

ENCOURAGING ECONOMIC SELF-DETERMINATION IN INDIAN COUNTRY

HEARING BEFORE THE SUBCOMMITTEE ON LONG-TERM GROWTH AND DEBT REDUCTION OF THE COMMITTEE ON FINANCE UNITED STATES SENATE ONE HUNDRED NINTH CONGRESS SECOND SESSION

MAY 23, 2006



Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

35-146—PDF

WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON FINANCE

CHARLES E. GRASSLEY, Iowa, *Chairman*

ORRIN G. HATCH, Utah	MAX BAUCUS, Montana
TRENT LOTT, Mississippi	JOHN D. ROCKEFELLER IV, West Virginia
OLYMPIA J. SNOWE, Maine	KENT CONRAD, North Dakota
JON KYL, Arizona	JAMES M. JEFFORDS (I), Vermont
CRAIG THOMAS, Wyoming	JEFF BINGAMAN, New Mexico
RICK SANTORUM, Pennsylvania	JOHN F. KERRY, Massachusetts
BILL FRIST, Tennessee	BLANCHE L. LINCOLN, Arkansas
GORDON SMITH, Oregon	RON WYDEN, Oregon
JIM BUNNING, Kentucky	CHARLES E. SCHUMER, New York
MIKE CRAPO, Idaho	

KOLAN DAVIS, *Staff Director and Chief Counsel*
RUSSELL SULLIVAN, *Democratic Staff Director*

SUBCOMMITTEE ON LONG-TERM GROWTH AND DEBT REDUCTION

GORDON SMITH, Oregon, *Chairman*

CHARLES E. GRASSLEY, Iowa JOHN F. KERRY, Massachusetts

(II)

CONTENTS

OPENING STATEMENTS

	Page
Smith, Hon. Gordon, a U.S. Senator from Oregon, chairman, Subcommittee on Long-Term Growth and Debt Reduction, Committee on Finance	1
Baucus, Hon. Max, a U.S. Senator from Montana	2

WITNESSES

Etcitty, Raymond C., Esq., chief legislative counsel, Navajo Nation Office of Legislative Counsel, Window Rock, AZ	4
Scheffler, Lenor A., Esq., Best & Flanagan, LLP, Minneapolis, MN	7
Clarkson, Dr. Gavin, assistant professor, School of Information, School of Law, and Native American Studies, University of Michigan, Ann Arbor, MI	10
Schickli, Scott, Esq., Orrick, Herrington, & Sutcliffe, LLP, Portland, OR	16
Shammel, Wayne A., Esq., general counsel, Cow Creek Band of Umpqua Tribe of Indians, Roseburg, OR	19

ALPHABETICAL LISTING AND APPENDIX MATERIAL

Baucus, Hon. Max:	
Opening statement	2
Clarkson, Dr. Gavin:	
Testimony	10
Prepared statement	27
Etcitty, Raymond C., Esq.:	
Testimony	4
Prepared statement	55
Scheffler, Lenor A., Esq.:	
Testimony	7
Prepared statement with attachment	70
Schickli, Scott, Esq.:	
Testimony	16
Prepared statement	90
Shammel, Wayne A., Esq.:	
Testimony	19
Prepared statement with attachment	95
Smith, Hon. Gordon:	
Opening statement	1

COMMUNICATIONS

Alaska Federation of Natives	143
Confederated Salish and Kootenai Tribes of the Flathead Nation	149

ENCOURAGING ECONOMIC SELF- DETERMINATION IN INDIAN COUNTRY

TUESDAY, MAY 23, 2006

U.S. SENATE,
SUBCOMMITTEE ON LONG-TERM
GROWTH AND DEBT REDUCTION,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 2:37 p.m., in room SD-215, Dirksen Senate Office Building, Hon. Gordon Smith, (chairman of the subcommittee) presiding.

Also present: Senator Baucus.

OPENING STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM OREGON, CHAIRMAN, SUBCOMMITTEE ON LONG-TERM GROWTH AND DEBT REDUCTION, COMMITTEE ON FINANCE

Senator SMITH. Welcome, ladies and gentlemen. We are pleased to have you here on this important issue of tribal self-determination.

We are going to talk today about the Federal Government's policy of encouraging Indian tribes in their efforts towards self-determination, which has been the Federal goal since the 1960s.

The problem is that, as we have translated this into reality, we have treated, in theory, tribal governments like quasi-sovereign entities, just as we have State and local governments, but we have not given them the same ability to access capital markets.

Tax-exempt bonding authority is literally the bread and butter of most State and local governments, and the current law limits tribes' ability to issue such bonds.

The Indian Tribal Governmental Tax Status Act of 1982 provided Indian tribal governments with a tax status similar to States and municipalities. However, bonds issued by tribal governments are subject to limitations not imposed on State and local government issues.

Tribal governments may not issue tax-exempt private activity bonds. Furthermore, they may issue tax-exempt governmental bonds, but only if substantially all the proceeds are used for central governmental functions and not economic development.

In doing so, this act runs counter to our Federal policy of self-determination. If tribes are hamstrung in their ability to develop their infrastructure and foster a robust economy, then a Federal policy of self-determination is rather hollow.

Contrary to popular conceptions, most of the 562 Indian tribes in America do not have casinos. According to the National Indian Gaming Association, less than half of them engage in Class II or Class III gaming. As they have for generations, many tribal members, therefore, live in poverty.

As reported by the Advisory Tax Committee on Tax-Exempts in its 2004 report, "Most Indian tribes have an economy that is on par with most third world countries." In 2000, the American Indian population had a poverty rate of about 26 percent in comparison with a poverty rate of about 12 percent for the general U.S. population.

Indian tribal governments have struggled for years to develop the infrastructure necessary to attract businesses and employers to create employment opportunities. Instead, unemployment is endemic on reservations, and under-employment, rampant.

Without new job growth and self-sustaining revenue bases, the goal of Indian reservations as viable homelands for American Indians will simply be unattained.

So I look forward to today's testimony, because it gives us an opportunity to reflect on our current tax system and perhaps re-think our tax policy so that it better fosters the development of tribal economies.

I like the quote of Ronald Reagan, who said, "The Federal Government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities. A full economic recovery for tribes will unleash the potential strength of this private sector and ensure a vigorous economic climate for development which will benefit not only Indian peoples, but all other Americans as well."

I would like to turn the mic over to my colleague and friend from Montana, a fellow northwesterner and the Ranking Democrat on the Senate Finance Committee.

**OPENING STATEMENT OF HON. MAX BAUCUS,
A U.S. SENATOR FROM MONTANA**

Senator BAUCUS. Thank you very much, Mr. Chairman. First, I commend you for holding this hearing. This is very important. I know, especially in the State of Montana, I see tribes doing a good job.

There has been major improvement over the years in managing their affairs and moving toward economic development, including self-determination. It has always been on again, off again.

Should tribes develop themselves, have their own contracts, or work through BIA, IHS, or whatnot, it is kind of on again, off again. It depends largely on the tribe. It depends on lots of other situations.

I also believe that it is time to lift the shackles that we, as the Federal Government, often have on reservations that prevent tribes from developing more aggressively.

For example, I think that there should be more tax-exempt bond authority available for tribes so they can determine their own destiny more. I very much thank you, Mr. Chairman, for holding this hearing.

One of the witnesses today is Wayne Shammel, who is the general counsel for the Cow Creek Band of Umpqua Tribe of Indians, in your own State of Oregon. He is also a member of the Confederated Salish and Kootenai in Montana.

Senator SMITH. We can both claim him. [Laughter.]

Senator BAUCUS. I think we both will.

The title of this subcommittee hearing is "Encouraging Economic Self-Determination in Indian Country." One of the policy arguments for self-determination, clearly, in addition to government-to-government relationship between tribes, is to support the development of tribal economies.

There is a lot we can do. We can add infrastructure, housing, telecommunications, et cetera. That must be addressed very aggressively. In order to pay for it, tribes cannot rely on Uncle Sam when tribal programs are being reduced or eliminated by the Federal budget, which often is the case.

That is why I turn more to permitting tribes to issue tax-exempt bonds. I might say—you may know about this, Mr. Chairman—we have a program recently passed called the Clean Renewable Energy Bond (CREB). It is a renewable energy program for nonprofits. Tribes would clearly qualify. So not only can private entities build alternative energy programs, like wind towers, but so can nonprofits, including tribes.

In our State, 35 applications met the April 26th deadline for Montana nonprofits. I do not know if any of them were tribes. But I am hopeful that tribes, too, can participate in a program like this so they can also develop wind power on the reservations. By focusing on tax-exempts, I think that is another tool that tribes can have.

But, all in all, I just want to thank Wayne for being here, and thank you, Mr. Chairman, for what you are doing. This is very, very important, and I just urge our witnesses to be aggressive themselves and tell it like it is, and give us some concrete, specific ideas so we can advance the ball.

Thank you very much.

Senator SMITH. Thank you, Senator.

We thank all of our witnesses here. As I call you up, I am going to talk about you; take your place as I do so.

Our first witness will be Mr. Raymond Etcitty. He is the chief legislative counsel for the Navajo Nation. He served on the IRS Advisory Committee on Tax-Exempt and Government Entities from 2003 to 2004.

Our second witness will be Ms. Lenor Scheffler. She is a member and chair of Best & Flanagan's Native American law practice group. In 2004, she was appointed to the IRS Advisory Committee on Tax-Exempt and Government Entities.

Then we will hear from Mr. Scott Schickli. He is of counsel in Orrick's Pacific Northwest office of Portland, OR, and is a member of the Tax and Public Finance Practice Groups. His practice focuses on tax aspects of tribal and other public finance transactions.

Then we will hear from Dr. Gavin Clarkson. He is Assistant Professor in the School of Information at the University of Michigan. He has simultaneous appointments at the Law School and in Native American Studies.

Then a Montanan-turned-Oregonian, Mr. Wayne Shammel is the general counsel of the Cow Creek Band of Umpqua Tribe of Indians in Oregon. He was born and raised on the Flathead reservation and is a member of the Confederated Salish and Kootenai Tribes.

We thank you all for being here.

Senator BAUCUS. Mr. Chairman? If you will pardon me.

Senator SMITH. Yes.

Senator BAUCUS. It is Confederated Salish and Kootenai Tribes.

Senator SMITH. Salish.

Senator BAUCUS. Salish Kootenai. We like to think he is both Oregonian and Montanan. [Laughter.]

Senator SMITH. Yes. That is sort of like Easterners calling us "Or-e-gon." [Laughter.]

Senator BAUCUS. You would be very proud of me. I go out of my way to correct that mispronunciation regularly.

Senator SMITH. All right. I appreciate that. Thank you.

Why do we not start with Mr. Etcitty?

STATEMENT OF RAYMOND C. ETCITY, ESQ., CHIEF LEGISLATIVE COUNSEL, NAVAJO NATION OFFICE OF LEGISLATIVE COUNSEL, WINDOW ROCK, AZ

Mr. ETCITY. Thank you, Senators. Thank you very much for this opportunity.

My name is Raymond Etcitty. I am the chief legislative counsel for the Navajo Nation. The Navajo Nation is a large tribe. We say we are the largest in the Southwest. We have 300,000 members. We currently encompass a land mass that is 27,000 square miles, so we are larger than the size of the State of West Virginia. I provide legal advice to our council.

However, in 2004 I was on the IRS Advisory Committee. The IRS Advisory Committee is a committee that provides guidance and advice to the IRS regarding how the IRS operates.

In 2004, I chaired a group that provided a report to the IRS on the Indian Tribal Tax Status Act of 1982. In that report, I essentially stated that, when the act was drafted, we were in a period of, and we are still in a period of, self-determination in which the Federal Government is assisting in helping tribes becoming self-sufficient as Indian nations.

In 1982, Congress approved this act, and the act clarified how tribes would be treated for certain taxing purposes by the Federal Government.

With respect to the tribal bonds issue, the act itself provided some limitations. So, although the act had the intent of treating tribes equally with States, it was somewhat limited.

When it came to private activity bonds, Congress had stated that tribes were unable to do that. However, with respect to governmental bonds, those were bonds where Congress placed some limitations.

So if you look at the other governments, local and State governments, they are able to issue bonds tax-exempt, and are, therefore, able to obtain low interest rates on these and work with the IRS.

When it comes to the tribes on issuing these specific bonds, the tribes are somewhat limited by the act as to how to deal with these issues.

In 1987, Congress amended the act again. However, in doing so the particular phrase that tribes had been hindered with is a phrase called "essential governmental functions." Essentially, the act stated that when it comes to issuing bonds and others, "tribes shall do so only for essential governmental functions." This definition was not clarified in the act itself.

Senator SMITH. For the record, give us an example of how a city might be able to issue bonds different than that.

Mr. ETCITY. Thank you. As an example, near the Navajo Nation there is a metropolis city called Albuquerque. In Albuquerque, there is Intel. From what I understand, the city, Rio Rancho, issued a private activity bond in order to help finance the Intel building, helped finance manufacturing.

So that is a private activity in which a government will use its tax status to help finance potentially private activity using the bond capacity, bond status of a government. When it comes to tribes, they are not able to do so.

Senator SMITH. I just wanted to get that distinction on the record. I mean, if the government was supposed to treat tribal governments like State and locals, they are not doing it.

Mr. ETCITY. Senator Smith—Chairman Smith.

Senator SMITH. Senator is good. I get called a lot worse. [Laughter.]

Mr. ETCITY. With the Navajo Nation, we have encountered this. The Navajo Nation is lacking in infrastructure. As I stated, we have about 300,000 members, and we are looking at ways to provide infrastructure.

Basic infrastructure not only helps our citizens, but, if you have a good infrastructure, you can then start requesting outside businesses, outside groups, within the tribe, to help build it. I believe people have stated that we have about a 50-percent unemployment rate upon the Navajo Nation, and we lack infrastructure.

So by expanding and allowing tribes this opportunity to issue private activity bonds or to clarify how government bonds are operated, that will again provide, as was stated, tools to the Navajo Nation for further economic development.

When it comes to government bonds, the issue, as I stated, is "essential governmental functions." I believe in my report I did state that the Treasury Department, back in 1984, developed some temporary regulations trying to define that. However, Congress's amendments in 1987 turned that around.

In 1987, there was an amendment to the act that, as I usually tell people, provided a negative definition, so it did not state, an essential governmental function is this.

Instead, the act essentially states that the definition of an essential governmental function is a negative definition. It sort of states that an essential governmental function is an activity, a function, that is not customarily performed by a State or local government. So, therefore, some people do say, this is what governments do.

Instead of defining what it is, you have created a problem by defining what it is not. So what eventually happens is your bond counsels, instead of trying to fit it within a definition, they are more fearful that the negative definition swallows the entire rule itself.

So, therefore, your negative definition again hinders the ability of tribes to issue bonds, because in doing so they believe that their activities may not be qualified as essential governmental functions.

For the Navajo Nation, again, we sort of encounter this whenever we look to developing jails, hospital spaces, and other services. As I always point out, when it comes to Indian tribes like the Navajo Nation, we are not only looking out for Navajos.

We have many Navajos within our reservation, but we have other Indians, and we also have non-Indians. Pretty much within the Navajo Nation, the government itself provides all the governmental services.

I usually indicate and tell people that the Navajo Nation looks after its own members, it looks after other Indians, it looks after non-Indians, it looks after visitors.

So we have this entire group of people who come upon the Navajo Nation, so therefore you do have police services, you do have other services—ambulance services, health services—all of these governmental activities, opportunities for economic development.

We may have a person who comes to the Navajo Nation wanting a job that may be a non-Indian. So since it is a reservation, as ours in the Navajo Nation is, it is up to the Navajo Nation to stand on its own and to provide these opportunities.

So if a visitor required, again, police service, ambulance services, some of these things are not provided by the Nation. When it comes to the police, the question with the Navajo always is, how do we finance these? Do we use private companies in order to finance jail spaces?

How do we provide the health care systems? Will the hospital be owned by the Navajo Nation, the tribe, or a private entity? So in order to help facilitate these things, we need the capacity to provide this economic development.

In many cases, you will have someone who decides to move to the reservation, live upon the reservation. However, we also need economic development opportunities for them.

A person who marries a Navajo and wants to live there, will want a job. Well, it is pretty much incumbent upon the Navajo Nation, much like other governments, to develop this infrastructure, to develop the means by which outside companies can come upon the Navajo Nation and grow.

Again, when you are talking the size of West Virginia, it is pretty hard for just one government, one entity to control that vast area. We have to start working with outside entities, outside people and, again, use these bond capacities in a manner to facilitate economic development within the Navajo Nation.

I usually state that there is a person on the Navajo Nation whose name is Trib Trerard, an economist. He usually tells me that in the United States, in the Great Depression, he states the unemployment rate was around 20 percent, or something like that. I think it was closer to 18 percent, around there. He stated, the Navajo Nation is 50 percent.

So if they call that the Great Depression at that unemployment rate, what do you call the situation upon the Navajo Nation when it is about three times what the unemployment was in the Great

Depression? I do not know what terminology you would use, but again, this is significant.

Senator SMITH. What percentage of non-Navajo would be in the Navajo Nation for which you are providing services? I am just curious. What part of that percentage would be considered Caucasians?

Mr. ETCITY. Thank you very much, Senator. With regard to the Navajo Nation, figures are roughly around 10 percent. So the Navajo Nation, as large as it is—

Senator SMITH. Members of other tribes?

Mr. ETCITY. Members of other tribes, probably about 3 percent up to 5 percent.

Senator SMITH. All right.

Mr. ETCITY. So the Navajo Nation, again, as large as it is, you do have public schools, you do have Indian health care, you do have Bureau of Indian Affairs schools, you have private schools, you have private businesses, private industry there. So, many of these places are staffed by non-Indians.

A lot of non-Indians come back to the reservation. They will marry a Navajo, so while the Navajo is working they will have the spouse who is non-Indian. Meanwhile, in the Navajo Nation we also have tourists who visit the Grand Canyon, Monument Valley.

There are over 100 different types of monuments, and there are tourist attractions within the Navajo Nation's four corners. So, people estimate we have several million visitors who come to the Navajo Nation yearly.

So the focus, I always say, on the Navajo is, again, we try to build economic development the old-fashioned way. We look at tax incentives, tax bonds. We look at these means to achieve economic development. When we do it, we are looking at not a small level, but a macro level, how States, how large local governments try to achieve these things.

They achieve these goals by, again, issuing tax-exempt bonds, trying to lure businesses onto the reservation. They do so by doing governmental bonds and trying to provide basic infrastructure, basic government services.

Currently, the problem with the tax law as written and as currently written by the IRS, is that these provide limitations. If we want to issue bonds for a certain purpose, I believe there are great concerns that that may not fall exactly within what the IRS requires.

Senator SMITH. So if you are going to develop the services, you need the economic base, you need economic development, and you are not allowed to have that through bonding authority now?

Well, thank you very much, Raymond.

[The prepared statement of Mr. Etcitty appears in the appendix.]

Senator SMITH. Ms. Scheffler?

**STATEMENT OF LENOR A. SCHEFFLER, ESQ.,
BEST & FLANAGAN, LLP, MINNEAPOLIS, MN**

Ms. SCHEFFLER. Thank you, Mr. Chairman. I appreciate the opportunity to be here this afternoon and to speak. I am from the Mdewakanton Dakota Community of the Lower Sioux in Southern Minnesota, a much smaller tribe. We have about 900 members, and less than 1,000 acres.

I am, as you had mentioned in the introduction, a current member of the Advisory Committee on Tax-Exempt and Government Entities for the IRS. In 2005, we followed up Mr. Etcitty's report with our own survey and review of existing information and guidance for Indian and tribal governments, and we looked at a number of issues that were of concern, particularly what guidance was out there and what is available for tribes in a number of areas.

We did focus on the tax-exempt bond issue because, particularly in the last year and a half, the IRS compliance folks have focused on tribal deals. The perception in Indian country was that that was an inordinate amount of attention for the number of deals.

It also caused—in our observation, working on the committee and also among my clients—a chilling effect, with some tribes shying away from even those types of what would be common-sense essential governmental services, because of the concern of what, in fact, the definition is. Is it what Congress may have meant, or is it what the IRS compliance officers are implying it is through their audits? So we focused on that and talked to folks across Indian country.

A number of items. I just want to remind the committee, and Mr. Chairman, as we look at this issue, the context is, as you well pointed out, the vast majority of tribal people are not wealthy. Not everyone has a gaming enterprise, though that has been one economic tool in recent years that has been successful for the tribes.

The States and local economies, local municipalities, they learned about State lotteries. So in some ways, tribal folks have learned from dominant society what works and what does not, so we have used gaming enterprises as one option.

Other tribes with resources have found some success in tourism, oil and gas, but not all tribes have the resources, because most of the tribes were placed on reservations in isolated, and not necessarily productive, areas.

Another point to contrast is that the tribes do not have the tax base that State and local governments have, or even the Federal Government. State, local and Federal governments can raise taxes. In Indian country, we sit on trust land which we cannot leverage, mortgage, nor really tax.

Some tribes do have tax ordinances, tax codes, and they do raise tax revenue, but it is not sufficient or adequate to supply and to support the tribal government operations or the tribal programs for their tribal members. I think that is important to remember, that there is just not the tax base the State and local governments enjoy.

Congress, as you pointed out, has a longstanding policy of encouraging self-determination, self-government, some economic development. Seventy years ago there was the passage of the Indian Reorganization Act, and in there one of the goals was to have tribes be able to go into business.

They granted charters from the Secretary of Interior with the idea that, with governments and with the opportunity to do business, that in fact we could enter the economic mainstream. It was well-intentioned, but with marginal success.

But at least those charters are there, and some tribes in Indian country are taking advantage of that opportunity and pursuing economic development.

As mentioned, the two tools that came along after that, the ability to issue tax-exempt bonds and a limited ability to issue private activity bonds, were two tools that, theoretically, tribes should have been able to use.

But, it has been pointed out, and you'll hear more about it, what does "essential governmental function" mean? Common sense tells tribes and the practitioners who represent them that it should be the same things as State and local governments do, and that has just not been the case.

I am sure you will hear about golf courses, sports facilities, and other things that State and local governments fund with their tax status, and the tribes are not able to engage in that.

In the private activity bond area, it is so narrow and limited that it virtually has not been of any value. I do not know that there has ever been an issuance, and maybe some of the other folks of the panel would have some information. But theoretically, that would be a good tool and opportunity for tribes to use.

What it is, is these tools would be helpful to build economies for tribes that are not gaming, but they also will help tribes that maybe have gaming right now, which is continually under challenge.

So having the opportunity to diversify and look at other ways to strengthen our economies, be able to provide programs to our tribal members, and to participate in the overall economy of our States, these two tools need to have attention and they need the attention of Congress.

The amendments. I do not have the magic words. Maybe some of my colleagues on this panel today will have the magic words. But, clearly, we need definitions. At a minimum, it seems to me that treating tribes as State and local governments is a place to start.

As far as broadening the ability of tribes to issue private activity bonds, since it is so narrow and so limited, there should be plenty of room to expand there.

Really, I think the place to start, or the place to focus on, is the IRS Code at section 7871, which was originally passed in 1982 and 1987, and there are regulations that are also a part of that. I think that really is the beginning point.

Most importantly, as you are focusing on this, Mr. Chairman and the committee, it is very important to contact and be informed with, and by, the tribes, talking to them, having conversations, understanding really what would be effective in carrying out Congress's longstanding policy of encouraging economic development in Indian country.

Thank you.

Senator SMITH. Thank you very much.

[The prepared statement of Ms. Scheffler appears in the appendix.]

Senator SMITH. If I could ask you, what tools could the Federal Government provide to the Indian tribes to make it easier for their advisors to find tax statutes and guidance related to Indian and

tribal governments? Are there some tools that we need to get to you in a way that would be helpful?

Ms. SCHEFFLER. Well, in our report in 2005, we had talked with the IRS and the Treasury's Chief Counsel's Office about what regulations could they do and what actions could they help with and educate.

With Treasury and the Chief Counsel's Office, the regulations that might provide some definition and assistance in the essential governmental functions, for example, is just not a priority.

Senator SMITH. So do you think that is why the IRS is slow to move on this?

Ms. SCHEFFLER. Absolutely. That was not a priority. In reading some of the literature surrounding the whole "essential governmental functions," it is almost a question of, what did Congress really mean, in some of the articles that were written about how that law was passed, and I think there was a Florida House of Representatives Congressman who had his own special axe to grind, shall we say, based on some of the literature.

So we can give them advice as committee members, but, clearly, this particular issue is a Congressional fix, I think, so that means proposing legislation. Or if you can put pressure on the Treasury Department and the Chief Counsel's Office to talk to tribes and clarify the regulations.

Senator SMITH. Well, that is part of what this hearing is about.

Ms. SCHEFFLER. But as I was told by one IRS official, suggest a legislative fix, because they did not know that the Treasury would do much if you all called them again.

Senator SMITH. Well, thank you very much.

Dr. Clarkson, why do we not go to you next? We will just go down the line.

STATEMENT OF DR. GAVIN CLARKSON, ASSISTANT PROFESSOR, SCHOOL OF INFORMATION, SCHOOL OF LAW, AND NATIVE AMERICAN STUDIES, UNIVERSITY OF MICHIGAN, ANN ARBOR, MI

Dr. CLARKSON. Mr. Chairman, thank you very much for the invitation to come to speak today.

Again, my name is Dr. Gavin Clarkson. I am a professor at the University of Michigan in the School of Information, the Law School, and Native American Studies.

In terms of background, I have a law degree from the Harvard Law School and a doctorate from the Harvard Business School. I also hold the Series 7, 24, and 66 securities licenses, and I have helped tribes raise approximately \$200 million in various different bonds, including tax-exempt bonds.

What I would like to talk about today, Mr. Chairman, is the need for capital improvement in Indian country. According to the Harvard Project on American Indian Economic Development, there is \$50 billion of unmet capital need that goes unfunded each year in Indian country, and it is due, unfortunately, in large part to the restrictions that are present in section 7871 of the tax code.

Basically, you have tribes such as the Navajo Nation, as I understand it, the size of West Virginia, that have only 2,000 miles of

paved roads. Twenty percent of Indian country does not have running water or plumbing facilities.

These deficits in capital improvement and infrastructure are a direct consequence of the tribes' inability to tap into the capital markets in the same way that State and local governments can.

The essential governmental function test which Mr. Scheffler and Mr. Etcitty just described is a test that only applies to tribes. State and local governments do not have to pass the essential governmental function test in order to issue tax-exempt bonds. They have no restrictions. Only Indian tribes face these restrictions.

Senator SMITH. As you read the statute, does that violate the intent of Congress?

Dr. CLARKSON. The question is, was it the intent of Congress or was there one particular individual who managed to exert influence in a conference committee report? It is hard to tell what the intent of Congress was in the aggregate.

It is very clear to see what Congressman Givens's intent was, and that was to restrict the ability of tribes to issue the tax-exempt bonds. But it goes contrary to Congress's intent and longstanding practice of local empowerment and allowing tribes to exercise their ability to do self-determination.

So, it certainly is inconsistent with the broader Congressional policy of allowing Indian tribes to exercise self-determination, to exercise local control, and to basically treat them on par with State and local governments.

In fact, the conference report described that the intent of the bill was to treat tribes the same as State and local governments. Unfortunately, the resulting legislation failed miserably in that regard.

Senator SMITH. From your understanding of the history, have there been instances where these have been issued and they or the payments on the bonds have been defaulted on, or when the State and local communities have issued these and they have gone bad? Why the discrimination against the Indian tribes on this?

Dr. CLARKSON. Well, Senator, I am trying to be a little bit restrained in my rhetoric here.

Senator SMITH. I am trying to draw you out. [Laughter.]

Dr. CLARKSON. I have been circulating a *Law Review* article that I am anticipating publishing that goes through the history of the Tribal Tax Status Act and the 1987 amendments. It is a gentle policy piece that has the title of "Racism in the Tax Code."

As an academic, I am being provocative, so I am attempting to not use that rhetoric here. Unfortunately, the reality, the facts on the ground are, Indian tribes are being discriminated against in the tax code for no other reason than for being Indians.

Senator SMITH. I mean, if it is racism, that is what I want to focus the light on. But we do not have an IRS witness here. Are there instances where bonds have been abused or defaults have occurred? Is there a track record that justifies this on some other basis than racism?

Dr. CLARKSON. Senator, the IRS got a copy of my article and they called me to come meet with them. They promised it was not to audit me. [Laughter.] I sat down with the acting head of Tax-

Exempt Bonds, and they are actually helping me gather the data to understand the problem.

My understanding from the IRS is, they do not like the statute either, but they are stuck enforcing it. But what they were unaware of, until they read my article and looked at the data that I had gathered, was the fact that Indian tribes—well, let us put it this way.

There are approximately 15,000 tax-exempt bonds that are issued every year, and approximately 1.25 percent of those are challenged by the IRS. Almost 40 percent of the direct-issue tax-exempt bonds issued by tribes in the last 3 years have been challenged by the IRS, and 100 percent of the conduit bonds issued by tribes have been challenged by the IRS.

Senator SMITH. Well, why is it? Are they to finance economically unsustainable projects?

Dr. CLARKSON. No. These are for things like municipal golf courses, water treatment plants. For the conduit projects, the one I was involved with was for a hotel.

Senator SMITH. So there is nothing in the track record in terms of the performance of these bonds that would justify this treatment?

Dr. CLARKSON. Nothing at all, Senator. In fact, I am not aware of any tribe that has defaulted on a tax-exempt bond. Obviously there are a litany of instances where other municipalities and other governments have defaulted. I think Indian country actually has a stellar record in comparison to State and local governments just in general.

But you have the instance where the IRS is stuck enforcing a defective statute. To that end, they have indicated that they were unaware of the hazard rate of challenge. At least at the senior levels, they were unaware of that. So, they have expressed to me their interest in identifying bias and eliminating it. But in discussions that I have had with them, they, I think, would agree that the best fix would be a legislative fix.

Senator SMITH. So they want that, then? They feel like they are hamstrung in treating tribes like State and local bond issuances?

Dr. CLARKSON. That is the sense I get. I do not want to say that I am speaking for the IRS, but in all my conversations with IRS officials and senior IRS management, they recognize the problems in the statute, they recognize its defectiveness, they recognize its ambiguity, they recognize the uncertainty that it has created.

I think it would be administratively easier on them and require less specialized resources if they could just treat tribes as States. I think that would make it simpler for everybody. I think the IRS would find that simpler.

I would love to say that I could speak for them, but I obviously cannot. In my conversations with them, I have not heard a single IRS senior manager say that they think the statute, as is, is good.

I will give you an example. There is a tribe in Las Vegas. They are in Las Vegas, but they are not going to be competing with the Steve Wynn's of the world, or the MGMs in the gaming space. But they have land and they have access to water, so they have put together a golf course. And like 2,500 other municipalities in this

country, they financed that municipal golf course with tax-exempt debt.

Senator SMITH. Is this the Paiute?

Dr. CLARKSON. Yes, sir. The Las Vegas Paiute.

Senator SMITH. I have played it. It is great. [Laughter.]

Dr. CLARKSON. You played it. Let me ask you, Senator. Did you enjoy playing it?

Senator SMITH. Oh, it was wonderful.

Dr. CLARKSON. Was it a pretty course?

Senator SMITH. Beautiful.

Dr. CLARKSON. Well, here is the problem. The IRS says that if it was a pretty course, it cannot be intended to meet the recreational needs of the tribe, and the therefore challenged the tax-exempt status of it because it was pretty enough to attract non-Indian golfers.

Senator SMITH. I did not know I was hurting them to play there. [Laughter.]

Dr. CLARKSON. Senator, it was a pleasant golfing experience. It was one where, by playing it at the tribe's golf facility, you contributed to the economic base of the tribe. You helped employ groundskeepers. Hopefully you bought something at the pro shop.

Senator SMITH. But that is the point of this whole thing. I mean, so the idea that they should build golf courses just for Indians to play on is just ridiculous.

Dr. CLARKSON. Well, Senator, I could not agree more wholeheartedly. When you read through the Field Service Advisory that the IRS issued, it is highly problematic. Let me go back to my reserved self and say it is highly problematic.

But it also creates a high degree of uncertainty. The statute, as amended in 1987, adds, in addition to the essential governmental function test, it says you only get to be an essential governmental function if you are something that is "customarily" performed by other governments, without providing any guidance or any indication of what that means.

So even though there are 2,500 other municipal golf courses financed with tax-exempt debt—and in my written testimony I go through and give you a listing of several State-operated and governmentally operated resorts with hotels that were financed with tax-exempt debt—but for whatever reason, the current interpretation by the IRS of this defective statute says that that is not permissible for a tribe to do, and that is just wrong.

Senator SMITH. It sounds like Congress did not write it clearly enough. It sounds like Treasury is kind of sitting on it.

Dr. CLARKSON. Well, Mr. Chairman, let me suggest, the problem is that Congress decided to pass a statute that discriminated against the tribes. If they would remove that discrimination, eliminate the disparate treatment—I do not think the tribes are asking for anything special.

I think they are just asking to be treated the same, to be given the same access to the capital markets as their State and local counterparts. The problem is, because the statute is ambiguously drafted, it creates uncertainty. When the capital markets are faced with uncertainty, the appropriate reaction is to charge more interest.

So you have situations where tribes have to pay more to do the exact same thing, even if they could qualify for tax-exempt bonds, because it is uncertain as to whether their water treatment plan will survive scrutiny by the IRS.

I know there are at least two different tribes currently under challenge by the IRS for sewer plants, for water treatment plants. In fact, if you look at the legislative history, that was spelled out specifically. They were talking about roads, schools, and sewers. So, the ambiguity in the statute has begun to run amok.

I also want to emphasize that it is actually the poorer tribes that face the most harm from this defective statute. Some of the wealthier tribes, if they need the infrastructure, they can pay the taxable rates. It is unfortunate that they have to, because their State and local counterparts just down the road do not have to.

But I will tell you an example. I did a bond where I helped a tribe repurchase approximately 23,000 acres of ancestral homeland. There was no way they were going to be able to afford the purchase price and the debt service if they had to pay taxable rates, so we put together a very creatively structured tax-exempt bond that used a variety of mechanisms to draw down the rate to the point where they could afford the debt service and we amortized it over 40 years.

But had they not been able to get the tax-exempt rates, the project simply would not have gone through. They would not have been able to purchase the land. This is part of why the tax statute is so deleterious to Indian country, and this is part of why you have \$50 billion in unmet capital needs.

In fact, you have several million dollars in tax receipts that the Federal Government could be collecting, but does not, because if you remember the statute, the models that I put together actually showed that this would have a positive impact on Federal revenues, or at a minimum, be revenue neutral, because in Indian country, as Mr. Etcitty has pointed out, unemployment in some areas runs 50 percent in some tribes. I think there is even a tribe in Oregon that has an unemployment rate of 82 percent.

So in those cases, if the tribe were able to do a bond that would generate jobs, all of a sudden you would be getting Indian tribal members off of unemployment into wage-paying jobs, and they would then be paying taxes.

So the recent tax revenues from the workers, in these projects that would not get done if they could not get tax-exempt rates, would be revenue-enhancing and would more than offset any subsidy of taxes on bonds that are paid to the bond holders.

So even though the Federal Government may be getting less in revenue from taxes on the interest payments to the bond holders, that would be more than made up for just in taxes on wages alone.

Unfortunately, my model is a little incomplete because I started building it on Friday. But basically you have the situation where the taxes on the wages alone are more than enough to compensate for any loss in tax revenue in terms of tax on the bonds. But you also eliminate the need for some of the welfare transfer payments, because you are elevating the economic prospects of Indian country by allowing tribes to become self-sustaining economic engines.

So, if I could leave you with three main points. You have \$50 billion in unmet capital need that is a direct result of the defective tax statute. The essential governmental function test only applies to the tribes, it does not apply to State and local governments, and is, therefore, highly discriminatory. Finally, if you were to amend the statute, amend section 7871 so as to treat tribes just like States, you would actually increase Federal revenues. I have one model that says it is by \$77 million a year.

Senator SMITH. That is not through income taxes or FICA taxes?

Dr. CLARKSON. Just from taxes alone on the wages paid to workers in these projects. If you look on page 6 of my written testimony, and I have a chart here I can pull up in a second, but if you look at the number of tax-exempt bonds that were issued by non-tribal governments, in 2002 there were 14,000 bonds, accounting for \$355 billion.

In 2003, it was 14,752 bonds, accounting for \$378 billion. In 2004, it was 13,306 bonds, accounting for \$356 billion. In contrast, and as a direct result of the defective tax statute, in 2002, Indian country issued 4 bonds.

In 2003, Indian country issued 6 bonds, which was the one I worked on. In 2004, Indian country issued 5 bonds. So even though Indian country makes up at least 1.5 percent of the general population, it accounts for less than one-tenth of 1 percent of the tax-exempt bonding activity in the country, and it is a direct result of the hamstringing of tribal tax-exempt bond authority. You in Congress have the power to fix it very simply by amending section 1871 to treat tribes just like States.

Senator SMITH. Well, we will fix it. I wonder if you had a thought on this, and I just ask this for my own education. Is there any evidence that the ambiguity in this statute was done because there was a sense that tribes have other tax advantages that private businesses do not have, as to consumption taxes and things like that?

Dr. CLARKSON. No, sir. Actually, I believe the opposite. The intention of the legislation in 1982 was, basically, as you well know, you do not have an exemption from taxation unless one is specified.

So the intention of the 1982 act was to give tribes the tax-exempt bonding authority that they did not have. When the Internal Revenue Code was first passed in 1913, automatically it basically carried the provision for State and local governments to have tax-exempt bonding authority.

It was a direct Federal subsidy, an intentional Federal subsidy of local governments to be able to fund infrastructure, to fund economic development. Over time, the notion of a central government function has expanded.

I know it is an unpopular case, but if I might read to you a paragraph from the recent Supreme Court case, *Kelo*. Basically, the Supreme Court has opined, "Promoting economic development is a traditional and long-accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the court has recognized."

So the Supreme Court has said essential governmental functions, from a local government standpoint, are extremely expansive. There should have been no reason why Congress limited tribal au-

thority; when their expressed intention was to give tribes an expanded bonding authority, they fumbled at the goal line. It got hijacked in conference and, unfortunately, tribes have been paying the price ever since.

Senator SMITH. You have been very helpful, Doctor. Thank you so much.

[The prepared statement of Dr. Clarkson appears in the appendix.]

Senator SMITH. Mr. Schickli?

**STATEMENT OF SCOTT SCHICKLI, ESQ., ORRICK,
HERRINGTON, & SUTCLIFFE, LLP, PORTLAND, OR**

Mr. SCHICKLI. Thank you very much, Mr. Chairman, for inviting me here today.

My name is Scott Schickli. I am a tax attorney who, for 25 years, has focused on issuance of tax-exempt debt, and, for the last 13 years of those in Portland, OR, I have done a large amount of work on tribal financing.

As a lawyer, I am going to speak very narrowly and incrementally here. Others have testified to the benefit that changes in the existing law can bring to development of infrastructure and economic prosperity in Indian country.

I am going to focus on a fairly narrow point and ask your assistance, not in changing the law, but in clarifying the intent on one particular point relating to essential governmental function. That alone, without changing the text of the statute, can provide immense benefit to tribes.

Congress has long recognized the importance of public infrastructure, and this recognition has been very evident, as Dr. Clarkson pointed out, in the Federal tax code since its beginning.

It permits State and local governments to issue tax-exempt debt for a huge variety of purposes, and in fact, local governments routinely issue tax-exempt bonds to build streets, parking lots, water and sewer utilities, other utilities, and they do it to benefit their residents, to attract tourists, and to serve new commercial and industrial enterprises.

Local governments also issue tax-exempt debt to finance convention centers, hotels, auditoriums, parks, golf courses, and other recreational facilities, both to serve their residents, to attract tourists, and again to generate public revenue.

So, tribes have many of the same needs as State and local governments in promoting economic development, but they are increasingly handicapped by an ambiguous regulatory environment.

As a result, they are increasingly stymied in their ability to undertake the same types of infrastructure, recreational, and economic development projects that local governments provide for their citizens.

Tribes need your assistance in clarifying that they can use, under the 1987 act, tax-exempt debt to promote economic development to the same extent as State and local governments.

Let me take a little detour into history, some of which has already been touched on here, to get to my one and only point. Congress first authorized tribes to issue tax-exempt bonds in 1982 for

essential governmental functions, but did not define what an essential governmental function was.

Two years later, in 1984, Treasury issued regulations that defined an essential governmental function for tribal purposes very broadly. It included, among other things, not only customary activities of State and local governments, but also the many commercial and industrial activities that were eligible for assistance under two acts, the Snyder Act and the Indian Self-Determination Act.

In 1987, Congress amended the law to provide, as has been said before, a negative comment on what an essential governmental function did not include, which is that it did not include any function which is not customarily performed by State and local governments.

The 1987 amendment, again, did not affirmatively define what an essential governmental function was, it simply excluded certain undefined activities from the list.

Many believe, including myself, that Congressional intent, then, was simply to limit the financeable activities of tribes to the customary essential governmental functions of State and local governments. Others, though, have pointed to the fact that the legislative history of the 1987 act—and this is the only point that I really want to address here—is the only available guidance as to what Congress's intent was.

That legislative history does not speak with one voice. The most authoritative part of the legislative history, the conference report, simply repeats the language of the 1987 act itself. It states the intent of Congress was—and it states it exclusively in the negative—to identify certain things that Congress did not intend to be an essential governmental function.

But the conference report, the most authoritative part of the legislative history, conflicts with and does not adopt significant portions of the original House report. The original House report declared that the Treasury regulations were invalid, to the extent that they permitted taxes and financing by tribes of commercial and industrial facilities.

It may be the only time in history in which Congress has told the IRS and Treasury that they were being too liberal in their approach to taxation, but it did happen in the 1987 House report.

Because the conference report did not repeat the more restrictive language of the House report, it appears that the House report does not reflect the true intent of Congress.

This conflict in views as to what Congress intended has reached the point where it is paralyzing the ability of tribes to access tax-exempt financing for economic development and infrastructure development, which was the very benefit that was intended to be extended to tribes in 1982.

Senator SMITH. Do you know of some projects that would go forward if we could fix this, I mean, as a tax attorney in Portland?

Mr. SCHICKLI. Yes, I do.

Senator SMITH. Good. We will fix it.

Mr. SCHICKLI. The ambiguity is, as everyone today here has mentioned, sewer facilities, water facilities, roads, parking lots are routinely developed by cities to bring shoppers to a shopping district, to provide sewer and water services to large industrial facilities.

The situation in Indian country is that tribes develop their infrastructure for the same reasons as local governments do. But unlike States and local governments, tribes themselves undertake much of the economic development in their territory rather than relying on private enterprise.

We do not believe that Congress intended to treat tribal infrastructure in any different fashion than State and local infrastructure, simply because it served the interests of tribal, rather than private, enterprise.

I am not talking here about changing the law to authorize taxes and financing for explicit tribal business enterprises, although there are certainly strong arguments in support of that.

I am talking about simply not disqualifying tribes, clarifying that Congress did not intend to prohibit a tribe from using tax-exempt financing to finance a sewer system because its largest customer, in addition to individual residences and the like, is a large tribal commercial facility.

We see no evidence in the conference report that Congress intended to prevent tribes from using tax-exempt debt to finance any facilities that State and local governments customarily finance, regardless of whether those facilities are operated on a profitable basis.

So as a result, without changing the law, simply by reenacting the provision as stated but stating clearly what you intend that provision to cover, you can assist tribes in dealing with the situation in which Indian country lags significantly in every measure of infrastructure and economic development.

Mere clarification of the 1987 Congressional intent, with respect to this one important provision, can have a truly significant effect on the ability of tribes, large and small, to be able to borrow for roads and other activities and functions that promote economic development in Indian country.

Senator SMITH. Let me ask you the question I was getting at with Dr. Clarkson. Are there any tax advantages that tribes have that local and city governments do not have? For instance, they do not pay property taxes.

Mr. SCHICKLI. They do not pay property taxes. They are exempt from general income taxes. Like city and State governments, they do pay FICA taxes on wages earned by employees. I cannot think of a tax advantage that they have that State and local governments do not have.

