



GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

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Via Regular U.S. Mail, Facsimile, and Email

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Re: Tax Reform for American Indian Tribes—Exclusion of Tribal Government General Welfare Benefits from Income and Other Matters

Dear Members of Congress:

As you consider reforms to federal tax policy, I write on behalf of the Great Plains Tribal Chairman's Association to urge you to enact legislation to clarify that benefits in the form of general

welfare services and programs provided by Indian tribes to our citizens are excluded from gross income of the individual tribal citizens. Draft legislation is attached to this comment for your consideration. I also ask you to consider legislation on New Market Tax Credits, tax exempt bonds, and tribal government pension plans.

General Welfare Exclusion

The United States Constitution acknowledges Indian tribes as governments, and as such tribes are not subject to direct taxation for on-reservation activities. In addition, the Constitution's Apportionment Clause and the 14th Amendment to the Constitution provides: "Indians not taxed," meaning tribal citizens are excluded from taxation and representation because our people were represented by tribal nations. When Congress enacted legislation to extend U.S. citizenship to "non-citizen Indians," at the insistence of tribal leaders the law preserved tribal citizenship and tribal rights to property unimpaired and unaffected: *"Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."*

In return for hundreds of millions of acres of tribal homelands and other obligations on the part of tribal governments, the United States made treaty promises to provide for the health, education, and general welfare of Indian people. Many of these promises are codified in federal laws such as the Indian Self-Determination and Educational Assistance Act, the Indian Health Care Improvement Act, the Native American Housing and Self Determination Act, and hundreds of other laws, most of which are included in Title 25 of the United States Code and many of which are administered by the Bureau of Indian Affairs and the Indian Health Service.

Congress and the public widely acknowledge that the Federal Government has not upheld these treaty promises. With regard to the statutory obligation to tribes, these attempts too have failed through inadequate or non-existent funding.

In recent years, some Indian tribes, tired of waiting on the United States to meet its obligations, have taken it upon ourselves to provide these general welfare services to our people. Tribal governments provide (or supplement federal programs and grants) benefits to meet the housing, education, elder care, transportation, cultural and other needs of tribal citizens. For many tribal governments, provision of these programs and services are an inherent matter of tribal culture. Even before the formation of the United States, tribal governments have always existed for the good of our people, and to help our communities through difficult times.

Instead of fostering these acts of tribal self-determination, in recent years, Internal Revenue Service (IRS) field agents have targeted benefits provided by tribal governments to our citizens as taxable income.

A January 28, 2013 Report of the Treasury Inspector General for Tax Administration ("Treasury IG Report") confirms these intrusions. The Treasury IG Report notes that between FY 2008 and FY 2011, the IRS completed 908 "tax modules" or examinations of 95 Indian tribal entities and 203 tribal members connected to 68 tribes. Of these 908 examinations, only eight cases were referred to the National Fraud Office, and the Criminal Investigator (CI) accepted only four of those cases for further investigation. The Treasury IG Report confirms concerns that tribes have been investigated at a much higher rate than the rest of the general population. It also shows that the increased investigations have yielded few results. However, these audits and examinations come at a significant cost to tribal governments in the form of time and resources.

As you may know, in December of 2012, the Treasury Department and IRS took initial steps to curb the IRS field agent practices and to respect tribal sovereignty when it issued Notice 2012-75 (“draft guidance”). The draft guidance is a step in the right direction. However, the draft guidance is not permanent and it leaves a significant amount judgment about the validity of tribal government programs in the hands of IRS field agents. In addition, despite the fact that the draft guidance is not final, IRS field agents continue to pursue enforcement actions involving tribal government-provided benefits to Indian citizens. It is irresponsible to pursue or continue enforcement actions while the IRS determines how the federal tax code should apply to Indian tribes.

To put a stop to these intrusions on tribal sovereignty and to conform with the mandates of the U.S. Constitution, I urge you to consider including the attached legislative proposal and moratorium language in any tax reform legislation that Congress considers in the coming year.

