



CSAC

WASHINGTON BRIEFS

FOURTH QUARTER 2015

The final quarter of 2015 was marked by the usual partisan rancor over what has become a standard exercise on Capitol Hill: negotiating an eleventh-hour budget deal. With a fiscal year 2016 spending agreement long overdue – and with government agencies operating on a short-term continuing resolution – congressional leaders once again found themselves in the unenviable position of needing to cobble together a massive omnibus appropriations bill.

As expected, the biggest battles during the year-end budget deliberations were over a series of policy riders. Throughout the negotiations, Republicans urged their leaders to use the must-pass spending legislation as a vehicle to advance their agenda on issues ranging from abortion to Syrian refugees to environmental regulations. Democrats stood firm in their opposition to such a strategy, however, and succeeded in preventing the inclusion of a number of extraneous add-ons. While most of the contentious policy issues – including a proposal to delay the Obama administration's controversial Waters of the United States (WOTUS) regulation – were dropped from the final bill, Republicans were successful in lifting a longstanding ban on crude oil exports.

In the end, and despite strong objections from conservative Republicans and progressive Democrats, Congress cleared and President Obama signed into law in late December a \$1.15 trillion fiscal year 2016 spending bill (HR 2029). The bipartisan compromise (PL 114-113) includes fresh line-by-line funding for every federal agency through September 30, 2016 and provides nearly \$74 billion in war-related Overseas Contingency Operations funding.

The measure also provides \$4.2 billion for wildfire fighting and prevention programs within the Department of the Interior and the U.S. Forest Service, including \$1 billion in firefighting reserve funds. The funding, which is \$670 million above the fiscal year 2015 enacted level, will fully address wildland fire suppression operations at the 10-year average.

Of additional interest to California's counties, the spending agreement also delays for two years the *Affordable Care Act's* excise tax on high cost employer-sponsored health plans and temporarily extends (through October 1, 2016) a law that prevents local governments from taxing broadband internet access. The Act also provides \$100 million to address drought relief efforts in the West.

It should be noted that the fiscal year 2016 spending bill was preceded by an earlier budget deal (PL 114-74) that authorized a two-year reprieve from the sequester-level spending caps. Enacted in November, the precursor agreement authorized an additional \$80 billion in spending (\$50 billion in fiscal year 2016 and \$30 billion in fiscal year 2017) split evenly between defense and nondefense programs. Without the authorization of additional federal spending in fiscal year 2016, President Obama would have used his veto pen to strike down any and all of this year's appropriations bills.

Finally, in a separate vote, the House approved this past quarter a package of tax extenders that was negotiated in tandem with the omnibus. The measure, which permanently renews a number of tax provisions and temporarily extends a range of other tax breaks, was passed by a wide margin. While the lower chamber voted on each measure separately, the two bills were combined into one package prior to Senate consideration and passage.

TRANSPORTATION REAUTHORIZATION

On December 4, President Obama signed into law a long-awaited surface transportation reauthorization bill. Approved by overwhelming margins in both the House and Senate, the new law will provide five years of highway and transit program funding to States and local governments. Passage of the legislation, entitled the *Fixing America's Surface Transportation (FAST) Act*, represents the first time in a decade that Congress has cleared a long-term highway measure.

Overall, the FAST Act authorizes roughly \$305 billion for highway, transit, safety, and rail-related programs. Of that total, \$225 billion in guaranteed contract authority is provided for the federal-aid highway program and \$61 billion is set aside for federal transit programs. Because revenue and interest coming into the Highway Trust Fund over the life of the Act is projected to amount to only \$208 billion, Congress approved a \$70 billion transfer from the U.S. Treasury's General Fund. The transfer, which will cover the remaining costs, will be offset with a variety of unrelated funding sources.

The FAST Act represents a major victory for California's counties, as it includes a number of CSAC's policy priorities. For starters, the Act creates an environmental "reciprocity" pilot program, which will allow up to five states to utilize State environmental laws and regulations in lieu of Federal laws for key infrastructure projects. Under the Act, an approved state will be permitted to exercise program authority on behalf of up to 25 local governments for locally administered projects.

It should be noted that CSAC championed the creation of the FAST Act's reciprocity program. While the initiative was supported by several key members of the California congressional delegation, Representative Jeff Denham (R-CA) successfully marshaled the proposal through the reauthorization process.

The FAST Act also expands participation under the Surface Transportation Project Delivery Program (NEPA assignment/delegation program). Specifically, the law will allow States to exercise program authority on behalf of local governments for locally administered projects or provide guidance and training on consolidating and minimizing the documentation and analyses necessary for local agencies to comply with NEPA and comparable requirements of State law.