Senator SMITH. But they have their own property tax. Perhaps some do, I do not know. But I am just trying to weigh the equities here. I am just trying to think, is there another side?

My mother always taught me that the best way to ruin a good story is to hear the other side. I do not know the other side of this, but from what I understand, there is no good reason why this ambiguity exists.

Mr. SCHICKLI. Thank you, Senator. Again, my focus was very narrow, just on clarifying what the original intent was.

Senator SMITH. We can do that.

[The prepared statement of Mr. Schickli appears in the appendix.]

Senator SMITH. Mr. Shammel, a Montanan-Oregonian.

Mr. SHAMMEL. Cow Creek country now, sir.
 Senator SMITH. Yes. I am claiming you.

STATEMENT OF WAYNE A. SHAMMEL, ESQ., GENERAL COUNSEL, COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, ROSEBURG, OR

Mr. SHAMMEL. Thank you very much, Chairman Smith, for calling us here today.

I am most interested in following up in creating the record that you would like to do. I would, first, like to recognize Michael Rondeau, who is our chief operating officer from the Tribe. Thank you for coming here with me, Mike.

Dr. Clarkson made a comment about his "reserved self," and I promise not to do that. I am not sure that I have much of one.

I would like to step away from my prepared comments for a second and respond to a comment about the IRS feeling like it is hamstrung from the Tax Status Act. I do not buy it, quite honestly. I think there is a large institutional bias built in on some historical assumptions about how this country has developed in relation to Indian country that have followed through in the implementation of their administrative procedures.

Senator SMITH. That is why I keep asking the question: is there something else that they are given that I am not aware of?

Mr. SHAMMEL. Yes. It is our whole history.

Senator SMITH. All right.

Mr. SHAMMEL. I mean, the wealth of our country was originally founded on stealing lands from the Indians and selling it in a great retail market. There is now a resurgence in this country, given the recent commercial successes of certain tribes. There is this underlying fear that the tribes are going to take back over. I have to tell you, I find that absolutely, stunningly ridiculous.

Senator SMITH. No, you want customers.

Mr. SHAMMEL. That, and the fact that we are great Americans. There is an oft-quoted fact about, more American Indians are fighting and dying for the flag since the Revolutionary War till now. We take great pride in that. It is very offensive to find out that you are afraid that we are going to take back our country. So, I will point that out.

One thing, sir, I am not sure you might even be aware of: we have always found that we are comfortable with, or accepting of, the fact that the Congress has plenary power over the tribes. We did not realize that the Treasury Department was going to take that upon themselves also.

Every year, the Congress publishes a list of the Federally recognized tribes, and we know that that confirms our inter-governmental status with the Federal Government on an annual basis.

However, if you are an Indian tribe, as distinct from a State or municipality, you have to get a special ruling from the IRS in order to just qualify for the tax-exempt bonding that our other distinguished panelists are pointing out.

So, despite the word of Congress that we exist as tribes and as bodies underneath the Federal Government, underneath the Tax Act to access this mechanism, we still need the blessing from the

Treasury Department. I have always found that astounding. I would think, when Congress spoke, that was enough.

Senator SMITH. Well, we are always fighting with the executive branch. [Laughter.]

Mr. SHAMMEL. One of the themes that I wanted to touch on was not just the benefits to Indian country on the issuance of tax-exempt debt, but also to our local communities. One of the things, from Navajo country to Cow Creek, that you are going to find with tribal economic development, is these are community development initiatives.

We do not tend to distinguish who receives our services on the basis of their tribal membership or not. You want to drive on the road, you do not need a membership card.

Do you want to drink water from the water treatment system? You do not need a membership card. You want to be a patron? You do not need a membership card. However, if you happen to be the tribal government, you have to jump through these different hoops to issue the debt.

Senator Smith, I wanted to thank you, and Senator Baucus, in his absence, for your particular leadership on Federal tax issues affecting Indian tribes over the past several years.

I very much appreciate your particular effort on the comprehensive effort of our tribal pension benefit plans, and both you and Senator Baucus have advocated the passage of tax incentives in Indian country over the years to spur investment in Indian country, such as the accelerated depreciation provisions and the Indian employment tax credit, both of which expired on December 31, 2005, and, in addition to the initiatives that we are talking about today, very much need to be extended.

The Cow Creek Tribe is one of nine Federally recognized tribes in Oregon. We have approximately 1,300 members and about 1,600 employees. We are the second-largest employer in Douglas County, third if you count the Federal Government.

We have single-handedly contributed to our unemployment rate dropping from just under 12 percent to just over 8 percent. We are pretty high in that county, but we figure that 2 or 3 percent is fairly valuable.

What does that have to do with tax-exempt bonding? Everything. When the tribe was restored in the early 1980s, it was the passage of the Indian Gaming Regulatory Act and the expansion of capital into Indian country for gaming that allowed the tribe to move forward on its mission of community development. We have followed through on that, through diversifying our economy past gaming and into local infrastructure projects.

We are currently in the middle of a water and sewer development project in the Canyonville area. It is the largest public works project in Southwestern Oregon in over 30 years. With that, we are bringing the entire local community along.

But what we are finding, on the margins, because of the costs associated with bringing the capital in to the project, we are having to turn away the very best edges of what the State and Federal Governments want to do in cooperation with us.

Let me give you an example. Part of our project is to re-do the freeway interchange at Exit 99, which is where the tribe's casino and the Canyonville developments are.

The State said, well, while you are redoing this, we have a problem. We want to close down a couple of rest areas, one to the north, one to the south, and combine them in one spot. So, we entered into a joint project with them.

We said, we would like to do that also, because we can then have people stopping near our area, and we can get your assistance in an in-kind basis in improving this interchange for the developments that we are doing.

As we moved forward with that project, we gained a lot of momentum with entities like the Oregon Travel Information Council, and, oh, my goodness, this is a wonderful public/private partnership that we have to move forward our idea of turning our rest areas into regional tourism kiosk destinations.

We have had to tell them, we love that idea also, it can also help us, but we have \$3 million into this, this is a \$50 million project. The extra \$1.5 million that you are looking to find to put full-time staffers in there, to have people, when they come through our State, be able to stop and find out about all of the wonderful activities in our area, we simply cannot afford it.

I can directly equate that \$1.5 million to what we have had to do in financing this project in moving segments of our project from the tax-exempt to the taxable side of the ledger.

For example, in 1998, we were able to issue close to \$55 million in bonds, about \$35 million of which were tax-exempt. Now in the course of refinancing that project, there are several elements that we have had to take off of the tax-exempt side of the ledger and move to the taxable side of the ledger, so basically about a 20 percent cost increase.

One example was the convention center that happens to be attached to the Seven Feathers Hotel and Casino resort. In 1998, when we originally went through the bonding process and constructed this, we went through a lot of hoops to make sure that it was physically separate, that there were separate accounting structures, a lot of additional costs so that we could qualify for the same types of tax-exempt debt funding that 90 percent of the convention centers in this country are based on.

In 2006, just in order to retain a nationally qualified bond counsel, we had to give up that portion of that tax-exemption. This year, in reissuing those bonds, all of that debt that we were able to get through in 1998 as tax-exempt was recategorized as taxable simply to get the bond opinion.

In order to issue these, you need to get a nationally recognized bond counsel. We actually had to go through quite a journey to find a bond counsel that was willing to sign off. Why? Because of the chilling effect imposed by the IRS simply by making statements about how, well, if it is attached to a commercial enterprise, we might audit it. What does that do? It makes bond attorneys nervous. It chases investors away.

Just yesterday evening as we were sitting here after dinner, I got a call from one of my underwriters saying, hey, we are having a

problem with this particular investor. They do not understand the difference between a qualified and unqualified opinion.

Your tax counsel is going to give us a bond opinion that says the IRS has looked at these issues, basically the very reason for our hearing, and they were inserting a paragraph. Why? Because they do not want to be held accountable for this uncertainty.

So now we have an investor who is willing to put about \$20 million into these projects that has all these non-tribal benefits and attributes too that is saying, is that a qualified opinion? I have a nationally recognized counsel saying, we are not sure what it is, we are just trying to describe what the IRS is doing.

So in tangible effects, the costs on what is about a \$100 million transaction in 2006 have gone up half a million dollars or more in excess of what they would have been, and we are paying 20 percent more for the money.

The result is, the project has contracted, and of course our priorities have to focus back on the tribal community, first and foremost. What it has done is pulled back on our ability to serve those outward interests that we are trying to serve as well.

Another example would be Senator Wyden, some months ago when he was visiting us, mentioned the work that you were all doing in Oregon in trying to push forward on biomass initiatives.

So the Cow Creek Tribe has spent upwards of \$75,000 already doing fuel supply studies, engineering studies, figuring out how we can link the work that we are doing to the initiatives that you all are trying to push to get our forest products industry on a more diversified industrial basis.

We were sitting through, working through the legal and financial analysis, and realized, if we were the State of Oregon, we would be able to work with private industry, go out there, and for the tax-exempt costs, be able to start putting together these plans and put it into work.

But unfortunately, because of the restrictions that have been described by our panel, we can only do that on a conduit basis and we simply cannot get bond counsel to sign off on it because, as has been noted, 100 percent of those deals have been challenged.

So here we are, being incented and asked to assist on initiatives that are coming from your offices, and we are stuck because of what the Treasury Department has done. Really, I think it is not much more than an ambiguity, driven by the desires of some to categorize our activities on a more commercial than governmental basis.

I looked back over the last 75 years of development of Federal Indian policy and the wonderfully enlightened things that have happened, from the Indian Reorganization Act, to the Self-Determination Act in the 1970s, and then the things we thought were great boons, like the Tribal Governmental Tax Act that we have been discussing, and realized that there is a distinction being created about tribes.

There is a bias being created about tribes, that because we are so small, we have been dispossessed from much of the ground, the assumption has been about our disappearance and that we would eventually sort of melt in and go away.

There are many people, some of your colleagues, some of your colleagues in the House, who still believe that as an underlying principle. That is my personal opinion, sir. I believe that is what is driving some of this.

There is a conscious, a willful disregard of the ability of the tribes to segment their activities on the governmental and commercial side, whereas, we have a full set of Federal laws that recognized just that.

Under the Reorganization Act, we can form constitutional governments and we can issue Federal charters, but somehow that is looked at differently than a State operating as the State government, versus the State operating as an industrial development authority.

[The prepared statement of Mr. Shammel appears in the appendix.]

Senator SMITH. Wayne, recently I was driving from Portland to Pendleton. I turned on the radio and there was a call-in talk show. It may be the projects you are describing, but the Cow Creeks were the issue, and you were buying some land in the county, and people were complaining that the purchase takes the land off the tax rolls. Is that what you are talking about?

Mr. SHAMMEL. We face a lot of that. We faced it for the first time in Cow Creek's history and since their restoration here recently with one of our county commissioners. Frankly, I think it had more to do with the election than the actual policy overriding it.

We commissioned a study—and I am getting to your point, sir—to analyze the net economic impacts in Douglas County of the tribe's business and land acquisition activities, and it is attached to my testimony, too, sir.

The answer was, in 2004, the net economic impact of the Cow Creek Tribe was \$107.1 million.

Senator SMITH. So, it was positive?

Mr. SHAMMEL. The additional. That was taking out of the equation jobs that would otherwise exist, money that would otherwise be spent. When you look at the land in the county, we were less than 2 percent of the exempt property in the county, so behind veterans' exemptions, behind armed forces exemptions.

So my personal opinion is, this is just simply a matter of control. There are some people out there, that particular commissioner, perhaps some in the Treasury—I do not know; I cannot speak for them; they have all been fine people that I have dealt with, so please do not audit me—who would rather force us to pay them \$1,000 to distribute to someone else rather than watch us voluntarily give \$2,000 to it.

That is the net effect that we are facing with these restrictions in the tax code. The things that we could do for our own folks, the things we can do for the outside communities, are being disincented for purposes that we frankly do not understand either.

I believe that it is a weakening argument for us to point back at racism as the issue, but it is bias of some sort, because I cannot sort it out otherwise.

Senator SMITH. It is obviously not very productive to use that word, but I do want to get this fixed, and we will pursue it vigorously.

Will you do me a favor, Wayne?

Mr. SHAMMEL. Yes, sir.

Senator SMITH. Will you give Sue a big hug for me?

Mr. SHAMMEL. I will.

Senator SMITH. Tell her it is from me.

Mr. SHAMMEL. I will, sir.

Senator SMITH. Thank you, gentlemen, and Ms. Scheffler. Thank you so much for your testimony. You have added immeasurably to the Senate record. You have certainly shined the light on what we need to do, and we will set about doing it. Thank you for coming such a long way.

Doctor, do you have a final comment?

Dr. CLARKSON. Yes. There is a story I meant to mention earlier about how backwards this is. There was a tribe in Oklahoma that was repurchasing some ancestral homeland as well. They are in farming country there in central Oklahoma, and there was a full crop of corn on the land.

They wanted to buy the land, and they could have actually harvested the corn to pay for the debt service, but their tax counsel told them, if you harvest the corn, you will jeopardize the tax-exempt status of the bonds you are about to issue to buy the land.

So at the end of the day, the tribe repurchased the land with a tax-exempt bond, but to avoid having the IRS challenge it based on the essential governmental function, they had to let the corn rot.

Basically, that sort of rotting impact, that sort of depressing impact, that deleterious impact is pervasive throughout Indian country. Indian country is a victim of this tax code.

I am not giving the IRS a pass. I do think that they recognize that there are problems in the statute. It goes beyond just expanding what essential governmental functions are. It also includes expanding and giving tribes the ability to issue meaningful private activity bonds.

For example, a very important issue. A lot of governments issue private activity bonds to finance mortgage loans for low-income housing. That is something that is clearly an essential government function. Tribes cannot do it. There are all sorts of private activity bonds that are financed for economic opportunity, whether it is building hotels, whether it is building resorts.

Post-Katrina New Orleans is wholly dependent on a resurgence in tourism to bring back its economic vitality. Guess what? They are going to be issuing tax-exempt bonds, they are going to be issuing private activity bonds, and everybody thinks it is a great idea.

Indian country has tourism opportunities, but they are denied the ability to issue bonds to fully take advantage of the natural beauty that is throughout Indian country because the tax code restricts them.

You were asking me, and I did not give you a good answer right at the beginning, about the differentials in terms of any sort of tax advantages. Indian tribes really do not have any tax advantages over State and local governments. In fact, they are worse off.

There are instances where tribes that generate economic activity on a reservation can charge sales taxes, but it turns out that if the purchasers are not Indian, the State can impose additional taxes

on the non-Indian purchases on the reservation, but the converse is not true. The tribe cannot tax transactions that happen off the reservation.

For example, New Hampshire routinely advertises its lack of sales tax as an enticement. When I was living in Cambridge, it was sometimes worth the drive up to New Hampshire to purchase a large-ticket item because you were not paying sales tax. They do that as a mechanism for economic opportunity, but that opportunity is denied tribes.

Senator SMITH. We do that in Oregon, too.

Dr. CLARKSON. And in terms of taking land off tax rolls, any time a State or local government purchases land, it goes off the property tax rolls. A lot of people were complaining that Indians do not pay taxes on their gaming revenues, but I am unaware of any State that pays taxes on its lottery proceeds.

So, just as State and local governments do not pay tax on their commercial or quasi-commercial activities, tribes do not either, so they are on par with that. But on the flip side, the State actually has an advantage.

When I was on the faculty at Rice University in Houston, the Sam Houston Race Park went up. A horse racing track went up, financed with tax-exempt bonds. So the State can be in the gaming business and use tax-exempt bonds to finance it.

So if you take the most egregious examples of what people might find problematic, the States are doing it. But we can pull back and look at much more benign things, like hotels, convention centers, golf resorts, or even hospitals.

The other problem, in addition, is the notion of conduit financing. There are some opinions coming out of the IRS—and again, I am not giving them a pass—where they have basically said that the statute is completely silent in terms of the ability of tribes to use conduit mechanisms to finance things, and basically the reason the tribes went to the conduit mechanisms was because of the inequities in the tax code.

Even Merrill Lynch is on record as saying that that is the rationale for conduit financing. We have a private non-profit, a charity, going to build a hospital. They will go and either do a private activity bond, or it may go through some sort of development authority and issue a conduit bond.

The IRS said, well, gee, if the tribes cannot do it directly, they cannot do it indirectly. But as I recall, the entire purpose of conduit financing is to allow entities to do it indirectly, *i.e.*, issue tax-exempt bonds even though they are not governmental entities. The entire purpose of conduit financing is to allow entities to do indirectly that which they cannot do directly.

But again, because of the ambiguities in the statute, because the IRS is taking the most extreme interpretation of the statute, tribes, again, are being punished and hamstrung. So, it is heartwarming to hear you say you are going to fix it, and if there is anything I can do to help, whether providing data or writing testimony, please let me know how I can help.

Senator SMITH. I would love to get your article, but I hope we fix it before I get the article. [Laughter.] Yes?

Mr. SHAMMEL. Senator Smith, one last comment that we have not addressed here yet at the table. You asked what tools might be helpful.

The one other impediment that the tribes have that we have not discussed yet is lack of an exemption from registration under the securities laws that is shared by the State and local governments now. As a result of the lack of this exemption, we are forced into a higher yield, what they usually call a 144(a) Qualified Investor Market.

The net effect is, our debt is always a quarter of a percentage point higher, even when we can break through these other hurdles and issue tax-exempt debt. So you first have the hurdles to get through that we have talked about today, and then when you get that, then we have an even more expensive marketplace because we do not share that exemption with the State and local governments.

Dr. CLARKSON. To echo Mr. Shammel's point, my preliminary research on that issue—which is a separate article that takes on the capital markets—indicates that the price premium that tribes pay is anywhere between 75 basis points to 250 basis points. So there again, you have a situation——

Senator SMITH. Surely for regulatory reasons and statutory reasons.

Dr. CLARKSON. Again, this is one of those instances where you do not get an exemption unless one is specified. Unfortunately, in 1933 and 1934 when Congress was redoing the Securities Act, even though they were at the same time passing the Indian Reorganization Act, I guess it never occurred to any of the Senators then that tribes might be issuers of capital market debt.

Even though they put in exemptions for registration from municipal debt, adding two words “and tribes” would have solved the problem. But again, this is an instance where tribes, when they go to the capital markets, are at an extreme disadvantage to their State and local counterparts.

Now, this does not have anything to do with the tax code, but it has everything to do with the lack of a securities registration exemption for tribes and it is, again, an instance where, if you have a municipality or a tribe doing the exact same thing, the tribe is going to pay more for no other reason than that they are a bunch of Indians, and that is just wrong.

Senator SMITH. Yes. On that note, we will thank you again, and we are adjourned.

[Whereupon, at 4 p.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Written Testimony of Dr. Gavin Clarkson
Assistant Professor

University of Michigan School of Information, School of Law, and Native American Studies

I. Summary

Upwards of \$50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development, in part due to the restrictions imposed on tribal access to the capital markets, specifically the ability of tribal governments to issue tax-exempt debt. Section 7871 of the Internal Revenue Code requires tribal tax-free bond proceeds to only be used for “essential governmental functions,” a restriction not applicable to state and municipal bonds. Section 7871(e) further limits the scope of available tax-exempt bonding authority by stating that “the term ‘essential government function’ shall not include any function which is not customarily performed by State and local governments with general taxing powers” without providing any guidance as to when a particular activity becomes “customary” for a municipal government.

These restrictions have severely limited tribal abilities to access the capital markets, and although American Indians make up more than 1.5% of the population, tribes issued less than 0.1% of the tax-exempt bonds between 2002 and 2004. These restrictions harm the poorer tribes the most, as the differential between tax-exempt and taxable interest rates often determines the feasibility of a project. Without access to tax-exempt rates, poorer tribes simply cannot afford the debt service required to begin to make a dent in the more than \$50 billion in unmet capital needs.

Tribal governments are also victims of a disproportionate number of enforcement actions by the Internal Revenue Service (“IRS”). Only approximately 1% of the more than 15,000 tax-exempt municipal offerings are audited by the IRS each year, but at least 40% of direct tribal tax-exempt issuances and 100% of tribal conduit issuances have been or are currently being challenged by the IRS. The ambiguity of the statute has led to a number of IRS enforcement actions that simply would not have happened had the issuer not been a tribe. In each of these cases, the tribes financed activities that had previously been financed by state and local governments without any challenge from the IRS. In at least one instance, the IRS Chief Counsel’s office recommended against the enforcement action because of the weakness of the IRS position.

When the capital markets face uncertainty, their logical response is to charge a price premium. The ambiguity in the statute coupled with the IRS’s extreme interpretation of that statute causes such uncertainty, and results in higher interest rates for tribal projects. Additionally, IRS actions have effectively destroyed the market for tax-exempt conduit bonds for tribal projects, even if those projects could have been financed by other conduit borrowers.

Under the status quo, the Tax Code and the IRS are systematically discriminating against tribal governments relative to state and local governments. Congress has the opportunity to rectify this differential treatment simply by rewriting section 7871 to treat tribes as states for all tax purposes, without qualification. Based on the models that I have constructed, the impact on tax revenues of such a change would likely be positive, or at least revenue neutral.

II. Background

*Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.*¹

Just like state and local governments, Indian tribes, as separate sovereign governments, have an obligation to improve the lives of their citizens. When such governmental entities engage in economic development activities to elevate the economic status of their constituencies, they often seek outside funding to finance those activities. Many tribal governments, however, are still suffering from the impacts of deleterious historical federal policies and are unable to provide the basic infrastructure that most Americans take for granted, such as passable roadways, affordable housing, and the plumbing, electricity, and telephone services that come with a modern home.² Additionally, tribal communities are often burdened with extremely low socio-economic factors, including low educational achievement, high unemployment, high poverty,³ and low per capita income.⁴

For many tribes the only sources of capital to address these problems are limited to grants and other assistance from the federal government, but such funds are often insufficient to address the myriad responsibilities facing tribal governments.⁵ Tribal governments are in desperate need of better and more affordable access to capital, such as the tax-exempt bond market, given that as much as \$50 billion in annual capital needs go unmet in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development.⁶ This deficit stands in stark contrast to the widely publicized success of tribal gambling facilities.

Contrary to popular belief, gaming does not provide sufficient funds to meet the needs of all tribal governments, as most of the more than 560 federally recognized Indian tribes⁷ do not have any form of gaming operations,⁸ and of those that do, only a small handful generate significant revenues.⁹ While a small number of tribes near major metropolitan centers have started successful gaming enterprises, hundreds of tribes have not entered the gaming industry,

¹ *Kelo v. City of New London*, 125 S.Ct. 2658 (2005).

² See Raymond C. Etcitty, "Tribal Advice and Guidance Policy, Advisory Committee on Tax Exempt and Government Entities," p. II-7 (June 9, 2004), available at http://www.irs.gov/pub/irs-tege/act_rpt3_part2.pdf. See also Bureau of the Census, Statistical Brief, Housing of American Indian on Reservations – Plumbing (April 1995) (Approximately 20% of American Indian households on reservations lack complete plumbing facilities, compared to 1% of all U.S. households, and 1 in 5 American Indian reservation households disposed of sewage by means other than public sewer, septic tanks, or cesspool.)

³ The average percentage of American Indians living in poverty is 25.67%, compared 12.38% for the general population. See U.S. Census Bureau 2000.

⁴ Per capital income for American Indians is \$12,893.00, compared to the overall U.S. average of \$21,587.00. See U.S. Census 2000.

⁵ Etcitty at p. II-7

⁶ See Henson, E. and J. Taylor, *Native America at the New Millennium*, Harvard Project on American Indian Economic Development Working Paper, 2003.

⁷ "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," Federal Register, November 25, 2005 (Volume 70, Number 226), p. 71193

⁸ According to the National Indian Gaming Association, only 217 tribes have gaming operations of any kind.

⁹ See National Gambling Impact Survey Commission Report, p. 2-10 ("The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.")

and many that have operate casinos located far from population centers.¹⁰ Most reservations are characterized by extensive land bases, spread out communities, and homesteads mired in one long-standing poverty cycle.¹¹ In fact, the need for economic development in Indian Country remains acute and impacts nearly every aspect of reservation life, as most Indian tribes have an economy that is on par with many third world countries. The unemployment rate, for example, hovers around 50 percent for Indians who live on reservations, nearly ten times that for the nation as a whole, and almost one third of American Indians live in poverty.¹²

All too many tribal governments lack the ability to provide the basic infrastructure most U.S. citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity and telephone services that come with a modern home. According to the U.S. Census Bureau, approximately 20% of American Indian households on reservations lack complete plumbing facilities, compared to 1% of all U.S. households. About 1 in 5 American Indian reservation households dispose of sewage by means other than public sewer, septic tanks, or cesspool.¹³

The Navajo reservation is the same size as West Virginia, yet it only has 2,000 miles of paved roads while West Virginia has 18,000 miles.¹⁴ Obviously, roads, telephones, electricity, and the like are taken for granted by investors and employers even in the most distressed inner cities of the United States. Their absence from large portions of Indian country poses a daunting barrier to tribal leaders' attempts to attract new private sector investment and jobs.

Such realities highlight the importance of stimulating economic development to create economic opportunity for tribal members. Many scholars, investors, and tribal officials charged with developing their economies are well aware that access to capital for tribes and individual Indian entrepreneurs is a significant and pressing problem. The unanswered question is one of capital formation: How do tribes obtain the necessary capital to build a permanent economic base? The answer should be to access the capital markets in the same way that state and local governments do to finance their own economic development activities, but unfortunately severe impediments to a level playing field continue to plague Indian Country.

State and local governments obtain revenues to finance their operations primarily through three channels: tax revenues, borrowing, and federal grants.¹⁵ Borrowing has increasingly become a favored method of raising revenue for state and local governments.¹⁶ These entities may, with some exceptions, issue so called tax-exempt bonds.¹⁷ This tax-exempt status of

¹⁰ See Donald L. Barlett and James B. Steele, *Wheel of Misfortune*, TIME, December 16, 2002.

¹¹ "Entrepreneurial Sector is the Key to Indian Country Development," Indian Country Today, September 6, 2002 at p. A2.

¹² See Tex Hall, The Native American Capital Formation and Economic Development Act of 2003: Testimony on Senate Bill 519, 2003.

¹³ Statistical Brief, Housing of American Indian on Reservations - Plumbing, 1995, Bureau of the Census

¹⁴ Michael J. Kurman, *Indian Investment and Employment Tax Incentives*, 41 FED. B. NEWS & J. 578 (1994).

¹⁵ M. David Gelfand, STATE AND LOCAL GOVERNMENT DEBT FINANCING, §1.04, Clark Boardman Callaghan (2003)

¹⁶ Such obligations fall under the heading of "municipal securities" in Section 3(a)(29) of the 1934 Act. The applicable definition under this section for our purposes describes a municipal security as "direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, an any municipal corporate instrumentality of one or more states..." Therefore, municipal security or municipal debt, when used in this article, can refer to a state, municipality, or an agency or instrumentality of either.

¹⁷ I.R.C. §103 (1986).

municipal bonds has been a part of the Federal Tax Code since its adoption in 1913.¹⁸ Fippinger explains that a tax-exempt bond is “a debt security in which the interest portion of the debt service paid is not included in gross income.”¹⁹ The tax-exempt status of municipal debt allows state and local governments to issue bonds at lower interest rates, since the income from those bonds results in the same net level of income for taxpayers in higher tax brackets.

To illustrate this phenomenon, assume that a taxpayer, whose effective tax rate is 40 percent, purchases a \$1000 taxable bond from a corporation that pays interest of 10 percent. She will receive an annual interest payment of \$100, but she must pay \$40 of that in taxes, resulting in a net income of \$60. If she were to purchase a \$1000 tax-exempt bond from a municipality that pays 6 % in interest, she would still receive \$60 and would be economically indifferent between the two bonds, assuming that all other attributes of the bonds were equivalent, such as the risk of default and the dates of payment. Thus, the municipality can raise the same amount of capital as the corporation for substantially less in interest expense.

Unfortunately, such advantage is not universally available in Indian Country. Although a number of tribal economies have been able to expand²⁰ and obtain debt financing from a variety of lenders²¹ to finance economic development activities and infrastructure improvements,²² most tribes are still unable to access the capital markets competitively, if at all. A primary roadblock to capital markets is the discriminatory provisions of the 1982 Indian Tribal Governmental Tax Status Act (“Tribal Tax Status Act”),²³ part of the Internal Revenue Code (“Tax Code”). While the goal of the Tribal Tax Status Act was to treat tribes just as states are treated in the Tax Code,²⁴ the act fell far short of achieving the goal of equal treatment desired by tribes,²⁵ and in fact substantially limits the ability of tribes to raise debt for economic development activities. Although the Tribal Tax Status Act extended “certain tax provisions to American Indian Tribal governments on the same basis as such provisions apply to States,”²⁶ it did not recognize tribes as equivalent to states for *all* tax purposes, specifically denying them the elements of public finance that they desired most.²⁷

While the federal policy of exempting from federal taxation interest paid on state bonds issued to finance and effectuate state policy is a recognition and affirmation of that state’s sovereignty, a similar recognition and affirmation of sovereignty unfortunately does not extend to Indian tribes because tribes face two additional restrictions that do not apply to their state and local governmental counterparts. In the first instance, unlike state and local governments, Indian

¹⁸ Eric J. Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 424 (2004).

¹⁹ Robert A. Fippinger, *THE SECURITIES LAW OF PUBLIC FINANCE*, §1:2.2, Practising Law Institute (2002).

²⁰ See FELIX COHEN’S HANDBOOK OF AMERICAN INDIAN LAW, 2005 ed., §21.03, hereinafter HANDBOOK (Professor Clarkson was a contributing author for this most recent edition of the HANDBOOK, providing material on tribal finance, tribal corporations, economic development, and intellectual property).

²¹ Fitch Ratings Report, “Tribal Governments in the Bond Market,” February 4, 2004, p. 1.

²² Townsend Hyatt, Perry E. Israel, Alan Benjamin, *An Introduction to Indian Tribal Finance* (published by Orrick, Herrington & Sutcliffe LLP) 2004. See also HANDBOOK, §21.03.

²³ Title II of Pub. L. No. 97-473, 96 Stat. 2608 (1982) (codified at I.R.C. §7871) (2004) [hereinafter Tribal Tax Status Act].

²⁴ See 127 Cong. Rec. S5666, S5667 (daily ed. June 2, 1981) (remarks of Sen. Wallop (R-Wyo.)).

²⁵ See, e.g., Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADM. L. REV. 333 (Summer 1994); Robert A. Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335 (1985).

²⁶ Senate Report No. 97-646 (1982), section I (summary).

²⁷ See HANDBOOK *supra* note 20, §21.03[2][c].

tribes cannot issue private activity bonds.²⁸ Worse, however, is the act's "additional requirement"²⁹ that tribal tax-free bond proceeds can only be used for "essential governmental functions,"³⁰ a restriction not applicable to state and municipal bonds.³¹

The damage to tribal economic prospects was compounded when the act was amended in 1987 to clarify that tribes can only issue tax-free bonds for projects "customarily"³² financed by states and local governments (e.g., schools, roads, government buildings, etc.).³³ Thus, Indian tribes can only issue tax-exempt debt if "substantially all" of the borrowed proceeds "are to be used in the exercise of any essential governmental function."³⁴ In addition, section 7871(e) states that "the term 'essential government function' shall not include any function which is not customarily performed by State and local governments with general taxing powers" but does not provide any guidance as to when a particular activity becomes "customary" for a municipal government. As the tax-base of a tribe is usually insufficient for a tribe to issue general obligation bonds³⁵ and since the revenue from a revenue bond is usually linked to the project being financed,³⁶ this additional restriction to "customary" governmental activity places tribes at a tremendous disadvantage relative to the capital markets and is inequitable when compared to other forms of municipal debt.³⁷

III. Direct Statutory Harm

By restricting the scope of what can be financed with tax-exempt debt, poor tribes in particular are denied the opportunity to address their glaring infrastructure and economic development needs. Tribes with substantial natural resources or significant gaming operations have the option of financing certain activities on a taxable basis even if, absent a restrictive Tax Code, they would be able to finance those activities on a tax-exempt basis. Poorer tribes, however, do not have that luxury, and upwards of \$50 billion in annual capital needs go unmet in Indian Country,³⁸ in part because the debt service required to finance the projects to meet those needs is too expensive at taxable rates. Tribal governments need the ability to issue tax-exempt debt on the same basis as state and local governments. To continue to deny them such ability is to continue to foster discrimination in the Tax Code.

²⁸ See Williams *supra* note 25, at 382; Aprill *supra* note 25 at 335; see also Hyatt, Israel, *et al*, *supra* note 22, p. 19 ("State and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit corporations, or to finance mortgage loans for first-time low- and moderate-income home buyers, or to finance low- and moderate-income residential rental property. Private activity bonds are also issued for airports, docks, and wharves, solid waste facilities, sewage facilities, and certain other facilities."). Under current law, Indian tribes are barred from issuing private activity bonds for anything other than a tribal manufacturing facility. 26 USC §§7871(c)(2)-(c)(3).

²⁹ I.R.C. §7871(c).

³⁰ I.R.C. §7871(c)(1).

³¹ See HANDBOOK *supra* note 20, §21.03[2][c].

³² I.R.C. §7871(e).

³³ See H. R. No. 100-391 at 1139, 100th Cong., 1st Sess. (1987).

³⁴ 26 USC §7871(c)(1). "Substantially all" is not defined in the statute but is believed to mean at least 95% of the proceeds. See Hyatt, Israel, *et al*, *supra* note 22, p. 18.

³⁵ See Williams, *supra* note 25, at 385 ("few Indian communities enjoy the thriving economic environment necessary to sustain a stable tax base").

³⁶ See Aprill, *supra* note 25, at 342.

³⁷ Although legislative proposals have been offered in the past that would put tribal debt on an equal footing with municipal debt for tax law purposes, such legislation has yet to pass. See e.g. H.R. 2253, 107th Congress (2001)

³⁸ See Henson, E. and J. Taylor, *supra* note 6.

The deleterious impact of these discriminatory restrictions can be seen in the relative paucity of tribal tax-exempt financings. For the years 2002, 2003, and 2004, state and local governments issued an average of 14,038 short- and long-term tax exempt bonds.³⁹ Over the same period, tribal government annually issued an average of five short- and long-term tax-exempt bonds.⁴⁰ In dollar terms, for the years 2002-2004, state and local governments issued on average \$363.6 billion of tax-exempt debt⁴¹ while tribal governments issued on average only \$202 million of tax-exempt debt.⁴²

Given the relative numbers of municipal and tribal issuers, the expected number of tribal tax-exempt issues should be more than an order of magnitude higher. American Indians account for more than 1.5% of the national population, yet tribes issue less than one tenth of one percent of the tax-exempt bonds each year.

	2002 Issues	2002 Par Amount (US\$ mil)	2003 Issues	2003 Par Amount (US\$ mil)	2004 Issues	2004 Par Amount (US\$ mil)
State authority	1,943	125,595.7	1,978	119,013.3	1,884	102,837.4
Local authority	2,109	59,156.1	2,141	62,572.7	1,837	57,197.4
District	4,351	54,509.7	4,613	56,560.5	4,298	58,235.3
City, Town or Village	4,062	46,948.4	4,330	54,526.9	3,782	53,368.7
State	272	34,042.4	262	48,401.7	241	47,042.6
County /Parish	1,047	23,325.1	1,146	24,479.3	961	23,182.0
College or University	199	7,045.9	226	8,929.4	235	8,860.1
Direct Issuer	69	3,991.1	56	4,244.1	68	5,781.3
Co-op Utility	4	930.0	-	-	-	-
Total	14,056	355,544.4	14,752	378,727.9	13,306	356,504.8
Indian tribe	4	194.4	6	233.2	5	178.4

Source: Thompson Financial

³⁹ See Spreadsheet and letter from Lisett Rodriguez of Thomson Financial on May 12, 2006. For 2002, 2003, and 2004, state and local governments issued 14,056, 14,752, and 13,306 tax-exempt short and long-term bonds respectively. *Id.*; See also BOND BUYER ONLINE ARCHIVES, ANNUAL MUNICIPAL DEBT SALES, LONG TERM BONDS, NUMBER OF ISSUES, available at, http://www.bondbuyer.com/msa_displayquickreport.html?prod=decade_bondissues (last viewed 12/12/2005); BOND BUYER ONLINE ARCHIVES, ANNUAL MUNICIPAL DEBT SALES, SHORT TERM BONDS, NUMBER OF ISSUES, available at, http://www.bondbuyer.com/msa_displayquickreport.html?prod=decade_noteissues (last viewed 12/12/2005), stating that for 2002, 2003, and 2004, state and local governments issued 12,517, 13,251, and 11,993 tax-exempt long term bonds respectively and for 2002, 2003, and 2004, state and local governments issued 3,435, 3,300, and 3,172 tax-exempt short term bonds respectively.

⁴⁰ See Spreadsheet and letter from Lisett Rodriguez of Thomson Financial on May 12, 2006. For 2002, 2003, and 2004, tribal governments issued 4, 6, and 5 tax-exempt short and long-term bonds respectively. *Id.*; See also BOND BUYER ONLINE ARCHIVES, LONG TERM BONDS, *supra*, note ; BOND BUYER ONLINE ARCHIVES, SHORT TERM BONDS, *supra*, note . For the years 2002, 2003, and 2004, tribal governments issued 6, 9, and 5 long term bonds respectively. For the years 2002, 2003, and 2004, tribal governments issued 0, 0, and 1 short term bonds respectively. (These Bond Buyer tribal bond statistics likely include some taxable bonds and therefore the Thomson figures provide a more accurate picture of tribal tax-exempt debt issuances).

⁴¹ *Id.* For 2002, 2003, and 2004, state and local governments issued \$355,545.5 billion, \$378,961 billion, and \$356,504.8 billion dollars of tax-exempt debt respectively. *Id.*

⁴² *Id.* For 2002, 2003, and 2004 tribal governments issued \$194.4 million, \$233.3 million, and \$178.4 million dollars of tax-exempt debt respectively. *Id.*

Although many municipal bonds fund infrastructure projects, a significant number fund projects related to tourism and economic development. Tourism is a major economic force for many municipalities and is vital to the economic prospects of several communities. As an example, post-Katrina New Orleans is almost wholly dependent on a rebound in tourism for its long-term economic viability. Tourism and tourism-related economic development can include hotels, golf resorts, and convention centers, even racetracks and casinos, all of which cannot be financed by tribes with tax-exempt debt. In contrast, the IRS has acknowledged that several thousand municipal golf courses have been financed with tax-exempt debt, and billions of tax-exempt bonds have been used by non-tribal governments to build hotels (see Appendix A) and convention centers (See Appendix B).

Repurchasing ancestral homeland is another potential use for tax-exempt bonds, yet statutory restrictions and the extreme interpretation by the IRS have resulted in some highly unfortunate outcomes. In one instance, a tribe was interested in repurchasing some ancestral homeland adjacent to land that it already owned. Unfortunately, the land in question was farmland with an existing crop of corn nearing maturity. The tribe wanted to issue tax-exempt bonds to purchase the land but was advised that if they harvested the corn, the tax-exempt status of their bonds could be jeopardized. The tribe was thus forced to let the corn rot in order to preserve the tax-exempt status of the bonds.

In another case, a tribe had the opportunity to repurchase 23,000 acres of ancestral homeland for approximately \$5.5 million. Most of the land in question had been over forested, but a small section containing harvestable timber remained that would help the tribe afford the land purchase. Again, the restrictions in the Tax Code meant that the tribe would not be able to harvest timber on the land, and they could barely afford the interest payments even at tax-exempt rates. Working with a colleague of mine, we were fortunately able to develop a structure that allowed the tribe to afford the necessary debt service, and the tribe was able to purchase the land.

IV. Harm Resulting from Agency Interpretation and Enforcement

In the wake of the 1987 amendment to the Tribal Tax Status Act, one issue facing tribes seeking to utilize tax free debt obligations is that Congress has provided little guidance, other than the limiting language in the 1987 Conference Report, as to what is and what is not an essential governmental function customarily performed by states.⁴³ As noted above, the uncertainty engendered by these terms provides little guidance for regulated entities, in this case, Indian tribes,⁴⁴ and much leeway to regulators, in this case, the IRS.

For the years 2002, 2003, and 2004, the Tax Exempt Bonds Office closed an average of 363 audits each year.⁴⁵ Assuming that an exam takes two years to complete,⁴⁶ this time period

⁴³ A recent letter sent by Eric Solomon, the Treasury Department's acting deputy assistant secretary for tax policy, seems to have only added to the uncertainty. See Alison L. McConnell, *Enforcement: Treasury Letter Leaves Lawyers Debating Tribal Bonds Issue*, BOND BUYER, January 19, 2006. While some have interpreted the letter as validating the IRS's current enforcement stance, others argued that "Solomon's juxtaposition of 'essential government function' with 'customary' activities of state and local governments...sustained tribes' arguments for financing commercial facilities with tax-exempt bonds." *Id.*

⁴⁴ Indian Country Today has noted the possibility that "tribes could be penalized for not complying with a dodgy definition." Rebecca L. Adamson, *The Taxman Cometh*, INDIAN COUNTRY TODAY, January 14, 2003.

⁴⁵ TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *Statistical Portrayal of the Tax Exempt Bond Office's Enforcement Activities From Fiscal Year 2002 through Fiscal Year 2004* (September 2005), available at, <http://www.treas.gov/tigta/auditreports/2005reports/200510186fr.pdf>.

⁴⁶ The length of a bond audit is variable and recent reports detail means to shorten the audit cycle. See ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES, AUDIT CYCLE TIME AND COMMUNICATIONS: EMPLOYEE

results in approximately 1.29% of all state and local tax-exempt issues being audited. The percent of tribal bond issues audited is more than an order of magnitude greater than 1.29%. In a March 2005 *Bond Buyer* article, Charles Anderson, field operations manager for the IRS tax-exempt bond office, stated the intention to conduct “a dozen or more examinations of tribal bond issues within the next year or so.”⁴⁷ In September 2005, Charles Anderson stated that twelve tribal tax-exempt bonds, six tribal conduit bonds and six direct tribal issues, are currently being challenged by the IRS.⁴⁸ Christie Jacobs of the office of Indian Tribal Governments at the IRS stated during February, 2006, that eight to ten tribal tax-exempt issues were currently under audit.⁴⁹ Current research efforts thus appear to reveal that 100% of tribal conduit bonds issued since 2002 and at least 40% of direct tribal bonds issued since 2002 have been subject to IRS examinations.⁵⁰ In a January 12, 2006, Memorandum, several Dorsey & Whitney tax attorneys expressed the following opinion regarding the IRS’ enforcement practices:

We believe that, if the Service were forced to defend its position before a court, the tribes should prevail on both of these issues [direct tribal issues and conduit issues]. Our concern is that, by initiating numerous audits against individual tribal issuers, the Service is (a) taking on the tribes one by one, (b) without the tribes being able to coordinate their analysis, research and arguments, (c) in a situation where it is very difficult to get the issues before a court for review.⁵¹

This high rate of tribal audits appears even more disturbing in light of the fact that tribal tax-exempt issues make up only one-tenth of one percent of the tax-exempt bond market.⁵² The focus of IRS resources on issuances making up merely .1% of the total market by itself raises questions of IRS bias against tribal governments. Even the venerable Wall Street firm of Merrill Lynch is on record decrying the inequity of the tax treatment of tribes relative to municipalities.⁵³

One of the more egregious examples of hostile and adverse treatment of tribes is the case of the Las Vegas Paiute Tribe. The tribe was not in a position to compete in the gaming market, but they did have sufficient land thirty miles north of Las Vegas to develop a golf course. The Paiutes used proceeds from a tax-free bond issuance to finance construction of a public golf course with a clubhouse, a retail store that sells golf-related items, and a restaurant, all of which

PLANS AND TAX EXEMPT BONDS (June 9, 2004), available at, http://www.irs.gov/pub/irs-tege/act_rpt3_part4.pdf. For the purposes of this article, two years is believed to be representative of the average cycle time. Even if the average cycle time is more or less than two years, the underlying point of disparate between state and local and tribal tax-exempt issuances remains true.

⁴⁷ Emily Newman, *IRS Looking for Evidence of Arbitrage Abuse*, BOND BUYER, March 16, 2005.

