

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

JOHN A. "ROCKY" BARRETT, JR.,)	
and SHERYL S. BARRETT)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL NO.CIV-06-968-HE
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

**PLAINTIFFS JOHN A. BARRETT, JR., AND SHERYL S. BARRETT'S
MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF**

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Dated the 12th day of September, 2007

TABLE OF CONTENTS

	<u>Page(s)</u>
INTRODUCTION.....	1
STATEMENT OF UNDISPUTED MATERIAL FACTS.....	2
ARGUMENT AND AUTHORITIES.....	11
Standard for Summary Judgment.....	11
Chairman Barrett’s Compensation By The Tribe Is Not Subject To Income Tax Because It Derives From Trust Funds From Judgments By The Indians Claims Commission	11
Legislative and General Background.....	12
Legal Analysis	18
The Barretts At All Times Acted In Good Faith And With Reasonable Cause And No Penalties Should Be Imposed Pursuant To 26 U.S.C. §6662.....	23
CONCLUSION.....	27

TABLE OF AUTHORITIES

Cases

<i>Allen v Commissioner</i> , T.C. Memo. 2005-118	25
<i>Allen v Commissioner</i> , T.C. Memo. 2006-11	25
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202, 216 fn. 19, 107 S.Ct. 1083 (1987)	21
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001)	16
<i>Cross v. Commissioner</i> , 83 TC 29 (1984)	25
<i>Higbee v. Commissioner</i> , 116 T.C. 438, 446 (2001)	24
<i>Lazore v Commissioner</i> , 11 F.3d 1180 (3 rd Cir. 1993)	25
<i>Montana v Blackfeet Tribe of Indians</i> , 471 U.S. 759, 766, 105 S.Ct. 2399 (1985)	19
<i>Myrick v. Commissioner</i> , T.C. Summ.Op. 2007-143, 2007 WL 2325196 (August 15, 2007)	23
<i>Northern Cheyenne Tribe v. Hollowbeast</i> , 425 U.S. 649, 655, n.7, 96 S.Ct. 1793, 1797, n.7 (1976)	19
<i>Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991)	22
<i>Prairie Band Potawatomi Nation v. Wagon</i> , 476 F.3d 818, 824 fn 9 (10 th Cir. 2007)	22
<i>Pueblo of Santa Ana v. United States</i> , 214 F.3d 1338, 1342 (Fed. Cir. 2000)	19
<i>Squire v. Capoeman</i> , 351 U.S. 1, 6 (1956)	18
<i>United States v. Simons</i> , 129 F.3d 1386, 1388 (10 th Cir. 1997)	11

Rules and Statutes

25 U.S.C. § 1405.....	14, 19
25 U.S.C. § 450a.....	21
25 U.S.C. § 1402.....	14
25 U.S.C. § 4022(a)	17
25 U.S.C. § 4023.....	17
26 U.S.C. § 6662.....	9, 23, 24, 25, 27
26 U.S.C. § 6664(c)(1)	25
26 U.S.C. § 7491(c)	23
26 C.F.R. § 1.6664-4(b)(1)	25
Rule 56, Fed.R.Civ.P.	1, 11

Other Authorities

44 FR 7235 (Feb. 6, 1979).....	12
48 FR 40567 (Sept. 8, 1983).....	14
48 FR 40567-01	19
72 FR 13648 (March 22, 2007)	12
U.S. General Accounting Office, Financial Management: BIA's Management of the Indian Trust Funds, GAO/T-AIMD-93-4 (1993).....	16
U.S. General Accounting Office, Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements, GAO/T-AIMD-94-99 (1994)	16

Treatise

41 <i>Am.Jur 2d</i> , Indians § 2 (1995)	19
--	----

Public Laws

American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, codified at 25 USC §§ 4001 <i>et seq.</i>).....	6, 16
Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70 - 70v-3 (1946)	5, 12
Indian Judgment Funds Use or Distribution Act. 25 USC § 4023.	17
Indian Reorganization Act of 1934 (48 Stat. 984).....	12
Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203), 25 U.S.C. § 450 <i>et seq</i>	21, 24

Indian Finance Act of 1974 (88 Stat. 77)	21
Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, codified at 25 USC §§ 1401 <i>et seq.</i>	14
Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967)	12
 IRS Material	
Rev. Rul. 59-354, 1959-2 C.B. 24	18
Rev. Rul. 54-456, C.B. 1954-2	18
Internal Revenue Manual, Chapter 88, Section 1, Part 4.88.1.6.3.1 (01-01-2003)	18

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**PLAINTIFFS JOHN A. BARRETT, JR., AND SHERYL S. BARRETT'S
MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs John A. Barrett, Jr. ("Chairman Barrett"), and Sheryl S. Barrett (collectively, the "Barretts"), hereby move for summary judgment on all claims by the Barretts against the Defendant United States of America and, based thereon, request that the Court enter judgment in their favor. In support hereof, the Barretts submit the following:

