

Indian Law

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Alert

Tribal Bond Provisions Included in the Economic Stimulus Package

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H.R. 1, the American Recovery and Reinvestment Act of 2009 (the Act), includes four provisions that expand the authority of Indian tribal governments to issue tax-exempt or tax credit bonds:

- 1) tribal economic development bonds
- 2) qualified school construction bonds
- 3) clean renewable energy bonds
- 4) qualified energy conservation bonds



Collectively, these four provisions represent a significant achievement for Indian Country. The provisions reconfirm the governmental status of tribes and open the door to future expansions of their bond-issuing authority. Whether these provisions will be sufficient to thaw the credit markets, however, remains to be seen.



Both the House and Senate passed the Act on February 13, 2009. President Obama signed the Act into law on February 17, 2009.

The following is an overview of the four bond provisions most relevant to tribes.

1. Tribal Economic Development Bonds (Section 1402)

Description of Provision

Under current law, Indian tribal governments are limited in their ability to issue tax-exempt bonds. Under Internal Revenue Code (Code) Section 7871(c), tribal governments are authorized to issue tax-exempt bonds only if

substantially all of the proceeds are used for essential governmental functions. The term “essential governmental function” does not include any function that is not customarily performed by state and local governments. Code Section 7871(c) further prohibits tribal governments from issuing any tax-exempt private activity bonds, with the exception of certain bonds for manufacturing facilities.

The Act allows tribal governments to issue economic development bonds without satisfying the essential governmental function test. The provision is intended to stimulate economic development on tribal lands. However, the provision contains a national bond limitation of \$2 billion that will be allocated as the Secretary of the Treasury determines appropriate, in consultation with the Secretary of the Interior. Depending on how the allocation is done, the provision’s effectiveness as a stimulus to the economy could be limited.

Definition of a Tribal Economic Development Bond

The Act defines a “tribal economic development bond” as any bond issued by an Indian tribal government where: (1) the interest on the bond would be exempt from tax under Code Section 103 if issued by a state or local government, and (2) the bond is designated by the Indian tribal government as a “tribal economic development bond.”

Exceptions

In the Act, the term “tribal economic development bond” does not include any bond used to finance: (1) a gaming facility or gaming business property; or (2) any facility located outside the Indian reservation (as defined in Code Section 168(j)(6), which defines the term

“reservation” for purposes of accelerated depreciation on Indian lands).

Treasury Study

The Act requires the Treasury Department to conduct a study on the effects of tribal economic development bonds, including whether restrictions in Code Section 7871(c) should be eliminated, and report back to Congress no later than one year after the date of enactment.

Implementation

Neither the Act nor the conference explanation discusses how the volume cap will be allocated among the 562 federally recognized tribes by the Secretary of the Treasury. The Secretary could choose from any number of criteria when making allocations – e.g., enrolled population, unemployment levels, viability of projects, ability to secure financing. Some tribes have expressed concern that a per capita allocation of the bond limitation could result in a large proportion of the bond authority not being utilized due to credit market constraints.

2) Qualified School Construction Bonds (Section 1521)

Description of Provision

The Act creates a new category of tax-credit bonds¹ that may be issued by state and local governments for the construction, rehabilitation, or repair of public school facilities, or for the acquisition of land on which a public school facility will be constructed. This provision also contains a special authorization for the issuance of \$400 million of qualified school construction bonds by Indian tribal governments for schools funded by the Bureau of Indian Affairs.

Definition of a Qualified School Construction Bond

The term “qualified school construction bond” means: (1) a bond in which 100 percent of the available project proceeds are used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such facility is to be constructed with part of the proceeds; (2) a bond issued by a state or local government within the jurisdiction of which the school is located, except that Indian tribal governments (as defined in Code Section 7701(a)(40)) shall be treated as qualified issuers for the Indian school allocations; and (3) a bond designated by the issuer as a bond for the purposes of this provision.

Implementation

The Act does not state how the special authorization will be allocated among tribes with BIA-funded schools. Further, the Act does not provide an allocation for tribal schools that are not funded by the BIA.

3. Clean Renewable Energy Bonds (Section 1111)

Description of Provision

The Act raises the national limitation for clean renewable energy bonds (CREBs) to finance facilities that generate electricity from the following resources: wind, closed-loop biomass, geothermal, small irrigation, hydro-power, landfill gas, marine renewable, and trash combustion facilities. The authorization will be subdivided into thirds: one-third will be available for qualifying projects of state, local and tribal governments; one-third will be available for qualifying projects of public power providers; and one-third will be available for qualifying projects of electric cooperatives.