⁴⁸ See Alison L. McConnell, *IRS’ Anderson Says Attorneys At Fault for Tribal Bond Confusion*, BOND BUYER, September 22, 2005.

⁴⁹ Figure taken from phone conversation with Christie Jacobs on February 14, 2006.

⁵⁰ The percentage of direct tribal issues is obtained by using Charles Anderson’s figure of six direct issues under audit from the September 22, 2005 *Bond Buyer* article, see note 48, and dividing this figure by 15, the *Thomson Financial* reported number of tribal issues since 2002, see note 39. The actual figure is likely higher because Anderson’s figure of six direct issues does not likely cover all direct issue audits of bonds issued since 2002.

⁵¹ Mark A. Jarboe, LynDee Wells, Thomas D. Vander Molen, Mary J. Streitz of Dorsey & Whitney, *Memorandum to Tribal Clients Concerning Tribal Tax-Exempt Financings* (January 12, 2006).

⁵² See Spreadsheet and letter from Lisett Rodriguez of Thomson Financial on May 12, 2006.

⁵³ See e.g. Merrill Lynch Municipal Credit Research, “Indian Gaming Bond Pricing Update,” May 24, 2004 (tribes are forced to contend with “inequities in the Tax Code”)

were open to the general public.⁵⁴

In August of 2002, however, the IRS issued a Field Service Advice Memorandum (“FSA”) and advised the Las Vegas Paiutes that construction of a public golf course is “other than an essential governmental function within the meaning of §7871(e).”⁵⁵ Although the IRS acknowledged that “as of 1998 there were 2,645 publicly owned, municipal golf courses in the United States,”⁵⁶ and “it is likely that construction and operation of golf courses are customary governmental functions,”⁵⁷ it nonetheless decided to deny the tax-exemption based on its determination of “customary use.” In a letter to the IRS, Mary J. Streitz of Dorsey & Whitney complained that by

[o]ver-relying on selected portions of the legislative history, the FSA suggested that tribal governments may not finance “commercial or industrial facilities” with tax-exempt bonds *even where such facilities satisfy the customary performance test*. Although the House Ways and Means Committee had indicated a concern about tribal governments financing commercial and industrial activities with tax-exempt bonds, the committee chose to adopt only the customary performance test to address its concerns.⁵⁸ (emphasis in original).

Streitz also pointed out that “[t]he entire legislative history reinforces that the statutory test turns on the frequency of a government practice, not on any other requirement.”⁵⁹

The argument set forth by the IRS is that the golf course was not “intended to meet the recreational needs of [the] Tribe.”⁶⁰ Although thousands of other public golf courses have been considered essential governmental functions, the IRS took the position that Indian tribes cannot utilize tax-free debt to construct golf courses and accompanying club houses because, in its opinion, the course was not of the type that would be used by tribal golfers. The FSA admits that all publicly built and operated golf courses “are developed to enhance the lifestyle of both golfing and non-golfing citizens of the community and perhaps to create jobs,”⁶¹ and in-house counsel recommended not litigating the bond exemption because it would “be difficult to argue that Golf Course is so commercial in nature that state and local governments would not own and operate similar enterprises.”⁶² Additionally, the FSA acknowledged that “some courts, including the Tenth Circuit, have adopted the principle that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.”⁶³ In short, the IRS’ position was untenable based on existing public practices and judicial rulings, but it denied the tax-exemption anyway.

Thus, the FSA essentially says that Indian tribes cannot utilize tax-free debt to construct golf courses and accompanying club houses if the courses pass a subjective line of being too nice for tribal members, or in the alternative, nice enough that it might attract non-tribal members. One wonders if courses funded with tax-exempt bonds such as Torrey Pines would encounter

⁵⁴ IRS Field Service Advice Memorandum No: 20024712 (date of release Nov. 22, 2002) [hereinafter FSA].

⁵⁵ FSA at 1.

⁵⁶ FSA at 2.

⁵⁷ FSA at 1.

⁵⁸ Mary J. Streitz, *Letter to Timothy L. Jones, Internal Revenue Service, Tax Exempt Bonds* (November 26, 2002).

⁵⁹ *Id.* at 2.

⁶⁰ FSA at 5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

these same difficulties. The FSA admits that all publicly built and operated golf courses “are developed to enhance the lifestyle of both golfing and non-golfing citizens of the community and perhaps to create jobs,” but nonetheless denies the tribe’s admitted effort to “further the economic development of [the] Tribe and to reduce [the] Tribe’s dependence on” its limited available resources,⁶⁴ because these are commercial rather than recreational pursuits.

Streitz criticizes this analysis by pointing out that the FSA overlooks the fact that “many state and local government golf courses are “destination” golf courses intended to attract visitors from *outside* the community in which the golf course is located, thus promoting economic development in the community and raising revenues for the state or local government.”⁶⁵ A list of such destination golf resorts is included in Appendix C.

V. Destruction of the Tribal Conduit Bond Market

Constricted by the discriminatory essential governmental function requirement, some tribes have chosen to finance projects such as hotels on a taxable basis; however, several tribes have attempted an alternative involving a tax-exempt “conduit financing.”⁶⁶ In conduit financing the tax-exempt security is actually issued by a local government agency (referred to as the conduit issuer) to finance a project for a third party (referred to as the conduit borrower). The security for this type of issue is either the credit of the conduit borrower or pledged revenues from the project itself rather than the credit of the conduit issuer. Such securities are not general obligations of the conduit issuer because the conduit borrower is liable for generating the pledged revenues. Since the conduit issuer is not subject to the “essential governmental function” test, the conduit mechanism should enable the tribe to finance projects with tax-exempt bonds that it might otherwise have to finance on a taxable basis.⁶⁷

This alternative method of raising revenue for income and job generating projects permits tribes to finance the development of such projects as hotels and convention centers but places the tribe in the position of borrower instead of issuer of the tax-exempt debt. Therefore, the tribe is the obligor, although not the issuer, of the tax-free debt obligation. This distinction is important as the essential governmental function requirement of section 7871(c)(1) only applies to obligations “issued by an Indian tribal government (or subdivision thereof).” Thus, conduit financing is debt financing, with the state acting as the middle-man.

Additionally, conduit financing is an established form of public finance typically utilized by 501(c)(3) (non-profit) organizations. Conduit financing has also won the endorsement of the Tax Court. In *Fairfax County Economic Development Authority v. Commissioner*,⁶⁸ the Tax Court held that the development authority was the real issuer of industrial development bonds used to build a facility, a portion of which would be leased to the United States Government Printing Office.⁶⁹ It reached this conclusion despite the fact that the federal government was the obligor of the bonds because the credit of the government as a lessor of the retail space backed the bonds.⁷⁰ The Tax Court reasoned that form governs substance in section 103 cases and held

⁶⁴ *Id.* (Note that this sentence was blacked out where the quote ends. This is the author’s interpretation of this part of the FSA).

⁶⁵ Streitz, *supra* note 58, at 3.

⁶⁶ Merrill Lynch has suggested that the use of conduit financing directly “stems from inequities in the tax code,” Merrill Lynch Municipal Credit Research, “Indian Gaming Bond Pricing Update,” May 24, 2004.

⁶⁷ See Hyatt, Israel, *et al*, *supra* note 22, p. 21.

⁶⁸ 77 T.C. 546 (1981).

⁶⁹ *Id.* at 546-49.

⁷⁰ *Id.*

that the development authority be respected as the issuer of the bonds, even though the federal government was the real obligor.⁷¹ Despite the formal legality of these arrangements, the IRS has effectively destroyed the ability to issue conduit bonds for tribal projects, arguing that tribes cannot do directly what they cannot do indirectly⁷² while other conduit borrowers of tax-exempt bond proceeds routinely do so without challenge. How else would private charities raise tax-exempt debt for facilities such as a hospital?

Despite the criticism of the IRS's aggressive approach in the 2002 FSA, the service has taken a hostile position against conduit financing by tribes as well. The IRS recently issued a Technical Advice Memorandum ("TAM") taking the position that tribal proceeds from conduit financings are subject to the "essential government function" test.⁷³ The IRS justified its hostility towards tribal conduit financing by suggesting that allowing tribes to use the conduit mechanism would "would run counter to Congressional intent."⁷⁴ This argument was criticized by Mark Jarboe of Dorsey & Whitney as an instance of the IRS taking "a results-oriented approach to creating [sic] an ambiguity because of what they think Congress meant rather than what Congress said."⁷⁵

Even though the very legislative history cited in the TAM suggests that water treatment plants fall squarely within the definition of an essential governmental function as evidenced by legislative history,⁷⁶ the IRS is nonetheless challenging the tax-exempt bonds issued by the Morongo tribe for "water and wastewater system improvements, roadway improvements, and public parking facilities."⁷⁷

Through its enforcement activities, the IRS continues to propagate discrimination in the Tax Code. Although the legislative restrictions resulted from demonstrably hostile motives,⁷⁸ the IRS has chosen to pursue the most restrictive interpretation possible in its enforcement, exacerbating the discriminatory effect.

VI. Conclusion

The authority to supplement tax revenue by issuing tax-free debt obligations is clearly a major part of any state's efforts to develop and maintain its infrastructure and economy. The policy of self-determination, along with the legal recognition of tribes as governments with responsibilities to their constituent populations, necessitates tax-free bond authority.

Yet tribes, to this day, and as a direct consequence of the essential governmental function requirement, do not enjoy such authority to any meaningful degree. Not only is section 7871 discriminatory against Indian tribes, inconsistent with the federal policy of self-determination, and contrary to the legal recognition of tribes as governments, it is a stifling repression of the efforts of the historically most impoverished, isolated, and disaffected minority group in the

⁷¹ *Id.*

⁷² See Susanna Duff Barnett, *\$145.5M Cabazon Deal Under Scrutiny IRS Steps Up Probes of Indian Tribes*, BOND BUYER, August 06, 2004 (quoting Charles Anderson, manager of field operations for the IRS tax exempt bond division).

⁷³ IRS Technical Advice Memorandum TAM-142470-05, PLR 200603028, 2005 PLR Lexis 1322 (October 11, 2005, release date January 20, 2006).

⁷⁴ *Id.* at 6.

⁷⁵ Alison L. McConnell, *IRS: 'Essential Government Function' Needed for Conduit Debt*, BOND BUYER, January 23, 2006.

⁷⁶ H.R. Conf. Rep. No. 97-984, at 16-17.

⁷⁷ See Rick Saskal, *IRS Takes Closer Look at Calif. Tribal Deal's Tax-Exempt Status*, BOND BUYER, August 30, 2005.

⁷⁸ See generally Williams *supra* note 25; Aprill *supra* note 25.

nation to improve their daily lives. Indeed, although the law now technically grants tribes tax-free bond authority, the essential governmental function test in reality renders this power one that exists in theory only.

Tribes are similarly situated to states in terms of their governmental obligations to their citizens. Tribes also enjoy a significant degree of sovereignty as domestic dependent nations. Therefore, tribes should, as a matter of both policy and equity, enjoy an identical status as states in the Tax Code, including the broad ability to issue tax-free debt.

Indian tribes have for centuries existed in a kind of dual world where they are sovereigns for some purposes but treated as if their governmental responsibilities are not real for other purposes. The Tax Code's restriction on tribal tax-free bonding authority is an example of the latter. This restriction is a blatant and unjustifiable discrimination against Indian tribes by the Congress in the enacting legislation and by the IRS in its enforcement actions. Moreover, the official federal policy of Indian Tribal Self-Determination requires meaningful access to the tax-free bond market if it is to be successful.

Based on models I have developed to account for taxes on wages paid by employees of projects that, absent the availability of tax-exempt financing, would simply not take place, I am confident that amending section 7871 to expand the scope of tribal tax-exempt bond authority would have a positive impact on federal tax revenues, or at least be revenue neutral. Thus, there is no budgetary impediment to making the necessary changes to the statute.

The Supreme Court's view of economic development as an essential governmental functions bears repeating:

Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.⁷⁹

Unfortunately, the Supreme Court was not opining on an Indian law case but was instead discussing economic development in the municipal context. The parallels are clear, however. Under the status quo, the Tax Code and the IRS are systematically discriminating against tribal governments relative to state and local governments. Congress has the opportunity to rectify this differential treatment simply by rewriting section 7871 to treat tribes as states for all tax purposes, without qualification.

⁷⁹ *Kelo v. City of New London*, 125 S.Ct. 2658 (2005)

Appendix A

Hotel projects involving tax-exempt issuances of hundreds of millions of dollars have commenced in a number of municipalities, including the following:

- The Austin City Council approved the authorization of up to \$275 million of tax-exempt bonds to finance an 800-room hotel near the city's newly expanded convention center.⁸⁰
- Baltimore issued \$305 million to build a Hilton convention hotel in downtown Baltimore.⁸¹
- The Chicago Metropolitan Pier and Exposition Authority issued \$133 million of tax-exempt hotel revenue bonds for a Hyatt Hotel.⁸²
- The City of Omaha Convention Hotel Corporation sold \$103.5 million of tax-exempt bonds for a 450-room hotel to be managed by Hilton Hotel.⁸³
- The Denver Convention Center Hotel Authority issued \$349 million in revenue bonds to build a 1,100-room hotel managed by the Hyatt Corporation.⁸⁴
- The South Carolina Jobs-Economic Development Authority issued \$63.4 million in bonds to fund construction of a 404-room hotel to be operated by Radisson Hotels International Corporation.⁸⁵
- The Indianapolis Local Public Improvement Bond Bank issued \$18.2 million in tax-exempt bonds to help fund a 230-room luxury Hilton hotel.⁸⁶
- Overland Park, Kansas, issued \$87 million in bonds to build a 412-room, full-service convention center hotel operated under a 15-year contract by Sheraton Operating Corporation.⁸⁷
- The city of West Palm Beach, Florida, issued \$55 million in tax-exempt revenue bonds for a parking structure for CityPlace, a \$550 million mixed-used development downtown.⁸⁸
- The Virginia Economic Development Review Issued \$10 million in tax exempt bonds to renovate the Stonewall Jackson Hotel, which contains 124 deluxe guest rooms.⁸⁹
- The District of Columbia Council approved a measure authorizing the redevelopment of the Washington Convention Center site, which could eventually lead to up to \$1.3 billion

⁸⁰ Elizabeth Albanese, *Austin City Council Approves Bond Authorization for Hotel Financing*, BOND BUYER, March 14, 2001, at 5.

⁸¹ Andrew Ackerman, *Baltimore Convention Hotel Plan Gets Second Nod From City Council*, BOND BUYER, August 17, 2005, at 5.

⁸² Karen Pierog, *Chicago hotel revenue to back exposition authority bond sale*, BOND BUYER, February 26, 1996, at 1.

⁸³ Elizabeth Carvlin, *Deal in Focus: City-Backed Omaha Hotel Granted Rare Insurance Coverage*, BOND BUYER, April 10, 2002, at 34.

⁸⁴ Elizabeth Albanese, *Deal in Focus: Denver Selling \$349 Million for Convention Center Hotel*, BOND BUYER, June 17, 2003, at 27.

⁸⁵ Christine Albano, *Big Entrance: Hotel Deals Set Off Frenzied Buying, Earn High Yields*, BOND BUYER, June 6, 2001, at 1.

⁸⁶ Elizabeth Carvlin, *Indianapolis Bond Bank Plans \$28M For Hotel, With Moral Obligation*, BOND BUYER, May 4, 2004, at 4.

⁸⁷ Christine Albano, *High-Yield Focus: Kansas Hotel Deal's Revised Structure Eases Buy-Side Concerns*, BOND BUYER, December 20, 2000, at 7.

⁸⁸ Shelly Sigo, *West Palm Beach, Fla., Still Has All-Stars in Its Eyes*, BOND BUYER, July 20, 2001, at 37.

⁸⁹ Matthew Vadum, *VIRGINIAL: Hotel Gets Facelift*, BOND BUYER, October 27, 2005, at 35.

in tax-exempt bond issuances.⁹⁰

A similar practice involves the issuance of tax-exempt bonds to build hotels in economically depressed areas eligible by their empowerment zone status. Such was the situation in the following instances:

- Little Rock, Arkansas, voters approved the issuance of \$19 million in tax-exempt empowerment zone revenue bonds to renovate the Little Rock Hilton.⁹¹
- San Antonio issued \$130 million of tax-exempt empowerment zone bonds to finance a new Hyatt Corporation 1,000-room convention center hotel.⁹²
- The St. Louis Industrial Development Authority issued \$98 million of tax-exempt federal empowerment zone bonds to partially fund the construction of a convention center hotel.⁹³

Tax-exempt bonds have not only been used to build hotels and convention centers but also to finance horse tracks owned by counties or municipalities.

- In 1987, Polk County, Iowa officials issued \$40 million in tax-exempt bonds to build the Prairie Meadows Horse Racing Track.⁹⁴
- Retama Park outside of San Antonio was financed with \$75 million in tax-exempt debt, financing, with a rate of 8.75% on 25-year bonds.⁹⁵ Retama Development, the nonprofit organization set to by the city to construct and equip the racetrack in 1997, subsequently issued \$93.9 million in refunding bonds.⁹⁶
- The Grand Prairie Sports Facilities Development Corporation refinanced "one of the most successful horse racing tracks in the state" in part by issuing \$15.2 million of tax-exempt debt.⁹⁷

⁹⁰ Matthew, Vadum, *Old D.C. Convention Center Site Gets Go-Ahead for Redevelopment*, BOND BUYER, June 8, 2005, at 4.

⁹¹ Elizabeth Albanese, *Little Rock Voters Approve Hotel Bond Issue*, BOND BUYER, July 11, 2002, at 3.

⁹² Elizabeth Albanese, *San Antonio Deal for Hyatt Hotel Empowered With Tax-Exemption*, BOND BUYER, April 26, 2005, at 1.

⁹³ Yvette Shields, *St. Louis' Hotel Financing Deal Wins Investment-Grade Rating*, BOND BUYER, November 15, 2000, at 3.

⁹⁴ *Will County Bet on Racetrack Bonds?* HOUSTON BUSINESS JOURNAL, August 24, 1992, at 1.

⁹⁵ Janin Friend, *Lone Star racetrack is set to issue debt, but some in industry say deal is risky*, BOND BUYER, July 7, 1994, at 1.

⁹⁶ Emily Newman, *Tax Enforcement: IRS: Texas Development Corp.'s \$171M of Debt May Be Taxable*, BOND BUYER, January 12, 2005, at 5.

⁹⁷ Darrell Preston, *Deal in Focus: Texas Town Cleans Up at the Track With Recent Refunding*, BOND BUYER, March 30, 1999, at 22.

Appendix B

Tax-Exempt Civic and Convention Center Financings, January 1, 1995 to February 2, 2005

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
07/02/2002	1,482.98	Metropolitan Pier & Expo Auth	IL	Revenue & Refunding Bonds
09/01/1998	524.46	Washington DC Convention Center	DC	Sr Lien Dedicated Tax Rev Bonds
09/15/1996	506.77	Metropolitan Pier & Expo Auth	IL	Refunding Bonds
02/01/1997	460.84	Anaheim Public Finance Auth	CA	Senior Lease Revenue Bonds
09/01/1999	420.58	Metropolitan Pier & Expo Auth	IL	Metro Pier & Expo Bonds
12/01/1996	340.56	San Francisco St Off Bldg Auth	CA	Lease Revenue Bonds
04/01/1998	326.23	Dallas City-Texas	TX	Revenue Refunding & Improv Bonds
08/05/2003	300.47	New Orleans Exhibition Hall Auth	LA	Revenue Bonds
07/15/2000	299.71	Orange Co-Florida	FL	Tourist Development Tax Rev Bonds
11/01/2002	292.43	San Jose Financing Auth	CA	Lease Revenue Bonds
05/01/2002	260.60	Florida Capital Trust Agency	FL	Revenue Bonds
04/01/2004	237.54	Omaha City-Nebraska	NE	GO Refunding Bonds
06/04/2003	235.52	Los Angeles Conv & Exhib Ctr Au	CA	Var Rte Lease Rev Ref Bonds
06/01/2003	226.05	Los Angeles Conv & Exhib Ctr Au	CA	Lease Revenue Refunding Bonds
09/01/1998	205.00	Convention Ctr Expansion Fin Auth	CA	Lease Revenue Bonds
12/01/1997	201.04	Marion Co Conven & Rec Facs Auth	IN	Excise Tax Lease Rev Rental Bonds
09/02/1998	200.74	Metropolitan Pier & Expo Auth	IL	Expansion Project and Ref Bonds
12/01/2000	198.00	Omaha City-Nebraska	NE	General Obligation Bonds
02/01/2001	194.21	Denver City and Co-Colorado	CO	Excise Tax Revenue Bonds
07/15/1997	193.49	Orange Co-Florida	FL	Tourist Dev Tax Ref Rev Bonds
07/01/2001	186.15	San Jose Financing Auth	CA	Lease Revenue Bonds
08/01/1999	184.74	Washington	WA	Certificates of Participation
03/01/1996	182.01	San Antonio City-Texas	TX	Hotel Occup Tax Rev Bonds
12/01/1998	177.89	Orange Co-Florida	FL	Tourist Dev Tax Ref Rev Bonds
07/02/1996	175.28	Dade Co-Florida	FL	Special Obligation & Refunding
01/15/1996	167.12	New Orleans Exhibition Hall Auth	LA	Special Tax Bonds
02/01/2000	158.42	Gtr Richmond Convention Ctr Auth	VA	Hotel Tax Revenue Bonds
11/01/1999	150.00	Las Vegas Conv & Visitors Auth	NV	Revenue Bonds
06/15/1995	143.91	Houston City-Texas	TX	Revenue Refunding Bonds
04/01/2001	140.50	Houston City-Texas	TX	Hotel Occupancy Tax Rev Ref Bonds
02/01/1996	137.26	Kansas City Munic Assist Corp	MO	Leasehold Ref Rev Bonds
06/14/2001	134.95	Austin Convention Enterprises	TX	Conv Ctr Hotel 2nd Tier Rev Bonds
05/15/2001	134.89	Oakland Joint Powers Fin Auth	CA	Lease Rev Ref Bonds
05/01/1999	130.00	Boston-Massachusetts	MA	BAN
02/15/1999	128.27	New Jersey Sports & Expo Auth	NJ	Convention Center Ref Bonds
03/01/1996	127.42	Metropolitan Pier & Expo Auth	IL	Hospitality Facilities Rev Bonds
11/01/1999	124.17	Maryland Economic Dev Corp	MD	Revenue Bonds
10/01/2000	121.62	King Co-Washington	WA	Unltd Tax GO Refunding Bonds
04/17/2003	118.58	St Louis Municipal Finance Corp	MO	Leasehold Rev Ref Bonds
04/15/2002	116.89	Boston-Massachusetts	MA	Special Obligation Bonds
08/01/2003	110.24	Regional Convention & Sports Comp	Autho	Refunding Bonds
06/14/2001	109.67	Austin Convention Enterprises	TX	Conv Ctr Hotel First Tier Bonds
07/11/2002	108.20	Minneapolis City-Minnesota	MN	Convention Center Bonds
11/01/2002	106.31	Hampton-Virginia	VA	Convention Center Revenue Bonds
03/02/2004	106.01	Hamilton Co Convention Facs Au	OH	Convention Facs Auth Rev Bonds
04/01/2002	102.97	Omaha Convention Hotel Corp	NE	First Tier Revenue Bonds
09/01/2003	102.25	Charlotte City-North Carolina	NC	Ref Certs of Participation
11/06/2001	101.32	Rhode Island Convention Ctr Auth	RI	Refunding Revenue Bonds
09/01/1996	97.43	Clark Co-Nevada	NV	GO Ltd Tax Bonds
06/24/1999	97.00	Minneapolis City-Minnesota	MN	General Obligation Bonds

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
03/24/2004	93.94	Ernest N Morial Exhib Hall Auth	LA	Special Tax Refunding Bonds
06/01/2001	93.00	Washoe Co-Nevada	NV	GO Convention Center Ref Bonds
03/01/1999	92.43	Beverly Hills Public Fin Auth	CA	Lease Revenue Bonds
10/07/2003	90.88	Detroit City-Michigan	MI	Conven Facs Spec Tax Rev Bonds
01/01/2000	85.62	Washoe Co-Nevada	NV	GO Convention Center Bonds
07/02/2002	85.00	San Jose Financing Auth	CA	Lease Revenue BANs
12/13/2001	84.58	Grand Rapids Building Authority	MI	General Obligation Bonds
12/01/1997	84.00	Franklin Co-Ohio	OH	Tax and Lease Anticipation Bonds
02/01/2000	82.52	New Jersey Sports & Expo Auth	NJ	State Contract Bonds
02/01/2001	81.94	Portland City-Oregon	OR	Limited Tax Revenue Bonds
02/25/2004	81.34	Palm Beach Co-Florida	FL	Public Improvement Rev Ref Bonds
10/19/2004	80.89	Kansas City Munic Assist Corp	MO	Leasehold Improvement Rev Bonds
05/01/2001	80.71	Palm Beach Co-Florida	FL	Public Improv Rev Bonds
09/21/2000	80.00	Minneapolis City-Minnesota	MN	GO Convention Center Bonds
03/22/2001	75.00	Denver City and Co-Colorado	CO	Excise Tax Revenue Bonds
05/20/2003	74.00	Florida Capital Trust Agency	FL	Revenue Bonds
07/01/1999	70.00	California Infrstr & Eco Dev Bank	CA	Revenue Bonds
01/09/2003	67.67	San Francisco Redev Agency	CA	Lease Rev Ref Bonds
09/15/1997	67.29	North Charleston-South Carolina	SC	Ref Certificates of Participation
06/01/2000	67.03	College Park Business & IDA	GA	Civic Center Proj Rev Bonds
12/30/2003	65.86	Vancouver City-Washington	WA	Conference Ctr Sr Rev Bonds
05/10/2001	65.00	Gwinnett Co Development Auth	GA	Var Rte Revenue Bonds
01/01/2002	64.57	Birmingham-Jefferson Civ Ctr Au	AL	Special Tax Refunding Bonds
11/01/2002	64.10	NYC Industrial Dev Agency	NY	Civic Facilities Revenue Bonds
06/03/2004	62.40	Palm Springs Financing Authority	CA	Lease Revenue Bonds
11/14/2002	60.00	San Jose Financing Auth	CA	Lease Revenue Bonds
11/14/2002	60.00	San Jose Financing Auth	CA	Lease Revenue Bonds
05/01/1998	58.52	Baltimore Mayor & City Council	MD	Convention Center Ref Rev Bonds
06/01/2003	58.29	Rhode Island Convention Ctr Auth	RI	Refunding Revenue Bonds
11/15/1998	57.05	Salt Lake Co Muni Bldg Auth	UT	Lease Revenue Bonds
04/14/2004	57.00	Cobb-Marietta Coliseum & Exhib Au	GA	Revenue Bonds
08/20/2003	55.95	NYC Convention Center Operating C	NY	Certificates of Participation
08/01/2003	55.87	Regional Convention & Sports Comp	MO	Conv Cntr & Sport Facs Ref Bonds
04/29/1996	55.87	St Paul Housing & Redev Auth	MN	Sales Tax Rev Refunding Bonds
11/19/2003	55.30	Kentucky St Property & Bldg Comm	KY	Revenue Bonds
11/01/2002	54.41	Franklin Co Convention Facs Auth	OH	Tax & Lease Rev Antic Ref Bonds
07/01/1995	54.14	Metropolitan Pier & Expo Auth	IL	Dedicated State Tax Rev Bds
11/01/2001	53.70	San Marcos Public Facs Auth	CA	Public Imp Ref Revenue Bonds
07/01/1998	52.95	Cumberland Co-North Carolina	NC	Ref Certificates of Participation
11/02/2000	52.50	San Francisco City & Co Fin Corp	CA	Lease Revenue Bonds
11/02/2000	52.50	San Francisco City & Co Fin Corp	CA	Lease Revenue Bonds
11/02/2000	52.50	San Francisco City & Co Fin Corp	CA	Lease Revenue Bonds
03/01/2001	52.11	Overland Park City-Kansas	KS	Internal Improvement Bonds
01/01/1995	51.58	Cumberland Co-North Carolina	NC	Certificates of Participation
05/24/1995	51.39	Escondido Jt Powers Fin Auth	CA	Lease Revenue Bonds
09/19/2000	50.28	Illinois	IL	Civic Center Bonds
03/01/2000	49.77	Manchester Housing Authority	NH	Authority Revenue Bonds
09/15/1998	49.59	NYC Industrial Dev Agency	NY	Civic Fac Ref and Equip Rev Bonds
11/07/2002	48.40	Minneapolis City-Minnesota	MN	GO Convention Center Bonds
09/01/1995	47.39	Empire State Development Corp	NY	Project Revenue Refund Bonds
03/01/1998	46.68	Clark Co-Nevada	NV	GO Limited Tax Bonds
08/01/2001	44.90	West Allis City-Wisconsin	WI	Var Rte Dem Rev Bonds
02/15/2000	44.40	Fort Worth City-Texas	TX	Comb Tax & Rev Cert of Oblig
12/01/1997	43.66	Long Beach Bond Finance Authority	CA	Lease Revenue Refunding Bonds

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
04/01/1999	42.20	Nassau Co Industrial Dev Agency	NY	Civic Fac Ref & Improv Rev Bonds
04/24/2002	41.65	NYC Trust for Cultural Resources	NY	Revenue Bonds
06/01/2001	40.85	South Carolina Jobs Econ Dev Au	SC	Senior Revenue Bonds
04/23/1997	40.65	Bakersfield City-California	CA	Certificates of Participation
09/04/2002	40.12	Des Peres-Missouri	MO	Tax Increment Bonds
07/01/2001	39.80	Hot Springs City-Arkansas	AR	Sales & Use Tax Ref & Imp Bonds
06/24/2004	39.74	Minneapolis City-Minnesota	MN	GO Convention Center Ref Bonds
01/01/2004	39.00	Louisville & Jefferson Vist Conv	KY	Revenue Refunding Bonds
05/01/1998	37.59	Illinois	IL	Civic Center Refunding Bonds
09/16/2004	37.24	Chula Vista City-California	CA	Certificates of Participation
08/01/2000	37.00	Ernest N Morial Exhib Hall Auth	LA	Special Tax Bonds
09/02/1998	36.56	Metropolitan Pier & Expo Auth	IL	Coupon and Principal Receipts
10/15/1999	36.55	Pittsburgh-Allegheny Co Pub Aud	PA	Auditorium Bonds
12/01/1999	35.84	Ashwaubenon Comm Dev Auth	WI	Lease Revenue Bonds
05/15/2003	35.08	Clark Co-Nevada	NV	GO Ltd Tax Refunding Bonds
12/01/1996	35.00	Evansville Building Authority	IN	Excise & Income Tax Lease Bonds
07/01/1995	34.30	Oceanside-California	CA	Refunding COP
11/15/1995	34.19	Kansas City Munic Assist Corp	MO	Leasehold Ref Rev Bonds
03/01/1996	34.00	Hot Springs City-Arkansas	AR	Sales & Use Tax Bonds
08/15/2001	33.77	Lafayette Yard Comm Dev Corp	NJ	Revenue Refunding Bonds
04/01/2002	33.58	Rio Nuevo Multipurpose Facs Dt	AZ	Certificates of Participation
06/10/2004	33.57	San Francisco City Co Redev Agcy	CA	Lease Revenue Refunding Bonds
08/01/2000	32.90	Portland City-Oregon	OR	Convention Cntr Urban Renewal
06/01/1999	32.80	NYC Development Auth	NY	Revenue Bonds
10/01/1996	32.60	Hayward City-California	CA	Certificates of Participation
05/22/2003	31.99	Fort Wayne Redevelopment Auth	IN	Lease Rental Revenue Bonds
11/01/2002	31.55	Corpus Christi City-Texas	TX	Tax & Hotel Tax Certs of Oblig
01/15/1997	30.39	NYC Industrial Dev Agency	NY	Civic Facility Rev Bonds
-	30.00	Wisconsin Center Dt	WI	Variable Rate Demand Rev Bonds
03/01/2000	29.64	Richardson City-Texas	TX	Comb Tax & Rev Certs of Oblig
10/04/2001	28.54	Palm Springs Financing Authority	CA	Lease Revenue Refunding Bonds
02/01/2000	27.80	Boston-Massachusetts	MA	BANs
04/15/2000	27.78	Charlotte City-North Carolina	NC	Certificates of Participation
06/05/1998	27.50	Pittsburgh-Allegheny Co Pub Aud	PA	Promissory Bond
07/15/1999	27.08	Inglewood Public Finance Auth	CA	Lease Revenue Ref Bonds
11/01/1997	27.00	Mississippi Development Bank	MS	Special Obligation Bonds
10/01/1997	26.59	Compton-California	CA	Ref Certificates of Participation
08/15/2004	26.42	Hillsboro City-Oregon	OR	Full Faith and Credit Bonds
07/02/2002	26.26	Anaheim Public Finance Auth	CA	Lease Revenue Bonds
12/01/1995	25.76	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Revenue Bonds
10/23/1997	25.15	Minneapolis City-Minnesota	MN	Convention Center Revenue Bonds
01/09/1997	25.03	Washington	WA	GO Refunding Bonds
06/15/1999	25.00	Austin City-Texas	TX	Convention Ctr Project Bonds
-	25.00	Austin City-Texas	TX	Sub Lien Venue Project Bonds
01/15/1998	25.00	New Orleans Exhibition Hall Auth	LA	Special Tax Bonds
09/10/2003	24.34	Charlotte City-North Carolina	NC	Refunding Certs of Participation
01/01/1999	24.31	Greenville Memorial Auditorium Dt	SC	Ref Certificates of Participation
11/01/2002	24.00	NYC Industrial Dev Agency	NY	Civic Fac Rev Bonds
10/01/1999	23.95	Cobb-Marletta Coliseum & Exhib Au	GA	Revenue Bonds
06/01/1998	23.86	Dearborn City-Michigan	MI	Civic Center Bonds
04/15/1997	23.54	West Covina-California	CA	Ref Certificates of Participation
06/01/2001	23.50	South Carolina Jobs Econ Dev Au	SC	Subordinate Revenue Bonds
01/01/2003	23.19	Maryland Stadium Authority	MD	Lease Revenue Bonds
04/30/2004	23.09	New Jersey Sports & Expo Auth	NJ	Luxury Tax Refunding Bonds
03/01/1998	22.16	Stanislaus Co-California	CA	Certificates of Participation

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
04/08/2004	21.55	Nevada	NV	Lease Rev Certs of Participation
12/01/1998	21.53	Englewood City-Colorado	CO	Certificates of Participation
03/01/1998	21.39	Myrtle Beach Public Facs Corp	SC	Certificates of Participation
11/01/1997	20.92	Marion Co Conven & Rec Facs Auth	IN	Excise Tax Revenue Bonds
08/29/2000	20.55	Suffolk Co Industrial Dev Agency	NY	Civic Facility Ref Rev Bonds
10/01/2001	20.38	College Park Business & IDA	GA	Revenue Bonds
11/15/1997	20.29	St George Interlocal Agency	UT	Lease Revenue Bonds
08/01/1996	20.29	Toledo-Lucas Co Conv & Visit Bur	OH	Special Lodging Tax Rev Ref Bonds
10/01/2001	20.00	North Slope Borough-Alaska	AK	Civic Facility Revenue Bonds
01/05/2005	20.00	NYC Industrial Dev Agency	NY	Civic Fac Ref & Imp Rev Bonds
07/15/1996	19.79	Greenville-South Carolina	SC	Certificates of Participation
01/01/2000	19.38	Washoe Co-Nevada	NV	GO Convention Center Bonds
08/26/2004	19.28	Broward Co-Florida	FL	Tourist Dev Tax Spcl Rev Ref B
06/10/2004	19.17	Minneapolis City-Minnesota	MN	GO Convention Ctr Ref Bonds
08/01/2001	19.00	Laguna Hills-California	CA	Certificates of Participation
05/14/1998	18.35	Tallahassee-Leon Co Civic Ctr Aut	FL	Capital Improv Rev Bonds
02/13/2001	18.06	Portland City-Oregon	OR	Limited Tax Revenue Bonds
11/23/2004	18.00	Cleveland-Cuyahoga Co Port Auth	OH	Var Rte Cultural Facs Rev Bonds
07/23/2003	17.72	NYC Industrial Dev Agency	NY	Civic Facility Revenue Bonds
06/01/2000	17.50	White Earth Band Chippewa Indians	MN	Revenue Bonds
04/15/2000	17.38	Blair Co-Pennsylvania	PA	Guaranteed Revenue Bonds
10/15/1995	17.34	Maryland Stadium Authority	MD	Lease Revenue Bonds
03/01/2001	17.32	Sioux Falls City-South Dakota	SD	Sales Tax Rev Refunding Bonds
08/15/1996	17.30	Omaha Auditorium Facilities Corp	NE	Lease Rev Bds
09/30/1998	17.29	Luzerne Co Convention Ctr Auth	PA	Var Rte Dem Hotel Rev Bonds
08/01/1998	17.21	Fort Collins City-Colorado	CO	Certificates of Participation
04/11/2002	16.10	Toledo City-Ohio	OH	Adj Rte City Svc Spec Asses Notes
08/30/2000	15.82	NYC Industrial Dev Agency	NY	Var Rte Dem Civic Fac Rev Bonds
08/01/1998	15.69	La Mirada Redev Agency	CA	Refunding Special Tax Bonds
01/30/2004	15.49	Cincinnati City-Ohio	OH	Convention Center BANs
01/28/2004	15.18	Louisville & Jefferson Vist Conv	KY	Revenue Refunding Bonds
10/28/2004	15.04	Commerce Jt Power Fin Auth	CA	Lease Revenue Bonds
01/15/1998	15.00	Arlington-Texas	TX	Tax and Rev Certs of Obligation
08/23/2000	15.00	Chautauqua Co Indust Dev Agency	NY	Civic Facility Revenue Bonds
09/01/1999	15.00	Connecticut Hlth & Ed Facs Auth	CT	Facs Auth Revenue Bonds
11/06/2001	15.00	NYC Industrial Dev Agency	NY	Adj Rte Civic Fac Revenue Bonds
10/01/1995	15.00	Ocean City-Maryland	MD	Municipal Purpose Bonds
01/01/2004	14.94	Harris Co Cult Educ Fac Fin Corp	TX	Contract Rev Ref Bonds
09/01/2001	14.65	Summit Co Port Authority	OH	Revenue Bonds
12/01/2001	14.34	Gatlinburg Public Bldg Auth	TN	Muni Obligation Refunding Bonds
06/15/2003	14.23	Middle Georgia Coliseum Auth	GA	Revenue Refunding Bonds
06/30/1999	13.66	NYC Industrial Dev Agency	NY	Civic Fac Rev Refunding Bonds
10/29/1998	13.60	Westminster-California	CA	Var Rte Demand Certs of Partic
06/04/1997	13.54	College Park Business & IDA	GA	Civic Center Proj Rev Ref Bonds
10/01/1997	13.48	Campbell-California	CA	Ref Certificates of Participation
02/01/2000	13.45	Okaloosa Co-Florida	FL	Fourth Cent Tourist Dev Tax Bonds
10/15/2000	13.43	Charlotte City-North Carolina	NC	Certificates of Participation
05/01/1996	13.38	Downey Civic Center Corp	CA	Refunding Certificates of Parts
09/15/1996	13.30	Santa Fe City-New Mexico	NM	Gross Receipts Tax Revenue Bonds
11/01/1997	13.29	Pasadena Community Facs Dt #1	CA	Special Tax Bonds
06/30/2004	12.85	Albany Industrial Dev Agency	NY	Civic Fac Revenue Bonds
10/01/1996	12.85	College Park Business & IDA	GA	Civic Center Proj Rev Bonds
07/15/2003	12.83	Kennewick Public Facs Dt	WA	Ltd Sales Tax Oblig Bonds
11/01/2003	12.80	Rancho Santa Margarita- Califomi	CA	Certificates of Participation
02/01/1999	12.80	San Marcos City-Texas	TX	GO Ref & Improvement Bonds

Dated Date	Amount (\$ mls)	Issuer	State	Issue Description
02/01/1996	12.47	Birmingham-Jefferson Civ Ctr Au	AL	Ref & Cap Outlay Special Tax Bds
07/01/2002	12.35	Birmingham-Jefferson Civic Center	AL	Special Tax Bonds
03/14/2002	12.32	Muncie's Edit Building Corp	IN	Lease Rental Rev Ref Bonds
10/01/1997	12.30	Palm Springs Financing Authority	CA	Lease Revenue Refunding Bonds
-	12.21	NYC Industrial Dev Agency	NY	Civic Facilities Revenue Bonds
06/01/2003	12.18	Reno City-Nevada	NV	2002 Spec Improv Dt #5 Bonds
07/15/1996	12.00	Greenville Memorial Auditorium Dt	SC	General Obligation Bonds
04/01/1996	12.00	Madison City-Wisconsin	WI	General Obligation Bonds
09/15/1997	12.00	Nampa Urban Renewal Agency	ID	Revenue Allocation Ref Bonds
03/30/1995	12.00	Syracuse Industrial Dev Agency	NY	Civic Facilities Revenue Bds
03/05/1996	11.99	Fresno-California	CA	Certificates of Participation
07/10/2002	11.93	Campbell-California	CA	Refunding Certs of Participation
01/04/2001	11.76	NYC Industrial Dev Agency	NY	Civic Fac Revenue Bonds
08/11/1999	11.76	Green Bay Redevelopment Auth	WI	Lease Revenue Bonds
06/15/1996	11.58	St Lawrence Co Ind Dev Agency	NY	Civic Facility Revenue Bonds
03/27/1997	11.43	Redding Joint Powers Fin Auth	CA	Lease Revenue Bonds
05/28/1997	10.89	Palmdale Civic Authority	CA	Revenue Bonds
08/01/2004	10.87	Fairfax Co Redev & Housing Auth	VA	Lease Revenue Bonds
10/01/1998	10.72	Laguna Hills-California	CA	Certificates of Participation
05/01/1997	10.68	Mississippi Development Bank	MS	Special Obligation Bonds
12/01/1999	10.53	Ridgecrest-California	CA	Ref Certificates of Participation
12/15/2000	10.50	Killeen-Texas	TX	Comb Tax & Hotel Occupancy Cert
10/15/2001	10.47	Charlotte City-North Carolina	NC	Ref Certificates of Participation
06/01/2002	10.45	Bellevue City-Washington	WA	GO Limited Tax
12/01/1998	10.33	Santa Clara City-California	CA	Special Assessment Bonds
03/01/2001	10.21	Wichita Falls-Texas	TX	GO Construction & Ref Bonds
07/01/1995	10.00	Harrison Co-Mississippi	MS	GO Coliseum & Convention Bds
11/01/1999	10.00	Maryland Economic Dev Corp	MD	Sr Lien Revenue Bonds
12/01/1996	10.00	Polk Co-Iowa	IA	GO County Purpose Bonds
-	10.00	Utica Industrial Dev Agency	NY	Civic Facility Revenue Bonds
04/01/1996	10.00	Vicksburg City-Mississippi	MS	General Obligation Bonds
10/23/2001	9.90	Carmel-By-the-Sea-California	CA	Sunset Center Lease Rev Certs
09/01/2002	9.70	Troy Downtown Development Auth	MI	Community Center Facilities Bond
04/01/2003	9.69	Skagit Regional Public Facs Dt	WA	Ltd Sales Tax GO Bonds
09/21/2000	9.65	Suffolk Co Industrial Dev Agency	NY	Civic Facilities Revenue Bonds
06/01/1997	9.60	Louisiana Board Trust St Coll & U	LA	Lease Revenue Bonds
04/05/2001	9.50	Salem-Ohio	OH	Var Rte Civic Facs Rev Bonds
08/15/1998	9.40	Bismarck City-North Dakota	ND	Lodg & Restaurant Tax Rev Bonds
09/01/2002	9.34	Longmont-Colorado	CO	GO Civic Center Refunding Bonds
06/01/2001	9.29	Paducah City-Kentucky	KY	General Obligation Bonds
07/01/1998	9.14	Miami Beach Redevelopment Agcy	FL	Tax Increment Rev Bonds
10/15/1998	9.03	St Lawrence Co Ind Dev Agency	NY	Civic Facilities Rev Ref Bonds
03/01/1996	8.90	Illinois Educational Facs Auth	IL	Adjustable Rate Demand Rev Bds
03/15/1999	8.61	Round Rock City-Texas	TX	Hotel Occupancy Tax Revenue Bonds
-	8.50	Summit Co-Ohio	OH	Multi-Mode Var Rte Civic Fac Bds
12/01/1999	8.44	Overland Park City-Kansas	KS	Internal Improvement Bonds
09/15/1995	8.28	Washington	WA	Certificates of Participation
01/29/2004	8.27	Monroe Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
12/15/2002	8.18	Union Twp-Ohio	OH	Civic Ctr Ltd Tax GO Bonds
02/01/1999	8.00	Duluth City-Minnesota	MN	GO DECC Improvement Bonds
08/15/1996	7.94	Taylor Co-Texas	TX	General Obligation Bonds
06/01/2001	7.83	Gig Harbor-Washington	WA	Ltd Tax GO Bonds
06/25/1997	7.75	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Revenue Bonds
05/18/1999	7.67	Hempstead Industrial Dev Agency	NY	Civic Fac Revenue Bonds
12/18/1997	7.55	Encinitas-California	CA	Ref Certificates of Participation

