

**OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF
SELECTED ISSUES RELATING
TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS**

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SUBCOMMITTEE ON SELECT REVENUE MEASURES
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CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. GENERAL RULES REGARDING THE TAXATION OF INDIAN TRIBES AND TRIBAL MEMBERS AND THE TAXING POWERS OF INDIAN TRIBES	3
A. Income Taxation of Indian Tribes, Wholly Owned Tribal Corporations, and Indian Tribal Partnerships	3
1. Federal income taxation of Indian tribes and wholly owned tribal corporations ...	3
2. Federal income taxation of Indian tribes holding partnership interests	4
3. State taxation of Indian tribes	4
In general	4
B. Tax Treatment of Enrolled Members of Indian Tribes	7
1. Federal tax	7
2. State tax	9
C. Taxing Powers of Indian Tribes	10
D. Alaska Native Settlement Trusts	10
II. SELECTED FEDERAL TAX RULES AND ISSUES RELATING TO INDIAN TRIBES AND THEIR MEMBERS	15
A. Indian Tribal Governments Treated as States for Certain Purposes	15
1. In general	15
2. Tax-exempt bonds	16
B. Gaming Activities of Indian Tribes	23
1. Overview	23
2. Federal tax treatment of income from gaming operations	24
3. Treatment of gambling winnings and losses	24
4. Excise taxes on wagering	27
C. Economic Development Incentives	30
1. Accelerated depreciation for business property on Indian reservations	30
2. Indian employment credit	33
3. Credit for the production of Indian coal facilities	34
5. New markets tax credit	35
6. Qualified opportunity zones	45
7. Low-income housing tax credit	49
III. BACKGROUND STATISTICS ON NATIVE AMERICANS	52
A. Overview	52
B. Proportion of Native Americans in the U.S. Population	52
C. Geographic Distribution of Native Americans in the United States	54
D. Economic Status of Native Americans	56
E. Educational Attainment of Native Americans	62
F. Indian Health Service and Health Status of Native Americans	63

INTRODUCTION AND SUMMARY

The Subcommittee on Select Revenue Measures of the House Committee on Ways and Means has scheduled a hearing for March 4, 2020, entitled “Examining the Impact of the Tax Code on Native American Tribes.” This document¹ prepared by the staff of the Joint Committee on Taxation, provides a description of Federal tax law and an analysis of selected issues relating to Native American² tribes and their members as well as data on the economic status of Native American tribes and Native Americans in the United States.

Native American households generally have lower incomes and higher rates of poverty than other households in the United States. According to 2017 U.S. Census data, the per capita income of the Native American population was \$17,584, compared to \$31,106 for the U.S. population as a whole. Overall, 25.4 percent of Native Americans lived in poverty in 2017, compared to 13.4 percent for the U.S. general population.

Part I of this pamphlet provides an overview of the Federal and State taxation of Indian tribes and their members and of the taxing powers of Indian tribes. Indian tribes generally are exempt from Federal income tax and, in the absence of Congressional consent, generally are exempt from State income tax. With limited exceptions, enrolled members of Indian tribes are subject to Federal income tax, but generally are exempt from State income tax unless Congress consents to such taxation. Indian tribes have an inherent sovereign power to tax transactions that occur on certain Indian lands and that significantly involve the Indian tribe or its members. Because both Indian tribes and States have the right to tax certain transactions of non-members of Indian tribes within Indian country, instances of double taxation may not be relieved unless one or the other jurisdiction cedes its authority to tax the transaction, for example by permitting a tax credit. Part I also discusses the treatment of Alaska Native Settlement Trusts established to promote the health, education, and welfare of beneficiaries and to preserve the heritage and culture of Alaska Natives.

Part II discusses several special rules regarding the taxation of Indian tribes or their members and the taxation of income from certain activities conducted by Indian tribes or on Indian reservations. For example, under section 7871,³ Indian tribes explicitly are afforded comparable treatment to that of U.S. States for certain purposes under the Federal tax laws. These purposes include, among others, the ability to receive deductible charitable contributions, the ability to issue tax-exempt bonds in certain circumstances, and special treatment for purposes

¹ This document may be cited as follows: Joint Committee on Taxation, *Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members* (JCX-8-20), February 28, 2020. This document can also be found on the Joint Committee on Taxation website at www.jct.gov.

² The laws regarding Native Americans generally use the term “Indian.” This pamphlet uses the terms “Native American” and “Indian” interchangeably. For purposes of this pamphlet, the terms “Native American” or “Indian” refer to people having origins in any of the original peoples of the 50 U.S. States and the District of Columbia, unless otherwise stated.

³ Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended (the “Code”).

of certain Federal excise taxes. Part II also describes tax rules relating to gambling operations, which produce significant revenue for many Indian tribes. Part II then describes several tax rules designed to encourage economic development on Indian reservations, including the accelerated depreciation rules for property on Indian reservations and the Indian employment tax credit, among others.

Part III provides statistical information regarding Native Americans in the United States, including information concerning the economic conditions and population of Native Americans.

I. GENERAL RULES REGARDING THE TAXATION OF INDIAN TRIBES AND TRIBAL MEMBERS AND THE TAXING POWERS OF INDIAN TRIBES

A. Income Taxation of Indian Tribes, Wholly Owned Tribal Corporations, and Indian Tribal Partnerships

1. Federal income taxation of Indian tribes and wholly owned tribal corporations

No one provision of the Code governs the U.S. income tax liability of Indian tribes or their members. However, the Code provides that Indian tribes (referred to as “Indian tribal governments”) are treated as States for certain Federal tax purposes.⁴ Whether an Indian tribe or an entity operated by the tribe is subject to tax may vary depending on a number of factors, including whether it is Federally recognized as a tribe, whether the entity is formed under Federal or State charter, etc.

The Internal Revenue Service (“IRS”) has long taken the position that Federally recognized Indian tribes are not subject to Federal income taxation because the tribe is not a taxable entity.⁵ Wholly owned tribal corporations chartered under Federal law under section 17 of the Indian Reorganization Act of 1934⁶ or section 3 of the Oklahoma Indian Welfare Act⁷ are also not taxable entities for U.S. income tax purposes. These entities maintain their non-taxable status regardless of whether their income-producing activities are commercial or noncommercial in nature or are conducted on or off the Indian tribe’s reservation.⁸

⁴ Sec. 7871. These purposes are discussed in Part II below.

States and their political subdivisions are exempt from tax under an implied statutory immunity in that no provision of the Code imposes a tax on the income of States and their political subdivisions (and no provision expressly exempts such income from tax). In some cases, however, Congress can override this implied immunity as it has done in section 511(a)(2)(B) of the Code, which imposes an income tax on the unrelated business income of State colleges and universities.

⁵ Rev. Rul. 67-284, 1967-2 C.B. 55. The taxation of enrolled members of Indian tribes is described in section I.B.

⁶ 25 U.S.C. sec. 477.

⁷ 25 U.S.C. secs. 501-509.

⁸ See, e.g., Rev. Rul. 94-65, 1994-2 C.B. 14 (extending Rev. Rul. 94-16 to Oklahoma tribal corporations organized under the Oklahoma Indian Welfare Act); Rev. Rul. 94-16, 1994-1 C.B. 19 (neither an Indian tribe conducting an unincorporated business nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to Federal income tax on its income); Rev. Rul. 81-295, 1981-2 C.B. 15 (Federally chartered Indian tribal corporation has the same tax status as the tribe and is not taxable); Rev. Rul. 67-284, 1967-2 C.B. 55 (Indian tribes are not taxable entities); IRS Office of Indian Tribal Governments, *FAQs for Indian Tribal Governments Regarding Status of Tribes (Taxable vs. Nontaxable vs. Not Subject to Tax)*, available at <https://www.irs.gov/government-entities/indian-tribal-governments/faqs-for-indian-tribal-governments-regarding-status-of-tribes-taxable-vs-nontaxable-vs-not-subject-to-tax>.

In contrast, a corporation organized under State law and owned by an Indian tribe or tribal members is subject to Federal income tax on income earned from activities conducted on or off the Indian tribe's reservation.⁹

The tax status of tribally owned corporations chartered under tribal law has not been addressed by the IRS in published guidance. Commentators suggest that the treatment may depend on the extent to which the corporation is an "integral part" of the Indian tribe.¹⁰

2. Federal income taxation of Indian tribes holding partnership interests

Generally, an entity recognized as a partnership is not taxed at the entity level on the income it receives. Instead, items of income, gain, loss, deduction, and credit received by the partnership "flow through" to the partners who in turn account for those items on their tax returns.¹¹ An Indian tribe may operate an unincorporated business or be a partner in a partnership with a taxable entity or an individual without affecting the tribe's non-taxable status or the tax treatment of the other partners.¹² The taxable status of Indian tribes who organize a limited liability company ("LLC") has not been directly addressed by the IRS in published guidance. Under regulations, LLCs are generally treated as a partnership or disregarded as an entity separate from its owner, unless the LLC elects to be taxable as a corporation.¹³

3. State taxation of Indian tribes

In general

Indian tribes and tribal corporations generally are exempt from State taxation within their reservations, and remain so unless Congress clearly manifests its consent to such taxation.¹⁴ For example, the Supreme Court has held that Congress consented to State *ad valorem* real property taxes on Indian land from which limitations on alienation were removed through the issuance of

⁹ Rev. Rul. 94-16, 1994-1 C.B. 19; Rev. Rul. 94-65, 1994-2 C.B. 14. However, for Indian tribes which organize corporations under State law, relief from Federal taxes will be granted if the tribe shows a good faith effort to dissolve the State-law corporation and reorganize under section 17 of the Indian Reorganization Act of 1934 or section 3 of the Oklahoma Indian Welfare Act.

¹⁰ See Felix S. Cohen, *Cohen's Handbook of Federal Indian Law 2012 Edition*, LexisNexis, 2012, including 2019 supplement, p. 679 (citing scholarship on the taxable status of corporations organized under tribal law and two Private Letter Rulings (Private Letter Ruling 200409033, February 27, 2004, and Private Letter Ruling 200148020, November 30, 2001) analyzing the taxable status of entities incorporated under tribal law).

¹¹ Sec. 701.

¹² See Rev. Rul. 94-16, 1994-1 C.B. 19.

¹³ Treas. Reg. sec. 301.7701-3(a); Treas. Reg. sec. 301.7701-1(a)(3).

¹⁴ *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Cass County, Minn., v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

a fee patent.¹⁵ Accordingly, land owned in fee by an Indian tribe is generally subject to State property taxes whether located within or outside of a reservation,¹⁶ even if the land had been formerly held in trust for the Indian tribe.¹⁷

Congress has not consented to all taxes on property. States may not apply a property tax to allotted lands held in trust for an Indian tribe by the Federal government, and States may not apply an excise tax upon the sale of any interest in land within an Indian reservation.¹⁸ Similarly, any land or right acquired by the United States in trust for an Indian tribe pursuant to the Indian Reorganization Act¹⁹ is exempt from State taxes, even if the land or right so acquired is located outside of a reservation.²⁰

Income taxes

Indian tribes generally are taxable by States on income earned outside of their reservations.²¹ However, income from mineral royalty interests is exempt from State taxation if it is derived by an Indian tribe from the lease of unallotted reservation land and entered into under the Indian Mineral Leasing Act of 1938.²² Nevertheless, States may apply production taxes to the exploitation of mineral interests by non-Indians pursuant to such a lease, whether or

¹⁵ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (finding a clear manifestation by Congress to permit such taxation in the Indian General Allotment Act of 1887, 25 U.S.C. sec. 331 *et seq.*, as amended by the Burke Act of 1906, 25 U.S.C. sec. 349).

¹⁶ Land within Indian reservations generally is held either in trust by the Federal government for the benefit of a tribe or individual members of an Indian tribe, or owned in fee by either an Indian tribe, members of an Indian tribe, or non-Indian persons. Initially, Indian reservation land generally was held in trust by the Federal government for the benefit of Indians resident on the land. From the late 19th century until passage of the Indian Reorganization Act of 1934, 25 U.S.C. sec. 461 *et seq.*, the Federal government allotted certain Indian lands to individual members of an Indian tribe and after a period of time issued fee patents to some of the allotted parcels. The recipient of a fee patent was free to sell the land, which has resulted in certain portions of Indian reservations presently being owned in fee by Indians, Indian tribes, and non-Indians. With the passage of the Indian Reorganization Act of 1934, Congress halted further allotments and extended indefinitely the existing period of trust applicable to already allotted, but not yet fee patented, Indian lands. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-56 (1992).

¹⁷ *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998).

¹⁸ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 268-70 (1992).

¹⁹ Indian Reorganization Act, ch. 576, 25 U.S.C. sec. 461 *et seq.* (1934).

²⁰ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-59 (1973). The exemption under the Indian Reorganization Act extends to bar a compensating use tax on personal property permanently attached to realty but does not bar an income tax or a non-discriminatory gross receipts tax on income derived from a business conducted using the property. *Ibid.*, p. 158.

²¹ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157-58 (1973) (tribe held to be subject to State gross receipts tax on income earned from a ski resort operated by the tribe off-reservation).

²² *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

not the value obtainable by an Indian tribe for the mineral lease is affected.²³ However, States may not apply production taxes that are so high as to have a significant negative effect on the marketability of an Indian tribe's product.²⁴

Sales taxes

States may impose sales and excise taxes on sales or activities within an Indian reservation if (1) the legal incidence of the tax rests on persons who are not tribal members, (2) the balance of Federal, State, and tribal interests favors the State, and (3) minimal burdens in collecting the tax are imposed on an Indian tribe or tribal members.²⁵ Two cases illustrate the limits of State power to apply a tax upon persons who are not tribal members engaged in business in Indian country. First, a State may not apply a motor carrier license fee or fuel use tax on a non-Indian logging company's use of reservation roads where the logging was pursuant to a comprehensive Federal regulatory scheme and the roads used were maintained entirely by the Indian tribe and the Federal government.²⁶ Second, a State may not apply a gross receipts tax to a non-tribal member's construction firm that was employed to build a school for an Indian tribe, when the school was to be financed and operated by the Indian tribe and the Federal government.²⁷

²³ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989).

²⁴ *Montana v. Crow Tribe*, 484 U.S. 997 (1988), summarily aff'g 819 F.2d 895 (9th Cir. 1987), explained in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 fn. 17 (1989).

²⁵ *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Ok.*, 498 U.S. 505, 512 (1991) (upholding State cigarette sales tax on sales to non-members of the tribe); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 186-87 (1989) (upholding imposition of State severance tax on private producers of oil and gas on reservation lands); but see *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459-62 (1995) (finding that State could not impose its motor fuels tax when the legal incidence of the tax fell on the tribe for motor fuel sales made inside reservation lands). "The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Ibid.*, p. 458-59.

²⁶ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

²⁷ *Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

B. Tax Treatment of Enrolled Members of Indian Tribes

1. Federal tax

Income taxes

As U.S. citizens,²⁸ individual members of Indian tribes are subject to Federal income taxes, even if the source of the income received by individual tribal members is income distributed by the Indian tribe and otherwise exempt when received by the Indian tribe.²⁹

Certain types of income earned by members of Indian tribes are not subject to Federal tax. For example, payments in satisfaction of a judgment of the United States Court of Federal Claims in favor of an Indian tribe that are distributed per capita to tribal members pursuant to a plan approved by the Secretary of the Interior are excluded from tax.³⁰ Per capita distributions made to tribal members from certain Indian trust funds are also not subject to the Federal income tax.³¹ Another type of excluded income is income derived directly from land held in trust by the Federal government for the benefit of an Indian tribe or a member of an Indian tribe.³² Income is derived directly from trust land if it is generated principally from the use of reservation land and resources rather than from capital improvements upon the land, and includes income from logging, mining, farming, or ranching activities.³³

In addition, the value of certain general welfare benefits received by tribal members is excluded from the member's gross income if those benefits are received under a tribal

²⁸ See 8 U.S.C. sec. 1401(b) (granting U.S. citizenship to members of "an Indian, Eskimo, Aleutian, or other aboriginal tribe" born in the United States).

²⁹ *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). Per capita payments of net revenues from gaming activities conducted or licensed by any Indian tribe are specifically made subject to Federal taxes by the Indian Gaming Regulatory Act, 25 U.S.C. sec. 2710(b)(3)(D), Pub. L. No. 100-497 (October 17, 1988).

³⁰ 25 U.S.C. secs. 1401-1407.

³¹ 25 U.S.C. secs. 117b(a), 1407; Notice 2015-67. The IRS extended the treatment of per capita distributions from certain Indian trust funds to certain direct pay leases and other contracts, including leases pursuant to the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 ("HEARTH Act"). IRS Memorandum for Indian Tribal Governments Employees, re Interim Guidance on the Direct Pay of Tribal Lease Funds, June 8, 2017. A special rule, described below, governs distributions from Alaska Native Settlement Trusts.

³² *Squire v. Capoeman*, 351 U.S. 1, 10 (1956). Several courts have held that the exclusion is only available for income derived from land allotted to the individual earning the income and is not available for income derived from land leased from the tribe or another individual to whom the land is allotted. *Kieffer v. Comm'r*, T.C. Memo 1998-202, p. 3; *Anderson v. United States*, 845 F.2d 206, 208 (9th Cir. 1988); *Holt v. Comm'r*, 364 F.2d 38, 41 (8th Cir. 1966); but see *Campbell v. Comm'r*, T.C. Memo 1997-502, p. 5 (per capita distributions from casino was not income from land held in trust by the Federal government because such income was from capital improvements to the land, not income derived from the land itself). The exclusion does not extend to income derived from the reinvestment of income derived from allotted land. *Capoeman*, 351 U.S. 1, 9.

³³ Income derived from recognized fishing rights-related activity by a member of an Indian tribe or a qualified Indian entity is also excluded from Federal income and employment taxes. Sec. 7873.

government program.³⁴ The program must be administered under specific guidelines and not discriminate in favor of members of the governing body of the tribe. In addition, the benefits must be available to any tribal member who meets such guidelines, be for the promotion of the general welfare, not be lavish or extravagant, and not be compensation for services.³⁵

Employment taxes

Federal employment taxes consist of Federal income tax, Federal Insurance Contributions Act (“FICA”) taxes, and Federal Unemployment Tax Act (“FUTA”) taxes.³⁶ FICA taxes include the Old-Age, Survivors, and Disability Insurance tax (“Social Security”) and the Hospital Insurance tax (“Medicare”). In general, Federal employment taxes are imposed on wages paid by an employer with respect to services performed by its employees absent an exception. The definitions of wages for Federal income, FICA, and FUTA tax purposes are similar: wages includes all remuneration for services performed by an employee for his or her employer for income tax purposes, and wages includes all remuneration for “employment” for FICA and FUTA purposes, unless an exception applies.³⁷

For Federal income and FICA tax purposes, services performed by employees of an Indian tribal government generally constitute “employment” unless otherwise excepted.³⁸ Under one exception, compensation attributable to services performed by Indian tribal council members in that capacity is exempt from Federal income and FICA tax withholding and FUTA taxes.

³⁴ Sec. 139E. The requirements under section 139E for the excludability of Indian general welfare benefits clarified that payments for general welfare benefits such as housing assistance and adoption assistance may be received tax-free by tribal members without consideration of the individual recipient’s financial need. Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 113th Congress* (JCS-1-15), March 2015, p. 40-41. This document can be found on the Joint Committee on Taxation website at www.jct.gov. The exclusion for Indian general welfare benefits is inapplicable to per capita payments made by an Indian tribe from gaming revenue. *United States v. Jim*, 891 F.3d 1242 (11th Cir. 2018).

