IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CROW CREEK SIOUX TRIBE, and the CROW CREEK HOUSING AUTHORITY,

Plaintiffs,

v.

SHAUN DONOVAN, in his capacity as the Secretary of the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and RODGER J. BOYD, in his capacity as Deputy Assistant Secretary for Native American Programs,

Defendants.

No. 09-3021

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiffs Crow Creek Sioux Tribe and the Crow Creek Housing Authority, by and through their attorney, Mario J. Gonzalez, Esq., hereby submit this memorandum of points and authorities in support of Plaintiffs' Motion for Judgment on the Pleadings.

STATEMENT OF FACTS

A seven-member Board of Commissioners manages the business and affairs of Plaintiff Crow Creek Housing Authority, which is an agency of Plaintiff Crow Creek Sioux Tribe. By-Laws of Crow Creek Housing Authority, Art. II, §§ 1 & 3. The members of the Board of Commissioners are appointed by the Crow Creek Tribal Council. *Id.*, Art. II, § 3. The Tribal Council makes appointments of successors to the Board of Commissioners every two years, at the first Tribal Council meeting after the general election. *Id.* In other words, the members of the Board of Commissioners serve two-year terms.

A majority of the Board of Commissioners, or four Commissioners, "shall constitute a quorum for the transaction of business at any meeting of the Board of Commissioners[.]" *Id.*, Art. II, § 7. The act of the majority of the Commissioners present at a meeting "at which a quorum is present" constitutes the act of the Board of Commissioners. *Id.*, Art. II, § 8. With regard to voting, the Bylaws provide that

> *The Chairman of the Board shall vote only in the event of a tie vote.* If another officer or Commissioner is the presiding officer of a meeting, they shall have all of the functions and limitations of the Chairman while they serve as presiding officer; provided, however, that they may vote.

Id., Art. II, § 14 (emphasis added). Any vacancy occurring in the Board of Commissioners "may be filled by appointment by the Tribal Council representative who appointed the Commissioner whose seat is vacant." *Id.*, Art, II, § 10.

The officers of the Board of Commissioners, namely the Chairman, Vice Chairman, Secretary and Treasurer, are elected to two-year terms by the Board of Commissioners. *Id.*, Art. III, §§ 1 & 2. "A vacancy in any office because of death, resignation, removal, disqualification or otherwise, may be filled by the Board of Commissioners for the unexpired portion of the term." *Id.*, Art. III, § 4.

The Tribal Council, which is the governing body of the Tribe, is composed of six members, who are elected. Constitution of the Crow Creek Sioux Tribe, Art. III, § 3. Although the Constitution and Bylaws of the Crow Creek Sioux Tribe do not expressly define what is a quorum, it is well established that absent such a definition, a quorum is "a majority of the entire body." Black's Law Dictionary 1421 (4th ed. 1968). Thus, a quorum of the Tribal Council is four members.

With regard to voting, the Chairman of the Tribal Council, who is elected from within the Tribal Council's own members, Constitution of the Crow Creek Sioux Tribe, Art. III, § 4, "shall vote only in case of a tie." Bylaws of the Crow Creek Sioux Tribe, Art. I, § 1. All ordinances, resolutions and motions must be enacted by a majority vote. *Id.*, Art. VII, § 4.

As for the eligibility requirements for members of the Tribal Council, they provide in relevant part that "[n]o person shall be eligible for membership in the Tribal Council who has ever been *convicted of a felony*, or misdemeanor within the year preceding the election." Bylaws of the Crow Creek Sioux Tribe, Art. III (emphasis added). Thus, a councilman or councilwoman cannot be removed from the Tribal Council just because he or she has been indicted for a felony.

In March 2009, three members of the Board of Commissioners (who are all also (a) officers of the Board and (b) members of the Tribal Council), namely Norman Thompson, Sr., Randy Shields, Sr., and Thomas Thompson, were suspended by the Acting Director of the Departmental Enforcement Center of the Department of Housing and Urban Development (HUD), based on a criminal indictment filed in the United States District Court for the District of South Dakota, Central Division, for bribery and retaliation. The suspensions were from participation in procurement and nonprocurement transactions "as a participant or principal with HUD and throughout the Executive Branch of the Federal Government." *See* Notices of Suspension. HUD's action in imposing the suspensions was taken "in accordance with the procedures set forth at Title 2, Code of Federal Regulations (C.F.R.), Parts 180 and 2424." *Id.* Specifically, the suspensions were imposed pursuant to 2 C.F.R. §§ 180.700[1] and 180.705.

