

External Opinion
File # 99-17

336-8817

August 27, 1999

Lorenzo Campbell, Executive Director
DNA-People=s Legal Services, Inc.
Route 12, Highway 264
Window Rock, Arizona 86515-0306

Dear Mr. Campbell:

This is a response to your request for an opinion on whether DNA-People=s Legal Services, Inc. (DNA) should consider the Jicarilla tribe=s trust funds as income for client eligibility under 45 CFR Part 1611, the Legal Services Corporation=s (ALSC≅ or ACorporation≅) regulation on client financial eligibility.

According to the Jicarilla Tribal Code that you provided our office, per capita payments from the trust fund are periodically distributed equally to all members of the Jicarilla Apache Tribe. The trust fund is established under the Per Capita Distributions Act, Public Law 98-64, which in turn references Section 7 of the Judgment Fund Distribution Act, Public Law 93-134. The funds are deposited in the United States Treasury and are held in Trust by the Secretary of the Department of the Interior. The Tribal Council manages the trust fund in cooperation with the Secretary as permitted by Public Law 98-64.

Federal law regulates the use and expenditure of tribal trust funds and whether or not such funds should be counted as taxable income or as income for federal benefit programs. First, the Judgment Fund Distribution Act (AJudgment Act≅) regulates judgment funds awarded to Indian tribes and groups by the Indian Claims Commission or the Court of Claims that are held in trust by the federal government. Public Law 93-134, 87 Stat. 466 (1973). As enacted in 1973, it authorized the Secretary of the Department of Interior to establish a plan for the use and distribution of such funds. Section 7 of the Act protected the tribal trust funds from Federal or State income taxes and also protected any per capita payments distributed to tribal members under the Secretary=s plan from being considered as income or resources for purposes of assistance or benefits under the

Social Security Act. In 1983, an amendment to Section 7 expanded the protection for the funds in part by providing that, except for per capita payments in excess of \$2000, the funds should not be considered as income or resources for any federal or federally assisted program. *See* Public Law 97-458, 96 Stat. 2512 (Jan. 12, 1983). The amendment also added a new Section 8 that provided protection for Ainterests of individual Indians in trust or restricted lands.≡ *Id.*

Another law, the Per Capita Distributions Act (ADistributions Act≡), Public Law 98-64 (1983), was enacted primarily to permit per capita payments to Indians out of tribal trust revenue to be made by either the Secretary of the Interior or tribal governments. Under prior law, these funds could be distributed only by the Secretary. The Distributions Act=s coverage is not limited to tribal trusts covered by the Judgment Act.¹ According to the legislative history of the Distribution Act, it applies to funds long held in trust for the Indians by the federal government under laws enacted in 1896 and 1898. *See* H. Rep. No. 230, 98th Cong., 1st Sess. 1 (1983), citing 29 Stat. 336 (1896) and 30 Stat. 502 (1898). Section 2(a) of the Act expressly subjects trust fund payments covered therein to the provisions of Section 7 of the Judgment Act, as amended.²

Sections 7 and 8 of the Judgment Act are codified at 25 U.S.C. §§1407 and 1408. The Distributions Act is codified at 25 U.S.C. §§117a through 117c and §117b incorporates Section 7, as amended, of the Judgment Act. Thus, read together, these U.S. Code provisions regulate whether or not income or interests in Indian trusts are taxable or should be considered as resources or income for federal benefits.

Section 1407 provides that:

None of the funds which -- (1) are distributed per capita or held in trust pursuant to a plan approved under the provisions of this chapter, or (2) on January 12, 1983, are to be distributed per capita or are held in trust pursuant to a plan approved by the Congress prior to January 12, 1983, or (3) were distributed pursuant to a plan approved by Congress after December 31, 1981, but prior to

¹ Section 2(b) of the Act provides that nothing in the Act shall affect the requirements of the Judgment Act provided that distributions of per capita payments under the Judgment Act may also be made by Indian tribes.

² As noted above, the amendment to Section 7 includes the new Section 8.

January 12, 1983, and any purchases made with such funds, including all interest and investment income accrued thereon which such funds are so held in trust, shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act [42 U.S.C.A.] or, except for per capita shares in excess of \$2000, any Federal or federally assisted program.

