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TEXT:

Treatment of Alaskan Native and Tribal Income for Improved-Pension Purposes

1. You have requested our opinion concerning the following issues pertaining to income computation for purposes of the improved-pension program:

a) Was the decisive factor in counting certain payments to Indians as income in Op. G.C. 8-87 (10-30-87), but excluding other such payments in Op. G.C. 2-88 (5-12-88), that in the former opinion payments were in proportion to land ownership, while in the latter opinion payments were per capita?

b) Are distributions to Alaskan Natives pursuant to the Alaskan Native Claims Settlement Act (ANCSA) outside the scope of the Judgment Funds Distribution Act and the Per Capita Distributions Act?

c) Does section 15 of Pub. L. No. 100-241 exclude from income computation under the improved-pension program \$2,000 per annum of cash dividends on stock in an Alaskan Native corporation?

d) Can all per capita distributions under Pub. L. No. 93-134 be excluded in their entirety from income for improved-pension purposes, without regard to the reason behind the distribution?

e) If the reason for the distribution must be considered, what criteria are determinative of whether a distribution may be excluded in its entirety or whether it is subject to the \$2,000 limit of 25 U.S.C. § 1407?

f) Does the \$2,000 exclusion provided by 25 U.S.C. § 1407 apply: 1) on an annual basis or on one occasion only; and, 2) by family unit or to each family member individually?

The Distinction Drawn in Op. G.C. 8-87 and 2-88.

2. As noted in Op. G.C. 2-88, Indians may derive income from trust lands either directly or through a trust arrangement with the Federal government. In Op. G.C. 8-87, there was no indication that the veteran had received per-capita payments from sums held in trust by the Federal government. However, the payments involved in Op. G.C. 2-88 were made per capita from funds held in trust by the Government. As Pub. L. No. 98-64, § 1, 97 Stat. 365 (1983), applies only to 'funds which are held in trust by the Secretary of the Interior . . . for an Indian

tribe . . . distributed per capita to members of that tribe,' only such funds are brought within the exemption provision of 25 U.S.C. § 1407 by operation of that public law. Thus, with regard to question (a), above, the controlling distinction between the payments dealt with in Op. G.C. 8-87 and those addressed in Op. G.C. 2-88 is that only in the latter opinion were the payments at issue made per capita from funds held in trust by the Secretary of the Interior.

Treatment of Dividends Paid by an Alaskan Native Corporation.

3. Before reaching the applicability of the Indian Tribal Judgment Funds Use or Distribution Act, the Per Capita Distributions Act, and section 15 of Pub. L. No. 100-241 to dividend payments by Alaskan Native corporations, the threshold issue of the countability of such dividends under the provisions of U.S. Code title 38 must first be addressed. Section 503(a) of title 38, U.S. Code, governing income computation for improved-pension purposes, provides that 'all payments of any kind or from any source' shall be included in annual income, with the exception of certain specified categories. The history of this provision indicates Congress' purpose 'that a pensioner's total annual non-pension income shall be included in determining the amount of pension payable, unless a specific exclusion from such income is authorized by law.' S. Rep. No. 95-1329, 95th Cong., 2d Sess. 22 (1978). One such exclusion applies to 'profit realized from the disposition of real or personal property other than in the course of a business.' 38 U.S.C. § 503(a)(6); see also 38 C.F.R. § 3.272(e). To the extent that dividends paid by Alaskan Native corporations may be considered profit realized from the disposition of property, they may be excluded from income computation pursuant to section 503(a)(6).

