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## *Red Ink as Far as the Eye Can See: The Federal Deficit and Debt Situation*

America's economy continues to struggle as the summer rolls on. With the national unemployment rate at 9.2 percent, the Obama Administration and Congress continue to discuss ways to reduce spending and rein in the long term debt without further weakening the economy.

On Aug. 2, 2011, Congress passed and President Barack Obama signed into law a landmark budget agreement to raise the nation's \$14.3 trillion debt ceiling just hours before the government's borrowing authority ran out and, in the process, avoiding a first-ever U.S. government default. The U.S. Department of Treasury and various credit rating agencies had warned of financial chaos and devastating effects to the economy if Congress failed to raise the debt ceiling.

The agreement increases the debt ceiling by at least \$2.1 trillion and cuts spending by nearly \$2.4 trillion over 10 years. The ceiling increases are to come in two steps: 1) the debt limit will be increased by \$900 billion immediately; and 2) an increase of \$1.2 trillion to \$1.5 trillion will be later determined by Congress.

In addition, the agreement creates a 12-member bicameral, joint deficit-reduction committee, which will be responsible for putting together a \$1.5 trillion deficit-

reduction package that must be reported to Congress by Nov. 23, 2011, with an up or down vote by Dec. 23, 2011. If the joint committee deadlocks or if Congress fails to act on the recommendations, it will automatically trigger a \$1.2 trillion, across-the-board spending cut, divided evenly between defense and non-defense programs. The automatic spending cuts will apply to Medicare but not to Social Security, Medicaid, veterans or civil and military pay. Medicare cuts would only affect payments to providers, not beneficiaries.

An immediate reduction in the deficit would occur by placing statutory caps on discretionary spending. According to the Congressional Budget Office, statutory caps on discretionary spending for fiscal years 2012 through 2021 would save approximately \$935 billion over 10 years. Total discretionary spending caps for fiscal year 2012 would be \$1.043 trillion and for fiscal year 2013 would be \$1.047 trillion

Further, the budget agreement does not include tax increases, although the joint committee may consider such increases. The agreement also requires both the House and Senate to vote on a proposed balanced-budget amendment to the Constitution by the end of the 112th Congress.

## Efforts to Limit Federal Contracting Opportunities for Native Firms

The U.S. Small Business Administration's (SBA) 8(a) program was created to assist small, disadvantaged businesses – including tribal businesses – to successfully compete in the American economy and to help these companies gain access to federal and private procurement contracts. Within the SBA's 8(a) program, tribal businesses, including Alaska Native Corporation-owned firms, are eligible to receive unlimited, sole-source contracts regardless of dollar size, and with no maximum dollar limit. Individual small 8(a) firms, by contrast, may receive sole-source contracts up to a ceiling of \$4 million for goods and services and \$6.5 million for manufacturing. Tribal 8(a) firms and Alaska Native Corporation-owned firms may also own multiple 8(a) companies, as long as each business is in a different industry. These Native 8(a) firms are afforded these contracting terms to alleviate the extreme poverty and unemployment rates in Indian tribal communities and in Alaska Native villages.

While the 8(a) program has resulted in significant revenues for many Indian tribes and Alaska Native Corporation-owned firms and has improved the well-being of citizens within these communities, some in Congress wish to limit federal contracting opportunities for Indian tribes and Alaska Native Corporation-owned firms. In January 2011, Sen. Claire McCaskill (D-Mo.) introduced S.236, a bill to eliminate the preferences and special rules for Alaska Native Corporations under the 8(a) program. The measure amends the *Small Business Act* and the *Alaska Native Claims Settlement Act* and directs the SBA Administrator to apply to Indian tribes and ANCs as individual small businesses the same competitive thresholds for awarding contracts to other small businesses. McCaskill's bill also authorizes the SBA Administrator to determine whether Indian tribes and ANCs are socially or economic disadvantaged according to eligibility standards for SBA 8(a) small business loans. S.236 is pending before the Senate Committee on Small Business and Entrepreneurship. The House companion measure, H.R.598, was introduced by Rep. Bennie Thompson (D-Miss.), and is pending before the House Subcommittee on American Indian and Alaska Native Affairs.

