

***Eastern Band of Cherokee Indians
GenWell Program
Frequently Asked Questions***

The EBCI plans to start a program that will help EBCI members save money. The savings will come from a change in Tribal law that will allow certain payments by the Tribe to its members to be exempt from federal income tax. The program is called the *EBCI GenWell Program*. It is an alternative to per capita distributions. This document answers some frequently asked questions about the Program.

1. What is the EBCI GenWell Program?

The EBCI GenWell Program is being created in Tribal law, and in guidelines to be written after the law is passed, to enable EBCI members to take advantage of the tax benefits offered by the IRS in the Tribal General Welfare Exclusion Act of 2014.

2. What is the Tribal General Welfare Exclusion Act?

The Tribal General Welfare Exclusion Act is a federal law that became effective in 2014. The law added language to the Internal Revenue Code to provide that an individual's taxable income does not include the value of any "Indian general welfare benefit" paid by a tribe to the individual. An Indian general welfare benefit generally is defined as a payment made from a tribe to a tribal member for the promotion of general welfare if certain requirements are met.

3. What will the GenWell Program do?

The GenWell Program will allow the EBCI to make benefit payments to Tribal members for certain purposes that will qualify the payments for exclusion from the member's gross income, and therefore the member won't have to pay federal income tax on the payments.

4. What are some of the requirements for the payments?

Some of the requirements are that the payments cannot be compensation for services and they cannot be "lavish or extravagant".

5. Who will be able to use the Program?

Eligible enrolled members of the EBCI who are 18 years-of-age or older will be able to use the Program.

6. *Will I be able to get GenWell Program payments and per capita payments at the same time?*

No. The GenWell Program is an alternative to per capita payments. Enrolling in the GenWell Program will constitute a voluntary waiver of participation in per capita distributions.

7. *Why would I want to give up per capita payments for GenWell Program payments?*

GenWell Program payments will likely put more money in your pocket because you won't have to pay federal income taxes on them. The IRS and the courts have said that GenWell Program payments and per capita payments can come from the same source - casino gaming revenues – but per capita payments are taxable while general welfare program payments are not.

8. *Will distributions under the GenWell Program be less than per capita distributions?*

The Tribe anticipates that the amount of the GenWell Program distributions will be the same as what Tribal members previously received as per capita distributions. Although the amount of the benefit is likely to be the same, the *after-tax amount* of the GenWell Program distribution is greater than the per capita distribution. This means more money for you. This is because per capita payments are fully taxable while GenWell Program payments will be non-taxable.

9. *Aren't GenWell payments just per capita payments under a different name?*

No, GenWell payments are not just per capita payments under a different name. Per capita payments are a product of the federal Indian Gaming Regulatory Act of 1988 (“IGRA”). That law says that a tribe may use its net gaming revenues from IGRA-regulated casinos for a handful of public purposes, including to provide for the “general welfare of the tribe and its members”. Tribes provide for the general welfare of their members in a variety of ways, including by distributing a portion of net gaming revenues to all Tribal members on a “per capita” basis, without established programs and guidelines in place. The tax laws say that these per capita payments are taxable.

In 2014, Congress passed the Tribal General Welfare Exclusion Act. This law added language to the Internal Revenue Code to clarify that if a tribe makes qualified payments to its members, the payments will be excluded from the member's income and will be non-taxable. Additionally, the law clarified that the money a tribe uses to make these payments can come from any source, including net gaming revenues. To take advantage of this law,

however, the tribe has to have its own appropriate law and guidelines in place. The EBCI is doing this through the GenWell Program.

10. What kinds of payments will qualify for exclusion from federal income taxes under the GenWell Program?

Benefit payments made for the following purposes will qualify for the exclusion: housing, education, elder assistance, disability assistance, cultural and religious purposes, health, transportation, utility costs, personal care, and childcare.

11. When will the GenWell Program start?

The Tribal ordinance that opens the door for the EBCI GenWell Program is currently before Tribal Council and could be voted on at any time. However, a lot of work has to be done after the ordinance is passed. The Tribe anticipates that the GenWell Program will be rolled-out in the spring of 2023.

12. How can I participate in the GenWell Program?

Tribal members who want to participate will be asked to enroll in the Program. Enrollment will not be automatic. At the appropriate time after the Tribal law is passed, the Tribe will notify Tribal members of the opportunity to enroll. Because this is a new Program, the Tribe expects that not everybody will be comfortable with it from the outset. Anybody who is not comfortable with it will not have to participate.

13. If I choose to participate in the GenWell Program, will I still receive a 1099 from the Tribe?

No. Unlike per capita distributions, GenWell Program distributions are non-taxable and will not be included on your 1099.

14. How did the Tribe determine that the anticipated distributions through the GenWell Program are not “lavish or extravagant”?

Based on cost-of-living surveys and other reasonable means, the Tribe has determined that, on average, the cost of the general welfare-related expenses of our members exceeds the amount of the GenWell Program distributions. Because the actual need exceeds the amount of the benefit, the Tribe determined that the General Welfare Exclusion benefit won't be “lavish or extravagant.”

