

**INDIAN GOVERNMENTS AND THE TAX CODE:  
MAXIMIZING TAX INCENTIVES  
FOR ECONOMIC DEVELOPMENT**

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**HEARING**

BEFORE THE

**COMMITTEE ON FINANCE  
UNITED STATES SENATE**

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

—————  
JULY 22, 2008  
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# CONTENTS

## OPENING STATEMENTS

	Page
Baucus, Hon. Max, a U.S. Senator from Montana, chairman, Committee on Finance .....	1
Grassley, Hon. Chuck, a U.S. Senator from Iowa .....	3

## WITNESSES

Desiderio, Dante, certified financial planner and economic development policy specialist, National Congress of American Indians, Washington, DC .....	3
Laverdure, Donald (Del), chief legal counsel, Crow Nation Executive Branch, Crow Agency, MT .....	5
Shammel, Wayne A., general counsel, Cow Creek Band of Umpqua Tribe of Indians, Roseburg, OR .....	7

## ALPHABETICAL LISTING AND APPENDIX MATERIAL

Baucus, Hon. Max: Opening statement .....	1
Cantwell, Hon. Maria: Prepared statement .....	19
Desiderio, Dante: Testimony .....	3
Prepared statement .....	21
Grassley, Hon. Chuck: Opening statement .....	3
Laverdure, Donald (Del): Testimony .....	5
Prepared statement .....	31
Shammel, Wayne A.: Testimony .....	7
Prepared statement .....	48
Snowe, Hon. Olympia J.: Prepared statement .....	56

## COMMUNICATIONS

Association on American Indian Affairs .....	59
Council of Energy Resource Tribes .....	62
Flandreau Santee Sioux Tribe .....	64
Jensen, Erik M. ....	66
Lummi Indian Business Council .....	73
National American Indian Housing Council .....	81
Native American Resource Partners, LLC .....	91
Southern Ute Indian Tribe .....	94
Ute Tribe of the Uintah and Ouray Reservation .....	98



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**TUESDAY, JULY 22, 2008**

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, DC.*

The hearing was convened, pursuant to notice, at 10:06 a.m., in room SD-215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Grassley and Smith.

Also present: Democratic Staff: Bill Dauster, Deputy Staff Director and General Counsel; Cathy Koch, Senior Advisor, Tax and Economics; Tiffany Smith, Tax Counsel; Pat Bousliman, Natural Resource Advisor; Richard Litsey, Counsel and Senior Advisor for Indian Affairs; and Susan Hinck, Fellow. Republican Staff: Nick Wyatt, Tax Staff Assistant; and Ellen McCarthy, Tax Counsel.

**OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR  
FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE**

The CHAIRMAN. The hearing will come to order.

The Teton Sioux Lone Man once said, "I have seen that in any great undertaking, it is not enough for a man to depend simply upon himself." He was right. In economic policy, as in any great undertaking, we need to work together. And for American Indians, that can mean working with family, working with tribes, and working with the United States.

Times are tough in Indian country. Even before the current economic downturn, the Census Bureau reported that a third of American Indians or Alaska Natives who were available for work were unemployed. The median American Indian household earns \$15,000 less than the median U.S. household, and more than 1 in 4 American Indians and Alaska Natives lives in poverty—more than 26 percent. That is the highest poverty rate of any American ethnic category.

Economic development in Indian country requires a great undertaking. We need to work together. Families, tribes, and the Federal Government each need to play a part. Indian nations often suffer from high unemployment rates because there are no businesses on or near the reservation. There is often simply nowhere to go to find a job.

Indian reservations in our country often suffer from economies and conditions that one might expect to find in the developing

world. Many reservations are in rural areas where transportation, infrastructure, and communications are minimal at best.

Today, we will hear about three strategies for economic development in Indian country. We will discuss tax-exempt bonds, we will discuss accelerated depreciation, and we will discuss the Indian employment tax credit.

These are not going to solve all of our problems, but they will help. All three of these tax policies affect tribal entities and reservations. Today we will discuss the effect that these tools are having on the economic development of the tribes and reservations, and we will discuss how we might make them work better.

We will hear from two witnesses who work as legal counsels on two different reservations. We will hear from a member of the oldest Indian organization in the United States, the National Congress of American Indians.

These days, many tribes are focusing on energy issues. Some tribes hope that revenues from energy production may give them the ability to provide needed services for the tribal members.

Tribes are working to find new revenues, even though laws and treaties often make these services the responsibility of the Federal Government. All too often, the Federal Government is failing to provide the services that it is obliged to provide.

My own tribes in Montana tell me that, if they can raise the needed capital, they can expand energy resource development and reduce their reliance on the Federal Government. They tell me that with tax incentives of the sort that we discuss today, they could provide medical care and housing for their populations.

In this regard, the tribes of Montana are not alone. Energy resources mean that many tribes live on the edge of great potential wealth. If they can get the needed capital to explore and develop their opportunities, many tribes hope to tap that wealth, and they hope to benefit their people.

Many tribes may benefit from the economic development that tax-exempt bonds, accelerated depreciation, and the Indian Employment Tax Credit can help to provide. Issuing tax-exempt bonds is a viable way for tribes to raise the needed capital to build much-needed infrastructure like roads and bridges, and accelerated depreciation and the Indian Employment Tax Credit are mechanisms that can encourage non-Indian businesses to locate on, or near, reservations.

These tools can help provide much-needed jobs for areas with the highest unemployment rates, and these tools can also help companies to find lucrative business opportunities in the process.

Today we will examine how tribes are able to utilize these tools to promote jobs, build infrastructure, and enhance the quality of life for the first citizens of this country. I suspect that these tools have not yet provided all the benefit that they might, and, if that is true, I want to hear why. I want to hear other ideas that you might all have of how we can help make all this work better.

So let us get to work on the great undertaking of economic development in Indian country. Let us find new ways to work together,

and let us find ways to improve life for Native American families, for the tribes, and for the country of which we are all part.\*  
 Senator Grassley?

**OPENING STATEMENT OF HON. CHUCK GRASSLEY,  
 A U.S. SENATOR FROM IOWA**

Senator GRASSLEY. Mr. Chairman, thank you for holding this hearing. Just as with every other part of our society where we hold hearings on tax incentives, it is important for us to understand the impact of tax incentives used by Native Americans, particularly with regards to economic development.

Appropriately, the Internal Revenue Code includes specific incentives to promote investment in Indian country, such as the Indian Employment Tax Credit, and accelerated depreciation for business properties placed on reservations.

Of course, as we all know, uncertainty of tax policy has economic consequences, and there is a certain amount of uncertainty now that the accelerated depreciation and the Indian Employment Tax Credit has ended and expired at the end of 2007. Just as with any tax incentive, certainty of tax treatment for future planning and investment is critical. Allowing these tax incentives to expire dilutes their effectiveness and further complicates business planning.

This uncertainty in taxation is further exacerbated by an additional layer of taxation by tribal governments. In addition to these tax incentives, tribal governments may issue tax-exempt bonds for governmental purposes. This provides tribal governments a valuable option for lower-cost tax-exempt financing. It is important to look at how these rules operate to meet the needs of tribal governments and, of course, to maximize the use of taxpayer dollars as a matter of fairness to every taxpayer in America.

So I look forward to this testimony and helping advance any needed legislation.

The CHAIRMAN. Thank you, Senator.

I would like to introduce the panel. The first witness is Dante Desiderio. Mr. Desiderio is the economic development policy specialist with the National Congress of American Indians. The second witness is Del Laverdure. Mr. Laverdure is chief counsel to the Crow Nation Executive Branch. Then Wayne Shammel. Mr. Shammel is with the Cow Creek Band of Umpqua Tribe of Indians.

Thank you all for coming. As is our regular practice, your statements will be included in the record, and we ask each of you to speak about 5 minutes.

Mr. Desiderio?

**STATEMENT OF DANTE DESIDERIO, CERTIFIED FINANCIAL  
 PLANNER AND ECONOMIC DEVELOPMENT POLICY SPE-  
 CIALIST, NATIONAL CONGRESS OF AMERICAN INDIANS,  
 WASHINGTON, DC**

Mr. DESIDERIO. Thank you, Senators.

The National Congress of American Indians is the intergovernmental body for American Indian and Alaska Native tribal govern-

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\*For more information, *see also*, "Overview of Federal Tax Provisions Relating to Native American Tribes and Their Members," Joint Committee on Taxation staff report, July 18, 2008 (JCX-61-08), <http://www.jct.gov/publications.html?func=startdown&id=1278>.

ments. For over 60 years, tribal governments have come together as a representative Congress through NCAI to deliberate issues of critical importance to tribal governments. We have been invited here today to talk about the ability of tribes to access capital and attract businesses to reservations using existing incentives. We can assure this committee that both of these issues are critically important to tribal governments.

There are a few high-profile examples of tribes around the country that have prospered economically, leading to a perception that all but a few tribes are wealthy and successful. This perception could not be further from reality. There are hundreds of tribes that remain nearly invisible and are struggling to preserve their reservations, their culture, and their sovereignty. Real per capita income of Indians living on reservations is still less than half the national average; unemployment is still double what it is for the rest of the country; and a full 8 of the 10 poorest counties in the United States are home to Indian tribes.

Many tribal governments lack the ability to provide basic infrastructure most U.S. citizens take for granted, such as passable roadways, affordable housing, plumbing, electricity, and telephone service. It is difficult to believe that in America, where 97 percent of the households have a phone, there are reservations unable to provide basic telephone service to half of their citizens.

These sub-standard economic and quality of life indicators have a social toll as well. Health disparities are prevalent, and suicide rates, a symptom of lack of opportunity, are high, with over 60 percent more incidents than the average in America. Alcoholism on reservations and diseases like tuberculosis are both over 500 percent higher for Indians.

The need for economic development for tribal governments is heightened not just because of the need to address these entrenched conditions, but because tribal governments lack an adequate tax base to provide basic citizen services.

Tribes cannot impose property taxes on trust land, sales taxes are regressive and require a viable underlying economy, and a secondary income tax on a low-wage population will simply not create a sustainable government revenue base.

State and local governments have the ability to fully utilize lower-cost tax-exempt financing for a broad range of general government activities, including providing roads, water, parking, as well as golf courses, marinas, and convention centers. However, the current law limits tribal access to the same financing because of an essential government function test that has been interpreted and defined differently over the years.

Currently, the IRS, through its strict interpretation, and its approval and audit practices, has had a stifling effect on the tribal tax-exempt market, with fewer than five tribal issues, on average, being placed a year. Tribes need to use this government tool in the same manner as other governments to build an economic base, fund community nonprofits, and build infrastructure.

Without an economic base, it is difficult to understand how tribes will have the means to repay any debt. As the 2004 Advisory Committee on Tax-Exempt and Government Entities Report concluded, the unclear definition of essential government function leaves trib-

al governments with the impossible task of providing government services to their citizens and visitors, without any real ability to utilize tax-exempt financing, one of the biggest financial tools of nearly every other State and local government.

The second critical issue for tribes is the ability to make full use of the business incentives authorized by Congress in 1993. The business incentives include accelerated depreciation for businesses locating on reservations and a wage and health credit when they hire from the local Indian workforce.

Accelerated depreciation and tax credits have proven to be successful in influencing capital spending, but because these incentives have been renewed on a year-to-year basis and at times been left to expire, they have been under-utilized by both businesses and tribes. The uncertainty associated with their availability sends a mixed message to businesses, especially for partnerships that can make the biggest difference in elevating a tribal economy, like natural resource development projects that take years to develop and build.

Uncertainty and risk are two formidable road blocks to raising capital and attracting capital. Congress can level the playing field for tribes by clarifying the use of a tax-exempt financing tool commonly used by other governments, and Congress can give tribes the opportunity to partner and succeed in developing an economic base by extending the business incentives for a meaningful period.

As governments with tremendous responsibilities and challenges, tribes should be able to fully utilize existing financing tools, build their infrastructure, develop their economy, and ultimately improve the quality of life for their citizens just as other governments.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Desiderio.

[The prepared statement of Mr. Desiderio appears in the appendix.]

The CHAIRMAN. Mr. Laverdure?

**STATEMENT OF DONALD (DEL) LAVERDURE, CHIEF LEGAL COUNSEL, CROW NATION EXECUTIVE BRANCH, CROW AGENCY, MT**

Mr. LAVERDURE. Good morning. I want to thank Chairman Baucus and the members of the Senate Finance Committee for holding this important hearing on Indian tax issues.

My name is Donald Laverdure, and I currently serve as chief legal counsel for the Crow Nation Executive Branch. Prior to this time, I was assistant professor of law and founding director at Michigan State University College of Law. I spent 2 years previous to that working on an LLM on Indian tax issues. So with that background in mind, my entire legal career has been focused on this subject, and I appreciate the opportunity to address this.

The American people generally believe Indians do not pay taxes or their fair share, that Indian nations sometimes are not legitimate governments, and that all Indians are wealthy by virtue of tribal gaming. The fact is, that is perception and not fact. Indian nations, such as the Crow Nation, have 50-percent unemployment, we have an average age of 22, and per capita income is \$6,000 per year for a family of four.

Moreover, we do not have a developed local economy, where we spend roughly \$122 million immediately off the reservation and contribute to the other pieces of Montana's economy. What we would like is to have our own economy and to have small business opportunities and all the aforementioned, based on energy development by the Crow Nation.

The history of taxation in Indian country is long and tortured, and I will not go into all the details that I have provided in my written testimony. But despite the poverty, Indian wealth is potentially subject to four or five concurrent government taxes: Federal, tribal, State, county, and city, an unjust structure that I call Indian tax law.

Today we are considering three pieces of what I would characterize as modest Federal legislation to create the certainty and predictability for economic development in Indian country, and with the Crow economy in particular.

Our master energy plan includes, in the testimony that I have provided, a world-class coal-to-liquids project. We would like to be America's partner. We would like to reduce America's dependence on foreign oil. The bottom line is, we need help. I believe that this Senate Finance Committee, and Congress in particular, by leveling the playing field for Indian country with respect to tax policy, can do this in order for the Crow Nation and other Indian nations to be truly independent and have meaningful self-determination, where Indians make decisions for themselves.

In contrast to other governments, Indian tax law has created a schism, the unjust structure I talked about. I think Alexander Hamilton wrote it, appropriately, back in Federalist Paper No. 12: "A nation cannot long exist without revenue and, destitute of this essential support, it must resign its independence."

With Federal tax authority firmly established in the expansion of State and local taxes, to tax almost all wealth activities in Indian country along with a U.S. Supreme Court that is very hostile to Indian country and continuously diminishes tribal tax authority, many Indian nations, including the Crow Nation, have been rendered powerless and dependent within their own homeland.

That being said, I strongly recommend that this committee carefully consider, and I hope permanently extend, the existing and proposed Federal Indian tax legislation. I believe that the subject matter before this committee represents legislation that creates some incentives for doing business in Indian country. As a lead negotiator in various energy projects, oftentimes tribal governments, because of the existing tax structure, have to negotiate their tax authority or rates down in order to attract energy development.

What we would like from this Finance Committee is partnership and leadership to clear the field of all these concurrent taxes and create the level playing field that is necessary for development in Indian country.

With the coal-to-liquids project that we have, we think that we can be America's partner and that, working together with the Congress when they clear the field, and also with the local governments and States, that we can have source-based taxation in Indian country.

But the problem is, development takes time, and companies are just beginning to realize the benefits. We have partners now ready and willing, and these existing pieces of legislation would, in the internal, overall project economics, be meaningful and tip towards the world-class development we would like to see.

We think that the internal rate of return for these for their investments will tip this towards the coal-to-liquids project that we would like to see accomplished and come to fruition, and we hope to close very soon. We hope that your leadership will make that possible by passing the legislation before us.

Thank you.

The CHAIRMAN. Thank you, Mr. Laverdure.

[The prepared statement of Mr. Laverdure appears in the appendix.]

The CHAIRMAN. Mr. Shammel?

**STATEMENT OF WAYNE A. SHAMMEL, GENERAL COUNSEL,  
COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, ROSE-  
BURG, OR**

Mr. SHAMMEL. Good morning. Thank you, Chairman Baucus, Senator Grassley, Senator Smith.

I am Wayne Shammel. I am here on behalf of the Cow Creek Band of Umpqua Tribe of Indians out of southwest Oregon. Chairman Shaffer sends her greetings. Also, although I am not here to speak on behalf of the Flathead Tribe, I had a chance to talk with Chairman Steele, and he said, "Make sure to tell Max hello." So, good morning.

I was born and raised on the Flathead reservation with a family that was involved in BIA, Indian politics, and non-Indian business there, and took that background and decided that I wanted to be involved with a progressive movement in Indian country to try to change the framework from the traditional idea of conflict—Indian law being about the boundaries between nations—and try to turn it into a more balanced approach where we are working together as partners, because I think that is a great tradition in America that gets lost a lot in the discussion about Indian country—the fact that the communities that have succeeded as well as any are those that have integrated well and worked with the reservations and tribal communities as opposed to necessarily being in conflict.

To do that, going through college and law school, I decided to focus on business and finance, realizing that the business of America is business. I came to find out that so much of the Indian law has been defensive and litigious, that there was very little route to achieve some of these lofty economic goals. One of the best ones is capital finance, so that is where we are focused, working through large law firms into Indian country and into a general counsel position, putting that into practice, beginning with turning gaming revenues into economic diversification.

What we have done at the Cow Creek Tribe is take those gaming revenues, use tribal tax-exempt bond financing and other debt instruments, and roll about \$40 million worth of revenue into about \$300 million worth of local benefit.

The point I would like to make is, because of the restrictions on tribes and the difference between tribal ability to issue that type

of debt versus non-tribal entities, that number should be closer to \$400 million in our county. Our tribe wants to work in partnership with the local community, using the abilities that we have under the law as a government. What we found was, even with one hand tied behind our back in terms of our ability to issue debt, we have now become the second-largest employer in the county. We contribute over \$107 million a year annually in net economic benefit.

The biggest portion of that comes not because of the Indian gaming revenue, it comes because we have been able to diversify, with nine separate, different entities. We have formed our own utility, we have recently tried to expand our utility from wheeling the northwest power down into our region to expanding again to solar projects and so forth, and have found that because of the disparity in the treatment between tribes under the tax code and other governmental entities, most of the investors will shy away.

I will give you a tangible example of this. In 1996, the tribe issued its first set of tax-exempt bonds, along with a set of taxable debt, to finance housing, land acquisition, some resort construction, and a convention center. At that point it was fairly clear, because communities, municipalities, and States throughout the country had issued the package of debt for the convention center and hotels, that tribes should be able to do this also.

By 2006, that had changed. We went back to the market to refinance all of our debt and found that we could not even get bond opinions, had to shop for almost a year. Our costs were increased at least 3-fold above other issuers. Yet, going through all those hoops, taking that risk, we were one of the lucky groups to get through. As Dante had pointed out earlier, there are four or five a year that happen.

Because of these disparities between the way that tribal and non-tribal debt issuers are treated, it has created a structural instability in the market so that basically Wall Street is trying to take more money out of the reservations because the government is telling it it is all right. They can charge us more money because the laws say that the tribes, yes, they are treated as governments and we want that tax-exempt debt—we all find that an attractive investment—but we can also price you like you are in the high-yield market. So the market is getting its cake and eating it too, and the tribes are barely getting through the door in getting most of their debt projects done.

In my belief, the local communities are suffering. I think, particularly given the state of the economy now, that tribes should be viewed as anchors for what are generally rural and poor communities, that we have the ability, because of our commitment to our locality, to use our governmental status to help not just our own agenda, but everyone around us. We are not going anywhere.

One of the myths of the great fights between Indians and non-Indians is that it continues to go on, but I am here to tell you, although I cannot pretend to speak for all Indian people, tribes are not separatists. We are loyal Americans. We are here to be part of the country. The vast majority of us, although we might not be pleased with the term, are still satisfied to be part of this Nation and be domestic dependent nations, as Chief Justice John Marshall put it in the 1830s. Nonetheless, our independence underneath the

law is a sham unless we can be treated at least as equal with the States.

In 2006, when we went to issue tax-exempt debt again, we actually took the convention center out of the deal and refinanced that with taxable debt. That cost us more. That had simply to do with the fact that the IRS had been working since the passage of the Indian Tax Status Act of 1982 to tighten and restrict the rules in a strange way.

Any time that it was available for States or municipalities to expand their ability to issue debt under the existing rules, there had been fairly favorable treatment under the idea and guise of economic development and wanting to support a governmental push for economic development. However, in Indian country it was interpreted in exactly the opposite way. I believe Mr. Desiderio and Mr. Laverdure touched on that sufficiently for our oral commentary.

Suffice it to say that, since that time, all of the tribes then were treated by the market as, first, commercial entities. Then they recognized our status as governmental entities for issuance of debt. Now it has gone back again, and we are treated as commercial entities. This happened specifically in the rating area, where tribes were able, 10 years ago, to go in and only be rated for Wall Street transactions by buying debt insurance from one of the national guarantee agencies.

Two years ago, that changed. Through the efforts of all these people sitting around here, pushing for years to try to get us equal access, the tribes were finally treated by the rating agencies as governments. A year ago, it rolled back, so now, again, we are here in this limbo. I believe that limbo is created because of the legal disparity that we are talking about here. And why should the market not go after what it sees as the ability to grab more profit out of something that is being structurally created by Congress?

The CHAIRMAN. I am going to have to ask you to kind of wrap up, Mr. Shammel, if you could, with your testimony.

Mr. SHAMMEL. That will do it for me then, sir.

The CHAIRMAN. Thank you very much. Thank you.

[The prepared statement of Mr. Shammel appears in the appendix.]

The CHAIRMAN. Mr. Laverdure, what does this all come down to? You are saying that the tax treatment of tribes is just different from the tax treatment of other entities, non-tribal entities. What is it? I mean, is it excessive tax? Is it inconsistent interpretation? Is it failure or loss of the permanence? Is it changed too often? What is it? What does this really come down to?

Mr. LAVERDURE. Thank you, Senator Baucus. I think you have actually summed it up very well. One is the length of time. Year-to-year extensions do not work. You cannot put those in economic models and rely on them for financing. It just kills the deal.

Number two is excessive taxation. Basically every other government has their hand in some wealth-generating activity. For ours, for example, it would be property taxes by Bighorn County. There would be the various State taxes that applied depending on the title to the land. Tribal taxes could also apply, and certainly Federal taxes on all the activities above with their energy partner.

So, when you face that many, your rate of return starts to go down correspondingly, and the fact that these incentives are only year-to-year and you cannot rely on them, it really does detract from people wanting to do business in Indian country, especially in large-scale projects that we are trying to accomplish which would change the nature of not only the Crow Nation, but the whole region, in bringing 3,000 to 4,000 jobs, 400 to 500 permanent technical jobs. That is why we are here to ask for your help, to say we should permanently extend these.

And also, the Alternative Fuel Tax Credit is absolutely essential to a coal-to-liquids project. So it is Indian-specific, as well as some other incentives. I think that can get us over the hump.

The CHAIRMAN. Right. Now, how much would that help, that is, if the alternative tax credit were extended? Second, if the other provisions were extended a much longer period of time, how much does that solve the problem for you from a taxation perspective?

Mr. LAVERDURE. Well, when you focus, Senator, on a particular project, like our coal-to-liquids project, in the economics that we have run, the Indian Employment Tax Credit, if it was reworked more like a work opportunity credit, that certainly would help with employment. But in terms of the project itself, accelerated depreciation, if you say it is at \$80 a barrel, would be 1 to 1.5 percent. The Alternative Fuel Tax Credit is 3 to 3.5 percent.

When you are talking \$80 a barrel without tax benefits, it can run anywhere from 11 to 13 percent IRR. We know that industry standard is 15 percent, so you add in the other 4 percent and you have a project that will go. It is really at the margin there, and these incentives, including that Alternative Fuel Tax Credit, would push the project toward an investment goal.

The CHAIRMAN. What about the different layers of taxation? That gets cumulative after a while. You are kind of in a unique, unfortunate situation. You have lots of different jurisdictions. Is it worthwhile to try to address that or not?

Mr. LAVERDURE. Thank you, Senator. The first is, we are focusing on the project to make it as practical as possible so we can get our hands around it, but in terms of the larger tax policy, which I think is partly addressed in this hearing, I would say that, if Congress treated tribes as States for all Federal tax purposes, not just certain ones, and even with those certain ones, when you have this Federal statute which has ambiguities, the IRS has interpreted that statute very narrowly. Moreover, tribes are audited at a phenomenal rate. So that differential treatment with a partial statute that helps, you can see how it creates a problem.

So, if we could say tribes are the primary governing entity, they have the primary tax authority in Indian country, carve out their land bases, separate and distinct as they started, then I think you could have the certainty and predictability in the larger sense for creating the level playing field for economic development.

The CHAIRMAN. So, if tribes were treated as States for the purposes of taxation in all cases, that would mean that there would be no State tax. There would be no State property tax.

Mr. LAVERDURE. That would be the penultimate solution.

The CHAIRMAN. And no State income tax whatsoever. I am just asking, that would be the result? I am not passing judgment as to

whether that is good policy or not, but I am just asking, practically, operationally, would that be the result?

Mr. LAVERDURE. Well, Senator Baucus, those are very good points, and that could be one conclusion. I would submit that the money is there locally to be used for various purposes, whether it is schools, roads, infrastructure. Because other governments are getting all the taxes, their towns, their roads, their bridges are fine, and the ones within the reservation, as we know, are Third World country conditions. So it would actually help all the local economies, and tribes would finally have a say over where that revenue went.

So it is not a question of, is it going to be a tax haven like Bermuda or something. It would be more like, if there is a government, and they could work with the local governments, the tribes would be at the table to say, this revenue should go to this school which is severely under-funded, these roads are terrible, there are pot-holes everywhere, and we know that in Indian country the infrastructure is much, much worse because of the lack of a tax base.

