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Major Native American Issues in the 109th Congress

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Summary

Native American issues before Congress are numerous and diverse, covering such areas as federal recognition of tribes, trust land acquisition, gambling regulation, education, jails, economic development, welfare reform, homeland security, tribal jurisdiction, highway construction, taxation, and many more. This report focuses on four Native American issues currently of great salience before Congress: health care, energy, trust fund management reform, and Native Hawaiian recognition. This report will be updated as developments warrant.

Thus far over 400 bills have been introduced in the 109th Congress that apply, in whole or in part, specifically to Indians,[1] federal Indian programs, or Native Hawaiians. Typically over 500 Native American-related bills, covering some three dozen policy areas, will be introduced during a Congress. Among the major Native American policy issues of concern to the 109th Congress are:

- Indian health care,
- Indian energy,
- Indian trust fund management reform, and
- Native Hawaiian recognition.

Each of these issues is briefly discussed in this report.

Indian Health Care

Indian Health Care Improvement Act. Congress has for over 5 years been wrestling with the reauthorization of the Indian Health Care Improvement Act (IHCIA; P.L. 94-437, as amended). Federal responsibility for Indian health care is met primarily through the Indian Health Service (IHS) in the Department of Health and Human Services

[1] In this report, the term "Indian" means American Indians and Alaska Natives (the latter term includes the American Indians, Eskimos (Inuit and Yupik), and Aleuts of Alaska); the term "Native American" means Indians and Native Hawaiians.

(HHS). While IHS's permanent authorizing legislation, the Snyder Act of 1921, is very broad, the IHCIA authorizes a great many specific IHS programs, including health professional recruitment and retention, mental health services, urban Indian health services, construction and repair of health facilities, various special IHS funds, and IHS reimbursement by Medicare, Medicaid, and other federal and private health insurance programs. Authorizations for appropriations for IHCIA programs expired at the end of FY2001, but Congress continues to appropriate funds for the programs.

Leading Indian health proponents in and out of Congress suggested major changes in IHCIA. A number of significant changes have not been acceptable to HHS or other agencies, however, and ongoing negotiations have produced a succession of IHCIA reauthorization bills through the 106th-109th Congresses. Only one IHCIA reauthorization bill has been introduced so far in this Congress, S. 1057, which was referred to the Senate Indian Affairs Committee. For detailed discussion of S. 1057 and Indian health issues, see CRS Report RL33022, *Indian Health Service: Health Care Delivery, Status, Funding, and Legislative Issues*.

Indian Energy Issues

Energy Development. Many tribes asked Congress to remove what they saw as barriers to wider energy production on Indian lands. Energy production — through fossil-fuel development, electrical generation, hydropower, or wind power on trust lands — is viewed as a major potential engine of economic development for Indian tribes with these resources. Although some 46 tribes receive minerals income, the Department of the Interior (DOI) has estimated that only a quarter of oil resources, and less than one-fifth of gas resources, on Indian lands have been developed. The 109th Congress addressed one hurdle that concerned some tribes, the requirement in federal law that leasing or other agreements with third parties to develop energy resources on trust lands must be approved by the Secretary of the Interior, which triggers environmental reviews under the National Environmental Policy Act. The Energy Policy Act of 2005 (P.L. 109-58) included an Indian energy title that, among other provisions, allows tribes to enter into agreements for energy development without obtaining prior approval from the Interior Secretary. But tribes first have to create — and have the Interior Secretary approve — regulations to govern such energy agreements. The regulations must include a tribal environmental review process that allows for public comment. The Interior Secretary can, if petitioned, review a tribe's compliance with its own energy-agreement regulations and either suspend or rescind the agreements or the regulations. The federal government will not be liable for financial losses sustained by tribes (or other parties) in any agreements approved under these tribal regulations. Different groups remain concerned that tribes will be able to avoid substantive environmental review, or that the federal government may avoid its trust responsibility for tribal energy assets. (For a general discussion of the act, see CRS Issue Brief IB10143, *Energy Policy: Legislative Proposals in the 109th Congress*.)

