



# NATIONAL CONGRESS OF AMERICAN INDIANS

June 12, 2012

Secretary Timothy Geithner  
U.S. Department of Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Secretary Ken Salazar  
U.S. Department of Interior  
18<sup>th</sup> & C Streets, NW  
Washington, DC 20240

**Re: Request for Consultation on Tax Status of Trust Funds under the Per Capita Act**

Dear Secretaries Geithner and Salazar:

On behalf of the National Congress of American Indians, a membership organization tribal governments, I write to request government-to-government consultation under Executive Order 13175. We request consultation because the Internal Revenue Service is pursuing a significant change in federal policy regarding the tax status of tribal trust funds.

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

## **Background**

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

Per capita payments from tribal trust funds are specifically excluded from both federal and state taxes under the Per Capita Act of 1983, 25 U.S.C. 117a-117c. *See*, Handbook of Federal Indian Law (2009 Supp. §8.02[2][b]). Long before 1983, this tax exclusion existed in federal law because it is derived from Indian treaties and the federal trust responsibility. There are five principle sources of this longstanding legal doctrine.

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### **Indian Treaties and the Federal Trust Responsibility**

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

### **Squire v. Capoeman and the 1957 Interior Solicitor’s Opinion**

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

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

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

### **Per Capita Act of 1983**

Third, in 1983, Indian tribes requested that Congress provide authority to make per capita payments of tribal trust funds directly from tribal accounts, rather than from the federal trust account. This authority was provided in the Per Capita Act, which repealed an earlier statute requiring that such payments be made by an officer of the United States. (Congressional Committee reports attached.) In the Act, Congress confirmed the continuing tax exemption of these trust fund payments by stating as follows:

(a) Previous contractual obligations; tax exemption

Funds distributed under sections 117a to 117c of this title shall not be liable for the payment of previously contracted obligations except as may be provided by the governing body of the tribe and distributions of such funds shall be subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended [25 U.S.C. 1407].

25 U.S.C. § 117b. The cross-referenced provision titled “Tax Exemption; Resources Exemption Limitation,” provides in pertinent part:

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

25 U.S.C. § 1407. The committee reports accompanying the Per Capita Act, likewise, support the continuing tax exempt status of these trust fund payments. The House Report provides:

Section 2(a) [codified in 25 U.S.C. § 117b] provides that funds distributed pursuant to this legislation . . . shall be subject to the provisions of section 7 of the Judgment Distribution Act with respect to tax exemptions . . . .

H.R. Rep. No. 652, 97th Cong., 2d Sess. 3 (Jul. 22, 1982); see also S. Rep. No. 659, 97th Cong., 2d Sess. 2 (Sep. 8, 1982) (same language).

The IRS contends that this explicit exemption from taxation is “round about” and “obtuse” because Congress used a cross-reference to another statute. If this were a principle of statutory interpretation, a significant portion of the United States Code would be rendered useless. Instead, the most fundamental principle of construction is that statutes must be interpreted according their plain meaning. Here, the language of tax exemption is unambiguous.

In addition, the IRS contends that the Per Capita Act could not have been intended as a tax exemption because it was scored as revenue neutral for budget purposes. As explained above, the Per Capita Act was a confirmation of the longstanding tax exempt status of funds derived from trust resources in a new context authorizing tribes to make the distributions.

### **Indian Gaming Regulatory Act and Per Capita Payments**

Fourth, the Indian Gaming Regulatory Act (IGRA) was enacted in 1988, and provides that per capita payments from Indian gaming are subject to Federal taxation. 25 U.S.C. § 2710(3)(D). In 1986, the House Committee on Interior and Insular Affairs submitted a report on an earlier version of IGRA that further explained the taxation provision:

“[Section 11, Paragraph(b)(2)(b) of H.R. 1920] further states that, if the funds are used to make per capita payments to tribal members, such payments will be subject to Federal taxation. It is not intended that this be the case if any of such revenue is taken into trust by the United States, in which case the provisions of the Act of August 2, 1983 (97 Stat. 365) [the Per Capita Act] would be applicable.”

