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NEW TAX BURDENS ON TRIBAL SELF-DETERMINATION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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NEW TAX BURDENS ON TRIBAL SELF–DETERMINATION

THURSDAY, JUNE 14, 2012

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. The Committee will come to order.

We say aloha to all of you and welcome to this hearing on New Tax Burdens on Tribal Determination.

Federal Indian policy is rooted in the United States Constitution, in its treaties and its Federal statutes, and in these documents and in administrative actions the Federal Government has always acknowledged the unique status of Indian tribes on government-to-government basis. We can all agree that Indian tribes and Indian people have given much to this Country, in land, in every war since the inception of this Country, and in culture. Tribes have never been opposed to contributing to the well-being of the Country or doing their fair share, so long as the unique status of sovereigns is acknowledge.

Today we are holding a hearing on taxation of Tribal governments and individual Tribal members to ensure that the government-to-government relationship is upheld by every branch of the Government.

During this Congress, the Committee has heard from many tribes that are concerned with recent efforts by the Internal Revenue Service to tax important Tribal governmental benefits provided for the general welfare of their citizens, a cultural practice at the core of Tribal identity. Today tribes provide a wide range of these programs, including funeral assistance, elder care, education assistance, and many of the social services.

The ability of tribes to provide for the general welfare of their citizens is truly critical to the self-determination of Tribal governments. This is especially important given that one out of every four Native people in the U.S. lives in poverty.

Where the Federal Government has fallen behind in its trust responsibility to tribes, tribes have done their best to fill in the gaps. This Committee has spoken in strong support of the efforts of the

Department of the Interior to settle longstanding trust suits. However, we have heard from tribes who are concerned that distribution of those trust settlements to Tribal members may now be subject to taxation, in sharp contrast to prior policy and Federal statute.

Tribes have raised these concerns during consultations with the Treasury Department and the Internal Revenue Service. I am looking forward to a productive discussion on this issue and welcome any recommendations on moving forward in a positive way.

The Office of Indian Tribal Governments within the Internal Revenue Service was created to enhance the relationship between the IRS and Tribal governments. You can see the mission statement of that office displayed here before you today. It is this side.

Today we will hear from the Treasury and the IRS regarding their efforts and to hear about their recent consultations. We will also hear from Tribal leaders who have been directly impacted by IRS policies and from national organizations who have been involved in the Tribal tax initiatives.

The record for this hearing will remain open for two weeks from today for comments from all parties.

Senator Barrasso, as the Vice Chairman, will now present his opening statement.

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman. As you advised, I took a look at the mission of the IRS Office of Tribal Government, and you see the words partnership, opportunities, respectfully, cooperatively, and that is what we are talking about with self-determination here, Mr. Chairman. So I want to thank you for holding the hearing. I am going to keep my opening statement brief so we can proceed to the witnesses.

Last December, the Committee received testimony from Indian tribes about the effects of taxation on Indian reservations, and then on May 15th of this year the Finance Committee held a hearing in which it addressed, in part, the Tribal taxation issue. So this hearing, I think, hopefully, will build, as you have said, upon past hearings, and to that end we will hear from tribes on how recent IRS actions have affected their communities. We will also hear from the Department of Treasury and the Internal Revenue Service on these and other proposed actions for Indian Country.

So I welcome the witnesses, look forward to the testimony, and thank you, Mr. Chairman, for your leadership.

The CHAIRMAN. Thank you very much, Mr. Vice Chairman.

Senator Tim Johnson, your opening statement, please.

STATEMENT OF HON. TIM JOHNSON,
U.S. SENATOR FROM SOUTH DAKOTA

Senator JOHNSON. Good afternoon. Thank you, Mr. Chairman, for holding this hearing. I first would like to welcome Mr. Klein from our second panel. Welcome, Mr. Klein. I wanted to take time to thank you for all your work with my staff at the Banking Committee.

I would also like to give a special welcome to a good friend, President Steele, from the Oglala Sioux tribe, for his attendance and testimony today. Welcome, President Steele. It is good to see you.

As you know, Mr. Chairman, this issue has significant effects on the tribes and Tribal members of my home State. In South Dakota, we have nine Indian tribes. Unfortunately, some of these tribes are located in the poorest counties in the entire U.S. Many of the families on these reservations do not have steady incomes and, from time to time, require assistance from our Tribal governments, from heating assistance to burial assistance, to pow wow prizes, our Tribal members rely heavily on their governments.

While I understand that the Internal Revenue Service has a mission and there should always be accountability for Federal funds, we should not be focusing attention on the Nation's poorest individuals. Rather, we should be using our treaty and trust responsibility to look for ways to assist our tribes to become more self-sustaining and to provide them the tools to determine their own path forward.

I look forward to the testimony today and it is my hope that we can find some solutions today to alleviate the burden put on our poor tribes and Tribal members.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Johnson.

Senator Tom Udall, your opening statement.

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Mr. Chairman, very much, and thanks to co-member Senator Barrasso for moving forward with this very important hearing. Our discussion today regarding the general welfare exclusion application to Tribal government programs is an important one as we work to improve economic conditions in Indian Country.

The title of the hearing is very formal, but the problem we are here to discuss goes to the very heart of Tribal self-government and self-determination. The Federal Government and all of its arms must interact with the tribes as the sovereign nations that they are, and with all of the respect that that implies. I am especially concerned that Tribal programs to improve housing conditions, provide training and educational opportunities, and to preserve traditional customs could be viewed as a way to skirt taxation of per capita payments.

Working through the application of tax law is never an easy thing, but I hope that our efforts today will help make the process easier to navigate for tribes and ensure that all parties are working together effectively.

Look forward to hearing the testimony of the witnesses and, Mr. Chairman, thank you once again for focusing on this issue.

The CHAIRMAN. Thank you very much, Senator Udall.

With that, I welcome our witnesses. I appreciate that you have all traveled to be here with us today and look forward to hearing your testimony on this very important matter.

I ask that you limit your testimony to five minutes. Your full written testimony will be included in the record.

Serving on our first panel is The Honorable John Yellow Bird Steele, who is President of Oglala Sioux Tribe in Pine Ridge, South Dakota; and the Honorable Athena Sanchey-Yallup, Secretary of the Tribal Council for the Confederated Tribes and Bands of the Yakama Nation in Toppenish, Washington.

President Steele, will you please proceed with your testimony?

STATEMENT OF HON. JOHN YELLOW BIRD STEELE, PRESIDENT, OGLALA SIOUX TRIBE

Mr. STEELE. I thank you, Senator Akaka, Senator Barrasso, the other members of the Committee.

I have supplied you with a written testimony, and I would say that on the back of this written testimony I supplied a resolution from what is called the Great Plains Tribal Chairmen's Association, and the Great Plains Tribal Chairmen's Association, of which I am the Vice President, Great Plains Tribal Chairmen's Association calls upon the United States to seek legislation to correct the Internal Revenue and the Treasury's efforts right now. So that is where I will be coming from, is asking yourselves to possibly do legislation for us to straighten this out.

From the Oglala Sioux tribe, one of my Tribal presidents tells me that an IRS person went to his reservation, and when he told him he had a treaty, he told him he can read his treaty in prison. These field people need to be more educated. They represent the United States Government.

Now, I think to myself, these immigrants come over from across the sea to get away from King George's tax and his, what were those prisons he had over there, debtor's prisons, and they come here and want to put a Tribal leader in their debtor's prison; what they were getting away from overseas to come over here to this great land? It sounds a little crazy to me. That is what he said to that Tribal president.

And to you, Senators, honorable Senators, I do not blame you, but we pay every tax there is to pay of the Federal Government from our reservation except for the land tax, which the Federal Government holds in trust for us. We don't mind paying your taxes; it means we are getting money from somewhere. But we would pay more taxes if you were to give back the stolen lands of the sacred Black Hills that the United States Government unilaterally stole in 1877, and confirmed in 1980 by the United States Supreme Court. We would pay the Government more taxes if you give back that land you stole.

But as it is now, on the reservations in South Dakota, we number number one, number two, number three, number seven, poorest in the whole United States in the 2010 census. Everybody sitting in this room does not or cannot empathize with an individual living on Pine Ridge. Where is your next meal coming from? How do you get some gas money to take baby to the hospital because he has an earache? Mother has cancer; she needs to get to an appointment in Rapid City. Father-in-law died. To give him a traditional wake, like our ancestors did, it costs money now. There is Federal law saying you have to be embalmed, put six feet under; and they usually stay up with the body for anywhere from two to three nights.

Go to the tribe, get help for gas money. Go to the Tribe to get help for the funeral. That funeral, it has run the Tribal government quite a bit of money here, just this year, to the tune of over $400,000; about $3,200 per individual funeral. If we give a 1099 for that, can you imagine, next year, IRS coming to that person and saying you owe us $1,000? Where is that individual going to get $1,000 when he can't get enough gas money to go to the hospital with his young one?

Senators, my daughter raised four children with no running water, with the freezing weather, two-inch walls on a trailer that was donated because some State upgraded their codes and they donated it to us free.

IRS is sitting out there waiting to tax, and they are making the Tribe the middleman with giving a 1099 to those individuals. They do not understand that we have a treaty with the United States Government that was ratified by two-thirds of the Senate, that falls under the Constitution of the United States, Article VI, supreme law of the land. We are very proud of our sovereignty. Contrary to *Hicks vs. Nevada,* the Supreme Court of the State of South Dakota says State police cannot go onto reservations. I have an order from FCC saying we have regulatory authority over the airwaves over Pine Ridge. We own all the taxes there.

IRS come in to do this, treating us like an organization; doesn't recognize our sovereignty; taking a big chip off of our sovereignty; ordering us to help them tax our own Tribal members who can't afford it. This, Senators, is unconscionable. Maybe our treaties are old. Maybe the Constitution is old. They don't want to recognize our self-determination, our sovereignty; a sovereign within a sovereign.

The CHAIRMAN. President Steele, will you please summarize your statement?

Mr. STEELE. I have spoken. I will answer questions. Thank you.

[The prepared statement of Mr. Steele follows:]

PREPARED STATEMENT OF HON. JOHN YELLOW BIRD STEELE, PRESIDENT, OGLALA SIOUX TRIBE

Good Afternoon, Mr. Chairman and Members of the Committee. Thank you for holding this hearing. The question of IRS activities in Indian Country is important because the IRS has been burdening Indian tribes and tribal government efforts to foster a healthy community and a livable homeland on our reservations.

My name is John Yellowbird Steele. I am the President of the Oglala Sioux Tribe, and I submit this testimony on behalf of my people. In our history, our people were a free and prosperous indigenous nation. We were self-governing, with a very democratic system of villages or tiyospayes, who chose our chiefs based upon merit and achievement. Our people are one of the Seven Council Fires, *Oceti Sakowin*. We held a vast territory from southeast Minnesota and Iowa through North and South Dakota, Nebraska, Kansas, and Colorado to Wyoming and Montana.

Through our treaties with the United States, we preserved our right to self-government and Federal law protects our original rights to self-government. In the 1815 Treaty with the Teton, for example, the United States pledged "peace and friendship" and its "protection" to our people. In the 1825 Treaty with the Oglala, the United States sought to reaffirm our friendship and establish trade regulations. The Supreme Court has said, "The power to tax is the power to destroy." But in regard to our treaties, the Court has said protection does not imply destruction. Therefore, in keeping with the treaties, the IRS must not tax our essential governmental functions and the government programs and services that we, as a government, provide to our tribal citizens to try to make our "permanent homeland" a decent place to live.

Oglala Lakota History and Traditions

Our Nation or *Oyate* always provided for all of our people through sharing and generosity. For example, if a man died and left his wife a widow with orphan children,

his brother would take in the family and care for them. If he needed help, the whole community would help them. If tribal elders needed food or aid, the young people would help them. That is our tradition—we care for all of our people. As our great leader Crazy Horse said, "We preferred our own way of living, and we were no expense to the government."

Our outlook is not so different from the rest of America. When President Bush and Senator Kennedy reached an agreement on Education, Congress enacted a law that says, "No child left behind." Among our Lakota people, when we pass laws to better our community, we say, "No one left behind."

Historically, the United States visited many injustices upon our people. In 1854, when a stray cow left behind by Mormon settlers on the road to Utah was found by a Mnicoujou Lakota man, named High Forehead, travelling from the North, he brought it to his relatives among the Sicangu Lakota. They ate it for dinner. The next day, a U.S. Army platoon led by Lieutenant Grattan came to the Lakota camp and confronted Chief Conquering Bear, demanding surrender of the man. The Chief explained that High Forehead had travelled on, but Chief Conquering Bear then offered three horses to replace the cow. Lt. Grattan and his men opened fire, killing the Chief. The Chief's people defended themselves and killed Grattan and his 16 men. The next year, President Pierce sent General Harney and 600 men on a punitive expedition to punish our people for defending ourselves. At the Battle of Ash Hollow, Harney and his men surrounded a sleeping village with cavalry and cannons and killed 86 of our men, women and children, who had nothing to do with the Grattan Affair.

In 1866, the United States sent out a treaty delegation to Fort Laramie to negotiate a peace treaty, but while the treaty delegation was meeting with the chiefs, the Army came with a column of men, horses and cannons to build forts in our Powder River Country. Chief Red Cloud said, "The Great Father sends us presents and wants us to sell him the road," Red Cloud said. "But the White Chief goes with soldiers to steal the road before the Indians say yes or no." That began Red Cloud's War to save the Powder River Country, and in the end, the United States abandoned its forts and sent out a treaty delegation.

In our Sioux Nation Treaty of 1868, western South Dakota including the Black Hills was recognized as our permanent homeland, we reserved 44 million acres in Nebraska, Wyoming and Montana as "unceded Indian territory," and we also reserved our hunting grounds in Nebraska and Kansas. Under the 1868 Treaty, the United States recognized our original rights to self-government.

In Ex *Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the United States did not have authority to try Crow Dog for the murder of Spotted Tail, a well recognized Sicangu Lakota Chief, because the treaty reserved crimes by one Indian against another to the tribal justice system. The Supreme Court explained:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate

> legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

Yet, the United States violated the treaty. Just a few years after the treaty was signed, General Sherman sent out the Custer expedition to search for gold in the Black Hills. Later, he ordered us to leave our lands, which were protected under the 1868 Treaty. When our people stood by our rights, President Grant sent out Custer, Crook and Terry with separate armed columns, leading to the Battle of the Rosebud and the Battle of the Little Big Horn. After we won the battles, the United States sent out more armies and our people were hunted in our own lands. We still have relatives who are war refugees in Canada.

We knew the value of the Black Hills, our sacred place and the Center of the Lakota Universe. The gold mine turned out to be the largest and most productive in the Western Hemisphere, with billions of dollars in gold mined. The theft of the gold mine and millions of acres of land left our people in poverty. As an elder, Chief Red Cloud reflected that the U.S. Government "made us many promises, but they only kept one. They promised to take our land and they took it."

We suffer many hardships to remain together as our Oglala Lakota Nation. Shannon County on our Pine Ridge Reservation is the 3rd poorest county in America, measured by per capita income. Over 47% of our people live below the poverty line. Our Lakota relatives on the Cheyenne River Sioux Reservation in Ziebach County, South Dakota live in the poorest county in America. Our Lakota relatives on the Rosebud Sioux Reservation in Todd County, South Dakota live in the 2nd poorest county in America. When our Lakota and Dakota relatives on the Standing Rock Sioux Reservation counties are counted, 5 of the 10 poorest counties in America are located on our Sioux Reservations that were originally part of the Great Sioux Nation under the 1868 Treaty.

In our treaties, we ceded millions of acres of land to the United States in exchange for treaty promises, education, health care, housing, and economic development. The basic pledge is that the United States would help us make our permanent homes on the reservations to be livable homes. Yet, those treaty promises have not been fulfilled.

Chief Red Cloud said, "I am poor ... but I am the Chief of a Nation. We do not want riches but we do want to train our children right. Riches would do us no good. We could not take them with us to the other world." Today, although our people are poor, we are proud and we stand on our Treaties. We call upon the United States to respect our Treaties, as part of the Supreme Law of the Land.

In short, the 1868 Treaty sets apart our land for our "absolute and undisturbed use" as a permanent home and recognizes our right to self-government. Under *Ex Parte Crow Dog*

(1883), our treaties reserve "the highest and best form of government" to our people, *self-government*. Today, we rely on our original sovereign authority to provide for our people as a Native Nation.

Under Federal law, there is no repeal of a prior law by implication. Our treaties are the Federal laws that deal most specifically with our people. When the United States Congress passes a general law that would interfere with our treaties if the laws were not harmonized, those laws must be read together with our treaties to preserve our rights to self-government.

Since the United States has not fully upheld its treaty obligations to assist our people with education, health care and other government services, we, as a tribal government, must do everything we can to better our tribal community. The IRS violates our treaties when it seeks to tax the basic government services that our tribal government provides to our citizens.

IRS Interference with Tribal Self-Government

Indian tribes are sovereign governments that pre-date the formation of the United States. Indian tribes are the original American democracies. Our right to self-determination as indigenous peoples must be protected under international human rights laws, and indeed, the Constitution of the United States recognizes the original and continuing status of Indian tribes as indigenous sovereigns, implicitly and explicitly.[1]

The Apportionment Clause excludes "Indians not taxed" from Apportionment of Congress and from the per capita taxation originally levied by the states to fund the United States government in its formative period. Our people were originally not taxed by the states or the United States because they were citizens of our own tribal nations. After almost a century of treaty-making and more than 370 treaties, the 14th Amendment affirmed the Constitution's original provisions: first, by treating tribal members as citizens of Indian nations, not the United States, in the Citizenship Clause and second, by reaffirming the status of "Indians not taxed" in the Apportionment Clause (which was amended to do away with the constitutional reference to slavery).

The 14th Amendment's Citizenship Clause provides: *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."* In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Supreme Court held that the Citizenship Clause did not automatically make tribal citizens become U.S. citizens.[2] The Court explained:

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[1] The Constitution of the United States recognizes Indian tribes as sovereigns, with authority to enter into Treaties and conduct international relations in the Treaty Clause. By the authority of the Supremacy Clause, our Sioux Nation Treaties are part of "Supreme Law of the Land." The Apportionment Clause excludes "Indians not taxed," from taxation and apportionment of Congress.

[2] "Senator Jacob Howard of Ohio, the author of the Citizenship Clause, defended the new language against the charge that it would make Indians citizens of the United States. Howard assured skeptics that Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States.' Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, supported Howard, contending that 'subject to the jurisdiction thereof' meant 'not owing allegiance to

> Under the constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.... Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that 'representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' ... Indians not taxed are still excluded from the count, for the reason that they are not citizens.

The United States has, since the first days of the Republic, recognized Indian tribes as native nations, under treaty protection. *See Articles of Confederation, Art. VI* (1781); Treaty with the Delaware Nation, 1778. As a result, Indian tribes are recognized as governments, not taxable entities under the Internal Revenue Code. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The Tribal Government Tax Status Act, 26 U.S.C. sec. 7871, is a reflection of our government status.

Although Indian tribes were not made citizens by the 14th Amendment's Citizenship Clause, Congress acted early in the 20th Century to confer citizenship on American Indians. In 1924, under the Indian Citizenship Act, non-citizen Indians were made U.S. citizens:

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anybody else…subject to the complete jurisdiction of United States.' Indians, he concluded, were not 'subject to the jurisdiction' of the United States because they owed allegiance—even if only partial allegiance—to their tribes. Thus, two requirements were set for United States citizenship: born or naturalized in the United States and subject to its jurisdiction." S Rider, *Defining Citizens: Congress, Citizenship, and the Meaning of the Fourteenth Amendment* (Feb. 17, 2011).

> *That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."*

Act of June 2, 1924, Public Law 68-175. The Indian Citizenship Act was not intended to disturb tribal citizenship or the rights of individual Indians to tribal property or lands. The IRS should therefore recognize that the Indian Citizenship Act exempts tribal government benefits to tribal members from taxation.

Accordingly, the Supreme Court has held that individual Indian income that is derived from trust lands is not subject to income taxation. *See Squire v. Capoeman*, 351 U.S. 1 (1956). Taken together, the Constitution, treaties, and statutes of the United States make clear that our tribal citizens should not be taxed by the Federal Government, our Trustee, based upon tribal government programs or services derived from tribal trust property, designed to promote the general welfare of tribal citizens, or designed to make our reservations livable as "permanent homes."

In its regulations, the IRS explains that individual Indians, though generally subject to Federal income taxation, should not be taxed upon:

> **22.41.1.6 (10-14-2011) Nontaxable Income of Tribal Members**
>
> 1.) The following items are specifically excluded from the taxable income of individual tribal members:
>
> Income directly derived by the Indian allottee from restricted allotted land that is held in trust by the United States Government,
>
> Income derived from a fishing rights-related activity that is exempt under IRC section 7873,
>
> Income that is exempt under treaty or statute, and
>
> Income received from land claim settlements and judgments pursuant to 25 U.S.C. 1407.

We believe that the IRS has recognized the right principle—Federal tax laws are not intended to interfere with tribal self-government or treaty rights. Yet, the IRS does not apparently understand that tribal government programs and services are the essence of tribal self-government because tribal self-government is only realized through tribal government action on behalf of its citizens.

Because of this failure of vision, the IRS has become a menacing, interfering and overwhelming bureaucracy in Indian Country. The IRS apparently has an unspoken plan to audit each and every Indian tribe in the country in a harassing manner that negates Indian sovereignty and interferes with our relationship with our tribal members. Will any tribal member want to

work with tribal government when the IRS hands them a tax bill any time they receive government services or participate in government programs?

The IRS has sent an incredibly burdensome audit form to our Oglala Sioux tribal government, which seeks records of

- Payments to employees, Council Members, tribal members, including expense reimbursement, distributions from gaming revenue, fringe benefits, bonuses, and accountable plan documentation.
- Petty Cash records.
- Gifts and loans to tribal members and/or employees with related documents.
- Health care, educational benefits, legal advice/representation, utility assistance, housing assistance, recreational activities provided on behalf of tribal members and employees.
- Pow-wow prizes and related tribal contest prizes.
- All bank records, credit card statements, expense receipts, and tribal government program plans.

This is what we would call a fishing expedition. There is nothing that says that the Oglala Sioux Tribe has not complied with the IRS, but the IRS is imposing a burden, a tremendous burden, on us. That administrative burden interferes with our self-governance.

In 2009, just as Congress was preparing to pass the Obama Health Care Plan, the IRS was seeking to tax health care benefits provided by tribal governments to tribal members. Federal employee benefits were not taxed. Veteran's benefits were not taxed. The Indian Health Service programs were not taxed. Federal prisoner's health care benefits were not taxed. State employee health care benefits were not taxed. State citizen's health care benefits were not taxed. Medicare, Medicaid, and children's health care benefits were not taxed. Yet, the IRS wanted to tax tribal government health care. Congress rejected that, enacting a law that says the IRS may not tax health care benefits, insurance, or care provided by tribal governments to tribal members and their dependents.

The IRS explains the meaning of Section 139(d) of the Patient Protection and Affordable Health Care Act:

> Section 139D provides, in general, that gross income does not include the value of any qualified Indian health care benefit. Section 139D defines the term "qualified Indian health care benefit" to mean:

- any health service or benefit provided or purchased, directly or indirectly, by the Indian Health Service (IHS) through a grant to, or contract or compact with, an Indian tribe or tribal organization, or through a third-party program funded by the IHS;

- medical care provided or purchased by, or amounts to reimburse for medical care provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of the member;

- coverage under accident or health insurance (or an arrangement having the effect of accident or health insurance), or an accident or health plan, provided by an Indian tribe or tribal organization for medical care to a member of an Indian tribe, including a spouse or dependent of the member; and

- any other medical care provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian tribes or their members.

"Frequently Asked Questions (FAQs) about new Section 139D," IRS Website. I mention this to show that the IRS does not even follow Congress's guidance when there is a clear mandate to stop taxing tribal government health care, health insurance and medical assistance programs—the IRS included an audit of tribal health programs in its notice, which we were recently asked to answer!

The IRS is now asking Indian tribes throughout the country to submit justifications for not taxing tribal government programs for child care, elder care, education, housing, heating assistance, burial assistance, and cultural activities, such as pow-wows and tribal celebrations. We believe that the IRS is employing a discriminatory double standard. For example, the United States provides housing to the President, the White House and Camp David, etc. Is the President taxed for his housing benefits? No.

Yet, the IRS wants to audit housing benefits, such as surplus FEMA trailers provided to tribal members, who have no access to a real house. My daughter's family lives in a house with no running water—they have to use an outhouse for sanitation. Our people are found by the Census Bureau to be the poorest people in the country, with 47.3% of our people living below the poverty line.

We do not mean to suggest that the President should be taxed for living in the White House. We support the President and the Congress, and the United States has good reason for not taxing the President's housing benefits. Naturally, we have good reasons for seeking FEMA trailers for our people, who otherwise would not have a home. Similarly, the United States has good reasons for providing for the President's travel expenses aboard Air Force One, Marine One, in limousines, etc. Those are not taxed. We have good reasons for providing per diem payments to our Tribal Council Representatives. We should not be

harassed about providing for our Tribal Council because it is our governing body, central to our treaty-protected original, inherent rights to self-government.

For another example, Indian tribes often have burial programs to assist our tribal citizens. In the past, Native Nations gathered to help our communities and families send their loved ones on the journey to the spirit world. Today, Indian tribes honor that tradition by assisting with burials and, typically, Tribal Leaders will make strong efforts to attend funerals of tribal citizens. Also, it is important for tribal elders and ceremonial leaders to attend and participate in the funeral events. The United States should not interfere with our cultural and community traditions, whether it acts through the IRS or any other agency. Yet, the IRS wants to review tribal government burial assistance programs. Who would the IRS tax: The deceased husband and father? Or the grieving widow and children?

