VAOPGCPREC 15-97

Date: April 10, 1997

From: General Counsel (022)

TO: Acting Under Secretary for Benefits (20)

## QUESTIONS PRESENTED:

- a. Are interest payments received from bonds issued by Menominee Enterprises, Inc. countable as income for purposes of determining entitlement to improved pension?
- b. Are interest payments received from such bonds countable as income under the section 306 pension program, the old law pension program, or the parents' dependency and indemnity compensation program?

## COMMENTS:

1. In 1954, Congress enacted legislation "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Act of June 17, 1954, ch. 303, 68 Stat. 250. On April 29, 1961, the Secretary of the Interior published notice in the Federal Register that, pursuant to that legislation, the title to all property, real and personal, held in trust by the United States for the Menominee Tribe had been transferred from Federal control and that individual members of the tribe would no longer be entitled to any services performed by the United States for Indians by virtue of their status as Indians. 26 Fed. Req. 3726 (1961). Also on that date, a "Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions" (Termination Plan), as required by that legislation, was published in the Federal Register. 26 Fed. Reg. 3727-55 (1961). The Termination Plan recognized the functions of Menominee Enterprises, Inc., a corporation established under Wisconsin law to manage Menominee tribal assets for the benefit of the Menominee people. The Termination Plan included authority for Menominee Enterprises to issue "income bonds" with a total value of \$10,000,000. 1 The authorized

An "income bond" is an instrument in which the annual interest obligation is limited by or tied to the obligor's

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bonds (Menominee bonds) were subsequently issued to each of the some 3,270 enrolled members, or heirs, of the Menominee Tribe. These bonds, which mature on December 1, 2000, carry a par value of \$3,000 and pay interest at an annual rate of four percent.

- 2. Legislation approved in 1973 restored Federal recognition to the Menominee Tribe and directed the Secretary of the Interior to negotiate a "plan for the assumption of the assets of [Menominee Enterprises]." Menominee Restoration Act, Pub. L. No. 93-197, §§ 3(a), 6, 87 Stat. 770, 772 (1973) (Restoration Act). Section 3(d) of the Restoration Act provided that "nothing contained in this Act shall alter any property rights or obligations [or] any contractual rights or obligations." 87 Stat. at 770. Assets were to be transferred subject to outstanding corporate indebtedness and any other obligations. Restoration Act, § 6(b), 87 Stat. at 773.
- Under the plan negotiated pursuant to section 6 of the Restoration Act, the Menominee tribal land and forest, a sawmill, and other real property of Menominee Enterprises were transferred to the United States to be held in trust for the Menominee Tribe and operated as a tribal enterprise. Plan for Transfer of All of the Assets of Menominee Enterprises, Inc., a Wisconsin Corporation, Pursuant to Sections 6(a) and 6(b) of the Menominee Restoration Act at 8 (Dec. 27, 1974) (Restoration Plan) (copy attached). nominee Tribe, as successor to Menominee Enterprises, assumed responsibility for payment of interest on the Menominee bonds. Restoration Plan at 16-17. The Restoration Plan provided that the tribe would be the primary obligor under a supplemental bond indenture. Restoration Plan at 17. terms of the bond obligation were changed to provide a fixed annual interest obligation of four percent without regard to net income of the obligor. Restoration Plan at 16. The Restoration Plan provided that, if the tribe is unable to make the required interest payment in any

earnings for the year. Black's Law Dictionary 179 (6th ed. 1990).

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given year, the United States will make such payment, subject
to reimbursement by the tribe. Restoration Plan at 17.

- 4. The question has arisen whether interest from the Menominee bonds is countable as income for purposes of calculating entitlement to improved pension. Pursuant to 38 U.S.C. §§ 1521, 1541, the amount of improved pension payable to an eligible veteran or surviving spouse must be reduced by the amount of that individual's annual income. Section 1503(a) of title 38, United States 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 categories of payments specified therein. The legislative history of section 1503(a) indicates Congress intended "that a pensioner's total annual nonpension income shall be included in determining the amount of pension payable," unless a specific exception applies. S. Conf. Rep. No. 1329, 95th Cong., 2d Sess. 22 (1978). Therefore, any payment received by a person eligible for improved pension must be counted as income unless expressly excluded by statute.
- This office has, on several occasions, discussed pensionincome computation in the context of whether various types of payments received by Native Americans are subject to statutory exclusion. See, e.g., VAOPGCPREC 1-94 (O.G.C. Prec. 1-94). These opinions discussed income exclusions based on the Per Capita Distributions Act, Pub. L. No. 98-64, 97 Stat. 365 (1983), codified at 25 U.S.C. §§ 117a-117c, and the Indian Tribal Judgment Funds Use and Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (1973), codified as amended, at 25 U.S.C. § 1401, et seq. These provisions, when read together, effectively exempt up to \$2,000 annually from certain per capita 2 distributions authorized by the Secretary of the Interior or an Indian tribe from income computation for purposes of determining entitlement to Federal benefits. 25 U.S.C. §§ 117a, 117b(a), 1407; see also 38 C.F.R. § 3.272(r). However, only a per capita distribution made to tribal members from property