*See* House Rep. 99-188, p. 16 (March 10, 1986). This report was submitted by Representative Morris Udall, who introduced the Per Capita Act only three years before. The same statement is contained in a report from the Senate Select Committee on Indian Affairs on the same bill. Senate Rep. 99-493, p. 15 (September 24, 1986). Indeed, if not for the exemption of trust per capita payments from taxation, there would have been no need to specify in IGRA that per capita payments derived from gaming revenues are subject to federal taxation.

### **Longstanding Administrative Practice**

Fifth, and finally, since at least the 1950's the Department of Interior has made per capita payments from tribal trust funds, has not reported them as income for federal tax purposes, and has vigorously defended their tax exempt status. The Interior regulations at 25 C.F.R. 115 were revised in 2000 and continued to provide procedures for making these payments without provision for tax reporting. Many federal and state agencies (HHS, SSA, BIA, Legal Services Corporation, et. al.) have interpreted the Per Capita Act to require them not to count per capita payments held in trust as an asset or resource. (See, *e.g.*, SSA (20 CFR Part 416, 59 FR 8536); HUD, 55 FR 29905.) These agency regulations interpret the Per Capita Act uniformly to extend the provisions of 25 U.S.C. 1407 to funds derived from tribal trust resources. The IRS has conducted tax compliance reviews with many Indian tribes over the decades, and we know of no time other than 1957 when the issue was raised. Previously, the IRS publicized its position on this issue at its website stating that per capita distributions are exempt from federal income tax "when there are distributions from trust principal and income held by the Secretary of Interior." The IRS recently removed this instruction from its website.

### **Conclusion**

The National Congress of American Indians urges the Departments of Treasury and Interior to swiftly address this proposed breach of federal law, treaties and the federal trust responsibility by the Internal Revenue Service. The Obama Administration is currently engaged in a historic effort to settle a significant number of lawsuits brought by Indian tribes for mismanagement of tribal trust funds. Many of the tribes settling these lawsuits are considering the payment of some portion of the settlement funds in per capita payments to tribal members. The IRS change in policy on the taxability of these payments smacks of continued unfair dealing by the United States at a very sensitive time.

Thank you for your consideration of this request for consultation and for your serious attention to the issues raised in this letter. I look forward to meeting with your Departments in the near future to address this matter.

Sincerely,



Jefferson Keel

cc: Jodi Gillette, White House  
Tony West, Department of Justice  
David Hayes and Hilary Tompkins, Department of Interior  
Aaron Klein, Department of Treasury  
Douglas Shulman and Christie Jacobs, Internal Revenue Service

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 prendre \* \* \*."

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 prendre 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 prendre is an interest in land and can exist in gross. (United States v. Gossler, 60 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

PROVIDING THAT PER CAPITA PAYMENTS TO INDIANS  
MAY BE MADE BY TRIBAL GOVERNMENTS, AND FOR  
OTHER PURPOSES

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JULY 22, 1982.--Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs,  
submitted the following

REPORT

[To accompany H.R. 4365]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 4365) to provide that per capita payments to Indians may be made by tribal governments, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert, in lieu thereof, the following:

That funds which are held in trust by the Secretary of the Interior (hereinafter referred to as the "Secretary") for an Indian tribe and which are to be distributed per capita to members of that tribe may be so distributed by either the Secretary or, at the request of the governing body of the tribe and subject to the approval of the Secretary, the tribe. Any funds so distributed shall be paid by the Secretary or the tribe directly to the members involved or, if such members are minors or have been legally determined not competent to handle their own affairs, to a parent or guardian of such members or to a trust fund for such minors or legal incompetents as determined by the governing body of the tribe.

Sec. 2. (a) Funds distributed under this Act shall not be liable for the payment of previously contracted obligations except as may be provided by the governing body of the tribe and distributions of such funds shall be subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466) as amended.

(b) Nothing in this Act shall affect the requirements of the Act of October 19, 1973 (87 Stat. 466), as amended, or of any plan approved thereunder, with respect to the use or distribution of funds subject to that Act: *Provided*, That per capita payments made pursuant to a plan approved under that Act may be made by an Indian tribe as provided in section 1 of this Act if all other provisions of the 1973 Act are met.

