few months; it should not take a few years. This Administration has settled historic tribal claims when far less data was available and where no court rulings existed, much less definitive Supreme Court rulings in the Tribes' favor. The time to settle all outstanding claims is now.

Second, the Office of Management and Budget has sought to overrule the Supreme Court's Ramah and Arctic Slope rulings by proposing anti-tribal provisions in the fiscal year 2014 appropriations and continuing resolution measures.

These hostile provisions are intended to eliminate all future contract claims—essentially converting mandatory bilateral contracts into discretionary unilateral grants. Nothing could be a more direct attack on the Indian Self-Determination Act and the Nation's commitment to Tribal Self-Governance than this new initiative. Even the U.S. Chamber of Commerce has condemned the proposal as a direct attack on the fundamental rules that control the government contracting process. What is worse, this proposal was developed without any input from Indian Country.

The OMB proposal should be promptly withdrawn, and the Administration should re-commit to honoring in full all tribal contracts and compacts.

Third, the Administration has failed to pursue an inclusive, serious and transparent process for developing reforms in the contract support cost arena in the wake of the Ramah and Arctic Slope decisions. The IHS has refused to re-convene its contract support cost work group, it has disregarded work group recommendations for reforms, and it has announced a plan for non-public small-group consultations with subgroups of other advisory committees. It has failed to hold any national or regional tribal consultation sessions, and even the BIA has only held one such session.

The agencies must re-commit themselves to an open, transparent and good faith consultation process before making changes to any aspect of the tribal contracting and self-governance compacting regime. IHS, in particular, must embrace tribal consultation and must look to the contract support cost work group for additional guidance in this highly technical but vitally important area.

* * *

Mr. President, your Administration has been a beacon of hope in its management of Native American affairs. Among your Administration's most important achievements has been the development of historic settlements with Indian Tribes in several major litigations, its advocacy for amendments to the Indian Health Care Improvement Act and the Violence Against Women's Act, and its commitment on critical appropriations measures. But when it comes to honoring the

Nation's commitment to the contracting and compacting Tribes who were historically, and illegally, underpaid, and who continue to be underpaid, the Administration has permitted fiscal concerns to eclipse the imperative to do justice and to honor the Nation's obligations.

We Tribal Leaders respectfully but urgently call upon the Administration to promptly settle all outstanding IHS and BIA claims, to honor the Nation's current and future contract obligations to the Tribes, and to put into place concrete and meaningful consultation processes with Indian Country.

We salute your commitment to improving the well-being of Native American Tribes within the framework of the government-to-government relationship, and we look forward to working closely with you to seize the opportunities presented by the Supreme Court's Ramah and Arctic Slope decisions.

Respectfully,

Sycuan Band of the Kumeyaay Nation	Columbia River Inter-Tribal Fish Commission	Alabama Coushatta Tribe of Texas
Aroostook Band of Micmacs	Catawba Indian Nation	Susanville Indian Rancheria
Cayuga Nation	Chitimacha Tribe of Louisiana	Coushatta Tribe of Louisiana
San Carlos Apache Tribe	Eastern Band of the Cherokee Nation	Houlton Band of Maliseet Indians
Tunica-Biloxi Tribe of Louisiana	Jena Band of Choctaw Indians	Narragansett Tribe

Janice M. Doherty Nome Eskimo Community	Kawerak, Inc.	Bristol Bay Native Association
Joyce Guerrero Prairie Band Potawatomi Nation	Standing Rock Sioux Tribe	Bryan Brewer Oglala Sioux Tribe

October 28, 2013

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

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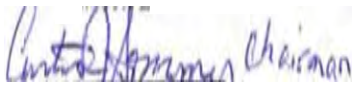
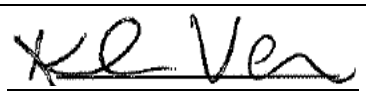
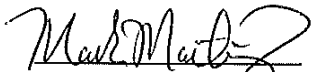
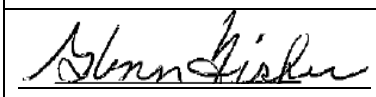
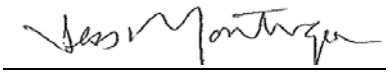
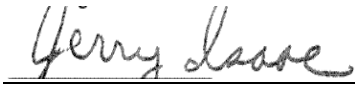
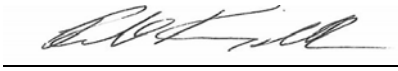
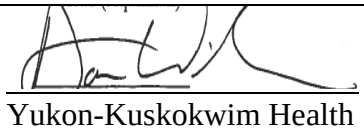
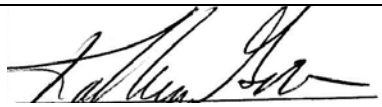
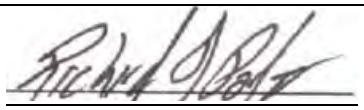
Respectfully,

