



CSAC WASHINGTON BRIEFS

FIRST QUARTER 2013

Debate over pressing fiscal matters largely dominated the headlines in the first quarter of 2013. Faced with two separate deadlines - a March 1 date for implementation of the across-the-board spending cuts mandated by the *Budget Control Act* (BCA) and a March 27 expiration of fiscal year 2013 spending authority - members of Congress and Obama administration officials continued to battle over ways to achieve long-term deficit reduction without compromising necessary investments in essential priorities.

With regard to sequestration, the BCA's indiscriminate, automatic spending cuts went into effect as planned on March 1. The law requires an annual reduction of roughly five percent for nondefense programs and eight percent for defense programs. However, given that the cuts must be achieved over only seven months instead of 12, the White House Office of Management and Budget (OMB) estimates that the effective percentage reductions will be approximately nine percent for nondefense programs and 13 percent for defense programs in 2013.

On a related matter, Congress approved in late March legislation (HR 933) that funds the federal government through the remainder of fiscal year 2013. The measure adheres to the budget caps established by the BCA and locks in most of the cuts under sequestration. The bill sets discretionary spending authority for the year at about \$984 billion, which is down from the \$1.043 trillion spending level in fiscal year 2012.

While HR 933 extends previous year funding levels for a number of programs, the bill also provides regular appropriations for agencies covered under the Defense and Veterans Affairs-Military Construction spending bills, as well as the Agriculture, Commerce-Justice-Science, and Homeland Security appropriations measures. Taken together, more than two-thirds of discretionary funding is subject to relatively detailed appropriations.

In addition to wrapping up work on fiscal year 2013 appropriations, House and Senate lawmakers also began this past quarter the process of crafting their respective budget resolutions for next fiscal year. On March 21, the House approved on a 221-207 vote a proposal (H Con Res 25) sponsored by Budget Committee Chairman Paul Ryan (R-WI). The resolution - which seeks to balance the budget in 10 years - calls for reducing projected

spending by \$4.6 trillion through a combination of cuts to domestic programs, repealing the 2010 health care law, and overhauling the tax code.

Incidentally, there are relatively few policy changes included in the 2014 budget blueprint compared to the GOP's previous budget. Like last year, the resolution proposes to replace the current fee-for-service Medicare program with a voucher-like system, beginning in 2024. In addition, the budget recommends transforming the Medicaid and food stamp programs into block grants to States.

Across Capitol Hill, the Senate adopted on March 23 its first budget resolution in four years on a 50-49 vote. The Democratic budget proposal (S Con Res 8), sponsored by Chairwoman Patty Murray (D-WA), would end the 10-year budgetary timeframe with a \$566 billion deficit. It would, however, reduce the overall deficit by roughly \$1.85 trillion through a mix of spending cuts and tax increases. Unlike Ryan's budget, the Democratic plan includes a replacement of the sequester in its deficit reduction estimate.

Because of the stark differences between the House and Senate budget resolutions, there is a strong likelihood that the two chambers will be unable to produce a final 2014 budget blueprint. In the absence of a finished product, the House and Senate Appropriations Committees will set their own top-line spending levels for the next fiscal year.

On a related matter, the Obama administration is scheduled to unveil its fiscal year 2014 budget the week of April 8. Although the president, by law, is required to issue his budget on the first Monday in February, the administration has indicated that a number of fiscal uncertainties - including the end of year fiscal cliff deliberations - has forced the White House to delay the release of its budget.

Finally, the National Association of Counties (NACo) held its 2013 Legislative Conference March 2-6 in Washington. California was well represented at the annual event, as numerous California county officials made the trip to our nation's capital, including leaders from CSAC.

REAUTHORIZATION OF THE SECURE RURAL SCHOOLS ACT

As a result of sequestration, the U.S. Department of Agriculture (USDA) announced this quarter that payments authorized under the Secure Rural Schools (SRS) program would be subject to a 5.1 percent cut. According to OMB, although SRS technically expired in fiscal year 2012, the agency has determined that the payments are still subject to sequestration because the funds are actually distributed in fiscal year 2013.