INTRODUCTION

On its face, this case concerns the question of the taxability of funds paid to Chairman Barrett as Chairman of the Citizen Potawatomi Tribe *fka* Citizen Band Potawatomi Indian Tribe (the "Tribe"), and the source of those funds. To answer that question, however, one has to delve into years of history by the various Indian tribes within the United States and their attempts to be justly compensated for the lands and reservations taken from them by the United States Government. Those struggles for just

compensation have resulted in some awards to the various tribes, including the Tribe. For years, the portions of those awards not distributed *per capita* to the members of the tribes have been managed by the Secretary of the Interior through the Bureau of Indian Affairs. The mismanagement of those funds has been well documented within the United States Government and the courts. As a result, in part, Congress enacted legislation to allow the tribes to manage the funds on their own, subject to various requirements, which had to be approved by the Secretary of the Interior. The Tribe elected to manage the funds held by the Secretary of the Interior on the Tribe's behalf and, at the same time, retain the trust characteristics of the funds.

From the beginning, these funds have been impressed with tax exemption to their recipients. The Tribe, as a governmental act, has made the conscious decision to pay the Chairman from these funds. It is from these funds which Chairman Barrett is paid, and which is the subject of the dispute in this case. The Defendant claims the payments to be taxable. Chairman Barrett and the Tribe claim the payments are not subject to taxation.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. During the 2001 tax year, the Barretts were married taxpayers. (Para. 1, Stipulation of Facts filed August 16, 2007 ("Stip.")).
2. Chairman Barrett is a member of the Tribe, the ninth largest federally recognized tribe of American Indians with approximately 27,000 members across the United States. (Para. 3, Stip.).

3. Chairman Barrett is a native of Shawnee, Oklahoma and a graduate of Shawnee High School. He has studied at Princeton University, the University of Oklahoma, and Oklahoma City University. Chairman Barrett earned a Bachelor's of Science degree in business at Oklahoma City University and attended the Graduate School of Business at OCU. He has also been awarded an honorary Doctorate of Commercial Sciences from St. Gregory's University. (Para. 2 of Exhibit "A," Affidavit of John A. Barrett, Jr., attached hereto ("Aff. Of Barrett").

4. During the calendar year 2001, Chairman Barrett was the duly elected Chairman of the Citizen Tribe (the "Tribe"). (Para. 3, Aff. Of Barrett)

5. The Tribe's governing body and governmental headquarters are located in Pottawatomie County, State of Oklahoma, near Shawnee, Oklahoma. (Para. 4, Aff. Of Barrett)

6. Chairman Barrett first became involved with governance of the Tribe in 1971, when he was appointed Vice Chairman of the Tribe to complete the balance of a term until the next election. In 1971, the Tribe had less than \$1,000.00 in funds and two and a half acres of land. (Para. 5 and 6, Aff. Of Barrett)

7. In 1985, Chairman Barrett was elected at the annual meeting of the Citizen Potawatomi Nation Indian Council (which consists of all competent members of the Tribe over 18 years of age) as Chairman of the Tribe, a position to which he has been re-elected by the general membership of the Tribe through today. (Para. 10, Stip.; Para. 7, Aff. Of Barrett)

8. The Chairman is in the executive branch of the Tribe, and has various constitutional duties. (Para. 8, Aff. Of Barrett) The constitutional duties of the Chairman are to head the Executive Branch of the Tribe and include general supervision of the daily affairs of the Tribe, seeing that the laws of the Tribe are faithfully enforced, and presiding over meetings of the various bodies of the government of the Tribe. (Para. 9, Aff. Of Barrett)

9. The Constitution of the Tribe also provides for a separately elected judicial branch and a legislative branch called the Business Committee. The Business Committee is comprised of the Chairman, Vice Chairman, Secretary/Treasurer and two Councilmen. All of these positions are elected by the Citizen Potawatomi Nation Indian Council at their annual meeting. The functions of the Business Committee include developing a budget for the use of the Tribe's funds on a fiscal year basis and appropriating funds for the day-to-day operations of the Tribe. These functions include budgeting for and appropriating any compensation of the Chairman. (Para. 11, 12 and 13, Stip.; Para. 10 and 11, Aff. Of Barrett)

10. Today, the Tribe has a \$350 Million a year cash flow operation, including fourteen separate businesses and the management of thirty contracts for the United States government. Chairman Barrett is involved in all aspects of these operations. The Tribe owns and operates the largest tribally owned national bank in the United States, First National Bank & Trust Company, Shawnee, Oklahoma, of which Chairman Barrett serves as Chairman of the Board of Directors. (Para. 12, Aff. Of Barrett)

11. In the late 1940s and early 1950s, the Tribe brought various claims with the Indian Claims Commission against the United States Government pursuant to the Indian Claims Commission Act ("Claims Commission Act"), 60 Stat. 1049, 25 U.S.C. §§ 70 - 70v-3 (1946). One of the purposes of the Claims Commission Act was to settle "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." *Id.* § 70a. (Para. 16, Stip.)