National Congress of American Indians	Self-Governance Communication and Education Tribal Consortium	Northwest Indian Fish Commission
California Rural Indian Health Board	Little River Band of Ottawa Indians	Confederated Salish and Kootenai Tribes
Sault Ste. Marie Tribe of Chippewa Indians	Chippewa Cree Tribe of the Rocky Boy's Reservation	Choctaw Nation
Squaxin Island Tribe	Citizen Potawatomi Nation	Reno-Sparks Indian Colony
Confederated Tribes of Grand Ronde	Arctic Slope Native Association	Wampanoag Tribe of Gay Head (Aquinnah)
Nooksack Indian Tribe	Cook Inlet Tribal Council	Sac & Fox Nation

 Quinault Indian Nation	 Native Village of Tanana	 Nez Perce Tribe
 Pueblo of Sandia	 Pit River Health Service	 Pueblo of Zuni
 Puyallup Tribe of Indians	 Skokomish Indian Tribe	 Kodiak Area Native Association
 Shoshone-Bannock Tribes of the Fort Hall Indian Reservation	 Shoshone-Paiute Tribes of the Duck Valley Indian Reservation	 Riverside - San Bernadino County Indian Health, Inc.
 Tanana Chiefs Conference	 Winnebago Tribe of Nebraska	 Swinomish Indian Tribal Community
 SouthEast Alaska Regional Health Consortium	 Port Gamble S'Klallam Tribe	 Kansas Kickapoo Tribe
 Grand Traverse Band of Ottawa and Chippewa Indians	 Central Council of Tlingit & Haida Indian Tribes of Alaska	 Alaska Native Tribal Health Consortium
 Aleutian Pribilof Islands Association	 Red Lake Band of Chippewa Indians	 Yukon-Kuskokwim Health Corporation
 Pueblo of Isleta	 Southcentral Foundation	 Knik Tribe

Santee Sioux Nation	Southern Indian Health Council	Cherokee Nation
Kenaitze Indian Tribe	Chugachmiut	Tule River Indian Health Center
Assiniboine and Sioux Tribes of the Fort Peck Reservation	Tule River Indian Tribe of California	Lower Elwha Klallam Tribe
Hoopa Valley Tribe	Jamestown S'Klallam Tribe	Association of Village Council Presidents
Taos Pueblo	Oneida Tribe of Indians of Wisconsin	Northwest Portland Area Indian Health Board

EDUCATION

Talking Points - NATIVE EDUCATION PRIORITIES

Background & Context

Native education is in a state of emergency. Native students lag far behind their peers on every educational indicator, from academic achievement to high school and college graduation rates. Since 2005, the mathematics score disparity among American Indian and Alaska Native students and their non-Native counterparts has increased and average reading scores have not improved.[i] This crisis is perhaps most apparent in the Native high school dropout rate, which is above 50 percent in many of the states with high Native populations.[ii] Even fewer of our students enroll in and graduate from college.[iii]

The situation is even more dire in Bureau of Indian Education schools, where during the 2010-2011 school year, the graduation rate stood at 59 percent and barely one-third of students performed at proficient/advanced levels in both language arts and math.[iv] These disparities have been overwhelmingly detrimental to tribal nations and Native partners, who need an educated citizenry to lead our governments, develop reservation economies, contribute to the social well being of our communities, and sustain Native cultures.

Tribal nations have a tremendous stake in an improved education system. Education prepares Native children not only for active and equal participation in the global market, but also to be positive, involved members of their communities. Equally significant, an investment in education equips the future leaders of tribal governments. There is no more vital resource to the continued existence and integrity of tribal nations than Native children.

It is through this context that we respectfully request you support and be our champion for strengthening tribal participation in education in any legislation that moves before Congress. It is the job of this Committee to work with tribes and rally behind the priorities of Indian Country. Those priorities manifested themselves in the Native CLASS Act last Congress. While similar legislation has yet to be introduced, our education priorities remain the same. We hope Chairwoman Cantwell, Vice Chairman Barrasso and the Committee will take charge to advocate and introduce amendments to the ESEA as it moves to the floor of Congress, so our priorities are included. Now is the time to act.

Strengthen Tribal Participation in Education

Tribes and their tribal education agencies are in the best position to address the unique needs of Native children. As such, tribes should be granted funds to manage education programs in the same ways that are provided to states and districts. The ESEA reauthorization should authorize tribes to operate ESEA title programs in public schools that are located on Indian lands and serve Native students. The Department of Education would work with tribes to identify appropriate title programs for tribal administration, and tribes would work with the local educational agency on their respective reservations to implement the title program(s) in qualifying schools.

This was Indian Country's number one ask last Congress, and it continues to be our top priority today. This is a no-cost solution to providing tribes parity with schools districts as well as giving tribes the right to educate and better address the needs of their children. No education bill should pass out of Congress without language that strengthens tribal participation in education. We look forward to working with this Committee to ensure your Chairwoman and members support and will champion the inclusion of this priority.

Preserve and Revitalize Native Languages

The survival of Native languages and cultures is essential to the success of tribal communities and ways of life. Because immersion is largely recognized as the best way to learn a language, the ESEA reauthorization should establish a grant program for eligible schools to develop and maintain Native language immersion programs. This grant program would be the first of its kind to provide sustainable funding for immersion programs, and in doing so, would generate long-term data on Native language immersion best practices.