³⁵ In addition to the income exclusions described in this section, a special rule permits a charitable deduction not exceeding \$10,000 per taxable year for certain expenses incurred in carrying out sanctioned whaling activities. The deduction is available only to an individual who is recognized by the Alaska Eskimo Whaling Commission as a whaling captain charged with the responsibility of maintaining and carrying out sanctioned whaling activities. See sec. 170(n).

³⁶ Sec. 3101 (defining the rate of Social Security taxes), 3111 (defining the rate of Medicare taxes), Sec. 3402 (describing Federal income tax withholding procedures), 3121(a) (defining wages for FICA tax purposes), Sec. 3401 (defining wages for Federal income tax withholding purposes). The Railroad Retirement Tax Act (“RRTA”) is also a Federal employment tax under Subtitle C of the Code applicable to eligible employers and employees, providing Social Security and Medicare equivalent benefits.

³⁷ Secs. 3401(a); 3121(a), (b). Remuneration paid for services performed by members of an Indian tribe as employees of unrelated third-party employers are subject to the general Federal employment tax regime.

³⁸ Secs. 3402(a); 3102.

However, council members may be eligible to make an election to request FICA tax withholding from their compensation.³⁹

For FUTA purposes, services performed by employees of an Indian tribe are excluded from the definition of “employment,” with one condition.⁴⁰ Wages paid for employee services for an Indian tribe are not exempt from FUTA taxes if the Indian tribe fails to make State unemployment tax (“SUTA”) contributions, payments in lieu of contributions, or payments of penalties or interest assessed with respect to such failure.⁴¹ To the extent State unemployment tax requirements are not met, wages paid to employees of an Indian tribe are subject to FUTA taxes.

2. State tax

Individual members of an Indian tribe that reside on an Indian reservation are exempt from State taxes, unless Congress clearly manifests its consent to such taxation.⁴² Members of an Indian tribe who reside outside of a reservation are subject to State taxes on income, regardless of whether the income was derived from within an Indian reservation.⁴³

As explained above, States may not apply a property tax to allotted lands held in trust for an Indian tribe or members of an Indian tribe by the Federal government and may not apply an excise tax upon the sale of any land within an Indian reservation. However, States may apply real property taxes to property that is owned in fee by an Indian or persons who are not tribal

³⁹ Sec. 3402(p); Rev. Rul. 59-354. To the extent compensation is included in taxable wages for social security purposes, the compensation is included in the individual’s Social Security benefits computation.

⁴⁰ Sec. 3306(c)(7). Under FUTA, employers must pay a tax equal to six percent on wages up to a wage base, \$7,000 in 2020, paid with respect to covered employment. For this purpose, Indian tribe is defined as including any subdivision, subsidiary, or business enterprise wholly owned by the Indian tribe. Sec. 3306(u).

⁴¹ Sec. 3309(a), (d). States are directed to grant Indian tribes the option to contribute to the State unemployment fund or make payments in lieu of contributions for benefits claimed by the tribe’s unemployed workers. This exemption was enacted by the Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, sec. 166(a)(1)-(2) (December 21, 2000). This exemption does not apply when the Indian tribe is merely a “statutory employer” -- that is, the entity having control of the payment of wages. *Blue Lake Rancheria v. United States*, 653 F.3d 1112 (9th Cir. 2011) (Court reversed and remanded to District court and held that the common-law employer (wholly owned by the Indian tribe) was the employee leasing company as opposed to the client to whom the workers were leased, and thus, the employee leasing company was entitled to the exemption from employment taxes as an instrumentality of the Indian tribe).

⁴² *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 462-67 (1995); *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 765 (1985); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165 (1973).

⁴³ *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 462-67 (1995).

members within reservations. In addition, States may require tribal members to collect sales taxes on sales made to non-members of the Indian tribe.⁴⁴

C. Taxing Powers of Indian Tribes

Indian tribes have an inherent sovereign power to tax transactions occurring on Indian lands held in trust that significantly involve the Indian tribe or its members.⁴⁵ For transactions occurring on lands not held in trust within an Indian reservation, an Indian tribe generally may tax its members, but may not tax non-members unless it has civil authority over the non-members.⁴⁶ Without an express grant of civil authority by Congress, an Indian tribe may only exercise civil authority over non-members in two cases: (1) if non-members have entered consensual relationships with the Indian tribe or tribal members, and (2) if the conduct of non-members threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the Indian tribe.⁴⁷ A non-member's conduct of a business on land owned in fee within a reservation is not itself a sufficient basis for the exercise of civil authority by an Indian tribe.⁴⁸

D. Alaska Native Settlement Trusts

The Alaska Native Claims Settlement Act ("ANCSA")⁴⁹ established Native Corporations⁵⁰ to hold property for Alaska Natives. Alaska Natives are generally the only permitted common shareholders of those corporations under section 7(h) of ANCSA, unless a Native Corporation specifically allows other shareholders under specified procedures.

ANCSA permits a Native Corporation to transfer money or other property to an Alaska Native Settlement Trust ("Settlement Trust")⁵¹ for the benefit of beneficiaries who constitute all

⁴⁴ *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512-13 (1991).

⁴⁵ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

⁴⁶ *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

⁴⁷ *Ibid.*

⁴⁸ *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001) (tribe held not to have authority to apply a hotel occupancy tax on a hotel owned by non-members on land held in fee located within a reservation).

⁴⁹ 43 U.S.C. sec. 1601 *et seq.*

⁵⁰ Defined at 43 U.S.C. sec. 1602(m). Sec. 646(h)(2).

⁵¹ Defined at 43 U.S.C. sec. 1602(t). Sec. 646(h)(4).

or a class of the shareholders of the Native Corporation, to promote the health, education and welfare of beneficiaries, and to preserve the heritage and culture of Alaska Natives.⁵²

Native Corporations and Settlement Trusts, as well as their shareholders and beneficiaries, are generally subject to tax under the same rules and in the same manner as other taxpayers that are corporations, trusts, shareholders, or beneficiaries.

Special rules allow an election to use a more favorable tax regime for transfers of property by a Native Corporation to a Settlement Trust and for income taxation of the Settlement Trust.⁵³ There is also simplified reporting to beneficiaries.⁵⁴

Under the special tax rules, a Settlement Trust may make an irrevocable election to pay tax on taxable income at the lowest rate specified for individuals and to pay tax on capital gains at a rate consistent with being subject to such lowest rate of tax.⁵⁵ As described further below, beneficiaries may generally thereafter exclude from gross income distributions from a trust that has made this election.⁵⁶ Also, contributions from a Native Corporation to an electing Settlement Trust⁵⁷ generally do not result in the recognition of gross income by beneficiaries on account of the contribution.⁵⁸ An electing Settlement Trust remains subject to generally applicable requirements for classification and taxation as a trust.

A Settlement Trust distribution is excludable from the gross income of beneficiaries to the extent of the taxable income of the Settlement Trust for the taxable year and all prior taxable years for which an election was in effect, decreased by income tax paid by the Trust, plus tax-exempt interest from State and local bonds for the same period.⁵⁹ Amounts distributed in excess of the amount excludable are taxed to the beneficiaries as if distributed by the sponsoring Native Corporation in the year of distribution by the Trust, which means that the beneficiaries must include in gross income as dividends the amount of the distribution, up to the current and accumulated earnings and profits of the Native Corporation.⁶⁰ Amounts distributed in excess of

⁵² With certain exceptions, once an Alaska Native Corporation has made a conveyance to a Settlement Trust, the assets conveyed shall not be subject to attachment, distraint, or sale or execution of judgment, except with respect to the lawful debts and obligations of the Settlement Trust.

⁵³ Sec. 646.

⁵⁴ Sec. 6039H.

⁵⁵ Sec. 646(b) and (c).

⁵⁶ Sec. 646(e).

⁵⁷ Defined at sec. 646(h)(1).

⁵⁸ Sec. 646(d)(1).

⁵⁹ Sec. 646(e)(1).

⁶⁰ Sec. 646(e)(3).

the current and accumulated earnings and profits are not included in gross income by the beneficiaries.

A special loss disallowance rule reduces (but not below zero) any loss that would otherwise be recognized upon disposition of stock of a sponsoring Native Corporation by a proportion, determined on a per share basis, of all contributions to all electing Settlement Trusts by the sponsoring Native Corporation.⁶¹ This rule prevents a stockholder from being able to take advantage of a decrease in value of a Native Corporation that is caused by a transfer of assets from the Native Corporation to a Settlement Trust.

The fiduciary of an electing Settlement Trust is obligated to provide certain information relating to distributions from the trust in lieu of reporting requirements under section 6034A.⁶²

The election to pay tax at the lowest rate is not available in certain disqualifying cases where transfer restrictions have been modified to allow a transfer of either: (a) a beneficial interest that would not be permitted by section 7(h) of ANCSA if the interest were Settlement common stock,⁶³ or (b) any stock in an Alaska Native Corporation that would not be permitted by section 7(h) of ANCSA if it were Settlement common stock and the Native Corporation thereafter makes a transfer to the Trust.⁶⁴ Where an election is already in effect at the time of such disqualifying transfer, the special rules applicable to an electing trust cease to apply and rules generally applicable to trusts apply. In addition, the distributable net income of the trust is increased by undistributed current and accumulated earnings and profits of the trust, limited by the fair market value of trust assets at the date the trust becomes so disposable. The effect is to cause the trust to be taxed at regular trust rates on the amount of recomputed distributable net income not distributed to beneficiaries, and to cause the beneficiaries to be taxed on the amount of any distributions received consistent with the applicable tax rate bracket.

Under rules enacted in 2017, a Native Corporation may assign certain payments described in ANCSA to a Settlement Trust without having to recognize gross income from those payments, provided the assignment is in writing and the Native Corporation has not received the payment prior to assignment.⁶⁵ The Settlement Trust is required to include the assigned payment in gross income when received with the same character as if such payment was received by the

⁶¹ Sec. 646(i).

⁶² Sec. 6039H.

⁶³ Defined at 43 U.S.C. sec. 1602(p). Sec. 646(h)(3).

⁶⁴ Sec. 646(f).

⁶⁵ Sec. 139G(a). The amount and scope of any assignment must be described with reasonable particularity and may either be in a percentage of one or more such payments or in a fixed dollar amount. Further, such assignment must specify a duration either in perpetuity or for a period of time, and whether it is revocable.

Native Corporation.⁶⁶ The Native Corporation is not allowed a deduction for the assigned payment.⁶⁷

Additionally, a Native Corporation may elect annually to deduct contributions made to a Settlement Trust.⁶⁸ If the contribution is in cash, the deduction is in the amount of cash contributed. If the contribution is in property other than cash, the deduction is the amount of the Native Corporation's adjusted basis in the contributed property (or the fair market value of such property, if less than the Native Corporation's adjusted basis), and no gain or loss may be recognized on the contribution.⁶⁹ The Native Corporation's deduction is limited to the amount of its taxable income⁷⁰ for that year, and any excess may be carried forward 15 succeeding years. The Native Corporation's earnings and profits for the taxable year are reduced by the amount of any deduction claimed for that year.⁷¹

Generally, the Settlement Trust must include income equal to the deduction by the Native Corporation.⁷² For contributions of property other than cash, the Settlement Trust takes a basis in the property equal to the adjusted basis of such property in the hands of the Native Corporation immediately before the contribution (or the fair market value of such property immediately before such contribution, if less than the Native Corporation's adjusted basis), and may elect to defer recognition of the income associated with such property until the Settlement Trust sells or exchanges the property, in whole or in part.⁷³ In that case, any income that is deferred (*i.e.*, the amount of income that would have been included upon contribution absent the election to defer) is treated as ordinary income, while any gain in excess of the amount of income that is deferred takes the same character as if the election had not been made.

If property subject to this election is disposed of within the first taxable year subsequent to the taxable year in which the property was contributed to the Settlement Trust, the election is voided with respect to such property, and the Settlement Trust is required to pay any tax

⁶⁶ Sec. 139G(b).

⁶⁷ Sec. 139G(e).

⁶⁸ Sec. 247(a). A Native Corporation makes the election to deduct contributions to a Settlement Trust for a specific taxable year by including a statement with its original or amended income tax return. See IRS News Release IR-2018-16, January 30, 2018. Any election may be revoked on a timely filed amendment or supplement to the Native Corporation's income tax return.

⁶⁹ Sec. 247(b).

⁷⁰ As determined without regard to such deduction.

⁷¹ Sec. 247(c).

⁷² Sec. 247(f)(3).

⁷³ Sec. 247(f) and (g). To make such election, the Settlement Trust must identify and describe with reasonable particularity the contributed property on a statement attached to its original or amended income tax return for the year in which the property was contributed. See IRS News Release IR-2018-16, January 30, 2018.

applicable to the disposition of the property, including any applicable interest, and an additional amount equal to 10 percent of the amount of the tax with interest.⁷⁴ There is a four-year assessment period in which to assess these tax, interest, and penalty amounts.

Any Native Corporation which has made an election to deduct contributions to a Settlement Trust as described above must furnish a statement to the Settlement Trust not later than January 31 of the calendar year subsequent to the calendar year in which the contribution was made.⁷⁵ The statement must include: (1) the total amount of contributions to which the election applies; (2) for each contribution, whether the contribution was in cash; (3) for each non-cash contribution, the date that the contributed property was acquired by the Native Corporation and the adjusted basis and fair market value of such property on the contribution date; (4) the date on which each contribution was made to the Settlement Trust; and (5) such information as the Secretary of the Treasury determines is necessary or appropriate for the identification of each contribution and the accurate inclusion of income relating to such contributions by the Settlement Trust.

⁷⁴ Sec. 247(g)(3)(C).

⁷⁵ Sec. 6039H(e).

II. SELECTED FEDERAL TAX RULES AND ISSUES RELATING TO INDIAN TRIBES AND THEIR MEMBERS

A. Indian Tribal Governments Treated as States for Certain Purposes

Present Law

1. In general

Section 7871 expressly provides that Indian tribal governments are treated as States for certain tax purposes. First, tribal governments may be recipients of deductible charitable contributions for income, estate, and gift tax purposes. Second, tribal governments are extended the treatment provided to States under the following excise taxes: tax on special motor fuels, manufacturers excise taxes, communications excise tax, and tax on use of certain highway vehicles. Special treatment relating to excise taxes is available to tribal governments only with regard to transactions involving the exercise of an essential governmental function, as described below,⁷⁶ by the Indian tribal government. Third, taxes paid to Indian tribal governments are deductible for income tax purposes to the same extent as State taxes. Fourth, Indian tribal governments may issue tax-exempt bonds under certain conditions described further below.⁷⁷

In addition, Indian tribal governments are treated as States for purposes of: (1) unrelated business income tax rules that apply to State colleges and universities, (2) treatment of amounts received under a disability and sickness fund maintained by a State, (3) the rules relating to tax-sheltered annuities,⁷⁸ (4) obligations issued on discount bonds, (5) the tax on excess expenditures to influence legislation, and (6) private foundation rules.

⁷⁶ Section 7871(e) limits the term essential governmental function to exclude any function that is not customarily performed by State and local governments with general taxing powers. This provision was added by the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, sec. 10632(a) (December 22, 1987).

⁷⁷ For more detailed information regarding the rules applicable to tax-exempt bonds, see Joint Committee on Taxation, *Present Law and Background Information Related to State and Local Government Finance* (JCX-36-12), April 23, 2012; Joint Committee on Taxation, *Overview of Selected Provisions and Options Relating to Funding and Financing Infrastructure Investments* (JCX-2-20), Part II.A, January 27, 2020.

⁷⁸ Sec. 403(b). Under section 414(d) of the Code and section 3(32) of the Employee Retirement Income Security Act of 1974 (“ERISA”), a qualified retirement plan of an Indian tribal government is a governmental plan (and thus exempt from ERISA and various Code requirements) if all of the participants are employees substantially all of whose services are in the performance of essential government functions, but not in the performance of commercial activities (whether or not an essential government function).

2. Tax-exempt bonds

In general

Indian tribal governments may issue tax-exempt bonds⁷⁹ in several types of circumstances if they meet requirements applicable to bonds issued by States and local governments as well as certain other rules applicable only to Indian tribal governments. Indian tribal governments may issue tax-exempt bonds for governmental purposes, subject to the requirement that substantially all of the proceeds of the issue are used in an essential governmental function, as discussed below.⁸⁰ Indian tribal governments also may issue private activity bonds but only for the purpose of financing manufacturing facilities.⁸¹

The Code provides that Indian tribal governments may also issue a third type of tax-exempt bond called “Tribal economic development bonds” to finance projects and facilities (but not certain gambling facilities) if the bonds would be tax-exempt if issued by a State or local government.⁸² The restriction of essential government function and the limitation on private activity bonds to certain manufacturing facilities do not apply. However, this Code provision is subject to an allocation limit of \$2 billion.

Governmental bonds

Like States and local governments, Indian tribal governments may issue so-called “governmental bonds.” These bonds are bonds the proceeds of which are primarily used to finance governmental facilities or which are repaid with governmental funds. The Code does not expressly define governmental bonds. Instead, bonds are generally treated as governmental bonds if they limit private involvement sufficiently to avoid classification as private activity bonds,⁸³ contain arbitrage restrictions,⁸⁴ and satisfy bond registration and information reporting requirements and various other restrictions described in the Code.⁸⁵

⁷⁹ Generally, gross income does not include interest on State or local bonds. Sec. 103.

⁸⁰ Sec. 7871(c)(1).

⁸¹ Secs. 7871(c)(3), 103.

⁸² The American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111-5, sec. 1402, added section 7871(f) to the Code.

⁸³ The exclusion from income of interest on State and local bonds does not apply to private activity bonds, unless the bonds are issued for certain permitted purposes (“qualified private activity bonds”) and other Code requirements are met. Secs. 103, 141.

⁸⁴ Secs. 103(b), 148.

⁸⁵ Secs. 103(b), 149.

Indian tribal governments must meet an additional requirement to issue governmental bonds. Specifically, all bond proceeds must be used in an essential governmental function,⁸⁶ and such function must be customarily performed by State and local governments with general taxing powers.⁸⁷

Private activity bonds for tribal manufacturing facilities

As with governmental bonds, Indian tribal governments are more restricted than States and local governments in their ability to issue private activity bonds. Section 7871(c)(3) permits tribal governments to issue private activity bonds⁸⁸ so long as the bond proceeds are used for manufacturing facilities⁸⁹ that are owned and operated by the tribal government on “qualified Indian lands,”⁹⁰ and that employ tribal members.⁹¹

A project financed by manufacturing facility bonds must meet requirements as to use, location and ownership, and employment. The use requirement provides that at least 95 percent of the net proceeds of the issue are to be used for the acquisition, construction, or improvement of property that is part of a manufacturing facility and subject to an allowance for depreciation. The location and ownership requirement provides that at least 95 percent of the net proceeds are to be used to finance property to be located on qualified Indian lands of the issuer, which is to be owned and operated by the issuer.⁹² At the time of issuance, it must be reasonably expected that

⁸⁶ Sec. 7871(c)(1).

