

# **Current Tax Issues in Indian Country: A Follow-Up to the Tax Summit**

**September 8, 2011  
2:00 p.m. - 3:30 p.m. EST**

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# Webinar Road Map:

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- 2:00 – 2:05 p.m. – Intro & Overview
- 2:05 – 2:20 p.m. – Taxation of Tribal Benefits
- 2:20 – 2:35 p.m. – Tax-exempt Bond Issues
- 2:35 – 2:50 p.m. – PACT Act/Tobacco Compliance Issues
- 2:50 – 3:05 p.m. – State Taxation of Permanent Improvements to Tribal Trust Land
- 3:05 – 3:30 p.m. – Updates on Current Tax Issues, followed by Q & A

# Today's Presenters

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- Lynn Malerba – Chief, Mohegan Tribe
- Ron Allen – Chairman, Jamestown S'Klallam Tribe
- Dante Desiderio – Executive Director, Native American Finance Officers Association (NAFOA)
- Lance Morgan – President & CEO, Ho-Chunk, Inc.
- John Dossett – General Counsel, National Congress of American Indians (NCAI)

# Summary & Background

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In April, NCAI, USET, & ATNI hosted a Tribal Leaders Tax Summit at Miccosukee

Through that dialogue, a list of numerous taxation issues was developed

NCAI Midyear: We elected to focus on four central initiatives in the short-term

# Four Tax Initiatives

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1. Taxation of Educational and Cultural Benefits Issued by Tribal Governments
2. Tax-Exempt Bond Financing
3. State Taxation of Improvements to Tribal Trust Land
4. PACT Act Tobacco Compliance Issues Affecting Tribal Tobacco Distributors

# Taxation of Benefits Issued by Tribal Governments

IRS taxation of tribal benefits (e.g., tutoring programs, cultural exchange programs, feast days) infringes on a tribal government's right to provide for its community.

Our Position: The IRS should not treat tribal benefits as income when they seek to compliment a federal trust obligation, such as education or healthcare, or provide a service that is similar to what the federal, state or local governments provide; and

The tribe, through its status as a sovereign, defines what tribal programs are appropriate for its own people.

# General Welfare Doctrine

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The IRS recognizes a 'General Welfare Doctrine,' which programs such as TANF and other needs-based programs fall under.

Tribal benefits that are distributed equally, without regard to need, are often considered taxable by the IRS

Solution – there has been initial discussion with the Treasury & IRS about providing guidance that respects tribal sovereignty



# General Welfare Doctrine & Tribal Governments

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- Should be expansive enough to include programs designed to further the health, education and culture of a particular Indian community and should not be limited to purely financial need or require income assessments
- The tribe, as a sovereign nation, should be given deference as to what constitutes an educational, health, or cultural program and/or benefit

# Defining a Tribal Welfare Doctrine

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Tribes may develop their own welfare distribution mechanism, which aligns their programs with the IRS' current 'General Welfare Doctrine,' yet maintains aspects of tribal sovereignty:

[http://www.pascuayaqui-nsn.gov/static\\_pages/tribalcodes/docs/6\\_PYTC/1-1\\_General\\_Welfare\\_Policy\\_FINAL.pdf](http://www.pascuayaqui-nsn.gov/static_pages/tribalcodes/docs/6_PYTC/1-1_General_Welfare_Policy_FINAL.pdf)

Must be drafted broad enough to provide tribe ample discretion to exercise its sovereignty

Downside – there are a lot of procedural processes that need to be addressed for this approach to work

# Educational Benefits

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Section 117 of the IRC provides for the tax-exempt treatment of qualified scholarships, which includes:

- tuition;
- fees;
- required books; and
- equipment

for academic degree candidates

Educational benefits that fall outside the scope of Section 117 should be structured to fall within the General Welfare Doctrine, *i.e.*, should be needs-based

# Current Steps Towards Addressing this Initiative

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We have met with representatives from the IRS as well as the Treasury to discuss this issue

The Treasury is currently developing its tribal consultation policy, per E.O. 13175

Last year, Tribal Health benefits were excluded from income as a part of the Affordable Care Act.

This year, potential amendments to IRC 117 to exclude tribal educational & cultural benefits have been developed for the Elementary & Secondary Education Act reauthorization.

# Addressing Barriers to Tribes' Access to Tax-Exempt Bond Financing

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Tax-Exempt Bonds remain a relatively untapped source of financing by Indian tribes due to three issues:

- 1) Lack of a tax base to secure the bonds;
- 2) Lack of access to the credit market; and
- 3) The 'Essential Government Function' analysis

Our Position: The essential government function test should be eliminated so that tribal governments are treated the same as state and local governments for tax exempt bonds.