Provide Tribes Access to Student Records of Tribal Citizens

The ESEA reauthorization should expressly grant tribes and tribal education agencies access to tribal student academic records in the same way that local educational agencies have access. For a number of reasons, accurate, comprehensive, and meaningful data on Native students is lacking. Federal education reporting requirements often omit Native students due to their small numbers, and many Native students transfer among federal, state, and tribal school systems during the K-12 years, but the various systems are not required to transfer student data. Tribes and their education agencies are in the best position to track and coordinate Native student data, regardless of the education provider and student location. With a comprehensive database, tribes can synthesize and analyze data about their own students and utilize it to make data-driven decisions to improve education outcomes.

Encourage Tribal/State Partnerships

States that have Indian lands within their geographic boundaries have not been required—or even encouraged—to collaborate with tribes to meet the educational needs of Native children. However, tribes can offer essential insight into addressing the unique educational needs of Native students because they know their children and communities best. The ESEA reauthorization should require states and local educational agencies to consult with tribes when developing applications for ESEA title programs that would serve Native students. Such provisions would encourage states and local educational agencies serving Native students to work more closely with tribes and tribal communities.

Equitably Fund the Bureau of Indian Education

The Bureau of Indian Education (BIE) is currently ineligible for many of the Department of Education's flagship programs, such as Race to the Top, because the ESEA does not include language expressly making them eligible. Children attending BIE schools are among the country's highest-need and most at-risk students, and at the very least, they should have access to same resources as other students around the country. The ESEA reauthorization should include express statutory language making all funding stream available to BIE schools, either through an overarching provision or within each ESEA program.

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[i] *National Indian Education Study 2011* (NCES 2012-466). National Center for Education Statistics, Institute of Education Sciences, United States Department of Education. http://nces.ed.gov/nationsreportcard/nies/

[ii] School Year 2010-2011 Four-Year Regulatory Adjusted Cohort Graduation Rates, Department of Education. http://www2.ed.gov/documents/press-releases/state-2010-11-graduation-rate-data.pdf

[iii] US Census Bureau, American Community Survey 2005-2009 estimates.

[iv] Bureau of Indian Education, "Bureau-Wide Annual Report Card, 2010-2011." Bureau of Indian Education, "Bureau-Wide Annual Report Card, 2010-2011." http://www.bie.edu/cs/groups/xbie/documents/text/idc016697.htm

National Indian Education Association

United South and Eastern Tribes

January 15, 2014

The Honorable Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Arne Duncan, Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Bureau of Indian Education

Dear Secretaries Jewell and Duncan,

On behalf of the National Indian Education Association (NIEA) and the United South and Eastern Tribes (USET), we want to thank you for your recent visits to Indian Country where you met with Native education stakeholders and students. NIEA is the largest Native education organization in the country with over 2,000 members and USET is an inter-tribal organization comprised of 26 federally-recognized Tribal Nations from across the eastern half of the United States. Our organizations have recently strengthened our collaborative efforts to raise awareness of the inequities facing Native students and to underscore and highlight the importance of education in Indian country. We are seeking your commitment to work in partnership with us to provide remedies to the persistent issues that are increasing educational inequity between Native and non-Native students.

Our organizations urge you to make the improvement of the Bureau of Indian Education (BIE) a top priority within the U.S. Department of the Interior (DOI). We appreciate and are excited by the creation of the American Indian Education Study Group. The collaboration between DOI and the U.S. Department of Education (ED) as well as your recent statements regarding Native education is a good start, but now is the time for action to reverse the years of educational injustices across Indian country

For far too long, bureaucratic issues between the Bureau of Indian Affairs (BIA) and the BIE have resulted in inefficiency and ineffectiveness in meeting the educational needs of our Native youth. It is time for DOI and ED to fulfill the federal government's trust responsibility and make Native education funding and effectiveness a top priority, so that Native students have access to the education necessary to strengthen their communities and cultures for generations.

While the Study Group's assessment is critically important, the findings of the group must lead to action within the BIE. As the only population for which the federal government has an explicit obligation to educate, Native students must be made the priority to the Administration, the Departments, and the BIA within DOI. Only until federal agencies make BIE a top priority and seriously address the needed systemic changes and issues highlighted in the September

2013 Government Accountability Office Report will educational outcomes realistically improve and the achievement gap between Native and non-Native students narrow.

Tribes and Native communities place great emphasis on the education of their students and it is long past time that DOI and ED equally prioritizes Native education. As the Departments finalize decisions regarding the BIA and BIE, we insist that you consult and collaborate with tribes and Native education stakeholders to design appropriate solutions based on local needs. We also challenge you to continually focus your attention to guaranteeing functional communication and inter and intra-agency work that improves effectiveness.

On behalf of our organizations, we appreciate your past and current efforts and challenge you to build on that work to create results for the BIE. Native students are the future of our communities. Without them, tribes and Native communities will lose a generation of leaders who are critical for protecting tribal sovereignty, culture, and Tribal Nation rebuilding. For more information or if you have questions, please contact Ahniwake Rose, NIEA Executive Director, at 202.544.7290 or *arose@niea.org* or Kitcki Carroll, USET Executive Director, at 615.467.1540 or *kcarroll@usetinc.org*.