The United States pays for Veteran funerals at a price that may exceed $15,000. Yet, the IRS does not seek to tax the Veterans or their families because the United States has a very good reason for providing the funeral assistance. We do not question the U.S. Veteran's Affairs policy--in fact, we agree with it and support it. All we ask is for the IRS to provide us with the same courtesy to tribal citizens when we provide tribal burial assistance.

Churches provide funeral assistance to parishioners. Is the IRS seeking to tax the church or its members for the food service that they provide to support families burying their relatives? Is the IRS seeking to tax church members for the church plots that may be provided in the church yard? No.

Indian tribes are singled out by the IRS for discriminatory tax treatment due to the IRS's curious and short-sighted focus on Indian tribes.

The Indian Self-Determination Policy Mandates Respect for Indian Sovereignty

President Franklin D. Roosevelt initiated a policy of respect for tribal self-government in the Indian Reorganization Act. Although we went through a terrible period under the so-called Termination Policy in the 1950s, led by Senator Arthur Watkins from Utah, President Eisenhower called for Public Law 280 to be amended to require tribal consent to state assumptions of jurisdiction in Indian Country.

Presidents Kennedy and Johnson turned away from the Termination Policy and began the Indian Self-Determination Policy. President Johnson included Indian tribes in the War on Poverty, establishing a Cabinet level working group on Indian self-determination and economic assistance. President Johnson signed the Indian Civil Rights Act into law, securing basic civil rights for tribal citizens and requiring tribal consent to any further state assumption of jurisdiction under Public Law 280.

President Nixon brought forth the Indian Self-Determination and Education Assistance Act and officially repudiated the Termination Policy in a Special Message to Congress supporting Indian Self-Determination. President Reagan supported tribal economic development, self-determination and self-sufficiency and sought to cut the

bureaucratic red-tape that has historically been imposed on Indian tribes. He initiated the Federal tribal government-to-government relations policy. President Reagan also signed the Indian Gaming Regulatory Act into law. President George H.W. Bush continued President Reagan's policies.

President Clinton issued Executive Order 13175 (2000), Consultation and Collaboration with Indian Tribal Governments, to respect Indian sovereignty, self-government and self- determination. Accordingly, the Executive Order explains: "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." The Executive Order states further that:

> Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

Both President George W. Bush and President Obama have reaffirmed Executive Order 13175. The Executive Order provides direction to Federal agencies on agency rulemaking:

> (a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments....
>
> (c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:
>
> (1) encourage Indian tribes to develop their own policies to achieve program objectives;
>
> (2) where possible, defer to Indian tribes to establish standards; and
>
> (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

In sum, the Department of the Treasury and the IRS are directed by the President to "preserve the prerogatives and authority of Indian tribes."

In general, treaties protect tribal self-government and the courts construe subsequent statutes as not impacting tribal self-government unless Congress has evinced an express intention to do so. Tribal government provision of programs and services is protected as an aspect of self-

government by the Indian Gaming Regulatory Act, which mandates the provision of such services prior to payment of any per capita payments to individual members. IGRA makes the per capita payments taxable, drawing a clear distinction from tribal government programs and services, which are not taxable. 25 U.S.C. sec. 2710.

The IRS should respect the traditional areas of tribal self-government, including:

- **Housing.** Wars, non-Indian encroachment and Indian treaties limited aboriginal tribal homelands, typically making it necessary for native peoples to abandon traditional housing and adopt American-style housing to deal with different climate conditions. Recognizing that Indian tribes have typically been relegated to remote and often uneconomic reservations, the IRS should acknowledge that Indian tribes as governments must provide assistance to tribal citizens in the area of housing in accordance with reasonable standards of American housing to make our reservations livable homelands. This is vitally important to the general welfare of Native Nations and tribal communities.[3]

- **Education.** The United States destroyed traditional Native American lifeways by limiting our territory, killing the buffalo, taking our hunting, fishing and farming areas, taking our natural resources and taking our lands for numerous Federal purposes—including non-Indian homesteading, park lands, forest lands, national grass lands, wilderness preserves and military bases, among other things. The treaties promised education in return for huge takings of lands and the United States has not fulfilled those promises. More recent statutes establish new pledges to promote the education of tribal children, youth and adults. Accordingly, it is the policy of the United States to promote education. When tribal governments provide education services through tribal colleges and universities or grants and scholarships to attend state or local colleges and universities, the United States should recognize that tribal governments are providing for the general welfare of tribal citizens. Our tribal educational services should not be subject to taxation by the United States.

- **Child Care and Elder Care.** The United States provides child care through programs such as Headstart and those are not taxable. The IRS should recognize that Indian tribes have unique traditions of child care, where the community was typically involved in providing assistance to raise Indian children in accordance with Indian culture. As the Indian Child Welfare Act acknowledges, Indian children are the most precious resource of Indian tribes and due to a history of taking Indian children away from family homes through boarding schools and forced adoption, Indian tribes need to assist Indian children in growing up in a nurturing environment. Elders are venerated in Indian tradition and provide the critical repository of culture, language and religion for Indian societies, who rely on our oral traditions. Accordingly, tribal governments traditionally provide care for elders, such as hot meals, access to education programs, heating assistance and small

[3] Typically, Indian tribes provide adjunct services to make reservations liveable homes for tribal citizens, as envisioned in treaties, statutes, and executive orders. For example, many tribes provide adjunct heating assistance to deal with freezing cold climates, water to assist in making homes liveable, or sewer and sanitation services to make reservation lands habitable. These programs should not be interfered with by the Federal Government.

subsistence payments. Tribal government program choices should be respected, even though they may not precisely mirror Federal programs, and should not be subject to taxation by the United States.

- **Cultural Programs.** Tribal governments must foster tribal cultures because our native cultures are unique and have a great value to Native Nations and tribal communities. The United States over a period of generations has spent billions of dollars to strip us of our cultures through unconstitutional religious proselytizing, outlawing our religions, forbidding our children to speak our languages, forcible separation of our children from our families, and programs to replace native cultures with "American" culture. None of these efforts were taxed by the IRS. Nor should the IRS tax tribal cultural programs. Congress has evinced a policy to promote native cultures and languages through the American Indian Religious Freedom Act, the Native American Graves Repatriation Act, native language acts, and the establishment of the National Museum of the American Indian. The IRS would not tax a field trip to Washington, D.C. to go to the NMAI. It must not tax trips to pow-wows, tribal gatherings and celebrations, trips to historic sites, or trips to neighboring Indian tribes.

There are many other programs that Indian tribes provide to tribal members that are traditional and cultural in nature.

The IRS General Welfare Doctrine Review

Due to numerous complaints from Indian tribes around the country, the IRS has requested comments on its General Welfare Doctrine and the tribal government programs that may qualify for exclusion from income under its provisions. Yet, we do not trust the IRS to recognize tribal rights because the IRS has minimized tribal government rights. When one Tribal Leader raised objections to IRS intrusion based upon tribal treaty rights, he was told, "You can read your treaties in prison, if you like."

The Constitution is clear: Indian treaties have the force of law. There is no repeal of law by implication, so our treaties are still in force on our Indian reservation lands. Congress seeks to promote a better community life on Indian reservations by providing programs for:

- Children—Headstart, Healthy Start, Youth programs, Boys & Girls Clubs.
- Education—Pre-School, Elementary, Secondary, Post-Secondary, Technical Schools, Scholarship programs, among others.
- Culture—Native American Graves Protection and Repatriation Act, Native Languages Act, National Museum of the American Indian Act, American Indian Religious Freedom Act.
- Elderly—Older Americans Act Native American Program.
- Economic Development—SBA Indian Programs, Commerce MBDA, BIA Office of Energy and Economic Development, USDA RUS.
- Health Care—IHS
- Housing—Native American Housing and Self-Determination Act HUD, FHA.
- Transportation—BIA Roads, USDOT Native American Highways Program.

- Justice—COPS, Tribal Jails, Tribal Courts.

The problem is that the Federal Government never appropriates enough money to carry out the laudable mandates.

Therefore, the IRS should say to itself, if the Federal Government is doing all of these programs to promote better reservation community life in accordance with Indian treaties and failing due to immeasurable need and impossibly limited funding, then Indian tribes should do whatever they can to better their communities. Congress should enact a simple straightforward statutory provision to remedy the IRS mistakes:

> ***When a tribal government program is designed to better tribal community life and make an Indian reservation "livable" as a permanent home for tribal citizens, then it is in the "general welfare" of the United States because it furthers the Federal trust responsibility and treaty pledges to Indian tribes. Benefits from such tribal government programs are not subject to taxation. Indian income derived from tribal trust or individual Indian trust property, land or resources is not subject to taxation.***

Alternatively, tribal governments will need more detailed legislation to protect tribal self-government, treaty rights, the undisturbed use and occupancy of our reservations as "permanent homes." Specific legislation should include the following elements:

> **Findings.** The United States has entered into hundreds of treaties with Indian tribes, which guarantee tribal self-government, tribal lands as permanent homelands, and establish a Federal trust to protect tribal property.
>
> The United States must not tax income derived from tribal or individual Indian trust property or trust land.
>
> The United States encourages tribal self-government and tribal self-sufficiency, so the Federal agencies should not interfere with tribal government efforts to provide tribal government programs and services to tribal members.
>
> The United States should not burden Tribal Executives or Tribal Legislative Councils with taxation for tribal per diem, expenses and stipends because that burdens tribal self-government.
>
> Specifically, the following tribal government programs should not be burdened or taxed by the IRS:
>
> - **Child Care.** The United States recognizes that our children are our most precious resource and there are many Federal programs, so tribal government child care programs should be excluded from taxation.

- **Elder Care.** Our elders hold the cultural knowledge and history of our people. We must support them in their later years because they are our past, present and provide the traditional base for our future.

- **Education.** The United States promised in our treaties to provide education, instead our children were ripped away from parents and family support to go to government boarding schools far from home. They were stripped of language and culture and returned home as strangers. As we seek to educate our children and redress these historical wrongs, the IRS should not burden us with taxes for services that the Federal Government pledged to provide.

- **Housing.** Our people have suffered substandard housing for many generations in our alternating freezing winter cold (sometimes 20 degrees below zero) and high summer heat (sometimes over 110 degrees). Tribal governments must be able to provide decent housing for our people, including utility assistance, insulation and home repairs, without Federal taxation of these essential government services.

- **Police, Fire Protection, and Transportation.** Public safety is a public good, including police and fire protection, and transportation. Because we have inadequate medical facilities on our reservation, we often have to medevac patients out to Rapid City or other regional centers. We need to support their families to travel with them to help in these crises. Police and firemen sometimes are first responders to accidents and medical emergencies. The IRS should not burden these programs.

This more specific legislation should follow the guidelines set forth in 26 U.S.C. section 139D, Indian Health Care Benefits, enacted to stop the IRS from taxing Indian health care and health insurance.[4]

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[4] 26 U.S.C. sec. 139D. Indian Health Care Benefits.
(a) General rule
Except as otherwise provided in this section, gross income does not include the value of any qualified Indian health care benefit.
(b) Qualified Indian health care benefit
For purposes of this section, the term "qualified Indian health care benefit" means—
(1) any health service or benefit provided or purchased, directly or indirectly, by the Indian Health Service through a grant to or a contract or compact with an Indian tribe or tribal organization, or through a third-party program funded by the Indian Health Service,
(2) medical care provided or purchased by, or amounts to reimburse for such medical care provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of such a member,
(3) coverage under accident or health insurance (or an arrangement having the effect of accident or health insurance), or an accident or health plan, provided by an Indian tribe or tribal organization for medical care to a member of an Indian tribe, include a spouse or dependent of such a member, and
(4) any other medical care provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian tribes or members of such a tribe.
(c) Definitions
For purposes of this section—

The Great Plains Tribal Chairman's Association and the National Congress of American Indians have passed resolutions calling for such legislation (GPTCA attached), and we request your support to enact the legislation. Stop the IRS from wrongfully interfering with tribal self-government, treaty rights, trust lands and resources, and Indian homelands.

Conclusion

The IRS has embarked on audits of Indian tribes that we believe are very discriminatory. These audits seek to identify tribal government programs that are providing government services to tribal members and to assess them as income to be subject to Federal taxation. We do not believe that the same audits are being conducted on Federal, State and local governments or foreign nations. The IRS should halt this discriminatory auditing of Indian Country.

Consistent with the Constitution, treaties, statutes, and executive orders of the United States, the IRS should defer to Indian tribal governments providing tribal government services to tribal citizens. The IRS should recognize that Indian tribes as governments have long sought to promote the health and vitality of Native Nations and tribal communities, including tribal languages, cultures and religions. Treaties, statutes, and executive orders establish indigenous homelands, where tribal self-government is protected. The IRS should not interfere with Indian tribes' governmental programs and services designed to provide a decent way of life for tribal citizens, especially when such programs and services supplement Federal programs, where the United States' treaty promises and trust responsibility duties are underfunded or lacking.

Congress must enact a new law to put the IRS back on track. The legislation can be simple and straightforward: The IRS should not tax tribal government programs that are intended to make our Indian reservations livable homes for our tribal citizens. Alternatively, our essential tribal government programs can be spelled out and protected in a manner similar to tribal health care and health insurance.

On behalf of the Oglala Sioux Tribe and the Great Plains Tribal Chairman's Association, I respectfully request that you support legislation to direct the IRS not to interfere with tribal

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(1) Indian tribe
The term "Indian tribe" has the meaning given such term by section 45A (c)(6).
(2) Tribal organization
The term "tribal organization" has the meaning given such term by section 4(l) of the Indian Self-Determination and Education Assistance Act.
(3) Medical care
The term "medical care" has the same meaning as when used in section 213.
(4) Accident or health insurance; accident or health plan
The terms "accident or health insurance" and "accident or health plan" have the same meaning as when used in section 105.
(5) Dependent
The term "dependent" has the meaning given such term by section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(l)(B) thereof.
(d) Denial of double benefit
Subsection (a) shall not apply to the amount of any qualified Indian health care benefit which is not includible in gross income of the beneficiary of such benefit under any other provision of this chapter, or to the amount of any such benefit for which a deduction is allowed to such beneficiary under any other provision of this chapter.

self-government, treaty rights, trust lands and resources, and the absolute and undisturbed use of our Indian reservations as permanent homes. Federal law requires as much, but the IRS refuses to listen. As Chief Red Cloud said, "They made us many promises, more than I can remember, but they kept only one; they promised to take our land, and they did."

Please act now. Our need is urgent. Thank you for your thoughtful consideration of this important government-to-government request for assistance.

Attachment

Resolution No. 9-S-16-12

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

TO HONOR OUR TREATIES, AGREEMENTS AND THE EXECUTIVE ORDERS ISSUED IN ORDER TO HONOR OUR TREATIES AND AGREEMENTS BY CEASING AND DESISTING THE IRS EFFORTS TO TAX OUR TRIBAL GOVERNMENT PROGRAMS AND SERVICES TO TRIBAL CITIZENS WHICH INTERFERES WITH OUR TRIBAL GOVERNMENT RELATIONSHIP WITH OUR TRIBAL CITIZENS, VIOLATES OUR HOMELANDS, AND VIOLATES OUR RIGHT TO TRIBAL SELF-GOVERNMENT.

WHEREAS, The Great Plains Tribal Chairman's Association (GPTCA) is composed of the elected Chairs and Presidents of the 16 Sovereign Indian Tribes and Nations recognized by Treaties with the United States that are within the Great Plains Region of the Bureau of Indian Affairs; and

WHEREAS, The Great Plains Tribal Chairman's Association was formed to promote the common interest of the Sovereign Tribes and Nations and their members of the Great Plains Region which comprises the states of North Dakota, South Dakota, Nebraska; and

WHEREAS, Indian Tribes are sovereign that pre-date the United States, with prior and treaty protected rights to self-government and to our Indian lands, and

WHEREAS, the constitution of the United States, through the Treaty, Commerce, Supremacy, and Apportionment Clauses and the 14th Amendment, recognizes the sovereign status of Indian Tribes as Native nations established prior to the United States; and

WHEREAS, Federal Agencies have a responsibility to respect the letter and spirit of the United States Constitution, Treaties, current Federal laws, and Executive Orders, regarding the Federal Government's relationship with Tribal Governments; and

WHEREAS, Our reservations are part of the original homeland of our people and under our traditional law, we have been struggling to lead our community back to self-determination and self-sufficiency after the devastating genocidal campaigns against us in the 19th Century; and

WHEREAS, The United States undertook many treaty obligations in exchange for the cession of hundreds of millions of acres of land, yet the Federal Government has fallen far short in meeting theses solemn obligations; and

WHEREAS, Through our treaties, agreements, and executive orders, the United States recognized and affirmed our inherent rights to self-government and correspondingly, limited the access of Federal officials to our reservations in the absence of our consent; and

WHEREAS, After many years Tribes in Indian Country have instituted programs to provide governmental benefits to their Tribal citizens; and

WHEREAS, Internal Revenue Service is auditing the benefits provided to individual Tribal citizens by their Tribal Government; and

WHEREAS, the Internal Revenue Service is violating our treaty rights to the absolute and undisturbed use and occupancy of our reservations as permanent homelands and is interfering with the governmental relationship between our Tribal Governments and tribal citizens; and

WHEREAS, The IRS discriminatory approach to the auditing of Indian tribes is a severe problem given the fact that the 5 of the 10 poorest counties in the country are within our Indian reservations in South and North Dakota; and

WHEREAS, The Internal Revenue Code Section 61 states that, except as otherwise provided, gross income includes all income from whatever source derived, and the Internal Revenue Service and federal courts have consistently held that payments made under similar social benefit programs for the promotion of general welfare are not includable in gross income; and

WHEREAS, the General Welfare Doctrine provides a common law (or statutory interpretation by implication) exclusion for government social welfare programs, the test is based on facts and circumstances (or a IRS agent's personal value judgment) and is difficult to apply; and

WHEREAS, The General Welfare Doctrine as applied by the IRS interferes with treaty rights, self-government, and the absolute and undisturbed use and occupancy of our homelands and discriminates in favor of Federal and state programs and against tribal government programs based upon the non-Indian value judgments of IRS agents; and

WHEREAS, Statutory language is needed to clarify that governmental benefits provided by Indian tribal governments for their members is not subject to income taxation; and

WHEREAS, Federal legislation to amend the Internal Revenue Code is needed that would clarify that governmental benefits provided by an Indian tribe to its members is not subject to income taxation; and

WHEREAS, This legislation would apply to governmental benefits provided after the date of enactment. It also includes language to prohibit the IRS or the courts from assuming or inferring that benefits provided by Indian tribes that are not within the scope of the bill were taxable prior to the legislation's effective date; and

NOW THEREFORE BE IT RESOLVED, The Great Plains Tribal Chairman's Association calls upon the United States to honor our treaties, agreements, and the executive orders issued in order to honor our treaties and agreements by ceasing and desisting the IRS efforts to tax our tribal government programs and services to tribal citizens which interferes with our Tribal Government relationship with our tribal citizens, violates our homelands, and violates our right to tribal self-government;

BE IT FURTHER RESOLVED, The Great Plains Tribal Chairman's Association supports legislation to treat tribal government educational and other benefits as an aspect of tribal self-government and tribal civic life, not personal income to individual tribal members;

BE IT FURTHER RESOLVED, The Great Plains Tribal Chairman's Association calls upon National Congress of American Indians, National Indian Gaming Association, Native American Finance Officers Association and other national indian organizations to support legislation to honor tribal self-government by stopping the IRS interference with our Tribal Government relationship with our tribal citizens by seeking to tax Tribal Government programs and services provided to tribal citizens under the so-called General Welfare Doctrine;

BE IT FINALLY RESOLVED, that this resolution shall be policy of the Great Plains Tribal Chairman's Association until withdrawn or modified by subsequent resolution.

CERTIFICATION

This resolution was enacted at a duly called meeting of the GPTCA at a meeting held at the Standing Rock Sioux Tribe in South Dakota, at which a quorum was present, with 10 members voting in favor, 0 members opposed, 0 members not abstaining, and 6 members not present.

Dated this 16th day of March, 2012.

Secretary,
Great Plains Tribal Chairman's Association

Attest:

Chairman, Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nations (Three Affiliated Tribes)
Great Plains Tribal Chairman's Association

The CHAIRMAN. Thank you very much, President Steele, for your testimony.

Ms. SANCHEY-YALLUP. would you please proceed with your statement?

STATEMENT OF HON. ATHENA SANCHEY–YALLUP, EXECUTIVE SECRETARY, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION TRIBAL COUNCIL

Ms. SANCHEY-YALLUP. Good afternoon, members of the Committee, honorable Committee. My name is Athena Sanchey-Yallup. I am a member of the Confederated Tribes and Bands of the Yakama Nation. I am currently the executive secretary for my Tribal council.

I am here today to request assistance from this Committee because the IRS is attempting to enforce a tax on Yakama Nation per capita distributions of trust resources. We request the Committee to confirm and clarify its intent not to tax trust resources and trust

per capita payments, and 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 action. I make these requests and address this Committee on behalf of my 10,400 members of the Yakama Nation.

In 1855, the Yakama Nation signed a treaty with the United States Government. This Congress ratified the treaty with the Yakama in 1859. The United States Constitution recognizes the Yakama treaty as the supreme law of the land. We hold our treaty sacred in words that cannot be conveyed. My people ceded over 10 million acres to the United States in exchange for promises for the 1.4 million acre reservation we reserved for the exclusive use and benefit of the Yakama people.

The Yakamas were further promised that our annuities would be free from burdens. Today, I was humbled to actually witness the original treaty of my Tribe that was done in 1855. It is really emotional for me to sit here, two hours later after seeing that and try to understand what my ancestors did for me to sit here today; what they had to witness, what they had to go through, and what they actually reserved for my Tribal members of 10,400 today.

Within that, we know we have the right for all trust resources to be reserved for the exclusive use of my Tribal members. Today, the IRS threatens to breach those sacred promises to my people. For the first time in our history, the IRS seeks to audit and tax each of Yakama's 10,400 Tribal members' trust lands distributed to them as annuities on a per capita basis from sale of our timber trust lands. Most of our members currently today, as you stated earlier, live in poverty; they receive only a few hundred dollars per year from the dwindling timber sales on the Yakama lands. What the IRS is now attempting to do is extraordinary; overreaching action that is contrary to the expressed intent of this Congress and the promise of the Treaty of 1855.

Based on the Per Capita Act and the Treaty of 1855, the BIA has distributed trust per capita distributions to my members for decades and done so without tax consequences, and the Yakama Nation had the right to assume those responsibilities under the supervision and control of the BIA per the Per Capita Act, and also the distributions were nontaxable. However, today, IRS is asserting they are. I have provided you a copy of the United States Solicitor's 1957 opinion that was addressed to my Tribe regarding the BIA position on the timber sale proceeds for trust per capita. We have relied on this representation from the Federal Government for decades.

In knowing that I am running out of time, Mr. Chairman, I have written a full testimony of all of the issues that the Yakama Nation has regarding the IRS's assumed ability to tax trust per capita to my members. Thank you.

[The prepared statement of Ms. Sanchey-Yallup follows:]

PREPARED STATEMENT OF HON. ATHENA SANCHEY-YALLUP, EXECUTIVE SECRETARY, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION TRIBAL COUNCIL

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, Kahmiltpah, 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 ⅓ 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.[1] 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").[2] 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:

> 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

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[1] "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).

[2] 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-1980s.

> 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.[3] 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 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.

III. 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 re-

[3] 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.

porting 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 governmentto- 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.

The CHAIRMAN. Thank you very much, Ms. Sanchey-Yallup.

President Steele, can you describe the impact IRS audits on general welfare programs have on the ability of the Tribes to carry out their governmental functions and provide for Tribal members?

Mr. STEELE. Chairman Akaka, it is going to take a lot of my staff's time to gather all the documents. The IRS wants all the documents. It seems like they are on a fishing expedition to find out just what we spend our money on, and this is not only to impact my working staff, who are very limited because of the funds that the Tribe has to do additional work, but it is going to impact, like Gentlewoman Yallup says here, the traditional life of my people because the money we handle is their money.

We are not unlike the Federal Government; we handle the people's money, and when they have a need, we care for the whole community. You passed a law, No Child Left Behind. We have an unwritten law, No One Left Behind. So when they are in need, we help them out.

It is going to be detrimental to both our culture, our traditions, and be an additional burden on Tribal government, a burden I don't know if we can handle without putting some more people on.

The CHAIRMAN. Thank you, Mr. President.

Ms. Sanchey-Yallup. the Yakama Nation is undergoing an IRS audit in per capita distributions of trust funds to Tribal members. Do you see this type of audit as a change in policy by the IRS? And, if so, what type of notification did tribes receive regarding this change in policy?

Ms. SANCHEY-YALLUP. Thank you, Mr. Chairman. Again, in the oral report I reference a 1957 opinion, as well as in my written

statement, and the question regarding is this a change by IRS, I would have to say yes. Also, before BIA did administer their distribution of trust per capita, which was assumed by the Yakama Nation government, again, by our right, they were non-exempt, they were not taxable.

However, IRS did change somewhere and on the IRS website it did have a notation for the frequently asked questions as we go out there and look at it. The trust distribution is non-taxable. On the website of November 18th, 2011, it said that. Later on in the IRS frequently asked questions, again, regarding the issue of distribution, April 3rd, 2012, the trust distribution was removed, again, without any change in law; again, without any true honest government-to-government consultation to the Yakama Nation.

