

**STATEMENT OF ATHENA SANCHEY YALLUP,
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THE YAKAMA NATION**

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON NEW TAX BURDENS ON TRIBAL SELF-DETERMINATION

June 14, 2012

Chairman Akaka, distinguished members of the Committee, it is with humble gratitude but with a troubled heart that I testify on the subject of “New Tax Burdens on Tribal Self-Determination.”

My name is Athena Sanchey-Yallup. I am an enrolled member of the Confederated Tribes and Bands of the Yakama Nation, and the Executive Secretary of the Yakama Nation Tribal Council. I am here today on behalf of Chairman Harry Smiskin, who was unable to appear before you today due to medical reasons. I have travelled from my homelands here to bring to your attention how the Internal Revenue Service has violated longstanding federal law establishing the tax exempt nature of tribal trust timber property and related proceeds of the Yakama Nation. I am here today to ask you for intercession between the IRS and the Yakama people. I am here to discuss how all of Indian Country are under attack by the IRS in the form of taxation on trust distributions to tribal members.

The real threat to the Yakama Nation began in the last year and a half when the IRS began auditing and seeking to tax per capita distributions of trust funds to each of Yakama’s 10,400 tribal members for the first time in the history of this Nation. This is an extraordinary action that is contrary to Congress’ express intent to exempt trust resources and trust funds from federal tax. It is contrary to our Treaty of 1855.

We request assistance from this Committee. We believe Congress and this Committee have clearly stated that trust resources are to be preserved for individual Indians, and in that regard, that their trust per capita payments are exempt from tax. The IRS is attempting to force a tax on trust lands and resources. We request the Committee confirm and clarify its intent not to tax trust resources and trust per capita payments. Second, we request that you support our efforts to compel the IRS to consult with the Yakama Nation, on a government to government basis, before taking any enforcement actions based on this new policy and practice of the IRS to tax trust per capita payments.

We respectfully submit the following statement supporting the position that this new federal tax burden is without precedent, without support of federal law, and in violation of the Yakama Treaty of 1855.

I. **YAKAMA NATION’S 1855 TREATY WAS INTENDED TO PROTECT TRIBAL TRUST RESOURCES FROM FEDERAL TAXATION**

In order for me to speak on behalf of my people, I want to share with this Committee the background of the Yakama Nation and the Treaty of 1855 (12 Stat. 951). Since time immemorial, the lands

of the Yakama people extended in all directions along the Cascade Mountain Range to the Columbia River and beyond. The ancestors of today's Yakamas were of different tribes and bands: The Palouse, Pisquose, Yakama, Wenatchapam, Klinquit, Oche Chotes, Kow way saye ee, Sk'in-pah, Kah-miltpah, Klickitat, Wish ham , See ap Cat, Li ay was and Shyiks. In recognition of the original 14 Treaty signers, a Tribal Council of 14 leaders is elected by enrolled Yakamas by the raising of their right hand. As an elected leader, I am bound to uphold the laws of my people, protect the Reservation, and honor the Treaty of 1855.

The Yakama Nation Reservation comprises 1.37 million acres reserved for our use by the Treaty of 1855. Last week, we celebrated the 157th anniversary of our Treaty's signing. We hold our Treaty sacred, in ways that words cannot convey. That is because my People ceded over 10 million acres to the United States pursuant to that Treaty. In exchange, we were promised that the 10 million acres we ceded reserved for us the "exclusive use and benefit" of the 1.37 million acres on the Yakama Nation Reservation. The Ninth Circuit interpreted this clause as reserving to the Yakamas the right to the benefits of their trust lands free from the imposition of federal income taxes. *Hoptowit v. Commissioner*, 709 F.2d 564, 566 (9th Cir. 1983). Further, the Yakamas understood that they would suffer no injury – including the form of taxation today – pursuant to various provisions within the Treaty, including, but not limited to, the use of the resources set aside for Yakamas, annuities and the saw mill. Today, the IRS threatens to breach those sacred promises to my People in direct contradiction of judicial precedent and decades of IRS policy.

The Yakama Nation has some of the best timber in the United States. That is why we negotiated in our Treaty that the United States would provide us a sawmill, which the federal government did not adequately provide. Still, Yakama Nation has been involved with timber harvesting and selling for decades. The BIA has always told us that the proceeds from trust land timber sales are legally required to be held in trust by the BIA for Yakama members. The BIA has also told us that those proceeds are not subject to taxation. I have provided you a copy of the United States Solicitor's 1957 opinion on this issue. We have relied on this representation from the BIA for decades. We have relied on the federal government's Treaty promise that our trust lands and resources would be for our exclusive use and benefit.

In all this time the IRS never tried to tax those trust distributions, until today. I ask you, the esteemed members of this Committee, to ask the IRS: Why, after more than 50 years, are tribal trust land distributions now taxable? What has caused the IRS to suddenly take the hostile position against the Yakama Nation and other tribes that tribal trust land timber distributions are taxable? There have been no new laws by Congress or amendments to the Per Capita Act.