Sincerely,

Pam Agoyo, President
National Indian Education Association

Brian Patterson, President
United South and Eastern Tribes

CC: Kevin Washburn, Assistant Secretary – Indian Affairs
William Mendoza, Executive Director, White House Initiative on American Indian and Alaska Native Education
Mike Black, Director, Bureau of Indian Affairs
Dr. Charles Roessel, Director, Bureau of Indian Education

113TH CONGRESS
2D SESSION

S. 1948

To promote the academic achievement of American Indian, Alaska Native, and Native Hawaiian children with the establishment of a Native American language grant program.

IN THE SENATE OF THE UNITED STATES

JANUARY 16, 2014

Mr. TESTER (for himself, Mr. SCHATZ, Mr. BEGICH, Mr. JOHNSON of South Dakota, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To promote the academic achievement of American Indian, Alaska Native, and Native Hawaiian children with the establishment of a Native American language grant program.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Native Language Immersion Student Achievement Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Congress established the unique status of Native American languages and distinctive policies supporting their use as a medium of education in the Native American Languages Act (Public Law 101–477).

(2) Reports from the Bureau of Indian Affairs and tribal, public, charter, and private schools and colleges that use primarily Native American languages to deliver education, have indicated that students from these schools have generally had high school graduation and college attendance rates above the norm for their peers.

(3) The Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.) includes policy barriers to schools taught through Native American languages and a lack of adequate funding to support such opportunities.

(4) There is a critical need that requires immediate action to support education through Native American languages to preserve these languages.

SEC. 3. NATIVE AMERICAN LANGUAGE SCHOOLS.

Title VII of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7401 et seq.) is amended by adding at the end the following:

"PART D—NATIVE AMERICAN LANGUAGE SCHOOLS

"SEC. 7401. NATIVE AMERICAN LANGUAGE SCHOOLS.

''(a) PURPOSES.—The purposes of this section are—

''(1) to establish a grant program to support schools using Native American languages as the primary language of instruction of all curriculum taught at the school that will improve high school graduation rates, college attainment, and career readiness; and

''(2) to further integrate into this Act, Federal policy for such schools, as established in the Native American Languages Act (Public Law 101–477).

''(b) PROGRAM AUTHORIZED.—

''(1) IN GENERAL.—From the amounts made available to carry out this section, the Secretary may award grants to eligible entities to develop and maintain, or to improve and expand, programs that support schools, including prekindergarten through postsecondary education, using Native American languages as the primary language of instruction of all curriculum taught at the schools.

''(2) ELIGIBLE ENTITIES.—In this section, the term 'eligible entity' means a school or a private or tribal, nonprofit organization that has a plan to develop and maintain, or to improve and expand, pro-

grams that support schools using Native American languages as the primary language of instruction of all curriculum taught at the schools.

''(c) APPLICATION.—

''(1) IN GENERAL.—An eligible entity that desires to receive a grant under this section shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require, including the following:

''(A) The name of the Native American language to be used for instruction at the school supported by the eligible entity.

''(B) The number of students attending such school.

''(C) The number of present hours of Native American language instruction being provided to students at such school, if any.

''(D) The status of such school with regard to any applicable tribal education department or agency, public education system, indigenous language schooling research and cooperative, or accrediting body.

''(E) A statement that such school—

''(i) is engaged in meeting targeted proficiency levels for students, as may be

required by applicable Federal, State, or tribal law; and

''(ii) provides assessments of student using the Native American language of instruction, where appropriate.

''(F) A list of the instructors, staff, administrators, contractors, or subcontractors at such school and their qualifications to deliver high quality education through the Native American language of the school.

''(2) ADDITIONAL APPLICATION MATERIALS.—In addition to the application described in paragraph (1), an eligible entity that desires to receive a grant under this section shall submit to the Secretary the following:

''(A) A certification from a Federally recognized Indian tribe, or a letter from any Native American entity, on whose land the school supported by the eligible entity is located, or which is served by such school, indicating that the school has the capacity to provide education primarily through a Native American language and that there are sufficient speakers of such Native American language at the school or available to be hired by the school.

''(B) A statement that such school will participate in data collection conducted by the Secretary that will determine best practices and further academic evaluation of the school.

''(C) A demonstration of the capacity to have speakers of its Native American language provide the basic education offered by such school on a full-time basis.

''(d) AWARDING OF GRANTS.—In awarding grants under this section, the Secretary shall—

''(1) determine the amount and length of each grant;

''(2) ensure, to the maximum extent feasible, that diversity in languages is represented; and

''(3) require the eligible entities to present a Native language education plan to improve high school graduation rates, college attainment, and career readiness.

''(e) ACTIVITIES AUTHORIZED.—An eligible entity that receives a grant under this section shall carry out the following activities:

''(1) Support Native American language education and development.

''(2) Develop or refine instructional curriculum for the school supported by the eligible entity, in-

cluding distinctive teaching materials and activities, as appropriate.

''(3) Fund training opportunities for teachers and, as appropriate, staff and administrators, that would strengthen the overall language and academic goals of such school.

