



WASHINGTON REPORT

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2014 Election Results

As expected, the 2014 Mid-Term elections resulted in a Senate “flip” from majority Democrat to majority Republican, as well as additional GOP seats in the House of Representatives, increasing its majority there to 247 seats, the largest any party has held since 1947. With 54 Republican seats in the Senate, the Republican Party now has full control of the Congress. In some ways, this clears a path for more productivity in Congress, as the two Chambers can more easily draft and move major legislation. In spite of its majority, however, the GOP does not have the numbers to override a Presidential veto, and so if intends to be productive, it must take a more collaborative approach with this Administration.

On the morning following the election, Speaker of the House, John Boehner, and Senate Majority Leader, Mitch McConnell, published an op-ed in the Wall Street Journal outlining the Republican majority’s agenda for the 114th Congress. Among their goals over the next two years are reforming the tax code, reducing government bureaucracy and regulation, and repealing or changing the Affordable Care Act.

With a new majority in the Senate and retirements in the House, there will be a number of changes in Committee Leadership in both Chambers.

USET ACTION: USET is currently working to update and repackage a number of its legislative priorities, including its comprehensive tax reform platform. The revised tax reform platform was approved by the USET Board of Directors during 2014 Annual Meeting. We plan to provide education to new Members of Congress, as well as relevant committee leadership, during the first quarter of the New Year.

FY 2015 Appropriations

Before recessing for the November elections, Congress was unable to complete the appropriations process through regular order, and funded the government for the first few months of Fiscal Year (FY) 2015 under a “continuing resolution.” A continuing resolution (CR) is a stopgap measure, providing a continuation of the previous year’s funding levels for a particular period of time. In this case, the current continuing resolution was set to expire on December 11th, at which time Congress must have approved full-year funding for FY 2015 or yet another CR in order to avoid a government shutdown.

Congress returned for its lame duck session in November to much debate over whether to provide full-year appropriations through a 12-bill omnibus package or pass an additional short-term continuing resolution into February. Following the President’s executive order allowing for some undocumented immigrants to stay in the United States, discussion turned to a combination of the two, otherwise known as a Cromnibus

(CR+omnibus); full year appropriations for some agencies and continuing resolutions for others.

Ultimately, Congress agreed to a Cromnibus bill, a \$1.1 package providing for full-year appropriations for every agency, with the exception of the Department of Homeland Security (DHS), which is funded through February 27th. Since DHS oversees immigration, this is an opportunity for the 114th Congress to undo the President's executive order.

Passed by a vote of 219-206 in the House on December 11th and 56-40 in the Senate on December 13th, the legislation provides full year appropriations for both the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). For FY 2015, the BIA is funded at \$2.6 billion, an increase of \$70 million or 2.8% over FY 2014 enacted levels. This includes \$2 million for roads maintenance, \$20.2 million for school replacement, and \$5.1 million for social services. The IHS is funded at a total of \$4.6 billion, an increase of \$208 million or 4.7% over FY 2014 enacted levels. This includes \$663 million for Contract Support Costs (CSC), which is intended to provide full funding for CSC in FY 2015, as well as return funds to other programs that were used to cover last year's shortfall. It also funds Purchased/Referred Care (formerly Contract Health Services) at \$914 million, which is \$35 million above the FY 2014 enacted level.

Taxation

➤ **General Welfare Exclusion Act Signed Into Law**

In the days leading up to Congress' recess for the November elections, Indian Country saw strength in unity as it came together to successfully advocate for the passage of H.R. 3043, the Tribal General Welfare Exclusion Act of 2014. Passed by the House under suspension of the rules on September 16th, the Senate by unanimous consent on September 18th, and signed into law (PL 113-168) by the President on September 26th, the law amends the Internal Revenue Code to ensure that benefits provided by a Tribe to its citizens are not taxable as gross income. It also establishes a Tribal Advisory Committee (TAC) to the Treasury, requires that Internal Revenue Service (IRS) field agents undergo training on federal Indian law, and that the IRS suspend all audits of Tribal governments and citizens until the training is complete.