Congress first authorized the NEPA delegation program as a pilot initiative in 2005. The program allowed Caltrans to assume Federal environmental review responsibilities under NEPA and has resulted in a simplified and expedited environmental process for transportation projects on State-owned facilities. The provisions of the FAST Act are designed to help California's local governments realize the same program benefits in the interest of expediting local projects.

With regard to funding for key local infrastructure, the FAST Act makes more federal-aid highway dollars available to counties through a revised Surface Transportation Block Grant Program (STBGP). The law also gradually increases the percentage of STBGP funds that are sub-allocated to local areas from 51 percent in fiscal year 2016 to 55 percent in fiscal year 2020 (previous law sub-allocated 50 percent of funds to local areas).

Additionally, the FAST Act opens up funding under the National Highway Performance Program (NHPP) for locally owned bridges that are *on* the federal-aid highway system, a key CSAC priority. While States would not be required to make such expenditures, the added flexibility is designed to encourage funding parity for local bridge projects. The law also maintains the local "off-system" bridge funding set-aside, which was a key component of the previous highway bill (MAP-21).

Finally, the FAST Act increases investment in public transportation by authorizing higher overall funding levels for urban and rural public transportation formula grant programs. The Act also includes funding for new competitive grant programs for buses and bus facilities, innovative transportation access and mobility, frontline workforce training, and public transportation research activities.

On a related matter, the final fiscal year 2016 budget deal provides nearly \$42.4 billion (an increase of approximately \$2.1 billion) in obligation limitation funding for the Federal Highway program, consistent with the newly enacted FAST Act. The legislation also includes \$500 million for the competitive TIGER grant program, which is consistent with the fiscal year 2015 level. The spending bill does not provide funding for high-speed rail.

Notably, the final budget agreement also does not include a provision that would allow longer double trailer trucks on the national highway system. Instead, the legislation requires the Department of Transportation to transmit to Congress its final Comprehensive Truck Size and Weight Limits Study within 60 days of enactment.

NATIVE AMERICAN AFFAIRS

On December 2, the Senate Committee on Indian Affairs cleared by voice vote legislation (S 1879) that would overhaul the Department of the Interior's fee-to-trust process. The bill, sponsored by committee Chairman John Barrasso (R-WY), includes a series of reforms spearheaded by CSAC. Additionally, the legislation would overturn the Supreme Court's controversial *Carcieri v. Salazar* decision, which prohibits the Secretary of the Interior from taking land into trust on behalf of tribes that were not under federal jurisdiction as of 1934.

Entitled the *Interior Improvement Act*, the Barrasso legislation would transform the process whereby the Bureau of Indian Affairs (BIA) takes Indian fee land into trust. Counties in California have long advocated for reforms in the federal government's trust land system, which has led to unnecessary conflict, controversy, and litigation.

Under current practices – which are governed not by federal statute but by regulations that have been promulgated by the BIA – counties are afforded limited, and often late, notice of a pending trust land application. Additionally, the BIA does not accord local concerns adequate weight in the land-into-trust process, as counties are only invited to provide comments on two narrow issues – potential jurisdictional conflicts and the loss of tax revenues. Moreover, current law does not provide any incentive for Indian tribes to enter into enforceable mitigation agreements with counties to address the often significant off-reservation impacts associated with tribal development projects, including casinos.

Under S 1879, the BIA would be required to provide adequate, up-front notice to counties whenever the agency receives a partial or complete application from a tribe seeking to have off-reservation fee or restricted land taken into trust. In turn, counties would be afforded an opportunity to review and comment on the application.

Furthermore, the legislation would encourage tribes that are seeking trust land to enter into cooperative agreements with counties, the terms of which could relate to mitigation, changes in land use, dispute resolution, fees, etc. In cases in which tribes and counties have not entered into mitigation agreements, the bill would require the Secretary of the Interior to consider whether off-reservation impacts have been mitigated. Many of the provisions of S 1879 closely track CSAC's own comprehensive fee-to-trust reform proposal.

It should be noted that Chairman Barrasso introduced at committee markup a revised version of S 1879, which included a number of revisions sought by CSAC. For example, the revised bill would provide counties with additional time to comment on trust-land applications (the original legislation included a comment period of 30 days; the substitute bill would provide for a 60-day comment period). In addition, the timeframe for the Secretary to both review an application and issue a "Determination of Mitigation" were expanded. The legislation also would further define and clarify several key terms.