The CHAIRMAN. Right. Right. Thank you very much. My time has expired.

Senator Grassley?

Senator GRASSLEY. Yes. Mr. Desiderio, how would you clarify the term "essential government function" to fully utilize the use of tax-exempt financing?

Mr. DESIDERIO. Well, Senator, I was remiss in my oral testimony. I want to thank this committee for holding this Finance hearing. Tribes really appreciate the respect this committee is giving them to voice these issues that are really of concern.

The essential government function test that was initially intended to give tribes the similar bonding authority to State and local governments, I think tribes are frustrated with how that is being interpreted, or is currently interpreted by the Internal Revenue Service. The repercussions from the Internal Revenue Service audits and the field service advisories, as was stated before, have a chilling effect.

The National Congress of American Indians has a resolution of support, and supports the language that is proposed in S. 1850, which is defining the essential government functions to mean any function which is performed by a State or local government with general taxing powers.

Senator GRASSLEY. And I assume that you are following what would be applicable then to Indian governments, the same as any other political subdivision. Is that the equity that you are seeking, or does that simplify it too much?

Mr. DESIDERIO. Well, I think it is pretty clearly stated in the bill, which is the Tribal Tax-Exempt Bond Parity Act, so we are seeking parity with the State or local governments. It is important to note, we are seeking no more and no less than the State or local governments.

Right now, the IRS is in a position, an awkward position, of playing gatekeeper, where they are approving what are considered essential government functions for projects for the local and State governments, and at the same time those same projects that are undertaken by tribes are not approved, they are disallowed. So

they are setting up this gatekeeper function where the IRS is actually determining quality of life issues for tribal citizens versus non-tribal citizens.

Senator GRASSLEY. All right.

Then a very general question, because we have spent most of the time—in your testimony and in the questions thus far—talking about tax incentives that presently exist and the renewal of those. Do you have any other tax incentives that you think would be helpful for economic development of the tribes that we have not talked about yet?

Mr. DESIDERIO. We do. I want to bring up a couple of issues. We have had an economic stimulus plan that was passed by Congress recently that was designed to give incentives for individuals for consumer spending and for some limited business spending.

The National Congress of American Indians has put together what we are calling our American Indian Economic Stimulus Act. The two things that we are talking about today, which are the Tax-Exempt Bond Parity Act and the accelerated depreciation and employment tax credits, are two of those things.

The third thing is to be able to authorize tribes to transfer the energy tax credits and allow them to be participants, encourage them to be participants in the domestic energy production. Those three things, we think, are targeted at having the most effect for enhancing the economic development for Indian tribes—more spending on infrastructure, creating jobs, getting incentives for businesses, and larger energy projects. A lot of the tribes that are in more acute economic states are large land-based tribes. The Energy Production Tax Credit and full use of the accelerated depreciation can help those tribes the most by bringing in these long-term partnerships.

As Mr. Laverdure had stated, the way the current accelerated depreciation and the tax credits are set up now, it does not value the tribes' participation at the table, so there is no way to plan long-term or to court companies to come in for those large projects that take years to develop.

The other issue that I think this committee could help with is the administration of the current Pension Protection Act. I think there has been a bill that was passed by the House, and also the Senate, to apply technical corrections to the Pension Protection Act. The way the bill reads now, there is a government functions test for the tribal pension plans that makes it difficult for tribes to administer two different plans for the same tribal entity. We are asking this committee to apply the technical corrections in the Pension Protection Act to allow tribes to have one government plan, just like State or local governments do. So, we urge you to take that up in conference.

Senator GRASSLEY. Senator Smith?

Senator SMITH. Thank you, Senator Grassley.

All three of you, I appreciate so much your testimony here. I want to single you out, Wayne, for special appreciation. This is the second time you have come back to testify on behalf of this bill in terms of bonding authority. Many of the questions I have, you have already answered very well in your testimony.

But I cannot help but recognize the tremendous opportunity that exists on tribal land in terms of renewable energy, and certainly for the Nation, which has a need for renewable energy—wind, biomass, certainly solar as well, geothermal. These are tremendous resources that the tribes have, but they remain undeveloped, in part, if not in whole, because the tribes do not have Federal income tax liability as governments. But then neither do the States, and yet they are excluded from taking advantage of production tax credits, without virtually conveying ownership of their reservations.

That just seems, on its face, wrong and something in need of correction. I wonder if you agree with that assessment, and if any of you want to elaborate a little further on the central issue here, why tribes should be treated as governments, as sovereign governments for purposes of economic development—just as the States are—so that we thereby show the respect and provide the opportunities to tribal governments that the State governments enjoy.

Mr. SHAMMEL. Thank you, Senator. Tribes should be treated as States because it is a central prong of the American constitutional structure. It comes as a surprise to many people because popular culture teaches that Indians are somehow the enemies. We are not. We are part of you. The contributions of American Indian culture to American history make us what we are.

So I think it is a general idea of convincing people that we are friends and we are just like you, and when we tell you we are going to use these debt instruments and these other legal abilities to be helpful, hold us to our word, but let us move forward and do it. There is this idea of, somehow we are going to try to take back the country if we have fair rules to play underneath. I do not think that is going to happen any time soon. So it is a culture of fear and misperception in dealing with the tribes as governments.

Frankly, the vast majority of our fellow country people do not even understand that. Most of them would still continue to view us as voluntary groups and societies of some kind. It is a surprise to them when you explain, hey, this has been that way from the beginning.

I would note that today is the 218th anniversary of the 1790 Indian Trade and Intercourse Act, one of the very first statutes passed by the Congress. That was the foundation of a lot of the economics of this entire country, and the tribes have been left kind of high and dry after that. I think what we would like to do now is untie that hand that is behind our back, treat us as the full partners in the American union that we are, and we will prove ourselves up to it.

Mr. LAVERDURE. If I could, Senator Smith, thank you for the question and the opportunity to respond. I think, in the overall structure, it would be helpful if some of these incentives, like renewables and other non-renewables, if we just included that tribes and Indian reservations are eligible for those credits as well. Certainly national tax incentives would apply on the reservation, but sometimes when the Congress does not specify, then the IRS and other agencies will narrowly interpret and leave tribes out of the energy and economic development game, if you will.

In particular, some other things that I was going to mention. Senator Grassley, who stepped away, said, are there other incen-

tives? I have a table, a 4-page table of various incentives that would apply to the project, and certainly extending the Department of Defense length of contracts—we are going to do a coal-to-liquids project—would be helpful, and investment tax credits, and all the like, similar to the questions you are asking.

With the Crow Nation, it is not just coal-to-liquids, but we would like to develop wind power, geothermal, and all the like. Those incentives also have some of the limitations that we mentioned earlier, but certainly treating tribes as States at the outset would go a long way towards helping tribal governments in the economic development playing field.

Senator SMITH. I am tempted to ask, are there other interest groups that are pushing back against the tribes having access to this bonding authority because you would use it for coal-to-liquids and things that others may regard as harmful to the environment?

Mr. LAVERDURE. Well, Senator Smith, I assume there will be interest groups that will probably take an active role once the project is announced very shortly.

Senator SMITH. But right now your position is, simply, the Treasury Department is disallowing this bonding authority in relationship to tribes, so it makes it much more difficult to access capital markets to develop these resources.

Mr. LAVERDURE. That is correct, Senator Smith. I think that if, anywhere else, a FutureGen or another project wants to develop coal-to-liquids in another State, there are going to be local governments involved that are going to issue this tax-exempt bonding authority. We are saying tribes should also be able to access that, particularly because the overall purpose is to help the Nation and not just a particular tribe. So as energy partners, I think that it is good tax policy to create that incentive in Indian country, as well as anywhere else.

Senator SMITH. I am saying the same thing. I appreciate you, Mr. Chairman, for helping to lead the effort on this bill that we have introduced. I wish you all well, and I thank you all for being here. And Wayne, for coming all the way over the Oregon Trail again, we appreciate it.

Mr. SHAMMEL. My arms are still tired.

The CHAIRMAN. Thank you, Senator. I am sorry I had to step out briefly.

Is it the problem with the interpretation of essential government purpose, is that the hang-up that you have with respect to issuance of bonds by the tribes? It makes it more difficult for you because that is the language that is hanging you up? Is that the problem here with respect to the issuance of bonds?

Mr. LAVERDURE. Yes, I would say that that is one of the issues. Section 115 of the Internal Revenue Code is pretty clear. It states, "For all purposes." The IRS, essentially carte blanche, allows State or local governments to utilize it for any purpose. I can give you a very recent example. There are tons of municipal golf courses out there. Why can a tribe not use the same authority to create a golf course as well? Instead, the IRS has said it cannot. It is that simple when you come to an example.

So, if this committee could create the legislation to enable tribes to access capital markets like everybody else, clarify that that es-

sential government function should be the same regardless of entity, then I think that would go a big step towards solving that problem.

The CHAIRMAN. Now, the three provisions I first mentioned in my opening statement—bonds, accelerated depreciation, and also the Indian Employment Tax Credit—which of those are the most effective, and are there others that would be more effective?

Mr. LAVERDURE. Well, at least for the Crow Nation, the Indian Employment Tax Credit has been absolutely useless, to be honest, because it is so complicated. It has a wage cap of \$35,000, and it needs to be restructured where we have, say, an eligible wage of \$20,000 in the first year, \$35,000 in the second year, and then have a floor instead of a ceiling. Then you could have it apply to good-paying jobs as opposed to excluding them and having the lower-income jobs be the ones subject to that credit.

Accelerated depreciation has been used. It has been useful. The long-term extension, especially in capital-intensive projects, would be very helpful. I think, at least with the Crow Nation, bonds have been particularly difficult, just like my colleague here said, to access. So I think the combination of those tools, as I heard you mention earlier, Senator, if we had more tools in our chest to work with and open those up, I think we can get into the energy picture and help the Nation and ourselves.

The CHAIRMAN. But are there other provisions that would be even more helpful, or as helpful?

Mr. LAVERDURE. At least for us, the Alternative Fuel Tax Credit would be essential, the long-term renewal of that. An investment tax credit. For example, 100-percent expensing of investments in the year of capital outlay. Those types of incentives would really bring the investment firms to the table.

The CHAIRMAN. All right. I will ask the other two of you, Mr. Shammel and Mr. Desiderio, whether there are other provisions, whether there would be greater bang for the buck.

Mr. DESIDERIO. I think, when the National Congress of American Indians held an economic summit last year, the issue for the Capital and Finance Committee that came up as one of the highest priorities was the tax-exempt bonding issue. As far as your comments about which is more important, I think the tax-exempt bond authority for tribes, clarifying that, will do more universally to help all tribes serve their citizen populations and develop an economic base.

I guess the common frustration among tribal leaders is that Congress has authorized these fiscal tools, but there is this inability of tribes to really realize their full value. So the tribes that do not have an economic base or a revenue base to be able to issue tax-exempt debt are frustrated, and are trying to come up with ways, creative ways, to finance school construction or school repairs and coming up with ways to try to finance water projects.

So those two tools, the accelerated depreciation and tax credits, along with the tax-exempt bonding authority, together, I think, can make a huge difference for all tribes, and especially for right now, you have to look at where the economy is and some of the indicators. Energy and tourism are, because of the high energy prices and the falling dollar—those two things. The tribes can use their

cultural assets for tourism, and tribes can take an advantage and be partners in domestic energy production.

Having those tools fully available for tribes—we are in a position now, or Congress is in a position, to give tribes an opportunity to participate in developing their economy and use these two factors, the high energy prices and the low dollar, to really help the tribal economies.

Mr. SHAMMEL. Senator, in terms of other incentives that you are talking about, I would suggest that Congress should open up the private activity bond prohibition. That is not currently covered in S. 1850. That would help us legitimize governmental purpose financing facilities, such as rental housing, electrical generation plants, things that are commonly done by non-tribal governments.

Another one that I would suggest that Congress review is amending the Securities Act of 1933, to place tribal bonds on par with those issued by State or local government in terms of registration requirements, the same basic playing field, which is opening up the capital markets. But those are two other large areas—

The CHAIRMAN. What is the difference there?

Mr. SHAMMEL. We do not have the exemption from registration requirements in the same way that State or local governments do for issuance of any type of securities. Tribes are just treated differently. It is, again, just that simple.

The CHAIRMAN. Treated differently in what way?

Mr. SHAMMEL. We are forced to register. Governments generally can fit underneath a registration exemption. Tribes cannot, so it forces up the costs of your debt, reduces the rate of return on all of your projects.

To touch briefly on Senator Grassley's comment earlier about the cost impacts of this, I can give you a direct cost impact where these market impediments have harmed a local community. Our job creation projection was over 11.5 a month based on costs of projects that we are working on, particularly utility projects. But because of the costs that we had to incur that State governments would not have had to, it went down to just over 9. So on a monthly basis, that is 20 people, 25 people in our community that were not employed over a 1-year period that otherwise would have been.

The CHAIRMAN. How much do these tax issues get to the heart of the matter, or are there other measures that also help jobs and economic development on reservations? We are not talking about tax issues.

Mr. SHAMMEL. The treatment as a State question would fix it almost overall. That does bring up the complicated issue of checkerboarded jurisdiction that you pointed out earlier, and that is basically a major issue throughout Indian country. But in our lifetimes, the incidence and success of intergovernmental contracting and agreements leads me to believe that that is something that could be worked out on a State or local level when, as Dante pointed out earlier, all of the governments are trying to do the same thing: house our children, educate them, build roads, bridges.

But there is a lot of fear outside of Indian country that, all of a sudden, that is going to erode our power. We will not have control. What we are trying to convince people of is, if you just treat us as a State and we learn to work together, that works all over, in tax compacting, and so forth.

The CHAIRMAN. Mr. Laverdure, your thoughts on that?

Mr. LAVERDURE. Yes, Senator Baucus. I appreciate the probing questions and giving us an opportunity to think outside the box. Federal title to Indian land is an enormous barrier. How do you get a mortgage when the Federal Government holds title? You have to come up with creative ways of new property interests that you have to create to leverage against it. Of course, that creates uncertainty, there is no predictability, and it is something new. People with money do not want to take chances. So we have to do something about that in order to really have property that is useful that you can leverage.

For example, with large, land-based tribes, there is a huge land base, but if it is all in Federal title, how can you turn that into economic development? It makes it 3 times as hard. The fact that there is just terrible record-keeping with the Bureau of Indian Affairs complicates matters even worse. Tribes need to be taking over that function. Tribes need to manage their own land. We have to release that Federal title so that tribes can actually utilize their assets to help themselves.

The CHAIRMAN. Is there any need for a BIA any more?

Mr. LAVERDURE. Well, without offending anyone from the BIA who might be here who might need to help us on our projects and approve it, I would say, long term, tribes really need to take over and run their own show. It is time.

The CHAIRMAN. All right. I appreciate it.

With respect to the title issue, any thoughts you have there about how to deal with the Federal title problem? How do we deal with that?

Mr. LAVERDURE. Well, as a matter of fact, I do have a thought on that, Senator Baucus. I would say that it should be tribal title, not Federal title. It was originally tribal land anyway, so why not just say it is tribal title and the Feds have some trust responsibility that is there, but turn over what was tribal homelands and then tribes can utilize them how they want. I mean, you have State territories with permanent political boundaries.

We need permanency. Just because somebody buys something and they are non-Indian, it goes out of Indian country and then other governments take over jurisdiction, that is the dilemma we are in. So, if we tried to privatize it and make it into fee-simple, then other governments come in and have control. If we keep it in Federal title, then we cannot get banks to come in and finance a transaction. We are in the worst dilemma you can be in, so oftentimes the decision is, let us get it back in Federal title and protect it so at least we have some say over it.

The CHAIRMAN. All right. This has been helpful. This is a big problem. I am not quite sure where we go from here or what changes we can make, or what priority we can make them. But we will be working on that right now, and this committee will, too. I really appreciate the time that you have taken to come and talk

to us. You have suggested a lot of good ideas, and it is up to us now to follow up.

Thank you very much.

The hearing is adjourned.

[Whereupon, at 11:01 a.m., the hearing was concluded.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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**Statement of Senator Maria Cantwell  
Senate Finance Committee Hearing  
Indian Governments and the Tax Code:  
Maximizing Tax Incentives for Economic Development**

July 22, 2008

Thank you, Mr. Chairman, for calling this hearing to discuss the critically important issues of spurring investment and increasing economic opportunities in Indian country.

Increasing economic opportunities is one of the best ways we can improve the lives of Native Americans and prepare these communities for success in the 21st century.

It will require promoting innovation. It will require ingenuity. And it will require creating an environment attractive to investment.

But I firmly believe it can be done.

In fact, in my home state of Washington, several tribes serve as a constant reminder that sustainable economic success is possible in Indian Country. The Tulalip Tribe, located just north of my hometown of Edmonds, built a bingo hall – the first of its kind in Washington state – in June of 1983. Since then, they have turned profits from their casino into multidimensional investments. From very profitable commercial developments like an outlet mall, to investments into the welfare of their people, including paying for college tuition member's children, the Tulalips are a success story.

But not all tribes are as lucky.

The Tulalip Tribe reservation is bordered on the east by Interstate-5 and is located near highly-populated areas. Their geographic location in a high-traffic area is key to their economic development opportunities. Reservations in more rural parts of the country fundamentally do not have the same kinds of opportunities.

While I am proud of the success of the Tulalip Tribe, I am concerned for other tribes in my home state who struggle to provide necessary services to their members. We must determine how best to attract businesses and raise capitol for these reservations that are not as geographically fortunate.

It begins with Congress' support and quick passage of a tax extender package that includes a much needed extension of two key economic development incentives: the Indian employment credit that helps create jobs on reservations and the accelerated depreciation for business property on reservations that makes it less costly for businesses to invest in new equipment.

Both give tribes the tools they need to succeed and increase their prosperity.

But this is not all we must do to encourage the necessary economic development.

We must also extend two other key economic development initiatives: the empowerment zones designation and the renewal communities' designation. Both initiatives trigger a set of tax incentives for investments made in these designated communities that are in need of help.

By encouraging these types of incentives, we are investing in much more than the economy. We are investing in a group of people that hope for a future of economic success, prosperity, and innovation. And we are investing in tomorrow's possibilities for these communities. It's an investment we cannot afford to ignore.

We must partner together to give tribes the tools they need for real sustainable economic development and success.

I am glad the committee is focusing on these critical issues, and I look forward to continuing this important work together.

Thank you.

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United States Senate Committee on Finance

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Hearing on

“Indian Governments and the Tax Code: Maximizing Tax  
Incentives for Economic Development”

July 22, 2008

National Congress of American Indians  
1301 Connecticut Avenue, NW  
Suite 200  
Washington, DC 20036  
202-466-7767

The National Congress of American Indians (NCAI) is the intergovernmental body for American Indian and Alaska Native tribal governments. For over sixty-years tribal governments have come together as a representative congress through NCAI to deliberate issues of critical importance to tribal governments and endorse consensus policy positions. NCAI is honored to present at the Senate Finance hearing to discuss American Indian finance issues that our membership has deemed critical to growing tribal economies, and more importantly, critical for tribal leadership to effectively govern and serve their tribal populations.

There are a few high-profile examples of tribes around the country who have prospered economically. However, there are hundreds more who remain nearly invisible, who are struggling to preserve their reservations, their culture, and their sovereignty. Most reservations are characterized by extensive land bases, spread out communities, and homesteads mired in one long-standing poverty cycle. Most Indian tribes experience economic and social conditions that are on par with many developing nations.

While relatively few tribes have prospered, there is a perception by the American public and some in Congress that gaming has created wealth in tribes all across the country with a few tribes excepted. This perception could not be farther from reality.

Real per-capita income of Indians living on reservations is still less than half of the national average. Unemployment is still double what it is for the rest of the country. A full 8 of the 10 poorest counties in the United States are home to Indian reservations. Many tribal governments lack the ability to provide the basic infrastructure most U.S. citizens take for granted, such as passable roadways, affordable housing, plumbing, electricity and telephone service. It is difficult to believe that in America, where 97.5% of households have a phone, there are reservations are unable to provide basic telephone service to 70% of their citizens. In addition, there is a tribal average of 3 in 10 households without basic means of communication.

These substandard economic and quality of life indicators have a social toll as well. Health disparities are prevalent and suicide rates (a symptom of lack of opportunity) are high with over 60% more incidents than the average in America. Alcoholism on reservations and diseases like Tuberculosis are both over 500% higher among Indians.

Despite the challenging social and economic conditions on reservations, there are a number of recent economic successes resulting from tribes exercising their sovereignty and utilizing available federal tools to grow their local economies and provide their citizens with a better quality of life – the goal of every government. For example, a few tribes located near major metropolitan centers have seen startling success by creating destination gaming enterprises. Some tribes further from population centers operate gaming venues that serve to create reservation jobs and provide limited government program support.

Tribes and Alaska Native Corporations have become viable federal business partners by providing products and services to the federal government, the largest purchaser of goods and services. Government contracting has the added benefit of giving members diverse career choices and not just a job at home.

Tribes are beginning to witness energy success stories from a couple of tribes that have managed to produce and develop their natural resources. Instead of having lease agreements for outside companies to develop tribal natural resources, tribes are looking to partner to develop their own resources to create an economic base and employment opportunities.

Even with these successes, the need for economic development in Indian Country remains acute and impacts nearly every aspect of reservation life and tribal governance. Tribal leaders are confronted with many of the same challenges that other government leaders face in this country. However, tribal governments lack an adequate tax base to provide basic citizen services.

Tribes cannot impose property taxes on trust land. Sales taxes are regressive and require a viable underlying economy and an income tax on impoverished people will not create a sustainable government revenue base. Recent Supreme Court cases have compounded this problem by permitting state taxation on Indian land while at the same time limiting the ability of tribes to tax non-Indians.

Tribal leaders have greater needs than their non-Indian counterparts and, at the same time, tribal governments have fewer resources with which to fulfill their governmental responsibilities to their citizens. Meaningful economic development is sorely needed because it has been proven to be a successful means for tribes to create the sustainable revenue base considered necessary for any government to function.

The researchers at the Harvard Project on American Indian Economic Development and others have found time and time again, that creating an environment which supports tribal self-determination and tribally-driven

economic development is the most effective strategy for confronting the persistent poverty in many Indian communities. This same conclusion was drawn in a report prepared for the Department of Health and Human Services in 2004.<sup>1</sup> The report concluded that of the more than 100 federal programs available to assist tribes or tribal members with economic development,<sup>2</sup> none stands out as the most beneficial for every tribe. Rather, the researchers concluded, “the federal government’s ongoing commitment to Indian self-determination, tribal self-governance, and tribal sovereignty has had a positive impact on [business and economic development] in Indian country.”<sup>3</sup> In acknowledging this reality, it is vitally important that federal policy makers give tribal governments the tools necessary to create vibrant economies on reservations that empower tribal leaders to govern effectively.

#### Capital - Financing a Revenue Base

Developing an economic base to fund government programs in lieu of a tax base requires capital. Congress has already recognized that Indian tribal governments need policies that ensure fair access to the same public financing tools available to other governments when raising capital when it enacted 26 USC 7871. Congress has also recognized the need to provide incentives for external capital to invest in building a tribal economic base through the use of business tax credits by including the incentives in the Omnibus Budget and Reconciliation Act of 1993.

Both of these capital needs were well-intended and aligned with the federal policy of tribal self determination. However, subsequent congressional actions and regulations caused these promising tools to be dramatically underutilized for their intended purposes and fall short of their initial goals.

Congress currently has a tremendous opportunity to fulfill the original intent of providing cost-effective financing and directing external capital to Indian tribes. However, it is appropriate to look back on previous federal policy efforts and the consequences that are related to today’s discussion.

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<sup>1</sup> Hillabrant, et al., “Overcoming Challenges to Business and Economic Development in Indian Country,” (August 2004).

<sup>2</sup> A 2001 GAO report estimated that there are approximately 100 federal programs to assist Indian tribes and tribal members with economic development. This is in addition to any regulatory advantages and tax incentives intended to promote economic development on tribal lands. Government Accountability Office, “Economic Development: Federal Assistance Programs for American Indians and Alaska Natives,” (December, 2001) (GAO-02-193).

<sup>3</sup> Hillabrant, et al., “Overcoming Challenges to Business and Economic Development in Indian Country,” (August 2004).

Economic conditions in Indian Country were dismal at the turn of the 20<sup>th</sup> century. In 1887, Congress adopted the General Allotment Act, which broke up much of the tribal land base in an attempt to move Indians into the agricultural economy by promoting farming. Within 50 years, non-Indians had acquired 90 million acres of tribal land, reducing Indian landholdings from 140 million acres to 50 million acres.

The Allotment Act was intended to promote farming by Indians. But the tribes had no means to obtain irrigation water, a necessity for agriculture – especially in the undeveloped arid west. The 1902 Reclamation Act extended billions of dollars of irrigation subsidies to non-Indian farmers. Yet despite its trust responsibility, the federal government left Indians out of the reclamation program, denying the tribes a prime opportunity to improve their economies. The National Water Commission called it “one of the sorrier chapters...in the history of the United States Government’s treatment of Indian tribes.”<sup>4</sup>

In today’s sophisticated global economy, access to capital is as important as access to water in an agricultural economy. Giving Indians a plot of land and expecting success while other farmers could more easily take advantage of subsidized irrigation is unrealistic. And given the importance of capital for economic growth, it is important that finance tools are applied equitably and given a fair chance at succeeding in their intended purpose.