⁸⁷ Sec. 7871(e). This provision was added by the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, sec. 10632(a) (December 22, 1987). Prior to the enactment of this provision, the IRS interpreted the term essential governmental function to include any project for which Federal assistance to Indian tribes may be provided, including some commercial and industrial activities not generally conducted by States and local governments with general taxing powers. See H.R. Conf. Rep. No. 100-495 (1987).

⁸⁸ Outside the context of Indian country, private activity bonds are generally bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons. For these purposes, the term “nongovernmental person” includes the Federal government and all other individuals and entities other than States or local governments. Interest on private activity bonds is taxable, unless the bonds are issued for certain purposes permitted by the Code and other requirements are met. Section 7871(c)(3)(C) provides that an obligation to which this paragraph (dealing with the exception for certain private activity bonds used for certain tribal manufacturing facilities) applies shall be treated as a private activity bond.

⁸⁹ The term “manufacturing facility” is defined by cross reference to section 144(a)(12)(C) as any facility which is used in the manufacturing or production of tangible personal property (including the processing resulting in a change in the condition of such property).

⁹⁰ “Qualified Indian lands” means land which is held in trust by the United States for the benefit of an Indian tribe. The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Sec. 7871(c)(3)(E).

⁹¹ Sec. 7871(c)(3)(D).

⁹² Tribes may jointly finance a manufacturing facility, and the employment test may be met in such case by *pro rata* apportionment of wages by tribe according to the relative participation of each tribe.

the employment requirements will be met with respect to the facility financed by the bonds. As of the close of each calendar year in the testing period, the aggregate face amount of all outstanding tax-exempt bonds financing the facility cannot be more than 20 times greater than the aggregate wages paid during the preceding calendar year to enrolled members of the Indian tribe of the issuer (or spouse of such member) for services rendered. The employment requirement must be met each year beginning two years after the date of issuance. If the employment requirement is not met for any year for which it applies with respect to an issuance, all bonds that are part of that issuance cease to be tax-exempt to their holders. The annual tribal employment test is in lieu of an annual aggregate volume limit.⁹³

Tribal economic development bonds

Under a provision added to the Code in 2009, Indian tribal governments are permitted to issue “tribal economic development bonds.”⁹⁴ A tribal economic development bond is any bond issued by an Indian tribal government (1) the interest on which would be tax-exempt if issued by a State or local government, and (2) that is designated by the Indian tribal government as a tribal economic development bond.⁹⁵

The aggregate face amount of bonds that may be designated by any Indian tribal government cannot exceed the amount of national tribal economic development bond limitation allocated to such government.⁹⁶ There is a national bond limitation of \$2 billion, allocated as the Secretary determines appropriate, in consultation with the Secretary of the Interior.⁹⁷ As of this

⁹³ Manufacturing facility private activity bonds issued by tribes are not subject to State volume caps. See H.R. Conf. Rep. No. 100-495 (1987). Thus, the private activity bonds issued by tribes do not count against the volume cap of the State where the reservation is located. However, persons living on Indian reservations within a State are counted for purposes of calculating that State’s volume cap, thus, States could issue bonds for the benefit of tribal reservations located within the State.

⁹⁴ ARRA, Pub. L. No. 111-5, sec. 1402 added sec. 7871(f) to the Code.

⁹⁵ Sec. 7871(f)(3). Tribal economic development bonds issued by an Indian tribal government are treated as if such bonds were issued by a State except that section 146 (relating to State volume limitations) does not apply. Sec. 7871(f)(2).

⁹⁶ Sec. 7871(f)(3)(C).

⁹⁷ Sec. 7871(f)(1)(B). Announcement 2011-71, 2011-46 I.R.B. 770, November 14, 2011 (IRS sought comment from Indian tribal governments on the reallocation of available amounts of national bond volume limitation authority that were previously allocated and have been, or subsequently are, forfeited under Notice 2009-51, 2009-28 I.R.B. 128, July 13, 2009, and Announcement 2010-88, 2010-47 I.R.B. 753, November 22, 2010). According to the Treasury Department, issuance of these bonds through November 2011 was very limited, comprising less than three percent of the total \$2 billion bond authorization. In its report on the tribal economic development bond program, the Treasury Department asserted that the reasons for this lack of actual usage relate mainly to credit challenges facing Indian tribal governments. Department of Treasury, *Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code*, December 2011, p. 4, available at <http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/Report%20to%20Congress%20-%20Tribal%20Economic%20Development%20Bonds%20-%20FINAL%2012.19.11.pdf>. In Notice 2-12-48, 2012-31 I.R.B. 102, July 30, 2012, the Treasury department and IRS solicited applications for allocations of available

writing, no volume limitation is available for allocation (subject to the forfeiture of unused volume limitation previously awarded).⁹⁸

Under the tribal economic development bond program, Indian tribal governments have the authority to issue bonds to finance projects and facilities owned by Indian tribes and located on Indian reservations, but outside the scope of “essential governmental function” bonds, such as convention centers, golf courses, hotels, restaurants, certain entertainment facilities, etc. In addition, Indian tribal governments have the authority to issue private activity bonds for any one of the seven types of “qualified bonds” used for purposes that Congress has permitted⁹⁹ and are not limited to financing tribal manufacturing facilities. The six other types of qualified private activity bonds include (1) exempt facility bonds;¹⁰⁰ (2) qualified mortgage bonds¹⁰¹ to finance the purchase or repair or rehabilitation of owner-occupied single-family homes located in the jurisdiction of the issuer; (3) qualified veteran’s mortgage bonds¹⁰² to finance veterans’ purchases of owner-occupied single-family homes (as long as a State issued such bonds before June 22, 1984); (4) qualified student loan bonds;¹⁰³ (5) qualified redevelopment bonds¹⁰⁴ to finance the redevelopment of blighted areas; and (6) qualified 501(c)(3) bonds¹⁰⁵ to fund the exempt activities of a section 501(c)(3) organization.

Tribal economic development bonds cannot be used to finance any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory

volume cap (including amounts previously allocated and subsequently forfeited) and provided detailed guidance regarding the requirements for such applications and the method that will be used to allocate volume cap.

⁹⁸ See <https://www.irs.gov/tax-exempt-bonds/published-volume-cap-limit-for-tribal-economic-development-bonds> (as of February 25, 2020). Although there is currently no portion of the \$2 billion limitation available for allocation, some portion of the allocated volume cap remains unissued.

⁹⁹ Sec. 141(e) (provides the list of seven categories of qualified private activity bonds). For purposes of tribal economic development bonds, use of bond proceeds by an Indian tribe, or instrumentality thereof, is treated as use by a State. Sec. 7871(f)(2)(B).

¹⁰⁰ Sec. 142. Business facilities eligible for this financing include transportation (airports, ports, local mass commuting, high-speed intercity rail facilities, and qualified highway or surface freight transfer facilities); privately owned and/or operated public works facilities (sewage, solid waste disposal, water, local district heating or cooling, and hazardous waste disposal facilities); privately-owned and/or operated residential rental housing; and certain private facilities for the local furnishing of electricity or gas. Bonds issued to finance “environmental enhancements of hydro-electric generating facilities,” qualified public educational facilities, and qualified green building and sustainable design projects also may qualify as exempt facility bonds.

¹⁰¹ Sec. 143.

¹⁰² Sec. 143. Sec. 142(l)(2).

¹⁰³ Sec. 144(b).

¹⁰⁴ Sec. 144(c).

¹⁰⁵ Sec. 145.

Act) is conducted, or housed, or any other property used in the conduct of such gaming. Nor can tribal economic development bonds be used to finance any facility located outside of the Indian reservation.¹⁰⁶

Issues Relating to the Issuance of Tax-Exempt Bonds by Indian Tribal Governments

The power of States to issue tax-exempt bonds is not conditioned upon the exercise of an essential governmental function. The existence of an essential governmental function requirement for Indian tribal governments reflects Congress's concern that the Federal subsidy for tax-exempt bonds be used for governmental activities rather than quasi-commercial or commercial activities that would be carried on by a private business.¹⁰⁷

Although not defined in the Code, an essential governmental function includes providing for schools, streets, and sewers.¹⁰⁸ The standard permits financing for facilities comparable to facilities that are customarily acquired or constructed and operated by States and local governments such as offices for the tribal government and a lodge owned and operated by a tribal government.¹⁰⁹

¹⁰⁶ Sec. 7871(f)(3)(B).

¹⁰⁷ See, e.g., S. Rep. No. 97-646, 97th Cong., 2d Sess., p. 13 (1982) (noting that the provision “includes a number of restrictions on [the treatment of Indian tribal governments as States for purposes of the issuance of tax-exempt bonds] with respect to commercial or industrial activities or other activities other than essential governmental functions”).

¹⁰⁸ H. Rep. No. 97-984, 97th Cong. 2d Sess. 16-17 (1982). The phrase “essential governmental function” also appears in another section of the Code dealing with exempting income derived from the exercise of any essential governmental function and accruing to a State or any political subdivision. See sec. 115. The IRS, in various rulings, has interpreted this section to apply to the income of an entity organized separately from a State or its political subdivision. Rev. Rul. 71-131, 1971-1 C.B. 28; Rev. Rul. 77-261, 1977-2 C.B. 45. Rev. Rul. 77-261, 1977-2 C.B. 45 (the income of a fund, established under a written declaration of trust to pool the temporary investments of the State and its political subdivisions, is excludable from gross income under section 115(1). The fund was authorized by State statute, managed by the State treasurer, and benefited only the State and its political subdivisions). Private Letter Ruling 200008024, February 25, 2000 (the income from a corporation managed by government officials which was incorporated by a State authority for various purposes is excludable under section 115 because it performed the same tasks that States and political subdivisions perform. The corporation was formed: (i) to enable governmental entities to pool their purchasing power to take advantage of volume discounts; (ii) to reduce costs by consolidating bidding and contracting procedures; (iii) to serve as a products, services, and financing resource for government agencies; and (iv) to assist governmental entities with financing for businesses that contribute to the community. The corporation was precluded from distributing its property or profits to any private person). A private letter ruling binds only the IRS and the taxpayer who requests guidance and therefore may not be cited or relied upon as precedent.

¹⁰⁹ H.R. Rep. No. 100-495, p. 1012, n.5 (1987).

An essential governmental function has been interpreted as not including commercial or industrial activities.¹¹⁰ For some purposes, commercial activities include hotels, casinos, service stations, convenience stores, and marinas.¹¹¹

Opponents of the essential governmental function standard may argue that there is a lack of clarity regarding what types of projects Indian tribes can undertake. On the other hand, the lack of clarity seems to exist only with respect to projects that are not usually performed by States and local governments such as private rental housing, cement factories, or mirror factories.¹¹² These activities more closely resemble those activities for which private activity bonds are issued, an area in which Congress has expressed concern and provided various rules and limitations for State issuance.¹¹³

Tax-exempt private activity bonds that are issued by States and local governments generally are limited in both approved type of facility and volume. Thus, the States must abide by a volume limitation on the use of the Federal subsidy for private commercial activities. The

¹¹⁰ See Advance Notice of Proposed Rulemaking (Definition of Essential Governmental Function Under Section 7871 and Limitation to Activities Customarily Performed by States and Local Governments), 71 Fed. Reg. 45474 (August 9, 2006). The notice provides that “an activity will be considered an essential governmental function that is customarily performed by State and local governments if: (1) There are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental 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.” The notice further stated that the Treasury Department and the IRS anticipated issuing proposed regulations that would “provide that examples of activities customarily performed by State and local governments include, but are not limited to, public works projects such as roads, schools, and government buildings.” See also Private Letter Ruling 200911001, March 13, 2009 (IRS applied this three-part test to determine that tribal ownership and operation of an electric generating facility to provide electrical services to tribe is an essential governmental function; IRS noted that municipalities have long owned, operated and financed municipal power utilities often on a tax-exempt basis and that the project was not distinguishable from public works projects such as roads, school, or governmental buildings which lack a profit-making objective; tribal law required the borrower to operate on a non-profit basis); Private Letter Ruling 200648024, December 1, 2006 (IRS applied this three part test to determine that construction of a tribal government building to house various administrative offices, emergency services, a cultural center, a museum, as well as infrastructure improvements, are essential governmental functions; IRS concluded that numerous State and local governments have owned and operated museums and financed them with tax-exempt bonds and infrastructure improvements did not become commercial by virtue of benefiting commercial operations). Compare Field Service Advice 200247012, August 12, 2002 (construction and operation of a golf course by an Indian tribe is not an “essential governmental function” because of the commercial nature of the golf course, notwithstanding the fact that its construction and operation are customary government functions).

¹¹¹ See generally Notice 2006-89, 2006-43 I.R.B. 772 (summarizes the changes made to section 414(d) under which plans established and maintained by Indian tribal governments and certain related entities are governmental plans and provides transition relief with respect to compliance); Notice 2007-67, 2007-35 I.R.B. 467 (extended transitional relief for plans of Indian tribal governments); see also Joint Committee on Taxation, *Technical Explanation of H.R. 4, the “Pension Protection Act of 2006,” as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006* (JCX-38-06), August 3, 2006.

¹¹² See H.R. Rep. No. 100-391, p. 1139 (1987). As discussed above, it is clear that tax-exempt bonds are permitted for Indian tribes that develop schools, roads, sewers, and government offices.

¹¹³ Sec. 141.

State volume limits on private activity bonds are based on State population or a minimum floor amount for small States. Tribal economic development bonds, which allow tribes to issue private activity and other bonds on generally the same basis as States, provide for a national volume limit of \$2 billion.

In December 2011, the Treasury Department published a study analyzing the tax treatment of tribal bonds.¹¹⁴ The study provided the following four recommendations for tax-exempt bonds issued by Indian tribes:

- For tax-exempt governmental bonds, Indian tribes should be treated the same as State and local governments, and the “essential governmental function” standard should be repealed;
- For private activity bonds, Indian tribes should have permanent authorization to issue such bonds for the types of projects and activities that are allowed for State and local governments, subject to an annual national volume cap tailored to the Indian Country (to be allocated amongst the tribal governments by the Treasury Department);
- Allow Indian tribes to use tax-exempt bonds to finance projects that are located on Indian reservations and also for projects that are both (a) contiguous to, within reasonable proximity of, or have a substantial connection to an Indian reservation, and (b) provide goods or services to resident populations of Indian reservations; and
- Retain restrictions against using tax-exempt financing for certain gaming projects, but gaming revenues may continue to be used as a source of payment or security for tax-exempt bonds that finance eligible projects. Some may argue that a volume limitation is appropriate for private activity bonds, but that the allocation of that volume limitation by the Treasury Department may not give tribal governments the flexibility to finance the projects the tribes have determined are best suited for their economic needs.

Neither volume limitations nor the elimination of restrictions on types of issuance addresses the difficulties some tribes have in accessing the bond market due to limited revenue sources and instances of poor credit quality.¹¹⁵ Thus, some may argue that more directly addressing the difficulties in accessing the bond market would be of more assistance to tribes.

¹¹⁴ Section 1402(b) of the American Recovery and Reinvestment Act of 2009, P.L. No. 111-5, directs the Secretary of the Treasury to conduct a study of the effects of this provision and to report to Congress on the results of the study and recommendations. As part of this report, the Treasury Department noted that the total amount of tax-exempt bonds (including tribal economic development bonds) issued by tribal governments during 2009 and 2010 was \$415.52 million. Department of Treasury, Report and Recommendations to Congress regarding Tribal Economic Development Bond provision under Section 7871 of the Internal Revenue Code, December 2011, Appendix A, available at <http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/Report%20to%20Congress%20-%20Tribal%20Economic%20Development%20Bonds%20-%20FINAL%2012.19.11.pdf>.

¹¹⁵ Although \$2 billion in tribal authority was made available for allocation when the tribal economic development program was initiated, very few bonds were ultimately issued in connection with the first allocations of volume cap. See <https://www.irs.gov/tax-exempt-bonds/published-volume-cap-limit-for-tribal-economic>.

B. Gaming Activities of Indian Tribes

1. Overview

Gaming activities have become a significant source of revenue for many Indian tribes. Indian gaming is a \$33.7 billion-per-year industry, with 247 Indian tribes operating 520 casinos of varying sizes within 29 of the States.¹¹⁶

Such activities generally are regulated under the Indian Gaming Regulatory Act (“IGRA”),¹¹⁷ which establishes a detailed regulatory, recordkeeping, and reporting regime for tribal gaming. Under the IGRA, the National Indian Gaming Commission (“NIGC”) has general oversight responsibility for Indian gaming.¹¹⁸

Currently, certain forms of online gambling are prohibited by State or Federal law.¹¹⁹ However, the Federal law that made sports gambling illegal, the Professional and Amateur

[development-bonds](#) (as of February 25, 2020). In Notice 2012-48, 2012-31 I.R.B. 102, July 30, 2012, the Treasury Department and the IRS solicited new applications for allocations of available volume cap (including amounts previously allocated and subsequently forfeited) and provided much more detailed guidance regarding the requirements for such applications and the method that would be used to allocate volume cap. In Notice 2015-83, 2015-51 I.R.B. 861, the Treasury Department and the IRS provided further clarification that tribal economic development bonds may be used in connection with a “draw-down” loan structure in which the lender advances funds for the loan on different dates. The 2015 notice allows additional time to use allocated volume cap for such bonds in certain cases, eliminating a potential obstacle that tribes previously may have faced when issuing such bonds. Nevertheless, some portion of the available volume cap remains unissued, although there is currently no portion of the \$2 billion limitation available for allocation.

¹¹⁶ Press Release, National Indian Gaming Commission, “2018 Indian Gaming Revenues of \$33.7 Billion Show a 4.1% Increase,” September 12, 2019, available at <https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase>.

¹¹⁷ 25 U.S.C. secs. 2701-2721.

¹¹⁸ This responsibility could extend to Tribal internet gambling in the future if any of the Congressional proposals to legalize internet gambling become law.

¹¹⁹ Gambling that is prohibited when conducted in person is ordinarily outlawed when conducted online. Some States ban Internet gambling explicitly while others rely upon their generally applicable gambling laws. There are many Federal gambling laws (including at least seven Federal criminal statutes), most enacted to prevent unwelcome intrusions of interstate or international gambling into States where the activity in question has been outlawed. See Charles Doyle, Congressional Research Service, *Internet Gambling: An Overview of Federal Criminal Law* (97-619), January 24, 2012, p.1, available at <http://www.crs.gov/Products/RL/PDF/97-619.pdf>.

Two Federal criminal statutes often mentioned in this context are the Wire Act (18 U.S.C. sec. 1084), which generally outlaws the use of interstate telephone facilities by gambling operators to transmit bets or gambling-related information, and the Unlawful Internet Gambling Enforcement Act (31 U.S.C. sec. 5361 et seq.), which generally makes financial institutions liable for processing certain illegal online gambling transactions. The Wire Act is most often cited as the basis for criminalizing online gambling operations. However, the Wire Act has never been successfully applied to any form of gambling aside from sports betting. For example, the United States Fifth Circuit Court of Appeal has concluded that the Wire Act does not apply to Internet casino gambling that does not involve sports betting. *In Re MasterCard International, Inc., Internet Gambling Litigation*, 132 F. Supp. 2d 468 (E.D. La. 2001), aff’d 313 F.3d 257 (5th Cir. 2002). Along the same lines, the Department of Justice has recently

Sports Protection Act (“PASPA”) was struck down by a 2018 Supreme Court case, *Murphy v. National Collegiate Athletic Association*.¹²⁰ The Court held that PASPA was unconstitutional because, rather than prohibiting individuals from engaging in sports gambling, PASPA made it unlawful for States to “sponsor, operate, advertise, promote, license, or authorize” sports gambling.¹²¹ The *Murphy* decision does not limit Congress’s ability to legislate on the issue of sports gambling in the future. However, absent such a Federal intervention, States are currently free to enact their own laws to allow or prohibit sports gambling.¹²²

Below is a discussion of several of these Federal tax issues that relate to Indian gaming, including: (1) the taxation of income from gaming operations; (2) the tax treatment of gambling winnings and losses, including withholding and reporting requirements; and (3) excise taxes on wagering activities.