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
12/01/1998	7.50	Tinley Park-Illinois	IL	General Obligation Bonds
06/01/2002	7.35	NYC Industrial Dev Agency	NY	Civic Fac Revenue Bonds
05/01/2000	7.18	Mississippi Development Bank	MS	Special Obligation Bonds
06/01/1999	7.11	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Rev Bonds
03/26/1997	7.08	Monroe Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
10/12/1999	7.05	Syracuse Industrial Dev Agency	NY	Civic Fac Revenue Bonds
07/02/1998	7.00	Emeryville Public Fin Authority	CA	Lease Revenue Bonds
04/01/2001	6.97	Duluth City-Minnesota	MN	GO Refunding Rev Bonds
05/01/1998	6.87	Wichita Co-Texas	TX	GO Refunding Bonds
11/01/1996	6.86	Reno-Sparks Conv & Vistors Au	NV	Revenue Refunding Bonds
08/30/2001	6.83	South Bend Redevelop Authority	IN	Lease Rental Rev Ref & Imp Bonds
03/15/2001	6.80	Greenville City-North Carolina	NC	Special Obligation Rev Bonds
09/01/2002	6.79	Greater Boise Auditorium Dt	ID	Certificates of Participation
05/01/2001	6.79	Windsor Joint Powers Fin Auth	CA	Lease Revenue Bonds
11/15/2000	6.75	Amarillo-Potter Events Venue Dt	TX	Spec Tax and Lease Revenue Bonds
09/30/1997	6.75	Suffolk Co Industrial Dev Agency	NY	Multi Mode Var Rte Civic Fac Bds
12/01/1998	6.74	Industry City-California	CA	Revenue Bonds
01/01/1996	6.70	Sharonville City-Ohio	OH	Convention Center Bonds
12/24/2003	6.68	Beacon City-New York	NY	BANs
06/20/1996	6.57	NYC Industrial Dev Agency	NY	Civic Facility Rev Bonds
07/15/1998	6.50	Lake Co-Indiana	IN	Revenue Bonds
02/04/1998	6.42	Suffolk Co Industrial Dev Agency	NY	Civic Fac Revenue Bonds
02/01/1996	6.37	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Revenue Bds
07/01/1999	6.36	Bellflower-California	CA	Ref Certificates of Participation
02/01/1999	6.15	South San Francisco Cap Imp Auth	CA	Certificates of Participation
02/15/1998	6.14	Fort Wayne Redevelopment Dt	IN	Redev Dt Ref and Improv Bonds
08/01/1997	6.09	Springfield Metro Expo and a Aut	IL	General Obligation Bonds
10/20/2004	6.02	Carmel Civic Square Bldg Corp	IN	First Mortgage Refunding Bonds
12/01/1996	6.00	Franklin Co-Tennessee	TN	GO Public Improvement Bonds
09/28/2001	6.00	Henrico Co Econ Dev Auth	VA	Var Rte Revenue Bonds
06/27/1997	6.00	NYC Industrial Dev Agency	NY	Var Rte Civic Fac Rev Bonds
08/01/1998	6.00	Spartanburg Co-South Carolina	SC	General Obligation Bonds
01/01/1996	6.00	Yakima-Washington	WA	Ltd Tax GO Convention Center Bds
10/01/1996	5.99	Maine Court Facilities Auth	ME	Lease Rental Rev Bonds
11/15/1997	5.95	Lake Jackson City-Texas	TX	Certificates of Obligation
04/01/1999	5.95	Washoe Co-Nevada	NV	GO Recreational Ref Bonds
09/15/2002	5.90	Springdale-Ohio	OH	Community Center Expansion Bonds
06/04/1997	5.90	Suffolk Co Industrial Dev Agency	NY	Civic Facility Rev Bonds
06/01/2003	5.87	South San Francisco Cap Imp Auth	CA	Refunding Rev Bonds
04/01/1998	5.72	Santa Fe City-New Mexico	NM	Revenue Bonds
06/01/1999	5.69	NYC Industrial Dev Agency	NY	Civic Facility Revenue Bonds
05/15/2003	5.66	Laguna Hills-California	CA	Certificates of Participation
09/26/2001	5.64	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
03/01/2004	5.56	Augusta-Richmond Co Coliseum Au	GA	Revenue Refunding Bonds
06/01/2002	5.53	Watertown-South Dakota	SD	General Obligation Bonds
12/19/1995	5.34	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Rev CABs
06/11/1998	5.30	Big Bear Lake-California	CA	Ref Certificates of Participation
12/23/2003	5.24	Rensselaer Co Indus Dev Agency	NY	Civic Facs Revenue Bonds
06/27/2001	5.20	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
04/15/1995	5.08	Brea Public Fin Authority	CA	Lease Revenue Bonds
10/21/2002	5.00	Milwaukee City Redevelopment Auth	WI	Var Rte Dem Redev Rev Bonds
08/26/2004	5.00	Missouri Development Fin Board	MO	Cultural Facs Revenue Bonds
08/01/1998	5.00	Seattle City-Washington	WA	Limited Tax GO Bonds
-	5.00	St Louis Conv-Sports Complex Au	MO	Anticipation Notes
08/02/2001	4.86	Westchester Co Indust Dev Agcy	NY	Revenue Bonds

Dated Date	Amount (\$ mls)	Issuer	State	Issue Description
06/26/2003	4.80	Cuyahoga Co-Ohio	OH	Civic Fac Revenue Bonds
07/15/1999	4.80	Farmers Branch-Texas	TX	Tax & Hotel Occupancy Tax Certs
06/26/2002	4.72	Westchester Co Indust Dev Agcy	NY	Civic Fac Revenue Bonds
03/01/2001	4.63	Louisville & Jefferson Vist Conv	KY	Dedicated Tax Rev Ref Bonds
12/01/1998	4.60	Massachusetts Dev Finance Agency	MA	Revenue Bonds
09/01/1998	4.56	Monroe Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
06/22/1999	4.50	Westchester Co Indust Dev Agcy	NY	Civic Facility Revenue Bonds
04/10/2001	4.42	Santa Cruz City-California	CA	Certificates of Participation
11/23/2004	4.33	Brea Public Fin Authority	CA	Ref Lease Revenue Bonds
10/25/1995	4.18	Monroe Co Industrial Dev Agency	NY	Civic Facility Ref Rev Bonds
03/06/2000	4.14	Otsego Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
06/18/1999	4.13	Albany Industrial Dev Agency	NY	Civic Facility Revenue Bonds
03/01/2002	4.11	Sylvania City-Ohio	OH	Community Facs Improv Bonds
12/01/1999	4.06	Charleston-West Virginia	WV	Civic Center Improvement Bonds
03/15/2001	4.00	Fairview Heights-Illinois	IL	General Obligation Bonds
11/01/1999	3.90	Dutchess Co Industrial Dev Agcy	NY	Civic Fac Revenue Bonds
12/01/1999	3.90	Northumberland Co Authority	PA	Guaranteed Lease Revenue Bonds
08/01/2000	3.90	Richland City-Washington	WA	Ultl Tax General Obligation Bonds
12/05/1997	3.86	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
09/01/1998	3.64	Charleston-West Virginia	WV	Civic Center Improvement Bonds
04/11/2002	3.63	Erie Co Industrial Dev Agency	NY	Var Rte Civic Fac Rev Bonds
02/27/2003	3.63	West Covina Public Fin Auth	CA	Lease Revenue Bonds
10/01/1997	3.62	Portland City-Texas	TX	Sales Tax Revenue Refunding Bonds
04/01/2000	3.57	Clinton Public Works Auth	OK	Revenue Bonds
08/21/1997	3.50	Huntington-West Virginia	WV	Var Rte Demand Bonds
12/21/1995	3.50	NYC Industrial Dev Agency	NY	Civic Facility Revenue Bonds
01/29/2002	3.50	Palo Alto-California	CA	Certificates of Participation
10/30/1998	3.45	Westchester Co Indust Dev Agcy	NY	Civic Facility Rev Bonds
05/01/1997	3.33	Port St Lucie City-Florida	FL	Certificates of Participation
06/01/1995	3.16	Fort Wayne Redevelopment Dt	IN	Tax Increment Revenue Bonds
06/01/1997	3.07	Oldham Co Public Fac Constr Corp	KY	Mortgage Revenue Bonds
05/01/2003	3.00	Gibraltar-Michigan	MI	GO Unltd Tax Bonds
03/16/2004	3.00	Green City-Ohio	OH	Community Learning Center BANs
12/17/2001	3.00	Solon-Ohio	OH	Community Center Improv BANs
04/06/2000	3.00	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
10/15/2000	3.00	Wayne City-Nebraska	NE	Public Bldg Sales Tax Rev Bonds
12/07/2004	2.99	Massillon-Ohio	OH	GO Ltd Tax BANs
02/26/2004	2.96	Massillon-Ohio	OH	GO Ltd Tax BANs
01/28/2000	2.95	Rocky River City-Ohio	OH	Various Purpose GO BANs
04/27/2000	2.90	Suffolk Co Industrial Dev Agency	NY	Civic Fac Rev Bonds
11/15/1998	2.82	Peoria City-Illinois	IL	General Obligation Bonds
06/01/2001	2.72	Wixom City-Michigan	MI	GO Unltd Tax Ref Bonds
04/11/2001	2.70	Massillon-Ohio	OH	Land Acquisition BANs
12/01/1995	2.65	St Anthony City-Minnesota	MN	Tax Increment Bonds
02/01/2003	2.60	Wheeling-West Virginia	WV	GO Civic Center Bonds
12/05/1997	2.56	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
05/15/2003	2.52	Independence-Ohio	OH	Civic Center Ref Bonds
04/27/2000	2.50	Suffolk Co Industrial Dev Agency	NY	Civic Facility Revenue Bonds
06/29/2001	2.42	Oak Grove-Missouri	MO	Certificates of Participation
07/30/1998	2.34	St Paul City-Minnesota	MN	Lease Revenue Bonds
12/01/1999	2.14	Hiawatha City-Iowa	IA	Revenue Bonds
01/15/1997	2.10	Nampa Urban Renewal Agency	ID	Rev Allocation Tax Incr Bonds
05/01/2001	2.10	Portland City-Oregon	OR	Limited Tax Revenue Bonds
06/01/2002	2.06	Peoria City-Illinois	IL	General Obligation Bonds
10/19/1995	2.06	Sharonville City-Ohio	OH	Convention Center BANs

Dated Date	Amount (\$ mils)	Issuer	State	Issue Description
10/16/1997	2.00	Valley View Village-Ohio	OH	Community Center Note
05/15/1995	1.93	Colorado Tech Center Metro Dt	CO	Refunding Bonds
06/01/1998	1.93	San Dimas-California	CA	Certificates of Participation
06/01/1999	1.90	Mandan City-North Dakota	ND	Limited Tax Revenue Bonds
11/20/2001	1.85	Cuyahoga Co-Ohio	OH	Civic Facility Revenue Bonds
02/01/1999	1.70	Pecos Co-Texas	TX	Tax Notes
09/03/1997	1.70	Tallahassee City-Florida	FL	Capital Improvement Rev Bonds
04/13/2000	1.66	Glens Falls-New York	NY	Renewal BANs
09/01/2003	1.64	Greenbrier City-Arkansas	AR	Sales & Use Tax Bonds
12/01/1999	1.61	Charleston-West Virginia	WV	Civic Center Lease Rev bonds
04/01/1997	1.60	Lakeway-Texas	TX	General Obligation Bonds
12/01/1998	1.58	Granite Falls-Minnesota	MN	GO Community Center Bonds
05/19/1995	1.55	Sharonville City-Ohio	OH	Convention Center BANs
10/15/2001	1.54	Marshall City-Texas	TX	Comb Tax & Rev Certificates of Ob
12/01/1997	1.50	Kenosha Co-Wisconsin	WI	GO Promissory Notes
09/01/1996	1.50	Lynwood Public Financing Auth	CA	Lease Revenue Bonds
01/25/1999	1.50	Reno-Sparks Conv & Visitors Au	NV	Medium-Term Note
01/25/2001	1.50	Rocky River City-Ohio	OH	Civic Center BANs
12/01/1995	1.45	Edmonds-Washington	WA	Limited Tax GO Bonds
01/01/1995	1.43	Cumberland Co-North Carolina	NC	Certificates of Participation
06/01/2000	1.35	Junction City-Kansas	KS	Residential Rental Fac Rev Bonds
04/17/2000	1.32	Falls City-Nebraska	NE	Lease Purchase Bonds
08/01/2000	1.28	Jefferson City Indust Dev Auth	MO	Civic Facility Revenue Bonds
-	1.21	Westchester Co Indust Dev Agcy	NY	Civic Facilitys Revenue Bonds
04/15/1998	1.08	Ellsworth Public Building Comm	KS	Refunding Revenue Bonds
04/30/2001	0.91	Lackawanna Co Ind Dev Auth	NY	Civic Fac Revenue Bonds
09/01/1996	0.90	Ocean Shores-Washington	WA	Ltd Tax GO Convention Center Bds
11/01/1999	0.89	El Dorado-Kansas	KS	GO Public Building Bonds
01/29/2003	0.89	Brookhaven Indus Dev Authority	NY	Civic Fac Revenue Bonds
10/15/1998	0.85	Miamisburg-Ohio	OH	Building Improvement BANs
09/15/2000	0.83	Glasscock Co-Texas	TX	Limited Tax Permanent Imp Bonds
09/15/1998	0.80	Glens Falls-New York	NY	BANs
10/02/1997	0.80	Barberton City-Ohio	OH	Community Center Improv Notes
07/01/1997	0.80	Sparta-Wisconsin	WI	GO Promissory Notes
-	0.75	St Johns Bldg Authority	MI	Building Authority Bonds
10/01/1998	0.70	Barberton City-Ohio	OH	Community Center Improv Note
06/01/2002	0.69	Nassau Co Industrial Dev Agency	NY	Civic Fac Revenue Bonds
04/15/1997	0.51	Ector Co-Texas	TX	Tax Notes
03/15/2001	0.50	Mount Pleasant-Texas	TX	Comb Tax & Rev Cert of Obligation
09/15/2000	0.50	Raynham-Massachusetts	MA	Senior Center BANs
03/15/1996	0.50	Watertown City-New York	NY	BANs
03/11/1997	0.43	Hingham-Massachusetts	MA	Civic Center BANs
05/01/1998	0.42	Waverly-Iowa	IA	GO Refunding Bonds
11/01/2002	0.38	Strawberry Point-Iowa	IA	GO Civic Ctr Improv & Ref Notes
04/01/2004	0.25	Houma Area Conv & Visitors Bureau	LA	Certificates of Indebtedness
10/15/1995	0.22	Sacramento City-California	CA	Certificates of Participation
10/26/2000	0.17	Ogdensburg-New York	NY	BANs
02/18/1999	0.07	Monona-Iowa	IA	GO Community Center Note
Total:		18,301.45		

Appendix C

Golf Course Resort Hotels Owned by State or Local Governments

Owner	Hotel	Description
Alabama (Alabama State Parks Dept.)	Gulf State Park Resort Lodge	144-room hotel and 17 newly-remodeled lakeside cabins on 2.5-mile, sugar white beach on Gulf of Mexico. The facility includes restaurant and cocktail lounge, Olympic-size pool, tennis courts, convention/meeting facilities for up to 1000, gazebos, the longest pier on the Gulf (825 feet), and an 18-hole championship golf course. Opened in 1974, complete renovation in 1991. Planned \$20 million bond issue for capital improvements; possible expansion to 250 rooms with 1,500-person convention center.
Alabama (Alabama State Parks Dept.)	Joe Wheeler State Park Resort Lodge and Convention Center	75-room recently renovated hotel with 9 suites overlooking Wheeler Lake on the Tennessee River. The resort complex has a newly-renovated convention facility with accommodation for 400, restaurant, lighted tennis courts, swimming pool, full-service marina with 134 slips, and 18-hole golf course. Facilities also include 2 group lodges and 23 cabins.
Alabama (Alabama State Parks Dept.)	Lake Guntersville State Park Resort Lodge	100-room hotel, 16 cottages and 18 fireplace-equipped chalets. Facility includes restaurant, sauna, swimming pool, lighted tennis courts, 600-person convention complex (1,200-guest banquet facility), and 18-hole golf course.
Alabama (Alabama State Parks Dept.)	Lakepoint Resort State Park Resort Lodge	107-room hotel and 29 newly-renovated, fully-furnished cabins. Facility includes 7 meeting/banquet rooms, 6 lighted tennis courts, swimming pool, 1/4-mile beach on Lake Eufaula, and 18-hole golf course.
Arkansas (Arkansas Dept. of Parks and Tourism)	DeGray Lake Resort State Park	96-room newly renovated hotel on island in DeGray Lake. The facility has a lakefront 120-seat restaurant, convention center for up to 450, swimming pool, tennis courts, horseback riding facilities, 132-slip marina, and 18-hole championship golf course.
Colorado (South Suburban Park & Recreation District)	Lone Tree Golf Club and Hotel	15 luxury guest suites in 45,000 sq. ft. hotel/clubhouse with conference rooms, banquet and reception halls, café, pool, tennis courts, fitness room, and 18-hole championship golf course designed by Arnold Palmer. Owned by the District since 1991.
Georgia	Brasstown Valley Resort	102-room luxury hotel and 8 secluded 4-bedroom cottages. The rooms have fireplaces and balconies overlooking the mountains. The facility has over 14,000 sq. ft. of meeting space, including amphitheater, 6 conference rooms and a 300-person ballroom. Also includes restaurant, 72-foot stone fireplace, outdoor and heated indoor pools, health club with licensed massage therapists, spa, lighted outdoor tennis courts, horseback riding facilities, and an 18-hole championship Scottish links golf course ranked as one of the top five Georgia courses by Golf Digest. Constructed in 1995. Managed by Crestline Hotels and Resorts under a qualified management agreement.

Owner	Hotel	Description
Georgia (until 1997 – currently leased to Silver Dollar City/Marriott)	Evergreen Conference Center in Stone Mountain Park	249-room hotel with 31,000 sq. ft. conference center (35 meeting rooms), indoor and outdoor swimming pools, two restaurants, and two 18-hole golf courses, in the 3,200 acre Stone Mountain Park. One of the golf courses was designed by Robert Trent Jones and is one of the top 75 public courses in America. The facility also contains a massive tennis complex with stadium used in the 1996 Olympics. Opened in 1989. In 1996, \$43-million capital improvement program completed. Privatized in 9/97.
Georgia (Georgia Dept. of Natural Resources)	George T. Bagby State Park Lodge	30-room hotel and 5 cottages, with restaurant, swimming pool, conference center, tennis courts and 18-hole golf course.
Georgia (Georgia Dept. of Natural Resources)	Little Ocmulgee State Park Lodge	30-room hotel and 10 cottages, with restaurant, conference center, swimming pool, tennis courts, and 18-hole championship golf course.
Indiana (Indiana Division of State Parks and Reservoirs)	The Fort Golf Resort and Conference Center	7 units with luxury suite in Harrison House, and three other fully-furnished houses, in 1700-acre Fort Harrison State Park. The historic fort complex includes a restaurant, a 320-person ballroom, conference rooms, horseback riding and an 18-hole championship golf course designed by Pete Dye.
Kentucky (Kentucky Dept. of Parks)	Barren River Lake State Resort Park	51-room hotel and 22 two-bedroom, two-bathroom cottages. The facility includes 146-seat dining room, meeting rooms, 400-person banquet room, swimming pool, lighted tennis courts, 140-slip marina, horse stables, and 18-hole regulation golf course.
Kentucky (Kentucky Dept. of Parks)	General Butler State Resort Park Lodge	53-room hilltop hotel and 24 cottages. Each unit has a private balcony or patio. Facility includes swimming pool, tennis courts, 176-seat dining room, meeting rooms, newly opened conference center for up to 800 people, and 9-hole regulation golf course. Conference center opened 1/00.
Kentucky (Kentucky Dept. of Parks)	Jenny Wiley State Resort Park Lodge	49-room hotel with 224-seat restaurant, two private dining rooms, two meeting rooms, theater, Olympic-size swimming pool, modern conference center for up to 800 people, sky-lift, 199-slip boat dock, and a 9-hole regulation golf course.
Kentucky (Kentucky Dept. of Parks)	Kenlake State Resort Park Lodge	48-room hotel and 34 (?) one to three-bedroom fully-furnished cottages. Includes 182-seat restaurant, conference and meeting rooms, marina with 76 open slips and 130 covered slips, swimming pool, four indoor and five outdoor tennis courts, and 9-hole golf course.
Kentucky (Kentucky Dept. of Parks)	Kentucky Dam Village State Resort Park Lodge	72-room hotel, 14-room inn and 72 one to three-bedroom fully-furnished cottages. Includes 346-seat restaurant, swimming pool, tennis courts, convention facility for up to 900 persons, additional meeting rooms for up to 115 persons, 4,000 ft. paved and lighted airstrip, and 18-hole golf course.
Kentucky (Kentucky Dept. of Parks)	Lake Barkley State Resort Park Lodge	124-room hotel, 11-room Little River Lodge, and 9 two-bedroom, two-bath cottages. Facility has 331-seat restaurant lighted by 3-story tall windows, 500-person convention center, additional meeting rooms for up to 115 persons, new heated indoor pool, public beach, 122-slip marina, lighted tennis courts, trapshooting range, 4,800 ft. lighted airstrip and 18-hole golf course. Well-equipped fitness center has nautilus and free weights, glass racquetball court, tanning booths, sauna, 5 certified trainers and a certified massage therapist.

Owner	Hotel	Description
Kentucky (Kentucky Dept. of Parks)	Lake Cumberland State Resort Park Lodge	63-room hotel, 13-room secluded lodge, and ten cottages overlooking 50,000-acre Lake Cumberland, with restaurant, spa and exercise room, conference facilities, indoor and outdoor pools, tennis courts, riding stables, marina with 100 open slips and rental boats, and 9-hole par-3 golf course.
Kentucky (Kentucky Dept. of Parks)	Pine Mountain State Resort Park Lodge	30-room hotel and 20 cottages, with 216-seat restaurant, modern convention facility with room for up to 300 persons, additional meeting rooms, new A.D.A.-accessible pool, and \$10 million 18-hole golf course designed by Michael Hurdzan to open in 4/01.
Kentucky (Kentucky Dept. of Parks)	Rough River Dam State Resort Park Lodge	40-room hotel and 15 two-bedroom cottages overlooking the lake. Each room has private patio or balcony. The facility includes a 167-seat restaurant, banquet/meeting room for over 300 guests, additional meeting rooms for 250 guests, swimming pool, tennis courts, marina with over 190 slips, 3,200 ft. paved and lighted airstrip, and 9-hole par-3 golf course.
Springfield, Louisiana (Springfield Economic Development Corporation)	Golf Course Hotel Conference Center	100-room hotel with 12,500 sq. ft. conference center and 18-hole golf course. The course will be called the Blood River Golf Club and is scheduled to open late Summer 2001. State bond commission gave final approval for \$26.6 million in tax-exempt bonds on 10/19/2000; fairways cleared and construction to begin upon completion of financing; will be managed under 15-year management contract.
Maryland (Maryland Economic Development Authority)	Hyatt Regency Chesapeake Bay Golf Resort, Spa and Marina	400-room waterfront hotel with 35,000 sq. ft. conference center, 2 ballrooms, 18,000 sq. ft. health and fitness spa, multi-level indoor and outdoor swimming pool, 6 lighted tennis courts, 150-slip marina, and an 18-hole championship golf course designed by Keith Foster. Construction financed by sale of \$152 million in tax-exempt bonds. Sale of tax-exempt bonds in 12/99. Under construction; opening expected 12/01.
Maryland (Maryland Economic Development Authority)	Rocky Gap Lodge and Golf Resort	220-room resort hotel and golf course complex in Rocky Gap State Park, with 550-person ballroom, convention facilities, swimming pool, tennis court, fitness area, and 18-hole Jack Nicklaus Signature Golf Course. \$15.4 tax-exempt bonds sold in 1/95; total cost to State projected at \$34.4 million.
Minnesota (Iron Range Resources and Rehabilitation Board)	Giants Ridge Golf and Ski Resort	93-room hotel lodge with 7,000 sq. ft. of conference space, restaurant, bar, swimming pool, fitness area, 34 downhill ski runs, 70 km of cross-country ski trails, and championship 18-hole golf course designed by Jeffrey D. Brauer and Lanny Wadkins and named Minnesota's Number One Public Course in 1999. Owned by State since 1987. Golf course opened in 1997. Construction of a second 18-hole golf course is planned.
Ohio (Ohio Division of Parks)	Deer Creek Resort and Conference Center	113-room hotel and 25 fully-furnished cabins, with restaurant, lounge, indoor and outdoor pools, sauna, fitness room, 12,000 sq. ft. conference center with 9 meeting rooms accommodating up to 350 people, and 18-hole, 350-acre championship golf course designed by Jack Kidwell and opened in 1982. Managed by Delaware North Parks Service on 10-year contract.

Owner	Hotel	Description
Ohio (Ohio Division of Parks)	Hueston Woods State Park Resort	92-room hotel, one of the largest A-frames in the world with 100-foot sandstone fireplace, and 50 fully-furnished cabins. Includes restaurant, fitness center, outdoor swimming pool, conference center with 6 function rooms accommodating up to 300 people, tennis courts, and 18-hole championship golf course designed by Jack Kidwell. Managed by AmFac.
Ohio (Ohio Division of Parks)	Maumee Bay Resort and Conference Center	120-room hotel and 20 two- and four-bedroom cottages, with conference facilities and meeting rooms capable of accommodating up to 500 people. Set amidst 1,845-acre state park on the shores of Lake Erie, the facility also has an indoor/outdoor pool, a 1,500 ft. swimming beach, lighted tennis courts, and 18-hole Scottish Links golf course. Managed by AmFac.
Ohio (Ohio Division of Parks)	Punderson Manor State Park Resort	31-room Tudor-style hotel in former mansion and 26 fully-furnished two-bedroom cabins. The facility has 4 conference rooms, restaurant and cocktail lounge, indoor and outdoor pools, tennis courts, cross-country skiing, and 18-hole championship golf course. Managed since 1986 by AmFac. Major renovation completed 1999.
Ohio (Ohio Division of Parks)	Salt Fork Resort and Conference Center	148-room hotel and 54 fully-furnished two-bedroom cottages, including 17 chalets with hot tubs and gas fireplaces. Facility includes restaurant, indoor and outdoor swimming pools, fitness center, tennis courts, conference facilities accommodating up to 450 people, and 18-hole championship golf course. Within 20,000-acre wilderness area. Managed by AmFac.
Ohio (Ohio Division of Parks)	Shawnee Resort and Conference Center	50-room hotel and 25 recently renovated cabins with gas fireplaces. Includes indoor/outdoor pool, sauna, fitness room, tennis courts, conference facilities for up to 350 people, and nearby 18-hole championship golf course. Managed by AmFac.
Oklahoma (Oklahoma Tourism and Recreation Dept.)	Lake Murray Resort Park Inn	50-room resort hotel and 81 cottages, with restaurant, swimming beach and pool, horseback riding facilities, game room, 7 meeting rooms accommodating up to 400 people, airstrip, and 18-hole golf course.
Oklahoma (Oklahoma Tourism and Recreation Dept.)	Lake Texoma Resort Lodge	99-room resort hotel, 67 cottages, 4 beach huts and 20-room lodge, with restaurant, waterfront lounge, swimming pool and beach, fitness center, horseback riding facility, conference facilities for 500, marina, and Chickasaw Pointe Golf Resort, an 18-hole championship golf course that opened in 1997 and in 2000 was rated the 10th best municipal course in the U.S.
Oklahoma (Oklahoma Tourism and Recreation Dept.)	Quartz Mountain Resort Park Lodge	120-room newly constructed hotel/conference center with indoor/outdoor swimming pool, 5,000 sq. ft. dining hall, 700-seat performance hall, and 18-hole golf course. Home of the Oklahoma Arts Institute, which runs programs in the facility. Owned by the State of Oklahoma; managed by private entity. New hotel/conference facility scheduled for completion in Spring, 2000.
Oklahoma (Oklahoma Tourism and Recreation Dept.)	Roman Nose Resort Park Lodge	47-room resort hotel with conference facilities for 120 persons, restaurant, swimming pool, horseback riding stable and facilities, and 18-hole golf course designed by Floyd Farley. 10 cottages also available.
Oklahoma (Oklahoma Tourism and Recreation Dept.)	Western Hills Guest Ranch in Sequoyah State Park	101-room ranch hotel and 54 cottages, with restaurant, saloon, 9 meeting rooms with capacity of 898, swimming pool and beach, archery range, marina with boat rentals, horseback riding facilities and trails, and 18-hole golf course.

Owner	Hotel	Description
South Carolina (South Carolina Dept. of Parks, Recreation and Tourism)	Hickory Knob State Resort Park Lodge	77-room hotel and 18 duplex cabins on the shores of Strom Thurmond Lake. The facility includes a restaurant, lighted tennis courts, archery range, swimming pool, 100-person convention center, 150-person banquet room, and 18-hole championship golf course designed by Tom Jackson.
Tennessee (Tennessee Dept. of Environment and Conservation)	Falls Creek State Park Resort Inn and Conference Center	144-room hotel with 222-seat restaurant, banquet and conference facilities for up to 350 people, outdoor swimming pool, and 18-hole golf course designed by Joe Lee. Golf course opened in 1972.
Tennessee (Tennessee Dept. of Environment and Conservation)	Henry Horton State Park Resort Inn	72-room hotel with 4 suites, 350-seat restaurant with three private dining rooms, conference rooms, 200-person conference lodge, and challenging 18-hole championship Buford Ellingson golf course considered one of the finest in Tennessee. On the Duck River in a 1,140-acre state park near the Jack Daniels Distillery.
Tennessee (Tennessee Dept. of Environment and Conservation)	Montgomery Bell State Park Resort Inn	110-room hotel with 5 suites on Lake Acorn in 3,782-acre state park. The facility includes a 115-seat restaurant, indoor and outdoor pools, exercise room, 6,000 sq. ft. conference facility, and an 18-hole golf course redesigned in 1988 by Gary Roger Baird and rated one of the top 100 public courses by Golf Digest. Completely new hotel, restaurant and conference facility opened in 10/98.
Tennessee (Tennessee Dept. of Environment and Conservation)	Paris Landing State Park Resort Inn	130-room hotel with 250-seat restaurant, conference facilities with capacity for up to 1,200 people, tennis courts, swimming pool, and 18-hole golf course awarded 4 stars in 1995 by Golf Digest. The newly constructed conference facilities opened in 4/98.
Tennessee (Tennessee Dept. of Environment and Conservation)	Pickwick Landing State Park Resort Inn	125-room hotel and 500-seat conference center scheduled to open in summer, 2001. Currently the resort complex has a swimming pool, lighted tennis courts, and 18-hole golf course. Construction of new inn/conference center began 1999.
West Virginia (West Virginia Division of Natural Resources)	Cacapon Resort State Park Lodge	47-room hotel, 11-room Old Inn, and 25 cabins, with restaurant, new conference facility seating up to 535 people, tennis courts, horseback riding stables, and an 18-hole, par-72 championship golf course designed by Robert Trent Jones.
West Virginia (West Virginia Division of Natural Resources)	Canaan Valley Golf Course and Resort	250-room hotel and 23 fully-furnished cottages containing fireplaces and full kitchens, with indoor and outdoor pools, saunas, spa and fitness center, conference facilities, 500-person banquet room, tennis courts, 34 downhill ski slopes, 30 km. cross country ski trails, outdoor lighted ice-skating rink, and 18-hole championship golf course rated the 10th best public course in 1996 by Golf Digest. Set in 6,000-acre state park. Operated by Guest Services since 1988 under a 25-year non-renewable lease in which the state receives 14% of gross revenues.
West Virginia (West Virginia Division of Natural Resources)	Pipestem Resort State Park Lodge	112-room hotel, 30-room mountain lodge accessible only by tramway, and 26 fully-furnished cottages. Includes indoor and outdoor pools, saunas, exercise room, restaurants, new 600-seat conference facility, lighted tennis courts, and two golf courses: an 18-hole championship course designed by Geoffrey Cornish and a 9-hole par-3 course.

Owner	Hotel	Description
West Virginia (West Virginia Division of Natural Resources)	Stonewall Resort	200-room, \$50-million hotel and conference center with restaurant, lounge, spa, indoor and outdoor pools, fitness center, 14,000 sq. ft. of meeting and banquet space, and 18-hole Arnold Palmer Signature golf course. Set in Stonewall Jackson Lake State Park. Groundbreaking in July 2000 with opening expected in the Spring of 2002. Benchmark Hospitality will manage the facility under a qualified management agreement.
West Virginia (West Virginia Division of Natural Resources)	Twin Falls Resort State Park Hotel	20-room mountaintop hotel with conference rooms, restaurant, café, swimming pool and 18-hole, par-71 championship golf course.

Advisory Committee on Tax Exempt and Government Entities (ACT)

Report of Recommendations



Public Meeting
Washington, DC
June 9, 2004

**Advisory Committee on
Tax Exempt and Government Entities
(ACT)**

II. Tribal Advice and Guidance Policy

Raymond C. Etcitty, Project Leader

June 9, 2004

Table of Contents

Introduction	3
Brief History of Federal Indian Policy.....	3
Unique Aspects to Tribal Economic Development and the Need for Revenue Generation	6
Indian Tribal Governmental Tax Status Act of 1982 and its Implementation by the Treasury Department and the IRS.....	8
Proposed Resolution and How to Achieve It	11
Summation.....	12

Introduction¹

A major obstacle to the ability of tribal governments to implement long-term, self-sustaining economic development projects are the many restrictions within the Indian Tribal Governmental Tax Status Act of 1982 (hereinafter, "the Act"), 25 U.S.C. §7871. The Act contains limiting provisions that prohibit tribal governments from issuing tax-exempt bonds except for the performance of "essential governmental functions." The federal government's failure to understand and accommodate the developmental status of many tribal economies in defining "essential governmental function" actually defeats many tribes' ability to operate as a fully functioning governmental entity on an equal footing with state and local governments. The Act discourages the development and acquisition of the most basic elements of infrastructure taken for granted off the reservation, but so lacking and desperately needed by many tribal communities in virtually every state of the Union.

In order to understand how current federal Indian policies, although well-intended have, in application, fallen short in promoting sound tribal economic development, the following elements are considered herein:

- History of Federal Indian Policy;
- Unique Aspects to Tribal Economic Development; and
- The Indian Tribal Governmental Tax Status Act of 1982 and its Implementation by the Treasury Department and the IRS.

Finally, this report will provide recommendations for addressing the underlying problems of current law that currently frustrates the economic development of tribes; although a Congressional fix may ultimately be the best solution².

I. Brief History of Federal Indian Policy

Since our Nation's inception, the federal government's treatment of Indian tribes has run a complex and tumultuous course marred by inconsistencies and extremes. Political historians have grouped these stages into the distinct legal, political, and historical eras described below.³ Any adequate assessment of the current regime

¹ ACT member Perry Israel did not materially participate in the preparation of this report.

² The Project Group interviewed many IRS personnel, tax attorneys, and other officials working for or on behalf of tribal governments. The interviewees consistently maintain that the best solution for the problem facing tribal governments issuing tax-exempt bonds is for a Congress to amend the Act by defining the term "essential governmental functions" or allow tribal governments to issue private activity bonds. The interviewees also generally perceive that IRS officials want either the Treasury Department to develop regulations or desire Congress to amend the Act. Attorneys who work for tribal governments are also somewhat at odds with their recommendations. On one hand, they desire an administrative fix for the term "essential governmental functions" but they are fearful that if the IRS or Treasury Department attempts to administratively fix the problem, then Congress will not amend the Act. But they also are concerned that if Congress attempts to amend the Act, they perceive that the IRS or Treasury Department will not administratively fix the problem.

³ See *American Indian Law in a Nutshell*, William C. Canby, Jr; Felix S. Cohen's *Handbook of Federal Indian Law*, 1982 Edition.

Tribal Advice and Guidance Policy

requires a working knowledge of these eras in order to ensure that prospective goals, policies, and practices achieve common national goals while avoiding exacerbation of past mistakes.

- Establishment of Federal Role - (Colonial times to 1820): This period witnessed the birth of the United States and the establishment of relationships among Indian tribes, European nations, and the United States. The first Congressional acts concerning Indians were passed to regulate commerce between Indians and non-Indians and to manage land exchange issues.
- Indian Removal and Establishment of Reservations - (1820-1887): This was a time when the federal government dealt with the "Indian problem" by removing en masse virtually all tribal peoples further and further westward to established "reservations" in an effort to minimize contact between tribes and non-Indian society as the influx of non-Indian settlers steadily encroached upon ancestral tribal lands.
- Allotment and Assimilation - (1887-1934): This federal policy was championed by proponents of assimilation who believed that Indians would be treated in the most socially responsible and honorable manner by integrating them, not as members of a tribal community but as individuals, into mainstream non-Indian American society. In 1887, Congress approved the General Allotment (Dawes) Act that, for the most part, divided reservation lands into separate parcels that were then allotted to individual Indian males. The allotment policy, while viewed as the most socially responsible plan for dealing with the Indians, also conveniently served to open up vast surpluses of reservation lands for non-Indian settlement. Many Indian reservations that were allotted became (and often remain today) a checkerboard of lands owned by both non-Indians and Indians, with a concomitant hodge-podge of governmental jurisdiction often disputed by both parties.
- Indian Reorganization - (1934-1953): Based on the dismal failure of the allotment policy, which was well documented across the country, Congress attempted to reverse the devastating effects of allotment. Congress placed reservation lands into trust status and enacted a system of federal oversight governing the alienation of these lands. Economic development and education became funding priorities, and tribes were allowed to adopt constitutions and corporations, many of which used federal or state governmental models.
- Termination - (1953-1968): Reorganization of the Indians into cohesive tribal communities was then abandoned in favor of termination. During this era, the federal government "terminated" its official legal recognition of 109 tribes and extinguished the Indian peoples' status as wards of the government. Congress also legislated state control over Indian country in several states by enacting Public Law 280 that provided for state civil and criminal jurisdiction over reservation territory.

- Self-Determination - (1968-present): The civil rights movement of the 1960's led to the re-examination by the federal government of the termination policy. In a 1970 special message to Congress, President Richard M. Nixon called for a new federal policy of "self-determination" for Indian nations. Thereafter, Congress enacted numerous laws that ostensibly supported self-determination and economic development for Indian tribes, including the Indian Tribal Government Tax Status Act of 1982.

"Self-determination" is a federal policy that attempts to promote equitable government-to-government relations between the federal government and Indian tribes, to encourage tribal self-government, and to support the development of tribal economies.⁴ This policy has received official support through both Congressional⁵ and Presidential actions,⁶ as indicated by the following remarks by President Ronald Reagan in his January 24, 1983 American Indian policy statement:

... Instead of fostering and encouraging self-government, [f]ederal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision-making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency . . . The economics of American Indian reservations are extremely depressed with unemployment rates among the highest of the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services . . . Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services . . . The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities . . . A full economic recovery will unleash the potential strength of this private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.⁷

⁴ See Special Message to the Congress on Indian Affairs issued by Richard M. Nixon, July 8, 1970, and American Indian Policy issued by Ronald Reagan, January 24, 1983; 19 Weekly Comp. Pres. Doc. 98.

⁵ See Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§450 et seq.; Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963; Indian Financing Act, 25 U.S.C. §§1451 et. seq.; Indian Tribal Governmental Tax Status Act of 1982; 26 U.S.C. §7871; Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701-2721; numerous restoration acts for terminated tribes; and various environmental laws that recognize tribal authority.

⁶ *American Indian Policy* issued by Ronald Reagan, January 24, 1983; 19 Weekly Comp. Pres. Doc. 98; *Statement on Signing the Indian Self-Determination and Education Assistance Act* issued by Ronald Reagan, October 5, 1988, 24 Weekly Comp. Pres. Doc. 1268; *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Government* issued by George Bush, June 14, 1991, 27 Weekly Comp. Pres. Doc. 783; *Consultation and Coordination with Indian Tribal Governments* issued by William J. Clinton, May 14, 1998, Executive Order 13084; *White House Conference on Building Economic Self-Determination in Indian Communities* issued by William J. Clinton, August 6, 1998, 34 Weekly Comp. Pres. Doc. 1576.

⁷ *American Indian Policy* issued by Ronald Reagan, January 24, 1983; 19 Weekly Comp. Pres. Doc. 98.

(Emphasis added.)

II. Unique Aspects to Tribal Economic Development and the Need for Revenue Generation

Historically, Indian tribes existed as separate and distinct cultures and races from one another. Existing prior to federal, state, and local governments, each tribe developed and maintained its own internal governmental structure, each unique in form, size, land-base, and in the natural resources available to the tribal community. Resources were managed to commensurate with the needs of the tribe.⁸ Many of these original tribal governments still exist today, although most have modernized under the pressure of historical and political changes brought by the dominant culture.

Today, there are 562 federally-recognized Indian tribes in the United States.⁹ Legal developments in federal Indian law have left tribal governments with certain governmental functions and authority as quasi-sovereign entities that co-exist with federal, state and local governments.

As such, tribal governments have retained some inherent governmental authority, such as the power to raise revenues through taxation,¹⁰ gaming,¹¹ natural resource development and energy projects,¹² and other economic ventures. They have also regained certain powers once lost, although on a somewhat limited basis. Powers such as criminal and civil jurisdiction over Indian and non-Indians were restricted or extinguished during historical eras limiting tribal sovereignty. Like all governments, tribal governments use their revenues to provide essential governmental services and to promote economic development for their citizens,¹³ residents and visitors. In fact, the U.S. Supreme Court in *Merrion v. Jicarilla Apache Tribe*,¹⁴ held that all residents of Indian country include those persons (Indians and non-Indians, alike) who reside within the exterior boundaries of an Indian reservation "benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of tribal government."¹⁵ Further, the Court stated that a tribal government's power to tax is derived, not from its authority as a landowner (e.g. the power to exclude non-Indian from tribal land), but from its

⁸ The sovereign status of tribal governments have been recognized and reaffirmed time and time again by the U.S. Supreme Court. As Chief Justice John Marshall stated "The Indian nations [have always been considered as] distinct, independent political communities, retaining their original natural rights, as the undisputed possessor of soil, from time immemorial . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 505, 559 (1832). See also *U.S. v. Lara*, 204 WL 826057 (U.S.)

⁹ Federal Register, 12-05-03; Vol. 68, No. 234.

¹⁰ See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); and *Kerr-McGee v. Navajo Tribe*, 417 U.S. 195 (1985).

¹¹ See Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701-2721.

¹² Natural resource development includes coal, natural gas, oil, timber, water, etc.

¹³ Citizens of a tribal government are generally members of the Indian tribe. See *Morton v. Mancari*, 417 U.S. 535 (1974), (The U.S. Supreme Court determined that membership in an Indian tribe is a political distinction not racial).

¹⁴ 455 U.S. 130 (1982).

¹⁵ *Id.* at 138.

authority as a legitimate sovereign to control economic activity within its territorial jurisdiction.

