

AMERICAN INDIAN LAW AND POLICY

10 THINGS YOU NEED TO KNOW



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December 2017

Congress returned from the Thanksgiving holiday with an intense workload that must be completed by the end of the year. Tax reform remains a focus, and the Republican-controlled Congress is still committed to getting a final bill passed and sent to the President by the end of December. National tribal organizations are opposing both the Senate and House versions of the bill because they fail to include any meaningful tribal provisions that can spur economic development in Indian Country.

While tax reform cornered Congress's attention in November, time will need to be spent on funding for the federal government in December. Current government funding expires on December 8, and it is clear that Congress will need to pass another stopgap spending bill—the only question is for how long. The optimistic view is that Congress will pass a short-term spending bill to fund the government through December with the hope of passing an omnibus appropriations bill by year's end that would fund the government and programs through September 2018. The pessimistic view is that Congress will pass a Continuing Resolution through the first quarter of 2018 and spend the next few months debating spending levels.

Although President Trump's proposed budget for fiscal year 2018 included significant cuts to tribal programs, both the House and Senate versions of the Interior, Environment and Related Agencies Appropriations bills protect funding for tribal programs and provide some increases.

In addition to tax reform and funding, Congress has a backlog of legislative priorities that it needs to tackle over the next weeks and months. The Trump administration also has a number of regulatory priorities and political vacancies that need to be focused on. Here are a few key issues that impact Indian Country:

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Tribal-Specific Provisions Generally Left Out of Key Tax Reform Proposals

Before the Thanksgiving holiday, the House Ways and Means Committee and the Senate Finance Committee considered major tax reform legislation, achieving a step forward toward President Trump's goal of passing tax reform by the end of the year. Both the House and Senate proposals focused on individual and corporate tax rate cuts. On Thursday, November 16, the House passed [H.R. 1, Tax Cuts and Jobs Act](#) by a 227-205 vote. On Saturday, December 2, the Senate passed H.R. 1 with amendments by a 51-49 vote. The House and Senate will now go to conference to resolve differences between the two bills.

Both the House and Senate proposals fail to include any provisions advocated by tribal organizations for the purpose of helping stimulate tribal economic growth. The House bill included only one provision related to Indians: a provision that would exclude from an individual's income repayment of the person's loans pursuant to the Indian Health Service Loan Repayment Program. The Senate proposal includes only two provisions related to Indians: one provision adding Indian tribes to state qualified plans under the Low Income Housing Tax Credit and another

modifying the tax treatment of Alaska Native Corporations and Settlement Trusts.

Given the lack of tribal provisions included in the congressional tax proposals, both the National Congress of American Indians (NCAI) and Native American Finance Officers Association (NAFOA) issued a [joint press release](#) in opposition to the proposals and called on members of Congress to vote against both proposals until more tribal provisions are included. The additional provisions that the national tribal organizations would like to see included in the larger tax reform proposals are from H.R. 3138, the Tribal Tax and Investment Reform Act, which can be found [here](#), and the companion bill in the Senate, S.1935, which can be found [here](#).

Projections from the Joint Committee on Taxation indicate that the House and Senate tax proposals could add approximately \$1.5 trillion over 10 years to the annual budget deficit. It will be important for Indian Country to pay attention to the tax proposals because of the impact the increased deficit could have on federally funded tribal programs.

Congress's focus on enacting tax reform by the end of the year has diverted its attention from focusing on passing the fiscal year 2018 spending bills. Thus, Congress will be pressed for time as it attempts to pass the spending bills before the continuing resolution expires on December 8. On Saturday, December 2, the House Republicans released the text of a short-term continuing resolution to fund the government through December 22. Congress will have to agree to an extension, or there could be a federal government shutdown.