2. Federal tax treatment of income from gaming operations

As discussed above, Indian tribes and wholly owned tribal corporations chartered under Federal law generally are not subject to income tax. Therefore, gaming income of such Indian tribes or tribal corporations generally is not taxable. A tribal corporation incorporated under State law may, however, be subject to tax on such income.

Under certain circumstances, the IGRA permits Indian tribes to make per capita distributions to members from revenue derived from certain gaming activities conducted or licensed by the Indian tribe. The IGRA explicitly subjects the receipt of such distributions to Federal income tax.¹²³ Such distributions also are subject to special withholding requirements.¹²⁴

3. Treatment of gambling winnings and losses

Gains from wagering transactions are includible in a taxpayer’s gross income. A taxpayer who itemizes deductions may deduct losses from wagering transactions, but only to the extent the taxpayer recognizes gains from such transactions on the taxpayer’s income tax

reversed a long-held position by stating that the only online gaming the Wire Act applies to is sports betting. Memorandum Opinion for the Assistant Attorney General, Criminal Division, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, “Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to sell Lottery Tickets to in-State Adults Violate the Wire Act, September 20, 2011.

¹²⁰ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

¹²¹ PASPA restrained State law-making power, therefore violating the States’ rights and the Constitution’s anticommandeering principles. *Ibid.*, p. 1470.

¹²² *Ibid.*, p. 1484-85 (noting that absent valid Federal law to the contrary, states are “free to act” to legalize and regulate sports gambling).

¹²³ 25 U.S.C. sec. 2710(b)(3)(D), Pub. L. No. 100-497 (October 17, 1988).

¹²⁴ Sec. 3402(r).

return.¹²⁵ Losses from wagering transactions include not only the actual costs of wagers incurred by the taxpayer, but also other deductible expenses incurred by the taxpayer in connection with the conduct of the taxpayer's gambling activity.¹²⁶ For example, the costs of traveling to or from a casino are losses from wagering transactions that may be deductible only to the extent of gains from wagering transactions.

Withholding requirements

The IGRA provides that Code provisions concerning the reporting and withholding of taxes with respect to gambling operations shall apply to Indian tribes in the same way as they apply to States.¹²⁷ In general, proceeds from a wagering transaction are subject to withholding if the proceeds exceed \$5,000 and are at least 300 times as large as the amount wagered.¹²⁸ In the case of sweepstakes, wagering pools (except for pari-mutuel pools), and lotteries, proceeds from a wager are subject to withholding if the proceeds exceed \$5,000, regardless of the odds of the wager.¹²⁹ In the case of pari-mutuel pools with respect to horse races, dog races, and jai alai, proceeds are subject to withholding if the proceeds exceed \$5,000 and are at least 300 times the amount wagered. In the case of poker tournaments in which the sponsor pays winnings out of a pool comprised of all participants' fees, the sponsor of the tournament is required to withhold on payments of winnings more than \$5,000, reduced by the amount of the participant's fee.¹³⁰

Winnings from bingo, keno, and slot machines are generally exempt from withholding.¹³¹

For withholding purposes, the proceeds from a wagering transaction are determined by subtracting the amount wagered from the amount received. Any non-monetary proceeds that are received are taken into account at fair market value.¹³² In the case of horse races, dog races, and jai alai, all wagers placed in a single pari-mutuel pool and represented on a single ticket are

¹²⁵ Sec. 165(d).

¹²⁶ Sec. 165(d), second sentence, in effect for taxable years beginning after December 31, 2017, and before January 1, 2026.

¹²⁷ 25 U.S.C. sec. 2719(d) ("The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter...in the same manner as such provisions apply to State gaming and wagering operations").

¹²⁸ Sec. 3402(q)(3)(A).

¹²⁹ Sec. 3402(q)(3)(B) and (C).

¹³⁰ Rev. Proc. 2007-57, 2007-36 I.R.B. 547.

¹³¹ Sec. 3402(q)(5). Gambling winnings, including winnings from bingo, keno, and slot machines, are subject to backup withholding under certain circumstances. Sec. 3406.

¹³² Sec. 3402(q)(4).

aggregated and treated as a single wager for purposes of determining the amount wagered.¹³³ Amounts paid with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager.¹³⁴

Amounts withheld are calculated using the third lowest rate of tax applicable under section 1(c).¹³⁵ This rule produces a withholding rate of 24 percent. The Code applies backup withholding (currently at 24 percent) to gambling winnings in such cases where the payee fails to furnish his taxpayer identification number (generally the taxpayer's Social Security number) or where the Secretary of the Treasury notifies the payor that the taxpayer identification number furnished by the payee is incorrect.¹³⁶

Information reporting requirements

Present law imposes information reporting requirements that enable the IRS to verify the correctness of taxpayers' returns. In general, every person engaged in a trade or business is required to file information returns for each calendar year for payments of \$600 or more made in the course of the payor's trade or business.¹³⁷ A gambling winning generally is reportable on Form W-2G only if the amount paid with respect to the wager is \$600 or more and the proceeds are at least 300 times the amount of the wager.¹³⁸

Special information reporting rules apply for purposes of winnings from bingo, keno, and slot machines. Specifically, winnings (not reduced by the wager) of \$1,200 or more from bingo or slot machines, and winnings (reduced by the wager) of \$1,500 or more from keno, are subject to information reporting on Form W-2G, regardless of the odds of the wager.¹³⁹ In certain instances, aggregate information reporting of bingo, keno, or slot machine winnings is allowed such that multiple reportable gambling winnings in a single day may be reported on a single information return.

Information reporting for poker tournaments is required on winnings subject to withholding, that is winnings of more than \$5,000.¹⁴⁰

¹³³ Treas. Reg. sec. 31-3402(q)-1(c)(1)(ii).

¹³⁴ Treas. Reg. sec. 31-3402(q)-1(c)(1)(iii)(A).

¹³⁵ Sec. 3402(q)(1).

¹³⁶ Sec. 3406.

¹³⁷ Sec. 6041.

¹³⁸ Treas. Reg. sec. 31.3406(g)-2(d)(3).

¹³⁹ Treas. Reg. sec. 1.6041-10(b)(1).

¹⁴⁰ Rev. Proc. 2007-57, 2007-36 I.R.B. 547.

4. Excise taxes on wagering

Although Federally recognized Indian tribes and wholly owned tribal corporations chartered under Federal law are exempt from income taxation, they are subject to Federal excise taxes on wagering. The wagering excise taxes are not included in the list of excise taxes for which tribal governments are treated as States,¹⁴¹ and the Supreme Court has ruled that Indian tribes are subject to these taxes even though States are exempt.¹⁴²

Two excise taxes generally apply to wagering activities of gaming establishments owned by Indian tribes (and non-Indians): a wagering tax and an occupational tax.

Tax on wagers

A tax of 0.25 percent is imposed on any wager authorized under the law of the State in which the wager is accepted and a tax of two percent of any wager that is not so authorized.¹⁴³ The amount of the wager is the amount risked by the bettor, including any charge or fee incident to the placing of the wager, rather than the amount which he or she stands to win.

Each person who is engaged in the business of accepting wagers is liable for the tax on all wagers placed with such person. In addition, each person who conducts any wagering pool or lottery is liable for the tax on all wagers placed in such pool or lottery. Certain wagering activities conducted by States (sweepstakes, wagering pools, or lotteries) are exempt from these excise taxes, as discussed below.¹⁴⁴ Also, as discussed below, wagers placed in a coin-operated device, such as a slot machine, and certain wagers placed with State-licensed pari-mutuel wagering enterprises also are exempt from the wagering tax.¹⁴⁵

The Code provides that the term “wager” is defined as any: (i) wager with respect to a sports event or contest placed with a person in the business of accepting such wagers, (ii) wager placed in a wagering pool with respect to a sports event or contest, if such pool is conducted for profit, and (iii) wager placed in a lottery conducted for profit.¹⁴⁶ The Treasury regulations provide that a sports event includes amateur, scholastic, or professional events, such as horse racing, auto racing, dog racing, boxing, wrestling, baseball, football, basketball, tennis, golf, and

¹⁴¹ Sec. 7871(a)(2).

¹⁴² *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (holding that the Indian Gambling Regulatory Act does not exempt tribal governments from Federal excise taxes on wagering in the same manner as States).

¹⁴³ Sec. 4401.

¹⁴⁴ Sec. 4402(3).

¹⁴⁵ Sec. 4402(1) and (2).

¹⁴⁶ Sec. 4421.

track meets.¹⁴⁷ A contest is any type of competition involving speed, skill, endurance, popularity, politics, strength, and appearances.

A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more bettors based on the outcome of a sports event or contest, or on a combination of such events or contests. An event is conducted for profit where a wagering pool or lottery is operated with the expectation of a profit in the form of increased sales, attendance, or other indirect benefits. Thus, a social bet would not be considered a wager for this purpose. For example, during the baseball All-Star game, a group of employees in an office each contribute \$5 for a chance to win the entire proceeds contributed to the pool. The winner is the person holding the ticket for the correct total number of home runs scored. This bet is not a wager subject to the excise tax because it is not conducted for profit.

The term “lottery” includes numbers games, policy games, and similar types of wagering.¹⁴⁸ The term “lottery” generally does not include any drawing conducted by a tax-exempt organization. Any scheme or method for the distribution of prizes among persons that have paid for a chance to win is a lottery subject to the wagering tax if it is conducted for profit. The term “lottery” includes types of wagering where the player pays to select a number, or combination of numbers, in which the operator of the lottery agrees to pay a prize or fixed sum of money if the selected number or combination of numbers appear. Pull-tabs, raffles, punch boards, and tip jar games generally are considered lotteries subject to the excise tax. Pull-tab games involve pulling tabs off the front of the game to determine if they match numbers or symbols on the back, similar to instant scratch-off games in State lotteries.

The term “lottery” excludes any game of a type where usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made in the presence of all persons placing wagers in such game.¹⁴⁹ Accordingly, games such as bingo or keno are not lotteries since such games are usually conducted in a manner where wagers are placed, winners are determined, and the prizes are distributed in the presence of the persons participating in the game. Similarly, card games, dice games, or games involving wheels of chance (such as roulette and carnival wheels) are also generally conducted in such manner and are, therefore, not subject to the wagering excise tax.

There are three exemptions to the taxes on wagering. Specifically, there is no wagering tax on (i) wagers placed with or in a wagering pool conducted by a pari-mutuel enterprise licensed under State law, (ii) wagers placed in certain coin-operated devices, or on any amount paid, in lieu of inserting a coin, token, or similar object to operate so-called “slot” machines and machines that are similar to slot machines, and (iii) wagers placed in a sweepstakes, wagering

¹⁴⁷ Treas. Reg. sec. 44.4421-1.

¹⁴⁸ Treas. Reg. sec. 44.4421-1(b).

¹⁴⁹ Treas. Reg. sec. 44.4421-1(b)(2).

pools, or lottery conducted by an agency of a State acting under State law where the wager is placed with the State agency, or with its authorized employees or agents.

Case law helps clarify the exemption for pari-mutuel enterprises.¹⁵⁰ In the case of horse racing, for example, the pari-mutuel system of betting intended to be exempt is a system where all of the money bet on one race, divided into three divisions commonly known as win, place, and show (or first, second and third), is pooled and divided among the patrons holding tickets on winning horses, according to the amounts of money bet on the winning horses. But before such division is made, the statutory percentage fixed by law as a deduction from the total amount bet is first deducted from the total amount bet. Thus, for example, in the case where a State has licensed an organization to conduct horse racing with pari-mutuel betting in conjunction with an agricultural fair, the wagers are not subject to excise tax. However, the exemption does not apply to a “race book operation” where bettors wager directly against the house rather than participate in a pool as described here.

For purposes of the second exemption, coin-operated devices are defined to include so-called “slot” machines that operate by means of the insertion of a coin, token, or similar object and that, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; and machines that are similar to slot machines described above and are operated without the insertion of a coin, token, or similar object.¹⁵¹ Examples of these machines include some pinball type machines that have the features and characteristics of a gaming device. These include so called crane/claw/digger devices, as well as a coin operated machine that displays a poker hand or delivers a ticket with a poker hand symbolized on it that entitles the player to a prize if the poker hand displayed by the machine or symbolized on the ticket constitutes a winning hand.

Occupational tax

An occupational tax of \$50 per year (\$500 in the case of persons accepting wagers not authorized by the law of the State in which the wager is accepted) is also imposed for each person liable for the wagering tax and for each person who is engaged in receiving wagers for or on behalf of a person liable to pay the wagering tax.¹⁵² In general, where multiple persons do business in co-partnership at any one place, only one occupational tax must be paid.¹⁵³

In some cases, Indian tribes and other entities may accept wagers that are not authorized under the law of the State in which the wagers are accepted. In these cases, the higher two-percent excise tax on wagers and \$500 occupational tax apply.

¹⁵⁰ *Gordon v. U.S.*, 1970-2 USTC (CCH) 15,945 (D. Nev. 1970).

¹⁵¹ Treas. Reg. sec. 44.4402.-1.

¹⁵² Sec. 4411.

¹⁵³ Sec. 4902.

Each person required to pay the occupational tax must register with the IRS. The registration must include: (1) the person's name and place of residence; (2) if such person is liable for the wagering excise tax, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who accepts wagers for such person or on his behalf; and (3) if he is engaged in accepting wagers for or on behalf of any person liable for the wagering excise tax, the name and place of residency of each such person.¹⁵⁴ The Code authorizes the Secretary to prescribe, by regulation, such supplemental information from persons required to register as may be needed to enforce the wagering provisions ("supplemental registration").¹⁵⁵ Pursuant to Treasury regulations, a supplemental registration must be filed if one of the following occurs: (1) the taxpayer changes either the business or home address; (2) the business of a deceased person who had paid the occupational tax is continued by the surviving spouse or child, executor, administrator, or other legal representative; (3) the business is continued by a receiver or trustee in bankruptcy; (4) the business is continued by an assignee for creditors; (5) one or more members withdraws from the firm or partnership; or (6) the corporate name is changed. A supplemental registration also must be filed each time an additional employee or agent is engaged to receive wagers.

In the event of a failure to register by a person required to pay the occupational tax a penalty of \$50 is imposed.¹⁵⁶ Any person who is liable for the occupational tax but does not pay such tax shall, in addition to being liable for such tax, be fined not less than \$1,000 and not more than \$5,000.¹⁵⁷

C. Economic Development Incentives

The Code has several provisions relating to fostering economic development in Indian country.

1. Accelerated depreciation for business property on Indian reservations

In general

Section 168(j) was enacted by the Omnibus Budget Reconciliation Act of 1993¹⁵⁸ to encourage businesses to establish or expand nongaming operations on Indian reservations by permitting accelerated depreciation for certain capital investment. The provision originally applied to property placed in service after December 31, 1993, and before January 1, 2004, but it

¹⁵⁴ Sec. 4412.

¹⁵⁵ Sec. 4412(c), Treas. Reg. sec. 44.4412-1(b)(2) and (b)(3); and Treas. Reg. secs. 44.4905-1 (relating to change of ownership) and 44.4905-2 (relating to change of address).

¹⁵⁶ Sec. 7272(a).

¹⁵⁷ Sec. 7262.

¹⁵⁸ Pub. L. No. 103-66.

has been extended 10 times, most recently by the Further Consolidated Appropriations Act, 2020.¹⁵⁹

Under section 168(j), depreciation deductions with respect to certain property used in connection with the conduct of a trade or business within an Indian reservation are determined using the following recovery periods:

3-year property	2 years
5-year property	3 years
7-year property	4 years
10-year property	6 years
15-year property	9 years
20-year property	12 years
Nonresidential real property	22 years ¹⁶⁰

“Qualified Indian reservation property” eligible for accelerated depreciation includes property described in the table above that is: (1) used by the taxpayer predominantly in the active conduct of a trade or business within an Indian reservation; (2) not used or located outside the reservation on a regular basis; (3) not acquired (directly or indirectly) by the taxpayer from a person who is related to the taxpayer;¹⁶¹ and (4) not property placed in service for purposes of conducting or housing certain gaming activities.¹⁶²

Certain “qualified infrastructure property” may be eligible for the accelerated depreciation even if located outside an Indian reservation, provided that the purpose of such

¹⁵⁹ Pub. L. No. 116-94. Prior extending legislation includes the Bipartisan Budget Act of 2018, Pub. L. No. 115-123; Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113; the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295; the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240; the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312; the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343; the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432; the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311; and the Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147.

¹⁶⁰ Section 168(j)(2) does not provide shorter recovery periods for water utility property, residential rental property, or railroad grading and tunnel bores.

¹⁶¹ For these purposes, whether a person is related to the taxpayer is determined under section 465(b)(3)(C).

¹⁶² Sec. 168(j)(4)(A).

property is to connect with qualified infrastructure property located within the reservation (*e.g.*, roads, power lines, water systems, railroad spurs, and communications facilities).¹⁶³

An “Indian reservation” means a reservation as defined in section 3(d) of the Indian Financing Act of 1974 (25 U.S.C. sec. 1452(d)),¹⁶⁴ or section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. sec. 1903(10)).¹⁶⁵ For purposes of the preceding sentence, section 3(d) is applied by treating “former Indian reservations in Oklahoma” as including only lands that are (1) within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior), and (2) recognized by such Secretary as an area eligible for trust land status under 25 C.F.R. Part 151 (as in effect on August 5, 1997).¹⁶⁶

The depreciation deduction allowed for regular tax purposes is also allowed for purposes of the alternative minimum tax.¹⁶⁷

The accelerated depreciation for qualified Indian reservation property is available with respect to property placed in service before January 1, 2021.¹⁶⁸ A taxpayer may annually make an irrevocable election out of section 168(j) on a class-by-class basis.¹⁶⁹

¹⁶³ Sec. 168(j)(4)(C).

¹⁶⁴ Pub. L. No. 93-262.

¹⁶⁵ Pub. L. No. 95-608.

¹⁶⁶ Sec. 168(j)(6). By the terms of section 168(j) as originally enacted, the term “Indian reservation” meant a reservation as defined in section 3(d) of the Indian Financing Act of 1974 (25 U.S.C. sec. 1452(d)), or section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. sec. 1903(10)). In 1997, a technical correction was made to clarify that for these purposes, section 3(d) of the Indian Financing Act of 1974 is applied by treating the term “former Indian reservations in Oklahoma” as including only lands which are within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior) and are recognized by such Secretary as eligible for trust land status under 25 CFR Part 151 (as in effect on August 5, 1997). See Title XVI, sec. 1604(c) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34.

