

Date: May 23, 1997

VAOPGCPREC 21-97

From: General Counsel (022)

Subj: Pension Income: Characterization of Per Capita Distributions  
of Revenues from Gaming on Tribal Trust Land

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Are amounts received as per capita distributions of revenues from gaming activity on tribal trust property considered income for purposes of improved pension, section 306 pension, old-law pension, or parent's dependency and indemnity compensation (DIC)?

DISCUSSION:

1. The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721), authorizes Indian tribes to conduct gaming activities for profit on lands held in trust by the United States for tribes or individual Indians. The IGRA requires each Indian tribe engaged in gaming activity to adopt a gaming ordinance providing, among other things, that the net revenues from gaming will be used only for certain specified purposes, including funding of tribal government, providing for the general welfare of the tribe and its members, and promoting tribal economic development. 25 U.S.C. § 2710(b)(1)(B), (b)(2)(B), and (d)(1)(A)(ii). If the ordinance meets the criteria specified in the IGRA, the Chairman of the National Indian Gaming Commission (a component of the Department of the Interior created pursuant to the IGRA) must approve it. 25 U.S.C. § 2710(b)(2), (d)(2)(B), and (e). The IGRA states that certain gaming revenues may be used to make per capita payments to tribe members only if the tribe has adopted a plan to allocate revenues to the uses authorized by the statute and the plan has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(b)(3).

2. The question has arisen whether amounts received as per capita payments of tribal gaming revenues must be considered

income for purposes of improved pension, section 306 pension, old-law pension, and parents' DIC. In determining the amount

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of an individual's annual income for purposes of these income-based benefits, all payments from any source must be considered as income unless a specific exclusion from income is authorized by statute. See 38 U.S.C. §§ 1503(a) (improved pension) and 1315(f)(1) (parents' DIC); 38 C.F.R. § 3.252(c) (section 306 pension and old-law pension).

3. This office has previously recognized that title 25, United States Code, provides specific exclusions from income applicable to certain payments received by Native Americans. See VAOPGCPREC 1-94 (O.G.C. Prec. 1-94); VAOPGCPREC 76-90 (O.G.C. Prec. 76-90). One such exclusion is established by the Per Capita Distributions Act, Pub. L. No. 98-64, 97 Stat. 365 (1983) (codified at 25 U.S.C. §§ 117a-117c). That statute authorizes the Secretary of the Interior or an Indian tribe to make per capita distributions of "[f]unds which are held in trust by the Secretary of the Interior . . . for an Indian tribe." 25 U.S.C. § 117a. Pursuant to 25 U.S.C. § 117b(a), which incorporates by reference statutory provisions codified at 25 U.S.C. § 1407, up to \$2,000 per year of such per capita payments are excluded from income for purposes of any Federal or federally-assisted program. See VAOPGCPREC 1-94. A separate exclusion from income is provided by 25 U.S.C. § 1408, which states that up to \$2,000 per year received by an individual Indian as income derived from such individual's interest in trust or restricted lands shall be excluded from income for purposes of any Federal or federally-assisted program.

4. The attorney for an Indian tribe has asserted that per capita payments of tribal gaming proceeds are excluded from Department of Veterans Affairs (VA) income computations under 25 U.S.C. §§ 117a and 117b as per capita distributions of funds held in trust by the Secretary of the Interior or, alternatively, are excluded from income under 25 U.S.C. § 1408 as income derived from an individual's interest in trust lands. With respect to the first of those assertions, the exclusion under 25 U.S.C. §§ 117a and 117b applies only to per capita distributions of "[f]unds which are held in trust by the Secretary of the Interior." We have been informed by the Bureau of Indian Affairs that tribal gaming proceeds are not held in trust by the Secretary of the Interior. Rather, the tribes retain possession and control of such proceeds. See

*Vizenor v Babbitt*, 927 F. Supp. 1193, 1203 (D. Minn. 1996) (revenues from gaming on tribal lands "do not constitute property held in trust by the federal government, but are instead tribal property"); *Smith v. Babbitt*, 875 F. Supp. 1353, 1369 (D. Minn. 1995), *aff'd in part and appeal dismissed in part*,

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100 F.3d 556 (8th Cir. 1996) (funds generated by tribal community's corporate gaming enterprise are managed by the community and are not part of a trust corpus). Per capita distributions of gaming revenues are made from funds held by the tribe, rather than funds held in trust by the Secretary of the Interior. Accordingly, such per capita distributions are not excluded from income under 25 U.S.C. §§ 117a and 117b.

5. The tribal attorney has asserted that the responsibilities imposed on the Secretary of the Interior by the IGRA "impose a clear and specific trust responsibility regarding gaming income and any distribution of such income authorized as per capita payments." Nothing in the IGRA, however, authorizes the Secretary of the Interior to hold gaming proceeds in trust for a tribe.