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Senate Revives Threats to Repeal Portions of the Affordable Care Act; Special Diabetes Program for Indians Passes House

The Senate version of tax reform includes a provision to eliminate the Affordable Care Act's individual mandate in an attempt to help offset the deficit increases from the rest of the bill by more than \$380 billion. Although previous efforts to repeal the mandate have failed, repeal now appears more likely, given that the Senate passed the tax bill with the mandate repeal included. The Congressional Budget Office estimates that repeal of the mandate will cause more than 13 million individuals to lose their health care insurance.

A two-year extension to the Special Diabetes Program for Indians passed the House earlier this month. [H.R.3922, the Championing Healthy Kids Act](#), includes an extension for the Special Diabetes Program for Indians for fiscal years 2018 and 2019. The bill passed the House on November 3 and is now being considered by the Senate Finance Committee.

On November 8, the Senate Committee on Indian Affairs (SCIA) held a legislative hearing to receive testimony on [S.465, the Independent Outside Audit of the Indian Health Service Act of 2017](#). This bill was introduced back in February in an attempt to improve the agency's budget, staffing and management. On November 9, the SCIA also hosted a roundtable on "Confronting the Crisis: the Opioid Epidemic in Indian Country." The roundtable was not recorded, but testimony from the hearing on S. 465 is available [here](#).

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Efforts to Revise the Fee-to-Trust Regulations

Part 151 of Title 25 of the Code of Federal Regulations governs the process by which the Department of the Interior acquires lands into trust status for tribal nations. Over the years, there have been attempts to overhaul these regulations, but no significant changes have been made in the last 20 years. In the very last days of the Clinton administration, regulations were issued that were reportedly the product of several years of informal negotiations with tribal leaders. Those regulations would have extensively revised the regulations, but they were withdrawn in the early days of the Bush administration.

On October 4, tribal leaders were advised by Acting Assistant Secretary John Tahsuda that the Department of the Interior is again considering [revisions](#) to the [regulations](#). Mr. Tahsuda said that the Department was envisioning a two-step process for off-reservation acquisitions, and would consider gaming as a separate category of acquisitions. The department also seeks tribal input on issues such as what new criteria to add for off-reservation applications and whether intergovernmental agreements should facilitate approval of applications.

The Department indicated that any changes to the regulations would be subject to formal consultations with tribal nations, which have been delayed from November to dates yet to be announced in 2018. In addition to consultation, the Department would have to follow the requirements of formal, nonemergency notice and comment rulemaking before adopting any changes.

Reactions to the proposed modifications to the regulations have been mostly negative, including objections to the process used for announcing the effort. For example, the NCAI has requested that the Department start over to include an initial consultation with tribal nations regarding the need for revising the regulations in the first place, and to have a dialogue regarding the view of Indian Country regarding changes to the existing regulations.

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Indian Trader Regulation Comments In; Prospects for a Final Regulation Dim

As part of the Trump administration's efforts to promote economic development in Indian Country, the Department sought input from Indian Country on the need to update the outdated "Licensed Indian Traders" regulations currently found at 25 CFR 140 (promulgated in 1957 and last updated in 1965). The effort to modernize the Indian Trader regulations began during the Obama administration, and the Trump administration continued with exploring potential regulation revisions as a mechanism for eliminating dual taxation on tribal lands by state and local governments. At the end of July, the Department renewed its request for input and announced a series of formal consultation sessions. The Department expressed particular interest in obtaining data and information regarding specific projects that tribal nations are currently unable to initiate or approve under the existing tax laws. In September, the Department extended the deadline to receive comments to October 30 (from August 30) and announced additional consultation sessions. The Department received comments on behalf of 38 tribes and tribal organizations, as well as several intertribal organizations (Affiliated Tribes of Northwest Indians, NAFOA, NCAI, and National Indian Gaming Association). Copies of the submitted comments, transcripts of each tribal consultation session, and the letters issued by the Department are available [here](#).

Dr. Gavin Clarkson, the Deputy Assistant Secretary for Policy and Economic Development at the Bureau of Indian Affairs, spearheaded the effort to update the Indian Trader regulations, but announced his resignation from the Department on November 13. Given Mr. Clarkson's departure from the Department, it is unclear whether revising the regulations will remain a priority for the Trump administration.

