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THE WHITE HOUSE

WASHINGTON

May 29, 1973

To the Traditional Chiefs and Headmen of the Teton Sioux:



Mr. Patterson and the other four White House Representatives who met with you on May 17 and 18 have told me of their conversations with you and have reported to me the resolutions and proposals which you have given them.

As we promised, I am responding in writing to each of these resolutions and proposals.

1. Establishing a Treaty Commission

In 1871, the Congress of the United States passed an Act (16 Stat 566) which includes language now designated as Title 25 of the United States Code, Section 71. That language reads:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation or any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

What this means is that the days of treaty-making with the American Indians ended in 1871, 102 years ago. Any changes made in the terms of treaties or laws relating to Indians have since been made by agreements ratified for both Houses of Congress, or by statutes of Congress. Only Congress can rescind or change in any way statutes enacted since 1871, such as the Indian Reorganization Act.

There are committees of the Congress which spend a great deal of time considering the problems and needs of Indian people. One of these committees, the Senate Interior Subcommittee on Indian Affairs, is going to be paying a visit to the Pine Ridge Reservation shortly. Insofar as you

wish to propose any specific changes in existing treaties or statutes, the Congress is, in effect, a Treaty Commission and you should make sure that your spokesmen appear before the Senate Subcommittee and present their views as to which treaties or statutes should be amended and in precisely what way. In fact, I am today writing Subcommittee Chairman Abourezk and have forwarded to him copies of the resolutions which you gave to Mr. Patterson during your two days of meetings.

As Mr. Patterson reminded you, the President himself has proposed additions to and revisions of the old legislation affecting American Indians. Enclosed is a copy of the President's July 8, 1970 Special Message to the Congress in which these proposals were first made; they have been repeated in the years since 1970; they have not yet been enacted by the Congress; the President still stands by them as embodying the changes most needed today for the benefit and protection of Indian interests. The Committees of the Congress most concerned with Indian affairs are also scheduling hearings on these legislative proposals of the President. If you support these proposals, or have comments or changes to suggest, I hope you will arrange to appear before the Committees of the Congress and present your views.

2. Protecting Mineral and Water Rights

When Mr. Patterson asked you about the areas of concern which your proposed Treaty Commission would review, you indicated that the protection of Indians' natural resources rights should be an area of special attention.

This is likewise an area of special concern to this Administration, and I would like to tell you some of the specific actions we are taking. Secretary Morton has established a special Office of Indian Water Rights within the Bureau of Indian Affairs. That Office has 45 water rights inventories under way, has assisted in preparing for 14 lawsuits which have been filed with the courts and is in the process of preparing others for filing. The President has proposed that the Congress enact legislation to create an Indian Trust Counsel Authority to guarantee to Indian people that there will always be an unambiguous Executive Branch defense of the natural resources trust rights of Indian people. The attached Message describes the importance which the President attaches to this legislation.

Pending the creation of the Trust Counsel Authority, the White House has initiated an arrangement with the Attorney General and the Solicitor General that whenever Indian trust rights are involved in cases before any Federal Court, including the Supreme Court, if the government submits a brief which would, in the Secretary of the Interior's opinion, damage Indian trust rights, it will at least include in the brief the argument which sets forth a defense of these rights from the viewpoint of the Government as a trustee.

In a landmark Indian water rights case, Pyramid Lake, this Administration has initiated a suit directly in the Supreme Court to protect those rights. The brief we have filed is a statement on Indian water rights, of very broad applicability, as is evidenced by the following quotation from the brief:

"No laws authorizing the construction of irrigation projects have diminished the right to water for maintenance of Pyramid Lake... There is nothing in the language of the Reclamation Act of 1902 or any of its amendments that can reasonably be construed to authorize the taking of waters of the Truckee River, previously reserved for the Pyramid Lake Indian Reservation, for use on the Newlands Reclamation Project... And we know of no federal legislation that can reasonably be construed as diminishing the right to the use of water from the Truckee River System for the maintenance and preservation of Pyramid Lake".

What is needed to assure the protection of Indian natural resources trust rights is not a "Treaty Commission" but the passage of the Trust Counsel legislation by the Congress and, hopefully, a favorable Supreme Court decision in the Pyramid Lake case.

If you know of any specific Indian minerals or water rights matter in the Teton Sioux area which in your view is not being adequately handled by the Executive branch, I would appreciate it if you would bring it to my attention so that we can have the question reviewed.

3. A Referendum Vote

You passed a resolution indicating that it was your wish that a vote or poll be taken so that it could be ascertained how many of the Teton Sioux people wanted to go back to the method of Indian government used in 1868, and

amendments can occur only in accordance with the provisions of the respective articles governing amendment of the documents. In some cases, such as the Oglala Sioux constitution, this can only come about either by a valid petition or by a request of the tribal council, as I explained above.

In others, such as that of the Crow Creek Sioux Tribe, amendments can be initiated only by a request of the tribal council, while the Cheyenne River Sioux tribal constitution requires a joint petition and tribal council resolution.

