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Balance of Power Changes in Congress, Impacts on Indian Tribes Likely

The November 2010 mid-term congressional elections resulted in historic Republican gains in the U.S. House of Representatives and significant gains in the U.S. Senate. In the 112th Congress, Republicans will hold a 242 to 193 margin over the Democrats, while in the Senate, Democrats will retain a 53 to 47 majority.

Likewise, Republicans gained governorships across the country – including those in Iowa, Michigan, Ohio, Pennsylvania, Wisconsin, New Mexico, Oklahoma and Wyoming. Like the federal contests, most of the state campaigns focused on the weak economy, unemployment and state budget troubles.

Congress Likely to Reign-In Federal Spending and Reduce National Debt and Deficit

Many issues featured prominently in the November elections but none more so than federal spending and the country's budgetary crisis. In the current fiscal year, the United States is running a deficit of \$1.3 trillion. The long-term, cumulative debt is an astounding \$14 trillion, with projections of nearly \$17 trillion by 2015. Leaders of both parties have rightly described these trends as unsustainable, and as a result there will likely be sizeable reductions in federal discretionary spending – including Defense Department spending – as well as measures to reduce the growth of entitlement programs such as Medicare, Medicaid and Social Security.

One year ago, amid concerns over the federal deficits, President Barack Obama created the "National Commission on Fiscal Responsibility and Reform," a bi-partisan, 18-member body charged with finding ways to balance the budget and improve the longer-term fiscal outlook. In December 2010, the Commission issued its report entitled "The Moment of Truth," which proposed spending cuts of \$200 billion in both domestic and defense programs. The Commission's proposals would reduce the deficit by \$4 trillion by 2020 and would reform federal entitlement programs. The Commission also recommended:

- » A reduction of the federal civilian work force, a three-year freeze on lawmaker pay, a 15 percent cut in White House and congressional budgets, and elimination of all earmarks;
- » A requirement that spending cuts be equally split between security and non-security spending;
- » The creation of a "Cut-and-Invest Committee" to identify 2 percent of the discretionary budget that should be cut and propose how to redirect the savings into high-value investments;
- » A reduction in the size and number of tax expenditures, including elimination of business tax expenditures;
- » A reduction in agriculture subsidies by \$10 billion through 2020;
- » A gradual increase in the retirement ages for Social Security; and
- » A 15-cent per gallon increase in the gas tax to fund the Highway Trust Fund.

Although the Commission's proposals were not approved, they are likely to form the basis of congressional discussions for years to come.

Hastings Re-establishes New "Indian and Alaska Native Affairs Subcommittee"

Incoming Chairman of the Committee on Natural Resources Rep. Doc Hastings (R-WA) has re-established the "Subcommittee on Indian and Alaska Native Affairs," to handle Native American issues. Since 1995, these issues have been managed at the full committee. Alaska Rep. Don Young will chair the subcommittee and has indicated it will focus on Tribal Self Governance, energy development, land use and economic development in tribal communities.

Leadership and Makeup of House Committees in the 112th Congress

At the outset of the 112th Congress, John Boehner (R-OH) became the Speaker of the House with Eric Cantor (R-VA) as Majority Leader. Former Speaker Nancy Pelosi (D-CA) will be Minority Leader. The chairmen of the key committees are as follows:

- » **Appropriations:** Harold Rogers (KY)
- » **Budget:** Paul Ryan (WI)
- » **Education and Labor:** John Kline (MN)
- » **Energy and Commerce:** Fred Upton (MI)
- » **Financial Services:** Spencer Bachus (AL)
- » **Natural Resources:** Doc Hastings (WA)
- » **Ways and Means:** Dave Camp (MI)

House Republicans Approve Rules for the 112th Congress

House Republicans released new rules for the 112th Congress that propose to change the way the House operates, including a requirement that bills be available online 72 hours prior to a Floor vote. In addition, committees will post their rules online, provide three-day notice for markups, post committee votes within 48 hours after a markup as well as make amendment texts available. Committees will continue to webcast hearings and post members' attendance records at hearings and markups within 24 hours and provide a "truth in testimony" statement online that will show any conflicts of interest a witness may have.