In negotiating the Treaty of 1855, the Yakamas never expected, understood or intended the federal government to impose burdens on our tribal trust resources. We would have never ceded nearly all of our aboriginal land had we understood that we would be asked to give 1/3 of the modest earnings from trust resources to the government in the form of a taxes. We urge the Committee to scrutinize where the federal trustee has been allowed to benefit from a trust under its own fiduciary administration to Indian Tribes.

II. FEDERAL LAW PROTECTS TIMBER TRUST PER CAPITA PAYMENTS FROM TAX

Tribal members have always been the intended beneficiaries of the timber trust resources, by operation of both federal law and the Treaty of 1855.² Consistent with this understanding, the BIA (then later the Office of Special Trustee or “OST”) regularly distributed the timber revenues to the tribal members on a per capita basis from trust resources (“trust per capita payments”).³ The BIA and OST never considered the trust per capita payments to be subject to federal tax and never did any tax reporting (e.g., Forms 1099 to tribal members). In fact, in 1957 the Solicitor for the BIA issued an opinion addressing specifically this issue with the IRS (Bureau of Internal Revenue, at that time). The Solicitor concluded that the IRS’ reliance on the *Squire v. Capoeman* decision as a basis for taxing distributions of timber trust revenues to members was misplaced, and that the right to per capita payments is a recognition of communal individual interests and the United States holds the property in trust for the individual members. The Solicitor further concluded that applying trust funds to taxation is a violation of the 1855 Treaty that reserves to the Indians rights in property for which the funds have been substituted. The Solicitor’s opinion was in direct response to the IRS’ assertion that trust per capitas to Yakamas are subject to federal tax.

In 1983 this Congress confirmed that per capita distributions of monies held in trust are not subject to federal tax with the passage of the “Per Capita Act.” The “Per Capita Act,” as set forth in 25 U.S.C. 117a – 117c, explicitly excludes Tribal per capita distributions from federal taxation. The tax exemption for trust distributions is provided in § 117b(a) entitled “Previous contracted obligations; *tax exemption*,” which states that any distribution made under the Act, including distributions pursuant to §117a, is subject to the provisions of 25 U.S.C. 1407. Section 1407 states that none of the funds that are distributed per capita or held in trust pursuant to a plan approved under the provisions of this Act shall be subject to Federal or State income taxes. Therefore, the plain language of the Per Capita Act exempts any per capita distribution made from trust funds to tribal members from Federal income taxes. Note that 1957 Solicitor opinion, referred to earlier, was circulated among the Congressional committees at the time of their deliberations on the Per Capita Act and relied upon by Congress regarding the tax-exempt nature of the trust funds.

The legislative history of the Per Capita Act further supports the conclusion that Congress intended to exempt all per capita payments from trust funds. Congress has consistently described the purpose of the tax exemption clause of 25 U.S.C. § 117b(a) in later legislation as exempting tribal trust per capita distributions. For instance, when identifying the specific exceptions to taxation of Indians, Congress stated:

² “Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians.” *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939); *see also* 25 U. S. C. § 196; *United States v. Mitchell*, 445 U.S. 535 (1980). There exists a detailed set of regulations that govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the “development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.” 25 CFR § 141.3 (a)(3) (1979). Congress thus sought to provide for harvesting timber “in such a manner as to conserve the interests of the people on the reservations, namely, the Indians.” 45 Cong. Rec. 6087 (1910) (remarks of Rep. Saunders).

³ Pursuant to the Per Capita Act, the Yakama Nation assumed the responsibility for issuing the per capita checks to tribal members from the trust funds sometime in the mid-1980’s.

One exception to this general rule is the exclusion from income provided for income received by Indians from the exercise of certain fishing rights guaranteed by treaties, Federal Statute or Executive order (sec. 7873). *See also* 25 U.S.C. sections 1401-1407 (funds appropriated in satisfaction of a judgment of the United States Court of Federal Claims in favor of an Indian tribe which are then distributed per capita to tribal members pursuant to a plan approved by the Secretary of Interior are exempt from Federal income taxes); 25 U.S.C. section 117b(a) (*per capita distributions made to tribal members from Indian trust fund revenues are exempt from tax if the Secretary of the Interior approves of such distributions*).

(emphasis added). 104 H. Rept. 350, 104th Congress; 1st Session, Balanced Budget Act of 1995.

Furthermore, the same § 1407 exclusion language has been interpreted to govern per capita trust distributions to tribal members in regards to resource exclusion for the purpose of determining eligibility for public benefits. If the language of § 1407 can be used under the Per Capita Act to determine public benefit eligibility, it does not follow that the other provisions of § 1407 do not apply to per capita trust distributions in the same way. The resource exclusion language of 25 U.S.C. § 1407 must be read in parity with the tax exemption language of that clause. When describing the purpose of the Per Capita Act,

Congress stated:

Prior to the enactment of the Tribal Per Capita Distribution Act (P.L. 98-64), only per capita payments of Indian judgment funds (and purchases made with an interest and investment income accrued thereon) were excluded from consideration as income or resources for purposes of determining the extent of eligibility for assistance under the Social Security Act or for Federal or federally-assisted programs. (Indian Judgment Funds Distribution Act, P.L. 93-134, as amended by P.L. 97-458). The Tribal Per Capita Distribution Act (P.L. 98-64) *extended this treatment to tribal per capita distributions of funds derived from tribal trust resources*.

