

SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON
NATIVE COMMUNITIES' PRIORITIES FOR THE 118TH CONGRESS
MARCH 8, 2023

Good afternoon Chairman Shatz, Vice Chair Murkwoski, and Members of the Senate Committee on Indian Affairs. I would like to thank you for your time today, as well as the opportunity to talk with all of you about priorities for 2023, the 118th Congress, and beyond. I believe this hearing is especially important now, in the wake of COVID-19, as Indian Country prepares for the new challenges and opportunities that we know will come. NAFOA is a national intertribal organization with one hundred fifty-five (155) Member Tribes in twenty-six (26) states. Our mission is to strengthen tribal finance and grow tribal economies by advocating for bipartisan policy solutions. Our priorities are to ensure parity for tribes with states and to unlock the economic potential of Indian country. We support meaningful tribal tax reform to ensure tribes are treated the same as states elimination of the essential governmental function test, parity for tribal courts in regards to access to adoption tax credits and child support enforcement, and the elimination of dual taxation on tribal lands which stifles economic development. In order to grow unlock the full economic potential of Indian country we ask rights of way, leases, and permits must be approved as swiftly on Indian lands as they are outside of Indian lands.

I started with NAFOA in July of 2021. Over the last two years NAFOA has worked to keep tribal governments informed about the funding opportunities provided under the CARES Act, ARPA, and other statutes like the Inflation Reduction Act (“IRA”). We have hosted numerous webinars and events with Administration officials from the Departments of the Treasury, Commerce, Interior, and Energy, while also working to educate those officials, many of whom had not worked on tribal issues before. Each tribe is unique with its own array of issues and priorities, and there is no “one size fits all” solution for Indian Country to any problem Indian tribes face. However, there are changes that can be made to increase the ability of tribes to provide for their tribal citizens. History has shown that when the economic potential of Indian tribes is unlocked, the surrounding communities benefit as well.

The Trust Responsibility

A trust responsibility exists between the United States federal government and Indian tribes. Beginning with the 1778 Treaty with the Delaware, the United States entered into numerous treaties with Indian tribes and these treaties gave rise to the trust responsibility. The Commerce Clause of the United States Constitution has been interpreted to give the Congress broad authority in regard to Indian tribes. Under the trust responsibility the federal government has an obligation to uphold tribal sovereignty and the right to self-governance. Consistent with this obligation we urge the Congress to pass legislation to fix current tax regulations and meet the needs of tribes as they exist today. Tribes face structural obstacles arising from our unique history. One is that our lands are held in trust by the federal government and cannot be used as collateral when tribes are seeking financing. In addition, tribes are unable to create revenue through the imposition of property taxes as states do. These unique challenges impact tribal governments as they work to meet the needs of their tribal citizens.

Tax Reform

For many years Indian tribes have called for tax reform to address inequities in the current regulations. Members of both parties, including Vice Chair Murkowski, Senator Cortez Masto, Representative Ron Kind, and the late Representative Don Young all introduced legislation in the last Congress that addressed some or all of Indian country's long-standing priorities with regard to tax reform. I would like to thank the Members for their work and leadership on this legislation and include Representative Gwen Moore who has agreed to take responsibility for this important legislation now that Representative Kind has retired.

Taken together, the Tribal Tax and Investment Reform Act, first introduced by Congressman Ron Kind in 2013 in the 113th Congress and reintroduced in every Congress since, and the Native American Tax Party and Relief introduced by Senator Cortez Masto in the 117th, outline Indian country's tax priorities. While varying slightly, the legislation includes important provisions that will put tribes on equal footing with state governments.

Our requests for tribal tax reform can be summarized as follows: remove the essential governmental function test in the issuance of tax exempt development bonds to allow tribes to issue tax-exempt development bonds on equal footing with states by eliminating the essential government function test; ensure that contributions to charities created by tribal governments are treated the same as contributions to charities created by state and local governments; improve the effectiveness of tribal child support enforcement agencies by creating parity of access to the federal parent locator service and federal tax refund offsets; expand the special needs adoptions credit so it includes adoptions ratified by tribal courts; create an annual \$175 million New Markets Tax Credit for low income tribal communities and for projects that serve or employ tribal members; create parity with state governments by removing the essential governmental function test from the Employee Retirement Income Security Act; codify that possessory interests, permanent improvements (without regard to ownership), and activities under leases or rights-of-way on Indian trust land are not subject to state taxation this is a critical change that has had bipartisan support in the past.

A change that would provide tribes with greater to access capital and is consistent with the above suggestions would be to ensure the New Market Tax Credits can be used in conjunction with the BIA's Indian Loan Guarantee Program. In our work with tribal leaders, banks, and financial advisors, NAFOA hears first-hand the various issues and challenges they run into when trying to help tribes access capital for business or economic projects. Currently, tribes cannot take advantage of the NMTC if going through the Indian Loan Guarantee Program. This oversight would cost Congress nothing to correct but would dramatically increase the ability of smaller tribes to make deals.

Economic development:

The COVID-19 pandemic made it abundantly clear that tribal economies must be diversified in order to be strong. Congress can help unlock the energy potential of Indian country and help tribes diversify their economies and create jobs. Whether renewable or traditional, energy is an important part of tribal economic diversification. As the Biden administration emphasizes the shift to net zero by 2030, tribes are important partners in that shift. Over the past two years, NAFOA has partnered with the Department of Energy and other stakeholders to make sure tribes have the information they need to make decisions regarding energy development and about the various federal funding options that are available. We have seen the strong interest in energy development from Indian Country. I hear it when I speak to tribal leaders at the NAFOA conferences and as I attend other events across Indian country. The webinars NAFOA has hosted on energy development have been some of the best attended over the past two years.

Last year NAFOA testified before the House Energy & Commerce Committee on the Indian Loan Guarantee Program, which is part of the Department of Energy. The LPO program, which now is authorized to loan up to \$20 billion, is an example of the kind of initiative that solves two problems at once, increasing credit for tribal governments and unlock the energy potential of Indian Country. The 53 million acres of Indian lands are host to 20% of Americas conventional energy resources and hold the potential for vast renewable energy resources, all of which are ready to deploy. However, there are still many barriers facing tribal energy project development. The Inflation Reduction Act from last year included important changes that I am hopeful will have a strong impact, though that impact will depend on how the direct pay program and tax credits are implemented when the rules are finalized.

As mentioned above, tribal lands are generally held in trust by the federal government. This unique status creates unique barriers. It also creates barriers that non-tribal energy developers do not encounter. I have repeatedly heard that delays in approvals by the Bureau of Indian Affairs of rights-of-ways, permits, and leases increases costs of tribal projects, delays projects unnecessarily, and sometimes, directs projects onto neighboring non-tribal fee lands. Beyond energy, these delays impact broadband and other infrastructure projects. Congress can improve the efficiency of these processes by putting authority back into the hands of tribal governments where they wish to exercise it. Archaic and stifling rules regarding tribal land use can tie-up the process in red tape and discourage investments. In some cases, BIA requests could take up to two years, which can be the end to of any economic, development project. According to the GAO, the permitting review process under the BIA can take two times as long as the Bureau of Land Management.

Last April, NAFOA joined other intertribal organizations on a Tribal Partner Organizations letter supporting the necessary fix required of the *Carcieri* decision. To quote from that letter “It must be acknowledged and understood that at its core, the *Carcieri* decision is an attack on the Indian Reorganization Act (IRA) of 1934, which Congress enacted to stop the massive loss of Tribal homelands inflicted by the General Allotment Act of 1887 (Allotment Act).” Twice the House passed strongly bipartisan legislation that would address and fix the inequities arising from the *Carcieri* decisions during the 117th. This past week, Senator Tester and Representative Cole again introduced legislation addressing the *Carcieri* decision. I thank them both for their leadership on this topic, and I hope that this is the Congress we are able to fix this misguided decision and restore the ability of all tribes to take land into trust.

Conclusion

Congress has an obligation to protect tribal sovereignty and to promote tribal self-determination. NAFOA urges this Congress to take up the above priorities to promote the general welfare of tribes and their citizens by encouraging the economic growth and prosperity of Indian country. Tribal governments have been pushing for tax reform for decades and should not have to wait even longer for these crucial changes. I thank you all again for your time and look forward to answering any questions you might have.