The CHAIRMAN. Thank you.

President Steele, culture and tradition are vital to our Native communities.

Mr. STEELE. Yes, sir.

The CHAIRMAN. And preserving culture is a critical component of self-determination. Can you elaborate on the effect that taxation of traditional Tribal cultural activities has on the Tribe and its Tribal members?

Mr. STEELE. Yes, Senator. The people would have to give up their traditional method of letting their loved one go to the spirit world and staying up with them two or three nights physically and feeding all the attendees to what we call wakes. That is a cost and that will probably the interrupted, the traditional way we let the loved ones go to the spirit world.

Secondly, I don't know if our Tribal members would want to take back to school clothes from us. A child does not want to go to school if he doesn't have a new tee-shirt and some new tennis shoes, a pair of pants, and the parents know that that child needs to go to school to get breakfast and dinner or lunch. And you try to get that child in that classroom on the first day, and for that child to go to that classroom on the first day, he is going to want at least something to wear that is good. So we give them back to school clothes money. That is not traditional, but it is something that would impact the children going to school.

Other things are our powwows. IRS wants to tax a person if he wins any monetary value as a prize; give him a 1099. This is overextending, in our belief, IRS's authority. They are acting more on value judgment than any law. That is why we request legislation, possibly, to straighten IRS up. They just don't know what—they are treating us like an organization.

The CHAIRMAN. Thank you very much, President Steele.

Senator Johnson, for your questions, please.

Senator JOHNSON. Welcome, President Steele. Can you share with the Committee some examples of the types of assistance that the Tribe has provided?

Mr. STEELE. Senator, the IRS hasn't been to Pine Ridge yet. We got their letter that they are coming, and they want us to put these certain documents together, and it is all of our banking documents plus a lot of our expenditures in different areas. But we give, like I said, funeral expenses, back to school clothes. We give energy assistance.

We fix houses, Senator. And they want us to put a value on how much that lumber costs to patch a hole in the roof or the floor or put a little shingling on. They want us to put a value on that and give that person a 1099. Our weather gets quite cold in South Dakota and some of the homes just have wood heat, they don't have furnaces, so it is imperative that the Tribe help them out with energy assistance in either buying a pickup load of wood, helping to pay a light bill or buy some propane. And 1099s to all of these people, Senator? It is so much needed. They ask for a little food. We give them a 1099 with the food? This kind of stuff, Senator, is, to me, the next year, where are those people going to find the money to pay IRS?

Senator, I am sorry, but we are about 89 percent unemployed on Pine Ridge. About 40 percent live under the poverty level. It is difficult.

Senator JOHNSON. In the past, have you provided drinking water to any individual Natives who wouldn't otherwise have water?

Mr. STEELE. Yes, Senator, and we did it through either the Tribe before, then the real water program, where we hauled water to their homes. That was quite an expense. I don't know if IRS would want to tax the expense of giving water to homes to wash their faces and cook their dinners, but you know we still haul water to people's homes.

Senator JOHNSON. I am aware of that. President Steele, can you provide examples of how IRS auditing has limited or slowed economic development in Pine Ridge potentially?

Mr. STEELE. Well, Senator, we haven't had the audit, as I said, yet. We got the letter telling us to put all these documents together for them so they can come down and audit us. They have been up to Cheyenne River, they have been to Crow Creek, they have been to Sisson Wapton. They are making their rounds. They have letters to ourselves, up to Turtle Mountain, down to Winnebago that they are coming in and they want us to put these certain documents together.

It hasn't impacted us that they are there yet, but we are getting prepared for them to come in, and, Senators, it is just that they are intruding upon our sovereignty and they are attacking the poorest of the poor. When I look on TV and see whether or not the millionaires should receive any tax, and they are down there wanting to give 1099s to people who are just so poor.

Senator JOHNSON. Ms. Sanchey-Yallup, you stated that the IRS were not able to help the Yakama Nation in understanding its new status of trust per capita payments. How can the IRS improve its government-to-government relations?

Ms. SANCHEY-YALLUP. Thank you, Mr. Chairman, if I may. For IRS to improve their relationships with the Yakama Nation, they truly have to have a government-to-government relationship with us. As Mr. John Yellow Bird Steele has stated, we received a letter. An audit letter is not consultation. President Obama has Executive Order 13175 for all Federal agencies to communicate on a government-to-government level with all tribes. I consider a letter not a government-to-government consultation. The Yakama Nation has requested a formal government-to-government consultation with

IRS. Again, we did not receive that. And, truly, they should have a government-to-government consultation on my lands, at Yakama.

Senator JOHNSON. Is it your position that the IRS should come to face-to-face conversations with you about how they want to tax you and when that tax begins?

Ms. SANCHEY-YALLUP. Mr. Chairman, if I may, government-to-government consultation, to me, is face-to-face. Even though it is technology today, emails and all the other means of media, government-to-government is sitting down with my 14 elected officials and having a discussion. Again, my trust resources are not taxable. That was retained in my treaty with all exclusive rights within the 1.4 million acres of land, to me, as a Yakama member, and all 10,400 members, that is what we hold as trust resources to us. And, again, we ceded over 10 million acres of my territory of Washington to the United States Government so that trust will stay Yakama Nation trust, non-taxable.

Senator JOHNSON. My time has expired. Thank you.

Ms. SANCHEY-YALLUP. Thank you.

The CHAIRMAN. Senator Udall, your questions.

Senator UDALL. Just to follow up on Senator Johnson's question. Has there been any consultation at all with the IRS on the issues that you made the initial request?

Ms. SANCHEY-YALLUP. Mr. Chairman, if I may, their assumed consultation to me as a Tribal leader for the Yakama Nation is a letter.

Senator UDALL. Yes. And that is it?

Ms. SANCHEY-YALLUP. That is it.

Senator UDALL. That is all you have received?

Ms. SANCHEY-YALLUP. I am sorry to interrupt you.

Senator UDALL. No, please go ahead.

Ms. SANCHEY-YALLUP. After we received that, then they showed up and said we want to review the documents. We did not allow that type of situation to happen, and, again, consultation to the Yakama Nation is truly a face-to-face, sit-down discussion with the 14 elected Tribal council of the Yakama Nation.

Senator UDALL. And you have requested that, but haven't received that as of this date?

Ms. SANCHEY-YALLUP. Mr. Chairman, if I may answer, yes. A true and honest consultation with the Yakama Nation.

Senator UDALL. And that hasn't occurred.

Ms. SANCHEY-YALLUP. No, it has not.

Senator UDALL. Okay. Thank you very much for your testimony.

Thank you, Mr. Chairman. I don't have additional questions.

The CHAIRMAN. Thank you, Senator Udall.

Let me ask one question to Ms. Sanchey-Yallup. The Department of the Interior and Department of Justice are currently engaged in an historic effort to settle longstanding trust management lawsuits. Do you think current efforts by the IRS to tax per capita trust payments will affect these settlements moving forward?

Ms. SANCHEY-YALLUP. Thank you, Mr. Chairman. Yes, it will affect the trust per capita going forward. And I know we are not here to speak about that trust mismanagement issue, but we feel that is truly inconsistent with the treaty right of the Yakama Nation and it damages the Yakama Nation in ways that you cannot really

document or speak of if they choose to continue forward with assuming that is taxable.

And, again, we sit here as a treaty Tribe and we are asking for this Committee's assistance to compel IRS to understand my trust resources that were not truly given, but we are borrowing from Mother Earth, that it is the Yakama Nation's way of honoring and being trustworthy to Mother Earth by the trust resources and the payments to the Yakama members are non-taxable. And there has been no change in law and there has been no government-to-government consultation with the Tribe of the Yakama Nation.

The CHAIRMAN. Thank you very much.

Are there any further questions? Senator Johnson?

Senator JOHNSON. I have one more question for President Steele.

So far this year, can you estimate how much the Tribe has provided in welfare assistance?

Mr. STEELE. Yes, sir. All welfare assistance I think has cost the Tribe over $1 million. And, Senators, we do get some money from Venezuela through Joe Kennedy for energy assistance, and it passes through the Tribal ledgers, and IRS will probably tax them for that too.

Senator JOHNSON. I have no further questions.

The CHAIRMAN. Thank you.

Well, I want to thank this panel very much for your testimony, as well as your responses, and want to thank you for highlighting some of the problems that we have. So I want to thank you very much and thank you for coming to this hearing.

Mr. STEELE. We thank you, honorable Senators.

Ms. SANCHEY-YALLUP. Thank you, Chairman.

The CHAIRMAN. Now I would like to call the next panel.

Mr. Aaron Klein, Deputy Assistant Secretary for Economic Policy Coordination at the Department of Treasury; and Ms. Christie Jacobs, Director for the Office of Indian Tribal Governments at the Internal Revenue Service.

Mr. Klein, thank you for being here. Will you please proceed with your testimony?

STATEMENT OF AARON KLEIN, DEPUTY ASSISTANT SECRETARY, OFFICE OF ECONOMIC POLICY, U.S. DEPARTMENT OF THE TREASURY

Mr. KLEIN. Thank you very much, Chairman Akaka, Vice Chairman Barrasso, Senator Johnson, Senator Udall. Thank you very much other members of the Committee and the staff. It is an honor and a privilege to be here testifying before this Committee in the United States Senate today.

I am going to focus on the Treasury Department's Tribal Consultation program and discuss our most recent consultation efforts to clarify and improve the application of the general welfare doctrine.

In 2000, President Clinton signed Executive Order 13175, which requires all Executive Branch departments and agencies to engage in Tribal consultation and to establish a single point of contact for Tribal consultation, a position I hold at the Treasury Department.

In November 2009, President Obama issued a memorandum to all agencies and departments requesting that agencies be actively

engaged in Tribal consultation, that they review and consider revising their Tribal consultation policies, and that they consult with Tribal governments as they do so.

During those initial conversations with Treasury, Tribal leaders raised three key issues: first, they asked for a better process for improved Tribal consultation and enhanced dialogue going forward. Tribal leaders raised concerns about various tax code issues, some of which you have heard today, and in this context they frequently raised concerns about the application of the general welfare doctrine. Finally, tribes raised a number of issues regarding their access to capital for economic development.

Treasury took these comments to heart. We have engaged in a series of meaningful actions in response to Tribal leaders concerns, and I would like to update the Committee on our work.

Treasury took a series of steps to enhance our Tribal consultation process. Tribal consultation must take place from an understanding that conversations between the Federal Government and Tribal governments are conducted on a government-to-government basis, which is predicated on a mutual understanding and respect for Tribal sovereignty, as you well articulated, Mr. Chairman, and the witnesses before me.

We share that opinion. We share that factual belief and we have tried to create a strong consultation process predicated on that. We have tried to open up lines of communication in both directions. We have set up several institutional structures to improve our communication effort, leveraging technology, as well as making sure that we are in frequent contact with Tribal leaders and organizations both in Washington and in Indian Country.

During the course of our consultation efforts, Tribal leaders repeatedly raised concerns regarding whether certain payments or benefits provided by the Tribe to members are excludable from taxable income under the general welfare doctrine. This exclusion governs the types and kinds of benefits that tribes can provide to their members without creating a taxable event. To be clear, it does not govern what benefits a Tribe can provide its members. Tribes are free to provide benefits on whatever basis they see fit, subject to other provisions of law. What this exclusion does govern is whether the provision of such a benefit constitutes taxable income on the part of the recipient.

Treasury and the IRS listened to and considered the requests of Tribal leaders for increased clarity on the application of the general welfare doctrine. We agreed to begin a consultation process dedicated exclusively to this question. Treasury and IRS have held a series of joint consultation meetings with Tribal leaders. We invited comments concerning the application of the general welfare exclusion to Indian Tribal government programs. I am pleased to report to the Committee that we received over 85 comments from tribes and Tribal leaders on this issue.

Through our review of the written comments, our direct consultation efforts, and our own internal analysis, it is clear to us that additional guidance and clarity on the general welfare doctrine is warranted. Treasury and the IRS have now publicly committed to issue new written guidance on this subject. In doing so, we will re-

main mindful of the comments and positions thoughtfully articulated by tribes and Tribal leaders.

Another critical issue raised repeatedly by tribes and Tribal leaders is their access to capital. Treasury is actively engaged in trying to address this issue. The Native American CDFI Program, or NACA, focuses exclusively on establishing and growing CDFIs in American Indian, Alaskan Native, and Native Hawaiian communities. I believe the NACA program represents one of the most successful programs in promoting access to capital in Indian Country.

As an economist, I like to measure the success of a program by its demand. Certified Native CDFIs have grown by almost 40 percent since just 2009 and have increased fivefold since 2001. Clearly, the demand is there. I would especially like to thank Chairman Akaka, members of the Indian Affairs Committee, especially Banking Committee Chairman Johnson, and others for their strong support for the NACA program.

Treasury has also worked with tribes to improve their access to the capital markets. As many of you are aware, under current law, tribes have a more limited authority to issue tax-exempt municipal debt than States and localities. Many tribes have argued against this policy on a variety of grounds. The Recovery Act responded to these concerns by granting Treasury the authority to allocate $2 billion of Tribal Economic Development Bonds to Tribal governments.

The Act also required Treasury to study the program on the issues surrounding tribes' ability to issue tax-exempt debt. We consulted as our first step in this process, received 27 written comments for the record. We took those to heart, we thought through the issue, and we submitted our report to Congress last year.

Treasury's conclusion that Congress should generally adopt the State or local government standard for tax-exempt government bonds on a permanent basis for Tribal governments was broadly consistent with the comments we received throughout consultation.

In conclusion, Treasury really remains deeply committed to working with tribes and Tribal leaders throughout our consultation process. In my view, our consultation on the general welfare doctrine is a perfect example of the process working at its best. Tribal leaders raised this issue to Treasury in general consultation, we did our own internal analysis and listened to what they were saying, we decided to engage in a specific consultation on this issue, and we have engaged in a very thoughtful, respectful, and valuable dialogue which will culminate in new published guidance to try and improve the administrability in fairness to the tax code, while providing tribes and Tribal members greater certainty for compliance.

That concludes my testimony, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Klein follows:]

PREPARED STATEMENT OF AARON KLEIN, DEPUTY ASSISTANT SECRETARY, OFFICE OF ECONOMIC POLICY, U.S. DEPARTMENT OF THE TREASURY

Introduction

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and members of the Committee. I appreciate the opportunity to testify before you on the Treasury Department's Tribal Consultation program with a focus on our most recent consulta-

tion efforts to clarify and improve the application of the general welfare doctrine for Tribes for tax purposes.

Tribal Consultation

In 2000, President Clinton signed Executive Order 13175, which required all executive branch departments and agencies to engage in Tribal consultation on policies that have Tribal implications. EO 13175 also required each agency to establish a single Point of Contact for Tribal Consultation, a position I hold at the Treasury Department. In November 2009, President Obama issued a Memorandum to all agencies and departments requesting that agencies be actively engaged in Tribal consultation, that agencies review and consider revising their Tribal consultation policies, and that they consult with Tribal governments as they do so.

During those initial conversations with Treasury, Tribal leaders raised three key issues. First, they asked for a better process for improved Tribal consultation and an enhanced dialogue going forward. Specifically, they stressed the importance of Tribal sovereignty and that true consultation can only take place with the understanding that the relationship between Tribes and the Federal government is a government-to-government relationship. Second, Tribal leaders raised concerns about various tax code issues related to Tribal governments, Tribal corporations, and Tribal members. Among the many tax issues highlighted by Tribal leaders, concerns about the application of the general welfare doctrine were the most frequently raised. Finally, Tribes raised a number of concerns regarding their access to capital for economic development. Within this area, issues relating to Tribal Economic Development Bonds as well as the Community Development Financial Institutions (CDFI) Fund's Native American program were the two most significant.

Treasury took the comments raised by Tribal leaders to heart. We have engaged in a series of meaningful actions in response to Tribal leaders' concerns, and I would like to update the Committee on our work.

Consultation Efforts

Treasury has taken a series of steps to enhance our Tribal consultation process. First, Treasury developed an internal Tribal consultation process as required by the Presidential Memorandum. This process is in accordance with EO 13175 and has three main principles:

- The Treasury Department is committed to the establishment of a comprehensive consultation process leading to meaningful dialogue with Indian Tribes on Treasury policies that have implications for such Tribes, and in particular those regulations and legislative proposals that have a direct and identifiable economic impact on Indian Tribes or preempt Tribal law.
- Tribal consultation will assist Treasury's development of policy, regulation, and legislative activities, as it will increase Treasury's understanding of the issues and potential impact of activities on Tribes and American Indians and Alaskan Natives.
- The Treasury Department is committed to developing and issuing regulations and guidance in a timely and efficient manner.

Tribal consultation must take place from an understanding that conversations between the Federal Government and Tribal governments are conducted on a government-to-government basis, which is predicated on mutual understanding and respect for Tribal sovereignty.

A strong consultation process requires open lines of communication in both directions. Tribal leaders need to be able to easily contact Treasury, whether to request a meeting, ask about a specific program, or submit their views on a particular issue. Treasury needs to be able to communicate with Tribal leaders in a clear, consistent, and transparent manner, and easily solicit Tribal views on policy issues. To accomplish these objectives, we have set up several institutional structures to improve our communication. First, we have created an email address for any Tribal leader to send a Tribal consultation request, *Tribal.consult@Treasury.gov.* Moreover, we have established a specific webpage dedicated to Tribal consultation which is regularly updated with the latest Tribal consultation requests, policy statements, and reports to Congress (*http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Pages/Tribal-Policy.aspx).* We have also released our Tribal consultation plan so that any Tribe or interested party can see how Treasury is fulfilling our Tribal consultation requirement.

Since adopting our new Tribal consultation process, Treasury has engaged in multiple consultation processes over a wide variety of issues, including Tribal Economic Development Bonds and the application of the general welfare doctrine. In addition, we have continued to hold general consultation and listening sessions to solicit input

from Tribal leaders as well as to enable Tribal leaders to ask detailed questions directly to Treasury officials.

Consultation can and must take place both in Washington, D.C. and in Indian country. I have engaged in consultation and listening sessions in South Dakota, Oregon, and Louisiana. Other Treasury officials have travelled across the country to conduct specific outreach efforts, including a series of conferences and events regarding access to capital, which were sponsored by the CDFI Fund along with the Federal Reserve Banks of Minneapolis and San Francisco and other federal agencies. My colleagues at the IRS have also regularly held consultation sessions across the country.

Tribal leaders often raise issues that concern both Treasury and IRS. To best address these concerns, we have regularly held joint consultation sessions where Tribal leaders engage with senior officials from both Treasury and IRS simultaneously. This not only maximizes efficiency but also encourages a more collaborative process so that everyone is hearing and responding to all parties.

General Welfare Doctrine

During the course of our consultation efforts, Tribal leaders repeatedly raised concerns regarding whether certain payments or benefits provided by the Tribe to members are excludable from taxable income under the general welfare doctrine. This exclusion governs the types and kinds of benefits that Tribes can provide to their members without creating a taxable event. To be clear, it does not govern what benefits a Tribe can provide its members. Tribes are free to provide benefits on whatever basis they see fit, subject to other provisions of law. What this exclusion does govern is whether the provision of such a benefit constitutes taxable income on the part of the recipient.

Treasury and IRS listened to and considered the requests of Tribal leaders for increased clarity on the application of the general welfare doctrine. We agreed to begin a consultation process dedicated exclusively to this issue late last year, holding our first consultation meeting on November 30, 2011, in conjunction with the President's Tribal Nations summit. On March 8, 2012, we held another consultation session hosted by the National Congress of American Indians in conjunction with their annual conference. To provide an opportunity for direct dialogue for all Tribal leaders who were not able to make the earlier in-person consultation sessions, we also held a national phone call just two weeks ago on May 30, 2012. In all of these meetings, Treasury and IRS participated jointly, and while exact attendance figures are not known, it appears that approximately 300 people in total attended these events.

Our Tribal consultation on this issue was not limited to just these in-person meetings. The IRS issued Notice 2011–94 on November 15, 2011, which invited comments concerning the application of the general welfare exclusion to Indian Tribal government programs. When various Tribal leaders requested additional time to submit comments, we accommodated their requests by extending the deadline by an additional 30 days. I am pleased to report that we have received over 65 comments from Tribes and Tribal leaders within the official comment period, and more than 20 additional comments since then.

Through our review of the written comments, our direct consultation efforts, and our own internal analysis, it is clear to us that additional guidance and clarity on the general welfare doctrine is warranted. Treasury and the IRS have now publicly committed to issue new written, published guidance on this subject. In doing so, we will remain mindful of the comments and positions thoughtfully articulated by Tribes and Tribal leaders during the consultation process.

Access to Capital

Access to capital is another critical concern raised repeatedly by Tribes and Tribal leaders. Treasury is actively engaged in helping Tribes access capital to grow their local economies. Within the CDFI Fund, a bureau of Treasury whose mission is to expand the capacity of financial institutions to provide credit, capital, and financial services to underserved populations and communities in the United States, the Native American CDFI Assistance Program (NACA) focuses exclusively on establishing and growing CDFIs in American Indian, Alaskan Native, and Native Hawaiian communities. I believe the NACA program represents one of the most successful programs in promoting access to capital in Indian Country. There are 70 certified Native American CDFIs in operation all around the country, hopefully serving many of the Tribes represented here today. As an economist, I like to measure the success of a program by demand. Certified Native CDFIs have grown by over 38 percent since 2009 and have increased five-fold since 2001, when there were just 14. Clearly

there is demand among American Indians, Native Alaskans, and Native Hawaiians for CDFIs.

We are trying to keep pace with demand for Native American CDFIs. In March of this year, Treasury announced the results from our most recent round of funding for the NACA program. There were 71 applicants for over $23 million in funds. This included 25 existing certified Native CDFIs that applied for more than $16 million in grants along with 46 potential new Native CDFIs, certified Native CDFIs, and Sponsoring Entities that applied for over $6 million in technical assistance grants. Over the lifetime of the NACA program, Treasury and CDFI have awarded over $57 million to more than 250 applicants.

Given its success, there is also strong support for the NACA program in Congress, and I would like to thank Chairman Akaka, members of the Indian Affairs Committee, especially Banking, Housing, and Urban Affairs Committee Chairman Johnson, and others for their continued strong support for the NACA program. This is program is one of the most powerful and effective tools to promote economic development and bring basic financial services into Indian Country, and we are committed to working with Tribes and Tribal leaders to ensure its continued success.

Treasury has also worked with Tribes to help improve their access to the capital markets. As many of you are well aware, under current law Tribes have a more limited authority to issue tax-exempt municipal debt than states and localities. Many Tribes have argued against this policy on a variety of grounds, including that it has inhibited economic development, hampered Tribes' access to the capital markets, and was unfair when compared to the broad authority granted to State and local governments. The American Recovery and Reinvestment Act (Recovery Act) responded to these concerns by granting Treasury the authority to allocate $2 billion of Tribal Economic Development Bonds (TEDBs) to Tribal governments. These allocations would grant Tribes the authority to issue tax-exempt debt for a wide range of projects that previously would not have qualified. Treasury acted quickly, allocating the funds in two different $1 billion tranches and giving awards to 134 applicants.

Treasury was also given an opportunity in the Recovery Act to study the TEDB program and report back to Congress on both the program and, more broadly, on the issues surrounding Tribes' ability to issue tax-exempt debt. Our first step in this process was to act in accordance with Executive Order 13175 and begin a consultation process with Tribes. Through that process we received written comments from 27 Tribes, Tribal organizations, and interested parties from our open Notice in the Federal Register as well as many other comments and insights through various consultations. The input that we received through the consultation process proved invaluable as we sifted through the various policy options available. Broadly speaking, the comments indicated the strong desire to grant Tribal governments permanent and indefinite authority to issue tax-exempt debt similar to the authority enjoyed by state governments.

Treasury submitted its congressional report on TEDBs in December 2011, in which we concluded:

> "For reasons of tax parity, fairness, flexibility, and administrability, the Department recommends that Congress adopt the State or local government standard for tax-exempt government bonds . . . on a permanent basis for purposes of Indian Tribal government eligibility to issue tax-exempt governmental bonds, without a bond volume cap."

That is we recommended that Congress make permanent the experiment begun in the Recovery Act and allow Tribal governments to have access to tax-exempt bonds on their own terms as consistent with the TEDB program. This conclusion is broadly consistent with the positions articulated by many Tribes and Tribal leaders.

While Treasury has made this recommendation for parity on tax-exempt debt, it will not become law until Congress acts. In the meantime, TEDB allocations from the original $2 billion still exist and Treasury and the IRS are working to reallocate the existing authority. In that endeavor we have continued to seek Tribal input and hope to announce our plans for reallocation in the very near future.

Conclusion

Treasury remains committed to working with Tribes and Tribal leaders through our consultation process. In my view, our Tribal consultation on the general welfare doctrine is a perfect example of this process working at its best. Tribal leaders presented these issues to Treasury and IRS through general consultation and Treasury and IRS examined the issues and agreed to a more in-depth specific consultation, resulting in an extensive and highly productive dialogue. Consequently, the new

guidance will improve the administrability and fairness of the tax code while providing Tribes and Tribal members greater certainty for compliance. That concludes my testimony, and I look forward to answering any questions you may have.

The CHAIRMAN. Thank you very much, Mr. Klein.

Ms. Jacobs, will you please proceed with your statement?

