National Congress of American Indians
Comments to the Senate Finance Committee
Community Development & Infrastructure Working Group

Tax Parity and Economic Development in Indian Country
April 15, 2015

Indian tribal governments have a unique status in our federal system recognized in the U.S. Constitution and numerous federal laws, treaties and federal court decisions. American Indian and Alaska Native tribes have a governmental structure, and have the power and responsibility to enact civil and criminal laws regulating the conduct and affairs of their members and reservations. Tribes operate and fund courts of law, police forces, and fire departments. Tribes provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Like the revenue of states and local governments, tribal revenues are not treated as taxable income – but as the governmental revenues of a distinct and unique sovereign government.

As such, federal tax reform is of great interest to the National Congress of American Indians (NCAI) and our respective member tribes. This is because tax reform presents a very real opportunity to protect and enhance the many governmental functions and services provided by Indian tribes. There are many ways to include tribal governments in any upcoming tax reform. While the federal government recognizes that tribal nations are governments, tribes are frequently treated less favorably than state and local governments under our federal Tax Code. Such differential and unjust treatment typically results in tribal governments and tribal citizens being denied equitable federal tax exemptions and opportunities.

In restructuring the nation's Tax Code, it is critical that Congress address the unique problems and challenges of Indian Country and more consistently recognize the governmental status of Indian tribes. In expressing our views on potential areas to improve tribal tax policy, we do so as partners in American growth and, like each of you, as elected governmental representatives.

Principles of Tax Parity for Tribal Governments:

- Tribal governments must be treated with parity in all areas of tax policy
- The Constitution recognizes tribal governments; treaty and trust obligations
- Tribes have a responsibility to govern and regulate activities on tribal lands
- Tribes provide governmental services: education, health, public safety, and transportation
- Like states, Indian tribes are not taxable in recognition of their status as governments

Recognition of Tribal Governments' Authority is Needed:

- to raise tax and other revenue free from overlapping state taxation
- to create incentives for business and jobs
- to access government financing tools and the capital markets
- to make decisions regarding citizens' needs
- to gain certainty of jurisdiction to sustain economic growth.

Background on Tribal Tax Parity—A History of Uneven Progress

While there is no federal statutory provision that "exempts" Indian tribes from federal income tax, the Internal Revenue Service has consistently and correctly concluded that federally recognized tribes and their federally chartered corporations are not subject to federal income taxes.[1] With respect to tribal governments, the IRS in Revenue Ruling 67-284 based its conclusion on the fact that tribes (like states) are political bodies not subject to the income tax provisions of the Internal Revenue Code.

However, the IRS did not treat Indian tribes like states for all purposes of the Code. Revenue Ruling 68-231 provided that tribal bonds could not be treated like state government-issued bonds because Code section 103, which exempts interest paid on state and local bonds from income taxation, did not specifically mention Indian tribes. The IRS took a similar approach to several other Code provisions that explicitly exempted state and local governments.

Recognizing that tribal governments should be treated on par with state governments, Congress passed the **Indian Tribal Governmental Tax Status Act** in 1982 to provide comparable governmental tax treatment to tribes for federal tax purposes.[2] The Tribal Governmental Tax Status Act, codified as section 7871 of the Code, provides that federally recognized tribes are treated like states with respect to the following:

- Deductibility of charitable contributions to governments for exclusively public purposes
- Deductibility of gifts and bequests for public purposes
- Exclusion of interest on tax-exempt bonds (subject to certain restrictions on tribal bonds discussed below)
- Exemption from certain federal excise taxes (subject to certain restrictions)
- Deductibility of taxes paid to tribal governments
- Private foundation excise tax rules referencing governments
- Provisions relating to accident & health plans under Section 105
- Provisions authorizing retirement plans under Section 403(b) for educational employees

Unfortunately, the Tribal Governmental Tax Status Act did not live up to its original promise of treating tribes on par with states for federal tax purposes. For example, the provision that allowed Indian tribes to issue tax-exempt bonds was subject to many restrictions in the original 1982 Act, and more were added in 1987. Thus, Indian tribal bonds were subject to the following restrictions:

- An absolute prohibition on the issuance of private activity bonds, except for certain tribal manufacturing bonds subject to wage and employment tests that are virtually impossible for modern manufacturing facilities to meet

[1] Four revenue rulings address the tax status of tribal governments: Rev. Rul. 67-284, 1967-2 C.B. 55; Rev. Rul. 81-295, 1981-2 C.B. 15; Rev. Rul. 94-16, 1994-1 C.B. 19; and Rev. Rul. 94-65, 1994-2 C.B. 14

[2] Title II of Pub. L. No. 100-203, 96 Stat. 2605 (1982).