12. As a result of these various claims, the Tribe was awarded judgments against the United States. (Para. 14, Aff. Of Barrett)

13. In the mid-to late 1970s, awards were made by the Indians Claims Commission with respect to some of the claims by the Tribe. Under the distribution plan approved by the Secretary of the Interior of the United States (the "Secretary of the Interior") with respect to these awards, eighty (80%) of the awards were distributed pro-rata to all members of the Tribe, except that, if the member was a minor, the funds were to be retained by the Secretary of the Interior in specific accounts for that purpose. The remaining twenty (20%) of the awards were to be held in perpetual trust by the Secretary of Interior, with the income from such funds to be used for specific activities of the Tribe, including health aids, prosthetics and scholarships. (Para. 17, Stip.)

14. The Tribe has budgeted and disbursed from the trust funds varying amounts to members of the Tribe who qualify for health aids, prosthetics and scholarships. These disbursements were not subject to income tax to the recipients. (Para. 18, Stip.)

15. In the 1980s, awards were made by the Indians Claims Commission with respect to the remaining claims by the Tribe. Under the distribution plan approved by the Secretary of the Interior of the United States with respect to these awards, seventy (70%) of the awards were distributed pro-rata to all members of the Tribe, except that, if the member was a minor, the funds were to be retained by the Secretary of the Interior in specific accounts for that purpose. The remaining thirty (30%) of the awards were to be held in perpetual trust by the Secretary of Interior, with the income from such funds to be used for real estate acquisition, development of the Tribe, including increasing the effectiveness of the Government, and the maintenance of the property of the Tribe. (Para. 19, Stip.; Para. 17, Aff. Of Barrett)

16. Each year, the general membership of the Tribe would vote on the Tribe's budget for the expenditure of the income earned from the trust fund set-asides maintained by the Secretary of the Interior. (Para. 20, Stip.)

17. In 1994, Congress passed the American Indian Trust Fund Reform Act of 1994, 25 USC §§ 4001 *et seq*, which, *inter alia*, allowed tribes to withdraw and manage any trust funds held by the Secretary of the Interior on their behalf, subject to the approval of the Secretary of the Interior. (Para. 21, Stip.)

18. In 1995, the Tribe, through a general election, voted to withdraw all trust funds from the control and management of the Secretary of the Interior, and to place the control and management of the trust funds with the Tribe. After withdrawal, the funds maintained their status as trust funds. (Para. 22, Stip.)

19. In 1996, the Business Committee of the Tribe passed Resolution 96-44 authorizing the Chairman of the Tribe to effectuate the transfer of the management of the trust funds from the Secretary of the Interior to the Tribe pursuant to certain management policies and guidelines to be approved by the Secretary of Interior. (Para. 23, Stip.)

20. As part of the request for approval of the self-management by the Tribe of the trust funds held by the Secretary of the Interior, the Tribe submitted for approval to the Secretary of the Interior a detailed Investment Management Policy for the investment and use of the trust funds by the Tribe. Chairman Barrett was involved in the development of the Investment Management Policy and the negotiations and discussions with the Secretary of the Interior. Under the Investment Management Policy, the purposes and uses for the expenditure of the earnings withdrawn from the trust pursuant to the annual budget approved by the electorate remained the same as those in effect during the trust management tenure of the Secretary of the Interior. (Para. 21, Aff. Of Barrett)

21. In 1996, the Secretary of the Interior approved the Tribe's removal of the trust funds, subject to the Tribe's use and management of the funds in a manner consistent with the Investment Management Policy. The Tribe now maintains the trust fund in a separate trust account held with the First National Bank & Trust. The Tribe's earnings from the trust fund that are to be expended for the year are placed in the Tribe's General Fund account as a sub-account, and accounted for separately from the remainder of the Tribe's General Fund monies. Any earnings from the trust fund that are not

included in the budget or approved by the general membership of the Tribe remain with the trust fund and become part of the principal of the trust fund. (Para. 26 of Stip.) At that time of withdrawal, the trust funds from the 1980s Indian Claims Commission judgments totaled approximately \$3,750,000.00. (Ex. 5, Stip.; Para. 23, Aff. Of Barrett)

22. The Tribe has been successful in the management of the funds. The appreciated value of the funds under the Secretary of the Interior for the fourteen (14) year period prior to tribal management was less than six percent (6%) annually. Since assuming management of the funds, the Tribe has experienced over ten percent (10%) annual growth of the funds. Today, the trust funds total approximately \$11 Million to \$12 Million. (Para. 24 and 25, Aff. Of Barrett)

23. The Secretary of the Interior requires the Tribe to have performed an audit of the trust funds on a yearly basis by an independent auditor. After completion, the Tribe submits the audits to the Secretary of Interior. A summary of the Independent Auditor's Report, entitled the Comprehensive Annual Financial Report, is provided to the Tribe's general membership at the annual meeting of the Citizen Potawatomi Nation Indian Council. (Para. 27, 28 and 29, Stip.; Para. 26 and 27, Aff. Of Barrett)

24. The Tribe has been awarded a Certificate of Achievement for excellence in financial reporting by the Government Finance Officers Association of the United States and Canada for twenty years straight. (Para. 28, Aff. Of Barrett)

