



April 4, 2014

VIA EMAIL ONLY

Tracy Toulou, Director
Office of Tribal Justice
U.S. Department of Justice
950 Pennsylvania Ave. NW, Room 2318
Washington, DC 20530
OTJ@usdoj.gov

Dear Mr. Toulou:

On behalf of the Navajo Nation, this letter submits comments on the Department of Justice's proposed Statement of Principles for Working with Federally Recognized Indian Tribes ("Proposed Principles"). The Nation very much appreciates this effort by the Attorney General to take a new and improved approach to working with Indian tribes, which so often are significantly impacted by the work of the Department of Justice. We are happy to help the Department advance our mutual commitment to ensuring that the Department honors the United States' trust obligations to Indian tribes. We have two technical comments and one substantive comment on the Proposed Principles, as respectively explained below.

First, the Proposed Principles are presented as just an unorganized set of 23 bullet points, so it would be very helpful to organize them thematically. Such organization would provide greater clarity for all those in the Department and Indian country later would and should make use of the Proposed Principles. Moreover, there are several themes that are apparent in the Proposed Principles, which could provide such organization. This is something that the Office of Tribal Justice can readily implement without getting into particulars here.

Second, it is unclear from the Proposed Principles and the Dear Tribal Leader letter that transmitted them on whose behalf and in what format these would be finalized and issued. While we appreciate the work of the Office of Tribal Justice, that office does not have administrative oversight and responsibility for the various substantive divisions and local offices of the Department. Accordingly, the final Principles must be issued under the authority of the Attorney General himself and must be promulgated in a permanent, readily referenced manner in the Code of Federal Regulations or the United States Attorneys' Manual. Only this will ensure that the Proposed Principles prescribe uniform policies throughout the Department and have the necessary continuing applicability to all Departmental offices, employees, and activities.

Third, while there is much in the Proposed Principles that is apt and helpful, there is one area in which the provisions are lacking. The first stated principle is that that the Department "honors and strives to act in accordance with the general trust relationship between the United States and tribes." Halfway down page two, there is also the following: "The Department of

Justice is committed to protecting tribal treaty rights, tribal lands and natural resources, and tribal jurisdiction through litigation, where appropriate, and to handling litigation involving tribes in a manner that is mindful of the government-to-government relationship.” The problem with these principles is that they fail to adequately state the paramount, mandatory obligation of the Department—and indeed all of the federal government—regarding Indian tribes, namely, fulfill the strict “fiduciary trust” duties of loyalty, to protect Indian trust assets, and to promote tribal sovereignty and Indians’ best interests.

These mandates are not merely “general” or aspirational goals that the Department should just “strive” to achieve. Rather, these are absolute and binding obligations that every Department of Justice employee must be sworn to uphold, like every other legal requirement. The fact that federal trust responsibilities derive from the foundational history of the United States and numerous treaties and written agreements securing peace and a continent’s worth of land and resources does not make them any less binding. Moreover, these duties must not be subordinated to other mere administrative prerogatives or varying federal policy goals such as protecting the public fisc. Instead, the Department must make clear that the Executive Branch, acting through the Department of Justice, must never take actions or assert legal positions that are at odds with the United States’ fiduciary obligations to Indian tribes and individual Indians.

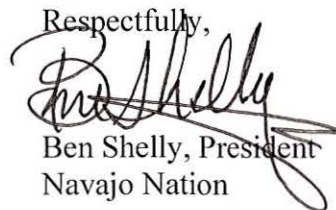
This point is well-stated in a recent report issued for the Department of the Interior:

The Commission does not mean to disparage individual career attorneys Rather, the criticism is leveled at the highest level of Executive Branch officials who have either advanced these positions, or tolerated their development, over several Administrations through benign neglect. The Commission acknowledges that the United States must assert valid defenses to litigation brought by tribes and individual Indians, but the usual zealous defense should be tempered and informed by the federal-tribal trust.

U.S. Department of the Interior Commission on Indian Trust Administration and Reform, Final Report 23 (Dec. 10, 2013).

We hope that you will agree that the comments outlined here are warranted and will help better fulfill the foundational federal responsibilities in working with Indian tribes.

Thank you very much for your attention to these important matters.

Respectfully,

Ben Shelly, President
Navajo Nation

cc: President Barak Obama
Attorney General Eric Holder
Secretary of the Interior Sally Jewell