You recognize that only the Congress can repeal the Indian Reorganization Act as such, but these three methods exist for determining the wishes of the Oglala Sioux people.

Of these three possibilities, I believe action should be deferred on the third until it is clearer what the progress and exact timing will be on the first or second methods. In view of the actual legal effect of the first method (as compared with the third, which is only an opinion sample and thus merely advisory in its effect), and in view of the assurances we have been given from Pine Ridge, I will recommend to the Secretary of the Interior that the referendum be one provided in Article XI of the Tribal Constitution.

4. Criminal Jurisdiction

I have carefully reviewed the Resolution which you passed on this subject and find that in one important part it is factually in error. The cases which we have been able to identify mentioned in the fourth paragraph of that Resolution did not occur on Indian Reservation land and are therefore not matters of federal criminal jurisdiction. In each such case, a State trial has been held. In each such case a separate inquiry has been made as to whether any federal statutes were violated and in each such case the finding has been that they were not. I am sure that the Oglala Sioux people would prefer to avoid intervening in matters which are now State jurisdiction just as much as they want the States to avoid intervention in matters exclusively of Oglala jurisdiction. Adherence to this principle of separation by both parties would greatly advance efforts to achieve Indian self-determination.

The Bureau of Indian Affairs, with the assistance of the U. S. Marshals Service, is now upgrading the law enforcement personnel on the Pine Ridge Reservation through the initiation of appropriate training programs and consideration of other community services that law enforcement personnel can provide.

5. Civil Jurisdiction

I am very much aware, from the report to me of the White House Representatives, of your concerns about civil rights enforcement on the Pine Ridge Reservation. As Mr. Patterson mentioned to you in his comments on May 18, this may be a problem on other Indian Reservations also, and as such it is important to us because the success of the President's new Indian self-determination policies will depend on the effectiveness and fairness of Indian tribal governments generally. The Assistant to the Secretary of the Interior for Indian Affairs, Mr. Marvin Franklin, has recently spoken in the same vein:

" If we restudy the majority of our tribal governments, we will find that tribal councils as provided in the constitutions arising from the Indian Reorganization Act were adequate in those depression days. But today, the reservations are engaged in multi-million dollar enterprises, housing programs, reservation developments, and in contracting that dictates a need for updating the governing structure. No longer is the autocratic form adequate to meet the varying needs for assurances of efficient governmental functions. Many tribes are now revising their constitutions to provide for those checks and balances between its executive, legislative and judicial branches with a broader selection for filling those positions in the hands of the tribal members."

" This is recognized as a key element in the matter of self-determination and carries a high priority in the Interior Department in working with tribal governments to make them capable of assuming responsibilities beyond those now exercised independently. "

We have the following responses to your concern in this area:

a) As referred to in the April 5 Agreement, there has been since March 26, 1973 a civil rights investigating team active on the Pine Ridge Reservation. That team's activities are continuing, pursuant to the terms of the April 5 Agreement. Mr. Patterson introduced some of those officers to you during your meeting; others will be added and the officer in charge at the time you receive this letter is Mr. R. Dennis Ickes who can be contacted in the BIA building in Pine Ridge.

b) Up to this point, this team has received 51 complaints, has investigated 40 of them, with 11 more pending, and has interviewed 356 different witnesses. In the opinion of the investigating attorneys, only 4 or 5 of these cases are accompanied by solid enough evidence to warrant probable Grand Jury action. I urge you, as Mr. Patterson and Mr. Soller did, to bring any specific complaints you have to the attention of Mr. Ickes and his special team, so that they can be promptly investigated; but these complaints must be supported by hard evidence.

c) To facilitate the presentation of complaints, the civil rights investigating team tells me that they plan to have a mobile van of lawyers and FBI personnel visit several areas of the Pine Ridge Reservation during June 4-8. These visits will include a visit to Kyle and I am asking Mr. Ickes to inform you ahead of time of the precise date and time the group will be at Kyle, so that you and your colleagues can conveniently appear. But again, I counsel you, you must have specific, hard evidence rather than merely rumors or allegations.

d) In view of the national importance of Indian civil rights, the White House is supporting Assistant Attorney General Pottinger in his decision to assign attorneys and other staff members of the Department of Justice to a special Indian Task Force to examine, identify and pursue the special civil rights problems of American Indians. Indian people must be guaranteed fair and lawful government, precisely as set forth in the Indian Civil Rights Act. I am not, in this letter, making any judgments that any Tribal official at Pine Ridge or any member of any other Tribal Government, is in violation of the civil rights statutes; but in fact I am sure that the elected Tribal Government officials all over the nation support my statement here and will work with Mr. Pottinger and his staff in making sure that civil rights guarantees are respected and enforced. Where investigations are necessary they will be made and follow-up actions taken.

e) I have spoken to Mr. Franklin and also to the head of the Department of the Interior's team of lawyers which is drawing up a model code for the administration of Justice in Indian courts pursuant to 25 USC 1311. I have asked both of them to accelerate their efforts to design further guarantees for fairness, for the separation of powers and for effective civil rights enforcement in Indian areas, including, but not limited to, all the Teton Sioux-reservations.

