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

January 7, 2025

tribal.consult@treasury.gov

RE: Proposed Rulemaking on Tribally-Chartered Entities (REG-113628-21) / Comments of the Coalition of Large Tribes

Dear U.S. Department of the Treasury and the Internal Revenue Service Administration Officials:

I write as Chairman 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 rule entitled "Entities Wholly Owned by Indian Tribal Governments."

For COLT, it is important to acknowledge that the 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] Additionally, Indian tribes, as sovereign governments, are explicitly mentioned only once in the body of the U.S. Constitution: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes* . . . ."[3]

It is critical to reset the foundation for federal tax authority in Indian country. Tribes and their citizens did not participate in the Constitutional convention. The Constitution and any amendments to the Constitution are not applicable to Indian tribes because they preexist all

[1] U.S. CONST. Art. I, § 2, Cl. 3.

[2] U.S. CONST. amend. XIV, § 2.

[3] U.S. CONST. Art. I, § 8, Cl. 3 (emphasis supplied). For insight on the origin and meaning of this clause, *see* Robert N. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1055 (1995).

American governments.[4] However, Constitutional-like agreements—federal-tribal treaties—were made between numerous tribal governments and the federal government on behalf of each other's citizenry.[5] Thus, any authority for a federal tax must derive from a specific grant or authorization from an Indian tribe through a treaty or express congressional legislation.[6]

Against this historical and legal backdrop, the first step in establishing good tax policy in Indian country is to reestablish and affirm the legal basis of the sovereign power to tax. It is COLT's position that the original understanding of federal-state tax federalism principles—embodied in the doctrine of intergovernmental tax immunity—remain applicable to the federal-tribal-state set of government relationships today. Consequently, COLT member tribes' want to reiterate that any proposed federal rule and its underlying analysis should begin with an understanding of reserved tribal treaty rights because the status,[7] applicable presumptions,[8] and interpretations of tribal-federal treaties,[9] or lack thereof, is often outcome-determinative.

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[4] *See e.g.*, Talton v. Mayes, 163 U.S. 376 (1896).

[5] Robert A. Williams, Jr., Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace, 82 Calif. L. Rev. 981 (1994).

[6] This logically follows from the principles of treaty federalism, where the U.S. Supreme Court held that "treaties were not a grant of rights to the Indians, but a grant of rights from them - a reservation of those rights not granted." *U.S. v. Winans*, 198 U.S. 371 (1905).

[7] "[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.

[8] *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).

[9] "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).

From COLT's perspective, the Department's proposed rule returns federal agency action to its 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 corporate governance, and is consistent with consent and the doctrine of intergovernmental tax immunity. In addition to the Department's proposed rule being consistent with tribal-federal treaties, the rule applies tribal nations' understanding of how those treaty provisions have been understood by generations of tribal leaders – namely that treaties and their provisions are evidence of a unique and longstanding trust relationship with the federal government, who obtained limited and delegated authority from tribes; and Indian tribes reserved all powers not expressly delegated.[10]

Based on extensive research, it is COLT's understanding that most federal taxes were simply not applied to Indian tribes.[11] This longstanding approach comports with federal-tribal treaties and is an implicit recognition of federalism-in-action.[12] In fact, in 1967, the Internal Revenue Service took its first formal position with respect to the legal status of tribal governments and

[10] *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); *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).

[11] The historical origin of this position may be derived from the Indian Reorganization Act of 1934. 25 U.S.C. § 477. In the 1934 Act, Congress provided that a tribe may incorporate under section 17 as a federally chartered corporation and would not be subject to federal income taxes, regardless of where the business was located. Rev. Rul. 94-16, 1994-2 CB 19. A comparable ruling was approved for tribal corporations organized under Section 3 of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. ' 503. Rev. Rul. 94-65, 1994-2 C.B. 14 (ruling that the tribal corporation was not subject to federal income tax for income earned by the business on or off the tribe's reservation).