Although S 1879 includes a number of key reforms to the fee-to-trust process, CSAC is actively seeking several important modifications to the bill. Among other changes, CSAC is pursuing the

inclusion of a change-in-use provision, as well as language that would further tighten the bill's Determination of Mitigation requirement to ensure that anticipated impacts are mitigated prior to land being taken into trust.

Looking ahead to next year, it is unclear when, or if, the *Interior Improvement Act* will advance to the floor of the Senate. While there appears to be general agreement that Congress should pass legislation that would both reverse the *Carcieri* decision and reform the BIA's fee-to-trust process, it is uncertain if the necessary consensus will be reached to pave the way for Senate floor consideration of S 1879.

In other developments, the House passed in early October legislation designed to help facilitate the development of energy on Indian lands by reducing certain statutory and regulatory obstacles. The measure, entitled the *Native American Energy Act* (HR 538), was approved on a 254-173 vote.

It should be noted that the bill as introduced and approved by the House Natural Resources Committee would have restricted public participation in the federal environmental review process. Pursuant to the original legislation, an environmental impact statement (EIS) required under the *National Environmental Policy Act* (NEPA) for any major federal action on a tribe's land would only have been available for public review and comment by "members of the Indian tribe and by any other individual residing within the affected area." The language would have had the effect of excluding county governments from the federal environmental review process with respect to all projects on tribal land.

In response to concerns expressed by CSAC, the bill's author – Representative Don Young (R-AK) – introduced a manager's amendment to HR 538. The amendment, which was agreed to by voice vote, would allow local governments and federally recognized tribes within the affected area, as well as States, to retain their authority to review and comment on a federal EIS. The amendment also clarifies that the language of the bill would not limit any public comment on a federal action concerning gaming on Indian lands under the *Indian Gaming Regulatory Act*. Approval of the language represents a victory for CSAC, which argued that neighboring local governments should not be barred from the opportunity to participate in the NEPA process given the fact that tribal development projects can and do lead to significant off-reservation impacts, environmental and otherwise.

SECURE RURAL SCHOOLS

The Secure Rural Schools (SRS) program, which expired on September 30, was not extended as part of the omnibus appropriations legislation. Therefore, unless the program is renewed during the upcoming budget cycle, final payments will be distributed to eligible counties in March of 2016. While there are a number of pending bills that seek to continue the SRS payment structure, none have been able to gain traction. This is due in large part to the inability of Congress to identify a source of funding to offset the cost of the program.

The latest SRS proposal (S 2164), which was introduced on October 7 by Senator Ron Wyden (D-OR), would extend the program for ten years (through fiscal year 2025) at higher funding levels. The bill also would shield the program from sequestration. Additionally, S 2164 would permanently reauthorize and fund both the Payments-in-Lieu-of-Taxes (PILT) program and the Land and Water Conservation Fund (LWCF). While the Congressional Budget Office (CBO) has yet to analyze the financial impact of the measure, it will likely be cost prohibitive. As such, the legislation is not expected to advance in its current form.

In addition to the Wyden bill, as well as other similar proposals to extend SRS funding, several measures have been introduced that would reform forest management practices. In fact, the House approved legislation – the *Resilient Federal Forests Act* (HR 2647) – earlier this year that aims to increase timber production by expediting the environmental review process for certain projects. However, congressional Democrats and Obama administration officials have expressed serious concerns with HR 2647. In their view, the legislation would undermine environmental safeguards and severely diminish public participation.

PAYMENTS-IN-LIEU-OF-TAXES

In a major victory for California's counties, the omnibus spending bill provides \$452 million to fully fund the federal Payments-in-Lieu-of-Taxes (PILT) program in fiscal year 2016 – up from \$442 million. As a whole, California counties typically receive the largest share of PILT funding each year. In fiscal year 2015, 57 California counties received a combined total of nearly \$46 million. By comparison, Utah counties received the next highest allocation of PILT funding amounting to just over \$37.6 million.

For its part, CSAC continued to work with lawmakers to ensure that PILT would be fully funded for the upcoming year, including urging members of the California congressional delegation to make the program a top budgetary priority. CSAC also encouraged members to sign onto several letters to House and Senate leaders calling on them to provide full funding for PILT in fiscal year 2016 and beyond. Recent correspondence spearheaded by Representatives Chris Stewart (R-UT) and Jared Polis (D-CO) garnered the signature of 83 lawmakers, including 20 from the California delegation. In the upper chamber, 37 senators – including Senators Dianne Feinstein (D-CA) and Barbara Boxer (D-CA) – sent a similar letter to Majority Leader Mitch McConnell (R-KY) and Minority Leader Harry Reid (D-NV).