Incidentally, USDA's announcement was immediately criticized by lawmakers from both parties - particularly those who represent rural, forested communities - who argue that the program should not be subject to the across-the-board cuts because it expired in fiscal year 2012. According to supporters of the program, SRS payments, which were released in January, should be considered part of the fiscal year 2012 budget cycle.

For his part, House Natural Resources Committee Chairman Doc Hastings (R-WA), along with 30 of his congressional colleagues, sent a letter to USDA and OMB requesting a detailed explanation of the legal authority behind the decision to retroactively subject SRS to sequestration. It should be noted that Representatives Tom McClintock (R-CA) and Doug LaMalfa (R-CA) were among the members who signed the letter.

Another similar effort was sponsored by Congressman Raul Grijalva (D-AZ), the ranking Democrat on the Public Lands Subcommittee. His letter urges the Obama administration to work more closely with Congress and to meet with impacted states before moving forward with the retroactive collection of SRS funds. The correspondence was signed by 19 members of the House, including Representatives Mike Thompson (D-CA), Jim Costa (D-CA), John Garamendi (D-CA), and Jared Huffman (D-CA).

Despite the aforementioned objections, USDA has begun to notify states of potential options to recover the necessary funds. Governor Jerry Brown has been informed through correspondence from USDA that California can either deduct the total sequestered amount of nearly \$2 million from its Title II funds, which have not yet been released, or counties will be asked to pay back a portion of their Title I and Title III payments. For its part, CSAC, in cooperation with RCRC and several California education groups, sent a joint letter to the U.S. Forest Service to express concerns with any attempt to recapture fiscal year 2012 SRS allocations.

In other developments, Senate Energy and Natural Resources (ENR) Committee Chairman Ron Wyden (D-OR) and Finance Committee Chairman Max Baucus (D-MT) released a joint statement earlier this year in which they pledged to extend SRS for at least one more year. This short-term extension is intended to give Congress more time to craft a long-term resolution for rural communities. CSAC has urged Senators Dianne Feinstein (D-CA) and Barbara Boxer (D-CA) to work with their colleagues in the Senate to secure an additional year of funding for the program while a long-term solution is developed.

At a March 19 hearing before the ENR Committee, Chairman Wyden reaffirmed his commitment to reauthorize SRS. He also called on the Forest Service to increase timber harvests on federal land but stressed the need to do it in a way that is consistent with existing environmental laws. Furthermore, Wyden acknowledged that increased timber harvests alone would not be enough to make up for lost SRS payments; accordingly, he vowed to pursue "fresh approaches" for funding rural communities.

Finally, the House and Senate budget resolutions for fiscal year 2014 would create a deficit neutral reserve fund for rural counties and schools. This provision would allow the Budget Committee chairmen to revise their respective budget resolutions to accommodate legislation reauthorizing SRS. Similar language was included in previous House budget resolutions.

ARMY CORPS OF ENGINEERS LEVEE VEGETATION REMOVAL POLICY

In late March, the Senate Environment and Public Works (EPW) Committee unanimously approved a reauthorization of the Water Resources Development Act (WRDA). The legislation (S 601), sponsored by EPW Committee Chairwoman Boxer, would implement a number of key water resources reforms under the purview of the U.S. Army Corps of Engineers (Corps).

Among other things, S 601 includes a section on vegetation management, which would require the secretary of the Army to conduct a comprehensive review of the Corps' levee vegetation removal policy. In conducting the review, the secretary would need to consult with other entities, including representatives of state and local governments, federal agencies, and appropriate nongovernmental agencies.

It should be noted that the Corps' levee vegetation policy generally requires local flood control agencies to remove vegetation from levees in order to allow for easier inspections and to reduce any potential weakening of, or damage to, levees from root growth and overturned trees. In California, the cost of complying with the policy is estimated to be roughly \$7.5 billion.

S 601 also would require the secretary to consider whether the Corps' policy can be amended to promote and allow for consideration of variances on a statewide, tribal, regional or watershed basis, a key reform promoted by CSAC. The bill would require the secretary to base variances on such factors as: soil conditions, hydrologic factors, vegetation patterns and characteristics, environmental resources, levee performance history, any scientific link between vegetation and levee safety, the availability of limited funds for levee construction and rehabilitation, etc.