USET ACTION: Prior to passage of the law, USET met with Members of Congress, sent numerous letters to Capitol Hill, and organized an Inter-Tribal Organization letter that was sent to Party and Committee Leadership during deliberations on whether to move the bill.

○ [Inter-Tribal Organization Letter](#)

- **Implementation Issues**

During recent discussions with Treasury Department representatives, Tribal leaders have been informed that the Treasury Department views the new law as allowing non-Tribal leaders to be appointed to the Tribal Advisory Committee (TAC), that a charter for the TAC was already being developed even though members of the TAC have not yet been appointed, that the Department has concluded that the Federal Advisory Committee Act applies to the TAC, that the Department has not suspended all audits and examinations of tribal governments as directed under the new law,

and that the Department will develop guidance versus utilizing notice and comment rulemaking to implement the new law. Each of these actions has been taken without consulting Indian Country.

USET ACTION: USET distributed a Tribal template letter and organized an Inter-Tribal Organization sign-on letter to Treasury calling for Tribal consultation during the 2014 White House Tribal Nation's Conference, as well as subsequent consultation early in the New Year.

- [Inter-Tribal Organization Letter](#)
- [USET Letter](#)

➤ **IRS Requests Comments on Proposed Guidance on Per-Capita Distribution of Funds Previously Held in Trust by DOI Secretary**

In March of 2014, the IRS released proposed guidance regarding the distribution of funds that were previously held in trust by the Secretary of the Interior and derived from trust assets, land, or resources (i.e. not gaming revenue). Prior to the passage of the 1983 Per Capita Act, the Secretary distributed funds directly to individual Tribal members and these distributions were excludable from gross income (i.e. not taxable). The Per Capita Act provided Tribes with the authority to receive these funds from DOI and hold them in trust accounts for later per capita distribution to citizens.

However, the law was not clear as to whether this trust income was taxable to individual Tribal citizens when distributed by Tribes. The proposed guidance released by IRS in March clarifies that per capita distributions from the DOI to Tribes to Tribal members are excluded from an individual's gross income, assuming that the dollars received from the trust account are, in fact, per capita distributions of trust dollars and the account is not being used as a way of evading taxes. The proposed guidance provides a number of examples of funds distributed from a trust account that would create a taxable event for Tribal citizens.

USET ACTION: USET provided comments to the IRS that generally support the proposed guidance. However, USET has concerns regarding the IRS's description of the exceptions to this rule related to the mischaracterization of taxable personal income as non-taxable per capita distributions. Our comments call for the IRS to eliminate reference to those exceptions and instead expressly reference that the IRS will defer to the Department of Interior and its procedures for the audit and accounting for tribal trust funds.

- [USET Comments](#)

Health

➤ **CMS Tribal Consultation Policy**

Pursuant to its Tribal Consultation Policy (TCP), the Centers for Medicare and Medicaid Services (CMS), issued a “Dear Tribal Leader” letter on August 20th revisiting the policy and requesting comments on how it could be improved. In addition, CMS requested recommendations on how CMS can work with state Medicaid agencies to improve state-Tribal consultation.

USET ACTION: USET provided comments to CMS that focus on improving the language and functionality of the CMS TCP. Further, USET recommended that CMS issue guidance to State Medicaid directors outlining a process for Tribal consultation that includes CMS outreach to Tribes verifying that proper consultation takes place.

- [USET comments](#)

➤ **IHS and Medicare Like Rates**

In contrast to Medicare, Medicaid, the VA, and private insurers, Indian Health Service (IHS) and Tribal Purchased/Referred Care (PRC, formerly Contract Health Services) programs currently pay highly inflated full-billed charges for non-hospital services purchased for their patients. A 2013 Government Accountability Office (GAO) report revealed that the Indian Health System could save and reallocate millions of dollars if PRC programs instead paid a “Medicare-Like” (MLR) rate for these services.