- Government bonds issued by tribes were required to meet the essential governmental function test
- "Essential governmental functions" for this purpose were limited to those functions "customarily performed" by state and local governments with general taxing powers (e.g., schools, roads and sewers)

The Tribal Tax Status Act also applied the "essential governmental function" test to the excise taxes from which tribes were exempted, even though state and local government exemptions were not so restricted. In addition to imposing specific restrictions on tribes that were not applicable to states, Section 7871 failed to address many areas of the Code where special treatment is extended to states. Unfortunately, the IRS has taken the position that these omissions demonstrated that tribes should not be treated like states, and denied governmental status with respect to a number of different provisions, including various federal excise taxes not specifically cross-referenced by Section 7871. See, e.g., Revenue Ruling 94-81, 1994-2 C.B. 412 ("Indian tribal governments have no inherent exemption from federal excise taxes").

Tribal Tax Parity

NCAI firmly believes that because Indian tribes are governments, they should generally be treated like states for all federal tax purposes. As part of a comprehensive tax reform bill, Section 7871 needs to be broadened to treat Indian tribes like states for all tax Code purposes, except in those limited instances where a special rule for tribal governments is absolutely necessary. In most cases, a special rule will not be necessary.

Specific Instances where the Tribal Tax Parity is Urgently Needed

While we believe that tribes should be treated like states for all tax purposes (and generally should not be subject to special rules or restrictions that states and local governments do not have to meet), there are several specific areas where tribal tax parity is urgently and particularly needed:

- Tribal Construction and Maintenance of Transportation Networks
- Tribal Government Tax Exempt Bonds
- Tribal Government Employee Benefit and Pension Plans
- Tribally Funded and Controlled Foundations and Charities
- Tribal Child Support Enforcement Agencies
- Tribal Allocations of Clean Renewable Energy Bonds ("CREBs")
- Adoption Tax Credit
- Indian Health Service Doctor Scholarship and Loan Repayment Tax Exemption
- Kiddie Tax Penalty on Transfers of Tribal Funds to Youth
- Tribal Government Inclusion in Marketplace Fairness Act

Tribal Construction and Maintenance of Transportation Networks

The current scheme for funding surface transportation in the United States is based on a federal-state motor fuel taxation regime that precludes tribes from participating in the system on an equitable basis. While the system of using federal fuel tax revenue for road construction and state fuel tax revenue for maintenance has worked to dramatically improve roads in many parts of the nation, it has failed miserably in Indian Country.

Like states, Indian tribes receive some funding for road construction from the federal Highway Trust Fund, but the amount given to tribes is much less than what states receive. Currently, Indian Reservation Roads make up nearly 3 percent of federal roadways, but they receive less than 0.5 percent of total federal highway funding.[3] At the current funding levels, the IRR program receives only about half the amount per road mile that states receive.

Faced with a severe inadequacy of funding from federal and state sources, tribal governments have looked for other sources of revenue, including levying their own motor fuel taxes. While tribes have the same authority as other governments to collect taxes, the ability of tribes to tax fuel on tribal lands has been severely diminished by the U.S. Supreme Court. The Court has upheld the authority of the states to reach onto tribal land to collect a state motor fuel tax. The dual taxation that would result if both states and tribes impose a motor fuel tax makes it impractical for tribes to generate revenue through motor fuel taxes. Although some tribes and states have been able to negotiate motor fuel tax revenue-sharing agreements, those cases are the exception rather than the rule. In most areas, the state governments' collection of motor fuel taxes in Indian country displaces the ability of tribal governments to collect motor fuel taxes.

NCAI urges Congress to explore alternate funding sources for the Highway Trust Fund, and to treat tribal governments on par with state and local governments in their ability to raise revenue to fund the costs associated with building and maintaining transportation infrastructure.

