



NATIONAL CONGRESS OF AMERICAN INDIANS

National Congress of American Indians Comments to the Senate Committee on Indian Affairs

Access to Capital in Indian Country

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The National Congress of American Indians is pleased to provide comments regarding yesterday's hearing, entitled "Access to Capital in Indian Country." 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.

As such, access to capital is of great interest to NCAI and our respective member tribes. This is because access to capital presents a very real opportunity to protect and enhance the many governmental functions and services provided by Indian tribes. 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. Tribal access to financing tools and capital markets is needed to make critical decisions regarding citizens' needs, sustain economic growth, and provide employment opportunities for tribal citizens and the surrounding community.

In addressing the barriers to revenue generation in Indian Country, it is critical that Congress acknowledge 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 access to capital, we do so as partners in American growth and, like each of you, as elected governmental representatives.

Areas Where Access to Financing Tools and Capital Markets can be Improved:

- Tribal Government Tax Exempt Bonds
- Tribal Allocations of Clean Renewable Energy Bonds ("CREBs")
- Set-asides for New Markets Tax Credit and Low Income Housing Tax Credit
- Integrated Planning for Infrastructure and Economic Development

Tribal Government Tax Exempt Bonds

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.¹ Among other provisions, 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 tax exempt government bonds, with 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
- 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 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” 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

¹ Title II of Pub. L. No. 100-203, 96 Stat. 2605 (1982).

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.² 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.³ 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 statewide 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 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.

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 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

² 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>.

³ See Tax Exempt Bonds and Borrowing for Indian Tribes, Orrick, Herrington & Sutcliffe LLP, available at http://www.nafoa.org/pdf/10555_Tribal_Finance.pdf.

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.

Tribal Inclusion in Community Development Financial Institution (CDFI) Fund Bond Guarantee Program

Under the CDFI Bond Guarantee Program, the Treasury Department guarantees the full amount of bonds issued in support of CDFIs that make investments for eligible community or economic development purposes. These loans tend to have lower rates, and can be used for activities that promote community revitalization and stability, job creation, financial services, community facilities, housing and businesses for the benefit of low-income people, and economic development. While the CDFI Fund has expressed willingness to fund tribal operations that meet the loan parameters, tribes have been inadvertently left out due to the CDFI Fund's preferred use of land as collateral, as most tribal land is held in trust by the federal government. More efforts should be made to guarantee tribal access to this program going forward.

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.

Integrated Planning for Infrastructure and Economic Development

Tribes may already use Native American Housing and Self Determination Act (NAHASDA) funds for the basics of planning for housing, including related infrastructure like water, power and sewage. However, NCAI encourages Congress to provide greater resources for integrated planning for economic development and jobs.

Because of separated federal funding streams, tribal planning processes tend to silo into plans for housing, transportation, power, telecommunications, environmental compliance, water and sewage. But at the local level, this infrastructure has to be connected.

In addition, there is a growing emphasis on planning for economic development and jobs and recognition of the importance of business agglomeration. Industries tend to cluster in certain regions, and it is important for tribes to plan and build businesses and jobs that complement their existing strengths.

Tribal industries tend to cluster in certain areas such as:

- Gaming/Hotel/Recreation/Entertainment
- Agriculture, Oil & Gas, Timber
- Commercial Real Estate
- Government Contracting – 638 and 8(a)
- Retail – Indian owned and taxed businesses
- Housing
- Roads
- Health Care
- Education
- Law Enforcement
- Native Arts & Crafts

All of these industries need access to capital, and capital follows well-developed plans for development that will generate revenues and repay the loan. Thus, greater integration of housing and economic development planning is needed to draw this much needed capital to Indian Country.

NCAI looks forward to working with Congress in working to provide greater access to capital in Indian Country. 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.