



The Confederated Tribes of the Colville Reservation



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

Committee on Natural Resources
Subcommittee on Indian and Alaska Native Affairs

Oversight Hearing on the Per Capita Act and Federal
Treatment of Trust Per Capita Distributions

September 14, 2012

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

For decades, there has existed a bright line—per capita distributions from funds held in tribal trust accounts are not taxable. The Colville Tribes is concerned by reports that the Internal Revenue Service (“IRS”) has called the Per Capita Act into question as a valid income tax exemption for per capita distributions from tribal trust accounts. We find this even more curious in light of the recent notice issued by the Treasury Department and the IRS that per capita distributions from the dozens of tribal trust settlements announced earlier this year are tax exempt, even if they were distributed from private, non-trust accounts.

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

Background on the Colville Tribes

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

The Colville Reservation encompasses more than 1.4 million acres, of which approximately 66 percent is commercial forest land. Although the Colville Tribes has diversified into several lines

of business, it has traditionally relied on timber sales and its forest products industries as primary sources of employment and revenue to fund tribal government programs.

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

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

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

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

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

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

In the Colville Tribes’ experience, OST has been and is similarly cognizant of the federal tax treatment of funds distributed per capita from tribal trust accounts. The Colville Tribes has

previously worked cooperatively with OST to demonstrate that certain tribal revenues could be deposited in trust under OST regulations. OST evaluates these requests carefully. For example, prior OST officials have informed the Colville Tribes that because the Indian Gaming Regulatory Act explicitly provides that per capita distributions of gaming revenues are taxable, OST must be very careful to ensure that any funds accepted into trust do not include comingled gaming revenue.

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

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

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

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

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

As tribal communities around the country began learning about their tribes' settlements and began demanding per capita distributions, the tax status of the SPOA settlements seemed to take center stage at Treasury and the IRS. The focus on the settlement taxation issue diverted resources from other Indian-related issues, such as the IRS's implementation of the Indian provisions of the Affordable Care Act of 2010. All of this ultimately led Treasury and the IRS to

issue Notice 2012-60, “Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases” (the “Notice”).

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

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

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

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

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