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[1] 2 C.F.R. § 180.700 provides as follows:

> Suspension is a serious action. Using the procedures of this subpart and Subpart F of this part, the suspending official may impose suspension only when that official determines that –
>
> (a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 180.800(a), or
>
> (b) There exists adequate evidence to suspect any other cause for debarment listed under § 180.800(b) through (d); and
>
> (c) Immediate action is necessary to protect the public interest.

In general, the effect of the suspensions is governed by guidelines promulgated by the Office of Management and Budget (OMB), as follows:

> a person who is excluded [an exclusion includes a suspension, *see* 2 C.F.R. § 180.940,] by any Federal agency may not:
>
> (a) Be a participant in a Federal agency transaction that is a covered transaction; or
>
> (b) *Act as a principal of a person participating in one of those covered transactions.*

2 C.F.R. § 180.130 (emphasis added).

The Crow Creek Housing Authority clearly qualifies as a "person" within the meaning of Section 180.130. *See* 2 C.F.R. § 180.985 (defining "person" as meaning "any individual, corporation, partnership, association, unit of government, or legal entity, however organized"). It is likewise undisputed that the Tribal Housing Authority participates in one or more covered transactions as a recipient of HUD Indian Housing Block Grant funds. It is also undisputed that the "principals" of the Tribal Housing Authority would include both the members of the Board of Commissioners and the officers elected by that Board. *See* 2 C.F.R. § 180.995(a) (defining "principal" as including "[a]n officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction"). Thus, Section 180.130(b), on its face, bars the three suspended members of the Board of Commissioners from acting as either members or officers of the Board of Commissioners.

In addition, HUD has adopted supplemental regulations to OMB's "governmentwide definition" of the term "principal" set forth at Section 180.995. Those supplemental regulations provide that a "principal" is also "*[a] person who has a critical influence on*, or substantive control over, *a covered transaction*, whether or not employed by the participant." 2 C.F.R. § 2424.995 (emphasis added). Arguably, the members of the Tribal Council could be viewed as persons "who ha[ve] a critical influence on" covered transactions in view of the power of members of the Tribal Council to appoint

the members of the Board of Commissioners.

HUD in fact has taken the position that, not only must the three suspended Board members refrain from further action as either members or officers of the Board of Commissioners, but also that they are barred from participating in any vote to appoint their successors, whether such a vote is taken by the Board of Commissioners or by the Tribal Council.

HUD's suspensions of three members of the Board of Commissioners and the Tribal Council has left the Board of Commissioners without a quorum to do business and has disabled both the Board of Commissioners and the Tribal Council from acting to make the necessary appointments of successors to the vacancies created by the HUD suspensions in both the membership of the Board of Commissioners and in the officers of the Board.

Despite this dire impact on the operation of the Tribe's government, HUD did not undertake to engage in consultation with the Tribal Council prior to taking the action of suspending the three members of the Board and Tribal Council. On _____, the Tribal Council voted to make a formal request for consultation pursuant to HUD's Government-to-Government Tribal Consultation Policy, adopted on June 28, 2001 ("Tribal Consultation Policy"), which policy was adopted by the agency to implement President Clinton's Executive Order 13175 of November 6, 2000. The Tribal Consultation Policy specifically provides that, "Tribes *at any time* may exercise their right to request consultation with HUD." *See* U.S. Department of Housing and Urban Development, Government-to-Government Tribal Consultation Policy, ¶ IV.B.1., (June 28, 2001), http://www.hud.gov/offices/pih/ih/regs/govtogov _tcp.cfm (emphasis added).

Pursuant to the Tribal Council vote, the Tribal Council's Vice Chairman, Randy Shields, Sr., sent a letter dated June 29, 2009, to the Deputy Regional Director of HUD's Denver Regional Office, formally requesting consultation on behalf of the Crow Creek Sioux Tribe, pursuant to the Tribal Consultation Policy. The letter stated that the purpose of the formal request for government-to-

government consultation was to discuss all issues relating to the suspensions of three members of the Tribal Housing Authority Board of Commissioners and the Tribal Council, including whether HUD's suspensions infringe upon the Crow Creek Sioux Tribe's right to self-government, whether HUD improperly imposed the suspensions without first consulting with the Tribal Council pursuant to HUD's Tribal Consultation Policy, whether HUD should grant an exception to allow the Tribal Council members to participate in appointing their successors, and whether HUD should reverse or vacate the suspensions or stay them pending meaningful consultation.