Looking ahead to the new year, CSAC is once again poised to work with members of the California congressional delegation and other key members in an effort to secure long-term, mandatory PILT funding.

HEALTH AND HUMAN SERVICES

Child Welfare Financing Reform

In late November, Senate Finance Committee Chair Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) released a draft child welfare reform bill. The bipartisan legislation, entitled the *Family First Act*, would make fundamental changes to child welfare financing. Specifically, the measure would provide a federal IV-E foster care match to states and counties for the

provision of services aimed at preventing a child's placement into foster care and/or services to youth who are exiting the foster care system to help them and their families avoid additional placements. The legislation also would require states to reduce the use of group homes and other congregate care settings beginning October 1, 2019. The bill's language is similar to the requirements of AB 403 enacted into California law earlier this year.

The CBO is currently estimating the costs of the various provisions of the draft measure. Looking ahead, the Senate Finance Committee plans on holding a markup of the bill early in the new year.

On the House side, Representative Lloyd Doggett (D-TX), ranking member of the Ways and Means Committee's Subcommittee on Human Resources, introduced the *Family Stability and Kinship Care Act* (HR 3781) in late October. This measure will serve as a companion to S 1964, which was introduced earlier this year by Senator Wyden. Many of the provisions of HR 3781/S 1964 are reflected in the new Hatch-Wyden bipartisan draft bill.

TANF Reauthorization

Further action has stalled on a bipartisan House bill reauthorizing the Temporary Assistance for Needy Families (TANF) program. In general, conservative members have objected to some of the discussion draft's provisions that would provide more work and training options to TANF recipients and the counties providing those services.

On a related matter, the recent move by Representative Paul Ryan (R-WI) from chairing the Ways and Means Committee to becoming Speaker of the House has meant that there were significant changes in the makeup of the committee, including new leadership in the Human Resources Subcommittee, the panel with jurisdiction over TANF. Representative Vern Buchanan (R-FL) is now the subcommittee chair and three of the six Republican members are new to the subcommittee. Those changes were accompanied by staff turnover within both the Democratic and Republican ranks. It will take some time for the new members to be educated about the issues under their jurisdiction.

Affordable Care Act (ACA) Excise Tax

The fiscal year 2016 appropriations Act (PL 114-113) includes a two-year delay, to 2020, in implementing the *Affordable Care Act's* 40 percent federal excise tax on high-cost health insurance plans. The excise tax is based on the total cost of the employer and employee contribution to the plan, as well as any savings account arrangements such as health reimbursement arrangements and flexible spending accounts.

By a vote of 90-10, the Senate adopted an amendment earlier in December to repeal the excise tax entirely. Senator Boxer was one of seven Democrats to vote against the amendment. For its part, the Obama administration has also opposed any changes to implementing the excise tax.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

In a victory for California's counties, the final fiscal year 2016 omnibus spending bill includes \$210 million for the State Criminal Alien Assistance Program (SCAAP) – an increase of \$25 million from the fiscal year 2015 enacted level. CSAC aggressively pushed for an increase in SCAAP throughout the fiscal year 2016 appropriations process.

Earlier in the fourth quarter, 43 members of Congress – including 20 members of the California congressional delegation – sent a letter to the leaders of the House Appropriations Committee requesting adequate resources for SCAAP. CSAC worked closely with the offices of Representatives Paul Gosar (R-AZ) and Linda Sánchez (D-CA), the lead co-authors of the SCAAP correspondence.

Of additional interest to CSAC, the fiscal year 2016 omnibus spending bill does not include language prohibiting federal grant funding for so-called "sanctuary cities." Such language had passed the House of Representatives earlier in the year and was being aggressively pushed by conservative Republicans.

In other developments, Senator Feinstein, along with Senators John McCain (R-AZ), Jeff Flake (R-AZ), and Chuck Schumer (D-NY), introduced in early December bipartisan legislation (S 2395) that would reauthorize SCAAP at \$950 million through fiscal year 2020. Although lawmakers have continued to provide funding for the program through the annual appropriations process, the authorization for SCAAP technically expired in fiscal year 2011.

In addition, the Feinstein legislation would allow jurisdictions to be reimbursed for the costs of housing undocumented individuals who are accused of certain crimes – and not only convicted of such offenses, as is allowed for under current law. The change would correct a long-standing flaw in federal statute that disadvantages county governments, which often spend a considerable amount of financial resources housing pretrial offenders who may not ultimately be convicted of the crimes for which they are accused.