Tribal Government Tax Exempt Bonds

The American Recovery and Reinvestment Act authorized $2 billion in bond authority for a new category of bonds to be allocated amongst Indian tribes, known as "Tribal Economic Development ("TED") Bonds." TED Bonds were intended to provide tribes with more flexibility to use tax-exempt financing than is allowable under the current "essential governmental function" standards as noted above. The TED Bonds are dollar-limited to an amount too small to use for many projects, require projects to be located on Indian reservations, and prohibit the financing of gaming facilities. The law required Treasury to conduct a study of the effectiveness of the new bonding authority, and to recommend to Congress whether it should "eliminate or otherwise modify" the essential governmental function standard for Indian tribal bond financing. The Treasury study was completed in December 2011.

The core recommendation of the study was that Congress should adopt the same standard for tribal government bonds as applies to governmental bonds issued by State and local governments. The Treasury Department clearly recommended repealing the "essential governmental function"

[3] U.S. Dept. of Transportation, Federal Highway Administration, TEA-21, A Summary (1998).

standard for Indian tribal governmental bond financing. The study explains that it is making this recommendation "[f]or reasons of tax parity, fairness, flexibility, and administrability . . . ."

Treasury also recommended that Congress adopt what it called a "comparable" private activity bond standard so that Indian tribal governments could issue some private activity bonds. Such bonds would be subject to a national volume cap, and Treasury would be authorized to make allocations among Indian tribal governments.

Treasury recommended that Congress limit Indian tribal bond issuances in two respects: (1) No bonds could be used for gaming projects, and (2) some kind of project location restriction would apply. With respect to the latter, Treasury recommended that Congress provide more flexibility for the financing of tribal projects than it did for the TED Bonds under ARRA. Specifically, Treasury recommended that tribal bonds be allowed to finance projects that are located on Indian reservations, together with projects that both: (1) are contiguous to, within reasonable proximity of, or have a substantial connection to an Indian reservation; and (2) provide goods or services to resident populations of Indian reservations.

TED Bonds present an enormous opportunity for tribal governments to engage in revenue-generating development at a size that makes these projects economically viable. When issuing tax exempt bonds, investors are willing to accept lower interest rates than they would on comparable bonds subject to tax on interest.[4] Because payments made on TED Bonds are not taxable, the effective rate of return on a 7.7% taxable bond is the same as a 5% untaxed TED bond.[5] This means that with TED Bonds, tribes are able to finance revenue-generating projects at a fraction of the rate they would end up paying over the long-term life of a non-exempt bond. However, because of the unworkable restrictions placed on these bonds, most tribes are unable to take advantage of the opportunity to finance projects at favorable interest rates.

In particular, NCAI has serious concerns about the "project location restriction"--even in its modified form as proposed by the Treasury Department. The requirement that the financed project provide "goods or services" to reservation residents would limit the use of tax-exempt debt for many tribal economic development projects. Further, many tribes lack the reservation land base needed for revenue-generating facilities or the land base is so remote that it would be impossible to provide adequate services to their tribal communities from that location. Tribes that have had their lands taken away, which includes newly restored tribes and tribes located where population density puts land possession at a premium, nonetheless have the same demands on governmental services as tribes with large, local land bases. The requirement for proximity to an Indian reservation would also eliminate a tribe's ability to meet state-wide government contracting requirements.

Based on considerations of parity, tribal governmental bonds—as distinguished from private activity bonds—should not be subject to a "project location" restriction of any type. It is our understanding

[4] *See* Treasury Department Fact Sheet: Tribal Economic Development Bonds, *available at* http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/Tribal%20Economic%20Development%20Bonds%20Fact%20sheet%202014.pdf.

[5] *See* Tax Exempt Bonds and Borrowing for Indian Tribes, Orrick, Herrington & Sutcliffe LLP, *available at* http://www.nafoa.org/pdf/10555_Tribal_Finance.pdf.

that state and local governments are not subject to any territorial restrictions, except with respect to private activity bonds, such as industrial development bonds, where they are subject to a "substantial connection" test, which has been liberally interpreted by the IRS. The "substantial connection" test is illustrated in Private Letter Ruling 8442023 (July 12, 1984). In this ruling, the IRS permitted an industrial development authority to finance a hotel approximately 10 miles outside its jurisdictional boundaries because the issuer was able to show that there would be a direct, material benefit to the issuing jurisdiction. This approach would provide Indian tribes with the flexibility to finance nearby projects that directly benefit the tribe as a whole. In sum, a "substantial connection" or "nexus" test applies to state and local governments, and Indian tribal governments should be accorded the same treatment.