f) Now present on the Pine Ridge Reservation and actively examining the financial records of both the Tribal Council and the Bureau of Indian Affairs is a special team from the independent accounting firm of Touche, Ross and Company. We expect that their report will be finished by July 26 and I am assured that their final summary report will be available to any member of the Oglala Sioux Tribe who wishes to inspect it. In our opinion, financial accountability of governmental bodies -- whether Indian or non-Indian -- to their citizens is as important as the civil rights guarantees I mentioned earlier.

g) An essential part of civil rights guarantees for minority or disadvantaged citizens is access to legal services. I do not know how many of the Teton Sioux peoples have had the benefits of a legal services program on their respective Reservations, but I will promise you that as soon as the new Legal Services Corporation which the President has recommended is created by the Congress, I will recommend to the Board of the Corporation that they consider supporting an effective Indian Legal Services program, including the Oglala Sioux. My recommendation would not be binding on the new Corporation, but I feel certain they would give it full consideration.

h) During the meetings of May 17-18, Mr. Patterson noted at least one reference to what he understood as Social Security benefits not being made available to an allegedly eligible Indian individual. If you will give us the names and Social Security numbers of any Teton Sioux Indians whom you claim are improperly being denied social security benefits, we will be glad to have their cases checked by the proper authorities here.

6. A Second Meeting

You have expressed a desire to have a second meeting with White House representatives, and have suggested May 30 at Kyle.

Please permit me to make an alternative suggestion: a second meeting may turn out to be useful, but first I need to have your comments, in turn, on the substance of this letter. We need to have them in writing so that the five White House representatives can consider them and go over them with our colleagues in the Executive Branch.

I therefore respectfully suggest that this step be taken first, and that you, the traditional chiefs and headmen, personally put in writing the suggestions, questions or comments you have in response to this communication. Then I suggest that we arrange our second meeting within a few weeks after I receive your comments and I am prepared to set a definite date for that meeting as soon as your comments have been received.

It is requested that in your letter you identify by name and address the specific traditional chiefs and headmen from the Teton Sioux Reservations who should be invited to the second meeting. In order to ensure a businesslike and productive meeting, we would like your guarantee that the Indian side will be represented by just these named chiefs and headmen and your counsel, Mr. Robidoux.

7. "Other Wounded Knees"

Mr. Patterson tells me that during your talks, several Indian speakers referred to the likelihood of other confrontation situations in the future.

Gentlemen, I must repeat to you what Mr. Patterson himself emphasized: instigation of further civil disturbances and violations of local or federal law will only bring grief to Indian people themselves. Indians will lose much of the sympathy and support they now enjoy from this Administration, from the Congress and from the public. The possible actions I have indicated in this letter will become much less possible; the passage of constructive legislation will become less likely. I am confident that you and Indian leaders throughout the country, being genuinely interested in meeting the needs of Indian people, want to accomplish this in a positive way and will reject the false advice of those who would only lead you backwards.

I look forward to hearing further from you.

Sincerely,



Leonard Garment

WASHINGTON

January 8, 1974

Dear Chief Fools Crow and Matthew King:

On behalf of the President, I want to thank you for your letter of November 19 to him, and for the specific questions you enclosed in the Bill of Particulars which Vine DeLoria delivered to Brad Patterson. We promised to have a detailed response to the specific questions, and the enclosure to this letter, prepared principally by the Department of Justice, constitutes that response. As you asked, the response avoids rhetoric and "soothing words" in its answers and confines itself to facts of history and law, with citations of statutes and Court decisions. By way of preface, however, I would like to add a personal word.

The Sioux people have been raising questions about the implementation of the Government's treaties with the Sioux since the 1920's. At that time, the special place in the judicial branch which the Congress authorized to review and decide those questions and claims was the U. S. Court of Claims. Between the 1920's and 1946, the Sioux filed eleven claims cases before the Court of Claims.

The eleven cases were resolved in favor of the United States Government, with the Court of Claims finding that either the United States had fulfilled its Treaty obligations, or that the Government had paid the Sioux more than the damages which they had sustained.

In 1946, a new avenue for claims was opened up to Indian people by the creation of the Indian Claims Commission. As the answer to question four here indicates, the Western Sioux today have seven pending dockets before the Indian Claims Commission; there has not yet been a final decision in any of these seven.

Your letter therefore comes at a time when some of the very issues of concern to you are in fact being adjudicated by the special body which the Congress has established for this purpose. I am aware that the process of reviewing these seven claims has been lengthy, but at each stage of the review, certain appeals have been filed by the attorneys for the Sioux-- as is of course their right. The result, however, is a prolonged adjudi-

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cation process. But it is still going on and final decisions will eventually come. If the Sioux win, the compensation awards by the United States to the Sioux will amount to many millions of dollars.

As the enclosed response indicates, if you have any complaints about how these suits are proceeding you should contact the attorneys who have long been retained by the Oglala Sioux people to represent them in these lawsuits.

