AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 115–254

BUILDING TRIBAL ECONOMIES: MODERNIZING TAX POLICIES THAT WORK FOR INDIAN COUNTRY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

NOVEMBER 1, 2017

Printed for the use of the Committee on Indian Affairs

U.S. GOVERNMENT PUBLISHING OFFICE
30–362 PDF WASHINGTON : 2018

COMMITTEE ON INDIAN AFFAIRS

JOHN HOEVEN, North Dakota, *Chairman*
TOM UDALL, New Mexico, *Vice Chairman*

JOHN BARRASSO, Wyoming
JOHN McCAIN, Arizona
LISA MURKOWSKI, Alaska
JAMES LANKFORD, Oklahoma
STEVE DAINES, Montana
MIKE CRAPO, Idaho
JERRY MORAN, Kansas

MARIA CANTWELL, Washington
JON TESTER, Montana,
AL FRANKEN, Minnesota
BRIAN SCHATZ, Hawaii
HEIDI HEITKAMP, North Dakota
CATHERINE CORTEZ MASTO, Nevada

T. MICHAEL ANDREWS, *Majority Staff Director and Chief Counsel*
JENNIFER ROMERO, *Minority Staff Director and Chief Counsel*

CONTENTS

	Page
Hearing held on November 1, 2017	1
Statement of Senator Cortez Masto	29
Statement of Senator Daines	35
Statement of Senator Franken	4
Statement of Senator Heitkamp	31
Statement of Senator Hoeven	1
Statement of Senator Moran	25
Statement of Senator Murkowski	27
Statement of Senator Udall	2
WITNESSES	
Desiderio, Dante, Executive Director, Native American Financial Officers Association	13
Prepared statement	15
Marrs, Carl, CEO, Old Harbor Native Corporation	5
Prepared statement	6
Onnen, Hon. Liana, Chairwoman, Prairie Band Potawatomi Nation	7
Prepared statement	9
APPENDIX	
Begaye Hon. Russell, President, Navajo Nation, prepared statement	39
Mandan, Hidatsa and Arikara Nation (MHA Nation), prepared statement	40
National Congress of American Indians, prepared statement	44
Response to written questions submitted by Hon. Jon Tester to:	
Dante Desiderio	60
Carl Marrs	62
Hon. Liana Onnen	58

BUILDING TRIBAL ECONOMIES: MODERNIZING TAX POLICIES THAT WORK FOR INDIAN COUNTRY

WEDNESDAY, NOVEMBER 1, 2017

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. John Hoeven, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN HOEVEN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. Good afternoon. Thanks to everyone for attending.

I will call this oversight hearing to order.

Today's hearing is entitled Building Tribal Economies: Modernizing Tax Policies that Work for Indian Country. The Committee will examine the obstacles that Federal tax policies present to tribal economic growth and infrastructure development.

In 2012, this Committee held an oversight hearing on the same issue to hear from tribes about how Federal tax policies have burdened their ability to practice the principle of tribal self determination. Now, five years later, we are still looking at many of those concerns.

Overburdening tax policies, layers of regulations and a fundamental misunderstanding of how the Unites States interacts with tribes on a government-to-government basis continue to stymie tribal economic development. Tribes and their communities face numerous other barriers to economic development, some of which we may not be able to change such as remote locations, in some cases, of tribal homelands.

As our Country prepares to undertake the most comprehensive tax reform effort since President Reagan was in office, this Committee must work to ensure that tribes are included in that effort. In so doing, we must be aggressive in our approach to overcome the additional barriers tribes face.

That is why I have introduced S. 2012, the Tribal Economic Assistance Act of 2017, the TEA Act, along with Senators Murkowski and Heitkamp as co-sponsors. I want to thank both of them.

This legislation removes the regulatory obstacles that prevent tribal access to a number of tax incentives for community invest-

ments. The bill also makes permanent important tax credits that will entice private investment in tribal businesses and communities like the Indian Employment Tax Credit and the Accelerated Depreciation Tax Credit.

The Act will also facilitate infrastructure development on the reservation by providing incentives for new market tax credit project proposals that will take place in tribal communities. This bill would also encourage private/tribal partnerships to fund important school construction projects in tribal communities.

Finally, the bill will eliminate the burdensome government essential functions test that has limited tribes from issuing public financing tools like tax exempt government bonds.

Also, two other bills were recently introduced involving Indian tax. Senator Moran introduced S. 1935, the Tribal Tax and Investment Reform Act of 2017. In a moment, I will turn to Senator Moran to discuss the provisions in his bill.

Finally, Senator Murkowski has introduced S. 1698, the Settlement Trust Improvement Act of 2017 along with Senator Sullivan as a co-sponsor. I will also offer her the opportunity to discuss the provisions within her bill.

Today I look forward to hearing from our witnesses on how the proposals in these tribal tax bills as well as others will work to support tribes.

I also want to thank my colleagues, Senators Hatch and Widen for their work on behalf of Indian Country as many of the Indian tax provisions discussed today fall within the Finance Committee jurisdiction.

Before turning to our witnesses, I want to ask Vice Chairman Udall for his opening statement.

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you so much, Chairman Hoeven. Thank you for holding today's hearing on tax reform in Indian Country. It is very timely and we expect House Republicans to release their tax legislation tomorrow but without any consultation with Indian Country. While we are still waiting on details, what we know about the House Republican tax plan shows little promise for Native communities.

The Republican budget calls for $1.5 trillion in cuts over ten years to pay for their tax breaks, but the Majority is not sharing where those spending cuts will come from. Medicaid and Medicare are prime targets and those programs provide a lifeline for many in Indian Country. The Majority's plan could very well force big cuts to the Indian Health Service and the Bureau of Indian Education. These important agencies are already severely underfunded.

The United States has a trust obligation to provide health and education services to tribes. These critical programs should not be sacrificed for tax cuts to the wealthy. Many tribes have a saying that the decisions we make today should consider the impacts for seven generations to come, a very wise saying.

With this tax cut bill, the Majority is failing to take into account Indian Country's views on issues of national importance. Today's hearing provides the Committee with an opportunity to hear tribal

voices about what tax reform should look like. I think this is a good step.

I hope we can work together on real, bipartisan tax reform for our Nation that includes Indian Country. For years, Indian Country has repeatedly emphasized three principles for tax reform: parity, certainty and consultation.

With regard to parity, tribal governments and State and local governments are similar in many ways. They provide their communities with access to medical care and education, fund law enforcement agencies and provide for the general welfare.

Yet, when it comes to taxes, tribes are treated differently. Tribes cannot access tax exempt bonds in the same way States and localities are allowed. Unlike States, tribes cannot garnish Federal tax returns of parents who owe child support, and families of Native Americans special needs children may not be eligible for the same tax benefits received by other families with non-Native special needs children.

These are just a few of the examples of the inequitable treatment of tribes in the Tax Code. We could go on and on with many other examples. This unequal treatment between the tribes and the States does more than just stifle economic growth in Indian Country and hurt Native American families. It diminishes the very core of tribal sovereignty and the exercise of self-governance.

The second principle is certainty. Taxation of business in Indian Country is complex and, at times, unpredictable. Part of the complication is State taxation of activities on tribal lands. This prevents tribes from raising their own tax revenue and reinvesting in their own communities.

It undermines tribal authority, strains budgets and diverts valuable resources away from tribal communities. In years past, Congress provided businesses located in Indian Country with short term tax credits for capital investments and for employing Indians. This helped provide some temporary relief.

We need to take a hard look at how we can make tax credits permanent. This includes low income housing tax credits, an issue my colleague, Senator Cantwell, has championed.

The third and most important principle is tribal consultation. Tax reform should provide broad benefits across society not focus on giving massive tax breaks to the top 1 percent. It should go through the regular order, not this fast track, back door process.

I am particularly disappointed that the Administration could not bother to send a witness for this hearing to discuss its signature issue of tax reform.

With that, Mr. Chairman, thank you so much for calling today's hearing and providing us an opportunity to discuss how tax reform can work for all of Indian Country.

Thank you very much.

The CHAIRMAN. Are there other opening statements?

Senator Franken.

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. Thank you, Chairman Hoeven and Vice Chairman Udall for holding this hearing today to examine how the Tax Code affects tribal communities.

I know the Chairman, along with Senators Heitkamp and Murkowski, recently introduced a thoughtful bill to help spur economic development in tribal areas. Mr. Chairman, I would like to work with you on that issue.

However, given the time we have for today's hearing, it is impossible to ignore the tax bill the House Republicans are releasing tomorrow, if they do release it tomorrow. I understand a witness from the Department of Treasury was scheduled to testify today but his appearance was canceled in light of the imminent release of the Republican tax bill. I urge Chairman Hoeven and Vice Chairman Udall to schedule a future hearing with an Administration witness on this issue prior to Senate consideration of such a major tax policy change.

I believe we need a fair and simpler tax code. That is why Democrats have said that any tax cut bill should be focused on working families instead of giving huge tax cuts for the top 1 percent of income earners as the Vice Chairman just said.

That is why I am a co-sponsor of legislation to make it easier for Americans to file their taxes by giving them the option of a free automated filing process. Based on the tax framework the Republicans released in September, experts have projected their plan would cost $2.4 trillion which would be added to the national debt. Eighty percent of the tax cuts would go to the top 1 percent of income earners and very little for low income and middle income families.

As many tribal communities struggle with a lack of funding for infrastructure development, school construction and health care, to me it is unconscionable to be adding trillions of dollars to the national debt in order to fund tax cuts for the wealthy without addressing these other serious issues. I hope this hearing will be a reminder of why we need a bipartisan approach to tax reform that addresses the real needs of tribal communities and not the corporate focus partisan process that the Republicans are currently pursuing.

Thank you again, Mr. Chairman.

The CHAIRMAN. Do other members have opening statements they would like to make?

[No audible response.]

The CHAIRMAN. Hearing none, we will proceed with our witnesses. Our witnesses today are: Mr. Carl Marrs, Chief Executive Officer, Old Harbor Native Corporation, Anchorage, Alaska; The Honorable Liana Onnen, Chairperson, Prairie Band Potawatomi Nation, Mayetta, Kansas; and Mr. Dante Desiderio, Executive Director, Native American Financial Officers Association in Washington, D.C.

Welcome to all of you. Thanks for coming.

Mr. Marrs, please proceed.

STATEMENT OF CARL MARRS, CEO, OLD HARBOR NATIVE CORPORATION

Mr. MARRS. Thank you, Chairman Hoeven, Vice Chairman Udall and members of the Committee. Thank you for inviting me to testify today.

My name is Carl Marrs. I am proud to say I am an Alaska Native. Over the past 45 years, I have served the Alaska Native community in various roles and offices. I am presently the CEO of Old Harbor Native Corporation.

My purpose here today is to testify in support of S. 1698, the Settlement Trust Improvement Act. In addition, I also support the Tribal Economic Development Assistance Act and the Tribal Tax Investment Reform Act.

Congress enacted the Alaska Native Claims Settlement Act, ANCSA, in 1971 to accomplish a full and just settlement of the aboriginal land claims of Alaska Natives. Section 2 of ANCSA mandated that this settlement be accomplished in conformity with the real economic and social needs of Natives. ANCSA required Alaska Natives to form corporations.

Almost immediately, it became apparent that the corporate form did not always address the real economic and social needs of Natives. In 1988, Congress enacted various amendments to ANCSA in Public Law 100–241 which authorized Alaska Native corporations to establish settlement trusts which would have two main purposes: first, to exist as permanent institutions to hold and manage Native land assets in perpetuity; and second, to provide for the health, education and economic welfare of individual Natives.

The purposes are tribal in nature. The holding and managing of Native lands in perpetuity is one of the most basic of tribal functions. Alaska Natives who are beneficiaries of the settlement trust are also tribal citizens.

Settlement trusts were intended to make ANCSA's aboriginal land settlement multigenerational. Unfortunately, Public Law 100–241 did not address the significant tax issues the settlement trust presents.

Congress added Section 646 to the Tax Code in 2001 so that Native shareholders do have phantom income. When assets are transferred to the settlement trust, the trust itself rather than the beneficiaries, pays the taxes. These provisions allow settlement trusts greater flexibility to invest and retain assets for the long term.

The Tax Code remains a road block for the use of settlement trusts. Old Harbor is one of the few Native corporations that established and maintains a settlement trust so I am very familiar with the following detrimental tax issues.

First, assets must be transferred to a settlement trust on an after-tax basis. Second, the tax treatment is uncertain if a Native corporation assigns its right to receive certain ANCSA cash payments to a settlement trust. Lastly, if appreciated assets, including Native land, are transferred to a settlement trust, immediate gain will be triggered to the transferring Native corporation.

S. 1698 addresses these issues. First, the bill provides certain tax treatments when a Native corporation assigns ANCSA-required payments to a settlement trust. Second, it allows Alaska Native corporations to elect whether or not to deduct contributions to a

settlement trust. The settlement trust would have income in the same amount as the deduction claimed by the Native corporation.

Third, S. 1698 provides that there is no income or gain recognition to a Native corporation when property is transferred to a settlement trust. This will greatly facilitate the Native lands into trust.

I also want to comment briefly on S. 2012 and S. 1935. I support these bills which affect Alaska Native lands because of the Indian Employment Credit, the accelerated depreciation and the New Market Tax Credit which apply to lands owned by village and regional corporations.

Also, S. 1935 clarifies that tribal charities are to be treated the same as charities controlled by other governmental entities for purposes of deduction of contributions. This parallels the deductions that S. 1698 permits for contributions to settlement trusts.

In conclusion, I know the Committee is aware that Alaska Natives are rich in culture and tradition, but have very limited economic means. These three bills help address this imbalance.

I thank the Committee for the opportunity to testify. I would be pleased to answer any questions the Committee may have.

Thank you.

[The prepared statement of Mr. Marrs follows:]

PREPARED STATEMENT OF CARL MARRS, CEO, OLD HARBOR NATIVE CORPORATION

Chairman Hoeven, Vice Chairman Udall, and Members of the Committee, thank you for inviting me to testify today. My name is Carl Marrs. I am proud to say that I am an Alaska Native and that over the past forty years, I have served the Alaska Native community in various roles and offices. I am presently the Chief Executive Officer of Old Harbor Native Corporation.

My primary purpose today is to testify in support of S. 1698, the Settlement Trust Improvement Act of 2017. In addition, I also support S._____, The Tribal Economic Assistance Act of 2017 and S. 1935, the Tribal Tax and Investment Reform Act of 2017.

Congress enacted the Alaska Native Claims Settlement Act (ANCSA) in 1971 to accomplish "a fair and just settlement" of the aboriginal land claims of Alaska Natives. Section 2 of ANCSA mandates that this settlement should be accomplished "in conformity with the real economic and social needs of Natives." ANCSA required Alaska Natives to form corporations to participate in the settlement. Almost immediately, it became apparent that the corporate form did not always address "the real economic and social needs of Natives."

In 1988, Congress enacted various amendments to ANCSA in Public Law 100–241. Public Law 100–241 authorized Alaska Native Corporations to establish "Settlement Trusts," which would have two main purposes:

- First, to exist as permanent, Native-oriented institutions to hold and manage Native land assets in perpetuity.
- Second, to provide for the health, education and economic welfare of the individual Natives who are the Settlement Trust's beneficiaries.

These purposes are tribal in nature: the holding and managing of Native lands in perpetuity is one of the most basic of tribal functions and the Alaska Natives who are beneficiaries of Settlement Trusts are also tribal citizens. In other words, Settlement Trusts were to be an important vehicle in making ANCSA's aboriginal land settlement multi-generational.

Unfortunately, Public Law 100–241 did not address the significant federal tax issues that Settlement Trusts present. Congress added section 646 to the Tax Code in 2001 so that Native shareholders do not have "phantom income" when assets are transferred to a Settlement Trust and so the Trust itself, rather than the Native beneficiaries, pays the taxes on the Trust income even if that income is distributed to the beneficiaries. These provisions allow a Settlement Trust greater flexibility to invest and retain assets for the long term.

Section 646 has been helpful, but in my experience the Tax Code remains a road block to the use of Settlement Trusts. Old Harbor is one of a few Native Corporations that have been able to establish and maintain a Settlement Trust, so I am very familiar with the following detrimental tax issues. First, assets must be transferred to a Settlement Trust on an after-tax basis. Second, the tax treatment is uncertain if a Native Corporation assigns its right to receive certain ANCSA cash payments to a Settlement Trust. Lastly, if appreciated assets (including Native lands) are transferred to a Settlement Trust, immediate gain will be triggered to the transferring Native Corporation.

S. 1698 addresses these aforementioned issues. First, the bill provides certain tax treatment when a Native Corporation assigns ANCSA-required payments to a Settlement Trust. Second, S. 1698 allows an Alaska Native Corporation to elect whether or not to deduct contributions to a Settlement Trust. The deduction would be the amount of any cash transferred, and if property is transferred, the deduction is limited to the amount of the Native Corporation's basis in the property. The Settlement Trust would have income in the same amount as the deduction claimed by the Native Corporation. Third, S. 1698 provides that there is no income or gain recognition to a Native Corporation when property is transferred to a Settlement Trust. This will greatly facilitate transfers of Native lands into Trusts.

I also want to comment briefly on S._____, the Tribal Economic Assistance Act of 2017 ("TEA Act") and S. 1935, the Tribal Tax and Investment Reform Act of 2017. I am whole-heartily in favor of the changes that would be made by these bills, which are aimed primarily at lower 48 Tribes and their reservations. However, these bills also favorably affect Alaska Natives and their lands. This is because the Indian Employment Credit of section 45A, the accelerated depreciation provisions of section 168(j), and the New Markets Credit of section 45D all apply to "reservations" as defined in section 3 of the Indian Financing Act, and section 3 defines "reservations" to include lands owned by Village Corporations and Regional Corporations. Also, S. 1935 clarifies that tribal charities are to be treated the same as charities controlled by other governmental entities for purposes of deduction for contributions. This parallels the deduction that S. 1698 permits an Alaska Native Corporation for contributions to a Settlement Trust.

In conclusion, I know that the Committee is aware that Alaska Natives are rich in culture and tradition but have very limited economic means. These three bills help address this imbalance. I thank the Committee for the opportunity to testify and would be pleased to answer any questions the Committee may have.

The CHAIRMAN. Thank you, Mr. Marrs.

Chairperson Onnen.

STATEMENT OF HON. LIANA ONNEN, CHAIRWOMAN, PRAIRIE BAND POTAWATOMI NATION

Ms. ONNEN. Good afternoon.

I am Liana Onnen, Chairwoman, Prairie Band Potawatomi Nation. I thank you for the opportunity to testify before you today.

Today's hearing is especially significant as tax reform for Indian Country truly gets to the heart of your efforts to strengthen tribal governments and improve our members' quality of life. We appreciate the timeliness of this hearing, given the current overarching discussions on tax reform.

In September, the Republican leadership released its United Framework for fixing the Tax Code. It pointed out that too many in our Country are shut out of the dynamism of the U.S. economy. The United Framework proposes to establish a fairer system that levels the playing field.

Unfortunately, tribes are among those who have been shut out of the economic opportunities available to others. We value this Committee's work to level the playing field and let us in. It is important to remember that when tribal economies thrive, our neighboring communities thrive with us.

The Prairie Band Potawatomi is an economic engine for our region in Kansas. We employ nearly 1,300 employees, 725 of which are non-tribal members whose wages and taxes contribute directly to our surrounding communities. Our governmental revenues that we generate from our gaming facility, other enterprises and our taxing authority make our government possible.

Many of our tribal programs serve tribal and non-tribal community members. However, we could do far more if Congress were to eliminate barriers to tribal economic development and act to modify tax incentives to attract private investment to tribal communities.

The bills we discuss today are vital to leveling the playing field for tribes. They will remove obstacles and improve opportunities to attract investment and create jobs. They will help us be stronger economic engines for not only our reservations, but also our regions.

We welcome legislation offered by Chairman Hoeven and other members of this Committee, including S. 1116 and S. 2012. We especially appreciate and support Senator Moran's introduction of S. 1935. This bill will spur much needed economic development on Indian lands, promote tax fairness and strengthen tribal self determination.

S. 1935 will address the disparity for tribes and the issuance of tax exempt bonds. Unlike State and local government bond issuances, the Tax Code limits tribal tax-exempt bonds to projects that meet the requirements of the Essential Government Functions test. This distinction has limited our ability to use tax exempt financing.

State and local governments can use tax-exempt bonds for projects that generate new revenues such as convention centers and public recreational facilities. Yet, we could not have used tax-exempt bonds for our golf course, which was built eight years ago. The Treasury Department has found the tribal limitation unfair and recommended that tribes have full parity with States with tax exempt bond financing, including private activity.

S. 1935 will reveal the Essential Government Functions test and permit tribes to issue private activity bonds. This promotes fairness for tribes in the Tax Code and will enable us to accelerate time frames for commercial development and opportunities.

S. 1935 will also allow tribes' child support enforcement agencies to access the Federal Parent Locator database available to State child support agencies. While we are very fortunate to have a good relationship with Kansas on this issue, direct tribal access to the Federal database is a matter of governmental parity and will enhance tribes' ability to enforce the law without undue burdens.

S. 1935 will also recognize tribal court determinations of a child having special needs for purposes of the Adoption Tax Credit as opposed to having the tribal member adoptive parents go to State court for such a determination. Our adoptive families should have the benefit of receiving this tax credit through a tribal court determination.

In conclusion, the Prairie Band Potawatomi Nation strongly supports S. 1935. It recognizes tribal sovereignty and promotes strong tribal governments and economies. Through passage of S. 1935,

tribes will be better positioned to contribute to and benefit from the opportunities available in the U.S. economy.

It will help level the playing field for tribes with regard to economic development and job creation. We encourage this Committee to fully embrace S. 1935 and to work with the Senate Finance Committee to include it in a larger tax reform effort.

Tribes' tax priorities have been on hold for decades. We appreciate the Committee making sure that tribes are at the table now as tax reform works its way through Congress. We will be counting on you to continue to work with us to make sure tribes are included in the final tax product.

Thank you again for your work. I would be happy to answer any questions you may have.

[The prepared statement of Ms. Onnen follows:]

PREPARED STATEMENT OF HON. LIANA ONNEN, CHAIRWOMAN, PRAIRIE BAND POTAWATOMI NATION

Introduction

On behalf of the Prairie Band Potawatomi Nation (PBPN), I thank you for the opportunity to testify at this important hearing. This Committee is charged with addressing a multitude of significant issues that affect tribes and our people, from public safety to health care to everything in between and beyond. Our Nation thanks you for your work on these matters and for scheduling this hearing today.