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U.S. Supreme Court Hears Oral Arguments in Patchak 2.0 Case

On November 7, the U.S. Supreme Court heard oral argument in the second version of the Patchak v. Zinke litigation.

The factual background of this case is as follows: David Patchak originally brought suit against the Secretary of the Interior and others claiming that the Secretary lacked the authority to put property into trust for the Gun Lake Tribe. The Bureau of Indian Affairs had granted the tribe's petition to put the property into trust in 2005. The tribe subsequently constructed and opened the Gun Lake Casino on what is now trust property. The lawsuit went to the U.S. Supreme Court in 2012 on a preliminary standing issue. The Court held then that Mr. Patchak had standing to sue the Secretary for putting the property into trust. In response, President Obama signed into law the Gun Lake Act, which provided, among other things, that any action related to the Gun Lake trust property in question should be promptly dismissed by the federal district courts.

The issue in the case heard this month is whether that statute, by directing the federal courts to "promptly dismiss" a pending lawsuit, violates the Constitution's separation-of-powers principles. At oral argument, the justices' questions focused primarily on a long-standing rule that Congress has the power to "strip" the federal courts of jurisdiction established by an 1869 Supreme Court decision. The nature and tone of the justices' questions seemed to indicate that at least some on the Court see the statute in question as a permissible jurisdiction-stripping statute, which means that the Court may very well be inclined to uphold the statute and rule in favor of the United States. If the Court does not uphold the statute, the case will likely be remanded to the U.S. District Court for the District of Columbia, where the initial action was filed, for a determination on the merits of whether the Secretary had authority under the Indian Reorganization Act to take the property into trust for the Gun Lake Tribe.

Of note, Pratik Shah of Akin Gump Strauss Hauer & Feld LLP appeared before the Court on behalf of the Gun Lake Tribe. The audio of the oral argument is available [here](#). The briefs in the case are available [here](#).

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Latest News in Tribal Water

[On November 16, 2017, the U.S. Senate confirmed Brenda Burman as the U.S. Department of the Interior Bureau of Reclamation Commissioner](#), the first woman to ever lead Reclamation. Commissioner Burman is an experienced western water policy hand and veteran of Reclamation, and she has had extensive experience working on tribal water issues. Deputy Commissioner Alan Mikkelsen will also remain deeply involved in all these issues.

Two other announcements were made on November 16: (i) the Bureau of Reclamation [announced two funding opportunities](#) for fiscal year 2018 through its Drought Response Program, a program for which tribes are eligible, and (ii) in Arizona, the Governor's Drought Interagency Coordinating Group [recommended a continuation](#) of the state drought declaration, which has been in place since 1999.

On November 27, the U.S. Supreme Court declined to review a decision by the 9th Circuit Court of Appeals that the Agua Caliente Band of Cahuilla Indians' water rights were established when the federal government created the tribe's reservation in the 1870s and extend to groundwater in the Coachella Valley. The declination by the Court provides a significant win to the tribe. The quality and quantity of water, that the tribe is entitled to, will be decided in the subsequent phases of the litigation. The 9th Circuit's decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* can be found [here](#).

On November 29, Secretary of the Interior Ryan Zinke signed the Pechanga Settlement Agreement, which was passed as part of [S. 612](#) and signed into law by President Obama in December 2016, as shown in the photo below. The Settlement Agreement confirms the Pechanga Band's *Winters* rights and provides federal funding to ensure that the Pechanga Band of Luiseño Indians has physical access to approximately 5,000 acre-feet of water supplies per year.