Although the federal government has tried to promote tribal self-determination, the status of tribal governments as "quasi-sovereign" entities has become self-defeating. The primary reason for this predicament is the inherent assumption in federal law that all governments, including tribal governments, possess or can easily acquire the fundamental infrastructure needed to provide basic services to its citizens, residents and visitors. In reality, many tribal governments, still suffering from the impacts of historical federal policies, lack the ability to provide the most basic infrastructure that most U.S. citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity and telephone services that come with a modern home.

In fact, most Indian tribes have an economy that is on par with most third world countries. According to the U.S. Census Bureau, approximately 20% of American Indian households on reservations lack complete plumbing facilities, compared to 1% of all U.S. households. And about 1 in 5 American Indian reservation households disposed of sewage by means other than public sewer, septic tanks, or cesspool.¹⁶

Moreover, historical and social circumstances have created a climate in which Indian populations living within Indian territories generally have extremely low socio-economic factors, including low educational achievement, high unemployment¹⁷, high poverty¹⁸, and low per capita income.¹⁹ Overall, the lack of adequate infrastructure and low socio-economic factors are unattractive to business development on Indian reservations. And without resolution of these problems, the problems will continue.

Many tribal governments rely on state and federal funds to mitigate these problems. But the funds are insufficient to address the myriad responsibilities facing tribal governments. Similarly, gaming does not provide sufficient funds to meet the needs of all tribal governments. It is a general misconception that all Indian tribes are rich and have gaming, since more than a majority of all Indian tribes are without gaming of any kind.²⁰ Therefore, if the creation of self-sustaining revenue sources is the goal, tribal governments must be permitted to issue tax-exempt bonds, the bread and butter of most state and local governments treasuries. Unfortunately, the current statutory scheme of the Indian Tribal Governmental Tax Status Act and the implementation of the Act do not allow tribes to issue tax-exempt bonds. It is odd that self-determination has

¹⁶ See Bureau of the Census, Statistical Brief, Housing of American Indian on Reservations – Plumbing (April 1995).

¹⁷ The general U.S. population has unemployment rate of 5.8%, compared to 13.6 percent of the workforce on Indian reservations. See U.S. Census Bureau 2000.

¹⁸ The general U.S. population has a poverty rate of 12.38%, compared to 25.67% for American Indians. See U.S. Census 2000.

¹⁹ The general U.S. population has a per capita income of \$21,587.00, compared to \$12,893.00 for the American Indians. See U.S. Census 2000.

²⁰ Total number of federally recognized Indian Tribes: 562. Number of Tribal Governments engaged in gaming (Class II or Class III): 224. See National Indian Gaming Association website, www.indiangaming.org

been a U.S. Presidential policy and a goal of Congress since the late 1960s, but the Indian Tribal Government Tax Status Act as currently written does not fully reflect or advance this federal policy.

III. Indian Tribal Governmental Tax Status Act of 1982 and Its Implementation by the Treasury Department and the IRS

In 1982, Congress passed what was perhaps the most important piece of tax legislation to impact the federal governments treatment of Indian tribes for taxation purposes -- The Indian Tribal Governmental Tax Status Act.²¹ Prior to this time, federal law was unclear on how tribal governments, and their subdivisions, were treated for various federal tax purposes.²²

In keeping with the Self-Determination era of federal Indian policy, the Act attempted to treat tribal governments equally to state and local governments for certain tax purposes. It did not, however, achieve the objective of placing these governments on equal footing to one another.

The Act allowed a deduction from federal income tax for taxes paid to Indian tribes; allowed charitable contributions to tribal governments to be deductible for income, estate and gift tax purposes; and allowed an exemption for tribal governments for various federal excise taxes. But the Act also prohibiting tribes from issuing tax-exempt private activity bonds²³ and limited the ability of tribal governments to issue tax-exempt governmental bonds by allowing them to be issued only for activities that can be classified as "essential governmental functions."

Although the Act itself did not define the term, a Congressional Conference Committee Report stated that "essential governmental functions" includes projects like "schools, streets, and sewers." The report also stated that tribal governments could not issue "private activity bonds" including industrial development bonds. In short, when

²¹ The Indian Tribal Governmental Tax Status Act of 1982, (Title II of Pub. L. No. 97-473, 966 Stat. 2605, 2607-11, as amended by Pub. L. No. 98-21, 97 Stat. 65, 87 [1983-1 CB 510, 511, §1065 of the Tax Reform Act of 1984, 1984-3 (Vol. 1) Cumulative Bulletin 556, made permanent the rules treating Indian Tribal governments, or subdivisions thereof, as states. See also Revenue Procedure 86-17 and Revenue Ruling 86-44. The term "Indian Tribal government" is defined under IRC § 7701(a)(40), as amended, to mean the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, that is determined by the Secretary of the Treasury, after consultation with the Secretary of the Interior, to exercise governmental functions. This definition is used to comprise the federally recognized list as determined by the Bureau of Indian Affairs. The Indian Tribal Governmental Tax Status Act of 1982, (Title II of Pub. L. No. 97-473, 966 Stat. 2605, 2607-11, as amended by Pub. L. No. 98-21, 97 Stat. 65, 87 [1983-1 CB 510, 511]).

²² See Revenue Ruling 67-284 (Indian tribes are not a taxable entity.); Revenue Ruling 81-295 (Federally-chartered corporations wholly owned by an Indian tribe is not a taxable entity.); and Revenue Ruling 68-231 (Bonds issued by tribal governments would not be treated similar to bonds issued by state governments.)

²³ The Act applies the following requirements for special manufacturing facility bonds: 95% of the bond proceeds must be used to finance property that is acquired, constructed or improved by the tribal government, the property must be of a type that is subject to depreciation and part of a manufacturing facility, the property must be on Indian lands that must be held in trust by the United States at least five years prior to the issuance of the bond and be held at all times the bonds are outstanding, and an employment test is used. See IRC §787 (C)(3).

Congress prohibited Indian tribes from issuing private activity bonds and limited tribes from issuing governmental bonds for "essential governmental functions." Congress simply failed to follow the clearly stated federal policy of tribal self-determination.

Governmental bonds²⁴ and private activity bonds²⁵ would be a vital financial tool for tribal governments because these bonds allow the government to secure capital for the building of infrastructure, which, in turn, encourages economic development within Indian reservations.

In 1984, the Treasury Department developed proposed/temporary regulations, Treasury Regulation §305.7871-1(d)(1984), T.D. 7952, 1984-1 C.B. 276, to define the term "essential governmental function." The regulations defined "essential governmental functions" as a type of function that is:

- a) Eligible for funding under the Snyder Act (25 U.S.C. §13)²⁶;
- b) Eligible for grants or contracts under Indian Self-Determination Act (25 U.S. §450(f), (g), and (h)); or
- c) An essential governmental function under I.R.C. § 115 and the regulations thereunder when conducted by a state (or political subdivision, thereof).

The Snyder Act and the Indian Self-Determination Act are congressional acts that allow the federal government to provide funds for tribal self-governance and self-determination. When the Regulations incorporating activities that could fall under the Snyder Act and Indian Self-Determination Act, the Regulations in effect expanded the activities that tribal governments could tax-exempt finance which appear to go beyond the intent of Congress. On one hand, the regulations do not appear out of character with federal policy towards Indian tribes and the need to develop economic development. On the other hand, the Regulations did not give much weight to the Conference Report and its examples of what is an "essential governmental function." It has been

²⁴ Governmental bonds are obligations issued by a governmental unit (or other entity) to finance governmental operations. A local government issues these bonds for its own purposes. For example, a county can issue bonds and expect to use the proceeds to:

- build or renovate a building which the county itself will use,
- build, repair and/or maintain schools and roads,
- build and operate a county-owned power plant or sewage treatment facility.

Two distinguishing characteristics of governmental bonds are that the bond proceeds:

- will be USED by the governmental entity for its own purposes, and
- the bond-financed property will be OWNED by the governmental unit.

See IRS Module B, *Introduction to Federal Taxation of Municipal Bonds*, page B-3.

²⁵ Generally, private activity bonds are bonds issued by a governmental unit (or related entity):

- the proceeds of which will be used by an entity OTHER THAN a governmental unit, AND
- the debt service of which will be paid from private payments.

See IRS Module B, *Introduction to Federal Taxation of Municipal Bonds*, page B-4.

²⁶ The Snyder Act authorizes the Bureau of Indian Affairs to make federal expenditures to assist Indian tribes for such purposes as "industrial assistance and advancement and general administration of Indian property."

speculated that the Regulations were drafted based on comments received from tribal governments.²⁷

After the regulations were published, seven tribal bonds were issued that totaled under \$300 million.²⁸ Six of the seven bonds were for off-reservation projects that involved "leverage buy-outs" of commercial and industrial facilities. The only bond issued for an on-reservation project was to construct a health clinic. The tribal bonds that were issued for off-reservation commercial and industrial facilities received significant negative public and media attention²⁹. In reaction to the public scrutiny following the tribal bond offerings for off-reservation projects, Congress in 1987 amended the Indian Tribal Government Tax Status Act. The Report of the House Committee on its reason for amending the Act states:

The committee is extremely concerned about recent reports of Indian tribal governments issuing tax-exempt bonds for what are substantively interests in commercial and industrial enterprise.³⁰

[W]ith respect to bonds issued by Indian tribal governments, the term essential governmental function does not include any governmental function that is not customarily performed (and financed with governmental tax-exempt bonds) by States and local governments with general taxing powers. For example, issuance of bonds to finance commercial or industrial facilities (e.g. private rental housing, cement factories, or mirror facilities) which bonds technically may not be private activity bonds is not included within the scope of the essential governmental function exception.

The House Report concluded with a harsh remark of the Treasury Department regulations:

Additionally, the committee wishes to stress that only those activities that are customarily financed with governmental bonds (e.g. schools, roads, governmental buildings, etc.) are intended to be within the scope of this exception, notwithstanding that isolated instances of a State or local government issuing bonds for another activity may occur. Further, the fact that the Bureau of Indian Affairs may provide Federal assistance for Indian tribal governments to engage in commercial and industrial ventures as tribal governments activities is not intended to be determinative for purposes of the Internal Revenue Code.

²⁷ See Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and Tax Legislation Process*, 46 Admin. L. Rev. 333 (1994). See also John E. Theberge and Diana A. Imholtz, *Tax-Exempt Financing Involving Indian Tribal Governments*, The Exempt Organization Tax Review, August 2003, Vol 41, No. 2; and Kathleen M. Nilles, *Tribal Bondage: A Brief History of the Tax-Exempt Financing Rules Applicable to Tribes*, prepared for "Tribal Bonds: A Unique Case" at The Inaugural National Native American Tribal Finance Conference, February 18th-20th, 2004, The Spa Resort & Casino, Palm Springs, California.

²⁸ See Aprill, at 33.

²⁹ See Matthew Schifin, "Smoke Signals" *Forbes* (June 15, 1987) at 42.

³⁰ H.R. Rep. No. 391 at 1139.

(Any existing Treasury Department regulations that may infer a contrary result are to be treated as invalid.)³¹

(Emphasis added.)

Unfortunately, the amendment did little to resolve the problem, since it did not clearly define the term "essential governmental functions." Instead, the amendment added language stating that the term "essential governmental functions" shall not include any function that is not customarily performed by State and local government with general taxing powers. Congress' action in effect overturned the Regulations.

Since the 1987 amendments to the Act, there have not been any regulations defining the term "essential governmental functions." Moreover, the IRS also has not provided any guidance or instructions to tribal governments on what is or what is not an "essential governmental function."³² But on November 22, 2002, the IRS issued Field Service Advice 20024712 (hereinafter "FSA") to address an issue of whether the construction and operation of the Golf Course by an Indian tribe is an "essential governmental function" within the meaning of §7871(e). The FSA examined the legislative history of the Act and the events surrounding the 1987 amendments. And the FSA also added a type of subjective balancing test in which the purpose of the activity is examined to determine whether the activity is more commercial or more governmental, in nature and purpose. This standard is very much subjective without further guidance and information. The FSA concluded, although there were 2,645 publicly owned, municipal golf course in the United States, the commercial nature of the golf course owned by an Indian tribe cause it to be other than an essential function within the meaning of §7871(e).

IV. Proposed Resolution and How to Achieve It

The IRS should take the following steps to develop guidance and instruction to tribal governments for the term "essential governmental function":

- The IRS should request the Treasury Department to develop regulations to define "essential governmental functions" under §7871(e);
- The IRS should clarify that the "essential governmental function" under §7871(e), be construed in accordance with the term "essential governmental function" under §115.
- Withdraw FSA 200247012 and suspend issuance of any other non-precedential Guidance.

³¹ H.R. Rep. No. 391, 100th Cong., 1st Sess. 1139 (1987).

³² The Project Group examined the available material on the IRS website and publications that the IRS provides for the public.

Tribal Advice and Guidance Policy

The IRS can't develop clear guidance and advice for the term "essential governmental functions" if there are no regulations. There is hesitation by the IRS and the Treasury Department to do anything but wait for a congressional fix.

- A. The IRS should request the Treasury Department to develop regulations to define the term "essential governmental functions" under Section 7871(e).

As stated above, the Treasury Department has not developed any regulations since 1984 that defines the term "essential governmental functions." Short of Congressional legislation that fully recognizes tribal government as having equal federal tax treatment with state and local governments, a Treasury regulation defining the "essential governmental function" test under §7871(e) is the best solution. But in order to develop such regulations, the Group recommends that regulation should balance the following:

- The legislative history of the Act
- The federal policy of self-determination.

The history of the Treasury Department and IRS with the term "essential governmental functions" demonstrates a myopic vision. When Treasury Department originally developed its regulations to define "essential governmental functions," it appears that the regulations were drafted based on tribal government recommendations with little regard to the legislative history of the Act³³. This decision to develop the regulation without examining the legislative history of the Act caused a Congressional backlash that resulted in the 1987 amendments to the Act. In addition, the manner by which FSA 20024712 was drafted also appears to be too one-sided.

The Group believes that the FSA relied solely upon the confusing legislative history of the Act and did not rely on any tribal policy or tribal input to develop the advice. The legislative history should not be read as imposing an additional test (i.e., "no 'commercial' activity") on the activities conducted by tribal governments. Therefore, in an attempt to provide some balance in draft subsequent regulations, the regulations should attempt to balance two sources of information – the legislative history of the Act, and the federal policy of self-determination, which is currently being implemented through the development of IRS's proposed tribal consultation policy. These regulations should be drafted with the assistance of tribal governmental representatives who are familiar with reservation communities and the unique revenue-generating opportunities found across Indian Country.

- B. The IRS should clarify that the "essential governmental function" under §7871(e), be construed in accordance with the term "essential governmental function" under §115.

Under §115, activities that make or save money for the state can be "essential governmental functions" so long as the income generated from the activity is used for a

³³ See Aprill, Bonds.

governmental purpose³⁴. The Group recommends avoiding giving inappropriate weight to the legislative history's mention of "commercial or industrial facilities" in construing §7871(e). Congress did not incorporate the phrase "commercial or industrial" facilities into the statutory language in §7871(e). Therefore, IRS guidance should focus on clarifying the words of the statute – "not customarily performed by a state or local government with taxing power," using §115.

C. Withdraw FSA 200247012 and Suspend Issuance of any other Non-precedential Guidance.

FSA 200247012 has muddied the waters. It is premised on an incorrect assumption of law – i.e., that "revenue-generating activities" conducted by a tribal government are not "essential governmental" functions. In addition to giving far too much weight to references in the committee reports to the words "industrial" and "commercial," the FSA imports a grossly subjective element into the determination of whether a particular tribal activity constitutes an essential government function. For example, the FSA suggests that "the probable role of the Golf Course in the community contrasts with that of the more typical golf course developed by a state or local government." Until the Treasury Department or IRS issues clear public guidance under §7871(e), the IRS should not be permitted to use the examination process to make new law in this area.

D. Suspend Any New Compliance Initiatives Applicable to Tribal Bonds Until After Published Guidance is Issued.

It would be inappropriate at this time for the IRS to implement any new compliance initiatives aimed at tribal bond issuances. IRS agents simply do not have adequate guidance from the IRS Chief Counsel and Treasury Department to measure compliance with the "essential governmental function" test at this time. If informal guidance is issued, it should be explicitly labeled as interim safe harbor guidance.

V. Summation

How can tribal governments develop sustainable economies that produce recurring revenues needed to provide the infrastructure for their citizens, residents and visitors, when tribal governments have their hands tied behind their back? Since the 1987 amendments, the Treasury Department hasn't published any further proposed regulations to define the term "essential governmental function." Without any guidance

³⁴ See, e.g., Revenue Ruling 90-74 1990-2 C.B. 34 (government liability pools, which met the obligations of political subdivisions to protect the financial integrity, fulfilled an essential governmental function); Revenue Ruling 77-261, 1977-2 C.B. 45 (an investment fund established by state constituted an essential governmental function). In Private Letter Ruling 200116009 (April 23, 2001), the IRS ruled that §115 excluded the income of a nonprofit corporation formed by a city to assist it in financing, acquiring, constructing and operating a convention center hotel. A key premise underlying the ruling was the IRS concluded that the operation of the hotel was an essential governmental function because it allowed the city to lessen the deficit associated with the convention center's operation.

Tribal Advice and Guidance Policy

or instruction, tribal governments and the public are left with the tedious burden of requesting separate private letter ruling to determine whether their proposed project is something that state or local governments with taxing powers "customarily" perform and whether the activity is more governmental or commercial in nature or purpose. Tribal governments and the IRS are also left to attempt to discern what Congress meant in the legislative history when it referred to "commercial or industrial facilities." Overall, the unclear definition of "essential governmental functions" leaves tribal government with the impossible task of providing governmental services to their citizens, resident, and visitors without any real ability to utilize tax-exempt, one of the biggest financial tool of nearly every state and local governments.

Testimony of Lenor A. Scheffler

**Partner, Best & Flanagan, LLP and
Member of the IRS Advisory Committee
for Tax-Exempt and Government Entities.**

Before the

Subcommittee on Long-Term Growth and Debt Reduction

Of the Senate Committee on Finance

Presented on May 23, 2006

Thank you for the invitation to appear before the Subcommittee to address “Encouraging Economic Self-Determination in Indian Country” and, specifically, to discuss Tribal tax-exempt bond issues.

IRS ACT June 8, 2005 Report

For the past two years, I have served as a member of the IRS Act Advisory Committee on Tax-Exempt and Government Entities (the “ACT”). Attached is ACT’s June 8, 2005 Report¹ (the “ACT 2005 Report”) entitled “Survey and Review of Existing Information and Guidance for Indian Tribal Governments.” This document was completed in 2005 after extensive consultation with Tribal Government officials; Tribal Government staff, including financial officers, internal and external accountants, and internal and external lawyers; and with Tribal members.

The ACT 2005 Report covers areas that are important to the economic development of Tribes in the United States. Its recommendations cover a number of significant topics; many recommendations include requests for guidance regarding topics such as the federal tax treatment of different legal structures used for Tribal businesses and Tribal economic development entities; tax treatment of Tribal trusts; and a definition of what constitutes “an essential governmental function” for purposes of Tribal tax-exempt financing.

In my testimony and written remarks, I would like to describe the economic dilemma that faces Tribes, outline some of the past and present efforts to address these financial challenges, and suggest some actions that would be useful in making significant progress towards the economic viability of Tribes.

Unique Status of Tribes

At the onset, I would like to emphasize that Indian Tribes are unique. We are not simply a racial group. We are not a state or local government. We are sovereign governments numbering over 560 federally recognized Tribes (the “Tribes”). Tribes maintain a government-to-government relationship with the United States Government. For additional information on this unique status, see page six of the ACT 2005 Report for an overview of the federal statutes

¹ IRS Publication 4344 (Rev. 6-2005)

that reflect Congress' policy of encouraging economic development in Indian country. These statutes support self-government, self-determination, and self-sufficient Tribes.

Economic Status of Tribes

Historically, Tribes and Tribal members have been impoverished. Little or no economic activity has occurred on our Tribal lands, and we continue to be challenged by these circumstances today. Of the over 560 Tribes in the United States, only a few hundred are considered economically viable. Contrary to popular belief, not all Indians have become wealthy from Indian gaming. Most of our Indian brothers and sisters live on reservations that continue to be isolated and have high rates of unemployment, poverty and violence.

I am proud to say that throughout Indian country—even in the most remote reservations—strides have been made to change the circumstances of the People. Tribes have developed business initiatives and other programs for economic development; several excellent examples have been identified in recent testimony before the Senate Select Committee on Indian Affairs.

Revenue Generation Issues for Tribes

The ACT 2005 Report and recent testimony on economic development to the Senate Select Committee on Indian Affairs have highlighted the economic condition of Tribal members and the resulting implications for maintaining a viable tax base. State, local, and federal governments have a tax base that is sufficient to support government operations and the general welfare programs for their citizens.

Tribes have the authority to tax just like any other sovereign nation. Some Tribes are economically viable and do collect sufficient taxes to support Tribal programs; however, they remain the exception. Most Tribes are still fighting poverty, and thus cannot generate taxes sufficient revenue to provide for governmental services. In addition, Tribes face challenges from other taxing authorities, e.g., state and local governments that want "their share" or complain about unfair tax advantages that Tribes may have. The common areas of contention are cigarette and motor fuel taxes. These tax issues are often the subject of litigation or tax agreements.

In summary, Federal, state, or local governments can generate revenues to support their government operations and programs for their citizens by imposing taxes. However, given the economic conditions of its citizens, Tribes cannot depend on taxes and must look to other sources of revenue to support their government operations and programs for their citizens. This is an important point that cannot be emphasized enough or repeated enough.

Revenue Generation from Tribal Businesses

Because revenue is not available via taxation, Tribes have increasingly funded government operations and general welfare programs through Tribal-owned businesses. Tribes operate a variety of successful businesses around the country, thereby providing revenue to fund Tribal Government operations and programs.

The most well-known business endeavors are the Tribal casinos. In one example, a Tribal business entity operates a casino, it remits net gaming revenues after expenses to that Tribe's Government just like a corporation is required to pay taxes. The Tribe then uses the net gaming revenue for tribal government operations and programs to promote economic development, to donate to charitable organizations or to help fund operations of local government agencies. These priorities are set forth in the Indian Gaming Regulatory Act of 1988².

The Indian Reorganization Act and Tribal Economic Development

The earliest legislative support for Tribal economic development began more than 70 years ago. The Indian Reorganization Act of 1934 (the "IRA")³ was designed to reduce the loss of Tribal lands, to provide economic development to Tribes, to encourage and provide for self-determination of Tribes, to recognize cultural plurality, and to revive Tribalism. The framers of the IRA thought that by granting Tribes a form of government and the power to enter into business, Tribes would then be equipped to participate in the mainstream economy.

Under the IRA, Tribal corporations were chartered by the Secretary of Interior. These so called "§17 Charters" from the Secretary of Interior allowed some Tribes to create business entities that pursued commercial endeavors. Although the IRA's early efforts were not ideal, they provided an early framework for Tribes to pursue economic development.

Tribal Tax Exempt Bonds

The next significant federal initiative in support of Tribal economic development was the Indian Tribal Governmental Tax Status Act of 1982 (the "1982 Act")⁴ and the regulations by the Treasury Department and the IRS to implement it.

As described on page eight of the ACT 2004 Report⁵, the 1982 Act permitted Tribal Governments to be treated as State governments for various tax purposes. Tribes could issue tax-exempt bonds for essential government functions within the following definition:

For purposes of this section, the term "essential governmental function" shall not include any function which is not customarily performed by State and local governments with general taxing powers.⁶

This definition has not provided helpful guidance. Tax-exempt bond financing is an economic development tool that state and local governments have used for decades. For example, state and local governments can use tax exempt financing to finance convention centers, airports, golf courses, and sports facilities and to entice for profit businesses to their communities.

² 25 U.S.C. Section 2701(b)(3) and (d)(1)(A) (1988)

³ 25 U.S.C. § 461 et seq.

⁴ Pub. L. No. 100-203, ch.80, 96 Stat. 2607 (1982) (codified at I.R.C. Section 7871 (1993))

⁵ IRS Publication 4344 (5-2004)

⁶ 26 U.S.C.A. Section 7871(e)

Tribes need to be able to use tax-exempt bond financing in the same manner. However, when Tribes engaged in economic development activities typically performed by state and local governments, both Congress and the IRS Compliance Auditors have stated that such activities are not within the statutory definition and that Congress never meant for Tribes to engage in those activities. For example, state and local governments commonly fund golf courses with tax exempt financing. However, when Tribes attempted to fund of Tribal golf courses with tax exempt financing those efforts have been challenged.

The Next Steps

Congress has a longstanding policy of encouraging Tribal economic development. I have provided information on the two foundational statutes that have furthered this goal in the past. Congress now has the opportunity to further this policy by enacting new legislation that serves this objective of economic self-sufficiency. I.R.C. § 7871 and relevant Treasury regulations⁷ are the appropriate vehicles for amendments to resolve the ambiguities of the 1982 Act and clarify what Tribes can and cannot do with tax exempt financing.

An additional option to broaden a Tribe's economic development is to provide Tribes with a broader ability to issue private activity bonds. This would provide Tribes with another tool to drive economic development like state and local governments have used extensively.

Currently, Tribes can issue private activity bonds only within very narrow circumstances; in contrast, state and local governments have much broader ability to issue private activity bonds. The result is that although Tribes have less ability to generate revenue for government operations and programs for its citizens, they are unable to use a tool that is widely used to generate revenue by state and local governments.

Because of the short timeframe, I have not brought any proposed legislation with me today; however, I would be glad to work with the Sub-Committee's staff to develop legislation in this area. Consistent with the Congressional policy of encouraging Tribal economic development, I believe that any revision of the current statute should include the following elements:

1. Permit Tribes to utilize tax-exempt bonds to fund the same activities as state and local governments, thereby financing all essential government functions; and
2. Permit Tribes to utilize private activity bonds to support economic development.

Any amendment or other revision to the current statute will require consultation with Tribes. Within this conversation, the Tribes can share information learned from their economic development experiences, and can provide Congress, the Treasury Department and the IRS with valuable insights into the unique status and economic challenges faced by the Tribes. I look forward to those conversations.

Thank you for the opportunity to speak with you today.

015413/202596/444423_1

⁷ Treas. Reg. Section 205.7871-1

**Advisory Committee on
Tax Exempt and Government Entities
(ACT)**

***Survey and Review of Existing Information
and Guidance
for Indian Tribal Governments***

Lenor A. Scheffler and Robert L. Gips, Project Leaders

JUNE 8, 2005

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY.....	3
II. PROJECT PROCESS	5
III. BACKGROUND	6
IV. RECOMMENDATIONS AND DISCUSSION.....	10
A. GUIDANCE RECOMMENDATIONS	10
B. WEBSITE RECOMMENDATIONS	13
V. CONCLUSION	16

I. EXECUTIVE SUMMARY:

There are over 560 federally recognized Indian Tribes in the United States. Each Tribe has its own government. The Tribal Governments, their tribal members, tribal government staff, financial officers, internal and external accountants, and internal and external lawyers who work with them are the customers (the "ITG Customers") of the Office of Indian Tribal Governments ("ITG"). The resources available to Tribes varies considerably. There are relatively few Tribes with sufficient resources to afford expert staff and counsel regarding tax matters. A great number of Tribes are not able to hire tax experts and must rely on generalists. At the same time, most Tribes are still in the early stages of tribal economic development and guidance on tax matters is particularly important.

An additional consideration is that Tribes have a unique status within our federal system as sovereign entities. The Federal Government maintains a government-to-government relationship with Tribes. Only a small number of federal officials have had the opportunity to be educated about tribal history, tribal status and tribal sovereignty, partly because of the unique nature of Tribes and their governments, partly because of a past history of official neglect (sometimes benign and sometimes not), and partly due to Tribes' historical lack of political power. Tribal governmental status often is not well understood, and consequently, tribal tax status is not well understood. In addition, a need for clarification remains in a variety of areas.

The recent recognition by the IRS of the need for the ITG and the ensuing creation and staffing of the ITG have been significant steps forward in turning the corner on this history of neglect, and on the lack of understanding of tribal tax and related issues. The ITG has recognized the importance of basic principles of tribal sovereignty and tribal outreach and has made great strides in its short existence. This progress is due both to the ITG's recognition of tribal sovereignty, and to the personal efforts of key ITG staff. The ITG has been viewed by ITG Customers as a positive initiative. The ITG has improved the lines of communication between Tribes and the IRS. This in turn has helped lead to a deeper mutual understanding between the ITG and Tribes. Information developed by the ITG, and the availability of ITG representatives to meet with Tribes, has led to an increased understanding of the IRS' requirements and undoubtedly has led to increased voluntary compliance.

However, while the creation of the ITG has been a significant step forward in creating usable and useful information for Tribes and enhancing compliance opportunities, as the ITG itself recognizes, substantial work in this area is yet to be done. To aid in this effort, our project has involved the following:

- Review areas where guidance is currently inadequate, including areas where guidance has been under review or promised.
- Review areas where new guidance is needed.

- Recommend action in these areas.
- Identify and review current sources of web-based information for ITG Customers, and recommend ways to enhance presentation of this material to ensure greater understanding of the current IRS policy.

In the course of our work, it became apparent that current enforcement efforts by the IRS -- some of which are viewed by Tribes as unfair and at odds with how the IRS treats state and local governments -- coupled with a lack of progress on promulgation of past promised guidance, threatens to undermine the positive work that has been done by the ITG. Our recommendations address this issue in hopes of preserving and enhancing the progress that has been made to date by the ITG.

II. PROJECT PROCESS:

The Project Group began by gathering and reviewing available IRS published materials relating to Indian Tribes, including relevant Internal Revenue Code provisions, regulations, revenue rulings, revenue procedures, private letter rulings and technical advice memoranda. We also reviewed other IRS guidance products provided by the ITG, including publications, newsletters and other information. The Project Group also reviewed all material posted on the ITG's website, ranging from FAQ's to listings of relevant information.

Following this data collection and review, the Project Group undertook a variety of interactive data exchanges with representatives of ITG Customers. E-mails were sent to a sampling of ITG Customers, explaining the Project's scope and seeking written and oral feedback. Follow up conference calls were conducted with ITG Customers. Interviews were conducted by the Project Group in person and by conference call with members of ITG staff, the Chief Counsel's office, the Office of Tax Policy at Treasury, TE/GE website representatives, and representative national and regional tribal organizations. Throughout this process, the Project Group made recommendations to the ITG regarding its ongoing work to address issues of website design, content and guidance products.

III. BACKGROUND:

As noted in the Executive Summary, promulgation of guidance for Indian Tribes and other ITG Customers historically has not been a focus of the IRS. A number of factors may account for this situation. First, the unique status of Tribes as governments is not well understood. Second, the Internal Revenue Code is often silent on essential provisions, leaving greater gaps than might be found in other areas. Third, many Tribes historically have been impoverished, with little or no economic activity occurring on Indian lands, thus muting the demand for guidance.

Unlike local, state and federal governments, Tribes do not have a tax base to support their government operations and general welfare programs for their tribal members. Much of Indian country¹ is held in trust and not subject to taxation. Tribes must look to business development and excess revenues from business enterprises to fund governmental operations and general welfare programs. There has been a long-standing Congressional policy encouraging economic development in Indian country², and over the past fifteen years an explosion in the pace of economic development has occurred for a number of Indian tribes. This is a welcome trend for communities that historically have been marred by some of this country's worst poverty, unemployment rates, lack of adequate housing, and poor infrastructure.

Unfortunately, the issuance of guidance by the IRS has not kept pace with the speed of economic development initiatives occurring in Indian country. This has been a source of frustration and even anger, cited to our Project Group during interviews and surveys. Tribal governments are hampered by inadequate guidelines available to assist Tribes in understanding the federal income tax consequences of using various business structures. For example, no guidance exists concerning the tax consequences of using a tribally-owned, state chartered limited liability corporation, or a tribally-owned, tribally chartered limited liability corporation, or a tribally-owned, tribally chartered corporation. Such basic questions are particularly important for Tribes, because tribal governments tend to be the primary source of economic development for Tribes, and hence the major source of employment and income opportunities for tribal members and their families.³

¹ Indian country generally refers to territory under the jurisdiction of an Indian tribal government, and is statutorily defined at 18 U.S.C. §1151.

² See Indian Employment, Training and Related Services Demonstration Act of 1992 Pub. L. 102-477, Oct. 23, 1992, 106 Stat. 2302 (25 U.S.C. 3401 et seq.); Indian Gaming Regulatory Act Pub. L. 100-497, Oct. 17, 1988, 102 Stat. 2467 (18 U.S.C. 1866-1868; 25 U.S.C. 2701 et seq.); Indian Self-Determination and Education Assistance Act Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203 (25 U.S.C. 450 et seq.); Native American Business Development, Trade Promotion, and Tourism Act of 2000 Pub. L. 106-464, Nov. 7, 2000, 114 Stat. 2012 (25 U.S.C. 4301 et seq.); and Native American Housing Assistance and Self-Determination Act of 1996 Pub. L. 104-330, Oct. 26, 1996, 110 Stat. 4016 (25 U.S.C. 4101 et seq.).

³ Tribes, similar to other governments, exist in large part to provide services to the community -- direct services to constituents, infrastructure services and administrative services. The difference is that Tribes increasingly rely on economic development to fund those governmental services

The IRS has publicly stated for nearly a decade that initiatives to provide guidance in this area were under study or actively under study⁴, but there is a marked lack of tangible progress.

The nature of ITG Customers differs from that of other IRS customer groups. The tribal tax world is not a known environment like that encompassing exempt organizations or employees plans. There is not an army of specialists who know the clear parameters and can advise or advocate for their clients. Only a few Tribes have staff with professional tax experience, and there are literally only a handful of lawyers who have been able to focus their practices on tribal tax matters. The fact is that most Tribes are advised by generalists -- whether lawyers, accountants, or tribal employees. This state of affairs underscores the need for the IRS to provide ITG Customers with clear and useful guidance. Furthermore, because there is a significant diversity of technical understanding among ITG Customers, the IRS must be able to meet the information needs of ITG Customers with both basic and advanced understanding of tax issues. As Congress has mandated legislatively in recent decades, the goal should be to help all Tribes achieve 'self determination' -- the right and power to manage their own affairs and to exercise their sovereignty.

The IRS' mandate to provide such guidance to Tribes is also underscored by the unique trust relationship that the Federal Government has with Indian Tribes. This relationship includes trust asset management responsibilities, whereby the United States has the responsibility of acting as trustee for vast amounts of Tribal assets and individual tribal members' assets. This fiduciary responsibility has, to the great discredit of our country, been breached for over a hundred years; Cabinet officials have repeatedly been held in contempt of court for this breach in recent years.⁵ This trust responsibility also extends to the more inchoate responsibilities of the Federal Government to act on behalf of Tribes.⁶ The trust responsibility forms an additional backdrop through which Tribes view the IRS's actions, and against which the IRS's actions will be measured.

Within this atmosphere of increasing Tribal economic development, and lacking guidance from the IRS, the general view of many ITG Customers that were interviewed

(supplemented with tribal taxes and other fees if available), while states and municipalities generally rely on their larger land and population bases to assess taxes (income, sales and property) to support services, supplemented by other fees and its own economic development initiatives. The need for Tribes to self-fund governmental services has accelerated as federal funding for Tribes has come under greater pressure in recent years.

⁴ See the general discussion of the history of such initiatives at pp. 10-11.

⁵ See *Cobell v. Norton*, U.S. District Court declaring Interior's conduct in managing trust assets and responses to class action suit as "the most egregious governmental misconduct it has ever seen". 2002 WL 163465 at *35.

⁶ See generally F. Cohen, *Handbook of Federal Indian Law* 220-228 (1982) (Cohen). *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983); *Tulce v. Washington*, 315 U.S. 681, 684-685, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)

was a sense of frustration and even anger at the slow pace of IRS follow-through on existing guidance projects.⁷ These feelings were heightened by the belief that while the IRS has failed to deliver promised guidance, it has been seen to be increasingly focused on enforcement. New resources are perceived to have been devoted to enforcement efforts, rather than delivery of the promised guidance. This perception is only reinforced by current ITG work plans and overall TE/GE new hiring which is focused on enforcement efforts, and recent announcements regarding enforcement efforts.⁸

We learned from our discussions with TE/GE staff, Chief Counsel's Office and Treasury that there are several factors which underlie the slow pace of producing new guidance. These include: lack of resources; the complexity of issues presented; concern about precedential effect in seemingly unrelated areas; and the fact that the TE/GE group is only one of the relevant members of the IRS working groups that must ultimately reach consensus on new guidance. It is clear that new guidance will involve complex considerations and will require careful deliberation.

Nonetheless, we think that it is equally important for TE/GE to recognize the frustration felt within Tribes over such delays, which is heightened by a sense among ITG Customers that (i) the IRS is increasingly focused on enforcement rather than guidance, and (ii) what little recent guidance has been issued has been perceived by ITG Customers as unfair to tribal governments (because either the IRS does not understand tribal governments or it wants to treat them as non-profit entities and not true governments, e.g., treating tribes differently than governments that construct and operate golf courses and hotels with tax-exempt financing).

Furthermore, some interviewees, including influential tribal advocates, expressed concern that the consultation process is merely a façade, and that "compliance check" meetings currently being conducted by ITG are thinly disguised fishing expeditions for enforcement opportunities. More fuel is added to these fires by the lack of a signed consultation policy.

These experiences and this perception undermine the good work that ITG has done in its first few years of existence.

The ACT thus believes that a renewed emphasis on promptly completing existing guidance projects is critical and in the best interests of both Tribes and the IRS. The ACT also believes that such an emphasis is inherent in the trust relationship. We believe further that greater transparency in the process of creating guidance, and

⁷ In addition to the discussion of the history of promised guidance regarding the tax consequences of various legal structures for tribal economic development entities *infra* at pp. 10-11, see also discussions *infra* at p. 11 regarding promised guidance regarding tribal trusts and at p. 12 regarding lack of guidance on tax exempt tribal financings.

⁸ See *Bond Buyer*, v. 352, April 28, 2005, 2005 WLNR 6999635 (discussing IRS announcement of plans to institute a dozen or more new examinations of Tribes to see if any transactions involved abusive arbitrage devices).

greater understanding of the issues faced by the IRS in creating such guidance, is necessary. Accordingly, the ACT is making several recommendations regarding these aspects of the guidance process.

The ACT also believes that continued focus on dissemination of existing information is important. ITG has made a good start through the ITG web site, and we believe this is an area meriting further focus and work.

IV. RECOMMENDATIONS AND DISCUSSION:

A. Guidance Recommendations

As discussed above, there are several core subject matter areas where ITG Customers have been promised but not received guidance. These include the following:

Recommendation #1: Issue guidance regarding the federal tax treatment of different legal structures used for tribal businesses and economic development entities. As noted earlier, Tribes generally do not have tax revenues adequate to support government operations, and many tribal members depend on tribal general welfare programs for housing, health care and elder care, as well as, tribal businesses for job training and employment. Excess revenues from tribal business operations are a critical source of funding for tribal governmental programs, but guidance on the income tax consequences of alternate business structures has been minimal. The IRS has provided very limited guidance in the past on this matter, despite the fact that further guidance on this matter has been a matter of official study and consideration for nearly a decade. As noted earlier, tribal governments are the primary engine for economic development in Indian country, lending urgency to the need for this guidance.

Observation: Limited guidance exists at this point. Tribes are not taxable entities, though most tribal income, when distributed to tribal members, is subject to individual income taxation.⁹ The IRS has ruled that if a Tribe forms a wholly owned corporation under state law, the corporation is subject to federal income tax.¹⁰ It is also clear that Tribes may form wholly owned, federally chartered "Section 17" corporations under the Indian Reorganization Act, 25 U.S.C. §465, and that such corporations are not subject to federal income tax.¹¹ Section 17 corporations, however, can take months to establish, their charters cannot be amended without federal approval, and their status is confusing to third parties. Tribes urgently need guidance on the IRS's view of the income tax consequences of Tribes conducting business through wholly owned corporations and limited liabilities companies formed under tribal law, and on the status of wholly owned limited liability companies formed under state law.

For ITG Customers, the length of time that this issue has been under consideration, without issuance by the IRS of precedential guidance, is a source of extreme frustration. In the preamble to the final regulations on the tax classification of business entities in 1996, the IRS noted that the Treasury Department and the IRS were considering the status of wholly owned, tribally

⁹ Rev.Rul. 67-284, 1967-2 C.B. 55.

¹⁰ Rev. Rul. 94-16., 1994-1 C.B. 19.

¹¹ Rev.Rul. 81-295, 1981-2 C.B. 15; *see also, Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 157 n. 13 (1973). These federal law corporations are referred to as Section 17 corporations because they are incorporated pursuant to Section 17 of the Indian Reorganization Act.

chartered corporations.¹² Subsequently, in 2001, the Treasury Department and the IRS agreed to resolve questions regarding such tax treatment. This matter has been on the IRS work plan for years, with no apparent progress toward resolution.

Discussions with ITG, Chief Counsel's Office, and Treasury indicated that this was considered to be a complex matter involving the possible creation of precedent for other governmental entities. Given the unique status of Indian Tribes, the Project Group is uncertain why guidance in this area necessarily needs to be considered precedent-setting in other areas, and we urge further consideration of the weight granted to this concern.

Additionally, the Project Group believes that this area might be one where, if comprehensive guidance is not likely to be readily forthcoming, the IRS should consider issuing limited guidance addressing more discrete elements of the various possible structures that Tribes might use for economic development.

The continued absence of guidance in this critical area hampers vitally needed tribal economic development.

Recommendation # 2: Issue guidance regarding tribal trusts. The IRS has provided limited guidance to Tribes on the issue of the tax treatment of tribal trusts. Revenue Procedure 2003-14 provided guidance on the income tax consequences applicable to trusts established by Tribes using gaming revenues for the benefit of minors and incompetent persons. That Revenue Procedure also requested public comment and set out a no-rule position on private letter ruling requests while the comments were being considered. Significant public comments were received. However, no action has been taken on the comments received, and because of the Service's no-rule position, Tribes are not able to get any guidance whatsoever, even in the form of private letter rulings.

Observation: Despite the fact that Rev.Proc. 2003-14 addressed minor and incompetent trusts, the no-rule issued by the IRS was drafted so broadly that it encompasses most other trust rulings a tribe might request, including those related to adults. Many Tribes have been forming a variety of trusts over the past few years, and the IRS's inaction is another source of frustration for Tribes. Additionally, the inaction of the IRS on the comments received to date and the no private letter ruling position have created an environment in Indian country for tax avoidance schemes and unscrupulous promoters. Such an environment undermines the IRS's current emphasis on curtailing abusive schemes. As promised, comments on Rev. Proc. 2003-14 should be incorporated into a new Revenue Procedure, and in the interim, the no-rule position should be rescinded.

¹² See Treas.Dec.869, 61 Fed.Reg. 66585 (Dec. 1, 1996)

by the IRS. Such action will further the IRS's stated goal of discouraging and deterring misuse of government entities by third parties.¹³

Recommendation # 3: Issue guidance regarding what constitutes an "essential governmental function" for purposes of tribal government issuance of tax-exempt debt. This issue was the subject of an ACT report last year entitled *Tribal Guidance and Policy*.¹⁴ As that ACT Report noted, governmental bonds issued by Tribes are an essential tool for creation of tribal infrastructure. Tribes may not issue private activity bonds, but tribal governments may issue tax-exempt bonds for "essential governmental functions." Unfortunately, the meaning of that term remains unclear. Without reprising the issues addressed in that Report here, these issues continue to fester, and frustration within the tribal governmental community continues to grow as the IRS has significantly expanded the number of Tribes under audit as issuers or borrowers of tax-exempt debt.