Tax issues in Indian Country go to the heart of our efforts to improve the quality of life for our members. We especially appreciate the timeliness of this hearing, given the overarching discussions on tax reform. Last month the Republican Leadership released its "United Framework" for fixing the Tax Code. It pointed out that "too many in our country are shut out of the dynamism of the US economy. . ." and proposes to establish a "fairer system that levels the playing field." This Committee knows that Indian tribes and our communities are among those who have been shut out. We appreciate that Committee Members have introduced legislation to level the playing field. Specifically:

- Chairman Hoeven and Sen. McCain have introduced S.1116, the Indian Community Economic Enhancement Act of 2017. This bill responds to the challenges we face in Indian Country by identifying and removing obstacles to economic development.
- Senator Moran's Tribal Tax Reform and Investment Act of 2017 (S. 1935) will spur much-needed economic development on Indian lands, promote tax fairness, strengthen tribal self-determination and recognize tribal sovereignty. The PBPN extends a special word of thanks to Senator Moran for introducing this important bill.
- Chairman Hoeven, along with Senator Murkowski and Senator Heitkamp, introduced S. 2012, the "Tribal Economic Assistance Act of 2017".
- Senator Cantwell (along with Senate Finance Committee Chairman Hatch) introduced the Affordable Housing Credit Improvement Act of 2017 (S. 548).

We thank each of you and all Members of this Committee for your leadership in working with us to seek a fairer system. We count on you to ensure that tribal governments and our communities are the partners and the beneficiaries of this tax reform effort. As you know, our tax priorities have been on hold for decades. We remain hopeful that the bills you have introduced demonstrate a true commitment to prevent Indian Country from being left behind in the current tax reform effort.

PBPN's experience shows that when tribal economies thrive, our members and the surrounding communities all benefit. PBPN has been an economic engine for our region in the State of Kansas. We employ more than 170 tribal members and 125 non-members in our tribal government. Our Entertainment Corporation employs more than 700 people, and nearly 600 of those are non-members. The majority of the non-tribal members we employ live off-reservation and their wages and taxes contribute directly to surrounding communities. Meanwhile, our casino and golf course attract more than 110,000 visitors per month to our Reservation.

Many of the programs the PBPN provides and funds through tribal government revenues are for both members and non-members, thereby enriching the cultural,

social, recreational and educational opportunities available in our region. Countless organizations host events at our 18hole golf course, our Elders Programs is available for all seniors, and our Boys and Girls Club provides exciting activities not only for our tribal member youth but also for those nearby our Reservation. The revenues we generate from our casino, our tribal sales tax and our tribal cigarette tax make these programs possible.

PBPN, however, could do far more if Congress eliminates barriers to tribal economic development and acts to modify tax incentives to attract private investment to tribal communities. The majority of projects the Nation has completed have been almost entirely financed through our own enterprises taxes and federal appropriations. With greater ability to attract private partners we could concurrently finance and operate a wider variety of projects, programs and enterprises. We believe the bills that the Committee Members have introduced are vital to accomplishing these objectives as described in greater detail below.

Tax Reform and Tax Parity

S.1116, the ICE Act, recognizes the fundamental problem for tribes in the tax arena: tribal governments are not treated in the same manner as states or local governments under the Federal tax code. This lack of parity and our limited access to tax incentives has impaired our economic development and restrained our ability to create jobs in our communities. As this Committee's report on S. 1116 points out, Indian Country faces "disproportionate barriers" to economic development. Unemployment, even in the best of times, is still more than twice the national average. S.1116, S. 1935 and S. 2012 provide tools that remove some of these barriers and improve opportunities to attract investment and create jobs.

Tax-exempt financing. This Committee's report on the ICE Act (S. 1116) points out that the "lack of parity in treatment of an Indian tribe as a governmental entity under Federal tax law . . .impedes. . .the ability of Indian tribes to raise capital through issuance of tax exempt debt. . .and benefit from other investment incentives accorded to State and local governmental entities." This is so true and the situation needs to be rectified. S. 1935 and S. 2012 both seek to level the playing field regarding tax-exempt financing. Under current tax law, Indian tribes may finance the construction of roads, schools and other governmental infrastructure projects with tax-exempt bonds. Yet, unlike state and local government bond issuances, the tax code limits tribal tax-exempt bonds to projects that meet the requirements of the essential governmental function test.

This distinction has limited our ability to utilize tax-exempt financing. Although state and local governments use tax-exempt bonds for projects that generate new revenues such as convention centers and public recreational facilities, we could not use tax-exempt bonds for our golf course. Such tax-exempt financing would enable us to accelerate the timeframe for development of business and commercial development opportunities. Moreover, we have long discussed plans to develop lands we own adjacent to US Highway 75. This location with its highway access offers tremendous commercial potential, but without the financing tools that are available to state governments, PBPN is at a disadvantage to access funding to move ahead with development. Clearly, the playing field is not level when states and local governments can issue tax-exempt bonds for these projects, but tribal governments cannot.

For this reason, we welcome S. 2012's repeal of the essential government functions test as an important step in promoting tax fairness between tribal and state governments. Indeed, the Treasury Department's 2011 Report to Congress found the tribal "essential governmental function" limitation unfair and difficult to administer. In that report, Treasury also recommended that tribes should have full parity with states with tax-exempt bond financing, including private activity bonds. Sec. 3 of S. 1935 contains terms that would repeal the essential government functions test and permit tribes to issue private activity bonds. We encourage the Committee to embrace the tax fairness provided by S. 1935.

Governmental Pension Plans. A similar disparity in the tax code creates unfair burdens for tribal governments with regard to our governmental pension plans. State government pension plans are exempt from ERISA requirements. However, the "essential governmental function/commercial activity" limitation for tribal plans in the tax code means that tribal government employees engaged in the Tribe's revenue generating activity may not be eligible for governmental plan status. As a result, PBPN, like other tribes that choose to establish governmental plans. as permitted under the tax code, is still required to administer two separate benefits plans: an ERISA-exempt governmental plan for all employees performing essential governmental functions and a commercial ERISA-compliant plan for our employees who work in our gaming facility. As you know, our casino is not operated as a private business. It is a government operation that raises revenue pursuant to the In-

dian Gaming Regulatory Act and must spend its revenues only in accordance with federal law. Requiring tribes to meet standards that do not apply to any other government is unfair and fails to recognize the sovereign status of tribes. S. 1935 would correct this problem and establish fairness, simplicity and efficiency in the administration of government employee benefits plans.

Correcting other disparities. S. 1935 corrects several other disparities in the federal tax code to provide tribes the same benefits and tools available to states, including those with respect to the treatment of tribal foundations and charities, child support enforcement, and the adoption tax credit. [1]

S.1935 would ensure that charitable organizations formed to support tribal governments would be treated the same as charitable organizations formed to support state and local governments. There is no basis for treating such organizations differently. Currently, it is difficult for tribes to raise funds for separate nonprofit organizations for charitable purposes. PBPN currently makes substantial contributions to charitable organizations in our surrounding region through the charitable giving program of the Nation. We have not created a public charity that seeks tax-exempt donations and private foundation support. However, the Nation might consider doing so should the law be changed. The changes proposed by S. 1935 would ensure parity of tribal governments with state and local governments in this respect and facilitate tribes' efforts to raise charitable contributions from foundations, corporations and individual donors.

A. 1935 would also allow tribes' child support enforcement agencies to access the Federal Parent Locator database that is available to state child support agencies and to offset tax refunds of individuals who owe past due child support. The PBPN government has had a child support enforcement office for five (5) years. We are fortunate to have an effective collaborative working relationship with the child support enforcement department of the State of Kansas. However, direct tribal access to the federal database, is urgently needed by many tribal governments not only as a matter of governmental parity but as a matter of smart government. It will enhance tribes' means to enforce the law in a manner that minimizes administrative burdens.

Section 7 of 1935 is another provision that properly acknowledges the governmental status of Indian tribes. This section would recognize tribal court determinations of a child having special needs for purposes of the adoption tax credit. Today, adoptive parents must receive such a determination from a state court before they can benefit from the tax credit. The PBPN tribal court has presided over twenty-two (22) adoptions in the past five (5) years with three currently pending. Despite the Mandate of the Indian Child Welfare Act to give full faith and credit to the public acts, records, and judicial proceedings of Indian tribes, a special needs determination must be made by a state court in order for an adoptive parent to receive a federal adoption tax credit. To require tribal members to leave the jurisdiction of tribal court to venture to a state court for an adoptive proceeding, creates confusion over jurisdictions and seems to require proceedings that the ICWA was enacted to avoid. By acknowledging the validity of tribal court determinations, S. 1935 is consistent with. 25 C.F.R. § 1911 by giving the same recognition to tribal court determinations as that afforded to state court. There likely has been a real disparity here where tribal member adoptive families may not have had the benefit of receiving this tax credit that has been available to other eligible families adopting through state court.

PBPN strongly supports S. 1935 because it helps to level the playing field so tribal governments have resources to encourage private investment in Indian Country while it reduces administrative burdens in the same manner as provided to states under the Tax Code. Treating all governments in the federal system the same way promotes fairness, uniformity, reduces bureaucracy, prevents inconsistent treatment and avoids unintended consequences. We also stand behind S. 1935 as it recognizes tribal sovereignty, self-determination and promoting strong tribal governments and economies. Through passage of S. 1935, tribes will be better positioned to contribute to and benefit from the dynamism of the US economy. We encourage this Committee to fully embrace S. 1935 and work with the Senate Finance Committee to advance it into law as part of the larger tax reform effort.

---

[1] I want to note other legislation has been introduced in the Senate (S. 1309), which would provide tribal governments the same option that state and local governments have to enter into agreements with the Social Security Administration to provide Social Security and Medicare coverage to tribal government officials.

Tax Incentives and Economic Development

For years, Tribal Leaders have pointed out that tax code provisions to promote economic development do not address the needs and opportunities in Indian Country. As a result, Indian Country has been left behind by a system of incentives that sends capital, investment and jobs to others but leaves tribal governments without. By this hearing, this Committee is doing its part to engage with Tribes as the current tax reform process accelerates.

The bills introduced by Members of this Committee demonstrate that you understand that the existing tax incentives need to be improved to better secure investment in reservation infrastructure and commerce. While improvements are needed to protect Indian Country from being left further behind, I urge this Committee to be mindful that from our experience investing in Indian Country not only helps the tribes, but their surrounding communities as well.

I want to stress that in order to enhance prospects for economic development and job creation in Indian Country, this Committee's engagement with the tax-writing Committees is vital. The "United Framework" for fixing the Tax Code expressly preserves only the Research & Development Tax Credit and the Low-Income Housing Tax Credit. That Framework leaves it to the discretion of the tax-writing Committees whether to retain other tax credit programs. PBPN and other tribes are raising our voices to urge those Committees to retain and improve the effectiveness of the existing tax credits applicable to tribal communities. I would like to encourage your support for retaining several tax credit programs along with modifications that will make them more effective for Indian Country.

Low-Income Housing Tax Credit (LIHTC). PBPN welcomes the United Framework's retention of the LIHTC even though, as a practical matter, most tribal communities have been left behind with regard to the allocation of the LIHTC. As you know, American Indians face some of the worst housing and living conditions in the United States. Forty percent of housing on Indian reservations is substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded. Yet, with the LIHTC allocated to state agencies based on population, as opposed to need, there is no incentive or regulation requiring state agencies to consider tribal projects in their IRS approved Qualified Allocation Plans. In our experience, even where the credit is available the private investor may still be unwilling or unable to put up the financing. Indian Country needs congressional action to amend the LIHTC so that a greater portion of the available federal tax credits are allocated specifically to tribal communities and that investors have incentives to partner to develop affordable housing in Indian Country. The Affordable.Housing Credit Improvement Act of 2017 (S. 548) provides an incentive for states while reducing the burden on states when using their existing allocations for tribal housing.

New Market Tax Credit (NMTC). The design of the NMTC Program is intended to make more projects feasible and cost effective by making it easier for tribes to attract private investment. In practice, however, relatively few tribal communities have benefited from this Program that has delivered some $70 billion in tax credit authority nationwide. PBPN believes that now is the time to improve the NMTC, not abandon it. We support S. 2012 that directs the Secretary of Treasury to provide tribal projects with "Priority" status for the allocation of NMTCs. We welcome House bill H.R. 3129, the Aiding Development of Vital Assets in Native Communities and Environments ("ADVANCE") Act, which creates additional incentives for allocating the NMTC to projects in tribal communities. We encourage you to press for improvements to the NMTC that will make it effective for delivering needed projects in Indian Country.

PBPN supports S. 2012 language that would make permanent the *Accelerated Depreciation Business Property on an Indian Reservation Tax Credit* and the *Indian Employment Tax Credit.* These two tax credit programs are underutilized in tribal communities due to their status as short-term temporary measures (that have been approved periodically along with the other tax provisions passed as part of a "tax extenders" package). If made permanent, accelerated depreciation would provide an outstanding mechanism to attract capital-intensive projects on reservations and can bring high-skilled jobs to Indian communities. Additionally, cash saved in taxes can be reinvested in the business or in employees. [2]

[2] We note that the "United Framework" proposes to repeal the depreciation schedules to allow immediate expensing of investment in capital equipment. The "United Framework" proposal does not change the depreciation rules on new structures. If accelerated depreciation in Indian Country is retained (permanently, or at least as long as the immediate expensing rule applies), we believe the accelerated depreciation incentive for investment in Indian Country could become quite useful. An investor could put in a new building/facility in Indian Country (and receive ac-

Simplifying, expanding, and making permanent the Indian Employment Tax Credit would lead to greater use of the credit, thereby helping to increase employment rates and promote economic growth in Indian Country. S. 2012 would make the credit permanent, which is a vital step forward. PBPN also recommends the Committee consider modifying the tax credit formula as recommended by the National Congress of American Indians (NCAI) and the Native American Finance Officers Association (NAFOA).

Business Partners and Investor Face Multiple Layers of Taxation in Indian Country

Even when tribal governments succeed at obtaining investment and partnerships with the private sector to generate revenues to provide services in our communities, outside jurisdictions may seek legal loopholes to divert or tax these revenues. This Committee's report on the ICE Act (S. 1116) includes a discussion of the adverse impact of multiple layers of taxing jurisdiction over economic development on Indian lands. The uncertainty as to whether an outside tax applies or not in itself can prove to be a deal breaker for economic development in our communities. Moving forward with discussions and negotiations with business entities that desire to do business with the Prairie Band requires a level of certainty regarding the business entity taxing climate.

The Nation supports the Department the Interior's efforts to document the economic harm caused by multiple layers of taxation on tribal lands through its Indian Trader Act regulatory effort. We encourage this Committee to engage in exploring legislation that would eliminate this uncertainty and ensure that those revenues generated in tribal communities are reinvested there and are not subject to the jurisdiction of outside governments, who spend those revenues in off-reservation locations that do not benefit tribal communities.

Conclusion

Thank you for your consideration and support. I look forward to working with you to advance these vital efforts for investment and job creation in tribal communities.

The CHAIRMAN. Thank you.

Mr. DESIDERIO.

STATEMENT OF DANTE DESIDERIO, EXECUTIVE DIRECTOR, NATIVE AMERICAN FINANCIAL OFFICERS ASSOCIATION

Mr. DESIDERIO. Good afternoon, Senators.

My name is Dante Desiderio, a member of the Sappony, a tribe located on the border of North Carolina and Virginia.

I am also the Executive Director for NAFOA. NAFOA had its start in trying to convince capital markets to come into Indian Country and also trying to organize a financial management system that worked for tribal governments. Today, we are honored to represent the broad economic interests of tribal governments all across the United States and the Alaska Natives in their homelands as well.

I want to start my testimony by thanking the Senate Committee on Indian Affairs for hosting a hearing on Modernizing the Tax Policies to Work for Indian Country. This hearing is both needed and timely since it falls in the same week the House of Representatives is introducing their version of tax reform for the United States.

We are counting on this Committee to ensure tax policies that promote growth for tribal governments are included in our national effort. Congress has an important role in making sure programs meet basic needs for tribes.

---

celerated depreciation) and be able to immediately expense any investment in equipment that is put into that building. We would certainly seek to tap into this combination of benefits as we explore possible developments on our lands adjacent to US Highway 75.

Typically, this is done through the discretionary budget process. Each year it gets more and more difficult, leaving education, health care and housing needs underfunded or unmet. While Congress has to continue funding these needed programs, it is time for Congress to start thinking seriously about investing in Indian Country.

There are strong examples of economic and political organizations around the world that view infrastructure build out, capacity building, technical assistance, government financing and grants as worthwhile, nation-building investments that pay long term dividends not just for the nation that receives these investments, but for the surrounding nations as well.

For example, the World Bank invests in infrastructure development, provide grant and government financing and technical assistance as part of that investment. The United Nations provides assistance to regional economies. The Economic Commission for Africa provides assistance for contract negotiations, planning and policy development.

If the goal of Congress is to support self-governance for tribal nations, then we must move more aggressively towards making similar investments in Indian Country. Modernizing tax policy is a great start. It is recognition that tribal governments need effective tax and finance policies to move their nations forward. It is also recognition that prior policies have not worked as well as intended.

NAFOA would like to urge Congress to take the lessons of failed economic policies to create better ones. Our testimony submitted for the record supports the legislation introduced in various bills by members of this Committee. Senator Hoeven's bill, Senator Moran's bill and Senator Cantwell's bill in Finance that deals with the critical housing issues are all supported by our organization.

Our testimony also considers past policies and offers three structural considerations that should be part of policymaking in Congress and the Administration. The first, and most difficult, consideration asks the question, how well does policy accommodate for the tribal economic model?

Tribal governments utilize economic development to fund government programs in lieu of tax revenue. Tribal lands do not build collateral or support a tax base in the same manner as other governments or other nations.

Therefore, applying the policies which ask for the same matching requirements, the same collateral sources and the same revenue streams will never be as effective as intended. We have to find a solution that takes these realities into account.

The second structural consideration for economic policy in Indian Country is direct funding. Passing Federal funds along with the Federal trust responsibilities to the States simply has not worked. The funding that should go to tribal governments does not get into Indian Country. Tribal governments are different and they should be accommodated.

The third structural consideration is the idea that economic policies should defer to tribal government autonomy and planning as a policy goal. A study recently concluded that tribes that exercise greater sovereignty have more success in building sustained economies regardless of the type of development. Policies should defer to autonomy and support capacity building to build that autonomy.

This also means that policies that have limitations or are not on par with other governments should be immediately amended. This includes ending the Essential Government Function test.

Indian Country has been united around these modest and overdue proposals for a long time, sometimes for decades. Collectively, these capital incentives, financing activities and credits offered in these various bills would all work to solve some of the most difficult issues preventing consistent and sustained growth in Indian Country. Congress has a unique opportunity to make a significant difference at this critical time for tribes and the communities that surround tribal governments.

Thank you for the opportunity to represent tribal interests in tax reform.

[The prepared statement of Mr. Desiderio follows:]

PREPARED STATEMENT OF DANTE DESIDERIO, EXECUTIVE DIRECTOR, NATIVE AMERICAN FINANCIAL OFFICERS ASSOCIATION

Introduction

NAFOA, in representing the economic interests of over one hundred tribal governments, has a clear mission to build and grow tribal government economies. We do this by developing capacity building programs for youth and professionals, by advocating for effective economic policy solutions, and by bringing together partners needed to promote economic activity including the academic, government, and private sectors. There are many other non-governmental organizations that strive to grow specific economies across the U.S. and national economies around the world. However, Indian Country remains one of the most challenging economic areas to effectively address.

There are hundreds of tribal governments spread throughout the United States. They are represented in every region and have been shaped by different histories and defined by different cultures. This geographic and cultural diversity is a great statement for the survival of Native peoples. However, the varied governmental and economic entities make it difficult to develop general economic policies that will broadly impact the growth of tribal economies. More important, for economic development purposes, every tribal government and Alaska Native Corporation (ANC) has been and continues to be greatly influenced by long-standing federal policies designed with the admiral goal of protecting tribal assets with limited thought given to growing tribal assets and economies. Land restrictions that do not build collateral or a tax base, along with approval processes that often deter development are the inadvertent outcome of protective policies.

The rich tribal government diversity and limiting federal policy structures are a reminder of how challenging it is to address the economic interests of tribal governments with general or borrowed solutions. Indian Country has experienced well-intended policies that have not worked as intended, not because they were not good solutions, but because they were structured or implemented incorrectly. This leads naturally to the question any policy maker or advocate should be asking before developing a solution: What considerations or structures are needed for economic policy to be effective in Indian Country? The answer to this question is important as the nation considers tax reform and is looking for policies that will effectively drive economic activity.

Structures for Modernizing Tax Policies

There are three structural considerations that will have the greatest impact when developing or amending federal-Indian economic policy. These structural considerations are inter-related with one supporting the others. The first and most difficult is how well does the policy accommodate for the tribal economic model. Tribal lands do not build collateral or a tax base in the same manner as other governments. Policies attempting to ask for the same matching requirements, collateral sources, and revenue streams will never be as effective as intended.

Matching requirements for the Native CDFI programs place a strain on the program and they threaten many CDFI's with failure. Indian Country is the most under-capitalized sector in the American economy. Even with successes in the grassroots CDFI programs in creating grassroots community development, we still witness banks and other lending organizations sit on the sidelines. A good example can

be found in South Dakota where CDFI's can take credit for the local economy growing faster than the surrounding region. In other communities, this would success would mean an influx of capital and banking services. However, this has not occurred for the tribal community. Matching requirements need to be flexible and waived for tribal governments and for those entities that serve tribal communities.

Collateral requirements and revenue streams that back debt should also be flexible. The CDFI Bond guarantee in the Department of Treasury stands as an example of a well-intended program that failed Indian Country by insisting that land be the preferred form of collateral. This left tribal governments out of a program that should have had a significant impact on community development. Changes have since been made to the program, but it highlights the idea that collateral and revenue backing a loan for tribal governments may mean lease agreements, enterprise revenue, or more important, government revenue which may be safer than debt secured by traditional means.

In no way is this suggesting that the protectionist policies regarding land status should be changed, but merely suggesting that policy should accommodate for this economic feature.

The second structural consideration for economic policy in Indian Country is direct funding. This has less to do with simply setting aside money for tribes and more to do with the process in which awards are made, and subsequently, how decisions are made after the awards are received. An example of both the process and subsequent awards can be found in the Low-Income Housing Tax Credit program. States now receive a 100 percent set aside of the federal funds available for housing. Indian housing needs are often not included in the Qualified Allocation Plans submitted by the state housing authorities, meaning tribes need to rely on states serving tribal citizens over their own citizen and political interests. The process of excluding tribes from the application process and the subsequent practice of relying on state governments has not worked at the expense of meeting the greatest housing need in the nation.

Finally, economic policy for Indian Country needs to have local autonomy and planning. Tribal government economies and needs are too diverse and influenced by local cultural and political considerations for general policies to work in all cases. General policies tend to help those governments get started, but also manage to hold back those governments that want tailored and creative solutions to grow their economies.

Solutions that require consideration of the tribal government economic model, direct funding, and support of local autonomy and planning work best and are an effective use of taxpayer funds. The HEARTH Act and self-governance contracting are excellent examples of modernized policies that have created a greater sense of autonomy. The lost opportunity from expecting that tribes will fit other funding criteria and priorities, or that states will consistently act as federal stewards is unrealistic and proven untrue.

