

Encouraging Economic Self-Determination in Indian Country

*Testimony of
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Subcommittee on Long-Term Growth and Debt Reduction*

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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.