25. In 2001, Chairman Barrett received compensation from the Tribe for his duties as Chairman in the amount of \$48,057.64. (Para. 29, Aff. Of Barrett)

26. The source of the funds to pay Chairman Barrett's compensation was the trust funds self-managed by the Tribe and received from the Secretary of Interior. The authority for the payment of the compensation from the trust funds was the Business Committee of the Tribe, which was approved by the general electorate of the Tribe at the annual meeting of the Tribe, and subsequent payment was made pursuant to that authorization. (Para. 37, Stip.; Para. 30 and 31, Aff. Of Barrett)

27. The payments of Chairman Barrett's compensation from the trust funds were a conscious and intentional act of the Tribe because of the Tribe's firm belief that the trust funds are not subject to Federal income taxation to the recipient. This would save the Tribe money, and consequently free up funds for other tribal programs, because, in part, to hire someone, or to properly pay the Chairman, to oversee a \$350 Million operation would require much more than the salary the Tribe pays Chairman Barrett. (Para. 32, Aff. Of Barrett)

28. After audit, the Internal Revenue Service (the "IRS") determined that the compensation paid to Barrett by the Tribe was taxable income to Chairman Barrett. On June 16, 2005, the IRS issued a Notice of Deficiency proposing to assess the Barretts for additional income taxes for the 2001 tax year with respect to the compensation paid to Chairman Barrett. The proposed assessment by the IRS was for income taxes in the amount of \$19,355.00, and penalties of \$3,871.00, pursuant to 26 USC § 6662, which amounts were ultimately assessed by the IRS. (Para. 40, 41, 42, 43 and 44, Stip.)

29. After payment of all amounts assessed, the Barretts, in March, 2006, filed Form 1040X, Amended U.S. Individual Income Tax Return, requesting a refund of the amounts paid pursuant to the assessments relating to the compensation paid to Chairman Barrett as Chairman of the Tribe. By letter dated May 10, 2006, the IRS denied the Barretts' refund claim in full. (Para 44, 45, 46, 47 and 48, Stip.)

30. No part of the amounts claimed by the Barretts in their refund claim has been repaid or refunded to the Barretts. (Para. 49, Stip.)

31. In addition to being Chairman of the Tribe, Chairman Barrett is also: 1) president of Barrett Drilling Company, an independent oil and gas production company; 2) president of Barrett Land and Cattle Company, a registered Angus cattle ranch; 3) Chairman of the Board of Rainbow Development Corporation, through which he and a partner developed Rainbow Casino in Vicksburg, Mississippi, and Chairman Barrett currently retains a limited revenue share as payment for its sale to Alliance Gaming Corporation in 1997; 4) serves as the Oklahoma Delegate to the National Tribal Self Governance Advisory Committee; and 5) serves as a delegate to the National Congress of American Indians. Chairman Barrett formerly served on the Board of Directors of the National Tribal Chairman's Association and the Oklahoma City Area Indian Health Advisory Board, and as an officer in the United Tribes of Western Oklahoma and Kansas. He is a founder of the National Indian Action Contractor's Association. Chairman Barrett currently holds a Class III gaming license in the State of Mississippi. (Para. 33, 34, 35 and 36, Aff. Of Barrett)

ARGUMENT AND AUTHORITIES

Standard For Summary Judgment

The standard for ruling on a Motion for Summary Judgment is set forth under Rule 56(C), Fed. R. Civ. P., which in pertinent part provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *United States v. Simons*, 129 F.3d 1386, 1388 (10th Cir. 1997)

Chairman Barrett's Compensation By The Tribe Is Not Subject To Income Tax Because It Derives From Trust Funds From Judgments By The Indians Claims Commission

The source of the funds used to pay compensation to Chairman Barrett as Chairman of the Tribe was trust fund monies previously awarded by the Indians Claims Commission. Those funds are not subject to income taxation. Accordingly, Defendant's claim that these funds are taxable must fail. Chairman Barrett is entitled to a refund of all amounts paid for the 2001 tax year.

Legislative and General Background

The Tribe is the ninth largest federally recognized tribe. *See, e.g.* list of Federally Recognized Tribes first published by the Department of the Interior in 1979 at 44 FR 7235 (Feb. 6, 1979) and the latest list of Federally Recognized Tribes at 72 FR 13648 (March 22, 2007). The Tribe was federally recognized long before these lists were required to be established and maintained by the Department of the Interior. The first Constitution of the Tribe was approved by the Secretary of the Interior on October 5, 1938 pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984 codified as 25 U.S.C. § 461 *et seq.*) and the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967 codified as 25 U.S.C. § 501 *et seq.*). *See*, Preamble, Ex.1, Stip.

On August 13, 1946, President Harry S. Truman signed into law the Indians Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70 - 70v-3. One of the purposes of the Claims Commission Act was to settle "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." *Id.* § 70a.

