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

**UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS**

OVERSIGHT HEARING ON "PER CAPITA ACT AND FEDERAL TREATMENT OF TRUST PER CAPITA DISTRIBUTIONS"

September 14, 2012

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 Subcommittee – 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 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.

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