COLT

COALITION OF LARGE TRIBES

Blackfeet Nation • Cheyenne River Sioux Tribe • Confederated Tribes of the Warm Springs Indian Reservation of Oregon
Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation
Muscogee (Creek) Nation • Navajo Nation • Northern Arapaho Tribe • Oglala Sioux Tribe • Rosebud Sioux Tribe
San Carlos Apache Tribe • Shoshone-Bannock Tribes • Shoshone-Paiute Tribes of the Duck Valley Indian Reservation
Sisseton Wahpeton Sioux Tribe • Spokane Tribe • Ute Indian Tribe • Ute Mountain Ute Tribe • Walker River Paiute Tribe

December 16, 2024

tribal.consult@treasury.gov

RE: Proposed Rulemaking on Tribal General Benefits (REG-106851-21) / Comments of the Coalition of Large Tribes

Dear U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) Administration Officials (collectively the Department):

I write as Executive Director of the Coalition of Large Tribes (COLT), an intertribal advocacy organization representing the interests of the more than 50 tribes with reservations of 100,000 acres or more, constituting approximately 95% of Indian lands in the United States and encompassing more than 50% of the Native American population. COLT's member tribes span Montana, North Dakota, South Dakota, Washington, Oregon, Idaho, Utah, Wyoming, Colorado, Nevada, Arizona, New Mexico and Oklahoma. COLT is in strong support of the Department's proposed regulations implementing Section 139E – a proposed action to clarify the Tribal General Welfare Exclusion Act of 2014 (Act).

At the outset, it is important to acknowledge that the Act and Department's proposed rule is consistent with the U.S. Constitutional design for Tribal nations and their citizens. In the U.S. Constitution Article 1, Section 2, Clause 3, the text states, "Representatives and direct taxes shall be apportioned among the several States . . ., according to their respective numbers . . ., and *excluding Indians not taxed*, ..."[1] Even after ratification of the 14th Amendment to the U.S. Constitution, Congress retained the phrase "*Indians not taxed*" in Section 2 of that Amendment.[2] Moreover, the earliest federal agency interpretations concluded that federal income taxes did not apply to Indians.[3]

Similarly, the Act and Department's proposed rule is consistent with tribal-federal treaties and COLT's understanding of how those treaty provisions have been understood by multiple

[1] U.S. CONST. Art. I, § 2, Cl. 3.
[2] U.S. CONST. amend. XIV, § 2.
[3] 12 U.S. Op. Atty. Gen. 208, 210 (1867) ("Our internal revenue system has not in any instance or for any purpose been extended over the Indian country."); Pueblo Indian cases; 34 Op. Atty Gen. 439, 445 (1925) ("it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."). It is important to note that the latter opinion is after ratification of the 16th Amendment (authorizing direct income taxes on people and entities) and the 1924 congressional grant of national citizenship to all Indians. 8 U.S.C.A. § 1401(b) (1994).

generations of Indians. Generations of tribal leaders have viewed tribal-federal treaty negotiations and their provisions as evidence of a unique and longstanding relationship with the federal government, which obtained limited and delegated authority from tribes, and Indian tribes, who reserved all powers not expressly delegated.[4] Therefore, COLT member tribes' want to reiterate that any proposed federal rule and/or any analysis should begin with an understanding of reserved tribal treaty rights because the status,[5] applicable presumptions,[6] and interpretations of tribal-federal treaties,[7] or lack thereof, is often outcome determinative.

As such, COLT member tribes strongly affirm the Department's proposed rule because they correctly exclude tribal general welfare benefits from a tribal recipient's income for federal income tax purposes. Furthermore, from COLT's perspective, the Department's proposed rule returns federal agency action to U.S. Constitutional origins by implementing "Indians not taxed" in today's world, comports with reserved tribal treaty rights by deferring to tribal sovereignty and governance, and incorporates the Indian canons of construction by interpreting the Act as the Indians understand the statutory provisions.