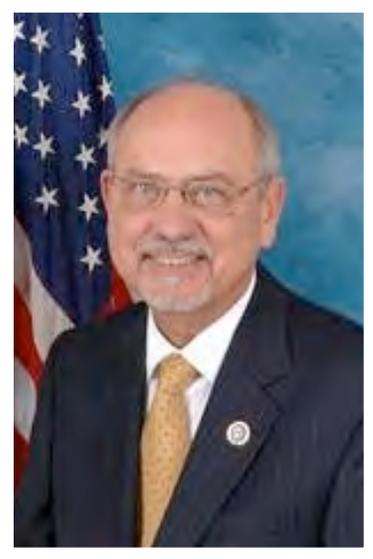
Despite their controversy, House GOP rules did not include a provision on "earmarks," and leadership indicated it would enforce the ban through "leadership decisions." Now in the majority, Republican leaders can enforce it by refusing to consider any legislation that includes earmarks, and committee chairmen are informed they will not be able to advance legislation that includes earmarks.

A More Evenly Divided Senate

Senate Democrats and Republicans re-elected their respective leadership teams for the 112th Congress, with Harry Reid (D-NV) to continue to serve as Majority Leader in the Senate and Mitch McConnell (R-KY) as Minority Leader for the Republicans. With Republican gains of six seats, Democrats will likely end up with a one-seat majority on most Senate committee rosters. The chairmen of key Senate committees are as follows:

- » **Appropriations:** Daniel Inouye (HI)
- » **Banking, Housing, Urban Affairs:** Tim Johnson (SD)
- » **Budget:** Kent Conrad (ND)
- » **Energy and Natural Resources:** Jeff Bingaman (NM)
- » **Finance:** Max Baucus (MT)
- » **Indian Affairs:** Daniel Akaka (HI)

QUESTIONS FROM THE TRIBAL BUSINESS JOURNAL FOR Incoming HCNR Chairman Doc Hastings



Q

In General. First, congratulations to you and the incoming Republican majority in the House of Representatives. As the Chairman of the Committee on Natural Resources, what will your priorities be for the 112th Congress?

A

“ This past November, the American people sent a clear message to Congress: reduce spending, focus on job creation and perform your constitutional duty to oversee the Executive Branch’s policies and decisions. As Chairman of the Natural Resources Committee I plan to make all three of those efforts a top priority this Congress. The committee will conduct thoughtful oversight on a number of issues, including those to help develop tribal economies. ”

Q

Re-establishment of the Indian and Interior Subcommittee. Every two years, congressional leaders, Indian tribal leaders, and others revisit the issue of re-establishing the Subcommittee on Indian and Interior Issues. Do you expect the subcommittee to return or will the Indian issues be handled at the Full Committee level as they have been since 1995?

A

“ I am happy to report the establishment of a Subcommittee on Indian and Alaska Native Affairs, to be led by Congressman Don Young of Alaska. Mr. Young has a long, distinguished record of leadership on Indian and Alaska Native issues and I am pleased he has accepted the chairmanship. The establishment of the new subcommittee enables a core group of members to address tribal matters with a special focus that is not always possible when such matters are considered at the Full Committee level or within another subcommittee. It also facilitates consultation between the House and Indian Country, and transparency that voters demanded in the recent November elections. ”

Q

Economic Development on Indian Lands. What, in your view, are the biggest challenges to greater levels of investment and business activity on Indian lands?

A

“ There are a number of challenges, but a primary obstacle is excessive federal control of business activity on Indian lands. In our great free enterprise system, investors interested in locating to a reservation or individual allotment cannot tolerate the kind of delays and uncertainty inherent in the current federal system governing investment and business on Indian lands. The current regulatory process is outdated. It is also exposed to political pressure, federal lawsuits, and epic amounts of red tape. As a result, business construction and development in some regions of the United States can be found thriving on non-tribal lands while across the reservation boundary line, tribal lands are found to be vacant. ”

To their credit, a number of tribes are leading the way in navigating around the federal leasing minefield, establishing themselves as some of the most successful land managers around. Using them as examples, a new federal paradigm ought to be explored to give tribes and individual Indian landowners the option – at their discretion – of enjoying the freedom, risk, responsibility, and reward of managing their lands without obtrusive BIA involvement. Tribes know best how to meet their own land management objectives.

In the next Congress, the Subcommittee on Indian and Alaska Native Affairs will conduct a thorough review of these issues in a manner that respects our unique congressional-tribal relationship and maximizes the tribes’ natural and inherent advantages to create business and job opportunities.

Questions from the Tribal Business Journal for Incoming HCNR Chairman Doc Hastings > continued from page 3

Q

Indian Energy and Natural Resources Development. Indian Country is endowed with huge potential to develop timber, agricultural products, oil, gas, coal, biomass, wind, solar, geothermal and other forms of energy. How can your committee help the tribes interested in developing their resources achieve their potential? Will the committee consider legislation such as the “Indian Energy Parity Act of 2010” that was introduced but not enacted in the 111th Congress?

A

“ Tribes are indeed richly blessed with “all-of-the-above” energy resources, minerals, and fertile farm and timber resources. I am very familiar with the large, land-based tribes in Washington state that have abundant and well-managed timberlands. Some forestry experts have found these lands to be in better health than the U.S. forest lands abutting the reservations. ”

Each tribal and individual Indian landowner decides how best to utilize their natural resources, but the federal government should be a better partner than it has been in helping them pursue a wise use of their trust assets.

Concerning energy policy, though there does not appear to be a House version of the “Indian Energy Parity Act of 2010,” the bill contains concepts rooted in self-determination that warrant serious consideration. Energy production is a major component of the Natural Resources Committee agenda in the 112th Congress, and increasing U.S. energy production to grow our economy and create new jobs is a priority of the Republican Majority. Tribal development of energy resources – renewable and non-renewable – will occupy a very important place in our deliberations.

Q

Desert Rock Power Plant. In 2009, the Bureau of Indian Affairs dealt a serious blow to the Navajo Nation’s efforts to build and operate the multi-billion dollar Desert Rock coal-fired power plant. Do you have any plans for the committee to revisit the bureau’s actions regarding this project?

A

“ Under new Republican leadership in the House, this issue may well be carefully examined. Not only did the Obama Administration’s denial of the permit and lease for the Desert Rock harm the economy of the Navajo Nation, it deprived energy consumers of affordable electricity from a large, efficient, clean coal power plant. On a troubling note, the administration’s actions appear to have been made without adequate tribal consultation, contrary to the pledges made by the president and Secretary of the Interior. In my staff’s review of documents surrounding this controversy, it appears the only entities meaningfully consulted were the environmental activists opposed to the project. The administration should be held accountable for its actions and omissions, particularly when the tribe needs the creation of new, high-wage jobs and new revenues to meet tribal members’ needs. ”

Q

Cobell Settlement. In the waning days of the 111th Congress, the Senate and House approved the Cobell v. Salazar settlement, providing some \$1.14 billion for individual Indian trust account holders and \$2 billion to consolidate fractionated Indian lands. You registered some concerns about the settlement, can you discuss those?

A

“ No one disputes that a settlement of this long-running lawsuit was needed. It could have been resolved much sooner but for the strategy of the Obama Administration and the plaintiffs to avoid public hearings, a separate vote on the merits of the deal, and opportunities to amend it to correct significant flaws identified by respected tribal organizations and leaders, individual Indian allottees, and trust reform experts. Without correction, these flaws may result in inequitable payments to many individual Indians. ”

I attempted to fix these problems by offering an amendment for the benefit of individual Indians, in accordance with the formal resolutions adopted by Affiliated Tribes of Northwest Indians, the Great Plains Tribal Chairmen’s Association, and the National Congress of American Indians. A key improvement my amendment made was to cap attorney fees at \$50 million, and utilize the savings to increase payments to Indian damages claimants. For reasons neither the administration nor the plaintiffs’ attorneys have divulged, both parties agreed that attorneys may be paid in excess of \$100 million. This is a high figure by any standard – it represents up to one third of the claims the attorneys litigated. Unfortunately, my amendment was blocked by the Democrat majority.

It is critical to understand that every dollar paid in attorney fees is a dollar out of the pockets of individual Indians. Yet the plaintiffs refused to justify to Congress the need for such an extraordinary amount, and why many individual Indians who suffered gross damages at the hands of the government may get pennies on the dollar.

It remains to be seen what the presiding judge will do, but one thing is certain: every individual class member concerned about the problems in this settlement is urged to write the court as soon as possible.

It may be too late to write a better settlement agreement, but it is not too late to request the presiding judge to change parts of the deal that are within his power to change, for the benefit of individual Indians. Lawyers must not be the primary beneficiaries of this deal.

Q

Trust Reform. In the minds of many, settling the *Cobell* lawsuit is a prelude to more comprehensive reforms of the management of Indian and tribal trust assets. Do you think the new Indian and Alaska Native Affairs Subcommittee will up trust reform in the new Congress? Will these efforts include considering possible legislative resolutions to the pending tribal trust lawsuits?

A

“ Though a formal agenda is not yet developed, I do not think the new subcommittee can accomplish a lot without a careful and thorough examination of trust reform proposals. There are some creative concepts in trust reform that can vastly improve tribal self-governance with no cost to the taxpayer and these should be explored. The views of tribes are welcome even before we commence such hearings. Tribes are urged not to wait for the secretary’s new commission on trust reform: after all, the Constitution delegates to Congress – not to the secretary or this commission – power to regulate trade with Indian tribes. ”

Regarding tribal trust lawsuits, I would be interested in ascertaining the status of the lawsuits and a careful examination of the risks and liabilities of continuing the litigation. The federal debt just reached \$14 trillion, and under the deficit reduction rules being implemented in the House of Representatives, it may be difficult to resolve lawsuits by an act of Congress without a full understanding of the risks, liabilities, and costs associated with them. But I can promise that under new House Republican leadership, any efforts in this regard will be transparent and deliberative, not obscure and hasty.

Q

Land into Trust and Gaming. In 2009, the Supreme Court handed down the *Carcieri* case holding that the Secretary of the Interior may not take land into trust for any Indian tribe that was not “under federal jurisdiction” as of 1934. Do your plans for the 112th Congress include legislation to address the *Carcieri* decision?

A

“ The committee will explore a resolution of the controversy surrounding *Carcieri* in full, open, transparent discussion and debate. My colleagues and I fully understand the importance of fee-to-trust and this will be high on the committee agenda. It is to be hoped that the Department of the Interior will cooperate with the committee in this important endeavor. To date, the department has not been cooperative, severely impinging the ability of Congress to find a resolution. It is also important to note that House consideration of legislation addressing the *Carcieri* decision must necessarily include the opportunity for representatives to offer amendments that reflect their informed view of how the fee-to-trust process at the Department of the Interior should function. ”

This should not discourage a tribe from talking to its representative in Congress about specific fee-to-trust needs. Congress is in a better position to assess the merits of fee-to-trust requests than the Department of the Interior. For example, last year Congress enacted a bill to transfer lands from Olympic National Park to the Hoh tribe in trust to increase the size of their reservation and meet housing and other needs. It is doubtful the department was capable of doing this on its own in a manner that would not invite controversy and lawsuits.

Q

Self-Determination and Self-Governance. 2010 was the 40th anniversary of President Nixon’s historic “Message to Congress on Indian Affairs,” which in many ways laid the groundwork for tribes to contract and compact with the United States and to assume greater responsibility for health, law enforcement, social services, and natural resource programs. Should these initiatives be expanded?

A

“ Yes, without a doubt. I worked on, and helped to pass, the Department of the Interior Tribal Self-Governance Act of 2010 this year. Congress should not limit itself to considering only this type of measure. For example, there has been no work in years on finding a resolution of the disputed *San Manuel* ruling of the National Labor Relations Board, a ruling that took away tribal governance over labor laws. It is worth exploring ways to move legislation forward to address this. And as a supporter of the HEARTH Act, which authorizes tribes to take on more surface leasing decisions with less federal review, the committee will certainly work on legislation to advance surface leasing liberalization for tribes. The work will not be easy and tribal consultation and tribal support to advance these efforts will be critical. The new subcommittee will look forward to hearing from and meeting tribal leaders on self-governance initiatives. ”

Q

Water Settlements. In recent years, a number of court-ordered Indian water settlement bills have been approved by Congress. Several more are pending and there are likely to be more in the years to come. Do you support this approach – negotiated settlements – rather than the alternatives, which often involved costly and acrimonious litigation?

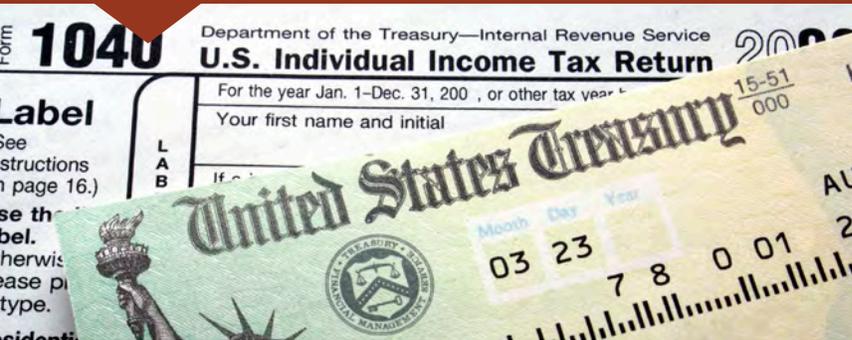
A

“ In general, negotiated settlements between all litigant parties are preferable to endless litigation. Such settlements also provide water-use certainty for tribal and non-tribal communities. As part of future Indian water settlement bills, Congress will be asked to spend hundreds of millions of dollars, depending on the settlement in question. In these times of fiscal austerity, Congress will need to know whether the amounts it is being asked to authorize are good not only for tribal and nearby non-tribal interests, but also for the American taxpayer. ”

The 111th Congress in Review

The mid-term elections had many themes, including the need to: strengthen the American economy and generate jobs; reduce annual federal deficits and long-term debt; reform the tax code; and improve transparency and accountability in the congressional process.

On December 22, 2010, the U.S. Congress adjourned *sine die* and in its final days passed a flurry of significant bills, including the Defense Authorization Act (a repeal of the so-called “Don’t Ask – Don’t Tell” ban on homosexuals openly serving in the armed forces), food safety legislation, a health care bill for 9/11 first responders, and approval of the Strategic Arms Reduction Treaty.



Extending Income Tax Cuts First Enacted in 2001 and 2003

On December 17, 2010, President Obama signed into law the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010* (Pub.L.111-312), a \$858 billion tax package negotiated by the President and Republicans. The law extends for two years all of the so-called “Bush tax cuts” first enacted in 2001 and 2003. The new law also extends unemployment benefits for 13 months, reduces payroll taxes for employed Americans for one year, and extends various expiring tax incentives, including Build American Bonds, Clean Renewable Energy Bonds, and Qualified School Construction Bonds. Of particular importance to tribal communities, the new law extends for two years the research and development credit, the Indian employment credit, and the accelerated depreciation for business property placed on Indian lands.

Fiscal Year 2011 Appropriations Bills

In the waning days of the session, the Senate failed to approve Senate Appropriations Chairman Inouye’s \$1.1 trillion “Omnibus Appropriations” bill that included all 12 annual appropriations bills. Likewise, the House-passed long-term continuing resolution (CR) failed in the Senate, which on December 21, 2010, resulted in Congress approving a fourth short-term CR (Pub.L.111-322) to fund through March 4, 2011, the operation of the federal government at Fiscal Year 2010 spending levels.

Starting with the 112th Congress, the House will likely propose sizeable, across-the-board reductions to both the unfinished fiscal year 2011 spending bills and the fiscal year 2012 appropriations bills on the order of 10 to 20 percent. In addition to reduced levels of spending, the House has approved a strict rule that prohibits “earmarks” in spending bills and in authorizing legislation. In his State of the Union address, President Obama threatened to veto any spending bill that contains earmarks.