[12] As a result, there have been relatively few federal-tribal governmental tax disputes until recently. *See e.g., Chickasaw Nation v. United States*, 122 S.Ct. 528 (2001) (holding that the Indian Gaming Regulatory Act did not exempt tribes from paying gambling-related excise and occupational taxes that States did not have to pay under Chapter 35 of the Internal Revenue Code); *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), vacated by 534 U.S. 84, 122 S.Ct. 528 (2001), remanded to 280 F.3d 1371 (Fed. Cir. 2002) (concluding that tribes were not exempt from excise taxes on pull-tab games).

concluded that Indian tribes are not taxable entities.[13] In 1981, the IRS extended its 1967 ruling when it held that an Indian tribal corporation, organized under Section 17 of the IRA, shares the same tax status as the tribe and is therefore not taxable on its income from activities carried on within Indian country.[14] In 1994, the IRS recognized and affirmed treaty federalism principles by requiring consistency with the federal-tribal relationship to the exclusion of any connection with state business entity law.[15]

The Department's proposed regulations provide tribally-chartered entities with the same tax treatment as federal chartered tribal corporations – in effect, these entities would not be subject to federal income tax on income earned in the conduct of commercial business on or off the organizing tribe's reservation. As such, COLT member tribes strongly affirm the Department's proposed rule because it extends the rationale of previous Departmental rulings to include all tribally-chartered and wholly owned entities. COLT member tribes appreciate the respect that the Department's proposed regulations provide with respect to acknowledging diverse tribal governance and corporate structures.

COLT also supports the Department's proposed regulations recognition of multi-tribe ownership structures because it facilitates intertribal trade, something COLT member tribes have been doing for thousands of years. The Department's rule honors tribal treaties and self-determination by not imposing an integral part or other multi-factor control test and no new reporting requirements. The Department's deference to tribally-chartered entities is important

[13] Rev. Rul. 67-284, 1967-2 CB 55; accord Rev. Rul. 94-16, 1994-1 CB 19. A revenue ruling is an official interpretation by the IRS of the proper application of the tax law to a specific transaction." BLACK'S LAW DICTIONARY 1320 (7th ed. 1999).

[14] Rev. Rul. 81-295, 1981-2 C.B. 15.

[15] Rev. Rul. 94-16, 1994-1 C.B. 19. In fact, if the tribal corporation is organized under state law it is subject to federal income taxation, absent an express provision to the contrary. *See* PLR 9429011; Rev. Rul. 94-65, 1994-2 C.B. 14 (providing guidelines for tribal businesses incorporate under state law to dissolve and reincorporate under federal law or tribal law); PLR 9710011 (providing retroactive relief under Rev. Rul. 94-65).

because it facilitates their purpose to generate much needed tribal governmental revenue due to a lack of the same property, income, and sales tax base as non-tribal governments.

In specific, COLT is very pleased that the regulations allow for reliance on the proposed rule for tax years that precede the notice of proposed rulemaking. That certainty is important for previously formed and wholly owned tribal entities and the important corporate purpose and revenue generation that those pre-existing entities provide for tribal communities. Similarly, COLT supports these entities being eligible for clean energy tax credits through elective pay and for them to be treated as an instrumentality of a tribal government.

With respect to employment and excise taxes, COLT believes in flexibility for tribal nations and their wholly owned entities. It should be a local tribal sovereign and corporate decision to assert an excise tax benefit, on behalf of a tribal government, or to treat a tribally-chartered entity as separate from the tribal government for excise and employment tax liability. The proposed federal regulations should acknowledge that each tribal community has its own economic circumstances, corporate reasons, and sovereign decisions to consider and choose when evaluating benefits and risks for each tribal entity and government.

COLT appreciates the Department's examples that help clarify the proposed regulation. Other examples of routine tribal entity structures would be helpful for COLT leaders (e.g., tribal entities that own multiple other tribal entities). We urge the Department to engage in tribal consultation and prioritize additional guidance for the federal tax treatment of tribally-charted entities that are owned in part by persons or entities other than tribes. Many tribal nations have partnered with third parties to initiate economic development projects throughout the country and that tax guidance will be very important.

The Department's regulations appropriately recognize that every tribal nation, including COLT member tribes, should be treated as sovereign governments, with primary and exclusive control over its revenue generation within and outside of its own territory. The proposed regulation reaffirms tribal self-determination by respecting tribal nations to make their own decisions, whether governmental or commercial and with entities of their own creation and/or choice, to best serve their homelands and citizens without any federal income taxation of that tribal revenue generation. In conclusion, the Department's proposed rule returns federal agency action to U.S. Constitutional origins by implementing "Indians not taxed" in our modern context, comports with reserved tribal treaty rights by deferring to tribal sovereignty and governance, and incorporates

intergovernmental tax immunity principles. Consequently, COLT strongly supports the Department's proposed regulation.

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

Respectfully,

J. Garret Renville, COLT Chairman
Chairman, Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota