

**PER CAPITA ACT AND FEDERAL
TREATMENT OF TRUST PER
CAPITA DISTRIBUTIONS**

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AND
ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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**OVERSIGHT HEARING ON “PER CAPITA ACT
AND FEDERAL TREATMENT OF TRUST PER
CAPITA DISTRIBUTIONS.”**

**Friday, September 14, 2012
U.S. House of Representatives
Subcommittee on Indian and Alaska Native Affairs
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 11:00 a.m., in Room 1324, Longworth House Office Building, Hon. Don Young [Chairman of the Subcommittee] presiding.

Present: Representatives Young, Noem, Hastings (ex officio), Luján, Kildee, Hanabusa.

**STATEMENT OF THE HON. DON YOUNG, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF ALASKA**

Mr. YOUNG. The Committee will come to order. I note that a quorum is present.

The Subcommittee on Indian and Alaska Native Affairs is meeting today to hear testimony on the Per Capita Act and Federal Treatment of Trust Per Capita Distributions.

Under Committee rule 4 of opening statements of Members, the Chairman, myself, the Ranking Member, or whoever sits in for him, we will ask unanimous consent to include the other Members' opening statements if submitted to the clerk by today.

Today, the Subcommittee will review the Federal Government's controversial tax treatment of nongaming per capita payments distributed by Indian tribes to their enrolled members. Gaming revenues are governed by the Indian Gaming Regulatory Act of 1988 and are not an issue in this hearing. Under a historical precedent case law and a law known as the Per Capita Act, per capita payments for tribes to their members are nontaxable if the funds are taken from the accounts held in trust by the Department of the Interior. These funds in turn are derived from the development of natural resources on lands held in trust for tribes, among other sources.

To be clear, per capita payments are not government handouts. They are benefits that belong to Indians secured under terms negotiated in treaty and statute whereby tribes ceded tens of millions of acres of land to the United States. It would be a grave injustice to tax revenues originating from lands held for the exclusive use

and benefit of American Indians who secured their property at great cost.

Today's hearing was called when the Committee learned that several tribes received troubling notices from the IRS. The IRS notified the tribes that enrolled members receiving per capita payments from tribes' trust accounts were taxable. The taxability of such benefits appears to be unprecedented. It drastically affects the special terms of statutes of recognized tribes, a matter of which this Committee has jurisdiction.

At the same time that tribes are wrestling with this new unauthorized tax liability, the IRS last week issued a public notice declaring that per capita payments from the private accounts of 55 tribes are not taxable. These are tribes that recently settled their trust mismanagement lawsuits with the Obama Administration, a settlement proceeding called the Settlement Proposal of the Obama Administration, or SPOA.

While the United States should not tax tribal settlement funds, the IRS guidance regarding SPOA funds is most curious. It is clear that the Per Capita Act protects tribal funds from taxation when they are in trust accounts. It does not protect funds held in private nontrust accounts. This begs a question: Why would the IRS tax tribal payments derived from trust resources when granting tax relief for payments derived from nontrust accounts? This, to me, makes no sense; and it creates the perception that something political has occurred in the Department of the Treasury; and that would be very, very unfortunate.

I maintain that none of the funds I have described should be taxable, but the IRS must explain why it thinks certain trust payments are taxable while the private ones are not. The Committee is interested in ensuring that congressional intent is correct and followed under the Per Capita Act.

I look forward to hearing from my witnesses, and now I will recognize my late Ranking Member for an opening statement.

[The prepared statement of Mr. Young follows:]

**Statement of The Honorable Don Young, Chairman,
Subcommittee on Indian and Alaska Native Affairs**

Today the Subcommittee will review the Federal government's controversial tax treatment of non-gaming per capita payments distributed by Indian tribes to their enrolled members. Gaming revenues are governed by the Indian Gaming Regulatory Act of 1988 and are not at issue in this hearing.

Under historical precedent, case law, and a statute known as the Per Capita Act, per capita payments from tribes to their members are not taxable if the funds are taken from accounts held in trust by the Department of the Interior. These funds in turn are derived from the development of natural resources on lands held in trust for tribes, among other sources.

To be clear, these per capita payments are not government hand-outs. They are benefits that belong to Indians, secured under terms negotiated in treaty and statute whereby tribes ceded tens of millions of acres of land to the United States.

It would be a grave injustice to tax revenues originating from lands held for the exclusive use and benefit of American Indians, who secured their property at a great cost.

Today's hearing was called when the Committee learned that several tribes received troubling notices from the IRS. The IRS notified the tribes that enrolled members receiving per capita payments from the tribes' trust accounts are taxable. The taxability of such benefits appears to be unprecedented. It drastically affects the special status of recognized tribes, a matter over which this Committee has jurisdiction.

At the same time that tribes are wrestling with this new, unauthorized tax liability, the IRS last week issued a public notice declaring that per capita payments from the private accounts of 55 tribes are not taxable. These are tribes that recently settled their trust mismanagement lawsuits with the Obama Administration, a settlement process called the Settlement Proposal to the Obama Administration, or “SPOA.”

While the United States should not tax tribal settlement funds, the IRS guidance regarding SPOA funds is most curious.

It is clear that the Per Capita Act protects tribal funds from taxation when they’re in trust accounts. It does not protect funds held in private, non-trust accounts.

This begs a question: Why would the IRS tax tribal payments derived from trust resources, while granting tax relief for payments derived from non-trust accounts?

This makes no sense, and it creates the perception that something political has occurred in the Department of the Treasury.

I believe that none of the funds I’ve described should be taxable, but the IRS must explain why it thinks certain trust payments are taxable while the private ones are not. I look forward to hearing more about these issues from our witnesses today, and hope to explore solutions to ensure the Per Capita Act is implemented as intended by Congress.

STATEMENT OF THE HON. BEN RAY LUJÁN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. LUJÁN. Thank you very much, Mr. Chairman.

Tribal governments, like State and local entities, are not subject to Federal taxation. Tribal trust lands reserved for the beneficial use of Indian tribes by the United States are similarly not subject to Federal taxation.

The tax-exempt status of tribes and their trust land is grounded in Indian treaties and the trust responsibility, but individual Indians are taxed on their personal incomes subject to limited exceptions. For decades, the IRS has treated income derived from natural resources on tribal trust land which is then distributed on a per capita basis from trust accounts as immune from Federal taxation.

Tribal leadership, however, has recently reported an increase in efforts by the IRS to tax per capita payments made to tribal members from trust funds derived from trust resources, despite what tribes argue is clear statutory authority under the Per Capita Act to prohibit treatment of such funds as taxable income.

The National Congress of American Indians passed a resolution rejecting the IRS’ alleged efforts and urging the IRS and the Department of the Treasury to cease these efforts immediately. And, Mr. Chairman, I would ask for unanimous consent to enter the National Congress of American Indian Resolution LNK-12-010 into the record.

Mr. YOUNG. Without objection, so ordered.

Mr. LUJÁN. Thank you, Mr. Chairman.

[The National Congress of American Indian Resolution LNK-12-010 follows:]



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #LNK-12-010

TITLE: Urging IRS to Cease Unlawful Efforts to Tax Trust Per Capita Payments

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, for more than sixty years some member tribes of the NCAI have made very modest per capita distributions to their enrolled members of revenue, held in trust by the Office of Special Trustee ("trust per capita payments"), which is realized from the utilization of tribal trust resources; and

WHEREAS, such trust per capita payments have always been regarded by the member tribes of the NCAI, the Department of Interior and by the United States Congress as excluded from taxation by federal or state governments; and

WHEREAS, the Internal Revenue Service (IRS) of the U.S. Department of Treasury has recently asserted to several member tribes of the NCAI that the IRS now regards such tribes' modest trust per capita payments as taxable income to the recipient tribal members; and

WHEREAS, the NCAI considers the IRS recent assertions of taxability to constitute a shift in policy and/or practice which has tribal implications and, as such, requires meaningful consultation with the affected NCAI member tribes, on a government to government basis, as mandated by Executive Order No. 13175 and IRS internal policies; and

WHEREAS, requests by the NCAI member tribes subject to the new IRS policy and action regarding the taxability of trust per capita payments to consult with the IRS and the Department of Treasury under IRS internal policies and Executive Order No. 13175, Section 5, have been denied; and

WHEREAS, the NCAI strongly believes that the new IRS policy and action regarding the taxability of trust per capita payments is contrary to long-standing federal policy, federal common law and the "Per Capita Act" of 1983 (Public Law 98-64).

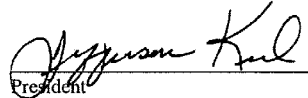
NOW THEREFORE BE IT RESOLVED, that the NCAI hereby respectfully but strongly urges the IRS and the Department of Treasury to immediately cease implementation of the new IRS policy regarding taxability of trust per capita payments as such action is in violation of federal policy, federal common law and Public Law 98-64; and

BE IT FURTHER RESOLVED, that the NCAI hereby requests that the IRS, the Department of Treasury, the Department of Interior and the White House commence meaningful government-to-government consultations with the NCAI member tribes, and other tribes across the nation, directly impacted by the new IRS policy regarding taxability of trust per capita payments as required by Executive Order No. 13175 and IRS internal policies; and


BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2012 Mid-Year Session of the National Congress of American Indians, held at The Cornhusker Hotel from June 17-20, 2012 in Lincoln, Nebraska, with a quorum present.


President

ATTEST:


Recording Secretary

Mr. LUJÁN. I am pleased that the IRS has been called to testify today to answer questions about taxation of per capita income derived from such resources for the record; and I would like to hear exactly how it treats per capita income derived from trust resources and, if there has been a change in its practice, the legal basis upon which it is basing such practice.

I am concerned that the IRS is not communicating with Indian country as effectively as it should and that tribal tax policies are not being conveyed with uniformity and that this is contributing to ambiguity in the field.

Let me be clear: As a matter of Federal Indian tax policy based on over a century of treaties, respect for tribal sovereignty and empowerment of tribe self-determination, funds derived from trust resources that are distributed on a per capita basis to individual Indians cannot and should not be subject to Federal tax. If the IRS is engaged or intends to engage in efforts to tax per capita distributions, as our tribal witnesses today will testify, it should cease such efforts immediately.

Also, I understand the IRS has issued guidance that clarifies that per capita payments from settlement of tribal trust cases be-

tween the United States and 55 tribes are not subject to Federal taxation. This guidance is most welcome. It is now beyond dispute that these payments should be tax exempt as they originated as damages in part as a result of the Federal Government's mismanagement of tribal trust accounts.

This hearing will inform us as legislators in Congress about whether the Per Capita Act should be clarified to make express that per capita income derived from trust resources and issued from tribal accounts is not subject to Federal taxation.

I look forward to the testimony, and I yield back.

[The prepared statement of Mr. Luján follows:]

**Statement of The Honorable Ben R. Luján, Ranking Member,
Subcommittee on Indian and Alaska Native Affairs**

Thank you, Mr. Chairman.

Tribal governments, like state and local entities, are not subject to federal taxation. Tribal trust lands, reserved for the beneficial use of Indian tribes by the United States, are similarly not subject to federal taxation. The tax exempt status of tribes and their trust lands is grounded in Indian treaties and the trust responsibility. But individual Indians are taxed on their personal income subject to limited exceptions.

For decades, the IRS has treated income derived from natural resources on tribal trust land, which is then distributed on a per capita basis from trust accounts, as immune from federal taxation.

Tribal leadership, however, has recently reported an increase in efforts by the IRS to tax per capita payments made to tribal members from trust funds derived from trust resources, despite what tribes argue is clear statutory authority under the Per Capita Act to prohibit treatment of such funds as taxable income.

The National Congress of American Indians passed a resolution rejecting the IRS' alleged efforts and urging the IRS and the Department of the Treasury to cease these efforts immediately.

I'm pleased that the IRS has been called to testify today to answer questions about taxation of per capita income derived from trust resources for the record. I'd like to hear **exactly** how it treats per capita income derived from trust resources and, if there has been a change in its practice, the legal basis on which it is basing such practice.

I'm concerned that the IRS is not communicating with Indian country as effectively as it should, and that tribal tax policies are not being conveyed with uniformity and that this is contributing to ambiguity in the field.

Let me be clear: as a matter of federal Indian tax policy based on over a century of treaties, respect for tribal sovereignty, and empowerment of tribal self-determination, funds derived from trust resources that are distributed on a per capita basis to individual Indians cannot and should not be subject to federal tax. If the IRS has engaged, or intends to engage, in efforts to tax per capita distributions, as our tribal witnesses today will testify, it should cease such efforts immediately.

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This hearing will inform us as legislators in Congress about whether the Per Capita Act should be clarified to make express that per capita income derived from trust resources and issued from tribal accounts is not subject to federal taxation. I look forward to the testimony.

I yield back.

Question submitted to the IRS by The Honorable Ben Ray Luján
ITG FAQ Answer #2: Are any Per Capita Distributions exempt from Federal income taxation?

Yes, when distributions are received resulting from a land claims settlement and judgment, and also when there are distributions of trust principal and income held by the Secretary of the Interior.

Mr. YOUNG. I thank the gentleman.

I will now recognize the Chairman of the full Committee, Doc Hastings.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you very much, Mr. Chairman, and thank you for scheduling this hearing.

I want to welcome all three of the tribal witnesses who flew in here from the great Pacific Northwest to be with us today. Two of the witnesses, Executive Secretary Athena Sanchez Yallup and Chairman John Sirois, are representing the Yakama Nation and the Colville tribes respectively, and both of these tribes are located in eastern Washington. One of them is fully within my district, and the other is partially in my district.

This hearing is needed to clarify ambiguous, potentially conflicting policies of the Obama Administration relating to the Federal Government's income tax treatment of certain payments made by tribes to their enrolled members. It is my understanding that, for at least the last 50 years, distributions of per capita payments to enrolled tribal members have been considered nontaxable if those payments are derived from accounts held in trust by the Department of the Interior. These are accounts for funds from the development of tribes' trust resources, such as timber specifically in my area and from judgments and claims that are deposited.