STATEMENT OF CHRISTIE J. JACOBS, DIRECTOR, OFFICE OF INDIAN TRIBAL GOVERNMENTS, INTERNAL REVENUE SERVICE, U.S. DEPARTMENT OF THE TREASURY

Ms. JACOBS. Good afternoon, Chairman Akaka and members of the Committee. I appreciate the opportunity to be here this afternoon to discuss how the general welfare exclusion applies to Tribal programs.

As I begin, I want to acknowledge that the United States has a unique government-to-government relationship with Indian tribes, as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions. The Office of Indian Tribal Governments within the Internal Revenue Service was created in response to requests by Tribal leaders. This office exists to facilitate the government-to-government relationship and to assist tribes in meeting their Federal tax obligations.

The principal issue for discussion today is the general welfare exclusion. Tribes, like all governments, sponsor programs designed to support their members. To be very clear, whether this exclusion is or is not applied does not limit what benefits or social programs tribes can provide to their members. The question is whether payments made through those programs are excludable from the income of the recipient under the general welfare doctrine.

There are two key tax concepts: first, Internal Revenue Code Section 61 provides that gross income includes all income from whatever source derived, unless a specific exception in the Code applies; second, the general welfare exclusion is a non-Code exception, an administrative exclusion that has developed in official IRS guidance and recognized by courts and Congress for more than 50 years.

Despite the statutory breadth of Section 61, the administrative rulings show that payments made by government units, Tribal or non-Tribal, can be excluded from a recipient's gross income under the general welfare doctrine if the payments are: made under a government program; for the promotion of the general welfare based generally on individual, family, and other needs; and do not represent compensation for services.

The IRS does not have, and never has had, a special program for examining Tribal government social welfare programs. The question may arise if the Tribe seeks a letter ruling about a specific program. It can also arise during an IRS review of a Tribal government's tax reporting compliance. The Code requires all persons, including Indian Tribal governments, to report to the IRS certain payments of $600 or more. During an examination, records may show such payments to Tribal members requiring further inquiry as to whether the general welfare exclusion applies. If so, those payments do not need to be reported.

The IRS always examines a program using the same three-pronged analysis. Comments from the Tribal community have fo-

cused on two of those prongs: whether the payments are being disbursed based upon the needs of the recipient and whether the payments constitute compensation received for services.

While there are many Tribal and non-Tribal examples in administrative rulings, the difficulty has been that each application is fact-specific, and the historical and cultural context within the Tribal government environment adds a layer of complexity.

In response to concerns raised by various tribes and Tribal leaders, the IRS issued Notice 2011–94 last November, inviting comments concerning the application of the general welfare exclusion to Indian Tribal government programs and beginning a specific consultation process with tribes on how to find a solution that addresses their concerns and improves clarity and consistency of the tax law.

Since then, the IRS has received numerous, as you have heard, written comments from tribes and Tribal leaders, which we are currently reviewing, and the IRS and Treasury have engaged in multiple consultation sessions, such as in November during the White House Tribal Nations Conference, in March during the National Conference of American Indians annual meeting, and a national consultation session conducted through teleconference to facilitate participation.

In addition, on June 6th, the Advisory Committee on Tax Exempt and Government Entities, which is made up of representatives from the public, including representatives of the Tribal community, issued a report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members. We are currently reviewing the recommendations of that report and we expect to continue receiving input as we move forward.

The IRS plans to publish written guidance that will address issues and respond to concerns raised by tribes in their oral and written comments. Our intent is that this published guidance, along with improved internal coordination procedures, will provide increased clarity and consistency of the application of the general welfare doctrine. Tribal concerns are very important to us and we look forward to continuing to work with tribes on this item in the future.

I am aware of the Administration's commitment to strengthen and build the government-to-government relationship between the United States and Tribal Nations, and I appreciate the Committee's interest in these matters.

Thank you. This concludes my testimony, and I would be happy to answer any questions.

[The prepared statement of Ms. Jacobs follows:]

PREPARED STATEMENT OF CHRISTIE J. JACOBS, DIRECTOR, OFFICE OF INDIAN TRIBAL GOVERNMENTS, INTERNAL REVENUE SERVICE, U.S. DEPARTMENT OF THE TREASURY

Introduction

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and members of the Committee.

I appreciate the opportunity to be here this afternoon to discuss how the general welfare exclusion applies to tribal programs.

At the opening of my testimony, I want to acknowledge that the United States has a unique government-to-government relationship with Indian tribes as set forth in the Constitution of the United States, treaties, statutes, executive orders, and

court decisions. The Office of Indian Tribal Governments within the Internal Revenue Service (IRS) was created in response to requests by tribal leaders. This office exists to facilitate the government-to-government relationship and to assist tribes in meeting their Federal tax obligations.

General Welfare Exclusion

The principle issue for discussion today is the general welfare exclusion. Tribes, like all governments, sponsor social welfare programs designed to support their members. Of principal relevance to the IRS is whether payments made through those social welfare programs are taxable. To be very clear, whether this exclusion is or is not applied does not limit what benefits or social programs tribes can provide to their members. The question is whether the provision of those benefits is excludable from gross income under the general welfare doctrine.

In order to provide context to this discussion I would like to briefly explain certain tax principles that apply to government social welfare programs, how the IRS has applied these principles in the past to tribal social welfare programs, and what the IRS is doing in order to address the concerns of the Indian tribal community on this topic.

Brief Explanation of Tax Principles

The two concepts relevant to this discussion are gross income and the IRS's administrative general welfare exclusion from gross income.

Section 61 of the Internal Revenue Code (Code) provides that gross income includes all income, from whatever source derived, unless a specific exception in the Code applies. This provision establishes the general rule that income will be taxed unless it is expressly excluded from taxation.

The general welfare exclusion is, however, a non-Code exception. It is an administrative exclusion that has been developed in official IRS guidance and recognized by the courts and Congress over a fifty-five year period. *See, e.g.,* Rev. Rul. 63–136, 1963–2 C.B. 19; *Graff v. Commissioner*, 673 F.2d 784 (5th Cir. 1982), *affg. per curiam* 74 T.C. 743 (1980); *Bailey v. Commissioner*, 88 T.C. 1293 (1987).

Some have expressed a concern that guidance on the general welfare exclusion lacks clarity because it is not found in the Code but in these other forms of administrative guidance and court decisions that stretch over five decades.

It is clear that the exclusion can apply to payments made by governmental units, tribal or non-tribal. Although Code section 61 defines broadly the items that are included in gross income, the IRS has consistently concluded that payments made to individuals by governmental units, under legislatively provided social benefit programs, for the promotion of the general welfare, are not includible in a recipient's gross income. *See, e.g.,* Rev. Rul. 74–205, 1974–1 C.B. 20; Rev. Rul. 98–19, 1998–1 C.B. 840.

To qualify under the general welfare exclusion, payments must: (1) be made under a governmental program, (2) be for the promotion of general welfare (*i.e.*, be based generally on individual, family or other needs), and (3) not represent compensation for services.

I'd like to emphasize that the general welfare exclusion applies equally to general welfare program payments of all governments, tribal, federal, state, and local.

Past Application of the Exclusion to Tribal Programs

The IRS does not have and never has had a special program for examining tribal government social welfare programs. Historically, there were two primary ways that the IRS came to analyze tribal social welfare programs and whether payments made through these programs qualified for the general welfare exclusion.

One way that the IRS may come to examine a tribal program is for the tribe to seek a letter ruling from the IRS on the tax implications of a certain program. The IRS has historically provided all governments, tribal and non-tribal, with the opportunity to seek a letter ruling to determine if a certain program qualifies for the general welfare exclusion. Some tribes have availed themselves of this process. However, the expense, time needed, and the limited reliance provided by a letter ruling may have discouraged tribes from seeking letter rulings for their programs.

The second way tribal social programs may come under review is through an examination of a tribal government's tax reporting compliance. The Code requires all persons, including Indian tribal governments, to report certain payments of $600 or more to the IRS. During an examination, a review of an Indian tribal government's books and records may show payments of $600 or more to tribal members for social programs. These payments require further consideration, because payments to which the general welfare exclusion applies do not have to be reported.

The IRS always examines a program using the same three prong analysis of the general welfare exclusion. There has not been significant concern voiced to us re-

garding the first prong of this analysis: whether payments are being made from a government fund or not. The comments we have received on the application of the general welfare exclusion within the tribal context have been on the second and third prongs of the analysis: whether the payments are being disbursed based upon the needs of the recipient and whether the payments constitute compensation received for services.

For example, in one private letter ruling, a tribe provided certain educational assistance and benefit payments to its members who attended institutions of higher learning and vocational or occupational training. Most tribal members qualifying for assistance had an income below the national family median income level. In this instance, it was determined that the educational assistance payments were made to enhance educational opportunities for students from lower-income families and, therefore, were excluded from gross income because the payments were for the promotion of the general welfare.

In another ruling, it was determined that payments to participants in a tribal program designed to train unemployed and underemployed residents in construction skills were excluded from income under the general welfare exclusion because the primary purpose was training, which is based on the need for additional skills to prepare for the job market, and was not a payment for the compensation of services.

The difficulty in these examples and in applying the general welfare exclusion has been that each application is fact-specific and requires an independent analysis. The historical and cultural context within the tribal government context adds a layer of complexity to this analysis. Historically, tribes have expressed their concern to us that the IRS has not consistently applied the general welfare exclusion.

The IRS Response to Tribal Concerns

At various points, different tribes and tribal leaders have voiced concerns over the application of the exclusion provided under the general welfare doctrine. This issue came up through various levels of consultation and outreach with tribes and tribal leaders.

In November, 2011, in response to these consultation sessions, various meetings and general outreach with tribes and tribal leaders, and internal IRS and Treasury discussions, the IRS issued Notice 2011–94, which invited comments concerning the application of the general welfare exclusion to Indian tribal government programs. The purpose of the Notice was to begin a specific consultation process with tribes on how to find a solution that addressed their concerns and improved clarity and consistency of the tax law.

The IRS has received over 80 written comments from tribes and tribal leaders submitted in response to Notice 2011–94. We are still reviewing those comments as we consider the next step in this process. Additionally, the IRS and Treasury held a general welfare-specific consultation session in conjunction with the White House Tribal Nations Conference on November 30, 2011. It was attended by over one hundred tribal representatives. On March 8, 2012, Treasury and the IRS participated in a consultation session hosted by the National Congress of American Indians in conjunction with their annual conference and attended by approximately forty tribal representatives. On May 30, 2012, Treasury and IRS held a national phone forum that had over 150 participants. Recently, on June 6, 2012, the Advisory Committee on Tax Exempt and Government Entities, which is made up of representatives from the public including representatives of the tribal community, issued a report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members. We are currently reviewing the recommendations of the report and we expect to continue receiving comments as we move forward.

The IRS plans to publish written guidance that will address issues raised by tribes in their comments. Our intent is that this published guidance, along with improved internal coordination procedures, will provide increased clarity and consistency of the application of the general welfare doctrine. In the process of doing so, we will respond to many of the concerns which we have heard through the written and in-person consultation sessions. Our goal is to publish guidance as soon as possible. Tribal concerns are very important to us and we look forward to working with tribes on this item in the future.

This concludes my testimony and I would be happy to answer any questions you might have.

The CHAIRMAN. Thank you very much, Ms. Jacobs.

Mr. Klein, the Treasury Department has been holding consultations on the application of the general welfare doctrine to Tribal

governments. What will be the end product of those consultations and what is the time frame for publishing the end product?

Mr. KLEIN. Thank you, Chairman Akaka. As was noted, we began this direct consultation last November on this specific issue and we have held several meetings. I think some of the milestones along the way here have been the 85 comments that have come in.

We have stated, as the time frame going forward, that we are going to publish this written guidance. I don't have an exact time as to when. There is an inherent tension, as you heard from witnesses in the first panel, as I am sure you have heard from others and as we have heard. These are real concerns about programs that are going on and affecting real people every day, so we want to address this as quickly as possible.

On the other hand, engaging in consultation in this productive dialogue takes time in the back and forth. It takes time to go through the comments; it takes time to think through some of these complicated issues, because as we are setting their unique concerns that face Indian Country, but they are also precedent that would affect other governmental entities that fall under this.

It would be my hope that we are able to balance those sets of competing interests and issue published guidance in the not too distant future. That being said, I don't view that as an endpoint to the process; I view it as a continual process and a continual chance for enhanced dialogue on this, because these issues, given their complexity, will continue for quite some time.

The CHAIRMAN. Can the Treasury keep the Committee informed of the programs on this that you are talking about?

Mr. KLEIN. Absolutely, Mr. Chairman.

The CHAIRMAN. Thank you.

Ms. Jacobs, taxation of Tribal social programs or benefits interfere with a tribe's ability to provide those benefits to its members. What do you say to someone like President Steele, who has testified that a tax bill to someone on his reservation may mean the difference between complying with an IRS payment or providing food stamps to their family?

Ms. JACOBS. Thank you for that question, Mr. Chairman. During the consultation sessions that we have been having, we have heard these concerns from a variety of tribes, and part of the issue they have raised is consistency with these programs. We have now instituted better internal procedures. I have issued instructions to my field staff that they must coordinate all of these general welfare questions with our technical staff so that we can have a better communication and have a better effort at ensuring consistency in these matters.

This is an issue for all governments because the general welfare exclusion applies equally to State and local governments, as it does to Tribal governments, as they all seek to take care of the welfare of their citizens and members. It is the same doctrine, and at times we say yes or no to a State or local government, as we may have to say yes or no to a Tribal government on their programs. I believe those governments share the same concerns about their citizens and we are cognizant of that and continue to listen to the tribes' concerns as they raise their unique circumstances to us.

The CHAIRMAN. Thank you.

Mr. Klein, one of the major issues that the tribes have brought to my attention is that the field examiners are often unaware or dismissive of Tribal culture and the unique status of tribes as governments. What type of training do your examiners undergo prior to interacting with Tribal governments to ensure they are respectful of the unique cultural, social, and governmental status of tribes?

Mr. KLEIN. Thank you, Chairman, for that question. You are absolutely right, the importance of first recognizing the government-to-government nation and respect of sovereignty, as well as understanding the added layer of complexity that cultural programs provide for Tribal governments and their members is incredibly important.

When we went out for this notice for comments, we actually specifically mentioned cultural programs as an area where we were seeking further understanding and information in terms of what benefits tribes provide, because in that area they are very different from other governments, and we need to respect and understand that is the purpose of the Tribe and we need to understand, as we go forward in this guidance process, how we can best provide that type of guidance for tribes for their cultures.

In terms of the IRS training, I will turn, if you don't mind, over to Ms. Jacobs for her office, since that is really under her responsibility.

The CHAIRMAN. Thank you.

Ms. JACOBS. Well, thank you, Mr. Chairman, for allowing me to add to Mr. Klein's answer.

When the Office of Indian Tribal Governments first came into existence around 12 years ago, we worked very closely with a variety of tribes from across the Country and ended up working directly with a Tribally owned entity to develop some training that not only focused on Indian law, but also on protocol training, cultural training in the general sense, not specific to the general welfare exclusion. All of our employees go through that training and are expected to have a knowledge of the tribes that they are assigned to assist in the field, and those training efforts continue to be ongoing and refined as we gain experience in working with the tribes from the Internal Revenue Service.

The CHAIRMAN. Thank you very much.

Senator Johnson, your questions.

Senator JOHNSON. Ms. Jacobs, when did you first begin to demand 1099s?

Ms. JACOBS. Senator, 1099 reporting has been in the tax code for a time that I cannot speak to. I could get back to you with the date that that started. In the general welfare area this comes up if a program is determined to result in a tax consequence to an individual, then a 1099 would be issued. It also comes up most generally in the employment tax context for vendors and that sort of payment.

Senator JOHNSON. I was under the impression that 1099s were not required in Indian Country previously.

Ms. JACOBS. Senator, I would be happy to provide your staff with a more detailed analysis of the 1099 requirements, but as I stated in my testimony, all persons, including Tribal governments, State

and local governments, are required to file 1099s on the payments to which 1099s apply.

Senator JOHNSON. They always have been?

Ms. JACOBS. I would have to get back to you on that.

Senator JOHNSON. Is there any other way you can imagine that you could avoid the 1099 situation?

Ms. JACOBS. Senator, I believe that in these ongoing consultations on the general welfare doctrine, this is an issue we have been discussing. What are the understandings of the programs that are out there in Indian Country, what ways are the tribes administering them and how we can work with them on the administrative issues, as well as the delivery of the programs that they are engaged in. I think our ongoing dialogue with the tribes to explore those issues is something that we could then take into account as we move forward in developing some sort of published guidance so that we are all in a situation of further clarity and consistency in administering the tax law in this area.

Senator JOHNSON. Is there any way you could arrive at the de minimis number in dealing with the amount spent?

Ms. JACOBS. Thank you, Senator. That is also one of the concerns and issues that we have been discussing with the tribes through the consultation, and a concern that we will certainly take into account as we continue the dialogue on developing further guidance for both the tribes and other governments who are affected by the general welfare exclusion.

Senator JOHNSON. I have no further questions.

The CHAIRMAN. Thank you very much.

Senator Udall, your questions, please.

Senator UDALL. Thank you, Chairman Akaka.

Ms. Jacobs, can you tell us the number of audits the IRS conducted of Indian tribes last year?

Ms. JACOBS. Senator, thank you for that question. I do not have that sort of data available to me, but we would be happy to take your question back and get back to you with that.

Senator UDALL. Okay. And I would also be interested in has the trend changed over the last five years. So those two answers to those questions.

In your testimony you mentioned that tribes can avail themselves of a letter ruling to certify that a program qualifies for the general welfare exception. Approximately how many of these are requested annually, and has that number stayed relatively consistent over the last five years? Is that in the same category?

Ms. JACOBS. Yes, Senator. The precise numbers would be in the same category, but may I explain a bit? The private letter program is something available to any government or any other company, individual through our chief counsel's office, where you can present your situation and receive a ruling on those tax consequences. I am not sure whether the chief counsel's office is able to delineate between one sort of government asking the questions versus another, so I am not sure if we will have those numbers.

The other item I might mention is that when anyone comes in for a private letter ruling, they have the opportunity to withdraw that request if the answer we give them a preliminary answer and it is counter to their position. If it is negative, they can withdraw

that request and it won't be published. So it may also not be possible to completely give you the landscape, but we will do our best to describe those situations for you.

Senator UDALL. Thank you. Your testimony cites two examples of where the general welfare exemption was applied to Tribal programs. Can you share an example of a program or tax event where the general welfare exemption was denied?

Ms. JACOBS. Well, Senator, as I have said, one of the issues with the general welfare exception is that it is very fact-specific. It has developed over 50 years as a facts and circumstances test, and I think there is a lot of information and misinformation out there on some of the issues involved with governments and the general welfare exception.

It is difficult to describe when a situation might be allowable versus not; often the facts appear to be very similar. For example, in a housing program, once one delves into whether the individuals actually have the benefits of ownership and are therefore able perhaps to have their house improved in a way that then allows them to sell that property and gain a benefit, versus a situation that might occur on Tribal trust land where an individual would not own the land and, therefore, not be able to sell it and have that benefit could be an example of where things look similar but might not be.

Senator UDALL. Might not be. Let me ask about, and I am not asking for a ruling here because I understand it is fact-specific. There is a tradition in New Mexico of feast days, and this goes way back to the idea of the individual pueblo and households in the pueblo inviting everybody in. I mean, it is a very broad invitation. If you are within 100 miles or something, you decide you are going to go to the Jemez Pueblo or the Zuni Pueblo or something like that, and come to a feast day, when it is publicly announced. We have heard of an incident of a field agent issuing 1099s to Tribal members for distributions that pueblo governments give to heads of households to help offset feast day costs.

The fee state, sometimes you can have anywhere from 50 to 100, 200 people come through. The people that hold these feasts are of modest incomes, so the Tribe is trying to help them incur some of the costs, but also remain true to the tradition. So if you follow your example here, to qualify under the general welfare exclusion, payments must, number one, be made under a government program. I assume what the Tribe should do here is that if they had a program like this on feast days, that they would make it official through the council or something, and say there is a program for giving out money to support the feast days, and that makes it more credible, Mr. Klein seems to be nodding, that makes it more credible in terms of how the money is allocated.

Then your second criteria is for the promotion of the general welfare, be based generally on the individual, family, or other needs, it would seem like it would qualify there, and not represent compensation for services.

But it seems the key in this kind of situation is having a program in place where the money that goes from the Tribe to the individual to support the feast day is something that is recognized by the governing body and then it has a much better chance to

make it into the general welfare exemption or exclusion. Would that be fair? Not asking you to make any ruling, but just knowing what the facts are there.

Ms. JACOBS. Senator, obviously, I can't speak to any particular situation, but these are exactly the sorts of things that we are appreciating in our consultation with the tribes, describing the reality of the situations to us so that we can work together to come up with guidance on those situations.

Senator UDALL. Yes. And we really appreciate you doing that, because I think when you and Mr. Klein are in these consultations, that you sit down with the tribe, as some of the previous witnesses talked about, learn about their traditions, learn about the culture, learn what it is that they have done for hundreds of years, maybe thousands of years.

Then I think you are better able to apply this particular exemption to their circumstances and situation, and give them some guidance. Just like I was talking about here, you know, it might make it a little stronger if you actually set up, under the governing body, a program so that monies that would flow would do for the following reasons.

Mr. Klein, did you have a comment on that?

Mr. KLEIN. I think that is exactly right, Senator. I think when there are established programs, especially those that have gone through, the Tribal government is a self-governing organization, and programs that have been adopted and ratified by Tribal council through that process clearly become a stronger program with respect to the general welfare doctrine.

Senator UDALL. Thank you.

Sorry for going over, Chairman Akaka, but I just wanted to focus in on that. Thank you very much.

The CHAIRMAN. We will have another set of questions.

Let me begin this second part here.

Ms. Jacobs, can you tell the Committee, is the audit examination process the same for all government entities? Is there parity with the State and local governments?

Ms. JACOBS. Well, thank you for that question, Mr. Chairman. I would say that all governments are subject to the verification of their reporting requirements. In all governments, generally the primary issue that we, the IRS have, relates to employment tax compliance. All governments, including Tribal governments, are employers and the rules about employment tax is generally the same for all of those governments, and that is generally what we would be looking at with them. So in that respect, other than the specific rules that are different for tribes and specific rules that might be different for States, the general process is the same, yes, sir.

The CHAIRMAN. Now, to the panel, are you aware that the Obama Administration has made it a priority to settle longstanding trust cases? Tribes are now concerned that distribution of those settlements to individual Tribal members will be considered taxable income. This seems contrary to the Per Capita Act. Do you view distribution of these settlements as taxable income? And how do you reconcile the prior interpretations of the Per Capita Act?

Mr. KLEIN. Chairman, to answer the first part of your question, yes, we are aware of the longstanding desire to settle these claims.

We are aware and have become increasingly aware in a variety of venues about tribes' concerns about the tax status of not just the settlement, but other income derived from Tribally trust land.

I will defer to the expert on the panel on the tax status and nature of those things, but we have become aware and tribes are continuing to increasingly bring it to our attention.

Ms. JACOBS. Mr. Chairman, yes, to echo Mr. Klein, we have, in various situations, consultation sessions, as well as individual inquiries, become more aware that tribes are concerned regarding the general landscape of the taxability of trust assets and distributions of those assets. Because of that concern, I think we are interested in starting a dialogue with the tribes so that we can fully understand their concerns and make sure that we have consistency in administering the rules that are related to those distributions.

As has been raised, sometimes the statute allows exemption and sometimes it does not, and there has been no change in the law in that area, nor has there been a change in the policy in that area. So we would like to work together, Treasury and IRS, and obviously in consultation and collaboration with the tribes, as well as the Department of Interior, to ensure that we are administering as they come into being, the new settlements in the most effective manner and consistent with the law.

The CHAIRMAN. Well, I want to thank both of you so much for your testimony and your responses, as well. Thank you for highlighting some of the concerns that there are. And let me finally say I want to commend you for working together on these issues, and hope you continue to do that, and also to be sure the tribes are consulted, as you are. I am glad to hear about your training programs, because that also adds to it. So, again, thank you very much.

Mr. KLEIN. Thank you, Mr. Chairman.

Ms. JACOBS. Thank you, Mr. Chairman.

The CHAIRMAN. Let me invite the third panel to the witness table. Serving on the third panel is Ms. Lynn Malerba, Chief of the Mohegan Tribe on behalf of the United South and Eastern Tribes in Nashville, Tennessee; and Mr. William Lomax, President of the Native American Finance Officers Association in Washington, D.C.

I want to welcome both of you to the hearing and ask Ms. Malerba to please proceed with your testimony.

STATEMENT OF HON. LYNN MALERBA, CHIEF, MOHEGAN TRIBE; ON BEHALF OF THE UNITED SOUTH AND EASTERN TRIBES, INC.

Ms. MALERBA. Thank you, Chairman Akaka and also to the other members of the Committee. I am sure that they will be reading this testimony, as well as to the staff here today. I am honored to be able to provide this testimony on behalf of the United South and Eastern Tribes, USET.

USET has united with other respected Tribal organizations in the InterTribal Organization Tax Initiative to jointly address the tax policy priorities of tribes. One of the reasons the Initiative formed was due to widespread concern that the Internal Revenue Service examinations and audits of Tribal general welfare program benefits are being carried out in a manner that is incompatible

with Federal law, treaties, trust responsibility, and the self-determination policy.

As Chairwoman of the Tribal Self-Governance Advisory Committee, it has been my privilege to work with tribes on issues of self-governance throughout Indian Country and to have gained understanding for their goals for their communities.