By letter dated July 29, 2009, Rodger J. Boyd, HUD's Deputy Assistant Secretary for Native American Programs, responded to the Tribe's formal request for government-to-government consultation. In denying the request, the Deputy Assistant Secretary initially pointed to Paragraph IV.A. of the Tribal Consultation Policy, which provides that "Tribal Coordination, Collaboration and Consultation applies when any proposed policies, programs *or actions* are identified by HUD as having a substantial direct effect on an Indian tribe." Tribal Consultation Policy, ¶ IV.A (emphasis added). He then stated that "[i]n accordance with this policy, HUD engages in various forms of tribal consultation *when making significant policy determinations that require consultation*, including extensive tribal consultations through negotiated rulemaking when promulgating regulations that govern HUD Indian programs." (Letter from Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, HUD, addressed to Randy Shields, Sr., Vice Chairman, Crow Creek Sioux Tribe, dated July 29, 2009 ["Boyd Letter"], p. 1 (emphasis added).)

Deputy Assistant Secretary Boyd further found that "[t]he suspension of three members of the Tribal Housing Authority Board of Commissioners and Tribal Council does not amount to an action that has a substantial direct effect on the Crow Creek Sioux Tribe for purposes of the Tribal Consultation Policy so as to warrant the granting of a formal government-to-government consultation." (Boyd Letter, p. 1.) In support of this finding, the Deputy Assistant Secretary stated that, "[u]nlike, for

instance, rulemaking when proposed HUD action often has a substantial effect on any individual tribe participating or likely to participate in HUD programs, the suspensions at issue here involve a very limited number of individuals and, regardless of the outcome of these proceedings, will not necessarily have the necessary substantial direct effect on the tribe itself so as to warrant formal consultation." (*Id.*) The Deputy Assistant Secretary further stated that his determination was "consistent with HUD's longstanding view that HUD program enforcement action against individuals does not require HUD to engage in formal consultation prior to the initiation of such actions." (*Id.*, pp. 1-2.) He further stated that his determination was "consistent with paragraph X of the Tribal Consultation Policy which clearly states that the policy is 'not intended to, and does not, create any right to administrative or judicial review, or any other right of benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employes, or any other persons." (*Id.*, p. 2.)

ARGUMENT

STANDARD OF REVIEW FOR A MOTION FOR JUDGMENT ON THE PLEADINGS

A grant of judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law. *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008); *Faibisch v. University of Minnesota*, 304 F.3d 797, 803 (8th Cir. 2002). In ruling on the motion, the court must accept as true all facts pled by the non-moving party and grant all reasonable inferences from the pleadings in the non-moving party's favor. *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 428 (8th Cir.), *cert. denied*, 510 U.S. 861 (1993), citing *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters*, 627 F.2d 853, 855 (8th Cir. 1980).

I. HUD ABUSED ITS DISCRETION AND FAILED TO OBSERVE PROCEDURE REQUIRED BY LAW BY REFUSING TO CONSULT WITH THE TRIBE BEFORE IMPOSING MULTIPLE SUSPENSIONS OF TRIBAL OFFICIALS HAVING A SUBSTANTIAL DIRECT EFFECT ON THE TRIBE, IN CONTRAVENTION OF HUD'S GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY.

On June 28, 2001, HUD adopted its Government-to-Government Tribal Consultation Policy, which "applies to *all* HUD program[s] that have substantial direct effects on federally recognized Indian tribal governments." HUD's Government-to-Government Tribal Consultation Policy ["Tribal Consultation Policy"], ¶ I.C. (June 28, 2001) (emphasis added). In implementing this policy, HUD "will be guided by the fundamental principles set forth in section 2 of Executive Order 13175, to the extent applicable to HUD programs." *Id.*

Section 2 of Executive Order 13175, promulgated by President Clinton on November 6, 2000, provides as follows:

> Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:
>
> > (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
> >
> > (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
> >
> > (c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Executive Order 13175, Sec. 2 (Nov. 6, 2000).