However, the IRS has notified several tribes that members receiving per capita payment sourced from trust timber resources are now taxable, while the IRS has just issued a new notice declaring that certain per capita payments made by 55 tribes from funds in private accounts are not taxable. These funds in these accounts are derived from a recent tribal trust lawsuit settlement with the Obama Administration. The discrepancy in the treatment of these payments is a source of great uncertainty to tribes everywhere, particularly those actively engaged in forest management, a vital activity in the Pacific Northwest.

The IRS policy potentially exposes many impoverished Indian people in Washington State to new, unexpected tax liabilities at a time of high unemployment and rising energy prices. And the policy seems to turn long-standing Federal principles of Indian law on its head. Namely, lands reserved for Indian tribes under treaties, acts of Congress, and Executive Orders are meant for the exclusive use and for the benefit of tribes.

In addition, inconsistent and unclear government tax policies always result in economic uncertainty. In the middle of a recession, the last thing the tribes need while trying to serve their members is more uncertainty with respect to the tax treatment of tribal revenues. So I appreciate very much the Subcommittee holding this hearing.

This was brought to my attention by a casual remark made by one tribal member recently, and we looked into it and found this is indeed serious.

I appreciate the Chairman and Ranking Member holding this hearing.

[The prepared statement of Mr. Hastings follows:]

**Statement of The Honorable Doc Hastings, Chairman,
Committee on Natural Resources**

Thank you, Chairman Young, for scheduling this hearing. I welcome all three tribal witnesses who flew here from the Pacific Northwest to be with us today. Two of the witnesses—Executive Secretary Athena Sanchey Yallup and Chairman John Sirois are here representing the Yakama Nation and the Colville Tribes, respectively.

Both of these tribes are located in Eastern Washington, which is an area that I have the honor and privilege to represent.

Mr. Chairman, this hearing is needed to clarify ambiguous and potentially conflicting policies of the Obama Administration relating to the federal government's income tax treatment of certain payments made by tribes to their enrolled members.

It is my understanding that for at least the last 50 years, distributions of per capita payments to enrolled tribal members have been considered non-taxable if those payments are derived from accounts held in trust by the Department of the Interior. These are accounts where funds from the development of a tribe's trust resources—such as timber—and from judgments and claims are deposited. However, the IRS has notified several tribes that members receiving per capita payments sourced from trust timber resources are now taxable.

Meanwhile, the IRS has just issued a new notice declaring that certain per capita payments made by 55 tribes from funds in *private* accounts are not taxable. The funds in these accounts are derived from a recent tribal trust lawsuit settlement with the Obama Administration.

The discrepancy in the treatment of these payments is a source of great uncertainty to tribes everywhere, particularly those actively engaged in forest management, a vital activity in the Pacific Northwest sustaining thousands of jobs and driving the economies of many small towns.

The IRS's policy potentially exposes many impoverished Indian people in Washington State to new, unexpected tax liabilities in a time of high unemployment and rising energy prices. And the policy seems to turn long-standing federal principles of Indian law on their head. Namely, lands reserved for Indian tribes under treaties, Acts of Congress, and Executive Orders are meant for the exclusive use and benefit of tribes.

In addition, inconsistent or unclear government tax policy always results in economic uncertainty. In the middle of a recession, the last thing that tribes need while trying to serve their members is more uncertainty with respect to the tax treatment of their tribal revenues.

I appreciate the Subcommittee clearing the air on this important issue, and look forward to hearing ideas for a resolution.

Mr. YOUNG. I thank the gentleman.

I will now call the witnesses to the table.

Christie Jacobs, Director of the Office of Indian Tribal Governments, Internal Revenue Service; Athena Sanchey Yallup, Executive Secretary, the Confederated Tribes and Bands of the Yakama Nation; Ron Suppah, Vice Chairman, Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon; and John Sirois, Chairman of the Confederated Tribes of the Colville Reservation.

Please take your seats. You are already there.

I hope you know that your opening statements are 5 minutes. Watch the clock in front of you; and if you are doing a great job, I may let you go a minute over. But, if not, I am going to shut you off anyway.

The microphones are run by a button in front of you. Make sure you push it.

And I am sure you know what the timing lights do.

So we will now recognize the first witness, Christie Jacobs from Internal Revenue Service.

You are recognized, Christie.

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

Ms. JACOBS. Good morning, Chairman Young, Ranking Member Luján, and members of the Subcommittee. I appreciate the opportunity to be here this morning to discuss the taxation of per capita payments made by tribes to their members from proceeds of certain settlements or assets held in trust.

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 was created in response to a request by tribal leaders. The office exists to facilitate the government-to-government relationship and to assist tribes in meeting their Federal tax obligations.

There are two distinct but related issues for discussion today: first, per capita payments made by tribes to their members from proceeds of certain settlements of tribal trust cases between the United States and those Indian tribes; and, second, per capita payments made by tribes to their members from resources held in trust by the United States.

In order to provide context to this discussion, I would like to briefly explain the legal principles involved. Section 61 of the Internal Revenue Code, which defines gross income, and the Per Capita Act found in title 25 are both relevant to this discussion.

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived unless a specific exception in the Code applies. Tribal members are citizens of the United States and are subject to payment of income taxes unless an express exception, like a statute or treaty applies. The Federal courts have applied this rule to per capita distributions from trust assets and found them subject to tax. However, those cases have not considered the application of the Per Capita Act.

The Per Capita Act, which is codified in title 25, provides authority to Indian tribes to make per capita payments to their members out of tribal trust revenue. Under the Per Capita Act, funds held in trust by the Secretary of the Interior for an Indian tribe that are distributed per capita to members of that tribe may be distributed either by the Secretary of the Interior or at the request of the governing body of the tribe and subject to approval by the Secretary of the Interior and the tribe.

The Per Capita Act provides that funds distributed under that Act are subject to the provisions of section 1407 of the Indian Tribal Judgment Funds Use or Distribution Act. The funds described in that section, and all interest and investment income accrued on the funds while held in trust, are not subject to Federal income taxes.

Recently, the United States entered into settlement agreements with Federally recognized Indian tribes resolving litigation in which the tribes allege that the Department of the Interior and the Department of the Treasury mismanaged monetary assets and nat-

ural resources the United States holds in trust for the benefit of the tribes. Upon receipt of the settlement proceeds, the tribes will dismiss their claims with prejudice.

The United States foresees the possibility of entering into additional similar agreements in the future with other tribal trust litigants.

On September 6, 2012, Treasury and the IRS published Notice 2012–60. The notice concluded that the per capita payments described above are excluded from the tribal members’ gross income.

Prior to issuing this notice, pursuant to Executive Order 13175, we engaged in direct consultation as requested by several tribes and tribal organizations. These consultations and conversations were extremely useful in preparing the notice.

The notice applies only to per capita payments from proceeds of the settlements that are described in the notice and upon which we engaged in consultation with the affected tribes. The issue of per capita distributions from trust assets is outside the scope of the notice, but, as stated in the notice, this issue may be addressed in future guidance after further consultation.

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

Mr. YOUNG. Thank you, Ms. Jacobs. I appreciate that.

[The prepared statement of Ms. Jacobs follows:]

**Statement of Christie J. Jacobs, Director,
Office of Indian Tribal Governments, Internal Revenue Service**

Introduction

Good morning, Chairman Young, Ranking Member Luján, and members of the Subcommittee.

I appreciate the opportunity to be here this morning to discuss the taxation of per capita payments made by tribes to their tribal members from proceeds of certain settlements or assets held in trust.

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. The office exists to facilitate government-to-government interactions and to assist tribes in meeting their Federal tax obligations.

The Principal Issues

There are two distinct, but related, issues for discussion today: (1) per capita payments made by tribes to their members from proceeds of certain settlements of tribal trust cases between the United States and those Indian tribes, and (2) per capita payments made by tribes to their members from resources held in trust by the United States.

In order to provide context to this discussion, I would like to briefly explain the legal principles involved.

Brief Explanation of Legal Principles

Section 61(a) of the Internal Revenue Code, which defines gross income, and the Per Capita Act (25 U.S.C. § 117a, *et. seq.*) are both relevant to this discussion.

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income is defined as all income from whatever source derived. Under § 61, Congress intends to tax all gains and “undeniable accessions to wealth, clearly realized,^[1] over which taxpayers have complete dominion.” *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). Indians are citizens subject to the payment of income taxes. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). An exemption from the payment of taxes “should be clearly expressed.” *Id.*

Unless an express exception—like a statute, treaty or agreement—applies, the general rule is that gross income is all income from whatever source derived. The Federal courts have applied this rule to per capita distributions from a tribe to its

members from trust assets and found them subject to tax. *See, e.g., Tonasket v. C.I.R.*, T.C. Memo. 1985-365. However, these cases have not considered the application of the Per Capita Act.

The Per Capita Act, codified in 25 U.S.C. §§ 117a through 117c, provides authority to Indian tribes to make per capita payments to Indians out of tribal trust funds. Under the Per Capita Act, funds held in trust by the Secretary of the Interior for an Indian tribe that are to be distributed per capita to members of that tribe may be distributed by either the Secretary of the Interior or, at the request of the governing body of the tribe and subject to the approval of the Secretary of the Interior, the tribe.

The Per Capita Act provides, in 25 U.S.C. § 117b(a), that funds distributed under that Act are subject to the provisions of 25 U.S.C. § 1407 of the Indian Tribal Judgment Funds Use or Distribution Act. Under § 1407, the funds described in that section, and all interest and investment income accrued on the funds while held in trust, are not subject to federal income taxes.

Per Capita Payments from Settlement Proceeds—Notice 2012-60

Recently, the United States has entered into settlement agreements—and foresees the possibility of entering into additional similar agreements in the future with other tribal trust litigants—with federally recognized Indian tribes resolving litigation in which the tribes allege that the Department of the Interior and the Department of the Treasury (Treasury) mismanaged monetary assets and natural resources the United States holds in trust for the benefit of the tribes. Upon receipt of the settlement proceeds, the tribes will dismiss their claims with prejudice.

On September 6, 2012, Treasury and the IRS published Notice 2012-60. The notice concluded that the per capita payments described above are excluded from the tribal members' gross incomes.

The notice applies to per capita payments made from agreements settling trust mismanagement claims. The notice states that "other per capita payments made by the Secretary of the Interior or Indian tribes to members of Indian tribes[,] are "outside the scope of this notice and may be addressed in future guidance."

Prior to issuing this notice, we engaged in direct consultation as requested by several tribes and other affiliated organizations and in the spirit of Executive Order 13175. These consultations and conversations were extremely useful in preparing the notice.

Per Capita Payments from Trust Resources

The notice applies only to per capita payments from proceeds of the settlements that are described in the notice and upon which we engaged in consultation with affected tribes. The issue of per capita distributions from trust assets is outside the scope of the notice, but as stated in the notice, this issue may be addressed in future guidance after further consultation.

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

[The response to questions submitted for the record by Ms. Jacobs follows:]



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

December 5, 2012

The Honorable Don Young
Chairman
Subcommittee on Indian and Alaska Native Affairs
U.S. House of Representatives
Washington, DC 20515

Attention: Nancy Locke

Dear Chairman Young:

I am responding to your inquiry dated September 28, 2012, in which nine written follow-up questions were asked. Answers are provided below:

Questions from Chairman Young

In questions 1-5, you ask for specific information regarding coordination of Notice 2012-60 with the Department of the Interior (Interior) and the Department of Justice (Justice) prior to its issuance. Public guidance issued by the Department of the Treasury (Treasury) is subject to a formal clearance process. Notice 2012-60 was appropriately cleared through that process. However, because Interior has jurisdiction over Title 25 of the United States Code, which includes the Per Capita Act, and Justice represented the United States in the litigation and settlements, both Interior's Office of the Solicitor and Justice's Environment and Natural Resources Division were consulted and provided an opportunity to review and comment on the proposed guidance. While the IRS cannot speak to the clearance processes at Interior or Justice, any feedback provided was given due consideration.

Question 6 asks for the names of Tribes that Treasury or the Internal Revenue Service (IRS) officials met with concerning taxation issues of the settlements addressed in Notice 2012-60. In the course of developing this guidance, several tribes and other affiliated organizations requested direct consultation on the income tax treatment of per capita payments from the Tribal Trust case settlements. In response to these requests and in the spirit of Executive Order 13175, direct consultation and communication occurred. However, consultation meetings in which Treasury is involved proceed with the explicit understanding that specific cases before the IRS will not be addressed. In addition, pursuant to 26 U.S.C. 6103, the IRS is prohibited from disclosing the names of taxpayers involved in particular tax matters.

Question 7 asks the IRS to identify any officials from the White House who provided Treasury with input, analysis, direction, or otherwise engaged with Treasury or the IRS on Notice 2012-60. Treasury and the IRS did not receive any input, analysis, or

direction from the White House, and did not otherwise engage with the White House regarding the development of Notice 2012-60.

In question 8, you ask what the federal government plans to do to address certain concerns of the Confederated Tribes of the Colville Reservation regarding the terms of their negotiated settlement. We understand that as part of the negotiation with the United States, the Confederated Tribes of the Colville Reservation arranged to have a portion of the Tribes' settlement proceeds deposited into a trust account maintained by Interior for a period of five years, and the rest of the settlement proceeds into the Tribes' private, non-trust bank account. We appreciate that the Tribes took this proactive step to address the possibility that the per capita distributions might be subject to income tax prior to the definitive IRS statement on the issue and we specifically commended the Tribes for these prudent actions.

Question from Congresswoman Hanabusa

In her question, the Congresswoman asks whether there is a statute that operates to subject to taxation settlement payments that are initially not taxable when distributed on a per capita basis, if deposited in a private interest bearing account. As discussed in Notice 2012-60, the per capita distributions made from the settlement proceeds are exempt from taxation when distributed and received by the tribal members. However, any earnings or interest earned on these exempt funds while they are held in a private bank account would be subject to federal income taxation pursuant to section 61 of the Internal Revenue Code.