The Congress should remember that tribal governments do not have the typical taxing base of state and local governments and their business revenues are the core revenue base that enables tribes to become less dependent on federal resources and address the enormous needs of their respective communities.

Tribal Pension and Employee Benefit Plans

If the "essential governmental test" is unworkable in the government bond context, it is proving to be even more unworkable in the tribal employer plan arena.

Under a provision hastily conceived in a House-Senate Conference on the Pension Protection Act of 2006 ("PPA"), tribal governmental plans are treated as "governmental plans" only if all of the employees in the plan are substantially engaged in "essential governmental" functions, and not commercial activities. While the staff of the Joint Commission on Taxation suggests that Congress intended to classify casinos, hotels, service stations, convenience stores and marinas as commercial activities that are not essential governmental functions, there is no legislative history to that affect and no specific guidance on these classifications has been published by the Departments of Treasury or Labor.

At this point in time, almost 9 years after the PPA provision impacting Tribal pension and welfare plans was enacted, Tribes have no guidance on which employees are subject to ERISA or the Internal Revenue Code private sector rules, let alone how to operate their employee benefit plans in compliance with these rules. There is no guidance on any number of key technical compliance issues, including the proper application of participation and service crediting rules, the applicability of ERISA plan asset rules, or whether the corporate control group and aggregation rules are intended to apply to Tribes and their tribal enterprises. Despite the lack of guidance, however, the Department of Labor ("DOL") is now imposing significant penalties ($50,000 per year) on Tribes that are making good faith filings in an effort to meet the Internal Revenue Service and DOL requirements under the PPA. These penalties are being imposed despite Tribes' waiver and consultation requests under Executive Order 13175. When these penalties are combined with the costs the Tribes are incurring in plan modifications, plan audits and other compliance activities, some Tribes are being forced to consider the elimination of their employee retirement programs. State and local governments maintaining employee benefit plans face none of these issues. Moreover, Tribes appear to be the only sponsor that can be subject to two separate sets of rules (government and commercial) at the same time depending on what functions an employee may be performing on any given day.

In 2011, IRS issued an advance notice of proposed rulemaking that would have expressly declared that the generation of revenue (even for public purposes) is not an essential function of Tribal governments, and would have required Tribes to apportion the activities of "shared" employees between "government" and "commercial" activities. Like states, Tribes must bring revenues into the public fisc. However, Tribes often lack a significant tax base to fund government operations. As a result, Tribes must engage in revenue generating activities to replace tax income that is not available to support infrastructure, deliver health care to members, and provide education and other essential services. NCAI contends that it is not appropriate to focus on the type of revenue generating activity when determining whether an activity is an essential governmental function. Rather, the focus should be on the use of the revenue by the Tribal government. Tribes should be able to engage in the same types of activities that states and local governments engage in to without jeopardizing their government status, and without forcing Tribes to comply with two costly, and sometimes conflicting, sets of rules at the same time.

The Senate-passed version of the 2006 pension legislation (S. 1783, 109th Cong.), which had strong bipartisan support from members of this Committee, contained a much more administrable and equitable approach to the treatment of tribal governmental plans. This language is reproduced below.

SEC. 1311. DEFINITION OF GOVERNMENTAL PLAN.

(a) Amendment to Internal Revenue Code of 1986- Section 414(d) of the Internal Revenue Code of 1986 (definition of governmental plan) is amended by adding at the end the following: `The term `governmental plan' includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency instrumentality (or subdivision) of an Indian tribal government, or an entity established under Federal, State, or tribal law which is wholly owned or controlled by any of the foregoing.'

(b) Amendment to Employee Retirement Income Security Act of 1974- Section 3(32) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(32)) is amended by adding at the end the following: `The term `governmental plan' includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency instrumentality (or subdivision) of an Indian tribal government, or an entity established under Federal, State, or tribal law that is wholly owned or controlled by any of the foregoing.'

Tribally Funded and Controlled Charities and Foundations

Under current federal tax law, the public charity status of section 501(c)(3) organizations funded by or formed to support Indian tribal governments is unclear. By contrast, the tax treatment of such charitable organizations funded by or formed to support federal, state and local governments is made clear by specific provisions of the Code (e.g., provisions treating such government funding as public support).

