

**ADVISORY COMMITTEE ON
TAX EXEMPT AND GOVERNMENT ENTITIES
(ACT)**

**Indian Tribal Governments:
Report on the General Welfare Doctrine as Applied to
Indian Tribal Governments and Their Members**

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Table of Contents

I. Executive Summary	1
II. History of Relevant Tax Law and Tax Administration	5
A. Statement of the General Welfare Doctrine	5
B. Development of the General Welfare Administrative Exclusion	6
C. Judicial Acceptance of the General Welfare Exclusion	13
D. Administration of the General Welfare Exclusion in Indian Country	14
III. Statement of the Issue from the Tribe’s Perspective	21
A. Survey of Tribal Comments to Treasury	22
B. Summary of Common Tribal Welfare Programs	24
IV. The Case for Modification of the General Welfare Exclusion as Applied to Indians	27
A. The General Welfare Exclusion Should Not Undermine a Tribe’s Inherent Power to Regulate its Internal and Social Relations	28
B. A Tribal Definition of Need Is Warranted	31
V. ACT Recommendations	43
A. Create a Rebuttable Presumption in Favor of Tribal General Welfare Programs	43
B. Modify IRS Approach to “Disguised” or “Deemed” Per Capita Payments under IGRA	45
C. Treasury Level Advisory Committee/Undersecretary of AI/AN Affairs/Tribal Consultation Policy Amendment	45
VI. Summary	49

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I. Executive Summary

This report addresses an ever-increasing and evolving area of controversy between tribes and the Internal Revenue Service (IRS) involving the taxation of benefits provided by tribal governments to their members. The issue is whether payments made by the tribal government to its members under a tribal program designed to promote the general welfare of the tribal citizens is includable in the income of those recipients. The controversy arises commonly in the context of information reporting audits of tribes by the Internal Revenue Service (IRS). This context itself presents a problem for both tribes and the IRS as the audits are, by nature, case by case and resource intensive and do not result in clear guidelines that all tribes may follow to determine the taxability of tribal benefit programs. Further, in most instances, the tribal benefit does not fall within a statutory exemption from taxation, so taxation of the benefit is determined by a rather imprecise administrative rule of exemption called the “General Welfare Doctrine” (GWD) which provides that payments made by federal, state, local, and Indian tribal governments under a legislatively-provided social benefit program for promotion of the general welfare are excludable from gross income.

Complicating the matter even more for benefits paid by tribal governments is the fact that the administrative exemption under the General Welfare Doctrine has evolved largely from rulings related to benefits provided by state and local governments to their citizens. The paradigm of state and local governments and their role and relationship to their citizens does not often provide a meaningful or instructive model in determining whether tribal programs serve the “general welfare” of tribal citizens and, as such, are exempt from taxation. American Indian tribes are unique in the American political landscape. Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Tribal governments have a very different relationship and role with respect to tribal citizens than state and local governments have to their citizens. Because tribal property (land, resources, and certain tribal funds) is held communally, decisions about allocation of resources are vested in the tribe’s government. And, historically, the tribe’s government is meant to ensure that the resources of the tribe are preserved for the members, that culture and tradition is maintained and fostered, and that the individual needs of the members are met from these resources. Accordingly, tribal benefit programs are as diverse as are the needs of the more than 566 federally recognized tribes and their members. Predictably, most tribal benefit programs do not fit squarely within the contours of a General Welfare Exclusion which has been defined largely by the types of programs a state and local government would customarily provide to its citizens.

For Indian tribal citizens from tribes that conduct gaming activities, another limiting condition for the general welfare exemption is found in Section 11(b)(2)(B) of IGRA which provides that net revenues from tribal gaming must be used for limited purposes, which include (among other things) to provide for the general welfare of the Indian tribe and its

members. 25 U.S.C. 2710 (b)(3)(D), Indian Gaming Regulatory Act (“IGRA”). Uses of the net gaming revenue are set forth by the tribe in a Revenue Allocation Plan that must be approved by the U.S. Secretary of the Interior. Gaming revenues not used for tribal operations and the general welfare of the members, and which are distributed “per capita” to the tribal citizens, are expressly subject to tax as confirmed by IGRA. It is not uncommon for the IRS to assert that all forms of cash or in-kind benefits paid to a tribal citizen constitute a deemed per capita payment of gaming net revenues. This presents a troubling issue for tribes whose allocation of net gaming revenues to the general welfare of the members has already been approved by the Secretary of the Interior, but the IRS proposes to tax these general welfare benefits as if they are instead “per capita” payments.

In response to ongoing concern of tribes that the application of the General Welfare Doctrine to tribal programs lacks clarity, consistency, and certainty, the Department of the Treasury recently sought comments from tribes to discuss the application of the administrative exemption to Indian tribal government programs that provide benefits to tribal citizens. Comments were invited describing actual or proposed programs and how the exclusion applies or should apply to these programs and benefits. Although the comment period ended officially on March 15, 2012, the Department of the Treasury and IRS have indicated that input from the ACT and continuing input from tribes will facilitate future guidance in this area.

Accordingly, the ACT report is meant to advance the conversation between the IRS and tribes and to facilitate future guidance. The ACT acknowledges that this is a significant area of controversy, with many divergent views among tribes and a vast array of different tribal programs among the 566 federally recognized tribes. The ACT report does not purport to represent the views of all the tribes and cannot reasonably encompass all the possible permutations of the issue. Thus, to serve the resolution of this area of controversy, the ACT report will:

- present a statement of the General Welfare Doctrine and its development as well as the history of the relevant tax law and the exclusion’s administration in Indian country;
- describe the tribal perspective on the lack of clarity of the General Welfare Doctrine, present a survey of the comments received in response to Notice 2011-94, and provide a sampling of tribal programs and services that serve the general welfare of the tribal citizens and tribal communities;
- describe the unique role of tribal governments, as well as some of the history and traditions of tribes and their governments in order to make the case for a different administrative exemption rule to apply to tribal benefit programs; and

- make recommendations to:
 - (1) develop a process which permits tribes to take affirmative steps to develop their general welfare programs in a way that will provide either a safe-harbor or rebuttable presumption to shift the burden of proof to the IRS to establish that the particular tribal program has not met the General Welfare Exclusion, e.g., a tribal government may codify its tribal General Welfare Doctrine or approve policies by resolution;
 - (2) modify the IRS approach to “disguised” or “deemed” per capita payments under IGRA; and

[We found the historical record and contemporaneous comments from tribes emphasizing the importance of the traditional and customary tribal practice-of-giving starkly contrasted the lack of an administrative capacity within the Department of the Treasury and the Service that would have enabled an understanding of the significant harm visited upon tribal societies by the indiscriminate denial of a General Welfare Exclusion for tribes. We, therefore, are compelled to exceed our mandate, otherwise limited to a review of and recommendations for changes to tax policy and administration, by offering two additional recommendations. Recommendations are: first -- for the amendment of the Department/Service tribal consultation policy to include specific language requiring prior consultation with federally recognized American Indian and Alaska Native tribes; and second -- for the development of a federal-tribal advisory committee, as well as for the addition of a tribal affairs office. The purpose would be to facilitate federal-tribal discussions and resolve problems before they arise in the field.]

- (3) amend the Department/Service tribal consultation policy; create a Treasury/IRS Secretary’s Tribal Advisory Committee (STAC) which would (among other things) serve as a forum for tribes and Treasury/IRS to discuss issues and proposals for changes to Treasury/IRS regulations, policies and procedures; and establish the position of Undersecretary for Tribal Affairs.

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II. History of Relevant Tax Law and Tax Administration

A. Statement of the General Welfare Doctrine

Internal Revenue Code (Code) Section 61 provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Tribal income not otherwise exempt is includable in the gross income of the Indian tribal citizen when distributed or constructively received by them. Rev. Rul. 67-284.¹

For individual Indians, there are some specific exceptions to taxation. Statutory exclusions include income from the exercise of fishing rights (26 U.S.C. § 7873) and the receipt of per capita distributions of certain funds held in trust by the Office of Special Trustee (BIA) under 25 U.S.C. §§ 1401-1408. A common law exclusion applies to income of an Indian allottee derived directly from his/her trust land. *Squire v. Capoeman*, 351 U.S. 1 (1956). Finally, there may be specific types of income that are exempt by treaty.

Further, it is generally accepted that basic government services are typically excluded from income. These include: education, public safety, court system, social services, public works, health services, housing authority, parks and recreation, cultural resources, and museums. See Technical Advice Memorandum (TAM) 200035007. Where, in lieu of these general services, payments are made by federal, state, local, and Indian governments to individuals and families, a particular administrative exception to the general rule of broad includability of income has developed through IRS rulings and determinations, called the “General Welfare Doctrine” (GWD) or “General Welfare Exclusion” (GWE).

Under the General Welfare Doctrine, payments made by federal, state, local, and Indian tribal governments under a legislatively-provided social benefit program for promotion of the general welfare are excludable from gross income. This is a seemingly broad statement of exclusion for government payments that promote the general welfare of its citizens. However, the IRS has further refined the circumstances to which the doctrine is limited:

When a governmental unit makes payments to or for the benefit of an individual or family, in the absence of a disaster, governmental payments made without regard to financial status, health, educational background, or employment status do not qualify under the General Welfare Exclusion because they are not based on “need.”

See Rev. Rul. 76-131²; and Rev. Rul. 85-39.³

¹ 1967-2 C.B. 55.

² 1976-1 C.B. 16.

³ 1985-11 C.B. 21.

Based on this definition, the parameters of the General Welfare Exclusion are as follows:

- 1) the exclusion applies only to individuals or families, not businesses. (See Notice 2003-18);⁴
- 2) the payment must be made from a governmental general welfare fund for a legislatively-provided social benefit program;
- 3) the payment cannot be for services provided by the recipient; and
- 4) the payment must be for the promotion of the “general welfare.”

Rev. Rul. 82-106.⁵ The basis of need is determined by financial status, health, educational background or employment status, or on the basis of a disaster.

As we show in this report, establishing the requisite “need” has been a source of contention and confusion for tribal governments, as well as all governments. It is helpful to review some of the historical IRS rulings in this area to ascertain where some of the issues arise and to begin to explore options for resolving them.

B. Development of the General Welfare Administrative Exclusion

The General Welfare Exclusion was first enunciated in the mid-twentieth century. Among the first rulings is Revenue Ruling 57-102 which provided that a state’s assistance payments to blind persons made pursuant to a legislative act were not includable in income.⁶ The doctrine was refined further in the mid-1960’s with several rulings that concerned taxability of benefits under work-training programs. Revenue Ruling 63-136 provided that a state’s payments to train unemployed workers under a federal program, including payments for transportation and subsistence in the case of persons whose training was provided in facilities not within commuting distance of their regular place of residence, were excludable from income.⁷ However, work training programs for unemployed workers that involved on-the-job training were not excludable, because the payments were considered by the IRS to be tantamount to compensation for services even though the services embodied some degree of training. See Rev. Rul. 65-139;⁸ clarified by Rev. Rul. 66-240.⁹ Later in 1971, the IRS modified its position again on the issue of payment for services in a work-training context, stating that payments made to welfare recipients in a work-training program would not be includable in income, except to the extent the payments under the work-training

⁴ 2003-1 C.B. 699.

⁵ 1982-1 C.B. 16.

⁶ 1957-1 C.B.15.

⁷ 1963-2 C.B.19.

⁸ 1965-1 C.B. 31.

⁹ 1966-2 C.B. 19.

program may exceed the amount they would have otherwise received in the form of public welfare benefits. Revenue Ruling 71-245.¹⁰

Ruling areas evolved outside of work assistance payments to general welfare programs that addressed other types of need. For instance, Revenue Ruling 74-74¹¹ allowed tax-free reimbursements from the state of New York to crime victims who would suffer “serious financial hardship” due to their loss of earnings and expenses incurred by reason of their injury (i.e., financial need). In Revenue Ruling 74-205,¹² the IRS ruled that replacement housing provided by a government entity to persons displaced by certain federal laws were excludable from income. The payments were specifically made to acquire “decent, safe and sanitary dwellings of modest standards sufficient in size to accommodate the displaced owners, and reasonably accessible to public services and places of employment,” (i.e., not explicitly financial need).