Congress recently passed the Economic Stimulus Act of 2008, which provided direct incentives to individuals in order to boost consumer spending along with businesses tax credits intended to boost capital expenditures. While the bill was still being considered, the National Congress of American Indians proposed an American Indian Stimulus Package to accompany the measure. The American Indian Stimulus Package focused on three primary considerations that would directly affect the American Indian economy: 1.) clarification of the “essential government function” definition in order to promote tribal use of tax exempt bond financing, which is consistent with creating an economic revenue base and would create infrastructure projects and jobs on the reservation; 2.) authorization of a long-term extension of the business tax incentives, including the use of accelerated depreciation and Indian employment tax credits in order to promote external economic partners; and 3.) clarification of the federal tax code so as to allow tribes to transfer energy production tax credits that would stimulate investment in tribal energy resources.

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<sup>4</sup> Based on Building Reservation Economies and Sustainable Homelands, A Proposal for a Progressive Tribal-Federal Effort. Tribal Leaders Economic Summit, Washington DC, January 1993

The American Indian Stimulus Package focuses on providing a fix to existing legislation. All the components are proven to be effective, but tribes have not been given the opportunity to access their full use. For example, Congress and subsequent IRS actions have limited the use of tax exempt bonds by applying a strict definition to "essential government function" prior to a tribe issuing tax exempt debt.

#### Access to Existing Government Financing Tools

Congress first authorized tribes to issue tax-exempt bonds in 1982. At that time, it limited tribes to issuing tax-exempt bonds for "essential governmental purposes," but did not define the term. In 1984, the Treasury Department issued Regulations that defined an essential governmental function very broadly for tribal purposes. Among other things, this included matters treated as essential governmental purposes for states and local governments under Section 115 of the Internal Revenue Code, in addition to the many commercial and industrial activities eligible for funding under the Snyder Act and the Indian Self-Determination Act.

In 1987, Congress modified the broad regulatory definition of an essential governmental function by amending the law so that it did "not include any function which is not customarily performed by State and local governments with general taxing powers." The 1987 amendment does not affirmatively define an essential governmental function, but simply excludes certain types of facilities from the eligibility list.

Congress' intent was simply to limit tribes to the same essential governmental functions that apply to state and local governments. However, conflicting views as to what Congress intended are paralyzing the ability of tribes to access the low-cost benefits of tax-exempt financing – the very benefit that was intended for tribes by the 1982 Act.

In 2004, the Advisory Committee on Tax Exempt and Government Entities concluded their report with a question and comments that more than justify congressional action:

"How can tribal governments develop sustainable economies that produce recurring revenues needed to provide the infrastructure for their citizens, residents and visitors, when tribal governments have their hands tied behind their back?"

Since the 1987 amendments, the Treasury Department hasn't published any further proposed regulations to define the term "essential governmental function." Without any guidance or instruction, tribal governments and the public are left with the tedious burden of requesting separate private letter ruling to determine whether their proposed project is something that state or local governments with taxing powers "customarily" perform and whether the activity is more governmental or commercial in nature or purpose. Tribal governments and the IRS are also left to attempt to discern what Congress meant in the legislative history when it referred to "commercial or industrial facilities."

**Overall, the unclear definition of "essential governmental functions" leaves tribal government with the impossible task of providing governmental services to their citizens, resident, and visitors without any real ability to utilize tax-exempt [financing], one of the biggest financial tools of nearly every state and local governments.<sup>5</sup>**

The strict interpretation of tribal tax-exempt uses has also led to greater IRS audits. According to a white paper written by Professor Gavin Clarkson<sup>6</sup> for the NCAI Policy Research Center (attached), fewer than 1% of the tax-exempt municipal offerings are audited by the IRS each year. Yet direct tribal tax-exempt issuances are thirty times more likely to be audited within four years of issue. Needless to say, the additional cost of private letter filings, increased risk of IRS audits and the lack of allowable financing clarity has had a stifling effect on the tribal tax exempt market with fewer than 5 tribal issues on average being placed per year.

Even tribes that have sought financing projects that would appear by any other measure to be essential have been denied mostly because there is a commercial component that would also utilize the service. For example a tribe attempted to secure financing for a water distribution system and reservoir only to be disallowed because it would serve the tribe's commercial enterprise. The same held true for a tribe trying to establish a parking garage. Other state and local governments typically provide roads, water, parking to attract businesses with no challenges to their bond offerings. State and local governments routinely finance golf courses, marinas and convention centers. Even the new Yankee stadium is being built with the proposed use tax exempt financing although some are finally questioning the public benefit.<sup>7</sup>

<sup>5</sup> Advisory Committee on Tax Exempt and Government Entities  
June 9, 2004 – Page II-13-14

<sup>6</sup> Capital and Finance Issues: Tribal Enterprises, Authored by Dr. Gavin Clarkson

<sup>7</sup> News Day, Tax-exempt aid for new Yankee Stadium raises questions, by Keith Herbert and Michael Frazier

The current law, with its focus on the essential governmental function test, tends to hamstring any intergovernmental efforts, as well as public-private partnerships. For example, currently there is a tribe that is interested in using tax-exempt financing for a modest community health clinic. The clinic project is being undertaken jointly with a local municipality. Since the tribe's population is not large enough to support an Indian-only facility, the new clinic would serve both tribal members and county residents on a fee-for-service basis. There is significant concern that the IRS could view this as a commercial enterprise because it is not limiting its provision of services to the tribal community.

Uncertainty and risk are two formidable roadblocks to raising capital. Congress should act to provide clear guidance on the use of tax exempt financing so tribes can utilize one of the most effective government financing tools to meet basic citizen infrastructure needs and develop a revenue stream for government programs.

#### Business Tax Incentives – External Capital

The second part of the American Indian Stimulus Act deals with providing tribes with the ability to attract external capital onto reservations through the use of business incentives. The incentives were initially enacted in 1993 for a ten-year period in response to the poor state of the American Indian economy. They consist of accelerated depreciation for businesses locating on reservations and an additional wage and health care tax credits. The business investment tax credits have proven to be some of the most successful incentives for tribes to attract non-Indian investment onto Indian lands to address underdeveloped infrastructure and high reservation unemployment rates.

Since their initial implementation in 2003, they have been renewed on a short term basis with the latest one-year extension expiring in December of 2008. The short term extensions send a mixed message to businesses especially those that could make the biggest difference in elevating an Indian economy - large natural resource development firms that take years to develop and even longer to build manufacturing and capital facilities needed to function. Having an incentive renewed periodically by Congress presents added risk and uncertainty to potential partners.

This incentive is more timely now than in the past because there have been important economic factors that make these incentives more compelling for tribes. Political and consumer sentiment has shifted toward domestic and alternative energy production and, more important from a business perspective,

cost-effective price points have been reached in the energy sector making large scale domestic production of coal and oil profitable and alternative energy development more attractive. With the help of Congress, tribes developing and producing energy are on the verge of transforming their economies by partnering to develop their natural resources. Congress should send a clear message to businesses looking to partner with tribes in growing their local economy and providing needed employment to their citizens. The incentives should be extended on a long-term basis.

The final component to the American Indian Stimulus Package directly deals with tribes developing energy resources as an equal partner. Tribes with large land bases, often among the most in need of development, are seeing a renewed interest in the development of their natural resources. Tribes are currently competing at a disadvantage to businesses when trying to attract energy development projects. Tribes are not eligible to use the investment incentives set aside for businesses effectively making energy investments by tribes more costly and placing them at a competitive disadvantage. To stimulate investment in energy, tribes should have the same ability to use tax incentives as other businesses when developing their natural resources.

Congress should ensure that tribes have the ability to compete in developing their existing resources and creating renewable energy by amending the existing codes to authorize tribes to sell the available tax credits. This would place tribes in the position of partnering to increase both existing domestic energy production and renewable energy projects.

#### Conclusion

When a bank underwrites a loan to a business, it ensures the business plan calls for enough capital to succeed. There is no business case for lending half the money in the hopes the bank will only limit its losses to half the amount requested. A bank ensures the business has enough capital so that it can earn interest on the loan and become a long term customer.

Congress has given tribal governments the tools to access and attract capital but has not authorized their full use. Because of built-in uncertainty, added cost and risks, tribes have not been given the full opportunity to succeed. To be successful, Congress should give tribes full use of government financing authority and business incentives to build an underlying economy and government revenue stream.

Currently Congress is discussing the merits of a second stimulus package based on infrastructure spending. Creating a federally subsidized infrastructure program without giving the tribes the same tools as other governments will only deepen the economic divide. Tribes deserve the opportunity to use the finance tools, create a vibrant and healthy economy, and reduce their dependence on federal programs.

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Attachments

National Congress of American Indians Policy Research Center White Paper entitled Capital and Finance Issues: Tribal Enterprises by Professor Gavin Clarkson

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Reference Resources

- Testimony of Scott Schickli before the Subcommittee on Long-Term Growth and Debt Reduction, Committee on Finance, United States Senate, May 23, 2006.
  - Paul Moorehead, Draft Papers on Economic Development Tax Incentives.
  - Gavin Clarkson, National Congress of American Indian Policy Research Center, Capital and Finance Issues: Tribal Enterprises. Gavin Clarkson before the Subcommittee on Long-Term Growth and Debt Reduction, Committee on Finance, United States Senate, May 23, 2006.
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**United States Senate Committee on Finance  
Hearing on Indian Governments and the Tax Code  
"Maximizing Tax Incentives for Economic Development"  
July 22, 2008**

**Written Testimony of Donald Laverdure, Chief Legal Counsel  
Crow Nation Executive Branch**

**I. Introduction**

Good Morning. I want to thank Chairman Baucus and the members of the Senate Committee on Finance for holding this hearing on Indian tax issues. My name is Donald Laverdure and I currently serve as Chief Legal Counsel and Senior Advisor for the Crow Nation Executive Branch. Prior to my current position, I was an Assistant Professor of Law and Founding Director of the Indigenous Law Program at Michigan State University College of Law. I also served two years as a William H. Hastie Fellow, Lecturer in Law and Executive Director of the Great Lakes Indian Law Center at the University of Wisconsin Law School.

During my legal career, academic and practice, my primary focus has been Indian tax issues, regardless of the forum – research and writing, speaking and teaching, and/or litigating and negotiating. As such, I have testified several times at local government levels, assisted and/or represented more than twenty Indian nations and organizations, and taught law classes and numerous seminars on Indian tax issues over the past nine years.

With this background in mind, my purpose today is to provide a full and accurate context to judge the federal legislative incentives presented before this committee. In this testimony, I provide the following sections: (i) public perception regarding Indians and taxes and a brief history of taxation in Indian country; (ii) background and summary of the federal legislation (including proposed amendments) before this committee; (iii) proposed energy projects to practically illustrate why these incentives are important and critical for economic development; and (iv) conclude that these legislative measures are a necessary first step to level the economic playing field for Indian nations and their economic partners.

**II. Public Perception and History of Taxation in Indian Country**

*A. Public Perception*

Today, many Americans believe that Indians do not pay taxes, that Indian nations are not legitimate governments, and that most Indians are wealthy because of casinos. Given public opinion, it is not surprising that ordinary citizens and interest groups, especially in states with successful tribal gaming facilities, pressure their elected officials, federal and local, to demand that Indians “pay their fair share.” Thus, many Americans argue that any special rights “given” to Indians from “old” treaties, primarily casinos and tax free status, are no longer valid.

Moreover, the public is taught that two sets of governments exist in America under the U.S. Constitution – federal and state. Therefore, like previous generations, the American public

confuses fact with perception based on: (i) confusion with respect to the legal and tax status of individual Indians; (ii) a fundamental misunderstanding of the pre-constitutional and independent sovereign status of Indian nations; and (iii) distorted information regarding the actual socioeconomic conditions in Indian country (basing perception on the minority of wealthy gaming tribes and incorrectly imputing their circumstances to many other tribes that remain impoverished). Consequently, generational misplaced public perception typically results in recycled federal policies impacting Indians – termination of Indian nations, assimilation of Indians into majority society, and taxation like every other American.

There is no doubt that public opinion impacts, and has previously formed the basis of, federal policies affecting Indians. In the past, with regard to property and natural resources such as land, water, and minerals, public opinion led to the devastating Federal Indian policies of removal, allotment, and termination – all of which resulted in non-Indian control of some form of tribal wealth in Indian country. Indeed, decisions concerning such wealth never included tribal leaders or tribal citizens. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (no recourse in any branch of the federal government when the federal government unilaterally took Indian homelands, even fabricating signatures to meet previously agreed upon treaty terms); *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955) (no compensation for federal taking of aboriginal lands); Removal Act of 1817 (removal of Indians in New York); Removal Act of 1830 (removal of Cherokees from Georgia); General Allotment Act of 1887 (breaking up tribal land base and opening up Indian land to settlers); Flood Control Act of 1944 (condemning tribal homelands for federal dam projects).

An examination of the relevant legal and political decisions, based on public perception, reveals that taxation in Indian country is an efficient mechanism that invariably changes the legal and political status of tribal governments and their citizens in order for non-Indians and American governments to unjustly capture newly discovered wealth from Indian country. Throughout American history, tribal governments and their citizens have shouldered immense burdens and responsibilities of other governments and their citizens, typically through takings and taxes of each new form of Indian wealth, while receiving minimal and often no benefits in return. Today, many Indian homelands are relatively small geographic areas comprising some of the most impoverished communities in the United States. Despite the poverty, **Indian wealth is potentially subject to four or five concurrent government taxes (federal, tribal, state, county and city) – an unjust structure that I call "Indian tax law."**

## *B. History of Indian Tax Law*

### *1. Federal Commerce and Indian Nations*

As the original inhabitants, Indian nations had established local economies and trade networks. Contact from Europeans had initiated an economic link between separate societies – an exchange of goods and services among Indian nations, colonies and European countries. Indian tribes' relationship with other governments, and their respective citizens, was therefore critical to international trade and diplomacy. Prior to ratification of the U.S. Constitution, colonies regulated trade with Indians.

Indian commerce, a significant trade venue and source of wealth, was a critical issue to the framers of the U.S. Constitution. Since the founding of the republic, every generation of Americans and their elected officials, local and national, has debated who regulates and therefore controls some form of wealth in Indian country, actual or potential. Even though Indian nations did not participate in the constitutional convention, two important provisions were adopted in the U.S. Constitution regarding Indians: (i) Congress has the power to regulate commerce with the Indian tribes; and (ii) representatives and direct taxes shall be apportioned among the several states “*excluding Indians not taxed.*” U.S. Constitution Article I, Section 8, Clause 3 (commerce clause); Article I, Section 2, Clause 3 (proportional representation clause).

With exclusive commerce power, federal officials negotiated hundreds of treaties with Indian nations, seeking peace, friendship and exclusive trade. At least initially, the federal commerce power was used to control all non-Indian individuals that sought to do business in Indian country. Over the years, Congress enacted a series of Indian Trade & Intercourse Acts that imposed licensing and a series of other requirements for Indian traders by the federal government – which continues in substantial effect to this day. See Act of June 30, 1834, ch. 161, sec. 25, 4 stat. 729. Federal regulation began with non-Indians in Indian country and eventually transformed into plenary authority over all persons within Indian country.

Similarly, the various European nations, colonies and the federal government sought to regulate and generally profit from the underlying Indian land. The British Crown sought to maintain exclusive rights to purchase property from Indian nations and regulated such to minimize the impact of land speculators from buying and sometimes stealing Indian land. In *Johnson v. M'Intosh*, the U.S. Supreme Court held that discovery of the Indians gave England, and then the federal government, the right of first refusal to purchase Indian lands, creating a monopoly to purchase such territory. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

Indian nations ended up with a property right constituting something less than fee simple to their own homelands and the U.S. created a system of land tenure with minimal disruption to already well-established procedures. In fact, title to millions of acres of land had already been obtained. See Felix Cohen, *Original Indian Title*, *Minnesota Law Review* (1941). Even today, as a result of *Johnson v. M'Intosh* and subsequent federal court opinions, Indian nations' land cannot be sold without acquiescence of the federal government. 25 U.S.C. Section 177.

In contrast to federal powers in Indian country, the U.S. Supreme Court has ruled that state laws have no force within Indian territory except with the tribe's consent, or treaty conformity, or acts of Congress. Upon discovering gold in Cherokee territory, the State of Georgia had asserted unilateral control over individuals, resources, and property within Cherokee territory. However, the Supreme Court denied Georgia's power, stating that “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Despite *Worcester*, President Jackson removed the Cherokees from their homeland in Georgia on the trail of tears to Oklahoma territory.

These decisions regarding general federal and state power within Indian country are important because they have direct bearing on which government extracts revenue from wealth generation

in Indian country. Over time, federal and tribal circumstances changed and so did the federal-tribal relationship: (i) originally, there was a bilateral relationship between the Indian nations and federal government, through treaties and agreements (pre-constitution to 1871); (ii) implied federal control of Indians (1871 to 1934); and (iii) express federal pre-emption of state power in Indian affairs (1934 to present). The evolutionary nature of the federal-tribal relationship created anomalous federal and state taxation consequences – a path that initially precluded, then allowed for, federal, state and local taxation in Indian country. In 1876, the Commissioner of Indian Affairs stated, "whenever an Indian reservation has on it good land, or timber, or minerals the cupidity of the white man is excited, and a constant struggle is inaugurated to dispossess the Indian, in which the avarice and determination of the white men usually prevails."

## 2. *Federal Taxes and Indian Nations*

Unlike commerce, the governmental tax relationship among Indian nations, the federal government, and states was not addressed in the text of the U.S. Constitution. Similar to the federal-state intergovernmental tax immunity doctrine, Indian nations were not historically subject to federal taxation and the national government was not subject to local taxes. See *McCulloch v. Maryland* (1823) (holding that the federal government was immune from state tax); U.S. Attorney Gen. Op. 1824 (federally-licensed traders within Cherokee territory were immune from Cherokee taxes). In 1913, three important tax issues occurred, each of which still has ramifications for governmental taxation in America today.

First, direct federal taxes were ratified with the Sixteenth Amendment to the U.S. Constitution. Second, Congress provided an express statutory exclusion for state governments, but not tribal governments, from federal taxation. See 26 Internal Revenue Code Section 115 (excluding gross income derived from any public utility or a state exercising any essential government function). Third, with passage of the Sixteenth Amendment and IRC Section 115, the rationale for the intergovernmental tax immunity doctrine had been rendered obsolete, setting the stage for its erosion and eventual demise. See *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (upholding federal taxes assessed on a state instrumentality); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (holding that state taxes applied to federal employees).

Despite the omission of Indian nations from the federal statutory exclusion, the Internal Revenue Service ("IRS") treated tribes like states, ruling that tribal governments were not subject to generally applicable federal taxes. See Rev. Rul. 67-284, 1967-2 C.B. 55; Rev. Rul. 81-295, 1981-2 C.B. 15. More recently, the IRS issued a multifaceted ruling with respect to federal taxation of tribally-owned businesses: (i) an unincorporated business entity, wholly-owned by a tribe is not taxable regardless of location of income earned; (ii) a wholly-owned tribal corporation under the 1934 Indian Reorganization Act ("IRA") Section 17 is not taxable regardless of location of income earned (because it is considered to be an instrumentality of the federal government); and (iii) a tribally-owned corporation formed under state law is taxable (federal and state) regardless of location of income earned. Rev. Rul. 94-16, 1994-1 C.B. 19.

Unfortunately, there is no guidance, statutory or administrative, regarding the tax consequences of tribal entities chartered under tribal law. Needless to say, outside investors and tribes themselves are subject to significant financial risk because of the uncertainty in today's emerging

era of tribal corporations / entities. In order to encourage much needed economic development and to further Indian self-determination in Indian country, Indian nations should not be subject to taxation when they form business entities under their own law and create economic development within their own territory (just like state and local governments).

In contrast to the IRS, the U.S. Supreme Court and the Ninth Circuit Court of Appeals ruled that Indian nations are subject to applicable federal taxes because tribes were not statutorily excluded by Congress from such provisions. *See Chickasaw Nation v. U.S.*, 122 S. Ct. 528 (2001) (tribally-owned casino subject to federal wagering excise tax); *Confederated Tribes of Warm Springs v. Kurtz*, 691 F.2d 878 (9<sup>th</sup> Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (tribally-owned and operated sawmill subject to federal vehicle and fuel excise taxes); *In Matter of Cabazon Indian Casino*, 57 B.R. 398 (9<sup>th</sup> Cir. BAP 1986) (tribally-owned casino subject to federal unemployment and withholding taxes; by contrast, a tax credit is provided to states). State governments are not subject to the same federal excise taxes that are applied to Indian nations because they have a statutory exclusion from gross income under Section 115 of the Internal Revenue Code.

Congress has, however, partially spoken on the taxation of Indian nations when it enacted the Tribal Tax Status Act of 1982, treating tribes as states for *certain* federal tax purposes. 26 U.S.C. Section 7871(a). The legislation provides the following tax consequences: (i) deductions for charitable contributions, estate tax, gift tax, real estate tax; (ii) exemptions for certain excise taxes; (iii) an exclusion for interest on tribal government bonds and for benefits from accident and health plans; (iv) tax-exempt status for tribal colleges and universities; (v) tax on excess expenditures to influence legislation; and (vi) other tax benefits for employee annuities, discount obligations and private foundations. Importantly, the legislation provides that a tribal government must be performing an essential governmental function, like a state, to qualify for many of the aforementioned tax benefits.

The IRS has interpreted the provisions of the 1982 Tax Act narrowly, causing Indian nations to be subject to negative tax consequences that no other government in America must suffer. As a result, Indian nations are generally unable to issue tax-exempt bonds and are the subject of disproportionate IRS audits with casino financing transactions. More importantly, Indian nations cannot access capital from the investment market that is necessary to develop infrastructure for economic development. While on the other hand, state and local governments can and do regularly access the bond and financial markets for local economic development (e.g., municipal golf course).

Why are Indian nations subordinate to all other American governments with respect to these important tax issues that often constitute critical paths toward economic development? I do not know, but the Tribal Government Tax-Exempt Bond Parity Act of 2007 is a step in the right direction, presumably amending the 1982 Tribal Government Tax Status Act, and is related to a larger issue – governmental equality for Indian nations vis-à-vis all other governments in the United States. Fundamentally, one immediate solution in my mind is clear – **Congress, and this committee in particular, should set its priority for Indian tax policy by legislating tribes to be equal to states for all federal tax purposes.**

### 3. *Federal Taxation of Individual Indians*

Historical records shed little light on the constitutional phrase "Indians not taxed." For most of American history, individual Indians were legally determined to be tribal citizens and not federal or state citizens. *See, e.g.*, 7 U.S. Op. Atty. Gen. 746 (1856); *Elk v. Wilkins*, 112 U.S. 94 (1884). Even though Indians could not become federal citizens by general acts of Congress, the U.S. Attorney General concluded that Indians were subject to federal authority. During this time period, however, many Indians who maintained their tribal relations were not subject to local taxes. *See, e.g.*, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (holding that local property taxes were not applicable to tribal Indians in Indian country).

The phrase "Indians not taxed" implied that some Indians were taxed, setting the stage for inconsistent court decisions. After the Civil War, in 1868, Congress ratified the Fourteenth Amendment to the U.S. Constitution and declared that all persons born or naturalized in the U.S. and subject to its jurisdiction, are citizens of the U.S. and of the State wherein they reside, but retained the phrase "Indians not taxed." U.S. Constitutional Amendment XIV. The earliest agency interpretation concluded that the federal income tax did not apply to Indians because internal revenue laws had not been extended to Indian country. 12 U.S. Op. Atty. Gen. 208, 210 (1867).

In 1870, however, the U.S. Supreme Court held that federal tobacco taxes applied to products manufactured and sold by individual Cherokees within Cherokee territory. *The Cherokee Tobacco*, 78 U.S. 617 (1870). The Cherokee Nation and the federal government had negotiated a treaty in 1866, providing for taxation of tobacco products sold outside of Indian country. Then in 1868, two years after the federal-tribal treaty, Congress passed an internal revenue act that imposed taxes on tobacco produced anywhere within the exterior boundaries of the United States. Despite express federal-tribal treaty language providing for taxes on sales *outside* of Indian country, the Supreme Court upheld the federal tobacco taxes on products manufactured and sold by Cherokees within Cherokee territory.

The U.S. Supreme Court, in *Cherokee Tobacco*, gave the following reasons for its decision: (i) Indian territory is part of the United States (despite removal and a promise that it would never be); (ii) outsiders would be lured by illicit gain; (iii) Indian treaties could be superseded by acts of Congress; and (iv) tax burdens were required from American citizens and were indispensable to meet public needs. At the same time, lower federal court decisions ruled inconsistently regarding the citizenship of American Indians under the Fourteenth Amendment. *See, e.g.*, *U.S. v. Lucero*, 1 N.M. 422 (1869) (holding that Pueblos were citizens); *McKay v. Campbell*, 16 Fed. Cas. No. 8840 (D.C. Ore. 1871) (ruling that child of tribal Indians was not a citizen); *U.S. v. Cook*, 25 Fed. Cas. 695 No. 14891 (C.C. 1879) (after dissolving tribal relations, Indian could become American citizen).

In 1884, in *Elk v. Wilkins*, the U.S. Supreme Court affirmed earlier interpretations of the "Indians not taxed" language in the Fourteenth Amendment, holding that such language barred American citizenship for Indians. 112 U.S. 94 (1884). The Court said the tribal citizens "owed immediate allegiance to their several tribes, and were not part of the people of the United States." Thus,

despite *Cherokee Tobacco*, the Court stated that "general acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them."

Justice Pound aptly described the anomaly of permitting federal taxation of noncitizen Indians: "they are nationals and without a nation." Cuthbert W. Pound, *National Without a Nation: The New York State Tribal Indians*, 22 *Colum. L. Rev.* 97, 98 (1922). *Cherokee Tobacco* was the first U.S. Supreme Court decision affirming the federal tax power over individual Indians within Indian country. Despite the Court ignoring express federal-tribal treaty language to the contrary, *Cherokee Tobacco* is the accepted authority for all other federal taxes upon Indians within Indian country and its rationale is generally accepted and relied upon by federal courts today.