You are also aware, of course, that your communication to the President is not the official position of the Oglala Sioux. That can come only from the elected Tribal Council and Tribal Officers of the Oglala Sioux. We respect your right to differ with the Tribal Council and to send us your views; in fact the five White House representatives who spent two days with you and your colleagues last May came especially to receive those views and to hear you and your associates who spoke to them. But, as in any democratic society where there is contention and differing opinions, the proper court of last resort is the ballot box. Fortunately, the Oglala Sioux people are about to have the opportunity to express their views and to give their governing mandate to candidates of their choice shortly in an election at the Pine Ridge Reservation. The United States Government is totally neutral with respect to the outcome of that election, and we look forward to working closely with whatever Tribal Council and Officers receive the mandate of the Oglala Sioux electorate.

Meanwhile, I believe that the enclosed answers are as specific, complete and detailed as possible. This is what you requested and this is what we have endeavored to do. What these answers say, in sum, is that the 1868 Treaty is still a valid legal document, with its obligations still in force except insofar as any of them have been changed by the Congress, by the parties, satisfied by litigation or expired - and that has happened in several specified instances. I note that you plan to study our response and reply to us once more. If your understandings on any of these questions are different from ours, we will welcome that further word from you.

I think these exchanges are more useful than further large meetings at this time, since they may help to define with greater precision what it is about the 1868 Treaty and its implementation that is troubling you and your colleagues.

In closing, I express the hope that both you as Indian people as well as those of us working in the area of Indian affairs in the Federal Government, will look ahead and not just backwards. I have no desire or inclination to

defend the past two centuries of treatment of Indian peoples. In many instances, they were centuries marked by shameful conduct toward Indians by the Federal Government. The President has broken with that past and in his Message of July 8, 1970 set an agenda for the future which is in a fundamentally new direction. I hope you and your associates will join with us and with the principal nationwide Indian organization in working for the achievement of that agenda.

It is not enough to curse history to undo or repair historic wrongs. What is essential is realistic and sustained action using the intelligence and energy of all those persons and groups in and out of government who understand the legitimacy of Indian grievances and the compelling need to act on them.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Leonard Garment". The signature is written in dark ink and is positioned above the typed name.

Leonard Garment
Assistant to the President

Chief Frank Fools Crow
Mr. Matthew King, Chairman
Oglala Sioux Treaty Council
Oglala, South Dakota

attachment .

Question No. 1

Does the United States of America regard the Treaty of April 29, 1868, 15 Stat. 635, ratified February 16, 1869, and proclaimed by the President of said nation on February 24, 1869, as a valid legal document binding the Lakota Nation and the United States in a legal relationship?

Answer No. 1

Insofar as the 1868 Treaty has not been changed by the parties, changed by legislation, satisfied by litigation, or expired it is binding on the parties to the same extent that other treaties are binding and is a valid legal document. The extent of its modifications and of its binding effect on the parties is developed more fully below.

Question No. 1(a)

If the United States does not regard this treaty as a valid and legally binding document at what point did the United States disclaim or declare invalid such treaty?

Answer No. 1(a)

To our knowledge, the United States has never disclaimed or declared invalid the 1868 Treaty as a whole. As noted, portions have been modified, revoked, superceded, or satisfied.

Question No. 1(b)

If the United States does not regard this treaty as a valid and legally binding document, what document does the United States regard as legally binding upon either party or both parties?

Answer No. 1(b)

The extent to which provisions of the 1868 Treaty have since been modified and the extent to which they have not been modified, and thereby remain as active treaty commitments, are shown below.

Question No. 1(c)

If the United States does not regard this treaty as valid and legally binding upon it, what is the basis for the claim by the United States that it has any jurisdiction over the people of the Lakota Nation, at all?

Answer No. 1(c)

As noted in Answer No. 1, above, the United States does regard the 1868 Treaty as valid and as binding as other treaties to the extent its provisions have not been changed or satisfied.

Even in the absence of jurisdictions conferred by treaty, it is well established that the United States has general jurisdiction over Indian tribes. See Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-566 (1903); Choate v. Trapp, 224 U.S. 665 (1912); Shoshone Tribe v. United States, 299 U.S. 476 (1937); Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942). In Federal Indian Law, G.P.O. 1958, page 21 (and the cases cited



in support thereof), it is said:

At the outset we wish to emphasize the fact that the exercise of these plenary constitutional powers, which emanate from the people, cannot be limited by treaties so as to prevent later repeal, modification, or adjustment of the treaty provisions by Congress in the exercise of its constitutional powers, insofar as they are operative as law within the United States and its possessions. The plenary power of Congress over the Indian tribes, as long as they continue to exist as such, and their tribal property, cannot have been rendered ineffectual by any Indian treaty.

Plainly the law gives Congress jurisdiction over the Sioux tribes, the same as is provided over all other Indian tribes in the United States.

Question No. 2

What is the current status of the 1868 Treaty?