The Indians Claims Commission Act established the Indians Claims Commission and was designed to settle disputes concerning the taking of lands from the various Indian tribes, including the Tribe, throughout the United States. As President Truman stated upon signing the Indians Claims Commission Act "Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain, paying them approximately 800 million dollars in the process. It

would be a miracle if in the course of these dealings--the largest real estate transaction in history--we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.” Document 204, Statement by the President Upon Signing Bill Creating the Indian Claims Commission, August 13, 1946, Public Papers of Harry S. Truman. John Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California.

The Tribe filed various claims with the Indians Claims Commission. These included Indians Claims Commission Docket Numbers 15-C, 15-D, 15-E, 15-I, 15-K, 15-L, 15-M, 15-N, 15-P, 15-Q, 15-R, 29-A, 29-B, 29-C, 29-D, 29-G, 29-I, 29-J, 29-K, 29-L, 29-M, 29-N, 29-O, 29-P, 71, 96, 128, 146, 216, 217, 306, 308, 309, 310, 311, and 338. See, Ex. 2 and Ex. 3, Stip.; and Para. 13, Aff. Of Barrett.

As a result of the claims, awards or judgments were made to the Tribe in the 1970s and 1980s. Some of the funds were distributed *pro rata* to the members of the Tribe. The remaining funds were to be held in trust by the Secretary of the Interior. The funds held in trust by the Secretary of the Interior were to be used for tribal purposes as approved by the Secretary of the Interior. With respect to the first round of awards or judgments, the portion to be held in trust was to be used one-half for prosthetic and medical devices, and the remainder was to be used for scholarships, and subject to the approval of the Secretary of the Interior, any surplus of funds could be used for other

tribal purposes. With respect to the last round of awards or judgments, the portion of the award to be held in trust was to be used for the benefit of the entire Tribe's economic well-being. The plan called for the acquisition of additional lands to build upon the land base of the Tribe, the development of the Tribe's assets, and to provide for the maintenance and care of the property of the Tribe.

These plans were developed pursuant to the Indian Tribal Judgment Funds Use or Distribution Act. (87 Stat. 466, codified at 25 USC §§ 1401 *et seq.*) The Indian Tribal Judgment Funds Use or Distribution Act required the Secretary of the Interior to prepare, after consultation with the Tribe, plans for the use and distribution of funds appropriated to pay judgments awarded to the Tribe by the Indians Claims Commission. Instead of having Congress affirmatively review and approve each plan, the Indian Tribal Judgment Funds Use or Distribution Act required the Secretary to prepare and approve the plan, and, then, submit the plan to Congress. Thereafter, such a plan became effective sixty days after it was submitted to Congress, unless during the sixty day period, a joint resolution of Congress was enacted disapproving the plan. 25 USC §§ 1402, 1405.

In April 1983, pursuant to these statutes, the Secretary of the Interior submitted to Congress a plan for the Potawatomi Nation of Indians, which includes the Tribe. 48 FR 40567 (Sept. 8, 1983) This plan became effective on July 17, 1983, and was published on September 8, 1983 and concerned the last round of the awards mentioned above. Under the plan, seventy percent (70%) of the funds were distributed *pro rata* to all members of the Tribe. *Id.* at Section 3.

The remaining funds were to be used for the “programming aspects” of the plan. *Id.* at Section 5. With respect to the Tribe, the thirty percent (30%) of the funds for the programming aspects of the plan were to be used “in a Ten-Year Tribal Acquisition, Development, and Maintenance Plan.” *Id.* at Section 5(d). The Tribe was required to prepare guidelines and a budget for these so-called “Set-Aside Funds.” *Id.* at Section 5(d)(i). At the end of the ten (10) year period, a review was to be made by the Tribe of the Tribe’s needs with respect to the Set-Aside Funds, and any adjustments could be made with the approval of the Secretary of the Interior. *Id.* at Section 5(d)(iii).

The plan approved by the Secretary of the Interior specifically provided that **“None of the funds distributed per capita or made available under this plan for programming shall be subject to Federal or State income taxes...”** *Id.* at Section 6(b). (emphasis supplied).

On January 2, 1985 the Secretary of the Interior approved guidelines for the programming aspects of the plan, and a Set-Aside Funds budget submitted by the Tribe. See, Exhibit 3, Stip. The guidelines established definitions for the Acquisition, Development and Maintenance components of the plan. See, Section 1.4, Exhibit 3, Stip. Development was defined as “those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally.” *Id.* The Tribe operated under these guidelines until 1996, at which time they were renewed or readopted as discussed below.

The funding for the programming aspects of the plan under the Acquisition, Development and Maintenance was to come from the earnings on the principal amounts awarded to the Tribe. *Id.* at Section 1.3. Principal was to be used only if absolutely necessary. Of course, the decisions concerning the investment of the funds were in the hands of the Secretary of the Interior.

