

# SANTA YNEZ BAND OF CHUMASH INDIANS

P.O. BOX 517 · SANTA YNEZ · CA · 93460

Tel: 805.688.7997 · Fax: 805.686.9578

[www.santaynezchumash.org](http://www.santaynezchumash.org)

## BUSINESS COMMITTEE

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September 10, 2019

Treasury Tribal Advisory Committee  
Department of the Treasury  
1500 Pennsylvania Avenue NW, Room 1426G  
Washington, DC 20220  
[Tribal.Consult@treasury.gov](mailto:Tribal.Consult@treasury.gov)

## RE: Public Comment in advance of Sept. 18, 2019 TTAC meeting

To the Honorable Treasury Tribal Technical Advisory Committee:

As the Committee addresses the General Welfare Exclusion (GWE), the Santa Ynez Band of Chumash Indians ("Chumash") respectfully requests the following issues be included:

### 1. Safe Harbor for the Use of Casino Net Revenues for GWE

Revenue Procedure 2014-35 gives some limited guidance in distinguishing between taxable per capita payments and non-taxable payments under the GWE:

Sec. 2.03, p. 7:

Payments under Indian tribal governmental programs meeting these requirements qualify for the general welfare exclusion whether the revenues that the Indian tribal government uses to fund the programs derive from levies, taxes, service fees, revenues from tribally-owned businesses, or other sources. For example, general welfare programs may be funded from casino revenues. However, per capita payments to tribal members of tribal gaming revenues that are subject to the Indian Gaming Regulatory Act are gross income under § 61, are subject to the information reporting and withholding requirements of §§ 6041 and 3402(r), and are not excludable from gross income under the general welfare exclusion or this revenue procedure. See 25 U.S.C. §§ 2701-2721 and 25 C.F.R. Part 290.

However, recently the 11<sup>th</sup> Circuit in *United States v. Jim* (11 Cir. 2018), the Court of Appeals upheld the decision of the trial court that payments funded by net gaming revenues were taxable as per capita payments under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. Sec. 2710(b)(3) and not exempt under the Code Section 139E.

The *Jim* case involved a very unique fact pattern and distribution years that predated the GWE. Nor do we think the case could reasonably be read to prohibit the use of gaming revenue for

GWE so long as the distributions are not *in substance* per capita payments. However, as Indian Gaming is the most successful form of economic development in all of Indian Country, any confusion about the use of net gaming revenues to fund General Welfare programs could undermine the entire GWE.

Thus, we think this may be a topic that TTAC should consider addressing. We would suggest considering guidance that clarifies (1) that program benefits which meet the criteria for treatment as “Indian general welfare benefits” under Code Section 139E do not lose that status merely because they are funded with gaming revenues; (2) that IGRA requires taxation of only those gaming revenues that are distributed “per capita”; and (3) that the determination of whether payments are classified as “per capita” will depend on each tribe’s individual revenue allocation plan and program descriptions.

In this regard, there should be recognition that general welfare benefits are not “per capita” just because they are equal. In fact, such limits are often put in place due to budget constraints and/or cultural values for the equitable apportionment of tribal resources. Payments, even if equal for all members with a qualifying need, should be distinguished from an IGRA per capita, if they are designated for specific GWE purposes. A \$200 per member per year allowance for cultural language training paid for from gaming revenues, for example, should not lose its status for GWE merely because each member has equal access to the same level of qualifying assistance. Other tribes may budget a uniform amount for use by tribal members to address different pre-approved GWE needs. If expended for qualifying program purposes, such benefits should not lose their status because the tribe addresses budget limitations on a uniform basis.

As a safe harbor pending final guidance, it may be helpful to confirm that tribes may rely on the description of per capita *versus* general welfare assistance in their IGRA approved revenue allocation plans, and/or to confirm that payments designated for specific GWE purposes are distinguished from “per capita” payments subject to taxation under IGRA.

## 2. Expanded consideration for medical payments as GWE eligible

Given the challenges to the Affordable Care Act in which Section 139D was included, we would like to see the category of medical benefits separately addressed as Revenue Procedure 2014-35 specifically did not address any Section 139D medical benefits:

### 2.04 *Benefits that are not addressed by this revenue procedure*

In addition, this revenue procedure does not address certain benefits that members of an Indian tribe may exclude from income under a specific provision of the Code or other federal statute. For example, § 139D provides that gross income does not include the value of medical care (as used in § 213) an Indian tribe (as defined in § 45A(c)(6)) provides to a member of the tribe or the member’s spouse or dependents. Thus, a payment that an Indian tribe makes to an Indian medicine man to use traditional practices for the purpose of treating a tribal member’s disease may be excludable from the tribal member’s gross income under § 139D. *See Tso v. Commissioner*, T.C. Memo 1980-399. [p. 8]

We note that Code Section 139D is limited certain benefits that qualify as medical care for purposes of employee health programs (as defined in Code Section 213) and uses a definition of member, spouse and dependent that is arguably narrower than that used in Revenue Procedure 2014-35. We believe that tribes should be free under Code Section 139E to develop health and wellness programs distinct from those benefits otherwise covered by Code Section 139D.

Thank you for the opportunity to provide public comment on these important GWE and federal income tax issues. If you have any additional questions, please contact me or Sam Cohen, Government Affairs and Legal Officer ([scohen@sybmi.org](mailto:scohen@sybmi.org)).

Sincerely,

A handwritten signature in black ink, appearing to read 'Kahn', written over a horizontal line.

Kenneth Kahn,  
Tribal Chairman