The bill also would require the secretary to solicit and consider the views of the National Academy of Engineering and the National Academy of Sciences as part of the policy review process.

CSAC has worked closely with Chairwoman Boxer and the EPW Committee on the levee vegetation provisions of S 601. Incidentally, the vegetation language of the committee-approved bill has been strengthened and improved over a draft WRDA measure that was released by the committee last November.

On a related matter, Representative Doris Matsui (D-CA) introduced on January 23 legislation that would require the secretary of the Army to conduct a comprehensive review of the Corps' levee vegetation removal policy. The bipartisan bill, entitled the *Levee Vegetation Review Act* (HR 399), is cosponsored by 27 members of the California congressional delegation and includes many of the same provisions as Senator Boxer's WRDA legislation.

Although HR 399 is not expected to move as a stand-alone bill, the intent is for provisions of the legislation to be included in the House WRDA bill. As of this writing, the House has not yet begun its WRDA reauthorization process.

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 Legislative Conference. The resolution, which had to make its way through three separate Steering Committees before being considered by the full Board, expresses NACo's support for HR 399 and 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

This past quarter, there were two bills introduced in the House that would overturn the Supreme Court's *Carcieri v Salazar* decision. In *Carcieri*, the Court ruled that the secretary of the Interior's trust land acquisition authority is limited to those tribes that were under federal jurisdiction at the time of the passage of the *Indian Reorganization Act* (IRA) of 1934. Since the Court's ruling in 2009, Indian Country has made enactment of a *Carcieri* "fix" its number one legislative priority.

The first piece of legislation, HR 666, is sponsored by Representative Edward Markey (D-MA), the ranking member of the House Natural Resources Committee (NRC). The bill has 20 Democratic cosponsors, including four of the five Democratic members who sit on the NRC's Indian and Alaska Native Affairs Subcommittee.

The second bill, HR 279, is sponsored by Representative Tom Cole (R-NE). Cole, though not a member of the House NRC, is co-chair of the Congressional Native American Caucus. Cole's bill has a total of three cosponsors.

It should be noted that the Markey and Cole legislation both would provide the Interior secretary with authority to take land into trust for all Indian tribes. However, the Cole bill would explicitly extend the secretary's trust acquisition authority to any Alaska native community that the secretary acknowledges to exist as an Indian tribe.

On a related matter, the NRC's Indian and Alaska Native Affairs Subcommittee held an oversight hearing on March 19 on the standards for whether, how, and when Indian tribes should be newly recognized by the federal government. Assistant Secretary for Indian Affairs Kevin Washburn provided the Obama administration's views on the federal recognition process.

During the hearing, Subcommittee Chairman Don Young (R-AK) reiterated his support for legislation that would overturn *Carcieri*. Young, however, stated that he would only support a *Carcieri* fix if it did not include Alaska natives or tribes. Incidentally, the Bureau of Indian Affairs has declined to approve land-into-trust applications for Alaska tribes ever since the Supreme Court's 1998 decision in *Alaska v. Native Village of Venetie*. The court held that the *Alaska*

Native Claims Settlement Act extinguished all Indian Country in the state except for one reservation.

Finally, the Department of Interior earlier this year announced that it would change its long-standing "self-stay policy," which prevented the Department from putting land into trust for tribes while another party was suing over that decision. The policy was put in place to ensure that a litigant's legal action would not be invalidated by the secretary finalizing a trust acquisition.

Following the Supreme Court's *Salazar v. Patchak* decision in which the Court ruled that a party could sue for up to six years after Interior takes lands into trust for tribes, the Department decided that it would end the self-stay policy and put lands into trust, regardless of pending litigation. In response, several members of Congress, including Senator Feinstein, have expressed concerns regarding the Department's decision and have urged that a formal rulemaking process be opened to resolve outstanding issues.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

Congress approved as part of the recent fiscal year 2013 spending bill (HR 933) an additional \$15 million for the State Criminal Alien Assistance Program (SCAAP). Under the legislation, SCAAP is funded at \$255 million. Incidentally, SCAAP is one of the few programs that is receiving a boost in fiscal year 2013 funding, as most federal discretionary programs are being held at fiscal year 2012 spending levels.

