



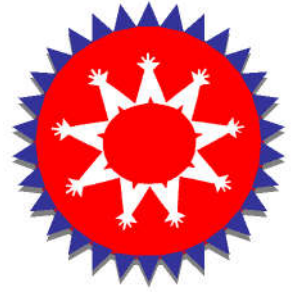
Oglala Sioux Tribe

PINE RIDGE INDIAN RESERVATION

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President Troy "Scott" Weston

July 15, 2017

Secretary Ryan Zinke
Assistant Secretary- Indian Affairs Michael Black
Bureau of Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

via email: consultation@bia.gov

Dear Secretary Zinke and Assistant Secretary Black:

**Re: Comments from the Oglala Sioux Tribe on Executive Order 13871 –
Reorganization of the Executive Branch**

The Oglala Sioux Tribe submits these comments in response to the Department's solicitation for input on President Trump's Executive Order 13871 to reorganize the Executive Branch of the U.S. Government issued on May 16, 2017. We appreciate the opportunity to submit these comments prior to implementation of the Executive Order. True government-to-government consultation, however, is needed before the Department takes any action that will affect our Tribe, our members and our rights.

Reorganization can be healthy if it empowers Tribes for self-determination

The current structures of the Department of the Interior (the "Department") and the Bureau of Indian Affairs ("BIA") were formed over one hundred years ago. These structures were put into place during a different time – a time when there were very different issues confronting Indian Country. Thus, a review of these structures to ensure the Department and the BIA are addressing issues facing Indian Country today can be a worthy endeavor. However, reorganization can be healthy only if it is done right and if it empowers tribes for self-determination and improves the United States' provision of services to tribes and Indian people. Our concern is that reorganization is just another name for downsizing and reducing the BIA – cutting a budget that is already grossly underfunded and reducing services that play such an essential role in our community. From 2001 forward, the BIA and Indian tribes have already had our budgets cut too much.

To build trust and to produce the results intended, the process needs to be transparent, and must involve government-to-government consultation not only at the beginning of the process but also throughout the reorganization. We appreciate that the BIA has come to us to obtain our views before you have crafted a policy, as oftentimes tribes are put in the position of commenting on an already-drafted policy after the decisions are made. As we have seen, such a process is counterproductive, since we then have to work to ensure that needed changes are

included in these policies after the fact. It is more prudent for tribes to be at the forefront of any reorganization of the BIA and not at the end.

To date, one of the only plans we have heard is Secretary Zinke's desire to move BIA resources to field offices and reduce the size of BIA's DC and Denver offices. While we support making decisions at more local levels and giving tribes greater control over decisions, we also feel that the BIA needs to ensure that local offices are given the authority to make decisions. If final decision-making authority still resides in an inadequately-staffed central office, the result will be bottlenecks and delays, the exact opposite of the Administration's intent in reorganizing. The tribes and the Department should work together to identify the types of decision-making authority that should be delegated to the local offices. This kind of collaborative, government-to-government approach can help to ensure that any reorganization is truly beneficial to all parties involved, especially to tribes and their members who the BIA serves.

No Diminishment of Treaty Rights

Under the United States Constitution, treaties—including Indian treaties—are the “supreme law of the land.” U.S. Const., art. VI, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 531 (1832). The United States, including all of its subdivisions and agencies, is bound to uphold Indian treaties. Federal agencies are required to consider the impacts to our treaties when reorganizing and must ensure that such reorganization does not negatively impact our treaty rights. Failure to consider and protect treaty rights is a violation of federal law and an affront to tribal sovereignty.

The Oglala Sioux Tribe is a sovereign Indian Nation and part of the Oceti Sakowin (Seven Council Fires or Great Sioux Nation). The seven divisions of the Oceti Sakowin, and bands within these seven divisions, signed many treaties with the United States. In 1851, the United States signed the Treaty of Fort Laramie with the Teton and Yankton divisions of the Oceti Sakowin. *See* Treaty of Fort Laramie, 11 Stat. 749 (Sept. 17, 1851). However, the United States did not abide by the terms of the treaty. Continued westward expansion resulted in the Powder River War of 1866-1868. The war ended not in victory for either side, but in a negotiated settlement, and the signing of the Sioux Treaty of 1868, 15 Stat. 635 (April 29, 1868). The Sioux Treaty established a 26 million acre reservation for the “absolute and undisturbed use and occupation” of the Sioux Indian, as a permanent homeland. By the terms of the Sioux Treaty of 1868, the United States promised to provide certain benefits and annuities to the Sioux bands each year.

For the Oglala Sioux Tribe and Great Sioux Nation, the ultimate authorities requiring consultation and acquiescence for reorganization of the BIA and Department are the Fort Laramie Treaties of 1851 and 1868. These treaty obligations remain in effect today. As explained by the Chief Justice John Marshall:

The Indian nations had always been considered as distinct, independent communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial.... The very term “nation,” so generally applied to them, means “a people distinct from all others.” The Constitution, by declaring treaties already made, as well as those to be made, the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and

consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are all applied in the same sense.

Worcester v. Georgia, 31 U.S. 515, 559–60 (1832). Furthermore, the United States discontinued negotiating treaties with tribes in 1871 by statute, yet that statute provides that “no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871 shall be hereby invalidated or impaired.” Our treaties are still in full force and effect.

Thus, the obligations of the United States to the Great Sioux Nation under the 1851 and 1868 Fort Laramie Treaties remain in effect today. This includes the obligation to consult with the Tribe on federal undertakings.

Federal agencies are not permitted to unilaterally abrogate our treaty rights. Rather, federal agencies have the legal responsibility to consult with us regarding actions that could impact our treaty rights, and no action that negatively affects our treaty rights should be approved without our express and informed consent.

No Diminishment of Trust Responsibility

The federal government has a trust responsibility to the Oglala Sioux Tribe and all other Indian Nations, which originates from the treaties, the U.S. Constitution, and the unique government-to-government relationship between tribes and the United States. This responsibility runs across all agencies, and agencies need to coordinate with each other to fulfill this responsibility. Our position is that fulfilling the trust responsibility requires obtaining our express and informed consent any time the federal government is undertaking a project that impacts our Tribe and our rights.

Federal departments and agencies under the Executive Branch play an essential role in fulfilling the federal government’s trust responsibility to Indian tribes by ensuring that American Indians have access to critical programs and services based on their political status as members of sovereign tribal nations involved in a government-to-government relationship with the United States. While programs serving Indian Country exist across the federal government, the Department of the Interior is perhaps most closely associated with the federal trust responsibility because of its close historical and contemporary ties to tribal nations and an abundance of programs serving tribes and Indian people.

Of particular concern regarding the federal government’s trust responsibility is the responsibility of the Department and the BIA to take land into trust for Indian tribes. The land-into-trust responsibility originates from one of the more egregious policy failures in our Nation’s history: the failed attempt to assimilate Native people by seizing collectively held tribal land and allotting such lands to individuals. While Congress soon realized the failure of what is now known as the “Allotment Era” and ended it with the Indian Reorganization Act (“IRA”), massive damage had already been done. Tribal governments lost meaningful management of large

portions of their homelands. It was to remedy this harm that Congress empowered the Department to help rebuild tribal homelands by taking land into trust through the IRA.

This responsibility is of great importance to us because the diminished land base has created major challenges for the Oglala Sioux Tribe, and this impacts our sovereignty and self-determination. The checker-boarding and fractionated interest problems on our Reservation make it very difficult for us to use our land within our boundaries, making it difficult to pursue economic development and complete much needed infrastructure projects. We strongly urge that any reorganization plan recognize the great importance of taking land into trust and incorporate a process that improves and streamlines the process, including quicker action from the BIA on land-into-trust applications. Resources and authority should be targeted to the local level for this task.

Consultation

The listening sessions and written comments that you are taking into consideration before drafting a policy are appreciated, but not sufficient. Longstanding policy and Executive Orders across several Administrations underscore the government's commitment to true government-to-government consultation with tribes. Any proposed reorganization must involve the same kind of consultation.

We support the adoption of measures that will streamline Interior processes and enable the Department to better fulfill its treaty and trust responsibilities. However, the intent and effect of streamlining must be improved processes for better provision of services by the Department, not a decrease in staff or resources in already underfunded and understaffed programs. The Department through the BIA should convene a Tribal Reorganization Workgroup as soon as possible to review agency programs serving Native populations. The Workgroup could then work jointly with BIA officials to identify programs that are not reaching their full potential and propose informed solutions for moving forward. Such an approach would be respectful of our tribal sovereignty. It would also further the federal government's duty to consult with tribal nations on federal policies or actions that may impact their communities and rights. The result of the Workgroup's cooperative efforts would be a more cohesive, detailed set of recommendations for Department leadership to consider during the reorganization process.

We recommend the creation of a Tribal Reorganization Workgroup to analyze and present an informed set of recommendations on ways to improve the effectiveness and accountability of Interior programs serving our Tribe and Indian Country. The Workgroup must, of course, include Tribal Leaders.