Unfortunately, for as long as the Secretary of the Interior through the Bureau of Indian Affairs has held trust funds on behalf of American Indians (since 1820), those funds have been mismanaged. *See, e.g.,* H.R. Rep. No. 103-778 (1994) (“The responsibility for management of Indian Trust Funds by the BIA has been determined through a series of court decisions, treaties, and statutes. Volumes have been written about improper management of funds within the Bureau of Indian Affairs since its inception.”); U.S. General Accounting Office, Financial Management: BIA's Management of the Indian Trust Funds, GAO/T-AIMD-93-4 (1993); U.S. General Accounting Office, Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements, GAO/T-AIMD-94-99 (1994); and *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

For these reasons, in 1994, the American Indian Trust Fund Management Reform Act of 1994 (“Trust Act”) was enacted. (108 Stat. 4239, codified at 25 USC §§ 4001 *et seq.*) In addition to providing comprehensive reform to the manner in which the Secretary of the Interior manages trust funds, the Trust Act allows tribes to “submit a plan to withdraw some or all funds held in trust for such tribe by the United States and managed by the Secretary [Secretary of the Interior] through the Bureau [Bureau of

Indian Affairs].” 25 USC § 4022(a). This permission to withdraw the trust funds included the judgment funds awarded by the Indians Claims Commission and held by the Secretary of Interior pursuant to the Indian Judgment Funds Use or Distribution Act. 25 USC § 4023.

In 1996, the Tribe submitted for approval to the Secretary of the Interior an Investment Management Policy for the withdrawal, investment and distribution of the trust funds by the Tribe. In 1996, the Secretary of the Interior approved the Tribe’s withdrawal of the trust funds. As a result, the Tribe now (and has since 1996) manages all the trust funds previously received by the Secretary of the Interior from the awards made by the Indians Claims Commission.

The Investment Management Policy approved by the Secretary of the Interior provides that the purpose and use of the earnings on the trust funds shall be consistent with the original claims settlements, i.e. those awards and judgments by the Indians Claims Commission. See, Page 2 and Section X, Ex. 5 of Stip. The principal of the trust funds is not to be invaded, and any earnings not distributed under the plan during a plan year become principal. *Id.* at Section X. The spending of the earnings on the trust funds is to be determined by the Tribe’s Business Committee. *Id.* at Section X. Amendments to the policies outlined in the Investment Management Policy could be made by the Business Committee of the Tribe. *Id.* at Section XII. The specific budgets and disbursement of the funds proposed by the Business Committee for a given year, however, require a vote of the general electorate of the Tribe in order to be effective.

See, Section 3, Article V of the Citizen Potawatomi Nation Constitution, Ex. 1, Stip. During the years in issue in this case, such budgets and plans of disbursements were submitted to, and approved by, the Tribe's general electorate.

Based on these elections, and the approval of the Business Committee of the Tribe, Chairman Barrett received compensation as Tribal Chairman from the Set-Aside Funds invested and managed by the Tribe, and previously held by the Secretary of the Interior.

Legal Analysis

The Barretts do not dispute the general rule that American Indians, being United States citizens, are subject to Federal income tax in the same manner as other United States citizens. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). However, as with all general rules, there are exceptions.

The Barretts claim that such an exception exists, i.e. that the payments to Chairman Barrett by the Tribe are not subject to Federal income tax because the source of those funds (the judgment awards by the Indians Claims Commission) are impressed with an exemption from Federal income taxes.

Of course, an exemption from the payment of Federal income tax may not be implied and, if exemption of an American Indian exists, it must derive plainly from the Federal tax statutes or from treaties or agreements with the American Indian Tribes concerned or some Act of Congress dealing with their affairs. *Squire, supra*; Rev. Rul. 59-354, 1959-2 C.B. 24; Rev. Rul. 54-456, C.B. 1954-2; and Internal Revenue Manual, Chapter 88, Section 1, Part 4.88.1.6.3.1 (01-01-2003).

In making such determinations, it is well settled that statutes passed for the benefit of Indian tribes are to be liberally construed. 41 *Am.Jur 2d*, Indians § 2 (1995); *Northern Cheyenne Tribe v. Hollowbeast*, 425 U.S. 649, 655, n.7, 96 S.Ct. 1793, 1797, n.7 (1976). Not only are statutes to be construed liberally in favor of the Indians, any ambiguous provisions are also interpreted to their benefit. *Montana v Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399 (1985); *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1342 (Fed. Cir. 2000).

As noted, the 1980s judgments by the Indians Claims Commission were awarded to the Tribe to be held in trust by the Secretary of the Interior pursuant to a Plan for the Use and Distribution agreed by the Tribe and the Secretary of the Interior under the Indian Tribal Judgment Funds Use or Distribution Act. That plan became final and was published in the Federal Register on September 8, 1983. *See*, 48 FR 40567-01. Under the Indian Tribal Judgment Funds Use or Distribution Act, the Plan for the Use and Distribution agreed upon by the Tribe and the Secretary of the Interior was deemed Congressionally approved. 25 U.S.C. § 1405(a).

Section 6(b) of the Plan for the Use and Distribution expressly provides: “None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes...” Under Section 5(d) of the plan, the programming aspect was the Ten-Year Tribal Acquisition, Development, and Maintenance Plan. This was defined to include “those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion,

strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally.” These provisions were carried forward under the Investment Management Policy to the current funds held by the Tribe under the Trust Act.