Evolution of the doctrine by category of “need” can be summarized as follows:

1) alleviating unemployment through direct payments and job training; i.e., “employment status;”

- Certain payments made to a participant in a program administered and financed by a public agency for the purpose of compensating for or alleviating unemployment have been held to be excludable from gross income, as long as the payment is not for services rendered. For example, Rev. Rul. 70-280¹³ holds that payments on account of unemployment paid by a state agency out of funds received from the Federal Unemployment Trust Fund are not includable in the gross income of the recipients.
- Similarly, Rev. Rul. 63-136¹⁴ holds that payments under the Area Redevelopment Act and the Manpower Development and Training Act of 1962 are intended to aid the recipients in their efforts to acquire new skills that will enable them to obtain better employment opportunities. As such, the payments fall in the same category as other unemployment relief payments made for the promotion of the general welfare, and thus, are not includable in the recipients’ gross income.
- On the other hand, if the payments are in the nature of compensation for services rendered, they are included in the gross income of the recipient. Thus, Rev. Rul.

¹⁰ 1971-2 C.B. 76.

¹¹ 1974-1 C.B. 18.

¹² 1974-2 C.B. 20.

¹³ 1970-1 C.B. 13.

¹⁴ 1963-2 C.B. 19.

65-139,¹⁵ as clarified by Rev. Rul. 66-240,¹⁶ holds that payments made to enrollees in certain work-training programs established under Title 1-B of the Economic Opportunity Act of 1964,¹⁷ are compensation for services and are includable in gross income. That work-training program provided useful work experience opportunities for unemployed men and women between the ages of 16 and 22 through participation in state and community work-training programs, so that their employability could be increased or their education resumed or continued.

- The determination as to whether payments under work-training programs are includable in a participant's gross income rests on whether the activity for which the payments are received is basically the performance of services or is only participation in a training program that promotes the general welfare. If the activity engaged in is basically the performance of services, the payments are compensation for services rendered, and are includable in the gross income of the recipient. Conversely, if the activity amounts only to participation in a training program, the payments are in the nature of relief payments made for the promotion of the general welfare and are excludable from the gross income of the recipient. Rev. Rul. 75-246.¹⁸
- Rev. Rul. 71-425¹⁹ holds that payments made by a state welfare agency in lieu of (and in amounts no greater than) the normal relief allowance, to participants in work-training programs under Title V of the Economic Opportunity Act of 1964, are not includable in the gross income of the recipient and are not wages for employment tax purposes, since the payments are measured by the personal or family need of the recipient rather than the value of any services performed.

The foregoing rulings identify a few parameters for the exclusion. Foremost is the limitation that the payment cannot be, principally, for services rendered. And, welfare programs directed at alleviating unemployment are specifically countenanced by the General Welfare Exclusion. Finally, the need can be expressed in terms of a household and not just the need of an individual recipient.

2) addressing financial need, i.e. “financial status;”

Interestingly, some of the following financial need rulings have articulated a specific measure for determining financial need, while some do not. This leaves some room

¹⁵ 1965-1 C.B. 31.

¹⁶ 1966-2 C.B. 19.

¹⁷ Pub. L. 88-452, 45 U.S.C. 2701.

¹⁸ 1975-1 C.B. 24.

¹⁹ 1971-2 C.B. 76.

for subjectivity in determining the requisite level of financial need. In that regard, the requisite financial need is not necessarily the lowest denominator, such as poverty level, but can be measured according to median income levels.

- Rev. Rul. 74-153²⁰ addresses payments made by a state to adoptive parents who use the payments for support and maintenance of their adoptive child. Payments may be made for any child in the local department's foster care program upon the placement of that child in an adoptive home that meets all other eligibility tests as an adoptive home except for the ability to provide financially for an adoptive child. The amount and duration of the payments are based upon a written agreement between the adoptive parents and the local Department of Social Services. The payments are disbursed from foster care funds at a maximum rate of three-fourths of the foster care rate for board and clothing.

Note, in the above ruling, the level of financial "need" is not defined as low-income or otherwise. The purpose of the payments were to further "the social welfare objectives of the state." The IRS did not require a specific showing that each recipient met some defined level of financial need.

- Rev. Rul. 74-205²¹ held that a community development program providing relocation payments and assistance for displaced individuals and families, as authorized under the Housing and Urban Development Act of 1968, and the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, were excluded as GW payments. These payments were provided in addition to the replacement acquisition costs and as a condition of receiving the additional assistance payments, a displaced owner only had to purchase and occupy a replacement dwelling within one year of receiving the payments. The purpose of the 1968 Act was to further implement the national goal of providing "a decent home and a suitable living environment for every American family."
- Rev. Rul. 75-271.²² Mortgage assistance payments in the form of interest subsidies under the National Housing Act. Interest subsidy amounts are determined by HUD based on a showing of "need," which is measured by the family household income.

In the above ruling, need is measured not by the individual, but by family household needs.

²⁰ 1974-1 C.B. 20.

²¹ 1974-2 C.B. 20.

²² 1975-2 C.B. 23.

- Rev. Rul. 76-373²³ addresses relocation costs paid to families displaced by urban renewal project under the Housing and Community Development Act of 1974. The primary objective of the Act was “the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.”

Development of viable communities and economic opportunities is the defining purpose for the foregoing General Welfare Exclusion, with only moderate financial need as the measure.

- Rev. Rul. 76-395.²⁴ Home rehabilitation grants, under the same Housing and Community Development Act of 1974, were made by a city to families whose annual income did not exceed \$5,000.
- Rev. Rul. 78-170²⁵ excludes utility assistance payments made by Ohio to low-income (total annual income of less than \$7,000) elderly or disabled residents.

3) **education assistance payments, i.e., “educational background;”**

There have been only a few private letter rulings specifically applying the General Welfare Doctrine to exclude educational assistance, probably because 26 U.S.C. § 117 may otherwise exempt the education benefits. Barring an exclusion under Code Section 117, the following rulings establish that education assistance payments may serve a general welfare purpose, without regard to a showing of individual financial need.

- Private Letter Ruling (PLR) 8725052. The Department of Agriculture provided education assistance payments to members of a family whose farm or ranch has been terminated or in financial crisis. Eligibility was based on financial need and directed only to farm families.
- Technical Advice Memorandum (TAM) 200035007.²⁶ Education benefits provided by a tribe in the form of pre-school, tutoring, secondary educations assistance for learning disabled and a summer youth program. In that case, direct distributions were not made to the member. The education program was administered without regard to financial need. The IRS concluded the tribe was providing a basic government service of educating its members.

²³ 1976-2 C.B. 16.

²⁴ 1976-2 C.B. 16.

²⁵ 1978-1 C.B. 24.

²⁶ 2000 TNT 172-13.

- PLR 200409033. This ruling involved a tribal education program. The program provided educational benefits in the form of books, supplies, transportation, tuition, room and board, and day care. There were two classes of recipients of these educational benefits: members whose income was at or below the national family median income level and those whose income may be greater than the median. The IRS ruled that the benefits paid to the lower-income members whose income was below the median constitute general welfare payments, while the members above that level could not exclude the education benefits from income unless the benefits otherwise qualified under 26 U.S.C. 117. Notably, the requisite showing of financial need was not “poverty,” but a median income level.

4) special needs related to “health;” and

There are few rulings for this area of “need.” However, these rulings point toward a more subjective measure, and seeming flexibility, in the application of the General Welfare Exclusion. In one, the state’s judgment as to what would be considered sufficient financial hardship was not upset by the IRS. In the other, implicit in the ruling is a determination that there is a public benefit in providing care to persons whose life circumstances or conditions warrant special assistance, tax-free. A showing of financial need under those circumstances is not necessary to excluding the benefit from income under the General Welfare Doctrine. These concepts are important to evaluating the General Welfare Doctrine as applied to tribes. That is, the judgment of the tribal government in determining the requisite level of financial need for its member benefits should be respected by the IRS much like the deference given in Rev. Rul. 74-74 below. Further, there are numerous conditions and circumstances afflicting tribes and their members that warrant special assistance, and financial need is not the only such need.

- Rev. Rul. 57-102.²⁷ This is one of the first exclusion rulings under the General Welfare Doctrine. The IRS found that a legislative program provided benefits to blind persons was a social welfare program whose benefits would not be included in the income of the recipients.
- Rev. Rul. 74-74.²⁸ Under a special program for crime victims, New York state provided support to those victims who suffered out-of-pocket losses or loss of work by reason of personal physical injury inflicted during a crime. The award was limited to \$100/week, or \$15,000 in aggregate, and was payable only to crime victims who would otherwise suffer “serious financial hardship” without the

²⁷ 1957-1 C.B. 26.

²⁸ 1974-1 C.B. 18.

award. The level of demonstrable financial hardship was not defined, and the award left to the judgment of a board appointed by the state. These awards were excluded from income by the IRS because they were in the “interests of the general public,” citing Rev. Rul. 63-136.

5) **disaster relief.**

Governmental payments to help individuals and families meet disaster-related expenses were initially evaluated for exclusion under the General Welfare Doctrine. Since 2002, there has been a statutory basis for excluding disaster relief payments under 26 U.S.C. § 139. The General Welfare Exclusion still may apply for payments outside the ambit Code Section 139. In this context of disaster relief, the general welfare rulings again contemplate a broader view of need beyond financial. Some of the pertinent rulings on General Welfare Exclusion provide as follows:

- Rev. Rul. 76-144.²⁹ This ruling holds that grants made under the Disaster Relief Act of 1974 to help individuals or families affected by a disaster meet extraordinary disaster-related necessary expenses or serious needs in the categories of medical, dental, housing, personal property, transportation, or funeral expenses (and not in the categories of nonessential, decorative, or luxury items) are excluded from gross income under the General Welfare Exclusion. In this context, because “need” is not defined in terms of financial need, the General Welfare Exclusion applies equally to all residents of an affected area regardless of their income levels. See also Rev. Rul. 2003-12³⁰ (payments for unreimbursed reasonable and necessary medical, temporary housing, and transportation expenses incurred as a result of a Presidentially-declared disaster).
- Rev. Rul. 98-19.³¹ Relocation payments made to an individual moving from a flood damaged area are not includable in income. Payments were made pursuant to the 1997 Emergency Supplemental Appropriations Act for Recovery from Natural Disasters (Supplemental Act).
- Chief Counsel Advice (CCA) 200022050. Payments from the state to assist low-income homeowners in replacing, repairing, or rehabilitating their flood-damaged homes are not includable in the homeowners’ gross incomes.

²⁹ 1976-1 C.B. 17.

³⁰ 2003-1 C.B. 283.

³¹ 1998-1 C.B. 840.

C. Judicial Acceptance of the General Welfare Exclusion

Courts have had very little to say on the subject of the General Welfare Exclusion. The Tax Court has reviewed cases for a General Welfare Exclusion only a few times. In *Bailey v. Commissioner*, 88 T.C. 1293, 1299-1301 (1987), the court held that a facade grant, paid to a building owner as part of an urban renewal initiative, was not based on a showing of need and, therefore, was not excluded under general welfare exception (although the grant was excludable from income under a different test). The court relied on many of the above-cited IRS rulings in support of its determination that the General Welfare Exclusion requires a showing of some type of “need.”

In *Graff v. Commissioner*, 74 T.C. 743 (1980), affd. per curiam 673 F.2d 784 (5th Cir. 1982), the issue involved the National Housing Act, which provides that qualifying sponsors of low-income housing projects are entitled to interest reduction payments by the federal government on mortgage loans taken to acquire the housing. The interest reduction payments enabled the sponsor to charge lower rents to the tenants. Thus, the tenant was intended to be the ultimate beneficiary of the interest reduction payments, and the benefit received by him is, in the nature of welfare, not taxable to him. 74 T.C. at 753-754. However, the interest payments to the sponsors were subject to tax.

In *Bannon v. Commissioner*, 99 T.C. 59 (1992), the court confirmed that payments made under a state of California welfare program to provide in-home supportive service to its disabled citizens are not income to those recipients. However, the disabled person may choose to hire support services with those funds, and the service provider is subject to tax on any of the funds paid to him or her. 99 T.C. at 63. Only the persons intended as the “ultimate beneficiaries” of the government subsidy can be said to have received a welfare benefit excludable from tax. *Id* (citing *Graff*). See also *Harper v. Commissioner*, T.C. Summary Opinion, 2011-56.

The Supreme Court has not addressed this tax exclusion doctrine directly, but has nodded to it. Referring to a New York state low-income housing subsidy, the Supreme Court acknowledged the doctrine in dicta in a case in which the ultimate question did not involve the presence of taxable income under the Code, but instead involved the possibility of profits under the securities laws: “In a real sense, it no more embodies the attributes of income or profits than do welfare benefits, food stamps, or other government subsidies.” *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 855 (1975). This ruling acknowledges that payments based on financial need are tantamount to government welfare payments and, as such, do not constitute income to the recipient.

D. Administration of the General Welfare Exclusion in Indian Country

1. Audits of Tribal General Welfare Benefit Programs

The issue as to whether certain payments made by a tribal government to its members are excludable under the General Welfare Doctrine arises commonly in the context of an information return audit of the tribal government. 26 U.S.C. § 6041(a) and § 1.6041-1(a)(1)(i) of the Income Tax Regulations provide, with some exceptions, that all persons engaged in a trade or business and making payment in the course of such trade or business to another person of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income, aggregating \$600 or more in the taxable year, must file an information return with the Internal Revenue Service. By Code Section 6041(d), the payor is required to furnish an information statement to the payee. Treas. Reg. § 1.6041-1(d)(2) (payor reports on Forms 1096 and 1099). The Code Section 6041 information reporting requirement applies to payments made also by governments. Accordingly, unless an exclusion from income applies under the General Welfare Doctrine (or some other statutory or common law exclusion), the IRS will find that distributions from tribal governments to their members are subject to the requirements of filing Forms 1099 (assuming the \$600 aggregate threshold was met).

A distribution to members could derive from many revenue sources, such as:

- a. distributions of profits from Class II and Class III gaming activities (“per capita” payments);
- b. profits from a tribal business other than a Class II or Class III gaming operation;
- c. interest income on investments;
- d. rental payments from improvements on tribal lands; and
- e. revenue sharing programs.

In addition to information reporting, the IRS may also audit the tribal government for its compliance with Form 945 reporting, which relates generally to withholding requirements under 26 U.S.C. 3402(r) on per capita distributions of profits from Class II and Class III gaming activities. Under the Indian Gaming Regulatory Act (IGRA), net revenues from any Class II or Class III gaming activities conducted or licensed by an Indian tribe may be used to make per capita³² payments to members of the tribe. 25 U.S.C. § 2710(b)(3)(D). One of

³² The IGRA guidelines define “per capita” payments as those payments made or distributed to all members of the tribe or to identified groups of members which are paid directly from the net revenues of any gaming activity. 25 CFR, Ch. 1, Part 290.

the four conditions for making such distributions is for the tribe to notify the recipient that the per capita is subject to federal tax and to withhold such tax when certain thresholds are met. *Id.*

The Internal Revenue Manual (IRM) at Chapter 4.88.1 is devoted to audits of Indian Tribal Governments. In this section of the IRM, the IRS describes how the agent should determine whether disbursements to members are exempt under the General Welfare Doctrine. The pertinent part of the IRM provides:

(3) Per capita payments do not include benefits for special purposes or programs, such as social welfare, medical assistance, or education. Although a tribal citizen may receive benefits from net revenue for social welfare, medical assistance, or education, the tribe's designation of these payments is not determinative of their tax status.

(4) Under the General Welfare Doctrine, certain need-based benefits are not taxable. Although there is no express statutory exclusion for a welfare benefit, government disbursements promoting the general welfare of the tribe are not taxable. Thus, a tribal citizen may receive non-taxable general welfare payments from the tribe. *Bannon v. Commissioner*, 99 T.C. 59 (1992); *Bailey v. Commissioner*, 88 T.C. 1293 (1987). See also Rev. Rul. 2005-46, Rev. Rul. 2005-2 C.B.120 (Payments to individuals by governmental units under legislatively-provided social benefit programs for the promotion of the general welfare are excluded from gross income under the General Welfare Exclusion).

(5) To qualify under the General Welfare Exclusion, payments must:

- a. be made from a governmental fund;
- b. be for the promotion of the general welfare (i.e., generally based on individual or family needs); and
- c. not represent compensation for services.

(6) A key consideration is that the General Welfare Doctrine requires an individual to establish need.

IRM 4.88.1.7.1.

This last point in the IRM, requiring a showing of individual need, appears contrary to a number of General Welfare Exclusion rulings previously cited. The General Welfare Exclusion permits tax-free benefits upon a showing of need for a family household, not each individual who may receive the general welfare benefits in that household. See, *e.g.*, Rev. Rul. 75-251.

2. IRS Rulings on Tribal General Welfare Programs

There is a paucity of rulings concerning the General Welfare Exclusion for tribal government welfare programs. The first ruling, involving Indian tribes and their members, was Revenue Ruling 57-233³³ holding that grants made by the United States to members of tribes for training and education are considered non-taxable gifts. A decade later, in Revenue Ruling 68-38,³⁴ the IRS approved, as non-taxable, payments to tribal citizens under a job-training program pursuant to state and federal programs; the program was considered effectively equivalent to the type of program approved in Rev. Rul. 63-136, as a general welfare payment.

Nearly fifteen years later, the IRS issued Rev. Rul. 77-77.³⁵ The ruling involved a grant program where individual Indians of various tribes received non-reimbursable grants under the Indian Financing Act of 1974, Pub. L. No. 93-262 (the “Act”). Title IV of the Act, entitled *Indian Business Grants*, was established by Congress for the purpose of stimulating and increasing Indian entrepreneurship and employment by providing equity capital through non-reimbursable grants made by the Secretary of the Interior to Indians and Indian tribes to expand profit-making, Indian-owned, economic enterprises on or near reservations. In determining the grants were excluded from income, the IRS relied on its previous rulings at Rev. Rul. 74-205³⁶ and Rev. Rul. 75-271³⁷ relating to mortgage assistance payments made on behalf of low-income homeowners under the National Housing Act. The ruling acknowledges a general and overall economic need of Indian tribes to expand economic activity on or near the reservation. This is an important acknowledgment that can and should be sufficient predicate for many tribal general welfare programs, beyond even the context of business grants.

In addition, the special circumstances relating to the trust status of tribal property can also serve as a rational basis for exempting tribal general welfare benefits. For instance, the IRS ruled that a business grant program designed by an Indian tribal government to stimulate the creation of reservation-based business enterprises was an exempt general welfare program. PLR 199924026 (March 19, 1999). In that case, a tribe made loans to fund start-up businesses by members because they could not receive traditional commercial loans. The IRS concluded that there was a proven need to subsidize startup businesses due to lack of third-party funding and, thus, the tribal grants were exempt from member income. This particular tribal reservation suffered high unemployment rates and lack of access to capital, which were factors supporting the conclusion that the payments were excludable under the General

³³ 1957-1 C.B. 60.

³⁴ 1968-1 C.B. 446.

³⁵ 1977-1 C.B. 11.

³⁶ 1974-1 C.B. 20.

³⁷ 1975-2 C.B. 23.

Welfare Doctrine. Similarly, in PLR 200336030, the IRS addressed a tribal housing assistance program that was modeled after the federal HUD program. The program gave priority to elderly tribal citizens, emergency situations involving health or safety hazards, and applicants with children. HUD-type programs essentially operate as an interest subsidy; and housing assistance, in the form of interest-free loans, can qualify as grants if based on financial need. Citing, Rev. Rul. 76-395.³⁸ Among the needs identified was the lack of conventional home financing for new construction because of limitations on creditor's rights and remedies on Indian trust lands. Both of these rulings identify circumstances unique to tribes, not the least of which is a pervasive need for economic development throughout Indian country and lack of access to capital. Yet, as discussed below, we see little acknowledgment of these special needs when the IRS reviews particular tribal general welfare programs to determine whether they are exempt from income.

As noted previously, educational assistance from tribes is the subject of some of the more recent IRS rulings. TAM 200035007 addresses tribal education programs administered without regard to financial need. The IRS acknowledged the tribe was providing a basic government service of educating its members and the benefits were, therefore, not includable in the recipient's income. In seeming contradiction to its 2000 ruling, the IRS ruled in a private letter ruling in 2004 that educational assistance payments from tribally chartered corporation for qualifying tribe members, with an income below the national family median income level, qualified for exclusion under the General Welfare Doctrine, but members whose income was above that level were required to include the education assistance payment in their gross income (unless the benefits otherwise qualified for exclusion from income under Code Section 117). PLR 200409033.

Other later rulings address certain housing assistance payments from tribes. In one such program, a tribe addressed the problem with a substantial number of its members who lived in inadequate or substandard housing. PLR 200336030 (Jun. 6, 2003). The tribe developed a housing assistance program modeled after HUD programs. The tribal housing benefits consisted primarily of loans in amounts up to \$80,000, 75% of which could be forgiven. This program qualified as a nontaxable general welfare program. See also, PLR 200632005 (tribe's housing grant program provided healthy, safe, habitable housing that could not be adequately met through other means). These are programs directed at lower income families and individuals, but also address a tribal government's interest in developing viable reservation communities by providing decent housing and a suitable living environment. The latter purpose is not measured exclusively on the basis of an individual's financial means.

As the above ruling suggests, it is a legitimate government purpose to promote a healthy living environment and sustainable *communities*. General welfare programs, which address

³⁸ 1976-2 C.B. 16.

community needs, have been acknowledged by the IRS to be exempt from taxation. See, *e.g.*, Rev. Rul. 75-271. Likewise, Congress appears to acknowledge that it is within the province of a tribal government to determine what community needs are essential. The Essential Families statute 25 U.S.C. 4131(b)(3) provides that a tribe may determine “the presence of the family on the Indian reservation ... *is essential* to the well-being of Indian families...” 24 C.F.R. § 1000.110(f) provides the income eligibility requirements “do not apply to non-low-income Indian families *which the [tribe] has determined to be essential* to the well-being of the Indian families residing in the housing area.” [emphasis added] The only criterion stated is that of “reasonableness” in that “...the need for housing for the family cannot reasonably be met without such assistance.” The Exception to Low-Income Requirement statute 25 U.S.C. 4131(b)(2)(A) only requires “...a need for housing for those [over income] families that cannot reasonably be met without that assistance” as the standard for approval. (Note: this statute is cited for illustrative purposes only and has not, as yet, been promulgated as regulation and is currently unavailable to tribes).

3. IRS Rulings Do Not Provide Clear Guidance

The above-cited private letter rulings provide little guidance to tribes for the simple and sufficient reason they are non-precedential and limited only to the facts of those cases. From a tax policy and tax administration concern, this results in lack of “fair notice” of IRS positions. Moreover, the rulings articulate, seemingly, conflicting views of the General Welfare Doctrine — for instance: a view that endorses a financial-needs test (*e.g.*, PLR 200409033) versus a view that endorses a broader application of general welfare services that a government may provide regardless of financial need (TAM 200035007, Rev. Rul. 57-102); or, a view that requires a showing of individual need (IRM 4.88.1.7.1) versus a view that allows need to be measured on an aggregate showing for the family household. (Rev. Rul. 75-251.)

Another complicating factor lies in the fact that the General Welfare Doctrine has evolved largely from rulings that address state and local government programs, not tribal programs. Not infrequently, tribal programs differ significantly from those customarily provided by state and local governments. Thus, existing state and local government rulings do not apply neatly to tribal programs. For the many reasons enumerated below, with respect to tribal culture and history, tribal governments establish many programs that are not based upon individual income. Programs to preserve tribal traditions, for example, must be made available to all tribal citizens and have little if anything to do with individual income. Tribal programs to promote self-determination, economic development, and employment on reservation, such as the business grant program approved in Revenue Ruling 77-77 and Private Letter Ruling 199924026, are based on community needs rather than on individual income.