Here is the latest news on pending tribal water rights bills in Congress:

- A technical amendment to the White Mountain Apache Tribe Water Rights Quantification Act of 2010, [S. 140](#), passed in the Senate on May 8, 2017, by unanimous consent and was ordered to be reported by unanimous consent by the House Committee on Natural Resources on November 8, 2017.
- On November 16, 2017, Sen. Jerry Moran (R-KS) introduced [S. 2154](#), a bill to approve the Kickapoo Tribe Water Rights Settlement Agreement.
- On December 6, 2017, the Senate Committee on Indian Affairs is holding a hearing on [S. 664](#), the Navajo Utah Water Rights Settlement Act of 2017, and [S. 1770](#), the Hualapai Tribe Water Rights Settlement Act of 2017.

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A Future for Tribal Coal?

With a President that has pledged to save the coal industry, and an Interior Secretary from a coal-producing state, tribal nations with coal resources have reason to be optimistic. But even with bold actions by the Trump administration, such as rolling back President Obama's Clean Power Plan, whether there is a market for coal remains questionable.

Case in point is the Navajo Generating Station (NGS), a coal-fired power plant located on Navajo Nation lands, which burns coal mined from Navajo Nation and Hopi Tribe lands. In 2016, the owners of NGS made the decision to close the plant due to the changing economics of the energy industry; namely, natural gas prices are likely to be less expensive than coal in the short and long term, and natural gas plants are far less expensive to operate.

This decision set in motion a year-long process where the Bureau of Reclamation and the Bureau of Indian Affairs convened dozens of meetings with NGS stakeholders to find a way for NGS to continue operating. The final result was an agreement for the plant to operate for two additional years.

However, the Trump administration has once again stepped in to try and change the course for coal. On September 28, Secretary Rick Perry of the Department of Energy issued a Notice of Proposed Rulemaking (NOPR) directing the Federal Energy Regulatory Commission (FERC) to consider implementing a rule requiring organized wholesale power markets to compensate qualifying “fuel-secure” generation resources based on each resource’s costs rather than on market revenues. The NOPR proposes that nuclear facilities and many coal facilities, but not natural gas facilities, receive full recovery of their costs, including operating costs and capital and debt costs, plus a return on equity. FERC will be holding a meeting on December 11, 2017, to discuss the issues.

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No Longer Home Alone at the Department of the Interior, but Still Waiting for Important Political Appointees to Arrive

During the early days of every new administration, tribal governments and others who do business in, and on behalf of, Indian Country focus on appointments within the Department of the Interior that may have a direct impact on natural resources and economic development within tribal communities. Secretary Ryan Zinke has appointed senior staff who do not require confirmation by the United States Senate, but the Department is still not fully staffed with key Senate-confirmed appointees.

The current Deputy Secretary, David Bernhardt (already confirmed), served in several positions within the Bush (43) administration, including as Solicitor. Now, as the Chief Operating Officer of the Department, Mr. Bernhardt can bring to bear his deep understanding of Indian Country issues. The senior team within the Immediate Office of the Secretary also includes James Cason, who is serving in the same Associate Deputy Secretary position that he had during the Bush administration. They are now joined by Brenda Burman as the U.S. Department of the Interior Bureau of Reclamation Commissioner, the first woman to ever lead Reclamation. Her extensive experience working with tribes will assist tribes in resolving water issues in Indian Country.

Alaska native Tara Sweeney was nominated by the President to serve as the Assistant Secretary—Indian Affairs on October 16, 2017. Her nomination is pending before the Senate, and it is uncertain when the Senate Committee on Indian Affairs will hold a confirmation hearing on Ms. Sweeney’s nomination. Meanwhile, John Tahsuda has been serving as Acting Assistant Secretary for Indian Affairs. Mr. Tahsuda is a member of the Kiowa Tribe of Oklahoma and previously served as Staff Director for the Senate Committee on Indian Affairs for the Republicans. He is expected to continue to serve as Principal Deputy Assistant Secretary following Ms. Sweeney’s confirmation.

Other Senate-confirmed departmental positions of importance to Indian Country remain open, either pending a confirmation vote by the Senate, a hearing or an announcement by the White House. Awaiting a confirmation vote are the following nominees: Joseph Balash to serve as Assistant Secretary for Lands and Minerals Management, Ryan Douglas Nelson to serve as Solicitor, and Susan Combs to serve as Assistant Secretary for Policy Management and Budget.