6. The Supreme Court has held that a common-law trust obligation may arise, notwithstanding the absence of an express statutory reference to creation of a trust, in circumstances where the Federal Government "'has control or supervision over tribal monies or properties'." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). In *Mitchell*, the Court concluded that a trust relationship arose where Federal statutes and regulations governing timber harvesting on tribal trust land imposed upon the Secretary of the Interior the "full responsibility to manage Indian resources and land for the benefit of the Indians." *Mitchell*, 463 U.S. at 224. The United States Court of Appeals for the Federal Circuit has held, pursuant to *Mitchell*, that a trust obligation may arise under statutes and regulations imposing specific obligations on the Secretary of the Interior, even though the statutes and regulations do not vest the Secretary with complete or comprehensive control over day-to-day management of tribal land or resources. *Brown v. United States*, 86 F.3d 1554, 1559-61 (Fed. Cir. 1996). *Brown* involved a statutory and regulatory scheme permitting individual Indians to enter into commercial leases of lands allotted to them, subject to the approval of the Secretary of the Interior, subject to the

conditions and forms prescribed by the Secretary, and subject to the Secretary's control over cancellation of leases. The Federal Circuit concluded that, although the Secretary did not have ongoing management responsibility over the administration of commercial leases, the Secretary's responsibilities under the statutes and regulations constituted sufficient control over such leases to give rise to a fiduciary duty under trust principles. *Id.* at 1561-63.

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7. The effect of characterizing the statutes and regulations at issue in *Mitchell* and *Brown* as establishing "trust" relationships was to permit Indian tribes and individual Indians to maintain actions in Federal Court for damages for breach of trust. Under the Tucker Act, 28 U.S.C. § 1491, the United States may be sued for damages in non-tort claims only if an applicable source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. *Mitchell*, 463 U.S. at 216-18; *Brown*, 86 F.3d at 1559. *Mitchell* and *Brown* concluded that statutes establishing trust responsibilities may be interpreted to permit an action for damages for breach of those trust responsibilities under established principles governing liability of trustees. *Mitchell*, 463 U.S. at 226; *Brown*, 86 F.3d at 1563. *Mitchell* and *Brown* make clear, however, that the provisions of the applicable statutes and regulations "define the contours of the United States' fiduciary responsibilities." *Mitchell*, 463 U.S. at 224; *Brown*, 86 F.3d at 1560, 1563. In other words, although the Secretary of the Interior's duties under statutes and regulations may be viewed as "trust" obligations enforceable in an action for damages, the extent of such duties is generally limited to the duties specified in the applicable statutes and regulations. *Brown*, 86 F.3d at 1563; *Pawnee v. United States*, 830 F.2d 187, 191-92 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

8. The IGRA vests the Secretary of the Interior and the National Indian Gaming Commission with limited control over Indian gaming and the distribution of proceeds from such gaming. For example, tribal gaming ordinances must be approved by the Chairman of the National Indian Gaming Commission before a tribe may conduct most types of gaming activity. 25 U.S.C. § 2710(b) and (d). The IGRA limits the tribe's use of gaming proceeds and requires the Secretary of the Interior to approve a tribe's distribution plan before a tribe may make per capita distributions of certain gaming proceeds to tribe

members. 25 U.S.C. § 2710(b)(2)(B) and (b)(3)(B) and (C). Although it may be reasonable, under *Mitchell* and *Brown*, to characterize such statutory obligations as "trust" obligations, the extent of the Secretary's trust obligations is limited to the duties specified in the IGRA. Nothing in the IGRA directs the Secretary of the Interior to take possession of tribal gaming proceeds or to hold such proceeds in trust for a tribe. The Secretary's duty to review tribal plans for distribution of gaming proceeds cannot be construed to require the Secretary to hold funds in trust for an Indian tribe.

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9. Although *Mitchell* and *Brown* suggest that various types of "trust" responsibilities may arise pursuant to statute and regulation, 25 U.S.C. § 117a refers to a specific type of trust responsibility -- the duty to hold funds in trust for an Indian tribe. The phrase "[f]unds which are held in trust" in 25 U.S.C. § 117a must be construed to refer to funds within the Secretary's possession. Absent sufficient indication to the contrary, we must presume that Congress intended the term "trust" in section 117a to carry its ordinary and established meaning. See *Pioneer Investment Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (it is presumed that Congress intends the words in its enactments to carry their ordinary, contemporary, common meanings); *Molzof v. United States*, 502 U.S. 301, 307 (1992) (where Congress employs a term of art with an established legal meaning, it is presumed that Congress intended to adopt the term's established meaning). A "trust" is ordinarily a legal arrangement in which property is held by one party, the trustee, to be managed by the trustee for the benefit of another. Black's Law Dictionary 1508-09 (6th ed. 1990); 76 Am. Jur. 2d *Trusts* §§ 1, 2, 52 (1992). Conveyance of the trust assets to the trustee is generally a prerequisite to establishment of a trust. 76 Am. Jur. 2d *Trusts* § 52.