Answer No. 2

The obligations assumed under the 1868 Treaty remain obligatory upon the parties to the same extent that other treaty obligations are obligatory insofar as they have not been satisfied or changed.

Question No. 2(a)

What articles of this treaty does the United States regard as binding upon it?

Question No. 2(b)

What articles of this treaty does the United States believe that it has fulfilled?

Answer Nos. 2(a), 2(b)

Standing alone the questions are rather broad. Many of them, however, are answered below as part of the specific answers to later questions. Additional answers can be made if additional specific questions are posed.

Question No. 2(c)

What articles of this treaty does the United States admit having not yet fulfilled?

Answer No. 2(c)

None, in the sense that the United States has failed either to perform or satisfy the obligations assumed. See generally Sioux Tribe v. United States, 95 Ct. Cl. 72, 81 (1941):

Plaintiffs' suit therefore is based primarily on the alleged violations of the treaty of 1868, or failure to fulfill its obligations. * * *

The Court concluded:

We hold that the obligations of the treaty of 1868 have been complied with both in fact and in effect.

Also see with respect to general annuities, Sioux Tribe v. United States, 85 Ct. Cl. 181, 195 (1937), cert. den. 302 U.S. 717:

* * * This amended petition presents the claim of the Sioux Tribe of Indians for damages sustained by the alleged failure

of the United States to fulfill its obligations with reference to annuities promised to be paid to the Sioux Indians in the form of property or money by the treaty of April 29, 1868.

The Court concluded:

* * * Under our construction of the language used in the treaty, it is clear that plaintiff cannot recover.

For additional details of the United States' performance of its 1868 Treaty obligations, see answers below.

Question No. 3

With respect to Article I of said treaty, we regard the dispatch of federal marshals to the Pine Ridge Indian Reservation last winter as a violation of said article in that such behavior violates the provision and promise of Article I that the United States "desires peace, and they now pledge their honor to maintain it." How does the United States justify its invasion of the lands of the Oglala Band of the Lakota Nation by federal marshals last winter?

Answer No. 3

We are unable to see how dispatching the Federal marshals to the Pine Ridge Indian Reservation violates the United States 1868 pledge to try to maintain peace. This would appear to us to be a performance of the pledge rather than a violation thereof. One of the purposes of sending United States marshals to the reservation was to preserve the peace as promised in Article I of the treaty.

With respect to the conduct of those marshals and the other Federal law enforcement officers last year, a distinguished Indian author and critic has written:

The federal government proved to be incredibly patient with the AIM militants. It was apparent that several federal laws had been broken, and the conservative Indians demanded that the government use force to remove the armed occupants of Wounded Knee. The administration felt, however, that the saving of lives was more important than enforcing the law in a rigid manner. To prevent bloodshed, it conducted prolonged negotiations with the embattled Indian protesters, thereby winning the gratitude and confidence of the great majority of Indians whose strongest concern was to prevent any loss of life. * * *

It is clear, however, that a new stage in Indian affairs has arrived which can only be solved by fundamental changes in the status and policies of tribal governments. Such basic changes cannot be settled either by the Indians or the federal administration. Under the U.S. Constitution, only the Congress can legislate new policy in the field of Indian affairs; so future solutions will have to wait on the cumbersome process of legislation, preceded by the hard work of intelligent and informed persuasion of a majority of the Congress. [Footnote: From "The New Activism" in DIALOGUE, 1973, Vol. 6, # 2, edited by USIA, pages 11-12.]

Question No. 4

With respect to Article II of said treaty, we regard the building of dams on the Missouri River as a violation of the treaty which continues until the present in that the United States has unilaterally and unconstitutionally deprived the Lakota people of their rights to use all of said Missouri River, the totality of said river laying within the boundaries of the Lakota Nation. What position does the United States take with respect to this violation?

Answer No. 4

The descendant tribes of the ancestral Sioux groups who entered into the 1868 Treaty are presently suing the United States under the provisions of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70. Their case alleging claims based on the 1858 Treaty is docketed as No. 74, before the Indian Claims Commission. Docket No. 74-1 embraces their claims based on the Act of February 28, 1877, and Docket Nos. 115-119 request accountings by the United States for failing to perform treaty obligations. These suits may embrace, at least in part, the complaint set forth in Question No. 4, above. However, to make sure that the complaints contemplated under Question No. 4 are intended to be included in the Indian Claims Commission litigation, we recommend that Messrs. Foolscrow and King contact the Sioux attorneys handling the litigation. They are:

Marvin J. Sonosky, Esquire
2030 M Street, N. W.
Washington, D. C. 20036

Arthur Lazarus, Jr., Esquire
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

William Howard Payne, Esquire
1086 National Press Building
Washington, D. C. 20004

These Sioux attorneys should also be contacted for confirmation of, or exceptions to, the other answers set forth in this memorandum which relate to the claims, or possible claims, presented under the Indian Claims Commission Act.