If you have any questions, please contact the Internal Revenue Service Office of Legislative Affairs at (202) 622-3720.

Sincerely,



Christie J. Jacobs
Director
Office of Indian Tribal Governments

cc: The Honorable Ben Ray Lujan
Ranking Member
Subcommittee on Indian and Alaska Native Affairs
U.S. House of Representatives
Washington, DC 20515

The Honorable Colleen Hanabusa
U.S. House of Representatives
Washington, DC 20515

Mr. YOUNG. Athena, please, Secretary of the Confederated Tribes and Bands of the Yakama.

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

Ms. SANCHEY YALLUP. Shix mayfski [speaking in native language].

Good morning, Chairman Young and members of the Subcommittee. I am honored to be here. I am Athena Sanchez Yallup. I am the Executive Secretary for the Yakama Nation, and I would like to thank you for this opportunity to testify on behalf of the Per Capita Act and Federal Treatment of Trust Per Capita Distributions.

I also request that my oral and written testimony be made part of the record on behalf of the Yakama Nation.

Mr. YOUNG. Without objection.

Ms. SANCHEZ YALLUP. The Yakama Nation negotiated the treaty of 1855 with the U.S. Government with the understanding that the rights bestowed to our treaty would be upheld by the supreme laws of the land. I have traveled from the land of my people and ancestors to bring your attention to the Internal Revenue Service's attempt to tax per capita distributions of the Yakama Nation trust resources. This is a serious issue that is potentially another broken promise of our treaty with the United States, and we cannot sit idly by and tolerate the treatment of the Internal Revenue Service.

The action of attacking trust resources is unprecedented and is not supported by Federal law. The Per Capita Act clearly states per capita distribution of trust funds are not taxable, and the new IRS Notice 2012-60 states mismanagement trust funds are not taxable funds either. We know trust resources, funds, or per capita distributions managed properly or mismanaged are not taxable.

Today we still continue this fight, and we need to maintain for our future generations the benefit of our sacred ancestors that our trust per capitas are not taxable. We know that the Yakama Nation Reservation and its trust resources are for the exclusive benefit of the Yakama people and not the IRS or any other part of the United States.

We were moved from our homelands along the Columbia River so that goods could be provided to the world. We understand that dams were built on the Columbia River and its tributaries to enhance the quality of life for the Northwest people. We understand housing was built during World War II, but it relocated our people from their homes, polluted our waters and fish, and kept us from our ancestral lands.

We understand that the United States has tried to keep our best interest through the trust responsibility, but yet we are sitting here today again to retain and restore our trust responsibility and our rights.

The Yakama people have adopted and survived many of the policies imposed on them from the United States, such as an allotment act, boarding schools, and terminations. My people and I will not dishonor the sacrifices of many; and I, as a tribal leader, must speak and stand up for the treaty rights and ask why does the U.S. and its agencies and staff continue to want more of what we have, what my leadership has fought for and maintained through litigation since the time of my treaty.

We strive to be the strongest tribal nation that adequately serves its people. When will the United States—now specifically the IRS—have enough of what the Yakamas have before they are satisfied?

I see my people going without work. I see alcoholism, drug abuse, and suicide affecting my people and question the government's ade-

quate health care. I see the IRS attempting to take more from the tribes that have given up so much already.

Our government tries to fill the voids from the lack of services from their Federal Government and create economic development, and our tribal governments respect our land and honor the air and water. We reinvest our resources to right the wrongs. We are true stewards of this land.

Maybe the United States should give us back the public lands in my ceded area. I am sure my people are capable of maintaining the lands of the Yakama Nation.

Again, the IRS' continued attempt to tax the Yakama trust resources is appalling and disgraceful. My trust resources are not taxable. With respect and honor, I request that the Subcommittee reaffirm Congress' intent that the per capita distributions of trust resources are not taxable and demand the IRS and the Department of the Treasury consult with tribes, as required by Executive Order 13175.

Thank you for the time and the opportunity to testify before this Subcommittee.

Mr. YOUNG. Thank you.

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

**Statement of Athena Sanchey Yallup, Executive Secretary of the
Confederated Tribes and Bands of the Yakama Nation**

Shix mayfski. Chairman Young, honored Subcommittee members, I would like to thank you for the opportunity to testify regarding the "Per Capita Act and Federal Treatment of Trust Per Capita Distributions." I ask that my oral and written testimonies be placed on the record on behalf of the enrolled members of the Confederated Tribes and Bands of the Yakama Nation.

My name is Athena Sanchey Yallup, and I serve as the Executive Secretary of the Yakama Nation Tribal Council. I have lived on the Yakama Reservation—where my ancestors have lived since time immemorial—for my entire life. I have worked for my tribal government for more than 25 years, and have served my people as an elected official since 2006. Today, I have travelled from the land of my people to speak on behalf of the 10,400 enrolled members of the Yakama Nation to bring to your attention the Internal Revenue Service's ("IRS") attempts to tax per capita distributions of the Yakama Nation's trust resources. This is a serious issue that affects every single Yakama member, and every Tribe with a reservation that attempts to provide for its own people. Given the gravity of this issue for the Yakama Nation and Indian Country, we request your assistance by (1) reaffirming Congress' intent that per capita distributions of trust resources are not taxable, and (2) facilitating consultation between the IRS and the Yakama Nation.

I respectfully submit the following statement supporting the Yakama Nation's position that this new federal tax burden is without precedent, without foundation in federal law, contrary to the federal trust responsibility, and in violation of the Yakama Treaty of 1855.

BACKGROUND ON YAKAMA NATION AND ITS TRUST RESOURCES

The creation stories of the Tribes and Bands that were brought together under the Treaty of 1855 speak of the creation of the Yakama People within what is now the ceded and reservation lands of the Yakama Nation. Anthropological data supports these stories, dating our ancestors' presence on our lands back more than 14,000 years. Our people have lived off of these sacred lands for millennia, and were nourished by the same resources that the Yakama people cultivate and utilize today. Our lands, our resources, and our people have been connected spiritually and physically throughout history unlike any relationship understood by Western Civilization.

In 1855, the Palouse, Piquose, Yakama, Wenatchapam, Klinquit, Oche Chotes, Kow way saye ee, Sk'in-pah, Kah-miltpah, Klickitat, Wish ham, See ap cat, Li ay was, and Shyik Indians came together to negotiate a treaty with Territorial Governor Isaac Stevens as representative of the United States. Our ancestors gave up nearly 10 million acres of land to protect our way of life, including our hunting and

fishing rights off reservation, and the right to the ‘exclusive use and benefit’ of our reservation lands. These *reserved rights* were memorialized in the Treaty of 1855, which outlines the rights that my People granted to the United States, and those that were retained for ourselves. Before the Treaty of 1855, the Confederated Tribes and Bands exercised our exclusive right to the use and benefit of our lands. The Treaty of 1855 explicitly protected that exclusive right so that future Yakamas could continue using and benefitting from the Yakama lands. Congress has not acted to divest the Yakama Nation of that right. Now, in what is a blatant attack on the sovereignty of the Yakama Nation, the IRS is attempting to do what Congress has not, by divesting the Yakama Nation of our right to the exclusive use and benefit of our lands.

On June 29, 2010, the IRS sent a letter to Chairman Harry Smiskin announcing an audit of the Yakama Nation for fiscal year 2008. Although the Yakama Nation defended all IRS tax matters, the audit has subsequently been expanded to include fiscal years 2009, 2010, and 2011 with respect to the Yakama Nation trust per capita distributions. This audit represents yet another attempt by the United States Government to tax our per capita distributions of our trust resources. Originally, the United States Department of the Interior (“DOI”) issued an opinion to the IRS in 1957, which clearly states that distributions of our trust resources are not to be taxed. From 1957 to 1983, when the Per Capita Act was passed, the Bureau of Indian Affairs (“BIA”) made distributions of our trust resources to our members without any tax consequence. In all these years that the federal government administered trust distributions, no tax forms were given to the Yakama people. From 1983 until 2010, the Yakama Nation made per capita distributions of trust resources under authority of the Per Capita Act without tax consequence to our members—just as our trustee did for over 20 years. The IRS even stated on its website that such distributions were not taxable as recently as November 2011. There have been no changes in the law. There have been no changes in Congressional policy. We are struggling to understand why the IRS has decided to directly contradict such explicit legislation and established federal policy.

The trust resources that the IRS claims to be taxable income are derived from forest management activities within the Yakama reservation, which provide essential benefits to the Yakama Nation and its people. These activities employ more than 500 enrolled Yakama members each year, the proceeds of which support the Tribal Government and members through semi-annual per capita distributions. These distributions are never more than a few hundred dollars, but this amount helps our members pay for basic necessities such as food, clothing, and electricity. These practices are in line with the Federal Government’s Indian policy of self-determination, which is meant to help the Yakama Nation provide for and support itself with limited federal assistance and interference. We are using our resources to provide basic governmental services, jobs, and economic security for our members. This is what self-determination looks like. But, we cannot hope to realize self-sufficiency when the Federal Government seeks to find new ways to hinder our progress at every turn. Our ancestors protected the lands of the Yakama People for our exclusive use and benefit, and we will not dishonor them by allowing the IRS to disregard the Treaty of 1855 by reaching into our protected forests to take our timber in the form of a tax.

Therefore, we ask that this Subcommittee acknowledge the rights reserved to the Yakama Nation in the Treaty of 1855 by reaffirming its intention that our trust resources are exempt from federal taxation, and by compelling the IRS to consult with the Yakama Nation on a government-to-government basis regarding this dramatic shift in federal policy.

PER CAPITA ACT

The Per Capita Act, which is the Congressional authority the Yakamas (and other Tribes) rely upon, was passed in 1983 to provide a legal mechanism for Indian Tribe’s to assume responsibility for distributing their trust resources to tribal members. In practice, the legislation merely changed the name of the issuing agency on the per capita check from the ‘Federal Government’ to the ‘Indian Tribe’. But, in doing so, the Federal Government reaffirmed its position that such distributions of trust resources are not taxable. The IRS seems blind to this position, despite the explicit language of the Per Capita Act and its legislative history, which support our position that the Yakama Nation’s per capita distributions of trust resources are not taxable.

The explicit language of the Per Capita Act states that per capita distributions of trust resources under the Per Capita Act are not taxable. Specifically, 25 U.S.C. § 117a provides that the Per Capita Act governs per capita distributions of resources held in trust by the Federal Government on behalf of Tribes. Section 117b, which

is entitled “Previous contracted obligations; *tax exemption*,” states that distributions made under the Act, including distributions made pursuant to § 117a, are 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 or State taxes.

The legislative history of the Per Capita Act further supports our position 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 from taxation. For instance, when identifying the specific exceptions to taxation for 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 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. Clearly, Congress understands § 117b to exempt per capita distributions of trust funds from federal taxation.

Given such explicit statutory language, and such a clear expression of Congress’ legislative intent, we are left to conclude that the IRS’s attempts to tax our trust resources are simply a disingenuous money grab that our People can ill afford to handle in this economic climate. Again we ask that you reaffirm Congress’ position that our trust resources are not taxable, and urge the IRS to consult with the Yakama Nation on a government-to-government basis to explain their harmful and unprecedented actions.

TRUST RESOURCE MISMANAGEMENT SETTLEMENTS

On September 6, 2012, the IRS issued Notice 2012–60 entitled “Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases.” This Notice expressly excluded all per capita payments of trust funds derived from United States-Tribal resource mismanagement settlements, but failed to extend this tax exclusion to the per capita distributions of trust resources. Apparently, the Department of the Treasury thought that Notice 2012–60 resolved the trust resources issue in its entirety, making this Oversight Hearing moot. Although the IRS Notice appropriately does not tax settlements related to trust resource mismanagement, its analysis does not reach its logical conclusion: that per capita distributions of trust resources are not taxable.

Notice 2012–60 cites to the 25 U.S.C. § 1407’s cross-reference in the Per Capita Act stating that “funds distributed under 25 U.S.C. § 117a are subject to the provisions of 25 U.S.C. § 1407.” The IRS is using the Per Capita Act to justify its position that trust mismanagement settlement funds distributed per capita are not taxable. Where we fail to follow the IRS’s analysis is where it doesn’t extend this reasoning to our trust resources. Why is the Yakama Nation going to enjoy tax-free distributions of timber revenues earned 25 years ago, but not enjoy tax-free distributions of timber extracted today? The law has not changed. The trees being cut today are no different than the trees cut for the last 75 years.

Adding to our confusion is the IRS’s reliance on the ‘origin of the claim’ doctrine. The origin of the claim doctrine traces the settlement recovery back to the source of the claim to determine its tax status. In this case, the source is “mismanaged trust accounts, lands, and natural resources . . . the United States holds in trust for the benefit of the tribes.” The only word in that sentence that distinguishes the trust resources at issue in our case from trust resources covered by the trust settlements is ‘mismanaged’. To follow this difference to its logical conclusion, if the Yakama Nation were to continue to have its trust resources mismanaged by the United States, our trust resources would not be taxable. But, if our trust resources are not mismanaged by the United States, our resources are taxable. Such a proposition is so absurd that I am embarrassed to have to present it to this Subcommittee, but here we are.

To resolve this dispute once and for all, we request that this Subcommittee reaffirm Congress’ intent to exclude our per capita distributions of trust resources from

tax, and to push the IRS and the Department of Treasury to consult with the Yakama Nation on a government-to-government basis.