On behalf of USET and the members of the Initiative , I want to express our appreciation that you have called this oversight hearing. As you have heard from the Tribal panel today earlier, IRS field auditors with limited understanding of Indian law and policy, and the governing traditions of the specific Tribal communities they are evaluating, are conducting audits of tribes that have the effect of vetoing the legislative actions of Tribal governments and second-guessing the policy determinations of the U.S. Congress.

USET Resolution 2012–35 calls for congressional investigation and oversight of IRS audit practices, and for suspension of audits until proper guidance is issued. Since November 2011, USET and Initiative members have participated in a consultation process with Treasury and IRS on the application of the general welfare exclusion to Tribal government program benefits. We have witnessed positive developments through dialogue with Treasury and IRS on the general welfare doctrine. We respect the enlightened comments of Mr. Aaron Klein and other Federal representatives in our March 8th and May 30th dialogues to show that considerable growth and reflection since our first meeting.

It would be highly unfortunate if unbridled IRS field audits and examinations undermine the collaborative spirit of dialogue and the important mutual understandings reached today between Treasury and tribes. Let me further explain the context of USET's concerns.

Tribes operate in unique context and face needs that are unlike those addressed by other governments' general welfare programs. Throughout history, American Indian, Alaskan Native, and Hawaiian Native Tribal leaders have ensured the continued survival of their people against overwhelming odds. Each indigenous Nation in what is now known as the United States has long been recognized as a sovereign government with a unique history, culture, land base, and citizenry. Unlike State and local governments, Indian tribes are simply not just governmental entities; they are also communities of familial relations who hold property and resources communally. Their leaders have been charged with responsibility to maintain and foster culture and traditions.

Tribal Nations have endured colonization, removal, termination, and other difficult periods in the United States history. The consequences of these policies have resulted in difficulties in maintaining traditional ways of life, poor health status, shortened life spans, limited educational opportunities, high unemployment, abject poverty, and inferior living conditions. Tribes are addressing these needs through general welfare programs tailored to the unique circumstances facing their communities pursuant to legislative action of their own Tribal governments. Tribal leaders work for the communal good of their people to address the present day impacts of

failed Federal Indian policies. These responsibilities and programs represent core governmental activities of sovereign nations.

In announcing United States support for the U.N. declaration on the rights of indigenous people, the Administration affirmed that the United States supports, protects, and promotes Tribal governmental authority over a broad range of internal and territorial affairs, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, land and resource management, environment, and entry by non-members, as well as ways and means for financing these autonomous governmental functions.

Further education and training of IRS personnel is required as to these fundamental Federal policies and principles. The consultation process must facilitate greater understanding and Federal policy implementation consistent with the trust relationship and self-determination policy.

The Initiative has called upon the IRS and Treasury to establish general welfare guidance in which the Service will defer to Tribal policy decisions as to the determination of need and exclude such program benefits from taxation. At this moment, even the existing general welfare framework has been interpreted extremely narrowly by the IRS in its Tribal audits. For instance, Tribal program benefits are deemed non-taxable only when interpreted extremely narrowly by the IRS in its Tribal audits.

Indeed, Indian tribes are not interested in poverty-based models or providing general welfare assistance based on measurements of financial need. Means testing program models for program eligibility tend to create disincentives and divisions among Tribal members and reinforces stigmatization that Indian tribes are trying to counteract through their cultural, social, and governmental programs.

The IRS has challenged benefits provided to Tribal cultural leaders who participate in activities that transmit Tribal culture as being taxable compensation for services provided. IRS has frequently initiated its audits on the presumption that Tribal general welfare benefits are actually disguised per capita payments from Tribal gaming revenues. IRS field auditors begin examinations with an over-bias and presumption of guilt until proven innocent. IGRA specifically authorizes gaming revenues to fund general welfare programs and limits taxations only to per capita distributions under a federally-approved revenue allocation plan.

In spite of the controversy underlying these issues, USET perceives areas of agreement where general welfare guidance could issue in the very short term. It is imperative that the mutual understanding between tribes and Treasury and IRS extends to all levels, not just headquarters staff.

This Committee has long recognized that Tribal Nations themselves are in the best position to determine how to provide for their people in the context of their unique histories and their unique needs. Guidance on the general welfare doctrine must respect those determinations and not interfere with Tribal efforts to address those needs.

In conclusion, USET respectfully puts forward the following request to the Committee: affirm that IRS should defer Tribal deter-

minations of community need and establish the presumption of Tribal general welfare program benefits are to be excluded from the income of recipients; call for the suspension of IRS field audits until new guidance is issued; encourage issuance of partial guidance on Federal Tribal agreement items while further Tribal Federal dialogue continues; ensure that tribes have the opportunity to review the draft guidance before published; endorse the creation of a Treasury-IRS Tribal advisory committee; and remind Treasury and IRS that the published guidance must conform to the Federal trust responsibility and the self-determination policy.

USET thanks this Committee to offer its testimony and looks forward to working with you in addressing these oversight issues. Thank you.

[The prepared statement of Ms. Malerba follows:]

PREPARED STATEMENT OF HON. LYNN MALERBA, CHIEF, MOHEGAN TRIBE; ON BEHALF OF THE UNITED SOUTH AND EASTERN TRIBES, INC.

Introduction

Chairman Akaka, Vice Chairman Barrasso and members of the Committee, I am honored to be able to provide this testimony on behalf of the United South and Eastern Tribes (USET). USET is an inter-tribal organization representing 26 federally recognized Tribes, including my tribe, the Mohegan Tribe. USET has united with the National Congress of American Indians (NCAI), the Native American Finance Officers Association (NAFOA), the Affiliated Tribes of Northwest Indians (ATNI), and the California Association of Tribal Governments (CATG) in the Intertribal Organization Tax Initiative ("the Initiative") to jointly address the tax policy priorities of tribes. The Initiative formed in April 2011 in large part because of the widespread concern of tribes that Internal Revenue Service (IRS) examinations and audits of tribal general welfare program benefits are being carried out in a manner that is incompatible with federal law, treaties, the trust responsibility and the self-determination policy.

Additionally, in my role as Chairwoman of the Tribal Self-Governance Advisory Committee, it has been my privilege to work with tribes on issues of self-governance throughout Indian Country and to have gained understanding of their goals for their communities. Self-Governance tribes dedicate their own resources to supplement federal funding for programs intended to benefit tribes and their members. Yet, in recent years, the IRS has increasingly sought to tax what were previously understood as non-taxable benefits provided by tribes to their members.

On behalf of USET and the members of the Initiative, I want to express our appreciation that you have called this oversight hearing. As you have heard from the tribal panel earlier today, IRS field auditors—who may have limited understanding of applicable federal Indian law and policy and who have little or no knowledge of the governing traditions of the specific tribal communities they are evaluating—are conducting examinations and audits that have the effect or vetoing the legislative actions of tribal governments, second-guessing the policy determinations of the U.S. Congress and undermining principles of comity enshrined in U.S. Constitution.

The oversight of this Committee is critical to ensure these agency excesses are curtailed and that policy is developed and executed in an equitable, transparent and consistent manner.

While USET has witnessed some positive developments through dialogue with Treasury and IRS on the general welfare doctrine, overly-aggressive IRS audits continue to taint the atmosphere. It would be highly unfortunate if unbridled IRS field audits and examinations undermine the collaborative spirit of dialogue and the important mutual understandings reached to date between Treasury and the tribes. Let me further explain the context and USET's concerns.

Tribes Operate in Unique Contexts and Face Needs That are Unlike Those Addressed by Other Governments' General Welfare Programs

Throughout history, American Indian/Alaska Native Tribal leaders have endeavored to ensure the continued survival of their people. Each indigenous nation in what is now known as the United States has long been recognized as a sovereign government with a unique history, a unique culture, a unique land base and a unique citizenry. Unlike state and local governments, Indian tribes are not simply

governmental entities; they are also communities of familial relations who hold property and resources communally and their leaders have been charged with responsibility to maintain and foster culture and traditions.

The leaders of these nations work toward the communal good of their people, ensuring that the cultural, physical, social, educational, basic living and emotional needs of their communities are met to the best of their abilities. Each tribal leader is eminently responsible to its members and is held accountable for his/her ability to ensure the long term well-being and continued existence of their extended tribal family.

Tribal nations have survived against overwhelming odds. They have endured colonization, removal, termination and other difficult periods in the United States history which in turn affected their communities. Indian Tribes and Alaska Natives have endured the consequences of these policies that have resulted in poor health status, shortened life spans, limited educational opportunities, high unemployment, abject poverty and inferior living conditions. Although some tribes have managed to generate significant revenues, this change has come about recently and is only beginning to address longstanding social needs.

Tribes view their general welfare programs as supplemental to inadequate federal programs based in the trust responsibility or treaty rights, and that these rights belong to all tribal members. In general, Indian tribes are not interested in poverty-based models of providing general welfare assistance based on measurements of financial need. Indeed, means-testing models for program eligibility tend to create disincentives and divisions among tribal members, and reinforce the stigmatization that Indian tribes are trying to counteract through their cultural, social and government programs.

Tribes are addressing these needs through general welfare programs tailored to the unique circumstances facing their communities pursuant to legislative action of their governments. Tribal governments must address the need to keep traditional culture alive, the need to keep tribal languages alive, and the need to keep tribal religion and customs alive, as well as to assure effective programs to address health, education, unemployment, housing and other welfare needs.

Guidance Applying the General Welfare Exclusion to Tribes Must Respect Tribal Community Needs and Provide for Deference to Tribal Determinations

The General Welfare Exclusion as applied by the IRS is an administrative doctrine that has evolved from rulings addressing state and local government benefit programs. State and local government relationships with their citizens are different from those of the tribal government and their members. Neither tribes nor individual tribal members should be penalized for providing general welfare benefits for a much wider range of "need" than citizens of a State or local government.

The IRS has applied the general welfare exclusion to find that payments to individuals from a governmental welfare fund, under legislatively provided social benefit programs for promotion of the general welfare are excludable from the recipient's gross income. According to the IRS, to qualify under the exclusion, the payments in question must: (1) be made under a governmental program; (2) be for the promotion of the general welfare (based on need); and (3) not represent compensation for services.

The problems being addressed in the tribal-federal consultation on the general welfare exclusion are multi-dimensional. The existing general welfare framework in recent years has been interpreted extremely narrowly by the IRS in its tribal audits. For instance, tribal program benefits are deemed non-taxable only when "need" is based upon *financial need* established pursuant to income-based criteria. This new requirement of means-testing offends tribal leaders' efforts to work for the common good of all, based upon tribally-determined needs that are may also be culturally-established or to implement programmatic commitments the federal government has failed to fulfill.

The IRS has challenged the benefits provided to tribal cultural leaders who participate in activities that transmit tribal culture as being taxable compensation for services provided. For a tribal official to have to issue a form 1099 to a spiritual leader for the conduct of a traditional ceremony is not only burdensome, but also culturally offensive. The Service's lack of flexibility in interpretation and outright misinterpretation call for published guidance built upon core principles of tribal sovereignty and tribal self-determination rather that narrow illustrations based upon the practices of state and local governments.

USET and Initiative members have called on Treasury and the IRS to establish general welfare guidance in which the Service will defer to tribal policy decisions as to the determination of need. USET further embraces the recommendation issued

last week by the Advisory Committee on Taxation (ACT) that general welfare guidance establish a presumption that tribally-established welfare programs that address tribal needs are not taxable to the recipient and do not require reporting by the tribe. We believe these principles of deference to tribes and the presumption of tax exclusion could be incorporated not only into the guidance that Treasury and the IRS will hopefully publish in the near future, but that could be immediately applied nationwide at all levels as a means to defuse tension with respect to ongoing audits even before formal guidance is published. The IRS can and must educate its field staff to implement IRS responsibilities in conformity with established policy, not based on uninformed or subjective impressions.

Tribes have pointed out to Treasury and the IRS that built into these tribally-administered programs are internal controls for accountability grounded in tribal culture and pursuant to federal requirements. This direct and local accountability is also exercised by tribal governments and their members in carrying out their general welfare programs. Deference to tribal authority should be incorporated into the IRS and Treasury GWE guidance in recognition of the accountability mechanisms in place that are based on tribal community values, reciprocal responsibilities and programmatic objectives. Tribal representatives and tribal members understand and can identify when general welfare programs are not accomplishing their objectives. They can identify shortcomings or abuse with an immediacy that federal agents will never attain. The IRS and Treasury could recognize tribal systems for local accountability by expressly making reference to tribal internal controls as part of the general welfare exclusion guidance.

Another alarming defect in the IRS interpretation of tribal general welfare programs is that the IRS has frequently initiated its audits on the presumption that tribal general welfare benefits are actually disguised per capita payments. Given this overt bias of the IRS field staff in these examinations, it appears absolutely necessary that the guidance contain explicit terms to convey that the Indian Gaming Regulatory Act (IGRA) expressly authorizes gaming revenues to be used by the tribal government for the general welfare of tribal members and that only the per capita distributions of gaming revenue under a federally-approved revenue allocation plan may be taxed.

Further Tribal-Federal Dialogue is Needed, but Guidance Should Issue as Soon as Agreements Have Been Achieved

In spite of deep controversy between the IRS and the tribes as to audits, USET has seen greater understanding arise from federal counterparts over the course of the three consultation sessions so far. We respect and appreciate the enlightened comments and perspectives expressed by Mr. Aaron Klein and other federal representatives in our March 8 and May 30 dialogues. The comments show a serious level of study, reflection and analysis from Treasury and the IRS since our first meeting in November 2011. While we may still have a long way to go to close gaps between tribal and federal perspective, USET and other members of the Initiative perceive areas of agreement where general welfare guidance could issue in the very short term. Prompt issuance of guidance on agreed-upon principles and approaches could eliminate areas of uncertainty, enhance trust between the Department and tribes and allow for focused federal-tribal dialogue to continue developing principles that will guide policy on the more complex issues.

For USET and the other members of the Initiative it is imperative that mutual understanding between tribes and Treasury/IRS extends to all levels—not just the headquarters staff. What has been established through the consultation is a mutual understanding that, as currently implemented by the IRS field staff, tribes lack certainty as to whether elements of its general welfare program are taxable or not. Treasury and the IRS have expressed a commitment to work with tribes to establish guidance that provides for such certainty.

Still problematic, however, is that IRS—at this moment—is auditing and examining tribal governments based on analyses that are incompatible with the long-standing understandings of the scope of the general welfare exclusion. As evident in the testimony from the tribal panel earlier today, provocative and unrestrained IRS examinations and audits threaten to contaminate what has otherwise been a positive and productive government-to-government dialogue. The Initiative has consistently requested suspension of these audits until guidance issues, but Treasury and IRS have alleged they lack authority to suspend the process.

USET fails to see rationale in continuing to subject tribal governments to the expense of preparing and collecting extensive documentation for submission and review of tribal general welfare policies, when neither the tribes nor the agents have sufficient guidance that establishes what it is they are looking for. Furthermore, the combination of increased audits and insufficient IRS guidance recognizing the im-

portant role played by tribal programs under the general welfare doctrine is increasingly placing tribal governments in the position of having to cut back or eliminate needed programs in order to devote limited resources to defending those programs in audits. USET asks this Committee to call upon the IRS to suspend its audits until guidance issues.

Consultation is Best Served When Tribes Review the Draft Guidance and Participate in Policy Development in a Sustained Manner

Given well-founded concerns that the published Treasury/IRS guidance could narrowly limit tribal programs eligible for the general welfare exclusion only to tribal means-tested programs and that would tax benefits to members extended through educational, cultural ,or other tribal programs, tribes have called for the opportunity to review and comment on any draft guidance Treasury and the IRS produce. USET and the Initiative members view such opportunity to comment as integral to government-to-government consultation that ensures policies affecting Indian country take into account the needs of the tribal nations and their differences across the regions of the United States.

This Committee has long recognized that tribal nations themselves are in the best position to determine how to provide for their people in the context of their unique histories and unique needs. Respecting the voice of tribes in determining federal policies has been observed consistently over the past forty years of federal Indian policy. In 1970, President Nixon stated:

> "Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the *Indian future is determined by Indian acts and Indian decisions*."
>
> Richard Nixon, Special Message to Congress, July 8, 1970, *Public Papers of the President of the United States* (1970), p. 564 (emphasis added).

President Obama recently echoed these same themes:

> "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship."
>
> President Obama, Memorandum on Implementing Tribal Consultation under Executive Order 13175 (Nov. 5, 2009).

Tribal leaders in the November 30, 2011, consultation with IRS stressed that simply convening one session of tribal discussion cannot sufficiently address the complex elements that comprise the tax implications of the general welfare activities of tribes. Ongoing dialogue is required. Treasury and the IRS have provided for a more enriching dialogue by participating in three discussions so far. While an improvement, further sustained interaction is needed for the government to understand and adequately reflect tribal views. The Initiative has proposed a Tribal Advisory Committee to serve as a forum for tribes and Treasury/IRS to discuss issues and proposals for changes to Treasury/IRS regulations, policies and procedures. Additionally the Advisory Committee on Taxation (ACT) has recommended that Treasury establish the position of Undersecretary for Tribal Affairs.

USET requests that the Committee support these sustained consultation concepts. We further request that the Committee provide its own input to the consultation process to set forth the need that the published guidance must conform to the federal trust responsibility and the self-determination policy. The Committee's resolution or statement affirming that these fundamental principles demand federal deference to tribal determinations of community need and a presumption that tribally-established general welfare program benefits are to be excluded from the income of recipients.

Conclusion

USET thanks the Committee to offer its testimony and looks forward to working with you in addressing these oversight issues. I will gladly respond to your questions.

The CHAIRMAN. Thank you very much for your testimony.
Mr. Lomax, will you please proceed with your testimony?

STATEMENT OF WILLIAM LOMAX, PRESIDENT, NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION

Mr. LOMAX. Aloha, Chairman Akaka.

The CHAIRMAN. Aloha.

Mr. LOMAX. My name is William Lomax and I am a member of the Gitxsan Nation and President of NAFOA. At NAFOA we serve the interests of Indian Country by working on a wide range of tax, finance, and other economic policy. Rarely do we see tax issues generate so much united and widespread Tribal concern as this does.

We firmly believe that the IRS, in carrying out its duties as a regulatory agency, is wrongly interpreting and enforcing the general welfare doctrine as it applies to Tribal governments. More recently, we believe the IRS has improperly shifted policy when it began to pursue taxing trusts and possibly settlement distributions to individuals.

We understand the IRS has a difficult task when enforcing the tax code and collecting what may be owed to the Federal Government, but that is not what is at stake here today. At stake today is something much greater. The IRS is using the full force of its agency to interpret the validity of Tribal programs and aggressively deter, through enforcement, the establishment or expansion of much needed Tribal programs and, as a result, Tribal self-determination.

Even more alarming from a Tribal perspective is that the IRS is making these determinations case-by-case, without integrating Federal Indian policy into their decisions. This has the effect of placing Tribal well-being, culture, and values in the hands of field agencies who routinely make these determinations, instead of duly elected Tribal leaders, Congress, and the Administration.

A few brief examples to illustrate the point. First, when a Tribe funded a trip for their elders to cultural and historical sites, including to Native focused historic battlefields, parks, and sacred landmarks, an IRS agent determined the value of the trip to be taxable to the elders. I don't recall anyone else ever receiving a 1099 for a field trip or for attending a church activity.

In the second example, an IRS agent ruled that Tribal citizens who benefitted from government programs should be taxed on the part of the revenue that was generated from gaming proceeds. The same benefits funded from other revenue were considered exempt. This example shows the intent of the IRS to interpret the source of the revenues more relevant than the program itself. In addition, the agent ruled that the Tribe should have withheld taxes, which led to significant penalties.

The IRS is quick to point out that these activities may still be carried out, they will just be subject to taxation. But the true deterrent lies in the enforcement effort and the uncertainty of what IRS may consider a taxable trigger. Five years ago and IRS commissioner testified to the fact that his agency had conducted 139 examinations during the past two years that focused specifically on the use of net gaming revenues. At that rate, all tribes in the lower 48 would have been on track to have been examined by now.

For 2011, Indian Tribal Government Work Plan states that one of its primary focus areas is reviewing the taxability of Tribal member distributions. Yet, in the IRS's 2011 Work Plan for Fed-

eral, State, and local government, the taxability of benefits provided by State and local government is not even mentioned.

The fact that Tribal governments are being examined at a high rate is not a simple matter for the tribes to deal with. An examination costs a Tribe a significant amount of scarce time and resources, especially when the agent's objectives are unclear and open-ended. More costly for a Tribe is a ruling that a government should have withheld taxes. This action costs significant sums of money because penalties are proportionate to the number of beneficiaries.

There are a number of other apprehensions that Congress and the Administration should have about the IRS approach and wisdom of using taxation as a deterrent for this purpose. First, many Tribal programs are making up for the prior adverse effects of centuries of attempted cultural assimilation and failed Federal policies. Second, it is difficult to imagine the revenue benefit to the IRS outweighing the harm done to Tribal governments through the creation of greater uncertainty, the increased expense on already strained governments, and the potential loss of cultural practices.

Third, as this Committee knows, the practice clearly goes against congressional intent and overall administrative policy of honoring self-determination and fairness in taxation. And, finally, the extensive need in Indian Country for education, health care, housing, and other basic services, along with years of unmet and unfulfilled Federal obligations, it stands to reason that the Federal Government should be doing all it can to support and incent these programs, not deter them through taxation.

In addition, the IRS has also embarked on a disturbing effort to tax per capita payments made to Tribal members from trust funds. Per capita payments from Tribal trust funds are specifically excluded from both Federal and State taxes under the Per Capita Act of 1983. Long before 1983, this tax exclusion existed in Federal law because it is derived from Indian treaties and the Federal trust responsibility.

The IRS has the opportunity to do the right thing and honor Federal policy. When they issue guidance on general welfare, it should firmly support self-governance and Federal Indian policy. After the IRS announced formal comments on general welfare six months ago, they received about 90 comments and hundreds participated in the three consultations that they held. A report submitted by the IRS Advisory Committee on general welfare affirms and supports Tribal self-determination, greater inclusion by tribes on IRS policy decisions, and that Federal Tribal policy should be included in guidance.

We are hopeful that the views expressed during this hearing, and Tribal comments in the IRS advisory report will be carried forward. In the absence of this, we strongly request Congress to act to uphold fairness and its Federal trust responsibility.

In addition, we are calling on Congress to put an immediate end to the current aggressive IRS activities of determining Tribal welfare and taxing trusts and settlement assets until these issues are resolved. After all, these are internal administrative IRS decisions that can be reversed without a regulatory change, let alone a legislative fix.

There is a saying in my Tribe that if you take a bucket of water out of the Skeena River, it keeps on flowing. The IRS in this case is not just reaching in to take a bucket of our resources; it is effectively changing the course of the river.

Thank you, Chairman Akaka, for your time.

[The prepared statement of Mr. Lomax follows:]

PREPARED STATEMENT OF WILLIAM LOMAX, PRESIDENT, NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION

NAFOA serves Indian Country by developing tribal financial capacity and building the essential partnerships necessary to advance tribal economic development. In addition, NAFOA serves tribal leadership and practitioners by supporting sound tax, finance, investment, banking, and economic policy. We are pleased to present testimony on one of the leading concerns of Indian Country—the Federal Government utilizing administrative tax policy to deter tribal self-determination and cultural preservation.

In particular, our testimony will focus on the principal concerns that directly impact self-determination. The concern is how the Internal Revenue Service (IRS) is applying the General Welfare Doctrine as it applies to tribal governments, in sharp contrast to the principals of tribal sovereignty and self-determination and longstanding federal Indian policy; and, the concern that the IRS has shifted policy to begin taxing distributions from tribal trust assets and settlements.

While guidance from the IRS is currently in progress, there is valid concern from tribal leadership based on direct agency contact with tribes and their members that the IRS may not move to fully support the unique status of tribes and the government-to-government relationship that exists between tribes and the Federal Government. If that status is not respected, it will impede the Federal Government's trust responsibility, hard-fought treaty rights, and over a century of judicial, administrative, and congressional federal Indian policy, not to mention, the current Administration's objectives of ensuring fairness in tax policy and application. NAFOA is requesting the Committee, in its oversight role:

1. Place a moratorium on any examinations of tribal general welfare programs until clear and consistent guidance or legislation is enacted.
2. Ensure sovereignty and federal policy, including self-determination, is upheld and supported in the creation of a general welfare doctrine for tribes.
3. Ensure tribal leader input, advisory committee input, and congressional intent be incorporated into the guidance document.
4. Ensure tribal leadership has the ample opportunity to review any formal or informal guidance prior to implementation and have meaningful input in this and other IRS policy that directly affects tribes.
5. End the abrupt change in IRS policy to begin taxing trust and settlement distributions to individuals.
6. Be prepared to step in with statutory language should the IRS' final guidance fail to uphold the core tenants of federal Indian policy.

The General Welfare Doctrine

The IRS generally begins with the presumption under Section 61 of the Internal Revenue Code which provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Furthermore, the agency assumes that tribal income, not otherwise exempt, is includable in the gross income of the Indian tribal citizen when distributed or constructively received, unless excluded by a specific statute or treaty.

Although the IRS Code under Section 61 is very broad, the IRS does exclude certain government services, payments, and benefits. At the start, a broad array of government services are typically excluded from income, including education, public safety, court system, social services, public works, health services, housing authority, parks and recreation, cultural resources, and museums. In addition, payments made by federal, state, local, and Indian tribal governments under a legislatively-provided social benefit program for promotion of the general welfare receive a particular administrative exception to the general rule of broad income inclusion and would fall under the General Welfare Doctrine (GWD) or General Welfare Exclusion (GWE).