¹⁶⁷ Sec. 168(j)(3). A technical correction was made in 2018 to clarify that if a taxpayer elects out of the otherwise applicable accelerated recovery periods for qualified Indian reservation property, no alternative minimum tax adjustment applies. See the Tax Technical Corrections Act of 2018, Pub. L. No. 115-141, Division U, sec. 101(e). Such technical correction was effective as if included in the Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, sec. 167. Note that the corporate alternative minimum tax was repealed for taxable years beginning after December 31, 2017. See an Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, sec. 2001, December 22, 2017, often referred to as the Tax Cuts and Jobs Act (“TCJA”).

¹⁶⁸ Sec. 168(j)(9).

¹⁶⁹ Sec. 168(j)(8). As part of the Protecting Americans from Tax Hikes Act of 2015, this provision was added to permit a taxpayer annually to elect out of section 168(j) on a class-by-class basis for qualified Indian reservation property placed in service in taxable years beginning after December 31, 2015. See Division Q of Pub. L. No. 114-113, sec. 167. This election may be for taxpayers with losses who are seeking to defer additional depreciation deductions, which is consistent with the electability out of other accelerated depreciation provisions.

Certain Indian reservation property may also be eligible for a special first-year depreciation deduction (commonly referred to as “bonus depreciation”). Specifically, a bonus depreciation deduction is allowed equal to 100 percent of the adjusted basis of qualified property acquired and placed in service after September 27, 2017, and before January 1, 2023.¹⁷⁰ The 100-percent allowance is phased down by 20 percent per calendar year for qualified property placed in service after December 31, 2022.¹⁷¹ Qualified property includes MACRS property with an applicable recovery period of 20 years or less, and therefore generally includes qualified Indian reservation property other than nonresidential real property.

For the period during which 100-percent bonus depreciation is available with respect to qualified property, including qualified property on Indian reservations, a geographic preference would only exist for qualified Indian reservation property that is not qualified property under the general bonus depreciation rules. That is, any extension of accelerated depreciation for business property on Indian reservations would provide a benefit relative to other geographic locations only for nonresidential real property. For other types of qualified Indian reservation property, treatment under the general bonus depreciation rules provides a greater increase in the after-tax return to investments on Indian reservations than does the treatment under the special rule for business property on Indian reservations.

2. Indian employment credit

The Indian employment credit allows a credit to employers against income tax liability for the first \$20,000 of qualified wages and qualified employee health insurance costs paid or incurred by the employer with respect to certain employees.¹⁷² The credit is equal to 20 percent of the excess of eligible employee qualified wages and health insurance costs incurred during the current year over the amount of such wages and costs incurred by the employer during 1993. The credit is an incremental credit, such that an employer’s current-year qualified wages and qualified employee health insurance costs (up to \$20,000 per employee) are eligible for the credit only to the extent that the sum of such costs exceeds the sum of comparable costs paid during 1993. No deduction is allowed for the portion of the wages equal to the amount of the credit.

Qualified wages means wages paid or incurred by an employer for services performed by a qualified employee. A qualified employee means any employee who is an enrolled member of an Indian tribe or the spouse of an enrolled member of an Indian tribe, who performs substantially all of the services within an Indian reservation, and whose principal place of abode while performing such services is on or near the reservation in which the services are performed. An “Indian reservation” is a reservation as defined in section 3(d) of the Indian

¹⁷⁰ Sec. 168(k). Prior to TCJA (*i.e.*, generally for property acquired and placed in service before September 28, 2017), the bonus depreciation allowance was 50 percent.

¹⁷¹ Sec. 168(k)(6).

¹⁷² Sec. 45A.

Financing Act of 1974¹⁷³ or section 4(10) of the Indian Child Welfare Act of 1978.¹⁷⁴ For purposes of the preceding sentence, section 3(d) is applied by treating “former Indian reservations in Oklahoma” as including only lands that are (1) within the jurisdictional area of an Oklahoma Indian tribe as determined by the Secretary of the Interior, and (2) recognized by such Secretary as an area eligible for trust land status under 25 C.F.R. Part 151 (as in effect on August 5, 1997).

An employee is not treated as a qualified employee for any taxable year of the employer if the total amount of wages paid or incurred by the employer with respect to such employee during the taxable year exceeds an amount determined at an annual rate of \$30,000 (which after adjustment for inflation is \$50,000 for tax years beginning after 2017).¹⁷⁵ In addition, an employee will not be treated as a qualified employee under certain specific circumstances, such as where the employee is related to the employer (in the case of an individual employer) or to one of the employer’s specified shareholders, owners, partners, grantors, beneficiaries, or fiduciaries, or is a dependent thereof.¹⁷⁶ Similarly, an employee will not be treated as a qualified employee where the employee has more than a five percent ownership interest in the employer. Finally, an employee will not be considered a qualified employee to the extent the employee’s services relate to gaming activities or are performed in a building housing such activities.

The credit does not apply to taxable years beginning after December 31, 2020.

3. Credit for the production of Indian coal facilities

In general, a credit is available for each ton of Indian coal produced from a qualified facility for during the 15-year period beginning January 1, 2006, and ending December 31, 2020.¹⁷⁷ Qualified Indian coal must be sold to an unrelated third party (either directly by the taxpayer or after sale or transfer to one or more related persons). The amount of the credit is \$2.00 per ton (adjusted for inflation; \$2.525 per ton for 2019).¹⁷⁸ A qualified Indian coal facility is a facility that produces coal from reserves that on June 14, 2005, were owned by a Federally recognized tribe of Indians or were held in trust by the United States for a tribe or its members.

¹⁷³ Pub. L. No. 93-262.

¹⁷⁴ Pub. L. No. 95-608.

¹⁷⁵ See Instructions for Form 8845 (Rev. January 2020), Indian employment credit. The credit expired for taxable years beginning after December 31, 2017 but was retroactively extended through 2020 by the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94 on December 20, 2019.

¹⁷⁶ Sec. 51(i)(1).

¹⁷⁷ Sec. 45(e)(10).

¹⁷⁸ *Ibid.* 85 Fed. Reg. 3486, January 21, 2020.

4. Empowerment zones

Empowerment zones generally provide tax incentives for businesses that locate within certain geographic areas designated by the Secretaries of the Departments of Housing and Urban Development (“HUD”) and Agriculture. The targeted areas are those that have a condition of pervasive poverty, high unemployment, and general economic distress, and that satisfy certain eligibility criteria, including specified poverty rates and geographic size limitations. Empowerment zone designations generally remain in effect through December 31, 2020.¹⁷⁹ The tax incentives include a Federal income tax credit for employers who hire qualifying employees, increased expensing of qualifying depreciable property, tax-exempt bond financing, and deferral of capital gains tax on the sale of qualified assets sold and replaced.

There have been three rounds of empowerment zone designations. The Omnibus Budget Reconciliation Act of 1993 authorized the designation of nine empowerment zones (“Round I empowerment zones”) and 95 enterprise communities to provide tax incentives for businesses to locate within targeted areas designated by the Secretaries of HUD and Agriculture.¹⁸⁰ The Taxpayer Relief Act of 1997 (“1997 Act”) authorized the designation of two additional Round I urban empowerment zones, and 20 additional empowerment zones (“Round II empowerment zones”). The Community Renewal Tax Relief Act of 2000 authorized a total of nine new empowerment zones (“Round III empowerment zones”). Indian reservations were not permitted to qualify for the Round I designations.¹⁸¹ However, Indian reservations could be nominated for Rounds II and III.¹⁸² Part of Jackson County and all of Bennett and Shannon Counties in South Dakota comprise the Oglala Sioux Tribe Empowerment Zone.¹⁸³

5. New markets tax credit

Background and scope

In general

The new markets tax credit (“NMTC”) is a geography-based tax credit program. Under section 45D(a), an investor may claim tax credits for a qualified equity investment in a qualified community development entity (“CDE”). The qualified CDE designates equity investments as qualified equity investments, rendering the investor eligible to receive tax credits. The qualified CDE can only designate up to an amount allocated to it by the Department of the Treasury’s

¹⁷⁹ Sec. 1391(d).

¹⁸⁰ The empowerment zone and enterprise community rules are found in sections 1391-1397 of the Code.

¹⁸¹ Sec. 1393(a)(4). The Omnibus Budget Reconciliation Act of 1993, which created empowerment zones, separately provided tax incentives for investment on Indian reservations. See sec. 168(j) (accelerated depreciation for property on Indian reservations) and sec. 45A (Indian employment credit), Pub. L. No. 103-66, sec. 13321 and sec. 13322, respectively.

¹⁸² Secs. 1391(g)(3)(E) and 1391(h)(3).

¹⁸³ Internal Revenue Service, Publication 954, *Tax Incentives for Distressed Communities* (January 2004), p. 4, available at <https://www.irs.gov/pub/irs-prior/p954--2004.pdf>.

Community Development Financial Institutions Fund (“CDFI Fund”). The CDFI Fund allocates amounts to qualified CDEs through a competitive application process.

The amount of NMTC is determined on a credit allowance date as an amount equal to the applicable percentage of the investment in the qualified CDE on that date. The applicable percentage is five percent for the first three years of the investment and six percent for the remaining four years, for a total credit of 39 percent over seven years. The credit allowance date is the date of the investment and the next six anniversary dates of the investment.

To continue to be eligible for tax credits, the taxpayer must continue to hold the qualified equity investment on the credit allowance date of each year. In other words, if the qualified equity investment ceases, or ceases to be qualified, the remaining tax credits are no longer allowed. The credits already claimed may also be subject to recapture if the CDE ceases to be qualified, if the proceeds cease to be used in a qualified manner, or if the taxpayer redeems its qualified equity investment.

Regulated financial institutions provide most of the equity for NMTC transactions. In addition to receiving the NMTC, regulated financial institutions often receive credit under the Community Reinvestment Act for investing in low-income Census tracts.

Substantially all the qualified equity investment must be used by the qualified CDE to provide investments in low-income communities through qualified active low-income community businesses.

Project structures

In a typical NMTC structure, an intermediary entity (the “investment fund LLC”) receives equity investments from investors (usually financial institutions) and debt from financial institutions and other sources. The investment fund LLC’s proceeds are then invested as an equity investment (referred to as a qualified equity investment) into a qualified CDE. The qualified CDE in turn makes a qualified low-income community investment in a qualified active low-income community business.

A qualified equity investment means stock (other than nonqualified preferred stock) in a corporation or a capital interest in a partnership that is acquired directly from a CDE for cash. A qualified equity investment also includes the investment of a subsequent purchaser if such investment was a qualified equity investment in the hands of the prior holder. A qualified CDE is any domestic corporation or partnership: (1) whose primary mission is serving or providing investment capital for low-income communities or low-income persons; (2) that maintains accountability to residents of low-income communities by their representation on any governing board of or any advisory board to the CDE; and (3) that is certified by the Secretary as being a qualified CDE. Substantially all the investment proceeds must be used by the CDE to make qualified low-income community investments. For this purpose, qualified low-income community investments include: (1) capital or equity investments in, or loans to, qualified low-income community businesses; (2) certain financial counseling and other services to businesses and residents in low-income communities; (3) the purchase from another CDE of any loan made

by such entity that is a qualified low-income community investment; or (4) an equity investment in, or loan to, another CDE.

Although equity investments in qualified active low-income community businesses qualify under the NMTC rules, generally such investments are in the form of loans. Equity investors that own a majority interest in a low-income community business can have their NMTC credits recaptured if the business violates the rules for qualification. However, Treasury regulations provide a “reasonable expectation” safe harbor for CDEs that lend to such a business; if the CDE “reasonably expects” that the rules are being satisfied, NMTC credits are not subject to recapture.¹⁸⁴

A qualified active low-income community business is defined as a business that satisfies, with respect to a taxable year, the following requirements: (1) at least 50 percent of the total gross income of the business is derived from the active conduct of trade or business activities in any low-income community; (2) a substantial portion of the tangible property of such business is used in a low-income community; (3) a substantial portion of the services performed for such business by its employees is performed in a low-income community; and (4) less than five percent of the average of the aggregate unadjusted bases of the property of such business is attributable to certain financial property and to certain collectibles. A business which operates a racetrack or other gambling facility cannot meet the definition of a qualified business and is therefore ineligible to receive allocations from the CDFI Fund.¹⁸⁵

Allocation process

The CDFI Fund annually allocates amounts to CDEs under a competitive application process.¹⁸⁶ The maximum amount that the CDFI Fund could allocate was \$3.5 billion per year for calendar years 2010 through 2019 and is \$5 billion for calendar year 2020. The NMTC expires on December 31, 2020.

For the 2018 allocation application round, the CDFI Fund received 214 applications requesting \$14.8 billion and awarded 73 CDEs \$3.5 billion in NMTCs¹⁸⁷ The successful CDE applicants focused on different types of investments and geographic areas, including financing projects ranging from large manufacturing plants to grocery and retail stores.

¹⁸⁴ Treas. Reg. sec. 1.45(D)-1(d)(6)(i).

¹⁸⁵ Treas. Reg. sec. 1.45D-1(d)(5)(iii)(B).

¹⁸⁶ As stated above, a CDE may designate investments as qualified equity investments up to the amount allocated from the CDFI Fund, and the investor holding the qualified equity investment may take a total credit of 39 percent on such investment over seven years.

¹⁸⁷ Information is available at <https://www.cdfifund.gov/news-events/Pages/news-detail.aspx?NewsID=346&Category=Press%20Releases>.

Applications for NMTCs are reviewed in two phases.¹⁸⁸ In Phase 1, applications are reviewed, scored, and ranked based on two criteria: business strategy and community outcomes. Applicants that meet the minimum scoring thresholds in Phase 1 advance to Phase 2 review and will be provided with “preliminary” awards, in descending order of final rank score, until the available allocation authority is fulfilled. Final rank scores are determined by evaluating management capacity, capitalization strategy, and other information regarding previous awards.

In evaluating and scoring the business strategy criteria in Phase 1, the CDFI Fund is looking for a CDE (1) to articulate, with specificity, its strategy to use an allocation and (2) to describe a long track record serving low-income communities and of providing products and services like those that it intends to provide through its investments. The CDE can earn “priority points” if it has a track record of five or more years of experience providing capital and/or technical assistance to disadvantaged businesses and communities. For the community outcomes criterion, the CDFI Fund considers the extent to which the CDE is working in particularly economically distressed or otherwise underserved communities, shows that its projected financing activities will generate demonstrable community outcomes, and demonstrates meaningful engagement with community stakeholders when vetting potential investments. In general, the highest ranked applications provide specifics concerning job creation, community development benefits, and a track record of providing capital and/or technical assistance to disadvantaged businesses and communities.

In Phase 2, management capacity is evaluated based on management experience in low-income communities, asset and risk management, and fulfilling government compliance requirements. Capitalization is evaluated based on an applicant’s track record of raising capital, investor commitments (or a strategy to secure such commitments), plan to pass along the benefits of the credit to the underlying businesses, and willingness to invest in amounts that exceed the minimum statutory requirements. Applicants with prior year allocations are evaluated on their effective use of prior-year allocations and whether they have substantiated a need for additional allocation authority.

NMTC and projects in Native American areas

Applicability of the NMTC for projects in Native American areas

The NMTC provisions require CDEs to serve or provide investment capital for low-income communities. CDEs formed to support Native American projects may satisfy this requirement in two ways.

¹⁸⁸ The 2019 NMTC program allocation application provides information on reviewer criteria throughout and is available at <https://www.cdfifund.gov/Documents/CY%202019%20NMTC%20Application%20-%20FINAL.pdf#search=2019%20NMTC%20program%20allocation%20application>. The term “infrastructure” is provided as a business type on page 58 of the application.

First, the CDE may invest in a project in a population census tract designated as a low-income community; a population census tract in a Native American area¹⁸⁹ can qualify as a “low-income community.” Generally, a low-income community is a population census tract with either (1) a poverty rate of at least 20 percent or (2) median family income which does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income.¹⁹⁰ In the case of a population census tract located within a high migration rural community,¹⁹¹ low-income is defined as a census tract that has either (1) a poverty rate of at least 20 percent or (2) median family income which does not exceed 85 percent of the greater of (i) metropolitan area median family income or (ii) statewide median family income.¹⁹² Finally, a population census tract with a population of less than 2,000 is treated as a low-income community for purposes of the NMTC if such tract is within an empowerment zone (the designation of which is in effect under section 1391) and is contiguous to one or more low-income communities.¹⁹³

Second, the CDE may invest in a project that serves a targeted population, as designated by the Secretary. Targeted populations are treated as low-income communities regardless of the composition of the population census tract or tracts in which the targeted population lives.¹⁹⁴ Certain Indian tribes are included in the list of groups that may be designated as targeted populations.¹⁹⁵

¹⁸⁹ “Native American area” is the term used by the U.S. Department of Treasury, CDFI Fund, Office of Financial Strategies and Research to describe land designated as Indian reservations by Federal or State authorities. These areas are composed of U.S. Census Bureau “American Indian/Alaska Native/Native Hawaiian Areas” available at <https://catalog.data.gov/dataset/tiger-line-shapefile-2018-nation-u-s-current-american-indian-alaska-native-native-hawaiian-area>.

¹⁹⁰ Sec. 45D(e)(1). For a non-metropolitan census tract, only the statewide median family income is considered.

¹⁹¹ A high migration rural county is any county that, during the 20-year period ending with the year in which the most recent census was conducted, has a net out-migration of inhabitants from the county of at least 10 percent of the population of the county at the beginning of such period. Sec. 45D(e)(5)(A).

¹⁹² Sec. 45D(e)(5)(A).

¹⁹³ Sec. 45D(e)(4).

¹⁹⁴ Sec. 45D(e)(2).

¹⁹⁵ Sec. 45D(e)(2); 12 U.S.C. sec. 4702(20); see also Treas. Reg. 1.45D-1(d)(9). An Indian tribe may be designated as a targeted population if the tribe are (i) low income persons or (ii) otherwise lack adequate access to loans or equity investments. 12 U.S.C. sec. 4702(20). A targeted population is “low-income” for this purpose if (1) in the case of a metropolitan area, the group’s median family income does not exceed 80 percent of the area median family income or (2) in the case of a non-metropolitan area, the group’s median family income does not exceed 80 percent of either area median family income or statewide nonmetropolitan area median family income. 12 U.S.C. sec. 4702(17); Treas. Reg. sec. 1.45D-1(d)(9).

Use of the NMTC for projects in Native American areas

Since inception of the credit, the CDFI Fund has allocated a total of \$57.5 billion to CDEs and CDEs have disbursed a total of \$48.3 billion in qualified equity investment proceeds to projects. The CDFI Fund reports data for all projects (5,799 qualified active low-income community businesses) between fiscal year 2003 and 2017 by State and zip code.¹⁹⁶ The CDFI has also prepared a short report on their dataset which includes some geographic breakdowns (metro/non-metro, levels of economic distress, etc.).¹⁹⁷

Over the course of the program, forty-five CDEs have loaned or invested approximately \$1 billion to businesses operating in Native American areas in 22 States. Five of these CDEs were either certified Native-American CDFIs (meaning 50 percent of its projects serve Native American communities) or Tribal Entities, a self-selected designation that is not defined in the NMTC application. These five CDEs loaned or invested 15 percent of the approximate \$1 billion.¹⁹⁸ The \$1 billion represents approximately 2.1 percent of the \$48.3 billion of total qualified equity investment proceeds disbursed by CDEs under the NMTC program. Over half of the total investment in Native American areas has been for projects in Oklahoma, Alaska, and Arizona.