HUD's Tribal Consultation Policy provides that "[w]hen proposed federal government policies, programs *or actions* are determined by HUD as having tribal implications, HUD will notify the affected tribe(s) and take affirmative steps to consult tribe(s) or its (their) designee." Tribal Consultation Policy, ¶ IV.B.1 (emphasis added). "Consultation" is defined by HUD's policy as "the active, affirmative process of (1) identifying and seeking input from appropriate Native American governing bodies, community groups and individuals; and (2) considering their interest as a necessary and integral part of HUD's decision-making process." Tribal Consultation Policy, ¶ II.A. Consultation is not satisfied by mere notification: "[t]he goal of notification is to provide an opportunity for comment; however, *with consultation procedures, the burden is on the federal agency to show that it has made a good faith effort to elicit feedback.*" *Id.* (emphasis added).

Respondents respectfully submit that HUD's action in suspending three members of the governing body of the Tribe's housing authority and the Tribal Council has "tribal implications," i.e., it has a "substantial direct impact" on the right of the Tribe to self-government, and that HUD therefore acted arbitrarily and capriciously, abused its discretion ,and violated its own Tribal Consultation Policy in failing or refusing to consult the Tribe before taking this action and in subsequently denying the Tribe's formal request for consultation.

It is well established in this Circuit that "[a]n agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA [Administrative Procedure Act]." *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D. S.D. 2006), citing *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979). Thus, for example, where the Bureau of Indian Affairs (BIA) had established a policy of "requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, *that opportunity must be given.*" *Yankton Sioux Tribe v. Kempthorne*, 442 F.

Supp. 2d at 784 (emphasis added), citing *Lowe Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399-400 (D. S.D. 1995) ("The BIA is not to be permitted to disavow its own policies and directives."). Indeed, the Eighth Circuit has similarly held that

> [W]here the Bureau has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, *that opportunity must be afforded.* Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles that govern administrative decisionmaking, . . . "but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d at 721 (emphasis added and citations omitted), quoting *Martin v. Ruiz*, 415 U.S. 199, 236 (1974).

In this case, HUD has established a policy of requiring prior consultation with a tribe and thereby created a justified expectation that the tribe will receive a meaningful opportunity to express its views before any action having a substantial direct effect on the tribal government is taken. Under controlling Eighth Circuit precedent, that opportunity must be given.[2]

In nonetheless refusing to afford the Tribe a prior consultation, HUD stated that the suspensions "involve a very limited number of individuals," that such suspensions "will not have the necessary substantial direct effect on the tribe itself," and that "HUD's longstanding view" is that "HUD program enforcement action against individuals does not require HUD to engage in formal consultation prior to initiation of such actions." (Boyd Letter, pp. 1-2.) What HUD fails to acknowledge is that it has suspended so many "individual" members from both the tribal Housing Authority Board of Commissioners and the Tribal Council that the agency has made it impossible for those bodies to

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[2] Consultation is likewise not satisfied by permitting the Tribal Council to comment on the agency's actions after the fact. As the Eighth Circuit has recognized, "[p]ermitting the submission of views after (an administrative decision has been made) is no substitute for the right of interested persons to make their views known to the agency in time to influence the (administrative) process in a meaningful way." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d at 720, quoting *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974).

convene the necessary quorum to take any action, including the appointment of successors. These suspensions, when considered cumulatively rather than individually, certainly meet the threshold of having a substantial direct effect on the tribal government, as they have made it impossible for the Board of Commissioners to function without the appointment of persons to replace the three suspended members, while at the same time stymying the ability of either the Board of Commissioners or the Tribal Council to make those appointments.

HUD further implies that the Tribal Consultation Policy only applies when HUD is "making significant policy determinations that require consultation." (Boyd Letter, p. 1.) This interpretation, however, ignores the plain language of the policy which requires HUD to take affirmative steps to consult with a tribe "[w]hen proposed federal government policies, programs *or actions* are determined by HUD as having tribal implications." *See* Tribal Consultation Policy, ¶ IV.B.1 (emphasis added). Thus, the Tribal Consultation Policy, by its express terms, applies to proposed agency actions as well as agency policymaking or policy determinations. "*A court need not accept an agency's interpretation of its own regulations if that interpretation* is inconsistent with the statute under which the regulations were promulgated, *is plainly inconsistent with the wording of the regulation*, or otherwise deprives affected parties of fair notice of the agency's intentions." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d at 718 (emphasis added).