New Market Tax Credits

New Market Tax Credits are intended to promote economic development in underserved areas. Existing law limits the New Market Tax Credits application to only certain areas of Indian country. As part of Congress’s Tax Reform legislation, the New Market Tax Credits should be extended across Indian trust lands. Amendment language should provide:

“Targeted Areas include substantially underserved trust areas as defined by 7 U.S.C. sec. 936f. Trust area economies that are suffering unemployment and are dependent upon a single industry may be included in ‘substantially underserved trust areas.’ Three percent (3%) of the New Market Tax Credit appropriations shall be allocated annually to substantially underserved trust areas.”

Tax Exempt Bonds

Under the Tribal Government Tax Status Act, 26 U.S.C. sec. 7871, Congress intended to treat Indian tribes as governments consistent with the Constitution, treaties and statutes of the United States. Congress included tribal government access to tax exempt bonds for community infrastructure and economic development. In the late 1980s, Congress limited the application of tax exempt bonds for tribal governments to “essential government functions,” and this has created substantial uncertainty as to the use of tax exempt bonds for tribal government activities and infrastructure. Moreover, this provision discriminates against tribal governments by applying a limitation not applied to state or local governments. Yet, tribal governments often have substantially greater needs for tax exempt bond financing for tribal community activities and infrastructure because Indian tribes have historically been left out of infrastructure projects. The discriminatory tribal “essential government function” test should be removed from the Tribal Government Tax Status Act.

Tribal Government Pension Plans

Tribal governments provide pension plans for tribal government civil service employees, government corporation employees, and government authority employees. Recently, when Congress expressly recognized that tribal governments provide pensions for many tribal government employees, an “essential government function” limitation was applied to tribal government pension plans, but not state or local government pension plans. Here again, Indian tribes should be treated fairly vis-à-vis state and local governments and this discriminatory limitation should be repealed.

I thank to the House Ways and Means Committee for accepting this comment as part of your examination of comprehensive tax reform, and I thank you all for your consideration of the attached legislation. I look forward to working with you to achieve reasonable tax reform that respects the United States Constitution, the status of Indian tribes as governments within our federalist system, and the significant and severe unmet needs of Native Americans.

Sincerely,



A. Gay Kingman
Executive Director

cc Hon. Chuck Grassley, Senator
Hon. Tom Harkin, Senator
Hon. Deb Fischer, Senator
Hon. Mike Johanns, Senator
Hon. Heidi Heitkamp, Senator
Hon. John Hoeven, Senator
Hon. Tim Johnson, Senator
Hon. John Thune, Senator
Hon. Bruce L. Braley, Representative
Hon. David Loebsack, Representative
Hon. Tom Latham, Representative
Hon. Steve King, Representative
Hon. Jeff Fortenberry, Representative
Hon. Lee Terry, Representative
Hon. Adrian Smith, Representative
Hon. Kevin Cramer, Representative
Hon. Kristi Noem, Representative

PROPOSED GENERAL WELFARE EXCLUSION AMENDMENT

To amend the Internal Revenue Code of 1986 to codify the exclusion from gross income of general welfare programs and services provided for Indians, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled,

SEC. 1. SHORT TITLE

This Act may be cited as the “Tribal Government Services Act of 2013”.

SEC. 2. FINDINGS AND AFFIRMATIONS.

Congress finds and affirms that –

(1) The Constitution of the United States acknowledges Indian tribes as native nations, with a bilateral government-to-government relationship with the United States in the Treaty, Commerce, and Supremacy Clauses. Indian tribes are vested with inherent sovereign authority over their members and their territory.

(2) The Constitution recognizes tribal citizens as “Indians not taxed,” subject to tribal government jurisdiction in the original Apportionment Clause and the 14th Amendment. Congress granted non-citizen Indians citizenship through the 1924 Indian Citizenship Act with the stipulation that the grant of such citizenship does not impair or in any manner affect an Indian’s right to tribal or other property. In this way, Congress preserved tribal government relations with tribal citizens, at the request of tribal citizens, as part of the basic bargain for dual citizenship for tribal citizens as U.S. citizens.

