



CSAC WASHINGTON BRIEFS

THIRD QUARTER 2013

Although lawmakers made headway on several big-ticket items during the third quarter, much of that progress was tainted by intense partisan gridlock over the fiscal year 2014 budget. In the absence of an agreement on a stop-gap spending bill, federal departments and agencies began on October 1 the process of furloughing roughly 800,000 employees. The result has been the disruption of a large number of government-administered programs and activities, as well as mounting fears that a prolonged shutdown could have a detrimental impact on the economy.

In addition to the debate over federal spending, lawmakers spent a portion of the third quarter discussing the impending need to provide yet another increase in the nation's debt ceiling. While the Treasury Department has used extraordinary measures since May to extend its borrowing authority, those measures are nearly exhausted. As a result, Congress will need to increase the statutory debt limit in mid to late October in order to stave off what would be calamitous economic consequences.

As of this writing, it is unclear how Congress will resolve the government shutdown or the debt-ceiling crisis. However, a growing number of lawmakers are predicting that congressional leaders will opt to combine a stop-gap funding bill with an increase in the nation's borrowing capacity. Merging the two issues could provide each party with an opportunity to extract sufficient concessions from the other while ensuring that a politically painful vote would only need to occur once.

Although the aforementioned fiscal matters took center stage in the waning days of September, lawmakers did consider several key legislative items earlier in the quarter. For starters, Congress passed and President Obama signed into law a short-term extension of the Secure Rural Schools (SRS) program. The extension, which covers payments for fiscal year 2013, was included as part of the *Helium Stewardship Act* (HR 527), which reauthorizes the sale of U.S. Helium reserves.

In addition, the House on July 11 narrowly approved the agriculture title of a new Farm Bill reauthorization package (HR 2642). House Republicans were forced to remove the nutrition portion of the legislation after an earlier comprehensive Farm Bill (HR 1947) was defeated due

to disagreements over the level of cuts to the Supplemental Nutrition Assistance Program (SNAP).

It should be noted that the House subsequently approved a measure (HR 3102) with a nutrition-only title that would cut SNAP funding by nearly \$40 billion over the next ten years. By comparison, the Senate-approved Farm Bill (S 954) would reduce SNAP funding by \$4 billion. Although 15 Republicans joined all Democrats in opposition to the House measure, the bill was approved on a narrow 217-210 vote. The goal of the GOP majority has been to combine the SNAP legislation with an agriculture measure as part of a unified five-year Farm Bill. As of this writing, however, those efforts remain stalled.

In other developments, the House Transportation and Infrastructure (T&I) Committee unveiled legislation this past quarter that would authorize a variety of water infrastructure projects under the purview of the U.S. Army Corps of Engineers (Corps), including port, levee, drinking water, dams, and environmental restoration projects. The committee approved the measure on September 19, with potential floor action slated for later in the fall.

REAUTHORIZATION OF THE SECURE RURAL SCHOOLS ACT

In a victory for CSAC and California's forest counties, and as indicated above, Congress approved legislation this past quarter that includes a one-year continuation (through fiscal year 2013) of the *Secure Rural Schools and Community Self-Determination Act*. Passage of the bill paves the way for the U.S. Forest Service to distribute fiscal year 2013 SRS payments in February of 2014, as scheduled. Pursuant to the legislation and consistent with previous SRS extensions, payments to counties (those electing to receive a share of the State payment) would be made at a five percent reduction from the level of payments made in the previous year.

On the long-term reauthorization front, the House approved legislation – the *Restoring Healthy Forests for Healthy Communities Act* (HR 1526) – that would require the Forest Service to actively manage its commercial timber lands. Specifically, the bill would require the U.S. Department of Agriculture (USDA) to establish a "Forest Reserve Revenue Area" within each unit of the National Forest System. In turn, USDA would have a fiduciary obligation to produce a minimum amount of commercial timber from each area for the financial benefit of counties that have traditionally relied on SRS payments.

Furthermore, the legislation would require projects to complete National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) consultations under a streamlined process. The measure also would provide for a one-year extension of SRS funding to give counties adequate time to adjust to the new payment structure.

CSAC remains concerned that a new payment system solely based on timber receipts could result in significantly less funding to California's counties. As a result, the association, along with the Regional Council of Rural Counties (RCRC), has encouraged Congress to ensure that

counties would be appropriately compensated should USDA fail, for whatever reason, to reach its intended revenue target. In addition, CSAC and RCRC have urged lawmakers to seek a broad, bipartisan consensus on the environmental streamlining provisions included in the legislation.

In other developments, House Natural Resources Committee Chairman Doc Hastings (R-WA) on September 4 issued subpoenas to the Office of Management and Budget (OMB) and USDA for documents related to the Obama administration's decision to subject SRS to sequestration. It should be noted that the committee sent a letter to both agencies in March requesting information on how the administration reached its decision. Neither OMB nor USDA responded to the committee's initial request or to subsequent requests for documents, prompting Chairman Hastings to subpoena the agencies for additional information.