Eventually, the *first Americans* obtained the right to vote in the United States in 1924. 8 U.S.C. Section 1401(b). Prior to this federal statutory grant of citizenship, Congress had already extended federal laws, including taxation, over Indians in Indian country, thereby constituting "taxation without representation." Similarly, the early agency interpretations and federal court decisions were quickly reversed in a series of court decisions, with the court holding that Indians were subject to federal tax laws unless Congress expressly exempted or excluded them. *Choteau v. Burnet*, 283 U.S. 691 (1931); *Superintendent v. Commissioner*, 295 U.S. 418 (1935).

### C. *Modern – Local Taxation in Indian Country*

In exercising its authority in Indian affairs, the federal government divested Indian nations of their land base under a series of allotment acts – eventually leading to the creation of new states in the West. Even in areas where tribal governments retained a portion of their homelands, non-Indians were allowed to settle substantial parts of Indian country. These new demographics, which now included non-Indian settlers, would lead to new forms of state and local control over wealth generating activities in Indian country.

Prior to allotment, property owned by Indian nations and their citizens had been immune from local property taxes. *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866) (holding tribal land to be immune from state property tax); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (holding lands allotted to individual Indians were immune from state property tax). Nevertheless, Congress could authorize state tax authority over Indian lands, however, such authorization was to be "unmistakably clear" in any such federal legislation. In one case, for example, the U.S. Supreme Court held that Congress expressly authorized state real property taxes on Indian lands under Section 6 of the 1887 General Allotment Act. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

Section 6 of the 1887 General Allotment Act also provided that previously non-taxable Indian lands were subject to state tax after the federal government issued a fee patent title to an individual Indian owner. More recently, the U.S. Supreme Court held that any fee simple land owned by an Indian nation, even if it was reacquired and held within its historic homeland, was subject to local taxes. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (tribally-owned fee land subject to county property tax); *City of Sherill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (tribally-owned fee land subject to city property tax). Similarly, if land is owned outside of Indian country in fee simple, whether held by tribal

governments or their citizens, it is subject to local taxes unless Congress specifically prohibits such local tax. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (upholding validity of New Mexico's gross receipts tax on tribally operated ski resort on land lease from the federal government and located adjacent to the tribe's reservation).

Public perception that led to federal and then state conflict over Indian land, water, and minerals has more recently included demands to share other Indian wealth generating activities. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (tribal Indians not subject state income tax only if living and working within their own homeland); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (non-Indian consumers subject to both state and tribal tobacco taxes); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (leading to federal regulation and state participation in wealth from tribal gaming); *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) (non-Indian not subject to tribal hotel occupancy tax); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (state motor fuels tax applies to patrons of tribal casino).

In the past thirty-five years, some Indian law scholars have noted that the U.S. Supreme Court has also accepted public opinion about what Indian rights "ought to be." David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the U.S. Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996). Indeed, the Court is pro-active in curtailing tribal sovereignty, contrary to its constitutional duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Supreme Court has repeatedly upheld the power of state and local governments to tax activities, persons, and property in Indian country, while simultaneously diminishing tribal tax authority over similar objects of taxation.

With some notable exceptions, the Supreme Court has rarely recognized and/or protected tribal authority in Indian tax cases, even over their own tax base – persons, property, and entities in Indian country. The historical trend is clear – increased public revenue for the federal, state and local governments from wealth in Indian country at the expense of Indian nations. Because of all of the foregoing, Indian nations cannot, and more often contractually agree not to, assess and collect taxes from wealth generating activities in Indian country in order to attract much needed economic development. Federal tax incentives would definitely help shoulder the tribal burden.

### III. Summary of Federal Legislative Indian Tax Incentives

#### A. Federal Tax Incentive Legislation

Included in the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. 103-66, 107 Stat. 558-63, codified at 26 U.S.C. 168(j), 38(b), and 45(A), are two Indian reservation-based Federal tax incentives designed to increase investment and employment on Indian lands. The theory behind these incentives was that they would act in tandem to encourage *private sector* investment and economic activity on Indian lands across the United States. Neither incentive is available for gaming-related infrastructure or activities.

The incentives – an accelerated depreciation allowance for "qualified property" placed in service on an Indian reservation and an Indian employment credit to employers that hire "qualified

employees” – expired on December 31, 2003, and have been included in the short-term “extenders packages” of expiring tax incentives since that time. Such extensions do not provide certainty to investors for long-term business planning and, as a result, the potential of the incentives is not realized.

#### 1. Accelerated Depreciation Allowance

In general, “qualified Indian reservation property” is defined as property: (i) used by the federal taxpayer in the conduct of a trade or business within an Indian reservation; (ii) is not used or located outside the reservation on a regular basis; and (iii) is not acquired by the taxpayer from a person who is related to the taxpayer. Certain property (“qualified infrastructure property”) may be eligible for the accelerated depreciation allowance even if located *outside* an Indian reservation if it connects with qualified infrastructure property located within the reservation. Specific examples included in section 168 are “roads, power lines, water systems, railroad spurs, and communications facilities.” See 26 U.S.C. 168(j)(4)(C).

Depreciation schedules for “qualified property” are as follows:

3-year property	2 years
5-year property	3 years
7-year property	4 years
10-year property	6 years
15-year property	9 years
20-year property	12 years
Nonresidential real property	22 years

Because renewable and non-renewable energy activities require significant equipment and physical infrastructure, and involve the hiring of large numbers of employees, the Committee on Finance has repeatedly recognized that the 1993 incentives are ideally geared to energy development on Indian lands. For several Indian nations, estimates of proven and undeveloped energy resources on Indian lands suggest that revenues to tribal owners would exceed tens of billions in current dollars. With an attractive market and the enactment in 2005 of a pro-development energy law, the *Indian Tribal Energy Development and Self Determination Act* (Pub. L. 109-58), energy-related activity on Indian lands will increase substantially in the years ahead.

Unfortunately, one-year or two-year extensions of the accelerated-depreciation provision do not provide an incentive for investment of new capital in Indian country for significant energy projects. Development of these kinds of projects generally takes a decade or longer. Investors need certainty that the benefit will be available when the project initiates operations in order to factor that benefit into their projected economic models, as well as their investment decision. A permanent or 20-year extension would address this problem, thus making the incentive attractive to investors in long-term energy projects on Indian lands.

As currently written, the depreciation allowance could be interpreted to exclude certain types of energy-related infrastructure related to energy resource production, generation, transportation,

transmission, distribution and even carbon sequestration activities. We recommend that language be inserted to statutorily clarify that this type of physical infrastructure expressly qualifies for the accelerated depreciation provision. In proposing this clarification, it is not our objective to eliminate those non-energy activities that might benefit from the depreciation allowance. Indeed, if adopted, the language we propose would not discourage other forms of economic development in Indian country.

By providing this clarifying language and this long-term extension, the accelerated depreciation provision will finally accomplish its purpose - enhancing the ability of Indian nations to attract energy industry partners to develop long-term projects utilizing the vast Indian resources available.

### 2. *Indian Employment Wage Credit*

The 1993 Act also included an "Indian employment wage credit" with a cap not to exceed 20 percent (20%) of the excess of qualified wages and health insurance costs that an employer pays or incurs. "Qualified employees" are defined as enrolled members of an Indian tribe or the spouse of an enrolled member of an Indian tribe, where substantially all of the services performed during the period of employment are performed within an Indian reservation, and the principal residence of such employee while performing such services is on or near the reservation in which the services are to be performed. *See* 26 U.S.C. 45(c)(1)(A)-(C). The employee will not be treated as a "qualified employee" if the total amount of annual employee compensation exceeds \$35,000.

As written, the wage tax credit is completely ineffective and does not attract private-sector investment in energy projects within Indian country. The provision is too complicated and private entities conclude that the cost and effort of calculating the credit outweighs any benefit that it may provide. We therefore propose that the wage and health credit be revised along the lines of the much-heralded Work Opportunity Tax Credit, which is less complicated and more likely to be used by the business community. We propose to retain the prohibition contained in the existing wage and health credit against terminating and rehiring an employee and propose to alter the definition of the term "Indian Reservation" to capture legitimate opportunities for employing tribal members who live on their reservations, even though the actual business activity may be off-reservation. This amendment would allow the Indian Employment Wage Credit to more effectively fulfill the purpose for which it was originally enacted.

### 3. *Indian Coal Production Tax Credit*

A third tax incentive is the Indian Coal Production Tax Credit, important to several Indian nations in the West, including the Crow Nation. The 2005 Energy Policy Act provided a business tax credit beginning in tax year 2006, based upon the number of tons of Indian coal produced and sold to an unrelated party. "Indian coal" is coal produced from reserves owned by an Indian Tribe, or held in trust by the United States for the benefit of an Indian tribe, as of June 14, 2005. The tax credit is calculated by totaling the number of tons of Indian coal produced and sold, then multiplying that number by \$1.50 (for calendar years 2006 through 2010). For tax years between 2010 and December 31, 2012, the total number is multiplied by \$2.00.

The origin of this production tax credit began with the goal of neutralizing the impact of price differentials created by sulfur (SO<sub>2</sub>) emissions allowances, thereby keeping Indian coal competitive in the regional market. I believe the following actions should be taken regarding the tax credit: (i) extend the application of the tax credit (from 7 to 20 years); (ii) allow the credit to be used against alternative minimum tax (AMT) for the full period of the credit; (iii) extend the "placed in service" date (from "by January 1, 2009" to "by January 1, 2022"); and (iv) delete the requirement that the coal be sold to an unrelated person (to allow and encourage facilities owned, in whole or part, by Indian nations to participate).

One purpose of the Indian coal production tax credit was to minimize the economic threat to the ability of the Crow Nation's economic partner to continue to mine coal. The credit helped keep the mine in production and simultaneously provided revenue to fund critical governmental functions. These proposed amendments and extension of the credit would continue to support the responsible development of these available resources.

#### **IV. Example of Current Projects – Crow Tribe Coal-to-Liquids Project**

##### *A. Summary and Overview*

The Crow Nation is currently engaged in advanced negotiations with a third party to plan and implement a very significant Coal-to-Liquids (CTL) project within the Crow Indian Reservation. This CTL project offers the best opportunity for the Crow Nation to monetize their currently stranded coal assets and is a critical economic necessity for the Nation. However, government support and incentives are needed to fully realize the economic viability of such a significant project. Incentives help mitigate the extremely high capital cost and project execution risk associated with this type of mega-project, even during a currently robust commodity market, due to historical uncertainties with such commodity markets.

With no commercial-sized CTL projects currently operating in North America, this particular project has the opportunity to demonstrate that large scale (multi-billion dollar) CTL projects can be developed and operated in a technically, environmentally, and socially responsible manner, as well as provide a critically needed key domestic energy source to the western United States. In sum, enabling this CTL project is absolutely critical to end decades of poverty and create the long term economic viability of the Crow Nation Tribe and simultaneously represents strategic national security interests by reducing America's dependence on foreign oil.

##### *B. Background and Supporting Context*

The total coal resources on the Crow Reservation is estimated to be 10 billion tons, which is about 3% of the total supply of coal in the United States. This CTL project will target coal-to-liquids conversion of roughly 2 billion tons of Crow coal, initially producing 50,000 barrels of liquid products per day and ultimately producing 125,000 barrels of liquid products per day. Crow coal can be converted to ultra-clean fuels, like synthetic jet fuel and diesel fuel at an estimated yield of 1 barrel of liquid product per ton of coal supply. Thus, when considered in traditional oil and gas terms, this project has the opportunity to responsibly develop and

monetize a 2 billion barrel oilfield – likely more significant than any single traditional oil and gas opportunity currently being pursued in North America.

By way of background, U.S. net imports equal 12 million barrels per day or 4.4 billion barrels a year. Consumption in the U.S. is 20.7 million barrels per day or 7.5 billion barrels a year. The U.S. has proven oil reserves of roughly 21 billion barrels. Thus, this CTL project has the ability to increase U.S. oil reserves by 10% -- a significant contribution to U.S. energy independence.

*C. Economic Benefits for the Crow Tribe*

A large integrated mine and CTL project will create 3,000 to 4,000 jobs during a four to five year construction period and an additional 700 to 900 permanent jobs upon the commencement of operations. The jobs created by this project would include high level positions, such as engineers and managers, as well as skilled trades (mechanics, electricians, welders). In addition, income generated by the project could serve to support the Tribe's severely underfunded education and health care programs and support the development of key infrastructure on the Crow Reservation to improve the lives of its citizens.

*D. Project Overview*

The total integrated cost of the proposed combined mine and CTL project is estimated to be \$7-8 billion for the initial 50,000 barrels per day (bpd) facility. This cost includes capturing 95% and more of carbon emissions for permanent underground storage and/or use in enhanced oil recovery projects (EOR). While rising crude prices would seem to help the economics of a CTL plant, construction and engineering costs also continue to dramatically rise, thereby constantly challenging the economic viability of this type of mega-project – the first of its kind in the United States. These costs underscore the importance for incentives to enhance the economic viability of this world-class project.

There are advantages in building CTL plants adjacent to the coal resources that otherwise have limited marketability due to lower quality and/or high transportation costs. CTL plants are located all over the world and this technology is ready for deployment in the United States. CTL has been used since before WWII, and South Africa has been operating 150,000 bpd since the 1950s. In addition, the latest clean-coal technology has improved product yields and enables environmental safeguards not previously available in the beginning years of this industry.

*E. Critical Need for Government Support*

Several CTL projects have been announced in the U.S.; however, all of these projects are struggling due to the high financial commitment needed to plan and implement these projects. Banks are reticent to lend to “first of a kind” project, even though the technology has been proven commercially in other countries and in demonstration plants here in the United States. Based on the foregoing, the following key actions are crucial for the viability of the Crow CTL project:

- Grant the Department of Defense and other federal agencies the ability to enter into long-term, guaranteed fixed-price contracts that will underpin the commercial framework needed for these types of long-term CTL projects;
- Extend the expiration date of the current 50-cents per gallon fuel excise tax credit from September 2009. Since it could take roughly 10 years for these types of projects to become fully planned, implemented, and operational, an end-of-year 2020 might be a reasonable extension date;
- Support a twenty percent (20%) investment tax credit for each CTL plant placed in service before the same future date; and
- Support 100 percent (100%) expensing of investments in the year of capital outlay for any CTL plant in operation by the same future date.

The above four incentives, in addition to the Indian tax incentives before this committee, are considered by many to be the most critical incentives to enable the advancement of these critically needed CTL projects. However, there are many other incentives that can assist in enabling these critically needed projects. The following table lists the current federal government incentives that should be strongly considered for extension:

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §§ 45(c)(9), 45(d)(10), 45(e)(10), 39	Renewable Electricity Production Credit/Indian Coal - General Business Credit	Coal-to-Liquid Plant and Coal Reserves	The credit is \$1.50 per ton on the sale of Indian coal for calendar year 2006-2009 and \$2.00 for calendar years beginning after 2009, linked to inflation. For 2007, the credit for Indian coal was \$1.544 per ton of coal that was sold.	1/1/2013
Federal - IRC § 45A. This provision has expired; however, Congress is considering legislation that would extend the credit, retroactive from January 1, 2008.	Indian Employment Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	Tax credit based on the increase in qualifying annual wages paid to enrolled Indian tribal members or their spouses from 1997 - 2004 as compared to a base year annual wage in 1993.	12/31/2007

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC § 168. This provision has expired; however, Congress should consider legislation that would extend the credit, retroactively	Accelerated Cost Recovery for property on Indian Reservation - Depreciation Deductions	Coal-to-Liquid Plant	Provides a shorter recovery period of approximately 40% for most non-residential depreciable property. The property must be placed in service prior to 12/31/2007 and used by the taxpayer predominantly in the active conduct of a trade or business within an Indian reservation, not used or located outside the Indian reservation on a regular basis, not acquired (directly or indirectly) by the taxpayer from a person who is related to the taxpayer and not property (or any portion thereof) placed in service for purposes of conducting or housing class I, II, or III gaming. Special rules for reservation infrastructure investment - shall not apply to qualified infrastructure property located outside of the Indian reservation if the purpose of such property is to connect with qualified infrastructure property located within the Indian reservation. Such term includes, but is not limited to, roads, power lines, water systems, railroad spurs, and communications facilities.	12/31/2007.
Federal - IRC §1396	Empowerment Zone Tax Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	Taxpayers located in a Federal Empowerment Zone who hire qualified employees are eligible for a credit of up to 20% of the first \$15,000 in employee wages for a maximum credit of \$3,000 per qualifying employee for each year they remain employed by the taxpayer.	12/31/2009
Federal - IRC. §6426(d); §6427(e)(2); §34(a)(3)	Alternative Fuel Credit - Fuel Credit	Coal-to-Liquid Plant and Marketing	Credit available to a taxpayer who sells an alternative fuel to be used as a fuel in a motor vehicle or motorboat, or so used by the taxpayer. The term "alternative fuel" includes any liquid fuel derived from coal (including peat) through the Fischer-Tropsch process, and excludes ethanol, methanol, or biodiesel.	9/30/2009

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §6426(e); §6427(c)(1); 34(a)(3)	Alternative Fuel Mixture Credit - Fuel Credit	Coal-to-Liquid Plant and Marketing	Credit available to a taxpayer who produces any alternative fuel mixture for sale or use in a trade or business. An alternative fuel mixture is a mixture of alternative fuel (as described above) and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel which is sold by the taxpayer producing such mixture to any person for use as fuel, or is used as a fuel by the taxpayer producing such mixture.	9/30/2009
Federal - IRC §4041(a)(1) and (2)	Alternative Fuel and Alternative Fuel Mixture (Enduser) Excise Tax	Coal-to-Liquid Plant	If the alternative fuel or alternative fuel mixture is not a taxable fuel, an excise tax nonetheless is levied when it is sold for use as a fuel in a diesel-powered highway vehicle, diesel-powered train, motor vehicle or motorboat.	No express expiration date
Federal - IRC. §4081(b)	Alternative Fuel Mixture (Blender) Excise Tax	Coal-to-Liquid Plant	If an alternative fuel mixture is a taxable fuel, it is subject to excise tax when removed, entered or sold by a blender. A taxable fuel has (i) at least four percent normal paraffin, or (ii) a distillation range of 125 degree F or less, a sulfur content of 10 ppm or less, and minimum color of +27 Saybolt.	No express expiration date
Federal - IRC §199	Deduction for Income Attributable to Domestic Production Activities - Federal Income Tax Deduction	Coal-to-Liquid Plant and Coal Reserves	The deduction is for a percentage of the lesser of (1) the taxpayer's "qualified production activities income" (QPAI) or (2) the taxpayer's taxable income for the tax year. The deduction will be limited for a taxable year to an amount equivalent to 50% of the W-2 wages paid by the taxpayer during the calendar year. QPAI is derived from, among other things, the following: any sale, exchange, or other disposition or any lease, rental, or license of qualifying production property that was manufactured, produced, grown, or extracted by the taxpayer in whole or in significant part within the U.S.	No express expiration date

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §45D	New Markets Tax Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	The credit is for a taxpayer who makes a qualified equity investment (in the form of stock or a partnership interest in a selected community development entity (CDE). The credit is available both to purchasers at original issue and to subsequent purchasers. A CDE is a corporation or partnership (1) the primary mission of which 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 any governing board or on any advisory board of the CDE; and (3) is certified by the Treasury Department as an eligible CDE. For an investment in a CDE to be a "qualified" equity investment, the CDE must designate it as such.	12/31/2008

## V. Conclusion

As a practical matter, several levels of government exist that provide services to meet public needs in America today. Each level of government independently assesses, enforces, and collects taxes on various forms of private wealth to yield public revenue. Throughout the history of our republic, and especially in the last half century, government tax collections have yielded substantial public revenue, enhancing the presence and power of the federal, state, and local governments.

Federal, state, and local government taxes are largely accepted in modern America because of consensual governance and the provision of public services. Over time, public opinion about taxation has shifted from issues of sovereign legitimacy to proportional tax burden and public spending choices, with tax policy debates often occurring during national and local political campaigns. Thus, even though some Americans complain about taxes (some protesting), without mentioning the basic services that are provided by taxes, like roads, water, sewers, schools, etc., their opinions and actions are largely expressed at the ballot box, not through litigation.

In contrast to other governments in America, Indian nations are mired in tax litigation and adverse legislation, national and local, both focusing on the legitimacy of tribal governments.

Despite pre-existing all other governments and possibly being subject to four or five concurrent government taxes in Indian country, a majority of the American public and some elected officials continue to believe that Indians do not pay taxes. Instead of building legal and physical infrastructure, developing and sustaining local economies, and debating tribal tax policies, public opinion forces Indian nations to exhaust valuable resources litigating tax disputes against other governments and local non-Indian residents.

Existing Indian tax law is the primary obstacle to tribal self-determination and economic development in Indian country. Alexander Hamilton wrote in Federalist Paper No. 12, "a nation cannot long exist without revenue and destitute of this essential support, it must resign its independence." With federal tax authority firmly established and the expansion of state and local powers to tax almost all activities, persons, and property within Indian country, along with diminishing tribal tax authority, many Indian nations have been rendered powerless and dependent within their own homelands.

The path from dependent sovereign to governmental equality is, undoubtedly, a substantial challenge. However, under current conditions, Indian nations cannot achieve meaningful self-determination in Indian country because they are not the primary tax and governing authority – they lack public revenue to provide basic services, and they are unable to address substandard socioeconomic conditions. By enacting this legislation, Congress will have established its intent to begin reforming the unequal and unjust structure of existing Indian tax law.

Therefore, I strongly recommend that this committee carefully consider and permanently extend the existing and proposed federal Indian tax legislation. In light of the history of taxation in Indian country, the subject matter before this committee represents modest legislation to create some incentives for doing business in Indian country. With long-term certainty and predictability of tax incentives, I firmly believe that Indian nations can attract partners to invest in much needed economic development in Indian country.

This tax legislation, if enacted, could tip substantial pending investment decisions toward world-class energy development and those decisions by themselves would make a significant and positive change for tribal communities. After this legislation, it is my hope that future legislation will be introduced to treat tribes as states for all federal tax purposes and that tribes and states will move toward source-based government-to-government taxation agreements in lieu of existing Indian tax law. Thank you for your time and attention and I would be happy to answer any questions.

**WAYNE SHAMMEL, ESQ.**

**COW CREEK BAND OF UMPQUA TRIBE OF INDIANS**

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Before the

**SENATE FINANCE COMMITTEE**

July 22, 2008

**CURRENT TAX LAW DISPARITIES EFFECTING TRIBAL ECONOMIC DEVELOPMENT**

The Tax Code has long provided a number of special provisions designed to help state and local governments secure economic advantages appropriate to their status as governments--such as tax-exempt bond financing, deductibility of charitable contributions received by them, and exemption from certain federal excise taxes. In addition, the Internal Revenue Code has been consistently interpreted not to impose an income tax on state, local and other governmental units. In 1982, Congress passed the Indian Tribal Governmental Tax Status Act in order to clarify how federally-recognized Indian Tribal Governments were treated for various federal tax purposes. Consistent with the principles of Indian self-determination, the Tax Status Act attempted to place Indian tribal governments on roughly the same footing as state and local governments. However, the playing field Congress created for tribes' issuance of tax-exempt bonds has never been completely level with that on which state and local governments operate. Tribes are subject to more restrictive rules. And those rules have never been adequately clarified to facilitate cost-effective compliance. All of these factors have resulted in a major chilling of the tax-exempt bond market with respect to Indian tribal government issuers and borrowers,

**Current Tax Code Restrictions on Tribal Debt**

There are three Tax Code provisions that apply only to tribal government bond offerings, and all three of these rules impose formidable restrictions on tribal debt: (1) the "essential governmental function" test; (2) the general prohibition on private activity bonds; and (3) the limited exception for tribal manufacturing facilities. In addition, some tribal governments have particular difficulty complying with certain generally applicable Tax Code restrictions, such as the prohibition on relying on federal funds to repay bonds.

### **Essential Governmental Function Test**

Generally, interest on tribal debt that is issued by a tribal government will not be tax-exempt unless substantially all of the proceeds of the debt are used in the exercise of an "essential governmental function." IRC Section 7871(c)(1). Section 7871 of the Tax Code contains no definition of this amorphous term, but Section 7871(e) tells us that an activity will not be treated as an "essential governmental function" if it is not "customarily performed by state or local governments with general taxing powers."

A major problem with the essential governmental function test is that it defines what tribal governments may do with reference to what state and local governments "customarily" do, which is a moving target. For example, over the past several years, many municipalities have utilized bonds for various economic development activities--g., hotels and other revenue-generating facilities. States have also increased the extent to which they conduct gaming activities (e.g., lotteries and racetracks).

On August 9, 2006, the Internal Revenue Service released an Advance Notice of Proposed Rulemaking (the "ANPR") seeking public comment on regulations it intends to propose defining an "essential governmental function" for purposes of Section 7871(c) of the Code. The ANPR would limit the scope of an essential governmental function in ways not intended by Congress. Three requirements would have to be met in order for an activity to be an essential governmental function. Each of these requirements is problematic, ambiguous, and will compound the problems tribes face in financing their capital needs.

First, the activity must have been engaged in by "numerous" state and local governments. The ANPR does not indicate what "numerous" means. Recent IRS audit activity suggests that the IRS has a very restrictive definition of "numerous," for instance, taking the position that governmentally owned convention center hotels have not been operated by "numerous" non-tribal governments even though several dozen have been created in the last few years.

Second, the activity must have been engaged in by non-tribal governments for "many years." This requirement further harms tribes, as it is both ambiguous and would cripple tribes' ability to respond quickly to innovative technologies. How many years after cities began to offer wireless internet services would tribes have to wait before being able to finance their own systems on a tax-exempt basis.

