

## 10 Things To Know About Native American Policy: Part 1

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December 11, 2017, 1:30 PM EST

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 expired on Dec. 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 Donald 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, Nov. 16, the House passed H.R.1, Tax Cuts and Jobs Act by a 227-205 vote. On Saturday, Dec. 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 Native Americans: 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 Native American 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.

### **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 Nov. 3 and is now being considered by the Senate Finance Committee.

On Nov. 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 Nov. 9, the SCIA also hosted a round table on "Confronting the Crisis: the Opioid Epidemic in Indian Country." The round table was not recorded, but testimony from the hearing on S. 465 is available here.

### **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 U.S. 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. 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.

### **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 Oct. 30 (from Aug. 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](#).

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 Nov. 13. Given Clarkson’s departure from the department, it is unclear whether revising the regulations will remain a priority for the Trump administration.

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

On Nov. 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 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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