This is a seemingly broad statement of exclusion for government payments that promote the general welfare of a government's citizens. However, the IRS has further refined the circumstances to which the doctrine is limited. The IRS generally focuses on the following three factors when considering whether a payment is excluded pursuant to the General Welfare Doctrine: (1) was it made by a governmental unit?, (2) was it for the promotion of general welfare?, (3) were services rendered for such payment?

The second requirement—that the payment be made to promote the general welfare—has received the most attention. In the past, the IRS has found a large variety of government programs to be for the promotion of general welfare. Programs that meet health needs, educational needs, job training needs, economic development needs, and several other needs were determined to be for the promotion of general welfare. For example, the IRS ruled that government provided health care benefits for the elderly, commonly known as Medicare benefits, were not taxable to recipients because the Medicare program furthered the social welfare objectives of the Federal Government.

Disparate Treatment

While the IRS strives to treat all governments the same, a review of the IRS's 2011 Work Plans indicates that some notable differences remain. The IRS's 2011 Indian Tribal Government Work Plan states that one of its primary focus areas is reviewing the taxability of tribal member distributions. Yet, in the IRS's 2011 Work Plan for Federal, State and Local Governments, the taxability of benefits provided by state and local governments is not even mentioned.

Indian Tribal Governments may assert different priorities on values such as cultural preservation and use a different model for delivering their services, but the services provided are not any more numerous or altogether unlike in their overall objectives than those programs and services provided by state and local governments.

What is different, however, is how the IRS has interpreted the validity of tribal programs and how they have aggressively enforced, and therefore, deterred the establishment or expansion of tribal programs; and as a result, tribal self-determination. And even more alarming, from a tribal perspective, is that the IRS is making these determinations without the full understanding, or at very least integrating, federal Indian policy into their determinations. This has the effect of placing tribal well-being, culture, and values in the hands of field agents who routinely make these determinations instead of with duly elected tribal leadership, Congress and the Administration.

Two examples (among others received) illustrate this concern. First, when a tribe funded a trip for their elders to cultural and historic sites, including to an historic battlefield involving the ancestors of the tribal elders, an IRS agent determined the value of the trip to be taxable to the elders. A second example shows the intent of the IRS to focus on the source of the revenue rather than the program. An IRS agent ruled that the tribal members who benefitted from government programs should be taxed on the part of the revenue that was generated from gaming proceeds with the same benefits derived from other revenue considered exempt. In addition, the agent ruled that the tribe should have withheld taxes.

The Indian Gaming and Regulatory Act (IGRA) requires withholding only when payments are made per capita from net gaming revenue and as approved by the Department of Interior in a filed Revenue Allocation Plan. In addition IGRA is clear that any other typical government or charitable use is allowable, including specifically authorizing net revenues from Class II and III gaming activities conducted by Indian tribes: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

This interpretation that the source of revenue is suspect would be dismissed if it were only one agent's interpretation that the revenue source of tribal governments is the determinant of taxability and withholding requirements. However, national and inter-tribal organizations have heard from enough tribal leaders to make an informed conclusion that tribes are being targeted for examinations at an extremely high and disproportionate rate.

It appears the IRS Commissioner has taken a similar inequitable view that tribal government revenue is somehow more suspect than state revenue derived from the same source and used for similar purposes of general welfare.

Five years ago Steven Miller, when testifying in front of the Committee on Finance stated, "To reduce the tax consequences to tribal members, some tribes have created mechanisms to classify what should be taxable per capita payments as gen-

eral welfare program payments, excludible from income, often through liberal interpretations of what constitutes a needs-based program. Others have created or invested in purported income deferral programs . . . .

To address this problem we have engaged in educational and enforcement activities. We also initiated 139 examinations during the past two years that focused specifically on the use of net gaming revenues."

This statement clearly expresses the IRS view that federal Indian policy and tribal self-determination are nothing more than "liberal interpretations of what constitutes a needs-based" program and something to be shut down. And, possibly more troubling, a clear effort on behalf of the IRS to use significant agency resources to enforce this view and deter tribes from utilizing tribal revenue for the benefit of their citizens by conducting 139 examinations in two years. At that rate and at that time, the IRS was on track to examine every tribal government in the lower 48 to ensure their view of federal Indian policy was carried out.

It is worth noting states that conduct gaming activities to benefit schools, roads and shore up or augment general funds have not received the same scrutiny.

The IRS and Treasury are quick to point out that these activities may still be carried out; they will just be subject to taxation. But the true deterrent lies in the entirety of the enforcement effort and the uncertainty of what IRS may consider a taxable trigger—uncertainty even surrounds programs that have been carried out in some form for generations such as funeral ceremonies and language preservation.

The fact that tribes are being examined at a disproportionate and alarming rate is not a simple matter for tribes to deal with. An examination costs a tribe significant time and resources, especially when the agent's objectives are unclear and open ended. More costly for a tribe is a ruling that a government should have withheld taxes. This action costs significant sums of money because penalties are proportionate to the number of beneficiaries.

In addition to the costs associated with the agency's actions, there are a number of other apprehensions about the IRS approach and wisdom of using taxation as a deterrent for tribal governments to advance the quality of life of their citizens and within their communities that should cause concern for Congress and the Administration.

First, tribal programs are making up for the prior adverse effects of centuries of attempted cultural assimilation and failed federal policies. Second, it is difficult to imagine the revenue benefit to the IRS (as an agent of the Federal Government) outweighing the harm done to tribal governments through the creation of greater uncertainty, increased expenses on already strained governments, and the possible loss of cultural practices. And, finally, given the extensive need in Indian Country for education, health care, housing, and other basic services, along with years of unmet and unfulfilled federal obligations, it stands to reason that the Federal Government should be doing all it can to support and incent these programs and not deter them through taxation and through the administrative expenses required to implement and comply with new and undefined IRS standards.

Congressional Intent

It is the last concern that caused this very Committee to use its oversight role to ensure federal Indian policy was considered valid criteria for carrying out the General Welfare Doctrine.

The Committee on Indian Affairs held an oversight hearing during the previous Congress in September of 2009. Shortly after, in an affirmation of support for tribal general welfare programs, Congress acted to support the exclusion from income the value of health care benefits provided by tribal governments to their citizens under the Affordable Care Act. In addition to actively addressing the issue in the Affordable Care Act, this Committee, during this Congress, moved to place language in the Early and Secondary Education Act draft that would exclude from income the value of education and cultural programs and services provided by tribal governments to its members.

During the 2009 Committee on Indian Affairs hearing entitled "Oversight Hearing to Examine the Federal Tax Treatment of Health Care Benefits Provided by Tribal Governments to their Citizens," tribal leaders expressed offense at the idea that the Federal Government would provide a disincentive for tribes to provide health benefits to their members since they were providing a service that the Federal Government failed to deliver. In addition, taxing health benefits was also counter-intuitive at best for the Federal Government since tribes relieved the Federal Government of an expense and obligation when participants were removed from an already strained Indian Health Services (IHS) system.

During the same hearing, leadership voiced their concern that excluding health care benefits may lead to the IRS incorrectly concluding that all other general wel-

fare programs specifically not excluded by law would then be open to challenge. To remedy the IRS from taking an aggressive approach of targeting other general welfare benefits, tribal leaders recommended that Congress include "no inference" language in the law and in report language, and that Congress continue to insert its oversight role.

Although no inference language was included in the law, it did little to dissuade IRS field agents from examining—through audits and information requests—general welfare programs implemented by tribes formally through legislatively established programs or informally through traditional practices. Tribal leaders' concerns were well justified, and in hindsight, they may have underestimated how aggressively the IRS would pursue tribal general welfare programs relative to other state and local government programs during the period since the hearing.

Since the passage of the tribal health care exclusion in the Affordable Care Act, most tribes still struggle to navigate the federal health care system administered through IHS. And, those few tribes that have experienced continued economic success have continued to administer their own programs to improve the quality of life for their citizens. There has not been a rush by tribal governments to provide health care benefits after the legislation was passed. This is because tribal leaders, vested with responsibility of making sound long-term decisions, have weighed the legacy costs and economic factors in the same manner as other government leaders and have made determinations that fit their respective tribe's priorities and long-term obligations.

This practical experience should have gone a long way in informing the Internal Revenue Service decision to subsequently focus on other general welfare benefits provided by tribal leadership.

As mentioned before, Congress, in the Indian Gaming Regulatory Act (IGRA), provided clear intent that any distributions made from net gaming revenues on an approved per capita basis would be subject to federal taxation with tribes carrying the responsibility of reporting. Conversely, Congress was silent on taxing net revenue retained for clearly governmental or social purposes including net revenue used: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

IRS Outreach and IRS Opportunity for Tribal Inclusion

NAFOA is requesting that prior congressional intent and the attributes of two recent works developed from IRS outreach be considered in the development of guidance. The first is the joint comments provided by the Tribal Tax Working Group in response to IRS Notice 2011–94 which called for input for the development of guidance on the general welfare exclusion as it applies to Indian tribal governments and their social welfare programs benefitting tribal members. The second is from the Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled "Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members."

The IRS announced, in IRS Notice 2011–94, the formal request for comments on the General Welfare Doctrine as it applies to tribal government programs on November 15, 2011. Shortly after, the IRS hosted its first consultation on the issue on November 30, 2011. The consultation coincided with the President's tribal leader meeting. Subsequently, the IRS hosted a second consultation, also in Washington, DC in March and just a few weeks ago hosted a phone consultation that was heavily attended. The initial deadline for comments was extended from February 13, 2012 to March 14, 2012. However, the IRS continued to encourage comments after the deadline leading up to the phone consultation. Almost ninety comments were received on the issue.

Joint comments were developed in response to IRS Notice 2011–94 which called for input for the development of guidance on the general welfare exclusion as it applies to Indian tribal governments and their social welfare programs benefitting tribal members. These comments were developed by the Tribal Tax Working Group. *(The Tribal Tax Working Group includes the broad-reaching coalition of NAFOA, the National Congress of American Indians (NCAI), United South and Eastern Tribes (USET), California Association of Tribal Governments (CATG), and the Affiliated Tribes of the Northwest (ATNI) among others formed to address what tribal leaders are calling one of the most recent and one of the more serious affronts to tribal sovereignty, taxation issues.)*

While NAFOA and the Tribal Tax Working Group do not represent all tribes, the following are what we consider common tribal considerations learned from the consultations, input, and outreach on the issue.

- Please see attached Joint Comments for Notice 2011–94 for the complete comments. *
- Please see the report in its entirety at *http://www.irs.gov/pub/irs-tege/tege__act__rpt11.pdf*].

The joint comments emphasized: Deference to tribal leadership and self-governance in carrying out tribal programs based on their respective community need and values; The inclusion of federal Indian policy; consistency in terms, concepts, and process; Needs should be based on tribal considerations; Exclusion of any program that supplements federal trust responsibility; and, Privacy of information.

These constructive comments, carefully weighed by tribal leadership, carry forward the current expectations of self-determination, federal policy, and the roots of protecting sovereignty.

In addition to the tribally-generated comments, the Advisory Committee on Tax Exempt and Government Entities (ACT), submitted its annual report and presented its findings last week on June 6, 2012. The ACT consists of three appointed members charged with engaging with and reporting to the IRS on a timely issue that is important to the IRS and their respective constituents. This year the issue was to add insight into whether payments made by the tribal government to its members under a tribal program designed to promote the general welfare of the tribal citizens is includable in the income of those recipients.

The ACT report is a comprehensive assessment that includes the history of the general welfare doctrine, the doctrine's exclusions, the doctrine's prior application for tribes, tribal views on the doctrine, and two very significant findings. The first finding is that there is a clear case for modifying the general welfare exception. The second finding specifically calls for clear methods for greater deference to tribal governments along with greater tribal involvement.

Both tribal leadership, in their comments, and the advisors in the IRS ACT report reached substantially similar conclusions in regard to taxation of tribal benefits used to advance general welfare. However, the Act Report calls for much more substantial tribal inclusion in the decisionmaking process. This inclusion calls for consultation, even in informal decisions that result in a policy change, a high-level appointment in Treasury to serve as a resource and ensure federal Indian policy is considered, and the formation of an external advisory group.

Both the joint comments and the ACT Report findings are summarized in the Appendix.

While Congress should do its best to immediately remedy the impacts of recent IRS actions regarding the General Welfare Doctrine as it applies to tribal governments; the Committee should also work toward fulfilling the longer-term recommendations made in the ACT Report. Having an advisory committee in place, a high-level appointee, or carrying out consultation when the agency's decisions impact tribes would have likely negated the latest IRS efforts to begin taxing revenue derived from tribal trust assets such as timber and other resources.

Taxation of Tribal Trust and Settlements

In addition to deterring self-determination, the IRS has embarked on a disquieting effort to tax per capita payments made to tribal members from trust funds. Per capita payments from tribal trust funds are specifically excluded from both federal and state taxes under the Per Capita Act of 1983. Long before 1983, this tax exclusion existed in federal law because it is derived from Indian treaties and the federal trust responsibility.

Besides being supported by federal treaties and law, the Administration, through the Department of Interior, at least since the 1950's, has made per capita payments from tribal trust funds and has not reported them as income for federal tax purposes. They have also vigorously defended their tax exempt status. The Interior regulations at 25 C.F.R. 115 were revised in 2000 and continued to provide procedures for making these payments without provision for tax reporting.

The Obama Administration is currently engaged in a historic effort to settle a significant number of lawsuits brought by Indian tribes for mismanagement of tribal trust funds. Many of the tribes settling these lawsuits are considering the payment of some portion of the settlement funds in per capita payments to tribal members. The IRS change in policy on the taxability of these payments is salt on a wound created by historic and unprecedented unfair dealing by the United States. The settlements attempt to make tribes and their citizens whole from fraudulent activities perpetuated by the Federal Government. Does the Federal Government really want to tax, in any manner, a settlement based on their own historic transgression?

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*The information referred to has been retained in Committee files.

Conclusion

The Internal Revenue Service (IRS) interpretation of the application of the general welfare doctrine and taxing trust assets and settlements has far-reaching impacts on tribal sovereignty. So far, the IRS has used the authority of the agency as a deterrent to tribal efforts to improve the quality of life for all citizens through methods appropriate for each respective tribe. They have also shown their intent of continuing to target tribal governments and ignoring long-standing federal policy by reaching in to tax settlements and trust assets.

All of these actions clearly call for Congress to oversee an agency that has not been accountable and acted independently of Administrative and congressional intent. The result of this IRS effort has been to cause confusion, place a strain on already limited personnel and financial resources, and, to have tribes once again feeling as if their cultural practices are under scrutiny.

The IRS has the opportunity to use the authority of the agency to incent such activity. When they issue guidance, it should firmly support self-governance and federal Indian policy.

We are hopeful that the views expressed during this hearing, in tribal comments, and in the ACT Report will be carried forward. In the absence of this, we strongly request Congress to act to uphold fairness and its federal trust responsibility. In addition, we are calling on Congress to put an immediate end to the current aggressive IRS activities of determining tribal welfare and taxing trust and settlement assets until these issues are resolved. After all, these are internal administrative IRS decisions that can be reversed without a regulatory change, let alone a legislative fix.

APPENDIX

The major provisions of the Joint Comments provided by the Tribal Tax Working Group in response to IRS Notice 2011–94 and the Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled "Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members."

Joint Comments Provided by the Tribal Tax Working Group in Response to IRS Notice 2011–94

1. Honor Tribal Sovereignty, the Federal Trust Responsibility, and Deference to Tribal Self-Government

Any guidance the IRS develops on the application of the general welfare exclusion to benefits provided by tribal governments to their members must take into account the backdrop of inherent tribal sovereignty, federal treaties and the trust responsibility, tribal history and social and economic conditions, the federal policy of tribal self-determination, as well as tribal authority for program administration under the Indian Self-Determination and Education Assistance Act and numerous other laws establishing a mechanism for tribal administration of federal programs (housing, child care, elder care, family services). These laws cover a broad range of federal program and services that have been consistently underfunded and understaffed. The resource pool is finite; tribes compete for these funds annually, and tribes that supplement or supplant federal funding are working.

2. Developing Substantive Guidance Consistent with Federal Indian Law and Policy

General Statement of Doctrine—The general welfare doctrine has been described in various forms of guidance over the years. Not all forms describe it alike, and some emphasize different elements. To promote tax compliance and allow tribes greater predictability in structuring their programs, we urge IRS and Treasury to adopt the following statement of the doctrine:

- The general welfare exclusion (as applied to Indian tribes and their programs) provides for the exclusion of payments that are (1) paid by or on behalf of an Indian tribe (2) under a social benefit program, that is based on either needs of the Indian community as a whole or upon the needs of individual recipients (which need not be financial in nature), and (3) that are not compensation for services or per capita payments.

Given the recent tendency by some IRS auditors in the field to interpret the doctrine narrowly by focusing largely on individual income determinations, it is critical to recognize non-financial needs in the guidance itself. The guidance should expressly affirm that the doctrine recognizes that the needs criteria can be both individual and community-based.

3. Consistency and Certainty in Key Definitions and Concepts

Even in cases where there is general agreement between tribes and IRS auditors on the GWE itself, there is often disagreement on how key terms and definitions within the doctrine are to be construed. We urge IRS and Treasury to adopt key definitions that are sufficient to promote tax compliance yet flexible enough to accommodate the broad range of tribal services impacted by the doctrine. For example:

a. *Community needs* should reflect that certain programs are so important to self-determination and the preservation of culture and tradition that they may qualify for general welfare protection regardless of individual financial need. Without limitation, these may include education, housing, health care, maintenance of language and traditions, and promotion of the tribal community's financial well-being and long term goals. In doing so, the guidance would respect that each tribal government, through its own policy setting process, is best situated to determine the needs of the tribe and its members and the policy solutions.

b. *Social benefit* should be defined with reference to a goal or goals established by the tribal council or governing body of each tribe. Each tribe has its own checks and balances in place for the approval of programs and those processes should be given deference in IRS field audits, even where the particular tribal program does not have a federal or state counterpart. IRS agents cannot substitute their personal judgment for decisions that are made pursuant to a political process and form of government recognized by treaties, Congressional acts and Presidential executive orders spanning more than a century of tribal-federal relations. The guidance must recognize the Federal Government's interests and responsibility to support tribal programs designed to provide for the well-being of their members and to ensure the continuance of tribal cultures in accordance with the priorities of each tribal government. There must be deference to programs that emerge and are implemented pursuant to this concept, even if those programs do not have a federal or state counterpart.

c. *Income guidelines* used to establish individual financial need, when required, should not be dictated with reference to specific federal or state statistics (such as median income or poverty thresholds). While tribal governments may look to state and federal income guidelines as a starting point, GWE guidance should ultimately defer to the political process within each tribe. When required, income guidelines should be recognized as a "safe harbor" only, with the ability of tribal governments to consider the individual facts and circumstances of each recipient (e.g., income far above the median, for example, may still be insufficient to address a catastrophic loss or displacement caused by a hurricane, fire or flood).

d. *Compensation for services* used to disqualify a payment from exclusion under the GWE should not apply to bona fide programs with community service ties. For example, tribal governments should be able to condition tax free educational assistance on a commitment by the recipient to serve the tribal community for a period of time during or after completion of course work in professions needed within the community. Tribal governments should be able to establish summer youth leadership programs that offer tax free food, housing and transportation to young members who develop a sense of community, for example, by mending fences, repairing reservation homes, cleaning trash from the roads or doing other tasks that teach responsibility and citizenship. In recent years, some IRS examining agents have construed tribal activities such as service on cultural preservation boards and summer youth work program offering nominal stipends or benefits as "employment."

e. *Per capita payments* should be limited to amounts designated as per capita payments under a federally approved revenue allocation plan in accordance with the Indian Gaming Regulatory Act (IGRA). Recipients of per capita payments are not restricted on how those funds are spent. In recent audits, however, some IRS agents have attempted to reclassify social welfare payments and in-kind benefits as taxable IGRA per capita distributions subject to tax and withholding under Section 3402(r) of the Code. The GWE guidance should confirm that IRS will respect the IGRA revenue allocation plan designations, and that payments made under a bona fide social benefit program are not per capita payments even if the benefits are provided on a community-wide or tribal-wide basis. A tribal government should be able to implement education or housing assistance, for example, on a universal basis without triggering per capita reclassification.

f. *Deference to tribal determinations* of community needs is a key concept for tribal leadership, but IRS officials have suggested in discussions that some standards are needed to prevent abuses. In the discussion, a suggestion was made that a narrative standard could be developed that would defer to tribes to develop programs consistent with their own social and/or community needs, except where the programs are "lavish or extravagant under the circumstances," a standard that applies to deduction of business expenses. We would encourage further discussion of this concept. The concept offers a guiding principle for general deference to tribal decisions, but there is some skepticism among tribal leaders that IRS agents have sufficient understanding of tribal circumstances, such as cultural programs and cultural travel.

4. Means Testing

As noted above, a recurring theme from discussions with tribal leaders is the need to dispel the notion that the GWE applies only to programs that are individually means tested. IRS guidance on the GWE should expressly acknowledge the right of tribal governments to provide community-based programs that are not means-tested, and programs that are based on non-financial needs.

5. Programs that Implement and Supplement Federal Responsibilities

The Federal Government, as a result of its treaty obligations and trust responsibility, has committed to providing education, housing, clean water and many other basic needs for Indian people. Through a conscientious shift in policy in recent decades, the Federal Government has encouraged the tribes themselves to provide for such needs in partnership with the Federal Government and, increasingly in recent years, instead of the Federal Government. Taxing benefits from tribes that would not be taxed if provided under a federal program is counterproductive to this government-to-government partnership.

6. Privacy/Information Sharing

The guidance should recognize that tribal governments are a partner in the goal of tax compliance and there should be a "government-to-government" level of deference in the scope of review that the IRS undertakes with regard to tribal general welfare issues.

Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled "Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members."

1. The Case for Modification of the General Welfare Exclusion as Applied to Indians

To resolve the General Welfare Exclusion issue, it may be appropriate to develop a general welfare exemption that applies specifically to tribal governments and their individual members. The U.S. has committed to protecting tribes as separate sovereigns. One expression of that commitment is the rule that federal laws should not be interpreted to invade upon a tribe's internal affairs—i.e., in this instance, its determination of general welfare needs of its members. Naturally, when the IRS asserts that a tribal government's distribution of cash or in-kind benefits is not made to promote general welfare of its members, this is perceived as a federal intrusion into the internal affairs of a sovereign tribe. On the other hand, the IRS is tasked with enforcing the federal tax laws, which entails seemingly intrusive audits to determine the form and substance of a transaction for tax purposes. Accordingly, there is cause to develop an administrative tax exemption that takes into account the unique circumstances of tribes and their sovereign authority over internal affairs, while at the same time promoting effective tax administration.

It is in the best interests of both the tribes and the IRS to seek a more cost-efficient and predictable means of testing tribal general welfare programs for tax exemption. Tribes require a predictable test or safe harbor for establishing their programs to maximize tax exemption and tax-favored opportunities.

2. Methods for Tribal Deference & Inclusion Going Forward

ACT made three recommendations for meaningful tribal inclusion and included justifications for the following:

a. *Create a Rebuttable Presumption in Favor of Tribal General Welfare Programs*

The ACT submits that it is important for Treasury to explore avenues for addressing the issue in a proactive manner, and to reduce the necessity of audits. The process must also achieve some certainty, while at the same time providing flexibility for tribes. There is, of course, an advance ruling process that can be

implemented. But, this can be quite costly for tribes. Instead, the ACT suggests that Treasury (in consultation with tribes) explore the development of a process which permits tribes to take affirmative steps to develop their general welfare programs in a way that will provide either a safe-harbor or rebuttable presumption to shift the burden of proof to the IRS to establish that the particular tribal program has not met the General Welfare Exclusion.

b. *Modify IRS Approach to "Disguised" or "Deemed" Per Capita Payments under IGRA*

The ACT further submits that a review and modification of the IRS application of Code Section 3402(r) withholding requirement, as it relates to general welfare payments, is necessary. In that regard, the ACT submits that it is improper and contrary to the intent of IGRA to re-characterize a general welfare program distribution as a deemed per capita subject to tax withholding under Code Section 3402(r). Such a presumption is likely to vitiate the Revenue Allocation Plan that has been approved by the BIA, particularly when the tribe has already distributed the total allocable percentage of per capita payments under its Revenue Allocation Plan for the year. To suggest that any distributions above that allocable per capita percentage are deemed per capitas subject to Code Section 3402(r), would arguably violate the Revenue Allocation Plan limits on per capita payments. It is the exclusive jurisdiction of the Bureau of Indian Affairs to determine allowable per capita uses of gaming revenue; IRS re-characterization of program uses of net gaming revenue obviates BIA's exclusive jurisdiction.

c. *Develop a Treasury Level Advisory Committee/Undersecretary of American Indian Alaska Native Affairs/Tribal Consultation Policy Amendment*

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

The Treasury/IRS STAC purpose would be to seek consensus, exchange views, share information, provide advice and/or recommendations; or facilitate any other interaction related to intergovernmental responsibilities or administration of Treasury/IRS programs, including those that arise implicitly under policy or rule, or explicitly under statute, regulation, or Executive Order. This purpose will be accomplished through forums, meetings, and conversations between federal officials and elected tribal leaders in their official capacity (or their designated employees or national associations with authority to act on their behalf).

The Undersecretary for Tribal Affairs office should be established to serve as the official point of contact for tribes, tribal governments, and tribal organizations wishing to access the Department of the Treasury. The Tribal Affairs office, to be effective, must be established within the immediate Office of the Secretary, report directly to the Secretary, and be the Departments' lead office for tribal consultation in accordance with Executive Order 13175—Consultation and Coordination with Indian Tribal Governments.