Third, the activity must not be a "commercial or industrial activity." This requirement, like the other two, is both difficult to apply and crippling in its effect on tribes' economic development. If a "commercial or industrial activity" is one that provides a fee for service, it would confine tribes to those activities that are not engaged in by private business, even if numerous non-tribal governments have engaged in them for many years. Non-tribal governments engage in numerous fee for service activities that are also engaged in for profit by private businesses, including, for example, electric service, gas service, waste disposal service, health care, higher education, parking, low income and special needs rental housing, sewer service, and recreational activities such as golf, swimming, tennis, and public marinas.

**General Prohibition on Private Activity Bonds.**

Indian tribal governments generally may not issue private activity bonds. IRC Section 7871(c)(2). Such bonds are frequently issued by state or local governments. For example, state and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit organizations, or to finance mortgage loans for low-income home buyers or residential rental property. Private activity bonds are also issued for airports, docks and wharves, solid waste facilities, and certain energy or utility projects.

**Limited Exception for Tribal Manufacturing Facilities.**

There is only one narrow exception to the general prohibition on private activity bonds issued by Indian tribal governments. Under IRC Section 7871(c)(3), tribes may use tax-exempt bonds for a qualifying manufacturing facility. To so qualify, the manufacturing facility must be one used in the production of tangible personal property and meet three major tests--(1) it must be tribally owned and operated, (2) it must be located on lands which have been in trust for at least 5 years, and (3) it must meet periodic testing criteria for employing a certain number of tribal members or their spouses relative to the amount of bond proceeds utilized. Although this provision was well intended when it was passed, its requirements are exceedingly difficult to meet. They impose virtually untenable burdens on the type of capital-intensive, high technology plants that are built in the United States today.

In short, in extending tax-exempt bonding authority to tribes, Congress has enacted rules that are both burdensome for tribal governments to comply with and difficult for the IRS to administer. As noted by Professor Ellen Aprill, a former Treasury Department Attorney-Advisor, "in the Tribal Tax Act, tribal governments were given bonding authority they were unable to use and denied bonding authority they would have welcomed." See Aprill, "Tribal Bonds: Indian Sovereignty and the Tax Legislative Process," 46 *Admin. Law Rev.* 333, 348 (Summer 1994).

**Recent IRS Administration of the Restrictive Tribal Bond Rules**

In October of 2002. The Bond Buyer reported that the IRS was planning to implement a new compliance initiative aimed at tribal bond issuances and several other areas. Mark Scott, then the head of the IRS Bond Division, stated that the focus of the tribal audits would be to determine compliance with the "essential governmental function" test. See "IRS Eyeing Student Loans, TIFs, Tribal Debt for 2003," *The Bond Buyer* (Oct. 8, 2002). Following publication of the article, several bond practitioners and tribal attorneys criticized the IRS for proposing to enforce compliance with a test that it had never adequately explained or defined. The IRS subsequently downplayed any intent to target tribal bond offerings.

However, only a month later, the IRS released a National Office Field Service Advice (FSA) addressing the issue of whether the construction and operation of a golf

course by a tribe was an "essential governmental function." See FSA 20024712 (Aug. 12, 2002). The FSA concludes that although the construction and operation of golf courses are customary government functions, "there is an argument that the commercial nature of the [tribal] Golf Course causes it to be other than an essential governmental function within the meaning of [Internal Revenue Code] section 7871(e)." The version of the FSA released at that time was heavily redacted to suppress the opinion of the IRS Chief Counsel questioning whether the IRS field agent's proposed challenge to the tax status of the tribe's bonds would ultimately be successful if litigated in the courts.

Since 2003, the IRS has opened a relatively large number of audits of tribal bond transactions. Initially, the IRS audits targeted tribes that had engaged in conduit bond transactions--i.e., transactions in which a state or local government agency not subject to the restrictive rules issues bonds for the benefit of a tribal governmental borrower. Shortly thereafter, the IRS opened up at least a dozen audits involving transactions in which tribes issued governmental debt directly for their own use. IRS agents made it clear that a major focus of these audits is to challenge the use of bonds to finance infrastructure or facilities that supported a tribe's gaming operations. IRS agents have also made statements in the press questioning the propriety of using bonds to finance recreational facilities for tribes with small memberships.

1. In June of 2004, an IRS Advisory Committee recommended that the IRS take the following constructive steps to facilitate a better understanding of applicable rules by tribal governments and other parties in the bond market:
2. Request the Treasury Department to develop regulations defining "essential governmental function" under Section 7871;
3. Clarify that the term "essential governmental function" under Section 7871(e) should be construed in accordance with its construction under IRC Section 115;
4. Withdraw FSA 200247012 [the golf course Field Service Advice described above] and suspend issuance of other nonprecedential guidance;
5. Suspend any new compliance initiatives applicable to tribal bonds until after IRS regulations are issued.

See Advisory Committee on Tax Exempt and Government Entities (- ACT): Report of Recommendations (June 9, 2004) (IRS Publication 4344(5-2004)).

The Report, prepared by Navajo Nation attorney Raymond Etcitty, concluded with the following plea: "How can tribal governments develop sustainable economies that produce recurring revenue needed to provide the infrastructure for their citizens, residents and visitors, when tribal governments have their hands tied behind their back?" Mr. Etcitty noted that the Treasury Department had failed to publish any regulations interpreting the tribal bond provisions since such provisions were amended by Congress in 1987.

A second IRS Advisory Committee report, prepared approximately one year later, reported that the issues identified in the 2004 report "continue to fester, and the frustration continues to grow as the IRS has significantly expanded the number of Tribes under audit as issuers or borrowers of tax-exempt debt." The Committee concluded that "[these audit actions collectively have had a perhaps intended chilling effect on issuance of tax-exempt tribal debt, and at the same time have reinforced sentiments of bias among Indian tribal governments and their advocates." *See* Advisory Committee on Tax Exempt and Government Entities (ACT): Report of Recommendations (June 8, 2005), "Survey and Review of Existing Information and Guidance for Indian Tribal Governments," pp. 12-13 (prepared by Lenor Scheffler and Robert Gips).

The release of the ANPR, described above, provides further evidence that only Congress has the power to deal with the problem.

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### **III. RECOMMENDATIONS FOR LEGISLATIVE CHANGE AND OVERSIGHT**

There are a number of things that Congress can do to improve the current situation in which tribes are effectively prevented from accessing capital at the same rates and on the same terms as other governments. Some of these involve legislative changes. Others involve oversight to foster more effective and even-handed tax administration.

#### **Legislative Changes**

There are two possible legislative changes that would help tribes access capital in a more cost-effective manner. First, Congress should pass legislation repealing or modifying the "essential governmental function" test under Section 7871 and should make some provision for private activity bonds - particularly with regard to affordable housing and energy projects financed by tribes. At the very least, Congress should gear the requirements of the tribal manufacturing facility exception to the real-life economic realities (including U.S. labor market costs) faced by 21st century manufacturing plants. Second, although not within the jurisdiction of this Committee, Congress should provide tribes that issue bonds the same treatment under federal securities laws that it has accorded to state and local governments.

#### **Tax legislation**

Repeal of the "essential government function" test is recommended because the last 20 years have demonstrated that the restriction is difficult to interpret and almost impossible to administer. These difficulties have resulted in an institutionalized bias against tribal governments as issuers of tax-exempt bonds and have erected insurmountable "barriers to entry" by tribes into the financial marketplace. Although the original purpose of the "essential governmental" function may have been to prevent tribes as bond issuers from being exploited by private parties, it has consistently been used

against tribes acting in a government capacity and seeking to finance economic development within the boundaries of their own reservations.

Second, Congress should open up the general private activity bond prohibition to allow tribes to selectively issue bonds that would otherwise be considered private activity bonds. Such a provision would allow tribes to issue tax-exempt bonds for various types of facilities that serve a legitimate governmental purpose—such as facilities used by 501(c)(3) organizations, affordable rental housing, electric generation plants, water treatment, solid waste and sewage disposal plants. At the very least, Congress should closely examine and revise the provision that allows tribes to issue tax-exempt bonds to finance their own manufacturing facilities. The requirements of this provision must be made consistent with the economic realities of modern-day manufacturing in the United States. Legislation introduced in past Congresses by Senator John McCain and others would have allowed tribes to issue tax-exempt bonds permitted to be issued by State and local governments under current law, so long as the tribe maintained at least a 50% ownership stake in the financed facility and satisfied a more flexible employment test.

Senate Bill 1850 goes a long way toward dealing with many of the tax problems confronting tribal financing today. It eliminates the essential governmental function test for facilities located on an Indian reservation, and preserve it only for the financing of facilities located elsewhere, while excluding the portion of any building used for class II or class III gaming from eligibility for tax-exempt financing. It would permit tribes to issue private activity bonds under the same circumstances as non-tribal governments so long as the financed facilities were on the reservation of the issuing tribal government. And it would abolish the special limitations on tribal manufacturing facilities.

Senate Bill 1850 could be improved to deal with a number of important technical problems, some of which are identified below.

First, SB 1850 would arguably not permit a tribe to be treated as a state or local government for purposes of bonds issued by a non-tribal government that in part benefit a tribe. For instance, a tribe's rental of portions of a school complex financed by a county to provide supplemental education for tribal members would arguably be inconsistent with the non-tribal government's use of tax-exempt financing.

Second, financing costs for tribes tend to be higher than those for non-tribal governments, and SB 1850 should make clear that amounts used to pay costs of financing are not net proceeds for purposes of the requirement that 95% of the net proceeds be spent on a facility located on the issuer's reservation.

Third, SB 1850 requires that the facility financed by bonds not subject to the essential governmental function test be located on the issuing tribe's reservation, and not just any Indian reservation. This limitation would make it difficult for multiple tribes to cooperate in the development of a joint use facility, and should be modified.

Fourth, the definition of an Indian reservation arguably would not include Alaska Native Villages.

Fifth, SB 1850 does not clarify the meaning of an “essential governmental function” for facilities located off-reservation, and should be modified to be more inclusive that would be permitted by the ANPR.

Sixth, Congress should also consider providing a special exception for certain tribal bonds from the “federal guarantee” prohibition. This prohibition generally comes into play where the governmental borrower relies on future federal assistance to repay the loan. It is largely irrelevant for gaming tribes with sufficient cash flow, but the provision creates problems for poor tribes and those with large memberships, particularly in the development of tribally owned-low income and special needs housing, where guarantees by HUD under the Section 6 and Section 184 programs can preclude the use of tax-exempt financing under current law. Tax-exempt bond issuances of such tribes may fail to secure approval of bond counsel or underwriter's counsel because of the level of federal assistance being received by the tribe.

#### **Securities legislation**

Congress should amend the Securities Act of 1933 to place bonds issued by tribal governments on par with those issued by state and local governments with respect to federal securities registration requirements. The current lack of exemption serves no useful purpose and simply imposes extra transactions costs on tribal governmental issuances.



GOVERNMENT

July 28, 2008

O F F I C E S

SENATE COMMITTEE ON FINANCE  
ATTN EDITORIAL AND DOCUMENT SECTION  
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2 3 7 1

Re: Statement for the Record

NE STEPHENS

To the Senate Finance Committee:

S T R E E T

I had the honor of testifying before the committee on July 22, 2008, on the issue of tribal tax and finance parity issues. As part of this appearance, I submitted written testimony. Unfortunately, in the rush to get to D.C. and meet submission deadlines, I failed to properly attribute Scott Schickli, Esq., of the Orrick, Herrington & Sutcliffe law firm for his efforts in drafting the written testimony. Credit for that work product is primarily due to Mr. Schickli, and I felt it necessary to correct the oversight via this letter.

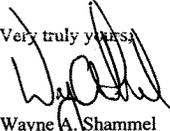
S U I T E 1 0 0

R O S E B U R G

Thanks again to the Committee, and thank you, Scott Schickli, for your excellent work and support.

O R E G O N

Very truly yours,

  
Wayne A. Shammel  
General Counsel

9 7 4 7 0

(541) 672-9405 cc: Scott Schickli

F A X N U M B E R

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**“INDIAN GOVERNMENTS AND THE TAX CODE:  
MAXIMING TAX INCENTIVES FOR ECONOMIC DEVELOPMENT”  
U.S. SENATE COMMITTEE ON FINANCE**

**U.S. Senator Olympia J. Snowe**

**July 22, 2008**

Mr. Chairman, thank you for holding this critical hearing examining the role of tax incentives in promoting economic development within Native American communities. Native Americans have a long and rich cultural history in Maine and our nation, and have made significant contributions to the U.S. in a wide range of areas. Indeed, Maine became the first state in the country to create a separate Department of Indian Affairs in 1965. I look forward to hearing from today’s panel on how we can continue to work with Native Americans to help build on these achievements, preserve the unique Native American way of life, and address the priorities of our communities.

Mr. Chairman, I would like to first to speak briefly about the Native American communities in my state of Maine of which I’m so proud. The Passamaquoddy and Penobscot Tribes were among the first Native Americans to have contact with Europeans. The Passamaquoddy have occupied this St. Croix River watershed region in Downeast Maine along the Canadian boarder for over the past 600 generations that translates into more than 12,000 years. The Penobscot whose tribal lands are located along the Penobscot River watershed supported at the request of George Washington the Continental Army during the Revolutionary War.

Moving from Downeast Maine north to Aroostook County, which is known as THE County in my state, one will find the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians. The Aroostook Band of Micmacs in Presque Isle is the most recent Maine tribe to receive Federal recognition after legislation that I sponsored as a then Member of the House became law in 1991 after three years of a collaborative effort with the entire Maine delegation. Just down the road in Houlton are the Maliseet Indians. Traditionally river people, the Maliseets’ tribal lands are found along the Meduxnekeag River, beautiful waterway prized for its brook and brown trout.

The Maliseets have been particularly entrepreneurial in their efforts to promote economic development and job creation within their community as evidenced by Tribalco. Tribalco is an innovative SBA 8(a) certified company headquartered in Bethesda, Maryland, and with offices in Littleton, Maine, Colorado, and Hawaii. The company provides telecommunications services and integrated solutions to government agencies and private sector clients across the globe.

Despite their long, proud history, Native Americans communities continue their struggle to escape the throws of poverty. According to the 2000 census, the average income of American Indians in Maine trailed that of the average Mainer by nearly \$7,000. Unemployment for the Micmac is nearly 50 percent while 65 percent of the Maliseet have incomes well below the poverty line. Such statistics are simply unacceptable, and I look forward to hearing from today’s panelist on how the tax incentives in place help promote economic development in these communities.

I will say, though, that the first step in making sure that incentives work is to extend the incentives prior to expiration, but sadly, the Indian employment credit and the accelerated depreciation for qualified business property on Indian reservations expired at the end of last year. Whether to extend critical tax incentives right now during a time of great economic uncertainty should be, frankly, a straightforward decision. I look forward to working with the Chairman and Ranking Member on finding a pathway forward to finally send a tax extenders bill to the President's desk.

We also should not forget about rural Empowerment Zones and Empowerment Communities and how they may also provide economic development resources for Native American communities. In my state, the Aroostook Empowerment Zone (EZ) is located in the heart of Indian Country with the Micmacs and Maliseets located within the County. We simply cannot allow the tax incentives associated with empowerment zones to expire at the end of next year.

More pressing, however, are the appropriations with rural Enterprise Communities (EC) that expire at the end of this fiscal year. While the Lewiston EC in my state is not associated with a Native American tribe, there are a number of rural ECs including in Montana and Arizona that are. If this crucial funding is not extended, local economic development agencies administering rural ECs and EZs will begin to shutter their programs and lay off staff. I know that this funding is an issue that falls within the jurisdiction of another Committee, but I hope we can work with the Appropriations Committee to ensure that this funding does not expire this fall.

Thank you, Mr. Chairman.



## COMMUNICATIONS



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#### Statement of Jack F. Trope, Executive Director

Jack F. Trope  
Executive Director

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#### Submitted to:

United States Senate  
Finance Committee

July 22, 2008 hearing – “Indian Governments and the Tax Code:  
Maximizing Tax Incentives for Economic Development”

Thank you for the opportunity to submit this statement for the record.

The Association on American Indian Affairs is an 86 year old Indian advocacy organization with offices in Rockville, Maryland and Sisseton, South Dakota. We are governed by an all Native Board of Directors who are members of tribes from all regions of the country. Our current work is focused in four main areas: youth/education, cultural preservation, health and tribal sovereignty. We work both nationally and at the grass roots level.

AAIA was instrumental in obtaining the original Tribal Government Tax Status Act of 1982. The main purpose of that Act was to ensure that the federal tax code treated tribal governments in a manner comparable to states and their subdivisions. It was recognition that tribal governments were exercising their sovereign authority to provide essential services to their members and that they needed the same financial tools as states if they were to adequately service their constituents.

That Act has enabled tribes to obtain financing for and to fund a variety of essential governmental services. However, as the testimony at the hearing vividly demonstrated, inequities between state and tribal governments persist. The witnesses have covered the issues of tax exempt bonds, accelerated depreciation and the Indian employment tax credit more than adequately and we will not address these issues in our testimony except to say that we support the testimony of NCAI and the tribal witnesses at the hearing.

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We are submitting this testimony to bring to your attention another instance where the tax code treats tribes and states differently -- the ability of tribes to create and/or support 501(c)(3) non-profit charitable organizations. As you may know, 501(c)(3) organizations provide a variety of critical services throughout this country in areas such as health and education -- services that are greatly needed throughout Indian Country.

In order to maintain its 501(c)(3) status, a non-profit organization must receive a substantial amount of public support -- in most cases, at least 1/3 of its revenues must be generated from the public. Otherwise, it is classified as a private foundation. "Public support" is defined to include grants from "governmental units." Because tribal governments are not referenced in the applicable section of IRS code (section 170(c)(1)), however, tribal governmental funds are currently not classified as "public support". Thus, tribal support for a non-profit organization serving its community could jeopardize its status as a 501(c)(3) organization.

In addition, States are empowered by the Code to create organizations that support charitable activities. These organizations can be accorded 501(c)(3) status. The IRS code does not provide for similarly created tribal organizations to be recognized in this manner.

Why does it matter whether tribes can create and/or support 501(c)(3) organizations? The primary reason is that 501(c)(3) organizations are often better able to raise outside funds to support their missions. Although tribes sometimes receive direct support from private sources such as foundations, many foundations only support 501(c)(3) organizations. In some instances, foundation governing documents specifically place that limitation upon a foundation. In addition, the ability for tribes to form inter-tribal organizations that would be eligible for tax-exempt and foundation financing is inhibited by this "glitch" in the current code.

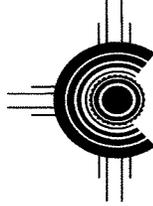
Recently there has been an effort, spearheaded by Senator Baucus and others, to encourage foundations to direct more funding to rural America. If tribal communities have viable and vibrant non-profit organizations operating in their communities, it is much more likely that they will benefit from these efforts.

A Joint Tax Committee revenue sheet indicates that these legislative changes will cost only \$1 million over 10 years -- a de minimis amount. These provisions were passed by both the Senate and House previously in the 108<sup>th</sup> Congress as part of the "Tax Administration Good Government Act", but that Act never became law because differences between the House and Senate (on issues unrelated to these tribal provisions) were never resolved.

We would note also that Rep. Becerra has introduced a bill in the House of Representatives that would make the technical changes to the tax code needed to fix this inequity. The bill number is H.R. 6005 and Rep. Rangel, Chair of the Ways and Means Committee, is an original co-sponsor.

These proposed amendments to the tax law are non-controversial, truly technical and can provide important assistance to tribal communities with minimal cost. As the Committee moves forward to consider amending the Tribal Government Tax Status Act to address its inadequacies and inequities in general, we hope that you will include the technical amendments needed to correct the oversight in the Act involving tribal support for non-profit organizations that serve their communities.

Thank you for considering this statement.



## ***Council of Energy Resource Tribes***

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 Montana Cree  
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**Executive Director:**  
 A. David Lester

**Prepared Statement of  
 A. David Lester, Executive Director  
 Council of Energy Resource Tribes (CERT)  
 695 South Colorado Boulevard, Suite 10  
 Denver, CO 80246**

**Submitted to the  
 Committee on Finance  
 United States Senate  
 For the  
 Oversight Hearing on  
 "Indian Governments and the Tax Code:  
 Maximizing Incentives for Economic Development"  
 July 22, 2008**

My name is David Lester and on behalf of the 53 member Tribes of the Council of Energy Resource Tribes (CERT), I am pleased to submit this written statement on energy and tax matters to the U.S. Senate Committee on Finance.

CERT is based in Denver, Colorado, and had its beginnings in 1975 when Indian Tribal leaders came together and decided to chart a new course for the prudent, Tribally-driven development of Tribal energy resources. In the 33 years since, Tribal leaders, through CERT, have dramatically restructured the federal-Indian relationship regarding mineral development on Tribal lands and, at the same time, have forged close alliances and partnerships with private sector energy interests. Grounded in Indian Self-Determination, the CERT mission is to support member Tribes as they develop their management capabilities and use their energy resources as the foundation for building stable, balanced, self-governed economies.

CERT is pleased that this Committee has continued its focus on the United States Internal Revenue Code (Code) and whether the incentives it contains serve the interests of economic development on Indian lands. We believe that, just as the Code is used by state and local governments and private businesses to help move their economies forward, Tribes should also benefit from targeted tax incentives to strengthen Tribal economies.

Unfortunately, it is our experience that the Code does not work well for Indian Tribal governments and their citizens. Even though Tribes have significant

energy resources, for example, and practically unlimited renewable energy resources, those resources are underdeveloped in large part because the tax incentives that Congress put in place in 1993 expired in 2003 and are now being renewed on a year-to-year basis. This uncertainty is an actual disincentive to the formation of the capital needed to bring vigorous economic development to Indian country. Year-to-year reauthorizations will not provide the certainty that private investors and corporations are looking for when they consider partnering with Tribes to invest in commercial operations on Indian lands and hire qualified Indian workers to manage those operations.

The two 1993 tax initiatives were enacted to provide private businesses with incentives to channel capital investment by providing accelerated depreciation for business infrastructure placed on Indian lands and wage and employment incentives to hire Indian people. Both have met with some success, although neither of these code provisions is easy to measure. In fact, a Government Accountability Office (GAO) report dated June 26, 2008 to this Committee outlined the difficulty in assessing the use and effectiveness of the Indian reservation depreciation provision of the Code.

Nevertheless, because of the severe competitive disadvantages that Tribal economies suffer, we believe that federal incentives are imperative to encourage non-Indian companies to do business on Indian and Tribal lands. One of the biggest impediments to development on these lands is the lack of physical infrastructure such as roads, electricity, potable water, pipelines and other amenities that investors demand prior to making a favorable investment decision. We urge that the Indian lands accelerated depreciation provisions be reenacted for a period of 20 years to ensure reliability and stability.

Also, Tribal communities often have large labor pools from which to draw employees. Although some of the labor force on reservations is untrained or undereducated, many are not and the cap on wages contained in the Wage and Health Credit is a disincentive since high tech jobs usually mean salaries that exceed the current caps. The current wage and benefits incentive needs to be revisited with a view to updating the requirements that are now outdated.

Finally, CERT believes that the tax exempt bond provisions that apply to Indian Tribal governments need to be revised to preclude the IRS from applying an "essential government function" to Tribal government bond offerings that is not applied to state and local bond issues. Tribes are governments that deserve the same treatment as other governments so they can raise capital for necessary infrastructure to ensure self-sustaining economies with a consequent reduction in federal transfer payments.

CERT also recommends that the Committee "throw a large net" and look at other Code provisions to analyze how they might be amended to strengthen Tribal economies and improve the material standard of living of Tribal members.

Thank you for the opportunity to submit this statement for the record of the Committee on this very important issue. CERT stands ready to work with the Committee on these important tax issues, and if you would like more detailed information, please contact me.



July 22, 2008

Hon. Max Baucus, Chairman  
Senate Finance Committee  
Senate Dirksen Office Building 215  
Washington, DC 20510

Dear Senator and Committee:

Thank you for the opportunity to comment on the Senate Finance Committee hearing on ways to improve tax policy for Native American Communities.

Our comments would be as follows:

1. Indian Employment Credit. We support extension of this credit but would urge it be available for five years rather than two. We also support re-instating the accelerated depreciation for reservation economic development projects.
2. A tax credit for wind energy should be accompanied by the ability to utilize tax exempt bonds as that would draw private capital to reservations promoting wind energy and green "jobs." The bonds should allow financing of transmission lines to join current or new electrical grids.
3. Native American tribes should have the same opportunities to issue tax exempt bonds for capital projects as states with a federal guarantee on the bonds and the ability of investment bankers/banks to go to the "Fed window" for financing these bonds.
4. Congress should write clear laws limiting the power of states to tax tribal interests on reservations whether paid by Native Americans or non-Native Americans just as each state reciprocates with other states. Recent legal decisions have generally ruled against Tribes and for States on tax issues.

One of our CPAs had a profound comment after working over 20 years with Native American enterprises.

"We need to address land and other cultural issues that prevent enterprises from locating on reservations. I doubt that tax policy alone will get the job done.

Tribal leadership must deal with four different focuses: Federally sponsored programs, Tribally sponsored programs, Tribally owned enterprises and member-owned private enterprises.

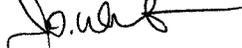
If we hope to get Tribes prospering, we need to start at the top and train leaders in a culturally appropriate manner on the different but similar principles and beliefs. They must utilize these to move their community forward with the resources received from the four different focuses mentioned.

There are four pillars of success: knowledge, generosity, fortitude and courage, but with many Tribes these pillars have crumbled and need to be rebuilt if Tribal members are to move forward.