Observation: When amending the Indian Tribal Government Tax Status Act in 1987,¹⁵ the Report of the House Committee stated that "the term essential governmental function does not include any governmental function that is not customarily performed (and financed with governmental tax-exempt bonds) by States and local governments with general taxing powers."¹⁶ As noted in *Tribal Guidance and Policy*, since 1987 no regulations have been issued on this point, nor has further guidance been provided, other than Field Service Advice 2002412 (the "FSA") issued on November 22, 2002. This FSA determined that although there were 2,645 publicly owned, municipal golf courses in the country, a financing of a tribally owned golf course would not qualify as an essential governmental function, and the IRS has commenced audits of at least two tribal issuances of tax-exempt bonds intended to finance public golf courses.¹⁷ Within the tribal government community, this FSA and audits continue to cause consternation and a sense of bias. And while states and cities routinely issue tax-exempt debt for hotels and convention facilities, the IRS has commenced initial audit proceedings regarding several recent instances of conduit bonds issued by non-tribal entities for the benefit of Tribes constructing hotel and meeting facilities in Indian country.¹⁸ These audit actions collectively have had a perhaps intended chilling effect on issuance of tax-exempt tribal debt, and at the

¹³ One of the four "key enforcement priorities" in the IRS Strategic Plan is to "discourage and deter non-compliance within tax-exempt and government entities and misuse of such entities by third parties for tax avoidance and other purposes." IRS Strategic Plan, <http://www.irs.gov/newsroom/article/0,,id=125266,00.html>.

¹⁴ *Tribal Guidance and Policy*, ACT Report, June 9, 2004. See

<http://www.irs.gov/charities/article/0,,id=98353,00.html> at 97 *et seq.*

¹⁵ Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608, 256 U.S.C. § 7871.

¹⁶ H.R. Rep. No. 391 at 1139.

¹⁷ See Bond Buyer, *supra*.

¹⁸ *Id.*

same time have reinforced sentiments of bias among Indian tribal governments and their advocates.

Comment: We recognize that actions in this area by the IRS are circumscribed by the fact that the best solution to this issue – issuance of regulations by Treasury – is not within the IRS' control; and by the fact that enforcement actions are proceeding. But guidance in this area has reverted to guidance by field examination and audit. Enforcement is not a substitute for guidance, and the ACT believes that Tribes need and deserve guidance promptly.

Recommendation #4: Provide more consistency, transparency and communication to the tribal government community and leading advocates regarding the guidance process. Through our discussions with ITG representatives, Chief Counsel's Office, and Treasury, the Project Group became more aware of some of the limitations placed upon the ITG and the TE/GE group in attempting to provide guidance on some of the foregoing issues. We are aware of the fact that many issues require input from groups outside TE/GE, including other subject matter groups within the IRS, and from agencies outside the IRS. Despite these issues, the Project Group recommends that ITG, Chief Counsel, and the TE/GE group redouble their efforts to gain cooperation needed to address the foregoing guidance issues. At the same time, we believe that efforts to explain the guidance process to ITG Customers – including both procedural issues and substantive concerns – will be helpful to both the IRS and ITG Customers, and are worth undertaking. This can be done through attending and speaking at one or two national tribal gatherings, and through an annual invitation to tribal advocates to meet with relevant IRS officials in Washington for more informal discussion of open issues.

Observation: As noted before, even though ITG has done an excellent job of reaching out to Tribes, there is a perception among ITG Customers that the ITG has little control or power over the guidance process, and that the process of guidance formulation is a black hole of uncertainty. There is minimal awareness, at best, of who is responsible for tribal guidance, where various projects stand, what the timetables for completion are, and what some of the competing substantive concerns of the IRS might be. While discussions with Chief Counsel revealed that several individuals tend to be involved in most tribal guidance decisions, this is not generally known. We would recommend that several people within Chief Counsel's Office be assigned the responsibility of developing familiarity with Indian law and serve as liaison for tribal guidance efforts. Treasury has an individual who serves as a liaison for guidance efforts. This is commendable.

B. Website Recommendations

ITG's website is an important source of information for Indian country. We like the fact that it is an independent landing page, reflecting ITG's logo. We understand from meetings with those responsible for the page that ITG has a limited number of

options in changing the layout of the page. We also understand that this is due to a desire within the IRS for consistency of layout.

The widely dispersed geographic nature of Indian Tribes, and the fact that the ITG Customers are not served by a large corps of tax specialists illustrates the importance of the website for information dissemination. It also explains why the website needs to be user-friendly, comprehensive, and as current as possible. ITG's website reflects considerable past work and thought, but could be improved in several ways.

Recommendation # 5: Develop a comprehensive, easily-locatable, and cross-referenced set of all statutes, regulations, revenue rulings and other guidance related to Indian tribal governments. As of this writing, there remains no single, comprehensive and accurate source of the IRS' tribally-related materials that can be easily referenced by tribal officials and practitioners. Ideally, such a source should be compiled in two, hyper-linked formats: first, a listing of relevant materials by statute, regulation, revenue ruling, revenue procedure, field guidance, private letter rulings, and so on, listed from most precedential to least, with a brief summary description of the subject matter of each document; and second, by subject matter.

Observation: There are literally only a handful of tribal tax professionals who have easy access to the full panoply of IRS rulings affecting Tribes. ITG Customers are not likely to subscribe to tax publications or have access to specialized materials. While there are many helpful FAQ's on the website, there is a great need for one place where ITG Customers can easily find all relevant materials. The current ITG website aggregates some of this material, but the site is incomplete, and hard to locate. To find the ITG page that only partially aggregates these materials, one must navigate to irs.gov/tribe, go to "related topics", click there on "more topics", and scroll down to "regulations and rulings" – a confusing set of steps that is not intuitive. Instead, we recommend that, as is done on the Tax Exempt Bond Community landing page, there be a permanent link to 'Published Guidance' on ITG's landing page.

Comment: This recommendation has been discussed since fall 2004 with ITG, which agrees with the concept and has been working to gather and organize relevant materials for posting. We encourage ITG to complete this work as quickly as possible and post it in the recommended format.

Recommendation # 6: Post on the ITG website a detailed explanation in plain English of the hierarchy of guidance, in terms of binding precedential value. We envision this explanatory piece as a sort of "Layman's Guide To Guidance" or "Guidance Matrix" or "Guidance Flow Chart" accompanying the cross-referenced set of statutes, regulations and other guidance discussed in Recommendation #5, with such materials explaining, for instance, the difference between revenue rulings and private letter rulings, which guidance is binding, and which advisory.

Observation: Due again to the number of website ITG Customers who are not tax professionals, such an explanation would be extremely helpful, and we believe that its creation should not require extensive resources.

Recommendation # 7: Consider creative ways to update and improve the various FAQs that appear on the website. There are numerous FAQ sections within the website, which contain a wealth of information for ITG Customers who are trying to understand issues relating to Tribes and tribal taxation. Much of this information was created a number of years ago, upon the inception of the ITG. Some of the information is internally inconsistent (for example, different definitions of items in various FAQs), some information is outdated, and some information is factually incorrect. In addition, hyper-links need to be increased. In an ideal world, there might be staff within ITG available to review, revise and update the FAQs. If, however, this is not the case, alternative approaches should be considered for assistance. One promising possibility would be to work with one or several law schools that have Indian law programs, and ask for student volunteer assistance, coordinated through law professors, to revise and modernize the FAQs. The ITG would then be tasked with reviewing and finalizing new or revised content, but would be saved a good deal of labor.

Observation: Members of the Project Group have had initial conversations with Indian law professors at several law schools, and believe that there would be significant interest in such a project.

Recommendation #8: Reorganize ITG's landing page so that the topics addressed in the body of the page serve as guidelines to the places where relevant content can be found. As currently organized, there is no apparent rationale to the topics on the landing page, which appear to cycle on and off with the most recent developments being listed, and earlier developments being displaced accordingly. Instead, we recommend that current developments be listed under a heading with that title; that published guidance be similarly listed under a heading with that title; and so on.

Observation: The Project Group believes that a good template for such organizational change can be found in the Tax Exempt Bond Community landing page, and this should be emulated.

Recommendation # 9: Provide a direct link to ITG's web page from the general IRS landing page. The rationale for such a link is fairly straightforward. Most people trying to access IRS tribal information do not and will not know of the ITG web page. Most people landing on the main IRS web page most likely will not know that Indian Tribal Governments are part of "Government Entities". Others may search from the main IRS landing page in the search box. With three separate samplings, ITG's website is not one of the initial items that came up. Specifically, if "Indian Tribes" is typed in the search box, there are 376 results that include FAQs but none take you straight to ITG's web page. If "Indian Tribal Government" or "Tribal Government" are typed into the search box on the main IRS landing page, there are 500 results to search through and

no link to the ITG. If "Indian" is typed into the search box on the main IRS landing page, there are 35 results and, again, none take you to the ITG's web page. Therefore, having a direct link to the Indian Tribal Government page would be a tremendous tool for ITG Customers.

Observation: The ACT believes that the rationale for providing this link is similar to that which justified adding a similar link on the IRS.gov landing page to the tax exempt bond web page. Additionally, revising the IRS.gov landing page to list "Federal, State, Local and Indian Tribal Government Entities" would be more helpful than just "Government Entities." This is an easy short-term solution.

Recommendation # 10 : Allow more creativity in the design of the ITG web page.

The recommendations of the ACT regarding ITG's web site layout have been constrained by what we have been told are limits on the appearance of the ITG's web pages intended to promote uniformity in appearance of all IRS web pages. While we understand the desire for uniformity, we believe that the needs of ITG Customers differ so greatly from the needs of users of other IRS web pages aimed at individual taxpayers, that it makes more sense to allow greater creativity in design of ITG's web page. We believe that the likely outcome will be web pages better designed to meet the needs of the different taxpayer groups, and this in turn will promote greater use of the web pages with the concomitant benefits of increased, low-cost information dissemination and greater compliance.

Observation: The concern for uniformity, we believe, should not stifle creativity; and one could still envision a system where deviations from the current page design need central approval, in order to avoid gross inconsistencies. If there is concern about the effect of undertaking such a change all at once, an alternative would be to allow experimentation by one or two relevant groups, including ITG.

V. CONCLUSION

We appreciate the time and support of ITG staff, Chief Counsel's office, the Office of Tax Policy at Treasury, TE/GE website representatives, as well as the time and comments of all those Tribal representatives and advocates who shared their views with us.

The recommendations and views set forth herein are offered in the belief that the good work to date that has been accomplished in creating ITG will be enhanced through provision to Tribes of prompt promised guidance and improvements to the ITG website. These steps will enhance compliance opportunities and improve the relationship between ITG and ITG Customers.

Encouraging Economic Self-Determination in Indian Country

*Testimony of
Scott Schickli
Before the
Subcommittee on Long-Term Growth and Debt Reduction*

*Committee on Finance
United States Senate*

May 23, 2006.

America's Indian tribes need your assistance on matters of critical importance in developing infrastructure in Indian country and in clarifying that tribes can use tax-exempt debt to promote economic development to the same extent as states and local governments customarily do.

Congress has long recognized the essential role that public infrastructure plays in promoting economic development and in attracting businesses, residents and tourists to local communities. Nowhere is this recognition more evident than in the federal tax code, which permits state and local governments to issue tax-exempt debt for a wide variety of purposes, including economic development activities. Municipalities routinely issue tax exempt bonds to develop and expand streets, parking lots, water and sewer facilities, and other utilities to attract and serve new commercial and industrial facilities. Likewise, local governments create parks, public housing, convention centers, auditoriums, golf courses and other recreational facilities to serve their residents, to make their communities attractive tourist destinations and, in many cases, to generate revenues.

Increasingly, we have seen the development and financing of hotels to support other governmental tourist attractions and to generate much needed public revenue.

Tribes have many of the same needs as states and local governments in promoting economic development and providing for the needs of their citizens, but are increasingly handicapped by an ambiguous regulatory environment. As a result, Indian tribes may be stymied in their desire, obligation and ability to provide to their members the same types of customary infrastructure, recreational, and economic development projects that state and local governments provide for their citizens.

A little history will help illuminate the tribes' current difficulties in financing infrastructure in Indian country.

Congress first authorized tribes to issue tax-exempt bonds in 1982. At that time, it limited tribes to issuing tax-exempt bonds for "essential governmental purposes," but did not define the term. In 1984, Treasury issued Regulations that defined an essential governmental function very broadly for tribal purposes to include, among other things, not only matters treated as essential governmental purposes for states and local governments under Section 115 of the Internal Revenue Code, but also the many commercial and industrial activities eligible for funding under the Snyder Act and the Indian Self-Determination Act.

In 1987, Congress responded to the broad regulatory definition of an essential governmental function by amending the law to provide that an essential governmental function does "not include any function which is not customarily performed by State and local governments with general taxing powers." The 1987 amendment, with its double negatives, does not affirmatively define an essential governmental function, but simply excludes certain types of facilities from the eligibility list. Although many believe that Congress' intent was simply to limit tribes to the same essential governmental functions that apply to state and local governments, others have pointed to the fact that the legislative history of the 1987 Act (the only available guidance as to Congressional intent) does not speak with one voice. The most authoritative part of that legislative history, the Conference Report, simply repeats the language of the 1987 Act, stating the intent of Congress exclusively in the negative, i.e. to identify certain things that were *not* an essential governmental function. The Conference Report conflicts with and does not adopt significant portions of the original House Report, which expressed concern about tribal financing of "commercial and industrial enterprises" and declared the 1984 Treasury Regulations invalid to the extent they permitted tax exempt financing of "commercial and industrial facilities." Because the Conference Report did not repeat the more restrictive language of the House Report, it appears that the House Report does not reflect the true intent of Congress. The conflict in views as to what Congress intended has reached the point where it is paralyzing the ability of tribes to access the low-cost benefits of tax-exempt financing—the very benefit that was intended to be extended to tribes by the 1982 Act.

Why have tribes only recently become concerned about the meaning of the 1987 legislative changes? For years, few tribes had sufficient economic resources to support any borrowing at all, since they lacked a tax base and significant other revenues. Over the last 10 years, more and more tribes have been fortunate enough to develop revenue bases, such as natural resource development and recreational activities (including gaming) which they have used, in significant part, to support financing for governmental infrastructure. It thus has become imperative to understand what tribes can and cannot finance on a tax-exempt basis.

Tribes develop infrastructure for the same reason any other governmental unit does—to improve the quality of life of their citizens and to promote economic development. Indeed, these twin governmental responsibilities were central to Congress' original rationale in expanding eligibility for tax-exempt funding to Indian tribes. Unlike states, much of the economic development in Indian country is undertaken by the tribes themselves, rather than by private corporations. We do not believe Congress intended to treat tribal infrastructure in any different fashion than state and local infrastructure simply because it serves the interests of tribal enterprises. All public infrastructure, whether it be water systems, sewer systems, roads, parks or parking lots confers benefits on commercial interests as well as individual citizens. Nor do we find any indication in the legislative history that Congress intended to prevent tribes from using tax-exempt debt to finance any facilities that states and local governments themselves customarily finance, regardless of whether the facilities may be operated on a commercial basis. The ambiguity created by varying interpretations of the legislative history has made it

increasingly critical for there to be clear guidance accurately reflecting Congress' intent with respect to tribal financing.

As a result, you can provide significant assistance to Indian tribes simply by clarifying Congress' intent with regard to the existing statute. Indian country lags significantly behind other parts of this country in every measurement of infrastructure and economic development. Clarification of your intent with respect to these important provisions will have a significant positive effect on the health and welfare of all native Americans.

WAYNE A. SHAMMEL, ESQ.

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS
2371 NE Stephens Street
Roseburg, Oregon 97470
(541) 672-9405

**ENCOURAGING ECONOMIC SELF-DETERMINATION
IN INDIAN COUNTRY**

before the

**SUBCOMMITTEE ON LONG-TERM GROWTH AND DEBT REDUCTION
SENATE COMMITTEE ON FINANCE**

May 23, 2006

INTRODUCTION

Good morning, Chairman Smith, Senator Baucus, and distinguished members of the Senate Finance Committee and this subcommittee. My name is Wayne A. Shammel. I am the General Counsel of the Cow Creek Band of Umpqua Tribe of Indians. On behalf of the Cow Creek Tribe, I would like to thank you for the opportunity to discuss the challenges that Indian tribal governments face in encouraging economic self-determination in Indian Country, particularly as they relate to federal tax policy and tax administration—two key areas that fall within the legislative and oversight jurisdiction of this committee.

I would like to personally thank Senator Baucus and Senator Smith for your leadership on federal tax issues affecting Indian tribes over the past several years. Senator Smith, you have distinguished yourself by introducing and shepherding through the Senate a comprehensive set of provisions (sections 1311 through 1313 of S. 1783) to clarify the status of tribal government-sponsored pension plans. Senator Baucus, you have lent strong support for these provisions and taken a leadership role on many other provisions to treat tribal governments like other governments for federal tax purposes. Both of you have also advocated for the passage of tax incentives to spur private investment in Indian country, such as Indian reservation accelerated depreciation and the Indian employment tax credit – both of which expired on December 31, 2005 and urgently need to be extended.

The Cow Creek Tribe is one of nine federally recognized Indian tribes in the State of Oregon. It has approximately 1,300 members and is governed by an elected eleven-member Board of Directors. The Tribe has a rich history in southwestern Oregon that reflects hard work, perseverance and the desire to be self-reliant.

Over 150 years ago, the Cow Creek Tribe was one of the first two tribes in Oregon to secure a treaty with the United States. This treaty was ratified by the U.S. Senate on April 12, 1854. However, the treaty was not honored and the Tribe's governmental status was officially terminated in 1954. Relegated to marginal lands and forced to live a subsistence lifestyle, the members of the Cow Creek Tribe endured for 130 years until they again secured federal recognition of the Tribe's status and received modest compensation for lands taken away from them.

The Cow Creek Tribe regained federal recognition in 1982 when President Reagan signed P.L. 97-391. Then, in 1984, a court awarded the Tribe a settlement in the amount of \$1.3 million. The Tribe invested the funds in an endowment to purchase what is known as "evergreen" land. The Tribe was also able to use the investment earnings on the endowment for economic development, education, housing, and assistance to elders.

In 1992, the Tribe opened a Bingo Hall which has become the Seven Feathers Hotel & Casino Resort, a full service Indian resort and gaming facility. Through the Umpqua Indian Development Corporation, the Tribe has diversified its business endeavors. In addition to operating the Seven Feathers in Canyonville, the Tribe owns and operates several other businesses, including Creative Images Media Group, Seven Feathers Truck & Travel Center, Umpqua Indian Foods, Canyon Cubbyholes, Riverside Motel, Valley View Motel, Rivers West RV Park, Rio Communications, K-Bar Ranches, and Umpqua Indian Utility Cooperative.

The Tribe's economic diversification benefits tribal members, local residents, and the surrounding communities. In 2004, Cow Creek contributed \$107.1 million to the local economy in 2004 and sustained 1,610 payroll jobs. The Tribe also provides telecommunications services and other utilities. See ECONorthwest, The Economic Benefits of the Cow Creek Tribe to Douglas County, Oregon (A Net Economic Benefit Analysis) (Nov. 18, 2005) (copies provided to Subcommittee staff and available at <http://www.cowcreek.com/ca/CountyBenefits.pdf>).

The Tribe is currently working on a large project that will provide sewer treatment and water services not only to its Tribal enterprises located in Canyonville, but also to the entire City of Canyonville. The Tribe will hold a grand opening for the new Creekside RV Park and has recently partnered with the Oregon Department of Transportation to develop a rest stop at Exit 99 on I-5, which will benefit all travelers through this corridor.

The Tribe's Board of Directors supports and sponsors a wide range of projects – schools, local festivals, camps, sports teams, community events, and philanthropic organizations. The Tribe places a high priority on education for tribal as well as other community members. In 1997, the Tribe established the Cow Creek Umpqua Indian Foundation, which awards grants on a semi-annual basis and donates funds each year to Coos, Deschutes, Douglas, Jackson, Josephine, Klamath and Lane Counties, all in southern Oregon.

* * * * *

Cow Creek's testimony contains three major segments. First, it provides a brief description of the challenges faced by tribal governments in accessing capital for economic

development projects. Second, it focuses on how these challenges are exacerbated by certain provisions in tax code, and how such provisions are administered by the IRS. Third, it suggests how members of the Finance Committee and this Subcommittee could help ameliorate the situation through their support of remedial legislation and their exercise of oversight jurisdiction.

I. ECONOMIC DEVELOPMENT

Indian Country today is often seen as a world of economic extremes. While a few high-profile tribes have prospered economically in recent years, there are hundreds of tribes that are still struggling. Unemployment, poor health care, and substandard housing are typical of the more "invisible" reservations and the families and other individuals who inhabit them. In Eastern Oregon, for example, the Burns Paiute Tribe is located hours from any major population center and is plagued by an unemployment rate of approximately 82 percent. The community is located on a small amount of land and has few natural resources.

Nationwide, the real per-capita income of Indians living on reservations is still less than half of the national average. Unemployment on reservations is still double the average rate in the rest of the country. There is no question that further strides toward greater economic self-determination must be made.

When Indian tribal governments undertake economic development efforts, one reality that all tribes confront is the lack of a tax base. Tribes are not able to impose property tax on trust lands, and imposing an income tax on reservation residents or the businesses that locate on reservations is rarely feasible. Recent Supreme Court decisions have compounded the "tribal tax gap" by permitting the imposition of state taxation on Indian lands, while limiting the ability of tribal governments to tax non-Indians.

Faced with these limitations, tribes often pursue a variety of economic development ventures as a substitute for reservation tax revenues. Over the past 15 years, gaming revenues have proven to be the most consistently successful substitute for tax revenues to sustain the general revenue fund of the tribal government. (During this same period, many state governments have significantly expanded their lottery operations as an alternative to raising taxes.) However, many tribes are either unable or unwilling to put all of their eggs in the gaming basket.

In pursuing economic development projects, state and local governments frequently utilize tax-exempt financing. The advantages of tax-exempt financing are several. First, the interest rates tend to be significantly lower than commercial bank lending—due in part to the tax exemption accorded to municipal bond interest. Second, municipal debt offerings tend to have longer time horizons—20 to 30 years in many cases—which results in significantly smaller annual or monthly payments. The bottom line is that tax-exempt bonds can save governments money and preserve cash flow—especially when a major project must be financed with borrowed funds.

At present, tribal governments are not able to access financing on the same terms as state and local governments. Tax-exempt bond financing, in particular, is not available for many projects that tribes undertake—even those that are identical to projects undertaken by states and municipalities. Stadiums, hotels, affordable rental housing, utility and energy projects—these are just a few of the projects that tribes generally cannot finance with tax-exempt bonds because of Tax Code restrictions and IRS interpretations. In addition, tribes are subject to certain SEC registration rules from which state and local governments are completely exempted, and this lack of exemption materially adds to the interest and issuance costs that tribal governments must bear in a tax-exempt financing. The current-law tax-exempt bond restrictions are explored in further detail below.

II. CURRENT TAX LAW AND IMPACT ON TRIBAL ECONOMIC DEVELOPMENT

The Tax Code has long provided a number of special provisions designed to help state and local governments secure economic advantages appropriate to their status as governments—such as tax-exempt bond financing, deductibility of charitable contributions received by them, and exemption from certain federal excise taxes. In addition, the Internal Revenue Code has been consistently interpreted not to impose an income tax on state, local and other governmental units.

In 1982, Congress passed the Indian Tribal Governments Tax Status Act in order to clarify how federally-recognized Indian Tribal Governments were treated for various federal tax purposes. Consistent with the principles of Indian self-determination, the Tax Status Act attempted to place Indian tribal governments on roughly the same footing as state and local governments.

However, the playing field Congress created for tribes' issuance of tax-exempt bonds has never been completely level with that on which state and local governments operate. Tribes are subject to more restrictive rules. And those rules have never been adequately clarified to facilitate cost-effective compliance. Moreover, under a recent IRS audit initiative targeting tribal bond offerings, tribal governments that issue bonds have a 40 percent chance of having the tax status of their bonds challenged in a IRS audit, compared to an average audit rate of approximately 1 percent for state and local bonds.

All of these factors have resulted in a major chilling of the tax-exempt bond market with respect to Indian tribal government issuers and borrowers.

Current Tax Code Restrictions on Tribal Debt

There are three Tax Code provisions that apply only to tribal government bond offerings, and all three of these rules impose formidable restrictions on tribal debt: (1) the "essential governmental function" test; (2) the general prohibition on private activity bonds; and (3) the limited exception for tribal manufacturing facilities. In addition, some tribal governments have particular difficulty complying with certain generally applicable Tax Code restrictions, such as the prohibition on relying on federal funds to repay bonds.

Essential Governmental Function Test. Under this restriction, interest on debt that is issued by a tribal government will not be tax-exempt unless substantially all of the borrowed proceeds are used in the exercise of an "essential governmental function." IRC § 7871(c)(1). Section 7871 of the Tax Code contains no definition of this amorphous term, but § 7871(e) tells us that a function will not be treated as an "essential governmental" one if it is not "customarily performed by state or local governments with general taxing powers." The term "substantially all" is not defined either—but it is generally thought to mean at least 95 percent of the debt proceeds.

Based on their knowledge of the functions commonly performed by state or local governments, experienced bond counsel have advised tribes that such essential governmental functions should include tribal administration buildings, schools, hospitals and medical clinics, fire and police facilities, community and convention centers, parks and recreational facilities, public marinas, public parking and tribal purchases of land for public purposes. Based on examples in the legislative history explaining this restriction, it is fairly clear that tribes can also use bonds for basic infrastructure, such as the development of road and streets, sewers, and certain utilities (e.g., water distribution and wastewater treatment plants). However, it is difficult to opine with certainty under this test.

A major problem with the essential governmental function test is that it defines what tribal governments may do with reference to what state and local governments "customarily" do—which is a moving target. For example, over the past several years, many municipalities have utilized bonds for various economic development activities—e.g., hotels and other revenue-generating facilities. States have also increased the extent to which they conduct gaming activities (e.g., lotteries and racetracks). The IRS has never issued any guidance on the level of state or local government activity necessary to qualify it as a "customary" activity. Moreover, because of their lack of a tax base, tribes are more likely to be interested in utilizing bonds for activities that generate revenues, and not just to finance infrastructure and the provision of government services.

General Prohibition on Private Activity Bonds. Indian tribal governments generally may not issue private activity bonds. IRC § 7871(c)(2). Such bonds are frequently issued by state or local governments. For example, state and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit organizations, or to finance mortgage loans for low-income home buyers or residential rental property. Private activity bonds are also issued for airports, docks and wharves, solid waste facilities, and certain energy or utility projects.

Limited Exception for Tribal Manufacturing Facilities. There is only one narrow exception to the general prohibition on private activity bonds issued by Indian tribal governments. Under IRC § 7871(c)(3), tribes may use tax-exempt bonds for a qualifying manufacturing facility. To so qualify, the manufacturing facility must be one used in the production of tangible personal property and meet three major tests—(1) it must be tribally owned and operated, (2) it must be located on lands which have been in trust for at least 5 years, and (3) it must meet periodic testing criteria for employing a certain number of tribal members or their spouses relative to the amount of bond proceeds utilized. Although this provision was well intended when it was passed, its requirements are exceedingly difficult to

meet. They impose virtually untenable burdens on the type of capital-intensive, high-technology plants that are built in the United States today.

In short, in extending tax-exempt bonding authority to tribes, Congress has enacted rules that are both burdensome for tribal governments to comply with and difficult for the IRS to administer. As noted by Professor Ellen Aprill, a former Treasury Department Attorney-Advisor, "in the Tribal Tax Act, tribal governments were given bonding authority they were unable to use and denied bonding authority they would have welcomed." See Aprill, "Tribal Bonds: Indian Sovereignty and the Tax Legislative Process," 46 Admin. Law Rev. 333, 348 (Summer 1994).

Recent IRS Administration of the Restrictive Tribal Bond Rules

In October of 2002, *The Bond Buyer* reported that the IRS was planning to implement a new compliance initiative aimed at tribal bond issuances and several other areas. Mark Scott, then the head of the IRS Bond Division, stated that the focus of the tribal audits would be to determine compliance with the "essential governmental function" test. See "IRS Eyeing Student Loans, TIFs, Tribal Debt for 2003," *The Bond Buyer* (Oct. 8, 2002). Following publication of the article, several bond practitioners and tribal attorneys criticized the IRS for proposing to enforce compliance with a test that it had never adequately explained or defined. The IRS subsequently downplayed any intent to target tribal bond offerings.

However, only a month later, the IRS released a National Office Field Service Advice (FSA) addressing the issue of whether the construction and operation of a golf course by a tribe was an "essential governmental function." See FSA 20024712 (Aug. 12, 2002). The FSA concludes that although the construction and operation of golf courses are customary government functions, "there is an argument that the commercial nature of the [tribal] Golf Course causes it to be other than an essential governmental function within the meaning of [Internal Revenue Code] section 7871(e)." The version of the FSA released at that time was heavily redacted to suppress the opinion of the IRS Chief Counsel questioning whether the IRS field agent's proposed challenge to the tax status of the tribe's bonds would ultimately be successful if litigated in the courts.

Since 2003, the IRS has opened a relatively large number of audits of tribal bond transactions. Initially, the IRS audits targeted tribes that had engaged in conduit bond transactions—i.e., transactions in which a state or local government agency not subject to the restrictive rules issues bonds for the benefit of a tribal governmental borrower. Shortly thereafter, the IRS opened up at least a dozen audits involving transactions in which tribes issued governmental debt directly for their own use. IRS agents made it clear that a major focus of these audits is to challenge the use of bonds to finance infrastructure or facilities that supported a tribe's gaming operations. IRS agents have also made statements in the press questioning the propriety of using bonds to finance recreational facilities for tribes with small memberships.

In June of 2004, an IRS Advisory Committee recommended that the IRS take the following constructive steps to facilitate a better understanding of applicable rules by tribal governments and other parties in the bond market:

- Request the Treasury Department to develop regulations defining "essential governmental function" under § 7871;
- Clarify that the term "essential governmental function" under § 7871(e) should be construed in accordance with its construction under IRC § 115;
- Withdraw FSA 200247012 [the golf course Field Service Advice described above] and suspend issuance of other nonprecedential guidance;
- Suspend any new compliance initiatives applicable to tribal bonds until after IRS regulations are issued.

See Advisory Committee on Tax Exempt and Government Entities (ACT): Report of Recommendations (June 9, 2004) (IRS Publication 4344(5-2004)).

The Report, prepared by Navajo Nation attorney Raymond Etcitty, concluded with the following plea: "How can tribal governments develop sustainable economies that produce recurring revenue needed to provide the infrastructure for their citizens, residents and visitors, when tribal governments have their hands tied behind their back?" Mr. Etcitty noted that the Treasury Department had failed to publish any regulations interpreting the tribal bond provisions since such provisions were amended by Congress in 1987.

A second IRS Advisory Committee report, prepared approximately one year later, reported that the issues identified in the 2004 report "continue to fester, and the frustration continues to grow as the IRS has significantly expanded the number of Tribes under audit as issuers or borrowers of tax-exempt debt." The Committee concluded that "[t]hese audit actions collectively have had a perhaps intended chilling effect on issuance of tax-exempt tribal debt, and at the same time have reinforced sentiments of bias among Indian tribal governments and their advocates." See Advisory Committee on Tax Exempt and Government Entities (ACT): Report of Recommendations (June 8, 2005), "Survey and Review of Existing Information and Guidance for Indian Tribal Governments," pp12-13 (prepared by Lenor Scheffler and Robert Gips).

Additional Federal Rules that Impose Costs on Tribal Issuers

Under current law, securities of tribal governments (e.g., tax-exempt bonds) are treated differently from securities issued by states or local governments. Obligations issued by state or local governments enjoy a general exemption from federal securities laws, except for the rules relating to fraud. By contrast, tribal securities are subject to registration under federal securities laws unless they have the benefit of a specific transactional exception—e.g., the exception for "private placements" or the exception for bonds that are backed by a bank letter of credit. Structuring a transaction to meet either one of these exceptions imposes transactional costs that particularly penalize small to medium-sized offerings. Issuing debt as a private placement will generally result in higher interest rates being paid by the tribe, while securing the backing of a bank letter of credit will also cost the tribe additional basis points in the transaction.

III. RECOMMENDATIONS FOR LEGISLATIVE CHANGE AND OVERSIGHT

There are a number of things that Congress can do to improve the current situation in which tribes are effectively prevented from accessing capital at the same rates and on the same terms as other governments. Some of these involve legislative changes. Others involve oversight to foster more effective and even-handed tax administration.

Legislative Changes

There are three possible legislative changes that would help tribes access capital in a more cost-effective manner. First, Congress should pass legislation repealing or modifying the "essential governmental function" test under Section 7871. Second, it should make some provision for private activity bonds – particularly with regard to affordable housing and energy projects financed by tribes. At the very least, Congress should gear the requirements of the tribal manufacturing facility exception to the real-life economics realities (including U.S. labor market costs) faced by 21st century manufacturing plants. Finally, although not within the jurisdiction of this Committee, Congress should provide tribes that issue bonds the same treatment under federal securities laws that it has accorded to state and local governments.

Repeal of the "essential government function" test is recommended because the last 20 years have demonstrated that the restriction is difficult to interpret and almost impossible to administer. These difficulties have resulted in an institutionalized bias against tribal governments as issuers of tax-exempt bonds and have erected insurmountable "barriers to entry" by tribes into the financial marketplace. Although the original purpose of the "essential governmental" function may have been to prevent tribes as bond issuers from being exploited by private parties, it has consistently been used against tribes acting in a government capacity and seeking to finance economic development within the boundaries of their own reservations.

Second, Congress should open up the general private activity bond prohibition to allow tribes to selectively issue bonds that would otherwise be considered private activity bonds. Such a provision would allow tribes to issue tax-exempt bonds for various types of facilities that serve a legitimate governmental purpose—such as facilities used by 501(c)(3) organizations, affordable rental housing, electric generation plants, water treatment, solid waste and sewage disposal plants. At the very least, Congress should closely examine and revise the provision that allows tribes to issue tax-exempt bonds to finance their own manufacturing facilities. The requirements of this provision must be made consistent with the economic realities of modern-day manufacturing in the United States. Legislation introduced in past Congresses by Senator John McCain and others would have allowed tribes to issue tax exempt bonds permitted to be issued by State and local governments under current law, so long as the tribe maintained at least a 50% ownership stake in the financed facility and satisfied a more flexible employment test.

Third, Congress should amend the Securities Act of 1933 to place bonds issued by tribal governments on par with those issued by state and local governments with respect to

federal securities registration requirements. The current lack of exemption serves no useful purpose and simply imposes extra transactions costs on tribal governmental issuances. Congress should also consider providing a special exception for certain tribal bonds from the "federal guarantee" prohibition. This prohibition generally comes into play where the governmental borrower relies on future federal assistance to repay the loan. It is largely irrelevant for gaming tribes with sufficient cash flow, but the provision creates problems for poor tribes and those with large memberships. Tax-exempt bond issuances of such tribes may fail to secure approval of bond counsel or underwriter's counsel because of the level of federal assistance being received by the tribe.

Need for Congressional Oversight

The disproportionate audit rate of tribal bond issuances suggests that some form of institutionalized bias against tribes as governmental issuers may have infected the IRS' administration of the tax laws. This situation needs further examination by this Committee and its staff. Congress should also examine whether IRS should conduct any audit initiatives in areas, such as this one, where Treasury has failed to issue adequate administrative guidance. The IRS should be asked to respond to the recommendations made in 2004 and 2005 by the IRS Advisory Committee on Tax-Exempt and Government Entities.

CONCLUSION

As Congress reviews tax policies affecting Indian country economic development, a tremendous opportunity exists to help tribal governments access the debt capital more cost-effectively. The proposed changes to the tax code would also eliminate current sources of confusion and controversy between taxpayers (in this case, tribal governments) and the IRS. Modification of the "essential governmental function" test has broad support among affected parties and by those national organizations that represent their interests, such as National Congress of American Indians (NCAI). The Cow Creek Band of Umpqua Tribe of Indians, together with the NCAI, look forward to working with you to develop and pass effective legislative solutions in this area.

A Net Economic Benefit Analysis

The Economic Benefits of
the Cow Creek Tribe to
Douglas County, Oregon

Prepared for the Cow Creek Band Of
Umpqua Tribe Of Indians

ECONorthwest
ECONOMICS • FINANCE • PLANNING

888 SW Fifth Avenue
Suite 1460
Portland, Oregon 97204
503-222-6060
www.econw.com

Robert Whelan and
Alec Josephson

November 18, 2005

Executive Summary

The Cow Creek Band of Umpqua Tribe of Indians (“Cow Creek”) engaged ECONorthwest to determine the extent to which the Cow Creek benefit the economy of Douglas County, Oregon. The Cow Creek are indigenous to Douglas County. In recent years, they have invested heavily in local economic development projects, spent heavily on social programs, and donated large sums to area charities, and state and local governments. This report only addresses the net impacts of the Cow Creek in Douglas County.

Overview

ECONorthwest was asked to conduct a two-part analysis. The first part was to determine how much better off the Douglas County economy was in 2004 because of the Cow Creek. The second analysis measured the total county and local property taxes paid by Cow Creek employees in Douglas County.

The results of these analyses are described in four parts of this report:

- **Section One** is the executive summary, which highlights the major research findings of this report (page 1).
- **Section Two** provides background information on the Douglas County economy, the Cow Creek, Indian tribes, and the methodologies and data used in this analysis (page 3).
- **Section Three** is a discussion of the economic impact model and the results from it (page 15).
- **Section Four** delves into the results of an analysis of property tax records and reveals the amount of County and local property taxes paid by the employees of the Cow Creek that live in Douglas County (page 23).
- **Appendix A** explains economic impact analyses, how they are conducted, and how they should be interpreted (page A-1).

Major Findings

The analysis presented in this report found that the Cow Creek, through its government and economic development activities in Douglas County, had significant economic impacts on the local economy. Furthermore, the Cow Creek held only a small fraction of all the tax-exempt property in Douglas County while the employees of the Tribe and its tribal businesses paid in excess of \$1.1 million in residential property taxes. Specifically:

- The total economic output of Douglas County in 2004 was more than \$107.1 million greater than it would have otherwise been without the Cow Creek (page 16).
- There were 1,610 more payroll jobs in Douglas County in 2004 than there would have been if not for the Cow Creek (page 18).
- If there were no Cow Creek Tribe, total payrolls in Douglas County would have been nearly \$40 million or 3.9 percent less in 2004. In addition, self-employed workers and small businesses would have earned about \$6.4 million less. The resulting economic weakness would have filtered throughout the economy resulting in lower property values for homes and commercial real estate (page 21).
- Like other governments, lands held in trust for the Cow Creek are exempt from property taxes. However, the Tribe only accounts for 2 percent of all the value of tax-exempt properties in Douglas County. Other types of property holders that account for greater shares of all the exempt property in the County include disabled veteran homeowners, businesses in enterprise zones, farmers, owners of forestlands, religious organizations, and local and federal governments (page 25).
- Property taxes imposed in Douglas County on the residences of Cow Creek employees in 2004 totaled at least \$1,135,655 (page 25).
- This analysis only describes the net impact of the Cow Creek. It only counts the net increase in jobs and dollars in the County because of the Cow Creek. It excludes employment and spending that would have occurred anyway in 2004 even if the Cow Creek were not in the County. Thus, unlike many studies that measure gross impacts, this research takes the much more conservative approach by isolating just the net economic impacts (page A-8).

Section II Background and Methodologies

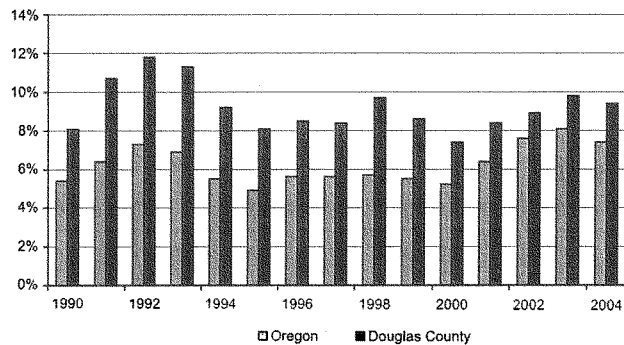
To provide a context for the analysis in this report, we begin with a description of Douglas County and an overview of the Cow Creek and federally recognized tribes in general. In addition, this section includes discussions of the data and methodologies used in this research.

Douglas County's Economy

Douglas County is Oregon's fourth largest in area. It was home to 41,637 households according to the July 1, 2005 estimate from Claritas, Inc. The population was 103,496.

Historically, the economy of Douglas County has been timber-dependent and it has suffered from persistently high unemployment. Figure 1 compares the unemployment rates in Douglas County and the state of Oregon since 1990.

Figure 1: Average Annual Unemployment Rates for Douglas County and the State of Oregon, 1990 to 2004



Source: Oregon Employment Department

In March 1992, a month before the Cow Creek opened their first large economic development project, the Cow Creek Bingo Hall, Douglas County had a 13.6 percent unemployment rate—5.2 percent above the statewide average at that time. In part, through further economic development efforts by the Cow Creek and others, the county unemployment rate fell to 7.4 percent according to the most recent (September 2005) report by the Oregon Employment Department. The gap between the county and state unemployment rates had narrowed to 1.9 percent.

The Cow Creek

Douglas County is the home of the Cow Creek Umpqua Indians. The economic impacts of the Cow Creek on the county are a consequence of the wages they pay, investments they make, and their purchases of goods and services in the county. The flows of dollars from the Cow Creek are a consequence of the Tribe's government and business activities. Overwhelmingly, these activities occur within the borders of Douglas County, Oregon.

History

The Cow Creek occupy the inland areas of what is today Douglas County, Oregon. In 1853, soon after the discovery of gold in southwest Oregon, the Tribe entered into a treaty which ceded their land to the federal government for 2.3 cents an acre—a tiny fraction of the true market value at that time. The initial Cow Creek reservation was settled and sold by non-Indians after the Tribe was scattered in the wave of “terminations” following the Rogue Valley War.

In 1954, Congress terminated the Cow Creek Band. After a long battle, the federal government reversed its position and disavowed termination. On December 27, 1982, President Reagan signed "PL 97-391," which restored the Cow Creek as an Indian tribe and established formal relations with the United States Government through its trust agency, the Bureau of Indian Affairs ("BIA").¹

Following recognition by the federal government, the Cow Creek sought compensation for its 1853 land claims. In 1988, after a protracted battle, the Cow Creek received a \$1.5 million settlement from the United States Government.

The Tribe determined to place the principal amount of the settlement in a permanent endowment and use the interest to finance tribal programs and services, and early economic development efforts necessary to stimulate job growth. A loan from the BIA in 1991 assisted construction of a bingo hall, which prospered and grew to become what is today the Seven Feathers Hotel & Casino Resort. Earnings from the resort have been reinvested in various tribal programs and job-creating businesses, all centered in Douglas County. By 2005, the Cow Creek became the third largest private employer in Douglas County.²

Principal Government and Business Activities of the Cow Creek

The Cow Creek have a direct impact on the Douglas County economy through their spending on tribal government and business activities. These consist of various entities, which spend money through the hiring of employees, payments to local construction contractors, and purchases of goods and services. Furthermore, the Cow Creek are a major contributor to charities as well as other non-profits and local governments in Douglas County.

¹ <http://www.cowcreek.com/story/s01history/index.html>

² Paul Craig, *News Review*, "Experts: County Employment Continues to Change," February 27, 2005.

Tribal Government Activities

The government activities of the Cow Creek consist mostly of basic services for general government, social and health services, and education. The largest funding source for these activities is the casino. However, other significant sources include federal and state grants, taxes levied on tribal businesses, investment earnings, and tribal business income.

An overwhelming share of the spending by Cow Creek tribal government occurs in the Douglas County economy, because that is where many of the tribe's members reside. Among the Cow Creek government activities, many of which serve Tribal employees, patrons, and neighbors as well as Tribal members, are:

Tribal education programs. Tribal government has several education programs including adult education, vocational training, higher education, a library grant program, tutoring programs, children's programs, and others.

Tribal burial benefits. The burial fund helps tribal members pay funeral and interment costs of deceased family members.

Housing. This program offers financial assistance to tribal families for needed home repairs and helps with down payments.

Nesika Health Group. Health and dental insurance are provided to tribal members and employees of tribal businesses through the Nesika Health Group, which is wholly owned by the Cow Creek.

Childcare assistance. The Cow Creek provide safe and quality childcare for low-income families that could not otherwise afford care while working, training for jobs, or attending school.

Healthcare programs. The Cow Creek Tribe operates a Health and Wellness Center as well as healthcare programs including tobacco prevention and cessation, providing over-the-counter medical supplies, mental health and family counseling, and prevention services.