Question No. 5

With respect to Article III of said treaty, we regard the acts of the United States consequent to the Treaty of 1868 as violations of this article in that we are unaware of any effort by the United States to determine the amount of arable land suitable for the people of the Lakota Nation. Does the United States maintain that it has fulfilled this article of the treaty? If so, when? And how?

Answer No. 5

Article 3 of the 1868 Treaty provided:

If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as farmers, the United States agrees to set apart, for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

It appears that not "a very considerable number" of Sioux were "disposed to commence cultivating the soil as farmers" in the years following the 1868 Treaty. In fact, very few were. See Sioux Tribe v. United States, 86 Ct. Cl. 299 (1938) cert. den. 306 U.S. 642, and Sioux Tribe v. United States,

89 Ct. Cl. 31 (1939), discussed below. Accordingly, in the absence of a specific showing to the contrary, the United States maintains that it has fulfilled Article 3 of the treaty.

Question No. 6

With respect to Article V of the treaty, we maintain that the United States has failed to enforce the provisions of this article to the benefit of the Lakota people and that far from keeping the agent's office open to investigate cases of depredation on person and property the agent and his successor the superintendent have aided and abetted such depredations and that their actions led directly to the confrontation at Wounded Knee. If the United States feels that it has performed its duties under this article in good faith, can it list its efforts to perform its duties and their results?

Answer No. 6

Article 5 of the 1868 treaty provides as follows:

The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

Since the signing of the treaty and the establishment of the original agency, the Sioux people have continuously had a resident agent. With the subsequent establishment of separate agencies for the Sioux groups, each has had its own agent (superintendent). Most recently, a separate agency has been established for each of the successor groups on the Lower Brule and Crow Creek nation reservations.

The Pine Ridge agency alone--for the Oglala Sioux--is staffed by some 400 employees, far more than anticipated by the treaty.

All these agencies are administering programs for the benefit of the Sioux people considerably in excess of what is called for under the treaty. The grand total made available through the BIA during 1973 to carry out programs for the benefit of those Sioux people whose ancestors signed the 1868 Treaty, and to maintain the agencies, was approximately \$23 million. This is an increase of some \$17 million over the amount expended during 1967, only five years earlier. Federal agencies other than the Indian Bureau are programming funds equal to, if not surpassing, those expended by the Bureau. We can contend, therefore, that the Government has complied with its responsibility that its agent faithfully discharged the duties enjoined on him by law.

The respective agencies are open to all Sioux people. Many complaints have been received and are acted upon daily. With respect to "depredation claims" either by or against Indians, our records do not disclose that any such claims have been filed under the Treaty of 1868. Should you be aware of any such cases and would advise us of specifics, we will review them and furnish you with a report.

If, by "depredations," Chief Foolscrow means the allegations which he and his associates have raised concerning recent civil rights violations, the actions of the United States have been diligent and full. Some fifty complaints were brought to the Government's attention. The Civil Rights Division of the Department of Justice and the Federal Bureau of Investigation investigated all of them. They interviewed over 170 witnesses



None of these investigations has yet turned up anything substantial enough to give the United States a prosecutable case. If by "depredations," Chief Foolscrow means allegations about funds being misused by the Oglala Tribal Council or by the Bureau of Indian Affairs at Pine Ridge, the United States again responded promptly last Spring, and contracted for an outside firm (Touche, Ross) to do a complete audit in both places. The results of the audit reveal that although there has been some sloppy bookkeeping for years by both government and Indian offices, there was no basis for criminal charges in either place.

Question No. 7

With respect to Article VI of the treaty, we maintain that the procedures described in this article were the ONLY means open to either the Lakota people or the United States to allot the lands of the Lakotas. We maintain that the United States, in fraudulently allotting the lands of the Lakotas has violated this article of the treaty. Does the United States claim that it has either fulfilled or followed the procedures described in this article in making allotments of the lands of the Lakotas? If so, how?

Answer No. 7

The first two paragraphs of Article 6 of the 1868 Treaty provided:

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the 'land book' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Since the record shows that but a relatively few Sioux were inclined to farm following the 1868 Treaty, it appears that the benefits of this sixth article were utilized by the Sioux only to a minor degree. In Sioux Tribe v. United States, 86 Ct. Cl. 299, 302-303 (1938), cert. den. 306 U.S. 642, this account of the post-1868 conditions is set forth:

In the years immediately following the treaty of 1868 there was little change in the mode of life of the Sioux Indians. Only a few of them complied with the provisions of the treaty and settled at the various agencies along the Missouri River. The great bulk continued to roam as before over their vast reservation.

The Court also noted in the same case that (p. 305):

The facts [as of 1886] do not show the nature or extent of farming operations by each of the families shown in the Commissioner's report as being engaged in agriculture, but a division of the total number of acres reported as being cultivated at the various agencies on the reservation by the number of families reported as 'engaged in agriculture' at such agencies, shows that the families at the Cheyenne River Agency cultivated 2.16 acres: at Crow Creek and Lower Brule, 4.71 acres: at Pine Ridge, 2.11 acres: at Rosebud, 3.74 acres; at Standing Rock, 2.95 acres; at Fort Peck, 1.39 acres; and at the Santee and Flandreau Agency, 20.30 acres, or an average at all the agencies of 3.58 acres. * * *

See, to the same effect, Sioux Tribe v. United States, 89 Ct. Cl. 31 (1939). From the above, it would appear that there was but a small demand for allotments under Article 6 and that a violation of the provision by the United States was improbable.