''(4) Other activities that promote Native American language education and development, as appropriate.

''(f) REPORT TO SECRETARY.—Each eligible entity that receives a grant under this section shall provide an annual report to the Secretary in such form and manner as the Secretary may require.

''(g) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated to carry out this section $5,000,000 for fiscal year 2015, and such sums as may be necessary for each of the 4 succeeding fiscal years.''.

○

FARM BILL

NCAI Summary of Native Provisions in 2014 Farm Bill: January 2014

Provisions of Interest in Indian Country:

- **Feasibility Study and Report for Tribal Administration of Federal Food Assistance Programs**
  - This is an initial step for tribes to administer federal food assistance programs that benefit their citizens, particularly SNAP which is administered by the state.
- **Food Distribution Program on Indian Reservations Traditional Foods Demonstration Project (FDPIR)**
  - Creates a new demonstration project with technical assistance and tribal consultation to allow the inclusion of traditional and locally grown foods from Native farmers and ranchers in FDPIR.
- **Service of Traditional Foods in Food Service Programs**
  - Allows for traditional foods to be served in residential child care facilities, child nutrition programs, hospitals, clinics, long-term care facilities, and senior meal programs.
- **Tribal Parity in Soil and Water Conservation Act Programs**
  - Explicitly adds tribes as an eligible entity for Soil and Water Conservation Act Programs.
- **$8.6 Billion Cut to the Supplemental Nutrition Assistance Program (SNAP)**
  - Unfortunately, the final bill cuts SNAP by $8.6 billion. This is a compromise between the $4 billion in cuts the Senate bill proposed and the nearly $40 billion from the House bill. The savings comes from increasing the threshold amount of Low-Income Housing Energy Assistance Program (LIHEAP) assistance necessary to qualify for increased SNAP benefits—the so called "Heat and Eat" provision—from $1 to $20.

2014 Farm Bill Talking Points:

The Farm Bill will cut $8.6 billion over 10 years to the Supplemental Nutrition Assistance Program (SNAP).

1. These cuts will greatly harm the health and well-being of American Indians and Alaska Natives.
2. Due to high unemployment and struggling economies in Indian Country, many American Indian and Alaska Native families receive federal food assistance.
3. Twenty-four percent of American Indian and Alaska Native households receive SNAP benefits.
4. Twenty-seven percent of American Indians and Alaska Natives were below the poverty line from 2007 to 2011—nearly double the national poverty rate.
5. More than thirty percent of American Indians and Alaska Natives in the nine states with the largest tribal populations are below the poverty line.

REQUEST: Congress to uphold its trust responsibility to American Indians and Alaska Natives and restore funding to SNAP to meet food security needs of Indian Country.

The Farm Bill authorizes certain provisions for Traditional Foods in Food Distribution and Food Service Programs.

1. A new demonstration project to allow inclusion of traditional and locally grown foods from AI/AN farmers and ranchers would promote healthier food options in the Food Distribution Program and would further encourage development of Tribal agricultural economies.
2. Authorization for traditional foods to be served in residential child care facilities, child nutrition programs, hospitals, clinics, long-term care facilities, and senior meals programs would provide healthier food options, support existing health programs, and promote significant cultural benefits to American Indians and Alaska Natives.
3. American Indians and Alaska Natives are at a greater risk for diabetes. From 1994 to 2004, there has been a 68% increase in diabetes in American Indian and Alaska Native youth aged 15 – 19 years. (American Diabetes Association)
4. The USDA 2007 Census of Agriculture reported that American Indian or Alaska Native farm operators grew 88 percent from 2002, outpacing the 7 percent increase in U.S. farm operators overall.
5. American Indian or Alaska Native farm operators are more likely than their counterparts nationwide to report farming as their primary occupation, and they are likely to derive a larger portion of their overall income from farming. They are also more likely to own all of the land that they operate rather than renting or leasing land.

REQUEST: Congress to make the demonstration project a permanent program, and to commit resources to provide technical assistance and training to American Indian and Alaska Native farmers so that they may fully participate and benefit from the Traditional Foods in Food Distribution and Food Service Programs.

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Farm Bill Agreement

This Conference Summary describes the conference agreement on HR 2642 , Agricultural Act of 2014, that the House will consider Wednesday.

The agreement extends most major federal farm and nutrition assistance programs through FY 2018 — but repeals direct and countercyclical payments to commodity producers, replacing them with two new risk-management programs to protect farmers when they suffer significant losses. It also bolsters the use of crop insurance for risk mitigation, creating new programs for "shallow losses" and for cotton, and repeals several major dairy programs and replaces them with a new voluntary margin insurance program.

It modifies the food stamp program to reduce the ability of states to artificially boost an individual's benefits, requiring that an individual receive at least $20 or more in state LIHEAP aid before that individual's SNAP benefits are automatically increased. It does not include House provisions to restrict categorical eligibility or the ability of states to waive SNAP work requirements for certain adults.

CBO estimates that the measure would reduce deficits by $16.6 billion over 10 years (or $23 billion when already-enacted sequester savings are factored in), including $8.6 billion from food stamps. Overall, mandatory spending under the agreement would total $956 billion over 10 years, including $756 billion (79% of the total) for food stamps.