RESOURCE EXCLUSION FOR FEDERAL BENEFITS DETERMINATION

The impact of the IRS's policy change is not limited in its impact to the final amount of taxable income on our members' tax filings. Rather, this policy change will directly affect our members' eligibility for the federal benefits that they rely upon so heavily. Following the Per Capita Act, federal agencies responsible for establishing an American citizen's income for the purposes of determining federal benefits issued regulations excluding per capita distributions of trust resources from income. In essence, the agencies determined that such tax-exempt income should also be exempted from federal income determinations. The IRS's new policy would force the Department of Interior, Department of Health and Human Services, Department of Housing and Urban Development, Social Security Administration, Department of Education, and the Department of Agriculture to start counting per capita distributions of trust resources as income. Such a change in policy is not supported by congressional intent, and would have an extremely detrimental effect on the Yakama People.

First, following the passage of the Per Capita Act in 1983, Congress stated that per capita distributions of trust resources should not be counted as income for the purpose of determining eligibility for federal benefits. In particular, Congress interpreted 25 U.S.C. § 1407's tax exclusion language to exclude per capita distributions of trust resources from income determinations for federal benefits as well. 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 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. Not only does this language represent evidence of Congress' intent to extend the tax exemption language of § 1407 to trust funds; further, it extends the income exemption language from § 1407 to per capita distributions of trust funds. The language could not be any clearer.

Second, this Subcommittee should take a moment to consider the implications of the IRS's new policy—that trust resources should be taxable, and therefore includable as income for federal benefit determinations—on the Yakama Nation and its People. The Yakama People are rich in our traditions and our culture, but we are financially destitute. Our people are forced to make decisions that the more fortunate among us will never have to make. Should you pay for heat during the winter, or warm winter clothes? Should you buy food for your family, or medicine for your sick? Now the IRS wants us to answer yet another question. Should Yakama members take their per capita distribution and risk losing their federal benefits, or keep their federal benefits and reject their per capita distribution? Our trust resources are protected by federal Treaty, federal law, and federal common law. The IRS' policy change does not promote self-determination and perversely requires poor tribal members to pass on tribal resources to avoid taxation. The IRS' policy change also corrupts the trustee relationship by profiting from trust resources of the beneficiary.

We are forced by the blatant attacks of the IRS to ask that this Subcommittee provide yet another statement that our trust resources are not taxable, and are not to be included in income determinations for federal benefits. What more can the Yakama Nation do to ensure that the Federal Government leaves our trust resources alone!

CONSULTATION

Adding insult to injury, the Yakama Nation has requested, in writing, government-to-government consultations from the Department of Treasury and the IRS on their changed taxation policies regarding per capita distributions of trust resources, and neither Agency has so much as answered our requests. When the Yakama Nation was asked to speak before the Senate Committee on Indian Affairs on June 14, 2012, I sat before Chairman Akaka and the esteemed members of the Committee—on the same panel with the IRS and Treasury—and we again requested consultation with the IRS and Treasury. Again, we heard nothing. In July 2012, the Yakama Nation requested consultation with the Department of Treasury, the Department of the Interior, Senators, Congressman, and the President of the United States. Chairman Young and Congressman Hastings quickly acted to set up a hearing before this Sub-

committee—for which we are extremely grateful—but we have yet to receive a response from the agencies responsible for creating such uncertainty for our People. The Federal Government owes a trust responsibility to Tribes that contemplates consultation, and President Obama memorialized that duty in Executive Order 13175.

Executive Order 13175, reaffirmed by President Barack Obama on November 5, 2009, requires federal agencies to consult on a government-to-government basis with Indian Tribes on matters that have tribal implications. The term ‘tribal implications’ includes policy actions that have substantial direct effects on an Indian Tribe. Should IRS’s interpretation of the Per Capita Act become accepted federal policy, there will be direct and immediate effects on my People. The taxation of our timber trust resources, which are protected by the inherent sovereignty of the Yakama Nation, the Treaty of 1855, and federal law, would require our members to further decrease their standard of living. Furthermore, the Treaty of 1855 guarantees the Yakama Nation the right to bring its grievances before the President of the United States, which my People have understood to be an explicit consultation right. Because the contemplated changes in IRS’s interpretation of the Per Capita Act will directly impact the Yakama Nation and the Yakama People, and under the Treaty of 1855, the Yakama Nation reiterates its request on the record for meaningful government-to-government consultation with the Department of Treasury and the IRS.

We ask that this Subcommittee urge the IRS and the Department of Treasury to consult with the Yakama Nation on a government-to-government basis as is required by the Federal trust responsibility towards Indian Tribes, and Executive Order 13175.

CONCLUSION

Based upon the Treaty of 1855, the Per Capita Act of 1983, the language of IRS Notice 2012–60, and the historical treatment of the Yakama Nation’s trust resources, per capita distributions of our trust resources are not taxable. The Treaty of 1855 reserves to the Yakama People the right to the exclusive use and benefit of our lands, which does not contemplate the IRS taking $\frac{1}{3}$ of every tree cut down on the Yakama Reservation in the form of a tax. The Per Capita Act’s express language and legislative history support our interpretation that per capita distributions of trust resources are not taxable. The IRS’s Notice 2012–60 uses the Per Capita Act to justify its conclusion that distributions from settlement funds meant to compensate Tribes for trust mismanagement are not taxable, but the same analysis is not extended to our trust funds because they don’t seem to be mismanaged? Such an analysis is absurd. Finally, the federal government and the Yakama Nation have been distributing per capita the Yakama Nation’s trust resources for nearly 75 years without taxing them. I must ask a simple question: why now?

On behalf of the Yakama Nation, I respectfully request that this Subcommittee (1) reaffirm Congress’ intent that per capita distributions of trust resources are not taxable, and (2) to facilitate consultation between the IRS and the Yakama Nation.

Thank you for giving the Yakama Nation a voice on this extremely important issue.

Kwtanushash chitkwi.

[A memo to the Bureau of Indian Affairs from the Office of the Regional Solicitor, dated May 1, 1957, follows:]

COPY

To: Bureau of Indian Affairs (Administration) Date: May 1, 1957
 From: Office of the Regional Solicitor cc: BIA Files
 Subject: Letter of February 19, 1957, from Bureau of Internal Revenue
 to Yakima Tribe pertaining to Income taxes

I have reviewed the letter of February 19, 1957 from the Bureau of Internal Revenue to the Yakima Tribes.

So far as allotments to individual Indians are concerned, the facts concerning the members of the Yakima Indian Nation are parallel with those pertaining to the allotments to Quinaielts in Squire v. Capoeman, 351 U.S. 1. Individual allotments within the Yakima Reservation are pursuant to the General Allotment Act of 1887, as amended, and, therefore, the decision in Squire v. Capoeman controls the matter of income from individual trust allotments.

In its letter, the Bureau of Internal Revenue contends that:

"Since we have found no exemption provision in the treaty of June 9, 1855, between the United States and the Yakima Nation of Indians, 12 Stat. 951, nor in any subsequent enactment dealing with that tribe, the decision in the Capoeman case would not be applicable to the tribal lands here involved.

"Accordingly, it is our conclusion that payments received by individual Indians from proceeds derived from sales of timber owned by the Yakima Tribe are subject to tax when received by members of that tribe."

The above contention of the Bureau of Internal Revenue is neither supported by the rationale of the Capoeman case nor by decisions pertaining to the Federal taxation of Indian tribal lands. In the Capoeman case the Supreme Court stated that Indians are citizens and that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. The court further stated that to be valid, exemptions to tax laws should be clearly expressed, and held that such exemption was clearly the legislative intent of the General Allotment Act. Tribal lands are peculiarly within the legislative power of Congress (Sisseton and Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424) and the exercise of federal guardianship over Indians (United States v. Sandoval, 231 U.S. 28). Title to tribal lands is vested in the United States in fee, with the right in the Indian tribe to use and occupancy (St. Marie v. United States, 24 F.Supp. 237, aff'd 108 F.2d 876, cert. denied 311 U.S. 652). Congress retains plenary power to deal with Indian lands in such manner as it deems for the benefit of the Indians (Fort Peck Indians v. United States, 132 F.Supp. 222).

Pursuant to its legislative and plenary power over Indian tribal lands, Congress has enacted certain remedial legislation governing the disposition of such property and the proceeds derived from disposition. Section 7 of the Act of June 25, 1910 (36 Stat. 857, 25 U.S.C.A. 407) provides:

"The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct. * * * "

When the above statute was enacted, there was in force the Act of June 21, 1906 (34 Stat. 327, 25 U.S.C.A. 410), as follows:

"No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period * * * except with the approval and consent of the Secretary of the Interior."

A sale of timber is a sale of the realty. Timber, until severed, is a part of the land. (Northern Pacific Railroad Company v. Paine, 119 U.S. 561, 564, 30 L.Ed. 513, 514) A sale of tribal timber on tribal unallotted land within the Yakima Indian Reservation is then within the provisions of both 25 U.S.C.A. 407 and 25 U.S.C.A. 410, above quoted, and the proceeds shall be used for the benefit of the Indians and shall not be liable for the payment of any debt or claim against the Indians.

Tribal property is communal property. Per capita payments or the right to per capita payments is a recognition of individual communal interests. Funds payable per capita are trusts for the benefit of the designated individuals. Over them the tribe has no control and in them the tribal members have neither estate nor interest (Whitmire v. Cherokee Nation, 30 Ct. Claims 138). The United States holds the property in trust for the Indian members of the tribe, and the proceeds from the sale are but a substitute for the property. To impose upon such proceeds on distribution an income tax would violate the above quoted remedial legislation of Congress and the supervisory control of Congress over Indian affairs. The Supreme Court in the Capoeman case quoted with approval the opinion of the Attorney General of the United States (34 Ops. Atty. Gen 445):

" * * * I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

The Supreme Court in the Capoeman case then cited with approval the opinion of Felix S. Cohen based on the above opinion of the Attorney General and a series of district and circuit court decisions, as follows:

"It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom"

and the court concluded that "these relatively contemporaneous official and unofficial writings are entitled to consideration." Felix Cohen's statement held that the tax exemption applied to tribal lands as well as income therefrom.

One of the cases used by Mr. Cohen to support his conclusion (approved by the Supreme Court in the Capoeman case) was Chouteau v. Commissioner of Internal Revenue, 38 F.2d 976. In that case (page 979), the court said:

"The mineral reserves under the lands are held in trust by the United States for the tribe and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still regarded as dependents on Governmental care; and it seems unreasonable to hold that a general tax statute should be applied to them when they are not named nor intention in some way expressed that it applies to them. * * *."

There is no distinction in law between mineral reserves held in trust by the United States for the tribe and the proceeds of sale of tribal timber held in trust by the United States for the tribe. The use and disposition of the trust is under the control of the Secretary of the Interior as he deems best for the Indian wards. The proceeds from the sale of the tribal timber are but a substitute for the land itself, and in the words of the Capoeman case "it is unreasonable to infer that in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking."

The letter from the Bureau of Internal Revenue further contends:

"Assuming that the award to the tribe for damages caused by construction of The Dalles Dam project was paid for loss to tribal lands (rather than for damage to individual trust allotments), whether or not the distributions therefrom to the tribal members are taxable to them would depend upon whether the award constituted either gain or income to the tribe. * * *"

The Bureau then contends that such payments would be subject to tax. In order to determine this matter, it is necessary to consider the nature of that for which the payments are made. The payments are made for loss of fishing rights accorded by treaty to fish in the usual and accustomed places, which rights are held in trust by the tribe for its members (Ligon v. Johnston, 164 Fed. 670, app. dismissed, 223 U.S. 741; Cherokee Nation v. Hitchcock, 187 U.S. 294). Such fishing rights are real property, being either land or an interest in land. In United States v. Winans, 198 U.S. 371 at 384, the court said:

"It [the right to fish in usual and accustomed places] only fixes in the land such easements as enable the right to be exercised."

and in New York ex rel. Kennedy v. Becker, 241 U.S. 562, the Supreme Court said:

" * * * they [the Indians] retained an easement, or profit
a premdre * * *."

In the case of United States v. Brookfield Fisheries, 24 F.Supp. 712, which involves the interpretation of fishing at Celilo Falls by the Yakima Indians, which is the very matter in controversy in the letter from the Bureau of Internal Revenue, the court characterized the treaty right to fish at the usual and accustomed sites as an "easement," and stated:

"A fishery in gross was attached to all real property and titles subject to that description. * * * The easement inhered in the title. * * *."

A profit a premdre is in its nature corporeal (Pierce v. Keator, 70 N.Y. 419 at 422 citing 2 Washburn Real Property 26 (3rd Ed.) 276). A profit a premdre is an interest in land and can exist in gross. (United States v. Gossler, 80 F.Supp. 971 at 974)

These easements or interests in land were being held by the tribe in trust for its members, and when they were sold by direction of Congress for the construction of The Dalles Dam, the proceeds from the sale are but a substitute for the land and the interest therein, likewise held in trust by the tribe for its members. The settlement award and proceeds constitute neither gain nor income to the tribe. When Congress appropriated funds for the purchase of the tribal trust easements and interests in lands at Celilo, it was remedial legislation to compensate the tribe for its land and real property. Such substitution of cash for land and land interests is pursuant to the plenary power of Congress. A substitute takes the nature of the original and stands charged with the same trust. (United States v. Thurston County, 143 Fed. 287, cited with approval in Sunderland v. United States, 266 U.S. 266) This rule applies to money as well as land, as the court applied the rule to money derived from the release of rights of occupancy. There is a further limitation upon the taxation of these funds, which arises from the enactment of R.S. 2097 (25 U.S.C.A. 122). That statute provides:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; * * *."

There are no express provisions of law authorizing the taxation of Indian tribal trust lands or trust funds. 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."

It is my opinion, therefore, that:

1. Per capita payments made to individual Yakima Indians from the proceeds derived from the sale of tribal timber are not taxable.

2. Per capita payments made to individual Yakima tribal members derived from the award to the Yakima Tribes for loss of tribal fishing rights caused by the construction of The Dalles Dam are neither income nor capital gain subject to taxation under the Internal Revenue laws.