## D.C. Federal District Court Approves Keepseagle Settlement

On April 28, 2011, the D.C. Federal District Court approved the *Keepseagle v. Vilsack* settlement resolving approximately 11 years of litigation between Indian farmers and ranchers and the U.S. Department of Agriculture (USDA). In 1999, Native American farmers and ranchers filed suit against the USDA, claiming bias in federal loan programs and services dating back to 1981. The settlement provides \$760 million to eligible Indian farmers, \$680 million in paid out damages and \$80 million for forgiveness of some or all outstanding USDA loan debts. The settlement creates two payment tracks: 1) requires claimants to provide substantial evidence of discrimination, with earning an award of \$50,000; and 2) requires claimants to provide more evidence of discrimination showing steep economic losses from discrimination, earning awards capped at a maximum of \$250,000. Native American farmers and ranchers may file claims under the settlement until Dec. 24, 2011.

## D.C. District Court Approves Cobell v. Salazar Settlement

On June 21, 2011, U.S. District Judge Thomas Hogan granted final approval to the \$3.4 billion American Indian trust account settlement, *Cobell v. Salazar*. The settlement provides \$3.4 billion and resolves claims by individual Indian money account holders (IIMs) against the United States for both an historical accounting and mismanagement.

Filed in 1996, the plaintiffs originally sought only an historical accounting – a determination of whether the U.S. properly managed and accounted for revenues paid into the accounts due to the leasing of Indian land and development of natural resources. The settlement also extinguishes claims that the U.S. mismanaged the IIM holders land and resources including, for instance, whether it permitted oil companies to extract oil without paying fair market value. Under the terms of the settlement, IIM holders were able to opt out from the mismanagement element but not from the historical accounting. The settlement does not resolve trust-related claims asserted by Indian tribes.

Of the \$3.4 billion, \$1.9 billion would be deposited into a "Trust Land Consolidation Fund" to purchase fractionated land interests from willing Indian sellers, consolidate them, and return the reconsolidated parcels to the respective tribes. An additional \$60 million would fund an Indian Education Scholarship, \$99 million for attorneys fees, and the remaining balance of \$1.3 billion would be paid to IIM holders, who number between 300,000 to 500,000 individuals.

The settlement was approved by the Obama Administration in December 2009 and the U.S. Congress in December 2010.

## GAO: Size of Indian Arts and Crafts Market and Misrepresentation Unknown

In April 2011, the U.S. Government Accountability Office (GAO) issued a report titled, "Indian Arts and Crafts: Size of Market and Extent of Misrepresentation Are Unknown." The GAO found that the size of the Indian arts and crafts market and the extent of counterfeiting such arts are unknown due to unreliable, limited and outdated estimates, and to the lack of a national database. The GAO determined that a study to collect such estimates would be complex, costly and may be unreliable, but concluded that the sale of goods falsely represented as authentic Indian-produced arts and crafts has been a persistent and potentially growing problem in the United States. Federal sources routinely estimate that the market for Indian arts and crafts is worth billions of dollars, and that counterfeit goods produced domestically and imported from abroad are worth hundreds of millions of dollars.

## Pushing for Domestic Energy Resource Development

While Administrative and congressional talks to confront climate change have stalled in the 112th Congress, over 250 legislative measures relating to energy and mineral development have been introduced. As gas prices rise, so do efforts to open the nation's onshore and offshore lands for oil and gas development. As part of the House Republicans' American Energy Initiative, the House Committee on Natural Resources continues to press for an "All-of-the-Above" energy strategy, while stressing oil, gas and coal development. In May 2011, the House passed the *Putting the Gulf of Mexico Back to Work Act* (H.R.1229), the *Restarting American Offshore Leasing Now Act* (H.R.1230), the *Reversing President Obama's Offshore Moratorium Act* (H.R.1231), and the *Energy Tax Prevention Act* (H.R.910). The measures are pending in the Senate.

On the Senate side, the Senate Committee on Energy and Natural Resources has held legislative hearings and reported measures on legislation related to renewable energy development and energy efficiency.

In relation to the development of energy resources on Indian lands the House Subcommittee on Indian and Alaska Native Affairs held an oversight hearing titled "Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands," in April 2011. Subcommittee Chairman Don Young (R-Alaska) is soliciting proposals from Indian tribes to reform the statutory, regulatory and policy barriers to greater levels of renewable and non-renewable energy development on tribal lands.

In May 2011, the Senate Committee on Indian Affairs held a listening session on draft legislation titled the "Indian Tribal Energy Development and Self-Determination Amendments Act of 2011." The draft bill amends Title V of the *Energy Policy Act of 2005* to eliminate regulatory barriers for energy resource development, energy efficiency and conservation activities on tribal lands. Comments on the draft bill may be sent to: [energy@indian.senate.gov](mailto:energy@indian.senate.gov).