ARMY CORPS OF ENGINEERS LEVEE VEGETATION REMOVAL POLICY

In a key development for CSAC, the House T&I Committee approved this past quarter a major water resources reform bill (HR 3080) that includes a robust section on the Corps' levee vegetation removal policy. Similar to the Senate-passed Water Resources Development Act (WRDA) reauthorization measure (S 601), the House bill would require the secretary of the Army to conduct a comprehensive review of the Corps' one-size-fits-all levee vegetation policy. In conducting the review, the secretary would be required to consult with other entities, including representatives of state and local governments, federal agencies, and appropriate nongovernmental agencies.

This provision also would require the secretary to consider whether the Corps' policy can be amended to promote and allow for consideration of variances on a regional or watershed basis. The bill would call for the secretary to base variances on such factors as: soil conditions, hydrologic factors, vegetation patterns and characteristics, environmental resources, levee performance history, institutional considerations, and other relevant factors.

CSAC worked closely with key members of the California congressional delegation and other members to secure the levee vegetation language of HR 3080. Looking ahead, the full chamber may consider the bill this fall. If approved, the House and Senate would need to convene a conference committee in order to produce a final WRDA reauthorization measure.

On a related matter, the House and Senate fiscal year 2014 Energy and Water Appropriations legislation includes report language on levee vegetation. The Senate language, drafted by CSAC and championed by Senator Dianne Feinstein (D-CA), urges the Corps to conduct additional scientific research on levee vegetation and to clarify how it will apply ESA considerations in its final vegetation policy. The House language, which also is supported by CSAC, references several of the major issues surrounding the Corps' vegetation policy, including potential conflicts with requirements under the ESA.

Finally, a resolution drafted and sponsored by CSAC on the Corps' levee vegetation policy was approved by NACo's Board of Directors during the association's Annual conference in Fort Worth. The resolution expresses NACo's support for modifying the Corps' policy to address significant local government implementation challenges. Approval of the resolution ensures that NACo is able to assist in generating broader support, particularly from outside of the state of California, for key modifications to the Corps' vegetation requirement.

NATIVE AMERICAN AFFAIRS

In September, the House Committee on Natural Resources' Subcommittee on Indian and Alaska Native Affairs held a hearing on "Executive Branch standards for land-in-trust decisions for gaming purposes." The hearing was in response to concerns expressed by tribes, local governments, and others that the Bureau of Indian Affairs' (BIA) policy guidelines do not adequately take into consideration the adverse impacts of off-reservation gaming. Incidentally, Subcommittee Chairman Don Young (R-AK) and other members of the subcommittee called on BIA to reexamine its current standards.

Four witnesses were invited to provide testimony, including Assistant Secretary for Indian Affairs Kevin Washburn, who provided the committee with a broad overview of how BIA reviews land-into-trust applications. According to his testimony, BIA adequately considers the concerns of all stakeholders, including the applicant tribe, as well as the impacted state, local and tribal governments and the public at large.

Also called on to provide testimony was Todd Mielke, Spokane County Commissioner and President of the Washington State Association of Counties, as well as Hazel Longmire, Vice-Chair of the Colusa Indian Community Council. Commissioner Mielke and Vice-Chair Longmire disagreed with Washburn's assessment and offered their personal experiences with the fee-to-trust process. In both cases, Mielke and Longmire felt that BIA did not adequately consider their concerns.

For its part, CSAC submitted written testimony for the record that primarily focuses on the need for Congress to address the flaws in the fee-to-trust process. Furthermore, the testimony describes the current problems with the system, discusses the opportunity presented by the Supreme Court's *Carcieri v Salazar* decision, and provides details on CSAC's trust reform proposal.

In other developments, CSAC submitted comments this past quarter to the Department of the Interior regarding a proposed rule designed to address land-into-trust appeals in the wake of the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*. In that case, the court ruled that the Quiet Title Act did not bar Administrative Procedure Act challenges to trust decisions after title transfer to the United States. The ruling essentially allows a party to initiate litigation for up to six years after the acceptance of the land into trust.

It should be noted that under current BIA regulations, the Secretary is required to publish a notice of a trust decision 30 days *before* transferring title. The 30-day waiting period provides parties with a window of opportunity to file suit in federal court to challenge a trust decision; in virtually all cases in the past, the secretary has agreed to “self-stay” the trust transfer during court proceedings. The Department’s policy also has afforded local governments and other affected parties the right to seek emergency relief in the form of a temporary restraining order or preliminary injunction.