I recommend that this matter be referred to the Commissioner of Indian Affairs and the Solicitor for conference with the Commissioner of Internal Revenue, with a request that the latter reconsider the Bureau's contentions in the light of the authorities and reasoning herein set forth. Should the Commissioner of Internal Revenue not reverse the Bureau of Internal Revenue's contentions, I recommend that the Yakima Tribes contest this matter in the federal courts to and including the Supreme Court, if necessary.

For the Regional Solicitor

/s/ Leon Jourolmon

Leon Jourolmon
Assistant Regional Solicitor

Mr. YOUNG. Ron Suppah.

**STATEMENT OF THE HON. RON SUPPAH, VICE CHAIRMAN,
TRIBAL COUNCIL OF THE CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON**

Mr. SUPPAH. Good morning, Chairman Young and honorable members of the Subcommittee. My name is Ron Suppah, and I am Vice Chairman of the Warm Springs Tribal Council in Oregon. Thank you for asking Warm Springs to share its recent experience with the Internal Revenue Service and its efforts to tax the very modest distribution of revenue made to our tribal members from tribal trust resources.

Warm Springs is a timber tribe; and for nearly 60 years the tribe has made periodic and very small payments to our tribal members from the revenue, called stumpage, generated by the sale of timber from our reservation's forests. Our reservation is 98 percent trust land. So the revenue from the sale of tribal timber, our principal trust resource, is paid to the Department of the Interior and held in a trust account for the benefit of the tribe.

Payments from the tribe's trust account go to all enrolled members in equal amounts and are, therefore, called per capita payments. While they are modest in size, 60 percent of the people living on the Warm Springs Reservation are unemployed. So these payments are very meaningful.

The tribe has always regarded these trust per capita payments to our tribal members as nontaxable. Let me give you five clear reasons why:

The first is our 1855 treaty with the U.S. Government where our tribe ceded 10 million acres of land worth untold trillions of dollars to the United States. In return, certain lands were reserved for our tribe with the language "for the exclusive use and benefit of the

tribe.” It is clear that our land and income directly from our land cannot be taxed by the United States.

Second, the 1956 U.S. Supreme Court decision called *Squire v. Capoeman* ruled that timber stumpage payments made to a tribal member from these trust allotments were not subject to taxation.

Third, a Department of the Interior Solicitor’s Office opinion the following year, 1957, concluded that the principle of *Squire v. Capoeman* applied to timber stumpage payments from the tribal trust timberlands, not just allotments.

Fourth, Congress squarely protected the nontaxable nature of tribal trust per capita payments when it passed the Per Capita Act in 1983. Committee staff from that time tell us that they always regarded trust per capita payments as nontaxable. To enshrine that understanding, section two of the 1983 Per Capita Act makes crystal clear that trust per capita payments, even if made by the tribes rather than by the government, would remain tax exempt.

Fifth, this matter is settled law to everyone except the IRS. Cohen’s Handbook of Indian Law, for example, states that trust per capita payments are nontaxable and cites the 1983 Per Capita Act.

Imagine our surprise when the Internal Revenue office in Portland, Oregon, advised us in March of this year that the IRS now regarded our trust per capita payments as taxable. They asked for the names and addresses of all of our enrolled members, apparently so the IRS could audit their tax returns and claim additional tax owed on their Warm Springs trust per capita payments. Of course, we refused to provide that information.

The IRS put their new position in writing. Let me quote the IRS April 20, 2012, letter to Warm Springs: “The IRS position is that per capita to members are taxable when they are sourced in timber revenues from unallotted tribal lands held in trust.”

This is a reversal of nearly 60 years of IRS practice. We have been trying to consult with the Treasury Department, the Interior Department, the White House as well as the IRS. Initially, IRS and Treasury told us they could not consult with the tribes because we were under a tax examination or audit. However, we have joined with the National Congress of American Indians and have had some limited meetings with government officials, although the issue remains unresolved.

Last week’s Treasury Department guidance on the tax status of recent settlements with tribes is a step in the right direction. In fact, Treasury relied on the 1983 Per Capita Act to conclude that per capita payments from the recent settlements were nontaxable.

Let me quote the guidance language: “Consequently, for Federal income tax purposes, per capita payments that an Indian tribe makes from the tribe’s tribal trust case settlement proceeds are treated the same as per capita payments from funds held in trust by the Secretary of the Interior under the Per Capita Act.”

This statement does everything but flat-out declare that trust per capita payments under the Per Capita Act, such as the Warm Springs tribal stumpage payments, are nontaxable. So why didn’t last week’s guidance clearly state that the Per Capita Act exempts from taxation all tribal trust per capita payments regardless of whether such payments are made by the tribes or by the govern-

ment? As things now stand, however, the Warm Springs tribe's disputes continue with the IRS, and this issue remains unresolved.

Mr. Chairman, this Subcommittee is the legislative body that originated the Per Capita Act in 1983. We urge you to reaffirm your legislative intent and communicate it to the IRS. We believe such instructions to the IRS may very well resolve this matter once and for all.

I thank you.

Mr. YOUNG. I thank you, Ron.

[The prepared statement of Mr. Suppah follows:]

**Statement of Ron Suppah, Vice Chairman, Tribal Council,
Confederated Tribes of the Warm Springs Reservation of Oregon**

Good morning, Chairman Young and honorable members of the Subcommittee. My name is Ron Suppah, and I am Vice Chairman of the Warm Springs Tribal Council, which is the governing body of the Confederated Tribes of the Warm Springs Reservation of Oregon ("Warm Springs" or the "Tribe").

I am here today to testify regarding the recent experience of our Tribe with efforts by the Internal Revenue Service to tax the very modest distributions of revenue made to our tribal members from the utilization of our tribal trust resources.

As background, you should know that Warm Springs is a timber tribe and for nearly sixty years the Tribe has made periodic and very small payments to our tribal members from the revenue—called stumpage—generated by the sale of timber from our Reservation's forests. Our Reservation is 98 percent trust land, so the revenue from the sale of tribal timber, our principal trust resource, is paid to the Department of Interior and held in a trust account for the benefit of the Tribe. Payments from the Tribe's trust account go to all enrolled members in equal amounts and are therefore called "per capita payments."

The Tribe has always regarded these trust per capita payments to our tribal members as non-taxable. In the 1956, a U.S. Supreme Court decision called *Squire v. Capoeman* ruled that timber stumpage payments made to a tribal member from his trust allotment were not subject to taxation. A Department of Interior Solicitor Office opinion the following year concluded that the principle of *Squire v. Capoeman* applied to timber stumpage payments from tribal trust timberlands, not just allotments.

If there had been any uncertainty about the non-taxable nature of tribal trust per capita payments, Congress resolved the issue when it passed the Per Capita Act in 1983 (Public Law 98-64, 25 U.S.C. §§ 117a-c). In fact, the House version of this legislation originated in this Committee. According to Frank Duchenaux, the now retired Committee counsel who drafted the 1983 legislation and Committee report (House Report 98-230), the purpose of the Act was to provide tribes with the option to make trust per capita payments directly to their members on tribal checks rather than continue to have the Bureau of Indian Affairs make the payments on Treasury Department checks. The Treasury checks had become a source of misunderstanding with many non-Indian businesses cashing the checks believing they represented a government "hand out", rather than the tribal members' own money generated from the utilization of tribally owned trust resources.

Mr. Duchenaux recently explained that he and Committee staff had always regarded trust per capita payments as non-taxable. However, he feared that allowing tribes to make the trust per capita payments themselves, rather than continuing to have the Government make the payments, might cause the IRS and state revenue agencies to question whether the payments were somehow now taxable. To guard against that mistaken interpretation, Mr. Duchenaux included language in Section 2 of the 1983 Per Capita Act making it clear that trust per capita payments under the 1983 Act, even if made by the tribes rather than by the Government, would have the same tax exempt status as payments made under Section 1407 of the Indian Tribal Judgment Funds Use or Distribution Act (25 U.S.C. §§ 1401-1408). The cross-reference to the tax exemption for payments made under the other Indian legislation was intended to clarify that all trust per capita payments under the 1983 Act were accorded the same treatment as distributions of Indian claims judgment and settlement funds. Importantly, the cross reference to Section 1407 also meant that trust per capita distributions under the Per Capita Act would not count as income or resources for determining eligibility for Social Security Act programs or other federally funded needs-based programs.

As I stated earlier, Warm Springs has long believed that the non-taxable nature of trust per capita payments was settled law. In fact, our Tribal Attorney showed us where the leading compilation of “black letter” Indian law, Cohen’s Handbook of Federal Indian Law, states that trust per capita payments are non-taxable and cites the 1983 Per Capita Act. So, we were very much surprised when the Internal Revenue Office in Portland, Oregon advised us in March of this year that the IRS now regarded our trust per capita payments as taxable. They asked for the names and addresses of all our enrolled members, apparently so the IRS could audit their tax returns and claim additional tax owed on their Warm Springs trust per capita payments. Of course, we have refused to provide this information.

Since the IRS told us of their new position, which we believe is a reversal of nearly 60 years of IRS practice, we have been trying to consult with the Treasury Department, the Interior Department and the White House, as well as the IRS. Initially, IRS and Treasury told us they could not consult with the Tribe because we were under a tax “examination” or “audit”. However, we have joined with the National Congress of American Indians and have had some limited meetings with Government officials, although the issue remains unresolved.

As you know, last week the Treasury Department issued a Notice of guidance (Notice 2012–60) regarding the federal income tax treatment of “Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases”. This guidance resolved an issue related to, but separate from, our trust per capita issue. The guidance made the welcome announcement that per capita payments from 55 recent tribal trust claims settlements were non-taxable, even though the payments were not made under the Indian Tribal Judgment Funds Use or Distribution Act and, in most cases, were not made from tribal trust accounts.

Last week’s guidance is a step in the right direction, and the Notice contains language that is supportive of our interpretation of the 1983 Per Capita Act. In particular, we were happy to see that the Notice referred to the 1983 House Report on the Per Capita Act, “. . . which provides that per capita distributions of tribal trust revenue ‘shall be subject to the provisions of [25 U.S.C. §1407] with respect to tax exemptions’”. Our legal arguments to the IRS have pointed to the same language in the House Report to support our position that the Per Capita Act confirmed the tax exempt status of trust per capita payments under the Per Capita Act.

We were also pleased to see that last week’s Notice of guidance relied on the 1983 Per Capita Act to conclude that per capita payments from the recent settlements were non-taxable. Let me quote the Notice language: “Consequently, for federal income tax purposes, per capita payments that an Indian tribe makes from the tribe’s Tribal Trust case settlement proceeds **are treated the same as per capita payments from funds held in trust by the Secretary of the Interior under [the Per Capita Act].**” (Emphasis added).

In our mind, this statement from last week’s guidance on the recent settlements does everything but flat out declare that trust per capita payments under the Per Capita Act, such as the Warm Springs tribal timber stumpage payments, are non-taxable. In fact, the guidance uses the same statutory cross reference technique as the Per Capita Act (which cross references Section 1407 of the Indian Tribal Judgment Funds Use or Distribution Act) to declare payments from the trust settlements as non-taxable.

Our disappointment, however, is that last week’s guidance did not go far enough. In a section called “Limitation”, the Notice of guidance declared that it “. . . applies only to per capita payments from proceeds on the Tribal Trust case settlements . . .” Our issue, which is the tax treatment of other per capita payments made by the Secretary of the Interior or Indian tribes to members of Indian tribes, is declared to be “. . . outside the scope of this notice . . .”

Why didn’t last week’s guidance clearly state that the Per Capita Act exempts from taxation all tribal trust per capita payments, regardless of whether such payments are made by the tribes or by the Government? We don’t know. By failing to make such a statement, however, the guidance falls short. Accordingly, as things now stand, the Warm Springs Tribe’s dispute with the IRS continues and the issue remains unresolved.

We urge this Subcommittee, as the legislative body that originated the Per Capita Act in 1983, to communicate to the IRS the Committee’s clear legislative intent in the 1983 Act to confirm the tax exempt status of trust per capita payments, made either by the tribes or by the Government. We believe such instruction to the IRS may very well resolve this matter once and for all.

We appreciate this Subcommittee’s leadership in this specific matter and urge your continued leadership and consideration of other Indian tax matters such as: tribes’ ability to access tax-free financing on par with all other governmental entities; exemptions for tribes’ general welfare assistance to their members, and parity

for tribal pension programs; issues which Warm Springs the National Congress of American Indians are working to resolve.

Thank you.

Mr. YOUNG. John Sirois, please.

**STATEMENT OF THE HON. JOHN E. SIROIS, CHAIRMAN, THE
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION**

Mr. SIROIS. [speaking Okanagan Salish.]

Good afternoon, Chairman Young—

Mr. YOUNG. Before you go on, both of you addressed me in your language. And I hope you said, "Good morning. Thank you for the hearing." If you said something else, I have an interpreter behind me who is going to tell me what you said. But go ahead.

Mr. SIROIS. Yes, Chairman. I said, "Good day and thank you for being here and listening to our hearts. Because we come here speaking from our hearts, sharing with you these things."

Mr. YOUNG. That makes me feel better.

Mr. SIROIS. So my name is John Sirois. I am the Chairman of the Colville Business Council, the governing body of the Colville Indian Reservation. On behalf of the Colville tribes, I appreciate this opportunity to testify on the Per Capita Act and the Federal treatment of trust per capita distributions.

Just to give you an idea about us, the Colville Reservation is located in North Central Washington, and it is about the size of the State of Delaware. About two-thirds of our reservation is covered in forested lands, commercial timberlands; and timber sales and forest products have traditionally been our primary source of employment and revenue to fund tribal governmental programs. About half of our 9,500 enrolled citizens live on or near the Colville Reservation.

For decades, there has been a bright line that per capita distributions from funds held in tribal trust accounts are not taxable. The Colville tribes are concerned by reports that the IRS has called into question the Per Capita Act as a valid income tax exemption for per capita distributions from trust accounts.

I have three key points I would like to make today.