Another problem lies in the fact that the tribes receive unequal treatment in the application of the General Welfare Exclusion. That is, the audit outcomes among tribes can vary significantly depending on the type of general welfare program under scrutiny, the representative involved, the IRS agent involved, and so on. Not uncommonly, there are varying interpretations by the IRS agents, from case to case, as to the requisite showing of “need,” with many interpretations narrowing to require a showing of individual financial need. Clearly, the General Welfare Exclusion is not so narrow, but more to the point, the interpretations do not consider the unique circumstances of the tribe and the particular general welfare needs being addressed by a particular tribal program.

Disparate and uncertain application of the General Welfare Exclusion is, of course, unacceptable to both the IRS and the tribes as it undermines effective tax administration and the ability of a tribe to manage its internal affairs.

4. Special Problems Concerning Application of the General Welfare Exclusion to Gaming Tribes

Code Section 3402(r) adds a complicating feature to audits of tribal governments that is not present in audits of state and local governments. As it relates to their respective general welfare programs, tribes with gaming operations appear to receive different treatment than states with lottery operations. Under the Indian Gaming Regulatory Act (“IGRA”), gaming revenues not used for tribal operations and the general welfare of the members, and which are distributed “per capita” to the tribal citizens, are expressly subject to tax. 26 U.S.C. § 3402(r) and 25 U.S.C. § 2710 (b)(3)(D). Code Section 3402(r) imposes a federal withholding tax obligation on “any person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenue of any Class II or Class III gaming activity conducted or licensed by the tribe.” There is no corollary to this statute for a state’s use of lottery revenues for the benefit of its citizens.

Pursuant to Section 2710(b)(3) of the IGRA, an Indian tribe may use net revenues from gaming to make per capita payments to members of the Indian tribe, but only if the following requirements are met:

- (A) the Indian tribe has prepared a plan to allocate revenues to authorized governmental or charitable uses;
- (B) the plan is approved by the BIA as adequate, particularly with respect to funding of tribal governmental operations and programs and promotion of tribal economic development;
- (C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved; and

- (D) the per capita payments are subject to federal taxation; and the tribes notify members of such tax liability when payments are made.

See 25 U.S.C. § 2710(b)(3).

Some tribes choose not to make per capita payments. For those that do make per capita payments, the IRS regularly asserts that purported “general welfare” distributions in cash or in-kind to a tribe’s members constitute disguised or deemed “per capita” payments under IGRA. As such, the IRS asserts that the distribution is subject to tax withholding under Code Section 3402(r) if a general welfare exemption does not clearly apply.

This appears to be a distortion of IGRA’s intent. Although the statutory language of Code Section 3402(r) does not explicitly limit its reach to per capita distributions of net gaming revenue, the context of the provision’s enactment suggests that it was intended to apply only to such payments and not to amounts paid to tribal citizens through governmental benefit programs. The Senate Finance Committee described, then current, the law governing the payment of per capita payments as follows:

Net revenues from certain gaming activities conducted or licensed by an Indian tribe may be used to make taxable distributions to members of the Indian tribe. The tribe must notify its members of the tax liability at the time the payments are made. 25 U.S.C. 2710(b)(3) and (d)(1). The tribe is not required to withhold on such payments except to the extent backup withholding rules apply under Code Section 3406.

S. Rep. No. 412, 103rd Cong., 2nd Sess. (1994). See also H. Rep. No. 826, Part 1, 103rd Cong. 2d Sess. (1994), reprinted in 1995-1 C.B. 250. While neither the Internal Revenue Code nor the legislative history of Code Section 3402(r) defines the term “taxable distribution,” the Service’s broad interpretation of Code Section 3402(r) results in unequal treatment among tribes (gaming and non-gaming tribes, or per capita and non-per capita tribes) and between tribal governments and state governments.

III. Statement of the Issue from the Tribe's Perspective

Because the general welfare exception is an administrative exemption that has evolved largely from rulings related mostly to benefits provided by state and local governments, tribal governments have not been given sufficient notice of Treasury's position on the taxability of tribal programs. As noted above, gaming tribes have historically relied upon IGRA to address taxability of payments sourced by net gaming revenues. While IGRA confirms that per capita payments are clearly subject to federal taxation and reporting to members, the other authorized uses of net gaming revenues carry inherently non-tax related purposes and characteristics: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

Tribal representatives trying to educate themselves elsewhere on the issue will find inconsistency in the tax treatment of tribal programs, not only in various rulings described in the previous pages, but also within informal guidance publications and webinars sponsored by the Indian Tribal Governments (ITG) division of the Internal Revenue Service. For instance, an August 2011 webinar, entitled "Do's and Don'ts: Reporting Requirements for Indian Tribal Governments," resulted in the assurance that per capita distributions do **not** include programs such as social welfare, medical assistance, or education (slide #45). However, recent audits have revealed that tribal programs (social welfare, medical assistance and education), without a showing of individual financial need, were deemed "disguised" per capita distributions and found to have new Form 1099 reporting requirements and sometimes back-up withholding, depending upon the source of program funding. Also within ITG's published "Native American Issues: Income Tax Primer" (current publication dated February 2008), under the heading "**Distributions**," [taxable] per capita distributions are distinguished from general welfare payments stating, "General Welfare Distributions are payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing, or other similar specifically identified needs." The primer goes on to state that it is critical that the need be based on financial, economic, health, educational, **or** other similar criteria that support the determination that the payment is assistance to address the identified "need" and that the individual must provide the information to support whether the payment fits the necessary criteria. In addition, the IRS ITG website Q&As provide such basic "easy case" examples -- that it can give the impression that the doctrine is narrower than the law may actually allow. Outside inconsistent Revenue rulings, Tax Advice Memorandums, Private Letter Rulings, and informal guidance publications, tribal governments have no clarity on application of the General Welfare Exclusion to Indian tribal government programs.

A. Survey of Tribal Comments to Treasury

In response to many inquiries from Indian tribal governments on this issue, and in order to provide clarity and certainty to Indian tribal governments and consistency in applying the exclusion, the Service and Treasury (pursuant to E.O. 13175) issued Notice 2011-94 on November 15, 2011, to invite comments describing actual or proposed Indian tribal government programs that provide benefits to members, and the application of the exclusion to these programs and benefits. Although the comment period officially ended March 15, 2012, input from tribal governments continues to be considered, as of this date.

The ACT would like to present some of the over-arching themes and consistencies in the comments which have been received to date in the hopes that any guidance issued will acknowledge and reflect tribal perspective and concerns. The replies, to date, from various tribes and tribal organizations to Treasury, can be summarized as follows:

- IRS/Treasury should be held accountable to Executive Order 13175 which provides direction to federal agencies on agency rulemaking.
 - Tribes request respect for Indian self-government and sovereignty and, where possible, deference to standards to which preserve the prerogatives and authority of Indian tribes as directed by the President.
 - Tribes request that the IRS/Treasury work with Indian tribes on a government-to-government basis, and recognize the federal government's unique obligation to tribes. Greater training of IRS employees on tribal governments is also requested.
- The U.S. is a party to the United Nations Declaration on the Rights of Indigenous Peoples which recognizes that indigenous peoples have important collective human rights which necessitate special measures by the government to protect and preserve those rights.
 - Federal policies should, thus, encourage the preservation of tribal culture in accordance with the UNDRIP, not tax and punish tribal citizens actively participating in the preservation of their traditions and practices.
- Acknowledge that IGRA mandates the provision of tribal programs and services as an aspect of self-government prior to taxable per capita payment to individual tribal citizens.
 - Also, that federally approved revenue allocation plans (RAP) in accordance with IGRA should be respected. Per capita reclassification, by IRS, violates IGRA RAP designations.

- Payments or services under a bona fide social benefit program are not per capita payments even if the benefits are provided on a community-wide or tribal-wide basis.
- Audits of Indian tribes are discriminatory on the basis that the same audits are not being conducted on state and local governments or foreign nations.
 - IRS agents should not substitute personal judgment for decisions that are made pursuant to a political process and form of government recognized by treaties, Congressional acts, and Presidential Executive Orders spanning more than a century of tribal-federal relations.
 - While General Welfare Exclusion guidance is being developed, interim relief from the inconsistent application of the exclusion to Indian tribes under audit or subject to other enforcement actions should be provided.
- Tribal self-government traditionally includes housing assistance, education, child and elder care, and cultural preservation.
- The federal government should foster, not punish or interfere with, the provision of programs that address the unmet unique treaty and legal obligations.
- Tribal education services should never be subject to taxation by the United States because of the historical solemn promises made and unfulfilled and because tribal education policies always equate to general welfare.
- Individual means-testing violates tribal culture and tradition and lack of means-testing should not disqualify a tribal program from the exclusion when other eligibility criteria are present.
 - “Need” is not just financial, and includes matters of health, educational background, employment status, and others.
 - “Need” can be community based, such as high unemployment rates, lack of access to capital, or disproportionate poverty levels.
 - “Need” can be cultural, such as programs that restore, protect, promote, and extend tribal cultural heritage.
 - “Need” can be justified by programs that supplement or supplant federal funding or work towards the same goals of federal policy (even in the absence of federal funding).

- “Social benefit” rather than “individual need” should be the primary focus, with deference to each tribal government in setting social goals and establishing programs to achieve them. Social benefit must encompass self-determination and be construed broadly to reflect unique cultural and traditional-based programs and economic development.
- Too much focus has been placed on individual means-testing, and too little on the overall social benefit a program seeks to achieve.
- Guidance must be broad and give substantial deference to the discretion of tribal governments and their legislative policy making process.
 - Each tribe has its own checks and balances in place for the approval of programs, and those processes should be given deference.
 - Tribal governments contain appropriate accountability mechanisms that are based on tribal community values, reciprocal responsibilities, and programmatic objectives.
 - Tribes can identify shortcomings or abuse with an immediacy that federal agents will never attain.
 - Tribal governments should be acknowledged as partners in the tax compliance process and not as adversaries.
- Benefits received pursuant to cultural programs should not constitute compensation for services when governmental assistance is tied to community service or job training programs.

B. Summary of Common Tribal Welfare Programs

In response to the request for descriptions of actual or proposed Indian tribal government programs, below are descriptions of some tribal programs which were compiled from the responses to the Notice, as well as additional surveys completed by the ACT. These are presented for illustrative purposes only and not intended to be exhaustive or exclusive.

- **EDUCATION PROGRAMS** – Tribal education programs are often enacted to address systemic, community-wide, gaps in achievement, as well as to promote and encourage scholastic pursuit by helping students overcome barriers to education. Programs outside those which are excludable under Code Section 117 may include transportation assistance, clothing assistance, musical instrument rental assistance, incentive programs for good grades and achievement, school-to-work programs, assistance with graduation expenses, etc.

- **TRANSPORTATION ASSISTANCE** – Transportation needs are critical for many remote Indian reservations and for tribal citizens, in general. Assistance with transportation may include auto repair grants, as well as public transportation for access to employment locations, tribal facilities, and health and education facilities.
- **HOUSING PROGRAMS** – Tribal housing assistance programs normally address overall community needs, such as health and safety, energy efficiency, and so on, by helping citizens to attain home ownership or improve existing living conditions. Typical housing programs include repair programs, loan assistance, construction assistance, elder or disabled member improvements, storm shelters, temporary shelter or hotel reimbursement programs, and other housing related assistance.
- **EMERGENCY ASSISTANCE** – This can come in many forms including assistance to prevent utility cut-offs or eviction, situations of unexpected loss, or being stranded and in need of a hotel room and/or meals.
- **BEREAVEMENT AND BURIAL ASSISTANCE PROGRAMS** – Tribal governments offer these services as a direct means of preserving culture and tradition and to promote family unity and honor to the family. Wakes, family obligations, food, and assistance are unique to each tribe.
- **CULTURAL PROGRAMS** – Maintaining and revitalizing culture and traditions is of paramount importance to each Indian tribe and is integral to the United States' government-to-government relationship with tribal governments. Cultural programs range from language classes to art classes, to pow-wows and other ceremonies, and to funding historical/cultural travel events. Although churches are not sovereign governments, churches' activities that promote religious principles are insulated from tax liability; and, similarly, when a tribe provides for the exercise of culture, the cultural enrichment, or the cultural restoration of its members, those benefits should be exempt from taxation, as well.
- **ELDER PROGRAMS** – Tribal elder programs recognize traditional or cultural obligations to elders that have no counterpart in non-tribal programs or even among different tribes. Tribal priorities in honoring elders should be respected much the same as government-provided Medicare benefits which further social welfare objectives. Elder programs can include meals, social events, home improvement and maintenance, cultural travel, and utility assistance.
- **ECONOMIC DEVELOPMENT PROGRAMS** – These are generally based on community needs that Indian tribes enact to address the unique economic problems on Indian reservations and to promote economic diversification and job creation for tribal

citizens. Programs could be job training programs, business grants, and other programs that are consistent with community goals.