Federal loan guarantees should be available to back tribal bonds on the market

# Tribal Economic Development Bonds

The Tribal Economic Development Bond (TED Bond) program under ARRA is a pilot program that allows tribes to finance projects using tax-exempt bonds in the same manner states and local governments finance projects (*i.e.*, it suspends the troublesome 'essential government function' analysis)

- The program has been underutilized due to a bad economy & tribe's lack of access to capital
- A study was to be completed on the TED Bond program by mid-February of 2010. It has yet to be completed.

TED Bond Recommendation: We urge Treasury to complete the TED Bond study by Fall 2011. Also, the TED Bond program should be reallocated with certain changes, including a more expansive volume cap, as well as a longer time extension for tribes to issue a bond offering (currently, the time allotted is one year from the date of allocation)



# Current Steps Towards Addressing this Initiative

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We have met with Treasury Department to discuss the completion of the TED Bond study, as well as changes which need to be made to the current Tax-Exempt Bonding procedures

We participated in a Senate Committee on Indian Affairs Taxation Roundtable and discussed this issue, as well as the other issues within our initiatives

We participated in a White House Native American Business Leaders Roundtable and discussed changes we believe need to be made in the area of Tribal tax-exempt financing

Article in the “Bond Buyer” highlighting our outreach to Treasury regarding the completion on the TED Bond Study

# State Taxation of Improvements to Tribal Trust Land

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*“The power to tax is the power to destroy”* – Chief Justice Marshall,  
McCullough v. Maryland

State taxation of the non-Indian interests of tribal economic development projects has hindered growth in various industries, most notably, energy & resource development

Our Position: All activities occurring on leased rights-of-ways and trust land should fall within the tribe's tax jurisdiction



# Current Developments

The 10<sup>th</sup> Circuit Court of Appeals recently held that New Mexico could impose taxes on oil and gas development occurring on the Ute Mountain Ute Indian Reservation

Ute Mountain Ute Tribe v. Rodriguez

This decision:

- Narrowed Supreme Court Precedent
- Failed to give proper weight to the absence of services the state provides to the tribal community
- And disregarded findings of fact in the lower court which balanced in favor of preemption of the state tax

# Addressing This Issue

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## The BIA is amending its 162 Leasing Regulations

- 162.415(c) Addresses Taxation of Permanent Improvements on Trust Land Associated with Business Leases
- Wind & Solar Resource Permits Section Addresses Ownership & Treatment of Improvements, Including Taxation

More information on the draft 162 Regulations can be found at: <http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm>

Also, some tribes routinely require consent to tribal jurisdiction when negotiating rights-of-way with outside entities

# PACT ACT Implementation

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## Federal Law Enacted March 2010

- Intended to Stop Mail Order Tobacco Sales

## Consultation June 2010

- “Straight forward Issues” DOJ official
- Complicated Tribal/State jurisdictional Issues

## PACT ACT -killed the Tribal Mail Order Bus.

- Pending NY litigation
- Enforcement of Tax Provisions due process issue
- Post Office ban still in place

# PACT ACT, Part 2

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States had hidden Agenda

- Now the “Master Settlement Enforcement Act”

State right to enforce a federal law against Tribal Interest

- Need information in order to enforce Pact Act and MSA enforcement statutes.

States lobby DOJ and ATF to interpret vague provisions

Will not Issue Regulations (Harder for Tribes to Sue)

DOJ/ATF Took Pro-State Positions

- November 2010 DOJ Open Letter
- April 2011 Clarification/FAQ

# Open Letter and FAQ's

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DOJ/ATF took pro-state positions

States are quoting Open Letter to Threaten  
Tribe's and Tribal Companies

“Interstate Commerce” Tribe to Tribe?

“Delivery Seller” Who is one?

- “Lawfully Operated” Dist, Retail, Man. exempt
- “All applicable licenses” Tribal vs State License

Sovereign Immunity Protection Hidden

# What's Being Done

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Pact Act: Not supposed to Increase State power over Tribes

NCAI and Tribal Industry Tobacco Group focus

- 3 meetings internally
- Meeting with DOJ/ATF and White House and BIA

## Goals

- New Consultation to discuss ramifications of DOJ/ATF's initial positions
- Retraction of some of the Initial guidance

# Other Tribal Tax Issues

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Payroll tax cut extension

Extension of Accelerated Depreciation & Indian Employment Tax Credit

Fond du Lac v. Frans – McClanahan limitation

Telecommunications Tax

Streamlined Sales Tax – H.R. 2701, S.1452

Taxation of digital goods & services – H.R. 1860, S. 971