Section 1408 provides that:

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 [42 U.S.C.A. §301 et seq.] or any other Federal or federally assisted program.

Section 117b provides that:

Funds distributed under sections 117a to 117c of this title shall not be liable for the payment of previously contracted obligations except as may be provided by the governing body of the tribe and distributions of such funds shall be subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended [25 U.S.C.A. §1407].³

These three provisions provide the following protections for tribal trust funds and interests of individual Indians in trusts or restricted lands for the purposes of LSC eligibility.

As a threshold matter, the protections in §§1407 and 1408 apply to assistance under the Social Security Act . . . or any other Federal or federally assisted program.≡ LSC-funded services do not come under the Social Security Act. *See* 42 U.S.C. 301 et seq. Nor is it a Federal program. *See* 42 U.S.C. 2996d(e)(1). However, it qualifies as a federally assisted program because it

³ Section 117a describes the funds as: A[f]unds which are held in trust by the Secretary of the Interior for an Indian tribe and which are to be distributed per capita to members of that tribe.≡

receives an annual federal appropriation to provide financial assistance to recipients. *See* Pub. L. 105-277, 112 Stat. 2681 (1998). Thus, the protections applicable to federally assisted programs apply for purposes of LSC eligibility.

As read together, §§1407 and 117b protect per capita shares up to \$2000⁴ from being counted as income or as a resource for the purposes of determining eligibility for LSC purposes. This protection applies to tribal trusts under both the Judgment and the Distribution Acts.⁵

Section 1408 protects the interests of individual Indians in trust or restricted lands from being considered as a resource under any federally funded program. It also protects up to \$2000 per year of funds received by individual Indians that is derived from such interests from being considered income for determining such eligibility.⁶ According to a Letter Opinion from the Department of the Interior, Section 1408 applies to ownership interests which an individual Indian may have in lands that are either held by the United States in trust for them or are restricted from alienation by federal law.⁷ Such interests are the result of the historical process of allotment on Indian reservations and are interests held independent of any judgment awarded to an Indian tribe. *Id.*⁸

Finally, the protections discussed in this opinion apply only to funds and other interests held *in trust* by the federal government and investment income accrued therefrom. The following have been found to qualify for the protections by the courts: income from the sale of timber from land held in trust, *Squire v. Capoeman*, 351 U.S. 1 (1956); income derived from farming and ranching operations on reservation land held in trust by the federal government, *Stevens v. IRS*, 452 F.2d 741 (9th Cir. 1971). Internal Revenue rulings have also found the following to qualify if they were derived from trust property: income derived from rentals, royalties, sales proceeds from natural resources of the land, sales proceeds from crops grown on the land and use of the land for grazing purposes. *See generally, The Law of Federal Income Taxation*, Jacob Mertens, Jr. §6A.101. On the other hand, per capita distributions of revenues from gaming activity on

⁴ Such funds would also include all interest and investment income accrued while the funds are held in trust.

⁵ *See* Pub. L. 98-64, 25 U.S.C. 117b, which applies Section 7 of the Judgment Act to Indian trusts under the Distribution Act.

⁶ This protection was added in 1993 by Public Law 103-66.

⁷ Letter Opinion to The Deputy Attorney General, State of Idaho, April 1994, attached.

⁸ The opinion also found that Section 1408 extends the exclusion beyond the value of the ownership interest itself, to the income which may be earned from that interest, up to \$2000 per year.≡

tribal trust property are not protected by §§1407 or 1408 because such funds are not held in trust by the federal government. Thus, such funds are considered to be income for purposes of the Department of Veterans Affairs income-based benefits. O.G.C. Pres.21-97(5-23-97).

In summary, DNA may disregard up to \$2000 of per capita payments from the Jicarilla tribal trust when considering income for LSC eligibility. Nor should such funds or interests of individual Indians in trust or restricted lands be considered as a resource for the purpose of LSC eligibility as provided in §§1407 and 1408.

I hope this adequately responds to your inquiry. Please let me know if I can provide any additional assistance.

Sincerely,

Suzanne B. Glasow
Senior Assistant General Counsel