Additionally, two notable appointees awaiting a confirmation hearing are Steven Gardner to serve as Director of Surface Mining and Reclamation and Enforcement, and Timothy Petty to serve as Assistant Secretary for Water and Science.

Nominations have yet to be announced for Fish and Wildlife, National Parks Service or the Bureau of Land Management. You can access ongoing nomination updates [here](#).

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Democrats and Republicans Leaving the D.C. Scene; Latest Retirement Announcements

Every Congress has some number of members who leave to enter the private sector, run for other office or just return home to enjoy a traditional retirement. The 115 Congress is no different, and the latest list of members leaving their current positions can be found [here](#).

Some 25 Republican members of the House of Representatives have announced that they will leave their positions at the end of 2018. Eleven of those are leaving to run for Governor or the United States Senate. Of the 11 Democrats who are leaving, one is running for President of the United States (Mr. Delaney of Maryland), three

are running for Senate, and four for Governor. There are also two Republican senators who are retiring, and current Alabama senator Luther Strange is leaving because he lost a special election to Roy Moore.

In addition to those members who announced that they are leaving at the end of this Congress in December 2018, Congressman Rob Bishop (R-UT), who currently chairs the House Natural Resources Committee, announced that he will retire at the end of the next Congress in December 2020.

Depending on how the election goes, Indian Country will potentially lose several House members who have been active on Indian Country issues, or it could gain new partners in Governors' offices and the Senate. For instance, Reps. Michelle Lujan Grisham (D-NM) and Steve Pearce (R-NM) are both running for Governor of New Mexico, and both have a good history of working with tribal nations on important issues.

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Overview of Bills Pending in Congress that Impact Indian Country

While the general public has focused much attention on the 115 Congress's efforts to repeal and replace the Affordable Care Act and tax reform, numerous bills have been introduced that would directly affect Indian Country in the areas of energy, land, health, tax and tribal recognition. A few of the pending bills in Congress that would have a broad impact on Indian Country include:

- H.R. 210, the Native American Energy Act, would amend the Energy Policy Act of 1992 to permit certain entities to appraise Indian land or trust assets involved in transactions subject to the appraisal requirements set by the Department of the Interior.
- H.R. 986, S. 63, the Tribal Labor Sovereignty Act of 2017, would amend the National Labor Relations Act to exclude Native American tribes and tribal enterprises on tribal land from the requirements of the law.
- H.R. 2662/S. 1250, the Restoring Accountability in the Indian Health Service Act of 2017, would amend the Indian Health Care Improvement Act to improve the recruitment and retention of employees in the Indian Health Service, restore accountability in the Indian Health Service and improve health services.
- H.R. 3864/S. 1895, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2017, would reauthorize the Native American Housing Assistance and Self-Determination Act of 1996.
- S. 1953, the Tribal Law and Order Reauthorization and Amendments Act of 2017, would amend the Tribal Law and Order Act of 2010 and the Indian Law Reform Act to provide for advancements in public safety services to Indian communities.
- H.R. 1074 would repeal the act titled "An Act to confer jurisdiction in the State of Iowa over offenses committed by or against Indians in the Sac and Fox Indian Reservation." This bill is significant because it would transfer criminal jurisdiction from the state back to the tribe and the federal government. These types of bills rescinding jurisdiction from states are not common and are a sign of the movement of federal policy towards providing more jurisdiction back to local tribal governments.
- S. 91, the Indian Employment, Training and Related Services Consolidation Act of 2017, would amend the Indian Employment, Training and Related Services Demonstration Act of 1992 to facilitate the ability of Indian tribes to integrate the employment, training and related services from diverse federal resources, and for other purposes.

A complete list of the bills pending in Congress that would directly impact tribal nations can be found [here](#).

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