First, trust funds have always been treated as nontaxable. It has long been common knowledge in Indian country that the surest way to protect per capita distributions from taxation is to distribute the funds from a trust account.

As my written testimony explains, the Per Capita Act on its face provides that per capita distributions from tribal trust accounts are tax exempt. Historically, the Colville tribes have made modest per capita distributions from our timber sales to our tribal citizens. We have always made sure that these were distributed from a tribal trust account.

Other Federal agencies have also considered per capita distributions from tribal trust funds as tax exempt. Over the years, the Colville tribes have worked closely with the Office of Special Trustee to make sure that our trust resource revenues would be accepted in the tribal trust accounts.

Second, Colville tribes negotiated to secure settlement funds in the trust. Colville was one of several dozen tribes to settle its trust

mismanagement claims against the United States this past spring. It was because of the Per Capita Act and the tax exempt treatment of trust per capitas that we insisted that funds from our trust settlement be held in trust. The United States did not want to keep any funds in trust because it did not want to be liable for mismanaging these funds in the future. We had to bargain for this provision because we knew that our tribal citizens would expect at least some of the settlement to be distributed per capita. We wanted to ensure that these funds would not be taxable.

Let me be very clear: We made our intent to protect these funds from taxation painstakingly clear in our negotiations. All of the government lawyers involved understood this, and the government recognized that there was a tax value to the tribes—especially us—in having funds deposited into a trust account rather than a private account.

The Treasury Department was a defendant in our case, and Treasury lawyers participated in our negotiations. After the settlements were publicly announced in April, it turned out that we were one of a very small number of settling tribes to negotiate to secure any settlement funds in the trust.

As tribal communities around the country began learning about the tribe's settlements and demanding per capita distributions, the tax status of the settlements took center stage at Treasury and the IRS. This led Treasury and the IRS to issue their September 6 notice. That notice treats settlement of per capita distributions from nontrust accounts the same as distributions from trust accounts.

Third, Treasury and the IRS should issue new guidance on the Per Capita Act. Colville and other tribes have relied on the long-standing treatment of the Per Capita Act as a tax exemption for decades, as have other Federal agencies. And, as I have mentioned, even during our settlement negotiations the government recognized the tax value to tribes in having settlement funds deposited into trust accounts for per capita distributions.

In closing, the Colville tribes believe that Treasury and the IRS should issue new guidance that the Per Capita Act provides a tax exemption for all per capita distributions from tribal trust accounts. If they do not consider the Per Capita Act a valid tax exemption for all per capita distributions from tribal trust accounts, this position simply cannot be reconciled with the September 6 notice.

This concludes my testimony.

[speaking Okanagan Salish.]

At this time, I would be happy to answer any questions that the members of the Subcommittee may have.

[The prepared statement of Mr. Sirois follows:]

**Statement of The Honorable John E. Sirois, Chairman,
The Confederated Tribes of the Colville Reservation**

Good afternoon Chairman Young, Ranking Member Luján, and members of the Subcommittee. On behalf of the Confederated Tribes of the Colville Reservation ("Colville Tribes" or the "Tribes"), I appreciate the opportunity to testify today on the Per Capita Act and on the federal treatment of trust per capita distributions. My name is John Sirois, and I am the Chairman of the Colville Business Council, which is the governing body of the Colville Tribes.

For decades, there has existed a bright line—per capita distributions from funds held in tribal trust accounts are not taxable. The Colville Tribes is concerned by re-

ports that the Internal Revenue Service (“IRS”) has called the Per Capita Act into question as a valid income tax exemption for per capita distributions from tribal trust accounts. We find this even more curious in light of the recent notice issued by the Treasury Department and the IRS that per capita distributions from the dozens of tribal trust settlements announced earlier this year are tax exempt, even if they were distributed from private, non-trust accounts.

The Colville Tribes hopes that this hearing will provide some needed sunlight on this issue, and that Treasury and the IRS will issue new guidance that unequivocally states that the Per Capita Act constitutes an express tax exemption for all funds distributed per capita from tribal trust accounts.

Background on the Colville Tribes

Although now considered a single Indian tribe, the Confederated Tribes of the Colville Reservation is, as the name states, a confederation of 12 aboriginal tribes and bands from across eastern Washington State. The Colville Tribes has more than 9,400 enrolled members, making it one of the largest Indian tribes in the Pacific Northwest. About half of the Colville Tribes’ members live on or near the Colville Reservation.

The Colville Reservation encompasses more than 1.4 million acres, of which approximately 66 percent is commercial forest land. Although the Colville Tribes has diversified into several lines of business, it has traditionally relied on timber sales and its forest products industries as primary sources of employment and revenue to fund tribal government programs.

The Colville Tribes owns a traditional sawmill, Colville Indian Precision Pine (“CIPP”), and a plywood manufacturing facility, Colville Indian Power and Veneer (“CIPV”). Both of these facilities are located in Omak, Washington. The downturn in the housing market forced the Colville Tribes to make the difficult decision to close CIPP in 2009 and CIPV in 2010 until market conditions improve. Closure of those facilities resulted in the loss of nearly 400 jobs, not including secondary jobs such as contract loggers and truck drivers that the facilities supported. These facilities remain closed.

Prior to the market downturn, the Colville Tribes had been able to utilize revenue from its timber sales to provide tribal members with modest per capita payments. The Tribes typically made two distributions in August and December to coincide with the back-to-school and holiday seasons, respectively.

The Per Capita Act and Historical Tax Treatment of Per Capita Distributions from Tribal Trust Accounts

The Per Capita Act (25 U.S.C. §§ 117a–117c) was signed into law in 1983 and allows the Secretary of the Interior or Indian tribes to distribute per capita payments from tribal trust accounts. The Per Capita Act explicitly states that funds that are distributed from tribal trust funds under the Act are subject to one particular section (25 U.S.C. § 1407) of a separate federal law called the Indian Tribal Judgment Funds Use or Distribution Act (“UDA”). Section 1407 of the UDA provides that per capita distributions subject to the UDA are not subject to state or local taxation, and up to \$2,000 is excluded from determining eligibility for certain federal or federally assisted programs. When read together, the Per Capita Act and the UDA operate to treat those funds distributed per capita from tribal trust accounts as tax exempt to the recipient.

By its terms, the Per Capita Act applies only to funds distributed per capita from tribal trust accounts and does not extend any benefits or protection to funds distributed per capita by tribes from private, non-trust accounts. The Department of the Interior (“DOI”), through the Office of the Special Trustee (“OST”), will only accept certain funds for deposit into trust accounts under its regulations. Examples of funds that can be so deposited include proceeds from timber sales, payments from leases or other encumbrances of Indian land, and funds “derived directly” from trust lands or trust resources when paid directly the Secretary, among others.

For decades, the IRS has not considered per capita distributions from tribal trust accounts as taxable income. Because of this historical treatment and the existence of the Per Capita Act, it has long been common knowledge in Indian country that the surest way to protect per capita distributions from federal taxation is to distribute funds only from tribal trust accounts.

In the Colville Tribes’ experience, OST has been and is similarly cognizant of the federal tax treatment of funds distributed per capita from tribal trust accounts. The Colville Tribes has previously worked cooperatively with OST to demonstrate that certain tribal revenues could be deposited in trust under OST regulations. OST evaluates these requests carefully. For example, prior OST officials have informed the Colville Tribes that because the Indian Gaming Regulatory Act explicitly provides

that per capita distributions of gaming revenues are taxable, OST must be very careful to ensure that any funds accepted into trust do not include commingled gaming revenue.

The SPOA Initiative and the Treasury Department’s Notice on Per Capita Distributions from the Tribal Trust Settlements

Earlier this year, the Colville Tribes and several dozen other tribes resolved their trust accounting and trust mismanagement claims against the United States through an initiative commonly referred to as the “Settlement Proposal to the Obama Administration” (“SPOA”). On April 11, 2012, the Department of Justice publicly announced settlements with 41 tribes, including the Colville Tribes. Other tribes have reached settlements since then. The Colville Tribes’ \$193 million settlement was the largest of the SPOA settlements.

The United States took the position during the SPOA process that any payments to settling tribes must be deposited in private, non-trust accounts. The United States also wanted to prohibit DOI and Treasury from ever accepting settlement payments into trust accounts at a later date. The United States wanted these provisions to ensure that it would not be liable for mismanaging settlement funds in the future.

The Colville Tribes had to negotiate to secure provisions in its settlement agreement to keep a portion of its settlement payment (\$38.6 million) in a trust account instead of in a private, non-trust account as the United States wanted. The Colville Tribes bargained for this provision knowing that its tribal membership would expect at least some of the Tribes’ settlement to be distributed per capita and to shield those funds from federal taxation. Our representatives made these points clear during the negotiations, and the government lawyers acknowledged our rationale for doing so. Because the Department of Treasury was a defendant in the Tribes’ lawsuit, lawyers from Treasury participated in our negotiations as well.

After the SPOA settlements were publicly announced on April 11, it turned out that the Colville Tribes was one of a very small number of settling tribes on that list to successfully negotiate to secure any settlement proceeds in a trust account. The other tribal settlements had settlement payments deposited into private accounts with the going-forward prohibition on DOI taking them into trust in the future. Of the tribes identified in the April 11 press release, the Colville Tribes’ \$38.6 million was the largest amount to be retained in trust.

As tribal communities around the country began learning about their tribes’ settlements and began demanding per capita distributions, the tax status of the SPOA settlements seemed to take center stage at Treasury and the IRS. The focus on the settlement taxation issue diverted resources from other Indian-related issues, such as the IRS’s implementation of the Indian provisions of the Affordable Care Act of 2010. All of this ultimately led Treasury and the IRS to issue Notice 2012-60, “Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases” (the “Notice”).

The Notice acknowledges that most of the SPOA settlements directed the settlement funds to be deposited in private, non-trust accounts. The Notice proceeded, however, to state that all per capita payments from the SPOA settlements are treated for federal tax purposes “the same as per capita payments from funds held in trust by the Secretary of the Interior” under the Per Capita Act. Although the Notice is not precise on this point, the apparent rationale for this conclusion is that the SPOA settlements resolved claims of mismanagement of tribal trust resources. The Notice goes on to conclude that interest earned by SPOA settlement proceeds while in a private bank account is taxable income when distributed per capita.

Treasury and the IRS Should Issue New Guidance on the Per Capita Act

The tax-exempt treatment of per capita distributions from tribal trust accounts has always been a bright line in Indian country. In light of the issuance of the Notice, it would be an absurd result if per capita distributions of timber sale or other trust resource revenue from tribal trust accounts were now to be considered taxable income. Not only have the Colville Tribes and other tribes relied for decades on the longstanding treatment of the Per Capita Act as an exemption, but other federal agencies such as OST have also recognized this treatment as well. With the issuance of the Notice, Treasury and the IRS should take this opportunity to issue new guidance that the Per Capita Act provides a tax exemption for all per capita distributions from tribal trust accounts.

To the extent that the IRS has questions or concerns about the types of revenue that OST accepts for deposit in trust, OST regulations provide clear guidance. In the Colville Tribes’ experience, OST is well-suited to evaluate these requests and has been doing so with the tax implications in mind for many years.

The Colville Tribes appreciates the Subcommittee's consideration of this testimony. At this time I would be happy to answer any questions that members of the Subcommittee may have.

Mr. YOUNG. I thank the panel.

And this is one of the poor things about this body right now. We do have to go vote. And you are free to go have a cup of coffee, do whatever you want to do. We will be back here at about 12:25.

I do apologize for that. I have no control over that. In the good old days, we had proxies, and we could have a good time. But we can't do that anymore. We want to look good in the public's eye. So I do apologize.

And thank you for your testimony. All of it was good, excellent testimony. When we come back, we will finish questioning and continue our discussion and try to solve this problem.

With that, we are now in recess until 12:25.

[recess.]

Mr. YOUNG. The Committee is out of recess.

I recognize the Ranking Member, Mr. Luján, for questions.

Mr. LUJÁN. Thank you very much, Mr. Chairman.

Ms. Jacobs, that tribal trust lands are not subject to taxation has been settled law for some time. Are trust lands and income derived from trust lands which tribes may distribute on a per capita basis to their members treated differently for tax purposes?

Ms. JACOBS. Thank you for that question, Congressman.

I believe that in this notice about the settlements is the first time that the Internal Revenue Service has spoken to the Per Capita Act, which would be the law you refer to that has been in effect for some time. And though the notice does not directly address the treatment of distributions—per capita distributions under the Per Capita Act to tribal members from tribal trust resources, I think the legal reasoning underpinning the particular notice we issued last week would support that those payments would not be includable as income.

Mr. LUJÁN. For the record, what is the IRS' practice on the tax treatment of per capita distributions from tribal trust incomes of income derived from natural resources?

Ms. JACOBS. Well, Congressman, as I said, we—maybe I need to give a little background. It is not an issue that comes up very often for us, is my understanding. And, as I said, we have not issued any guidance since the Per Capita Act passed in 1983 particularly on that topic. So this is the first time we would have addressed that at all.

Mr. LUJÁN. In its recent guidance on the tax-exempt status of settlement funds, the IRS relied on, I quote, "the source of funds and origins of claims principles in making its determination." Following this logic, shouldn't per capita income derived from trust resources be similarly tax exempt?

Ms. JACOBS. Congressman, I think there are two different legal principles at work in those questions. For the settlements, we needed to look at the origin of the claim, because we were dealing with a settlement issue. For items that are placed in trust that are then distributed per capita pursuant to the Per Capita Act, that would

be really relying solely on the Per Capita Act and not an origin of a claim sort of doctrine.

Mr. LUJÁN. Two things I think, Mr. Chairman.

One, I will ask unanimous consent to submit into the record screen shots from the IRS' website.

[NOTE: The IRS website screen shots have been retained in the Committee's official files.]

Mr. LUJÁN. Ms. Jacobs, why is there a difference in policy from November 18, 2011, to April 3, 2012, which are when these screen shots were captured?