(c) Nothing in this Act, except the provisions of subsection (a) of this section, shall apply to the Shoshone Tribe and the Arapahoe Tribe of the Wind River Reservation, Wyoming.

SEC. 3. (a) The Secretary shall, by regulation, establish reasonable standards for the approval of tribal payments pursuant to section 1 of this Act and, where approval is given under such regulations, the United States shall not be liable with respect to any distribution of funds by a tribe under this Act.

(b) Nothing in this Act shall otherwise absolve the United States from any other responsibility to the Indians, including those which derive from the trust relationship and from any treaties, executive orders, or agreements between the United States and any Indian tribe.

SEC. 4. (a) The following provision of section 1 of the Act of June 10, 1896 (29 Stat. 336), is repealed: 'That any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the Secretary of the Interior.'

(b) Section 19 of the Act of June 28, 1898 (30 Stat. 502), is repealed.

#### PURPOSE

The purpose of H.R. 4365, introduced by Mr. Udall, provides that per capita payments to Indians out of tribal trust revenue may be made by either the Secretary of the Interior or by tribal governments and repeals two obsolete laws which provide that only the Secretary may make such payments.

#### BACKGROUND

Section 1 of the Act of June 10, 1896 (29 Stat. 336; 25 U.S.C. 117) provides that sums of money to be paid per capita to individual Indians must be paid by Federal officials designated by the Secretary of the Interior. The Act of June 28, 1898 (30 Stat. 502) established a similar provision for Indian tribes located in Indian Territory, now a part of Oklahoma, and also provided that such payments would not be liable for the payment of any previously contracted obligation.

These laws were adopted at a time when most Indian tribes did not have the capability of handling their own affairs, including the receipt and disbursement of funds accruing to their benefit. In addition, at the time these laws were enacted, the individual members of many tribes were receiving periodic per capita payments or annuities based upon compensation paid for lands ceded to the United States under treaties or other agreements.

This is no longer the case. First, most Indian tribes have acquired the administrative, financial, and accounting capabilities to manage their own affairs, including the receipt and disbursement of funds. Many Indian tribes adopt annual tribal budgets funded with tribal trust and non-trust revenues. In addition, almost all tribes administer, to a greater or lesser extent, a variety of Federal programs. Second, few Indian tribes make periodic, regular per capita payments out of tribal trust revenue.

Only about five or six tribes make such payments. Another ten to fifteen make sporadic, irregular per capita payments. Until a recent opinion of the Solicitor of the Interior Department determining that such practices were in violation of the law, most of these tribes were making such payments themselves. When per capita payments out of tribal trust revenues were approved, trust funds would be transferred by the Secretary from trust accounts to the local tribal bank accounts and per capita payment checks would be drawn upon the tribal ac-

count. The Solicitor's opinion has resulted in a halt to this practice, but the tribes making such payments wish to continue to make their own payments.

First, payment of per capita sums by Federal officials with checks drawn upon the United States Treasury is often time-consuming as compared with payment by tribal check and also results in some administrative cost to the United States.

Second, the use of Federal checks often gives or reinforces the erroneous impression in the surrounding non-Indian community that Indian people are receiving cash payments from the Federal government out of the Federal Treasury simply because they are Indians. There is a failure to realize that these per capita payments are being made out of funds which belong to the Indian people and that such payments are in the nature of dividend distributions.

Third, the tribes feel that the use of tribal checks for the payment of per capita distributions results in a better understanding and realization within the local surrounding community of the beneficial economic impact that the Indian tribe and its resources and revenues have upon the economy of that community.

Finally, the repeal of these laws restricting, unreasonably, the right of an Indian tribe to make such payments is consistent with the policy of this government to insure the fullest self-determination of Indian tribes within the overall trust responsibility of the United States.