[4] See U.S. v. Winans, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted"); See e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (upholding the tribes' reserved treaty rights with respect to off-reservation hunting and fishing in previously ceded lands).; United States v. Winans, 198 U.S. 371 (1905) (holding that the tribe, pursuant to its treaty with the federal government, reserved the right to hunt and fish off-reservation); Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983), cert. denied, 464 U.S. 805 (1983) (concluding that the tribes' reserved right to hunt, fish and gather on ceded lands survived implied abrogation by later executive orders or treaties).

[5] "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. Art. VI, Cl. 2 (emphasis supplied). In Turner v. American Baptist Missionary Union, 24 F. Cas. 344, 346 (C.C. D. Mich. 1852), the federal court held that a treaty with Indian tribes has the same dignity and effect as a treaty with a foreign and independent nation, and as such, are the supreme law of the land.

[6] *See e.g.,* Deborah A. Geier, *Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 B.Y.U. L. Rev. 451 (1994).

[7] "In construing treaties, the courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them." RENNARD STRICKLAND, ET AL., FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 222 (1982 ed.) (internal citations omitted); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" -- How Long a Time is That?*, 63 Calif. L. Rev. 601 (1975).

The Department's proposed regulations reflect the consensus of tribal stakeholders after many meetings over a period of years and recognize tribal sovereignty. For example, the proposed rulemaking acknowledges that tribal nations, and not a federal agency, are in the best position to understand and meet the needs of their citizens. The Department's rule honors tribal self-determination by giving deference tribal governments and their determinations about what constitutes general welfare benefits.

COLT member tribes appreciate the respect that the Department's proposed regulations provide with respect to acknowledging diverse tribal traditions and governance structures. In specific, COLT is very pleased that the regulations allow flexibility and informality by allowing programs to continue and/or be established through tribal custom and traditions, and not just formal written programs and policies. The proposed federal regulations recognize that each tribal community's culture, traditions, geographic location, and economic circumstances must be considered when evaluating benefits and that it is important for tribal nations to operate programs according to their own culture and governmental practices.

COLT appreciates the Department's regulations for clarifying that tribal nations may utilize any source of funds for general welfare programs, including tribal gaming revenues. The Department's regulations appropriately recognize that every tribal nation has an inherent right to make a sovereign decision regarding its own revenue and that is consistent with our overall tripartite federalism (tribal, state, and federal). COLT also supports the broader eligibility of tribal program participants proposed in the definitions.

COLT strongly supports the suspension of Departmental audits until the final regulations are issued and providing a grace period to allow tribal communities to adapt and update, if necessary, to comply with the Department's proposed regulations. Before any action or audits by the Department, their personnel must receive comprehensive training. The comprehensiveness of the training must include tribal leader input nationally and must be in collaboration with the Tribal Treasury Advisory Committee (TTAC). To ensure that IRS agents and tribal nation's financial officers understand both the technical requirements and the sovereign principles underlying the Department's proposed regulations, the process to develop detailed training plans must be in consultation with TTAC and Indian country.

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The proposed regulation reflects the Act's purpose in promoting tribal traditions, culture, custom and governments practices as well as the promotion of tribal self-determination. The broad flexibilities in the proposed regulation – deference to tribal determinations, expanded definition of tribal program participants and use of any revenue, and the respect for tribal discretion regarding culture and ceremony – is critically important to COLT member tribes. Importantly, the Department's proposed rule returns federal agency action to U.S. Constitutional origins by implementing "Indians not taxed" in today's world, comports with reserved tribal treaty rights by deferring to tribal sovereignty and governance, and incorporates the Indian canons of construction by interpreting the Act as the Indians understand the statutory provisions. In conclusion, COLT strongly supports the Department's proposed regulation.

We appreciate your consideration and leadership on this important proposed regulation.

Respectfully,

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OJ Semans
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O.J. Semans, Sr., Executive Director