Finally, HUD points to the disclaimer in its Tribal Consultation Policy stating that the policy is "not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons." Tribal Consultation Policy, ¶ X. First, this disclaimer flies in the face of the Eighth Circuit's holding in *Oglala Sioux Tribe* that where an agency "has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be

given a meaningful opportunity to express their views before Bureau policy is made, *that opportunity must be afforded,*" since to do otherwise contravenes the agency's trust responsibility towards the tribes. 603 F.2d at 721 (emphasis added). Secondly, HUD's reliance on the disclaimer language in Paragraph X conflicts with other language of the consultation policy, which explicitly mandates that, once a policy, program, or action is identified by HUD as having a "substantial direct effect on an Indian tribe," HUD "will" take affirmative steps to consult the tribe. Tribal Consultation Policy, ¶¶ IV.A & IV.B.1; *see* Black's Law Dictionary 1771 (4th ed. 1968) (will is "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must'"). Indeed, the consultation policy states that the "[t]ribe at any time may exercise *their right* to request consultation with HUD." Tribal Consultation Policy, ¶ IV.B.1 (emphasis added). Thus, the language of HUD's Tribal Consultation Policy "indicates an intent to confer important procedural benefits upon the tribes in the face of agency discretion and thus the agency action is subject to judicial review." *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d at 783. To the extent that the disclaimer in Paragraph X creates an ambiguity regarding the existence of a procedural right to prior consultation, that ambiguity must be resolved in favor of the Tribe. "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

In short, HUD acted arbitrarily and capriciously, abused its discretion, and otherwise acted not in accordance with law, *see* 5 U.S.C. § 706(2)(A), and acted without observance of procedure required by law, *see id.* § 706(2)(D), by refusing to reverse and vacate, or at the very least stay, its action in suspending three members of the Tribal Housing Authority's Board of Commissioners and the Tribal Council until, pursuant to the agency's Tribal Consultation Policy, it first consulted with and elicited feedback from the Tribal Council regarding the "tribal implications" of the proposed suspensions, including especially the serious adverse impact of the suspensions on the Tribe's right of self-

government as guaranteed by the "orderly government" provision of by Article 8 of the Act of February 28, 1877 (19 Stat. 254).

II. HUD ABUSED ITS DISCRETION IN FAILING TO DETERMINE THAT THE MULTIPLE SUSPENSIONS OF TRIBAL OFFICIALS WILL HAVE A SUBSTANTIAL DIRECT IMPACT ON THE TRIBE BY ABRIDGING THE TRIBE'S RIGHT TO SELF-GOVERNMENT.

In refusing the Tribe's request for a prior consultation, HUD also failed to recognize that the agency's application of the OMB and HUD debarment and suspension rules, to suspend three members of both the tribal housing authority's Board of Commissioners and the Tribal Council, has a substantial direct impact on the Tribe by unduly infringing upon and interfering with the Crow Creek Sioux Tribe's right of self-government. That right is guaranteed by Article 8 of the Act of February 28, 1877 (19 Stat. 254), which provides that "Congress shall by appropriate legislation, secure to [the 1868 Treaty Sioux] *an orderly government.*"[3] (Emphasis added.) This right of self-government is a right held by the Tribe in its capacity as a sovereign nation. *Bowen v. Doyle*, 880 F. Supp. 99, 112 (W.D.N.Y. 1995). An Indian tribe is "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and retains the "right of self-government." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832).

The "orderly government" guarantee was interpreted by the United States Supreme Court in *Ex parte Crow Dog*, 109 U.S. 556 (1883) to preclude a tribal member from being prosecuted for the murder of another tribal member in federal court, where the tribal member had already been punished by the tribe and no federal statute expressly preempted the tribe's jurisdiction over the matter. In so holding, the Court said:

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[3] Article 2 of the 1868 Treaty (15 Stat. 635) created the Great Sioux Reservation out of the 1851 Sioux territory. The Crow Creek Sioux Tribe are parties to this treaty.

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, *necessarily implies*, having regard to all the circumstances attending the transaction, *that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs*, the maintenance of order and peace among their own members by the administration of their own laws and customs.