Tribes overwhelmingly offered thanks to Treasury and the Service for requesting official comments through the Notice process and for giving them an opportunity to provide input on this most important issue. Tribal programs and economies are directly affected by the taxation of tribal citizen benefit programs; and tribes have not been given clear guidance on the issue. Inconsistent and conflicting informal guidance and rulings; the need for Treasury and IRS to gain a better understanding of tribal governments and their inherent authority; and the necessity of giving new consideration to the function of tribal programs are all justifiable reasons for a comprehensive joint effort between Treasury and tribal governments to resolve this tax issue.

IV. The Case for Modification of the General Welfare Exclusion as Applied to Indians

To resolve the General Welfare Exclusion issue, it may be appropriate to develop a general welfare exemption that applies specifically to tribal governments and their individual members. The U.S. has committed to protecting tribes as separate sovereigns. One expression of that commitment is the rule that federal laws should not be interpreted to invade upon a tribe's internal affairs – i.e., in this instance, its determination of general welfare needs of its members. Naturally, when the IRS asserts that a tribal government's distribution of cash or in-kind benefits is not made to promote general welfare of its members, this is perceived as a federal intrusion into the internal affairs of a sovereign tribe. On the other hand, the IRS is tasked with enforcing the federal tax laws, which entails seemingly intrusive audits to determine the form and substance of a transaction for tax purposes. Accordingly, there is cause to develop an administrative tax exemption that takes into account the unique circumstances of tribes and their sovereign authority over internal affairs, while at the same time promoting effective tax administration.

This is an area of tax law that has seen meteoric rise in controversy between the IRS and tribes in the last few decades. Some say, until the advent of IGRA in the late 1980's, there was little revenue in Indian country to warrant much IRS scrutiny, and, significantly, there was never a vehicle to leverage a tribe to withhold tax on any perceived distribution of wealth until Code Section 3402(r). Whether those facts have any bearing, it is undisputed that audits of tribal governments and their enterprises have increased. And, the General Welfare Exclusion is playing a more prominent role in these audits as tribes develop more programs.

It is in the best interests of both the tribes and the IRS to seek a more cost-efficient and predictable means of testing tribal general welfare programs for tax exemption. Tribes require a predictable test or safe harbor for establishing their programs to maximize tax exemption and tax-favored opportunities. The case-by-case audit process to tease out key features that a tribe may later rely upon to establish a tax exempt general welfare program is both inefficient and unfair. Likewise, the IRS can better accomplish its twin goals of efficient tax administration and procedural fairness if there were more certain guidelines in establishing a tax exemption under the General Welfare Doctrine.

There are over 560 federally recognized tribes. Each have unique "needs" to address for their members and, to that end, unique tribally-sponsored general welfare programs tailored to those needs. It is impossible for the ACT to propose a solution that represents the divergent views of all the tribes, or encompasses the sheer diversity and magnitude of this issue across Indian country. More importantly, this is a matter for tribes and the federal government to

work out through consultation. Executive Order 13175.³⁹ Nevertheless, by this report, the ACT endeavors to provide some recommendations that may serve to advance resolution of this issue between the IRS and the tribes.

A. The General Welfare Exclusion Should Not Undermine a Tribe's Inherent Power to Regulate its Internal and Social Relations

There will be at least a couple avenues toward resolution of this issue in Indian country. One may involve a tribe establishing its own written General Welfare Doctrine and policy through governmental action. The other may involve the development of another IRS administrative exemption, through consultation between tribes and Treasury, which is specific to tribes - a "Tribal General Welfare Doctrine" - if you will. Either way, a tribe's inherent sovereignty over the internal affairs and social welfare of its members must be part of the calculus when IRS and Treasury set out to determine the tax-exempt nature of benefits received under a tribal welfare program. Part of the solution will also involve an understanding of the "community need" as determined by tribal governments replacing the individual means-testing applied in most audits, to date.

Accordingly, any fair application of the General Welfare Exclusion to tribes can only be accomplished with a thorough understanding and appreciation of tribal customs and the inherent sovereign authority of tribal governments over internal and social relations. The ACT explores some fundamentals to inform the analysis.

1. Retained, Inherent Tribal Sovereignty

Tribes are sovereign governments, and are not non-profit corporations, ethnic groups with entitlements granted by Congress, fraternal associations, religious organizations, or other entities lacking inherent governmental powers. Too often, discussion of the tribal general welfare exception associates tribal governments with dissimilar entities that lack the unique standing of tribes as the first of the three sovereigns, preceding in time the federal and various state governments.

Tribes are among the four sovereigns recognized by the United States Constitution, which are foreign countries, the federal government, states, and tribes. The Constitution and subsequent legal doctrine recognizes the *inherent* (rather than delegated) powers possessed by tribes that pre-date the United States. Indian governmental powers inherent to tribal governments cannot be limited only to a Congressional or Constitutional delegation of

³⁹ Federal Register / Vol. 75, No. 132 / Monday, July 12, 2010 / Notices.

powers,⁴⁰ but are also defined by historical, traditional, and customary understanding of Indian people themselves.⁴¹

In what is known as the “Marshall trilogy,” the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty:

1. *Johnson v. McIntosh* (21 U.S. 543 (1823)): the tribes’ power to dispose of their land required Congressional consent;
2. *Cherokee Nation v. Georgia* (30 U.S. 1 (1831)): Indian tribes were merely “domestic dependent nations” existing “in a state of pupilage, and their relation to the United States resembles that of a ward to his guardian;” and
3. *Worcester v. Georgia* (31 U.S. 515 (1832)): the states are excluded from exercising their regulatory or taxing jurisdiction in Indian country.

The Marshall trilogy developed three bedrock principles: (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes’ limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility.⁴² These principles have continued to guide Courts in their interpretation of the respective rights of the federal government, the states, and the tribes.

Tribal governmental powers may be viewed as limited by Congressional divestiture of, or limitations upon, certain tribal government powers through federal Indian law, United States Supreme Court decisions, federal jurisprudence, and Congressional legislation.⁴³ The concept of “domestic dependent nations,”⁴⁴ or “quasi-sovereignty” that limits tribal control only to internal relations without the express consent of the United States Congress was set forth in the 2001 United States Supreme Court decision, *Nevada v. Hicks*, that held, “[the] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without

⁴⁰ Indian Tribes as Sovereign Governments (Oakland, CA: AIRI Press, 1998), at 35.

⁴¹ See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 196 (2001) (“Our Ancestors recognized themselves as distinctive cultural and political groups, and that was the basis of their sovereign authority to reach agreements with each other, with the European sovereigns, and then the United States. In each of these instances, our Ancestors exercised governmental authority to protect their lands, resources, peoples and cultures.”)

⁴² American Indian Law Deskbook, University Press of Colorado, 1993.

⁴³ Indian Tribes as Sovereign Governments, op. cit.; Canby, William C., Jr., American Indian Law in a Nutshell (St. Paul, MN: West Publishing Company, 1988); and Strickland, Rennard, Felix S. Cohen’s Handbook of American Indian Law (Charlottesville, VA: Mitchie Bobbs-Merrill, 1982).

⁴⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

express congressional delegation.”⁴⁵ In *United States v. Wheeler*⁴⁶ the Supreme Court stated, “Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain “a separate people, **with the power of regulating their internal and social relations.**” (emphasis added). The Supreme Court in *Talton v. Mayes* said that Indians tribes’ inherent sovereignty predates the Constitution.⁴⁷ The Supreme Court decided that, because tribal power originates from the tribe’s inherent sovereignty, the tribe did not have to follow the U.S. Constitution’s rule for grand juries.

Under these principals of an inherent authority over their own internal affairs, such authority would necessarily include protecting and promoting the social welfare of a tribe’s members. Thus, a General Welfare Exclusion tailored specifically to an acknowledgement of this role and authority is “necessary to protect tribal self-government.”

2. Right of Self-Determination

Consistent with, and in addition to, the sovereignty of tribal governments, is the United Nations’ statement and support of the right of self-determination for indigenous peoples. The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) recognizes the collective and individual rights of native peoples. Among the most important of these rights is the right of self-determination, stated as follows:

Article 3. Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.

Article 4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The Declaration also recognizes the following rights:

- rights to control membership and institutions (Articles 5, 20);
- spiritual and religious rights, including sacred sites (Article 12); and
- rights to maintain a subsistence lifestyle and traditional economic activities (Article 20).

⁴⁵ 533 U.S. 353, 359 (2001) (emphasis removed) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

⁴⁶ 98 S.Ct. 1079, 55 L.Ed.2nd 303, 435 U.S. 313.

⁴⁷ 163 U.S. 376 (1896).

The Declaration specifically calls for the maintenance and protection of native cultures and identities, and the full and effective participation of Native peoples in all matters that concern them. On 16 December 2010, President Obama declared that the United States is going to sign the declaration. At the second White House Tribal Nations Conference, on December 16 of 2011, President Barack Obama announced that the U.S. would “lend its support” to UNDRIP. “The aspirations it affirms, including the respect for the institutions and rich cultures of Native peoples, are ones we must always seek to fulfill,” Obama said. “I want to be clear: What matters far more than words, what matters far more than any resolution or declaration, are actions to match those words.”⁴⁸

IRS support for a General Welfare Exclusion for tribal payments that address community need, and recognition of the cultural, economic, and governmental importance of this traditional and customary practice, would be a significant action to “match the words” of UNDRIP and the U.S. fulfillment of its principles.

B. A Tribal Definition of Need Is Warranted

To define the tribal standard for “need” contemplated by a tribal General Welfare Exclusion, the historical, traditional, and customary practices of tribes (as they relate to property transfers, giving, and the role of tribal leaders in the care of tribal citizens) must inform the analysis. It is incumbent upon Treasury and the IRS to understand these aspects of tribal culture, which, although different from state and local governments in application, are nonetheless the customary role of a government to satisfy the needs of its citizens. Thus, any rigid comparison of a tribal welfare program to a state and local general welfare program would distort the analysis and outcome.

Perhaps an apt analog to where we stand today in addressing the effects of an uninformed application of the General Welfare Exclusion is the history and genesis of the Canadian Potlatch law. The Potlatch law banned “any Indian festival, dance, or other ceremony” involving the “giving away or paying or giving back” of property.” In 1923, Andrew Paull of the Allied Tribes of British Columbia argued against Canada’s Potlatch law. Paull wrote, “what has been said in favor of the Potlatch has been done so by the people who are in a position to know, but the prayer of the Indians has not heretofore been given due consideration.”⁴⁹ In the same way, the view of tribal governments has not been given due consideration in the IRS application of the General Welfare Exclusion. The IRS and Treasury should seek to align their perception of tribes’ general welfare payments with its actual origin and purpose. To date, the IRS (mis)perception of tribal government payments in cash

⁴⁸ Indian Country Today Media Network.com, UN Declaration’s One-Year Anniversary: “Much to Celebrate, Much More to Be Done”, <http://indiancountrytodaymedianetwork.com/2011/12/12/un-declaration%E2%80%99s-one-year-anniversary-much-to-celebrate-much-more-to-be-done-66108>, December 12, 2011, By Gale Courtney Toensing.

⁴⁹ The Potlatch Papers, Christopher Bracken, University of Chicago Press, 1997, p. 227.

or property, to its tribal citizens, bears little to no resemblance to the actual historical, traditional, and customary practice of tribes. As some have said, the IRS perception is a substitute for the tribes' practice, and not an image of it.⁵⁰ This is because, in large part, the IRS either ignores or misapprehends the tribal culture that comprises the tribal practice.