Tax policy in Indian Country can be an effective case study when well-intended economic policies fail to include direct funding, place unnecessary restrictions on autonomy, and are developed with the expectation that land and other collateral assets among entities is equal. With the benefit of hindsight, tribal governments are ready to take advantage of national tax reform to amend ineffective tax policy and correct oversights.

Our testimony will focus on the following tax policies that address the creation of incentives designed to secure capital, authorize greater autonomy of financing activities and benefits, and fix unintended omissions.

1. Eliminates of the essential government function language in tax-exempt debt and pensions that impedes government financing and autonomy.
2. Directly fund tribal governments in New Markets Tax Credits.
3. Include tribal housing needs in Low-Income Housing Tax Credits.
4. Provide certainty to the accelerated depreciation and Indian employment investment incentives.
5. Provide specific fixes regarding adoption tax credits, Kiddie tax, and tribal charity formation.

Tribal governments rely on economic development to create much-needed jobs, fund government programs and services, and ensure the continuation of cultural and ceremonial practices. The reliance on economic revenue streams for government functions means the recommended policy fixes will be both meaningful and necessary.

Indian Country has been united around these modest and overdue fixes for a long time—in some cases decades. Congress has a unique opportunity to make a signifi-

cant difference for tribes and the communities and regions surrounding tribal governments.

Government (Public) Financing

Indian Country is left with limited options when it comes to public financing since tribal governments are the only governments limited to using public financing for only essential governmental functions. Even projects that are deemed essential for other governments have been disqualified and interpreted to mean any project that generates revenue. Housing, marinas, and even health care facilities jointly developed by tribal and other communities have been deemed non-essential because they produce revenue or interpreted differently for tribes. Every state, municipality, and city has the authority to utilize unquestioned essential and economic or private activity bonds.

Congress and the Administration have both reached the same conclusion on the of limitations of relying on public financing for only essential functions. In 2011, at the request of the Senate Committee on Finance, the Department of Treasury issued a report confirming their views on the limitation. The following statement from the report captures their conclusion.

> "The Treasury Department recommends repealing the existing essential governmental function standard for Indian tax-exempt bond financing under 7871(c)."—Report and Recommendations to Congress regarding Tribal Development Bond Provision under Section 7871 of the Internal Revenue Code
>
> [See Treasury report.]

The same Congress that issued the required the Treasury report attempted to apply a temporary fix by authorizing a $2 billion in Tribal Economic Development Bonds. Caps placed on the amount a tribe could utilize along with additional administrative hurdles made the bonding pool unattractive for tribal governments. Limitations meant two different sets of financings with different terms and expenses for the same project. Initial caps were lifted and tribes have been drawing on the financing; however, the pool will be depleted soon since only approximately $500 million remains today. Once the overall bond volume cap is exhausted, it can only be reauthorized by an act of Congress.

Public financing should be used to fund a majority of tribal government projects. Instead, the ill-defined limitation of financing only essential projects has made the financing tool the exception. This has serious consequences for development. Tribal governments have become accustomed to issuing commercial debt or accessing the private investors instead of relying on longer-term, cost-effective public debt. For commercial debt, this is analogous to trying to finance a house with a car loan. The loan repayment is much higher, shorter term, and has the effect of making typical government projects needed for community development unaffordable.

Tribes should have the autonomy to utilize the same public financing as other governments with the same rules and conditions. Establishing limitations on financing has failed at every turn. NAFOA supports the provisions offered by two Senate bills (S. 1935 and S. 2012) that repeal the essential governmental functions for tribal government financing.

Government (Public) Pensions

Similarly, since the passage of the Pension Protection Act (PPA) in 2006, the strict essential government function tests have forced tribes to adopt separate pension plans for government and "commercial" activities, doubling the cost of compliance and creating smaller plans with less bargaining power. It should be noted that the added cost and administration ultimately hurts the participants who are forced to switch plans even when working for the same employer and receive less in benefits since the costs are higher to maintain and administer multiple plans.

State and local governments do not face the essential government function test for their pension plans. These activities are recognized by the federal government as necessary in the raising of revenues for public purposes and plans covering these employees retain their governmental status. Tribal plans, on the other hand, are so restrictive they lose their governmental plan status if the employee is engaged in an activity that resembles a "commercial" activity even if it is deemed an essential government function.

The current state of the law under the PPA adds layers of inconsistent regulations to tribal plans that no other employment group must contend with, with no corresponding incentives for tribes to offer such programs. Tribal governments should have the autonomy of providing retirement benefits to their government employees.

NAFOA supports eliminating the essential government function language for government pension plans included in S. 1935 and S. 2012 to ensure tribes are subject to one set of rules like all other employers.

Public-Private Partnerships—Tax Credits

New Markets Tax Credits

The New Markets Tax Credit (NMTC) program within the CDFI Fund at the Department of Treasury has held the greatest promise for community development in Indian Country. By encouraging external investment in tribal projects, tribal governments could use the credits to build necessary infrastructure, schools, businesses, and government buildings. Unfortunately, the funding has rarely made its way into Indian Country. Only one Native CDE has received a funding allocation of $20 million of the $15 billion available over the last three years. Other CDE's only occasionally funded tribal projects over the same period.

This lack of direct funding for a program that has so much potential in Indian Country is unacceptable and, with the severe need, a missed opportunity can only be viewed as tragic. The program offers two of the three impact conditions for successful economic policy. It defers to local autonomy and planning and provides the collateral to help with additional financing. However, the program failed to fund tribal projects directly. Ironically, within the same CDFI Fund agency at Treasury, the directly-funded Native CDFI Program has proven to be one of the more successful capital and grassroots economic programs in Indian Country.

Examples of successfully-funded programs stand as exceptions and reminders of the program's potential. There is substantial evidence that the NMTC has encouraged private sector investment to jump-start economies, build community structures, and create jobs. Here are a few measurable impacts:

- North Dakota: *Spirit Lake Sioux, Turtle Mountain Band of Chippewa Indians*
  —Project: Built a new K–12 school (old school threatened by a floodplain)
  —Summary: Ninety percent of the Minnewaukan School District's students in rural North Dakota are members of the Spirit Lake Sioux Tribe or Turtle Mountain Band of Chippewa Indians. The NMTC provided $3.4 million in equity to this $13.2 million project. The community worked with a CDE to save quality jobs in a highly distressed small town and helped the community adapt to the natural disaster of Devil's Lake flooding.
- Washington: *Confederated Tribes of the Colville Reservation*
  —Project: Government Service Center
  —Summary: The Confederated Tribes of the Colville Reservation used NMTC to centralize critical services and provide an economic shot-in-the-arm to the capitol of Nespelem. Three CDEs partnered to provide an allocation that resulted in $6 million of the overall $44 million project. Concentrating high-quality jobs in Nespelem will boost the local economy and provide easier access to jobs and services for tribal members in Washington State.
- Montana: *Crow Tribe*
  —Project: Little Big Horn College's Wellness Center
  —Summary: Little Big Horn College, located on the Crow Tribe reservation, secured an NMTC allocation to build a health and wellness center that increases student retention and achievement. NMTC provided $2.3 million toward this $10 million project that helps hard-working students build pathways out of poverty.
- Oklahoma: *Chickasaw Nation and Cherokee Nation*
  —Project: Carl Albert Multi-Purpose Facility
  —Summary: The Chickasaw Nation partnered with a CDE of the Cherokee Nation to use NMTC to transform a shuttered I.H.S. hospital in Ada, OK. Now known as the Carl Albert Multi-purpose facility, the project provides employment, education and health services. NMTC provided $5 million out of an overall $40 million project budget to catalyze additional development in this highly-distressed community.
- Alaska: *Multiple Alaska Native Villages*
  —Project: TERRA Northwest/broadband
  —Summary: TERRA Northwest has brought broadband to rural Alaska Native communities by partnering with the telecommunications provider GCI and a CDE. Hospitals, schools, and homes in the community are now connected to the high-speed Internet that is the foundation of our modern economy.
- New Mexico: *Pueblo of Laguna*
  —Project: Water infrastructure

—Summary: The Pueblo of Laguna, located in New Mexico, was in a water crisis. By working with a CDE, the tribe raised $2 million that leveraged a total of $7 million in infrastructure investment. The tribe can now provide higher quality education, public safety and economic development to the members it serves.

Without tax credit programs, tribes will be challenged to attract investment that can serve as collateral for community development. We urge Congress to include direct funding for tribal governments under the NMTC program with at least a five percent set aside for tribal governments. Terms like priority or preference will be helpful, but only if they are defined and carry meaning. In addition, it is important that tribal governments are included early in promising ideas such as the Move America Bonds and Credits jointly drafted by Senator Wyden and Senator Hoeven. This creative economic policy can potentially offer tribal governments an excellent opportunity to build our communities using both public financing and private investment through credits.

Finally, NAFOA recommends that the Native CDFI program permanently waive matching requirements and increase program funding to ensure continued reach and positive impact in Indian Country. This is being done intermittently and should be permanent.

Low-Income Housing Tax Credit

The lack of housing in tribal communities remains a serious problem in Indian Country that effects socio-economic conditions. According to the Census Department, Indian Country has the highest occupancy per household and the longest housing waiting lists. The Minneapolis Federal Reserve's Center for Indian Country Development considers housing one of four areas that impede economic development and community stability. Despite the outsized role housing plays in creating stability and jobs in Indian Country, the Low-Income Housing Tax Credit (LIHTC) program is underutilized and only periodically successful in Indian Country.

The LIHTC is the primary source of financing for the construction and preservation of affordable housing on tribal lands as land restrictions and collateral is an issue. The LIHTC provides the private market with greater incentives to invest in affordable housing. The Internal Revenue Service (IRS) allocates housing tax credits to designated state agencies—typically state housing finance agencies—which, in turn, award the credits to developers of qualified projects. The LIHTC provides a viable source of infrastructure that could be used to benefit tribal communities. For example, the Blackfeet Nation was able to obtain nearly all of the $5 million project cost to build energy efficient homes that were designed for the unique weather challenges in Montana.

However, as allocations are awarded to state agencies and are based on population, as opposed to need, there is no incentive or regulation requiring state agencies to consider tribal projects in their IRS approved Qualified Allocation Plans. In fact, the incentive for states is often contrary to serving tribes since states often seek to prioritize their own state-run housing program objectives before considering tribally-run housing programs.

NAFOA encourages Congress to support the Affordable Housing Credit Improvement Act of 2017 (S.548) introduced by Senator Maria Cantwell (D–WA) and Orrin Hatch (R–UT). The bill designates tribal government communities as "Difficult to Develop Areas," making housing developments automatically eligible for a 30 percent boost to increase investment of LIHTC. The bill also requires states to consider the needs of Native Americans when allocating tax credits.

The needed solution helps build a fundamental infrastructure for tribal governments and improves the quality of life for tribal communities. This call to action on housing is best described by Senator Maria Cantwell, former Chair of the Senate Committee on Indian Affairs and member of the Senate Committee on Finance when she recently stated:

"It is important for our colleagues not to get stymied over the next several months as we discuss proposals for tax reform and infrastructure and not to take action on this issue because we don't know how we will afford it. What we can't afford is the rising number of Americans who can no longer afford rent or homeownership. We need to make sure there is a roof over their head so they can be a productive part of our economy."

"Out of all the housing programs, the Low-Income Tax Credits program is the best for low-income individuals. There is no comparison from Section 8 to HUD to LIHTC. It encourages private-public sector support and community."

Investment Incentives

While improvements to public financing for tribal governments, New Market Tax Credits, and Low-Income Housing Tax Credits will help build tribal communities and develop economies from within; investment incentives will help attract external business partnerships and jobs to tribal communities. The Accelerated Depreciation incentive coupled with a revised Indian Employment Tax Credit, can help bring significant and needed investment to Indian Country. Both incentives have been implemented in the past, and both have been ineffective—not for policy reasons, but because they were implemented ineffectively.

In the past, the incentives were part of the so-called "Indian extenders" that were only renewed for a one or two-year period and were mostly delayed and made retroactive. This made them unreliable for tribes to effectively use when trying to attract large, multi-year projects and unreliable for businesses trying to analyze the value of a partnership. In addition to being intermittently renewed, the Indian Employment Tax Credit was difficult to administer and lacked any provision to increase the salary and health expense eligible for a credit. Furthermore, the base year to qualify is fixed to the base year 1993, requiring employees to trace Indian employment back to the original date. This makes it unworkable for any new businesses that want to hire Indians and receive the credit.

NAFOA recommends making these valuable investment incentives permanent to encourage economic partnerships and to address the high unemployment rate in Indian Country. It is worth Congress investing in these incentives to keep jobs here in America and encourage the hiring and skill-building of Native people.

Correct Prior Oversights—Tribal Charity Formation, Adoption Tax Credit, Social Security, and Kiddie Tax

Tax policies that lack parity between tribal governments and state and local governments can be seen in the formation of charities, adoption of children with special needs, and in the opportunity for elected leaders to opt in to the social security system. Additionally, technical fixes are needed in some areas that were overlooked and impact many of the governance and administrative functions at a tribe.

Tribal Charity Formation

For all Americans, charities can be a vehicle for advancing education, defending human rights, and responding to other social needs of the community. Generally, there are two choices of how a 501(c)(3) can be classified, either as a public charity or a private foundation. Public charities receive advantages over private foundations: higher donor tax-deductible giving limits, the ability to attract support from other public charities and private foundations, and less lengthy and complex 990 tax returns.

Under current law, tribal governments can form a 501(c)(3) as a private foundation only. Private foundations restrictive regulations that can double compliance costs annually. Meanwhile, support from state and local governments are treated as "public support" for purposes of public charity classification.

NAFOA supports provisions that treat charitable organizations formed to support tribal governments the same as organizations formed to support state and local governments. NAFOA supports H.R. 3138, which amends the Internal Revenue Code and treats charitable organizations formed to support tribal governments the same as organizations formed to support state and local governments.

Adoption Tax Credits for Children with "Special Needs"

The current tax law creates disparity in adoptions as parents who adopt children who are non-Native American and designated as "special needs" can claim a tax credit, while parents who adopt children who are Native American "special needs" cannot. The lack of immediate access to the credit hinders adoption efforts and burdens families who must for pay court costs, adoption and attorney fees, and travel expenses. NAFOA encourages the Senate to support adoptive parents by treating tribes as states for the purposes of determining special needs children. NAFOA supports H.R. 3138, which addresses the lack of parity between states and tribal governments by amending the Internal Revenue Code by treating tribes as states. This inclusion will grant the appropriate recognition to tribes in determining "special needs children".

Social Security Fairness

Unlike state and local government elected leaders, council leadership at tribal governments do not have the ability to opt-in to social security coverage for services performed. NAFOA supports S.1309, the Tribal Social Security Fairness Act, which provides parity between tribal governments and state and local governments. The

Act allows tribes to "opt-in" to Social Security coverage for their otherwise excluded tribal council members.

Kiddie Tax

The "Kiddie tax" was designed to prevent income shifting between wealthy parents and their children. It provides a higher tax rate of unearned income based on the parent's tax bracket. This tax not only burdens minors and young adults with an inappropriately high tax rate, it also imposes compliance burdens on large numbers of taxpayers receiving relatively small amounts of government support. Ironically, tribal members who choose to attend college full-time are burdened by these higher tax rates well into young adulthood, which creates a perverse incentive with respect to higher education. NAFOA recommends amending the Internal Revenue Code to exempt tribal government distributions from the Kiddie tax.

Conclusion

Tax reform provides us with an opportunity to modernize policies. Individually, these policies have the potential to impact economic growth in tribal communities. However, when taken together these capital incentives, financing activities, and credits would all work together to solve some of the most difficult issues preventing consistent and sustained growth. Tribes would have a reliable tax credit program and public financing mechanism for larger community infrastructure and development needed to sustain growth. By having reliable pro-growth tax incentives like the Indian Employment tax credit and accelerated depreciation on property, equipment, inventory, and other common business investments, tribal governments could encourage new business growth, help existing businesses, and generate new jobs that will create a ripple effect of revitalization and growth.

The CHAIRMAN. Thank you to all our witnesses.

We will now start five-minute rounds of questioning.

Starting with you, Mr. Marrs, can you elaborate on how tribal communities would benefit from greater access to the New Market Tax Credit Program?

Mr. MARRS. The New Market Tax Credit Program is designed to provide a source of private funds for development of low income communities. However, there is an annual limit on the amount of the credit. Under the current law, this annual limit is to be allocated on a priority basis to various locations.

Present law does not directly prioritize lands of Alaska Natives or the lower 48 Indians for the credit even though Alaska Natives and Indians are, in economic terms, among the poorest of the poor in this Country.

The result has been that the New Market Tax Credit Program has not come to our lands. Without the New Market Tax Credit being applicable to our lands, those who would bring economic growth through the creation of economic development entities take their development money and go elsewhere.

Indians and Alaska Natives have no less of a need for economic development than others in low income areas. In many cases, our need is far greater. I support the TEA Act, S. 2012, because it adds our Alaska Native and Indian lands as priority areas for allocation of New Market Tax Credits. This, I believe, will encourage creation of economic development entities which, in turn, will bring much needed private capital and higher paying jobs to our Native and Indian lands.

I am not alone in this. The Alaska Federation of Natives has repeatedly sought to obtain expansion of New Market Tax Credits because of the very positive impact it will have on our Native and Indian lands throughout the Country. It is a great piece of legislation.

The CHAIRMAN. This is for both Mr. Marrs as well as Chairperson Onnen. Can you talk about how repeal of the Essential Government Function test can facilitate outside investment in infrastructure development for Indian Country, particularly in areas like Alaska and Kansas where you may have a more remote situation?

Ms. ONNEN. I will start with that one.

As you say, Kansas being in a rural area, it is often difficult to attract investors. Where we could really benefit from the elimination of the Essential Government Function test is in our ability to enter partnerships with the private sector to build, design, operate or maintain an infrastructure asset.

We all know you can build roads, sewer systems and things like that under the Essential Government Function test. But we need to have our horizons broadened with more opportunities given to us that are given to other governments and States. We are simply looking for parity on those issues.

The CHAIRMAN. Mr. Marrs.

Mr. MARRS. Mr. Chairman, in addition to that, a test from Section 7871 makes it easier for tribal entities, both in Alaska and in the lower 48, to issue tax exempt bonds which in turn helps provide necessary funds to spur economic development in rural tribal communities.

Our Village of Old Harbor is mainly made up of a small fishing fleet. We have all been working for a number of years to economically enhance that village so we do not have this outflow of our tribal members to the bigger cities.

Over time, there is deterioration of our members from those villages. Eventually, they get so small, there goes the school, there goes the village, and there goes the culture. These kinds of changes give us some hope for economic development and are a priority not only to us but I think should be to all American Indians where you can entice investors and money to help you develop.

In our case, we need a fish plant that will continue to provide high-paying employment for our people in the village. Through the help of Senator Murkowski, Senator Sullivan and others we have extended our runway, built a new dock and a new harbor dredged.

We need a hydro system in place and a fish plant. These things help us get to providing solidarity among our tribal members to stay in those villages. That is where they want to live. They do not want to move out but they do not have a choice.

The CHAIRMAN. Mr. Desiderio, programs like the Accelerated Depreciation Incentive and the Indian Employment Tax Credit are temporary. My question is, does that make a difference in terms of attracting these larger, multiyear projects, the fact they are temporary versus permanent? Can you comment on what impact that has on attracting projects?

Mr. DESIDERIO. In addressing the incentives to try to get tribes to attract outside investment, we have the Indian Employment Tax Credit, the Accelerated Depreciation and Indian Coal Tax Credit. Those are necessary for a very important reason. There are a lot of other approval processes that take longer time periods for outside investors to come in and get the same energy projects done in Indian Country or other large-scale projects.

We need an extra incentive to attract that capital to reward patience for dealing with Indian tribes and dealing with the approval process. Right now, tribes should be using the incentives to attract that outside investment but they are not really on the table for us. If you can imagine in negotiation saying, we might be able to have you take advantage of this if it gets retroactively renewed, which has been the case for the last several years.

Tribes cannot really offer that at the negotiating table and the companies take it anyway if they are doing business with Indian Country. The idea of the uncertainty of having these renewed every year or having these sporadically or retroactively renewed really does not create any kind of certainty for a company to make the decision to do business with Indian Country.

The CHAIRMAN. Thank you.

Vice Chairman Udall.

Senator UDALL. Thank you so much, Mr. Chairman. Again, thank you for the hearing.

Before I start my questioning, let me recognize President Russell Begaye with the Navajo Nation, which most people know is the largest tribe in the Country in three western States. He has been a real national leader on education, health care and the well being of Navajo people. It is good to see you here, President Begaye and your trusty assistant, Jackson.

Congress must be able to walk and chew gum at the same time. Yes, we can pass a bipartisan tax package and yes, we can fully fund our tribal trust obligations at the same time. Those are not mutually exclusive goals.

Mr. Desiderio, can you discuss the importance of fully funding programs and increasing investments in Indian Country?

Mr. DESIDERIO. Certainly, Senator.

The point I was making in the oral testimony about investing in Indian Country is a view on how we should be looking at Indian Country and the role of Congress in making sure we are building economic success in Indian Country.

Right now, if you think about the agency that is most represented in Indian Country, the Bureau of Indian Affairs at the Department of the Interior, if you look at what they have for investing in Indian Country, there are two examples. They have the Indian Loan Guarantee Program.

Every year, with the support of this Committee, that is renewed but we struggle with the renewal or the appropriated amount. We have $8 million to share for all of Indian Country for a loan guarantee program. That is not enough to really impact building a tribal economy. That is one of the few investments made into Indian Country.

We also have the Native CDFI Program that is great for building grassroots businesses but at $20 million for all of Indian Country, it is not enough. It is a necessary component but we are looking beyond that.

If you look at the New Market Tax Credit or the Bond Guarantee Program at Treasury, those are significant resources that should be finding their way into Indian Country but they are not.

The investment in Indian Country for $20 million in Treasury for the CDFI Fund or $8 million for the Loan Guarantee Program is

not enough for us to take seriously the idea that we need to build tribal economies.

Senator UDALL. A promising development over the past decade is the use of these New Market Tax Credits as mentioned today. These tax credits hold tremendous potential to spur investments in Indian Country.

In my State, the Pueblo of Laguna was able to leverage these credits as part of a $70 million water and wastewater project but it seems like the well has dried up. Over the last three funding cycles, only one tax credit allocation was given to a Native CDE, $50 million out of $7 billion allocation for projects in Indian Country.

Mr. Desiderio, what recommendations do you have for this important program so that we can get these tax credits flowing to projects in Indian Country?

Mr. DESIDERIO. It is actually a little worse than that. I think it is $15 billion that has been given out over the last three years. Indian Country got $20 million which is .04 percent or something like that.

Senator UDALL. That is appalling.

Mr. DESIDERIO. Yes, again, it is not enough.

The Tax Credit Program, there are a couple of reasons for this. One of the big reasons it is not getting to Indian Country is because we have people coming from the CDEs that serve other communities that lead these grant applications for CDEs. They do not understand Indian Country. For us, this is Treasury farming out their trust responsibility and letting others who are not familiar with Indian Country decide what is going to happen with these tax credits.

The important part about these tax credits, like the Laguna Pueblo, is that it makes capital feel comfortable coming to Indian Country. We also have that collateral that we do not normally have from land assets that comes in and offers 20 to 25 percent collateral that we can leverage, take out loans and make these projects feasible.

We have heard from tribes for years on this. Our recommendation is to have something set aside. The New Market Tax Credit sits inside the same agency as the Native CDFI Program. They have set-asides for tribal governments. It is one of the most successful programs we have in Indian Country.

We do not have to look too much further than that and say we need a set-aside. This is Federal money. Right now, States have a 100 percent set-aside for Federal money. We are asking for a 5 percent set-aside for tribal money.

We also realize these are complicated and complex transactions. Having some funds of the set-aside go to towards technical assistance to build tribal autonomy, to build capacity, which is what economic development doest, is really necessary for some of these programs to be effective.

Senator UDALL. That is a very good suggestion.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Moran.

STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS

Senator MORAN. Mr. Chairman, thank you very much.

Thanks to you and Senator Udall for hosting this hearing. The timeliness is such that it may create an opportunity for us to have leverage in including a number of these tax provisions in any tax bill the Senate may consider. We ought to make certain the things we learn in this hearing and our goals with tax changes that affect tribal members ought not be ignored as we have a debate about the U.S. Tax Code.

I want to thank Chairwoman Onnen for being here today and making the trip from Kansas. I appreciate her perspective and her leadership here in Washington, D.C., and especially back home. With her involvement in NCAI, she has a great opportunity to provide us with insight, knowledge and experience. Thank you very much.

I want to go back a few years. Senator Heitkamp and I introduced the Tribal General Welfare Exclusion Act. In 2014, it became law. I want to give any of our witnesses a chance to tell us, despite the passage of that legislation, if it is not living up to its hopes, if that is the case, and what are we still missing from that piece of legislation before I turn to the topic of the bills currently pending before this Committee.

Does anyone have any requests or suggestions for us in regard to implementation of welfare exclusion? Lots of people behind you have suggestions.

Mr. DESIDERIO. I will start while they are gathering their thoughts.

The general welfare is an important piece of legislation. It is one of the fundamental shifts in Federal policy to be able to recognize that tribal governments have a role in preserving cultural and ceremonial practices and also being able to serve our own citizens' needs based on our cultural idea of what need means. In that way, it has been an amazing piece of legislation to recognize that.

I think one of the more obvious issues to come out of that is the Treasury-Tribal Advisory Committee, which was part of that legislation. It has been a couple of years and it is still not established. We are waiting on one final appointment from that.

That committee has been going around Indian Country listening and gathering their thoughts on how to advise the Secretary of Treasury on tax items for Indian Country. Until that is formed, we cannot address some of these other issues like educating the IRS enforcement on tribal issues.

We also are experiencing a lot of momentum on tribes setting up their own general welfare plans and running with ideas of how, for example, to pay utility bills in the winter for those families in need and setting up exciting programs, I think, for Indian Country to consider. Until all that plays out and we get rules from Treasury and this Committee in place, we are still in the waiting period of having all of that settle. Overall, the legislation is a great recognition of tribal culture and decision making.

Senator MORAN. So we need the advisory committee totally formed. People whisper in my ear just as they do in yours. We had a discussion, as the hearing began, on how many positions are still

left unfilled. I guess you have answered that question. I think we know where that is and we need to increase the encouragement to fill that position. We will do that.

Then what you are telling me is once those recommendations are done, that committee can meet and provide advice to the Treasury Department and will be better able to fulfill the mission and the goals of general welfare exclusion legislation. Did I understand that correctly?

Mr. DESIDERIO. Absolutely, and not just general welfare. The law is broad enough to advise the Secretary on all tax matters related to Indian Country. With some of the other issues we are talking about today, we have the ear of the Secretary on tribal issues.

Senator MORAN. Thank you.

Anyone else? Chairwoman Onnen.

Ms. ONNEN. I just want to also echo the sentiment. In my opinion, the importance of the Tribal Advisory Committee being in place really is about communication and education. That will actually facilitate progress that was built into the General Welfare Exclusion Act.

You laid a wonderful groundwork that I have seen actually have true impact on my tribal members back home. I just want to see that continue to grow and expand. Communication means understanding. The more understanding we have, the better off we are all going to be.

Senator MORAN. Thank you very much.

My time has expired. I will try to talk about the current legislation in the next round if there is one.

Mr. Chairman, thank you.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Chairwoman Onnen, you are a former Regional Vice President of the National Congress of American Indians. I understand that earlier this year, NCAI adopted a resolution raising significant concerns about the Trump Administration's budget proposal.

In particular, NCAI pointed out, "The fiscal year 2018 budget request contains $300 million in cuts to the Indian Health Service with reductions in almost every other category which will mean less services and poorer health for American Indians and Alaska Natives." Further, they said the President's "reduction in funding for housing construction and the elimination of successful competitive grant programs such as the Indian Community Development Block Grant will generate more unmet housing needs."

Chairwoman Onnen, do you agree that the proposed cuts in the President's budget would have a negative effect on tribal populations?

Ms. ONNEN. Thank you for that question, Senator.

I think the easy answer to that question is, without a doubt, cuts that significant are going to impact tribal programs and the ability of tribes to provide services to their programs. The truth of the matter is I think everyone in this room knows that tribal programs are woefully under-funded anyway. To cut funding in this manner is definitely going to make things more difficult for tribes to be able to administer programs and take care of their people in the way they need to.

Senator FRANKEN. Don't you think rather than a $2.4 trillion tax cut, of which 80 percent goes to the wealthy, the President should be investing in programs that provide health care and housing?

Ms. ONNEN. I think at least everyone at this table would like to see more investment in housing and health care. You guys know more about finding balance than probably I ever will, with any luck, but I think finding balance is the trick here.

Everyone has needs, everyone has demands and everyone needs services. To take this back around, would that be fabulous? It would be. It would be great to have that funding and have it put into tribal programs.

However, if the case is that we cannot do that, this is why we come to this table today to talk about these types of issues so that we can have some economic independence to create these things for ourselves. The fact of the matter is we do not always know how that is going to roll down. That is hundreds of years of history.

We are trying to build our own economies ourselves to be sustainable. I don't want to let anyone off their trust responsibility. I believe true sovereignty really comes when tribes can also take care of themselves in addition to the United States upholding its trust responsibility.

Senator FRANKEN. Thank you.

Mr. Marrs, I have been an advocate of the New Market Tax Credit Program which has successfully spurred a wider range of innovative economic development activity in my State of Minnesota, both in cities and rural areas, yet they have not been used very much for projects on tribal lands. Are there unique challenges that have prevented the tax credits from being used for projects in tribal areas? What can be done to address those challenges?

Mr. MARRS. I think the problem has been that we have never been able to get Indian lands or Alaska Native lands prioritized into the system. Therefore, we do not get that quality we need for investment in our own developments.

To begin with, it is hard to raise money. It helps when an outside firm can come in and recapture some of the tax base. We find it just about impossible to get new development money because in rural Alaska, we are so far removed from everything and a lot of the reservations in the lower 48 are not in populated areas. It is hard to get that investment.

The way the New Market Tax Credit is now written I think will boost that effort on behalf of investors out there to come in and work with us. That is why we see it as an important piece. Even though it is not directly related to Alaska Natives and our lands, the way it is written, the Alaska Natives can benefit from it as the lower 48 tribes do. We really appreciate that effort.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Murkowski.

STATEMENT OF HON. LISA MURKOWSKI,
U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate your introduction of the TEA Act along with Senator Heitkamp. I think it is good. As Senator Moran

has noted, it is timely. I, too, hope much of what is being discussed today, whether your legislation or the legislation we have introduced to the settlement trusts, will find their way into a larger tax package.

I do think it is important. The messages we have heard here today need to be reinforced. We do not want to leave out our Indian or Alaska Native populations when it comes to taxes and tax reform. Thank you for what you are doing with that.

I know my staff has been in contact with your staff on a few recommended technical changes within your legislation, making sure we are including all the intended groups within the auspices of the TEA Act. I look forward to working with you on that.

Mr. Marrs, thank you for being here today. Thank you for speaking to S. 1698. I do think this is an important piece of legislation that really works to ensure ANCSA is operating as intended to help directly provide for the health, education and economic welfare of individual Alaska Natives who will benefit from these settlement trusts.

We talk a lot about the need and effort to make sure that indigenous Alaskans, under the land claims, see benefits that are multigenerational, which is the term we use. I appreciate the opportunity we have had to work with you on legislation now before the Committee to help ensure we do see these benefits pass from one generation to the next. It has certainly been one of my longstanding goals as well as yours.

From your perspective, experience and history with ANCSA, can you explain how this bill, S. 1698, can really help to ensure the benefits are available for future generations?

Mr. MARRS. As you well know, we operate a little differently because we were required to do corporations. We are not on reservations; we don't have Indian Country. In 1971, our shareholders were locked in. If you were a Native after 1971, you just were a Native not belonging to anything.

Senator MURKOWSKI. Can you repeat that? I don't think people understand that.

Mr. MARRS. When the Claims Settlement Act passed, if you were born prior to December 18, 1971, you were eligible to become a member of that corporation. If you were born after that, you did not get anything.

Over time, Congress has tried to change that. There is a law on the books that allows these corporations and their shareholders to bring in what they call "after-borns," those born after 1971.

A lot of the corporations are not doing that. We have these sort of lost members, except for the fact that they are all members of the tribal organizations. But the tribal organizations in Alaska, much like the lower 48, don't have a lot of income to help support their tribal members.

The idea here is a bridge for being able to put land in perpetuity in these trusts so that all of the future generations participate in those lands. Even though they may not be trust lands as Indian Country, they are sacred lands.

It also allows us to be able to put in money. In this case, we are asking to be able to contribute money and assets pre-tax to these

trusts that do pay a tax on their income, not as heavily as you get on the corporate side, but they still pay a tax.

They, in turn, help support the individuals and also support tribal cultural programs and education. There are a myriad of things we can do through those. If you think about the corporations formed under State law, you have a duty to those shareholders as a corporation. If we are putting off too much money on projects out there, we are subject to a shareholder derivative suit on the other side.

We need a mechanism to be able to move assets to take care of the whole, not just those born prior to 1971. There has sort of been a sea change in the fact that I think corporations are now realizing our job should be there supporting the tribal efforts because those are the important programs to our indigenous people.

I guess that is probably why I have been working on this trust legislation so long. To me, it is one of the bridges that makes this whole thing work for the long-term interests of all our shareholders.

Senator MURKOWSKI. I appreciate that explanation. I think it is important that we were able to incorporate that as part of the record because I do think it is not well understood that with ANCSA and the establishment of the corporations, you have those born pre-1971 and then you have the afterborns.

How you ensure there is a bridge is probably the most apt term, as you stated, to address those future generations of Alaska Natives. This is a mechanism, one designed, I think, fairly and openly that can help facilitate that.

I thank you for your good work on this. I look forward to hopefully putting this into play with the assistance of my colleagues here. Thank you for that.

The CHAIRMAN. Senator Cortez Masto.

STATEMENT OF HON. CATHERINE CORTEZ MASTO, U.S. SENATOR FROM NEVADA

Senator CORTEZ MASTO. Thank you.

I appreciate the conversation today. Thank you to all of you for joining us in this candid conversation.

Just so I can be clear, you all support S. 2012, S. 1935 and S. 1698 in their entirety, correct? Is that a yes from all of you?

Mr. DESIDERIO. We support the legislation, absolutely. We are cautious on terms like priority unless they are defined. They seem to be interpreted in different ways. That goes to the New Market Tax Credit. We would rather have set-asides and would rather be a bit more aggressive.

Senator CORTEZ MASTO. Supported with the caveat that you have talked about today, the changes you would like to see?

Mr. DESIDERIO. Absolutely.

Senator CORTEZ MASTO. Thank you.

Have you or any of your tribal members, that you are aware of, been involved with the Administration or Republican members of Congress in the current discussion on tax reform, what it is going to look like and how it is going to impact your tribal communities? That would be a question for you all.

Ms. ONNEN. You are asking about our membership back at home?

Senator CORTEZ MASTO. Correct.

Ms. ONNEN. Honestly, I would say that probably the average tribal member is not probably engaging in these conversations. I have been a tribal leader for three years and an employee for 15 years, and I am still wrapping my mind about the layers and multitude of things that are in the way. So I don't think the average tribal member fully understands what taxation really means to them and the barriers in front of them. That is my honest opinion. I come before you to try to be their voice. That is my job.

Senator CORTEZ MASTO. Okay. Have any of the others been involved in consultation with the current Administration or with the members of Congress on current tax reform that is going on right now?

Mr. DESIDERIO. We were involved in a meeting with the White House talking through some of these same issues we are discussing today and some other concerns and different members of Congress. However, like a lot of people, we are not certain where this is going to go.

Senator CORTEZ MASTO. You know more than I do. That is why I ask, because I am curious. I would hope that your discussion today and the concerns you have today are being incorporated somehow in the tax reform discussion happening amongst, unfortunately, just some of my colleagues and not all of us, which is frustrating to me because I sit on Indian Affairs and this is an incredible Committee and we work in a bipartisan manner. We work together on so many things.

I do not understand why that is not permeating throughout this tax reform discussion that is happening right now that is going to impact millions of people, hardworking families, and tribal members across this Country. It is frustrating to me. It is not how it is supposed to work here in Congress.

I did not come to the United States Senate to be shut out of this discussion when I have to represent tribal members in my State and many people across this Country. I appreciate your comments today. I too am advocating that the discussion we had and how we assist tribal communities with economic development, economic improvement and families, that we are going to be addressing your concerns in this tax reform package.

With that said, I am curious. You talked about economic independence, talked generally about how we spur and invite larger economic development in tribal communities, but can you talk to me about recommendations to ensure that tax reform also primarily benefits working families in Indian Country? What should we be looking at to benefit working families in Indian Country when it comes to tax reform?

Mr. DESIDERIO. When you are parsing over the information that has been released so far, there is the idea that the head of household is deleted in the conversation. Indian Country has probably the highest rate of single parents. I think that is something we are really concerned about that really impacts a lot of families in Indian Country.

The other issues that would be helpful are the child care tax credit which is actually a credit which will be helpful for Indian Country, as well as the elder or adult care. We often have high occupancy in the households taking care of both generations. Those things are very helpful. We would like to see those go forward.

Our concern and I think the reason we are here is to be able to build jobs back home. When you look at the housing tax credit, that really is meaningful for not just building housing in Indian Country, but putting a lot of local people to work. Those things are meaningful.

The New Market Tax Credits usually builds these institutions that serve those families, so all those things are meaningful in getting us the financing, like every other government, to be able to finance some of these projects to bring jobs to our communities. It is important for the middle class and everyone in the community.

Senator CORTEZ MASTO. Thank you so much for your comments today.

I notice my time is up, Mr. Chairman.

The CHAIRMAN. Senator Heitkamp.

STATEMENT OF HON. HEIDI HEITKAMP,
U.S. SENATOR FROM NORTH DAKOTA

Senator HEITKAMP. Thank you, Mr. Chairman.

This is always an area of incredible frustration for me because I believe that every time the words "State and local government" appear in the Code, we should also read "tribal government," and think about what that means and that the parity just does not exist.

There are some egregious examples that we have been working to try and change like the bill I introduced that has been put in Senator Moran's Tribal Tax and Reinvestment Act, which basically if you get an adoption tax credit, you don't get it if a tribal court ordered it. That is ridiculous. If you have a government pension plan and you are running a pension plan at a tribal-owned business, you have to maintain a separate pension plan.

Chairman Hoeven and I were very involved in the Bank of North Dakota. All the employees of the Bank of North Dakota had State retirement benefits. They did not have to have a separate plan.

I can go down these, tribal foundations and charities, excise taxes, kiddie taxes, taxes on health care professionals where we are basically taxing the benefit that we provide for employment. I can go on and on and on.

I am a huge supporter, maybe at even a much higher level, than Senator Cantwell from Washington has put in her bill for the tax credits. Anyone who has done any housing work, which we did in the State of North Dakota, knows those tax credits are the most significant program. If they simply go to the States and there is no direct requirement for parity or including those in tribal governments, that is incredibly frustrating.

I want you to know that we are going to look very closely at any kind of tax rewrite to try and see if we are going to fix these problems we know exist as a result of the failure of people to understand, who do not have Indian Country in their jurisdiction, that

tribal governments should not take a back seat to State governments.

With that said, one of the concerns I have is exactly what you mentioned which is a lot of the benefit, if the benefit shifts to those who are the wealthy among us, a lot of Native families will be left behind.

You talked about the child credit and the child care credit, neither one is refundable right now. If you have the earned income tax credit, that is refundable, which means that you get it whether you have a tax liability or not. We are going to look very closely at the demographics of tax reform to see if, in fact, there is a huge disadvantage for those people who are working poor, which is a huge category of folks who work on the reservations.

I am curious about the balance that we are going to have to achieve which is giving tax relief and not blowing up deficit. Already, we know we are under funding treaty responsibilities with appropriations.

How do you square all that? If you could draw a line and say we are watching this, yes, but if it means we are going to lose a commitment in NAHASDA, a commitment in Indian Health, that really does not benefit Indian Country. How many of you have thought about that tradeoff?

Mr. DESIDERIO. That is such a great point to bring up. I am not sure if we need to have this either/or idea for this.

We had this discussion lately with dynamic scoring and having these things pay for themselves through the growth of the economy. We do need the treaty obligations and the Federal trust responsibility.

I am not sure why Indian health care is a discretionary expense. Military health care is not. Let us move on the different side of the balance sheet when talking about the obligations that are some of the highest obligations in the land.

We are looking at the idea of balancing or investing and using the idea of dynamic scoring. These are investments. This is my main point in the oral testimony. We are making investments in Indian Country. These infrastructure investments, we did not choose the lands we are on, so we have to bring infrastructure into these rural and remote communities.

We have to have a way of building these communities and a different way of looking at this on the international level of building that infrastructure to create those jobs and to create the sustained economies and, as the Chairwoman mentioned, for tribes to be able to pursue economic development, create these opportunities and build a better quality of life for their citizens.

I think the argument of saying do we choose the investment or these obligations, the investment seems to float now and then between an obligation and dynamic scoring. We need these investments. They are going to pay returns in the long run.

Senator HEITKAMP. I am out of time but I do want to point out when you look at the budget, which was passed, which foretells what is going to happen in tax reform, there are some pretty serious cuts in that budget that will have a pretty dramatic effect on the ability of people to own homes and the ability of people to survive. While I would agree with you that we are being offered a false

choice, why should it be one or the other, we might want to be really careful about how this progresses.

The CHAIRMAN. Senator Moran, did you have additional questions you would like to ask or comments?

Senator MORAN. Yes, I would, Mr. Chairman. Thank you.

How often does the Essential Government Function prohibit something from happening? Is there an application of the IRS that says this is an essential government function and then it is denied? What is the process whereby we figure out this type of project does not qualify?

Ms. ONNEN. I am going to give you a real-life application from my tribe. The Essential Government Functions test, what it looks like or feels like from a tribal perspective sometimes depends on who comes out and talks to you about it, how they interpret it, how they develop it and how they want to apply it.

We could get someone who comes out and tells us this does not meet the Essential Government Functions test, you cannot do this. Literally, we can have someone come out three years later who says, yes, this does meet it. It is very arbitrary.

Senator MORAN. Both of those individuals you are talking to are an IRS agent or somebody who should have the authority to make that decision?

Ms. ONNEN. Yes. It becomes very arbitrary. Again, we are talking uncertainty. How can we know what we can or cannot do if it depends on the day and who shows up?

Senator MORAN. Do you have an example of what has been denied as not essential government?

Ms. ONNEN. When we go back to that conversation, it does go back to pension plans and that kind of thing we were working through. We got a yes and then we got a no and then it was a no. We have had to go back and forth ourselves just because of a local IRS person. I am just saying.

Senator MORAN. Mr. Desiderio, is there data on this issue of rejection? If you went to the IRS and said, what have you said yes to, what have you said no to, and does that kind of data exist?

Mr. DESIDERIO. I think first that would be a great question for the Committee to ask the Internal Revenue Service. That data is important.

Initially, about six years ago during 2004 and 2006, the IRS was examining or auditing almost every issue that came out of a tribal government. That had the effect of really killing the tax-exempt debt market for tribes.

Keep in mind the definition of the Essential Government Function test is anything that is customarily performed by State and local governments. Parking garages, golf courses, convention centers, things customarily performed, were disqualified by the Internal Revenue Service.

The other part of that is lately if you gather that data and look at it now, tribes have been drawing on the tribal economic development bonds that were set-aside in the Recovery Act, the $2 billion. There is about $500 million left and we are going to be out of that.

Instead of going through all the hassle of hiring the attorneys and bond counsel and getting the financial firms and all the administrative costs queued up only to be turned down, the safer route

is just to go to the economic development bond pool and get your tax-exempt debt that way.

Senator MORAN. That is a really good point, Mr. Desiderio. The circumstance would be, you would spend a lot of money only to be rejected. Therefore, you may not ever make the application; you will find a different route, perhaps more expensive to accomplish.

Mr. DESIDERIO. We have the largest financial firms that frequently come to our organization. They used to have separate divisions that just did tax exempt debt including tribes. They are all gone. This market has effectively been squashed.

Senator MORAN. On that topic, one of the things we need to think about in this broad topic my colleagues want to talk about, tax reform, is the tax-exempt status of interest on these financial instruments we are talking about.

There is another way we could end up. We could get you to be treated the same only to discover that the tax treatment of those bonds is no longer the same as it is today or tomorrow.

There is a broader topic here when we talk about what happens to the tax reform. We may be able to end the issue of essential government benefits, programs or functions, only to see that it does not matter because the Tax Code has been altered in how it treats governmental financing.

The final question I would ask is on the topic of pensions. You maintain two types of pension plans, government employees and so-called commercial employees. I understand the circumstance under which that arises.

Is there any estimate of how much money, administrative costs, would be saved by being able to administer a 1A pension plan?

Mr. DESIDERIO. We looked into this for joint tax. Our organization had come through the 5500s they required, ERISA compliance records, of about 350 tribes that maintained the 401(k) or the commercial type plans.

Those are the same tribes or a lot of the same tribes who also have a government plan. You can see how big it is to have that many trying to do the right thing for their employees. The administrative costs are one thing but it also costs the employee.

If you are working in the tribal government and go to work for a commercial entity or another entity within the tribe that might be perceived as commercial, you have to switch plans and go back and forth. It does not really help the employer either.

The definition of essential government function test in pension plans is even more restrictive than in tax exempt debt. Even if it is deemed an essential government function test, if the employee is doing anything that is commercial, it is disqualified. It is even more restrictive than the tax-exempt debt.

Senator MORAN. Are these plans administered beyond a particular tribe? Are there economies of scale in which an organization provides the management of those pension plans across a greater number of tribes?

Mr. DESIDERIO. No, those are mostly done on a tribe-by-tribe basis.

Senator MORAN. Thank you all very much for your testimony.

Mr. Chairman, thank you.

The CHAIRMAN. Senator Daines.

STATEMENT OF HON. STEVE DAINES,
U.S. SENATOR FROM MONTANA

Senator DAINES. Thank you, Mr. Chairman and Vice Chairman Udall.

Thank you for coming to testify today.

When you think about the State of Montana, you may not think about coal but we do in Montana. In fact, Montana has more recoverable coal than any State in the United States. We are about sixth in production and first in potential. In fact, we boost about having a quarter of the Nation's coal reserves.

In fact, our Crow Reservation sits on top of an estimated 9 billion tons of coal, that is with a B. However, unemployment on the reservation currently sits at around 50 percent. Without coal production, it would skyrocket to around 80 percent.

In fact, earlier this year, this very Committee heard testimony from the Chairman of the Crow Tribe, A.J. Not Afraid, on how vital this tax credit is to sustain his people. It does not take a seasoned elected official to understand the importance of coal to the Crow Nation. Last year, I held an energy summit in Billings, not far from the Crow Reservation. We had some protesters break in at the very end of the meeting.

We had a panel at that time and I was moderating. We had the prior chairman of the Crow Tribe, Mr. Old Coyote; we had some union leaders; and we had workers from the mine talk about how vital coal is to the people there. These protesters broke in with a big sign that said, "Keep It in the Ground." My staff panicked and said good grief, what are we going to do. We just continued to move forward with this great conversation we had.

There was a 12-year-old, Kevin Old Coyote's daughter, a wonderful young woman. She quietly walked around to the back of the room. She met the protesters face-to-face and said, "If you keep it in the ground, my people will starve." The protesters quietly folded up their signs and walked out. It took a 12-year-old young woman from the Crow Tribe to articulate the truth to these protesters.

That is why I have authored legislation to make the Indian Coal Production Tax Credit permanent. I am glad to have co-sponsors, Senators Tester, Heitkamp, and Barrasso, all of whom serve on this Committee.

I know you mentioned it briefly earlier, Mr. Desiderio, but what do you see as the benefits of the Indian Coal Production Tax Credit?

Mr. DESIDERIO. I am glad you brought this up. The Navajo, Crow and others, we are not picking and choosing what resources we have on our lands to develop. We want to try to support the resource development if a tribe chooses to do that.

It is really important, with all the different difficulties and approval processes that go into doing business in Indian Country, that we have some incentive for outside interests to come in and help tribes develop their resources.

The Indian Coal Tax Credit is important but I would go a bit further than that. These are multimillion dollar, multiyear projects that need to be built out. This accelerated depreciation goes along with that in setting up those structures and allowing those compa-

nies to come in and take an accelerated depreciation or write-down those assets quicker.

That goes along with the production tax credit of $2 per ton for coal and also the Indian Employment Tax Credit is helpful as well.

When you take those three together as an incentive for somebody to come in, tribes can actually use those incentives at the negotiating table and the companies can actually rely on those, it makes a big difference.

Right now, it is not an effective use to have these deferred or retroactively renewed. No one can rely on them on either side of the table.

Senator DAINES. We definitely need to play for the long game here considering the significant capital investment required to make this all work. Anyone who sees one of these operations is usually struck by two things.

One is how amazing the reclamation is. To the naysayers out there about what it means to mine coal in a place like Montana, when they see the reclamation and how beautiful the countryside is post-mining, they usually walk away profoundly changed. Second is the size of the equipment out there.

Given the regulatory barriers to energy development in Indian Country, do you see this tax credit as essential, you alluded to this, to leveling the playing field for coal production in Indian Country?

Mr. DESIDERIO. Again, this is a tax credit that will affect a few tribes but your point in your introductory comments is really important to those tribes. This is a very important tax credit.

Senator DAINES. As you said, you do not get to pick.

Mr. DESIDERIO. We do not get to pick.

Senator DAINES. Indian Country did not get to pick what was in their lands. They got that picked for them.

Mr. DESIDERIO. Right.

Senator DAINES. That is another issue. The Crow Tribe, to their credit, they look at all the above, energy kind of portfolio. They have hydro potential, wind potential and they have great coal potential.

I think it comes back to a sovereignty issue as well, self-determination. Let us develop our lands. We will do it in a responsible way.

I am out of time. Thank you, Mr. Chairman.

The CHAIRMAN. Vice Chairman Udall.

Senator UDALL. Thank you, Mr. Chairman.

We have heard from a number of tribes about problems associated with taxation and jurisdiction, including from the MHA Nation and the Navajo Nation in my home State. While tribes have been clear about the certainty they need over taxation and jurisdiction, the Administration has been all over the map.

Mr. Desiderio, what would you like to see the Administration do to address taxation and jurisdiction in a way that provides certainty to tribal businesses and State and local jurisdictions?

Mr. DESIDERIO. This is a real important issue for Congress to address. This is nothing short of the constitutional obligation of Congress to regulate trade among the Indian Nations. This is a constitutional charge to support the certainty of jurisdictions in tribes.

To that end, I think it is incumbent for the Administration to continue taking up the Trade or Act regulations and have Congress support that effort. We want to make sure that any trade inside Indian Country is and should be tax exempt. We also want to make sure that tribes are developing their own codes, commercial codes, to be able to participate in trade and commerce.

I think as we work through this, it would be very helpful for Congress to remain engaged and serve that role in regulating trade with Indian Country.

Senator UDALL. Congress first passed the Indian Employment Tax Credit to create jobs in tribal communities but this important tax credit expired in 2016. In addition to extending the Indian Employment Tax Credit, Mr. Desiderio, did you have any recommendations for updating and expanding the credit in a manner that would increase its deployment thereby promoting economic development and job creation on Indian reservations?

Mr. DESIDERIO. The first thing is that the compensation that is eligible for a credit is too low. It does not accommodate low and moderate income today. Since 1993, that has changed. We need compensation level updated.

The compensation level also includes the cost of health care. We need to make sure that is included as well when we are updating it.

Finally, there is a provision in there that you have to prove back to 1993 that you have had those Indian employees. If there are any additional employees, you only take the increase in compensation. We need that updated to state something like the last three years so people can actually take advantage of it.

Senator UDALL. Thank you. This has been an excellent panel. Thank you for being with us.

I yield back, Mr. Chairman.

The CHAIRMAN. Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

I just want to make one point for the record because I think it is important. We worked on the Essential Government Benefit with Senator Moran and this Committee.

A great example that led to the introduction of our bill was the example of burials or blankets or traditional ceremonial expressions that were very culturally significant and very much essential tribal outreach. Yet, it was ignored by the IRS.

We need to make sure this consultation process works and that we understand what might be an essential government function for a tribal entity is different perhaps than what would be an essential government function for a State government.

That is why we did the bill. It is really important that the cultural differences are reflected in the definition. Consultation is critical. We are going to follow up with the IRS, find out where the consultation is, and continue to work to try and bridge these cultural differences in terms of how we address essential government functions.

The CHAIRMAN. If there are no more questions today, then members may submit follow-up questions for the record. Of course, we would ask you to respond to those. The hearing record will be open for two weeks.

Again, I want to thank all of the witnesses for coming today. We appreciate very much your very good testimony. Thank you so much.

With that, we are adjourned.

[Whereupon, at 4:05 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. RUSSELL BEGAYE, PRESIDENT, NAVAJO NATION

I would like to thank Chairman Hoeven, Vice-Chairman Udall, members of the committee, and staff for holding an oversight hearing on the economic state of Indian Country. I would like to thank Senator Hoeven for introducing S. 2012 and cosponsors Senator Murkowski and Senator Heitkamp for signing on to the bill. I appreciate the timeliness of this bill, especially since the House released H.R. 1, the Tax Cuts and Jobs Act, with no mention in that bill of tribal tax reform. I greatly appreciate this committee for stepping up and advocating on behalf of Indian Country during this pivotal moment in national tax reform.

The Navajo Nation is 27,000 square miles of rural reservation located in three states, Arizona, New Mexico, and Utah. It is roughly the size of West Virginia with an on-reservation population of 164,000. The Navajo Nation Government and Enterprises are the biggest employers on the reservation, yet we still have an unemployment rate of 44 percent.

Based on a 2012 survey conducted by the Navajo Nation Department of Economic Development, 80 percent of Navajo consumers purchase their groceries off the Navajo Nation. About 75 percent of Navajo consumers will drive more than 50 miles to procure items. This survey highlights the problem of the severe lack of businesses on the reservation. The lack of businesses, in turn, contributes to our unemployment rate of about 44%—a telling number for the Navajo Nation.

The Navajo Nation seeks to find common ground for tribal tax reform that will foster economic growth and encourage a self-sustaining Navajo population. One of the primary barriers in developing our reservation economy is the lack of tax incentives to attract private investment within communities. The TEA Act provides the incentive to outside investors and encourage them to invest in our economies-thereby creating more jobs within our communities. Therefore, I offer my full endorsement of S. 2012, the Tribal Economic Assistance Act, with special attention directed to following provisions:

Section 2. Treatment of Indian Tribes as States with Respect to Bond Issuance

The Navajo Nation seeks to incentivize private investment in our tribal communities by issuing tax exempt bonds. However, the "essential government function test" has severely limited the Navajo Nation's ability to issue these bonds. State and local governments do not have to adhere to the same requirements as tribes to issue tax exempt bonds. As a sovereign nation, the Navajo Nation deserves the same parity as state and local governments. I support this section of the bill.

Section 3. Making Permanent the Indian Employment Credit & Depreciation Rules for Business Property on Indian Reservations

As previously mentioned, the Navajo Nation seeks to incentivize private investment. Codifying the Indian Employment Credit and Depreciation Rules for Business Property on the Navajo Nation is a great way to attract private investors. Due to our political and land status, starting a business on the Navajo Nation requires more capital than most other economic development projects. Making these tax credits permanent will allow investors to turn a profit- without it, private investors will take their business elsewhere. I support this section.

Section 4. New Market Tax Credit Priority for Tribal Corporations and Investment on Reservations

The New Market Tax Credit (NMTC's) will benefit the Navajo Nation's economic development projects, because we have little to no access to capital. As mentioned above, our unemployment rate is 44 percent, and the Navajo Nation would like to expand our economic projects to hire more community members (tribal members and non-members), while continuously improving our economy. We seek to develop more

Navajo entrepreneurs with this incentive as well as the Small Business Administration's Small Business Development Centers. I support this section.

PREPARED STATEMENT OF THE MANDAN, HIDATSA AND ARIKARA NATION (MHA NATION)

I. Introduction

Chairman Hoeven, Vice Chairman Udall and Members of the Senate Committee on Indian Affairs, the Mandan, Hidatsa and Arikara Nation (MHA Nation) appreciates the opportunity to provide this testimony for the Committee's Oversight Hearing on "Building Tribal Economies: Modernizing Tax Policies that Work For Indian Country." Modernizing federal tax policies is one of the most important issues facing the MHA Nation and all of Indian Country today. Federal tax policy for Indian Country must catch up with modern and successful federal policies supporting tribal sovereignty and self-determination.

Current federal tax policy limits tribal economic development. Tribes need the same authorities that every other government uses to maintain infrastructure, fund our government and support economic activity on our reservations. The MHA Nation supports legislation that would modernize tribal tax policy, including, S. 1935, the Tribal Tax and Investment Reform Act, and S. 2012, the Tribal Economic Assistance Act.

In addition, the MHA Nation asks that the Committee address the single biggest drain on tribal economies—state dual taxation of tribal economic activity. For too long state governments have been allowed to tax economic activity in Indian Country, thereby depriving tribes of the ability to tax the same activity without facing the risk that a dual tax will kill the activity being taxed. Tribes should have primacy when it comes to taxation of economic activity in Indian Country. Keeping tax revenues on Indian reservations allows for reinvestment and improvements that further support economic activities that benefits surrounding communities, including states. When states drain tax revenues from tribal governments and our reservations, tribal economies cannot grow or sustain themselves, and surrounding communities suffer.

State interference in energy and economic development on our Fort Berthold Indian Reservation demonstrates the need for trade and tax policies to catch up with federal selfdetermination laws and policies. In short, state dual taxation limits economic growth on and around Indian reservations and prevents Indian tribes from exercising full self-determination over their lands and resources. Without changes to these policies, tribal economies will never have the support needed and we will continue to be heavily reliant on federal budgets for tribal programs.

II. The U.S. Constitution and Treaties with Indian Tribes Provide Basis for Legislation Eliminating State Dual Taxation

The Committee only needs to look to the U.S. Constitution and the Federal government's treaties with Indian tribes for authority to pass legislation affirming the exclusive authority of Indian tribes to tax activities on our reservations and to eliminate state dual taxation. The United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several Sates, and with the Indian Tribes; . . ." U.S. Constitution Art. I, Sec. 8, Cl. 3. This broad and exclusive authority to regulate trade with Indian tribes provides no room for state taxation of Indian tribes.

Many treaties between the United States and Indian tribes included and affirmed this same authority. For example, the MHA Nation and its component tribes entered into treaties with the United States that reflect the federal government's exclusive authority to regulate trade with Indian tribes. These treaty provisions establish a bilateral trade relationship between the United States and the MHA Nation to the exclusion of state and local governments. These treaties also protect the MHA Nation from depredations, which includes official depredations as well as attacks, plundering, robbery and looting, by non-Indians.

In 1825, the Mandan, Hidatsa and Arikara Tribes each separately entered into peace treaties with the United States that specifically set out the federal government's exclusive role in regulating trade with them. For example, the Mandan treaty provides:

> All trade and intercourse with the Mandan tribe shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents; and none but American citizens, duly authorized by the United States, shall be admitted to trade or hold intercourse with said tribe of Indians.

. . .

[And,] the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations; . . . ."

TREATY WITH THE MANDAN TRIBE, 7 Stat., 264, Art. 4 and 5 (July 30, 1825). Treaties with the Hidatsa and Arikara Tribes included identical provisions to the one above.

Similarly, in the 1851 Treaty of Fort Laramie, the MHA Nation reserved the Fort Berthold Indian Reservation and its lands, waters and resources for the benefit of the MHA Nation and its members—this reservation of benefits excluded non-Indians and state governments. The treaty specifically prohibits non-Indians from taking the MHA Nation's resources for their own benefit. The treaty states:

In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

TREATY OF FORT LARAMIE, 11 Stat. 749, Art. 3 (Sept. 17, 1851).

The U.S. Constitution and treaties with Indian tribes are the supreme law of the land. These foundations of the U.S. legal system provide the basis for legislation that affirms the exclusive authority of Indian tribes to tax activities on their reservations and to eliminate state dual taxation.

III. Impact of State Dual Taxation on the MHA Nation

As you know, the MHA Nation and our Fort Berthold Indian Reservation is in the middle of one of the most active oil and gas plays in the United States. While the MHA Nation, individual Indian allottees and non-Indian landowners within our Reservation have benefited from this economic activity, more than half of the tax revenues from these activities went to the State of North Dakota. The loss of these revenues prevents the MHA Nation from keeping up with road repairs and improvements, law enforcement, housing, health care, elder care, environmental management and much more.

In addition, the loss of these tax revenues prevents the MHA Nation from investing in our future. Without these revenues, the MHA Nation is not able to invest in infrastructure that would bring long-term benefits and economic development to the Reservation including gas gathering facilities, a gas fired power plant, an oil refinery, and economic development zones. Without these revenues our communities and resources suffer the impacts of energy development and get few of the benefits.

Development in the Bakken Formation is expected to last another 35 more years. Oil and gas development at this level will provide income, tax revenues and energy resources that will grow our Reservation, State and National economies. Currently, production on the Fort Berthold Indian Reservation represents about 18 percent of all the production in North Dakota and about 2 percent of all the production in the United States. Maintaining and expanding this development opportunity requires a stable business environment and ensuring that the MHA Nation will be able to retain the tax revenues needed to sustain this growth.

As oil and gas development began to grow in the Bakken Formation on the Fort Berthold Indian Reservation, the MHA Nation reluctantly entered into a tax agreement with the State of North Dakota to prevent state dual taxation of tribal resources and the loss of this development opportunity. In the years before the tax agreement was signed, development surrounded the Reservation just over the border. Only after the MHA Nation agreed to give up more than half of the tax revenues from oil and gas development on our Reservation, and avoid threats of state dual taxation, did significant production begin on the Reservation.

Near the beginning of development on the Reservation, in the last half of 2008, almost $5 million was collected in tax revenues from the Reservation, including both Indian and non-Indian lands. Under the tax agreement with the State, 69 percent of these revenues, about $3.5 million, were distributed to the State, and 31 percent of the revenues, about $1.5 million, were distributed to the MHA Nation. Thus, while population, employment, truck traffic, law enforcement and regulatory needs began dramatically increasing on the Reservation, the MHA Nation was already behind and more than two-thirds of the taxes collected left the Reservation for State coffers. Few of these millions in tax revenues ever return to the Reservation.

Over the five-year period from 2008 to 2013, about $838 million was collected in tax revenues from the Reservation. Under the tax agreement, 58 percent of the revenues, about $486 million, were distributed to the State, and 42 percent of the revenues, about $351 million, were distributed to the MHA Nation.

Over the entire eight-year period from 2008 to 2016, about $2.276 billion was collected in tax revenues from the Reservation. Under the tax agreement, more than half of these revenues, about 51 percent, were distributed to the State. The MHA Nation received less than half, about 49 percent, of the tax revenues from oil and gas development on its Reservation. Thus, not only was the MHA Nation not able to keep 100 percent of the tax revenues from within its jurisdiction, the MHA Nation received less than half of these tax revenues.

In addition, a variety of other issues related to the tax agreement and the regulatory environment diminished the benefits the MHA Nation is able to realize from its resources. First, because development on Indian trust lands was slower to get underway than development on non-Indian trust lands, in the early years of the tax agreement the formula for dividing tax revenues benefited the State more than the MHA Nation. In other words, when oil and gas prices were at their highest, development on Indian trust lands lagged behind other areas, and so did the tax revenues flowing to the MHA Nation. This resulted in the MHA Nation not having adequate budgets early on to address the rapid increases in energy and economic activity on the Reservation.

Second, production on Indian lands only increased as development in the Bakken matured and oil and gas prices leveled off and even began to decline. Production on Indian lands was delayed during the time it took to get the tax agreement into place, staff up and train federal agencies to permit oil and gas development on Indian lands, and for limited drilling rigs and equipment to move from activities on non-Indian lands to Indian lands. Thus, the MHA Nation's share of tax revenues under the agreement was beginning to increase just as oil and gas prices began to fall. Because of delays in the taxing and regulatory environment, the MHA Nation was not able to capture the market at its highest.

Third, with declining oil and gas prices in recent years, the State acted unilaterally to lower the overall tax rate. As a result, even with production on Indian lands well underway, the taxes earned from each oil and gas well are declining. The MHA Nation estimates that the State's unilateral action to lower the tax rate will cost the MHA Nation about $700 million over the next 20 years.

While North Dakota maintains a rainy day Legacy Fund from oil and gas tax revenues with a balance around $4 billion in 2017, the MHA Nation estimates that its budget shortfall for the past 10 years was more than $1.95 billion. For the next 10 years, we estimate that we will need about $3.6 billion to develop our governing infrastructure, maintain physical infrastructure and keep up with growth on the Reservation.

In the area of housing the MHA Nation has an immediate need of $270 million for housing and $160 million for housing related infrastructure. Over the next 10 years, we anticipate needing $1.17 billion for housing growth and replacement, and $234 million for housing related infrastructure. New housing development will also require about $76 million in rural water infrastructure to provide municipal, residential and industrial water supplies. We also need to expand our solid waste facilities. Over the next 10 years we anticipate needing $150 million for solid waste facilities expansion.

We currently need about $215 million to cover road construction needs and anticipate needing $1.185 billion over the next 10 years to maintain Reservation roads. Roads maintenance and upgrades are needed to provide safe communities and to support commercial and energy activities. Recent estimates for new road construction to meet industrial standards are about $4.5 million a half mile. In addition, over the next 10 years we anticipate needing $365 million for transportation improvements and safety.

To take care of our increasing populations we also need to expand our existing health care clinic. We currently need $70 million to expand our clinic.

With increased populations we also have increased need for law enforcement. We currently estimate needing about $10 million to meet existing law enforcement needs, $10 million for our Drug Enforcement Agency, and $75 million for social services and public safety. In 2016, our law enforcement personnel handled almost 14,000 calls. Each year the demand on our law enforcement officers continues to increase. From 2015 to 2016:

- arrests rose from 30 to 103;
- methamphetamine seizures rose from 220 grams to 1037 grams;
- illegal use of prescription pill cases rose from 14 to 870;
- missing children reports rose from 0 to 16; and,
- missing person reports rose from 0 to 5.

Fortunately, on March 31, 2017, we were able to complete a new Public Safety and Judicial Center on a budget of $17.2 million. The Center provides space for law

enforcement, communication, a 911 call center and tribal courts. To operate the Center we will need an annual budget of $9.5 million.

To address the increase in drug related crimes and social problems we are developing a Drug Treatment Facility. We expect to complete the Facility in May 2018 on a budget of $24.8 million. The Facility will provide residential treatment. To operate the Facility we will need an annual budget of $5.25 million. Over the next 10 years we anticipate needing $240 million for drug enforcement.

To provide for our elders we are also developing an Assisted Living Facility. Completion is expected in April 2018 on a budget of $8.5 million. To operate the Facility we will need an annual budget of $2.4 million.

Finally, it is important to note that increased energy development also brings a need for increased human capital within tribal government. While the federal government asks tribes to take on more oversight and responsibilities for trust resources, federal proposals lack the funds tribal governments need to hire and train staff. Eliminating state dual taxation would be one way to help ensure that tribal governments have the funds needed to take on these responsibilities. To provide regulatory staff and resources to oversee oil and gas development on our Reservation under current laws we need $20 million immediately and anticipate needing $234 million over the next 10 years to staff and support regulatory offices.

Many of these physical and governmental infrastructure needs could have been fulfilled with the more than $1 billion taken by the State from oil and gas tax revenues on the Reservation from 2008 to 2016. Without these tax revenues, the MHA Nation is increasingly dependent on federal programs and agencies. We are also not able to invest in economic development that would provide long-term opportunities and growth on our Reservation.

VI. Loss of Tax Revenues Prevents MHA Nation Economic Development

Due to a lack of tax revenues the MHA Nation has not been able to invest in and support our Reservation economy in the same manner as other governments support their economies. The MHA Nation has a number of plans for economic expansion, but those plans stay on the drawing board. The MHA Nation is seeking to development value added opportunities that increase the benefit of each dollar of economic activity on the Reservation.

Natural Gas Gathering, Processing and Power Plant

Currently, a significant portion of the natural gas being developed on the Reservation is flared, i.e., wasted, due to a lack of infrastructure to capture, gather and distribute or use that gas. From 2008 to 2017 about 98 million MCF of natural gas has been flared on the Reservation. This gas has a market value of about $563 million that could have benefited energy companies, the MHA Nation, individual Indian allottees and non-Indians within the Reservation. In addition, approximately $101 million in royalties and about $62 million in tax revenues could have been earned from this gas.

The MHA Nation has plans to capture, develop and market its natural gas resources. The MHA Nation has done economic and feasibility studies for a gas gathering facility, a gas processing plant and a gas fired power plant. These facilities would be developed through our energy company Missouri River Resources. We estimate about $130 million is needed to develop the gas processing plant and $110 million is needed for the gas gathering system.

Oil Refinery

About 10 years ago, the MHA Nation began planning to construct the first oil refinery on Indian lands and one of the first refineries to be built in the United States in decades. This $400 million project remains on the drawing board. An oil refinery would increase the value of oil resources developed on our Reservation. We could be refining jet fuel to sell to nearby Minot Air Force Base. If we had been able to develop this refinery, from 2018 to 2025, we estimate that the MHA Nation would have earned about $368 million in net income.

Irrigation

The MHA Nation has plans for a $150 million irrigation facility to replace our farmlands flooded by the construction of the Garrison Dam and Reservoir. In 1948, the federal government flooded in excess of 155,000 acres of our Reservation, including our prime agricultural lands. Before the flood, MHA had a prosperous agriculturally based economy. That economy was ruined when the bottomlands were taken. The federal government promised to provide irrigation when those lands were taken and we have petitioned Congress to appropriate the necessary funds. While a significant portion of this irrigation project remains a federal responsibility,

with tax revenues from our oil and gas development, the MHA Nation could begin the process of recovering our agricultural economy.

Expansion of Missouri River Resources

We have plans for the expansion of our tribally owned energy company, Missouri River Resources (MRR), but MRR is under-capitalized. While we have leases for a number of wells, MRR does not have the resources needed to drill these wells and increase production. In addition to the tax revenues that have been taken by the State, additional funding is needed for federal loan guarantees and Tribal Economic Development (TED) Bonds to increase the investment capital available in Indian County. The rules governing TED Bonds also need to be clarified so that Indian tribes can use bonding authority in the same manner as ever other state and local government.

V. Conclusion

The MHA Nation strongly supports the tribal tax reform proposals included in S. 1935 and S. 2012, however, nothing deprives the MHA Nation and other tribes of the resources we need to promote tribal energy and economic development, self-sufficiency, and selfdetermination than the state dual taxation of our resources and businesses. Legislation is needed to affirm tribal taxing authority and eliminate state dual taxation. Existing authority within the U.S. Constitution and treaties with Indian tribes provides a clear basis for such legislation. Without a clear statement, tribal economies will continue to be undermined by state attacks on reservation economic development. The MHA Nation appreciates the opportunity to testify and stands ready to assist the Committee on this important issue.

PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

Chairman Hoeven, Vice Chairman Udall, and members of the Committee, we appreciate the opportunity to provide testimony on this critically important topic. As Congress considers the most significant tax reform since 1986, we have a shared responsibility to ensure federal tax policy provides tribal governments the same opportunities as other governments and promotes economic development and jobs in Indian Country. Currently, the Tax Code does not afford tribal governments many of the benefits, incentives, and protections available to state and local governments. This inequity significantly handicaps tribal authority to provide much needed government revenue for tribal programs and infrastructure and prevents economic growth on tribal lands. Tax reform is a unique opportunity for Congress to promote tribal sovereignty, selfdetermination, and self-sufficiency. Therefore, we want to specifically thank the Chairman, Senator Murkowski, Senator Heitkamp, and Senator Moran for introducing tax legislation for Indian Country. We hope your leadership on this issue will lead to tribal tax priorities being included in tax reform.

Key Principles of Tax Parity for Tribal Governments

All tribal proposals will need to adapt to fit within the larger framework that is under development, but certain fundamental principles will remain:

- The United States Constitution recognizes tribal governments as sovereigns
- The power to tax is an essential and necessary instrument of self-government
- Tribes have a responsibility to regulate conduct on Indian lands
- Tribes provide a broad range of governmental services: education, health care, public safety, and infrastructure needed to support economic development
- Like states, tribal governments are not taxable entities so they can retain and use their revenues for governmental purposes
- Tribal governments must be treated with parity in all areas of tax policy
- As sovereign governments, Tribes must have the authority:
  - —to generate tax revenue free from overlapping state taxation
  - —to create incentives for business development and job creation
  - —to access government financing tools
  - —to make decisions for promoting the health and welfare of citizens
  - —to promote certainty of jurisdiction, certainty to capital markets, and certainty in tax policy to enhance economic growth

Summary of Tribal Tax Reform Priorities

Provide Tax Parity to Tribal Governments. There is bipartisan legislation (H.R. 3138) in the House that would provide tax parity for tribal governments in the fol-

lowing areas. A Senate companion (S. 1935) was recently introduced by Senator Moran.

- *Tax-Exempt Bonds.* Unlike other governments, tribes can only use tax-exempt bond financing for "essential government functions." The IRS has interpreted this standard to exclude tribal economic development activities even though state and local governments routinely use tax-exempt financing for development projects. This limitation on tribes greatly inhibits infrastructure deployment and economic growth. Chairman Hoeven recently introduced a bill (S. 2012) with Senators Murkowski and Heitkamp that would provide tribal parity with respect to tax-exempt governmental bonds.
- *Government Pension Plans.* Unlike other governments, the Tax Code requires tribes to have separate types of pension plans (government and private) based on an employee's job activities. Consequently, only tribes incur the monetary and compliance costs of maintaining two separate pension plans. Tribal governments must be able to operate a single, comprehensive, government pension plan for all their employees.
- *Tribal Foundations and Charities.* Charities funded or formed by tribal governments do not enjoy the same tax treatment as those funded or formed by state and local governments. This disparity makes it difficult for tribes to form charities and leverage tribal resources to raise charitable donations from outside donors.
- *Tribal Child Support Enforcement Agencies.* Like state agencies, tribal child support enforcement agencies should have access to federal parent locator services and the ability to garnish federal tax returns to enforce past due child support obligations.
- *Indian Adoption Tax Credit.* Currently, families that adopt special needs children in tribal court are ineligible for tax benefits available to families that adopt special needs children in state court. Federal tax policy should treat tribal court orders the same as state court orders for purposes of classifying an adoptive child as special needs. In addition to the broader bills, identical pieces of bipartisan legislation have been introduced in the Senate (S. 876) and the House (H.R. 2035). Entitled the Tribal Adoption Parity Act in both chambers, the bills would ensure that adoptive parents who adopt special needs children in tribal courts receive the same support as adoptive parents who adopt special needs children in state courts.
- *Excise Taxes.* Tribal governments are not treated the same as state and local governments for a variety of excise tax exemptions, which diverts resources from government services for tribal citizens. Tribes should be treated the same as states for purposes of exemption from federal excise taxes.

Provide Tax Incentive Parity for Indian Health Service Health Professionals. Indian Health Service health professionals are ineligible for tax incentives available to other public sector health professionals. The Indian Health Service should have the same recruitment and retention tax incentives as other public sector health systems. During the 114th Congress, bipartisan legislation was introduced in both the Senate (S. 536) and House (H.R. 1842) to provide tax status parity for IHS programs.

Exempt Tribal Distributions from the "Kiddie Tax". Due to a flaw in the Tax Code, distributions from minors' trust funds established by tribal governments are subject to taxation at the rate of a minor's parents, resulting in an unintended disincentive to attend college. Correcting this would provide fairness to Indian youth and families receiving benefits from tribal funds.

Provide Tribal Leader Social Security Parity. Currently, tribal leaders do not even have the option to participate in the Social Security program, making retirement planning after a lifetime of public service significantly more difficult. Authorizing tribes to enter Section 218 agreements would ensure tribal leaders have the same opportunities to plan for retirement as state and local government officials. Bipartisan legislation has been introduced in the Senate (S. 1309) and the House (H.R. 2860) that would add a new section to the Social Security Act that would enable tribes to enter agreements with the Commissioner of Social Security—like state and local governments under Section 218 of the Social Security Act.

Simplify, Expand, and Make Permanent the Indian Employment Tax Credit. Congress passed the Indian Employment Tax Credit to create jobs in tribal communities. Simplifying, expanding, and making permanent the Indian Employment Tax Credit would increase its deployment, thereby promoting economic growth and job creation on Indian reservations. Chairman Hoeven recently introduced a bill (S.

2012) with Senators Murkowski and Heitkamp that would make permanent the Indian Employment Tax Credit.

Increase New Markets Tax Credits Deployment in Indian Country. Increasing deployment of NMTCs for projects in Indian Country through a set-aside or other incentives would spur investment in infrastructure, promote economic development, and create jobs in tribal communities. The ideal solution would include creating a set-aside in the NMTC program for CDEs that primarily invest in Indian Country projects. Bipartisan legislation (H.R. 3129) entitled, the Aiding Development of Vital Assets in Native Communities and Environments Act (the "ADVANCE Act"), has been introduced in the House and would create incentives to encourage NMTC applicants to commit to making investments in Indian Country and ensuring that at least one CDE whose primary mission is to fund projects within or that benefit Indian Country receives an allocation each round. Additionally, Chairman Hoeven recently introduced a bill (S. 2012) with Senators Murkowski and Heitkamp that would provide priority status for NMTC allocations for tribal enterprises and reservation investments.

Increase Low-Income Housing Tax Credits Deployment in Indian Country. Congress should treat tribes as states for LIHTC allocations, establish a tribal set-aside, and adjust the Tax Code to increase deployment of the tax credits in Indian Country. The LIHTC program could provide much needed private investment in affordable housing in tribal communities. A bipartisan bill, the Affordable Housing Credit Improvement Act of 2017 (S. 548), has been introduced in the Senate. The bill would do the following to encourage private investment in affordable housing in tribal communities: (1) require states to consider the affordable housing needs of Native Americans in their QAPs; and (2) modify the definition of DDA to automatically include projects in an Indian area, making these projects eligible for enhanced credits.

Make Permanent Accelerated Depreciation for Indian Country. Accelerated depreciation allows investors and business owners to accelerate the depreciable rate applied to equipment and personal property associated with economic activity on Indian lands. This tax incentive is an effective tool for attracting new business development and job creation in Indian Country. Making it permanent would provide certainty that the incentive will remain available and thus, further spur investment in tribal communities. Chairman Hoeven recently introduced a bill (S. 2012) with Senators Murkowski and Heitkamp that would make permanent Accelerated Depreciation for Indian Country.

Create Tribal School Construction Bonding Accounts. The American Recovery and Reinvestment Act created tax credit bonds that may be issued by tribes for school construction. However, without the capital outlay, the majority of tribal schools cannot use this funding avenue. Chairman Hoeven recently introduced a bill (S. 2012) with Senators Murkowski and Heitkamp that would establish an escrow account that would allow tribes to utilize these tax credit bonds.

Tax Cuts Must Not Lead to Budget Cuts for Tribal Programs

NCAI passed an important resolution during our 2017 Mid-Year Convention calling for the Equitable Treatment for Tribal Nations in Congressional Tax Reform (Res. #MOH–17–011 attached). This resolution has served a key role in bringing together tribal governments and our partner tribal organizations in a coordinated effort on tax reform.

However, NCAI also recently passed a resolution calling for Full Funding of the Federal Trust Responsibility and Ensuring the United States has the Revenue to Finance Federal Commitments in Tax Legislation (Res. #MKE–17–012 attached). Taken together these two resolutions reflect the tension that tribal leaders face in supporting the tax reform effort. Due to insufficient funding and services by federal agencies, Native communities have suffered severe social, economic, and environmental harms at a rate far in excess of other communities. Indian tribes across the nation have been forced to spend large amounts of scarce tribal funds to support the services that should have been provided or paid for by the United States. Deficit-financed tax cuts that lead to potential austerity cuts would affect all Americans but would disproportionately impact American Indians and Alaska Natives who rely on federal funding of the trust responsibility as well as social programs.

We urge the Committee to consider the impacts to American Indians and Alaska Natives if the federal budget is cut to reduce future deficits caused by tax cuts. Cuts to federal treaty and trust obligations coupled with cuts to mandatory programs, such as Medicaid and SNAP, could greatly outweigh the benefits of tax reductions. NCAI urges Congress to uphold the federal treaty and trust obligations and ensure that in the wake of tax reform, the U.S. Government will have the revenue needed to meet its commitments to Indian Country now and in the future.

Details of Tribal Proposals for Tax Reform

1. PROVIDE PARITY IN TAX–EXEMPT BOND RULES FOR TRIBAL GOVERNMENTS

Current Law

Under current law, state and local governments are eligible to issue two basic kinds of taxexempt bonds: (1) governmental bonds and (2) qualified private activity bonds. Bonds are generally treated as governmental bonds if the bond proceeds are used predominantly for State or local governmental use or the bonds are secured or payable predominantly from State or local governmental sources of repayment. This two-part test is referred to below as the "state/local government standard". In addition, qualified private activity bonds may be issued by state and local governments to finance different specified types of eligible facilities and programs subject to various rules.

In the case of Indian tribal governments, the landscape of tax-exempt bond rules is generally very different. Other than through a volume-limited provision for Tribal Economic Development Bonds ("TEDBs") contained in the American Recovery and Reinvestment Act and codified in Section 7871(f), Indian tribal governments are allowed to issue tax-exempt bonds only to finance facilities that serve an "essential governmental function." See Section 7871(c). While neither the statute nor any IRS regulation affirmatively defines what constitutes an "essential governmental function," Section 7871(e) warns that the term "shall not include any function which is not customarily performed by State and local governments with general taxing powers."

Reasons for Change

While it is clear that Indian tribes may finance reservation roads, schools, and sewers with taxexempt bonds, the essential governmental function test has severely limited the ability of tribes to utilize tax-exempt financing to fund projects in which state and local governments have become increasingly active—*e.g.*, energy production and distribution facilities, convention centers, parking and transportation facilities, as well as tourist accommodations and public recreational facilities located on tribal lands.

Tribes are seeking to diversify their revenue sources, provide economic opportunity for their citizens, and develop their local economies. Tribes urgently need parity with state and local governments in tax-exempt bond rules to ensure that they will continue to be able to finance critical infrastructure and economic development. The overall volume cap on TEDBs (originally $2 billion, now approximately $550 million) could be exhausted within the next 12 months. *See https://www.irs.gov/tax-exempt-bonds/published-volume-cap-limit-for-tribal-economicdevelopment-bonds.*

Using the "state and local government" standard has at least three advantages: (1) the state/local government standard is more administrable than the essential governmental function test, (2) as a policy matter, Indian tribal governments should not be treated differently than state and local governments, and (3) the private business use test (or, alternatively the private payment test) should be sufficient for ensuring that tax-exempt bond proceeds are used appropriately. [1]

2. PROVIDE PARITY FOR TRIBAL GOVERNMENT PENSION PLANS

Current Law

The Code and Employee Retirement Income Security Act (ERISA) have separate federal pension plan requirements for governmental and private employers. Originally, the definition of "governmental plan" in these laws was silent regarding Indian tribes—creating considerable uncertainty for tribal governments. Given their status as sovereigns under federal law, Indian tribes sought clarification of the Code and ERISA to ensure parity with all other governments in the United States.

In response to Indian Country, Congress included provisions in the Pension Protection Act of 2006 (PPA) to address tribal pension plans. Unfortunately, last minute negotiations by the House and Senate conferees resulted in the inclusion of language limiting tribal government status based on "essential government function" and "commercial activity" tests that do not apply to any other governments.

[1] As noted above, the state/local government standard is met if either 90 percent or more of bond proceeds are used for governmental use (the "private business use" test), or 90 percent or more of debt service is payable or secured from governmental payments or property (the "private payment" test).

Reasons for Change

Requiring tribes to meet standards that do not apply to any other government is unfair and fails to recognize the sovereign status of tribes. Moreover, this compromise has resulted in tribes being subject to both private sector and government sector rules at the same time depending on what an employee may be doing at any given moment. As a result, Indian tribes that want to preserve government status are forced to have separate plans for different types of employees—doubling the cost of compliance and reducing tribal bargaining power because of decreased plan size. In the last 10 years, federal agencies have published no guidance on how to operate or coordinate these two types of tribal plans, making true compliance impossible. Additionally, state and local government employees engage in a variety of activities—like running lotteries—that could be categorized as "commercial". Yet these activities do not jeopardize the governmental status of state and local government pension plans. Tribal governments, like state and local governments, should be able to operate a single, comprehensive, government pension program for all of their employees.

3. PROVIDE PARITY FOR CHARITIES FUNDED BY OR FORMED TO SUPPORT INDIAN TRIBAL GOVERNMENTS

Current Law

Every Section 501(c)(3) charitable organization is treated as either a public charity or a private foundation. Public charity classification is generally based on an organization's sources of funding or support. See Section 509(a)(1) and (2) of the Code. It may also be based on whether the organization was formed to support a particular type of organization, such as a state or local government. See Section 509(a)(3). Section 7871(a)(1) does permit Indian tribal governments to receive tax deductible charitable contributions so long as they are used for exclusively public purposes, but the Code fails to address the public charity status of Section 501(c)(3) organizations that are established or funded by Indian tribal governments. Accordingly, there are two areas in which tribal charities are not treated the same as those funded or controlled by state and local government:

- While support from state and local governments is treated as "public support" for purposes of public charity classification, financial support from an Indian tribal government is not treated as support from a governmental entity.
- While organizations formed to support state and local governments are treated as "supporting organizations" for purposes of public charity classifications, the status of organizations formed to support Indian tribal governments is unclear.

Reasons for Change

The lack of parity between tribes and other governments under the public charity classification rules makes it difficult for Indian tribes to form and fund Section 501(c)(3) nonprofit organizations. As a result, tribal governments often operate foundations as unincorporated funds or divisions of the government. While such tribal charitable funds work well if fully funded by the tribal government, they are not effective vehicles for leveraging tribal resources and raising additional charitable dollars from private foundations, corporations, and individual donors. Both the House and Senate have addressed this issue in previous legislation, but for reasons unrelated to the merits of the proposal, corrective legislation has never been enacted. The proposal has been previously scored by Joint Tax Committee as involving a negligible impact on federal tax revenues.

4. PROVIDE PARITY FOR TRIBAL CHILD SUPPORT ENFORCEMENT AGENCIES

Current Law

Tribes cannot directly access two important federal child support enforcement tools. Section 453 of the Social Security Act governs the Federal Parent Locator Service. This program helps authorized persons locate any individual: (1) who is obligated to pay child support; (2) against whom child support obligations are sought; (3) "to whom such [a child support] obligation is owed"; or (4) "who has or may have parental rights with respect to a child". See Section 453(a). The definition of authorized person includes state Child Support Enforcement (CSE) agencies but not Tribal CSEs. See Section 453(c).

The Federal Income Tax Refund Offset program is governed by the Social Security Act and the Internal Revenue Code. Section 664 of the Social Security Act and Section 6402(c) of the Code authorize the Department of the Treasury to withhold from

tax refunds amounts owed for past due child support payments. Section 664 and Code Section 6402(c) reference only state CSEs but not tribal CSEs.

Reasons for Change

All 50 states operate CSEs. Currently, 62 tribes have their own CSE programs. Like state CSEs, tribal CSEs are responsible for ensuring that children receive the support that is owed to them. Accordingly, they provide services that include attempting to locate custodial and non-custodial parents, establishing child support orders, and distributing payments, among others.

Despite tribes having the same obligation as states to protect children in their communities, tribes lack access to the Federal Parent Locator Service and Federal Income Tax Refund Offset Program. This lack of parity greatly reduces their ability to ensure parents fulfill their obligations to Native children and that these children receive the support that is owed to them.

5. PROVIDE PARITY FOR TRIBAL COURT ORDERS FOR PURPOSES OF THE ADOPTION TAX CREDIT

Current Law

Congress created the Adoption Tax Credit to mitigate the financial burden experienced by families adopting children and incentivize adoptions of children who might otherwise be difficult to place in adoptive homes. The Adoption Tax Credit allows parents to claim a credit of up to $10,000 adjusted for inflation ($13,460 in 2016). Parents who adopt a child with "special needs"—as determined by a court with jurisdiction over the adoption—are eligible to claim the full adoption tax credit without having to document qualified upfront adoption expenses. Other adoptive parents must demonstrate actual expenses to claim the credit.

Currently, Section 23 of the Code only allows states to designate children as "special needs". Considerations "include: age; membership in a minority or sibling group; ethnic background; medical condition; or physical, mental, and emotional handicaps."

Reasons for Change

Indian tribes have jurisdiction over adoption proceedings involving Indian children. Yet, tribes were not included in the Code language that provides authority to make "special needs" determinations. This oversight makes it more difficult for families adopting Indian children who have "special needs" to establish their eligibility for the support Congress intended to provide. The National Indian Child Welfare Association has estimated that several hundred Indian children and their adoptive families are unable to access the Adoption Tax Credit each year.

6. PROVIDE TRIBAL GOVERNMENTS PARITY REGARDING EXCISE TAX EXEMPTIONS

Current Law

Tribal governments are not treated the same as state and local governments for a variety of excise tax exemptions. Due to omission in the Code, Indian tribes are not exempt from many excise taxes from which states are exempt. Additionally, where the Code does provide exemptions for tribes, it imposes standards—such as the essential governmental function test—that are not also applicable to state and local governments. See IRS Revenue Ruling 94–81.

Reasons for Change

Tribes should be treated equal to states for purposes of exemption from federal excise taxes. Like states, Indian tribes are sovereign governments that must ensure the health, safety, and wellbeing of their citizenship. Accordingly, tribes operate and fund courts of law, police forces, and fire departments. Tribes also provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health care, economic assistance, and domestic/social programs. As is the case for other governments, tribal government revenue is essential for fulfilling obligations to tribal communities. However, the disparate treatment of tribal governments for purposes of exemption from federal excise taxes impairs the ability of Indian tribes to meet the needs of tribal citizens.

7. EXTEND TAX EXEMPT STATUS TO SCHOLARSHIPS AND STUDENT LOAN REPAYMENT FOR IHS HEALTH PROFESSIONALS

Current Law

Currently, scholarships and loan repayments are regarded as taxable income under the Internal Revenue Code. There are three exceptions:

- Section 413 of P.L. 107–16 excludes from taxation tuition, fees, and other related cost payments by the National Health Service Corps (NHSC) and F. Edward Herbert Armed Forces Health Professions Scholarships and Financial Assistance Program scholarships.
- Section 108(f)(4) of the Code excludes from taxation funds received through the NHSC Loan Repayment Program authorized under 338B(g) of the Public Health Service Act or a state loan repayment program described in section 338I of the Public Health Service Act.
- Section 3401(a)(19) excludes NHSC loan repayment from federal employment tax. IHS programs are not included in these exceptions, so IHS Health Professions Scholarships and loan repayment awards are taxed under the Code.

Reasons for Change

IHS provides services to underserved, rural communities and has difficulty recruiting health care professionals. The IHS Health Professions Scholarship and IHS Loan Repayment Program are effective tools that help IHS recruit dentists, physicians, dental hygienists, and nurses.

However, IHS is at a disadvantage when compared to other public health service care providers because the benefits received under the IHS Health Professions Scholarship and IHS Loan Repayment Program constitute taxable wages. To address this inequity and remain competitive, IHS pays the taxes assessed on recruitment benefits provided to its health professionals. While this ensures IHS can recruit and retain health professionals, it consumes resources that could be used to hire additional staff. Providing IHS recruitment benefits the same tax status as those offered by other public providers would reduce staffing issues at IHS and thereby improve health services in Indian Country.

8. EXEMPT TRIBAL GOVERNMENT DISTRIBUTIONS FROM THE "KIDDIE TAX"

Current Law

The purpose of the "Kiddie Tax" is to discourage wealthy parents from shifting incomeproducing assets to their children in lower tax brackets. Section 1(g) of the Code defines and applies the Kiddie Tax broadly. The broad scope of Section 1(g) has the unintended effect of imposing tax penalties on all tribal government distributions of more than $2,100 to tribal youth and young adults. The Kiddie Tax is applicable to tribal youth until age 19 and tribal young adults until age 23 when they are enrolled in school.

Reasons for Change

Applying the Kiddie Tax to tribal government distributions is contrary to the purpose of the Kiddie Tax. Tribes are immune from income taxation. So, unlike the wealthy parents who sought to avoid paying their taxes, tribal governments are not motived by tax avoidance.

Penalizing tribal youth and young adults for receiving tribal government distributions is also unfair because it results in doubling or tripling their tax rates. It also creates perverse incentives for Native youth to drop out of school. For example, if a 21-year-old Native student receives $9,000 from a part-time job, she pays federal income tax at a rate of 10 percent. But if she receives that $9,000 as unearned income from her tribe, and her parents' taxable income is $75,000, the IRS applies the Kiddie Tax so that her $9,000 in tribal funds is taxed at her parents' top rate of 25 percent, not 10 percent. If her parents make a combined total of $227,000, her $9,000 is taxed at her parents' top rate of 33 percent, not 10 percent. And so on, up to the top rate of 39.6 percent.

The proposal would amend Section 1(g) of the Code to expressly exclude the transfer of funds by a tribal government to young tribal members. This can be accomplished by adding the following as a new subparagraph (8) to Code Section 1(g):

"(8) None of the provisions of section 1(g) apply to any distribution made by an Indian tribal government, or by a grantor trust established by an Indian tribal government with respect to which such government is the owner (within the meaning of sections 671 to 679), to an enrolled member of the Indian tribe."

9. PROVIDE TRIBAL LEADERS THE SAME ACCESS TO SOCIAL SECURITY AS OTHER GOVERNMENT OFFICIALS

Current Law

Federal law originally exempted state and local governments from Federal Insurance Contribution Act (FICA) taxes (which include Social Security taxes). As a result, state and local government employees were not eligible for Social Security cov-

erage because they were not contributing to the program. To address this issue, Congress eventually amended the Social Security Act to permit states to elect to provide FICA coverage under "Section 218" agreements. [2]

The IRS does not treat Indian tribes as governments for FICA purposes because the definition of State in the Social Security Act does not expressly include Indian tribes. Consequently, tribes cannot elect coverage through Section 218 agreements.

This classification has been problematic for tribal government officials. In Revenue Ruling 59- 834, the IRS determined that services performed by members of tribal councils do not constitute employment for FICA purposes, and therefore, any amounts earned are not wages. So, while tribal council members must pay income taxes under federal law, they do not have the option to pay into and receive benefits from the Social Security program.

Reasons for Change

Currently, tribal leaders do not even have the option to participate in the Social Security program, making retirement planning after a lifetime of public service significantly more difficult. Authorizing Indian tribes to enter Section 218 agreements would ensure tribal leaders have the same opportunities to plan for retirement as state and local government officials.

The Department of the Treasury, the IRS, and the Social Security Administration have looked at possible administrative solutions to this issue. However, they have concluded that a legislative fix is necessary.

10. SIMPLIFY, EXPAND, AND MAKE PERMANENT THE INDIAN EMPLOYMENT TAX CREDIT

Current Law

The Indian Employment Credit is designed to be an incremental credit that encourages employers to hire Native Americans and promote economic activity in tribal communities. It is equal to 20 percent of the excess of eligible employee qualified wages and health insurance costs (up to $20,000) over the amount of such wages and costs incurred by the employer in 1993 (the "base year"). An eligible employee [3] is an enrolled member (or the spouse of an enrolled member) of an Indian tribe, who performs substantially all of the services within an Indian reservation, and whose principal residence is on or near the reservation in which the services are performed. Qualified employees must have wages that do not exceed an inflation-adjusted amount, currently set at $45,000. Additionally, the credit is not available for any employee whose on-reservation services are provided to or within a casino. The maximum credit available is $4,000 per eligible employee.

The Indian Employment Credit expired for tax years beginning after December 31, 2016.

Reasons for Change

Simplifying, expanding, and making permanent the Indian Employment Credit would permit greater deployment of the credit, thereby helping to increase employment rates and promote economic growth in Indian Country. Specific reasons for change are as follows:

- Simplifying the Credit. Because over 20 years have elapsed since the base year of 1993, the current formulation adds needless complexity and impacts employers in disparate ways. For example, if an employer incurred no eligible reservation employee qualified wages or health insurance costs in 1993, the employer's Indian Employment Credit during the current year would be the maximum tax credit of $4,000 per eligible employee. But if the employer had reservation employees in 1993, it would only be able to take a credit equal to the increase in wage and related costs over those incurred in 1993. Thus, updating the base year would address this disparity and restore the incremental feature of the credit. It would also eliminate the need for taxpayers to maintain tax records much longer than normally required. Updating this provision has been regularly supported by the Treasury Green Book.
- Expanding the Credit. Tribal government and non-profit employers regularly employ tribal members in Indian Country. Expanding access of the credit to these entities would further promote hiring and economic growth in Indian Country.

---

[2] In the 1990s, policy again changed, including state and local government employees in Social Security unless they had coverage under a Section 218 agreement or a qualified public retirement system.

[3] The Code uses the term "qualified employees". See Internal Revenue Code Section 45A.

- Making the Credit Permanent. Originally enacted in 1993, the Indian Employment Credit has been extended numerous times. Often, extension of the credit has been retroactive or near the expiration date, creating uncertainty for employers regarding the availability of the credit and potentially limiting the incentive the credit provides for employers to employ Indian tribal members. Making the credit permanent would eliminate uncertainty and create more private investment in tribal communities.

The proposal would do the following:

- Permanently extend the Indian Employment Credit and modify the base year from 1993 to the average of qualified wages and health insurance costs for the two tax years prior to the current year.
- Expand the income tax credit to include up to $30,000 in qualifying wages and health insurance costs per eligible employee and raise the cap on the permissible wages per eligible employee from $45,000 to $60,000. The credit percentage will remain at 20 percent, thus resulting in a maximum income tax credit of $6,000 per eligible employee.
- As an alternative to the income tax credit for certain governmental and nonprofit employers, provide a payroll tax credit for tribal government employers and Section 501(c)(3) organizations operating on Indian reservations. The payroll tax credit will be applied to reduce the applicable employer's share of federal payroll taxes for an eligible employee. The maximum credit available to a governmental or nonprofit employer will be $6,000 per eligible employee, but in many cases, it will be less because the employer's share of payroll taxes is only 6.2 percent of the wage base. The payroll tax credit will have no impact or effect on the employee's payroll tax credits (for Social Security or Medicare purposes), and it can only be taken by tribal governmental employers (as defined in Section 3306(u) of the Code) or organizations operating on an Indian reservation that have been recognized by the IRS as exempt from tax under Section 501(c)(3).

11. INCREASE DEPLOYMENT OF NEW MARKETS TAX CREDITS FOR PROJECTS IN INDIAN COUNTRY

Current Law

The New Markets Tax Credit (NMTC) program is a flexible mechanism to attract investment in economically distressed communities, including Indian lands. The Department of the Treasury's CDFI Fund implements the NMTC program. Community Development Entities (CDEs) apply annually to the CDFI Fund for allocations of tax credits. The application process is competitive, and the CDFI Fund scores applications to determine which CDEs receive an allocation. CDEs that receive allocations consider and award tax credits to individual projects. Congress extended the NMTC program through 2019 when it approved the tax extenders package in December 2015.

Reasons for Change

The NMTC program could greatly help tribes engage in community and economic development, as access to capital is a significant issue in Indian Country. In the past, tribes have used these credits for projects such as health clinics, administration buildings, and other infrastructure projects. Tribes have increasingly expressed interest in expanded deployment in Indian Country. Historically, however, few NMTC projects have been funded in tribal communities. The most recent award cycles are no exception. In calendar years 2015–2016, $7 billion of tax credits were awarded to 120 CDEs. Only one entity that primarily funds projects in Indian Country received an allocation of $50 million. Tribal communities are receiving less than one percent of the investment arising from the NMTC program.

The tribal proposal would spur investment and create jobs in Indian Country by increasing deployment of NMTCs for projects in Indian Country. The ideal solution would include creating a set-aside in the NMTC program for CDEs that primarily invest in Indian Country projects.

Doing so would greatly increase private investment for infrastructure and other projects that would facilitate economic growth in tribal communities.

Another solution would include creating incentives to encourage NMTC applicants to commit to making investments in Indian Country and ensuring that at least one CDE whose primary mission is to fund projects within or that benefit Indian Country receives an allocation each round.

12. PROVIDE TRIBES DIRECT ACCESS TO AND A SET–ASIDE FOR LOW–INCOME HOUSING TAX CREDITS

Current Law

The Low-Income Housing Tax Credit (LIHTC) program is one of the largest corporate tax programs administered by the federal government, and it is intended to reduce financing costs, thereby incentivizing the expansion of the supply of affordable housing. The LIHTC program authorizes states, U.S. possessions, and the District of Columbia to issue tax credits to developers that construct, rehabilitate, or acquire rental housing for low-income households. Tax credits are allocated based on population, as determined in the most recent census estimate released by the Bureau of the Census before the beginning of the calendar year the credit ceiling is set. In 2016, the federal government allocated $2.35 per person to states with a minimum allocation of $2,690,000.

State Housing Finance Agencies (HFAs) issue the tax credits to developers based on IRSapproved Qualified Allocation Plans (QAPs). Developers then generally sell the credits to investors for equity in the project. Enhanced credits are available for projects in difficult to develop areas (DDA) and qualified census tracts (QCT).

Reasons for Change

There is great need for affordable housing in Indian Country. HUD estimates that 33,000 housing units would need to be built to eliminate overcrowding in Indian Country and another 35,000 would be needed to replace existing physically inadequate housing units. Addressing these housing needs would cost $33 billion. The Indian Housing Block Grant program has helped address some of the shortfall but additional resources are necessary. The LIHTC program could provide much needed private investment in affordable housing in tribal communities.

Unfortunately, the benefits of the LIHTC program have largely not reached Indian Country. This is because tribes cannot receive an allocation of tax credits directly. Instead, tribes must apply to state HFAs for an allocation and in most cases, state HFAs have not made affordable housing on Indians lands a priority in their QAPs. Additionally, there is no incentive or regulation requiring state agencies to consider tribal projects in QAPs. Instead, states tend to focus on urban areas and often view tribal housing needs as a federal issue (even though LIHTCs are federal tax credits). Tribes also have difficulty meeting certain state QAP requirements because of complications related to the status of Indian lands.

So, although Native Americans are counted in state populations for purposes of allocating tax credits, Native American communities are receiving very little benefit from the LIHTC program.

The tribal government proposal would expand on the advances in S. 548 to help Indian tribes leverage private investment to meet their housing needs by making the following changes to the LIHTC program:

- Amend Section 42 of the Code to treat Indian tribes as states for purposes of allocating tax credits.
- Establish a set-aside of tax credits for projects in Indian Country.
- Adjust the income calculation formula to use the national average median income in lieu of the area average because in many areas of Indian Country, local area incomes are too low to benefit actual low-income housing users.
- Make tribes eligible to receive tax credits directly and transfer the credits to the building manager or developer through a long-term lease to accommodate the unique status of Indian trust lands.

Conclusion: Creating a New Standard of Economic Opportunity in Indian Country

Economic development and job creation has been the leading concern of tribal leaders throughout the country for many decades. NCAI strongly encourages Congress to take action on all of the fronts that we have identified above. Taken together, we can dramatically change the economic environment on Indian reservations. This effort will bring jobs to Indian communities, and also make significant contributions to health, public safety, productivity, and the well-being of our people. We thank you in advance, and look forward to continuing our joint efforts immediately.

ATTACHMENTS

THE NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION #MOH–17–011

TITLE: EQUITABLE TREATMENT FOR TRIBAL NATIONS IN CONGRESSIONAL TAX REFORM

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Congress is considering reform of the federal tax code to promote economic growth, reduce burdens of compliance, and increase fairness; and

WHEREAS, Tribal Nations must be included in national tax policy because under the current Internal Revenue Code, Tribal Nations are left without many of the benefits, incentives, and protections provided to state and local governments. This inequity significantly handicaps tribal authority to provide much needed government revenue for tribal programs and prevents economic growth on tribal lands; and

WHEREAS, tribal proposals will need to be adapted to fit within the larger framework that is under development, but certain fundamental principles will remain:

- The United States Constitution recognizes tribal governments as sovereigns;
- The power to tax is an essential and necessary instrument of self-government;
- Tribes have responsibility to regulate conduct on Indian lands;
- Tribes provide a broad range of governmental services: education, health care, public safety, and infrastructure needed to support economic development;
- Like states, tribal governments are not taxable entities, so they can retain and use their revenues for governmental purposes;
- Tribal governments must be treated with parity in all areas of tax policy; and
- As sovereign governments, tribes must have the authority to:
  —generate tax revenue free from overlapping state taxation;
  —create incentives for business development and job creation;
  —access government financing tools;
  —make decisions for promoting the health and welfare of citizens; and
  —promote certainty of jurisdiction, certainty to capital markets, and certainty in tax policy to enhance economic growth; and

WHEREAS, Congress is considering the elimination of depreciation schedules from the tax code in order to permit businesses to deduct the cost of capital investments in the year they are made. This change in tax policy would effectively eliminate the benefits of accelerated depreciation, one of the few tax incentives for business development in Indian country; and

WHEREAS, the Low-Income Housing Tax Credit (LIHTC) is the largest resource for creating affordable housing in the United States today, but Tribal Nations must apply to state government LIHTC programs, and many states use criteria that benefit only urban areas—thus ignoring the unmet low-income housing needs of Indian country; and

WHEREAS, in 2000, Congress established the New Markets Tax Credit (NMTC) to spur investment in low-income communities, but despite the potential of the NMTC program to enhance Indian country economic development and create jobs in underserved Native communities, in the last three funding cycles, only one Native American Community Development Entity has received funding under the NMTC program; and

WHEREAS, NCAI supports fair and equitable inclusion of Indian tribes in tax reform and will work cooperatively with all Tribal Nations and intertribal organizations to secure passage of such legislation.

A. Provisions for Tribal Government Tax Parity

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians supports the enactment of the Tribal Tax and Investment Reform Act, and urges that it address important issues in tax parity including:

1. *Tribal Government Tax-Exempt Bonds.* Under federal tax rules generally applicable to government debt, tribal governments may issue tax-exempt bonds only for "essential government functions" and are prohibited from issuing "private activity bonds."* The IRS has declined to view economic development as a governmental function, even though state and local governments frequently use tax-exempt financing for development projects;

2. *Tribal Government Pension Plans.* Under current law, Tribal Nations must maintain two separate types of employee pension plans—a government plan for tribal employees performing essential government functions and a separate plan for tribal business employees. Tribal governments, like state governments, should be able to operate a single, comprehensive, government pension program for all of their employees, regardless of their functions. Tribal governments should also be eligible to offer 457 plans currently reserved for state and local governments;

3. *Tribal Foundations and Charities.* Tribally-controlled and funded foundations and charities do not enjoy the same public charity classification as foundations and charities controlled and funded by state or local governments;

4. *Tribal Child Support Enforcement Agencies.* Tribal child support enforcement agencies need authority to access parent locator services and enforce child support orders through claims against federal tax refunds of parents with past due obligations;

5. *Indian Adoption Tax Credit.* Adoption is widespread throughout Indian country. Under current law, the IRS cannot recognize tribal court orders determining the 'special needs' of adoptive children. This provision is needed to permit adoptive parents of Indian children to receive tax credits on par with other adoptive parents whose children's special needs have been determined by state courts;

6. *Extend Tax Benefits Granted to Doctors Employed by Indian Health Service Facilities.* Specific tax benefits (such as exclusion from income for the forgiveness of student loan debt) are available to most doctors employed in the public sector but not to those employed by the Indian Health Service or tribal healthcare systems. These facilities need the same incentives for practitioners to bring their skills to Indian country as other public health facilities;

7. *Support Legislation to Exempt Tribal Government Distributions from "Kiddie Tax" Provisions.* Due to a flaw in the tax code, distributions from minors' trust funds established by tribal governments are subject to taxation at the rate of a minor's parents, resulting in an unintended disincentive to attend college. Correcting this would provide fairness to Indian youth and families receiving benefits from tribal funds;

8. *Provide Tribal Governments with the Same Excise Tax Exemptions as Provided to States.* Due to an omission in the tax code, tribal governments are not treated equal to state and local governments for a variety of excise tax exemptions: (i) excise taxes on luxury passenger vehicles, special fuels, and heavy trucks and trailers; (ii) manufacturing excise taxes, including the Gas Guzzler Tax; (iii) communications excise taxes, (iv) wagering excise taxes, (v) Harbor Maintenance Tax; (vi) occupational taxes on persons in the business of wagering, (vii) taxes on distilled spirits, wine and beer, (viii) taxes on certain firearms, and (ix) and the Structured Settlement Factoring Tax; and

9. *Tribal Leader Access to Social Security Benefits.* In 1957, the IRS determined that amounts paid to elected tribal government officials are not considered "wages" under the Federal Contributions Act and thus are not eligible for Social Security benefits. This IRS ruling causes elected tribal officials (particularly those with many years of tribal service) to potentially receive reduced Social Security benefits or be completely ineligible to receive those benefits. Congress should adopt the Tribal Social Security Fairness Act and amend Section 218 to permit tribal governments the same option that state and local governments have to enter into agreements with the Social Security Administration to provide Social Security and Medicare coverage to tribal government officials; and

B. Extension and Modification of Tax Provisions Aimed at Economic Development

BE IT FURTHER RESOLVED, that NCAI urges Congress to simplify, expand, and make permanent the Indian Employment Tax Credit. Specific changes include:

1. Modify the base year from 1993 to the average of qualified wages and health insurance costs for the two tax years prior to the current year;

---

*The only exception for tribal governments is the limited quantity of Tribal Economic Development Bonds available through an allocation process administered by the IRS. The available volume of TEDBs is likely to be depleted within the next 12 months, and will be wholly inadequate to allow Tribal Governments to rebuild infrastructure.

2. Expand the income tax credit to include up to $30,000 in qualifying wages and health insurance costs per eligible employee and raise the cap on the permissible wages per qualified or eligible employee from $45,000 to $60,000; and

3. Provide a payroll tax credit for tribal government employers and Section 501(c)(3) organizations operating within Indian country; and

C. Set-Asides for Low-Income Housing and New Markets Tax Credits

BE IT FURTHER RESOLVED, that NCAI supports enactment of Low-Income Housing Tax Credit legislation provided that the legislation includes the following Indian country provisions:

1. Indian nations and tribes should be treated as states for purposes of Low-Income Housing Tax Credit allocation, and Congress should establish a set-aside of Low-Income Housing Tax Credits for Indian country;

2. Indian tribes should be authorized to use the national average median income in lieu of the area average because in many areas of Indian country local area incomes are too low to benefit actual low-income housing users; and

3. Indian tribes should be eligible to receive the Low-Income Housing Tax Credit directly and transfer it to the building manager or developer through a long-term lease to accommodate the unique status of Indian trust lands; and

BE IT FURTHER RESOLVED, that NCAI supports legislation that would spur investment and create jobs by providing increased deployment of New Markets Tax Credits for projects in Indian country, including the Aiding Development of Vital Assets in Native Communities and Environments Act (or the "ADVANCE" Act), and a set-aside in the New Markets Tax Credit program for Indian nations; and

D. Addressing State Taxation with Regulatory Action and Congressional Action

BE IT FURTHER RESOLVED, that NCAI calls upon the Secretary of the Interior to move forward with updating and revising the Indian Trader Regulations to address state taxation of Indian country value, commerce, economic activity, Indian energy development, and Indian natural resource production, and to recognize the original, inherent sovereign authority of Indian nations and tribes to regulate Indian commerce; and

BE IT FURTHER RESOLVED, that NCAI calls upon Congress to fulfill its obligation under the Commerce Clause of the United States Constitution to confirm the original inherent sovereign authority of tribal nations to regulate all commerce that occurs on tribal lands, and to recognize nation-to-nation commerce; and

BE IT FURTHER RESOLVED, that NCAI also urges Congress to address state taxation of Indian country value, commerce, economic activity, Indian energy development, and Indian natural resource production, and areas such as leased property, personal property, oil & gas, sales taxes, and remote sales; and

BE IT FURTHER RESOLVED, that NCAI calls upon Congress to enact incentives and tax credits for renewable and conventional energy development in Indian country; and

BE IT FURTHER RESOLVED, that Congress and the Administration should seek the guidance of the Treasury Tribal Advisory Committee established under Public Law 113–168 on tax reform issues; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2017 Midyear Session of the National Congress of American Indians, held at the Mohegan Sun Convention Center, June 12 to June 15, 2017, with a quorum present.

