

Senate Committee on Indian Affairs

Oversight Hearing

"Building Tribal Economies: Modernizing Tax Policies that Work for Indian Country"

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Introduction

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

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

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

Structures for Modernizing Tax Policies

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

Matching requirements for the Native CDFI programs place a strain on the program and they threaten many CDFI's with failure. Indian Country is the most under-capitalized sector in the American economy. Even with successes in the grassroots CDFI programs in creating grassroots community development, we still witness banks and other lending organizations sit on the sidelines. A good example can be found in South Dakota where CDFI's can take credit for the local economy growing faster than the surrounding region. In other communities, this would success would mean an influx of capital and banking services. However, this has not occurred for the tribal community. Matching requirements need to be flexible and waived for tribal governments and for those entities that serve tribal communities.

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

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

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

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

Solutions that require consideration of the tribal government economic model, direct funding, and support of local autonomy and planning work best and are an effective use of taxpayer funds. The HEARTH Act and self-governance contracting are excellent examples of modernized policies that have created a greater sense of autonomy. The lost opportunity from expecting that tribes

will fit other funding criteria and priorities, or that states will consistently act as federal stewards is unrealistic and proven untrue.

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

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

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

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

Indian Country has been united around these modest and overdue fixes for a long time – in some cases decades. Congress has a unique opportunity to make a significant difference for tribes and the communities and regions surrounding tribal governments.

Government (Public) Financing

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

Congress and the Administration have both reached the same conclusion on the of limitations of relying on public financing for only essential functions. In 2011, at the request of the Senate

Committee on Finance, the Department of Treasury issued a report confirming their views on the limitation. The following statement from the report captures their conclusion.

“The Treasury Department recommends repealing the existing essential governmental function standard for Indian tax-exempt bond financing under 7871(c).” – Report and Recommendations to Congress regarding Tribal Development Bond Provision under Section 7871 of the Internal Revenue Code

[See Treasury report attached and included for the record]

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

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

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

Government (Public) Pensions

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

State and local governments do not face the essential government function test for their pension plans. These activities are recognized by the federal government as necessary in the raising of revenues for public purposes and plans covering these employees retain their governmental

status. Tribal plans, on the other hand, are so restrictive they lose their governmental plan status if the employee is engaged in an activity that resembles a “commercial” activity even if it is deemed an essential government function.

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

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

Public-Private Partnerships - Tax Credits

New Markets Tax Credits

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

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

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

- North Dakota: *Spirit Lake Sioux, Turtle Mountain Band of Chippewa Indians*
 - Project: Built a new K-12 school (old school threatened by a floodplain)
 - Summary: Ninety percent of the Minnewaukan School District’s students in rural North Dakota are members of the Spirit Lake Sioux Tribe or Turtle Mountain Band of Chippewa Indians. The NMTC provided \$3.4 million in equity to this

\$13.2 million project. The community worked with a CDE to save quality jobs in a highly distressed small town and helped the community adapt to the natural disaster of Devil's Lake flooding.

- Washington: *Confederated Tribes of the Colville Reservation*
 - Project: Government Service Center
 - Summary: The Confederated Tribes of the Colville Reservation used NMTC to centralize critical services and provide an economic shot-in-the-arm to the capitol of Nespelem. Three CDEs partnered to provide an allocation that resulted in \$6 million of the overall \$44 million project. Concentrating high-quality jobs in Nespelem will boost the local economy and provide easier access to jobs and services for tribal members in Washington State.

- Montana: *Crow Tribe*
 - Project: Little Big Horn College's Wellness Center
 - Summary: Little Big Horn College, located on the Crow Tribe reservation, secured an NMTC allocation to build a health and wellness center that increases student retention and achievement. NMTC provided \$2.3 million toward this \$10 million project that helps hard-working students build pathways out of poverty.

- Oklahoma: *Chickasaw Nation and Cherokee Nation*
 - Project: Carl Albert Multi-Purpose Facility
 - Summary: The Chickasaw Nation partnered with a CDE of the Cherokee Nation to use NMTC to transform a shuttered I.H.S. hospital in Ada, OK. Now known as the Carl Albert Multi-purpose facility, the project provides employment, education and health services. NMTC provided \$5 million out of an overall \$40 million project budget to catalyze additional development in this highly-distressed community.

- Alaska: *Multiple Alaska Native Villages*
 - Project: TERRA Northwest/broadband
 - Summary: TERRA Northwest has brought broadband to rural Alaska Native communities by partnering with the telecommunications provider GCI and a CDE. Hospitals, schools, and homes in the community are now connected to the high-speed internet that is the foundation of our modern economy.

- New Mexico: *Pueblo of Laguna*
 - Project: Water infrastructure
 - Summary: The Pueblo of Laguna, located in New Mexico, was in a water crisis. By working with a CDE, the tribe raised \$2 million that leveraged a total of \$7

million in infrastructure investment. The tribe can now provide higher quality education, public safety and economic development to the members it serves.

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

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

Low-Income Housing Tax Credit

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

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

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

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

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

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

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

Investment Incentives

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

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

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

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

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

Tribal Charity Formation

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

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

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

Adoption Tax Credits for Children with "Special Needs"

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

Social Security Fairness

Unlike state and local government elected leaders, council leadership at tribal governments do not have the ability to opt-in to social security coverage for services performed. **Nafoa supports S.1309, the Tribal Social Security Fairness Act, which provides parity between tribal governments and state and local governments. The Act allows tribes to “opt-in” to Social Security coverage for their otherwise excluded tribal council members.**

Kiddie Tax

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

Conclusion

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