IHS is considering implementing this rate of payment through regulation. However, Tribes are concerned that a regulation may create an access-to-care issue for patients. Providers who currently benefit from charging the Indian Health System much higher rates could choose to not see IHS or Tribal patients at all. That is why USET, along with other Tribes and Tribal organizations, is working to enact the Native Contract and Rate Expenditure (CARE) Act, H.R. 4843, which would ensure acceptance of the new, lower rate by conditioning it on a provider’s participation in the Medicare program.

In spite of efforts to address the issue in Congress, Indian Country was recently made aware of movement on an IHS MLR regulation. IHS has submitted a proposed regulation implementing a MLR to the Office of Management and Budget (OMB), which is an early step in the regulatory process. However, Tribes and their PRC programs have not been consulted on the contents of the proposed regulation.

USET ACTION: On November 17th, USET sent a letter to IHS requesting immediate consultation on its proposed rule implementing a Medicare Like Rate, and laying out Tribal concerns related to the adoption of a regulation vs. legislative action.

- [USET Letter](#)

Administration on Children and Families

➤ Consultation on FVPSA Funding Formula

On October 5th, the Administration on Children and Families initiated consultation with Tribes on the Family Violence Prevention and Services Act (FVPSA) Tribal grantee funding formula. The grants are designed to assist Tribes in the establishment, maintenance, and expansion of anti-domestic violence programs and projects. Since the grant award formula is population-based, smaller Tribes, including most USET Tribal grantees, do not receive an adequate level of funding each year. In its request for comments, ACF asked whether the base allocation to small Tribes should be increased and if it should use factors other than population in determining grant awards.

USET ACTION: USET submitted comments to ACF on November 17th. Our comments focus on improving the FVPSA grant funding distribution for small Tribes by increasing the base allocation, encouraging ACF to reexamine the way it distributes additional FVPSA dollars, and increasing transparency in the way grant awards are calculated.

- [USET comments](#)

Land Issues

➤ Rights-of-Way Regulations

On June 17th, the Department of the Interior published a proposed rule to comprehensively update and streamline the regulations that govern rights-of-way across Indian land which were promulgated more than 40 years ago and last updated more than 30 years ago. The regulations have been deemed ill-suited for the modern requirements for rights-of-way, including the need for faster timelines for BIA approval. The Department is proposing to streamline the process for obtaining BIA approval and ensure seamless consistency with recently promulgated BIA leasing regulations. It also seeks to make the process more efficient and transparent, increase flexibility in compensation and valuations, and support landowner decisions on land use. While much of the proposed rule makes only minor or beneficial changes to the current regulations, in some other respects the changes would touch on areas of great importance to Tribes and individual Indian landowners. Some of the proposed changes relate to important issues such as consent, fair market value, taxation, and the practice of “piggybacking,” among other matters.

USET ACTION: USET provided comments to the Department of Interior on November 26, 2014.

- [USET Comments](#)

➤ Carcieri Fix and Its Ongoing Ramifications

In *Carcieri v. Salazar* (2009) the U.S. Supreme Court held that the Secretary of the Interior does not have authority to take land into trust for Tribes that were not “under federal jurisdiction” in 1934, placing into doubt the legal status of thousands of acres of Tribal land. Although Carcieri fix legislation has been repeatedly introduced in both the House and the Senate, because of the demands of various Senators, in particular, but also certain representatives in the House, these bills have not advanced to the floor of either body. The Carcieri decision has led to other harmful case law, most notably the Patchak decision and the Big Lagoon decision. There continue to be at least another 17 cases pending where parties rely on Carcieri to undermine tribal sovereign rights.

USET continues to push for a Carcieri fix. After consulting with the Board, USET held one meeting with the National Association of Counties to learn directly from the counties about their concerns. USET has also participated in several discussions with Senator Feinstein's staff over the last few months, searching for a way around the current legislative impasse. It is evident that substantial additional work with both the counties and Senator Feinstein's office will be needed to improve the likelihood of passage of an acceptable Carcieri fix.

In the meantime, the Gun Lake Band secured enactment of legislation that confirmed the trust status of its existing lands. This is not a Carcieri fix, but it is based on the second part of the fix, which focuses on stabilizing existing Indian trust land holdings.