Contents

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Section I

Background & Summary

The federal government first provided financial assistance to farmers during the Great Depression. A system of price supports and income subsidies for major commodities was created under President Franklin D. Roosevelt to ensure that farmers had adequate funds to maintain their operations. Safeguarding the financial viability of the nation's agriculture infrastructure was viewed as a matter of national security. Since the inception of federal farm policy, the laws governing it have been reauthorized periodically; in recent decades they have been regularly reauthorized and modified as needed through multi-year farm bills.

Since 1973, the food stamp program — now formally known as the Supplemental Nutrition Assistance Program (SNAP), which is intended to help the poor and prevent hunger by increasing the food-purchasing power of eligible low-income households — has been reauthorized as part of the farm bill on the premise that federal programs intended to reduce hunger in America should be paired with programs that support the nation's agricultural abundance. Other federal nutrition programs, as well as international food aid, are now also routinely reauthorized as part of the farm bill.

The most recently enacted farm bill, the Food, Conservation and Energy Act of 2008 (PL 110-246), expired in September 2012, although most programs were extended through Sept. 30, 2013, with dairy programs being extended through December 2013. Without a new law or an extension of the existing law, farm policy reverts to "permanent" laws enacted in the 1930s and 1940s that establish commodity prices that are not sustainable and are no longer in line with present economics or agricultural policy.

Recent Actions

Congress has been working the past few years to reauthorize and update farm and nutrition programs, with the primary push on farm programs being an effort to end the direct payments program under which farmers receive payments based solely on their past production history. Lawmakers have experienced numerous difficulties, however.

In 2012, during the 112th Congress, the Senate passed a five-year farm and nutrition bill, but the House never considered its own version because GOP leaders believed it would not pass — with Democrats mostly opposed to its proposed cuts to the food stamp program and House Republicans divided, with many demanding much deeper cuts to food stamps.

In the 113th Congress, both the House and Senate quickly resumed work on a new multi-year reauthorization, with the Senate last June passing its five-year farm bill (S 954) by a vote of 66 to 27. The House later that month considered its own version (HR 1947 ; see House Action Reports Fact Sheet No. 113-8, June 18, 2013), but that bill was defeated on the House floor by a 195-234 vote as Democrats overwhelmingly opposed the measure's proposed $20 billion, 10-year cut to food stamps, and a quarter of House Republicans also opposed it because they thought the bill didn't cut SNAP or farm support programs enough.

GOP leaders subsequently decided to consider food stamps and farm programs separately, and in July the House by a 216-208 vote passed an agriculture-program-only five-year farm bill (HR 2642 ; see House Action Reports Fact Sheet 113-11, July 10, 2013) that excluded food stamps and other nutrition programs. In September, the House by a 217-210 vote passed a separate nutrition bill (HR 3102 ; see House Action Reports Fact Sheet 113-15, Sept. 18, 2013) that would cut food stamps even deeper than the earlier measures, reducing SNAP spending by $39 billion over 10 years and reauthorizing the program for only three years. No Democrats voted for either bill.

Later in September, the House voted to combine its two bills in order to go to conference with the Senate.

Conference Consideration

Going into the conference, the most contentious issue to be reconciled seemed to be the extent to which to cut the food stamp program, which has grown to claim more than 70% of the Agriculture Department's budget.

Both the House and Senate versions proposed to restrict a mechanism through which states have been able to significantly boost federal SNAP payments to individuals in the state by providing minimal assistance from the Low-Income Home Energy Assistance Program (LIHEAP). But the biggest contributor to the difference between the Senate's $4 billion SNAP reduction and the House's $40 billion cut was House provisions that would cause millions of individuals to lose their benefits by restricting "categorical eligibility" and ending benefits to able-bodied adults unless they had jobs. However, in the face of united Democratic opposition to those provisions, including a veto threat from President Obama, House negotiators agreed to drop them (for more detailed information on the House provisions, see House Action Reports Fact Sheet 113-15, Sept. 18, 2013).

The issue that received the most attention for delaying an eventual conference agreement was a new dairy support program. Initially, both the Senate and House bills included a new voluntary dairy program that would guarantee profits for milk producers but also effectively limit their milk production in order to prevent surpluses. The program

was dropped from the House bill on the floor after Speaker John A. Boehner, R-Ohio, expressed his opposition to the program, but it was revived in conference until Boehner declared that if the agreement included such a "Soviet-style" supply management program he would not bring the agreement to the House floor. Negotiations then centered on how to set up a program that gave the correct market incentives to reduce production in a time of oversupply while still providing support for dairy producers when their profit margins decreased.

Other issues that were not resolved until the final days of negotiation included the level of subsidies a farmer could collect in a year for risk-management programs (both the House and Senate bills capped payments at $50,000 per person or $100,000 for a married couple for each program; the final deal provides overall annual limits of $125,000 per person or $250,000 per couple, with no per-program caps); regulations on mandatory country-of-origin-labeling (COOL) for meat; and proposed Grain Inspection, Packers and Stockyards Administration (GIPSA) rules regarding livestock marketing.

