TRIBAL INTERIOR BUDGET COUNCIL RESOLUTION

Title: **Supporting Enactment of Legislation that Would Exempt Tribal Governments from the Employer Shared Responsibility Mandate**

WHEREAS, the Tribal Interior Budget Council (TIBC) was created to provide a forum and process, consistent with the Indian Self-Determination and Education Assistance Act, Section 450 (a)1 and Executive Order 13175 and Department of the Interior's (DOI) Government to Government policy, whereby Tribes and the Department work together to develop policy and budgets that provide for 1) the DOI to fulfill its Trust responsibilities and Treaty obligations; and 2) the fulfillment of Tribes' inherent sovereign rights of self-determination, self-governance, and self-sufficiency, as well as securing levels of funding necessary to strengthen Tribal governmental capacity to serve their Tribal citizens and communities; and

WHEREAS, these trust and treaty obligations of the United States to the Tribal Nations within its boundaries include, but are not limited to, providing health care, education, housing, social welfare, law and order, transportation, responsibility for trust lands, and many other services; and

WHEREAS, the fundamental trust, treaty and statutory obligations of the United States to American Indians have never been fully fulfilled, and American Indians and Alaska Natives suffer from great inadequacies and inequities in all aspects of those functions that are part of the overall trust, treaty and statutory obligations of the United States to American Indians, as has been continuously documented in many studies through the years; and

WHEREAS, legislation has been introduced in the Congress that would provide an exemption for Indian tribal governments and tribally owned businesses from the Employer Shared Responsibility Mandate (S. 1771 and H.R. 3080); and

WHEREAS, the Employer Shared Responsibility Mandate requires tribes with 50 or more full time and/or full-time equivalent employees to offer health coverage to those employees and their dependents or face stiff penalties; and

WHEREAS, the workforces of many tribes are made up of tribal members, most of whom receive health care as part of the federal trust responsibility, requiring tribal governments to provide additional health care coverage creates a substantial and unnecessary hardship; and

WHEREAS, enforcement of this mandate will cause Tribes throughout the United States economic hardship sufficient to require termination of tribal member workers and tribal programs necessary to meet the needs of tribal citizens, including programs for tribal elders and youth; and

WHEREAS, application of this mandate is unjust and wrongfully shifts the federal trust obligation to Tribes; and

WHEREAS, the National Indian Health Board (NIHB), the National Congress of American Indians (NCAI), the Self-Governance Communication and Education (SGCE), the Direct Service Tribal Advisory Committee (DSTAC), the United South and Eastern Tribes, Inc. (USET), the Sault Ste. Marie Tribe of Chippewa Indians, the Northwest Portland Area Indian Health Board (NPAIHB), the Rocky Mountain Tribal Leaders Council, Great Plains Tribal Chairman's Association, Red Cliff Band of Lake Superior Chippewa Indians, and the Rosebud Sioux Tribe all oppose the ACA Tribal Employer Mandate and support S. 1771 and H.R. 3080; and

WHEREAS, based on the United States Constitution, Treaties, statues and common law, the Federal Government must keep its promises on Health Care and make S. 1771 and H.R.3080 the law that honors the United States commitment to the Tribes and waives them from the ACA Tribal Employer Mandate; and

NOW THEREFORE BE IT RESOLVED, that the Tribes Congressional Delegation work with Tribes and/or their Representatives on the passage of S. 1771 and H.R. 3080; and

NOW THEREFORE BE IT FURTHER RESOLVED, that the leaders of the Tribal Nations across the 12 BIA regions attending the TIBC meeting urge the Senate and the House to pass S. 1771 and H.R. 3080 titled the Tribal Employment and Jobs Protection Act.

CERTIFICATION

This resolution came before the Tribal leader caucus attending the Tribal Interior Budget Council in Rapid City, SD on July 14th 2016 and was passed unanimously.

W. Ron Allen, Co-Chair
Tribal/Interior Budget Council

Edward K. Thomas, Jr., Co-Chair
Tribal/Interior Budget Council

Background on Issue

The trust relationship between the federal government and Indian tribes is rooted in guarantees made to Indian tribes by the federal government in treaties and reinforced by federal statutes and common law. The United States Constitution empowers the federal government to negotiate and enter treaties with Indian tribes. See, e.g., CONST. art. I, § 8; CONST. art. II, § 2; CONST. art. IV, § 3.

Pursuant to this constitutional authority, the federal government entered into a series of treaties with Indian tribes. These treaties generally contained promises by Indian tribes for land and peace in exchange for services to the tribes from the United States and create a general trust relationship between the United States and Indian tribes.