The map below shows the location of NMTC projects in Native American areas. Table 1 shows NMTC investments in Native American areas by State. Table 2 shows NMTC investments in specific Native American areas.¹⁹⁹ Table 3 shows NMTC investments by type of project.

¹⁹⁶ The information is available at https://www.cdfifund.gov/Documents/2019%20NMTC%20Public%20Data%20Release_FY_17.xlsx.

¹⁹⁷ The report is available at https://www.cdfifund.gov/Documents/2019%20NMTC%20Public%20Data%20Release_FY_17-comments%20incorporated_BL%20Edits%20incorporated_Final.pdf.

¹⁹⁸ Data provided by U.S. Department of Treasury, CDFI Fund, Office of Financial Strategies and Research.

¹⁹⁹ Data and map provided by U.S. Department of Treasury, CDFI Fund, Office of Financial Strategies and Research.

Location of NMTC Projects in Native American Areas

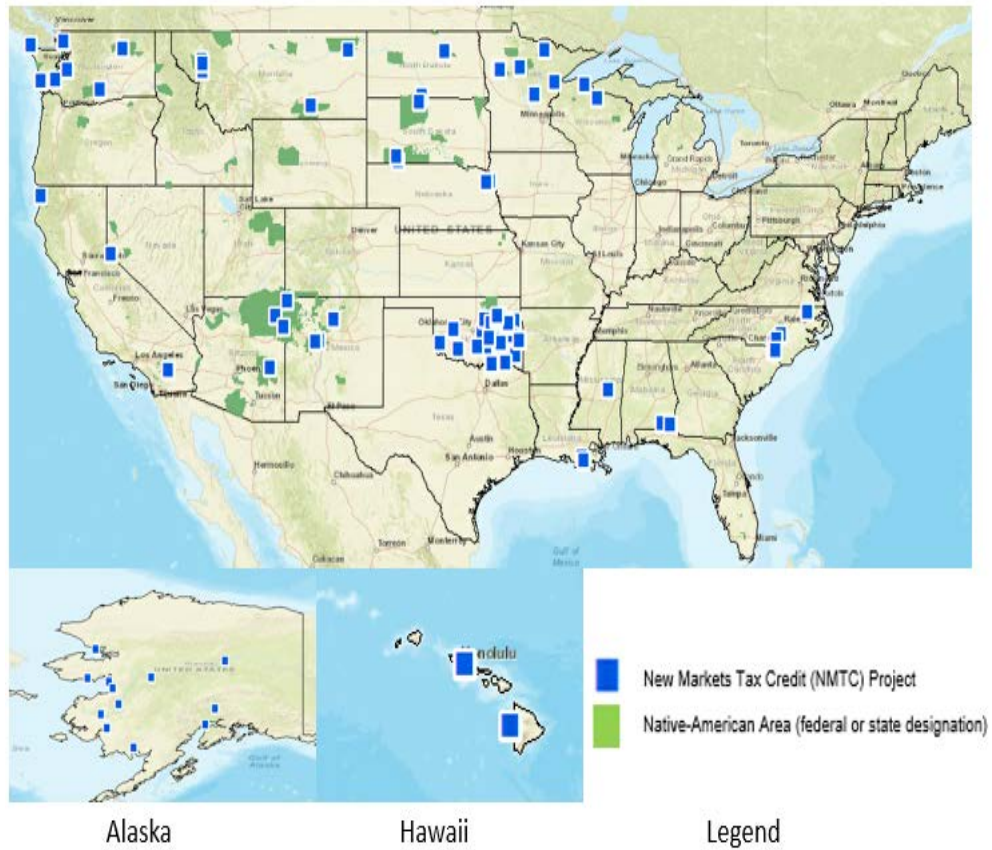


Table 1.-NMTC Investments in Native American Areas by State

State	Investment Amount	Percentage of Total Investments
Alaska	\$192,365,719	18.64
Arizona	\$91,014,000	8.82
California	\$334,000	0.03
Hawaii	\$36,311,500	3.52
Illinois	\$799,200	0.08
Kansas	\$8,640,000	0.84
Kentucky	\$585,362	0.06
Michigan	\$13,000,000	1.26
Minnesota	\$40,957,663	3.97
Mississippi	\$48,316,931	4.68
Montana	\$32,900,700	3.19
North Dakota	\$9,500,000	0.92
Nebraska	\$13,286,000	1.29
New Mexico	\$70,346,000	6.82
Nevada	\$10,500,000	1.02
Oklahoma	\$340,819,050	33.03
Oregon	\$2,855,000	0.28
Rhode Island	\$5,270,000	0.51
South Dakota	\$51,090,000	4.95
Texas	\$1,071,925	0.10
Washington	\$40,944,070	3.97
Wisconsin	\$20,874,000	2.02
Grand Total	\$1,031,781,120	100.00

Table 2.—NMTC Investments in Specific Native American Areas

Native American Area	State	Investment Amount
Alaska Native Village	Alaska	\$96,648,091
Alatna Alaska Native Village	Alaska	\$7,644,000
Ambler Alaska Native Village	Alaska	\$8,185,400
Bad River Reservation	Wisconsin	\$9,604,000
Bois Forte Reservation	Minnesota	\$12,805,663
Chehalis Reservation	Washington	\$3,000,000
Cherokee Oklahoma Statistical Area	Oklahoma	\$25,000,000
Chickasaw Oklahoma Statistical Area	Oklahoma	\$39,128,000
Choctaw Oklahoma Statistical Area	Oklahoma	\$117,447,000
Colville Reservation	Washington	\$13,293,750
Creek Oklahoma Statistical Area	Oklahoma	\$138,053,050
Crow Reservation	Montana	\$8,624,000
Dresslerville Colony	Nevada	\$10,500,000
Ekwok Alaska Native Village	Alaska	\$300,000
Flathead Reservation	Montana	\$17,172,700
Fond du Lac Reservation	Minnesota	\$5,145,000
Fort Apache Reservation	Arizona	\$41,600,000
Fort Peck Indian Reservation	Montana	\$7,104,000
Grayling Alaska Native Village	Alaska	\$6,660,155
Kalaupapa Hawaiian Home Land	Hawaii	\$7,448,000
Iowa Oklahoma Statistical Area	Oklahoma	\$1,900,000
Kalispel Reservation	Washington	\$10,490,000
Kealakehe Hawaiian Home Land	Hawaii	\$21,807,500
Kiowa-Comanche-Apache-Fort Sill Apache Oklahoma Statistical Area	Oklahoma	\$15,000,000
Kotzebue Alaska Native Village	Alaska	\$17,460,995
Koyuk Alaska Native Village	Alaska	\$22,629,578
Lac Du Flambeau Reservation	Wisconsin	\$11,270,000
Lac Vieux Desert Reservation	Michigan	\$13,000,000
Laguna Pueblo	New Mexico	\$46,924,000
Leech Lake Reservation	Minnesota	\$1,007,000
Makah Indian Reservation	Washington	\$7,620,320
Mille Lacs Reservation	Minnesota	\$11,520,000
Mississippi Choctaw Reservation	Mississippi	\$35,347,931
Navajo Nation Reservation	New Mexico, Arizona, Utah	\$28,316,000

Native American Area	State	Investment Amount
Pascua Pueblo Yaqui Off-Reservation Trust Land	Arizona	\$8,700,000
Pine Ridge Reservation	South Dakota	\$42,160,000
Santa Clara Pueblo	New Mexico	\$1,7150,000
Seminole Oklahoma Statistical Area	Oklahoma	\$4,291,000
Shoalwater Bay Indian Reservation	Washington	\$1,600,000
Standing Rock Reservation	North Dakota	\$18,430,000
Tanana Alaska Native Village	Alaska	\$1,200,000
Tuntutuliak Alaska Native Village	Alaska	\$30,637,500
Tyonek Alaska Native Village	Alaska	\$1,000,000
Waimanalo Hawaiian Home Land	Hawaii	\$7,056,000
White Earth Reservation	Minnesota	\$10,400,000
Winnebago Reservation	Nebraska	\$13,286,000
Other		\$56,214,487
Grand Total		\$1,031,781,120

Table 3.—NMTC Investments in Native American Areas by Type of Project

Type of Project	Investment Amount
Wireless Telecommunications Carriers (except Satellite)	\$116,523,585
Outpatient Care Centers	\$93,937,550
Tourism and Traveler Accommodation	\$73,774,002
Executive, Legislative, and Other General Government Support	\$71,098,413
Water, Sewage and Other Systems	\$53,104,000
Iron and Steel Mills and Ferroalloy Manufacturing	\$50,735,000
Elementary and Secondary Schools	\$42,160,000
Sawmills and Wood Preservation	\$41,600,000
Seafood Product Preparation and Packaging	\$40,300,000
General Medical and Surgical Hospitals	\$37,969,000
Child Day Care Services	\$33,663,000
Mixed Use	\$30,413,291
Other Amusement and Recreation Industries	\$28,471,500
Offices of Physicians	\$20,352,500
Building Material and Supplies Dealers	\$18,215,000
Nursing Care Facilities (Skilled Nursing Facilities)	\$17,460,995
Offices of Dentists	\$14,870,000
Aerospace Product and Parts Manufacturing	\$14,600,000
Social Advocacy Organizations	\$13,950,000
Grocery Stores	\$13,298,133
Museums, Historical Sites, and Similar Institutions	\$12,304,037
Junior Colleges	\$12,124,000
Commercial and Service Industry Machinery Manufacturing	\$12,000,000
Warehousing and Storage	\$11,930,000
Radio and Television Broadcasting	\$11,743,463
Gasoline Stations	\$10,500,000
CDE	\$10,000,000
Wired Telecommunications Carriers	\$9,500,000
Promoters of Performing Arts, Sports, and Similar Events	\$8,640,000
Motor Vehicle Parts Manufacturing	\$8,100,000
Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly	\$7,644,000
Support Activities for Water Transportation	\$7,620,320
Cut and Sew Apparel Manufacturing	\$7,380,000
Utility System Construction	\$7,154,000

Type of Project	Investment Amount
Employment Services	\$7,056,000
Other Food Manufacturing	\$6,650,000
Electric Power Generation, Transmission and Distribution	\$6,272,000
Industrial Machinery Manufacturing	\$6,000,000
Motor Vehicle Manufacturing	\$6,000,000
Office	\$5,270,000
Other Information Services	\$5,250,000
Administration of Housing Programs, Urban Planning, and Community Development	\$5,061,506
Other Fabricated Metal Product Manufacturing	\$3,750,000
RV (Recreational Vehicle) Parks and Recreational Camps	\$3,405,000
Other Wood Product Manufacturing	\$3,350,000
Nonscheduled Air Transportation	\$2,120,000
Animal Food Manufacturing	\$1,900,000
Retail	\$1,691,925
Nonresidential Building Construction	\$1,200,000
Support Activities for Mining	\$1,000,000
Residential	\$799,200
Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing	\$541,000
Health and Personal Care Stores	\$457,200
Natural Gas Distribution	\$337,500
Accounting, Tax Preparation, Bookkeeping, and Payroll Services	\$334,000
Management, Scientific, and Technical Consulting Services	\$200,000
Grand Total	\$1,031,781,120

6. Qualified opportunity zones

Background and scope

The qualified opportunity zone rules provide the tax benefits of deferral and exclusion to taxpayers who reinvest certain gain as equity in a qualified opportunity fund (“QOF”). QOFs are investment vehicles organized for the purpose of investing in one or more qualified opportunity zones. A qualified opportunity zone generally is a census tract that is a low-income community (or, in certain cases, a census tract contiguous with a low-income community) that has received a designation as a qualified opportunity zone by the State government of the State in which the tract is located.²⁰⁰

²⁰⁰ See sec. 1400Z-1(a), 1400Z-1(e).

A QOF must invest in qualified opportunity zone. Specifically, 90 percent of a QOF's assets, measured by value, must be business property ("QOZBP"), including interests in a partnership or corporation which owns or leases QOZBP and otherwise qualifies as a qualified opportunity zone business ("QOZB").²⁰¹

QOZBP, other than interests in QOFZBs, is tangible property used in either the trade or business of a QOF or a qualified opportunity zone business. Substantially all, defined for such purposes at 70 percent, of the use of this tangible property must occur within the qualified opportunity zone.

Qualified opportunity zones and investment in Native American areas

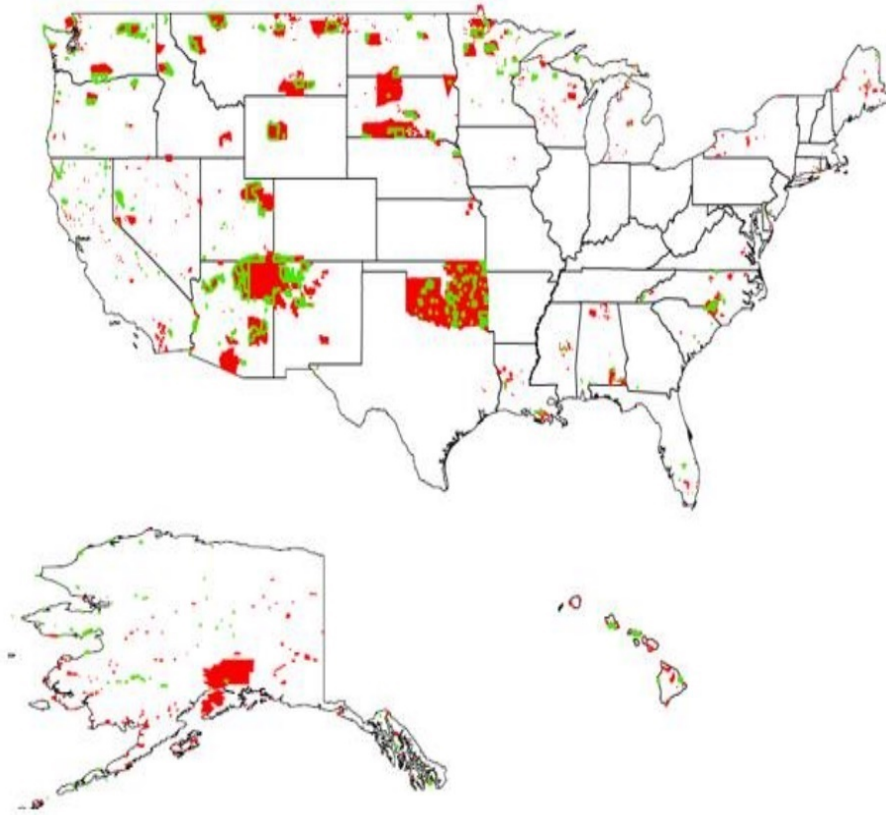
The qualified opportunity zone rules may be used for investments in Native American areas. Of the total 8,762 qualified opportunity zones that have been designated, 326, or 3.7 percent, overlap at least partially with Native-American areas.²⁰² Land and other tangible assets held by a QOF in these areas may meet the definition of QOZBP. Additionally, a corporation or a partnership organized under the law of a Federally recognized Indian tribe can be a QOF or a qualified opportunity zone business.²⁰³

²⁰¹ See sec. 1400Z-2(d).

²⁰² Data and map provided by U.S. Department of the Treasury, CDFI Fund, Office of Financial Strategies and Research.

²⁰³ Treas. Reg. sec. 1.1400Z2(d)-1(a)(1). Regardless of the taxable status of that entity, an entity serving as a QOF or operating as a qualified opportunity zone business is subject to the penalty in sec. 1400Z-2(f) for failure to maintain the investment standards of sec. 1400Z-2(d). See Treas. Reg. sec. 1.1400Z2(f)-1(a) and section I.A.1. above.

Location of Opportunity Zones in Native American Areas



However, projects in Native American areas face several hurdles that make investment in Native American areas under these rules difficult.

One such consideration is the ability of QOFs or qualified opportunity zone businesses to acquire land from Indian tribes or Indian tribal governments for projects. In general, tribes may not sell land to investors. A QOF or qualified opportunity zone business may, however, be able to lease land from a tribe; however, the process for leasing tribal lands may be cumbersome.²⁰⁴ In addition, property leased by a qualified opportunity zone business is subject to complicated statutory and regulatory rules.²⁰⁵

²⁰⁴ Much of the land in Native American areas is owned by the Federal government and held in trust for the tribes (“Indian trust land”). However, Tribes may lease Indian trust lands, but the Secretary of the Interior may be required to approve individual transactions. 25 U.S.C. sec. 415(a). However, Tribes may lease Indian trust lands, but the Secretary of the Interior may be required to approve individual transactions. While the Secretary of the Interior is required to review business leases within 60 days of receipt of the lease and supporting documents, 25 C.F.R. sec. 162.440, approval of a lease of Indian trust land constitutes “major federal action” under the National Environmental Policy Act (“NEPA”). *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). Therefore, an environmental impact statement must be prepared as part of these lease applications. 42 U.S.C. sec. 4332(C).

²⁰⁵ Sec. 1400Z-2(d)(3)(A)(i); Treas. Reg. sec. 1.1400Z2(d)-1(b)(2).

In addition to the leasing issues mentioned above, other factors may also influence whether investors decide to take advantage of the qualified opportunity zone rules to do projects in Native American areas. For example, Native American tribes enjoy sovereign immunity. This immunity extends to a tribe's commercial activities whether conducted on or off a reservation. Absent a waiver of that immunity by the tribe itself or by Congress, tribes cannot be sued for money damages or injunctive relief.²⁰⁶ Furthermore, investors in Native American areas may be subjecting themselves to both tribal law and the jurisdiction of tribal courts.²⁰⁷ These considerations and other are likely to increase the transaction costs involved in dealing with tribes.

7. Low-income housing tax credit

In general

The low-income housing tax credit is provided to States annually and subsequently allocated to owners of certain qualified low-income residential rental property by State or local housing credit agencies.²⁰⁸ Generally, the low-income housing tax credit may be claimed over a 10-year period after a low-income building is placed in service.

A low-income housing tax credit is allowable only if the owner of a qualified building receives a housing credit allocation from the State or local housing credit agency. The aggregate credit authority provided to each State for calendar year 2020 is the greater of \$3,217,500 or \$2.8125 per resident.²⁰⁹

Native American areas

Present law does not require housing credit agencies to allocate credits to projects located in Native American areas.²¹⁰ However, agencies are allowed to give preference in allocating

²⁰⁶ Felix S. Cohen, *Cohen's Handbook of Federal Indian Law 2012 Edition*, LexisNexis, 2012, including 2019 supplement, pp. 1327–28.

²⁰⁷ *Ibid.*, p. 1325.

²⁰⁸ For a list of State and local housing credit agencies (as compiled by the U.S. Department of Housing and Urban Development), see U.S. Department of Housing and Urban Development, *LIHTC Database: List of LIHTC-Allocating Agencies Providing Data for the LIHTC Database and the Web Addresses*, available at https://lihtc.huduser.gov/agency_list.htm.

²⁰⁹ See Rev. Proc. 2019-44, 2019-47 I.R.B. 1093, November 18, 2019. Sec. 42(h)(3)(I) provides for an increase in the State housing credit ceiling for 2018, 2019, 2020, and 2021. In 2019, the most recent year for which the IRS has issued resident population estimates for purposes of the low-income housing tax credit, the small population States were Alaska, Delaware, the District of Columbia, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. See Notice 2019-19, 2019-12 I.R.B. 907, March 19, 2019.