Consistent with the intent of the Tribal Government Tax Status Act to treat tribal government on par with other units of government, Congress should pass legislation to technically resolve this issue.

The Senate has previously addressed it with a provision contained in Section 153 of the Senate-passed version of the Tax Administration Good Government Act (H.R. 1528, 108th Congress). That provision would have done the following: (1) treated tribal funding as public support for purposes of Section 170(b)(1)(A) (vi) (i.e., the public charity classification test that is satisfied on the basis of how much support a charity derives from "public" sources), and (2) treated charitable organizations formed to support Indian tribal governments the same as organizations formed to support state, local and federal government for purposes of Section 509(a)(3).

Unfortunately, the House and Senate did not go to Conference on that bill in 2006, although the provision was included in a bill passed by the House in 2007. This is a small technical fix with likely zero or negligible cost that should be included in any comprehensive tax reform bill.

Tribal Child Support Enforcement Agencies

Tribal child support enforcement agencies need authority to access parent locator services, which are currently made available only to state and local governments. Also, the Code should be amended to allow tribal child support enforcement agencies, like state and local agencies, to enforce orders for support through withholding of past due child support payments from the federal income tax returns of parents with past due obligations. This provision is a technical fix with likely zero or negligible cost.

Tribal Allocations of Clean Renewable Energy Bonds (CREBs)

Tribal governments are able to compete with state and local governments for allocations of CREBs for energy development projects. However, to date, no tribal government projects have received a CREB tax credit allocations since the provision was enacted. As we have suggested in the case of the New Markets tax credit, there should be a set-aside for tribal projects under the CREBs provision.

Adoption Tax Credit

American Indian/Alaska Native tribal governments are currently unable to make a determination of special needs under the Adoption Tax Credit on par with states. Because of this, adoptive parents under tribal jurisdiction are unable to access the tax benefits available to adoptive parents, unless they go to state courts for a designation of special needs. Tribal governments are able to make these determinations under self-governance principles and this is critical because many tribal jurisdictions are in remote locations, miles from state court jurisdiction. The Tax Code's failure to recognize tribal court determinations as valid for tax purposes puts tribal adoptive parents in a situation in which they are treated unfairly when compared to adoptive parents under state jurisdiction. The Tax Code needs to recognize tribal court determinations of special needs on par with state courts.

Indian Health Service Doctor Scholarship and Loan Repayment Tax Exemption

National Health Service Corps scholarships and loan repayments for participant doctors employed throughout the public sector are tax exempt under Section 117(c)(2)(A) of the Tax Code. There is no similar exemption for recipients of Indian Health Service (IHS) scholarships and loan repayments. Doctors considering public service may be deterred from serving in IHS facilities over other public sector facilities due to this discrepancy. The need for health practice professionals in Indian Country is great and securing good doctors is difficult due to a number of factors. Tax Code

Section 117(c)(2) should be modified to include IHS scholarships and loan repayments as tax exempt.

Kiddie Tax

In 1986 Congress enacted a provision, often referred to as the "kiddie tax", which sought to prevent wealthy parents from dodging taxes by transferring income to their children. Unfortunately, the provision was broadly drafted to apply to all types of "unearned income," regardless of the source. Unlike wealthy parents, when tribal or state governments make distributions of funds to their citizens under the age of 25 years, they do so to serve policy goals. Governments do not pay income tax and thus are not avoiding income tax when they transfer tribal funds to young tribal members. The "kiddie tax" penalty applies not only to children but also young adults age 19 to 24 who are full-time students. The "kiddie tax" penalty perversely tempts Indian students to drop out of school so they can avoid paying higher taxes on the financial support they receive from their Indian Tribe. It is a distortion of tax policy to increase the income tax rate applied to a young adult tribal member just because he or she is enrolled in college. Congress should enact a technical amendment to exclude all distributions by a tribal, state, and local government to their citizens from the "kiddie tax" penalty provision.

Include Tribal Governments in the Marketplace Fairness Act

Congress should support the inclusion of tribal governments in the Marketplace Fairness Act as well as in any legislation that regulates the collection of sales taxes or implements the State Streamlined Sales and Use Tax Agreement. The Senate included tribes within last year's version, S. 743, which passed the full Senate, and tribes are included again in S. 698 introduced this year by Senator Enzi, which has been referred to the Committee on Finance for consideration.