ANWR Exploration. Within the Arctic National Wildlife Refuge (ANWR), in northeastern Alaska bordering Canada and the Arctic Ocean, are significant oil and gas prospects in certain areas of ANWR's coastal plain that are currently protected by federal law from exploration or development. These areas include both federal lands and lands whose surface and subsurface interests are owned by two Alaska Native village and regional corporations. The opening of ANWR to oil and gas exploration and development has long been controversial. Proponents of development argue that the oil

and gas are needed and can be developed with minimal ecological damage; opponents dispute both those points. The two Native corporations (and the local Native village) favor oil and gas development, but several Alaska Native villages south of ANWR oppose development, arguing that it will disrupt the ANWR calving grounds of the caribou herd on which the villages depend for food. Provisions to develop ANWR are in the FY2006 budget resolution and other freestanding bills and are proposed for FY2006 budget reconciliation. (For more detailed discussion, see CRS Issue Brief IB10136, *Arctic National Wildlife Refuge (ANWR): Controversies for the 109th Congress*.)

Indian Trust Fund Management Reform

Congress faces a possibly multi-billion-dollar problem stemming from Indian trust funds. The federal government's management of Indian trust funds and lands has led to financial claims against the United States by Indian individuals and tribes. The Indian individual claimants alone suggest they are owed as much as $176 billion. Besides lawsuits, the issue has also led to the controversial reorganization of two agencies, the Bureau of Indian Affairs (BIA) and the Office of Special Trustee for American Indians (OST) within DOI.

The BIA has long managed funds, lands, and related physical assets held in trust for Indian tribes and individuals. Trust lands total about 56 million acres (almost 46 million acres for tribes and 10 million acres for individuals). The funds' asset value recently totaled about $3.3 billion, of which about $2.9 billion was in about 1,400 tribal accounts and $400 million was in over 260,000 Individual Indian Money (IIM) accounts. The Treasury Department houses the accounts, including making payments to beneficiaries. Historically, the BIA has been frequently criticized for its management of trust lands and funds. Investigations and audits in the 1980s and after showed that, among other problems, the BIA could not document the asset values of all trust fund accounts and could not link all trust lands to their owners and accounts. Perceiving mismanagement and a violation of the federal trust responsibility, Congress enacted the American Indian Trust Fund Management Reform Act of 1994 to reform the management of Indian trust funds and assets; the Act directed the Secretary of the Interior to account for trust fund balances and created the OST to oversee trust management reforms. Two years later, based on the 1994 Act and general trust law, IIM account holders filed a class action suit in the federal district court for the District of Columbia against the various U.S. officials, demanding an accounting of their funds and correction of fund mismanagement (*Cobell* v. *Norton*, Civil No. 96-1285, D.D.C.). At least 25 more tribal law suits have been filed, covering specific tribes' funds. These events have led to the current reorganization of the BIA and OST and to congressional consideration of a settlement of IIM and tribal claims arising from trust fund and lands mismanagement.

Claims and Settlement.[2] In the first of two stages of the *Cobell* case, the district court in 1999 found that DOI and Treasury had breached their trust duties regarding (1) the document retention and data gathering necessary for an accounting and (2) the

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[2] For a legal analysis of the *Cobell* case, see CRS Report RS21738, *The Indian Trust Fund Litigation: An Overview of* Cobell *v.* Norton. Case documents and further information are available at the plaintiffs' and the Justice Department's websites, at [http://www.indiantrust.com] and [http://www.usdoj.gov/civil/cases/cobell/index.htm], respectively.

business systems and staffing to fix trust management. The court ordered DOI and Treasury to bring trust management up to current trust standards. The final stage of the lawsuit will determine the amount of money that ought to be in the IIM plaintiffs' accounts. In an intervening stage, the district court decided what historical accounting method should be used to determine the amount owed the plaintiffs. DOI had proposed reconciling all trust account transactions above a certain value but only a sampling of transactions below that value, back to 1938, while the plaintiffs had proposed using production and mapping databases and DOI data to estimate the total amount due. DOI estimated its method would show IIM losses in the tens of millions, while the plaintiffs' method suggested losses would be well over $100 billion.