USET ACTION: Work to secure introduction of Carcieri fix legislation early in the new Congress. Revise messaging to reflect changes in the makeup of the Congress. Continue a dialogue with other parties regarding ways to advance an acceptable Carcieri fix.

Trust Reform/Modernization

➤ USET Collaborates with Partner Organizations on Trust Reform/Modernization Initiative

As an extension of USET's trust reform initiative, USET has met with the other major Indian Country entities working on trust reform and trust modernization issues. Specifically, USET has jointly met with NCAI, ATNI, California Association of Tribal Governments, Navajo Nation, and the Indian Land Tenure Foundation. Counsel for the Oneida Indian Nation, which led the effort to secure the introduction of one of the trust reform bills, was also actively involved.

The goal of this effort is to find common ground in order to build an alliance which will increase the chances of success both in the short-term for certain administrative fixes and also over the long-term on systemic changes to the trust relationship that would better reflect tribal priorities, as well as further tribal sovereignty.

USET ACTION: Continue dialogue with other interested parties. Secure introduction of trust reform legislation in the next Congress, as well as hearings on both the short- and long-term goals of this initiative. Eventually secure passage of reform legislation, while understanding that some of these goals will take many years to achieve.

Sacred Sites

➤ **USET Works with FERC to Identify and Protect Sacred Sites, Improve Consultation**

In response to concerns from USET Member Tribal Historic Preservation Officers (THPOs) in Southern New England, USET has begun to work with the Federal Energy Regulatory Commission (FERC), the independent federal agency tasked with regulating the interstate transmission of electricity, natural gas, and oil. Over the summer, the Tribal THPOs brought to USET's attention issues related to the proposed sites of planned natural gas pipeline expansions from New York State across to Connecticut, Rhode Island, and Massachusetts. If mapping and avoidance planning are not conducted, the pipeline expansions have the potential to damage a number of ceremonial stone landscapes (CSLs) in their paths. The Tribes have yet to be formally consulted on this issue by FERC. This is partially due to deficiencies in FERC's cultural resources guidelines and regulations.

In an effort to spur Tribal consultation on this issue, USET, along with the Tribal THPOs, met with FERC staff in Washington, DC on September 29th. The outcome of the meeting was a 7-point action plan, with both short and long term goals, including FERC communication with gas pipeline companies with planned projects in the northeast, and revisions to its cultural resources guidelines and regulations.

USET Action: USET is working to organize a follow-up meeting with FERC to address progress on the 7-point action plan and continued Tribal concerns related to the mapping and avoidance of CSLs.

- [USET Letter to FERC Tribal Liaison Elizabeth Molloy](#)
- [USET Letter to FERC Chairman Cheryl LeFleur](#)

➤ **Defense Bill Contains Legislation that would Desecrate Sacred Site in AZ**

Despite strong opposition from Tribes, S. 339/H.R. 687, the Southeast Arizona Land Exchange, a bill that would result in the destruction of a sacred site of the Apache and Yavapai people, was approved by Congress. The legislation was included in the must-pass National Defense Authorization Act (NDAA) as part of a public lands omnibus package.

Section 3003 of the bill directs the Secretary of Agriculture to convey over 2,400 acres of U.S. Forest Service land in southeast Arizona in an area known as Oak Flat to a mining company called Resolution Copper (RC), which is owned by the foreign mining giants Rio Tinto PLC (United Kingdom) and BHP Billiton Ltd (Australia) in order to develop and operate a large-scale copper mine on this land that will result in the desecration of this sacred place.

USET Action: At the request of the San Carlos Apache Tribe, USET circulated an "Action Alert" encouraging Member Tribes to contact Senate Energy and Natural Resources Committee Chairwoman Mary Landrieu, Majority Leader Harry Reid, and

Senate Armed Services Committee Chairman Carl Levin, and urge them not to include S. 339 in any year-end legislation. In addition, USET was a signatory on an Inter-Tribal organization letter opposing section 3003, and urging that it be left out of the National Defense Authorization Act.

- [Inter-Tribal Letter](#)

[Archives of Previous Updates 2013 & January - August 2014](#)