The CHAIRMAN. Thank you very much, Mr. Lomax.

Ms. Malerba, the tax initiative that you set to help to form to address tax issues in Indian Country is a relatively new group?

Ms. MALERBA. It is a new group.

The CHAIRMAN. What changes have you seen at the IRS that made formation of this group necessary?

Ms. MALERBA. Well, I think Tribal governments have struggled to provide for their people, and now that we finally are able to provide for our people, I think that the IRS hasn't really known how to deal with us, necessarily; and I know that that is why the office was instituted.

But I think that what we have seen is there has been kind of tax policy applied inconsistently and also that court decisions also

have been inconsistent. So the tax initiative group got together to provide some good feedback to really talk about these issues and to work with the Treasury and IRS on the topic, because there is not a one-size-fits-all in Indian Country, as you know; the regions are very different, the tribes are very different, everyone has a different history.

So we have taken it upon ourselves to try to start working through these issues and educate the governmental partners that we have to make sure that there is fairness throughout Indian Country and that tribes are given the benefit of the doubt. And if you go back to the Marshall trilogy, it was that laws and regulations should be interpreted in the manner most favorable to the tribes, and we are not sure that is necessarily happening all the time.

The CHAIRMAN. Thank you.

Mr. Lomax, in your testimony, you called on Congress to step in to put an immediate end to the IRS activities surrounding examinations of the general welfare doctrine and trust distributions until certainty in application exists. Is it your view that statutory language is needed, or can this be achieved administratively?

Mr. LOMAX. Thank you for the question, Chairman Akaka. We believe that the best case for this is to be resolved administratively, but we are waiting to see whether or not it will be. There are a number of issues around that that we see. We think the IRS has a great opportunity to work with Tribal leaders on this issue; however, we haven't seen that kind of work, from our experience, happening.

It was mentioned earlier in testimony today that tribes have the opportunity to, for example, get a private letter ruling. I think tribes look at that as actually a veiled attack on sovereignty, because that puts the IRS, then, in the position of being the arbiter of whether or not any particular Tribal program has validity or whether it should be taxed. That, from Tribal perspective, we believe is very much the wrong way to be going. Tribal Nations shouldn't have to be seeking a private letter ruling to find out whether or not they can go on a field trip with their elders.

We believe that oversight is necessary from the Committee, and in the event that oversight does not bring the IRS into compliance, we believe that, then, legislation should be sought.

The CHAIRMAN. Thank you.

Ms. Malerba, in your testimony you recommend that the IRS defer to Tribal policy and determining need in certain applications of the general welfare doctrine. Given Treasury's concern and concerns about treating all taxpayers the same, do you think it is practical for Treasury to defer to each Tribe on this issue?

Ms. MALERBA. Thank you for your question, Chairman. Perhaps I am a little biased, having been the chairwoman of the Tribal Council in my previous role, but I don't believe that tribes should be treated like State and local governments. Tribes are different. Tribes are families; they are about communal good. They have experienced so much devastation that they are now in the process of rebuilding their communities. And all of the programs that the tribes are administering are in the absence of funding for Federal

Government programs, so tribes are assuming the responsibility of Federal Governments.

Tribes are very personal and they are up close and personal, and Tribal leaders are very accountable to their citizens. They know best what their citizens need, because if they aren't aware what their citizens need, their citizens are going to make it known to them. And they are very, very careful about developing the programs that are in the best interest of their people. They know best. It is government at the local level and it is the best government that you can have.

The CHAIRMAN. Thank you.

Mr. Lomax, the IRS has indicated that its treatment of tribes under the general welfare doctrine is the same as its treatment of States and other local governments. In your testimony you indicate tribes are being singled out. Can you elaborate on that?

Mr. LOMAX. Thank you for the question, Mr. Chairman.

Yes, absolutely. As I mentioned in testimony, it is very clear that the IRS is treating tribes quite differently in this manner. As I mentioned, the work plan for Tribal governments shows that the IRS is very intent on focusing on Tribal governments. Yet, when they look at the work plan for Federal, State, and local governments, taxability of benefits provided by State and local governments is not mentioned. So that is one thing.

But there are just too many stories from tribes right now. Tribes are very used to and see very clearly when they are getting different treatment, from years of experience, and we are just hearing too many stores from tribes about how the enforcement is arbitrary and increasing from the IRS on the general welfare type exclusion. We have seen tribes coming together in an almost unprecedented way to form this organization that Chief Malerba was discussing.

We heard from Commissioner Miller, actually stating that in an examination five years ago he has already examined 139 tribes. I would be curious to know if they had examined 139 State and local governments during that same time frame. I think the answer would clearly be no. I don't have anything to base that on, but I would be surprised if that were the case. So when you think about how tribes are being treated vis-a-vis the State and local governments, I think it is very clear that they are being treated quite differently.

The CHAIRMAN. Well, thank you very much for your testimony and your responses. This has been helpful to us as we continue to look into this. Looking forward to even organizations like yours working together in trying to deal with some of the concerns of the tribes. But I want to say thank you. Thank you so much for being here. Mahalo to all of our witnesses as well. This has been a very informative discussion for the Committee.

As the IRS and Department of Treasury move forward on this issue, I would like to stress again the importance of the unique government-to-government and trust relationship between Native Nations and the Federal Government. The Federal Government owes a legal duty to tribes to respect their sovereignty and self-determination, especially in the area of taxation.

As part of the strong history of treaties and legal relationships, the Federal Government is legally bound to provide health, edu-

cation, and other services to tribes and their citizens; however, Federal assistance will never be enough to meet the serious need in Native communities. That is why we must support, not hinder, Tribal self-determination programs that fill in the gaps where the Federal Government has fallen behind in its trust responsibility. We need to be aware of that and continue to try to work together on these concerns.

I am encouraged that the agencies have taken steps to build a relationship with tribes and urge that dialogue to continue so that better understanding of Tribal government can occur.

I would like to again thank all of our witnesses for traveling here today. I would also like to remind you that our hearing record will be open for two weeks after today for you to submit further comments. We look forward to that as we continue to deal with the concerns that we all have.

So mahalo. Thank you very much and much aloha to all of you. This hearing is adjourned.

Mr. LOMAX. Thank you, Chairman Akaka.

Ms. MALERBA. Thank you.

[Whereupon, at 4:00 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HERMAN DILLON, SR., TRIBAL COUNCIL CHAIRMAN, PUYALLUP TRIBE OF INDIANS

I. Introduction

As Chairman of the Puyallup Tribal Council, the elected governing body of the Puyallup Tribe of Indians, I am pleased to submit this testimony for the record. We appreciate very much the opportunity to present our testimony regarding the impact of the Internal Revenue Service (IRS) policies and actions on Tribal Self-Determination. In particular, I would like to discuss the Tribe's experience with the IRS's application of the general welfare exclusion doctrine.

II. The Puyallup Tribe

The Puyallup Tribe of Indians is a federally recognized Tribe located in Pierce County, Washington along the shores of Commencement Bay, a large inlet of Puget Sound. The Puyallup Tribe is a signatory to the Treaty of Medicine Creek, 10 Stat. 1132. Under this Treaty, the Tribe reserved the lands for its Reservation, which was established by two subsequent Executive Orders. Executive Order of Jan. 20, 1857; Executive Order of Sep. 6, 1873. Over the next fifty years, notwithstanding the establishment of the Tribe's Reservation, the Tribe lost ownership of most of the land within its Reservation as a result of Acts of Congress authorizing allotment and sale of reservation land, court decisions and other private and federal actions. See H.R. Rep. No. 101–57, at 3 (1989). With the enactment of the Indian Reorganization Act, 25 U.S.C. §§ 461–479, the Tribe adopted a constitution and organized its Tribal government, which then set out to restore the Tribal land base and develop programs to better serve its tribal members.

In 1983, a federal court confirmed the Tribe's title to the bed of the Puyallup River and adjacent exposed lands, including lands within the Port of Tacoma. *Puyallup Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). This decision gave rise to an historic Settlement Agreement between the Tribe, the City of Tacoma, the Port of Tacoma, the State of Washington and the Federal Government which Congress enacted into law. *Puyallup Tribe of Indians Settlement Act of 1989*, Public Law 101–41, 25 U.S.C. §§ 1773-*et seq.* (1989). The Settlement Act restored to the Tribe nearly 1,000 acres of land, including lands within the Port of Tacoma. In addition, the Act included a provision recognizing the right of the Puyallup Tribe to engage in foreign trade consistent with Federal law, notwithstanding a provision of the Treaty of Medicine Creek which prohibits such trade. 25 U.S.C. § 1773f(b).

Today, the Puyallup Reservation consists of approximately 28 square miles in Pierce County, Washington, and includes the cities of Tacoma and Fife. The Tribe has a membership of more than 4,000 people. Since the Settlement Act, the Tribe regained title to more than 2,000 acres of trust land within the Reservation, including 200 acres of land in the Port of Tacoma. In 2008, the Tribe entered into an Agreement with SSA Containers for the development of a new international container terminal facility that, when fully constructed, will be the largest in the Pacific Northwest. As a result of this Agreement and the Settlement Act's recognition of the Tribe's right to engage in international trade, the Puyallup Tribe anticipates developing relationships with international trade partners in the Pacific Rim and around the world.

Because the City of Tacoma was a primary Indian relocation destination for the federal government in the 1940s and 1950s, the Tribe also provides services to the more than 25,000 Native Americans from over 355 federally recognized Tribes and Alaskan Villages who now call the territory of the Puyallup Tribe home. These services include law enforcement services, elder services, health care services, a school system, and other educational services. The Tribe was one of the first Tribes in the United States to enter into a Self-Determination Act contract to assume the operation of a federal health care program on a reservation. This Clinic is now one of the most utilized tribal clinics in the Country.

III. Self-Determination And The Trust Obligation

The IRS must implement the Self-Determination policy and the corresponding federal trust obligation, which are the bedrock of the government-to-government relationship between Tribes and the federal government. The Service must do more than superficially acknowledge these foundational principles, but rather it must give them effect in every aspect of its relationship with Tribes. Thus, whether it is the development of policy, the drafting of guidance, the publication of a rule, an investigation; or an enforcement action, the IRS approach to a matter involving a Tribe must reflect that it is dealing with a government to which it has a unique trust obligation.

The federal Self-Determination policy is at the heart of the federal policy governing Indian affairs overall. The policy recognizes and supports tribal self-government. Since the earliest days of the Republic, federal law has recognized that tribes are sovereign entities with the power of self-government. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Supreme Court held that an Indian tribe is a "distinct political society.capable of managing its own affairs and governing itself." *Id.* at 16. In *Worcester v. Georgia*, 31,US. (6 Pet.) 515 (1832), Chief justice Marshall, writing for the Court, held that Indian Tribes are distinct, independent political communities, "having territorial boundaries, within which their authority [of self-government] is exclusive . . ." *Id.* at 557. By entering their treaties, the Court held, tribes did not "surrender [their] independence-[their] right to self-government . . ." *Id.* at 561.

The Self-Determination policy has guided the federal government's relationship with tribes since 1970 when President Nixon announced in a special message to Congress:

> It is long past time that the Indian policies of the federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of Justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for new era in which the Indian future is determined by Indian acts and Indian decisions.

Richard Nixon, *Special Message to the Congress on Indian Affairs,* 213 Pub. Papers 564 (July 8, 1970). Indian Self-Determination is the foundation of modern legislation involving Indian affairs including the Indian Self-Determination and Education Assistance Act, 25 U.S.C.§ 450 et seq., and the Indian Trial Governmental Tax Status Act, 26 U.S.C.§ 7871; *see also* Rev. Rul. 86–44, 1986–1 C.B. 376; Rev. Proc. 86–17, 1981–1 C.B. 550.

The Supreme Court has also repeatedly "recognized the distinctive obligations of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citations omitted), as well as reaffirmed the "undisputed existence of a general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The trust relationship is also the basis of the well-established rule that Congress will not be presumed to have abridged Indian treaty or property rights absent a clear express of intent, e.g. *United States v. Dion*, 476 U.S. 734, 738–40 (1986). These principles are fully acknowledged in the IRS's consultation policy implementing the Executive Order 13175.

The importance of embracing and fully implementing these principles is no more evident than in the IRS's application of the general welfare exclusion doctrine with regard to Tribal programs and services provided for the benefit of tribal members and the community at large. Under the general welfare exclusion doctrine, the IRS does not require that payments received by an individual under certain government social benefit programs be included in the calculation of income for tax purposes. However, as discussed in detail below, while the IRS has applied this exclusion to some benefits provided by tribal governments, it has not applied it to others, despite the similarities of the program to state and federal programs. Nor has the IRS consistently applied this policy through the prism that is the Self-Determination policy and the federal government's unique obligations to Tribes. This greatly impacts the Puyallup Tribe's ability to exercise our governmental responsibility to meet the needs of our members.

IV. General Welfare Exclusion Doctrine

The Puyallup Tribe has a number of assistance programs. We provide support to people for a wide variety of needs, including housing, medical care, funeral arrangements, emergency survival and safety issues, education, youth programs, and small business programs. The Tribe also has programs and initiatives intended to pre-

serve and pass on the Tribe's unique culture. The goal of all of these programs, as with any governmental program, is to improve the overall health and status of the community and its citizenry. Yet, in many instances the IRS considers the assistance provided pursuant to these Tribal programs to be taxable income for the tribal member beneficiaries.

The IRS's treatment of many of the Tribal programs is inconsistent with its treatment of not only federal programs but state programs as well. States and municipalities provide a number of programs and services that are available to all citizens without respect to financial means or other individual needs testing, such as public education, recreation programs, support for foster parents and other children's programs, concerts, parks, libraries, museums, and similar community services, programs and events. The IRS does not seek to audit and investigate cities or states providing these benefits because these are public benefits that are not directed to specific individuals, and IRS treats them as nontaxable. Likewise, benefits provided through similar tribal programs, particularly education and cultural programs, which are focused on community needs and benefits, rather than individual circumstances, should be excluded from income without any individual needs assessment.

Of particular concern to the Puyallup Tribe is the treatment of cultural programs, which are directed to the needs and interest of the community as a whole, rather than the benefit of any individual. Such cultural programs may include language instruction; youth camps with cultural focus, support for attendance at culturally related youth, elder and other tribal or inter-tribal events, which provide a means of teaching and preserving tribal culture.

One example of the IRS overreach in this area involves our annual Tribal powwows. These kinds of events have existed for generations where a Tribe invites other Tribes and people from other regions to come together and celebrate with songs and dances. There have always been competitions associated with these events. Our traditional stories tell us that these competitions are the reasons there is daylight and night; why human beings have dominion over animals; and why blue jay hops.

There was once a period in history when it was illegal for our people to practice these celebrations. *See http://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf.* Yet, notwithstanding the fear of prosecution, these songs and dances were preserved. Now it is the federal policy to support, foster and encourage these songs and dances as a part of the federal trust obligation and the government-to-government relationship. American Indian Religious Freedom Act, 42 U.S.C. § 1996 ; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.*; and the Native American Languages Act, 25 U.S.C. §§ 2901 *et seq.* Today, instead of the prizes of daylight and dominion that the Creator awarded our ancestors, our competitions now only have monetary prizes to award. In our view, when we entered into our treaty with the United States we preserved our right to continue to exercise our way of life free from unnecessary intrusion of the federal government, and just as federal law exempts from taxation income earned from treaty fishing, so too should it exempt any income earned from treaty-protected cultural activities. *See* 26 U.S.C. §7873.

However, that is not the case. Instead, the Tribe's accounting department must be present at every pow-wow and issue a 1099 form to any person receiving a prize or other remuneration during the pow-wow. While the Puyallup Tribe may have the resources to undertake this effort, it is a substantial burden on the Tribe and causes a great deal of hardship for the pow-wow dancers who have never before had to consider the prizes from their cultural activities as income on their taxes. This activity is not their job and the awards are not intended to compensate them for their dancing. Rather these awards are to provide support to dancers for coming to the event and to celebrate the very best of those who seek to preserve our culture. In some instances, the awards are only sufficient to cover the expenses of traveling to attend the pow-wow. Consequently, for some dancers, a prize means they are negatively impacted, because as a result of attending and getting the prize, they are out of pocket not only the expense of going to the pow-wow, but they now owe the IRS money. The implementation of the law in this manner is inconsistent with the Tribal Self-Determination policy and the federal trust obligation to tribal governments. Instead, the IRS should allow Tribe's latitude in the design and execution of their tribal cultural programs and activities.

Finally, the heart of the Indian Self-Determination and Education Assistance Act (ISDA) is the provisions of the Act that encourage and support Tribal governments stepping into the shoes of the federal government to carry-out federal programs. This principle has been embraced not only with specific programs operated pursuant to ISDA contracts and compacts, but other programs like housing, child care and

economic development. In this regard, there should be a blanket exception for assistance provided by a Tribal program that is carried out pursuant to the requirements of a federal program, regardless of whether those programs are done pursuant to an ISDA contract or compact or whether those programs are supplemented by tribal governments. It is well documented that programs intended to benefit Tribes and Indian people are woefully underfunded. *See* The U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (2003) ("A Quiet Crisis"). Thus, that a Tribe can operate and fully fund these programs should not be the basis for the IRS treating the benefits differently than when a state or the federal government operating these federal programs.

For example, the Tribe operates and receives funding pursuant to the Child Care Development Block Program. 42 U.S.C. § 618. The Tribe is able to expand this program to serve more people, and because of this the IRS considers taxable the child care assistance that we provide our Tribal member parents. This has a harsh impact on the Tribal member because the payments are made directly to providers and thus, the Tribal member does not have any additional income to pay the assessed tax.

The goal of this program is to provide assistance to parents to enter the workforce or get an education, which is consistent with the CCDBG program. The fact that the Tribe can assist more of its citizens than the federal government mandates does not make this assistance income to the member. Rather it is simply a governmental decision as to the best allocation of our limited resources. The federal government has the ability to mandate the expansion of services beyond the poorest of the poor. *See e.g.* P.L. 111–3, 123 Stat. 28, 42 U.S.C. § 1397bb(a)(b) (authorized the expansion of the federal Children's Health Insurance Program). So too must Tribes have the ability to mandate that our programs provide services beyond the poorest of its citizenry. Tribes more than any other governments understand when you extend a hand out to pull a person up, not only does that person rise, but the entire community rises with her. The IRS should not undermine a Tribe's effort to extend the hand to pull up its community, as this is the truest fulfillment of the self-determination policy.

Another example is the Tribe's education assistance program. The Tribe provides assistance for post-secondary and graduate degrees, which includes not only tuition assistance, but also living expenses for the eligible students. In our view, federal law should not tax support provided to a tribal member under a program whose purpose is to help with basic living expenses while the recipient pursues his/her education. The Tribe has made the governmental decision that this is the best way to address the identified need of the effects of historically inadequate educational opportunities and achievement.

Relatedly, the IRS's consideration of general welfare exclusion relies heavily on individual need. We submit that in order to support Tribal Self-Determination the IRS must consider need in the broader context of the entire Tribal community. In our view, the determination of need for general welfare exclusion purposes must recognize the historical damage done to tribal economies, cultures and identities, the chronic poverty and unemployment many tribes have experienced, and the remote and marginal lands upon which many tribes were forced to locate and maintain their communities. The U.S. Commission on Civil Rights concluded in *A Quiet Crisis* that:

> In exchange for land and in compensation for forced removal from their original homelands, the government promised through laws, treaties, and pledges to support and protect Native Americans. However, funding for programs associated with those promises has fallen short, and Native peoples continue to suffer the consequences of a discriminatory history. Federal efforts to raise Native American living conditions to the standards of others have long been in motion, but Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness. Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator.
>
> *Id.* at ix.

Even Tribes that have developed successful gaming, natural resource or other industries continue to confront substantial economic, educational and other deficits resulting from historical scars. A few years of success cannot erase the social problems resulting from many decades of historical wrongs, discrimination and economic and social disruption. Unfortunately, the federal government has not lived up to its obligation to provide resources and other assistance to tribes to meet these challenges.

The Civil Rights Commission further concluded:

there persists a large deficit in funding Native American programs that needs to be paid to eliminate the backlog of unmet Native American needs, an essential predicate to raising their standards of living to that of other Americans. Native Americans living on tribal lands do not have access to the same services and programs available to other Americans, even though the government has a binding trust obligation to provide them.

Id.

Any attempt to define need for purposes of tribal general welfare programs only by current income tests misses the big picture of the tribal experience, and the deep and severe problems that remain as part of that legacy. This is particularly so for segments of the tribal population such as elders who have suffered through severe social and financial problems throughout most of their lives, and in some tribal communities are only beginning to have personal resources to address their needs. In our view, the taxation of these assistance payments is counterproductive. As taxing the payments reduces the Tribe's ability to assist its members and others in the Indian community, which in turn results in a greater burden on federal and state programs to provide the assistance the Tribal program would provide in the absence of taxation.

V. Conclusion

The Puyallup Tribe has worked with the IRS with regard to a number of programs and has reached a resolution on some aspects, like gifts presented to cultural leaders, emergency housing assistance, and tuition assistance, that we are pleased with. For this we want to commend the IRS. However, as we discussed above, we believe there are still areas where the IRS must take a broader view of the intent and benefits of a Tribal program. Thus, we urge that the agency and the Congress strive to maintain the elements of the process and the legal standards that have created a positive working relationship between our Tribe and the IRS, while fixing the problems that result from the ambiguity and uncertainty that exist in the standards under which the general welfare exclusion is currently applied.

PREPARED STATEMENT OF HON. GREGORY MENDOZA, GOVERNOR, GILA RIVER INDIAN COMMUNITY

I am Governor Gregory Mendoza of the Gila River Indian Community (the "Community"). On behalf of the Community, I want to thank you, Chairman Akaka, Vice Chairman Barrasso, and the other distinguished Members of the Committee for this opportunity to submit written testimony on the "New Tax Burdens on Tribal Self-Determination."

By way of introduction, the Gila River Indian Community was formally established by Executive Order in 1859. The Community was thereafter expanded several times and currently encompasses approximately 375,000 acres. The Community is comprised of the Akimel O'odham (Pima) and the Pee Posh (Maricopa) people. We are the largest Indian Community in the Phoenix metropolitan area, with an enrolled population of over 19,000. We have a long history in the Phoenix Valley, dating back thousands of years.

Disparate Treatment of Tribal Governments

Mr. Chairman, we, like many other tribal governments, are very concerned about the efforts of the Internal Revenue Service to target tribal governments in an aggressive audit campaign. In a 2007 letter to the Senate Finance Committee, the Internal Revenue Service indicated that it had completed audits on approximately 139 tribal governments over the prior two years. Since that time the Internal Revenue Service has already audited approximately 260 tribal governments or approximately 77% of all tribal governments in the lower 48 states. This percentage reflects most, if not all of the tribal governments with significant revenues. We are very concerned that this expansive audit campaign against tribal governments appears to be a

disparate, and possibly discriminatory, practice of targeting tribal governments as opposed to our state, county, and municipal counterparts.

An example of this disparate treatment of tribal governments is the Internal Revenue Service's recent determination regarding the classification of members of tribal boards, committees and commissions. Unlike our state, county, and municipal counterparts, the Internal Revenue Service has made the determination that tribal members serving on tribal boards, committees and commissions should be classified as employees rather than independent contractors. Like other tribal governments, the longstanding policy and practice of the Community has been to treat such persons as independent contractors. This position is consistent with Treasury Regulation, Section 31.3401(c)-1 regarding directors of corporations. This regulation states, in the relevant part, that "a director of a corporation in his capacity as such is not an employee of the corporation." Thus, under federal law, directors of a corporation are classified as independent contractors. This should also hold true for members of tribal boards, committees, and commissions.

The Internal Revenue Service's new position has significant implications for tribal governments, tribal enterprises, and entities and those tribal members serving on those boards, committees and commissions. With this change in policy, tribal governments will be required to withhold taxes for those positions, where in the past no withholding was required since those positions were considered to be independent contractors. Similarly, in the non-tribal context comparable board, committee and commissions positions are classified as independent contractors. This change in policy has only come to light for many tribal governments as a result of the Internal Revenue Service's aggressive audit campaign targeting tribal governments.

Given the broad scope of these audit investigations, tribal governments are required to expend significant resources, including many professional and attorney man-hours, responding to the Internal Revenue Service's aggressive audit campaign. These audit investigations become even more troubling when examined with the backdrop of the Internal Revenue Service's restrictive interpretation of the General Welfare Doctrine, its reversal of policy regarding the classification of members of tribal committees and boards, and what appears to be an effort to unilaterally overturn the U.S. Supreme Court's decision in *Squire vs. Capoeman* and subject income derived from trust assets to taxation.

General Welfare Doctrine and the Federal Trust Responsibility

The General Welfare Doctrine has developed over time as an administrative exclusion promulgated through Internal Revenue Service guidance documents, which has been recognized by the courts. This doctrine has been applied to tribal, state, county, and municipal government programs providing social benefit programs for the promotion of the general welfare. To qualify for this exclusion, the General Welfare payments must (1) be made under a government program; (2) be for the promotion of the general welfare; and (3) not represent compensation for services rendered.