#### COMMITTEE AMENDMENT AND SECTION-BY-SECTION ANALYSIS

The Committee adopted an amendment in the nature of a substitute. As introduced, H.R. 4365 would simply have authorized tribes to make per capita payments with the approval of the Secretary, provided that such payments would not be subject to obligations previously contracted and that nothing in the legislation would affect the provisions of the Omnibus Judgment Distribution Act of 1973, and repealed the 1896 and 1898 laws. The substitute generally preserves that existing language, but also made some technical changes and added new language as set out in the section-by-section analysis which follows.

Section 1 provides that tribal trust funds which are to be paid on a per capita basis to tribal members may be distributed by the Secretary of the Interior or subject to his approval, by the tribe involved and that per capita shares of minors and legal incompetents shall be handled as determined by the tribal governing body.

Section 2(a) provides that funds distributed pursuant to this legislation shall not be subject to previously contracted obligations and shall be subject to the provisions of section 7 of the Judgment Distribution Act with respect to tax exemptions and eligibility for government benefits. Subsection (b) provides that nothing in this Act shall affect the provisions of the Judgment Distribution Act except that per capita payments to be paid out pursuant to that Act may be paid by the tribe as authorized by this Act. Subsection (c) provides that, with the exception of subsection (a), nothing in this Act shall affect the Shoshone and Arapahoe Tribes of the Wind River Reservation in Wyoming which are subject to a special Act authorizing per capita payments.

Section 3(a) provides that the United States shall not be liable with respect to any tribal distribution of funds under this Act if the Secretary has approved that distribution pursuant to the terms of this Act and reasonable rules and regulations adopted to carry out this Act. Where an Indian tribe seeks and receives approval to disburse per capita payments, the Committee does not intend that the fiduciary obligation of the United States shall be a standard by which rules and regulations carrying out this Act are developed and applied. Subsection (b) provides that nothing in this Act shall otherwise absolve the United States of its trust responsibilities to Indians and Indian tribes.

Section 4 repeals section 1 of the Act of June 10, 1896, and section 19 of the Act of June 28, 1898.

#### COST AND BUDGET ACT COMPLIANCE

Enactment of H.R. 4365 involves no cost to the United States. The cost analysis prepared by the Congressional Budget Office follows:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, D.C., June 17, 1982.

HON. MORRIS K. UDALL,  
*Chairman, Committee on Interior and Insular Affairs,*  
*U.S. House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 4365, a bill to provide that per capita payments to Indians may be made by tribal governments, and for other purposes, as amended and ordered reported by the House Committee on Interior and Insular Affairs, June 9, 1982.

Based on this review, it is expected that no additional cost to the government would be incurred as a result of enactment of this legislation. The bill would allow tribes to disburse per capita payments directly by tribal check. Under present procedures checks must be drawn upon the United States Treasury from trust accounts.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RAYMOND C. SCHEPPACH  
(For Alice M. Rivlin, Director).

#### INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 4365 will have no inflationary impact.

#### OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

#### COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, recommends approval of the bill, as amended.

## DEPARTMENTAL REPORT

The favorable report of the Department of the Interior, dated November 18, 1981, follows:

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY.  
*Washington, D.C., November 18, 1981.*

HON. MORRIS K. UDALL,  
*Chairman, Committee on Interior and Insular Affairs,  
House of Representatives,  
Washington, D.C.*

DEAR MR. CHAIRMAN: Your committee has requested the views of this Department on H.R. 4365, a bill "To provide that per capita payments to Indians may be made by tribal governments, and for other purposes."

We recommend that the bill be enacted, if amended as suggested herein.

H.R. 4365 would repeal two provisions of law which currently require that per capita payments to individual Indians of tribal income be made by officers designated by the Secretary of the Interior. H.R. 4365 would allow these payments to be made by either the Secretary or the tribal government to which the funds involved belong.

In addition, H.R. 4365 would continue the exemption of per capita payments from liability for payment of any previously contracted obligation, now provided by the 1898 provision which would be repealed by the bill. Further, the bill would specify that enactment of the bill would not affect the requirements for distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission or the Court of Claims. Distribution of those funds would continue to be controlled by the Indian Judgment Funds Distribution Act of October 19, 1973 (87 Stat. 466; 25 U.S.C. 1401 et seq.).