Gaming Commission. The Cow Creek have a gaming commission that is independent of the casino. The Cow Creek Gaming Commission licenses and runs background checks on casino employees and suppliers, monitors gaming to ensure legal compliance and fairness, establishes control standards, and conducts audits. In addition to the Cow Creek Gaming Commission, the Oregon State Police and the National Indian Gaming Commission also regulate and audit the Tribe's casino operations to ensure the safety and integrity of gaming operations.

Other government activities. Tribal government engages in a variety of other functions including planning, research, legal, cultural, financial administration, tribal enrollment, natural resource work, transportation and road maintenance, family and child services, property management, and economic development.

Tribal Business Activities

Following federal recognition, the Cow Creek have made a concerted and successful effort at stimulating job growth in Douglas County to elevate the economic wellbeing—of both tribal and non-tribal members—in the community. This led to the formation and acquisition of numerous businesses. Among the Tribe's business activities are:

Seven Feathers Hotel & Casino Resort. Located in Canyonville, the centerpiece of the resort is a 50,000 square foot casino with an adjoining 147-room luxury hotel, a 22,000 square foot convention center, several restaurants, a gallery, and other amenities.

Umpqua Indian Foods. This company manufactures, wholesales, and retails jerky, other meat products, gift baskets, and other gift items in downtown Canyonville.

Seven Feathers Truck & Travel Center. Designed as a full-service truckstop for the Canyonville exit on I-5, the travel center caters to truckers as well as passenger and recreational vehicles. The travel center sells motor fuels and tires. It also has a convenience store and a private lounge and shower rooms for professional truck drivers.

Creekside Restaurant. Associated with the travel center in Canyonville is the 250-seat Creekside Restaurant, which is open 24 hours a day.

Creative Images. The CiMediaGroup is a Roseburg based company engaged in custom printing, graphic design, media projects, videography, and web design.

Rio Communications. The Cow Creek recently relocated the headquarters of this firm to Roseburg. Rio is a telephone and Internet service company with sales throughout Oregon. They have branch offices in Portland, Medford, Bend, and Eugene.

Canyonville Cubbyholes. This is a self-storage provider located in Canyonville.

Hospitality Division. This subsidiary of the Cow Creek's Umpqua Indian Development Corporation oversees several small lodging operations including the Valley View Motel, the Riverside Inn, the Holiday Motel, and the Rivers West RV Park.

Umpqua Indian Utility Cooperative ("UIUC"). This Tribal utility operates the Tribe's Canyonville area utilities. UIUC purchases electricity from the Bonneville Power Administration and distributes it to the Tribe's resort, the Creekside Restaurant, and travel center in Canyonville. Soon it will also operate the Tribe's new water and sewer system.

K-Bar Ranch. The ranch is a cattle operation, which also produces hay and other feed crops.

Donations in 2004

The Cow Creek donate large amounts of money to schools, nonprofits, charities, local governments, and other community needs. In 2004 alone, the Cow Creek donated a cumulative total of \$1,010,666 to charitable, non-profit and local government causes in Douglas County, and \$605,894 to similar entities in neighboring counties.

The Cow Creek Foundation, which is funded through casino profits, issued \$469,798 in grants to Douglas County charities. The Seven Feathers Resort donated another \$198,733 on top of that. The Cow Creek Tribe gave over \$342,000 to Douglas County schools, communities, and charities in the county in 2004.

In 2004, there were well over 250 recipients of tribal donations. Below is a sample of 30, which reflect the range of organizations in Douglas County that benefited from the Cow Creek:

South Umpqua High Booster Club
 St. Francis Xavier Kitchen & Hospitality Center
 Umpqua Community College
 Douglas County Sheriff's Office
 Land of Umpqua Discovery Days
 FFA
 Boys and Girls Club of Umpqua Valley
 Douglas County Fairgrounds
 Cobb Street Children's Learning Center
 Umpqua Valley Christian School
 Roseburg Rescue Mission
 Yoncalla Summer Athletic Program
 March of Dimes
 City of Roseburg
 Myrtle Creek Volunteer Fire Department
 Roseburg Area Chamber of Commerce
 Phoenix School
 Douglas County Library
 4-H Livestock Auction
 Canyonville Park Board
 Myrtle Creek Summer Festival
 Family Development Center
 Salvation Army

Douglas County Youth Development Program
 South County Clothe a Child
 Greater Douglas County United Way
 Lookingglass Elementary School
 Southern Oregon Humane Society
 Douglas County Cancer Services Committee
 Roseburg Little League

Tribal Governments

Although tribes lost or transferred most of their lands to the United States, they retained certain sovereignty. Tribes, as other governments, actively guard against encroachments on their sovereignty.³

There are currently 562 federally recognized tribal governments in the United States. Each has a formal governmental structure, tribal members, and nearly all have trust lands. These governments have the authority to create laws and be governed by them subject to the limitations of Congress and federal case law.

The Meaning of Federal Recognition

Federal recognition means that tribes have a constitutionally guaranteed status as a sovereign entity similar to a state government.

Like state governments, tribal governments have many responsibilities to their constituents. Thus, tribal governments often provide members services such as healthcare, housing, education, job training, public safety and courts, social services, public infrastructure, and economic development. Two federal agencies, the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS"), provide some benefits and services to recognized Indian tribes, as well.

The ability of tribes to provide services, even with federal help, is often grossly insufficient to properly address the needs of their members. Therefore, tribes pursue economic development opportunities as a means of generating income for tribal members and to help secure stability for future generations.

As with other governmental entities, such as cities, counties, and states, federally recognized tribal governments, like the Cow Creek, are not subject to taxes. Businesses owned by tribal governments, just as businesses owned by states, counties, and cities, are also exempt from taxation. Individual members of federally recognized tribes, as well as businesses owned by individual tribal members, are generally subject to federal, state, and local taxes.⁴

³ <http://www.gota.wa.gov/FAQ/FAQ.htm>

⁴ See the United States Internal Revenue Service at <http://www.irs.gov/govt/tribes/article/0,,id=102543,00.html>

Tribal sovereignty gives federally recognized tribes the right to govern themselves resulting in a government-to-government relationship with the United States. Tribes have the right to form their own government, hold elections, regulate domestic relations of their members, administer justice and enforce laws, levy taxes, and determine its membership. Tribes also may establish their own regulations in a number of areas including gaming.⁵ These rights apply within the borders of a tribe's trust lands.

Trust Land

Nationally, about 55.7 million acres of land are held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Most of it is reservation land, however, some trust land is not on reservations. There is no practical legal distinction between tribal trust and tribal reservation lands.

Indian trust lands are lands associated with a specific tribe that are held in trust by the United States government on behalf of the tribe or an individual tribal member.⁶ When land is put into trust for a tribe, title of the property goes to the federal government. The Secretary of the Interior serves as trustee for such lands with many routine trustee responsibilities delegated to BIA officials. As with other property controlled by the federal government, reservation and trust lands are exempt from property taxes.

Net Economic Impact Methodology

ECONorthwest used a widely recognized software system, called IMPLAN, to build a model of the Douglas County economy.⁷ IMPLAN provides county-level estimates on production, consumption, employment, employee compensation, small business income (mostly the labor earnings of the self-employed and family owned businesses), and taxes for each of 509 economic sectors. An in-depth discussion of this modeling system, its use in determining economic impacts, and its strengths and weaknesses can be found in the Appendix to this report, which begins on page A-1.

⁵ <http://www.nativevillage.org/>

⁶ <http://www.usgs.gov/usgs-manual/500/500-6.html>

⁷ IMPLAN (for Impact Analysis for PLANning) was developed by the U.S. Department of Agriculture in cooperation with the Federal Emergency Management Agency and the Bureau of Land Management of the U.S. Department of the Interior to assist federal agencies in their land and resource management planning. Applications of IMPLAN by the U.S. Government, public agencies, and private firms span a wide range of projects, from broad resource management strategies to individual projects such as proposals for developing ski areas, coal mines, transportation facilities, and harvesting timber or other resources. ECONorthwest has applied the model to a variety of public and private sector projects in the Pacific Northwest including, most recently, wind power generation facilities, federal assistance for residential care facilities, and various projects financed by new markets tax credits.

Simply citing Cow Creek tribal expenditures and the impacts that occur would produce an upper bound estimate of the tribe's impact on the local economy. This upper bound estimate is often referred to as a measure of the "gross" economic impacts. Gross economic impacts offer a perspective on the magnitude of overall economic activity that can be traced back to expenditures and activities by the Cow Creek. Gross impacts do not necessarily reflect the creation of new jobs or income.

Instead of measuring gross impacts, ECONorthwest was asked to measure the "net" economic impacts of the Cow Creek Tribe. Using a net impact approach enables us to answer the following question: How much better off is the Douglas County economy because of the Cow Creek Tribe? The complete net impact analysis and the findings revealed by it are discussed in detail in Section III, which begins on page 15.

Economic Impact Data

In order to implement the IMPLAN model, the various expenditures by the Cow Creek Tribe must be attributed to the 509 industry sectors handled by the IMPLAN model. ECONorthwest relied extensively on the audited financial statements from the Cow Creek for calendar year 2004 and some special compilations requested from tribal staff. Key to the analysis was identifying only those expenditures originating from net new contributions to the Douglas County economy.

Tribal Spending

For modeling purposes, we categorized tribal activities into the following two groups: 1) tribal government, and 2) business or economic development activities. This categorization scheme is appropriate for two reasons. First, expenditures by tribal government are fed into the economic impact model differently than those of tribal businesses.⁸ Second, this categorization scheme proved quite useful to identify revenues and expenditures across activities (intersegment transfers) and prevent possible double counting. Both of these are discussed in detail below.

⁸ Impact analysis can be performed at two levels. There is a "Simple Analysis" which looks at changes in demand for some particular industry that is contained in the IMPLAN model of the region. This level of analysis is used for the tribe's business spending. There is also a "Complex Analysis" which looks at a new activity or industry not contained in the IMPLAN model of the region. The Complex Analysis requires that the user know the output, employment, income, and first round of indirect purchases. This level of analysis is used for the tribe's government activities.

Tribal Government Spending

The Cow Creek tribal government offers a variety of services, including: educational and housing programs, childcare and medical assistance, the gaming commission, and various other functions such as planning, research, legal, cultural, financial and administration. There is no generic tribal government sector in IMPLAN. Because the spending categories of the Cow Creek cut across many different economic sectors, a method called "complex analysis" had to be used. It required that a "production function" (in simple terms a spending pattern) be developed that matches the functions of the Cow Creek tribal government. It was based on the actual government spending actions of the Tribe.⁹

The direct effects of the Cow Creek's tribal government activities are based on employment and personal income data supplied by the Tribe. The direct output effects of Cow Creek tribal government activities were calculated using an expenditure approach. That is, the value of tribal government (direct output) is the sum of labor and non-labor operating expenses. This is similar to the manner in which IMPLAN measures direct government output for states.

To estimate the indirect effects of Cow Creek's tribal government activities, the analysis identifies changes in output for each industry from which Cow Creek purchases goods and services. The direct impacts in this model are more precisely described as the first round of indirect impacts. Subsequent rounds of indirect impacts occur as providers to the Tribe purchase goods and services from other businesses that will also need to buy goods and services. The indirect impacts of tribal government are what the IMPLAN model reports as direct and indirect impacts.

To calculate the induced impacts, the Tribe's estimate of disposable income to tribal government employees is used. This disposable income is distributed among industry sectors using IMPLAN's breakdown of personal consumption expenditures for medium-income households in Douglas County.

Tribal Business Spending

Expenditure and revenue data for the Cow Creek Tribe's various business activities were acquired from independently audited annual financial statements and used as inputs in the economic impact model.¹⁰

⁹ "Cow Creek Band of Umpqua Tribe of Indians Basic Financial Statements and Independent Auditor's Report," December 31, 2004, by The Sells Group, P.S., Lynnwood, WA.

¹⁰ "Umpqua Indian Development Corporation Financial Statements and Independent Auditor's Report," December 31, 2004, by The Sells Group, P.S., Lynnwood, WA, and "Seven Feathers Resort Division of the Umpqua Indian Development Corporation D/B/A Seven Feathers Hotel & Casino Resort Report on Financial Statements Two Years Ended December 31, 2004, by Conway, Stuart & Woodbury, CPAs, Las Vegas, NV.

The business activities conducted by the Cow Creek are all recognized or specified as existing industry sectors in the IMPLAN model of Douglas County. Therefore, revenues for these businesses were modeled as changes in demand in the relevant industry sector. This type of impact analysis is often called a "Simple Analysis." For example, if the Tribe receives revenues from its hotels, then those revenues are counted as a direct output impact and IMPLAN estimates the indirect and induced impacts.¹¹

The Cow Creek's business activities—particularly the Seven Feathers Hotel & Casino Resort—attract non-local visitors to Douglas County who then purchase goods and services from other local businesses. For instance, they may purchase gasoline and merchandise, eat at restaurants, and stay at a hotel not owned by the Tribe. ECONorthwest estimated these expenditures by non-local visitors and included them in the impact model.

Special Data Considerations

The IMPLAN model is flexible enough to allow the user to incorporate primary source data where possible. In some cases, ECONorthwest relied on detailed financial data to exclude expenditures that do not generate current economic activity, such as depreciation and amortization. We also excluded expenditures that could potentially lead to double counting or were known to occur outside the local, Douglas County economy. These latter two data issues are discussed in further detail below.

Intersegment Transfers

ECONorthwest removed potential sources of double counting by identifying intersegment transactions. Typical of many governments and large businesses, the financials of the Cow Creek contain transactions between divisions—expenditures of one entity, such as the casino, may appear as revenue in another, such as Umpqua Indian Foods. These intersegment transactions were identified and the double counting they would cause eliminated.

Isolating Douglas County Expenditures

Much of the spending by the Cow Creek tribal government and businesses results in a dollar-for-dollar impact on the Douglas County economy. Local labor purchases and the purchases of locally supplied materials and services, for example, provide a strong stimulus to local activity.

¹¹ Cow Creek businesses differ slightly from industry averages in employment, payroll and benefits. As a result, the actual data from audited financials and W-2 payroll statistics were used to adjust the production functions of certain sectors in the IMPLAN model so that the direct changes in output, employment, and income estimated by the IMPLAN model matched those supplied by the Tribe.

The IMPLAN model contains purchasing assumptions¹² for each industry sector that are specific to Douglas County. Instead of relying entirely on these purchasing assumptions, ECONorthwest worked closely with Cow Creek staff to identify spending that is known to occur outside of Douglas County. This spending, of course, is not included in the impact analysis.¹³ For example, gaming revenues that are shared or distributed to tribal members who live outside of Douglas County are not included in the impact analysis.

Not all purchases have a dollar-for-dollar impact. Equipment purchases, for example, will do so only if the equipment happens to be manufactured in Douglas County. Otherwise, the impact on Douglas County will be limited to the retail, wholesale, transportation, and other margins on the sale that are enjoyed by local entities.

The IMPLAN system permits a sector-by-sector breakout of these margins, and allows the user to over-ride these margin assumptions using primary source data if available. For instance, instead of the estimated retail margin embedded in the IMPLAN model, ECONorthwest was able to use actual retail margins for the Seven Feathers Truck & Travel Center using data from the Tribe's financials.

Components of Net Impacts

Net impact analysis only counts impacts that are new or additive to the local economy. That is, only spending and other economic activities that would not have occurred "but for" the existence of the Cow Creek Tribe are counted. To accomplish this, the impact model is driven using data that only represents new dollars to the Douglas County economy. There are three primary sources of these dollars. They are:

1. Expenditures by non-local sources that would have spent their money at places outside of Douglas County had it not been for the Cow Creek Tribe are the primary contributor to net economic impacts. The Tribe, in essence acts as an "exporter" of goods and services that are produced in Douglas County by selling to people and businesses located in other states or counties. Trucks off I-5 refueling at the Seven Feathers Truck & Travel Center that would otherwise have refueled in Jackson County would be an example of an export. So would Federal grant money awarded to the Cow Creek to fund a new clinic program, as that would also represent new dollars to the Douglas County economy.

¹² These purchasing assumptions are called "Regional Purchase Coefficients." They specify the ability of local suppliers to meet or satisfy a change in demand for a good or service.

¹³ Excluding spending that occurs outside of Douglas County imparts a conservative bias to this analysis by assuming none of the non-local spending makes its way back to the county. For instance, spending by tribal members who receive gaming distributions, but live outside of Douglas County, has no economic impact on Douglas County.

2. Expenditures by local sources (Douglas County residents and businesses) that would have been spent outside of Douglas County *but for* the Cow Creek Tribe. This is called “import substitution,” and it is a significant contributor to the net economic impact of the Tribe. An example of import substitution would be a person from Roseburg that formerly traveled to Reno to gamble, but now stays in Douglas County and gambles at the Seven Feathers Casino. The amounts are large. Recent data show that the average tourist spends \$507 per trip to Reno, which includes \$177 in gaming.¹⁴ By staying in Douglas County, a person could spend the same \$177 in gaming at Seven Feathers and spend the remaining \$330 in trip savings elsewhere in the local economy.
3. The third effect is a deduction. In this analysis, allowances must be made for “direct substitution,” which is spending by locals that would have gone to other local businesses *but for* the Cow Creek Tribe. An example would be the purchase of gasoline made at the Tribe’s travel center by a Douglas County resident that would have bought fuel at another local station had the Cow Creek travel center not been there.

Property Tax Analysis

The Cow Creek, being a major employer in Douglas County, indirectly supports local government through the property taxes paid by the Tribe’s employees. To measure the magnitude of this, an analysis was done where a list of employee addresses of those who worked for the Cow Creek in 2004 was matched against the Douglas County property tax rolls. It reveals the taxes paid by those employees to the County and various local taxing jurisdictions. An explanation of the results of this research begins on page 23.

Data Used in the Property Tax Analysis

There were two main sets of data used in the tax analysis. The Cow Creek provided a list of addresses of employees that received W-2 forms for work performed for the Tribe or its business entities in 2004. The second database set was the 2005 property roll master file, publicly available from the Douglas County Assessor’s Office, which was downloaded by ECONorthwest on October 18, 2005. Some property tax data in this report came from the Oregon Department of Revenue, which publishes countywide summaries of property values and taxes each year.

Property taxes for homes and manufactured housing were taken directly from the master file. Some employees, however, lived in apartment buildings, had post office box addresses, or other addresses from which specific residential street addresses could not be discerned. For these the median property tax per housing unit by Zip Code was used.

¹⁴ Calculated from data reported by the Reno-Sparks Convention & Visitors Authority “2003 Marketing Report.”

Net Economic Impacts

Overview of the Net Economic Impacts

The Cow Creek Tribe's government and various businesses have a significant net economic impact on the Douglas County economy. The Cow Creek attract new spending within the borders of Douglas County, thus supporting new jobs and investment spending that would not otherwise occur.

Interpreting Net Impacts

It is important to understand that the number reported in this analysis only represent the net impacts of the Cow Creek and not the entire effects of the Tribe's governmental and economic development activities felt in Douglas County. As this analysis will show, the Cow Creek had a net direct jobs impact of 750 yet the Tribe actually employed an average of 1,168 workers in 2004. Thus, the net direct job impacts are approximately 35 percent less than the actual gross number of jobs at the Tribe.

To give a better understanding of how this net modeling approach yields impact estimates that are more conservative than those measured in the typical gross impact analysis, the following illustration is provided:

- The Seven Feathers Hotel & Casino Resort provides gaming, lodging, eating and drinking, and other services. The value of these services represents the "gross" direct output of the casino resort. However, the "net" direct output is much smaller. Suppose the sum of spending by non-local visitors (exports) and import substitution less any spending that was diverted from other Douglas County businesses (direct substitution) is 40 percent of total revenues. Then only 40 percent of the output of the Seven Feathers Resort would be counted in a net analysis.
- Earnings from the net output of the Seven Feathers Hotel & Casino Resort are used to fund tribal government and other business activities. If the casino generates \$10 million to finance tribal government programs, only \$4 million of that total would be used in the net impact analysis (40 percent of \$10 million).

Impact Results

The Cow Creek's government and business activities were separated in order to develop expenditure data to be used as inputs into the economic impact model. The impact results, however, are reported together.

Table 1 displays the direct, indirect, and induced effects of the Cow Creek's activities on output, wages, small business income, other income, and jobs for Douglas County. These represent the net impacts of the Tribe and are based on spending in Douglas County that would not have occurred in the absence of the Tribe.

Table 1: Net Economic Impacts of the Cow Creek Tribe in 2004, by Type

Impact Type	Output	Wages	Small Business Income	Other Income	Net Jobs*
Direct	\$53,060,000	\$24,330,000	\$3,330,000	\$6,060,000	750
Indirect	25,750,000	8,200,000	1,800,000	3,100,000	380
Induced	28,310,000	11,450,000	1,250,000	3,160,000	480
Total	\$107,120,000	\$43,980,000	\$6,380,000	\$12,320,000	1,610

* The Cow Creek provided the annual equivalent of 1,168 jobs in Douglas County in 2004. Of these, 750 jobs would not have otherwise existed had the Cow Creek not been in the County. These 750 jobs represent the net direct economic impact of the Tribe on the County's economy.

Economic Output

The output measures reported in Table 1 are an indication of the total sales that are likely generated because of Cow Creek's activities in 2004. The Cow Creek directly generated \$53.1 million in economic activity in Douglas County in 2004. Even with their significant gaming and tribal government operations, approximately 65 percent of this economic activity occurred in the service and government sectors.

For many businesses or organizations, the direct impacts are generally concentrated in one sector. However, with the Tribe's various government functions, wide-ranging portfolio of business activities and capital expenditures, the direct impacts are spread among several sectors. For instance, of the \$53.1 million in direct output generated by the Tribe, approximately 17 percent is in the construction sector, seven percent in the retail and wholesale trade, five percent in finance, insurance and real estate, and three percent in manufacturing.

Employment and Income

The direct wage, income and job impacts are also significant. In 2004, the Tribe directly generated approximately \$24.3 million in net direct wages (over \$30 million in gross impact) and supported 750 net jobs (over 1,100 jobs when measured as a gross impact) in the County that would otherwise not exist if not for the employment opportunities offered by the Cow Creek. These wage, income, and employment impacts represent the net direct impacts of the Tribe on the local economy.

Spending on intermediate goods and services by the Tribe or other vendors that provide services to the Tribe (indirect purchases) generate additional impacts in other sectors of the Douglas County economy. As reported in Table 1, the indirect impacts consist of \$25.8 million in overall economic activity. This includes \$8.2 million in wages, \$1.8 million in income for small business owners, and \$2.5 million in other income such as rental income, dividends, and corporate profits.

Approximately 260 jobs are created by tribal and other businesses spending on intermediate goods and services. Although indirect spending by the Tribe and others benefit many sectors of the local economy, the net indirect impacts include major capital expenditures and donations by the Tribe. As such, the construction (38.6 percent) and service (30.3 percent) sectors receive the majority of indirect job impacts.

Induced Effects of Higher Incomes and Charitable Donations

As described earlier, the Cow Creek donated over \$1.0 million to over 250 recipients in Douglas County in 2004, including schools, nonprofits, and other charitable causes. When the Cow Creek Tribe makes donations, the recipients will purchase goods, services, or labor. When the Cow Creek contributes equipment or provides services, those contributions free up cash to be spent on other things. Such spending generates indirect and induced impacts in the local economy. ECONorthwest estimates that approximately 30 percent of the indirect service sector impacts, or almost 35 jobs, are traced to the contributions and donations the Cow Creek make to non-profits and others in Douglas County.

Consumption spending by households (induced purchases) whose incomes are linked to the Tribe's government and business activities result in additional economic impacts. As shown in Table 1, approximately \$28.3 million in new economic activity is generated because of the additional income generated for Douglas County households. This includes \$11.5 million in wages and \$1.3 million in income for local, small business owners. In addition, 480 jobs are induced by rising incomes.

Overall Net Impacts

Overall, the scale of economic impacts generated by the Cow Creek on Douglas County in 2004 is impressive. In total, the Cow Creek generated approximately \$107.1 million in net, new economic activity. The total, net contribution of the Tribe also includes approximately \$44.0 million in wages, \$6.4 million in income for small business owners, and 1,610 jobs.

Multiplier Effects

As Table 1 suggests, spending by the Cow Creek has a "multiplier effect" on the Douglas County economy.¹⁵ The multiplier effect can be measured in terms of incomes, jobs, or taxes (see page A-10 for an explanation of multiplier effects).

¹⁵ The Cow Creek purchase labor, and goods and services. In the next round of spending, tribal employees spend some of their income. In addition, businesses that supply the Cow Creek must themselves purchase labor, and goods and services. In each round of spending, some spending "leaks" out of the local economy as workers and businesses pay their taxes, save some of their income or profits, or purchase goods and services from non-local sources ("imports"). Spending will continue to filter throughout the economy until all of it is gone in the form of leakages. The multiplier, therefore, represents the extent to which an economy is able to meet the needs of local businesses and households. A larger, more diverse economy will be able to accommodate their spending, thus leakages will be smaller, and the multiplier effects on other sectors will be larger.

For example, on a net basis, the Cow Creek directly generated 750 jobs during 2004. Tribal spending is responsible for another 860 jobs in other sectors of the Douglas County economy. The employment multiplier on tribal activities, therefore, is approximately 2.2. Thus, for every ten tribal employees, approximately 12 jobs are generated in other sectors of the Douglas County economy. On a net basis, these are new jobs for the community that otherwise would not have occurred but for the Tribe.

Impact on Economic Diversification

The scope of impacts attributed to the Cow Creek is similarly impressive, and bodes well for other Douglas County workers and business owners. Indeed, the diversity of tribal activities and the higher-than-average compensation paid by the Tribe yield benefits for both the Cow Creek Tribe and others in Douglas County.

The economic diversity and strength engendered by the Cow Creek has three benefits. First, it helps insulate Douglas County from economic shocks. Secondly, it spreads the indirect and induced effects more broadly throughout the local economy. Finally, the above average wages of many Cow Creek workers fuels a more vibrant local economy through higher spending.

Table 2 provides additional details on the total economic impacts broken out by major industry sector.

Table 2: Net Economic Impacts of the Cow Creek Tribe in 2004, by Major Industry Sector

Industry Sector	Output	Wages	Small Business Income	Other Income	Jobs
Natural Resources	\$1,850,000	\$250,000	\$20,000	\$30,000	30
Construction	13,320,000	4,040,000	1,330,000	540,000	170
Manufacturing	4,510,000	1,120,000	10,000	380,000	30
Trans. Comm. Utilities	6,020,000	1,540,000	250,000	1,060,000	50
Trade	9,730,000	3,350,000	490,000	360,000	160
Finance, Insurance, Real Estate	8,800,000	1,160,000	230,000	2,200,000	80
Services	47,780,000	23,760,000	4,050,000	7,090,000	940
State and Local Government	15,110,000	8,750,000	0	670,000	150
Total All Industries	\$107,120,000	\$43,970,000	\$6,380,000	\$12,330,000	1,610

Note: State and Local Government includes Cow Creek tribal government.

Table 2 clearly shows that spending by the Cow Creek Tribe on tribal government and business activities has ramifications for many other areas of the Douglas County economy. For instance, approximately 940 jobs and \$23.8 million in wages for employees in service-related industries are either directly or indirectly generated by the Tribe. This is important because the service sector encompasses a wide range of occupations, with workers of different skills and abilities. Employment and income opportunities, therefore, are generated for workers of every income level.

In addition, significant employment and income impacts are found in the construction (170 jobs, \$4.0 million in wages); wholesale and retail trade (160 jobs, \$3.4 million in wages); government (150 jobs, \$8.8 million in wages);¹⁶ and the finance, insurance, and real estate sectors (80 jobs, \$1.2 million in wages).

Table 3 shows the local industries that benefit the most from the ripple effects—i.e., the indirect and induced impacts—associated with Cow Creek activities. Ranked by job impacts in descending order, construction, state and local government, and food services are at the top of the list. (State and local government does not include tribal employment. Thus, employees at local school districts, for example, benefit.)

Table 3: Industries Affected by the Indirect and Induced Spending Generated by Cow Creek Tribal Activities, Top 15 in Descending Order

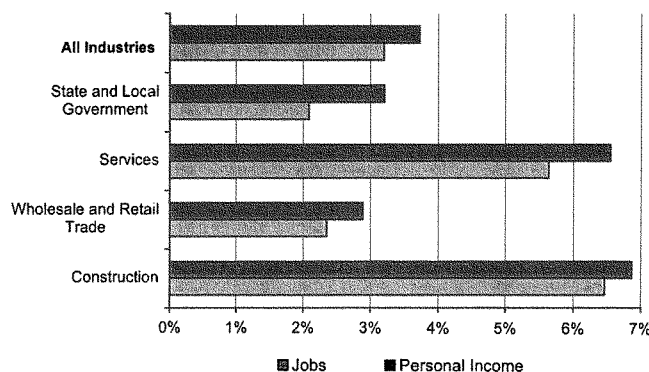
Industry
1. Construction
2. State and local government
3. Food services and drinking places
4. Real estate
5. Employment services
6. Offices of physicians, dentists, and other health care
7. Food and beverage stores
8. Hospitals
9. General merchandise stores
10. Insurance agencies, brokers and related
11. Arts, entertainment and recreation
12. Nursing and residential care
13. Civic, social and professional organizations
14. Wholesale trade
15. Social assistance- except child day care services

The impacts shown in this analysis take into account any spending by Douglas County residents at the Tribe's various business activities that was diverted from other local businesses. Even so, service and trade sectors affected by that substitution show net jobs gains primarily because of the wage and income benefits that accrued to County residents from the Cow Creek's activities in 2004. Food services and drinking places are third on the list in terms of jobs gained because of the indirect and induced spending generated by the Tribe. In addition, grocery and general merchandise stores make the list of top 15 affected industries.

¹⁶ This includes employment and payroll for Cow Creek Tribal government.

Figure 2 illustrates the importance of Cow Creek Tribal activities on Douglas County.

Figure 2: Net Job and Income Impacts Attributed to the Cow Creek Tribe As a Percent of Douglas County in 2004



Notes: 1. State and Local Government includes Cow Creek tribal government.
2. Personal income is the sum of wages and business income.
Source: ECONorthwest calculations using 2001 IMPLAN data.

In 2004, the Cow Creek Tribe accounted for approximately 3.2 percent of the employment and 3.7 percent of the personal income in Douglas County on a net basis. Capital spending by the Tribe produced significant benefits for local construction workers and contractors. The Tribe also accounted for 5.6 percent of all service sector jobs and 3.2 percent of government sector jobs in 2004. Those jobs that can be traced back to the Tribe's government and business activities accounted for an even larger share of income because tribal employees are paid better than similar workers elsewhere in the county.

Possible Economic Outcomes Without the Cow Creek Tribe

Using a net impact analysis framework makes it possible to examine what Douglas County would have looked like, in 2004, without the Cow Creek's government and business activities. From any economic measure, the net contributions of the Tribe in 2004 were positive. Indeed, even after subtracting out redirected spending, without the Tribe the county would have had approximately 1,610 fewer jobs in 2004.

Initially, job losses affect Douglas County by putting more people on the unemployment rolls. Those who are unable to find gainful employment either drop out of the labor force (these are called "discouraged workers") or move out of the area. When large numbers of workers are forced to drop out of the labor force, social problems tend to increase as the economic burdens on families become severe.

Heads of families with children who cannot find good jobs are likely to move. Indeed, since the late 1980's the Douglas County economy has been hard hit by national recessions and subsequent declines in the wood products industry. Although the economy has adjusted and the industry mix changed, losses in this primary industry reveal themselves in population growth trends for the county. According to US Census data, Douglas County's population grew by only 3.9 percent between 1990 and 2000, compared to 20.4 percent in Oregon, as a whole.

Table 4 shows what the Douglas County economy would have looked like with and without the Cow Creek Tribe in 2004. That is, it depicts the actual economic performance in 2004, and then evaluates the net jobs and incomes generated by the Tribe under the following two mobility scenarios: 1) jobs and incomes are lost but workers remain in the county, and 2) jobs and incomes are lost and workers leave Douglas County.

Table 4: The Douglas County Economy With and Without the Net Economic Impacts of the Cow Creek Tribe in 2004

Economic Health Indicator	2004 Actual Economic Performance	Economy Without the Cow Creek Tribe	Net Difference (percent)
If unemployed stayed in county			
Douglas County population	102,350	102,350	0.0%
School age population (5-17)	18,661	18,661	0.0%
Labor force	47,806	47,806	0.0%
Employed	43,713	42,103	-3.7%
Unemployed	4,093	5,703	39.3%
Unemployment rate	8.6%	11.9%	3.3%
Total payroll (millions \$)	\$1,140.2	\$1,096.2	-3.9%
If unemployed left the county			
Douglas County population	102,350	98,119	-4.1%
School age population (5-17)	18,661	17,763	-4.8%
Labor force	47,806	46,196	-3.4%
Employed	43,713	42,103	-3.7%
Unemployed	4,093	4,093	0.0%
Unemployment rate	8.6%	8.9%	0.3%
Total payroll (millions \$)	\$1,140.2	\$1,096.2	-3.9%

Sources: Bureau of Labor Statistics, Oregon Employment Department, Portland State University Population Research Center, and the US Census.

If we take the Cow Creek Tribe's government and business activities out of the Douglas County economy in 2004, the net loss of 1,610 jobs would have a profound effect. Under a scenario in which these unemployed workers remain in the county, then the number of unemployed workers would have increased by approximately 39.3 percent. Under this scenario, the unemployment rate in December 2004 would have gone from 8.6 percent to 11.9 percent.

On the other hand, if we assume that the 1,610 unemployed workers would have moved out of the county, the economic impacts would also be severe. Job losses would cause payrolls to fall approximately 3.9 percent, which would translate into a direct loss to businesses because of reduced sales. In addition many self-employed and small business owners would sustain losses in incomes totaling about \$6.4 million. State and local government revenues would also fall as the movement of workers and families out of Douglas County would likely create a depressing effect on property values.

Movement out of Douglas County by unemployed workers would lead to a contraction across demographic groups. Even if we assume that ten percent of the workers have another household member employed in the Cow Creek tribal government or one of its businesses, the loss of 1,610 jobs would cost Douglas County up to 4,231 residents, 898 school-aged children, and 1,449 households.

Given that approximately 72 percent of the households in Douglas County own their own homes, the decline in the number of households would have devastating effects on the quality of neighborhoods and, in turn, on property values and tax revenues for local taxing jurisdictions. In addition, commercial businesses would have had fewer customers and a smaller pool of consumer spending to cater to, which would have lessened the value of commercial real estate.

Property Taxes

In fiscal year 2004-05, approximately \$62.8 million in property taxes was imposed in Douglas County.¹⁷ The analysis presented here finds that in excess of \$1.1 million in property taxes were imposed on the residential properties of the employees of the Cow Creek that lived in Douglas County.

Property Tax

As most Oregon homeowners know, county tax assessors send out property bills in October each year. The assessor collects property taxes for numerous local jurisdictions and not just the county government itself. Taxes due are calculated by multiplying the tax rates of each jurisdiction with the net assessed value of the property.

The Douglas County Assessor's Office reported that the real market value of properties in the county were about \$7.2 billion in the last fiscal year. Property taxes of \$62,771,000 were imposed.

Table 5: Real Market Value, Net Assessed Value, and Property Taxes Imposed in Douglas County, FY 2004-05

Douglas County Property	Fiscal Year 2004-2005
Real market value	\$7,236,702,000
Net assessed value	5,608,699,000
Property taxes imposed	62,771,000

Source: Oregon Property Tax Statistics, fiscal year 2004-05, Oregon Department of Revenue.

The net assessed value of properties in Douglas County was just over \$5.8 billion. The net assessed value is the value of a property subject to taxation. It is usually calculated by the county assessor's office and is normally less than the market value. Some properties, such as utilities and large factories are assessed by the state on behalf of counties.

Tax bills are sent to property holders; however, many non-owners also pay property taxes. Renters indirectly pay as property owners include the cost of taxes in their rent calculations. Many commercial businesses implicitly pay property taxes through triple net lease agreements.

¹⁷ This figure and other countywide property tax data in this section come from the publication "Oregon Property Tax Statistics, Fiscal Year 2004-05." Published by the Oregon Department of Revenue and available online at <http://www.oregon.gov/DOR/STATS/statistics.shtml>.

Exemptions

Some types of property are assessed for less than full value. Farms and forestlands are often “specially-assessed” and are taxed much less than are other types of land used for commercial purposes. Homes of disabled veterans, historic properties, commercial buildings under construction, and businesses in enterprise zones are among the special classes that receive exemptions in Douglas County, which reduces assessed values.

Many properties are fully exempt and incur no property taxes. Land and buildings owned by governments, including most properties held by tribal governments, are 100 percent exempt.

Leading the list of 100 percent tax-exempt properties are those held by the U.S. government followed by school district and church owned properties and local governments. Among the partially exempt properties, the largest beneficiaries of tax exemptions are owners of farms followed by veterans, and holders of forestland.

In Table 6, the real market and assessed taxable values of properties in Douglas County that are subject to tax exemptions are shown. Almost \$3.8 billion of land, buildings, and other properties were subject to full or partial property tax exemptions in Douglas County. Land held by the Cow Creek accounted for 2 percent of that total.

Table 6: Exempt and Partially Tax Exempt Properties in Douglas County, Real Market and Assessed Values, FY 2004-05

Property Description	Real Market Value	Assessed Value
Federal	\$1,208,843,000	\$0
Veterans exemptions	558,854,000	321,282,000
Farm Use - specially assessed	549,723,000	45,194,000
Forest land - specially assessed	433,244,000	249,075,000
School districts	213,810,000	-
Religious organizations	129,732,000	-
County	127,938,000	-
City	105,229,000	-
Enterprise zone exemptions	87,604,000	8,989,000
American Indian (Cow Creek)	85,383,049	1,155,376
Other municipal corporations	84,595,000	-
Literary & charitable organizations	80,277,000	-
State	53,797,000	-
Other business & housing exemptions	35,774,000	15,648,000
Fraternal organizations	6,285,000	-
Historic property exemptions	4,779,000	2,048,000
Charitable schools & daycares	3,178,000	-
Burial grounds	1,212,000	-
All other social welfare	45,000	-
Total Exempt and Partially Exempt	\$3,770,302,049	\$643,391,376

Sources: Oregon Property Tax Statistics, fiscal year 2004-05, Oregon Department of Revenue. Data for American Indians from the Douglas County Assessor Office's 2005 property roll database - master file (downloaded by ECONorthwest on October 18, 2005).

Property Taxes on the Homes of Cow Creek Employees

The Cow Creek sent out W-2 forms to 1,647 people that worked for the Tribe or its businesses during 2004. Some received more than one form because they worked for multiple Cow Creek employers.

A W-2 is a standard Internal Revenue Service document used to report wages for income tax calculation purposes. People who received payment at any time in 2004 for work done for the Cow Creek, including workers who were also tribal members, all received W-2's.

Of the 1,647 recipients of W-2's, 224 or 13.6 percent lived outside of Douglas County. Approximately another 123 shared a residence with another Cow Creek employee. After deducting these, the analysis uncovered 1,300 unique Douglas County home addresses of employees. The total property tax on those residences was \$1,135,655 or 1.8 percent of the total property taxes imposed by Douglas County.

Economic Impact Analysis

This appendix describes the general method of analysis used to estimate the economic impacts of an initial stimulus, such as a new development, an industry, or a new business project. Economic impact analysis can also be used to predict the effects of policy decisions causing changes in the economy.

This appendix starts with a discussion of what economic impacts are and how they can be measured. It then delves into the workings of IMPLAN, which is the most widely used model for predicting economic impacts. This appendix concludes with a brief description of the limitations of input-output modeling.

Economic Impacts

The economy consists of numerous individual entities. Among them are households, consumers, tourists, businesses, nonprofits, and governments. Each makes decisions regarding work, spending, charity, savings, and investment. All of them try to optimize, with varying degrees of success and failure, their effectiveness in meeting their own goals. There is a constant struggle to adjust to changes both internally and externally. As a result, the interactions between independently acting entities are highly fluid.

Ironically, this independence has the collective effect of enhancing the overall performance of the economy. However, it also presents a problem when one wants to know what impact a particular entity has on the economy. That is because while some entities are directly linked through formal relationships, most are loosely tied to one another through series of transactions that are many steps removed. Precisely measuring all the impacts through a maze of transactions is futile.

Fortunately, economists have tools to estimate economic impacts. The most widely used is a framework known as input-output modeling. This technique gives highly sophisticated mathematical consideration to various elements of the economy. It measures the ripple effects of an economic stimulus by calculating the impacts of its spending flow from one entity to the next.

A sector is a group of establishments that produce similar goods or services. Examples of sectors include construction, farming, shoe stores, truck manufacturing, and elementary schools. The establishments in a sector can be businesses, nonprofits, or government entities. For each sector, one of several economic impacts may be reported. The most common are the number of jobs, income, and economic output, which is the value of production.

Purpose of Measuring Impacts

There are a number of reasons economists conduct an impact analysis. A common task is measuring the economic consequences of a proposed development. An example is the estimation of the employment and income that result from a new manufacturing facility. Community leaders use these estimations to weigh costs and benefits of the project. Policy makers use the forecast of additional tax revenue to evaluate permitting options.

An alternative task may involve considering the optimal course of action given a set of pending decisions. Land managers frequently conduct analyses of development alternatives to determine which yields the highest return. Land use planners use impact analysis to consider appropriate geographical placement for commercial zoning.

Impact analysis is also used to evaluate the effectiveness of an ongoing or completed project. These types of post-project analyses typically contrast actual outcomes (*e.g.*, number of jobs created or amount of income generated) with projected outcomes. The results can indicate if the project was as effective as anticipated and the reasons why.

Throughout the body of this text, we will illustrate some of the core concepts by using an example. Assume that we are analyzing an isolated county with three dairies. The three dairies are all the same size and they sell all their milk locally. A new dairy is being considered. It is expected to have the same sales and employment as the other three dairies now have. We want to know what the gross and net economic impacts of the new dairy would be.

Input-Output Models

One approach to economic impact analysis is known as input-output modeling. Input-output was first put to practical use by Professor Wassily Leontief in the late 1930's. Leontief went on to win the Nobel Prize in economics for this contribution.

An input-output model is a mathematical representation of regional inter-industry relationships. The model is based on linkages between economic sectors. Each unique linkage explains how spending in one sector affects production in all others. Linkages allow us to estimate the domino effect that a change in one sector has on the entire economy. This section details the salient features of an input-output model and the predictive tools economists use to conduct these analyses.

Linkages

Businesses in an economy are linked by their patterns of purchases and sales of goods and services. For example, the linkages for our dairy's production of milk and cheese include the purchase of cattle, food, and health care for the animals; farmers to care for and extract milk from the animals; and transportation services to bring raw milk to the production facility. Machinery must be purchased to process the liquid, package the final product, and transport it from the facility to distributors. Adding this dairy would increase the demand for production of each element required to bring milk and cheese to the market. All the goods and services that are components of the milk and cheese we buy at the grocery store are linked to those goods.

Another way of describing linkages is as production inputs and outputs. The input-output analytical method takes its name from these linkages in an economy. An input-output model describes how a change in demand for a good or service works its way through countless linkages in the economy. For a given change in demand, input-output models can estimate the resulting total change in an economy of output, employment, and income.

Final Demand

Final demand is the sum of all purchases of goods and services for final consumption within an economy. Final demand is an important component of input-output analysis because it represents the demand that an economic event generates. The subsequent ripples that a stimulus sends through a region are precisely what economists want to measure.

Input-output analysis works by taking the economic changes caused by a stimulus and solving for the new levels of local output that will be required to service that demand. We illustrate this by returning to our dairy example.

The construction of a new plant would require much more than just the milk used for its final product. Construction workers would need to be hired to build a large facility. All the wages, raw materials, and construction equipment must come from somewhere. Additionally, during the operations phase, the dairy would require a team of new employees, a fleet of trucks and drivers to transport the product, and numerous additional elements of its production process.

The seven categories of final demand

Input-output analysis is founded on the fact that one producer's inputs represent another's outputs. These factors of production are the economic activities that impact analysis helps us understand. There are seven different types of final demand.