Like all programs, however, SCAAP also is subject to the BCA's across-the-board budget cuts. Accordingly, the program will be receiving a roughly five percent spending reduction. However, as stated earlier, since the cuts must be achieved over only seven months instead of 12, the effective percentage reduction will be more in the nine percent range.

In addition, there is language in the final budget bill that allows the Department of Justice (DOJ) to reprogram up to 10 percent of total SCAAP appropriations for other Departmental functions and activities. Accordingly, the program could be further cut in fiscal year 2013 if DOJ exercises its authority to reprogram SCAAP dollars. DOJ has used similar discretion in the previous fiscal year to transfer SCAAP funds for other activities within the agency.

On the fiscal year 2014 budget front, the Obama administration's budget proposal is expected to include language recommending that SCAAP payments only be provided to jurisdictions for costs associated with housing inmates whose immigration status is able to be verified by the Department of Homeland Security (DHS). The administration's expected language would therefore eliminate reimbursement for "unknown" inmate days.

Last year, CSAC successfully fought to prevent the aforementioned policy change from being implemented by DOJ as part of the 2012 SCAAP awards cycle. If the policy had been

implemented, California's counties likely would have seen their SCAAP payments cut by roughly 50 percent.

REMOTE SALES TAX

This quarter, a bipartisan group of lawmakers in both the House and Senate reintroduced remote sales tax legislation. Specifically, the bill - the *Marketplace Fairness Act of 2013* (S 336; HR 684) - would allow states to require out-of-state internet and mail-order retailers to collect and remit state and local sales taxes. Notably, this measure reconciles the differences between three competing proposals (the *Marketplace Equity Act of 2011*; the *Main Street Fairness Act of 2011*; and, the *Marketplace Fairness Act of 2011*) that were introduced in the previous Congress.

The compromise bill incorporates a number of key provisions supported by CSAC. For example, it provides an alternative to joining the Streamlined Sales and Use Tax Agreement (SSUTA), which is a multistate agreement that requires states to simplify and make more uniform their sales and use tax administration. Only 24 states have agreed to the SSUTA, and California is not among them. Instead, the State can choose to adopt a minimum set of simplification requirements, which are outlined in the legislation.

Furthermore, the bill would require retailers to collect the full destination rate - the applicable state and local tax rate - on remote sales, another key CSAC priority. CSAC also supports language in the legislation specifying that it would only apply to remote purchases and would have no effect on intrastate sales or intrastate sourcing rules. Finally, retailers with less than \$1 million in annual remote sales would be exempt from the tax collection requirements.

CSAC has endorsed the *Marketplace Fairness Act of 2013* and has asked the California congressional delegation to support the measure.

In a positive development, the Senate, with the support of Senators Feinstein and Boxer, adopted an amendment to its fiscal year 2014 budget resolution that closely resembles the *Marketplace Fairness Act*. While the amendment passed by a vote of 75 to 24, it still faces heavy opposition from Internet retailers and senators from states without a statewide sales tax (AK, DE, MT, NH, and OR). Although budget resolutions are nonbinding documents, the vote on this amendment is significant because it shows there is enough support in the Senate to advance the bill.

AFFORDABLE CARE ACT IMPLEMENTATION

This past quarter, the Centers for Medicare and Medicaid Services (CMS) issued hundreds of pages of proposed rules and guidance to implement the *Affordable Care Act* (ACA). The proposed rules have addressed issues concerning Medicaid expansion, the insurance marketplaces, the design of insurance benefit packages and more. Stakeholders have been

eagerly awaiting additional information from CMS, given the fast approaching launch of the ACA's health insurance expansion on January 1, 2014.

During NACo's recent Legislative Conference, CSAC leaders met with key officials from CMS to discuss Governor Brown's proposed Medi-Cal expansion options under the ACA. CSAC focused on the county-based option and reviewed a number of the administrative concerns that may arise if each county is responsible for implementing Medi-Cal expansion.

