

IRS Taxation of Tribal Trust Per Capita Distributions

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What Funds Are In Tribal Trust Accounts?

- **25 CFR §115.702:** “Funds derived directly from trust lands, restricted fee lands, or trust resources that are presented to the Secretary, on behalf of the tribe or individual Indian owner(s) of the trust asset, by the payor...”
- **25 CFR 115.002 (definitions):**
 - “*Trust assets* mean trust lands, natural resources, trust funds, or other assets held by the federal government in trust for Indian tribes and individual Indians.”
 - “*Trust funds* means the money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust.”
 - “*Trust lands(s)* means any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or an individual Indian.”
- **Subject of new IRS tax claim:** funds derived from sale of timber (called “stumpage”) from tribal trust lands. Such trust funds distributed to tribal members in equal amounts are called “per capita distributions”. **Warm Springs has made very modest, periodic per capita payments from trust timber stumpage since 1950s.**

1957 Interior Solicitor's Opinion

- **Legal Question:** Are per capita payments to Yakama tribal members from the proceeds of the sale of tribal timber held in trust taxable?
- **Answer:** No.
 - “There are no express provisions of law authorizing the taxation of Indian tribal trust lands or trust funds...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.””
 - Opinion concluded that “Per capita payments made to individual Yakima Indians from the proceeds derived from the sale of tribal timber are not taxable.”
 - Opinion urged the Commissioner of Indian Affairs to advise the Commissioner of Internal Revenue that Yakama timber trust per capita payments were not taxable.

1983 Per Capita Act

- 25 U.S.C. 117a-c, the “Per Capita Act” of August 2, 1983. Statute does two things:
 - Allows tribes rather than the BIA/OST to make trust per capita payments.
 - Trust per capita distribution provided the same tax exemption and resource exclusion as distributions under Section 7 of the Indian Claims Judgment Distribution Act (25 U.S.C. 1407).
- **House and Senate committee reports** on Per Capita Act explain that the legislation means trust per capita payments under the Act “...shall be subject to the provisions of Section 7 of the Indian Claims Judgment Distribution Act with respect to **tax exemptions and eligibility for Government benefits.**” (emphasis added).
- **Former committee counsel** who authored one of the Per Capita Act committee report, when recently when asked about Congress’s intent in Per Capita Act to exempt trust per capita payments from taxations, said “**What could be more plain?**”.

Reference to the 1983 Per Capita Act in Subsequent Legislative History

- Congress, in considering language in the **1988 Indian Gaming Regulatory Act** making tribal gaming per capita payments expressly taxable, said in Report language that gaming revenues would not be taxable if the funds went into trust because “..in which case the provisions of [the **Per Capita Act**] would be application.” (Report by Rep. Udall, who authored 1983 Per Capita Act).
- Also, in the **1995 Balanced Budget Act**, Congress said “per capita distributions made to tribal members from Indian trust fund revenues are exempt from tax...”

2012 Congressional Joint Tax Committee Report

- May 15, 2012 Congress's **Joint Committee on Taxation** published an “Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members”
- “Overview” report states, as it did in 2008, “Also excluded from tax are payments in satisfaction of a judgment of the United States Court of Federal Claims in favor of an Indian tribe that are distributed per capita to tribal members pursuant to a plan approved by the Secretary of Interior [*7 of Indian Claims Judgment Distribution Act*], and per capita distributions made to tribal members from certain Indian trust funds.” [*Per Capita Act*] (emphasis added).

Federal and State Agency Interpretation of 1983 Per Capita Act Resource Exclusion

- The following Federal Departments and Agencies exclude trust per capita payments, citing the 1983 Per Capita Act, from being counted as income or resources for purposes of determining eligibility for Social Security Act programs, such as SSI, or other federally assisted low income programs: Social Security Administration, Department of Health and Human Services, Department of Housing and Urban Development, Legal Services Corporation, Bureau of Indian Affairs.
- Numerous state agencies that administer Federally funded programs, such as the food stamps, cite the 1983 Per Capita Act in support of regulations excluding trust per capita payments from being counted as income or resources for determining eligibility for federally funded programs. See, e.g. Texas Social Services. Administration:
[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=1&ch=48&rl=2908](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=1&ch=48&rl=2908)

Felix Cohen's Handbook of Federal Indian Law

- Citing the 1983 Per Capita Act, *Cohen's Handbook of Federal Indian Law* states as “black letter” law: **“per capita payments made from funds held in trust by the United States are not subject to taxation[.]”** *See* 8.02(2)(b) (2009 Supp.) (emphasis added).

April, 2012 Modifications to IRS Website Revealing IRS Policy Change

IRS Website, ITG FAQ Answer #2-"Are any Per Capita Distributions exempt from federal income taxation?"

- **November, 2011 answer:**

"Yes, when distributions are received resulting from a land claims settlement and judgment, **and also when there are distributions of trust principle and income held by the Secretary of the Interior.**" (emphasis added)

- **April, 2012 answer:**

"Yes, distributions of principle and interest made from land claims settlements or judgment funds that are held in trust from the Secretary of the Interior are not subject to taxation."

IRS/Treasury Rejection of Warm Springs Consultation Request on Policy Change

- May 15, 2012, Warm Springs requested formal government-to-government consultation with Department of Treasury and the White House pursuant to **Executive Order 12175, Section 5**, on the IRS policy change regarding taxability of trust per capita payments.
- **Consultation request denied** in email two days later because “...the issue [Warm Springs] raises is the subject of an on-going IRS exam.”

For Detailed Statement of Tribal Position See Statement of Athena Sanchey Yallup, Executive Secretary of the Yakama Nation Tribal Council

- June 14, 2012 Hearing of Senate Committee on Indian Affairs regarding “New Tax Burdens on Tribal Self-Determination”:

<http://www.indian.senate.gov/hearings/upload/Athena-Sanchey-Yallup-testimony061412.pdf>

- See, also, NCAI June 12, 2012 consultation request to Secretary Geithner (Treasury) and Secretary Salazar (Interior)