A more in-depth inquiry is warranted: What is this system of tribal payments? What is the significance of these payments to tribal society? What is the relation between the payment, the tribal government as giver, and the tribal citizen as recipient in the context of tribal culture and the inherent, retained sovereign authority of tribal governments to regulate their internal social relations?⁵¹ These are precisely the questions that should be asked, answered, and understood prior to formulation of an IRS policy on the General Welfare Exclusion as applied to tribal welfare programs.

1. Historical, Traditional, and Customary Practices Focus on Community Need

History shows that ownership of goods was not an accumulation of individual wealth, but rather such ownership must be understood in the context of a tribal economy that valued giving, among all members of the community, through a system of payments among community citizens. Wealth was neither hoarded nor equally distributed. Rather, those with skills and social standing, sufficient to accumulate property, provided a portion of their property to others as an amount of quality goods through participation in community giveaways. In this process, honor was received when bestowing property on others in the community; and honor was received when receiving such property. Marcel Maus describes the Tlingit and Haida Potlatch system, wherein Maus states that “[n]o less important is the role which honor plays in the transactions of the Indians. Nowhere else is the prestige of an individual as closely bound up with expenditure, and with the duty of returning, with interest, gifts received in such a way that the creditor becomes the debtor. . . . Progress up the social ladder is made in this way not only for oneself but also for one's family.”⁵² Through giving, and in giving property in a pre-monetary society, the individual and their clan and sib relations, earn honor and community standing by the giving and receipt of property. By this system of payments mediated by clans and sibs, honor was exchanged, tribal leadership positions were acquired, and community need was satisfied without shaming those in need.

The labeling of these transactions as gifts and giving is more a reflection of the Western culture that interprets the Indian culture, but is a poor representation of the rich and complex structure of this system. In fact “[t]he integrity of the community as a whole depends upon

⁵⁰ Ibid, p. 227-228.

⁵¹ Ibid, p. 23.

⁵² The Gift: Forms and Functions of Exchange in Archaic Societies 35-36 (1967).

this exchange of [property]. The underlying philosophy of the tribal community permeated the ways of commerce, a sense of interdependence between all of the families forming clans and kinship groups as the foundation for the larger tribal organization.”⁵³ While the giving is not particularized to a distribution to the needy, these transactions served this purpose as an ancillary outcome that benefitted the less wealthy and obviated the need for donations to those in need that otherwise would have dishonored the recipients as well as their clan and sib affiliations.

Among tribes, the system of giving is a bonding experience. Giving “bonds one to the group and within the group, because the individual provides gifts that allow the group to prosper, and the group provides gifts that allow the individual to prosper. Giving is a way of building new relationships, while maintaining and reinforcing old ones. The circle-of-life belief system is one of interconnections, or inter-relationships, where the key value is one of recognizing the reciprocal nature of relationships.”⁵⁴

From the early days of contact with Europeans, the record is replete with the generosity extended by tribal nations to Europeans, and extends to the modern record of the familial care that tribal nations extended to each other and to those invited into the tribal community as guests. The commercial relations formerly sought with tribal nations by representatives of European nations traveling through the ancient trade routes depended on the establishment of values of kinship affected by the tribal social behavior of giving. An example of this is illustrated in an account of Comanche society from this time period.⁵⁵

Comanches responded positively to demonstrations of social behavior like that involved in gift giving. American traders, unfamiliar with the ways of Indians, quickly learned the positive effects of providing their hosts with gifts. In this way, persons without any kinship or other social connections to the Comanches could begin to establish such ties through which commerce could be conducted. The European traders were not bribing Indians or buying franchises for access to commercial opportunity, but instead participating in the essential social structure of the Indian society and, by doing so, becoming an equal eligible for respect, honor, and equality.⁵⁶

Tribal historians and commentators have provided insight into these values. Charles Alexander Eastman, Ohiyesa, explained the view of tribal property exchange in this way:

⁵³ Angelique A. EagleWoman/Wambdi A. Wastewin, Tribal Values of Taxation Within the Tribal Economic Theory, *Kansas Journal of Law & Public Policy* [Vol. XVIII:1], p. 4.

⁵⁴ Mindy Berry, “Native American Philanthropy,” in *Cultures of Caring*, 49; and Ronald Austin Wells, *The Honor of Giving: Philanthropy in Native America* (Indianapolis: Indiana University Center on Philanthropy, 1998).

⁵⁵ *Ibid.*, p. 5.

⁵⁶ Gerald Betty, *Comanche Society: Before the Reservation*, 116 (2002).

“[I]t has always been our belief that the love of possessions is a weakness to be overcome. Its appeal is to the material part, and if allowed its way it will in time disturb the spiritual balance for which we all strive.”⁵⁷

Eastman spoke from the Dakota tradition as a core value of tribal society. Royal Hassrick in “The Sioux: Life and Customs of a Warrior Society” states:

“[A] precept of the Sioux was stated frequently by the tribesmen: ‘A man must help others as much as possible, no matter whom, by giving him horses, food or clothing.’ Generosity was a virtue upon which Sioux society insisted. To accumulate property for its own sake was disgraceful, while to be unable to acquire wealth was merely pitiable. The ownership of things was important only as a means of giving, and blessed was the man who had much to give. The Sioux pattern further required not only that a proffered gift might not be refused but that a return gift, even though a token, should sometime be exchanged.”⁵⁸

Angelique EagleWoman in “Tribal Values of Taxation Within the Tribal Economic Theory” explains the “congruence between tribal values and the basic concept of taxation.”⁵⁹ The American Heritage Dictionary of the English Language (2006) definition of “tax” is “a contribution for the support of a government required of persons, groups or businesses within the domain of that government.”⁶⁰ Eaglewoman’s view is that the “concept of interdependence envelops the basic concept of taxation – a recognition that for the tribal government to provide services, contributions are expected from those skilled within the community. Informally, contributions are made among tribal citizens on a daily basis along kinship, clan and family lines. Those who are employed are expected to contribute when requested on an individual basis for necessities of other community members.” The exchange of property among tribal citizens through the regulation of clan and sib social structures was, therefore, a form of taxation for the equitable re-allocation of essentials among the community members. This system of payments or property exchange regulated the societal or community need.

The historical and contemporary record clearly evidences that tribes’ customary and traditional practice of giving to address the **COMMUNITY** need is integral to the culture and necessary to protect, preserve, and regulate their social relations. Tribal society employed

⁵⁷ Charles Alexander Eastman (Ohiyesa), *The Soul of an Indian and Other Writings* 26 (Kent Nerburn ed., 2001) (“Therefore, we must early learn the beauty of generosity. . . . Public giving is a part of every important ceremony. It properly belongs to the celebration of birth, marriage, and death, and is observed whenever it is desired to do special honor to any person or event. . . . Upon such occasions it is common to literally give away all that one has to relatives, to guests of another tribe or clan, but above all to the poor and the aged, from whom we can hope for no return.”).

⁵⁸ Royal B. Hassrick, *The Sioux: Life and Customs of a Warrior Society* 36 (1964).

⁵⁹ Angelique A. Eaglewoman, *Id.*, p. 16.

⁶⁰ The American Heritage Dictionary of the English Language (4th ed. 2006), available at <http://dictionary.reference.com/browse/tax>.

this system of property exchange among all tribal citizens as a means to provide for the community need. There are many forms of giving in Native American culture, often called the Native American philosophy of giving,⁶¹ which evidences this system of payments as a traditional and customary practice. In this way, tribal society provided for the less fortunate without the shame inherent in giving only to the needy individual, and elevated talented individuals to positions of leadership. The community need was satisfied while both giver and recipient gained honor in the exchange. In a modern interpretation, this practice formed an economy of property exchange that was a means of taxation upon the prosperous, and a means of distribution to the needy. The practice of satisfying the community need provided essential property to all; established tribal leaders; and -- as an overall outcome -- preserved, protected, and regulated the society.

Unlike European American values, “wealth” in Native American culture is not measured by net worth, but rather by a combination of spiritual qualities, material goods, and behavior. Leaders are selected for their ability to take care of the tribe by sharing their wisdom and wealth.⁶² By highly rewarding equitable (not equal) giving or exchange, tribal leaders rose to prominence by frequently bestowing the necessities of life upon the needy. Thus, all members of society were necessary for balance to be maintained and to distinguish those who would lead.

These values were embraced by all Tribal Nations from coast to coast as fundamental to balance in native society.⁶³ In a 1987 dissertation by Jean Alice Maxwell, the value of sharing among households of Colville and Spokane tribal citizens along the West Coast were analyzed.⁶⁴ The research led to the conclusion that “by holding and observing these values, Colville and Spokane make a statement about who they are; and, as they themselves say among Indian people, who you are is more important than what you have.”⁶⁵

In his work on traditional American Indian economic policy, Ronald Trosper has characterized the four central components of this economic policy as community, connectedness, regard for the seventh generation, and humility.⁶⁶ The tribal value of community is understood as an economic policy with the values of fairness, connectedness, and interdependence in a community relationship that carries with it responsibility for the needs of the entire community. A regard for the seventh generation necessarily involves the concept of stewardship and protection of resources for those yet to be born. Finally, humility

⁶¹ Millett and Orosz 2002.

⁶² Ibid.

⁶³ See Mauss, *supra* note 7, at 32-37; see also Hassrick, *supra* note 78, at 35-36..

⁶⁴ Jean Alice Maxwell, *The Circle of Sharing Among Colville and Spokane Indians* (1987) (unpublished Ph.D. dissertation, University of Michigan).

⁶⁵ *Id.* at 398-99.

⁶⁶ Ronald L. Trosper, *Contemporary Native American Political Issues* 140 (Troy R. Johnson, ed., 1999).

embodies the awareness that if humans do not act appropriately, the natural world is powerful and may retaliate.⁶⁷

These four principles are useful in synthesizing tribal values operative in commercial relations. As stated earlier, the historic tribal economic system was based upon moderation – with neither large wealth accumulation nor equal distribution of all goods. Tribal Nations are neither communistic socialists nor early capitalists.

Ricardo Millett⁶⁸ states “Native communities view giving as a way to honor future generations and clan members ... which exemplifies the Native American philosophy that giving should be mutual and equal by all parties. Giving is viewed as equals giving to equals, rather than the rich giving to the poor.”⁶⁹ The practice satisfies the community needs, which are: first—to preserve the community fabric by bestowing honor on giver and receiver (equals giving to equals); second—to allocate property of kinds and amounts appropriate to the culture, with the twin outcomes that community members in need are provided for and tribal leaders are identified. Through this traditional and customary practice, the tribal culture was preserved through giving; and tribal leaders were selected for their ability to take care of the tribe by sharing.

2. The Historic and Continuing Role of Tribal Leaders Is to Meet Community Need

In less than 100 years, traditional forms of tribal government changed to a western style form of government. Nevertheless, the tribal system of exchange, whether the historical propertied exchange or the modern payments in cash or property, continue to exhibit the attributes of the traditional and customary practice of satisfying community need in order to both regulate and preserve the internal society and culture of tribes.

The inherent tribal governmental authority to promulgate and implement policy intended to serve the community need of its tribal citizens, by regulating the social relations integral to the health and welfare of tribal society, is to modern tribal governments as it was to historical, traditional tribes. Historical tribes were controlled by clans and sibs. Today’s tribes are modern western-style tribal governments. Tribal governments of every period have employed the practice of satisfying the community need to mediate the adverse effect of contact with non-Indian people and governments.

Since contact, the degradation of tribal economies and resulting impoverishment of tribal societies and their citizens have been, and are today, mediated by tribal leadership. Tribal

⁶⁷ *Id.*

⁶⁸ Ricardo Millett, Understanding Giving Patterns in Communities of Color, Fund Raising Management, Vol. 32, Issue 6, p. 25, August 1, 2001.

⁶⁹ *Ibid.*, p. 26.

societal leadership has been forced to change from clans and sibs to the modern form of IRA-style (Indian Reorganization Act) tribal governments.

Congress intended the Indian Reorganization Act of 1934 (IRA)⁷⁰ to resurrect tribal culture and traditions lost to the Indian General Allotment Act of 1887, known as the “Dawes Act,” which broke up tribal lands and allotted them to individual members of tribes. Federal policy under the Dawes Act sought to assimilate and acculturate tribal citizens as individuals into the dominant society. Tribal lands were traditionally held and used for the community need. The Dawes Act resulted in the diminishment of tribal lands from 138 million acres in 1887 to 48 million acres by 1934. The sale of unallotted lands as surplus and the liability of allotted lands to taxation resulted in the loss of more than two-thirds of tribally-held lands by 1934.

This loss of tribal lands destroyed both the tribal economy and traditional tribal government on the reservations.⁷¹ The IRA pressed for tribes to adopt standard constitutions based on the European-American conception of government. Tribes were compelled to adopt governments that tribal people, especially the elders and other traditional American Indians, did not support. Other tribes adopted governments because they were promised by supporters of the legislation that passage would help to end the massive hunger, poverty, and loss of land on American Indian reservations.⁷²

The significance of this forced change in governance for tribes cannot be understated. IRA tribal constitutions and bylaws were templates of a European-American version of governance strange to traditional American Indian ways. There was no longer a place for elders, spiritual leaders, and clan and sib leaders in tribal government due to cookie-cutter IRA tribal constitutions.

In spite of the wrenching changes wrought by the IRA, traditional tribal leadership survived through the traditional tribal practices of property exchange that served the community need, which includes: the need to identify and elevate tribal leaders; the need to allocate essential property to the needy; and the need to strengthen the community through the system of honor and mutual respect. This system of community need preserved tribes and their cultures during the most stressful years immediately following the imposition of the IRA when a number of tribal IRA-style governments were not accepted by their tribal citizens. Modern tribal IRA-style governments thrive but only in the context of traditional community leadership that flourishes in the traditions and culture of practices. Indian values, culture, and traditions are not found in tribal constitutions, but tribal leaders depend upon their ancient practice to satisfy community needs in order to validate IRA governmental systems.

⁷⁰ P.L. 73-383.

⁷¹ Casey, James A. Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty, 79 Cornell Law Review 404, 413 (1994).

⁷² Getches, Wilkinson, and Williams, Jr. (1993), “within 12 years, 161 tribal constitutions and 131 Indian corporate charters had been adopted by tribes pursuant to the IRA” (p. 221).

3. Tribes Face Extraordinary Challenges in Meeting the Needs of Their Citizens

Both the giving practices and needs of tribes have been challenged by their relationship to the United States government and the social, political, and economic changes wrought in the periods known as the reservation era, the New Deal, termination, and, today, self-determination.

The Indian Reorganization Act of 1934 ended the allotment policies, however, the intended recovery of tribal lands for tribes was not realized. Also, the imposition of IRA-style governments restructured traditional tribal leadership away from traditional clan and sib leadership to a western form of governance that sorely stressed tribal societies.

The good intentions of the IRA period were thwarted by the termination policies during the 1950's when Congress sought to terminate the historical relation between the federal government and Indian tribes.⁷³ Many Indian tribes suffered the loss of tribal status as federally recognized tribes, and all of tribes, suffered from a significant diminishment of federal trust services. The federal government also relocated many thousands of tribal citizens from their tribal communities to urban centers (e.g., San Francisco, Los Angeles, Denver, Minneapolis, etc.).⁷⁴

For Native Americans, removal and assimilation were both policies designed to give the federal government the unilateral power to extinguish a tribe and its citizens. Many who were subject to termination and relocation suffered a terrible loss of tribal connection and cultural identity in addition to impoverishment in foreign urban areas.

There exists a prevailing public view that the Indian Gaming Regulatory Act ("IGRA") provided prosperity for a majority of tribes. This is not true even among the overwhelming majority of tribes that operate tribal government gaming facilities. The record of continuing, significantly unmet tribal community need is evidenced by recent 2010 United State Census data and other credible data sources.

According to the 2010 Census, 5.2 million people in the United States identified as American Indian and Alaska Native, either alone or in combination with one or more other races. Out

⁷³ See generally, Native American Rights Fund, Twenty-Fifth Anniversary Report, p. 7. In 1954, Congress passed a resolution to terminate the historical trust relationship between the U.S. government and Indian tribes. Federal funding for all existing service programs to tribes were to end and Indians were to be considered a disadvantaged minority group. Tribes were no longer to be recognized as governmental units. The termination policy was in effect until the mid-1960s.

⁷⁴ See generally, Sharon O'Brien, *American Indian Governments*, Norman, OK: University of Oklahoma Press, 1989, p. 86. In 1956, Congress passed Public Law 959, which would use economic incentives to promote assimilation and urbanization in Indian country. It provided funds for institutional and on-the-job training for Indians. It did not, however, make these opportunities available on the reservations. Indians had to relocate to urban areas. Once they were living in the urban areas, Indians were no longer eligible for federal services. More than 35,000 individuals relocated to urban or off-reservation areas.

of this total, 2.9 million people identified as American Indian and Alaska Native alone. Almost half of the American Indian and Alaska Native population, or 2.3 million people, reported being American Indian and Alaska Native in combination with one or more other races. The American Indian and Alaska Native in combination population experienced rapid growth, increasing by 39% since 2000.⁷⁵

The percentage of the American Indian and Alaska Native population, alone or in combination, which lived in American Indian areas or Alaska Native Village Statistical Areas was 22%. These American Indian areas include federal American Indian reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state American Indian reservations, and state designated American Indian statistical areas.⁷⁶

Counties on Native American reservations are among the poorest in the country and, according to the Economic Research Service at the U.S. Department of Agriculture, nearly 60% of all Native Americans who live outside of metropolitan areas inhabit persistently poor counties.⁷⁷

The median income of American Indian and Alaska Native households was \$35,062. This compares with \$50,046 for the nation as a whole. The percent of American Indians and Alaska Natives that were in poverty in 2010 was 28.4%. For the nation as a whole, the corresponding rate was 15.3%. The poverty rate for American Indians living on reservations (31.2%) is nearly three times the national rate. On some reservations unemployment levels have reached 85%. Overall, the unemployment rate on reservations is over two times the national average. Over 22% of American Indians do not have enough food to meet their basic needs.

The percentage of American Indians and Alaska Natives 25 and older who had at least a high school diploma, GED, or alternative credential was 77%. Also, 13% obtained a bachelor's degree or higher. In comparison, the overall population had 86% with a high school diploma and 28% with a bachelor's degree or higher.

One in five homes on reservations lack complete plumbing facilities and less than 50% are connected to the public sewer system. This has led to the creation of numerous health and environmental hazards. Sixteen percent of reservation households have no telephone service. Only 33% of roads in Indian Country are paved and 72% are officially rated as poor. It is

⁷⁵ American Indians By the Numbers, <http://www.factmonster.com/spot/aihmcensus1.html>

⁷⁶ Walking Shield, Inc., www.WalkingShield.org, The Need: American Indian Socioeconomic, Housing, Health and Education Statistics, http://www.walkingshield.org/the_need.shtml.

⁷⁷ Tom Rogers, Native American Poverty, Spotlight on Poverty & Opportunity, <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=0fe5c04e-fdbf-4718-980c-0373ba823da7>.

estimated that 1.1 billion dollars is needed to adequately address housing inadequacies on American Indian reservations.

Over 90,000 American Indian families are homeless or under housed. Homelessness on reservations is becoming increasingly more visible as families are living in cars, tents, abandoned buildings or storage sheds. Over 30% of American Indian families live in overcrowded housing, and 18% are severely overcrowded with 25-30 individuals sharing a single home. These rates are more than six times the national average. Approximately 40% of housing on reservations is inadequate according to the federal definition, compared to only 6% nationwide. American Indians have the highest rate of home loan denial of any race in the United States; nearly 25%.

According to the U.S. Commission of Civil Rights in 2004 (*Broken Promises: Evaluating the Native American Health Care System*,” September 2004, The U.S. Commission on Civil Rights, pp. 7, 13), American Indians are:

- 770% more likely to die from alcoholism;
- 650% more likely to die from tuberculosis;
- 420% more likely to die from diabetes;
- 280% more likely to die from accidents;
- 190% more likely to die from suicide; and
- 52% more likely to die from pneumonia and influenza.

According to this study, American Indians also experience:

- a life expectancy a full five years under any other ethnicity in the United States;
- per capita funding for healthcare at 60% less than all other Americans and 50% less than federal prisoners; and
- the highest prevalence of Type 2 diabetes in the world. Treating diabetes for only those Native Americans who are currently diagnosed with diabetes would amount to \$1.46 billion per year, or 40% of the total budget for Native Americans health care.

According to the Indian Health Service in 2006:

- American Indian health facilities have an average vacancy rate of about 13% for all professional health positions. This ranges from a 5% vacancy rate for sanitarians to a 29% vacancy rate for dentists;

- over 79% of American Indian children 2-5 years of age have a history of tooth decay; and
- in total, there is a \$900 million backlog in unmet needs for American Indian health facilities.

Unfortunately, the socio-economic disparities faced by American Indians translate into deficient educational opportunities. The following is the disheartening reality of educational attainment for American Indians today:

- according to the National Education Association, American Indian students in California have a high school graduation rate of just 52%;
- the U.S. Department of Education's 2006 Nation's Report Card on U.S. history found that while White, Black, and Hispanic students all showed improvements on their scores since the last report in 1994, American Indian students showed no sign of improvement;
- in 2005, the California Postsecondary Education Commission found that eligibility rates for American Indian high school seniors were only 19.7% for a California State school compared to 34.3% for Whites. Further, only 6.6% of American Indian high school seniors met the University of California eligibility requirements compared to 16.6% of White students;
- according to a 2010 study⁷⁸ by the Civil Rights Project/Proyecto Derechos Civiles at UCLA's Graduate School of Education and Information Studies (GSE&IS) conducted in 12 states,⁷⁹ overall non-Native student graduation rates in the 12 states included in this study ranged from 54.1% to 79.2%, with an average of 71.4%. In contrast, graduation rates for American Indian and Alaska Native students ranged from 30.4% to 63.8%, with an average of 46.6%. The graduation rates for all American Indian and Alaska Native students were lower than the overall state rates, and with the exception of Oklahoma and New Mexico, the degree of disparity was approximately 17 percentage points or more. On average, the report found that graduation rates for American Indians and Alaska Natives (46.6%) were lower than the graduation rates for all other racial/ethnic groups including Whites (69.8%), Asians (77.9%), Blacks (54.7%), and Hispanics (50.8%); and
- according to the 2003 National Adult Literacy Survey, 32% of American Indian adults failed to attain basic reading levels, compared to only 13% of White adults.

⁷⁸ The Dropout/Graduation Crisis Among American Indians and Alaska Native Students; Failure to Respond Places the Future of Native People at Risk, <http://civilrightsproject.ucla.edu>.

⁷⁹ Alaska, California, Idaho, Montana, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wyoming.

Even among the more prosperous gaming tribes, a single generation of prosperity is woefully insufficient to address the significant harm wrought upon the culture, society, and governance of all tribes, in addition to the significant financial needs of the overwhelming majority of all tribes. Nor should economic advancement by tribes and their tribal citizens, which is the goal if not the effect of federal Indian policy, become a rationale to further erode tribal culture. The policy of genocide, followed by the now discredited policy of assimilation and then termination that sought to influence or compel tribal citizens to give up their traditional cultural practices, caused incalculable harm. The long list above should be sufficient reason to protect the traditional and customary tribal practices that tribal governments employ in response to its community need.