We believe that the requirements that per capita payments be distributed only by Federal officers are no longer necessary. They were enacted at a time when most tribes had no organizational means for accounting for the disbursement of funds to their members. This is no longer the case. Most tribes now prefer to handle such payments themselves and, until the Department's Solicitor determined that such practices were in contravention of the 1896 provisions, most tribes were capably handling the distribution of per capita payments from tribal funds held by the Bureau of Indian Affairs that were transferred from the U.S. Treasury to tribal treasuries. Since the bulk of these payments are usually cashed in stores or deposited in banks off the reservation, this practice was advantageous to Indian tribes, in that the non-Indian community was aware that the per capita checks were distributions of tribal income and not gratuity payments from the Federal government.

In light of the enactment of the Indian Self-Determination and Education Assistance Act (88 Stat. 2203; 25 U.S.C. 450) and the Administration's policy of Indian self-determination, we believe that tribes should be permitted to make per capita distributions of funds belonging to such tribes. H.R. 4365 would provide specific authority for per capita distributions to be made by either tribal governments

or the Secretary. Distribution by the Secretary, in his role as trustee, would be made should instances arise in which a tribe is not able to handle the accounting for such a distribution. Limitation of Departmental involvement in distributions would greatly reduce the burden on the Department that per capita distributions have become.

In line with this, we believe that the United States and the Secretary should not be subject to any liability with respect to distributions by a tribal governing body under the bill. Therefore, we recommend that section 2 of H.R. 4365 be amended by adding at the end thereof the following new subsection: "(c) The United States and the Secretary shall not be subject to any liability with respect to any distribution of funds by a tribal governing body under this Act."

We do believe, however, that the tribal government distributing the payments should be subject to liability in the event of any improper distribution of the funds involved. We therefore would, by regulation, require the tribes to waive their sovereign immunity with respect to suits of this kind before authorizing them to make per capita payments. Resolution of this issue might be clearer still if the legislation itself were amended to require the tribes to waive their sovereign immunity in those instances.

Finally, we note that section 1 of H.R. 4365 omitted a line. We recommend that the first sentence of section 1 be amended to read: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That funds which are held in trust by the Secretary of the Interior (hereinafter in this Act referred to as the "Secretary") for an Indian tribe and which are to be distributed per capita to members of such tribe may be so distributed by either the Secretary or the governing body of such tribe."

With the inclusion of the foregoing amendments, we support the enactment of H.R. 4365.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ROY H. SAMPSEL,  
*Deputy Assistant Secretary.*

#### CHANGES IN EXISTING LAW

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

#### ACT OF JUNE 10, 1896 (29 STAT. 336)

\* \* \* \* \*

#### SEC. 1. \* \* \*

[That any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the Secretary of the Interior.]

\* \* \* \* \*

## ACT OF JUNE 28, 1898 (30 STAT. 502)

\* \* \* \* \*

【SEC. 19. No payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to payment to any previously contracted obligation.】

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# Calendar No. 949

97TH CONGRESS }  
2d Session }

SENATE }

REPORT  
No. 97-659

## PROVIDING THAT PER CAPITA PAYMENTS TO INDIANS MAY BE MADE BY TRIBAL GOVERNMENTS, AND FOR OTHER PURPOSES

OCTOBER 1 (legislative day, SEPTEMBER 8), 1982.—Ordered to be printed

Mr. COHEN, from the Select Committee on Indian Affairs, submitted the following

### REPORT

[To accompany H.R. 4365]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 4365) to provide that per capita payments to Indians may be made by tribal governments, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

1. On page 2, line 16, after the word "met", delete the period and add the following: "including but not limited to, the protection of the interests of minors and incompetents in such funds."

### PURPOSE

The purpose of H.R. 4365, introduced by Mr. Udall, is to provide that per capita payments to Indians out of tribal trust revenue may be made by either the Secretary of the Interior or by tribal governments. By virtue of two laws enacted in 1896 and 1898, such disbursements may only be made by the Secretary of the Interior at this time. The funds which are the subject of this legislation are funds derived from sale or lease of tribal trust assets.