109 U.S. at 568 (emphasis added).

Similarly, in *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976) (per curiam), which likewise involved a treaty guarantee of "an orderly government," the United States Supreme Court reversed a decision of the Montana Supreme Court holding that the state court had jurisdiction over an adoption proceeding in which all of the parties were members of the Northern Cheyenne Tribe. The U.S. Supreme Court initially recognized that

> [t]he right of the Northern Cheyenne Tribe to govern itself independently of state law has been consistently protected by federal statute. As early as 1877, Congress ratified an agreement between the Tribe and the United States providing that "Congress shall, by appropriate legislation, secure to [the Indians] *an orderly government*; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." 19 Stat. 256. This provision remained unaffected by the Act enabling Montana to enter the Union, and by other statutes specifically concerned with the Northern Cheyenne Tribe.

424 U.S. at 386 (emphasis added).

The Court in *Fisher* then determined that "[s]tate court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court" as it would "subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." *Id.* at 387-388. Furthermore, as the Court found, "[n]o federal statute sanctions this interference with tribal self-government," since "Montana has not been granted, nor has it assumed, civil jurisdiction over the Northern Cheyenne Indian Reservation," under any federal statute. *Id.* at 388.

Crow Dog, *Fisher*, and other federal court decisions involving similar treaty guarantees of self-

government "all support the proposition that an Indian Tribe's right to self-government cannot be abrogated *absent an unequivocal expression of Congress' intention to do so*." *Bowen v. Doyle*, 880 F. Supp. at 11 (emphasis added).

The debarment and suspension rules of OMB and HUD have their origins, not in an Act of Congress, but rather in two executive orders, specifically Executive Order 12549 promulgated by President Reagan on February 14, 1986 and Executive Order 12689 promulgated by the first President Bush on August 16, 1989. Because "[n]o federal statute sanctions this interference with tribal self-government," *Fisher v. Dist. Court of 16th Judicial Dist. of Montana*, 424 U.S. at 388, HUD cannot suspend tribal officials from continuing to act as members of the Board of Commissioners and the Tribal Council pending resolution of the criminal charges set forth in the indictment. It is up to the Tribe to regulate its internal affairs by determining whether a member of the Tribal Council or of the Board of Commissioners who has been indicted for a serious crime should be suspended or disqualified from continuing to serve on those bodies pending resolution of the charges.

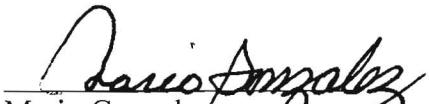
Alternatively, HUD is barred by the Tribe's right of self-government from enforcing the debarment and suspension rules in such a way as to prevent the suspended officials from at least participating in votes by the Board of Commissioners and/or the Tribal Council to appoint their successors. Otherwise, the tribal government would be hamstrung and blocked from operating in an orderly fashion, in direct contravention of the treaty guarantee.

In short, HUD acted arbitrarily and capriciously and abused its discretion, and acted without observance of procedure required by law in failing to recognize the substantial direct impact of HUD's enforcement action on the Tribe's right to self-government, an impact that triggers the application of HUD's government-to-government consultation policy.

CONCLUSION

In view of the arguments and citations set forth above, Plaintiffs Crow Creek Sioux Tribe and the Crow Creek Housing Authority respectfully request that the Court grant the Plaintiffs' Motion for Judgment on the Pleadings, and enter a judgment in favor of Plaintiffs (a) invalidating and setting aside the final decision of the Defendants, dated July 29, 2009, denying the request of the Crow Creek Sioux Tribe for a consultation pursuant to HUD's Government-to-Government Tribal Consultation Policy regarding the suspension of three members of the Crow Creek Housing Authority's Board of Commissioners and the Tribe's Tribal Council, and (b) enjoining the Defendants to reverse and vacate, or, in the alternative, to stay, the agency's action in suspending three members of the Tribal Housing Authority Board of Commissioners and the Tribal Council, and further enjoining the Defendants from re-imposing the suspensions unless and until the agency first consults with and elicits feedback from the Tribal Council regarding the "tribal implications" of the proposed suspensions.

Respectfully submitted,



Mario Gonzalez
Law Officers of Mario Gonzalez
522 Seventh Street, Suite 202
Rapid City, South Dakota 57701
Phone: 605-716-6355
Fax: 605-716-6357
Email: gnzlaw@aol.com

Attorney for Plaintiffs