In sum, Indian tribal governments have authority to collect sales taxes on Indian reservations. Tribal governments use these tax revenues to provide services on their reservations, such as police, education, health care and all the basic roads and infrastructure.

In the Marketplace Fairness Act, Congress will be exercising its Commerce Clause authority, which includes the authority to regulate Commerce "with foreign Nations, and among the several States, and with the Indian tribes." Like states, tribal governments are subject to confusing federal common law decisions on taxing jurisdiction, and can benefit from simplified rules on remote sales taxes and the sourcing of tax jurisdiction.

We urge that any legislation passed by Congress also protect the tax status of Indian tribal governments by allowing Indian tribes to participate in the same manner as states. NCAI has worked with states and the National Conference of State Legislatures, and Indian tribes were included in prior legislation, in S. 34 from the 110th Congress and in H.R. 5660 from the 111th. We believe that the provisions from these older bills are better model for including tribes.

Inclusion of tribes is extremely important, because the legislation will create the sales tax collection system for the next century, and sales taxes are a critical source of government revenue for Indian

tribes. State governments rely on federal funding for approximately 25% of their budgets, while tribal governments rely on federal funding for more than 60% of their budgets. Most often tribal governments are supplying services that the federal government is under treaty and trust obligations to provide. At a minimum, Congress should exercise its authority in a way that supports and protects the ability of tribal governments to raise tax revenues on their own. If a new national system of sales tax collection is to be created with Congressional approval, tribal governments should have the same opportunities to collect taxes as other jurisdictions within the federal system. We urge Congress to include tribal governments within the Marketplace Fairness Act.

Economic Growth

Tribes are continuously seeking new economic opportunities to attract businesses and jobs to reservation lands, where unemployment rates consistently rank among the highest in the Nation and the reality of little to no outside business investment is far too real. The following tax incentives, as part of a greater tax reform, would attract long term investment in Indian Country and provide the tools needed to revitalize Native communities:

- Permanent Tax "Extender" Incentives
- Set-asides for New Markets Tax Credit and Low Income Housing Tax Credit
- Tribal Empowerment Zones

Permanent Tax "Extender" Incentives

There is an urgent and continuing need for economic development on Indian reservations in the context of the Indian Employment Tax Credit (26 U.S.C. § 45(A)), the Accelerated Depreciation Provision for on-reservation business infrastructure (26 U.S.C. § 168(j)), and the Indian Coal Production Tax Credit (26 U.S.C. § 45). These tax credits expired on December 31, 2014, and should be reenacted on a permanent basis.

The Employment credit provides private businesses with an incentive for employing Indian tribal members in reservation-based business operations. The Accelerated Depreciation Provision provides businesses with the opportunity to take accelerated depreciation deductions on business property located on Indian reservations. NCAI recommends that Congress make both tax incentives permanent so that employers can rely on the incentives when planning to locate a facility in Indian Country. The lack of certainty in the future of these tax provisions undermines their ability to attract larger, long-term investments.

NCAI supports the proposal in the Department of Treasury FY 2015 Budget to update the Indian Employment Credit (Green Book pp. 13-15). The Indian Employment Credit is structured as an incremental credit applicable to current year qualified wages and health insurance costs in excess of such costs paid in the base year (1993, when the Credit was originally enacted). Updating the base year would achieve two goals: (1) simplicity by eliminating the need for businesses to maintain tax records long beyond normal requirements, and (2) restoration of the original incremental design of the credit. However, we note that in certain instances, this would result in a lesser amount of tax credit being available to certain businesses with on-reservation operations. We recommend use of

the tax revenue savings inherent in this change to extend the credit permanently and to make the New Markets Tax Credit more accessible to tribal projects, as proposed below.

NCAI urges extension of a tax provision of importance to tribes in coal-rich areas, the Indian Coal Production Tax Credit ("ICPTC"). The ICPTC was enacted for a temporary period in the Energy Tax Incentives Act of 2005 (*see* 26 U.S.C. § 45(d)(10), 45(e)(10)). The credit was later extended and expired on December 31, 2014. There is a compelling need for the ICPTC. Tribes with coal reserves rely on the jobs and revenues generated by mining operations to improve the well-being of their citizens as they strive for economic self-sufficiency. Unfortunately, on-reservation mining operations are disadvantaged by bureaucratic obstacles, additional federal regulatory requirements, and higher financial costs associated with mining on Indian lands, which make it difficult to compete with off-reservation operations. Since 2006, the ICPTC has helped offset those disadvantages and level the playing field for tribal mining operations.