### BACKGROUND

Section 1 of the Act of June 10, 1896 (29 Stat. 336; 25 U.S.C. 117) provides that sums of money to be paid per capita to individual Indians must be paid by Federal officials designated by the Secretary of the Interior. The Act of June 28, 1898 (30 Stat. 502) established similar provisions for tribes in Indian Territory, now Oklahoma.

Many Indian tribes have acquired the administrative, financial, and accounting capabilities to handle the disbursement of funds derived from the sale or lease of trust assets. Until recently, five or six tribes were making such disbursements to their members. A recent opinion of the Solicitor of the Department of the Interior held that tribes were not legally authorized to make these payments and the authority of the tribes was then withdrawn.

Tribes wishing to resume making these disbursements cite three reasons: (1) disbursements by the tribes has proved more expeditious than when handled by the Department of the Interior; (2) the local non-Indian community often believes that Indians cashing a Federal Treasury check are recipients of Federal welfare and resent Indians living on the Federal dole; (3) use of tribal checks rather than Federal checks will help make the local non-Indian community more aware of the economic value of the tribal community to the local economy. Additionally, tribes assert that vesting the tribal governments with authority to disburse trust revenues to their own members is consistent with the policy of self-determination.

#### LEGISLATIVE HISTORY

H.R. 4365 was introduced in the House of Representatives by Mr. Udall on August 3, 1982. Hearings were held by the House Committee on Interior and Insular Affairs in November of 1981. The bill was reported out of the Committee on July 22, 1982, and was acted upon favorably by the House of Representatives in July of 1982.

#### COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by unanimous vote of a quorum present, in an open business meeting on September 29, 1982, recommends that the Senate pass H.R. 4365, as amended.

#### AMENDMENT

There is one technical amendment to this bill which clarifies certain protections for minors and legal incompetents.

#### SECTION-BY-SECTION ANALYSIS

Section 1 provides that tribal trust funds which are to be paid on a per capita basis to tribal members may be distributed by the Secretary of the Interior or subject to his approval, by the tribe involved and that per capita shares of minors and legal incompetents shall be handled as determined by the tribal governing body.

Section 2(a) provides that funds distributed pursuant to this legislation shall not be subject to previously contracted obligations and shall be subject to the provisions of section 7 of the Judgment Distribution Act with respect to tax exemptions and eligibility for government benefits. Subsection (b) provides that nothing in this Act shall affect the provisions of the Judgment Distribution Act except that per capita payments to be paid out pursuant to that Act may be paid by the tribe as authorized by this Act. Subsection (c) provides that,

with the exception of subsection (a), nothing in this Act shall affect the Shoshone and Arapahoe Tribes of the Wind River Reservation in Wyoming which are subject to a special Act authorizing per capita payments.

Section 3(a) provides that the United States shall not be liable with respect to any tribal distribution of funds under this Act if the Secretary has approved that distribution pursuant to the terms of this Act and reasonable rules and regulations adopted to carry out this Act. Where an Indian tribe seeks and receives approval to disburse per capita payments, the Committee does not intend that the fiduciary obligation of the United States shall be a standard by which rules and regulations carrying out this Act are developed and applied. Subsection (b) provides that nothing in this Act shall otherwise absolve the United States of its trust responsibilities to Indians and Indian tribes.

Section 4 repeals section 1 of the Act of June 10, 1896, and section 19 of the Act of June 28, 1898.

#### COST AND BUDGETARY CONSIDERATIONS

The cost estimate for H.R. 4365, as amended, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, D.C., September 30, 1982.

HON. WILLIAM S. COHEN,  
*Chairman, Select Committee on Indian Affairs,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 4365, a bill to provide that per capita payments to Indians may be made by tribal governments, and for other purposes, as amended and ordered reported by the Senate Select Committee on Indian Affairs, September 29, 1982.

Based on this review, it is expected that no additional cost to the government would be incurred as a result of enactment of this legislation. The bill would allow tribes to disburse per capita payments directly by tribal check. Under present procedures, checks must be drawn upon the U.S. Treasury from trust accounts.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

#### REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that H.R. 4365, as amended, will have no regulatory or paperwork impact.