²¹⁰ For the purposes of this section, the term “Native American area” refers to Federal- and State-designated Native American areas, off-reservation trust lands, Hawaiian home lands, State-designated tribal statistical areas, tribal designated statistical areas, Oklahoma tribal statistical areas, and Alaskan Native village statistical areas. See Census Bureau, *Class Codes and Definitions*, available at <https://www.census.gov/library/reference/code-lists/class-codes.html>; Census Bureau, *TIGER/Line Shapefile, 2017*,

credits to projects serving the lowest-income tenants and to set project selection criteria that reflect the housing priorities of the agency and are appropriate to local conditions.²¹¹ Under this authority, several States, including California,²¹² Arizona,²¹³ and North Dakota,²¹⁴ have set explicit set-asides for projects that are located in certain Native American areas.²¹⁵ Other States, such as Minnesota²¹⁶ and South Dakota,²¹⁷ give preference or award additional points in their project selection process to projects located in certain Native American areas.²¹⁸ A 2018 study by the Federal Home Loan Mortgage Corporation estimated that Native American areas contained a total of 2,151 properties currently receiving low-income housing tax credits, supporting 84,400 subsidized units.²¹⁹ A separate analysis using U.S. Department of Housing and Urban Development data shows that subsidized units in Native American areas are concentrated in a small number of States, with over 80 percent of units located in Oklahoma, North Carolina, Washington, Alabama, and Alaska.²²⁰ The map below shows the distribution of subsidized units in Native American areas, by county, in 2017.

nation, U.S., *Current American Indian/Alaska Native/Native Hawaiian Areas National (AIANNH) National*, October 17, 2019, available at <https://catalog.data.gov/dataset/tiger-line-shapefile-2017-nation-u-s-current-american-indian-alaska-native-native-hawaiian-area>.

²¹¹ Sec. 42(m)(1).

²¹² California State Treasurer's Office, *CTCAC Allocation Process for Set Asides and Geographic Regions*, available at <https://www.treasurer.ca.gov/ctcac/2019-credit-estimates.pdf>.

²¹³ Arizona Department of Housing, *2018 Qualified Allocation Plan*, available at <https://housing.az.gov/sites/default/files/documents/files/2018-QAP-Final.pdf>, p. 36.

²¹⁴ North Dakota Housing Finance Agency, *2020 Low-Income Housing Tax Credit Program Allocation Plan*, available at <https://www.ndhfa.org/Development/LIHTC/2020LIHTCQAP.pdf>, p. 20.

²¹⁵ See Federal Home Loan Mortgage Corporation, *Spotlight on Underserved Markets: LIHTC in Indian Areas*, available at https://mf.freddiemac.com/docs/LIHTC_in_Indian_Areas.pdf, p. 19.

²¹⁶ Minnesota Housing, *State of Minnesota Housing Tax Credit 2021 Qualified Allocation Plan (QAP)*, October 2019, available at http://www.mnhousing.gov/sites/Satellite?blobcol=urldata&blobheadname1=Content-Type&blobheadname2=Content-Disposition&blobheadname3=MDT-Type&blobheadvalue1=application%2Fpdf&blobheadvalue2=attachment%3B+filename%3DMHFA_216814.pdf&blobheadvalue3=abinary%3B+charset%3DUTF-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1533150628785&ssbinary=true.

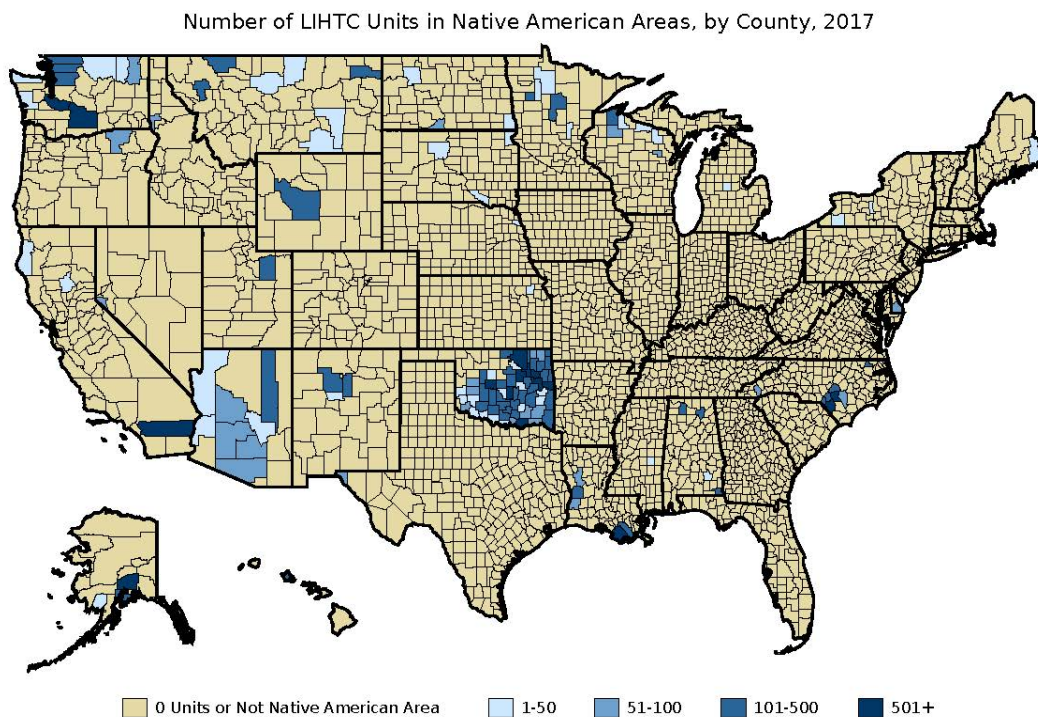
²¹⁷ South Dakota Housing Development Authority, *Amended 2018-2019 Qualified Allocation Plan*, July 1, 2019, available at <https://www.sdhda.org/images/docu/housing-development/QAP-2018-2019-Amended.pdf>.

²¹⁸ Federal Home Loan Mortgage Corporation, *Spotlight on Underserved Markets: LIHTC in Indian Areas*, available at https://mf.freddiemac.com/docs/LIHTC_in_Indian_Areas.pdf, p. 19.

²¹⁹ *Ibid.*, p. 12-13.

²²⁰ See section III.C. on the distribution of Native American and Alaskan Native populations in the United States.

Depending on the rules of the particular State or locality, a Native American tribe may be involved in a low-income housing tax credit project in one of several ways. For example, an applicant for low-income housing tax credits may be required to obtain legal authorization and permits from a tribal government for a project that is located on land controlled by the tribe.²²¹ Tribal governments, tribally designated housing entities, or other related entities may also be more directly involved, and serve as the lenders,²²² developers,²²³ or property managers²²⁴ for low-income housing tax credit projects in various States.



Source: U.S. Department of Housing and Urban Development, 2017.

²²¹ See, e.g., Arizona Department of Housing, *2018 Qualified Allocation Plan*, available at <https://housing.az.gov/sites/default/files/documents/files/2018-QAP-Final.pdf>, p. 53.

²²² *Ibid.*, p. 76.

²²³ See, e.g., Federal Reserve Bank of Minneapolis, *Case Study: Low-Income Housing Tax Credit*, “Santo Domingo Tribal Housing Authority, Santo Domingo Pueblo, New Mexico,” available at <https://www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-homeownership/case-study-low-income-housing-tax-credit>.

²²⁴ *Ibid.*

III. BACKGROUND STATISTICS ON NATIVE AMERICANS

A. Overview

Although Native Americans make up less than one percent of the U.S. population, they make up a larger percentage of the population in States in the West, Southwest, Northern Plains and Alaska. Native Americans are unique as an ethnic group as most tribes have Federally designated lands, or reservations. Thirty percent of Native Americans live on reservations.²²⁵

Native Americans²²⁶ generally earn lower income and have higher unemployment rates than other households in the United States. The average unemployment rate among Native Americans was 10.2 percent in 2017.²²⁷ In 2017, the per capita income of Native American households was \$17,584; this number is 43 percent lower than the per capita income of the overall U.S. population, \$31,106.²²⁸

B. Proportion of Native Americans in the U.S. Population

In 2010, American Indians and Alaskan Natives constituted 2.9 million people in the United States. However, another 2.3 million Americans affirm they are both Native American and another race, making a total of 5.2 million Americans (1.4 percent) who identify as all or part Native American.²²⁹ Excluding Pacific Islanders, Native Americans are the smallest minority group recorded by the U.S. Census.

Most Native Americans are affiliated with one or more specific Federally recognized Indian tribes; as of 2010, Navajo (286,627), Cherokee (284,229), and Sioux (112,102) are the most populous Indian tribes in the United States.²³⁰ On the other end of the spectrum, there are also some very small Indian tribes with fewer than 100 members. Figure 1 aggregates all Indian tribes that make up less than four percent of the total Native American population into one group, including all Alaskan Native tribes such as the Eskimo, Aleut, and Inuit. Tribal affiliations may be important, in part, because Federal and tribal benefits are often linked to formal tribal membership.²³¹

²²⁵ Census Bureau (2012), *The American Indian and Alaska Native Populations by Selected Tribal Groupings: 2010*. Detailed Tables B02001 and B02010.

²²⁶ In this section, the term “Native Americans” is used interchangeably with “Indians,” “American Indians,” and also “American Indians and Alaskan Natives.” For the purposes of this analysis, the term “Native Americans” refers to those who self-identify as “American Indian and Alaskan Native” in the census, and who do not identify as any other race.

²²⁷ Census Bureau, *American Community Survey Data*, 2017.

²²⁸ Census Bureau, *American Community Survey Data*, 2017.

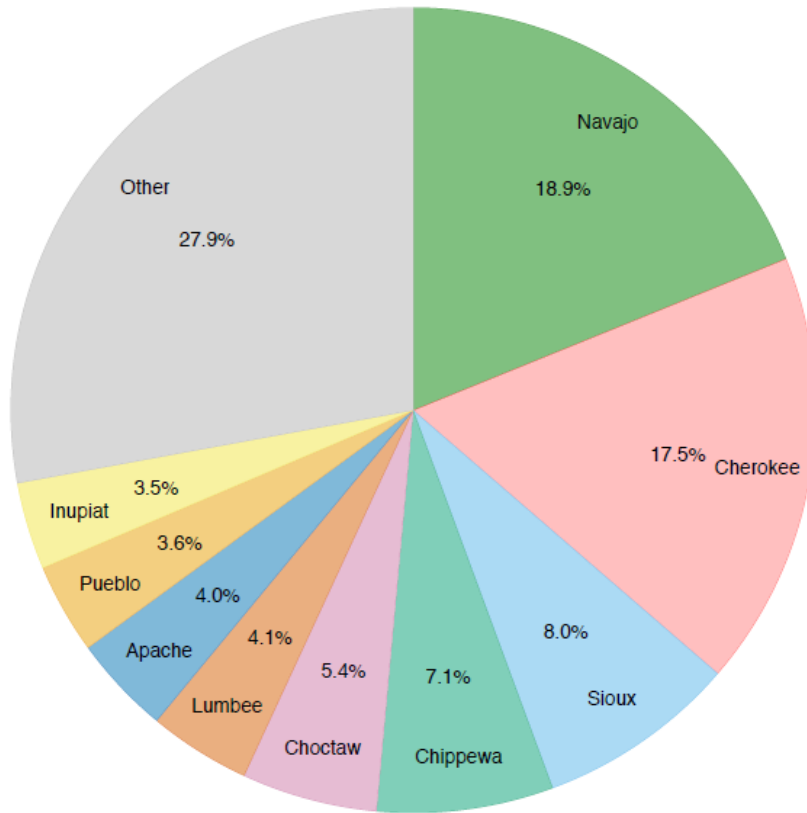
²²⁹ Census Bureau (January 2012), *The American Indian and Alaska Native Population: 2010*, p. 3.

²³⁰ Census Bureau (January 2012), *The American Indian and Alaska Native Population: 2010*, p. 17.

²³¹ In spite of this, 19.1 percent of Native Americans did not specify their Indian tribe in the 2010 Census.

Figure 1, below, displays the percentage of Native Americans by tribal affiliation. The Navajo and Cherokee are the two largest single Indian tribes, but the plurality of Native Americans are members of much smaller Indian tribes or are unaffiliated with any Indian tribe (“Other”).

Figure 1.–Percentage Distribution by Tribal Affiliation in 2010



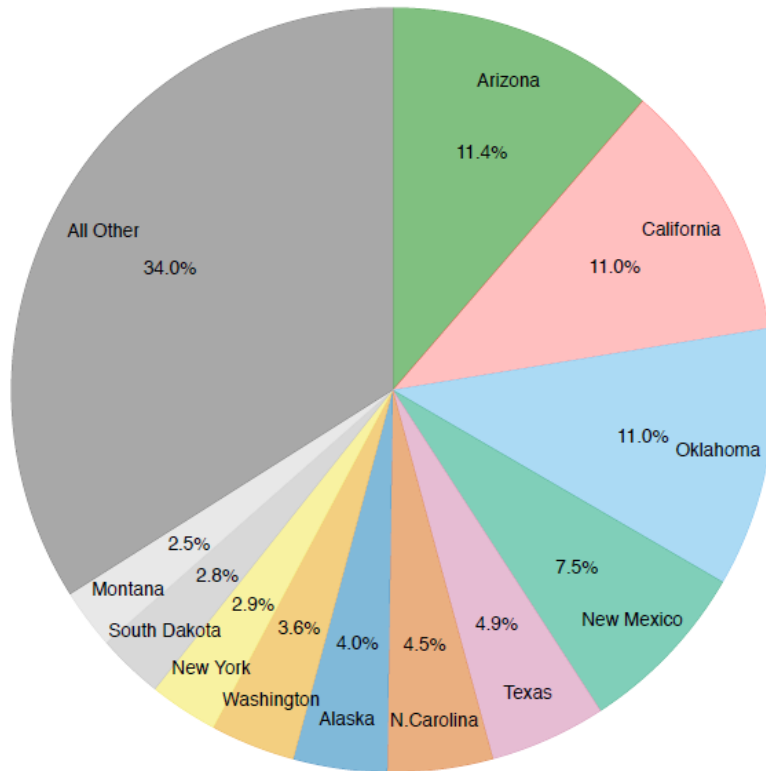
Source: U.S. Census, 2010 Decennial Census. Data does not include Native Hawaiians.

C. Geographic Distribution of Native Americans in the United States

Figure 2 shows the State of residence of the total U.S. Native American population. Approximately 11 percent of all Native Americans live in California; however, Native Americans comprise less than one percent of that State's total population. Only four percent of the country's Native Americans live in Alaska, but they comprise nearly 13 percent of the State's population.

Figure 2 also shows that approximately one-third of all Native Americans reside in three States: Arizona, California and Oklahoma. The Native American population is most concentrated in the West, Northern Plains, and Southwest.

Figure 2.—Distribution of Native American and Alaskan Native Population by State of Residence, 2017



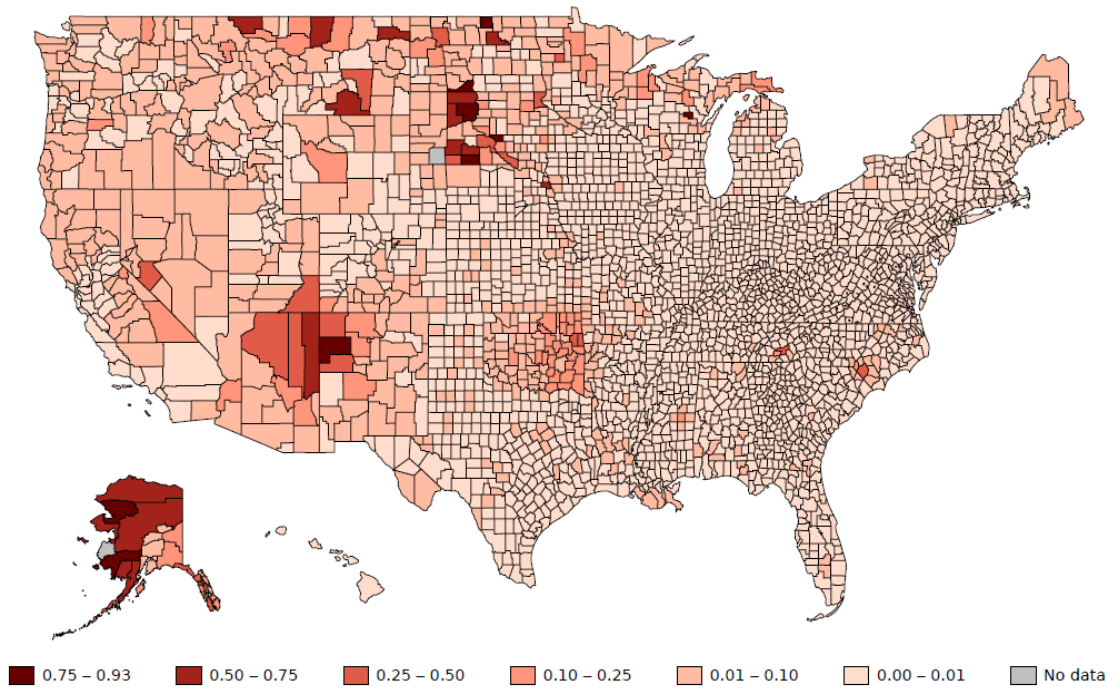
Source: U.S. Census, 5-Year American Community Survey, 2017. Data does not include Native Hawaiians.

Figure 3 shows the Native American population rate as a percentage of county population. The map highlights the concentration of the Native American population in the West, Northern Plains, Southwest, and Alaska.

Native Americans are the most rural of minority populations. While many other minority populations are heavily clustered in urban areas and States with high percentages of the populations located in urban areas, Figure 3, which displays the Native American population rate as a percentage of county population, demonstrates that Native Americans mostly live in rural

regions in the West, Northern Plains, Southwest, and Alaska. Approximately 30 percent of all Native Americans live on reservations²³² and the proportion of Native Americans living on reservations varies greatly by State.

Figure 3.—Native American Population as a Percentage of County Population, 2017



Source: U.S. Census, 5-Year American Community Survey, 2017

Native Americans are the most rural of minority populations. While many other minority populations are heavily clustered in urban areas and States with high percentages of the populations located in urban areas, Native Americans mostly live in rural regions in the West, Northern Plains, Southwest, and Alaska. Approximately 30 percent of all Native Americans live on reservations.²³³ The majority of Native Americans (70 percent) do not live on reservations, and the proportion of Native Americans living on reservations varies greatly by State.