Brian Cladoosby, President

ATTEST:

Aaron Payment, Recording Secretary

THE NATIONAL CONGRESS OF AMERICAN INDIANS RESOLUTION #MKE–17–012

TITLE: CALLING FOR FULL FUNDING OF THE FEDERAL TRUST RESPONSIBILITY AND ENSURING THE UNITED STATES HAS THE REVENUE TO FINANCE FEDERAL COMMITMENTS IN TAX LEGISLATION

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are en-

titled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the United States of America funds health and social service programs for the benefit of all Americans, including Social Security, Medicare, Medicaid, Supplemental Nutrition Assistance Program (SNAP), as well as annually appropriated programs specifically for tribes such as the Indian Health Service (IHS), Bureau of Indian Affairs (BIA), and others; and

WHEREAS, federal social programs, including Social Security, Medicare, Medicaid, SNAP, unemployment insurance, Temporary Assistance for Needy Families (TANF), the Earned Income Tax Credit, and the refundable component of the Child Tax Credit provide important benefits to Indian Country; analysis by the Center on Budget and Policy Priorities shows that 90 percent of such benefits go to the elderly, seriously disabled, or members of working families as opposed to able-bodied, working-age Americans; and

WHEREAS, part of the trust responsibility includes basic governmental services in Indian Country, funding for which is appropriated in the discretionary portion of the federal budget; as governments, tribes must deliver a wide range of critical services, such as education, workforce development, and first-responder and public safety services, to their citizens; and

WHEREAS, the House FY 2018 Budget Resolution would advance the most comprehensive tax overhaul in three decades and which would require Congress to cut entitlement programs by at least $203 billion over ten years; and

WHEREAS, the FY 2018 Senate Budget resolution would fast track a tax overhaul by authorizing an increase of $1.5 trillion in debt over the coming decade using the procedural tool of reconciliation; and

WHEREAS, the $1.5 trillion in tax cuts over ten years would be deficit-financed which would increase pressure for reducing the federal budget for programs ranging from health care, education, transportation, scientific research, community development, housing, with such cuts leading to adverse consequences for lower- and middle-income families and long-term growth; and

WHEREAS, under the Senate budget plan, the Senate Finance Committee would receive a reconciliation instruction to produce legislation that would increase the deficit by not more than $1.5 trillion over ten years, which means that the Finance Committee could cut taxes by more than that amount as long as it cut entitlement programs under its jurisdiction—such as Medicaid, Medicare, and Supplemental Security Income—enough to reduce the net cost to $1.5 trillion; and

WHEREAS, the Senate plan also calls for $632 billion in budget reductions to non-defense discretionary programs over the 2019–2027 period, which includes the funding for the federal trust responsibility as well a range of public services such as law enforcement, environmental protection, infrastructure, and others; and

WHEREAS, due to insufficient funding and services by federal agencies, Native communities have suffered severe social, economic, and environmental harms at a rate far in excess of other communities, including inequitable incidence of disease, unemployment, suicide, substance abuse, domestic abuse, violence, flooding, and wildfires; and

WHEREAS, as a further consequence of federal actions and inactions, Indian tribes across the nation have been forced to spend large amounts of scarce tribal funds to support the services that should have been provided or paid for by the United States; and

WHEREAS, deficit-financed tax cuts that lead to potential austerity cuts would affect all Americans, but would disproportionately impact American Indians and Alaska Natives (AI/AN) who rely on federal funding of the trust responsibility as well as social programs; and

WHEREAS, policymakers should consider the distributional impacts to households as well as American Indians/Alaska Natives if the federal budget is cut in the future to reduce deficits caused by tax cuts; the cuts to federal treaty and trust obligations coupled with cuts to mandatory programs such as Medicaid and SNAP could leave AI/AN people and low- and middle-class households worse off, even with some tax reductions.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) calls for Congress to uphold, in any tax legislation, the federal treaty and trust obligations that are funded in the appropriations process, as well

as ensure that the U.S. Government has the revenue to finance existing federal commitments and meet critical national needs now and in the future; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2017 Annual Session of the National Congress of American Indians, held at the Wisconsin Center in Milwaukee, WI, Oct 15, 2017—Oct 20, 2017, with a quorum present.

Jefferson Keel, President

ATTEST:

Juana Majel Dixon, Recording Secretary

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO HON. LIANA ONNEN

First, I must express our disappointment that the Tax Cuts and Jobs Act does not include any of Indian Country's requested tax priorities. We appreciate the Committee's November 1, 2017, hearing as it provided an opportunity to identify and discuss the beneficial tribal tax bills that Committee Members had introduced and co-sponsored during the current Congress. For our Nation, we were especially interested in S. 1935, the Tribal Tax Reform and Investment Act and S. 2012, the Tribal Economic Assistance Act, S. 1935. The witness testimony in that hearing underscored the need for parity so that the tax code would properly recognize tribes as governments and treat them like it treats other governments in the federal system. Witnesses also highlighted the need for amendments that would help tribes overcome obstacles to economic development on our lands. Both S. 1935 and S. 2012 included provisions that would do just that. The hearing gave us hope that these provisions and perhaps others from Indian Country would be included in this session's sweeping tax legislation. We are aware of your efforts to include these provisions for Indian Country and we sincerely thank you. We are, however, deeply disappointed with the end result. We hope you will commit to continuing to work with us to enact the tax provisions tribes need to further economic development and self-determination.

Question 1. What are challenges of growing economies in Native communities that are exacerbated by current tax policy?

Answer. One of the central problems with current tax policy is that in many instances the Internal Revenue Code fails to treat tribal governments as it treats state and local governments. As a result, tribes have to operate within narrow constraints or satisfy additional burdens to carry out the same functions state and local governments perform under more streamlined procedures with considerable flexibility. In some cases, the tax code even denies tribal governments the ability to exercise governmental powers that other governments use as routine practices. A prime example is the issuance of tax-exempt bonds, a significant government tool to accomplish economic and community development projects. Unlike state and local governments, tribal governments are limited to issuing tax-exempt bonds only for what the IRS interprets to be "essential government functions". Thus, while state and local governments can use such bonds for convention centers, public recreational facilities and similar development projects, which create jobs and generate revenues, tribes cannot do the same unless we can prove to the IRS's satisfaction that such projects constitute essential government functions. Removal of the essential government test for tribes to issue tax-exempt bonds would allow us to diversify our economies and accelerate timeframes for much-needed business and commercial development on our lands. This would help our Nation be an even better economic generator for our region. Development in Indian Country benefits neighboring communities. Our experience has shown that successful investment in Indian Country is a win for all neighboring governments, not just the tribal government.

We thank Chairman Hoeven and Senator Moran for their concerted efforts to remove the essential government function test for tribes. Both S. 1935 and S. 2012 include the provision to outdated and unfair restriction. S. 1935 also includes language that would permit tribes to issue private activity bonds, which would provide yet another tool to help us develop our lands, create jobs and raise the quality of life for our members.

Question 2. Have there been any tax policies that have produced unintended consequences? What have the impact of those been? Is there a path to correct?

Answer. The application of the essential government functions test for tribes in the pension plan arena has caused financial and administrative burdens for tribal

governments. This may be an unintended consequence of Congress not fully treating tribal governments as governments in the tax code. The result of this in this instance is that tribes that choose to establish government pension plans as permitted under the code, must administer two separate plans: an ERISA-exempt governmental plan for all employees performing government functions and an ERISA-compliant plan for employees who work in tribal government gaming facilities. State and local governments do not have to do the same. This is administratively burdensome and costly for tribes. Mostly, however, it is also an affront to the recognition of tribes as governments. Tribal gaming facilities are government operations which raise government revenues that tribes put toward their tribal programs to serve their members. This should be recognized, and the essential government functions test should be repealed in this arena. This would save tribes unnecessary and duplicative costs and acknowledge tribal sovereignty at the same time. S. 1935 would make the necessary changes.

Another unintended consequence is that tribal members who adopt special needs children would be required to obtain a determination from a state court before they can take advantage of a lawful adoption tax credit. This unworkable tax code provision must be changed. This policy fails to recognize tribal sovereignty. Further, the provision is unfeasible for tribal member adoptive parents of an Indian child as it would require those adoptive parents to file state court proceedings that the Indian Child Welfare Act was enacted to avoid. Giving the same recognition to tribal court determinations as state court determinations of special needs for purposes of the adoption tax credit is in line with ICWA and tribal sovereignty. S. 1935 would make the necessary changes to the law to address this issue.

Question 3. How can we ensure proper implementation of tax policies that impact tribes? What are important structures that need to be put in place or enhanced to ensure proper implementation?

Answer. The Tribal General Welfare Exclusion Act (Pub. L. No. 113–368; 26 U.S.C. 139E), which you both helped enact, created the Treasury Tribal Advisory Committee (TTAC) to ensure the proper implementation of tax policies that impact tribes. Section 3(b)(1) of the Tribal General Welfare Exclusion Act states that the TTAC "shall advise the Secretary on matters relating to the taxation of Indians." Further, Section 3(b)(2) of that Act requires the Secretary to develop (in consultation with the TTAC) training and education programs for IRS field agents with respect to "Federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian tribal governments. . . .".

The TTAC, therefore, is a vital mechanism in the Treasury Department that supplements Government-to-Government consultation. Six of the seven members of the TTAC have been appointed. Yet, three years after Congress established the TTAC, the TTAC has not begun its work because Senator Hatch has not finalized his assigned appointment and the Treasury Department has refused to convene the TTAC until all seven Committee members have been appointed. To this effect, we ask you to encourage your colleague, Senator Hatch, to quickly place his nominee on the TTAC. We also ask you to encourage the Treasury Department to convene the TTAC in the meantime. Certainly, the TTAC should be functioning and it could be providing needed counsel to the Department today. Further, we ask you and the Senate Committee on Indian Affairs to monitor the work of the TTAC and, particularly, the responses from the Administration to the TTAC's recommendations and requests.

We also think that this Committee should continue to hold oversight hearings on tax issues affecting Indian Country and engage in the legislative process to address tax code anomalies and inconsistencies that deprive tribal governments and their citizens of opportunities available to other governments and citizens in the United States. This Committee's active involvement in tax issues will ensure not only proper implementation of tax policies that impact tribes, but also proper development of the policies and laws we need to further our self-determination and progress toward providing for our members.

Question 4. What are the barriers to investing in Indian Country—especially for our large, land-based tribes?

Answer. Central barriers to investing in Indian Country include: (1) businesses are uncertain about the tax landscape in Indian Country and (2) the lack of clear, substantial incentives for businesses to make the decision to invest in Indian Country rather than elsewhere. Generally, large land-based tribes are ones with abundant resources and potential, but also difficult logistics (associated with remote areas) and a lack of capital for bringing projects to fruition. We need to work on tax provisions that not only provide tribal governments the tools to launch businesses and spur economic development themselves, but also provisions that facilitate partnerships with the private sector. Our reservations have resources and man-

power. There is no reason corporate America should not be looking to us more for business ventures.

To make this happen, however, we need to ensure corporate America about the tax rules that apply in Indian Country and make sure such rules provide an attractive landscape for investing. In terms of the latter, we need to make the Indian Employment Tax Credit permanent and expanded. We also need to make the Accelerated Depreciation Business Property on Indian Reservation Tax Credit permanent. These are important tax features to entice businesses to operate on our lands and use our members in their workforces. We ask the Committee to work to include these provisions in any extenders package that moves in Congress. We also support creating a set-aside in the New Market Tax Credits for entities that primarily invest in Indian Country projects. Provisions to this effect should be included in any tax legislation going forward.

In terms of addressing any hesitation by businesses to invest in Indian Country because of uncertainty about which tax rules apply and how they apply, we note the Department of the Interior's efforts to document the economic harm that results from multiple layers of taxation on tribal lands. We ask the Committee to ensure that the Department releases its report on the Trader Act regulatory effort. We need to continue to work on this issue. We also ask the Committee to explore legislation to eliminate the uncertainty about which tax laws apply and to make sure that revenues generated in Indian Country are not subject to outside jurisdictions' taxes, but reinvested on our lands.

Finally, we think it would be useful for the Committee to host a roundtable between businesses leaders from corporate America and Tribal Leaders. This would provide a good platform for important dialogue about changes in law and policy to attract businesses to invest on tribal lands and collaborate with Tribes. It would also provide an opportunity for business leaders who are hesitant to commit in Indian Country to have their questions answered.

Conclusion

I thank you again for the opportunity to provide information on behalf of the Prairie Band Potawatomi Nation. We have long been engaged in the tribal tax reform effort, as changes in the tax code are necessary to facilitate much-needed economic and community development on our lands. In addition to the foregoing and the issues discussed in my written and oral testimony for this hearing, we support the proposals presented in the National Congress of American Indians' Resolution MOH–17–11 .

Please do not hesitate to contact me if you have further questions. We look forward to working with you to make sure that Congress enacts the tax provisions needed for Indian Country.

Leaving Indian Country out of the Tax Cut and Jobs Act, unfortunately, was leaving us behind. Our nations have abundant resources and innovation to offer. We ask this Committee to work with us to include our tax provisions in law so that we can work toward realizing our potential for the good of our members and America overall.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO DANTE DESIDERIO

I am glad this Committee is taking up the issue of modernizing tax policies that work for Indian Country and hearing from leaders how this impacts their communities. I am concerned with the timing, considering Republicans have planned to release their tax plan today with little input from anyone, especially consultation with folks from Indian Country.

Question 1. What are the challenges of growing economies in Native communities that are exacerbated by current tax policy?

Answer. Current tax policy does not accept or understand the role tribal governments have in building their economies or in the necessary role economic revenue plays in providing tribal services. We can clearly look back at prior tax policy and see that it is broken for tribes because of restraining policies that only apply to tribal governments or because tribal incentives are only partially implemented. For example, the trillion-dollar tax-exempt debt market used by every other government as the primary source for financing community development is effectively unusable for growing tribal governments since its use is limited to specific government functions. The program is great for schools and infrastructure, but tribes do not have the ability to repay the debt unless there is economic growth which is an excluded use for tribes. Housing is also a restricted use for tribes and to make matters worse

tribes are often excluded from housing tax credits—a federal program implemented by states.

Question 2. Have there been any tax policies that have produced unintended consequences? What have the impact of those been? Is there a path to correct?

Answer. The tax policy that can be held out as having unintended consequences is the accelerated depreciation and Indian coal tax incentives. These incentives should have a significant impact on Montana tribes, but they are inconsistently, and at times, retroactively renewed. The unintended outcome is that tribes can't rely on using the incentives to negotiate partnerships and discount capital investments. The investors and external partners end up using them anyway when they are finally renewed from one year to the next with little or no benefit to tribes.

Question 3. How can we ensure proper implementation of tax policies that impact tribes? What are important structures that need to be put in place or enhanced to ensure proper implementation?

Answer. Tribal governments need to be included in tax policy in a way that accommodates their economic model and considers their capital needs. Tribal governments have come to rely on economic development as a way to fund programs and services. This is a different model and has been one of the successful outcomes of self-determination. Tax-exempt debt should be open for tribes to finance projects that create revenue. This is "essential" for tribal governments. Tribes currently use short term debt to fund long term government projects. This is equivalent to using a car loan to buy a house.

Securing significant capital necessary to sustain projects and fund projects that will build an economy should also be a key consideration. This means moving beyond just financing a business. The loan guarantee programs should be funded at a level to meet the need for tribal governments to grow and tribes should be included directly in tax credit programs such as housing, new markets, and consistently renewed incentives.

What I have heard from Montana and across the country is that there is too much uncertainty in Indian Country and they don't have faith in the security of their investment.

Question 4. What are the barriers to investing in Indian Country—especially for our large, land-based tribes?

Answer. Uncertainty is the greatest impediment to growth in Indian Country. There is uncertainty surrounding the definition and enforcement of terms like "essential government function" when it comes to use of government capital. There is uncertainty on the renewal of incentives formed to attract investment such as accelerated depreciation or the coal tax credit. There is uncertainty on taxing jurisdiction which is a necessary component for building a diverse economy that is less reliant on high margin businesses. This means the businesses that provide lower margins and create more jobs are disadvantaged. Tax policy should be directed toward relieving uncertainty by providing capital markets enough in incentives to overcome the obstacle.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JON TESTER TO CARL MARRS

On behalf of Old Harbor Native Corporation, I am pleased to submit my responses to the Questions posed by Senator Tester relative to my November 1, 2017 testimony before your Committee.

Question 1: ***What are the challenges of growing economies in Native communities that are exacerbated by the current tax policy?***

Answer: The biggest challenges to growing economies in Native Communities are that Tribes and Native Communities do not have the benefits and leverage afforded to States. If Tribes, and Alaska Native Corporations working with their Alaska Tribes, could be treated more like States (within the construct that Tribes are "governments"), then economic growth would be much easier to incentivize in Indian Country.

A major component of treating Tribes like States is the elimination of the "essential governmental function" test from Internal Revenue Code ("Code") § 7871. Eliminating that test makes it easier for tribal entities (both in Alaska and in the lower 48) to issue tax exempt bonds, which in turn will help provide the funds necessary to spur economic development in rural tribal communities. Eliminating the test also allows Tribes to more easily qualify for various exemptions from various federal excise taxes (including on special fuel) that are available to states, but are not available to Tribes unless the essential governmental function test has been met.

The current IRS ruling position as to what constitutes an essential governmental function is as follows: "(1) there are numerous state and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds, (2) state and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and (3) the activity is not a

commercial or industrial activity." To put it mildly, this can be a difficult standard to meet when Tribal entities try to address their economic development problems creatively.

For example, in the Native Village of Old Harbor on Kodiak Island, our fishing fleet consists of relatively small boats. It can be dangerous for our small boats to haul their catch to Kodiak, and if a tender vessel comes to our village to receive the fish, the price our fishermen receive is far lower. Given the high costs of operating a fishing vessel and fleet, these lower prices make it difficult for the Native village of Old Harbor, a traditional fishing village, to maintain a fishing fleet that provides good paying and productive work to the residents and members of the Alutiiq Tribe of Old Harbor. If the Native village of Old Harbor was able to construct a local fishing processing plant in the village, however, that would result in both higher prices for the fishing fleet and be another source of jobs for tribal members. As a result, there is a pressing need for a local fish processing plant in the village to retain good-paying jobs for our tribal members. The village of Old Harbor, with assistance from Old Harbor Native Corporation, has pursued this economic development opportunity of a local fish processing plant in the village for years.

However, Old Harbor is a remote village and generating the necessary electricity through diesel generators for a fish processing plant is prohibitively expensive. The solution for our village is the construction of a hydroelectric facility along with the fish processing facility so that the facility can survive economically. It is clear to our village that without a fish processing facility, our fishing fleet will leave the village, and when it leaves, so will all of the related jobs. This is already happening.

It is open to question whether construction of these facilities would meet the "essential governmental function" test of present law, because such facilities would normally not be customarily performed by State and local governments. Elimination of the "essential governmental function" removes this obstacle to needed economic development and allows us to finance and build the facilities we need to keep our fishing fleet and its jobs in our rural community.

Question 2: *Have there been any tax policies that have produced unintended consequences? What have the impact of those been? Is there a path to correct?*

Answer: Existing tax law has many unintended negative consequences for Indian Country and perhaps the simplest and most direct way to address and correct these negative consequences and disincentives to investment in Indian Country, especially in the near-term, is for Congress to enact S. 2012, The Tribal Economic Assistance Act (TEA Act), and S. 1935, the Tribal Tax and Investment Reform Act. These bills between them would have restored the 20% Indian Employment Credit of Code § 45A provided and the accelerated depreciation for reservation business property of Code § 168(j)(6). Both of these incentive provisions are not available after December 31, 2016.

Another current Senate Bill, S. 975, concerns making the Indian Coal Production Credit permanent authorized by Code § 45(e)(10). This credit (which lapsed December 31, 2016) was

very significant for certain tribes such as the Crow and provided significant incentives to draw third party capital to develop Indian Country coal and bringing much needed high paying jobs to tribal members.

As a final matter, although it is not a tax policy per se, I cannot overstate the difficulties that are posed when economic incentives are provided on a temporary rather than a permanent basis. In my experience, there is a tendency for serious, committed investors outside of Indian Country to ignore temporary measures, and the result is that less serious, and less committed investors pursue the economic incentive. When the temporary incentive vanishes, so do these less serious and less committed investors. Stated somewhat differently, temporary tax incentives can operative as a disincentive to the kind of long term investment that we need in Indian Country, particular when similar tax incentives are available outside of Indian Country on a permanent basis.

Question 3: How can we ensure proper implementation of tax policies that impact tribes? What are important structures that need to be put in place or enhanced to ensure proper implementation?

Answer: I believe that proper implementation of beneficial tax improvements for Indian Country economic growth will be achieved with the passage and implementation of S. 2012, the Tribal Economic Assistance Act of 2017 ("TEA Act"), S. 975, and S. 1935, the Tribal Tax and Investment Reform Act of 2017. I am whole-heatedly in favor of the changes that would be made by these bills, which are aimed primarily at lower 48 tribes and their reservations. However, these bills also favorably affect Alaska Natives and their lands. This is because the Indian Employment Credit of Code § 45A, the accelerated depreciation provisions of Code § 168(j), and the New Markets Credit of Code § 45D all apply to "reservations" as defined in section 3 of the Indian Financing Act ("IFA"), and section 3 of the IFA defines "reservations" to include lands owned by Village Corporations and Regional Corporations.

Also, S. 1935 clarifies that tribal charities are to be treated the same as charities controlled by other governmental entities for purposes of deductions for contributions. This parallels the deduction that Code § 247 (as added by December 22, 2017 by Public Law No. 115-97 (formerly known as the Tax Cuts and Jobs Act)), now permits an Alaska Native Corporation for contributions to a Settlement Trust.

I echo the concern of what you have heard from businesses in Montana and across the country: ***there is too much uncertainty in Indian Country and businesses simply do not have faith in the security of their investment.***

Question 4: What are the barriers to investing in Indian Country—especially for our large, land-based tribes?

Answer: The biggest barriers to investing in Indian Country relate to the difficulty of raising capital. One of the most important steps that can and should be taken concerns making

economic incentives permanent rather than temporary. A Congressional decision to provide tax incentives too often results in only a ten-year program that is in many case not sufficient to actually achieve any measure of permanent economic development. If I could make only one suggestion, it would be that Congress provide economic incentives for development in Indian Country on a permanent rather than temporary basis.

Another barrier that should be eliminated is the "essential governmental function" test.

Reforming the New Market Tax Credit program will also help reduce these barriers. The New Market Tax Credit is designed to provide a source of private funds for the development of low income communities. However, there is an annual limit on the amount of the credit, and under the current law, this annual limit is to be allocated on a priority basis to various locations. Present law does not prioritize the lands of Alaska Natives and Indians for the credit, even though Alaska Natives and Indians are, in economic terms, among the "poorest of the poor" in our country.

Without the New Market Credits being readily available to our lands, those who would bring economic growth through the creation of economic development entities go elsewhere. The result has been that the New Markets Tax Credit program has not come to Indian Country in any meaningful way.

Indians and Alaska Natives have no less of a need for economic development than other low income areas, and in many cases, a far greater need. I support the TEA Act, S. 2012, because it adds our Alaska Native and Indian lands as priority areas for allocations of the New Market Tax Credit. This, I believe, will encourage the creation of economic development entities, which in turn will bring much needed private capital to our Native and Indian lands. I am not alone in this view. Our Alaska Federation of Natives has repeatedly sought to obtain expansion of the New Markets Tax Credit because of the very positive impact it will have on our Native and Indian communities.

Conclusion

Thank you, Senator Hoeven, for allowing me this opportunity to respond to Senator Tester's questions. I would be pleased to provide additional testimony to the Senate Indian Affairs Committee in the future.

○