4. The purpose of the ANCSA, codified at 43 U.S.C. § 1601, et seq., was to provide 'a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims.' Pub. L. No. 92-203, § 2(a), 85 Stat. 688 (1971). Under the ANCSA, Alaskan Natives were to receive a combination of cash, mineral-lease proceeds, and land, id. §§ 6, 9, and 14, 85 Stat. at 690, 694, 702, in exchange for extinguishment of aboriginal land claims. Id. s 4, 85 Stat. at 689. See S. Rep. No. 92-405, 92d Cong., 1st Sess. 108 (1971). The cash and mineral-lease proceeds paid under the ANCSA are placed in the Alaskan Native Fund in the U.S. Treasury for distribution to Native regional corporations established under the ANCSA. 43 U.S.C. §§ 1605 and 1606. The regional corporations in turn distribute a portion of these funds to Native village corporations and Native shareholders. 43 U.S.C. § 1606(j). Village corporations are also authorized to distribute funds under the ANCSA. 43 U.S.C. § 1602(j). Pub. L. No. 92-203, § 2(c) 85 Stat. 688 (codified at 43 U.S.C. § 1601(c)), contained a statement of policy that the provisions of the ANCSA would not replace or diminish any right or privilege of Natives as citizens of the United States or relieve, replace, or diminish any obligation of the United States to protect and promote the rights or welfare of Natives as citizens of the United States. This policy, and the nature of the ANCSA itself were restated and

reaffirmed in Pub. L. No. 94-204, § 4, 89 Stat. 1145, 1147 (1976) (codified at 43 U.S.C. § 1626(a)), which provided 'the payments and grants authorized under this Act constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States.'

5. The foregoing discussion makes clear that funds distributed by the Federal government through the Alaskan Native Fund to Alaskan Native regional corporations and in turn distributed as dividends to individual Natives by regional corporations or Native village corporations represent payment for relinquishment of land claims by the recipients. These land claims may be considered 'property' for purposes of 38 U.S.C. § 503(a)(6), that term being commonly understood to include 'every species of valuable right and interest' 'tangible or intangible,' 'everything that has an exchangeable value.' Black's Law Dictionary 1095 (5th ed. 1979). Further, use of the term 'disposition' in section 503(a)(6), instead of the narrower word 'sale', indicates Congress' intention to include within the scope of the provision transactions which may not fall within the precise meaning of the latter term. Accordingly, in response to questions (b) and (c), above, we conclude that dividends paid to Alaskan Natives by Native corporations representing distributions from the Alaskan Native Fund may be excluded from income computation for improved-pension purposes pursuant to section 503(a)(6). In light of this conclusion, we need not decide whether the \$2,000 exclusions of the Indian Tribal Judgment Funds Use or Distribution Act, the Per Capita Distributions Act and section 15 of Pub. L. No. 100-241 apply to such dividends, since these liberalizing provisions may be construed as not limiting the section 503(a)(6) exclusion. See Op. G.C. 2-88, supra.

6. Although, as discussed above, dividends paid by an Alaskan Native corporation may represent a distribution of funds from the Alaskan Native Fund, they may alternatively represent a distribution of profits from the operations of the Native corporation. Alaskan Native regional corporations are, pursuant to 43 U.S.C. § 1606(d), incorporated 'for profit' under the laws of the State of Alaska. Native village, urban, and group corporations may be organized as 'for profit' or nonprofit corporations. 43 U.S.C. §§ 1602(j), (n), and (o), 1607(a). Payments to Native corporations under the ANCSA were intended in part to provide capital to allow Natives to compete economically with the non-Native population and to raise their standard of living through their own efforts. H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 6, reprinted in 1971 U.S. Code Cong. & Admin. News 2192, 2196. The land and money grants provided under the ANCSA were intended as the total compensation for extinguishment of aboriginal land rights. *Id.* at 2198. Profits derived from business operations, investments, or exploitation of assets by a Native corporation, rather than representing a Federal payment in exchange for land rights, are more analogous to the profits of a typical corporation in which a Native may own stock.

7. Congress recognized this distinction in Pub. L. No. 92-203 through the differing tax treatment provided to different types of dividend distributions by Native corporations. Section 21(a) of that statute, 85 Stat. at 713 (codified at 43 U.S.C. §1620(a)), exempted from Federal, State, and local taxation dividend distributions originating from the Alaskan Native Fund, but provided that this exemption 'shall not apply to income from the investment of such revenues.'