## Tax Incentives Expiring in December

Key provisions of the Internal Revenue Code expire and require periodic re-authorization. Congress normally provides the reauthorization in a so-called "tax extenders" bill that extends these tax provisions for a year or several years. Expiring on Dec. 31, 2011, are the following:

- » Placed-in-service date for facilities eligible to claim the refined coal production credit;
- » Credit for construction of new energy-efficient homes;
- » Credit for energy-efficient appliances;
- » Grants for specified energy property in lieu of tax credits;
- » Incentives for alternative fuel and alternative fuel mixtures;
- » Incentives for biodiesel and renewable diesel;
- » Income tax credits for biodiesel fuel, biodiesel used to produce a qualified mixture, and small agri-biodiesel producers;
- » Indian wage and health care credit; and
- » Accelerated depreciation rules for property placed on Indian land.

In March 2011, Representative John Sullivan (R-Okla.) introduced legislation, H.R.1039, to amend §168(j) of the Internal Revenue Code to permanently extend the Indian employment credit and the depreciation rules for property used predominantly within an Indian reservation. These tax incentives were first enacted in 1993 for a ten-year period and have been extended in one-year increments since 1994. H.R.474 was referred to the House Committee on Ways and Means. The Senate companion bill, S.1008, was introduced by Senator Jim Inhofe (R-Okla.) on May 17, 2011. It is pending before the Senate Committee on Finance.

## White House To Expand Economic Development in Rural America

In June 2011, President Obama signed an Executive Order establishing the White House Rural Council (the Council) to confront challenges faced in rural communities and expand economic potential. The Council, chaired by Secretary of Agriculture Tom Vilsack, will focus on policy initiatives for rural Americans, including American Indians, to build upon and improve the implementation of the Obama Administration's rural economic strategy and expand access to capital in rural and tribal communities. The Council intends to collaborate and improve flexibility in government programs and work closely with state, local and tribal governments, non-profits and the private sector. The Council plans to examine challenges facing Indian Country on job creation and increasing the flow of credit to Indian reservations. In addition, the Council will seek advice and guidance from tribal leaders and experts in Native American economic development.

## Efforts to Limit Trust Land Acquisitions for Gaming Purposes

In April 2011, Sens. Diane Feinstein (D-Calif.) and Jon Kyl (R-Ariz.) introduced the *Tribal Gaming Eligibility Act*, S.771, to amend the *Indian Gaming Regulatory Act* (IGRA) and place additional restrictions to gaming on land acquired after Oct. 17, 1988. S.771 would require Indian tribes to prove both a direct aboriginal and a modern connection to the land before it can be placed into trust for gaming purposes. According to Sen. Feinstein, S.771 is necessary to address what she sees as a growing number of "off-reservation" casino proposals in the State of California and across the nation. She further claims that "unbridled reservation shopping is occurring with little to no input from local governments or neighboring tribes."

Of the 565 federally-recognized Indian tribes, 238 tribes operate gaming facilities with 232 operating Class III gaming facilities. According to the U.S. Department of the Interior (DOI), only five non-contiguous parcels have been taken into trust since IGRA was enacted, and that as of June 2010, nine "two part" applications were pending for review by the DOI. Under IGRA, the Interior Secretary employs a "two part" determination to tribal requests for non-contiguous lands to be taken into trust for gaming. The "two part" test includes 1) a determination by the Secretary that the gaming establishment is in the best interest of the tribe, and not detrimental to the surrounding community; and 2) approval from the state's governor. S.771 is pending before the Senate Committee on Indian Affairs (SCIA). A House companion measure has not been introduced.

In addition, on July 28, 2011, Sen. John McCain (R-Ariz.) introduced the *Off-Reservation Land Acquisition Guidance Act*, S.1424, a measure to clarify the responsibilities of the Secretary of the Interior in making a determination whether to take non-contiguous land into trust for gaming purposes. S.1424 requires the Interior Secretary to consider distance when reviewing land-into-trust applications. The measure would reinstate the January 2008 Bush Administration "guidance memo" that the Obama Administration rescinded in June 2011. S.1424 is pending before the SCIA. Further, Rep. Charlie Dent (R-Pa.) submitted an amendment, No. 57, to the *Department of the Interior, Environment and Related Agencies Appropriations Act, 2011*, H.R.2584, that restricts tribes from using land claim settlements to open casinos.

## Gearing Up for the 2012 Elections



The U.S. Congress is gearing up for the upcoming elections taking place on Nov. 6, 2012. The Senate will have 33 seats up for election, including 21 Democrat seats, 10 Republican seats and 2 Independent seats. Senate lawmakers who have announced retirements include the following:

Sen. Joe Lieberman (I-Conn.)  
Sen. Jeff Bingaman (D-N.M.)  
Sen. Kent Conrad (D-N.D.)  
Sen. Herb Kohl (D-Wis.)  
Sen. Daniel Akaka (D-Hawaii)  
Sen. Jim Web (D-Va.)