10. Although the term "held" may have different meanings in different contexts, the context of section 117a indicates that the term is intended to refer to direct possession or control. The term "held" is employed in section 117a with reference to a specific trust asset (i.e., "funds") and with reference to a "trust" relationship, which, as noted above, generally contemplates that the trustee will obtain possession of the trust asset. Accordingly, the phrase "[f]unds which are held in trust" must be presumed to refer to funds actually received by

the Secretary of the Interior and held or managed on behalf of an Indian tribe.

11. In addition, the meaning of a particular statutory term or provision "is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear." *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Further evidence of the meaning of the phrase "held in trust" is provided by other provisions of title 25, United States Code, which employ that phrase. Several provisions of title 25 require the Secretary of the Interior to deposit certain funds in the United States Treasury for the benefit of Indian tribes. See 25 U.S.C. §§ 161, 161b, 348, 398b, 399, 400a. Section 162a of title 25, United States

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Code, provides that Indian tribal "funds . . . held in trust" by the United States may be withdrawn from the Treasury by the Secretary of the Interior and deposited in banks or invested in public-debt obligations of the United States or in certain other instruments. The Secretary is required to account for the daily and annual balances of "all funds held in trust" for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a. 25 U.S.C. § 4011(a). These provisions indicate that the phrase "funds . . . held in trust" is employed in title 25, United States Code, to refer to funds within the direct control of the Secretary of the Interior and maintained by the Secretary in accounts with the United States Treasury or banks or invested by the Secretary as authorized by statute.

12. Consistent with the provisions of title 25, United States Code, and the ordinary meaning of the term "trust," the phrase "[f]unds . . . held in trust" in 25 U.S.C. § 117a must be construed to refer to funds over which the Secretary of the Interior has direct possession or control. Although the IGRA authorizes the Secretary to approve or disapprove in advance a tribe's plan for allocation of funds held by the tribe itself, funds which are held by the tribe under such a plan, rather than by the Secretary of the Interior, are thus not "[f]unds . . . held in trust by the Secretary of the Interior" within the meaning of 25 U.S.C. § 117a and distributed under the Per Capita Distributions Act for purposes of 25 U.S.C. §§ 117b(a) and 1407. Accordingly, per capita distributions of tribal

gaming proceeds are not excluded from income for purposes of VA need-based programs under those provisions of law.

13. The attorney for the tribe has asserted, alternatively, that per capita distributions of up to \$2,000 per year in gaming proceeds must be excluded from VA income computations pursuant to 25 U.S.C. § 1408. Section 1408 states:

Interests of individual Indians in trust or restricted lands shall not be considered a resource, and up to \$2,000 per year of income received by individual Indians that is derived from such interests shall not be considered income, in determining eligibility for assistance under the Social Security Act or any other Federal or federally assisted program.

The tribal attorney asserts that gaming proceeds constitute income from interests in tribal trust lands, noting that, under the IGRA, gaming is permitted only on tribal trust property.

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14. For purposes of 25 U.S.C. § 1408, it is necessary to distinguish between trust lands belonging to a tribe as a whole and trust lands allotted to individual Indians. Pursuant to various statutes and treaties, the Secretary of the Interior routinely holds lands in trust for Indian tribes as a whole and manages those lands on behalf of the tribes. Section 1 of the Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified, as amended, at 25 U.S.C. § 331), authorized the President to allot portions of tribally-owned trust land to individual tribe members. When an allotment has been made, the Secretary of the Interior holds the allotted land in trust for the individual to whom the allotment was made. 25 U.S.C. § 348.

15. Congress was aware of this distinction in drafting Pub. L. No. 103-66, § 13736, 107 Stat. 312, 663 (1993), which amended section 1408 to add the \$2,000 income exclusion. The House report concerning legislation which became Public Law No. 103-66 indicated that income derived from tribally-owned trust lands and distributed per capita to tribe members would be excluded from income determinations under then-existing law. The report summarized the then-existing law as follows:

Income received by Indians from tribally-owned trust lands is exempt from consideration under Federal welfare programs, such as [Aid to Families with

Dependent Children] and Supplemental Security Income (SSI). This income is distributed on a per capita basis to tribal members, but the land is owned by the tribe as a whole and managed for the tribe's benefit by the Bureau of Indian Affairs.