(3) The United States reserved Indian reservations and lands as permanent homes for Indian tribes through treaty, agreements, statutes, and executive orders. Under reserved powers of tribal self-government, Indian tribes have a right and a duty to provide government programs and services to tribal citizens as assisted and supported by the United States. Under treaties, agreements, statutes, and executive orders, Indian tribes have a right and a duty to strive to make Indian reservations and lands “livable,” “permanent homes” for tribal citizens, now and in future generations. See 1868 Treaty with the Sioux Nation (“permanent home”); 1867 Treaty with the Sisseton Wahpeton Bands (“permanent reservation”);

(4) Such tribal government programs and services are in the general welfare interests of Indian tribes and the United States. Such tribal government programs and services are not taxable benefits to tribal citizens, but reflect the community tradition of tribal self-government that has been handed down by Indian tribes since time immemorial.

SEC. 3. EXCLUSION FROM GROSS INCOME FOR TRIBAL GOVERNMENT SERVICES AND PROGRAMS PROVIDED TO TRIBAL CITIZENS.

(a) In General.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 (relating to items specifically excluded from gross income) is amended by inserting after Section 139D the following new section:

“SEC. 139E. General Welfare Provided for Indians.

“(a) General rule

Except as otherwise provided in this section, gross income does not include the value of any qualified

Indian general welfare benefit.

“(b) Qualified Indian general welfare benefit

For purposes of this section, the term “qualified Indian general welfare benefit” means—

“(1) any housing, education, elder and disabled, transportation, or cultural and religious benefits authorized, provided or purchased, directly or indirectly, by the United States through a program, grant to, or a contract or compact with an Indian tribe or tribal organization, or through a third-party program funded by the United States,

“(2) housing, education, elder and disabled, transportation, or cultural and religious benefits provided or purchased by, or amounts to reimburse for such benefit provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, and the spouse or dependent family member of such a member,

“(3) any other housing, education (including early childhood education, after school programs, secondary and post-secondary education), elder and disabled, transportation, or cultural and religious benefit provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to such benefit authorized or provided by the Federal government to Indian tribes or members of such a tribe, and

“(4) other qualifying Indian general welfare benefits programs shall include transportation fares to public facilities; transportation, meals, and temporary lodging of a tribal family member while a family member is receiving medical care away from the reservation; assistance to individuals in exigent circumstances; costs for temporary relocation and shelter for individuals displaced from their homes; emergency assistance; special programs and services provided by the United States to Indians because of their status as Indians; and benefits directly related to provisions included in specific treaty agreements between the United States and the Indian tribe.

“(c) Definitions

For purposes of this section—

“(1) Indian tribe

The term “Indian tribe” has the meaning given such term by section 45A (c)(6).

“(2) Tribal organization

The term “tribal organization” has the meaning given such term by section 4(1) of the Indian Self-Determination and Education Assistance Act.

“(3) Dependent

The term “dependent” has the meaning given such term by section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof.

(b) Clerical Amendment.—The table of sections for such part III is amended by inserting after the item relating to section 139D the following new items:

“Sec. 139E. General Welfare Provided for Indians.”.

(c) Training.—The Secretary shall provide:

(1) training and education to IRS field agents in the field of federal Indian law and the Federal Government’s unique legal treaty and trust relationship with Indian tribes; and

(2) training of IRS field agents and training and technical assistance to tribal financial officers about implementation of this Act.

(d) Effective Date.—The amendments made by this section shall apply to tribal government programs and services made in tax years for which the period of limitation on refund or credit under Section 6511 has not expired and to such programs, services and benefits provided after the date of enactment of this Act.

PROPOSED MORATORIUM LANGUAGE

That no funds appropriated to the Department by this Act shall be available to initiate or continue enforcement actions involving the government benefits derived from programs and services provided by a federally recognized Indian tribe to the enrolled members of the tribe until the following conditions have been met: Treasury Department employees, officials, and senior executives of components and bureaus, including, but not limited to, field agents of the Internal Revenue Service, are trained in federal Indian law and the federal government's unique legal treaty and trust responsibilities to federally recognized Indian tribes; the Secretary consults with Indian tribes before issuing final General Welfare Exclusion guidance pursuant to IRS Notice 2012-75 and implementing standards for the Abuse Detection and Prevention Team program that focuses on Indian Tribal Governments pursuant to TIGTA ref no. 2013-10-018; and the Department provides training and technical assistance to tribal financial officers, IRS field agents, and other relevant Treasury, federal, and tribal officials with regard to implementation of the final guidance and standards.