The newly proposed rule would delete the 30-day waiting period, and as a result, parties would lose the right to seek emergency relief in court. Additionally, local governments would lose regulatory and taxing jurisdiction over the land, with tribal development projects able to immediately commence once the land is taken into trust.

Finally, on a related matter, CSAC provided formal comments to BIA regarding several proposed changes to the Bureau's process for acknowledging Native American groups as federally-recognized tribes. The comments identified several potential improvements for the federal acknowledgment process and encouraged BIA to consult with local governments to facilitate an open and public acknowledgement process.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

In the wake of the Senate's passage of a comprehensive immigration reform bill (S 744), House lawmakers continued this past quarter to seek a path forward on their own immigration measure. While House GOP leaders have refused to consider S 744, they have not yet shut the door on reform.

Rather than consider a comprehensive package, Republican leaders have expressed their desire to take up several piecemeal bills. For its part, the House Judiciary Committee has already approved a series of bills that address different aspects of the immigration system, including legislation (HR 2278) that would give local governments more authority over immigration enforcement.

Notably, HR 2278 includes a provision that would shift jurisdiction of SCAAP from the Department of Justice (DOJ) to the Department of Homeland Security (DHS). The bill also would reimburse local jurisdictions 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 the current statute. Such a change would benefit counties, which are responsible for housing pre-trial inmates. Additionally, the legislation would authorize "such sums as may be necessary" for SCAAP in fiscal year 2014 and each subsequent year.

It should be noted that the House enforcement bill's SCAAP provisions are similar to provisions found in the Senate-passed immigration reform legislation. However, the Senate bill includes language drafted by CSAC that would require DOJ to compensate jurisdictions for the costs of incarcerating "unknown" inmates. Unknown inmates are classified as such because they have

not had prior contact with federal immigration authorities and therefore are not included in the DHS database. The change would preclude DOJ from instituting a harmful policy change that it had proposed in 2012.

Finally, on the budget front, the House Appropriations Committee approved in July \$165 million for SCAAP as part of its fiscal year 2014 Commerce-Justice-Science (CJS) appropriations legislation (HR 2787). The proposed spending represents a \$90 million cut when compared to the fiscal year 2013-enacted level. Across Capitol Hill, the Senate Appropriations Committee included \$190 million for SCAAP in its CJS funding package (S 1329). This past quarter, CSAC sent correspondence to the California congressional delegation requesting members to work in a bipartisan fashion to increase the final funding level for SCAAP.

REMOTE SALES TAX

CSAC continued this past quarter to build congressional support for legislation - the *Marketplace Fairness Act* (S 743; HR 684) - that would allow states to require out-of-state internet and mail-order retailers to collect and remit state and local sales taxes. The Senate in May approved S 743, with the support of Senators Feinstein and Barbara Boxer (D-CA). It should be noted that the Senate-passed bill incorporates a number key provisions supported by CSAC. However, the lower chamber has yet to act on such legislation.

For his part, House Judiciary Committee Chairman Bob Goodlatte (R-VA) recently released a framework of principles that will guide his approach to remote sales tax legislation. In the past, Goodlatte has expressed concerns about the challenges faced by businesses in collecting and remitting sales taxes to a number of different jurisdictions. He also has expressed the need for safeguards to ensure that states cannot discriminate against out-of-state retailers. His framework, however, would address both of these concerns.

Rather than amend S 743, Chairman Goodlatte is expected to draft a new bill that will incorporate his legislative principles. However, it is unclear when such legislation will be unveiled. It should also be noted that Goodlatte may seek to package online sales tax legislation with other related issues, including a permanent ban on internet access taxes and a moratorium on new wireless taxes.

For their part, Senators Ron Wyden (D-OR) and John Thune (R-SD) introduced a bill (S 1431) in August that would permanently extend the moratorium on Internet access taxes. The current ban is slated to expire on November 1, 2014. Wyden and Thune also have introduced a separate proposal (S 1364) that would ban state and local governments from imposing any new, discriminatory taxes on digital goods and services, including music downloads, movies, and newspaper subscriptions.

AFFORDABLE CARE ACT IMPLEMENTATION

Partisan disagreements over the implementation of the *Affordable Care Act* (ACA) were at the center of much of the controversy surrounding recent efforts to approve a stop-gap budget bill. For their part, congressional Republicans passed a continuing resolution (CR) in late September that would have imposed a one-year delay in the implementation of the individual mandate portion of the ACA. The bill also would have repealed the tax on medical devices, as well as allowed organizations to opt out of providing contraceptive services. The legislation was rejected by Senate Democrats.

In addition, the House approved a separate CR that would have "defunded" the ACA. That measure also was rejected in the Senate. All told, the House has now voted 43 times to derail President Obama's signature legislative accomplishment.