Moreover, with the enactment of the Act of February 28, 1877, 19 Stat. 254, and the Act of March 21, 1889, 25 Stat. 888, these allotment provisions no longer applied to the Black Hills tract and other substantial portions of the Great Sioux Reservation. With respect to these latter lands and any others that were subsequently excluded from the reservations, the United States was free to allot the same to non-Indians to the extent that the law provided.

On the above record, we submit that the United States fulfilled the obligations of Article 6. Moreover, since the obligations endured for no more than a reasonable time after the 1868 Treaty (Cf. Sioux Tribe v. United States, 86 Ct. Cl. 299, 306-307 (1938), cert. den. 306 U.S. 642), the obligations under the article expired many years ago.

Question No. 8

With respect to Article VII of the treaty, we maintain that this article provides for a special and ongoing educational program for the Lakota people. We maintain that the United States has not fulfilled the provisions of this article and remains liable to the Lakota people in the field of education. Does the United States maintain that it has fulfilled this article of the treaty? If so, how?

Answer No. 3

Article 7 of the 1868 Treaty provides as follows:

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

The Sioux have already sued the United States upon this article of the 1868 Treaty. The decision is reported, Sioux Tribe v. United States, 84 Ct. Cl. 16 (1936), with the Supreme Court denying certiorari at 302 U.S. 740 (1937). The Sioux claim was described by the Court of Claims as follows (p. 25):

This Indian case now before the court * * * is predicated upon an alleged failure of the Government to comply with a treaty obligation and an act of Congress respecting the education of the children of the Sioux Tribe of Indians between the ages of six and sixteen years.

The Court went on to explain that the obligation involved was Article 7 of the 1868 Treaty, as quoted above, and that the act involved was that of March 2, 1889, 25 Stat. 888, with section 17 reading as follows:

That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect; * * *

The Court pointed out (84 Ct. Cl. at 26):

* * * The record establishes that for a long period of time the Government did not strictly observe the provisions of the seventh article of the treaty of 1868 or Section 16 [should be 17] of the act of 1889 with respect to furnishing the educational facilities provided therein. * * *

The Court, however, thereafter explained that there were good reasons why the United States did not strictly observe the provisions as written. On pages 27-28 it noted:

The plaintiffs say that the Government is at fault if a sufficient number of Indian children could not be compelled or induced to attend available Indian schools, because the seventh article of the treaty of 1868 made it the duty

of the agent for said Indians to see that this stipulation is strictly complied with.' Again it is contended that the Government's failure to adopt the mandatory principles of compulsory education places it in a position where no benefit may accrue to a wrongdoer.

The Court then held (p. 28):

The contention is, we think, without merit. The Indian parents pledged themselves to compel attendance. The parents, not an Indian agent, possessed the authority to enforce obedience. True, the agent could induce attendance, but for him to seek to compel, as some of them did, was but to invite the demonstration of serious hostility, which actually occurred. Aside from this, however, the duty mentioned was to see to it that, when the status quo mentioned in the treaty obtained, the treaty provisions with respect to schoolhouses and teachers would be strictly adhered to. The burden of proof rests upon the plaintiffs to sustain their case.

The Court went on to state that (p. 35):

The Government was under no treaty obligations to furnish schoolhouses and teachers if pupils could not be compelled or induced to attend school. Assuredly the treaty provisions were not intended to obligate the Government to do a useless thing, and from this record it is impossible to find that, in the early history of the treaty relationships obtaining, anything like 5,785 Indian children of the designated ages were annually available for schooling.

On page 36 it had this to say:

What the record does establish is the fact that in 1868 and for many years thereafter the unsettled and chaotic condition of the Sioux Tribe of Indians was such that strict compliance with the treaty of 1868 was an impossibility.

* * *

And the Court denied liability concluding that (p. 41):

* * * we believe the Government furnished in the early history of the treaty school facilities in excess of the demand for them from the Indians themselves.

In view of the above holding, we answer Question No. 8 in the affirmative: Yes, the United States has fulfilled its obligation under Article 7 of the 1868 Treaty. Moreover, since the Article 7 provision (as extended by the 1889 Act) expired at the end of 40 years, it is no longer an active provision of the 1868 Treaty having expired over 60 years ago.

Nonetheless, the Bureau of Indian Affairs of course continues to provide educational services to the Sioux people. On the Oglala Reservation, for instance, the Fiscal Year 1974 educational services budget totals \$4,878,000 and involves educational services to 2,907 Oglala children and 155 adults, from pre-school to college scholarships, and adult training. As far as we know no Oglala child is today denied schooling because of any lack of schoolhouses or teachers, and 200 young Oglala men and women are receiving post-secondary scholarship assistance.