Thus, it is uncontroverted that there is a pervasive, unmet need in Indian country for economic development, job creation, education, and other key infrastructural components that will support viable communities and decent living. See also *Indian Tribal Governments: Report on the Implementation of Tribal Economic Development Bonds Under the American Recovery and Reinvestment Act of 2009*, June 2010 (“ACT Report of Recommendations, 2010”). Accordingly, tribes must be given the ability to meet those needs, particularly since the federal government has not met its trust obligations in those areas of need. *Id.*

However, the IRS typically targets tribal practices/programs intended to address these unmet needs by denying the application of the General Welfare Exclusion to such payments. The General Welfare Exclusion by definition contemplates that a government will develop programs targeted at particular conditions or circumstances afflicting their citizens for which some governmental subsidy is necessary to serve the general welfare of the citizenry. And, in that regard, such a general welfare subsidy does not embody “the attributes of income or profits.” *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 855 (1975). As to what support is necessary and reasonably calculated to meet the particular need is rightfully within the province of that government to decide and should not be readily undermined by a narrow application of the General Welfare Exclusion. There is considerable room within the articulated parameters of the General Welfare Exclusion to give deference to the tribal government to meet “social welfare objectives” (e.g., Rev. Rul. 74-153); to provide “a decent home and a suitable living environment” (e.g., Rev. Rul. 74-205); or provide benefits which “expand economic opportunities” (e.g., Rev. Rul. 76-373).

But, to date, the manner in which the General Welfare Exclusion has been applied to tribal welfare programs is obstructing the ability of tribal leaders to raise the abject condition of their citizen Indians. The continuing challenges to tribes and their tribal citizens that result in a large unmet community need persist in Indian country. The General Welfare Exclusion should support and foster non-taxable tribal practices and programs that satisfy the community need, not hinder them.

V. ACT Recommendations

A. Create a Rebuttable Presumption in Favor of Tribal General Welfare Programs

The ACT submits that it is important for Treasury to explore avenues for addressing the issue in a proactive manner, and to reduce the necessity of audits. The process must also achieve some certainty, while at the same time providing flexibility for tribes. There is, of course, an advance ruling process that can be implemented. But, this can be quite costly for tribes. Instead, the ACT suggests that Treasury (in consultation with tribes) explore the development of a process which permits tribes to take affirmative steps to develop their general welfare programs in a way that will provide either a safe-harbor or rebuttable presumption to shift the burden of proof to the IRS to establish that the particular tribal program has not met the General Welfare Exclusion.

The ACT contemplates that certain fundamental requirements for establishing a General Welfare Exclusion under a rebuttable presumption would be mandatory and incumbent upon the tribe to prove. But, once proved, they would not be rebuttable (except upon a showing of fraud or other extraordinary circumstances). These two non-rebuttable factors are:

- 1) payments are made pursuant to a legislatively-provided social benefit program; and
- 2) for the promotion of general welfare.

The first factor should be easily proved by providing evidence of the tribe's implementing action for the program (Resolution, Ordinance, etc.). Once proved, there should be nothing rebuttable about a *bona fide* legislative action; the tribes as sovereigns possess the exclusive jurisdiction to determine what programs will meet the needs of their members. That is not to say that other factors for meeting the General Welfare Exclusion may not be rebuttable by the IRS, but this initial factor should not be one of them.

The second factor would also be non-rebuttable. The tribe's determination of "general welfare" involves a policy expression by a sovereign, a political process, an intrinsic cultural ethos, a historic tradition, a response to historic disruption of tribal communities, or so on. In other words, the tribe's expression of what constitutes "general welfare" in the context of their tribe and nation will be unique and inherently unassailable. Indeed, essentially none of the historical IRS general welfare rulings take aim at the *bona fides* of a state's legislative act or its statement of the general welfare being served by the legislative act; the same deference should be given to tribal governments.

That said, the crux of the controversy typically arises not as to these first two factors, but as to the nature of the payment. That is, assuming the payment is not a form of compensation, is it reasonably calculated to meet a cognizable general welfare need?

The comments of tribes and their representative organizations suggest that a broader definition of a cognizable “need” is envisaged by the General Welfare Doctrine. The ACT agrees. At a minimum, the existing IRS rulings support a broader interpretation of “need” that is not limited to an expression of individual, financial need. See, *e.g.*, Rev. Rul. 57-102; TAM 200035007 (financial need is not the measure). Nor does it require a showing of individual need; the community as a whole is a legitimate beneficiary of social benefit programs. See, *e.g.*, Rev. Rul. 76-373.⁸⁰

And, as we have discussed in this report, tribal governments serve a unique role in mediating the community need of members, unlike the common role of state and local governments. So, the General Welfare Doctrine as applied to tribes must embrace a new paradigm; one that accounts for the unique circumstances, traditions, roles, and functions of a tribal community.

Accordingly, a rebuttable presumption process would permit a tribe to establish the precise need it intends its program to meet, how the program is reasonably calculated to meet that need, how the program is administered to meet that need (i.e., that the tribe is, in fact, following its program guidelines), and that the actual benefit provided is reasonable and not excessive. The rebuttable factors would, therefore, be the following:

- 1) proof the payment is not compensation for services rendered by the recipient; and
- 2) proof the payment is reasonably calculated to meet an individual or community need, as defined by the tribal government.

The precise formula by which a tribe could satisfy the evidentiary requirements to create a rebuttable presumption is something the tribes and Treasury can work out through consultation and through the workings of the new tribal advisory committee/STAC. The ACT suggests there would be a minimum necessary threshold of proof for the tribe. And once proved, the IRS could only rebut the presumption if it develops sufficient contrary evidence to rebut the probative value of the tribe’s supporting documentation and data.

It is anticipated that a program “reasonably calculated” to meet the identified need would be reasonable in amount, and not excessive. That said, given the pervasive unmet economic, educational, and infrastructural needs throughout Indian country, it would be rare indeed that any tribal welfare program would have the means to provide for excessive benefits. Nevertheless, the tribal welfare program under this test would be one that is not intended to provide luxury or non-essential benefits (as that may be defined by reference to existing federal or tribal laws).

⁸⁰ 1976-2 C.B. 16.

B. Modify IRS Approach to “Disguised” or “Deemed” Per Capita Payments under IGRA

The ACT further submits that a review and modification of the IRS application of Code Section 3402(r) withholding requirement, as it relates to general welfare payments, is necessary. In that regard, the ACT submits that it is improper and contrary to the intent of IGRA to re-characterize a general welfare program distribution as a deemed per capita subject to tax withholding under Code Section 3402(r). Such a presumption is likely to vitiate the Revenue Allocation Plan that has been approved by the BIA, particularly when the tribe has already distributed the total allocable percentage of per capita payments under its Revenue Allocation Plan for the year. To suggest that any distributions above that allocable per capita percentage are deemed per capitas subject to Code Section 3402(r), would arguably violate the Revenue Allocation Plan limits on per capita payments. It is the exclusive jurisdiction of the Bureau of Indian Affairs to determine allowable per capita uses of gaming revenue; IRS re-characterization of program uses of net gaming revenue obviates BIA’s exclusive jurisdiction.

C. Treasury Level Advisory Committee/Undersecretary of AI/AN Affairs/Tribal Consultation Policy Amendment

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

The Department of Health and Human Services (HHS) has taken the lead among federal agencies in fulfilling its responsibility to comply with Executive Order 13175 by establishing the Secretary’s Tribal Advisory Committee (STAC).⁸¹

The Secretary of the Department of the Treasury should establish a similar STAC composed of the Treasury Secretary, the IRS Commissioner, senior Treasury and IRS officials, and representatives of tribes and national and regional inter-tribal associations throughout Indian country. The Secretary should also establish an Undersecretary for Tribal Affairs.

⁸¹ U.S. Department of Health & Human Services, IEA Tribal Affairs, <http://www.hhs.gov/iea/tribal/index.html>.

Treasury/IRS STAC

The Treasury/IRS STAC purpose would be to seek consensus, exchange views, share information, provide advice and/or recommendations; or facilitate any other interaction related to intergovernmental responsibilities or administration of Treasury/IRS programs, including those that arise implicitly under policy or rule, or explicitly under statute, regulation, or Executive Order. This purpose will be accomplished through forums, meetings, and conversations between federal officials and elected tribal leaders in their official capacity (or their designated employees or national associations with authority to act on their behalf).

The Treasury/IRS STAC should include without limitation the following core functions:

1. identify historical, current, and evolving issues effecting American Indians and Alaska Natives (AI/AN) including Tax Policy, Domestic Finance, and Economic Policy;
2. apply the trust obligation of the United States government to tribal governments, and its responsibilities under the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), to the Treasury Department's mission to build a strong economy and create economic and job opportunities in and for Indian country by promoting the conditions that enable economic growth and stability for tribes and on tribal lands;
3. to understand tax policy that respects AI/AN tribal government inherent rights and provides America's tribes top quality service by helping all parties understand and meet their trust and tax responsibilities and by developing standards for applying the tax law with integrity and fairness for all;
4. propose clarifications and other recommendations and solutions to address issues raised at tribal, regional, and national levels;
5. serve as a forum for tribes and Treasury/IRS to discuss these issues and proposals for changes to Treasury/IRS regulations, policies, and procedures;
6. identify priorities and provide advice on appropriate strategies for tribal consultation on issues at the tribal, regional, and/or national levels; and
7. ensure that pertinent issues are brought to the attention of Indian tribes in a timely manner, so that timely tribal feedback can be obtained.

The Treasury/IRS STAC should comprise positions filled by voluntary representatives: one delegate (and one alternate) from fourteen federally recognized tribes (one delegate and alternate from each of twelve Bureau of Indian Affairs (BIA) regions with two delegates and alternates from Alaska and California), and one delegate (and one alternate) for twelve

national or regional inter-tribal associations: (National Congress of American Indians (NCAI), United South and Eastern Tribes (USET), All Indian Pueblo Council (AIPC), Arizona Inter-Tribal Council (AITC), California Association of Tribal Governments (CATG), Affiliated Tribes of Northwest Indians (ATNI), Michigan Association of Sovereign Tribes (MAST), Alaska Inter-Tribal Association (AITC), Alaska Federation of Natives (AFN), Great Plains Tribal Chairman's Association (GPTCA), Inter-Tribal Council of Nevada (ITCN), and National Association of Financial Officers (NAFOA).

Treasury/IRS Tribal Consultation Policy

We recommend the tribal consultation policy of the Department of the Treasury and the Internal Revenue Service be amended to include the following provisions:

The Department of the Treasury shall adopt a policy of communication and consultation with all federally recognized American Indian and Alaska Native tribes. All department bureaus and agencies shall comply with the policy. The policy shall provide for timely and meaningful communication and consultation with Indian tribes and shall permit elected officials and other representatives of tribal governments to provide timely and meaningful input into the development of legislation, regulations, rules, and policies on matters that significantly or uniquely affect the AI/AN tribes. The policy shall require the state agency to communicate and consult with AI/AN tribes before the agency proposes legislation, or proposes or adopts regulations, rules, or policies that may materially affect AI/AN tribes.

Undersecretary for Tribal Affairs

The Undersecretary for Tribal Affairs office should be established to serve as the official point of contact for tribes, tribal governments, and tribal organizations wishing to access the Department of the Treasury. The Tribal Affairs office, to be effective, must be established within the immediate Office of the Secretary, report directly to the Secretary, and be the Departments' lead office for tribal consultation in accordance with Executive Order 13175-Consultation and Coordination with Indian Tribal Governments. Other duties and responsibilities of the Office of Undersecretary for Tribal Affairs should include:

- coordination and management of tribal and native policy issues and serve as the Department's expert and informational resource to the Secretary;
- provide executive direction for the Secretary's intradepartmental council;
- collaboration and outreach to tribes and national or regional Native organizations;

Indian Tribal Governments:

Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members

- coordination of Department participation in national tribal meetings and tribal site visits for the Department's executive leadership;
- advice and assistance to the Department's executives and senior staff on tribal affairs;
and
- coordination of the Secretary's policy development for tribes.

VI. Summary

There is a sound policy and tax administration basis for either expanding the existing General Welfare Doctrine as it applies to tribes, or developing a discrete administrative exclusion applicable only to tribal governments and their members. The United States has made a commitment to protect tribes as separate sovereigns. One expression of that commitment is the federal decisional rule that federal laws should not be interpreted to invade upon a tribe's internal affairs. Accordingly, administration of the general welfare exemption with respect to tribal programs should acknowledge a tribe's role and authority to determine what is necessary for the general welfare of its members. Any guidance under the General Welfare Exclusion must be designed to be consistent with federal law and policy and must reflect the sovereign status of tribes, the federal trust relationship, and the federal policy of self-determination.