## EXECUTIVE COMMUNICATION

The legislative report on H.R. 4365 received by the Committee from the Department of the Interior is set forth below:

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., September 28, 1982.*

HON. WILLIAM S. COHEN  
*Chairman, Select Committee on Indian Affairs,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The following are our views on H.R. 4365, a bill "To provide that per capita payments to Indians may be made by tribal governments, and for other purposes."

We recommend that the bill be enacted, if amended as we suggest. In addition to our comments, we are advised that the Department of Justice will shortly forward a report to the Committee recommending some clarifying amendments concerning U.S. liability under the terms of this bill.

H.R. 4365 would repeal two provisions of law which currently require that per capita payments of tribal income to the individual Indians be made by officers designated by the Secretary of the Interior. H.R. 4365 would allow these payments to be made by either the Secretary or the tribal governments to which the funds involved belong.

In addition, H.R. 4365 would continue the exemption of per capita payments from liability for payments of any previously contracted obligation, now provided by the 1898 provision which would be repealed by the bill. Any funds distributed per capita would also be subject to section 7 of the Indian Judgment Funds Act of October 19, 1973, which contains tax-exemption and offset provisions. Further, the bill would specify that enactment of the bill would not affect the requirements for distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission or the Court of Claims. Distribution of those funds would continue to be controlled by the 1973 Act, except that per capita payments made under a plan approved under the 1973 Act may be made by an Indian tribe if all other provisions of the 1973 Act are met. The bill would also exempt the Shoshone Tribe and the Arapahoe Tribe of the Wind River Reservation, Wyoming, from its provisions; however, the tax-exemption and offset provisions of section 7 of the 1973 Act would be applicable. These tribes are governed by a special per capita statute. Finally, H.R. 4365 would provide that the United States not be subject to any liability with respect to any distribution of funds by a tribe under the bill.

We believe that the requirements that per capita payments be distributed only by Federal officers are no longer necessary. They were enacted at a time when most tribes had no organizational means for accounting for the disbursement of funds to their members. This is no longer the case. Most tribes now prefer to handle such payments themselves and, until the Department's Solicitor determined that such practices were in contravention of the 1896 provisions, most tribes were

capably handling the distribution of per capita payments from tribal funds held by the Bureau of Indian Affairs that were transferred from the U.S. Treasury to tribal treasuries. Since the bulk of these payments are usually cashed in stores or deposited in banks off the reservation, this practice was advantageous to Indian tribes. In that the non-Indian community was aware that the per capita checks were distributions of tribal income and not gratuity payments from the Federal Government.

In light of the enactment of the Indian Self-Determination and Education Assistance Act and the Administration's policy of Indian self-determination, we believe that tribes should be permitted to make per capita distributions of funds belonging to such tribes. H.R. 4365 would provide specific authority for per capita distributions to be made by either tribal governments or the Secretary. Distribution by the Secretary, in his role as trustee, would be made should instances arise in which a tribe is not able to handle the accounting for such a distribution. Limitation of Departmental involvement in distributions would greatly reduce the burden on the Department that per capita distributions have become.

We note that section 3(b)(3) of the 1973 Act specifically provides that interests of minors and incompetents be protected. We believe the language in section 2(b) of the bill could be interpreted as allowing circumvention of that provision. To avoid this, we recommend that section 2(b) of the bill be amended to assure that the interests of minors and incompetents are protected. Therefore, we suggest that line 16 on page 2 of the bill be amended to read as follows: "met, including but not limited to, the protection of the interests of minors and incompetents in such funds."

If amended as we suggest, and after consideration of the Justice Department's views, which will be forthcoming shortly, we would recommend the enactment of H.R. 4365.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

JOHN W. FRITZ,  
*Deputy Assistant Secretary.*

#### CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF JUNE 10, 1896 (29 STAT. 336)

\* \* \* \* \*

SEC. 1. \* \* \*

[That any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the Secretary of the Interior.]

ACT OF JUNE 28, 1898 (30 STAT. 502)

\* \* \* \* \*  
[SEC. 19. No payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to payment to any previously contracted obligation.]  
\* \* \* \* \*

