NATIONAL CONGRESS OF AMERICAN INDIANS

July 8, 2011

The Honorable Timothy Geithner
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Completion of the Study on Tribal Economic Development Bonds Mandated Under Section 1402 (b) of the American Recovery and Reinvestment Act

Dear Secretary Geithner:

On behalf of the National Congress of American Indians (NCAI), I write to request an update on the status of the Study on Tribal Economic Development Bonds (the Study) required by Section 1402 (b) of the American Recovery and Reinvestment Act of 2009 (ARRA) and to urge its completion.

As you are aware, the Study was to be completed "[n]ot later than 1 year after the date of the enactment" of ARRA.[1] President Obama signed ARRA into law on February 17, 2009, however, the February 2010 deadline has come and gone, and tribes are still awaiting the final product.

The purpose of the Tribal Economic Development Bond (TEDB) component of ARRA was to boost economic development projects in Indian Country. Prior to ARRA, it was well-known that tax-exempt bond issuances by tribal governments were hindered by core policy roadblocks, including, but not limited to, the "essential government function" threshold required by Section 7871 (c)(1) of the Internal Revenue Code (IRC). The TEDB component of ARRA was to serve as a pilot project, whereby Tribal governments would be able to issue tax-exempt bonds on a level of parity with their state counterparts.

The Study is meant to measure the overall effectiveness of the TEDB program of ARRA and supply Congress with recommendations on tribal tax-exempt bonding issuances. The TEDB program is important to tribes because tribal tax-exempt bonding issuances, have the potential to fund critical infrastructure and economic development, while supplementing tribal governments' lack of a strong tax base. The study itself is critical because it will document the positive impact that the TEDBs have on tribal communities and serve as justification for continued tribal economic development—a field in which NCAI has been a tireless advocate.

While tribes can issue tax-exempt bonds under the IRC, the policies surrounding such issuances have made tax-exempt financing a rarity in Indian Country. As is, § 7871 of the IRC (the section pertaining to tribal issuance of tax-exempt bonds) limits tribal tax-exempt financing to projects where "substantially all of the proceeds" are "used in the exercise of any

[1] American Recovery and Reinvestment Act of 2009, Subtitle E, Section 1402 (b).

essential government function."[2] The manner in which this section has been interpreted has been anything but generous to tribal governments.

In 2006, the Internal Revenue Service ("IRS") issued an Advanced Notice of Proposed Rulemaking ("ANPR"), which attempted to define an "essential government function." It proposed that an activity constituted an "essential government function" when:

1) there are numerous state and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt government bonds;
2) state and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years; *and*
3) *the activity is not a commercial or industrial activity*.[3]

The third factor of this definition effectively negates many of the instances for which the first two, standing alone, apply.

For example, as noted in a June 2010 Report on the Implementation of Tribal Economic Development Bonds submitted by the Advisory Committee on Tax Exempt and Government Entities ("ACT"), states and local governments routinely finance projects using tax-exempt bonds which retain a commercial or industrial component (*e.g.*, "hotels, convention centers, stadiums, racetracks and golf courses").[4] The ANPR has yet to make it to the actual rulemaking phase; *i.e.*, regulations have not been proposed. Nevertheless, IRS rulings since then seem to be applying this standard to tribal projects. The result is that the "essential government function" analysis continues to hinder any realistic advancement in the area of tax-exempt bond issuance by tribal governments.

In closing, we want to reiterate the need for the ARRA Study on Tribal Economic Development Bonds to be completed. Tribal governments are in a position, much like the rest of the Nation, where the need for policies which stimulate economic growth are immediate. We feel the Study has the potential to provide concrete support for policy changes in the way tribal tax-exempt financing is administered and are confident these changes will promote a healthy growth in economic development in Indian Country. Thanks for your time and consideration. If you have any questions or comments, please contact John Dossett or Derrick Beetso at (202) 466-7767 or jdossett@ncai.org or dbeetso@ncai.org.

Sincerely,

Jefferson Keel

Jefferson Keel
President

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[2] Codified at 26 U.S.C. §7871(c)(1).
[3] Announcement 2006-59, *2006-2 C.B. 388.*, REG. 118788-06, 71 Fed. Reg. 45474 (emphasis added).
[4] *Indian Tribal Governments: Report of the Implementation of Tribal Economic Development Bonds Under the American Recovery and Reinvestment Act of 2009*, Advisory Committee on Tax Exempt and Government Entities, pp 15, June 9, 2010.