The term "per capita" means "by the head or polls; according to the number of individuals; share and share alike." Black's Law Dictionary 1136 (6th ed. 1990).

held in trust by the Secretary of the Interior is excludable under the Per Capita Distributions Act. 25 U.S.C. § 117a. The Indian Tribal Judgment Funds Use and Distribution Act, as amended, also contains a provision, codified at 25 U.S.C. § 1408, that up to \$2,000 per year in income received by individual Indians that is derived from interests of such Indians in trust or restricted lands shall not be considered income in determining eligibility for assistance under any Federal or federally-assisted program.

- In our view, interest paid on the Menominee bonds does not qualify for exclusion from income for improved-pension purposes under either the Per Capita Distributions Act or the Indian Tribal Judgment Funds Use and Distribution Act. Interest paid on the Menominee bonds cannot be considered a distribution from a trust. A trust has been described as a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with it for the benefit of another. Restatement (Second) of Trusts § 2 (1969); 76 Am. Jur. 2d Trusts § 1 (1992). A bond is a long-term debt instrument that promises to pay a creditor a series of periodic interest payments in addition to returning the principal at maturity. Black's Law Dictionary 178 (6th ed. 1990). The bonds in question were issued by a tribal corporation to members of the Menominee Tribe, and the obligation on the bonds was assumed by the tribe under the Restoration Plan. For purposes of the Per Capita Distributions Act, issuance of the bonds was more in the nature of a commercial transaction in which a corporation and its successor assumed an indebtedness to bondholders than the creation of a trust relationship between the bondholders and the Secretary of the Interior.
- 7. Further, a provision of the Termination Plan that, subject to a right of first refusal by Menominee Enterprises, a bondholder may sell or transfer Menominee bonds, is also relevant to application of the Per Capita Distributions Act. While the Menominee bonds may not be readily marketable securities, it is clear that some bondholders have sold their interest in the bonds. Restoration Plan at 18; Stephen J. Herzberg, The Menominee Indians: Termination to Restoration, 6 Am. Indian L. Rev. 143, 181 (1978). The fact that these securities may be bought and sold has the effect, over time, of precluding a "per

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capita" distribution to tribe members, which is a prerequisite
to operation of the income exclusion provided under the Per
Capita Distributions Act.

- 8. Neither can the bond-interest payments be considered income derived from the interests of individual Indians in trust or restricted lands for purposes of 25 U.S.C. § 1408. the Restoration Plan, bondholders are entitled to receive a fixed annual payment from the Menominee Tribe, or, secondarily, from the United States, based on their ownership of Menominee bonds. The obligation of the tribe and the United States to make such payments is not dependent on earnings from tribal land. Although income from logging activities on lands held in trust by the United States may be used to fulfill the tribe's obligation on the bonds, the payments in question are based upon the interests of the bondholders in the bonds, not upon any interest in the tribal lands. Accordingly, the facts do not support a finding that interest paid on Menominee bonds qualifies for exclusion from income for improved-pension purposes under either the Per Capita Distributions Act or the Indian Tribal Judgment Funds Use and Distribution Act.
- We have also considered whether interest income received from Menominee bonds can be considered profit from the disposition of property for purposes of 38 U.S.C. § 1503(a)(6), which excludes "profit realized from the disposition of real or personal property other than in the course of a business" from improved-pension income calculations. In VAOPGCPREC 10-97, the General Counsel reiterated the view previously stated in VAOPGCPREC 4-93 (O.G.C. Prec. 4-93) and VAOPGCPREC 12-89 (O.G.C. Prec. 12-89) that, while Alaska Native Corporation distributions from the Alaska Native Fund may be considered compensation for relinquishment of land claims and thus excludable in pension income calculations, distributions of funds earned by a Native Corporation do not represent compensation for relinquishment of land claims and cannot be excluded from income under what is now section 1503(a)(6) (formerly 38 U.S.C. § 503(a)(6)). As explained in VAOPGCPREC 12-89, profits derived from business operations, investments, or exploitation of assets by a Native corporation, rather than representing a payment in exchange for property rights, are more analogous to the profits of a typical corporation in

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which a Native may hold an interest. In the same manner,
interest paid on the Menominee bonds represents tribal earnings rather than proceeds from relinquishment of a property
interest.

