

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

**Before the House Committee on Natural Resources,
Subcommittee on Indian and Alaska Native Affairs**

**Oversight Hearing on “*Per Capita Act and Federal Treatment
of Trust Per Capita Distributions*”**

September 14, 2012

Washington, D.C.

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

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

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

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

If there had been any uncertainty about the non-taxable nature of tribal trust per capita payments, Congress resolved the issue when it passed the Per Capita Act in 1983 (Public Law 98-64, 25 U.S.C. §§ 117a-c). In fact, the House version of this legislation originated in this Committee. According to Frank Duchenaus, the now retired Committee counsel who drafted the 1983 legislation and Committee report (House Report 98-230), the purpose of the Act was to provide tribes with the option to make trust per capita payments directly to their members on tribal

checks rather than continue to have the Bureau of Indian Affairs make the payments on Treasury Department checks. The Treasury checks had become a source of misunderstanding with many non-Indian businesses cashing the checks believing they represented a government “hand out”, rather than the tribal members’ own money generated from the utilization of tribally owned trust resources.

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

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

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

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

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

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

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

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

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

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

We appreciate this Subcommittee's leadership in this specific matter and urge your continued leadership and consideration of other Indian tax matters such as: tribes' ability to access tax-free financing on par with all other governmental entities; exemptions for tribes' general welfare assistance to their members, and parity for tribal pension programs; issues which Warm Springs the National Congress of American Indians are working to resolve.

Thank you.