Sen. Jon Kyl (R-Ariz.)  
Sen. Kay Bailey Hutchinson (R-Texas)

In the House of Representatives, all 435 seats will be up for re-election. House retirements include:

Rep. Chris Murphy (D-Conn.)  
Rep. Mazie Hirono (D-Hawaii)  
Rep. Joe Donnelly (D-Ind.)  
Rep. Shelley Berkley (D-Nev.)  
Rep. Martin Heinrich (D-N.M.)  
Rep. Dan Boren (D-Okla.)  
Rep. Jay Inslee (D-Wash.)  
Rep. Dale Kildee (D-Mich.)  
Rep. David Wu (D-Ore.)  
Rep. Mike Ross (D-Ark.)

Rep. Jeff Flake (R-Ariz.)  
Rep. Mike Pence (R-Ind.)  
Rep. Todd Akin (R-Mo.)  
Rep. Denny Rehberg (R-Mont.)  
Rep. Rick Berg (R-N.D.)  
Rep. Ron Paul (R-Texas)

## Congressional Attention to the Fee-to-Trust Process

In February 2009, the U.S. Supreme Court issued a ruling in *Carcieri v. Salazar*, reversing the U.S. Department of the Interior's prior interpretation of the *Indian Reorganization Act* (IRA) and limiting the DOI Secretary's ability to take land into trust for Indian tribes that were not "under federal jurisdiction" prior to 1934. The decision has caused concern and confusion, and hindered economic development opportunities, housing and public safety. It has also placed into doubts the legal status of Indian lands. Indian tribes, with the support of the Obama Administration have called on Congress for a clean *Carcieri* "fix" legislation for amending the IRA and reaffirming the authority of the DOI Secretary to take land into trust for all federally recognized Indian tribes regardless of the date of federal recognition.

In the 112th Congress, legislation has been introduced to address the decision. In March 2011, Rep. Dale Kildee (D-Mich.) and Sen. Daniel Akaka (D-Hawaii) introduced legislation (H.R. 1234/S.676), to amend the *Indian Reorganization Act* to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes. The measures clarify the secretary's authority to take land into trust for all Federally-recognized Indian tribes, regardless of when the tribe was recognized. On July 13, 2011, the House Subcommittee on Indian and Alaska Native Affairs (SIANA) held a Legislative Hearing on H.R.1234. The Senate Committee on Indian Affairs favorably reported S.676 in April 2011.

Similarly, Rep. Tom Cole (R-Okla.) introduced legislation, H.R.1291, that would clarify the DOI Secretary's authority to place into trust lands for Indian tribes except for lands in Alaska. As with H.R.1234, H.R.1291 was considered on July 13, 2011, by the SIANA.

## Indian-related Measures Pending In the 112<sup>th</sup> Congress

Recently introduced Indian-related measures in Congress include:

*Tribal Labor Sovereignty Act* (H.R.2335)

*Indian Country Economic Development Act* (H.R.1599)

*Indian Tribal Trade and Investment Demonstration Project Act of 2011* (H.R.2362)

*Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act* or RESPECT (H.R.2380)

*Department of the Interior Tribal Self-Governance Act* (H.R.2444)

*Native American Challenge Demonstration Project Act* (S.1293)

*Native Culture, Language, and Access for Success In Schools Act* (S.1262)

*Study of Ways to Improve the Accuracy of the Collection of Federal Oil, Condensate, and Natural Gas Royalties Act* (H.R.2260)

*Fair Allocation of Internal Revenue Credit for Renewable Electricity Distribution by Indian Tribes Act of 2011* (H.R.1992)

*Off-Reservation Land Acquisition Guidance Act* (S.1424)

## Drinker Biddle

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The Indian Tribal Governments Practice at Drinker Biddle is now ranked Band 1 by *Chambers USA 2011* and is recommended for both client service and commercial awareness. Additionally, partners Paul Moorehead and Kevin Wadzinski are ranked in Band 1 and partner Brian Gunn is recognized as "Up and Coming."

The Indian Tribal Governments Practice at Drinker Biddle & Reath provides a full range of legal and federal legislative services pertaining to tribal governments, tribal organizations and gaming-related businesses in every region of the United States. For more information, visit our website at [www.drinkerbiddle.com](http://www.drinkerbiddle.com).