Tax policy is a way to attract some capital but I don't see long-term success without sustaining leadership qualities within each Tribe."

The Flandreau Santee Sioux Tribe extends our appreciation to the Senate Finance Committee for looking at the critical issue of fostering economic growth for Native American communities.

Sincerely yours,



Joshua O. Weston  
President

cc: Sen. Tim Johnson  
Sen. John Thune  
Rep. Stephanie Herseth Sandlin

**United States Senate Committee on Finance  
Hearing on Indian Governments and the Tax Code:  
Maximizing Tax Incentives for Economic Development  
July 22, 2008**

**Statement of**

**Erik M. Jensen  
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Submitted July 30, 2008**

I am pleased to comment on the important issues addressed at this hearing. I am sorry that I was unable to appear in person—I am recovering from surgery—because the discussion was so interesting and helpful.

I have been a professor at the law school of Case Western Reserve University for twenty-five years, specializing in taxation but also teaching American Indian law. Before joining the CWRU faculty, I clerked for the Honorable Monroe G. McKay of the United States Court of Appeals for the Tenth Judicial Circuit, the second most active Indian law circuit in the country, and I practiced tax law at the New York City firm Sullivan & Cromwell for three years. I have written many articles on taxation and on American Indian law; several have dealt with the intersection of these two bodies of law.

Economic development in Indian country unquestionably requires major infusions of capital, as all of the witnesses at the hearing emphasized, and congressional policy should further that goal. One of my most recent articles, “Taxation and Doing Business in Indian Country,” 60 *Maine Law Review* 1 (2008), is directly relevant to that subject. (In fact, the article was cited in the overview document prepared by the staff of the Joint Committee on Taxation.) In this statement, I shall make a few points about jurisdictional uncertainty as a deterrent to investment—points that I think were not stressed enough at the hearing. I shall then briefly comment on some of the statutory issues (particularly accelerated depreciation for “qualified Indian reservation property,” the Indian employment credit, and tax-exempt financing) that were discussed.

#### **I. The Uncertainties of Taxation in Indian Country**

Everyone realizes that many disincentives to invest in Indian country exist, or are perceived to exist (which leads to the same practical result). One of the major deterrents to investment is uncertainty about the tax situation potential investors would face. If a prudent investor cannot predict with reasonable certainty the tax liability he will incur on an investment in Indian country, he or she is likely to look for investment opportunities elsewhere.

Some of the discussion at the hearing was relevant to this point. For example, the witnesses, particularly Mr. Laverdure, stressed how undesirable it is to have so many levels of taxation (federal, state, tribal, county, and local) potentially applicable. All other things being equal, the more taxing authorities there are, the unhappier a potential investor is going to be. An investor’s total tax liability is likely to be greater, and complexity certainly will be greater. (Similar concerns affect those contemplating investments in metropolitan areas that straddle state lines.) And multiple layers of taxation often force tribes trying to attract investors to negotiate their own tax rates down, thus hampering the tribes’ ability to raise revenue for governmental purposes.

Furthermore, as the witnesses all emphasized, the uncertain status of section 168(j), providing accelerated depreciation rules for “qualified Indian reservation property,” and section 45A, providing for an “Indian employment credit” associated with employment of tribal members, is a source of great frustration. Both provisions terminated at the end of 2007. Although both have been extended in the past, generally a year at a time, the extension has often been enacted just before termination—or even retroactively in the year after termination (which is what would have to happen here). I will say more about

this later. Suffice it to say for present purposes that, if the availability of a particular tax incentive is uncertain, a person for whom that incentive is critical is not going to make the investment.

**A. A Further Tax-Related Disincentive to Invest in Indian Country:  
Extreme Jurisdictional Uncertainty**

Multiple taxing jurisdictions and muddled statutory incentives are real problems, but the uncertainty problem facing potential investors in Indian country goes much deeper. Largely because of the overlay of American Indian law—the body of law that is concerned with jurisdiction in Indian country and that therefore affects taxing authority—the power of the various governments (federal, state, and tribal) to impose their taxes on transactions within, and those doing business in, Indian country is much more difficult to determine than in most other contexts.

American Indian law has so many imponderables at its core that it is often hard, and sometimes impossible, for a potential investor to know what he or she would be getting into. This uncertainty is itself a significant deterrent to investment. Will the federal government tax the investor's income (almost certainly yes)? Will the state government (and perhaps its subdivisions) be able to tax the investment in Indian country? The answer there is also probably yes, but not automatically so, depending in part on changing doctrines of the United States Supreme Court. Will the tribe be able to tax the investor as well? That depends on many factors, including a Supreme Court jurisprudence that is becoming increasingly unfriendly to exertions of tribal power over nonmembers.

Reading tax statutes can be difficult in the best of circumstances; the difficulties of comprehending tax law are compounded in Indian country. Anyone trying to figure out what federal, state, and tribal governments can tax must examine a bewildering body of American Indian law authority. Business law practitioners typically do not read nineteenth-century cases, but advisors on American Indian law matters cannot escape that responsibility: they should be familiar with decisions of the John Marshall Supreme Court, for example, as well as dozens of subsequent cases that might affect jurisdictional issues (such as when state law is preempted in Indian country). Advisors might have to look as well at acts of Congress (and associated regulations) from across the centuries; at treaties the United States signed with tribes in the eighteenth and nineteenth centuries; at grand jurisprudential issues like the nature of inherent tribal sovereignty; and at principles of federalism. A number of practitioners in firms specializing in American Indian law and in more generalist firms have become experts on the intersection of business law and American Indian law, but this group is a distinct minority of the bar.

It gets worse. The analysis of a specific issue (for example, can state *X* tax the gross receipts of non-Indian contractor *A* who does business with Indian tribe *C*?) is likely to be particularistic, depending on factors peculiar to that controversy (such as treaty language). Generalizations about tax jurisdiction (or anything else) in Indian country can therefore be dangerous. Moreover, most commentators agree that, because of the particularistic analyses and the ebb-and-flow of judicial sympathy for tribal concerns, Supreme Court decisions do not come close to establishing a coherent body of American Indian law.

This legal uncertainty is bad enough in itself, but the difficulties are compounded because most potential investors are unfamiliar with tribal governments. A typical investor has some sense about tax law changes that national and state governments might make: rates might increase, for example, but they are not suddenly going up by 50 percentage points. With the relatively mysterious tribal governments, however, the non-Indian investor may be clueless about the future. Who would not worry about investing in a jurisdiction where, as far as the investor knows, the tax law might be fundamentally changed tomorrow?

Concerns about the volatility of tribal governments might be unfair, but they are real. And they are not entirely groundless. Tribal members often disagree among themselves about development, of course, and, if a tribal government changes, development policy could suddenly change as well. (A Chamber of Commerce official on the Pine Ridge Reservation was recently quoted as saying, “We have a political revolution every two years”—a comment that does not help in attracting investment.) In this respect, uncertainties about doing business in Indian country are like those facing would-be investors in developing countries.

No investor should expect absolute certainty in taxation: tax laws often change, and that is a risk all taxpayers must bear. For a non-Indian looking at investment in Indian country, however, the uncertainty can be overwhelming. Of course, the safe thing for a potential investor is to assume that he or she would be subject to any tax the status of which might be in doubt. If investors are forced to assume a worst-case scenario, however, that obviously does not help tribes looking for investment capital.

#### **B. What Congress Could Do to Lessen Jurisdictional Uncertainty**

There is a partial solution to the jurisdictional uncertainty outlined above: Congress could specify the scope of federal, state, and tribal taxing power with much greater specificity than is now the case. If Congress were to clarify the respective taxing powers of the various governments in Indian country, the result should be a major simplification in the tax law. All other things’ being equal, simplification is better than complexity for a potential investor.

I realize that, for political reasons, this suggestion probably could not be implemented immediately. And, even if everyone were on board politically, a lot of thought would have to be given to the details of jurisdictional legislation. But given the economic problems in much of Indian country, a legislative fix of this sort is worth considering.

It is within Congress’s power to do this. Whatever the inherent, traditional powers of American Indian nations within their own country, it is now generally accepted (except by the tribes themselves) that the federal government has plenary power over the tribes. As the Supreme Court said in 2004, “[T]he Constitution grants Congress broad general power to legislate in respect to Indian tribes, powers that [the Court has] consistently described as ‘plenary and exclusive.’” *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting, *inter alia*, *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979)).

The idea of federal plenary power is not new. It comes from the Constitution, or so it is assumed, although no constitutional language speaks to the issue directly. The authority derives from Congress's power under the Constitution to regulate "Commerce . . . with the Indian tribes," U.S. Const. art. I, § 8, cl. 3, coupled with the Treaty Clause, U.S. Const. art. II, § 3, cl. 2 (under the authority of which the United States, until 1871, treated with many tribes), and the Supremacy Clause. U.S. Const. art. VI, cl. 2.

As a result of the federal plenary power doctrine, doing business in Indian country can take almost any form Congress thinks it should take. Congress could exempt on-reservation transactions, and the parties participating in those transactions, from federal taxation; it could provide that states have no power to tax any person doing business in Indian country or any transaction occurring there; it could take away (or increase) the tribes' otherwise sovereign power to impose taxes; it could impose whatever regulatory restrictions on doing business that it thinks appropriate; and so on. Rationalization of the tax rules would be good for its own sake, but it could also ameliorate the arguably excessive taxation attributable to multiple taxing sovereigns.

Clarification of taxing jurisdiction would not make the world perfect, of course. Interpretive difficulties would inevitably remain—simplification can go only so far with a complex body of law—but it is hard to imagine that the result of a conscientious congressional effort could be more confusing than what we have now.

I understand that American Indian nations are not happy with the idea of federal plenary power, and my suggestion will therefore not be welcomed by those who I believe would benefit from it. Tribal proponents reject the plenary power doctrine for many reasons, but the core argument is that the doctrine does not recognize the tribes as having an existence independent of the United States.

But a doctrine that gives primacy to Congress is not so bad if Congress acts in the best interests of the American Indian nations. The plenary power doctrine will still irritate the tribes; good results can only partially compensate for a doctrine that assumes congressional control of Indian nations. But good results are better than bad results, and economic development in Indian country is a good result.

## **II. Accelerated Depreciation and Indian Employment Credit: The Need for Predictability**

All witnesses at the hearing properly complained about the chronic uncertainty associated with section 168(j), providing for accelerated depreciation for "qualified Indian reservation property," and section 45A, providing for an "Indian employment credit" associated with employment of tribal members. Both provisions terminated at the end of 2007. Both provisions have generally been renewed only on an annual basis, and in some cases the renewal has not taken place until after the relevant provision has formally terminated.

In this discussion, I shall focus on section 168(j), but much of the following would apply to section 45A's unpredictable status as well.

Any reasonable investor wants to be as sure as possible that, if he begins operations in Indian country on the assumption that certain tax benefits will be available, those benefits will in fact be there. An investor contemplating an Indian country project in 2008 will not know whether depreciable property placed in service in 2009 will be eligible for accelerated depreciation, and might not even know whether property placed in service in 2008 will be eligible. Accelerated depreciation might be available in both years, if Congress says so, but the investor will not know that today, when planning.

That is crazy. Section 168(j) has no purpose other than to provide an incentive to invest in certain sorts of property in certain parts of the country. It is perverse to have an incentive so unclear in its application that it can have little or no incentive effect.

If we were drafting a tax code from scratch, I would resist having depreciation rules that vary depending on special circumstances like this. The Internal Revenue Code has become a monster in large part because of targeted provisions. Special treatment often has justification—former Congressman Barber Conable used to refer to the “tug of equity” contributing to the expansion of the Code—but special treatment decidedly does not lead to simplification. For example, the definition of “qualified Indian reservation property” is on its face eye-glazingly complex, as is the definition of “Indian reservation.” (Mr. Laverdure similarly complained about the complexity of section 45A, in that case making the provision useless for his tribe.)

In addition, it is always hard to know the extent to which a targeted tax break really changes behavior in the desired way. How much of the benefit of sections 168(j) and 45A has been captured by those who would have invested in Indian country anyway? I have no doubt that, at the margin, these provisions have changed behavior in a way favorable to Indian nations, but I am unsure about how wide the margin is.

Regardless of the merits of targeted provisions in general, however, we are not starting from scratch in looking at sections 168(j) and 45A. If the desirability of these sections is accepted, and Congress has made that determination often over the years, it makes no sense to have their status redetermined on an annual, or almost annual, basis. If the sections are deemed to be desirable, they should be reenacted with no termination date at all (the norm for Code provisions, after all) or with a termination date sufficiently far in the future that investors can plan accordingly.

### **III. Tax-Exempt Financing and the “Essential Governmental Function” Test: Any Changes Should be Legislative**

The witnesses at the hearing complained about the administrative interpretation of the “essential governmental function” test applicable to tax-exempt financing undertaken by American Indian nations. Section 7871, enacted in 1982, treats tribes as states for some purposes, including the issuance of tax-exempt bonds, except that section 7871(c)(1) explicitly requires that “substantially all the proceeds [of the borrowing] . . . be used in the exercise of any essential governmental function.” Section 7871(e), added in 1987, further provides that, “[f]or purposes of this section, ‘essential governmental function’ shall not include any function which is not customarily performed by State and local governments with general taxing powers.”

I disagree that the Internal Revenue Service should be faulted for interpreting the meaning of “essential governmental function” narrowly. If changes need to be made to extend tribal use of tax-exempt bonds, those changes should be made by Congress, as was proposed in the Tribal Government Tax-Exempt Bond Parity Act of 2007.

At bottom the tribal complaint is that the Internal Revenue Service has been more restrictive in its interpretation of tribal power than it has been with states and municipalities. Given the underlying goals of section 7871, it does not seem right that the purposes for which an Indian tribe can issue tax-exempt bonds should be fundamentally different from the purposes for which a state and municipality can issue such bonds. Noting that many municipal golf courses can be found around the country, Mr. Laverdure asked, not unreasonably, “Why can’t a tribe use the same authority to create a golf course as well? Instead, the IRS says we can’t.”

I agree with the statement of general principle—that tribes really ought to be treated the same as states for this purpose—and I understand that there are many municipal golf courses in the United States. It is nevertheless hard for me to interpret section 7871(e) to support golf courses as an “essential governmental function.” (If Dwight David Eisenhower were still president, perhaps I would feel differently about the significance of golf in American governmental life.) As common as such municipal courses are, it is a stretch to characterize operating a golf course as a “function . . . customarily performed by State and local governments with general taxing powers.” To my mind, the Internal Revenue Service is therefore applying an appropriately narrow interpretation of the language of section 7871(e). The Service should not be expected to twist statutory language to come to a result not clearly mandated by Congress.

It is unfortunate, I think, that golf courses have become the poster child for this dispute. I can understand the desire for conformity in the treatment of American Indian nations, on the one hand, and states and municipalities on the other. But a skeptic might wonder why tax-exempt financing should be available for *any* golf course. If conformity is the goal, perhaps greater scrutiny should be given to the sorts of activities eligible generally under section 103.

Furthermore, it strikes me that the focus on golf courses and similar recreational facilities misses the economic-development boat (to mix metaphors horribly). Just as Indian gaming is of little benefit to tribes in many parts of the country—as Mr. Desiderio testified, the gaming success stories have given the non-Indian population a misguided impression of economic conditions in Indian country—the most economically depressed American Indian nations are generally not going to be able to make a go of it by establishing golf courses. Some tribes will be able to benefit from golf courses, to be sure, but not many will. At bottom, focusing on golf courses is a diversion from important development issues affecting Indian country.

In any event, we can all agree that the definition of “essential governmental function” ought to be clarified by Congress, to eliminate uncertainty as much as possible in all contexts and to give guidance to the Internal Revenue Service about what congressional intentions really are.



**LUMMI INDIAN BUSINESS COUNCIL**  
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**WRITTEN TESTIMONY OF THE LUMMI INDIAN NATION**  
**“Indian Governments and the Tax Code: Maximizing Tax Incentives**  
**for Economic Development”**  
**Submitted to the Senate Committee on Finance**  
**July 22, 2008**

**“Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestricted power over Indian Nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the Institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted with a fundamental contradiction between our political rhetoric and our political realities.”** *(Milner Ball, Constitution, Court, Indian Tribes, American Bar Foundation Research Journal, Volume 1987, Winter, Number 1, p.3)*

The Lummi Nation appreciates the opportunity to submit this written testimony. We request that the Senate Finance Committee gives careful consideration to our recommendations and commit to working toward securing the respective amendments to the Indian Laws (25 USCA) and U.S. Tax Code. This would be a fair means to work with the Tribes for the future improvement of Indian Country and resolution of the serious historical damages imposed upon the Indian People, and the Indian Tribes, by the Guardian. Socio-economic marginalization of Indian People due to federal laws, policies, and taxation is unacceptable conduct of the “Guardian.” The following amendments would be a fair and reasonable interpretation of the Congressional Constitutional Powers secured under the Indian Commerce Clause (Article I, Section 8, Clause 3), the Treaty Clause (Article II, Section 2, Clause 2), and the Supremacy Clause (Article VI, Clause 2) and the “Oath” of Office (Article VI, Clause 3):

**Indian Owned Fee Land - Tribal Members:** Fee Lands owned or purchased by an enrolled tribal member or members, located within the exterior boundaries of the respectively established Indian reservation, whether established by treaty, executive order, or federal enactment, shall only be subjected to the taxation powers of the respective self-determining, self-governing Indian Nation by power of preemption authorized by this legislation;

**Indian Owned Fee Land - Non-Tribal Members:** Fee Lands owned or purchased by an Indian or Indians, enrolled in any other federally recognized Indian tribe or tribes, within the exterior boundaries of an Indian reservation, whether established by treaty, executive order, or federal enactment, shall only be subjected to the taxation powers of the respective self-determining, self-governing Indian Nation where said land is located, by the power of preemption authorized by this legislation;

**Fee Lands Owned by Indian Nation:** Any Fee Lands owned or purchased or received in the form of donations or otherwise by an Indian tribe or Nation shall be and is hereby declared to be exempt from taxation by an external, non-Indian local government, so long as said land is owned by the tribal government, and is essential to the performance of essential government functions and the delivery of services and benefits to the dependent tribal community membership;

**Indian Owned Fee Lands:** Any Indian, who is not a resident on the respective Indian Reservation where he owns Fees Lands may sell the said lands to a federally recognized Indian Nation at or below market value, and the “seller” shall be entitled to receive a tax deduction incentive of 50% of the market value, to be deducted from their federal income taxes for any and all incomes derived from off-reservation sources, whether or not such qualification is exercised as an entitlement of the individual, joint, or corporation entity. Such lands, when purchased by an Indian Nation, shall be exempt from any taxation by external, non-Indian governments;

**Indian Owned Fractionated Interests:** Any Indian owned fractionated interests in any estate, where said lands are protected by restricted fee patent or trust patent, located within the exterior boundaries of a federally recognized Indian Nation, may be sold or donated to the Indian Nation by the Indian Heir or Owner at fair market value or less and the value of said legal transfer or sale to the Indian Nation shall be deductible from any and all income taxes they may owe to the United States for off-reservation income sources not associated with their trust estates or interests therein;

**Non-Indian Owned Fee Lands:** Any Non-Indian Owned Fees Lands sold to a federally recognized Indian Nation at or below market value shall entitle the “seller” to receive a tax deduction incentive of 25% per year, for the next four years following the sale, based on the fair market value, to be deducted from their federal income taxes, whether or not such qualification is exercised as an entitlement of the individual, joint, or corporation entity. Such lands, when purchased by an Indian Nation, shall be exempt from any taxation by external, non-Indian governments;

**Taxation of Non-Indian Owned Lands:** Taxes upon lands owned by non-Indians, located inside the exterior boundaries of an Indian Reservation, whether established by treaty, executive order, or federal enactment, shall continue to be paid to and collected by the local non-Indian government; provided, however, that the local non-Indian government shall enter a tax distribution compact with the respective tribal government, providing 100% of the taxes paid minus up to 20% for the administrative fees for processing, handling, and distribution of the collections. This is authorized provided the Indian tribe shall ear-mark said taxes received for the improvement or maintenance of public rights of ways or resolution of boundary survey disputes involving Indian lands and said rights of way boundaries.”

**Indian Owned Natural Resources:** All income, revenues, distributions, and dividends paid to tribal people and generated from Natural Resources that are owned by an enrolled Indian or Indian tribe or tribal entity, and located inside the boundaries of an established Indian

Reservation, whether or not established by treaty, executive order, or federal statute, shall be exempt from federal and state taxation under the exemptions established by Section 7873 of the Internal Revenue Code.

**Indian Employees of Tribal Government:** Any enrolled Indian, working for a self-determining & self-governing Indian Tribe, or any of its entities or agencies, within the exterior boundaries of an established Indian Reservation, shall be exempted from the payment of federal income taxes provided the tribal government has preempted such tax by law, and that all said revenues so preempted shall be gathered by the tribal government on a regular basis, and provided said revenues are used for the performance of essential government functions and provision of essential services to the dependent tribal membership or for the protection of said memberships' entitlements and rights or the enhancement of tribal economic development. This section shall apply to all said Indian Employees' income regardless of the original source of income or revenues. The tribal government shall exercise said taxation jurisdiction over both tribal and non-tribal Indians working within or for their government or within an on-reservation economy;

**Non-Indian Employees of Tribal Government:** Any non-Indian employee, working for a self-determining & self-governing Indian Tribe, or any of its entities or agencies, within the exterior boundaries of an established Indian Reservation, shall be exempted from the payment of federal income taxes provided the tribal government has preempted such tax by law, and that all said revenues so preempted shall be gathered by the tribal government for the performance of essential government functions and provision of essential services to the dependent tribal membership or for the protection of said memberships' entitlements and rights, or the enhancement of tribal economic develop. This section shall apply to said Non-Indian Employees' income regardless of the original source of income or revenues. The taxing tribal government shall exercise said taxation jurisdiction over all non-Indian employees working within their government or on-reservation economy;

**Tax Forms for Tribal Income Taxation:** Any income tax collected from a tribal member, an Indian non-tribal member, any Indian corporation or other legal business entity, and any non-Indian individual or business located inside of Indian Country, shall be collected and documented by the Indian tribe that makes such collections and reported to the IRS on forms designed to document such income tax collection, to assure the IRS that said in-lieu income taxes have been collected. The IRS shall provide the individual or entities with the proper forms to assure that they are not held accountable for federal income tax when said taxes were already paid to respective tribal nation; and,

**Essential Government Functions** shall include the purchase by an Indian Nation of any lands owned in fee status by any tribal member, non-tribal member, or non-Indian person or corporate entity, as well as the purchase of any fractionated minor shares in any trust or restricted fee patent estates located within the exterior boundaries of any reservation- whether

established by treaty, executive order, or federal statute. It is an essential government function to develop tribal economies, commerce, and business for the generation of tribal revenues for investment into tribal health, housing, education, economic infrastructure, and jobs training initiatives.

The essence of the above provisions is to provide the Indian tribes with access and the means to purchase "fee lands" and "fractionated interests" of trust/restricted fee patent lands. It provides incentives for the Indians and non-Indians to sell their fee lands to the tribes. It provides incentives for the Indians to sell their fractionated minor interests in trust or restricted fee patent estates to the tribes. It provides each tribe with immediate cash resources to begin implementation of the new land management and consolidation requirements. This process authorizes each tribe to pay itself at the rate of the value of the taxes that it normally generates and would have paid out to the federal government. Now the tribe retains those taxes as a part of their self-governance rights and there is no need for a distribution formula or additional federal administrators to manage the system. A National Technical Advice Memorandum could be negotiated between the tribes and the IRS/Treasury to govern the collection and reporting processes. Assessed Taxes, by the pre-emption requirements, would be equalized to those assessed upon comparable properties located within the surrounding community. The tribes shall be authorized to invest a percentage of the retained taxes into the retirement funds or health plans for the tribal employees, as an incentive to maintain long-term employment with the tribes.

**INHERITED FEDERAL PROBLEMS:** "Indian Affairs" has been treated, over the past two centuries, as the "Indian Problem." This has, since then, been inherited by the Self-Determining, Self-Governing Indian Nations in the same shadow...the "problem. Federal & state laws have been enacted, and judicially interpreted, to institutionalize the idea that Indians are incompetent, non-competent at both the individual and tribal levels. Tribal & individual land titles have been destroyed by BIA mismanagement. Questions on superior tax authority have been heavily slanted toward non-Indian local & federal governments. Indian Country is over-taxed by non-Indian Country. Commercial & economic opportunities are nearly non-existent for Indian Country, outside of the "gaming industry."

The "Commerce Clause" of the Constitution can work to enhance Indian progress, once Congressional fears of Indian economic success are removed. We live in the aftermath of constant attempts to destroy our traditional forms of governance, extended family, society, land ownership patterns, natural resource use & management, spirituality, forms of justice. Our people suffer the highest infant mortality, shortest life expectancy, highest teenage suicides, poorest housing, lowest educational/vocational attainment, highest poverty, poorest health, and highest under/unemployment rates in the country. In addition, our lands lack proper infrastructure development to encourage industrial & commercial development (water, sewer, power, roads, etc.). The Congress routinely underfunds all Indian programs and projects during appropriations.

Requests for federal assistance were routinely routed only to the Bureau of Indian Affairs, BIA Education, and Indian Health Services, as if there were no federal obligations that reached the other departments or independent agencies. To address this legacy of the “Indian Problem” Indian Country needs their priority right to the tribal economy tax revenues.

**FICTIONS IN LAW:** There is a prevailing stereotypical belief, in the United States, that Indians are socially, racially, politically, and legally inferior to whites and white governments. For this reason it is hard for non-Indians to leave Indian Country to Indians and recognize that the Indian People can be self-governing without state and federal controls. Congress has “Plenary Power” to regulate and govern “Indian Affairs” that is superior to and denies any such claims asserted by the individual states.