Personal consumption expenditures: The largest component of final demand comes from household spending. Households consume a wide variety of goods and services. Examples include food, energy, housing, transportation, and anything else that is required for sustenance and recreation.

Federal government: Government purchases are broken down into two categories: military and non-military. Military expenditures include any purchases made in the interest of national defense. Non-military expenditures include all other purchases made by the federal government for the remaining services it provides.

State and local government: State and local government purchases are broken down into two categories: education and non-education. Spending on public education goes primarily to compensate teachers, but also includes things like textbooks and supplies. Non-education spending includes anything not spent for public education such as policing, fire fighting, and state-sponsored healthcare. Tribal governments can also be included.

Inventory: Inventories accumulate anytime an industry fails to sell all of its output from a given year. Goods can be sold out of inventory any time sales exceed production. Industries rarely sell exactly what they produce each year, so this category is a widely used tool for reconciling economic activities.

Capital formation: A large component of productive capability is capital. Industries use varying quantities of capital depending on the nature of goods and services they provide. The manufacturing sector, for example, tends to require large investments in property, plant, and equipment for the goods it produces. This category of final demand contains all spending on capital equipment.

Foreign exports: Just as some economies must import goods and services from outside their borders, other economies sell a significant portion of their output overseas. Demand for final goods and services that come from other countries fall into this category. While the consumption of these dollars happens elsewhere, recall that input-output is concerned with where goods and services are produced.

Inter-institutional transfers: Any dollars that flow between non-industrial institutions are considered transfers. For example, households pay money to the federal government in the form of taxes. The federal government pays money to households in the form of welfare and social security.

Leakages

The spending and re-spending caused by linkages is not an endless process. Some dollars are taxed, saved, or spent and earned outside the borders of an economy. Input-output analysis considers the dollars that go outside a local economy to have “leaked” out. These dollars provide no further economic benefit.

The economic benefits of output are felt in places where goods or services are produced, not where they are used. Leakages occur whenever output requires that goods and services be bought from another region. The term leakage refers to dollars that must be spent outside of the local economy to purchase intermediate goods and services.

Undeveloped economies and/or smaller geographic regions tend to import a significant proportion of their total goods and services. Since a small economy produces few goods or services, most must originate elsewhere. This means that small economies tend to leak more economic activity than larger, more developed economies. It follows that impacts from a new project are usually lower for small economies.

IMPLAN

One of the most common software packages used to conduct input-output analyses is IMPLAN (for Impact analysis for PLANning). IMPLAN was developed by the US Forest Service in cooperation with the Federal Emergency Management Agency and the Bureau of Land Management to assist federal agencies in their land and resource management planning.

Applications of IMPLAN by the US Government, public agencies, and private firms span a wide range of projects. Examples include new factories, resorts, proposals for developing coalmines, and harvesting timber. IMPLAN can also be applied to a variety of policy issues. Predicting the effects of a tourism marketing campaign or for measuring the importance of an existing industry on a local community are common examples.

IMPLAN uses a large database of regional and national data to forecast economic activity. It reports the impacts of a project, development, policy change, or other economic event. These impacts are broken down by various sectors of an economy in a geographic area. IMPLAN uses several different measures of impacts and explains the extent to which they are linked to the project being analyzed. This helps us explain, among other things, how much spending in one sector affects production in all others.

Specifying the Geography of the Economy

The first step in conducting an input-output analysis using IMPLAN is to specify the geographic area being analyzed. IMPLAN can estimate input-output linkages and economic impacts for economies that range in size from the entire U.S. down to an individual county, or any grouping of counties and states in between.

Generally, the total impacts of a project are greater if you define the economy broadly because there are fewer leakages. However, many of the impacts are a result of dollars simply being reallocated from spending on one thing to another. Thus, the net benefit of a project is usually smaller when a larger geographic area is specified.

IMPLAN generates a model of the economy within the specified geographic area. The model includes a description of the relevant input-output linkages and the portion of economic activity that leaks out of the modeled economy.

Sectors

IMPLAN breaks an economy down to 509 separate sectors, based on the North American Industry Classification System ("NAICS"). They correspond closely to the U.S. Bureau of Economic Analysis' sector scheme for tracking industries and employment. Examples of sectors are sawmills, single-family home construction, cement manufacturing, grain farming, legal services, food stores, postal services, state and local government enterprises, television broadcasting, and public elementary and secondary schools.

IMPLAN estimates four types of impacts for each of the 509 individual sectors or groups of sectors: employment, taxes, value added, and output. IMPLAN can further breakdown each type of economic impact into three sub-categories: direct, indirect, and induced impacts. We illustrate these different impacts using the dairy example and focusing on employment impacts.

Four Types of impacts

There is no all-inclusive measure of economic impacts. Instead, analysts must select from the four types of impacts. They will then report those that are the most relevant to their research. The four types of impacts are:

- (1) Employment:** The total number of payroll employees, including part time workers. The self-employed are not counted, however, their earnings are captured under proprietor income.
- (2) Taxes:** Total federal, state, and local tax revenues.
- (3) Value Added:** This is the additional value created at a particular stage of production or through image and marketing. It may be calculated by taking the sum of the wages, proprietor income, other income, and indirect business taxes, which are defined below:
 - **Wages** represent the total cash and non-cash compensation of workers on payroll. This includes the value of benefits.
 - **Proprietor Income**, sometimes called small business income, is a form of labor earning by self-employed workers and the working owners of small businesses.
 - **Other Income** counts the various forms of property income. It includes rents, royalties, dividends, and corporate profits.
 - **Indirect business taxes** are the excise and sales taxes paid by individuals to businesses.

(4) Output: The total value of the production of a sector is its output. For most sectors, output is approximately equal to sales. The notable exceptions are government and the trade sectors. The output of government sectors is approximately equal to revenues. For the trade sector, which consists of firms that buy goods and re-sell them, output is roughly the difference between what they sell goods for and what they paid to procure them. The trade sector consists of wholesalers and retailers.

Three subcategories of impacts

For any given type of impact, its effects on the economy can be reported on one of three levels. The starting point is the direct impact.

For the manufacturer of milk, the **direct** impact as measured by employment would be the change in the number of jobs because of the given change in milk sales. For example, a million dollar increase in milk sales might increase employment at the dairy by ten employees. Another way of thinking about this relationship is that it takes ten employees to produce one million dollars worth of milk. Direct impacts, therefore, describe the changes in economic activity of sectors that first experience a change in demand because of a policy decision or project whose impacts are being analyzed.

Indirect impacts are the second stage of impacts that occur as a change in demand ripples through an economy. The linkages among firms and sectors drive indirect impacts. An increase in milk sales increases the demand for the inputs used to make it. Indirect employment impacts are the change in employment at firms that manufacture the inputs.

In the example, a million dollars of milk sales might generate ten jobs directly and four jobs indirectly in the various businesses that supply the dairy and farmers who raise the cattle. Those indirect beneficiaries then spend money for supplies and services, which results in another round of indirect spending.

Induced impacts capture the final stages of economic consequences of a change in output. Induced impacts are generated by the additional spending of households who benefit from the higher wages and business income they earn through all of the direct and indirect activity.

In the example, a million dollar increase in milk sales generates the equivalent of 14 direct and indirect jobs. These 14 jobs mean 14 new paychecks. In addition, some local business proprietors, such as contractors, also see their incomes rise. The induced impact is the increase in household expenditures caused by all of this new income. Completing our example, one million dollars in milk sales might result in 12 new induced jobs. Typically, these impacts are spread throughout the sectors of an economy and are larger than the indirect impacts.

Net Versus Gross Impacts

At the outset, one should decide whether the question being posed for analysis requires that net or gross impacts be determined. A common mistake is to use the results from a gross impact analysis to answer a question about the benefits or improvement to an economy due to a project. This often leads to unrealistic, if not preposterous, claims about economic benefits.

A gross impact analysis measures where every dollar from a stimulus is spent in the local economy and how many jobs those dollars paid for. Gross impact analysis is appropriate when the purpose of an analysis is to identify how much economic activity can be traced back to the stimulus. You must measure net impacts if the question requires a calculation of economic benefit.

Net impacts are often considerably smaller than gross impacts, but provide a truer picture of the benefits from a stimulus. A net impact analysis can help answer questions about what a stimulus will do. This could include how many new jobs will be created, what will be the net increase in economic output, how much will local taxes rise, or how much more housing would be needed to accommodate the growth?

Net impact analysis considers only those economic activities that occurred because of the stimulus. The difference is that gross impacts include economic activities that would have occurred anyway had the project or stimulus not occurred. We can explain this by giving a simple example using our dairy.

Suppose an economic impact analysis is run using projected sales (output) of our hypothetical new dairy. For this analysis, IMPLAN is modeling the impacts of only the county in which the dairy is located. Direct, indirect, and induced impacts will be considered.

Although some would be inclined to call these impacts the “benefits” to the county of the new dairy, the reality is that IMPLAN would only be reporting gross impacts. The problem is that much of the milk sold by the new dairy would result in lost sales to the other local dairies. It is unlikely that consumers would buy any more milk because of the new dairy. They would simply be spreading their purchases out over four dairies instead of just three. The gains from the output of the new dairy are mostly offset by losses in the sales, and ultimately employment, at the other three. Thus, the net impact would be much smaller than gross impacts.

A net impact analysis would consider the effects of competition from the new dairy on the other three. This allows an economist to forecast the net change in total output of all the dairies in the county. This change would be used as the input for IMPLAN instead of the total figures for the new dairy.

New Money

IMPLAN models using net figures for inputs can be difficult to construct. An easier alternative approach is to quantifying sources of new money brought into the local economy by the stimulus. The major sources are:

1. **Exports.** The term “exports” in an impact analysis refers to sales made to consumers and businesses that do not reside in the local economy being studied—even if they are not sold outside the United States. When a stimulus results in a sector selling more goods and services to buyers from outside the local economy (including tourists), positive net economic impacts occur. Thus, in our earlier example, if the new dairy causes countywide milk sales to other places to go up, there would be an increase in exports and higher net economic impacts.
2. **Import Substitution.** If local consumers were buying milk produced from outside the county, but because of the new dairy they are now buy more locally produced milk, that increase is called “import substitution.” In other words, county residents are substituting their purchases of dairy products originating from other places with output from the local dairies, thus, less money leaks out of the county, and that causes economic benefits.
3. **Price Changes Affect Spending.** The new dairy lowers the cost of producing milk in the county. Local residents buy the same amount of milk as they did when there were only three dairies in the county (because the price was driven down). This gives them more money for all other goods and services, thus having the same effect as increasing incomes. However, there is a partial offset because lower milk prices would cause some residents to buy more dairy products.

The difference between the net and gross impacts of a stimulus depends on various factors, some of which can be affected by strategies. Generally, if the stimulus being analyzed would be producing something in a local economy that is not currently being supplied locally and is in demand by area residents, the net economic impact is going to be high. Alternatively, if it is something that is widely available and purchased locally, with comparatively few cross economic border sales, then the net impacts would likely be small compared to the gross impacts.

Sometimes, strategies can be effected that would improve the net economic impacts of a project. Going back to the dairy example, if the new dairy introduced popular and new varieties of cheese not produced by the three other dairies in the county, import substitution would be higher and so would the net economic impacts. Similarly, if the new dairy were to hire all of its workers from the county resident workforce rather than commuters from other places, its net impact would be stronger.

Multipliers

Multipliers summarize the impacts on the economy because of a change in a sector or group of sectors. For example, a total output multiplier effect of 1.58 for the dairy industry would indicate that for each dollar increase in output by the local dairy industry, you could expect a \$1.58 increase in total economic output countywide. The first dollar would be the direct output. The other 58 cents would be the combined impacts of local indirect and induced output.

Few economic statistics are as misused as the multiplier effect. There are three common mistakes people make.

First, they often fail to identify the type of multiplier. There is no all-encompassing multiplier effect. Any one stimulus has job, income, output, wage, business income, tax, and other income multipliers. The phrase “multiplier effect” must always be qualified with the type of impact being considered. In the dairy example, we used the output multiplier.

The second mistake is using gross impacts instead of net to calculate multiplier effects. This leads to some extraordinary claims. We have seen reports of job multipliers of three-to-one and higher—implying that a project would generate three jobs for every one the project itself would directly pay for. Although there are exceptions, such claims are usually spurious. If they were not, governments could remedy chronic unemployment by subsidizing such three-to-one projects.

For the purposes of most readers and policymakers a multiplier effect is interpreted as a simple measure of how much a change in one type of impact in a sector (or stimulus) affects the economy as a whole. Therefore, one should use net impacts and not gross to estimate multiplier effects.

Finally, geography matters with multiplier effects. The greater the economy being measured, the fewer leakages, and the higher the multipliers become if you are using gross impacts. However, if you calculate net impacts, the opposite can occur. The larger you make your definition of the local economy, the smaller export sales and import substitutions become (since your definition of local is much broader). Thus, the reporting of multiplier effects or use of them must be qualified by their geographic scope.

Limitations of Input-Output Models

Input-output models are important tools for assessing industries, policy changes, new projects, and the like. However, like many quantitative tools, they have certain limitations. Here we will highlight some limitations of input-output models.

Snapshot

Input-output models are constructed to measure the flow of inputs and outputs in an economy over the course of a single year. We often refer to the results from an input-output model as a “snapshot” economic impact analysis.

As it is usually used to assess the current importance of a sector on an economy, such as the effect on total annual employment for a county or group of counties, this snapshot constraint is often not an issue. For future developments, the snapshot limitation is more problematic. If projects have a construction phase followed by an operations phase, something one often sees in environmental impact studies, two input-output analyses can be done. For the operations phase, an input-model is often run for a normal operating year in the future—one where revenue growth has stabilized. Occasionally, studies require running a series of input-output models for a series of future years.

Static Versus Dynamic

Input-output models are static, which means they do not have a feedback mechanism that takes the forecast for previous years to affect the forecast of future years. Input-output models consist of fixed linkages between sectors. These linkages are based on a historical structure of the economy (usually some recent year). Static models contrast with dynamic models, which make multiple year forecasts that allow the events of one year to change the linkages in future years, thus simulating the long-term changes in the structure of the economy one might expect.

If we go back to the dairy example, an input-output analysis of the county would allow us to take a one-year snapshot of the new dairy’s impacts on the local economy. A dynamic model, however, would show impacts over many years and how the structure of the economy might change. In this case, a fourth dairy might stimulate the building of a packaging factory or an expansion in dairy farms. Those would be dynamic effects.

Input-output models can be used to predict some types of dynamic effects. For example, you can estimate how changes in milk prices would affect the output of different sectors. However, effects that are more complex would require the use of special models, such as REMI (the acronym for “Regional Economic Models, Inc.”).

Constant Returns to Scale

Linkages in input-output models are based on historical data. Those linkages are fixed, meaning that any change in output will result in a proportionate increase of all inputs. For example, the ratio of employees to output in the dairy industry is constant. Ratios of factors like the amount of locally produced agricultural inputs to dairy output are also constant. Normally this is not a significant problem, but in cases where the stimulus is atypical or unusually large, the regional linkages can deviate substantially from those used in an input-output model.

For example, if we were to triple the assumed output of the new dairy, input-output analysis would simply triple all of the impacts. The number of direct hires would be three times larger, even though such a large operation would probably employ fewer people.

Consider a dairy with ten employees who produce 1,000 gallons of milk each month. If that dairy wanted to increase production to 2,000 gallons, the owner would likely have to make significant changes to the operation to double the output. If the same change in production were considered for a dairy with 100 employees who produce 50,000 gallons of milk each month, the new level of production would not require much effort because it is spread over many more people and a much more developed infrastructure. Economists refer to this concept as economies of scale.

Another problematic element of the input-output modeling approach is that it would assume a tripling of the amount of indirect output from local dairy farms (purchases of raw milk). However, the tripling of purchases would probably far exceed the capacity of local farms, causing the new dairy to buy more of its milk from other counties than the historical averages. Unfortunately, these historical averages are what the input-output linkages are based upon. The net effect of these problems is an overstatement of the actual economic impacts that a stimulus of this type would produce.

Fixed Commodity Input Structure

A fixed commodity input structure means that firms do not respond to price changes by substituting different goods in the production process. For example, an additional dairy farm will increase the supply of dairy products, which will tend to lower dairy product prices, including the price of cheese. The lower price of cheese would cause schools to offer more of it in their lunch programs. Input-output analysis assumes that the lower price of cheese has no effect on its consumption by schools, or other industries.

No Supply Constraints

Input-output models assume that a local economy never runs out of the ability to produce what local industries can consume. This demand side assumption means that local industry has unlimited access to raw materials and intermediate goods and services.

Price Effects

An input-output model, being a static model, does not consider price effects. In our example, a new dairy that would be triple the normal size could cause raw milk prices to rise substantially, which would affect the value of the output of farms and impinge on the profit margins of the dairies. Input-output models do not capture these price effects.

Time

It is obvious that most of the economic impacts that input-output analysis considers take place over time. Recall the three categories of economic impact: direct, indirect, and induced. These impacts are far from instantaneous. Sometimes the effects of a large project can span several decades. The direct purchase of intermediate goods and the payment of wages and benefits will also span that period. The indirect effects of those purchases are sometimes slow to ripple through the economy. Induced effects can take even longer, as many wage earners save earnings and do not use insurance benefits for a long time.

To account for this variable in an input-output analysis, economists must consider the fact that inflation erodes purchasing power over the years. If economic impacts are to be reported accurately, each dollar needs to be presented in terms of its economic value today. Economists must use a base year when conducting input-output analysis. All transactions that take place after that base year are discounted to account for expected changes in purchasing power.

The inflation assumptions that are built into an input-output analysis can have a profound impact on its results. Underestimating inflation by just one percent will inflate the net present value of a multi-million dollar project by a wide margin.

COMMUNICATIONS

PREPARED STATEMENT OF JULIE KITA, PRESIDENT
ALASKA FEDERATION OF NATIVES

TO THE U.S. SENATE COMMITTEE ON FINANCE
SUBCOMMITTEE ON LONG-TERM GROWTH AND DEBT REDUCTION

HEARING ON

ENCOURAGING ECONOMIC SELF-DETERMINATION IN INDIAN COUNTRY

May 23, 2006

INTRODUCTION AND BACKGROUND

On behalf of the Alaska Federation of Natives ("AFN") I am pleased to submit the following statement for the record of the hearing on *Encouraging Economic Self-Determination in Indian Country*.

The AFN was founded in 1966 by far-sighted Native leaders who saw a great need for a forum for the diverse indigenous people of Alaska to address their threatened aboriginal land rights. For the next five years the primary objective of AFN was the comprehensive federal legislation that was enacted as the *Alaska Native Claims Settlement Act* ("ANCSA", 43 U.S.C. §§1601 *et seq.*) which President Nixon signed into law on December 18, 1971.

The enactment of the ANCSA came 6 months after President Nixon issued his now-famous *Special Message to Congress on Indian Affairs* (Public Papers 1970, 564, 573) which rejected the failed federal policies of Termination and Assimilation. The Special Message recognized the Native welfare was best served by a new policy, Indian Self Determination, built on twin pillars of strong tribal governments and robust tribal economies.

In settling the massive aboriginal land claims, the ANCSA created 13 regional corporations and over 200 village corporations that remain intact and charged with the ownership and management of Alaska Native lands. Each Alaska Native is a shareholder in both a regional corporation and a village corporation where he or she resides and it is by virtue of shareholder status that the individuals have rights to the usage of the lands.

The AFN represents regional for-profit corporations, village corporations, as well as regional non-profit corporations and serves as an advocate for the political and economic objectives of Alaska Natives in the State of Alaska, in Washington, D.C. and

with international institutions such as the United Nations, the World Bank, the Asian Development Bank, and others.

PROFILE OF ALASKA NATIVE COMMUNITIES

Alaska is one of the most remote places in the United States. In over 200 rural villages throughout the state, the economies of most Alaska Native people are characterized by a traditional, subsistence-based economy and have increasing pressures to enter the cash-based economy. Over centuries, Alaska Natives developed the knowledge and tools to survive in the most hostile environments on earth. On the barren tundra, where there is little food and shelter, Native communities thrived and developed highly complex cultural and economic systems that were based on family relationships and protocols.

In addition to these challenges, rapid changes are taking place in rural Alaska today as the younger generations are being encouraged to integrate into the mainstream society and become part of the market economy where education, literacy, and other skills are conditions for improving one's material standard of living.

The public education system in Alaska is the prime investor in the human capital of rural economies and it must address the low graduation rates and high dropout rates of Alaska Native students. According to the First Alaskan Institute's *Report on Alaska Native K-12 Education Indicators 2004*, Native students graduate high school at a rate of 47.5% compared to 67.3% for all other ethnicities and their dropout rate for grades 7-12 is 7.8% compared to 3.9% for all other ethnicities. Similarly, the 2000 Decennial Census found that only 4% of residents in Alaska Native village statistical areas have a bachelors degree.

The AFN has partnered with the University of Alaska - Fairbanks on a 10 year project titled the *Alaska Rural Systemic Initiative* ("ARSI"), now in its final year. To address these discouraging education statistics, ARSI has systematically documented indigenous knowledge systems and created curricula to integrate Alaska Native ways into the formal western education system. This allows students an education that is more relevant and reflects their unique culture and way of life in rural Alaska while also enhancing western literacy skills. To foster entrepreneurship and build a strong labor force, AFN has realized that the academic achievement of Alaska Natives is critical and intertwined to economic sustainability and success of tribal governance.

PROFILE OF ALASKA NATIVE ECONOMIES

In addition to some 44 million acres of land, the ANCSA settlement provided one billion dollars to the regional corporations and, accordingly, since 1971 the regional corporations have been the main source of economic growth and job creation in rural Alaska. However the successes of the regional corporations are varied and some have been more successful than others in terms of economic activity.

Despite the successes of some regional corporations, economic and physical infrastructure in Alaska Native communities closely mirror those found in third world developing countries. According to the Alaska Department of Labor and Workforce Development, the April 2006 unemployment rate in Alaska Native communities ranged from 8% on the North Slope to 23% in the Wade Hampton Area of Western Alaska. These rates are relatively high compared to the 4.6% rate for the United States as a whole. According to the 2000 Decennial Census, 20% of Alaska Natives live in poverty compared to 11.3% the U.S population as a whole.

In Alaska Native villages, by nature of their remoteness and sparse populations, the export and import costs of durable and non-durable goods remains high due to the lack of transportation infrastructure as the rural villages are only accessible by water transport during the short summer barging season and air transport throughout the rest of the year. Many of these villages still lack plumbing that provides safe and sanitary sewer disposal and running water.

INDIAN TRIBAL GOVERNMENT ISSUANCE OF TAX-EXEMPT BONDS

The specific issue this Subcommittee has chosen to address is one of great importance to Alaska Native people, and Alaska Native villages. As set out below, the AFN supports a congressional clarification of the Indian Tribal Governments Tax Status Act ("the 1982 Act", Pub.L. 97-473, as amended, Pub.L. 98-21) so that tribal governments are accorded the same treatment as states and local governments for purposes of issuing tax-exempt bonds.

In 1982, President Reagan signed into law the 1982 Act to clarify how the federal government should treat federally-recognized Indian tribes for purposes of federal tax laws. In theory, the 1982 Act was intended to treat tribal governments on a par with state and local governments. In practice, tribal governments are not accorded the same treatment as states or local governments. In fact, tribes are subject to more restrictive rules governing the issuance of tax-exempt debt.

Some 225 Alaska Native villages are federally recognized as tribal governments entitled to the federal services, programs, privileges, and immunities of such governments and are included in the annual list of "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." Similarly, in 2001, the IRS published a list of some 200 Alaska Native villages and other communities considered to be "Indian Tribal entities" exercising "governmental functions" for purposes of certain tax exemptions under the Indian Tribal Government Tax Status Act. (Revenue Bulletin No. 2001-5, 465 at 460-472 (January 29, 2001), applying Title II of Pub. L. No. 97-473, 96 Stat. 2605, as amended by Pub. L. No 98-21, 97 Stat. 65. 1

¹ At least 6 major federal Indian statutes include Alaska Native villages within the definition of "tribe" for purposes of eligibility for the various contract, grant, and loan programs available to implement the new laws. They are the *ANCSA*, the *Indian Education Assistance and Self-Determination Act*, the *Indian Financing Act*, the *Indian Health Care Improvement Act*, the *Indian Child Welfare Act*, and the *Native American Housing Assistance and Self-Determination Act*. (Citations omitted).

First, the application of the “essential governmental function” test to tribal debt issuance means that interest on such debt not be exempt from tax unless substantially all of the borrowed proceeds are used in the exercise of an “essential governmental function.” Internal Revenue Code § 7871(c)(1). Code § 7871(e) provides that “essential governmental functions” are those that are “customarily performed by state or local governments with general taxing powers.”

Second, the prohibition on private activity bonds; Indian tribal governments generally may not issue private activity bonds. IRC § 7871(c)(2). Such bonds are frequently issued by state or local governments. For example, state and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit organizations, or to finance mortgage loans for low-income home buyers or residential rental property. Private activity bonds are also issued for airports, docks and wharves, solid waste facilities, and certain energy or utility projects.

Third, is the narrow exception to the general prohibition on private activity bonds issued by Indian tribal governments. Under IRC § 7871(c)(3), tribes may use tax-exempt bonds for a qualifying manufacturing facility, but this authority carries with it additional restrictions and requirements.

AFN ECONOMIC DEVELOPMENT PROPOSALS

In addition to much-needed clarifications to the 1982 Act, the AFN is proposing a number of new initiatives aimed at boosting economic growth and job creation in Native communities.

After years of witnessing failed and failing federal economic development policies for Native people, the AFN believes that new and vigorous ideas to initiate private-sector activities hold the key to economic growth and job creation in Alaska Native communities. For instance, the AFN recently launched the *Alaska Marketplace*, a development initiative modeled after the World Bank’s *Development Marketplace*, which it has implemented in some 20 countries. The *Alaska Marketplace* encourages rural entrepreneurship by bringing together innovators, financiers, and technical experts in a competition for seed money, with awards issued to the top business proposals on the basis of viability, sustainability, and cost effectiveness.

To foster long-term economic growth and job creation, the AFN believes that structural changes are needed and because of the federal-tribal relationship, these changes require congressional action to amend laws and target federal investment where it has the most potential of achieving our collective objectives. The AFN therefore proposes three new bold initiatives to create sustainable growth in Alaska Native communities.

The first is the creation of the *Alaska Native Economic Development Consolidated Funding Demonstration Project* to authorize Alaska Natives and regional corporations or consortia to undertake federally-funded projects to encourage economic,

business, community, and social development in their communities. This authority would enable Native communities to consolidate and integrate *existing* federal funds, services and programs that exist for the benefit of the Alaska Native population and in the process to achieve a level of synergy and “simultaneity” that is absent from current efforts.

In addition to the consolidated funding concept, the AFN proposes two additional initiatives be considered, both based on the Bush Administration’s incentive-based economic development policies. One is the *Economic Development Challenge Fund* on the domestic front and the *Millennium Challenge Corporation* to aid countries in the developing world.

The *Millennium Challenge Corporation* provides an interesting analog: it operates on four key principals that may be applicable to the Alaska Native situation: reducing poverty with private sector investment, rewarding good policy practiced by the host government, operating as partners in development; and a focus on results to channel investment to countries with clear objectives, transparency, and measured progress. In this regard, those Alaska Native communities which have demonstrated a commitment to fundamental change by improving schools, fostering entrepreneurship, attracting outside investments, reducing legal and regulatory barriers to business and housing development, and reducing violent crimes would have access to funds and assistance over and above currently available assistance to achieve sustained economic growth.

Based on these incentive-based models, the AFN proposes the *Alaska Native Economies Diagnostic Fund* and the *Alaska Native Economies Challenge Fund*. The diagnostic fund would assist participating Alaska Native communities to identify barriers to private investment and inhibitors to long-term economic growth. These communities, aided by technical experts, would conduct economic diagnostic studies and provide recommendations for reforms in the policy, legal, regulatory, and investment areas. Once a community has identified inhibitors to growth, it can avail itself of the aid of the *Alaska Native Economies Challenge Fund* to remedy these inhibitors and look to economic opportunities to transform their local economy.

In addition to these development funds, the AFN urges the Congress to breathe life into two key initiatives --- already enacted and poised for action --- that can foster economic activity in rural Alaska as well as on Indian lands in the lower 48 states. These laws, the *Native American Business Development, Trade Promotion, and Tourism Act of 2000* (Pub.L. 106-464) and the *Indian Tribal Regulatory Reform and Business Development Act of 2000* (Pub.L. 106-447) have yet to be adequately funded or made operational.

The *Native American Business Development, Trade Promotion, and Tourism Act* creates the “Native American Business Development Office” (“NABDO”) and is charged with the coordination of federal agency assistance for programs related to Indian economic development; providing technical and financial assistance, and administrative

services to identify and take advantage of business development opportunities and comply with appropriate laws and regulations.

This Act also seeks to improve Native economies by promoting Native American trade and exports and by coordinating existing federal programs to stimulate demand overseas for Indian goods and services. The Director of the NABDO --- acting through the Secretary of the Department of Commerce --- would provide a variety of relevant activities such as financing trade missions and identifying potential markets for Indian goods and services.

The *Indian Tribal Regulatory Reform and Business Development Act* establishes the “Regulatory Reform and Business Development on Indian Lands Authority” to undertake a comprehensive review of laws and regulations that affect investment and business decisions on Indian lands and to determine the extent to which those laws are obstacles to the private investment on Indian lands and the financial stability and management efficiency of Indian tribal governments.

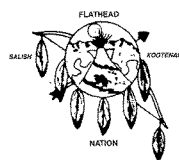
The AFN urges that these *existing* initiatives receive greater attention from both the Congress and the President and that funding to make them operational be made available.

The AFN further urges that bold efforts be made to foster successful long-term economic growth in rural Alaska by creating the *Alaska Native Diagnostic Fund* and the *Alaska Native Economies Challenge Fund* to enable Native communities to develop the knowledge and technical “know how” to take advantage of their rapidly changing economies and profit from participation in the marketplace.

To make real the promise of the 1982 Act, the AFN recommends 3 legislative changes to help tribes raise capital in the marketplace. Congress can and should pass legislation repealing the “essential governmental function” test under Section 7871. It can and should also make provision for private activity bonds with particular regard to affordable housing and energy projects financed by tribes. Finally, Congress should provide tribes that issue bonds the same treatment under federal securities laws that it has accorded to state and local governments.

CONCLUSION

On behalf of the AFN, I thank the Subcommittee for its interest in finding ways to stimulate Native economies and I look forward to working collaboratively to that end.



Joseph E. Dupuis - Executive Secretary
Vern L. Clairmont - Executive Treasurer
Leon Bourdon - Sergeant-at-arms

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION

P.O. BOX 278
Pablo, Montana 59855
(406) 275-2700
FAX (406) 275-2806
www.cskt.org



TRIBAL COUNCIL MEMBERS:

James Steele, Jr. - Chairman
Carole Lankford - Vice Chair
Lloyd D. Irvine - Secretary
Ron Trahan - Treasurer
Joe Durgio
Mike Kenmille
Steve Lozar
Jim Malatane
Reuben A. Mathias
Sonny Montgeau

Encouraging Economic Self-Determination in Indian Country May 23, 2006

Testimony of the Honorable James H. Steele, Jr., Tribal Chairman

It is my privilege to provide testimony on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) on the important issue of economic self-determination in Indian Country.

The CSKT noted four anniversaries in 2005. The first was the bicentennial of our Salish and Pend d'Oreille people's encounter with the Lewis and Clark Corps of Discovery in September 1805. Our people replenished the Corps' supply of horses, gifted them with food and clothing, and provided guidance to the Lolo Trail. Our act of hospitality toward non-Indians would set the stage for the next two centuries demonstrating our respect, friendship, and cooperation. The second anniversary occurred last July and marked 150 years since the Salish, Pend d'Oreille, and Kootenai tribes were convinced to sign the 1855 Hellgate Treaty to reserve a portion of our twenty million acres of aboriginal homeland, obtain the government's promise of security from enemy tribes, and secure a future for the coming generations of Indian people. The third anniversary occurred last October and marked 70 years since the ratification of the CSKT's Constitution and Bylaws as one of the first tribes in the United States to adopt one under the 1934 Indian Reorganization Act. The final anniversary was the 30th year of the Indian Self-Determination and Education Assistance Act of 1975. In 2005, our Tribes entered our fourth decade of self-determination and self-governance. At present, our Tribal government administers \$25 million in self-governance funds, \$100 million in contracts and grants, and \$25 million in tribal revenue; and our government has 1,000 full-time employees. We are the largest employer on the Flathead Reservation and we contribute over \$30 million in payroll and over \$50 million in purchasing in the local economy.

In the tradition of our ancestors, we strive to insure the survival of our future generations. The past two centuries are a brief period of time compared to the thousands of years of our existence. Yet the recent past has rendered the most profound impacts on our people and our way of life. One hundred years ago, prior to the allotment of Reservation lands and subsequent homesteading by non-Indians (in violation of the Hellgate Treaty), our people were self-sufficient and enjoyed good health. Our physically active lifestyle, free of debilitating artificial substances and dysfunctional behaviors, corresponded with a healthy diet that is now touted by nutrition experts as "whole food" or "organic food". Common illnesses and disease were almost non-existent;

even so, our people possessed knowledge of the curative and healing properties of the natural environment, many of which are still known and practiced today.

The past century of non-Indian contact and subsequent obliteration of our tribal languages, traditions, and cultures prompted us to our current path of sovereignty and self-sufficiency through contemporary self-governance. Not content to merely accept a foreign, non-Indian government dictating to us what we needed, we chose to take the responsibility for determining what was needed by our people and how best to approach those needs. As we begin our fourth decade of contemporary self-governance, we strive to maintain our identity as Tribal people and yet meet the challenges and enjoy the benefits of the present day.

The Flathead Reservation's abundant resources of forests, water, and land became the foundation of our efforts to self-govern in the 20th and 21st centuries. In 1933, construction began on Kerr Dam, which forever altered the Flathead River, its fisheries, and wildlife. The lease of our land for this hydroelectric facility has been the cornerstone of Tribal revenue for the last 21 years. The CSKT has the option to purchase the improvements in 2015 and manage the facility under a license with the Federal Energy Regulatory Commission.

The early 1950s saw the CSKT being targeted for termination due to our success at achieving some measure of economic self-sufficiency, but termination did not occur. By 1960, the Tribal people voted by referendum to increase the minimum blood quantum for enrollment to one-fourth degree, which is still in effect today. A Secretarial election in early 2003 sought to change the enrollment criteria to lineal descendancy with no minimum blood quantum, and the initiative was defeated by almost 5 to 1. The CSKT's current population is just over 7,000 members of which approximately 4,600 reside on the Flathead Reservation.

In the 1960s, the CSKT expanded efforts to manage forest resources that initially included Christmas tree permits and other small scale harvesting. In 1973 we established the Tribal Forest Management Enterprise to administer permits and stand improvement projects such as thinning, site preparation and reforestation. Today the Tribal Forestry Department, headed by tribal member Jim Durglo, is responsible for more than 500,000 acres of prime forest lands of which approximately 250,000 acres is in the commercial logging base with about 10% of that actually logged each year. Recognizing that forests were more than just sources of commercial timber revenue, in 1982 we established the 89,500-acre Mission Mountain Tribal Wilderness at the base of the Mission Mountains, the first to be established by any tribe in the United States. The Wilderness is prime habitat for grizzly bears and other wildlife. Shortly thereafter, we designated an adjoining Wilderness Buffer Zone that comprises 91,778 acres to further restrict logging and commercial development. By 1993, we had developed our first Wilderness and Buffer Zone Management Plan for the area.

In the 1960s, we began administering homesite leases. With the steady acquisition of more lands by purchase, our business and other commercial leasing expanded. In 1990, we implemented a P.L. 93-638 contract for BIA Agriculture and Real Estate Services, and in 1993, we consolidated services under a Compact as one of the ten original tribes in the Self-Governance Demonstration Project. Today the Tribal Lands Department is headed by tribal member Nathan Shourds. One of the most significant achievements has been the local management of the Title Plant. The

Tribes' titles do not have to be processed by a BIA Regional Office that must also process titles from numerous other agencies. Turnaround is also faster because we know the customer, we are familiar with the status of the land, and we are dedicated to being customer-service oriented. One advantage to the CSKT having in-depth local knowledge of land transactions is that problems or issues pertaining to titles are remedied before the title is recorded, resulting in no "title defects". We have installed software that allows for electronic imaging updating from the old microfiche method still deployed at the BIA Area offices. In addition, we have implemented processes that add additional privacy protection to recorded deeds and reduced the timeframe to cut a check and deposit into IIM accounts from 14 days to two or three days.

The 1970s would be significant for us in two major areas. The first was our recognition that our native languages, culture, and traditions were in danger of becoming lost. In 1975, we established the Salish-Pend d'Oreille (the two tribes are linguistically similar) and the Kootenai Culture Committees. Now in their fourth third decades, the Committees have played a major role in preserving, perpetuating, and interpreting the languages, culture and traditions and imparting those principles into the management of Tribal resources. The second was the passage of Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA) that laid the foundation for us to assert our opportunities to manage federal programs on the Reservation.

The enactment of ISDEAA prompted us to begin building a government infrastructure that could support the administration of federal contracts. Management systems had to be developed and maintained that demonstrated stability, accountability, and integrity. We have successfully developed and administered human resource and financial management systems for the past four decades.

The first programs contracted under Self-Determination were BIA Education and Employment Assistance and Indian Health Service public health nursing, health education, and other services. In 1980, we assumed BIA Social Services after completing a year-long study and planning process. There followed BIA wildlife and water management programs. By 1983, we established the Natural Resources Department that comprised Tribal-funded and BIA contracted resource programs in addition to various grant programs including one funded by the Bonneville Power Administration.

As part of the Flathead Indian Irrigation Project, an electric utility was created to serve the needs of consumers on the Flathead Reservation. In 1988, we assumed management of the electric utility under a P.L. 93-638 contract and now operate it as Mission Valley Power. The General Manager is Ralph Goode, a tribal member. At present, we are working with local citizens to develop a joint management structure for the operation of the Irrigation Division.

The 1990s would prove very productive for us in advancing our goals of self-determination and self-governance. In addition to the assumption of BIA land services programs, we also implemented a Compact for the health care services provided by the Indian Health Service. In 1994, we included BIA Roads and Safety of Dams in the compact; in 1995, BIA Forestry was transferred; and in 1996, administrative services were assumed. In 1998, we were one of the first in the country to assume management of a Tribal Assistance to Needy Families (TANF) program

under P.L. 102-477. In 1999, we implemented our final 638 contract when we assumed management of Individual Indian Money (IIM) accounts through the Department of the Interior's Office of the Special Trustee, Office of Trust Funds Management, and are one of only three tribes in the nation to do so.

The 1990s also saw the federal government attempting to respond to trust management issues by the passage of the 1994 Trust Reform Act and the subsequent Cobell litigation. Our earlier assumption of all BIA land and realty services would position us favorably to meet the challenges of achieving trust reform and to be a model for all of Indian Country. The CSKT, along with the Chippewa-Cree Tribes in Montana, the Salt River Pima-Maricopa Indian Community in Arizona, and the California Tribal Trust Reform Consortium (7 tribes) were excluded from the reorganization of the Department of the Interior by designation in the Interior Appropriations Act in Fiscal Years 2004, 2005, and 2006 (currently Section 122 of P.L. 109-54).

With the Self-Governance Amendments signed into law in 1994, it opened the door to tribes to request management of lands, resources, and properties outside the Bureau of Indian Affairs that had historical, geographical, or cultural significance to them. On the Flathead Reservation, such an opportunity existed for us to manage the National Bison Range. After a decade of effort that began in 1994, the Tribes and the U.S. Fish and Wildlife Service signed an annual funding agreement on December 15, 2004, that gives us a role in managing biological, maintenance, fire protection, and visitor services programs.

Running parallel to our efforts to successfully establish a stable Tribal government structure, we established viable corporate structures beginning with S&K Electronics, Inc., in 1984. The company operated primarily on manufacturing contracts with the federal government but is now largely supported by non-government contracts. A spin-off corporation, S&K Technologies, Inc., was formed in 1999 and has itself spun off corporations including S&K Global Solutions, Inc., and S&K Aerospace, Inc., with satellite offices in Alaska, Georgia, and Texas. S&K Developments, Inc., comprises the Best Western KwaTaqNuk Resort, S&K Marina, and Flathead Stickers and Lath, all located on the Flathead Reservation. Its most recent addition is Eagle Bank that will open in the coming weeks after FDIC's approval of its charter.

One hundred and more years ago, we successfully governed ourselves and we prospered. However, our success in contemporary self-governance has come at a heavy price. As noted previously, we have sustained irreparable losses of native language, culture, traditions, land, and natural resources. In the midst of increasing economic prosperity and endeavoring to sustain environmental quality, our people continue to endure unemployment (41%), lower educational achievement (50% high school graduation rate), and devastatingly high rates of alcoholism, drug abuse, suicide, accidental death, and other social ills. While some Tribal members enjoy six-figure incomes, some must depend on an array of assistance programs.

Our experience in managing programs on behalf of the federal government has presented us with the immense challenge of meeting our priorities within limited resources. The long underfunding of Indian programs was best documented by the U.S. Commission on Civil Rights' July 2003 report, "A Quiet Crisis: Federal Funding and Unmet Need in Indian Country". At present, we are only receiving funding for 50 to 60 percent of our needs in Bureau of Indian Affairs

programs and Indian Health Service programs. Our most crucial example of this is funding for health care, which we primarily purchase from the private sector because we don't have an Indian Health Service hospital on our reservation. In Fiscal Year 2005, our allocation to purchase health care, known as Contract Health Services, was \$8 million but we expended over \$13 million. As of October 1, 2005, we were forced to return the Contract Health Services program to the Indian Health Service, after managing it under self-governance from 1993 to 2005, because of the continual under-funding that could potentially drain our limited Tribal resources. Another example is the funding allocated for trust resource programs, all of which we manage under self-governance. In FY 2006, we reported to Department of the Interior Associate Deputy Secretary James Cason an unfunded need of \$2.7 million for forest, land, and trust funds management. Even a modest increase in funding for trust resource programs would have an impact on our ability to generate revenue; for example, staffing to plan and administer timber sales.

We have continually entreated Congress to increase funding for Indian programs, and we have been encouraged to see slight increases in certain areas such as health care and Indian Land Consolidation. In spite of under-funding, we have managed to re-design programs, reallocate resources, and set priorities to serve our people's needs in the best possible way. As a tribe, our task at present is to define and re-define our priorities, examine new sources of revenue, and evaluate new ways of doing business to increase cost efficiency.

On the Flathead Reservation, non-Indians outnumber our tribal population by 4 to 1. While we have doubled our ownership of the total Reservation land base of 1.3 million acres to just over 60 percent from the 30 percent at the time of the Indian Reorganization Act of 1934, we have limited opportunities for economic and commercial development. Our reliance on natural resources for revenue generation is balanced with our vision to wisely conserve for future generations. We are now examining gaming as becoming an enhanced portion of our overall revenues, and likewise with our utilization of natural resources, we are proceeding cautiously. We would welcome opportunities to finance the expansion and maintenance of roads, housing, and utility facilities to support the responsible growth of commercial development—the same as is done by state and local government entities through issuance of tax-exempt bonds. Our long history of successful government and business management make us an attractive candidate for issuing tax-exempt bonds whether for governmental functions or private activities. It is essential that the federal government recognizes the need to clarify existing regulations or promulgate new ones to make possible the economic self-sufficiency in Indian Country envisioned by the current Congress and Administration.

The CSKT strongly believes in self-determination and we proudly point to our successes to support our belief. The ultimate expression of sovereignty is to determine our own destiny and move toward it within our own resources. It is a profound responsibility for us to undertake the direct management of our nation's government and business structures because we are held immediately accountable for the success—or failure—of our efforts. Where once we could simply blame the federal bureaucracies for poor performance or inefficiency, we must now look inward. Constituents are only a few feet away and quick to vocalize their opinions whether positive or negative. Our choice to be self-governing keeps us forever mindful of the instant accountability and demand for responses or action from the people we serve.