[emphasis added]. 102 S. Rpt. 214, Bill S. 754.

While this particular legislative history addresses itself only to increasing the resource exclusion part of 25 U.S.C. § 1407, it clearly demonstrates Congress' intent that the Per Capita Act extend the provisions of 25 U.S.C. § 1407 to funds derived from tribal trust resources.⁵ It is contrary to Congressional intent to suggest that the tax exemption language of 25 U.S.C. § 1407 is meant to apply only to judgment funds, but that the resource exclusion part of that clause applies to any funds held in trust.

Accordingly, Yakama Nation, other federally-recognized tribes, the BIA, and OST all believe Congress' intent has been clearly expressed to protect trust funds from tax; and further yet, that Yakama's

⁵ Consistent with the above statement of Congressional intent, all federal and state agencies (HHS, SSA, BIA, Legal Services Corporation, et. al.) have interpreted the Per Capita Act to require them not to count per capita payments from timber revenues held in trust as an asset or resource. *See e.g.*, External Opinion #99-17, Legal Services Corporation; SSA 20 CFR Part 416, 59 FR 8536; HUD, 55 FR 29905. While these agency determinations do not address the tax exemption, their interpretation of the purpose of the Per Capita Act to extend the provisions of 25 U.S.C. § 1407 to funds derived from tribal trust resources confirms that the purpose of incorporating 25 U.S.C. 1407 in the Per Capita Act was not just to safeguard the terms and purposes of the Act of October 19, 1973 as the Commissioner contends.

treaty protects those funds from tax. Yet, the Yakama Nation today faces an assault on their tribal trust resources and their members' pro rata share revenues derived from those trust resources. The IRS is now asking Yakama Nation tribal leaders, such as myself, to divulge the names of the 10,400 plus tribal members in order to audit and tax them on their share of trust funds. This is an overreaching action in light of Congress' express intent to safeguard these trust funds from federal tax. It is also an overreaching act by the IRS in light of decades of IRS acquiescence in the non-taxation of these trust per capita payments.

II. PAST IRS PRACTICES AND TREATMENT OF TRUST PER CAPITAS

The IRS has never before taxed trust per capita payments made to the Yakama Nation tribal members. The Yakama Nation, and prior to that the OST, have been making trust per capita payments for generations. The IRS has previously taken no formal position, as they do now, that these payments are subject to federal tax. The IRS has had consistent contact with the Yakama Nation over the last fifty-plus years, and has conducted tax compliance reviews of the Yakama Nation reporting obligations. At no time did the IRS mention that the Yakama Nation should be reporting the trust per capita payments as taxable distributions to tribal members. At no time has the IRS provided any education or outreach to tribes generally to inform them of the IRS position that trust per capita payments are taxable. Indeed, the IRS seems now to be changing its view of the issue. Previously, the IRS publicized its position on this issue at its website stating that per capita distributions are exempt from federal income tax "when there are distributions from trust principal and income held by the Secretary of Interior." The IRS recently removed this tax-exempt instruction from the website.

More significantly, as I explained earlier, the Solicitor issued his opinion in 1957 in direct response to an inquiry by the IRS concerning the Yakama Nation per capita payments specifically. The IRS never proceeded to tax the Yakama Nation per capita payments after that 1957 inquiry. The Yakama Nation has relied on the IRS' apparent acquiescence in the non-taxable status of trust per capita payment since that 1957 opinion. We have always understood that a legal decision was made many years ago that trust per capita payments are not subject to tax. The IRS must certainly be estopped from changing policy established and relied upon by Tribes throughout the country for more than half a century.

Adding insult to injury, IRS has ignored our requests for consultation on the matter. The IRS' new position on this issue is a radical change in policy and practice that directly impacts the Yakama Nation, but IRS refuses to enter into a government-to-government consultation with us as is required under Executive Order 13175, its own agency rules and federal law. We have repeatedly asked for meaningful government-to-government consultation to understand why there has been such a significant change in IRS policy and practice. The IRS has simply demanded an audit, provided us their legal arguments for taxation and denied our requests for consultation. The IRS' actions directly violate the spirit and letter of the President's consultation policy and no further enforcement action on their part is warranted without prior consultation.

Thank you for the opportunity to testify before this Committee and your willingness to consider the burdens the IRS is causing Indian Country by auditing and taxing tribal trust land and resource distributions. Thank you also for hearing the Yakamas call for help and recognition of the Treaty of 1855.