This power was basically a duty of the U.S. to be self-regulating and self-policing in governing affairs “with” the Indian Tribes. It was not intended to be the constitutional power to govern the affairs “of” the Indian tribes. But, the legal fiction of Indian racial & political inferiority has corrupted the definition to mean that the lives and estates of the individual tribal Indian is in the absolute hands of the federal (BIA) government ... because the Congress declared said Indians (and their governments) to be incompetent. Plenary Power can be interpreted to be “*absolute power*” and as we know “*power corrupts and absolute power absolutely corrupts*” as we found in Cobell. This type of abuse is exemplified by the federal and individual state governments claiming superior right to all tax revenues that are generated inside of Indian Country.

**OF COURSE INDIAN COUNTRY IS CONCERNED:** Our tribal testimony seeks to set the record straight. Legal fictions and federal mismanagement have caused undue harm to Indians, tribal governments, and economic opportunities. Indian Country has been kept bankrupt due to the destruction of the Indian land titles via undivided fractionation of the Indian estates. The Indian Land Consolidation Act had a limited impact upon fractionated land problems suffered by the allotted tribes. Token Congressional appropriations have been available to buy back land for consolidation. Tribes compete for each dollar of the government handout. The recent Cobell Settlement proposals would have paid pennies on the dollar. Tribes need their land, the correlated income, and tax revenues for essential governmental functions and services, as well as for economic development within the exterior boundaries of the Indian Reservations. The federal tax laws (IRC) have to be amended to conform within constitutional intent, treaty law, and relieve Indian Country of revenue short falls. The fair and reasonable use of the Indian Commerce Clause (Art. I, Section 8, Cl. 3) by the U.S. Congress would be necessary to economically empower Indian Country. Fully funded Indian Self-Governance must be a mandate of the Congress. The solutions should resolve problems not create more. Taxation and representation go hand-in-hand with tribal Self-Governance; otherwise the Congress must fully fund Self-Governance in annual appropriations.

**THE FOUNDING FATHERS FIXED THE CONSTITUTIONAL RELATIONSHIP** but provided for a system to make changes if needed: The ‘fix-it’ system was that of Article V (the Amendment Power) - which made the constitution a living document, giving it the capacity to change with the necessities of time and the demands of the People. The 1787 Constitution was structured to address the relationships the national government would have within itself (Executive, Judiciary, Congress), with the individual states, with foreign states, and with the

Indian tribes. Contrary to the States' rights constitution of the Confederation era, the 1787 Constitution was based on people power. Thus, this constitution was founded on "Popular" and not "State" sovereignty. A part of the sovereignty compromise was to have the House represent the People and the Senate represent the states (until the Senate was made a 'Popular Sovereignty' institution by the 17<sup>th</sup> Amendment). And, the "People" became more diverse in that the 13<sup>th</sup> Amendment eliminated 'slavery' and the 14<sup>th</sup> Amendment allowed the Negroes, Gypsies, Hindus, Chinese, Irish, and other foreigners to become naturalized citizens, with the power to vote (15<sup>th</sup> Amendment). The 19<sup>th</sup> Amendment extended such rights to women. The 26<sup>th</sup> Amendment extended the right to vote to the 18 to 21 year old citizens. The form of national government has become more popular based over time, as the amendment power was exercised.

**EXCLUDING INDIANS NOT TAXED:** It bears repeating that the Founding Fathers recognized that the Indian Nations, and their people, were separate from the community known as "*We the People of the United States*...." They recognized that the type of government being formed was based on popular sovereignty. Neither the national nor the individual state constitutions were instruments designed by or for the Indian People. The national and state constitutions were creations of a '*Community of People*' which excluded the tribal Indians from membership, respectively. Thus, the 1787 Constitution used the words "*Excluding Indians not taxed*" (Art. I, Sec.2, Cl.3) to describe those people that were not within the community being represented by the national government or the individual states, and not taxed by a government that did not represent them.

After the Civil War, the subject of the tribal Indians status per citizenship came up again. It was resolved by the 39<sup>th</sup> & 40<sup>th</sup> Congresses, during the Reconstruction Debates, that the words "*Subject to the jurisdiction thereof*" in the 14<sup>th</sup> Amendment, Section 1 was meant to exclude 'tribal Indians' from national citizenship- since they were not subject to the jurisdiction of the United States- which was why the U.S. had treaties (per Art. II, Sec. 2, Cl.2; Art. III, Sec. 2, Cl.1' Art. VI, Cl. 1-3) with them, and enacted special laws (Art. I, Sec. 8, Cl.3) to govern the trade & commerce relationships with them. And, to make sure that the individual states could not make tribal Indians citizens if the United States could not, the 14<sup>th</sup> Amendment, Section 2 reiterated the words "*excluding Indians not taxed*." The 1866 Civil Rights Bill (14 Stat. 27) repeated the same words, to assure that it was clear that the bill did not apply to the tribal Indians. Tribal Indians were separate and owed their allegiance to their tribal nations first and foremost. It remained true that states could not treaty (Art. I, Sec. 10, Cl.1) or compact with the Indians (Art. I, Sec. 10, Cl. 3) - unless the tribes are, somehow constitutionally, classified the same as 'states' as found in Cherokee (1832). Indians Affairs has remained a matter of national power (i.e., plenary to the national government to the exclusion of the individual states), except in those few instances where P.L. 280 may have been lawfully applied at the state level by state amendments of its applicable constitutional disclaimer.

**DOI SOLICITOR'S OPINION (NOV. 7, 1940) ON THE SUBJECT "EXCLUDING INDIANS NOT TAXED":** The DOI Solicitor reviewed this question on "excluding Indians not taxed." He proved that 'tribal Indians' were not supposed to be national or state citizens under the constitutional system. But, in the end, without reviewing any questions as to whether or not the imposed citizenship violated constitutional intent, he concluded the tribal Indians were made naturalized citizens by the 1924 Citizenship Act and the term 'excluding Indians not taxed' no

longer applied to anyone that could be recognized as such (i.e., tribal Indians that are not taxed). In consequence, Indians, as citizens, were no longer to benefit from the concept of 'not taxed.' Indian citizens, it was reasoned, became completely taxable under the 16<sup>th</sup> Amendment and the IRS went after tribal Indians in force over time. Thus, this type of reasons would hold that the US Congress, and its lawyers, could declare the term "People" in the Constitutional Preamble is no longer valid and that by definition there are no "People" to delegate the power therefore democratic, republican representation is no longer a duty of the Congress or national government. Of course, it is a fiction, when applied to the tribal Indians or the People.

In 1787, taxation and representation went hand in hand; the two ideas could not be separated from what it meant for the "People" to have a delegated, representative form of government and to be taxed by the government of their choosing, and to hold that government accountable. Under the original interpretations, tribal Indians were neither represented by the national government nor taxable by it. Both questions of 'taxation' and 'representation' of the tribal Indians were raised in the Reconstruction Debates (39<sup>th</sup>/40<sup>th</sup> Congresses) and the 14<sup>th</sup> Amendment was drafted to assure neither was possible under the constitutional amendment. The 16<sup>th</sup> Amendment only applies to the tribal Indians if the 1924 Act is a legal amendment to the original 1787 Constitution and the 14<sup>th</sup> Amendment. However, we believe, as tribal leaders, that the Internal Revenue Code would only apply to those Indians that live and work outside of Indian Country, separated from their "tribal" communities and not dependent upon protection by their tribal nation. We know that an act of Congress is not a lawful amendment per Article V requirements. One thing the 1940 Opinion did was to leave clues to follow back to the 1787 constitutional intent, and predating that event. Our rights, as tribal Indians and tribal governments, to be represented by our own leaders, to be inherently governed over by our own traditional forms of government (however modified since treaty times), and to not be taxed inside our treaty reserved territories by non-Indian governments (state or federal) is a right secured until the day the United States returns all the treaty ceded lands back to the Indian people and their government. The Solicitor's conclusion was written, we believe, by a man that obviously believed the "demanded conclusion" was wrong but he was a good federal employee and concluded what was demanded of him....that the US could legally tax the constitutionally un-taxable tribal Indians.

#### **INTERNAL REVENUE CODE, SECTION 7873 - INDIAN FISHING RIGHTS**

**EXEMPTIONS:** At the request of a past (anti-Indian) U.S. Senator, the IRS went after the Indian Fishing Rights Income of tribal people in the Pacific N.W. and Great Lakes regions. In the Indian Fishing Rights Exemption campaign, the Lummi Treaty Task Force argued that treaty fishing rights income was exempt from federal and state taxation since the natural resources were specifically reserved for the tribal people, with a share already ceded to the United States (and the state thereby). The Task Force argued that to take another share in the form of (federal or state) taxation was a treaty violation and therefore illegal. The Task Force argued that for the United States (via the IRS) to exercise such power "to tax the (treaty) right was to destroy that (treaty-protected) right." We argued the "excluding Indians not taxed" language was still constitutionally valid as so much applies to our existence as a tribal people with treaty rights and both being protected by tribal government, and all resident within our nations exterior boundaries. Eventually, in concluding agreement, the Congress enacted the 'fishing rights tax exemption' language as Section 7873 of the IRC. What you must understand is that there is no difference between a reservation of treaty fish resources versus treaty reserved coal, oil, natural gas,

uranium, timber, gold, silver or other natural resources reserved for/by the tribal Indians via treaties-made. Federal and state taxation should never touch incomes gained by tribal Indians and Indian tribes that are derived from the management, harvest, processing, transporting, marketing, or distribution of treaty reserved natural resources. The same holds true whether or not the reservation was created by Executive Order or Act of Congress. If the income earned is by a tribal Indian or Indian tribe or one of its legal corporate personalities it remains, constitutionally, not taxable.

Thus, what we have, then, is the U.S. proclaiming itself (via Congressional enactments or executive policy or court opinion) to be the guardian of the vast Indian estates. It controlled the incomes derived from those estates, since they controlled contracting associated with the estates and the management of the resulting Individual Indian Money Accounts. But, somewhere, in the process, it began to take a share of the estate value for itself in the form of taxation. Thus, the guardian reaped the benefits before the ward (tribal Nations and tribal Indians) ever received any share (see Cobell) of their own reserved estates. The full benefit of the trust income was limited to the individual but not the other members of the family, extended family, community, or nation—even though the whole natural resource base was reserved for their exclusive use.

**BILLIONS OF DOLLARS IN FEDERAL AND STATE TAXES HAVE BEEN ILLEGALLY EXTRACTED FROM INDIAN COUNTRY OVER TIME** was a claim once made by the Center for World Indigenous Studies, in the mid-1980's. Indian tribes and tribal Indians should not pay federal or state taxes on incomes derived from natural resources they own, as a result of treaty, executive order, or federal statute. Tribal Indians should not pay taxes on incomes derived from SD/SG funds to any outside, non-Indian government. Any income taxes assessed by a tribal government should be a pre-emption of the federal income taxes or any state taxes in those states that have an income tax. Cobell was one form of violation of the trust owed to Indians, illegal taxation is another. Indian Tribal governments cannot stabilize if the state and federal governments are able to pre-empt all tribal taxes inside of Indian Country. Our national position, as tribal leaders, on the question of "Taxation" of tribal Indians and Indian Nations must be "**Absolutely Not!**".

Thank you for accepting this written testimony from the Lummi Nation.

Hy'shqe. Hoyt Siam. [Thank you; until the next time that I am before you.]

STATEMENT SUBMITTED BY MARTY SHURAVLOFF, EXECUTIVE DIRECTOR  
KODIAK ISLAND HOUSING AUTHORITY

ON BEHALF OF THE NATIONAL AMERICAN INDIAN HOUSING COUNCIL

TO THE UNITED STATES SENATE COMMITTEE ON FINANCE

REGARDING THE HEARING ON  
INDIAN GOVERNMENTS AND THE TAX CODE:  
MAXIMIZING TAX INCENTIVES FOR ECONOMIC DEVELOPMENT

August 6, 2008

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**Introduction**

On behalf of the National American Indian Housing Council (NAIHC), I respectfully submit testimony to Chairman Baucus, Ranking Member Grassley, and the distinguished members of the Senate Committee on Finance (“the Committee”), regarding the Hearing on Indian Governments and the Tax Code: Maximizing Tax Incentives for Economic Development.

I serve as the Executive Director of the Kodiak Island Housing Authority in Kodiak, Alaska. I am an enrolled member of the Lesnoi Village, Kodiak Island, Alaska. I am also the Chairman of the National American Indian Housing Council (NAIHC).

The National American Indian Housing Council was founded in 1974 to support and advocate for tribes and tribally designated housing entities (TDHEs). For nearly 35 years, the NAIHC has assisted tribes with their primary goal of providing housing and community development for American Indians, Alaska Natives and Native Hawaiians. The NAIHC consists of 266 members representing 460 tribes. The NAIHC is the only national Indian organization whose sole mission is to represent Native American housing interests throughout the Nation.

First of all, I would like to thank the Chairman, Ranking Member and the Committee for holding this hearing on the tax issues which uniquely affect Indian Country. Housing and community and economic development go hand in hand so when one is spurred the other will also thrive.

The lack of significant private investment, functioning housing markets and the dire economic conditions most Indian communities face mean that federal dollars make up a

significant amount of total housing resources for Native people. We hope that this testimony will offer the Committee our perspectives on what opportunities have borne fruit and what barriers remain to Indian tribes which endeavor to develop their communities and economies and improve the lives of their People.

#### **The Native American Housing Assistance and Self-Determination Act**

Built on the solid foundation of Indian self-determination policy and the law of the same name, the Native American Housing Assistance and Self-Determination Act (NAHASDA) was signed into law in 1996 and enacted to meet the housing needs of Indian people by improving tribal capacity and increasing tribal decision-making in the housing arena. Key elements of NAHASDA are the negotiated rule-making process, which allows for greater tribal participation in promulgating regulations, and the Indian Housing Block Grant (IHBG), which replaced confusing and scattered grant programs. The IHBG now affords tribes the flexibility to design housing unique to each Indian community's need and encourages tribes to develop long-term comprehensive housing strategies through the preparation of housing plans.

#### **Indian Housing Block Grant**

The IHBG has become the single largest source of capital for housing development, housing-related infrastructure, and home repair and maintenance in Indian Country. NAHASDA encourages tribes to administer their IHBG according to the unique and local circumstances of each Indian Nation. Since Fiscal Year 1998, nearly \$7 billion in federal housing assistance has been invested in Indian Country helping Indian families make down payments on homes, make monthly rents, helped with home rehabilitation and build new housing units.

While there have been improvements, Indian housing is still far more substandard than for the rest of the country. An estimated 200,000 housing units are needed immediately in Indian Country and approximately 90,000 Native families are homeless or under-housed. Overcrowding on tribal lands is almost 15 percent, and 11 percent of Indian homes lack complete plumbing and kitchen facilities.

Despite all that, tribes still exercise a great deal of creativity, and they employ resilient resourcefulness to house their people. Under NAHASDA's flexibility, the IHBG enables tribes unprecedented opportunities to use different sources of financing to meet housing needs in their community.

#### **Low-Income Housing Tax Credits**

One way tribes can spur new housing development is through leveraging the IHBG. In 1986, the Congress changed the Internal Revenue Service Tax Code (Code) to encourage home ownership through the creation of low-income housing tax credits (LIHTC). LIHTC projects receive federal income tax credits over a 10-year period using a formula that takes into account certain eligible costs called the eligible basis. In 2000, the Code specified that the IHBG can be used for rental assistance in LIHTC projects.

In 2007, HUD cleared the path a little more for tribes to participate in LIHTC projects through a new rule. Prior to the publication of the rule, if a tribe proposed using IHBG funds for project-based or tenant-based rental assistance in LIHTC projects, it was considered a model activity requiring HUD approval. Now such federal approval is not required. Project-based or tenant based rental assistance in LIHTC projects are eligible affordable housing activities and can be included in an Indian Housing Plan.

While word about LIHTC leveraging is getting around Indian Country, there is still only a small number of tribes that have undertaken LIHTC projects. Education and capacity building of tribal housing authorities are key in increasing usage of the program. There is a clear need to increase the training opportunities for housing authorities in the area of LIHTC program development. Notably, the NAIHC membership has requested additional specific LIHTC trainings and desire more opportunities to work with investors, program developers, compliance experts and consultants, and State Housing Finance Agencies and Housing Departments.

In fact, this year the NAIHC membership made low-income housing tax credits a priority of the organization. The NAIHC membership resoundingly approved Resolution 2008-09, "To Urge Changes to "Low Income Housing Tax Credit" Law and Regulations to Ensure Competitive Access By Indian Tribes and Tribally Designated Housing Entities."

In Resolution 2008-08 the membership directs NAIHC to:

- urge Congress and the appropriate federal agencies to reexamine the factors adversely affecting Indian housing participation in the Low-Income Housing Tax Credit program, and to make such legislative and regulatory changes as may be necessary to enhance tribal participation, including but not limited to: (1) redefining the use of Qualified Census Tracts (QCTs) and/or Difficult Development Areas (DDAs) to recognize specific Indian area need as opposed to county-wide criteria; (2) requiring a point scoring system that considers poverty levels specifically on Indian lands; and (3) considering tax credit set-asides specific to Indian country;
- urge the appropriate regulatory commissions or agencies in all States to re-examine the factors adversely affecting Indian housing participation in the Low-Income Housing Tax Credit program and to make such legislative and regulatory changes as may be necessary to enhance tribal participation;
- urge State governors to appoint an Indian representative to the boards of commissioners or appropriate governing bodies of each State's Housing Finance Agencies;
- urge all Housing Finance Agencies to re-examine and reconsider any recent rule changes that have reduced Indian housing competitiveness; and
- request that National Congress of American Indians, the Affiliated Tribes of Northwest Indians, and all other regional Native American associations and organizations join NAIHC to advocate aggressively for these changes.

The NAIHC stands ready to work with the Committee to further those efforts.

#### **Physical Infrastructure - The Foundation of Economic Development**

Housing development in Native American communities involves more than simply building dwelling units. The ability of Indian Tribes to strengthen their economies through revenue generation and job creation is hindered by a lack of physical infrastructure such as roads, bridges, railroad spurs, electricity, water facilities and a host of others. At the same time, it is unlikely the Federal Government has the will or the resources to help build these

physical assets. Consequently, Indian Tribes must raise the capital themselves. Authorizing the issuance of tax-exempt debt is one way Congress can give Tribes the help they so desperately need. Congress can also enact a long-term reauthorization of the Accelerated Depreciation allowance that encourages private investors to locate business property, equipment, and other infrastructure on Indian lands. Taken together, these and other incentives can assist the Tribes in strengthening their economies and improving the standard of living of their members.

#### **Conclusion**

Thank you for the opportunity to submit our perspectives, concerns and recommendations. On behalf of the NAIHC Board of Directors and membership, thank you for your continuing efforts to improve the housing conditions of American Indian, Alaska Native and Native Hawaiian peoples.



**NATIONAL AMERICAN INDIAN HOUSING COUNCIL  
RESOLUTION #2008-09**

**A RESOLUTION TO URGE CHANGES TO “LOW INCOME HOUSING TAX CREDIT” LAW AND REGULATIONS TO ENSURE COMPETITIVE ACCESS BY INDIAN TRIBES AND TRIBALLY DESIGNATED HOUSING ENTITIES**

- WHEREAS, the National American Indian Housing Council (NAIHC) represents the housing interests of American Indian tribes and Alaska Native villages and more than 266 tribally designated housing entities; and
- WHEREAS, the stated purpose of the organization is to promote advocacy for policy and legislative changes that will favorably impact our primary goals of providing safe, decent, and affordable housing for Indian people in a manner recognizing the unique government-to-government relationship of tribes and the federal government, and
- WHEREAS, developing new housing for low and very low income tribal members so that they may have safe, healthy, and affordable housing is a priority of our Northwest Indian Tribes, as it is for other tribes throughout the United States; and
- WHEREAS, federal funds available to tribes through their NAHASDA Indian Housing Block grants are very limited and are insufficient by themselves to develop new housing to meet the need, especially as it affects small tribes; and
- WHEREAS, federal low-income housing tax credits, per Section 42 of the Internal Revenue Code of 1986, as amended, are becoming more and more of a vital funding resource for new Indian housing construction as well as home rehabilitation across the country; and
- WHEREAS, some Northwest Tribes, as well as other tribes across the country, have been successful in beginning to use tax credits to solve their housing needs; and
- WHEREAS, there are, however, a number of obstacles under existing law and regulations, both at the federal and the State level, that adversely impact the competitiveness of tribes in applying for low-income housing tax credits; and
- WHEREAS, defined Qualified Census Tracts (QCT) and Difficult Development Areas (DDA) currently in effect for the State of Washington, which are set by HUD, do not take into consideration, per se, the impoverished nature of Indian reservations

and Indian housing needs and consequently impoverished tribes, especially those not located in currently defined QCTs and DDAs, are penalized to the extent they can no longer qualify for low-income housing tax credits; and

WHEREAS, recent changes in State of Washington low-income housing tax credit scoring criteria effective beginning in 2008, aside from the issue of currently defined QCTs and DDAs, have made it difficult if not impossible for all tribes within the State of Washington to be competitive for low income housing tax credits, regardless of whether they are located in QCTs or DDAs, especially with increased competition for non-Indian applicant projects.

**NOW THEREFORE BE IT RESOLVED that the National American Indian Housing Council urges Congress and the appropriate federal agencies to reexamine the factors adversely affecting Indian housing participation in the Low-Income Housing Tax Credit program, and to make such legislative and regulatory changes as may be necessary to enhance tribal participation, including but not limited to: (1) redefining the use of QCTs and/or DDAs to recognize specific Indian area need as opposed to county-wide criteria; (2) requiring a point scoring system that considers poverty levels specifically on Indian lands; and (3) considering tax credit set-asides specific to Indian country; and**

**BE IT FURTHER RESOLVED, that the National American Indian Housing Council urges the appropriate regulatory commissions or agencies in all States to re-examine the factors adversely affecting Indian housing participation in the Low-Income Housing Tax Credit program and to make such legislative and regulatory changes as may be necessary to enhance tribal participation; and**

**BE IT FURTHER RESOLVED, that the National American Indian Housing Council urges State governors to appoint an Indian representative to the boards of commissioners or appropriate governing bodies of each State's Housing Finance Agencies; and**

**BE IT FURTHER RESOLVED, that the National American Indian Housing Council urges all Housing Finance Agencies to re-examine and reconsider any recent rule changes that have reduced Indian housing competitiveness; and**

**BE IT FINALLY RESOLVED, that the National American Indian Housing Council requests that National Congress of American Indians, the Affiliated Tribes of Northwest Indians, and all other regional Native American associations and organizations join NAIHC to advocate aggressively for these changes.**

#### CERTIFICATION

As the duly appointed Secretary for the National American Indian Housing Council, I hereby certify that Resolution #2008-09, was adopted at NAIHC's 34<sup>th</sup> Annual Business Meeting in Seattle, Washington on May 14, 2008, with a quorum present.



Marty Shuravloff, Chairman



Jason Adams, Secretary

National American Indian Housing Council  
Federal Housing Programs and Related Infrastructure Issues

July 21, 2008

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INTRODUCTION

Housing development in Native American communities involves more than simply building dwelling units. Because most American Indian reservations and Alaska Native communities are in geographically remote and rural areas, community development often starts with the design and construction of basic physical infrastructure and amenities that most Americans take for granted. This includes water and wastewater infrastructure, electricity, heat and cooling systems, and a host of others. Providing these assets while building homes is an extremely costly endeavor and one reason for the high cost of housing development in Native communities.

In Alaska Native Villages, for instance, water and wastewater treatment systems are often insufficient or non-existent with nearly 33 percent of rural Alaskan homes without indoor plumbing. Without adequate sewer systems, villagers must use alternative waste disposal methods that can create risk of health complications for the community and/or possibly create an environmental disaster by contaminating the same water supply used for drinking.

According to the U.S. Indian Health Service as recently as 1995, the gastrointestinal death rate for American Indians and Alaska Natives was 40 percent higher than the rate for all other races in the United States. Safe drinking water is essential in preventing the spread of several diseases including, hepatitis, typhoid, cholera, and paratyphoid.

INDIAN HEALTH SERVICE

The U.S. Indian Health Service (IHS) strives to uphold the Federal government's obligation to promote the health of American Indian and Alaska Native people and to protect the sovereign rights of Indian Tribes. One part of the IHS' mission is to ensure that comprehensive personal and public health services are available and accessible to American Indians and Alaska Natives.

The Office of Environmental Health and Engineering within IHS houses the Sanitation Facilities Construction Division which is charged with providing American Indian and Alaska Native homes and communities with essential water supply, sewage disposal, and solid waste disposal facilities.

Federal funding is insufficient to address the health needs of Native people and for these activities in particular, competition is intense, among Indian Tribes and Alaska Native Villages for the limited funding that is available. In addition to funding shortfalls, there are restrictions in the law that prevent IHS Facilities Construction funding dollars from being blended with Federal housing funds in the construction of homes in Native communities.

#### NATIVE AMERICAN HOUSING ASSISTANCE & SELF-DETERMINATION ACT

The *Native American Housing Assistance and Self-Determination Act of 1996* (“NAHASDA,” as amended, 25 U.S.C. §4101) addresses the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, Alaska Native villages and on Native Hawaiian Home Lands. Since its enactment, NAHASDA has enhanced Indian tribal capacity to address the substandard housing and infrastructure conditions in by encouraging greater self-management of housing programs, greater leveraging of scarce Indian Housing Block Grant (IHBG) dollars, and greater use of private capital through Federal loan guarantee mechanisms.