- Further, the General Counsel has recognized that, where 10. renewable resources are exploited in a manner so as to produce a perpetual source of income, such income is countable for pension purposes. VAOPGCPREC 76-90 (O.G.C. Prec. 76-90); VAOPGCPREC 81-90 (O.G.C. Prec. 81-90). Under the terms of the Termination Plan, logging operations on the lands held by Menominee Enterprises were to be conducted on a sustained-yield basis so as to provide a perpetual source of income. The Restoration Plan, at 44, provided for continued operation of forest lands on this basis. Such operations appear more analogous to exploitation of a renewable resource than to a conversion of assets. Accordingly, interest paid on the Menominee bonds may not be excluded in determining income for improvedpension purposes on the basis of the exclusion for profit realized from the disposition of real or personal property.
- It has been asserted on behalf of the claimant that interest income from Menominee bonds should be characterized as a conversion of resources based upon Cootes v. Sullivan, No. 91-36073 (9th Cir. Feb. 11, 1992). In Cootes, the court accorded deference to the position of the Bureau of Indian Affairs that proceeds from the sale of timber on Indian land held in trust by the United States did not constitute "royalties" for purposes of determining entitlement to Supplemental Security Income. The decision of the United States Court of Appeals for the Ninth Circuit in Cootes was not designated for publication and therefore has little if any precedential value. Further, the factual situation presented in Cootes is clearly distinguishable from the situation addressed in this opinion. In Cootes, the payments in question derived directly from logging operations on land held in trust by the Bureau of Indian Affairs <sup>3</sup> for the Yakima Indian Tribe. In contrast, although funds for the bond-interest payment may have their source in logging operations, payment is made based upon a person's

 $^{3}$  The Bureau of Indian Affairs is a component of the Department of the Interior. See 25 U.S.C ch. 1.

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status as a Menominee bondholder as opposed to status as the beneficiary of a trust managed on behalf of a tribe by the Department of the Interior. Moreover, in the instant case, there is no limitation on how or where the money distributed to Menominee bondholders may be derived. As a result, the payments may not necessarily derive from the conversion of tribal resources. In our view, the above factors render the Cootes decision of little significance to the issue at hand. In view of the foregoing discussion, we conclude that interest payments on Menominee bonds are includable in income for improved-pension purposes.

The request for opinion also asks whether income from Menominee bonds is countable as income under the section 306 pension program, the old law pension program, or the parents' dependency and indemnity compensation program (parents' DIC). With respect to section 306 pension, i.e., pension entitlement to which was preserved under section 306(a) of the Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 98-588, 92 Stat. 2497, 2508, such pension is, pursuant to section 306(a)(2), paid on the basis of laws applicable to basic eligibility for and payment of pension as in effect on December 31, 1978. Former section 503 of title 38, United States Code, as in effect on that date, provided that, in determining annual income for pension purposes, "all payments of any kind or from any source . . . shall be included," with the exception of certain specified payments. None of the specified exceptions would apply to the bond-interest payments at issue here. With regard to old law pension, i.e., pension payable under section 9 of the Veterans' Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432, 436, entitlement to which was preserved under section 306(b) of Pub. L. No. 98-588, payment of such pension is subject to all applicable provisions of title 38 in effect on June 30, 1960. Pub. L. No. 86-211, § 9(b), 73 Stat. at 436. Former section 503 of title 38, as in effect on that date, contained a list of six exclusions from pension income, none of which would apply to the bond-interest payments at issue here. In the case of parents' DIC, payable under 38 U.S.C. § 1315 to needy parents of veterans who die of service-connected disabilities, section 1315(f)(1) provides that, in determining income under that section,

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"all payments of any kind or from any source shall be included," subject to certain specified exceptions not applicable to the Menominee bond-interest payments.

The exclusions from income provided by the Per Capita Distributions Act and the Indian Judgment Funds Use and Distribution Act apply to any Federal or federally-assisted program. However, for the reasons discussed above with regard to improved pension, the payments in question here fall outside the scope of the exclusions established by these two statutes. Further, in VAOPGCPREC 4-93, the General Counsel examined in detail the question of whether payments based on the conversion of assets should be included in income for purposes of the section 306 and old law pension programs and the parents' DIC program. The General Counsel found that an exclusion identical or similar to that currently in effect under 38 U.S.C. § 1503(a)(6) applies under each of those programs with respect to conversion of assets. In light of the similarity on this issue of the law applicable to the various need-based benefits, we conclude that the principles discussed above with respect to the improved-pension program governing determination of whether interest payments from Menominee bonds may be excluded from income as a conversion of assets are equally applicable to income determinations under the section 306 and old law pension programs and the parents' DIC program. Accordingly, interest payments received from Menominee bonds are countable as income under the section 306 pension, old law pension, and parents' DIC programs.

## HELD:

- a. Interest payments received by individuals based upon their status as holders of bonds issued by Menominee Enterprises, Inc., a corporation formed upon termination of Federal supervision of the Menominee Indian Tribe, must be included in annual income for purposes of determining eligibility for improved pension.
- b. Interest payments received by individuals based on their status as holders of bonds issued by Menominee Enterprises, Inc. are likewise countable as income for purposes of determining entitlement under the section 306 pension, old law

<Page 9> pension, and parents' dependency and indemnity compensation programs.

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