The district court on September 25, 2003, issued a structural injunction directing reform of IIM management and ordering DOI to account for all trust account and asset transactions since 1887, without using sampling, by September 30, 2007. Associate Deputy Secretary of the Interior James Cason, at a hearing the following month, estimated that compliance with the court order on historical accounting might cost $6-13 billion. In November 2003 Congress enacted a controversial provision, in the FY2004 Interior appropriations act (P.L. 108-108), directing that no statute or trust law principle should be construed to require the Interior Department to conduct the historical accounting until either Congress had delineated the department's specific historical accounting obligations or December 31, 2004, whichever was earlier. Based on this provision DOI immediately appealed the structural injunction; the U.S. Court of Appeals for the D.C. Circuit then temporarily stayed the structural injunction. Over a year later, on December 10, 2004, the Circuit Court overturned much of the structural injunction, finding that, on trust reform, the injunction's "micromanagement" overstepped legal bounds, and that, on historical accounting, the congressional provision prevented the district court from requiring DOI to follow its directions. The Circuit Court noted that the congressional provision expired on December 31, 2004, but did not discuss the district court's possible reissue of the order. On February 23, 2005, the district court did indeed issue an order on historical accounting very similar to its September 2003 order, requiring that an accounting cover all trust fund and asset transactions since 1887 and not use statistical sampling. The DOI estimated that compliance with the new order would cost $12-13 billion and appealed the order. Neither the district court nor the appeals court has stayed the new order during the appeal, however, so various deadlines that DOI must meet are still in effect.

Congress has acted on the *Cobell* suit chiefly through oversight hearings and through provisions in Interior appropriation acts and reports. Both the House Appropriations Committee and the conference committee, in their reports on the FY2006 Interior appropriations act (P.L. 109-54), stated that they rejected the position that Congress intended in the 1994 Act to require an historical accounting on the scale of that ordered by the district court, but no bills have been introduced in this or the last Congress to amend the 1994 Act to delineate the historical accounting obligation.

Congress has long been concerned that the costs of the Cobell lawsuit may jeopardize DOI trust reform implementation, reduce spending on other Indian programs, and be difficult to fund. Current costs include the expenses of the ongoing litigation. Possible future costs include $12-13 billion for the court-ordered historical accounting, a Cobell settlement that might cost as much as the court-ordered historical accounting, the $27.5 billion that the Cobell plaintiffs have proposed as a settlement amount (in their statement of principles for settlement legislation), or the over-$100 billion that Cobell

plaintiffs estimate their IIM accounts are owed. Among the funding sources for these large costs are discretionary appropriations and the Treasury Department's "Judgment Fund," although some senior appropriators consider the Fund insufficient for a $12-13 billion dollar settlement, much less a larger one. Among other options, Congress may await the appeals court's actions, or it may enact another delay to the court-ordered accounting, or it may direct a settlement, or it may delineate the department's historical accounting obligations. No language in the FY2006 Interior appropriations act either delayed the court-ordered historical accounting or otherwise settled the suit. Settlement bills have been introduced in past Congresses. Thus far one settlement bill, S. 1439, has been introduced in the 109th Congress. S. 1439 would establish a settlement fund from which payments would be distributed to IIM claimants under a formula to be determined by the Secretary of the Treasury, establish a commission to review and recommend changes in Indian trust asset management, allow increased payments for fractionated individual Indian trust interests, create a tribal trust management demonstration project, combine BIA and OST under a new Under Secretary for Indian Affairs, and require an annual independent audit of all Indian trust funds. The Senate Indian Affairs Committee held a hearing on S. 1439 on July 26, 2005, but has taken no further action.

Reorganization. The DOI, BIA, and OST have undertaken, or proposed, a number of administrative and organizational changes to implement trust management reform since the 1994 Act. One of the more important changes was the 1996 transfer from BIA to OST of the office that manages the trust funds; management of trust lands and other physical assets stayed with BIA. In April 2003 the DOI undertook a new, and ongoing, reorganization that splits the BIA trust management operations off from other BIA services at the regional and agency levels, and creates OST field operations (by placing fiduciary trust officers and administrators at BIA regional and agency offices) to oversee trust management and provide information to Indian trust beneficiaries. Tribal leaders and the *Cobell* plaintiffs vigorously oppose the current reorganization, claiming it included insufficient consultation with tribes, insufficiently defined new OST duties, and should have follow, not preceded, creation of new trust management procedures. The DOI responded that it had consulted with tribes for a year beforehand and that it had faced a court-ordered deadline. Attempts to halt the reorganization in recent Congresses have been defeated, and bills proposing various changes in DOI and BIA trust management, such as abolishing OST, assigning trust line authority to a new office, or establishing a commission to recommend improvements in federal Indian trust laws and policies, have not been reported from committee. S. 1439, as noted above, proposes to reorganize DOI management of Indian trust assets.