15. Do I need to show that I have an “individualized need” to qualify?

No. When passing the Tribal General Welfare Exclusion, its supporters in the U.S. Congress explicitly stated that individualized determinations of need are not required. In addition, prior to the Tribal General Welfare Exclusion, the IRS issued various safe harbors for tribal general welfare programs. If the requirements of a safe harbor are met, the IRS will presume that there is a “need” for the program regardless of individual circumstances. The IRS safe harbors include programs for housing, education, health care, utilities, and other expenses covered by the Program.

16. What if I need proof of income for a housing loan or other purpose?

The GenWell Program distributions are not income for federal tax purposes and, as noted in FAQ #13, will not be included on the 1099 you receive from the Tribe. However, upon request, the Tribe will issue you a different statement that includes the GenWell Program benefits. This statement can be used for loans and other purposes for which a verification is needed.

17. If the Tribe is replacing per capita distributions with General Welfare Exclusion benefits, why do the Tribe’s revenue allocation laws still include references to per capita distributions?

The Indian Gaming Regulatory Act still requires the Tribe to have its own revenue allocation laws that comply with the IGRA. It is important to keep the Tribe’s revenue allocation laws as flexible as possible, so the Tribe can respond to changes in the law and the economy in a timely and effective way. The Tribe has determined that the general welfare needs of its members exceed the amount of the current distribution and therefore can be distributed as General Welfare Exclusion benefits. It is possible, however, that at some time in the future the amount available for distribution to members will exceed their needs. At that point, a portion of the distribution would be made as taxable per capita payments. It is also possible that changes in federal law will require changes to the GenWell Program. Rather than amending the Tribe’s revenue allocation laws again (which is a slow process that requires approval of the federal government), the Tribe is building flexibility into the documents so it is prepared for whatever the future brings.

18. Do I need to submit receipts to the Tribe for my general welfare expenses or retain receipts for audit purposes?

The GenWell Program does not require receipts at this time. The Tribe also believes that it would be reasonable for members not to retain receipts for audit purposes because the

general welfare needs of the members exceeds the amount of the General Welfare Exclusion benefits received by the members. However, it is possible that the Internal Revenue Service will issue guidance in the future requiring receipts to be kept or members to otherwise substantiate their general welfare expenses. The Tribe will modify the Program as necessary to respond to future IRS guidance.

19. Are the GenWell Program distributions exempt from state income taxes?

Generally, yes. State income tax law almost always follows federal income tax law. Because the GenWell Program distributions are exempt from federal income tax, in most cases they will be exempt from state income tax as well. Like most other states, North Carolina follows federal tax law. Consequently, the GenWell Program distributions should not be subject to North Carolina state income taxes regardless of whether the member receiving the benefits lives on or off EBCI trust land.

20. Will the Program impact my Supplemental Security Income (“SSI”) or other federal and state benefits I receive?

The General Welfare Exclusion Act is a federal income tax law. It does not necessarily change how “income” is defined for non-tax purposes, such as SSI. Consequently, it is possible that GenWell Program distributions could impact someone’s participation in benefit programs like SSI. However, the treatment GenWell Program distributions received under these federal and state programs will be *the same or better* than how those programs treat per capita distributions. Also, the Tribe is working to ensure that the GenWell Program distributions are not treated as income for purposes of SSI and other similar benefits.

21. Are other tribes making distributions under the Tribal General Welfare Exclusion Act?

Yes. Although the specifics of the programs differ from tribe to tribe, approximately 14 other federally-recognized tribes have developed their own programs for making general welfare distributions to their members on a tax-free basis.

22. How does this impact minors and the minor’s trust?

Currently, all assets in the minor’s trust are tax-deferred, not tax-exempt. The Tribe is working to modify the minor’s trust so that a portion of the distributions from the trust can be treated as tax-exempt under the General Welfare Exclusion Act.

23. *If I participate in the GenWell Program, will I be audited by the IRS or be required to pay taxes or penalties?*

No. The IRS is temporarily prohibited from auditing general welfare programs. This prohibition will be in place until the IRS releases guidance on the Tribal General Welfare Exclusion, which is not likely to happen until after 2022. The Tribe will work to ensure that the GenWell Program complies with any new IRS guidance.

When audits resume, the Tribe anticipates that the IRS will only audit years occurring after the new guidance comes out. Based on statements made by senior IRS officials, the Tribe also expects that the IRS will not conduct audits of general welfare programs and distributions that are made before the guidance is issued.

Finally, IRS audits of tribal benefits are almost always resolved between tribal governments and the IRS, not between tribal members and the IRS. So, even if the IRS questioned the GenWell Program benefits, that would most likely be in an audit of the Tribe itself, not individual members.

24. *What if I have other questions?*

If you have more questions, please send them by email to: GenWell@ebci-nsn.gov.

25. *What if I want to do my own research?*

If you want to dig deeper into this on your own, we recommend reading the guidance published by the IRS on its website (www.irs.gov). Here is the full link: <https://www.irs.gov/government-entities/indian-tribal-governments/tribal-general-welfare-guidance>.