H.R. Rep. No. 111, 103d Cong., 1st Sess. 494-95, *reprinted in* 1993 U.S.C.C.A.N. 378, 726-27. While there is no statute or other authority expressly providing that income from tribally-owned trust land which is distributed per capita to tribe members is excluded from consideration in determining entitlement to income-based Federal benefits, Congress apparently concluded that income derived from tribally-owned trust land would be held in trust for the tribe by the Secretary of the Interior and that per capita distributions from funds held in trust would be subject to the income exclusion provided under 25 U.S.C. §§ 117b(a) and 1407. See S. Rep. No. 214, 102d Cong., 1st Sess. (1991) (a report concerning an earlier legislative proposal similar to the provision ultimately enacted as section 13736 of Pub. L. No. 103-66, which contained the statement that the Per Capita Distributions Act "excluded from

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consideration as income or resources . . . tribal per capita distributions of funds derived from tribal trust resources.").

16. The purpose of the 1993 amendment to 25 U.S.C. § 1408 was to create a similar exclusion for income derived from individually-owned property. The \$2,000 exclusion provided in 25 U.S.C. § 1408 applies to income derived from "[i]nterests of individual Indians in trust or restricted lands." The legislative history of section 13736 of Pub. L. No. 103-66 states that the purpose of the amendment was to "exempt[] income up to \$2,000 annually paid to an individual derived from leases on individually-owned trust or restricted Indian lands in determining eligibility and benefit levels" under certain Federal programs. H.R. Rep. No. 111, 103d Cong., 1st Sess. 495 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 727 (emphasis added); see also S. Rep. No. 214, 102d Cong. ("The purpose of this bill is to treat income derived from tribal lands that were individually allotted under the policies of the General Allotment Act of 1887 in the same fashion as income derived from tribal trust resources."). This statement makes clear that the exclusion under section 1408 applies only to income derived from individually-owned trust lands and not to income



from tribally-owned trust lands. In a certificate submitted by the tribal attorney in the instant matter, a Bureau of Indian Affairs realty officer stated that the tribe's gaming facilities are located on land held in trust for the tribe. Accordingly, it appears that 25 U.S.C. § 1408 is inapplicable in this case.

17. In addition, we question whether gaming proceeds may be considered income derived from interests in trust or restricted lands. The Supreme Court has concluded that income received by an individual Indian which is derived directly from allotted trust land is exempt from Federal taxation, but that other forms of income received by such an individual are subject to Federal taxation. *Squire v. Capoeman*, 351 U.S. 1, 9 (1956). In applying that principle, courts have consistently concluded that income is derived directly from trust land when the income results principally from the exploitation or use of the land and its resources, but not when the income results principally from a commercial business situated on trust land. See *Dillon v. United States*, 792 F.2d 849, 855-56 (9th Cir. 1986), cert. denied, 480 U.S. 930 (1987). Accordingly, income derived from mining, logging, agricultural, and similar activities has been held to be exempt from taxation. *Capoeman*, 351 U.S. at 10; *Stevens v. Commissioner*, 452 F.2d 741, 746 (9th Cir. 1971); *Big Eagle v. United States*, 300 F.2d

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765 (Ct. Cl. 1962). In contrast, income resulting from conduct of a business upon trust lands has been held to result primarily from the investment and labor in the business enterprise and not primarily from the trust land. See *Dillon*, 792 F.2d at 856; *Critzer v. United States*, 597 F.2d 708, 713 (Ct. Cl.) (en banc), cert. denied, 444 U.S. 920 (1979); see also *Saunooke v. United States*, 806 F.2d 1053, 1056-57 (Fed. Cir. 1986) (income representing rental value of land used in operation of businesses and leases of buildings not exempt from taxation). By analogy, income from gaming operations may be considered to derive primarily from investment in a business enterprise, rather than from an interest in the land itself.

18. The basic standard governing computation of income is the same for purposes of improved pension, section 306 pension, old-law pension, and parents' DIC. All payments from any source must be included in income unless a specific exclusion is authorized by statute. For the reasons stated above, the

exclusions from income authorized by the Per Capita Distributions Act and 25 U.S.C. § 1408 are not applicable to amounts received as per capita distributions of gaming proceeds pursuant to the IGRA. We have found no other statutory provision which would authorize the exclusion of such amounts from income for purposes of any of the referenced VA income-based benefits.

HELD:

Amounts received by an individual pursuant to a per capita distribution of proceeds from gaming on Indian trust lands pursuant to the Indian Gaming Regulatory Act are considered income for purposes of Department of Veterans Affairs income-based benefits.

Mary Lou Keener