Native Hawaiian Recognition

Native Hawaiians, the indigenous people of Hawaii, are not currently considered Indians under federal Indian law and have no political entity that, like Indian tribes, is recognized by the federal government. Congress has however authorized a number of federal programs to benefit Native Hawaiians. Supporters of recognition are concerned that the absence of a recognized Native Hawaiian political entity endangers federal and state Native Hawaiian programs, exposing them to current legal challenges that claim the programs are race-based. At present, Indian tribes are usually recognized either by Congress or through the DOI's administrative process; Native Hawaiians, however, are excluded from the DOI process, which means congressional action is needed for a Native Hawaiian political entity to be recognized. Two bills in the 109th Congress, S. 147 and

H.R. 309, would establish a process by which a Native Hawaiian political entity would be organized and federally recognized. The bills leave for later negotiations (and legislation) questions concerning the political entity's governmental powers and lands, and exclude the Native Hawaiian political entity from BIA programs and from coverage under the Indian Gaming Regulatory Act. Some of the arguments for and against the bills are summarized here.

Proponents argue that Congress has power to recognize a Native Hawaiian political entity because Congress' constitutional authority over "commerce with ... the Indian tribes" extends to all indigenous native peoples in the United States. They also argue that Congress has recognized a "special political and legal relationship with the Native Hawaiian people" (S. 147, §2(21)) identical with that with Indian tribes. They point to the numerous Native Hawaiian programs that Congress has established, especially the Hawaiian homelands program, which was established in 1921 when Hawaii was a territory but is now under Hawaii state control (with certain continuing congressional duties), under which certain public lands are reserved for lease only to Native Hawaiians. Proponents argue that Native Hawaiians have not given up their claims to sovereignty but rather had sovereignty forcibly withdrawn in the 1893 overthrow of the Kingdom of Hawaii, an action led by Americans living in Hawaii and with the active support of U.S. officials and armed forces. (The new government of Hawaii agreed to U.S. annexation in 1898.) They state that Native Hawaiians have maintained a single distinct community, with cultural and political institutions.

Opponents dispute these points. They argue that Congress' authority extends only to Indian tribes, not to all indigenous peoples, and that hence Congress does not have constitutional authority to recognize a Native Hawaiian political entity. They argue that the United States does not have a special responsibility to Native Hawaiians as it has for Indian tribes. Opponents also contend that recognition of a Native Hawaiian political entity would be based on race alone, arguing that unlike Indian tribes the Native Hawaiian entity would not need to meet criteria of geography, community, and continuous political autonomy. They argue further that Native Hawaiian recognition would set a precedent for political recognition of other, race-based, non-Indian groups. In addition, some opponents dispute the claims regarding Native Hawaiian sovereignty, arguing among other things that Native Hawaiians' sovereignty ended well before 1893 because the kingdom gave political rights to non-Native Hawaiians, or that sovereignty resided in the monarch, not the Native Hawaiian people, and ended with the 1893 overthrow.

Bills similar to S. 147 and H.R. 309 received extensive consideration in the previous three Congresses. S. 147 was reported by the Senate Indian Affairs Committee (S.Rept. 109-68), but an amendment in the nature of a substitute, based on discussions among congressional offices, the Administration, and the state of Hawaii, may be offered on the Senate floor. The Justice Department recently voiced continuing constitutional concerns, however. H.R. 309 was referred to the House Resources Committee but has not been reported. Separately, the House Judiciary Committee's Subcommittee on the Constitution held a hearing on constitutional issues raised by the bills. (For further analyses of legal and other issues, see CRS Report RL33101, *S. 147/H.R. 309: Process for Federal Recognition of a Native Hawaiian Governmental Entity*. The text of the proposed substitute amendment was available, as of September 29, 2005, at [http://akaka.senate.gov/assets/s%20147%20substitute%209-2.pdf]).