Enactment of Major Indian Legislation

Many significant bills affecting Indian tribes and their members were enacted in the 111th Congress. These measures include:

- » Settlement of Individual Indian Money Account Litigation (Cobell lawsuit)
- » Indian Health Care Improvement Act
- » Tribal Law and Order Act
- » Aamodt Litigation Settlement Act
- » Indian Arts and Crafts Amendments Act
- » A bill to repeal the “Bennett Freeze.”
- » Navajo Nation Water Rights Settlement
- » Reclamation Water Settlements Fund
- » Tuolumne Me-Wuk Land Transfer Act
- » Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement
- » White Mountain Apache Tribe Water Rights Quantification Act
- » Crow Tribe Water Rights Settlement Act
- » Native American Heritage Day Act
- » Native American Apology Resolution
- » Taos Pueblo Water Settlement Rights Act
- » Indian Veterans Housing Opportunity Act
- » Caregivers and Veterans Omnibus Health Services Act
- » Hoh Indian Tribe Safe Homelands Act

Indian bills that were considered but not enacted in the 111th Congress, including the so-called “*Carceri* fix;” the *Indian Energy Parity Act*; Indian surface land leasing reforms; the *Department of the Interior Tribal Self Governance Act*; and others, are likely to be revisited in the 112th Congress.



Pictured above, left to right are: Governor Ernest Mirabal, Pueblo of Nambe; Governor Perry Martinez, Pueblo de San Ildefonso; Governor George Rivera, Pueblo of Pojoaque; President Barack Obama; Governor James Lujan, Sr., Taos Pueblo; Chairman Cedric Black Eagle; Crow Tribe; and Governor Frederick Vigil, Pueblo of Tesuque.

Cobell v. Salazar and Indian Water Rights Settlements Enacted Into Law

On December 8, 2010, President Obama signed into law the *Claims Resolution Act of 2010* (Pub.L.111-291), approving an historic \$3.4 billion *Cobell vs. Salazar* settlement. The Act resolves the 14-year class action lawsuit against the United States for the federal government's mismanagement of individual Indian money accounts. The settlement includes \$1.24 billion in compensation for historical accounting claims to individual Indian account holders, and \$1.9 billion for the voluntary buyback and consolidation of fractionated Indian lands. In addition, the settlement creates a \$60 million federal Indian Education Scholarship Holding Fund.

The law also ends decades of negotiations between seven American Indian tribes and the federal government over four water rights settlements totaling more than \$1 billion. The settlements will provide permanent water supplies and support economic development opportunities for the Pueblos of Pojoaque, Nambe, Tesuque, San Ildefonso, and Taos in New Mexico; the White Mountain Apache Tribe in Arizona; and the Crow Tribe in Montana.

U.S. Department of Energy Establishes Office of Indian Energy Policy and Programs

The U.S. Department of Energy (DOE) has established the Office of Indian Energy Policy and Programs to effectively engage American Indian tribal governments in energy development on tribal lands. The office will be led by Tracey LeBeau, a member of the Cheyenne River Sioux Tribe of South Dakota. Also within the DOE, David Conrad, member of the Osage Nation of Oklahoma, serves as the Director for Tribal and Intergovernmental Affairs within the Office of Congressional and Intergovernmental Affairs. Energy Secretary Steven Chu will host a Tribal Energy Summit with American Indian and Alaskan Native leaders on May 5, 2011, in Washington, D.C.

Establishment of Indian Law and Order Commission

On December 17, 2010, pursuant to the *Tribal Law and Order Act* (Pub.L.111-211), the House announced the Speaker's appointment of former Representative Stephanie Herseth Sandlin (D-SD) and Rep. Earl Pomeroy (D-ND) to serve on the Indian Law and Order Commission. On December 22, 2010, the Senate Majority Leader announced Troy Eid, former U.S. Attorney General, and Jefferson Keel, President of the National Congress of American Indians, to serve on the Commission. In addition, on January 18, 2011, President Barack Obama appointed Carole Golberg, an Indian law professor; Theresa Pouley, member of the Confederated Tribes of the Colville Reservation and a judge; and Ted Quasula, member of the Hualapi Tribe and a law enforcement veteran to the Commission.

U.S. Announces its Support for the U.N. Declaration on the Rights of Indigenous Peoples

On December 16, 2010, President Obama announced at the second annual White House Tribal Nations Conference the United States' support for the United Nation's Declaration on the Rights of Indigenous Peoples. The Declaration is intended to protect the rights of native peoples worldwide, affirming their equality and right of self-determination by freely determining their political status and freely pursuing their economic, social and cultural development. The Declaration will also provide broad protections for indigenous lands, spiritual practices, education and language systems. It will set standards to fight discrimination and marginalization and eliminate human rights violations. The United States voted against the Declaration in 2007 and is the last major country to support and sign on.

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