Congress' stated rationale for this limited exemption was that, under general principles of taxation, compensation for extinguishment of land claims does not constitute taxable income. S. Rep. No. 92-405, 92d Cong., 1st Sess. 175-76 (1971). By not extending the exemption to income derived from ANCSA payments, Congress evidenced its understanding that such income was not to be considered compensation for relinquishment of land claims. Although Congress amended the tax exemption provision in 1988 to allow the exemption even where Alaskan Native Fund revenues are commingled with other corporate funds, it maintained the distinction for income from investment of such revenues. Reading section 4 of Pub. L. No. 94-204, and section 2(c) of Pub. L. No. 92-203, from which it derived, in light of the rationale for the tax-exemption provision, we conclude that these sections were intended to refer to Government payments under the ANCSA but not to revenues earned by Native corporations.

Otherwise, the tax treatment of the latter revenues would be inconsistent with Congress' stated rationale for the exemption. Because taxable dividend distributions by Native corporations do not represent compensation for relinquishment of land claims, such distributions cannot be considered excluded from income pursuant to 38 U.S.C. § 3(a)(6).

8. Having concluded that taxable dividend distributions by Native corporations are not excluded from pension-income computation under section 503(a)(6), we must consider whether they may be excluded under the provisions of law cited in your request for opinion and referred to in question (b), above. The Indian Tribal Judgment Funds Use or Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (1973), as amended, applies by its terms to 'funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Claims Court in favor of any Indian tribe, band, group, pueblo, or community.' 25 U.S.C. § 1401(a). As the ANCSA was not enacted to satisfy any such judgment, any funds associated with that statute would not fall within the scope of the Indian Tribal Judgment Funds Use or Distribution Act.

9. Section 2(a) of the so-called Per Capita Distributions Act, Pub. L. No. 98-64, 97 Stat. 365 (1983) (25 U.S.C. § 117b(a)), makes distributions under that statute subject to the provisions of section 7 of Pub. L. No. 93-134, as amended, (25 U.S.C. § 1407) exempting certain distributions from consideration as income or resources under Federal or Federally-assisted programs. However, as noted above, the Per Capita Distributions Act applies only to funds held in trust by the Secretary of the Interior for an Indian tribe and distributed per capita. 25 U.S.C. § 117a. Since taxable dividends paid by Native corporations consist of funds generated and held by the corporations themselves rather than the Government,

they cannot be considered funds held in trust by the Secretary of the Interior and are not within the scope of the Per Capita Distributions Act.

10. Finally, we must consider whether the ANCSA, as amended by Pub. L. No. 100-241, provides for exclusion from income of the dividends in question. As noted above, consistency with the tax treatment of taxable dividend distributions under the ANCSA requires that section 2(a) of Pub. L. No. 92-203 and section 4 of Pub. L. No. 94-204 be interpreted as not referring to such distributions. This interpretation is also consistent with Congress' goal in enacting the ANCSA to assist Alaskan Natives in achieving self-sufficiency and integrating economically with the non-Native population. Congress contemplated that stock ownership in Native corporations would be restricted to Natives for a period of only 20 years, after which such stock could be sold to the general public. Pub. L. No. 92-203, §§ 7(h), 8(c), 85 Stat. 692, 694. The Senate committee report on this legislation also indicates a belief that the bill could reduce the cost of providing welfare-type benefits to Natives. S. Rep. No. 92-405, 92d Cong., 1st Sess. 83 (1971).

Perpetual exemption from Federal- benefit eligibility determinations of profit-based dividends distributed by Native corporations would be inconsistent with both alienability of stock in such corporations and with reduction of Native dependence on social-welfare programs.

11. The legislative history of section 4 of Pub. L. No. 94-204 is also informative on this issue. The House and Senate committee reports on this measure indicate that section 4 was intended to overrule a Department of Agriculture interpretation that all dividend distributions by Native corporations must be counted in determining eligibility for the Food Stamp Program. In so doing, the reports expressed approval of a decision by the U.S. Court of Appeals for the Ninth Circuit, *Hamilton v. Butz*, 520 F.2d 709 (9th Cir. 1975), holding settlement payments under the ANCSA may not be considered resources for purposes of determining Food Stamp eligibility. The committee reports incorporated a Congressional Research Service report indicating that Department of Health, Education and Welfare (HEW) policy was to disregard tax- exempt ANCSA payments in determining eligibility for Aid to Families with Dependent Children and Supplemental Security Income benefits. H.R. Rep. No. 94-729, 94th Cong., 1st Sess. 20-22, reprinted in 1975 U.S. Code Cong. & Admin. News 2376, 2387-89; S. Rep. No. 94-361, 94th Cong., 1st Sess. 18-21 (1975). Congress' action in specifically overriding the Department of Agriculture interpretation, while not questioning that of the Department of HEW, suggests that the latter is consistent with Congress' intention in enacting the ANCSA. 2A N. Singer, *Sutherland Statutory Construction* § 49.09 (4th ed. 1984). Accordingly, we conclude that Congress did not intend, under section 2(a) of Pub. L. No. 92-203 or section 4 of Pub. L. No. 94-204, to exclude from consideration in benefit-eligibility determinations taxable dividend distributions by Native corporations.