Set-asides for New Markets Tax Credit and Low-Income Housing Tax Credit

The New Markets Tax Credit (26 U.S.C. § 45(D)) was established in 2000 to spur new or increased investments in operating businesses and real estate projects located in low income communities. The program has traditionally been a successful tool for attracting private capital to Indian Country. However, neither tribal organizations nor Indian reservation-focused applicants received a single dollar in the 2013 or 2014 rounds of NMTC funding. NCAI urges Congress to address this problem by creating a set-aside for Indian reservation-focused applicants and by amending 26 U.S.C. § 45(D)(i)(6) to direct Treasury to prescribe regulations to ensure that Indian reservations (as well as non-metropolitan areas) receive an allocation of qualified equity investments.

Similarly, the Low-Income Housing Tax Credit ("LIHTC") is too frequently unavailable to tribes. Indian tribes have great numbers of low-income tribal members and long waiting lists of members who need housing. Unfortunately, the LIHTC allocations are provided only to state governments, who most frequently use criteria that benefit only urban areas. We urge that a set-aside be created for tribal governments to ensure that the needs of their citizens are met.

Tribal Empowerment Zones

Indian Country remains some of the most economically underdeveloped territory within the United States. To allow all Indian nations to become more economically empowered, NCAI proposes significant changes in the economic foundation of Indian country. Tribes must be allowed to capture wealth that is generated on tribal lands without confiscation by the federal and state governments. While the federal government should never be relieved of its trust responsibility to support tribal governments, more should be done to allow tribes to develop their own economies.

Article I, Section 2 of the U.S. Constitution excludes "Indians not taxed" for purposes of apportionment in the House of Representatives and the levying of direct taxes.[6] At the time the Constitution was written, the meaning of this phrase was self-evident – that there existed Indians who lived outside of American political authority and who were not to be taxed or counted for apportionment purposes. This understanding – that Indians lived under the laws of their own sovereign nations and should not be subject to U.S. tax laws – was sustained for 155 years. In 1931,

[6] Similar language is also found in the Fourteenth Amendment.

however, the U.S. Supreme Court concluded that the federal Income tax applied to Indians as it did to other persons within the United States.[7] The Court gave little explanation for this conclusion. The closest thing to an explanation came in 1940, when the Solicitor of the Department of the Interior issued a formal opinion on the meaning of the "Indians not taxed" provision in the Constitution.[8]

The 1940 Solicitor's Opinion concluded that the "Indians not taxed" provision of the Constitution referred to Indians that existed at the time the Constitution was adopted, but who no longer existed following the enactment of the Indian Citizenship Act of 1924[9] and the Supreme Court's *Superintendent v. Commissioner* decision in 1935.[10] Nowhere in the Citizenship Act did the Congress expressly authorize the taxation of Indian people.

The Supreme Court's summary conclusion that Indians are subject to federal income tax, serves as the foundation for the continuing violation of constitutionally-protected tribal tax immunities. Congress should restore the treaty-recognized status of tribal lands as exempt from federal and state taxation. To initiate this approach, Congress should establish a Tribal Empowerment Zone Demonstration Project with the following elements:

- Tribal Empowerment Zones established throughout Indian Country
- No federal or state taxes of any kind within the zone
- Ten year demonstration project period

In addition to the establishment of Tribal Empowerment Zones, Congress should create incentives for individual entrepreneurship and job creation. Indians earning income "on" tribal land should be immunized from income tax. Both measures will provide significant incentive for job creation and economic development in Indian Country.

NCAI looks forward to working with Congress in considering these and other issues in the context of comprehensive tax reform.

For further information regarding any of the topics discussed herein, please contact John Dossett, General Counsel or Christina Snider, Staff Attorney at (202) 466-7767.

[7] *See Choteau v. Burnet,* 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935), *reversing Blackbird v. Commissioner of Internal Revenue*, 38 F.2d 976 (1930).
[8] Op. Sol. Interior, 57 Interior Dec. 195 (1945).
[9] Act of June 2, 1924, 43 Stat. 253.
[10] *See* 57 Interior Dec. at 207 ("Since all Indians are today [in 1940] subject to taxation by the Federal Government, there are no longer Indians not subject to taxation.") (citation omitted).