Housing activities that may be funded with NAHASDA assistance include new construction, rehabilitation, acquisition, infrastructure, and various resident support services. Housing assisted with these funds may be either for rental or for homeownership. NAHASDA funds can also be used for certain types of community facilities if the facilities serve eligible, low-income residents. While NAHASDA was first enacted in 1996, it has been amended three times: in 1998, 2000, and 2002. Its current five-year authorization expired at the end of 2007.

#### *A. House Legislation (H.R. 2786)*

The House of Representatives passed H.R. 2786 – the Native American Housing Assistance and Self-Determination Reauthorization Act of 2007 on September 6, 2007. H.R. 2786 reauthorizes NAHASDA until 2012. Section 3 authorizes a new “Subtitle B – Self Determined Housing Activities for Tribal Communities” which launches a five-year demonstration project in which participating Tribes or Tribally Designated Housing Entities (TDHEs) may set aside a portion of their IHBG to devote to housing activities with accompanying management flexibility in the form of reduced agency reporting, approval, and oversight.

Section 233(b) prohibits amounts under Subtitle B from being used to finance physical infrastructure. The rationale for this prohibition that was articulated at the time H.R. 2786 was drafted was that NAHASDA is a “housing program” and that there are other programs and funds dealing with infrastructure. This rationale ignores one of the fundamental principles of the Act: that Indian Tribes (not HUD or the Congress) know best the housing and related infrastructure challenges in their communities and should be free to address those challenges with the funds appropriated by Congress. NAHASDA sought to end this program “stove-piping” by breaking down program and funding

barriers and encouraging Tribes to blend these funds into a coordinated strategy for the benefit of their members.

*B. Senate Legislation (S.2062)*

The Senate passed S.2062 – the Native American Housing Assistance and Self-Determination Reauthorization Act of 2007 on May 22, 2008. S.2062 reauthorizes NAHASDA until 2012. An amendment to Section 202 specifically includes necessary infrastructure to the list of eligible affordable housing activities under the Act. Like its House counterpart, S.2062 establishes a new “Subtitle B – Self-Determined Housing Activities for Tribal Communities” to “provide Indian tribes with flexibility” in the use of block grant funds “in manners that are wholly self-determined by the Indian tribe for housing activities involving construction, acquisition, rehabilitation, or infrastructure.”

DISCUSSION

For decades the lack of an adequate physical infrastructure has hindered the harmonious development of housing and related economic development in Native communities, with predictably negative effects on the material standard of living of Native people. In addition to the ongoing unmet needs in Native communities, few would argue that a sound physical infrastructure plays a vital role in encouraging more productive tribal economies. As is the case with non-Indian communities, a well built and maintained road system, housing, electricity, wastewater, and land improvements all contribute the necessary foundation for economic growth, increased safety and improved quality of life for Native people.

Recurring challenges to the physical infrastructure issue involve access to capital and financing, conflicting statutory and regulatory provisions, and a need for comprehensive planning. Current appropriations language prevents IHS sanitation funds to be used in conjunction with NAHASDA funds to connect new water and wastewater infrastructure to the new homes.

With the foregoing context, the new Subtitle B authorizes a five-year demonstration period during which a Tribe or TDHE may set aside a portion of its IHBG to devote to housing activities with accompanying management flexibility in the form of reduced agency reporting, approval, and oversight. Since housing construction takes place in below ground and above ground phases, Tribes could greatly benefit from the flexibility that Subtitle B will provide especially in planning new housing development.

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NAIHC is the only national organization that promotes, supports, and encourages Indian tribes and tribally-designated housing entities (TDHEs) in their efforts to provide culturally-relevant, decent, safe, sanitary, and affordable housing for American Indians and Alaska Natives. NAIHC has a membership of 267 tribes and TDHEs, representing nearly 460 Indian tribes, and provides its members with training, technical assistance, research, communications and advocacy.

Statement for the Record of John P. Jurrius, President and CEO  
Native American Resource Partners, LLC

To the Senate Committee on Finance

Oversight Hearing

"Indian Governments and the Tax Code:

Maximizing Tax Incentives for Economic Development"

July 22, 2008

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On behalf of the Native American Resource Partners, LLC, (NARP), I am pleased to submit this prepared statement for the Committee on Finance's hearing record for the hearing held on July 22, 2008 entitled "Indian Governments and the Tax Code: Maximizing Tax Incentives for Economic Development."

Beginning in the early 1990s until late 2007, I served several tribal governments in various capacities including financial advisor and energy consultant. These tribes included some of the pre-eminent tribal energy leaders in the United States such as the Southern Ute Indian Tribe of Colorado, the Jicarilla Apache Tribe of New Mexico, and the Ute Tribe of the Uintah and Ouray Reservation of Utah. I was honored to work with these tribes and proud of the success they have achieved and the good things they are now able to do for their members.

As the President and CEO of a private equity firm dedicated to working with Indian tribal governments in developing their energy resources, I am keenly aware of the importance of incentives to attract investment capital and employment to Indian reservations.

Despite recent improvements in economic conditions in Indian country, reservation economies continue to suffer high rates of unemployment and poverty, joblessness, poor health, and an array of related social ills.

As this Committee knows, many Indian tribes have significant natural resources such as timber, coal, natural gas, oil, and other assets that are capable of being developed. The tribes' potential for improving their standard of living is stifled by geographical remoteness, distance from markets and population centers, a lack of physical infrastructure, ineffective combinations of governmental and commercial functions, and most of all a lack of capital.

The recipe for development in my experience is a combination of various factors including an able and determined tribal leadership, technical expertise, and capital in amounts that are required for large-scale energy projects.

While a sizeable number of Indian tribes are blessed with able leaders and abundant natural resources, few have the technical expertise and the access to capital to succeed in developing their energy resources.

Three factors convince me that Indian country may be on the verge of broad-based economic development made possible by the prudent development of energy resources on tribal lands. These factors are:

- o The enactment of the Indian Tribal Energy Development and Self Determination Act of 2005;
- o The enormous energy reserves owned by the tribes; and
- o The current pricing environment for energy products.

The new law will encourage both renewable and non-renewable energy development by liberalizing the approval process and freeing tribes from the necessity of securing Federal approval for energy leases and business agreements.

Second, Indian tribes have energy reserves that are sizeable and of world-class quality. As far back as 2001, the U.S. Department of Interior estimated that, if developed, tribal coal, oil, and gas would generate hundreds of billions of dollars in revenues to the tribes and their members.

To give the Committee some perspective in terms of the potential of Indian energy, Indian gaming revenues total some \$25 billion annually. If Indian energy receives the kind of nurturing, technical expertise and capital that is called for, we have every reason to think energy revenues will dwarf Indian gaming in just a few short years.

In terms of capital to finance energy projects, the reality is that the Federal government simply does not possess the capacity to be a reliable financier. The vision of the founders of NARP, LLC is that private capital can provide the financing for tribal energy projects and will in fact invest alongside the tribes in *tribal energy companies*.

Whereas the historical model of energy development in Indian country relied on a passive lessor-lessee relationship between an Indian tribe and its private partner, a more successful model will help tribes build and operate tribal enterprises that bring significant returns to the tribe and jobs and incomes to the tribal members.

This is not to say that private sector partners would be excluded. To the contrary, the experience of the Southern Ute Indian Tribe and the Ute Tribe of Utah demonstrate that private energy companies are solid and long-term partners of those tribes interested in strengthening their economies through energy development.

Attracting private entities to Indian reservations is an important objective and will greatly help Indian tribes develop their economies. The Committee's focus on the limitations of the Internal Revenue Code in terms of the availability of tax-exempt bonds

and the failure of Congress to provide certainty to the investment community regarding the 1993 Indian business development tax incentives is welcome indeed.

Congress should ensure that Indian tribes can issue tax-exempt debt under the same circumstances as States and local governments and Senator Smith's pending legislation (S.1850) would do just that.

In addition, Congress should provide a long-term extension to the Accelerated Depreciation provision for equipment and property placed in service on Indian reservations and the Wage and Health Credit for those private employers that hire Indians for those commercial activities. Congress should also ensure that incentives related to renewable and non-renewable energy resource development are reauthorized on a long-term basis.

I thank the Committee for the opportunity to submit this statement for the record and look forward to working with the Committee on these important matters in the near future.

Prepared Statement of the Honorable Clement J. Frost  
Chairman, Southern Ute Indian Tribe  
To the United States Senate Committee on Finance  
Oversight Hearing  
“Indian Governments and the Tax Code:  
Maximizing Incentives for Economic Development”  
July 22, 2008

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Introduction and Background on the Southern Ute Indian Tribe

On behalf of the Southern Ute Indian Tribes (“Tribe”) I am pleased to submit the following Statement for the Record relating to this Committee’s Oversight Hearing entitled “Indian Governments and the Tax Code: Maximizing Incentives for Economic Development.” The Tribe has more than 1,400 members and is located in the Four Corners area of Southwest Colorado. After decades of determined and often difficult effort, the Tribe now boasts an unemployment rate of between 5-6%, and employs more than 1,500 people who provide service to either the tribal government or to one of the Tribe’s many business enterprises.

I believe that the experience of the Tribe in strengthening its economy through energy resource development and diversification can provide insights to this Committee as well as to other Indian Tribes in the U.S.

Energy Development on Tribal Lands 1940s - Present

In the late 1940s, under the supervision of the Bureau of Indian Affairs, the Tribe began granting oil and gas leases on the Tribe’s lands. Over the course of the next 5 decades, more than 60 private oil and gas companies came onto the Tribe’s reservation to engage in oil and gas production. Despite the large number of operators and the extensive activities they undertook, the Tribe and its members remained mired in poverty. Further, the Tribe’s leaders felt that the Tribe must take a direct role in monitoring and enforcing compliance with the terms of its leases, which were generally dictated by BIA standard forms.

In 1980, the Tribe created its own Energy Department, which compiled basic data, maps and documents related to the Tribe’s energy resources. During this time, the Tribe also maintained a moratorium on future leasing until such time that effective resource management strategies could be developed by the Tribe. Aggressive oversight and enforcement of lease terms resulted not only in increased production, but also the termination of some leases that had been improperly held for decades merely for speculation. In 1986, the Tribe began negotiating directly with industry under the *Indian Mineral Development Act of 1982*, and consummated a

series of complex mineral development agreements that emphasized significant long-term benefits and resource management powers for the Tribe. The Tribe's leaders also felt it was critical, however, for the Tribe to develop direct operational expertise in order to maximize control and financial benefits related to its resource development.

In 1992, the Tribe formed Red Willow Production Company whose first task was to buy back leases and enhance the efficiency of the oil and gas wells located on tribal lands. Red Willow proved enormously successful and within a decade had helped transform the Tribe's role in energy development from that of a passive royalty recipient to a dynamic actor and the premiere Indian tribal energy producer in the Nation. In 1994, the Tribe also entered into a joint venture, known as Red Cedar Gathering Company, to acquire, expand and manage gas gathering and gas processing operations on the reservation. Today, approximately one percent of the natural gas consumed each day by the Nation travels through facilities owned by Red Cedar Gathering Company.

The Tribe's leaders also recognized, however, that its oil and gas resources were finite and that long-term success required diversified investments that could take the place of revenues derived from oil and gas development when those resources were depleted. In 2000, the Tribal Council approved implementation of a long-term financial plan and created the Southern Ute Indian Tribe Growth Fund ("Growth Fund") for that purpose. Using its valuable energy base, the Tribe invested significant tribal revenues into other areas of endeavor so that by 2005, the Tribe owned commercial assets valued at more than \$2 billion, had an "AAA" bond rating by Wall Street credit agencies, and had successfully diversified its economy to include all aspects of energy development, gaming, commercial real estate, banking and finance, health care and medical products, and a host of other revenue generating operations across the U.S.

#### The Internal Revenue Code and Economic Development in Indian Country

##### *1. Business Development Incentives and Tax Exempt Bonds*

This Committee's July 22, 2008, hearing focused on three provisions in the Internal Revenue Code (IRC) as follows:

- The Accelerated Depreciation for business property on Indian reservations (§ 168);
- The Indian employment tax credit (§ 45A); and
- Tax exempt bond financing authority (§ 7871).

The first two provisions were first enacted as part of the *Omnibus Budget and Reconciliation Act of 1993* and authorized for a ten-year period (1993-2003). Section 168(j) of the IRC provides for a faster write-off than otherwise allowed for business equipment, facilities, and related infrastructure placed in service on Indian reservations. The accelerated depreciation of real property also applies to qualified infrastructure property *located off the reservation* as long as it provides access to business property on tribal lands. By the nature of the accelerated depreciation provision, Federal taxpayers that deploy large capital investments depreciated over a long period of time are poised to benefit the most from it.

Section §45A of the IRC provides for an Indian employment tax credit to Federal taxpayers that hire qualified Indians for economic activities on Indian reservations. This credit is designed to encourage Federal taxpayers to hire Indians on Indian lands by providing a wage and health credit to those private sector entities that employ Indians on Indian lands.

These two incentives were authorized for the period 1993-2003 and since then Congress has chosen to reauthorize them in one-year increments.

By most accounts, these incentives have been used by Federal taxpayers who have been encouraged to channel investment capital and job opportunities to Indian lands. The Tribe supports the sentiments of both Chairman Max Baucus and Ranking Member Senator Charles Grassley that in order for these incentives to maximize economic development on Indian lands, Congress needs to provide a long-term reauthorization on the order of from 15 to 20 years. I would note for the Committee record, that such a long-term extension is supported by both the National Congress of American Indians --- the oldest, largest Indian tribal organization in the U.S., and the Council of Energy Resource Tribes, a 53-member tribal energy consortium.

The third item in the Code the Committee reviewed involves tax-exempt bond authority and tribally-issued debt for purposes of community development. The capacity of Indian tribes to raise capital through the issuance of tax-exempt debt has been hindered because of the strained interpretation by the Internal Revenue Service (IRS) of the IRC provisions. Specifically, the IRS' narrow interpretation of the term "essential governmental functions" has severely limited, if not prevented, the use of tax-exempt bonds by tribal governments for all but the most fundamental purposes.

This Committee held a hearing on the question of tax-exempt debt financing by Indian Tribes in 2006. Subsequently, legislation was introduced to provide clear and concise congressional guidance to the IRS as to the meaning of the term "essential governmental functions." This legislation, the "Tribal Government Tax-Exempt Bond Parity Act of 2007" (S.1850, G. Smith) would level the playing field by making clear that tribally-issued debt can be offered on the same terms as that issued by State or local governments. The bill defines the term "essential government function" to "include any function which is performed by a State or local government with general taxing powers." Tribal tax-exempt bonds can provide significant assistance to Indian Tribes in raising capital with a lower cost and will aid in encouraging the development of on-reservation activities and physical infrastructure. For all of these reasons, the Tribe supports S.1850 and the modest change it would make to current law.

## *2. Energy-Specific Tax Provisions*

In addition to the numerous energy-related tax provisions included in the *Energy Policy Act of 2005* (Pub. L. 109-58) and the *Energy Independence and Security Act of 2007* (Pub. L. 110-140), there are proposals currently pending to authorize an Indian Tribe to transfer its share of production tax credits for generating electricity using renewable resources to its private sector partner. For instance, H.R. 1954 (Grijalva) would amend §45 of the IRC to authorize Indian tribes to transfer these production credits for electricity produced from renewable energy resources. This legislation is necessary because Indian Tribes are not taxable entities and the value of their share of the production tax credit is currently being lost.

In addition, §29 of the IRC provides a tax credit for producing “fuel from a non-conventional source” with the objective of increasing domestic production of energy supplies. Sources of fuels that qualify as “non-conventional” include shale and tar sands, biomass, coalbed methane and others. If the Committee seeks to encourage energy development in Indian country, one thing it could do is to define “fuel from a non-conventional source” to include all production on or from Indian lands.

The Tribe supports these proposals and would be happy to work with the Committee to develop viable legislation on these and other proposals that will result in increased production on or from Indian lands and enhanced energy security for our nation.

### *3. Caution in Categorical Changes to the Code*

This Committee’s review and discussion of the issuance of tax-exempt bonds by Indian Tribes has centered on statutory and regulatory interpretations by the Service of the term “essential government function.” After much debate in Indian country and the Congress, legislation has been introduced to provide a definition of this term that would bring parity to tribally-issued debt and debt issued by States and local governments. The Tribe supports this legislation and believes it is a measured response to a discrete problem found in the IRC and its implementing regulations.

There are undoubtedly other sections of the IRC susceptible to the kinds of amendments proposed in S.1850. Indeed, it is tempting to think that the inequities and ineffective provisions found in the IRC might be cured with an across-the-board proposal that would treat Indian tribal governments as States and local governments *for all purposes*.

In the face of such sentiments, I respectfully urge this Committee to exercise caution and judgment because without knowing the precise consequences of such a comprehensive amendment, real damage could be done to the 561 tribal governments in the U.S. For instance, in the wake of the enactment of the *Pension Protection Act of 2006*, well-intended changes to the administration of pension plans by Indian tribal governments --- without knowing what ripple effects such changes would have --- might do more harm than good.

### Recommendations and Conclusion

In addition to the specific recommendations made above, the Tribe encourages the Committee to consult with Indian Tribes in any review of the IRC it might make in the future and to work collaboratively with Indian country to identify and cure those tax provisions that are failing to help strengthen Indian economies.

Thank you for the opportunity to submit this Statement for the Record.

If the Tribe may be of service to the Committee in the future, please do not hesitate to contact me.

Prepared Statement of the Honorable Curtis R. Cesspooch, Chairman

Ute Tribe of the Uintah and Ouray Reservation, Ft. Duchesne, Utah

Oversight Hearing before the U.S. Senate Committee on Finance

Indian Governments and the Tax Code: Maximizing Tax Incentives for Economic Development

July 22, 2008

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Introduction

My name is Curtis R. Cesspooch and I am the Chairman of the Ute Tribe of the Uintah and Ouray Reservation (Ute Tribe) located in northeastern Utah. The Tribe's headquarters are located in Ft. Duchesne, Utah. On behalf of the Ute Tribe, I want to thank Chairman Baucus and Ranking Member Grassley for holding this very important hearing. The Committee should also be commended for its willingness to take a hard look at the Internal Revenue Code to ensure that the important Federal policy objectives of encouraging economic growth and job creation on Indian reservations are being furthered.

Background and History of the Tribe

The Ute Tribe has the second largest Indian reservation in the United States with more than 4.5 million acres. The Tribe has 3,157 members and its government is an effective provider of services through 60 separate tribal departments and agencies including land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management.

The Ute Tribe has come a long way in developing a stable economy and a tribal government with sound management practices. As settlers migrated west and began to populate the Tribe's aboriginal areas, the U.S. Government created the Uintah Valley Reservation in 1861 and removed the Ute Indian bands from their homelands to the barren lands of the Uintah Basin. Starvation and disease significantly reduced the Tribe's numbers, yet the Tribe endured.

At the outset, it is important to note that the State of Utah completely prohibits gaming of any sort and, accordingly, the Tribes in Utah may not legally conduct gaming activities on tribal lands. As a result, the Ute Tribe's primary source of income is from oil and gas development. The Tribe has an interest in Ute Energy LLC which is pursuing oil and gas development on 300,000 acres of the Tribe's reservation.

The Tribe now averages a daily production of 1,000 barrels of oil and is in the process of opening up an additional 150,000 acres of mineral leases on the reservation with an \$80 million investment dedicated to exploration. I am pleased to inform you that in June 2008, the Ute Tribe entered a Joint Venture Agreement with the Anadarko Petroleum Corporation under

which the joint venture parties will manage a new gas processing and delivery hub in the Uintah Basin. The new entity, Chipeta Processing LLC, will add value to the Tribe's and Anadarko's reserves in the Uintah Basin.

Using revenues derived from energy development, the Ute Tribe has become a major employer and engine for economic growth in northeastern Utah with a diverse array of tribal businesses including a bowling alley, a supermarket, gas stations, a feedlot, an information technology company, a manufacturing plant, and an oil and gas development company. Our governmental programs and tribal enterprises employ 450 people, 75% of whom are tribal members. In addition, each year the Ute Tribe generates tens of millions of dollars in economic activity to surrounding towns and communities.

#### Energy Development and Improved Tribal Economies

There are three reasons this Committee and the Congress should focus on energy development in order to strengthen Indian economies and improve the standards of living of the Indian people. These are (1) the economic potential of Indian energy; (2) a very favorable market for energy prices; and (3) the new Indian energy law passed in 2005 and now being implemented.

In terms of the economic potential of Indian energy, Indian Tribes have at their disposal huge amounts of renewable and non-renewable energy resources. Nearly 20 Indian Tribes are regarded by the U.S. Department of the Interior as having "High Potential" for hydrocarbon development. These same estimates show the enormous potential of Indian energy --- both renewable and non-renewable --- to generate significant revenues to Tribes and job opportunities to their members.

With the enactment in 2005 of the *Indian Tribal Energy Development and Self Determination Act*, Indian Tribes now have at their disposal a tribal-centric and pro-development energy law to help them develop their resources. The new law emphasizes tribal decision-making, rather than Federal decision-making, and does not discriminate against any kind of energy resource a Tribe might choose to develop.

Last, the market conditions could not be more favorable. Current projections based on estimates conducted by the U.S. Government suggest hundreds of billions in revenues from non-renewable energy sources alone. See "Oil, Gas and Coal Resources on Indian Lands," Division of Energy and Mineral Resources Management, U.S. Department of Interior, Bureau of Indian Affairs, 2001.

#### Tax Incentives and Indian Energy Development

In 1993, Congress amended the Internal Revenue Code (Code) to add two new incentives to attract capital investment and jobs to Indian reservations: an Accelerated Depreciation provision and an Indian Wage and Health Credit available to Federal taxpayers. The intent was to use the Code to address the lack of infrastructure on reservations and the high rate of unemployment across Indian country. These incentives are not available for gaming or

gaming-related activity but are intended to encourage non-gaming economic development on Indian reservations.

Since 1993, the Internal Revenue Code has contained §168(j) that provides for accelerated depreciation for depreciable assets (e.g., business equipment, facilities, and related infrastructure) placed in service on Indian reservations, as well as §45A the Indian employment credit.

The accelerated depreciation provision is designed to encourage Federal taxpayers (e.g. the private sector) to build or otherwise locate business property and infrastructure on Indian tribal lands. Because of the accelerated depreciation provision, private businesses can achieve tax savings on property and infrastructure at a faster rate than those located off tribal lands. For example, tax savings can be achieved in 6 years for property and infrastructure located on tribal lands compared to 10 years for businesses located off tribal lands. Similarly, tax savings on property can be achieved in a 12 year recovery period on tribal lands as opposed to a 20 year recovery period off tribal lands.

The accelerated depreciation of real property also applies to “qualified infrastructure property” located *off the reservation* as long as it provides access to business property on tribal lands. The “qualified infrastructure property” must be used in conducting business and be available for public use for the benefit of the Tribe. By the nature of the provision those businesses with large capital investments, such as energy, would benefit the most.

The Indian employment credit is designed to encourage private sector businesses to hire Indians by providing a wage and health care credit to potential employers. If employers hire a “qualified Indian employee,” defined as an enrolled tribal member or their spouse that lives and works on the reservation, businesses can deduct twenty percent of wages and health care costs to their annual income taxes. The credit is applicable to the first \$20,000 of wages; however, these credits are limited to those employees who make less than \$30,000 a year.

These tax incentives conceivably can apply to any Indian reservation willing to host outside investment and business activity. The incentives were included in the *Omnibus Budget and Reconciliation Act of 1993* and were authorized for a ten-year period (1993-2003) and since 2003 Congress has chosen to reauthorize them in one year increments as part of what has become an annual “tax extenders” bill.

There are difficulties presented to business planners and investors faced with these one year extensions. Were the incentives to be extended over a significant period, e.g. 20-25 years, investors would be encouraged to invest in ventures on Indian land and hire qualified Indians as employees for the long-term. Because of its use and reliance on equipment, pipelines, transportation, and transmission and related infrastructure, the accelerated depreciation provision in particular would be helpful in spurring increased activity and partnerships between Indian tribes and their would-be energy partners.

In fact, in its March 11, 2005, analysis of Section 168(j), the Joint Committee on Taxation stated that

“[t]he shorter recovery periods can have the effect of substantially decreasing the tax liability of a business. However, the degree of benefit for each business varies based on the particular nature and situation of the business. For businesses engaged in activities that rely heavily on large depreciable assets, such as those involved in power generation, the shorter recovery periods could be very attractive.” (*Emphasis added*).

Efforts to Reauthorize the Incentives

Legislation has been introduced in the 110<sup>th</sup> Congress to permanently extend the 1993 tax incentives. These bills, S.176 (Inhofe) and H.R. 1875 (Boren) were referred to their respective committees of jurisdiction. In addition, the *Energy and Tax Extenders Act of 2008*, H.R. 6049 (Rangel), would yet again extend these incentives for one year, to December 31, 2009.

Cost estimates provided by the Joint Committee on Taxation are as follows:

- Cost of Accelerated Depreciation Through 2018            \$152 million
- Cost of Indian Employment Tax Credit Through 2018    \$59 million

While we know that since 2001 some \$54 million in wage and health care credits have been used by taxpayers, there is some question as to how much the depreciation provision has been used outside of the State of Oklahoma.

Conclusion

The Ute Tribe may be seen by the Committee on Finance and indeed the entire Congress as one way an industrious and aggressive Indian Tribe can use its natural resource base to generate revenues to sustain its government and its people. There are dozens of other Indian Tribes that possess significant energy resources but lack the technical expertise and the capital to fulfill their dreams of higher standards of living for their people and economic independence for their people.

I encourage the Committee to continue to look at the Internal Revenue Code and tax incentives to strengthen Indian tribal economies and bring jobs and revenues to communities that currently have neither.

Thank you.