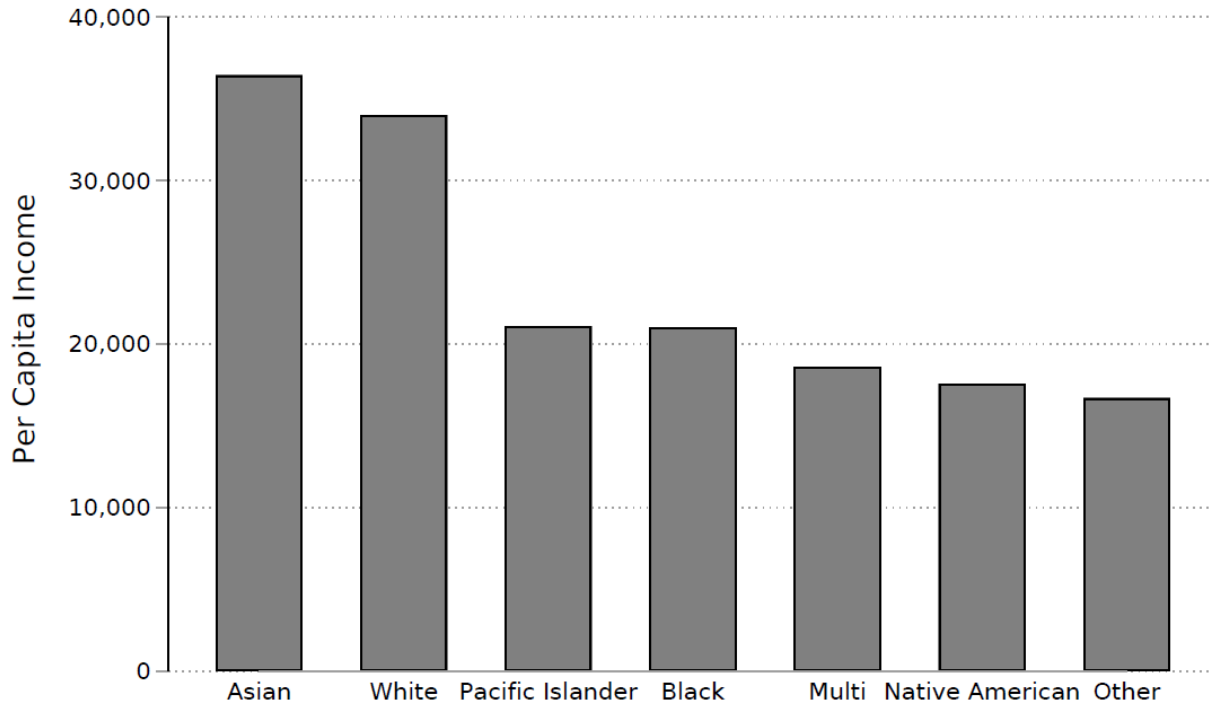
²³² Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, Table P1.

²³³ Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, Table P1.

D. Economic Status of Native Americans

According to U.S. Census data, per capita income for Native Americans (\$17,584) is 43 percent lower than per capita income for all U.S. households (\$31,106). Figure 4, below, shows the income distribution of per capita income by race, and highlights the disparity between the per capita income for Native Americans and the per capita income for other racial groups.

Figure 4.—Per Capita Income by Race, 2017



Source: U.S. Census, 5-Year American Community Survey, 2017.

Much of the income differential may be driven by the low rates of labor force participation and high rates of unemployment and poverty among Native Americans, as shown in Table 1. In 2017, the labor force participation rate among Native Americans was 57.5 percent relative to 63.3 percent for the general population. Moreover, 10.2 percent of Native Americans were unemployed, compared to five percent for the general population. High unemployment, paired with low average income, results in a 25.4 percent poverty rate in Native American populations compared with a 13.4 percent poverty rate in the general population.

Table 1.—Employment and Poverty Status by Race, 2017

Employment and Poverty Status by Race, 2017				
Race and Hispanic or Latino Origin	Population Age 16+	Labor Force Participation Rate	Unemployment Rate	Poverty Rate
White	192,226,790	62.8%	4.5%	11.1%
Black or African American	32,278,915	62.5%	9.5%	23.0%
American Indian and Alaska Native	2,079,354	57.5%	10.2%	25.4%
Asian	15,037,024	64.9%	4.2%	11.1%
Native Hawaiian and Other Pacific Islander	472,464	66.2%	6.2%	18.3%
Two or more races	6,278,183	67.0%	8.1%	16.7%

Source: U.S. Census, American Community Survey, 2017.

Occupational choice among employed Native Americans differs somewhat from the general population. Relatively more Native Americans work in service jobs (25.2 percent versus 17.9 percent in the total population), and fewer Native Americans work in management and professional occupations (27.3 percent versus 38.2 percent) as shown in Table 2.

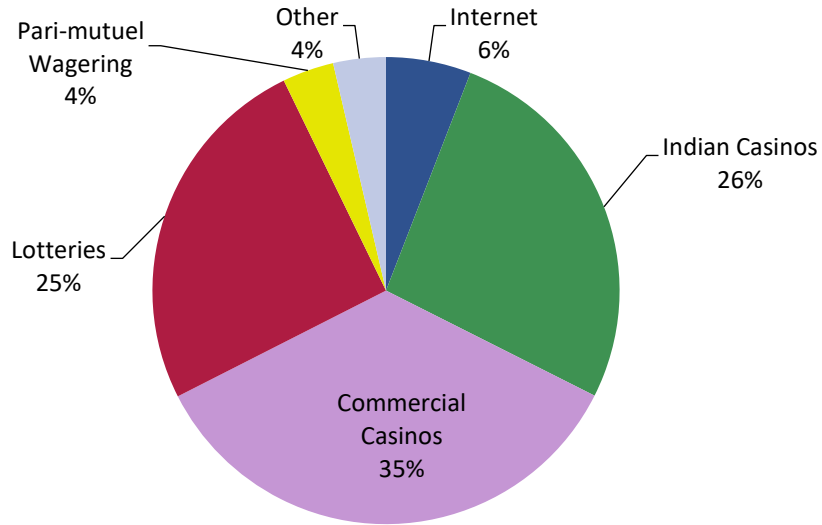
**Table 2.—Percent of Workers Older Than 16 Years Employed
By Occupations Group in 2017**

Occupation	Total Population (percentage)	American Indian/Alaskan Native (percentage)
Management, business, science, and arts occupations	38.2	27.3
Service occupations	17.9	25.2
Sale and office occupations	22.9	21.6
Natural resources, construction, extraction, and maintenance occupations	8.9	11.9
Production, transportation, and material moving occupations	12.2	14.0

Source: U.S. Census, American Community Survey, 2017.

In 1987, the Supreme Court issued a decision barring the State of California from applying its regulatory statutes to gambling activities on Indian reservations. In 1988, Congress passed the Indian Gaming Regulatory Act (“IGRA”).²³⁴ IGRA provides for the use of revenues from gambling to promote economic development and the welfare of Indian tribes. Since 1988, casinos have become an important source of revenue for some Native American tribal governments. Figure 5 shows Indian casinos accounted for 26 percent of total revenue from gambling in the U.S. in 2007.

Figure 5.—Gambling Revenue in the United States, 2007



Source: Christiansen Capital Advisors.

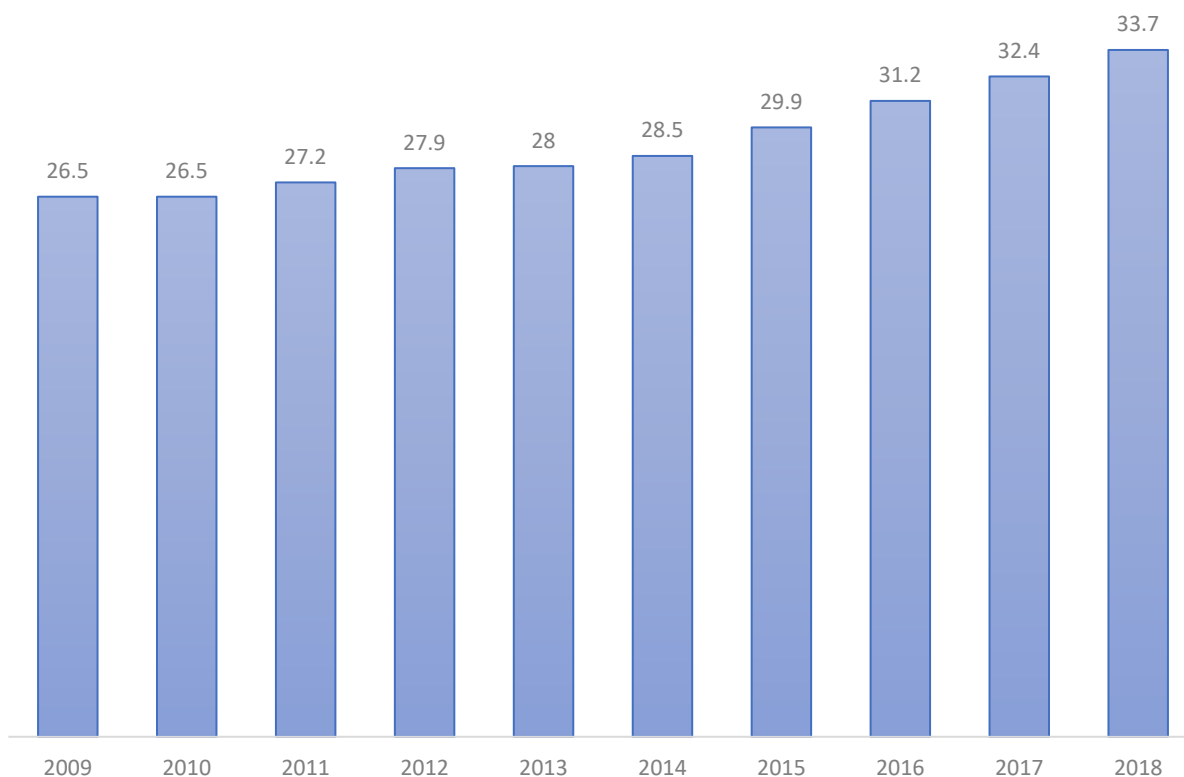
Note: “Other” includes: card rooms, legal bookmaking, charitable games.

Pari-mutuel wagering includes horse racing, dog racing, and jai-alai.

²³⁴ Pub. L. No. 100-497.

In 2018, 247 individual Indian tribes conducted gaming operations in 29 States, generating gross revenue totaling \$33.7 billion.²³⁵ Figure 6 shows a 27 percent increase in gross revenues from Indian gaming operations, as measured in nominal dollars, between 2009 and 2018. Under the IGRA, net revenues from any tribal gaming operation are required to be used for certain purposes, including funding tribal government operations and providing for the general welfare of the tribe and its members.²³⁶ Net revenues are defined to be gross revenues less amounts paid out for prizes and total operating expenses, excluding management fees.²³⁷

Figure 6.—Gross Revenues from Indian Gaming Operations in the United States, 2009-2018 (Billions of Dollars)



Source: National Indian Gaming Commission.

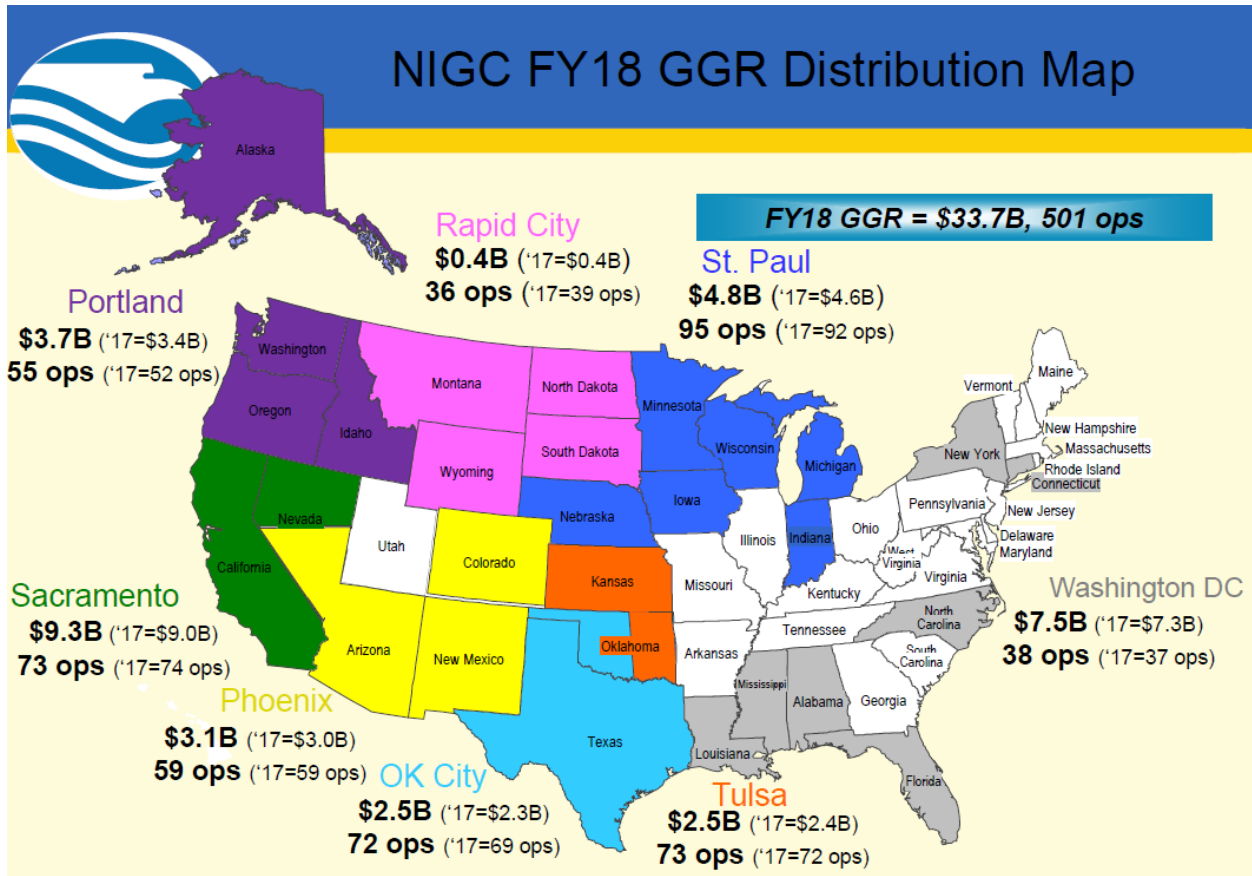
²³⁵ Press Release, National Indian Gaming Commission, “2018 Indian Gaming Revenues of \$33.7 Billion Show a 4.1% Increase,” September 12, 2019, available at <https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase>.

²³⁶ *Ibid.*

²³⁷ National Indian Gaming Commission, “Use of Net Gaming Revenues Bulletin,” January 18, 2005, available at <https://www.nigc.gov/compliance/detail/use-of-net-gaming-revenues-bulletin>.

Figure 7 shows the distribution of Indian gaming revenues across States in 2018 by reporting region. The largest total revenues were generated in California and northern Nevada; and States in the Washington, D.C. reporting region.

Figure 7.–Distribution of Gross Revenues from Indian Gaming Operations Across Regions, 2018 (Billions of Dollars)



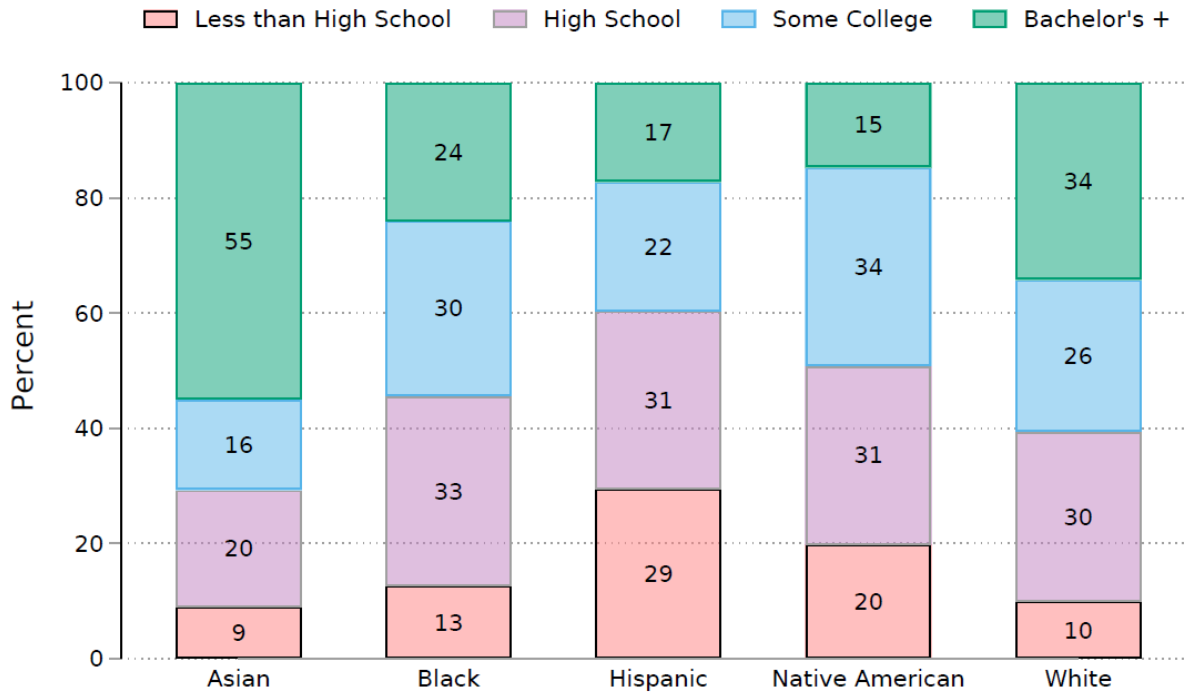
Source: National Indian Gaming Commission.

Note: In this figure, States are divided into seven reporting regions as shown. Gambling revenues are aggregated and reported across these regions.

E. Educational Attainment of Native Americans

Educational attainment is lower for Native Americans than it is for all other racial groups in the United States. In 2017, 15 percent of Native Americans received a bachelor's degree or higher, less than half the rate of the total population. In addition, in 2017, 20 percent of all Native Americans did not complete high school or high school equivalency, compared to ten percent of whites, 13 percent of blacks, 29 percent of Hispanics, and nine percent of Asians. Figure 8 shows the breakdown of educational attainment by race in 2017.

Figure 8.—Educational Attainment by Race in 2017



Source: U.S. Census, American Community Survey, 2017.

F. Indian Health Service and Health Status of Native Americans

Members of Federally recognized American Indian and Alaska Native Tribes and their descendants are eligible for services through the Indian Health Service (“IHS”). Among all Native Americans, 22 percent are uninsured, relative to ten percent of the general population.²³⁸

Table 3.–Mortality and Disease Disparity Rates

Disease	Likelihood Relative to the Rest of the Population
Alcoholism	6.6
Chronic liver disease	4.6
Diabetes	3.2
Unintentional Injuries	2.5
Homicide	2.1
Drug-induced	1.8
Suicide	1.7
Cancer	1.0

Source: Department of Health and Human Services: Indian Health Service, Indian Health Disparities, October 2019. Estimates based on data from 2009-2011.

The life expectancy of a Native American born today is 5.2 years less than the U.S. average life expectancy (73.0 years vs. 78.5 years, respectively).²³⁹ Certain diseases have far greater prevalence in the Native American community than in the rest of the community. According to Table 3, chronic liver disease and alcoholism are approximately four to six times more prevalent among Native Americans than the total U.S. population. Similarly, diabetes, unintentional injuries, homicide, drug induced mortality, and suicide are also more prevalent among Native Americans than in the total U.S. population.

²³⁸ Kaiser Family Foundation estimates based on the Census Bureau's American Community Survey, 2008-2018.

²³⁹ Department of Health and Human Services: Indian Health Service, Indian Health Disparities, October 2019. Estimates based on data from 2009-2011.