Summary

The conference agreement on HR 2642 , Agricultural Act of 2014, extends most major federal farm, nutrition assistance, rural development and agricultural trade programs through FY 2018 — but repeals or modifies certain major programs, including dairy programs, conservation programs and direct payments to farmers.

The measure provides five-year authorizations for both farm and nutrition programs (unlike the House version, which reauthorized nutrition programs for only three years), and it retains 1938 and 1949 agricultural laws as underlying, but suspended, permanent law that is superseded by the agreement's provisions (the House bill would have repealed those laws, making its commodity provisions the new permanent law and reducing the need to reauthorize farm programs in another five years).

The Congressional Budget Office (CBO) estimates that the bill would reduce net direct spending by $16.6 billion over 10 years compared with CBO's May 2013 baseline (or $23 billion in total savings when $6.4 billion in already-enacted sequester savings are factored in).

Reductions include $14.3 billion over 10 years from commodities programs, $8.6 billion from food stamps and $4 billion from conservation programs, while crop insurance spending would increase by $5.7 billion. Agriculture research, energy and horticulture programs would also see increases in mandatory spending. CBO estimates that total mandatory spending under the agreement would be $956 billion over 10 years, including $756 billion (79% of the total) for nutrition, primarily food stamps.

Commodities and Risk Mitigation

The agreement repeals current programs that make direct and countercyclical payments to agriculture commodity producers and replaces them with two new risk-management programs to protect farmers when they suffer significant losses: a Price Loss Coverage (PLC) program to address deep, multiple-year declines in commodity prices and an Agriculture Risk Coverage (ARC) program to cover a portion of a farmer's revenue losses when crop prices fall to 86% of the average of the middle three of the last five years.

The measure sets new subsidy caps of $125,000 per person or $250,000 per couple for total payments from the two programs as well as any marketing loan benefits. Cotton producers would not be eligible for either program. CBO estimates that the PLC program would cost an estimated $13.1 billion through FY 2023, while the ARC program would cost $14.1 billion.

Crop Insurance

The agreement includes changes to crop insurance programs, including the creation of two new programs, that CBO estimates would result in a net increase of $5.7 billion in direct spending over 10 years.

It establishes a new crop insurance program known as Supplemental Coverage Option (SCO), an areawide group-risk policy also called shallow loss coverage, under which producers can purchase additional insurance to cover a portion of losses not covered by individual crop insurance policies (i.e., part of their deductible). Coverage under SCO would be triggered only if the area loss exceeds 14%. CBO estimates that it would cost $1.7 billion over 10 years.

Because cotton growers would not be eligible for the new PLC and ARC risk mitigation programs, the measure also creates the Stacked Income Protection Plan (STAX) for upland cotton growers, under which they could obtain areawide group-risk insurance policies that would be available as supplemental insurance or as a stand-alone policy. CBO estimates that the new program would cost $3.3 billion over 10 years.

Dairy

The agreement reauthorizes three dairy programs and repeals four others — replacing them with a new voluntary margin insurance program that is aimed at protecting dairy farmers from economic loss. Overall, CBO estimates that the measure's dairy provisions would increase direct spending by a net total of $912 million through FY 2023.

The new dairy margin protection program is meant to protect farmers against losses if milk prices drop too close to feed costs. All dairy producers in the United States would be eligible for the program and could choose coverage level thresholds in 50-cent-per-hundredweight increments from $4.00 per hundredweight (cwt) to $8.00/cwt. At $4.00/cwt there are no premiums, and premiums for the first 4 million pounds of milk produced would cost less per cwt than those for milk produced beyond 4 million pounds.

Limits on Payments

The measure reduces the threshold at which a farmer becomes ineligible to receive benefits under federal commodity and conservation programs — prohibiting any such payments if his or her adjusted gross income (AGI) exceeds $900,000. The current limit is $1 million in annual AGI. In addition, individuals with less than $900,000 in AGI would be eligible for subsidies regardless of the portion of their income that comes from farming.

Disaster Assistance

The agreement reauthorizes and modifies certain Supplemental Agricultural Disaster Assistance programs through 2018, and it moves the disaster assistance authorizations to the commodities title of the law. Authorized programs include Livestock Indemnity Payments; the Livestock Forage Disaster Program; Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish; and the Tree Assistance Program.

It increases to $125,000 the cap on disaster payments that may be made to any one individual or entity and eliminates income restrictions for individuals or entities to receive agriculture disaster payments. CBO estimates that disaster spending would total $3.7 billion through FY 2023, including $897 million in FY 2014.

Food Stamps / SNAP

The agreement reauthorizes through FY 2018 spending for federal nutrition programs, including food stamps (formally known as the Supplemental Nutrition Assistance Program, or SNAP).

It modifies SNAP to reduce the ability of states to artificially boost an individual's food stamp benefits by providing a minimal level of assistance through the Low Income Home Energy Assistance Program (LIHEAP), requiring that an individual receive at least $20 or more in LIHEAP aid from the state before that individual's SNAP benefits may be automatically increased. CBO estimates that this provision would reduce spending by $8.6 billion over 10 years.