Subsequently, CSAC has been in contact with CMS and has provided the agency with a copy of the Medi-Cal expansion pilot demonstration proposal that Santa Clara County has sent to Governor Brown. CSAC also has provided CMS with the association's staff analysis of the two options under consideration in the state.

CLEAN WATER ACT – SECTION 404 PERMITTING

Representative Gary Miller (R-CA) reintroduced this past quarter bipartisan legislation to help streamline the Clean Water Act's (CWA) Section 404 permitting process. The bill, entitled the *Flood Control Facility Maintenance Clarification Act* (HR 1296), would provide a narrow permitting exemption for maintenance removal of sediment, debris, and vegetation from flood control channels and basins.

Under Section 404, counties, local flood control agencies, and similar local government 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.

The narrow interpretation of the law adopted by the Corps has caused a number of unintended consequences, including drastically increasing the Corps' workload and creating a significant permitting backlog. The processing time for a 404 permit can take from one to three years and often comes with costly mitigation conditions attached. It also has hampered local agencies in their efforts to perform routine maintenance in a timely and responsive manner, leaving them open to undue liability for flood damage.

CSAC has worked closely with Congressman Miller on HR 1296 and has endorsed the legislation. Several members of the California congressional delegation are original cosponsors of the bill. CSAC 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.

PROPERTY ASSESSED CLEAN ENERGY (PACE) PROGRAM

In March, a federal appeals court dismissed for lack of jurisdiction a case challenging a directive from the Federal Housing Finance Agency (FHFA) that essentially halted PACE programs across the country. The court held that FHFA's decision to stop buying mortgages on PACE-encumbered properties was a lawful exercise of its statutory authority as conservator of Freddie Mac and Fannie Mae, and thus cannot be challenged in court.

It should be noted that a lower court had previously ordered the agency to complete a formal rulemaking to implement the aforementioned directive. In fact, FHFA was in the final stages of enacting a rule, but as a result of the appeal, the agency is no longer required to do so.

Following the decision, Representative Mike Thompson is considering introducing legislation that would prevent FHFA from adopting policies that contravene established state and local PACE laws. In the 112th Congress, Thompson sponsored a bill - the *PACE Assessment Protection Act* - that would have established underwriting guidelines for PACE programs to help limit or, in some cases, eliminate any risk to lenders. It should be noted that the two primary Republican sponsors of the measure - Representatives Nan Hayworth (R-NY) and Dan Lungren (R-CA) - were both defeated in the November elections. In the interest of bipartisanship, Thompson is courting a new GOP sponsor.

In a related development, key members of Congress and prominent state attorneys general this past quarter called on President Obama to name a new, permanent director to FHFA. Interestingly, in its five year history, FHFA has never had a director confirmed by the Senate. Acting Director Edward DeMarco is a holdover from the Bush administration and has often been at odds with the current administration on a number of issues, including PACE. A new director, particularly one with a favorable impression of PACE, could help revive residential PACE programs across the country. Representative Mel Watt (D-NC), a longtime member of the House Financial Services Committee, is considered a leading candidate to replace DeMarco.

PENSION TIER CHANGES - CONFLICT WITH IRS REQUIREMENTS

Representative Loretta Sanchez (D-CA) reintroduced this past quarter 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.

It should be noted that the impetus for the Sanchez legislation is a recent Internal Revenue Service (IRS) ruling that prevents Orange County from fully implementing its hybrid pension plan. The plan, first adopted in 2010, allows new hires to choose between the County's current pension formula and a lower benefit formula that is combined with a 401(k)-style defined contribution plan. Under the latter option, the County matches employee contributions up to

six percent. *Existing* Orange County employees, however, are currently unable to opt-in to the hybrid plan due to the IRS Ruling (Ruling 2006-43).

At issue is the fact that Orange County's optional defined benefit plan tier for current employees could be seen as a cash or deferred arrangement (prohibited under IRC 414(h)(2)) as it changes the amount of the contribution picked up by the employer. As a result, allowing current employees to elect the lower pension benefit formula may force all of Orange County's employees to pay taxes on their retirement deductions.

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, Representative Sanchez has continued 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. For its part, 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.