12. Recently, Congress revisited the issue of countability of Native- corporation dividends while making major changes to the ANCSA to address a number of

difficulties which had arisen in its implementation. In so doing, it added a new subsection (c) to 43 U.S.C. § 1626 providing in pertinent part:

In determining the eligibility of a household, an individual Native, or a descendent of a Native . . . to--

(1) participate in the Food Stamp Program,
(2) receive aid, assistance, or benefits, based on need, under the Social Security Act, or
(3) receive financial assistance or benefits, based on need, under any other Federal program or federally-assisted program, none of the following received from a Native Corporation, shall be considered or taken into account as an asset or resource:

(A) cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;

* * * *

Pub. L. No. 100-241, s 15, 101 Stat. 1788, 1812 (1988).

13. Although the language of this amendment does not differentiate between taxable and non-taxable dividends, it does limit application of the \$2,000 exclusion to 'asset or resource' determinations. In providing similar \$2,000 exclusions for certain payments to Indians in Pub. L. No. 97-458, 96 Stat. 2512 (1983), Congress drew an apparent distinction between the terms 'income' and 'resources', suggesting that they have different meanings and that the latter refers only to net-worth-type determinations. See Op. G.C. 8-87, supra.

Sutherland indicates that words in a statute, which were used in a prior enactment of similar purpose, should be construed in the same sense. 2A Sutherland, supra, §§ 51.02 and 51.03; see also id. § 53.03 (reference may also be made to similar statutes not specifically related). Thus, it is reasonable to infer that Congress, in enacting similar provisions exempting certain resources of different groups of Native Americans from consideration in determination of eligibility for Federal benefits, used particular terms in the same sense and that such terms should be construed consistently. Further, the accepted meaning of the term 'resources', i.e., 'any property that can be converted to meet needs,' Black's Law Dictionary 1178 (5th ed. 1979), supports a distinction between income and resources. The term 'assets', which is defined as the 'entire property of a person . . . subject to the payment of his or her . . . debts,' id. at 108, is similarly suggestive of a net-worth, rather than an income, concept. Compare 38 C.F.R. s 3.275(b) (definition of 'net worth'). The Congressional Research Service report referred to in paragraph 11, above, used the terms 'assets' and 'resources' synonymously.

14. The language used represents a significant narrowing of the exclusions provided in differing House and Senate versions of the ANCSA amendment, which appeared to bar any consideration in eligibility determinations of up to \$2,000 of dividends received from Native corporations. See S. Rep. No. 100-201,

100th Cong., 1st Sess. 17 (1987); H.R. Rep. No. 100- 31, 100th Cong., 1st Sess. 41 (1987). The legislation ultimately adopted represents an amendment in the nature of a substitute for the versions approved by the two houses. House Explanatory Statement, 133 Cong. Rec. H 11933 (daily ed. Dec. 21, 1987), reprinted in 1987 U.S. Code Cong. & Admin. News 3299. Although the substitute in general, and the modified exclusion provision in particular, were described as making 'technical' changes in the Senate passed bill, *id.* at 3299, 3314, substantive changes were clearly made throughout the substitute. With the exception of cash, the interests excluded from resource determinations under section 15 of Pub. L. No. 100-241, i.e., stock in Native corporations and interests in partnerships, land, and trusts, are not readily alienable. Thus, as in the case of 25 U.S.C. § 1408, Congress' rationale for focusing on asset and resource computation may have been recognition of the hardship inherent in considering such non-liquid assets in eligibility determinations. In any event, it is our view that the plain meaning of the statutory language actually enacted must be considered controlling. 2A Sutherland, *supra*, § 46.01. In light of the foregoing, we must conclude, in further response to question (c), above, that section 15 of Pub. L. No. 100-241 does not provide the specific authority necessary to exclude from income for improved-pension purposes taxable dividend distributions received from Alaskan Native corporations. Rather it applies to exclude Alaskan Native Corporation dividend distributions, whether taxable or nontaxable, from consideration in determining net worth for pension purposes.