Current law also creates a gap in reimbursement if an individual's pretrial incarceration period and subsequent conviction do not occur within the same fiscal year. S 2395 would address these issues by ensuring that counties would be reimbursed for the costs associated with housing undocumented individuals who are accused of the crime or crimes for which they are being held.

Additionally, the bill includes language – drafted by CSAC during the Senate's consideration of immigration reform legislation in 2013 – that would require the Department of Justice (DOJ) to compensate jurisdictions for the costs of incarcerating inmates who are determined to be of "unknown" immigration status. Unknown inmates are classified as such because they have not had prior contact with federal immigration authorities and therefore are not included in the Department of Homeland Security (DHS) database.

The intent of the language is to preclude DOJ from unilaterally instituting a policy that would eliminate payments for unknowns. DOJ attempted to implement such a policy in 2012, which would have reduced California's counties' SCAAP allocations by roughly 50 percent. CSAC has argued that counties should not be financially penalized for what is ultimately the federal government's inability to verify the status of undocumented inmates. Notably, a federal review of inmate data revealed that a vast majority of inmates in county facilities who were previously categorized as "unknown" were subsequently shown to be of "known" status.

REMOTE SALES TAX

The final fiscal year 2016 budget Act temporarily extends a law – the *Internet Tax Freedom Act* (ITFA) – that prevents local governments from taxing broadband internet access. The current moratorium was set to expire on December 11, 2015, but will now remain in place until October 1, 2016.

It should be noted that a *permanent* extension of ITFA was added to an unrelated customs enforcement bill (HR 644) during the fourth quarter. The policy rider was unexpected, as it was non-germane to the underlying bill and was not included in any previous version of the legislation. In correspondence to Senators Feinstein and Boxer, CSAC urged the senators to oppose the provision and requested that they raise a point of order when the measure is considered on the Senate floor. As an alternative, CSAC supports a shorter-term bill – one that includes a clear sunset date and grandfathers all relevant existing state and local taxes. Furthermore, CSAC believes that any long-term extension of ITFA should be considered in conjunction with pending remote sales tax legislation, such as the *Remote Transaction Parity Act* (RTPA; HR 2775) or the *Marketplace Fairness Act* (MFA; S 698).

RTPA and MFA would both give states the ability to collect sales taxes from out-of-state Internet retailers, with the tax based on the final *destination* of the purchase. A third proposal – offered by House Judiciary Committee Chairman Bob Goodlatte (R-VA) – would allow states to require retailers to charge sales taxes based on the *location of the seller*, rather than on the location of the consumer. While House and Senate GOP leaders have thus far shown little interest in moving any of the three measures, a long-term extension of ITFA remains a key bargaining chip.

PROPERTY ASSESSED CLEAN ENERGY PROGRAM

Earlier this year, the Obama administration unveiled a number of initiatives designed to encourage renewable energy development and promote energy efficiency. Among other things, the administration's plan includes a proposal to expand financing options for residential Property Assessed Clean Energy (PACE) programs. The Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA) – which provides mortgage insurance for more than 7.6 million households nationwide – is expected to issue guidance early in 2016 allowing borrowers to use FHA financing for properties with existing PACE loans. However, it should be noted that the new guidelines will require the subordination of PACE financing to the first lien FHA mortgage.

For the most part, programs in California currently require PACE assessments to hold senior lien status, putting it first in line to be repaid in the event of a default. While this is the preferred option among investors, mortgage lenders have argued that this can be an impediment to the sale and refinancing of PACE-encumbered properties. Some lenders even require the lien to be paid in full prior to the sale or purchase of the property.

The dispute between investors and lenders has created some uncertainty in the PACE marketplace and has undoubtedly discouraged some homeowners from taking advantage of this innovative financing tool. At the very least, the forthcoming FHA guidance should help establish clarity for both borrowers and lenders, though it should be noted that the majority of programs operating in California will need to make some changes to their current financing structure to take full advantage of these new guidelines.

Finally, the administration's announcement could set the stage for the Federal Housing Finance Agency (FHFA), which oversees Fannie Mae and Freddie Mac, to make a similar move. Since 2010, FHFA has largely thwarted residential PACE programs across the country, due in large part to the agency's view that senior liens established by PACE assessments pose risk management challenges for existing mortgage lenders.

We hope this information is useful to California county officials. If you have any questions or comments, please feel free to contact us.