Thus, as is clear, the funds available for programming are not subject to Federal income tax. These funds are available to be used to help strengthen or increase the effectiveness of the Tribe from an economic and/or governmental perspective. The Barretts, and the Tribe, submit that this includes compensation necessary to pay a Chairman of the Tribe such as Chairman Barrett.

Providing compensation to the Chairman of the Tribe on a tax exempt basis does further the governmental and economic growth, expansion, strengthening, effective or evolutionary process of the Tribe. It allows the Tribe to commit the Chairman to the Chairman’s duties on a full-time basis. Because the Chairman is responsible for the day-to-day oversight of the operations of the Tribe, the full-time participation of the Chairman is important, particularly as the Tribe has grown, both governmentally and economically. In addition, tax exemption allows the Tribe to pay the Chairman a smaller amount than would otherwise be warranted. It is no small feat to manage and oversee the funds under the Ten-Year Tribal Acquisition, Development, and Maintenance Plan, which totaled approximately \$3,750,000 in 1996 (*See*, Exhibit A to Ex. 5, Stip.), and which today totals approximately \$11 to \$12 Million. Moreover, the real estate acquisition and other programs under the plan do not operate in a vacuum. The Chairman of the Tribe has to oversee these programs. Chairman Barrett has been involved in all aspects of these

successful operations. Even with tax exemption, it is submitted that the compensation Chairman Barrett received for overseeing the operations of a \$350 Million enterprise is woefully inadequate.

In addition, the tribal resources saved as a result of the tax exemption can be used for other tribal governmental purposes, allowing the Tribe to stretch its pocketbook further.

While Chairman Barrett is a current beneficiary of this tax exemption, the tax free nature of these payments will insure that the Tribe is able to recruit and promote other persons who have the competency and know-how to run the varied and successful operations of the Tribe.

Moreover, the tax exemption provided under the Plan for the Use and Distribution from the 1980s awards is consistent and part of Congress' desire to migrate away from Federal domination of programs and the provision of services to Indians and, instead, to develop strong and stable tribal governments. This is the express Congressional intent of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203 codified at 25 U.S.C. § 450 *et seq.*) which began a marked shift in Federal policy by Congress in its approach to Indian tribes and their members. 25 U.S.C. § 450a; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 fn. 19, 107 S.Ct. 1083 (1987).

Since the passage of the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Finance Act of 1974 (88 Stat. 77 codified at 25 U.S.C. § 1451 *et*

seq.) various Acts of Congress, Executive Branch policies and judicial opinions have consistently reaffirmed the strong Federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance. *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 824 fn 9 (10th Cir. 2007). These acts at the highest levels of the various branches of the Federal government are designed to achieve the goal of Indian self-government, and the over-riding goal of encouraging self-sufficiency and economic development. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991).

Section 5 of the Congressionally approved Plan for the Use and Distribution concerning the programming aspects of the plan dovetails into this strong Federal policy by providing for the use of the trust funds to “in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally.” The breadth of the language was intended to promote and encourage the discretion of the elected officials of the Tribe in determining the best uses of trust funds available under the programming aspects of the Plan for the Use and Distribution. The Tribe’s decision to compensate the Chairman of the Tribe from the trust funds, and that such compensation would fit within the parameters of the allowed uses of the trust funds, can not reasonably be questioned. For the Federal government, in the form of the IRS, to now step back into an area in which Congress and the Secretary of the Interior have conferred and approved substantial discretion for the Tribe, is contrary to the strong Federal policy of tribal self governance.

In short, payment of compensation to the Chairman of the Tribe from the trust funds previously held by the Secretary of the Interior and now managed by the Tribe is in comport with the objectives and mandate agreed upon and approved by the Secretary of the Interior, the Tribe and Congress. The payments do cause growth, building up, expansion, and increased effectiveness toward the economic and governmental effectiveness of the Tribe. Accordingly, the compensation paid to Chairman Barrett for the 2001 tax year is exempt from Federal income taxation. The Barretts are entitled to a refund of the income taxes paid.

**The Barretts At All Times Acted In Good Faith And With Reasonable Cause
And No Penalties Should Be Imposed Pursuant To 26 U.S.C. §6662**

Assuming for arguments sake only that an underpayment of income tax exists for the 2001 tax year, the Barretts at all times had reasonable cause for any underpayment determined by the Court, and the Barretts at all times acted in good faith. Accordingly, the Barretts should not be penalized pursuant to 26 U.S.C. § 6662 as asserted by the Defendant. As explained above, the Barretts are confident that the compensation paid to Chairman Barrett by the Tribe is not subject to income tax, and hence, an underpayment of tax does not exist for the 2001 tax year.

The Defendant has the burden of production to establish that the Barretts should be penalized under 26 U.S.C. § 6662. 26 U.S.C. § 7491(c). In other words, the Defendant must produce sufficient evidence that it is appropriate to apply the penalty to the Barretts. *Myrick v. Commissioner*, T.C. Summ.Op. 2007-143, 2007 WL 2325196

(August 15, 2007) citing *Higbee v. Commissioner*, 116 T.C. 438, 446 (2001).