It should be noted that most of the health care law is funded by mandatory spending not subject to congressional appropriations. Accordingly, even if Congress passed legislation blocking the Department of Health and Human Services (HHS) from implementing and enforcing the ACA, the law would remain intact and many of its major elements would continue to receive funding.

As for ACA implementation efforts, HHS continued this past quarter its preparations for the October 1 "soft launch" of the Health Insurance Marketplaces. The Marketplaces will provide individuals and small businesses with access to information on health plans while enabling them to enroll in plans, with January 1, 2014 the date in which insurance coverage becomes effective.

Notably, California is one of 17 states that will be operating its own insurance exchange, while 26 states will have their Marketplaces operated by the federal government. The remaining states will operate a state/federal hybrid exchange. In terms of the Medicaid expansion, about 25 states (including California) have elected to expand their Medicaid programs, while 21 have chosen not to take the option. By comparison, when Medicaid was first enacted in 1965, about half the states opted into the program, with the remaining states phasing in over the next 4-5 years.

As implementation efforts continue, there are still a number of questions remaining on the interoperability of computer systems, including accessing a federal data hub for information on applicants, including verifying earnings, and other eligibility factors.

CLEAN WATER ACT – SECTION 404 PERMITTING

In the third quarter of 2013, CSAC continued to build support for legislation (HR 1296) that would streamline the Clean Water Act's (CWA) Section 404 permitting process. The bill, which was reintroduced in March by Representative Gary Miller (R-CA), would provide a narrow

exemption for maintenance removal of sediment, debris, and vegetation from flood control channels and basins.

Under Section 404, counties and local flood control agencies are required to obtain permits from the Corps for the discharge of dredged or fill material into navigable waters. The CWA also provides a permitting exemption for the maintenance of currently serviceable structures. However, the Corps has determined that this exemption does not apply to certain routine maintenance activities, which has caused a number of negative, unintended consequences, including a significant permitting backlog.

CSAC has worked closely with Congressman Miller on HR 1296 and has endorsed the legislation. The association also has worked to broaden national support for the Miller bill, including working with the National Association of Flood and Stormwater Management Agencies (NAFSMA), as well as with NACo. In response to a request from CSAC, the NAFSMA Board of Directors voted to officially endorse the legislation.

Looking ahead, there may be an opportunity to include a Section 404 amendment as part of another legislative vehicle. CSAC continues to work with Congressman Miller's office to identify such opportunities.

PROPERTY ASSESSED CLEAN ENERGY PROGRAM

This quarter, CSAC, along with counties in California and local governments from across the nation, continued to advocate for the continuation of the Property Assessed Clean Energy (PACE) program.

Earlier this year, a federal appeals court dismissed for lack of jurisdiction a case challenging a directive from the Federal Housing Finance Agency (FHFA) that essentially halted residential PACE programs nationwide. The directive, which was issued in 2011, objected to local governments holding the first lien on residential PACE homes, calling it a significant risk to Fannie Mae and Freddie Mac.

It should be noted that a lower court had previously ordered FHFA to complete a formal rulemaking to implement the aforementioned directive. In fact, the agency was in the process of finalizing a rule, but as a result of the appeal, FHFA was no longer required to do so. While efforts continued this quarter to encourage FHFA to proceed with its rulemaking, that scenario is unlikely to play out at this point.

For his part, Representative Mike Thompson (D-CA) has considered re-introducing legislation that would prevent FHFA from adopting policies that contravene established state and local PACE laws. In the previous Congress, the congressman sponsored a bill - the *PACE Assessment Protection Act* - that would have established underwriting guidelines for PACE programs. However, with the two primary Republican sponsors of the measure no longer in Congress, efforts continued this past quarter to court a new GOP champion.

PENSION TIER CHANGES - CONFLICT WITH IRS REQUIREMENTS

CSAC continues to work with Representative Loretta Sanchez (D-CA) on legislation (HR 205) that would clarify the authority of local governments to propose and implement creative solutions to rising pension costs. The bill, which has been endorsed by CSAC, would provide counties with the flexibility to negotiate local solutions to responsibly address long-term, unfunded public pension liabilities.

HR 205 would revise IRS Ruling 2006-43 to allow Orange County - as well as other local jurisdictions - to propose and implement negotiated labor agreements that allow current employees to opt in to alternative pension tiers without exposing all employees, whether or not they opted into the new plan, to federal taxes on their pension contributions. The Sanchez bill, which is cosponsored by Representative John Campbell (R-CA) and Ed Royce (R-CA), has been referred to the Committee on Ways and Means where it is awaiting further action.

On the administrative front, CSAC continues to work with Representative Sanchez and others to urge the IRS to further clarify Ruling 2006-43; however, the Treasury Department has been unable to provide a viable timeframe for a decision. CSAC also has encouraged the Obama administration to issue additional guidance on this issue.

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