Treatment of Per Capita Distributions Under Pub. L. No. 93-134.

15. As you point out in your request for opinion, DVB Manual M21-1, para. 9.01c.(3) and Program Guide 21-1, part I, section E-5, para. 18, suggest that all distributions by the Bureau of Indian Affairs to Indian tribes pursuant to Pub. L. No. 93-134 represent conversions of assets to cash and therefore are excludable from pension-income computation. However, examination of the authority for these distributions indicates that such distributions may not in all cases reflect a conversion of assets.

16. Pub. L. No. 93-134, as amended, governs all use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission and the U.S. Claims Court in favor of Indian tribes. 25 U.S.C. § 1401(a). The Act of August 13, 1946, ch. 959, s 2, 60 Stat. 1049, 1050, authorized the Indian Claims Commission to hear and determine a broad variety of claims against the United States on behalf of Indian tribes. Such claims included not only claims based on the taking of land but also claims in law or equity arising under the Constitution, laws, and treaties of the United States, other claims in law and equity including tort claims, certain claims involving revision of treaties, and other claims based on fair and honorable dealings. Similarly, the Claims Court is provided broad jurisdiction under 28 U.S.C. § 1505 over many types of claims against the United States in favor of Indian tribes. Such claims include those arising under the Constitution, laws, or treaties of the United States and those otherwise

cognizable in the Claims Court. Thus, judgments of the Indian Claims Commission and the Claims Court, and consequent distributions under Pub. L. No. 93-134, as amended, may involve a variety of matters other than payments for land.

17. Accordingly, with regard to question (d), above, it is necessary to inquire as to the underlying basis for the distribution in question in order to determine whether it falls within a specified exclusion from pension income under 38 U.S.C. § 503(a) or is protected by only the more limited \$2,000 exclusion provided by 25 U.S.C. § 1407. (Of course, for distributions of \$2,000 or less, the result will be the same regardless of the basis for the distribution.) In determining whether a distribution falls within the coverage of the section 503(a)(6) disposition-of-property exclusion, per question (e), above, the determinative criterion must be whether the payment represents a conversion of assets from one form to another. See Op. G.C. 3-85 (9-16-85). If so, the section 503(a)(6) exclusion applies.

18. You have also raised two specific questions concerning application of the \$2,000 exclusion provided by 25 U.S.C. § 1407. That section provides, in relevant part, that:

None of the funds which . . . are distributed per capita or held in trust pursuant to a plan approved under the provisions of this chapter, . . . including all interest and investment income accrued thereon while such funds are so held in trust, shall . . . 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 or, except for per capita shares in excess of \$2,000, any Federal or federally assisted program.

19. This language seems ambiguous as to the period and aggregate amounts to which the \$2,000 exclusion from income is to be applied. The legislative history of the 1983 amendment, Pub. L. No. 97-458, *supra*, which added the \$2,000 exemption for Federal and federally-assisted programs, is similarly unclear on this point. For instance, the House report on the proposed amendment states, in pertinent part, that it 'provides that the first \$2,000 of any per capita share received by any individual shall not be considered as income or resource when determining the extent of eligibility or assistance for any other federal or federally-assisted program.' H.R. Rep. No. 97-340, 97th Cong., 1st Sess. 4 (1981). Similarly, the Senate report states only 'that the first \$2,000.00 of any shares of per capita funds shall be exempt from consideration as income and resources for purposes of determining eligibility.' S. Rep. No. 97-658, 97th Cong., 2nd Sess. 6, reprinted in 1980 U.S. Code Cong. & Admin. News 4409, 4413.