Indian Trust Asset Reform Act

A good place to begin looking at for a potential reorganization of the BIA is the Indian Trust Asset Reform Act, Pub. L. 114-178. This act was passed in 2016 and was an attempt to allow tribes to move to a system focused on tribal self-determination and economic opportunities. The Act would allow tribes to have greater control and decision making. Unfortunately, many provisions of the Act have yet to be implemented. The Act nonetheless

leaves a good roadmap of potential changes that can be made with reorganization. One of the greatest priorities for a reorganization can be found in the Act's establishment of an Under Secretary for Indian Affairs who would report directly to the Secretary. The Under Secretary would supervise and coordinate activities and policies of the BIA with activities and policies of non-BIA agencies and bureaus within the Department of Interior. It would also elevate Indian Affairs issues within the Department.

The Under Secretary was intended to ensure that other parts of the Department cannot implement policies that negatively affect tribes and beneficiaries without Indian Affairs knowing about it as early as possible. Any reorganization of the Department needs to confront the fact that Indian Affairs is an essential component of the Department. In one hundred years much has happened (it was not long ago that Indian Affairs was transferred from the War Department, for example) and reorganization needs to recognize and integrate Indian Affairs within the workings of the whole Department. The Oglala Sioux Tribe recommends the establishment of an Under Secretary for Indian Affairs.

BIA might not be broken—it just needs to be funded

While BIA is often made the scapegoat of problems facing Indian Country—and some of it may be well-deserved—we must also look at the resources it has to work with. Any plans for reorganization should recognize the fact that the BIA may not be broken but rather is just chronically underfunded. The BIA has an enormous responsibility to meet the needs of 567 Indian Nations, and there is strong consensus that Congress has not allocated enough resources to meet these needs. This situation creates a constant struggle pitting tribes against each other fighting for shrinking federal dollars.

Instead of spending extensive resources moving around BIA staff and responsibilities, it would be wise for the BIA to focus on examining its various funding allocations based on tribes' needs and why those needs exist. Further, the Secretary and the Administration should reject cuts for the BIA, especially in the Great Plains Region. Oglala Lakota County, within our Pine Ridge Indian Reservation, is one of the three poorest counties in the entire nation. We have an enormous need for infrastructure funding – for roads, schools, courts, law enforcement, healthcare facilities, water systems, youth and elder care centers – which, if obtained, would be put to immediate use for community development which, in turn, would facilitate the economic development we so greatly need on our Reservation. We need more resources, not less!

Disproportionate Impact of Reorganization on Indian Tribes

Because of the unique status of tribal nations within our federalist system, we rely on the federal government for support through direct government-to-government funding, services, agency programs, and cooperative partnership opportunities. We are concerned that Executive Order 13781 could be used to cut or diminish essential government services under the guise of reorganization. The comprehensive restructuring of executive federal agencies—such as Interior, HHS, and HUD, among others—without specific consideration or carve-outs for Indian programs will necessarily and disproportionately affect the health, safety, and welfare of our people, lands, and natural resources.

We are also alarmed by recent reports that Secretary Zinke is considering eliminating 4,000 positions from the Department of Interior. Assuming that the alleged cuts would be evenly distributed across the Department, the BIA—which employs approximately 8,000 personnel—would suffer the loss of 462 positions, which translates into a 5.8% reduction in its overall workforce. Such a loss would drastically impair its ability to fulfill its mission to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.” Further reductions in BIA resources when it has already been chronically underfunded for decades is simply unacceptable.

We urge the Department to exempt the BIA from any proposed reductions in the Interior workforce. We also strongly recommend that any programs housed in executive federal agencies serving the complex needs of Indian Country be appropriately protected during the restructuring process to ensure that the federal government continues to fulfill its treaty and trust obligations to tribal nations.

Tribes have been providing the BIA with specific ideas to streamline and improve. The BIA needs to focus in on one area at a time and then work with Tribal Leaders on targeted outcomes rather than just implementing across-the-board reductions in staff and services.

Conclusion

Time and again, tribes have either been altogether excluded from decision-making that has a direct impact on us and our rights, or we have participated only to have our concerns noted and dismissed. This failure to meaningfully consult with tribes has resulted in major threats to our culture, lands, and way of life. It is from this history that much of the concern and apprehension has come from with the recent discussions regarding reorganization.

The Oglala Sioux Tribe appreciates the early consultation that you have engaged in on reorganization thus far. However, as you move forward with your consideration to reorganize the Department or the BIA, you must provide tribes with details of any plans and continue to consult with us and Indian Country throughout your process. It is only through meaningful consultation and buy-in of Indian Country that a reorganization of the Department and the BIA can succeed. We also underscore that the Department and the BIA must adhere to the strict and high standards of the federal trust responsibility and the United States’ treaty obligations in any and all decisions and action steps that will affect us.

Sincerely,

A handwritten signature in cursive script that reads "Troy S. Weston".

Troy “Scott” Weston
President, Oglala Sioux