The ITG fact answer and question area asked this question: "Are any per capita distributions exempt from Federal income taxation?" The IRS on their own answered that question and they stated on November 18, 2011, "Yes, when distributions are received resulting from a land claim settlement and judgment and also when there are distributions of trust principal and income held by the Secretary of the Interior," which I agree with.

What the screen shot now says is, "Yes, distributions of principal and interest made from land claim settlements or judgment funds that are held in trust by the Secretary of the Interior are not subject to taxation."

Why was that language taken out?

Ms. JACOBS. Congressman, I am not aware of there being a change on the website. I can look into that.

I do know there was an effort to simplify questions, and it may have been a general part of that. But there was no particular reason I am aware of that one question would have been changed.

Mr. LUJÁN. So it seems to me that is why we are here today. It is not to simplify the question. It changes what is tax exempt and direction to constituencies.

I guess also my follow-up questions are: Is there something that can be done administratively by the IRS to make it clear that these are tax-exempt dollars? Or is legislation needed?

Ms. JACOBS. Congressman, I think we indicate in the notice that further guidance might be issued on the broader issue of income from tribal trust assets themselves versus the settlement context. We do have the legal reasoning in the notice, and I think it is possible to make some clarifying changes to things administratively through guidance as well as changes to the website. The problem with the website change is that it is not reliable guidance. We would want to do something that people can rely on.

Mr. LUJÁN. And last, Mr. Chairman, if I may, as my time runs out, I would hope that if we can do that maybe we can also reissue a letter that went out to the Confederated Tribes of the Warm Springs Reservation of Oregon dated April 20, 2012, from Mr. Joe W. Kincaid in which the closing paragraph states: As noted throughout, the IRS position is that per capitae are taxable to members when they are sourced in timber revenues from unallotted tribal land held in trust.

If we can do that administratively, I think that that will change the direction of what has happened with these tribes as well; and, Mr. Chairman, that sure would make things a lot easier, sir.

Mr. YOUNG. I thank the gentleman.

The gentlelady from Hawaii.

Ms. HANABUSA. Thank you, Mr. Chairman.

Ms. Jacobs, in reading your testimony, I have to tell you I am somewhat confused. I am confused in that statement you made on page 3 where you were talking about the notice. And it says, "Other per capita payments made by the Secretary of the Interior for Indian tribes to members of Indian tribes are outside the scope of the notice and may be addressed in further guidance." So when that notice was made, what do you anticipate as being, one, outside the scope of the notice? Are there any examples you can give me? And, two, how do you intend to address it in further guidance?

Ms. JACOBS. Sure. Thank you, Congresswoman, for that question.

The notice is limited to the settlement context. So it was also a subject of extensive consultation with the tribes who are affected by the settlements. So we did not address the broader question of distributions by tribes from tribal trust assets through the Per Capita Act because that would affect a broader group of tribes. We would want to consult more broadly. So that would be one of the types of items not necessarily covered by this notice.

In addition, we would probably seek to do that through a different form of guidance, which generally takes a longer period of time, something we call a revenue ruling or a revenue procedure.

So those would be the types of payments that we would say were beyond the scope of the guidance. But, as I have said before, I believe that the legal underpinnings of the rationale of the notice would apply to the sort of payments we are talking about, per capita distributions pursuant to the Per Capita Act from tribal trust resources.

Ms. HANABUSA. So am I understanding you correctly that, one, the fact that the asset is a trust asset—in other words, they are tribal assets but held in trust—at the point that the per capita distribution may be made that it does not mean that could not, I guess, rise to the level of a taxable event? That is something that you are still going to be looking at? Am I hearing you correctly?

Ms. JACOBS. Congresswoman, I think that we are saying in the notice that the Per Capita Act—if we are talking about distributions of tribally held versus individually held—tribally held trust assets, those distributions are subject to the Per Capita Act and would not be taxable. There might be instances where tribes are using income from a trust asset and making a payment that is not a per capita payment under the Per Capita Act, so that conceivably could be something that would be taxable. But every case would be looked at separately for the facts relating to that.

Ms. HANABUSA. So taking that discussion further, if, for example, an individual files a lawsuit and the settlement is reached—common language that we are using here—and as a result of that settlement it becomes "tribal assets"—in other words, it doesn't designate you in particular. This isn't for Ms. Jacobs. This is for the tribe—that you believe, given this notice, I would assume then that would not lead to a taxable event for any kind of per capita distribution as a result of that settlement. Would I be correct in that assumption?

Ms. JACOBS. Well, Congresswoman, if what we are talking about is the—we would have to look at what the origin of the claim was. And if the settlement was of a trust fund case, this notice indicates

that payments from those settlements are not subject to tax because of the nature of the origin of the claim.

Ms. HANABUSA. So it almost seems like what this notice is saying to tribal members or to tribes themselves is do not bring anything in terms of an individual right but you must bring things in terms of—something that may enhance the concept of their Indian country interests that the Interior is going to administer as trust property. Because, other than that, we are going to tax you.

Ms. JACOBS. Congresswoman, I don't believe that is the intent of the notice. The notice did not address individual trust suits. Those would have to be considered separately. We addressed in the notice the tribal trust cases only and the tax consequences of those cases.

Ms. HANABUSA. But by the caveat at the end that says this is all that this applies to, you are almost by innuendo telling them or telegraphing to the tribes that if it is brought in, in any other form other than for tribal assets, you stand the jeopardy or you stand the risk that it will give rise to a per capita tax issue. That would be the plain reading of this, wouldn't it?

Ms. JACOBS. Congresswoman, I believe other statutes would apply to individual Indian trust litigation. I do not believe we intended any more in the notice than to solely address these cases and the settlements from them. And that language limiting it is meant to indicate that this notice is limited to those cases which are listed at the end and for which we anticipate approximately 10 to 11 more to be added to that list.

Ms. HANABUSA. Of trust assets that will be exempt from taxation?

Ms. JACOBS. Congresswoman, the addition to the list would be—there are approximately 11 more settlements that we expect that are similar to the 55 we list in the notice, and those would be exempt under the reasoning of this notice.

Ms. HANABUSA. Mr. Chair, I will yield back.

Mr. YOUNG. Thank you. And, if you wish, we will have a second round.

Kristi, you are up.

Mrs. NOEM. Thank you, Mr. Chairman.

And to Director Jacobs, I just wanted to ask you for a little bit of clarification on some of that discussion that you had as well. But the notice that you are referring to, is that the Notice 2012-60?

Ms. JACOBS. Yes.

Mrs. NOEM. OK. The specific question I have is how that treats specific income that would come in from timber leases or grazing leases, income from a trust asset. What is your policy on taxing that type of income as it relates to tribes?

Ms. JACOBS. Well, Congresswoman, as we have discussed, the notice itself does not directly address those sorts of payments. That is per capita payments under the Per Capita Act from tribal trust assets. But the legal analysis applied in the notice to the payments that are made through the settlement would, I believe, support a position that those payments would not be subject to tax.

Mrs. NOEM. OK. So when you are looking at each of these instances, is there quite a bit of judgment that needs to be utilized in each individual specific case by the IRS when they are deciding whether to tax or not to tax this income type?

Ms. JACOBS. Well, Congresswoman, in the audit context, things do become very factual. So if we are speaking in terms of a specific matter, then, of course, we do look to see whether, in fact, it is something made under the Per Capita Act, for example, or to verify whatever the payment might be in a general context. If you take a deduction on your return, we would look at whether or not we have documentation for it, that sort of thing.

So, in that way, it would be specific. But we do not have any specific effort to look for these payments or to bring this issue to bear, and I think we are trying to issue general guidance so that people can have more clarity on particularly these settlements. And, as we have indicated, we would need to do that in the future for the broader question.

Mrs. NOEM. Some of your previous testimony that was given over on the Senate side, it appeared that some of the conversation was trying to get clarification on what the policy really was, that there was no new policy was what your testimony had said but yet there was never a clear definition of what the policy actually was. So if you wanted the opportunity to clarify what that would be today, I would certainly appreciate it.

Ms. JACOBS. Well, thank you, Congresswoman.

I think in the notice we are trying to indicate that we do want to consult further with tribes on the issue of the tax treatment of tribal trust assets, as referred to in the Per Capita Act. But the legal analysis in the notice would indicate that those are not subject to tax. I do think we need to have more conversations with the tribes. That is the legal analysis.

Mrs. NOEM. Thank you. I appreciate that.

With that, Mr. Chairman, I yield back.

Mr. YOUNG. I thank the good lady.

Mr. Luján, would you like to pursue another question?

Mr. LUJÁN. Mr. Chairman, thank you so much.

Director, just a quick follow-up. I appreciate the line of questioning as well. I know the IRS will not comment on individual audits or pending actions. However, I would like to know why we are hearing reports from tribal leaders testifying today that IRS action in the field is not consistent with existing tax policy.

Ms. JACOBS. Thank you very much for that question, Congressman.

Let me confirm that I cannot speak to the existence of audits as well as any specific details of them. But perhaps it would be useful if I explain in my experience when guidance comes out what happens were there to be an open audit question.

Normally what would happen on published guidance which is broadly applicable comes out, then any open audit that has that issue in it would be evaluated against the guidance; and the position taken in the audit would be brought in line with published position. So that process, as you can imagine, takes a little bit of time. The notice has come out only a week ago. So we are very early in it becoming public. In fact, it only was able to be posted on the website yesterday. So that is the normal process that would be evaluated and any audits brought in line with the position.

Mr. LUJÁN. I appreciate that clarification, Director. I think that will help shed some light on what we are trying to accomplish here.

Thank you very much. We look forward to seeing that as well. And, again, any other letters or documents that may be resubmitted to some of the tribes—namely, the one that I cited from April 20 to the Confederated Tribes of the Warm Springs Reservation of Oregon.

Thank you, Mr. Chairman.

Mr. YOUNG. Does the gentledady from Hawaii have some questions?

Ms. HANABUSA. Yes, Mr. Chairman.

As you know, there have been tribes that assume that they had, I guess, the status until the *Carcieri* decision came out. Have you looked at how that decision is going to affect the issue of when their “income” or distributions may be subject to the per capita tax? These are tribes that are post-recognized 1934. Have you looked at that?

Ms. JACOBS. Thank you, Congresswoman. No, we have not looked at the effects of the *Carcieri* decision.

Ms. HANABUSA. Do you expect that the *Carcieri* decision will have an impact on how the IRS views whether or not it will give rise to taxable income because of their status post-*Carcieri*?

Ms. JACOBS. Congresswoman, I am simply just not prepared to answer that question. We have not looked at that and the effect of that at all.

Ms. HANABUSA. Well, let me ask it this way: Has there been any consideration or concern on the part of the IRS that that particular decision may then change your interpretation of the per capita tax for those tribes who are post-1934?

Ms. JACOBS. No, Congresswoman, I don’t believe that we at the IRS have looked at that issue and been concerned. But any of us who work in Indian country are generally concerned about the decision and are waiting to see how it will affect any of our agencies.

Ms. HANABUSA. Has there been any attempt on the IRS’ part to differentiate as you issue notices to tribes that are not covered due to—well, let’s just say the the post-*Carcieri* decision tribes.

Ms. JACOBS. No, Congresswoman.

Ms. HANABUSA. So, right now, post-1934, a *Carcieri* decision tribe that may be affected by *Carcieri* is still going to have the benefit of the interpretation of this notice as to trust assets?

Ms. JACOBS. Well, Congresswoman, the issue simply has not come up. So if that were an issue, we would have to obviously do a legal analysis of whether the decision did have any effect. We just have not had that issue.

Ms. HANABUSA. So let me understand as simply as I can. So what this notice basically is now saying is that, for example, if interest income is derived from an asset like revenues from timber, that interest income, when it is then given to the members, that would give rise to a taxable event?

Ms. JACOBS. No, Congresswoman. If we are talking about interest earned while the trust asset or the income from the trust asset is held in trust—

Ms. HANABUSA. Well, what if it is held in a bank account somewhere else?

Ms. JACOBS. Well, if it is part of one of the settlements that the notice is on, I think the settlement makes it clear that once it is

in a private account the interest amounts would be taxable. And that is not a change. That has been the law for quite some time.

Ms. HANABUSA. But if that interest amount is held in trust, basically would that be some interior account of some sort, that would not give rise to a taxable event when that is distributed?

Ms. JACOBS. Yes, Congresswoman. If the interest is earned while the principal amount is held in trust, that interest is not subject to income tax. If the interest is earned while the amount is in a private account, then the answer is different.

Ms. HANABUSA. Have you in this discussion looked at the amount or the interest rates? Is there a difference between what you would get if it is held in trust versus held in a private account? Is there a difference in that?

Ms. JACOBS. Congresswoman, I do not have that information at all. We did not look and I do not know what the rates would be.

Ms. HANABUSA. But definitely if it is held in trust it is not taxable; and if it is not held in trust and returning, say, twice the amount that you would have in trust, that would give rise to a taxable event?

Ms. JACOBS. Yes, Congresswoman. That has been the settled position for some time.

Ms. HANABUSA. Thank you.

Thank you, Mr. Chairman.

Mr. YOUNG. I thank the gentlelady.

Athena, to your knowledge, what efforts has the IRS made to educate tribes about the taxability of per capita trust payments?

Ms. SANCHEY YALLUP. Thank you, Chairman, for the question.

The Yakama Nation has never been consulted on the issue of that. The Yakama Nation has received a letter stating that the IRS wanted to come and audit, and that is basically IRS' understanding of consultation to the Yakama Nation.

Mr. YOUNG. And, otherwise, they just notified you that they were going to audit you?

Ms. SANCHEY YALLUP. Yes, that is the only thing.

Mr. YOUNG. That is not proper consultation.

Ms. SANCHEY YALLUP. No, that is not.

Mr. YOUNG. In your opinion, has the IRS lived up to the President's directive to implement Executive Order 13175 regarding the Federal agency's consultation with Indian tribes?