20. However, we note that both of the committee reports talk in terms of determining eligibility, suggesting that the exclusion applies to the period with respect to which eligibility is determined. In the case of improved pension, this is a twelve-month period. Under this interpretation, an initial exclusion of up to \$2,000 would be applied to all funds distributed per capita under an approved plan. If an additional distribution were made during the following twelve-month period, another \$2,000 exclusion would apply.

21. We believe this interpretation is supported not only by the committee reports, but also by reference to the language of a similar, later- enacted statute, 43 U.S.C. § 1626(c). That statute, quoted more extensively in paragraph 12, *supra*, provides that, in determining the eligibility of a house- hold or individual Alaskan Native to receive need-based Federal financial benefits, cash received from a Native corporation shall not be considered as an asset or resource to the extent it does not, in the aggregate, exceed \$2,000 'per individual per annum' (emphasis added). 'Interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships'. 2A N. Singer, *Sutherland Statutory Construction* § 53.03 (4th ed. 1984). Section 1407 of title 25, United States Code, and 43 U.S.C. § 1626(c) both apply to protect need-based benefits of Native Americans from diminution as a result of certain payments intended for their benefit. It would be anomalous if, in the absence of any congressionally expressed intention to the contrary, a different rule applied to treatment of these payments. Accordingly, we conclude, in answer to question (f)(1), above, that 25 U.S.C. § 1407 applies on an annual, rather than a one-time only, basis.

22. As to whether the exclusion is to be applied by family unit or individually, the statutory language specifies that it is 'per capita shares in excess of \$2,000' (emphasis added) which are exempt under section 1407. Use of the term per capita denotes reference to distributions made 'according to the number of individuals.' *Black's Law Dictionary* 1022 (5th ed. 1979). Further, consistency with the somewhat analogous provisions of 43 U.S.C. § 1626(c) further suggests application of the exemption 'per individual' rather than by family unit. See, *supra*, paragraph 21. Thus, if household income is being considered for benefit eligibility in a Federal program, such as improved pension, and more than one member of the family has received distributions under one or more approved plans, up to \$2,000 for each family member who has received a distribution or distributions is exempt. Accordingly, the answer to question (f)(2), above, concerning section 1407 is that the \$2,000 exemption is not to be applied per family unit, but is to be applied to the income and net worth of each family member who has received a qualifying distribution.

HELD:

To summarize, then:

- a) The controlling distinction between the payments dealt with in Op. G.C. 8- 87 and those addressed in Op. G.C. 2-88 is that only in the latter opinion were the payments at issue made per capita from funds held in trust by the Secretary of the Interior.
- b) Distributions to Alaskan Natives pursuant to the Alaskan Native Claims Settlement Act are outside the scope of the Indian Tribal Judgment Funds Use or Distribution Act, Pub. L. No. 93-134, as amended, and the Per Capita Distributions Act, Pub. L. No. 98-64.
- c) Section 15 of Pub. L. No. 100-241 does not provide the specific authority necessary to exclude from income for improved-pension purposes taxable dividend distributions received from Alaskan Native corporations. Rather, it applies to exclude Alaskan Native corporation dividend distributions, whether taxable or nontaxable, from consideration in determining net worth for pension purposes.
- d) It is necessary to inquire as to the underlying basis for a distribution under Pub. L. No. 93-134 in order to determine whether it falls within a specified exclusion from pension income under 38 U.S.C. § 503(a) or is protected by only the more limited \$2,000 exclusion provided by 25 U.S.C. § 1407.
- e) In determining whether a distribution falls within the coverage of the 38 U.S.C. § 503(a)(6) disposition-of-property exclusion, the determinative criterion must be whether the payment represents a conversion of assets from one form to another. If it does, the section 503(a)(6) exclusion applies.
- f) The \$2,000 exemption provided by 25 U.S.C. § 1407 applies on an annual, rather than a one-time only, basis in determination of eligibility for improved-pension benefits. This exemption is not to be applied per family unit but is to be applied to the income and net worth of each individual family member who has received a qualifying distribution under the Indian Tribal Judgment Funds Use or Distributions Act.

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