It does not include House provisions that would have restricted "categorical eligibility" for SNAP or restricted the ability of states to waive SNAP work requirements for certain able-bodied adults, but it does create a pilot program to help get more SNAP recipients working by allowing states to require work and job training as part of receiving SNAP benefits.

The measure prohibits undocumented immigrants, major lottery winners, traditional college students, and convicted murderers and violent sex offenders from receiving SNAP benefits, and it requires stores authorized to accept SNAP benefits to purchase point-of-sale equipment that will allow electronic tracking of where SNAP benefits are used. It also includes provisions to prevent SNAP fraud, including by requiring the Agriculture Department to establish pilot projects to improve federal-state cooperation in reducing retailer fraud.

It also modifies the Commodity Supplemental Food Program to eliminate program eligibility for low-income pregnant and breast-feeding women, other new mothers up to one year postpartum, infants and children up to their 6th birthday. CBO estimates that the measure's nutrition provisions would reduce direct spending by $8 billion through FY 2023.

Conservation

The agreement reauthorizes through FY 2018 most conservation activities but consolidates the 23 current programs into 13. It also generally reduces the number of acres of land that may be enrolled in the programs but requires farmers to comply with conservation practices in order to receive premium subsidies on crop insurance and to participate in the measure's new risk-management programs. CBO estimates that the changes would produce $4 billion in savings over 10 years.

Reauthorized programs include the Conservation Reserve Program, the Farmable Wetlands Programs, the Conservation Stewardship Program and the Environmental Quality Incentives Program (EQIP). EQIP would be expanded to include functions now administered under the Wildlife Habitat Incentives Program.

It establishes a new Agricultural Conservation Easement Program by consolidating the Wetland Reserve Program, the Grassland Reserve Program and the Farmland Protection Program. Similarly, a Regional Conservation Partnership Program is established by combining the Agricultural Water Enhancement Program, the Chesapeake Bay Watershed Program, the Cooperative Conservation Partnership Initiatives Program and the Great Lakes Basin Program.

Other Programs

Forestry

The agreement repeals some expired forestry programs and reauthorizes most of the main programs. The measure grants the Forest Service authority to designate critical areas within the national forest system in order to address deteriorating forest health conditions and grants the Agriculture Department authority to enter into agreements with state foresters to provide restoration and protection services on U.S. Forest Service lands.

Horticulture

The agreement includes provisions addressing pesticides and reducing some regulatory requirements placed on pesticide users. It reauthorizes the Specialty Crop Block Grant Program, the Farmers Market and Local Food Promotion Program, and organic agriculture programs. CBO estimates that the horticulture provisions will increase mandatory spending by $694 million over 10 years.

Credit

The measure reauthorizes all Farm Service Agency (FSA) loans through FY 2018 and makes a series of changes aimed at facilitating credit for beginning farmers.

Rural Development

The agreement reauthorizes through FY 2018 dozens of rural development programs and eliminates 13 programs. CBO estimates that the rural development provisions in the agreement increase direct spending by $228 million through FY 2023.

The measure reauthorizes the Rural Microentrepreneur Assistance Program, which provides grant support to third parties that assist rural entrepreneurs in establishing microenterprises in rural areas; value-added agricultural product market development grants; and Rural Water and Waste Disposal Infrastructure. It requires the development of a simplified application process for grants and relending programs, including single-page applications where possible.

Research & Extension

The measure reauthorizes more than three dozen research, extension and education programs, including intramural and extramural research programs; land grant universities; Beginning Farmer and Rancher Development; and the Agriculture and Food Research Initiative. It eliminates dozens of other programs and reports.

According to CBO, the measure's research provisions would increase direct spending by $1.1 billion through FY 2023.

Energy

The agreement reauthorizes energy programs through FY 2018 and increases direct spending by $879 million through FY 2023 — including for the Biorefinery Assistance Program, the Rural Energy for America Program and the Biomass Crop Assistance Program. It includes language that prohibits subsidies for ethanol blending pumps.

Miscellaneous Provisions

The agreement is silent on the country of origin labeling regulations and the proposed regulations required by the 2008 farm bill (PL 110-246) regarding livestock and poultry marketing practices.

It extends for one year, through FY 2014, the payment in lieu of taxes (PILT) program, which would result in $410 million in spending this year.

References

The Conference Report (H Rept 113-333) was filed Monday, Jan. 27.

The House passed its agriculture-only farm bill on July 11, 2013, by a vote of 216 to 208 (see House Action Reports Fact Sheet 113-11). The House passed its nutrition-only farm bill on Sept. 19, 2013, by a vote of 217 to 210 (see House Action Reports Fact Sheet 113-15). On Sept. 28, 2013, the House merged the two bills through the adoption of H Res 361 by a vote of 226 to 191. The Senate passed its version of the farm bill on June 10, 2013, by a vote of 66 to 27.

See CQ Weekly 2013, pp. 888 , 942 , 1000 , 1034 , 1051 , 1098 , 1210 , 1280 , 1469 , 1558 , 1657 , 1782 , 1832 , 1858 , 2044 and 2093 ; CQ Weekly, pp. 19 and 123 .