The trust relationship that originated in treaties was reinforced early on by federal common law. As early as 1831, and consistently thereafter, the United States Supreme Court has recognized the special duty the federal government assumed in its dealings and agreements with Indians. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831); United States v. Mitchell, 463 U.S. 206, 225 (1983) (noting that a principle that "has long dominated the government's dealings with Indians . . . [is] the undisputed existence of a general trust relationship between the United States and the Indian people"); Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (recognizing "the distinctive obligation of trust incumbent upon the [federal] Government in its dealings with [Indians]"); see also Eric v. Sec'y of U.S. Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978) ("The doctrine that the federal government stands in a fiduciary relationship to Native Americans has been a part of our common law since the early days of the Republic.").

In keeping with its general trust responsibility to Indians, for over a century, the United States government has undertaken the specific trust obligation of providing health care to Indians. Felix S. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.04[1] (2005). The United States has repeatedly reinforced its duty to provide health care for Indians through legislation. For example, the Snyder Act of 1921, 25 U.S.C. § 13, and the IHCIA, 25 U.S.C. § 1601 et seq., expressly provide legislative authority for Congress to appropriate funds specifically for Indian health care. The purposes of these laws are to provide "relief of distress and conservation of health to Indians," 25 U.S.C. § 13, to "eliminat[e] the deficiencies in health status and health resources of all Indian tribes," 25 U.S.C. § 1621(a)(1), "to ensure the highest possible health status for Indians . . . and to provide all resources necessary to affect that policy," 25 U.S.C. § 1602(1), and "to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level," 25 U.S.C. § 1601(3).

More recently, in passing the Affordable Care Act, Congress reauthorized and made permanent the federal government's trust responsibility to Indians. In affirming its duty to Indian tribes, Congress declared that "it is the policy of this nation, in fulfillment of its special trust responsibilities and legal obligations to Indians –[] to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy[.]" 25 U.S.C. § 103 (2009). President Obama reaffirmed this duty in signing the 2010 bill amendment to the IHCIA, stating that the federal government's "responsibility to provide health services to American Indians . . . derives from the nation-to-nation relationship between the federal and tribal governments." President Barack Obama, Statement by the President on the Reauthorization of the Indian Health Care Improvement Act (Mar. 23, 2010).

Congress has recognized that Indian tribes are entitled to special statutory protections due to their proactive leadership in the federal-tribal relationship. See, e.g., 154 Cong. Rec. S10709 (2008) (statement of Sen. Reid). Congress has specifically recognized Treaties as an example of the proactive leadership of tribes. Id. The Treaties were entered into by the federal government and tribes to end hostilities and to cede tribal land to the government in exchange for the government providing health care and other necessities to the tribes. Id.

In enacting the Snyder Act, the IHCIA, and the Affordable Care Act, Congress imposed statutory trust duties on the United States to confer upon tribes the right to receive health care services and a duty to protect these rights. Through such legislation, "Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians." White v. Califano, 437 F. Supp. 543, 555 (D.S.D. 1977). Having undertaken responsibility for Indian health care, the United States has a statutory and fiduciary trust obligation to provide such care in a competent manner.

Federal courts have consistently reinforced Congress' recognition of the federal government's responsibility for Indian health care and duty to assure reasonable health care services to Indians. See, e.g., Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1000 (8th Cir. 1988) (noting that "[t]he existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, 'reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people'") (citation omitted); McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987) (noting that in "reviewing the text of the IHCIA and the relevant legislative history, one is struck by Congress' recognition of federal responsibility for Indian health care").

The Patient Protection and Affordable Care Act (ACA), was passed in the senate on December 24, 2009, and passed in the house on March 21, 2010. It was signed into law by President Obama on March 23rd, 2010 and upheld in the supreme court on June 28, 2012.

The ACA addressed once again the health care needs of federal recognized tribes as intended by Congress's and the President's commitment to honor Treaties by providing two provisions within the ACA.

The first being DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 1 and 602 [TD 9632] RIN 1545–BL36, Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage AGENCY: Internal Revenue Service (IRS), Treasury. ACTION: Final regulations, 53654 Federal Register / Vol. 78, No. 169 / Friday, August 30, 2013 / Rules and Regulations, Required Contribution Percentage, Members of Indian Tribes The regulations provide an exemption for individuals who are members of federally-recognized Indian tribes.

The Indian health coverage exemption allows American Indians and Alaska Natives (AI/ANs) and other people eligible for services through the Indian Health Service, tribal programs, or urban Indian programs (like the spouse or child of an eligible Indian) to avoid having to pay the fee for not having health coverage.

The second action under the Patient Protection and Affordable Care Act, was Part III—Indian Health Care Improvement, Pub L No. 111–148 (2010). Which states "Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy."

It is clear by Congress signing treaties with the Tribes that it recognizes its obligation to provide health care to federally recognized tribes. It is also clear that including Tribes in the "Affordable Care Act's Employer Mandates", was accidental in that it conflicts with historical treaty, trust and Congressional action requiring health care to be provided to the Tribes, and conflicts with the Individual Tribal Exemption and Part III—Indian Health Care Improvement, Pub L No. 111–148 (2010).