Of particular concern to our Community is that the Internal Revenue Service is taking a very restrictive position when determining whether a tribal governmental general welfare program/payment is "for the promotion of the general welfare." The Internal Revenue Service has taken the position that in order for a general welfare program to satisfy this prong of the exclusion test it must be a program based on "financial need" and requires a tribal government to apply a "means test" to determine eligibility for the tribal program. While applying a "financial means test" may be appropriate for certain tribal governmental programs, it is incumbent on the Internal Revenue Service to moderate its review of tribal general welfare programs in light of the Federal government's trust responsibility to Indian tribes. The Federal government's unique trust responsibility to Indian tribes differentiates the relationship of the Federal government and all of its Departments and agencies, including the Internal Revenue Service, from its relationship with state, county, and municipal governments. In examining whether a tribal governmental general welfare program is for the promotion of general welfare, the Internal Revenue Service should consider the purpose of the program and if the purpose of the program is to provide benefits to tribal members that are culturally appropriate, address a systemic or societal need, or supplement inadequate federal programs grounded in the Federal government's trust responsibility to Indian tribes or in treaty, then the program should qualify for the exclusion. It is our belief that the Internal Revenue Service should defer to a tribal government's determination of need.

Unfortunately, there are only two ways in which a tribal government can obtain a determination on whether a tribal general welfare program satisfies the General Welfare exclusion test. The first way is for a tribal government to apply for and receive a private letter ruling for the program. Our Community has successfully obtained a private letter ruling for our Residential Housing Improvement Program whereby we have been able to provide housing benefits to our Community members to address our critical shortage of safe and affordable homes for our members. The process of obtaining a private letter ruling is long, bureaucratic, and very expensive. It is not a process to be undertaken lightly and many tribal governments lack adequate resources to pursue a private letter ruling. In addition to the delays and expense of obtaining a private letter ruling, the ruling, once issued, only applies to the particular program referenced in the application and if there are changes to the program, a new private letter ruling may be required. For most tribal governments, only a few tribal general welfare programs would warrant the commitment of resources, time, and funding to pursue and obtain a private letter ruling from the Internal Revenue Service.

The second way a tribal government can obtain a determination on whether a tribal general welfare program satisfies the General Welfare exclusion test is to be audited. Rather than incur the considerable expense of obtaining a private letter ruling, most tribal governments choose to continue to administer general welfare programs for their memberships until such time as they are the subject of an audit. The outcome of the audit is driven largely by the field agent's interpretation of the phrase "for the promotion of the general welfare" and in most cases, the agents are taking the position that a financial means test should be applied by the tribal government in determining whether a tribal member qualifies for the program. Nowhere in the audit process is the field agent required to consider the Federal government's trust responsibility and whether the benefits conferred in the general welfare program are comparable to other Federal programs provided to Indian tribes pursuant to the trust responsibility.

If it is determined by a field agent that a tribal general welfare program does not satisfy the General Welfare exclusion, there are consequences for the tribal government for its failure to issue a 1099 form and reporting payments of over $600 to tribal members and consequences to the benefit recipient who in all likelihood did not report the benefit as income in their tax returns. Such a result is punitive for the program beneficiary, as well as the tribal government.

We would like to thank you Mr. Chairman and the other distinguished members of the Committee for your efforts to include language in the Affordable Care Act which excluded the value of any qualified health care benefit from the recipient's gross income. This effort came none too soon, as a number of tribal governments were reporting Internal Revenue Service enforcement efforts being initiated against tribal members who were receiving health care benefits from their tribal governments. We believe that in similar circumstances, where a tribal government is developing a general welfare program where the benefits conferred are comparable to, and supplement, other programs provided to Indian tribes pursuant to the trust responsibility, those programs should qualify for the General Welfare exclusion.

We understand that the Internal Revenue Service and the Department of the Treasury are engaged in consultation with tribal governments regarding clarifications to the General Welfare exclusion. We are hopeful that this consultation process will result in a further guidance that respects the Federal government's trust responsibility, provides sufficient clarity to tribal governments so that they can develop and tailor general welfare programs to satisfy the general welfare exclusion, and eliminates the latitude exercised by Internal Revenue Service field agents in unnecessarily restricting the general welfare exclusion to the detriment of tribal governments and their members.

Any guidance prepared for the General Welfare exclusion for tribal governmental general welfare programs should provide broad categorical exclusions without the requirement of a financial means test for assistance provided to tribal elders, educational assistance to tribal members, burial assistance for tribal members, and other benefits provided by the tribal government based on the Indian tribe's traditions and culture. These exclusions should take into account the Federal government's trust responsibility, the Indian tribe's history and social and economic conditions. Therefore, we recommend that the guidance for the tribal general welfare exclusion apply to general welfare programs that are based on overall tribal community needs or upon the individual need of the tribal member and where such need does not need to be financial in nature.

Tax Status of Revenues Derived from Trust Resources

We are deeply concerned regarding recent efforts of the Internal Revenue Service to assess taxes on revenues derived from trust assets, including per capita payments from tribal trust funds. This practice is contrary to longstanding legal principles articulated by the Supreme Court in *Squire vs. Capoeman* and by the Congress in the enactment of the Per Capita Act of 1983. It is alarming that these longstanding legal principles can be overturned by the Internal Revenue Service by administrative fiat. This troubling development is occurring as many tribal governments are settling their trust mismanagement claims against the United States. If this

practice is not ended, many tribal members will be faced with the prospect of the Federal government, through the Internal Revenue Service, taxing them for per capita payments from a damage award for the Federal government's mismanagement of the tribe's trust accounts. Such a result is profoundly disturbing for all tribal leaders across Indian Country.

Mr. Chairman, we request that this Committee consider legislation confirming the longstanding legal principles of *Squire vs. Capoeman* and the Per Capita Act of 1983 which hold that revenues derived from trust assets, including per capita payments from tribal trust funds are not subject to taxation.

Eliminate Restrictions on Tribal Tax-Exempt Bond Authority

I would like to thank you, Mr. Chairman and the distinguished members of this Committee for your hard work on the American Recovery and Reinvestment Act which provided $2 Billion in bonding authority for tribal governments to issue tax-exempt bonds for economic development projects. Moreover, the legislation eliminated the "essential governmental function" restriction that has previously limited the ability of tribal governments to issue tax-exempt debt under the Indian Tribal Tax Status Act. The American Recovery and Reinvestment Act has placed tribal governments on equal footing with our state, county, and municipal counterparts for purposes of issuing tax-exempt debt for economic development purposes. As a tribal government that has utilized the new bonding authority under the American Recovery and Reinvestment Act, we would encourage this Committee to work with the Senate Finance Committee to permanently eliminate the "essential governmental function" limitation and to increase the amount of tax-exempt debt a tribal government can issue. We believe that tribal governments can make use of this new bond authority to undertake a range of economic development projects, like our Community, and to address longstanding problems with the reservation healthcare delivery system by utilizing bond financing to construct ambulatory care centers, skilled nursing and long-term care facilities, dental clinics, dialysis centers, and other badly needed health facilities. We believe this authority could help resolve the severe facility backlog of the Indian Health Service, by authorizing tribal governments to finance health facilities rather than relegating tribes to wait patiently in line for their facility to creep up the Indian Health Service Priority list.

Extend Indian Employment and Accelerated Depreciation for Business Property on Indian Reservation Tax Credits

Mr. Chairman, we respectfully request that this Committee work with the Senate Finance Committee to renew and extend the Indian Employment Tax Credit and the Accelerated Depreciation for Business Property on Indian Reservation Tax Credit in the Internal Revenue Service Code. In our efforts to attract businesses to relocate to our reservation, we find that the incremental benefits provided by the employment tax credit and accelerated depreciation helps attract businesses to relocate to our reservation. Unfortunately, given the history of this provision in the Code, tribal governments are constantly working to ensure that these tax credits are included in larger tax legislation so that they do not lapse. As we sit here today, these tax

credits have lapsed and we are faced with an uncertain future and cannot provide the necessary assurances to businesses interested in relocating to our Community. We would recommend that these tax credits be made permanent to help address the significant hurdles confronting tribal governments seeking to promote economic development on their reservations.

Conclusion

In conclusion, we would ask this Committee to assist tribal governments to ensure that the Internal Revenue Service develops clear administrative guidance regarding the application of the General Welfare exclusion to tribal general welfare programs which reflects and respects the Federal government's trust responsibility to Indian tribes and records deference to tribal government's determination of need. We would also request that the Committee consider legislation that (1) confirms the longstanding legal principles of *Squire vs. Capoeman* and the Per Capita Act of 1983 which hold that revenues derived from trust assets, including per capita payments from tribal trust funds are not subject to taxation; (2) permanently eliminates the "essential governmental function" limitation and increases the amount of tax-exempt debt a tribal government can issue; and (3) renews and makes permanent the Indian Employment Tax Credit and the Accelerated Depreciation for Business Property on Indian Reservation Tax Credit.

I would like to thank you Mr. Chairman for all of your efforts on behalf of Indian tribes and for holding this important hearing.

PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI)

On behalf of the National Congress of American Indians (NCAI), thank you for the opportunity to submit this testimony regarding the Committee's Oversight Hearing, "New Tax Burdens on Tribal Self-Determination."

In 2005, the IRS began an aggressive campaign to audit every Indian tribal government in the country and impose inequitable tax treatment on Indian tribes. In this effort, the IRS has frequently undermined longstanding principles of tribal sovereignty, tribal self-government and the federal trust responsibility, and failed to respect the role of tribal governments under the U.S. Constitution and the plain language of federal statutes. NCAI urges Congress to exercise its oversight to reign in these abuses of federal authority.

Discrimination in Tribal Audits

There are over 80,000 local government entities in the United States and only a small fraction are ever audited by the IRS. In contrast, the IRS is on a campaign to audit every Indian tribal government. In a 2007 letter to the Senate Finance Committee, the IRS indicated that they had completed 139 audits in the previous two years. IRS budget documents show the completion of another 40 tribal audits per year in subsequent years. Although the IRS refuses to share data, these numbers indicate the IRS has audited 259 tribes through 2011, and new audits are taking place in 2012. To put this in perspective, there are only 336 tribes in the lower 48. (229 Indian tribes are in Alaska where there is very little tribal revenue.) To put this in even greater perspective, the NIGC reports that there are only 240 Indian tribes conducting gaming in the United States. The IRS has audited 77% of the tribes in the lower 48, and they have audited 100% of the tribes with any significant source of revenue. This is a discriminatory practice, as the IRS is not auditing anywhere near this percentage of state and local governments.

The remainder of this testimony will highlight several examples of how the IRS' Office of Indian Tribal Governments has discriminated against tribal sovereignty:

Tribal Tax Exempt Bond Market Destroyed by IRS

First, the IRS interpreted the "essential government function" test for tax exempt bonds to exclude any revenue generating activity, even when state and local governments routinely generate revenue from identical projects financed with government bonds. The legislative history for the Tribal Tax Status Act specifically includes revenue generating activities such as

hotels and lodges. The IRS decided arbitrarily, and counter to the opinion of qualified bond counsel, that tribal governments alone are prohibited from generating revenue.

Background

While tribes may issue tax-exempt bonds under the IRC, the policies surrounding tribal bond issuances have made tax-exempt financing a rarity in Indian Country. As is, § 7871 of the IRC (the section pertaining to tribal issuance of tax-exempt bonds) limits tribal tax-exempt financing to projects where "substantially all of the proceeds" are "used in the exercise of any essential government function."[1] The manner in which this section has been interpreted has not been generous to tribal governments.

In 2006, the Internal Revenue Service ("IRS") issued an Advanced Notice of Proposed Rulemaking ("ANPR"), which attempted to define an "essential government function." It proposed that an activity constituted an "essential government function" when:

- there are numerous state and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt government bonds;
- state and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years; *and*
- *the activity is not a commercial or industrial activity.*[2]

The third factor of this definition effectively negates many of the instances for which the first two, standing alone, apply.

For example, as noted in a June 2010 Report on the Implementation of Tribal Economic Development Bonds submitted by the Advisory Committee on Tax Exempt and Government Entities ("ACT"), states and local governments routinely finance projects using tax-exempt bonds which retain a commercial or industrial component (*e.g.*, "hotels, convention centers, stadiums, racetracks and golf courses").[3] The ANPR has yet to make it to the actual rulemaking phase; *i.e.*, regulations have not been proposed. Nevertheless, IRS rulings since then seem to apply this standard to tribal projects. The result is that the "essential government function" analysis continues to hinder any realistic advancement in the area of tax-exempt bond issuance by tribal governments.

A provision championed by the Senate Finance Committee in the American Recovery and Reinvestment Act (ARRA) authorized $2 billion in bond authority for a new category of bonds for Indian tribes, known as "Tribal Economic Development ("TED") Bonds." Such TED Bonds were intended to provide tribes with more flexibility to use tax-exempt financing than is allowable under the current "essential governmental function" standards as noted above. The

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[1] Codified at 26 U.S.C. §7871(c)(1).
[2] Announcement 2006-59, *2006-2 C.B. 388.*, REG. 118788-06, 71 Fed. Reg. 45474 (emphasis added).
[3] *Indian Tribal Governments: Report of the Implementation of Tribal Economic Development Bonds Under the American Recovery and Reinvestment Act of 2009*, Advisory Committee on Tax Exempt and Government Entities, pp 15, June 9, 2010.

TED rules are still subject to other restrictions that require financed projects to be located on Indian reservations and that prohibit the financing of gaming facilities.

The ARRA provision also required Treasury to do a study of the effects of the new bonding authority, and to recommend to Congress whether it should "eliminate or otherwise modify" the essential governmental function standard for Indian tribal bond financing. That Treasury study is now complete and was delivered to the Chairman and Ranking member of this Committee on December 19, 2011.

The core recommendation of the Treasury study is that Congress should adopt the same standard for tribal government bonds as applies to governmental bonds issued by State and local governments. In other words, the Treasury Department recommends repealing the "essential governmental function" standard for Indian tribal governmental bond financing. The Treasury study explains that it is making this recommendation "[f]or reasons of tax parity, fairness, flexibility, and administrability...."

In short, the IRS gutted the market for tribal tax exempt bonds without reason, and prevented tribal governments from using one of the most basic economic development tools that is available to every other government in the United States. Now, tribes are left to push for a legislative fix in the halls of Congress for this restrictive policy to be amended.

General Welfare Doctrine Used to Destroy Tribal Health and Education Programs

The second discriminatory practice appears in IRS audits of tribal governments. The IRS has generally interpreted tribal government programs for tribal citizens as an unlawful distribution of per capita payments.

Starting in approximately 2004, the IRS began a special audit focus on tribal government programs providing in-kind benefits to tribal members. As a result of that initiative, the IRS began focusing on tribal government programs, including the following:

- Health Care Programs
- Educational Programs
- Housing Programs (including preparation of reservation home sites for building, housing improvement, construction, down payment assistance, and maintenance/repairs)
- Loan Programs
- Emergency Assistance
- Cultural Events and Community Activities (e.g., powwows)
- Cultural Travel
- Elder Programs (including meals, social events and utility assistance)
- Legal Aid
- Recreation and sporting events
- Landscaping and grounds maintenance

The underlying premise of these IRS examinations appears to be that Indian tribal governments are paying out taxable income (whether in cash or in kind) to or on behalf of tribal members. The IRS is auditing the tribal governments based on the premise that they (as payors) have obligations to report such payments to the IRS (and the payees) by issuing 1099s, and, in certain cases, to also withhold tax on such payments.

In a June 28, 2007 to Senator Charles Grassley, Steven Miller, the then IRS Commissioner for Tax Exempt and Governmental Entities, made the following statements under the heading "Tribal Per Capita Payments":

> *Under the Indian Gaming Regulatory Act, revenues from tribal gaming can be used for several authorized purposes, including funding tribal government operations, providing for the general welfare of the tribe, and making per capita payments to tribal members. Per capita distributions are subject to Federal income tax, and the issuer must report the distribution on Form 1099.*
>
> *To reduce the tax consequences to tribal members, some tribes have created mechanisms to classify what should be taxable per capita payments as general welfare program payments, excludible from income, often through liberal interpretations of what constitutes a "needs-based" program. Others have created or invested in purported income deferral programs....*
>
> *To address this problem we have engaged in educational and enforcement activities. We also initiated 139 examinations during the past two years that focused specifically on the use of net gaming revenues.*

Further, the IRS Indian Tribal Governments (ITG) Work Plan for FY 2009 (posted on the IRS website at www.irs.gov/tribes) made the following statement about its Gaming Revenue enforcement initiative:

> *The Gaming Initiative commenced by the office of Indian Tribal Governments in FY2005 will continue into FY2009. Continuing discussions with the Chairman of the National Indian Gaming Commission indicate their extreme interest in ensuring that tribes appropriately use gaming revenues, and properly account for such use. Since they have limited oversight of that issue, it falls upon the IRS to ensure that information reporting requirements are met with regard to the expenditure of such revenues. With Indian gaming now surpassing $26 billion in gross revenue for 2007, and expected to grow by over $2 billion per year, our role and responsibilities will continue to expand. We plan to devote 6 FTEs to this initiative, and our examination goal includes 40 returns from this initiative."*

In testimony at a September 18, 2009 hearing before the Senate Committee on Indian Affairs on the IRS treatment of tribal government health programs, Sarah Hall Ingram, the current IRS

Commissioner for Tax Exempt and Governmental Entities, denied that the agency was targeting Indian tribal governments or that it had any special program to examine tribal health programs. Rather, Commissioner Ingram contended that "the issue of the taxability of medical benefits and health insurance coverage can arise from time to time in the normal course of an audit as we look at whether a tribe, or any other type of government or employer, is following appropriate information reporting and withholding practices as it administers its various programs."

More recently, on November 15, 2011, the IRS announced that it would be reexamining the applicability of the general welfare exclusion as applied to tribal government programs. Indian tribes have been asked to submit written comments to the IRS describing their programs, particularly the following.

- **Cultural** (for example, programs involving tours of sites that are historically significant to a tribe; language preservation programs; community recreational programs; cultural and social events);
- **Education** (for example, programs providing tutors or supplies to primary and secondary school students; job retraining programs for adults);
- **Elder programs** (for example, programs providing heating assistance or meals); and
- **Housing** (for example, programs providing housing on and off the reservation, with income limits different from those of the United States Department of Housing and Urban Development).

See IRS Notice 2011-94 at http://www.irs.gov/pub/irs-drop/n-11-94.pdf. As a result of this recent administrative focus, many tribal leader are concerned that IRS audits of tribal programs are likely to increase, along with potential tax withholding and reporting burdens imposed on tribal governments.

Notwithstanding IRS statements to the contrary, NCAI believes that the IRS actions in auditing tribal governments on their social welfare and other governmental programs are clearly not comparable to IRS treatment of state and local governments. There is no evidence that any similar audit initiative exists for state and local government programs. In addition to hearing testimony from the IRS at this hearing, NCAI would like to invite the Senate Committee on Indian Affairs and its staff to request that the IRS make available to Congress, in a detailed report, the number of examinations, and the focus of those examinations, which are conducted on tribal governmental programs.

As is, Indian tribes are united in the belief that the IRS is micromanaging the programs and services they can provide to their members. This has caused uproar throughout Indian Country, and the Treasury Department is currently developing guidance to assist in preventing further damage to tribal programs.

Taxation of Trust and Treaty Resources

Until recently it was possible to believe that the IRS was only misguided in its dealings with tribes, and that new regulations or guidance might fix the problem. But this year the IRS has shown the depths of its bias in a new attack on the federal trust responsibility. Income that is derived directly from Indian trust land, such as income from farming or timber, has never been subjected to federal taxation. Reserved tribal lands are the results of treaties and agreements where Indian tribes traded the millions of square miles that make up the United States and in return received a promise to forever hold the reserved lands in trust as a homeland for Indian people. The treaties never countenanced that the United States would get billions of acres of ceded land, and then come back to take a third of the income derived from reserved tribal lands.

This proposed change in policy violates federal law, tribal treaty rights, and the federal trust responsibility. Further, it threatens to undermine the pending tribal trust fund settlements that the Obama Administration has worked so diligently to achieve. The timing of the IRS effort -- to attempt to change the law regarding taxability of trust funds at precisely the time when the United States is finally making partial compensation for many decades of trust funds mismanagement -- raises the implication of unfair dealing. We urge that the IRS cease its efforts to collect taxes on distributions from tribal trust funds, and that the Departments of Treasury and Interior engage in consultation to address this attempted change in policy. Please see our attached letters on this topic.

Background

In recent years the IRS has initiated a broad audit campaign against all Indian tribal governments. Indian tribes have objected to the discriminatory nature of the audit campaign, and have questioned the approach that the IRS has taken with issues such as tribal tax exempt bonds and the application of the General Welfare Doctrine. Most recently, the IRS has embarked on an even more disturbing effort to tax per capita payments made to tribal members from trust funds.

Per capita payments from tribal trust funds are specifically excluded from both federal and state taxes under the Per Capita Act of 1983, 25 U.S.C. 117a-117c. Long before 1983, this tax exclusion existed in federal law because it is derived from Indian treaties and the federal trust responsibility. There are five principle sources of this longstanding legal doctrine.

1. **Indian Treaties and the Federal Trust Responsibility**

First, under the Indian treaties, Indian tribes ceded millions of acres of land to which they held title -- worth untold trillions to the United States. In return, certain lands were reserved for the tribes, generally with language such as "for the exclusive use and benefit" of the tribe or band of Indians. Tribal lands are held in trust or restricted status by the United States for the benefit of the tribes, and have never been subject to property taxes or taxes on the income derived from

those lands. It is impossible to conceive that the signatories of Indian treaties understood that the United States would tax revenues derived from Indian trust lands.

2. **Squire v. Capoeman and the 1957 Interior Solicitor's Opinion**

Second, the tax exempt status of Indian trust funds was confirmed in the Supreme Court decision of *Squire v. Capoeman* in 1956. In 1957, the IRS attempted to tax Interior's payment of per capita distributions of tribal trust funds derived from timber on the Yakama Reservation. In the attached Solicitor's Opinion, the Interior Solicitor's office concluded:

> To apply those trust funds, or a portion thereof, by taxation for the benefit of the United States, in lieu of applying such funds for the benefit of the tribal members who are the communal owners of such funds in trust for them by the tribe, which is an instrumentality of the Federal Government, would, in my opinion, violate the provisions of the treaty reserving to the Indian rights in property for which the funds have been substituted. In the words of the Supreme Court in the Capoeman case quoting from the Attorney General's opinion in a situation where there was no statutory basis for exemption "it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

In 1957, in the face of opposition from the Secretary of Interior, the Bureau of Internal Revenue retreated from its efforts to tax per capita payments of tribal trust funds.

3. **Per Capita Act of 1983**

Third, in 1983, Indian tribes requested that Congress provide authority to make per capita payments of tribal trust funds directly from tribal accounts, rather than from the federal trust account. This authority was provided in the Per Capita Act, which repealed an earlier statute requiring that such payments be made by an officer of the United States. (Congressional Committee reports attached.) In the Act, Congress confirmed the continuing tax exemption of these trust fund payments by stating that such payments are subject to 25 U.S.C. 1407, titled "Tax Exemption; Resources Exemption Limitation," which provides in pertinent part:

> None of the funds which - (1) are distributed per capita or held in trust pursuant to a plan approved under the provisions of this chapter ... including all interest accrued on such funds during any period in which such funds are held in a minor's trust, including all interest and investment income accrued thereon while such funds are so held in trust, shall be subject to Federal or State income taxes.... (*emphasis added*).

The IRS contends that this explicit exemption from taxation is "round about" and "obtuse" because Congress used a cross-reference to another statute. If this were a principle of statutory interpretation, a significant portion of the United States Code would be rendered useless.

Instead, the most fundamental principle of construction is that statutes must be interpreted according their plain meaning. Here, the language of tax exemption is unambiguous.

4. **Indian Gaming Regulatory Act and Per Capita Payments**

Fourth, the Indian Gaming Regulatory Act of 1988 provided that per capita payments from Indian gaming are taxable and Indian tribes must withhold federal taxes from such payments. This provision of IGRA was provided to distinguish gaming per capita payments from trust per capita payments. Both Senate (Report 99-493, p. 15) and House (Report 99-188) reports contain the following statement:

> [subsection (b) of Section 11 of HR1920] further states that, if the funds are used to make per capita payments to tribal members, such payments will be subject to Federal taxation. It is not intended that this be the case if any of such revenue is taken into trust by the United States, in which case the provisions of the Act of August 2, 1983 (97 Stat. 365) [the Per Capita Act] would be applicable.

This statement indicates that in 1986, just three years after its passage, Congress construed the Per Capita Act to exempt from taxation all per capita payments derived from trust funds.

5. **Longstanding Administrative Practice**

Fifth, and finally, since at least the 1950's the Department of Interior has made per capita payments from tribal trust funds, has not reported them as income for federal tax purposes, and has vigorously defended their tax exempt status. The Interior regulations at 25 C.F.R. 115 were revised in 2000 and continued to provide procedures for making these payments without provision for tax reporting. Many 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 held in trust as an asset or resource. (See, e.g., SSA (20 CFR Part 416, 59 FR 8536); HUD, 55 FR 29905.) These agency regulations interpret the Per Capita Act uniformly to extend the provisions of 25 U.S.C. 1407 to funds derived from tribal trust resources. The IRS has conducted tax compliance reviews with many Indian tribes over the decades, and we know of no time other than 1957 when the issue was raised. 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 instruction from its website.

Conclusion

Federal agencies have a responsibility to respect the status of Indian tribal governments under the U.S. Constitution, treaties, and the federal laws passed by Congress under its authority over Indian affairs. The IRS has chosen to disregard this responsibility, and instead is using its authorities to conduct an audit expedition against every Indian tribe in the country and undermine tribal governments through exceedingly narrow and myopic interpretations of longstanding federal laws and legal doctrines. NCAI thanks Congress for their oversight and vigorous action to address our concerns on these critically important issues.

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