The Barretts do not believe the Defendant can meet its burden. However, even assuming *arguendo* that the Defendant can meet its initial burden, the Barretts should still not be penalized under 26 U.S.C. § 6662, because the Barretts had reasonable cause for their position that the compensation paid to Chairman Barrett by the Tribe is not subject to income tax.

26 U.S.C. § 6662 provides as follows:

§ 6662 . Imposition of accuracy-related penalty.

(a) Imposition of penalty.-If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies.-This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following:

(1) Negligence or disregard of rules or regulations.

(2) Any substantial understatement of income tax.

An understatement is substantial if the amount for the taxable year exceeds the greater of: (i) 10 percent of the tax required to be shown on the return for the taxable year, or (ii) \$5,000. The greater of these two numbers is ten percent of the tax required to be shown on the return. That amount is \$285,368.00. See, Form 4549A, Ex. 9, and Para. 2, Stip. Because the alleged deficiency was \$19,355.00, no substantial understatement can occur.

"Negligence" is generally defined as any failure to make a reasonable attempt to

comply with the provisions of this title, and the term "disregard" is generally defined as any careless, reckless, or intentional disregard. 26 U.S.C. § 6662(c).

26 U.S.C. § 6664(c)(1) provides that no penalty shall be imposed under § 6662 "if it is shown that there was a reasonable cause for such [underpayment] and that the taxpayer acted in good faith" 26 U.S.C. § 6664(c)(1). According to the Treasury regulations, "[c]ircumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer." 26 C.F.R. § 1.6664-4(b)(1).

Here, the Barretts (specifically Chairman Barrett) have acted in good faith in asserting the position that the amounts paid to Chairman Barrett from the trust funds awarded by the Indian Claims Commission are not subject to Federal income tax. This is not only Chairman Barrett's position, but is also the Tribe's position.

This is not a case where the Barretts are claiming compensation is not taxable simply because Chairman Barrett is an American Indian. *See, e.g. Allen v. Commissioner*, T.C. Memo. 2005-118. Nor is this a case where Chairman Barrett is claiming compensation is not taxable under the General Allotment Act, *Cross v. Commissioner*, 83 TC 29 (1984), or a hodgepodge of inapplicable statutes or treaties. *Allen v. Commissioner*, T.C. Memo. 2006-11.

Instead, this case involves the interpretation of several laws over several years, which, on their face, are directly applicable. This case is more like *Lazore v*

Commissioner, 11 F.3d. 1180 (3rd Cir. 1993) where the Court held the taxpayers were not negligent in pursuing their claims that the amounts paid to the taxpayers were exempt on the sole basis that a treaty with the United States exempted the taxpayers from income tax because they were members of the Mohawk Indians. While the taxpayers did not prevail in their claim, the Court found the claims were made in good faith and not barred by precedent.

The claims by the Barretts in this case are not barred by any precedent that the Barretts have found. And, the Barretts claims have been made in good faith. The amounts claimed exempt by the Barretts represent less than ten percent (10%) of the taxable amounts the Barretts claimed on their returns. Again, the Barretts are not attempting to avoid the payment of taxes for the sake of not paying the taxes. The Barretts have the firm belief that the amounts paid to Chairman Barrett, having been derived from the trust funds of the Tribe, which represent compensation to the Tribe for the taking of tribal land by the United States, are not subject to Federal income tax. See, Para. 39, Aff. Of Barrett.

This was not something that was hidden. The Business Committee of the Tribe approved the payment from the trust funds and expressly recognized the claim that the payments would not be subject to Federal income tax. Moreover, the auditor of the Tribe's books and records was well aware of the position taken by the Tribe and Chairman Barrett with respect to these payments, as was the accounting department of the Tribe. In short, this was not something that was covered up or done in secret by Chairman Barrett.

In short, the position taken by the Barretts is by no means frivolous and was not done in bad faith. The Barretts and the Tribe have a good faith belief that the compensation paid to Chairman Barrett from the trust funds is not subject to Federal income tax.

Accordingly, the negligence penalty does not apply, and should have never been asserted.

CONCLUSION

The compensation to Chairman Barrett by the Tribe from the trust funds awarded the Tribe by the Indians Claims Commission is not subject to Federal income tax pursuant to the express terms of the Congressionally approved Ten-Year Tribal Acquisition, Development, and Maintenance Plan, as carried forward under the Investment Management Policy approved by the Secretary of the Interior at the Tribe took over management of the trust funds. Accordingly, the Barretts are entitled to a refund of all amounts (taxes, penalties and interest) paid on such trust funds, plus interest thereon. Assuming, *arguendo*, that these amounts are taxable to the Barretts, the Barretts had reasonable cause for the positions taken with respect to such compensation, and no penalty under 26 U.S.C. § 6662 is proper.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2007, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

Jacqueline Brown, Esq.
U.S. Department of Justice
P.O. Box 7238
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s/William H. Whitehill, Jr.
William H. Whitehill, Jr.

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