Ms. SANCHEY YALLUP. Thank you, Chairman, for that question.

In the Yakama Nation's opinion, IRS has not lived up to the proper Executive Order of consultation with the Confederated Tribes and Bands of the Yakama Nation.

Mr. YOUNG. The letter you received, did it come from Washington, D.C., or from the local office?

Ms. SANCHEY YALLUP. Chairman, it was received from the Portland office.

Mr. YOUNG. From the Portland office.

Ms. SANCHEY YALLUP. Yes.

Mr. YOUNG. OK.

All right. Ron, if these per capita trust payments are considered taxable income, what impact does it have on your membership eligibility for food stamps, Social Security, and other public assistance?

Mr. SUPPAH. Thank you for the question.

Warm Springs, not unlike any other government, has to pay for certain services with revenues generated by our enterprises. It would have a terrible impact on our tribal membership if those revenues were determined to be taxable, because we are suffering from a very severe financial problem at home in our nation.

Mr. YOUNG. OK. If the IRS doesn't change its attitude—and I hate to ask this because it makes some lawyer some money—are you prepared to litigate?

Mr. SUPPAH. I think in visiting with Colville and Yakama, Warm Springs had kind of laid out some steps.

Number one, our hope is that if this Committee—which is the appropriate Committee to make a determination and decision to possibly resolve this—would do that today, that would be the greatest news that we could have.

Second, if that were not to occur and we have to continue this battle in addressing this problem from Warm Springs, yes, we are preparing for litigation.

Third, I think that if the Committee would somehow direct IRS to honor Executive Order 13175 and consult with the affected tribes that would be good. Because I think that, right now, we seem to be just poking each other in the eye, and nothing is being resolved. We are just kind of talking about each other from across the fence.

Mr. YOUNG. OK. And, John, in your tribe's settlement, the government agreed to deposit 20 percent of the settlement funds into a trust. I take it that is a settlement fund of a big lawsuit, is that correct?

Mr. SIROIS. Yes, Mr. Chairman.

Mr. YOUNG. OK. Now was there something you had to bargain for? Or how did this come about and what did you have to give up?

Mr. SIROIS. Thank you, Mr. Chairman, for that question.

In the negotiation process, it was basically clear that we had to negotiate for a portion of that settlement being put into trust; and all sides clearly knew that we had to bargain for that. Because, otherwise, the remainder of the settlement would be taxed, taxable income. And that was the assumption and the direction that the negotiation team had.

Mr. YOUNG. Now let me clarify this. You settled—you are one of the 55 tribes.

Mr. SIROIS. That is right.

Mr. YOUNG. You are one of the few that took the 20 percent and put it into the trust—

Mr. SIROIS. That is right.

Mr. YOUNG [continuing]. Because you thought that the remaining amount would be taxable income?

Mr. SIROIS. That is correct.

Mr. YOUNG. And with their directive they came out and said, that is not taxable income—that part of it. But any other income from resources that were the original treaty, the original concept of your reservation, your nation, was not to be taxable.

Mr. SIROIS. That is correct.

Mr. YOUNG. OK. Good.

All right. Christie, I am a little confused. Where did this idea come from? Which brainchild and what area of the Moon did they come from?

Ms. JACOBS. Congressman, could you clarify which idea you are speaking of?

Mr. YOUNG. The memos, this has never been done since 1983.

Ms. JACOBS. The notice?

Mr. YOUNG. The notice went out. But, see, I happen to think a pimple comes from eating too much candy. Someone ate too much candy. Now who and where did this come from? Did it come from the Oregon office? That is where the letter comes from. Did it come from Washington, D.C.? Do we have some little energetic individual who thinks, Oh, we will get those Indian tribes, and they have to pay their money?

Ms. JACOBS. I apologize. Mr. Chairman, do you mean—

Mr. YOUNG. The idea, the memo.

Ms. JACOBS. Do you mean the notice?

Mr. YOUNG. Yeah, the notice.

Ms. JACOBS. Notice 2012–60.

Mr. YOUNG. I don't care what it is. The one that came in 2011, 2012.

Ms. JACOBS. The notice that we published last week was a result of requests from tribes and tribal organizations that we clarify the treatment of the settlements.

Mr. YOUNG. But they required that because there was a previous notice of identification that they would be audited. Is that correct?

Ms. JACOBS. My understanding, Mr. Chairman, is that the tribes that requested clarification were concerned that our positions were not clear about what the tax treatment of settlement payments would be, both—

Mr. YOUNG. That was for the 55 tribes—

Ms. JACOBS. Yes, sir.

Mr. YOUNG. But now we bring in the resources, moneys into a trust. How did that come up?

Ms. JACOBS. Well, Mr. Chairman, as we discussed, I am unable to disclose any information about whether or not anyone may have had that as an issue in audit. Nor can I confirm the existence—

Mr. YOUNG. With all due respect to you, you can't say it, but I will damn well subpoena somebody and find out about it.

Ms. JACOBS. Right.

Mr. YOUNG. Because what we are trying to do here is what is right. Not some government agency. These tribes worked all these years under the understanding that they would have a trust and when they distributed primarily interest from the capital of the trust to their members it would be nontaxable income.

Now someone came up with a bright idea—and why, I don't know. Because you think about the income of 90 percent of the tribes is below the minimum amount of taxation that they now have to declare which will affect food stamps and so on down the line. You have better things to do.

Mr. LUJÁN. So the letter that I handed to the Chairman was the one that I cited earlier from April 20, Mr. Chairman. The individual at least that wrote this or signed their name to it was Joe Kincaid.

Mr. YOUNG. And he is not with the IRS?

Mr. LUJÁN. Yes, sir. He is with the ITG. He is a group manager as well. And that is the letter that we are citing that went to the Confederated Tribes of the Warm Springs Reservation of Oregon dated April 20, 2012, that makes that statement in there that the IRS' position is that per capita are taxable to members when they are sourced in timber revenues from unallotted tribal lands held in trust. And that is the essence of—

Mr. YOUNG. Yes. This is what we are looking for, someone—I don't know how much money is involved. We will have to find out how much money is involved in taxable income.

I have another question.

It is my understanding moneys derived from the trust fund—the interest—if it was for, in fact, the tribe to use that in government agencies or within their government itself, that is nontaxable; is that correct?

Ms. JACOBS. Yes, Mr. Chairman. If they use their trust—

Mr. YOUNG. OK. If I were to make a suggestion if every tribe was to hire all its tribal members, you couldn't collect any tax. You would hire them for whatever the dividend is, \$500, \$1,000, whatever it is. Then you can't tax them.

Because, right now, this is going to affect every person that has ever gotten a dividend check from one of the tribes. If they don't file it correctly, then I take it that the individual would be liable for tax evasion.

Ms. JACOBS. Mr. Chairman, if I might, if the tribe is making per capita payments pursuant to the Per Capita Act, which I believe are the types of things you are discussing, from the trust assets, I think you can look at this notice and the legal analysis leads you to an official position that these are not subject to tax—

Mr. YOUNG. But it says right here, from tribal timber lands, they are taxable.

Ms. JACOBS. As I discussed earlier, Mr. Chairman, when we publish a position on a matter, anything that is individually being discussed in a different context would then be brought into line with that published position.

Mr. YOUNG. So what does that mean? You are going to tax them or not tax them?

Ms. JACOBS. Mr. Chairman, I do not believe that per capita payments made to tribal members pursuant to the Per Capita Act from trust resources are taxable.

Mr. YOUNG. Including timber resources from nonallocated lands under trust?

Ms. JACOBS. That would be exactly the sort of item that would be covered by the Per Capita Act. Yes, sir.

Mr. YOUNG. Then I think that should be clarified.

I mean, these people aren't here by accident. I mean, I don't know how many people have gone—you haven't gone through an audit. You work for the IRS. I went through it nine times. It is not a good feeling. And every time I told them, there is nothing there. Just because I put in a taxpayer bill of rights back about 30 years ago. Don't tell me that was by accident, by the way.

Was the Department of the Interior—did they agree with the analysis of what came down on the September 6th IRS notice?

Ms. JACOBS. Yes. Mr. Chairman, I hate to speak for another agency, but we did coordinate with both the Department of the Interior and the Department of Justice on the guidance.

Mr. YOUNG. The Department and BIA agreed with this?

Ms. JACOBS. We coordinated, sir, with the Solicitor's Office at the Department of the Interior.

Mr. YOUNG. Was the BIA ever notified?

Ms. JACOBS. Mr. Chairman, you would have to speak to the Department of the Interior about that. I know that we coordinate directly with the Solicitor's Office and those negotiating the settlements.

Mr. YOUNG. Well, for the members of the Committee, that is another example of why we should eliminate those spokesmen for the natives in the Department of the Interior and the BIA. They should be at this table saying this has never been implemented. There is no need for this notice. It has caused consternation amongst the native tribes.

And I can assure you, Ms. Jacobs—and with all due respect, it is not you personally. I would suggest respectfully you go back and make it clear that the revenues from the trust funds, from resources are nontaxable so they understand it, so they don't have to worry about it. And if you don't do that and if they don't do that, I am confident I have the votes not only in this Committee but in this House and probably on the Floor—I want to see the IRS stick its nose up in the air and say, we are not going to change our policy.

You have enough problems the way it is. You have bigger chickens to pluck than this problem.

As Mr. Kildee has said, I am very frustrated with the “forked tongue” approach, with the concept that we can have a settlement and a possibility—now we send out a notice saying that 55 are not going to be taxed but those that have trust funds are going to be taxed is totally inappropriate.

Would anybody else like to comment? Would the gentlelady from Hawaii or anybody else like to make a suggestion? Would anybody on the panel like to say anything before I adjourn this meeting?

Yes, ma'am. Athena.

Ms. SANCHEY YALLUP. Thank you, Chairman. Thank you for those comments. I appreciate that on behalf of the Yakama Nation.

As you notice, in the 2012–60 notice or opinion of the IRS, the Yakama Nation is not listed on there. So that is our question to IRS. Knowing that the settlement agreement is mismanagement of our trust resources—and it is from the 1972 period to the 1992 period Arthur Andersen audit, again, that is all trust.

I cannot help that the Federal Government mismanaged it. When I came here today, I felt the same thing, that I am confused on the notice. Truly, it should say, all settlement agreement funds that are issued or awarded or are actually ours to the tribes is nontaxable. And trust income is nontaxable. Because, since our opinion of the 1957 for the Yakama Nation, it was nontaxable.

Again, the natural resources for the exclusive use of the Yakama in article two of our treaty rights says it is our use and benefit for the inclusive exclusive use of the Yakama people. Within the min-

utes of our Yakama treaty, it speaks of burden. And truly taxation in the 2012 year is a burden to the Yakama Nation.

The treaty is written and understood as a Yakama, and that is how we look at that. Our resources are not taxable.

And I do appreciate your comment. I appreciate the opportunity to sit here on behalf of my people with this issue. It does worry me as a leader. It does worry all of our elected officials throughout Indian country on this issue. And my brothers to the left of me, I really support their effort. We are from the Northwest. And I really appreciate that.

Thank you.

Mr. YOUNG. I thank you.

And, Ron, I do hope that you don't have to litigate. Like I say, I don't have any love for lawyers. They cost me a lot of money.

But, having said that, we will hopefully have the IRS respond to this hearing and respond to this question, clarify it. And, if not, we will take care of it. I would prefer them doing it themselves.

Ron, go ahead.

Mr. SUPPAH. Mr. Chairman, a couple of things: In order for Warm Springs to protect our interest for our tribal membership, the tribal council took action to institute an IRS protocol policy because we were afraid that there were too many doorways that IRS could use to obtain the information that they wanted to get. And we did that to protect ourselves, to make sure that they only had one door to come through to consult with us about any IRS business.

Last, Mr. Chairman, I would appreciate it if the Committee would take a closer look at our trustees sort of absence from stepping up to support the tribes' position. Because, right now, the appearance from Warm Springs looking in from the outside of the Federal Government agencies, it is pretty much fractionated; and I think that all of these action agencies need to be working together to do what is right.

Thank you.

Mr. YOUNG. I appreciate that, and that may be something we can look at. Because the Interior Department never had a good record. That is the reason we had the settlement.

By the way, I thought it should have been \$27 billion. I did a lot of work on this before they reached a settlement. The inoperability and I say total corruption of the Interior Department over the years cost the tribes a great deal of money. And I know you have to have these trusts, I believe, with the Department of the Interior. And, again, there should be a watchdog so we don't have the same problem.

Go ahead, Mr. Luján.

Mr. LUJÁN. Mr. Chairman, just one follow-up on the last line of responses.

Director, I think your testimony covers this. When asked the question about why weren't other tribes included or would the other tribes to be brought in for consideration, you stated that you foresee the possibility of entering into additional similar agreements in the future with other tribal trust litigants. And that is where my line of questioning is, does the IRS' new guidance on the

tax-exempt status of per capita distribution of settlement funds apply only to the 55 tribes listed in the guidance?

Ms. JACOBS. Congressman, currently, it would apply only to the 55. But we are told by the Department of Justice and the Department of the Interior that they anticipate 10 or 11 more very similar settlements. So those then would be added to the list.

Mr. LUJÁN. So in consideration with the Yakama tribe's questions, they would fall into that category and they would be included?

Ms. JACOBS. If they had a settlement, yes, sir. But I believe the concern for them is the broader issue of payments made from trust assets, not from the settlement.

Mr. LUJÁN. Which the clarification of the notice should clarify.

Ms. JACOBS. Yes, sir.

Mr. LUJÁN. Very good.

Mr. YOUNG. I thank the members of the Committee, and I thank the witnesses and appreciate this. And I do hope we can solve this problem. I have always found there is a way to solve a problem.

I still want to know, like I say, where this brilliant idea came from. We will keep pursuing that unless there is a different change of attitude.

And the Committee is adjourned.

[Whereupon, at 1:15 p.m., the Subcommittee was adjourned.]