Definition of a Clean Renewable Energy Bond

The term “clean renewable energy bond” means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for capital expenditures incurred by governmental bodies, public providers, or cooperative electric companies for one or more qualified renewable energy facilities; (2) the bond is issued by a qualified issuer; and (3) the issuer designates the bond as a clean renewable energy bond.

Definition of a Qualified Renewable Energy Facility

A qualified renewable energy facility means a facility: (1) that qualifies for the tax credit under Code Section 45 (other than Indian coal and refined coal production facilities), without regard to the placed-in-service date requirements of that section; and (2) that is owned by a public power provider, governmental body (including an Indian tribe), or cooperative electric company.

Implementation

The application process for receiving a CREBs allocation will most likely be similar to previous CBEBs allocations as set forth in IRS Notice 2007-26, 2007-14 IRB 870 (March 15, 2007) and IRS Notice 2007-56, 2007-27 IRB 15 (June 18, 2007). Under those notices, state, local and tribal governments seeking to issue CREBS were required to submit an application spelling out the following:

- general information about the applicant (e.g., name and address)

- status of the issuer (e.g., government body)
- name, address and contact information of the borrower
- status of the borrower (e.g., government body)
- name of the project
- detailed description of the project
- information about the project facility
- construction commencement date and placed-in-service date
- independent engineer's certificate
- location of the project
- individual to contact for more information about the project
- status of regulatory approvals
- financing plan
- statements, if possible, about refinancing and reimbursements
- dollar amount of allocation requested for the project
- prior allocations for the project or a related project
- other allocation requests for related projects
- information on pooled financing bonds (if applicable)

4. Qualified Energy Conservation Bonds (Section 1112)

Description of the Provision

The Act provides for qualified energy conservation bonds used to fund qualified conservation purposes, such as reducing energy consumption, facilities or grants that support research, mass commuting facilities, education campaigns that promote energy efficiency, and certain demonstration projects.

Allocations of qualified energy conservation bonds will be made to the states with sub-allocations to large local governments. Allocations will be made to the states according to their respective populations, reduced by any sub-allocations to large local governments within the states. Sub-allocations to large local governments shall be an amount of the national qualified energy conservation bond limitation that bears the same ratio to the amount of such limitation that otherwise would be allocated to the state in which such large local government is located as the population of such large local government bears to the population of such state. The term "large local

government" means any municipality or county if such municipality or county has a population of 100,000 or more. Indian tribal governments are treated as large local governments for these purposes without regard to population.

Definition of a Qualified Energy Conservation Bond

The term "qualified energy conservation bond" means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of the issue must be used for one or more qualified conservation purposes; (2) the bond is issued by a state or local government (including an Indian tribe); and (3) the issuer designates the bond as a qualified energy conservation bond.

Definition of a Qualified Conservation Purpose

The term "qualified conservation purpose" means:

- 1) capital expenditures incurred for purposes of reducing energy consumption in publicly owned buildings by at least 20 percent, implementing green community programs, rural development involving the production of electricity from renewable energy resources, or any facility eligible for the production tax credit under Code Section 45 (other than Indian coal and refined coal production facilities)
- 2) expenditures with respect to facilities or grants that support research in (i) development of cellulosic ethanol or other nonfossil fuels, (ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels, (iii) increasing the efficiency of existing technologies for producing nonfossil fuels, (iv) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation, and (v) technologies to reduce energy use in buildings
- 3) mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting
- 4) demonstration projects designed to promote the commercialization of (i) green building technology, (ii) conversion of agricultural waste for use in the production fuel or otherwise, (iii) advanced battery manufacturing technologies, and (iv) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity
- 5) public education campaigns to promote energy efficiency (other than movies, concerts and other events held primarily for entertainment purposes)

Implementation

Even though Indian tribes will be treated like large local governments (and thus assured of receiving their own specific allocation), because the national bond limitation will be allocated to Indian tribal governments in proportion to the ratio that the each tribe bears to the population of the state in which it is located, many tribes may find that their allocation is too small to be used effectively.

Summary

The Act expands the ability of Indian tribal governments to issue tax-exempt and tax credit bonds. This expansion of authority is a positive development for Indian Country. Indian tribal governments will be able to use the bond proceeds for projects that will create jobs, construct and repair schools, and enhance energy efficiency and conservation. In addition, the Treasury Department report required in the tribal economic development bonds provision may be crucial in permanently eliminating the current restrictions on Indian tribal government bonds, which would allow Indian Country to achieve parity with state and local governments.

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¹ Generally, tax-credit bonds provide the bondholders/investors with a tax credit in lieu of interest, resulting in an interest-free loan to the issuer/borrower. However, tax-credit bonds are only “interest free” if the holder believes that the tax credit is sufficient to compensate for the borrower’s use of money and the risk that the underlying principal will not be repaid.

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