Question No. 9

With respect to Article VIII of this treaty, we demand an accounting of the fulfillment by the United States of the provisions of this treaty.

Answer No. 9

Article 8 of the 1868 Treaty provided:

When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

The Sioux have heretofore sued the United States on its failure to perform these Article 8 provisions. Sioux Tribe v.

United States, 89 Ct. Cl. 31 (1939). The Court there described the claim as follows (p. 31):

Plaintiff tribe seeks to recover \$782,545.54 for the alleged failure of the United States to fulfill its alleged obligation under Art. 8 of a treaty entered into in 1868 to furnish seeds and agricultural implements to 4,549 heads of families alleged to have been rightfully entitled to such articles of the value of \$175 each. From the amount of \$796,075 thus obtained plaintiff deducts \$13,529.46 actually expended by the defendant for seeds and agricultural implements, and the balance of \$782,545.54 is sought to be recovered in this suit.

The Court went on to show that there was very little demand by the Sioux for seeds and agricultural implements at that time (pp. 33-37) and concluded (p. 38):

Art. 3 of the treaty was not a continuing obligation of the Government, and we think a period of ten years over which the Secretary of the Interior held the appropriation, totaling \$94,000 made by Congress, for the purpose of purchasing selected lands and in good faith commenced farming for a living was a reasonable period of time.

In view of the above, our answer to Question No. 9 is that the United States has already accounted to the Sioux for Article 8 obligations.

Question No. 10

With respect to Article X of this treaty, we demand an accounting of the fulfillment by the United States of the provisions of this treaty.

Answer No. 11

Article 10 of the 1868 Treaty provided:

* * * And it is hereby expressly stipulated, that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

In the case of Sioux Tribe v. United States, 86 Ct. Cl. 299 (1938), cert. den. 306 U.S. 642, the Sioux Tribe sued on this provision of the treaty with the Court of Claims describing their claims in these words (p. 306):

It is the position of the plaintiff that under the stipulation of Art. 10 of the 1868 Treaty with the Sioux Tribe of Indians the United States was obligated to furnish one cow and a pair of oxen to each and every family in the Sioux Tribe which removed to the reservation at any time and which, at any time, thereafter, commenced to farm. On this basis it is contended that the Government incurred an obligation under Art. 10 of the treaty of \$210 a family, or \$955,290. After deducting the amount of \$126,000 expended by the Government for the purposes mentioned under Art. 10, plaintiff seeks judgment for \$829,290.

The Court then noted the United States' contentions in this fashion (pp. 306-307):

Defendant contends that the primary purpose of the Treaty of 1868, and particularly the stipulation of Art. 10, with reference to furnishing each family who commenced farming with one cow and two oxen was an added inducement to the tribe to abandon its nomadic life, settle upon the reservation, and at least make a start toward becoming self-sustaining; that the offer was open for acceptance by such families of the tribe as were already on the reservation or those who removed thereto, within a reasonable time and who commenced to farm within a reasonable time. It is further contended that it was obviously not the intention of the treaty makers that this offer under Art. 10 was to remain open for acceptance at the whim of the Indians at any time in the future, but only within a reasonable time after ratification of the treaty; that the plain intention of the treaty was that removal to the reservation and commencement of farming should be practically coincident; that the stipulation was so understood and interpreted by the Government, and that this interpretation is justified and sustained when other provisions of the treaty relating to the same subject matter are considered. Finally it is contended by defendant that the record fails to show that the amount of \$126,000 appropriated in July 1870 and expended by the Secretary of the Interior between that date and 1880 was not sufficient to supply such families with the animals agreed to be furnished as had, in good faith, accepted the offer contained in Art. 10 and had commenced farming within the meaning of the treaty.

The Court thereafter agreed with the contentions made by the United States (pp. 307-311) and dismissed the petition (p. 311).

Here again, we believe it clear that the United States has already accounted to the Sioux under Article 10 and that no further accounting should be necessary.

Question No. 11

With respect to Article XI of this treaty, we declare that we, the Lakota Nation, have fulfilled this provision. Does the United States maintain that it has fulfilled the provisions of this article of the treaty? If so, when? and How?

Answer No. 11

Other than the road and construction provisions of the sixth clause, the United States did not assume any obligations in Article 11. The sixth clause reads as follows:

They [the Sioux] withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

Insofar as we know, the substance of this provision (i.e., to fairly pay for any reservation lands taken for public purposes) has been obligatory on the United States, either under the treaty or under the provisions of general law, from 1868 to the present time, and no doubt many works have been constructed on the Sioux reservations during this

period. We assume any lands taken in connection therewith have been in accord with the legal and equitable requirements obtaining. If Messrs. Foolserow and King feel any such takings are questionable, they should identify same and set forth their reasons. A further answer could be made at that time.

Question No. 12

With respect to Article XII of this treaty, we maintain that the ratification by Congress of this treaty foreclosed the use by the United States of America ANY OTHER POSSIBLE MEANS of gaining additional land cessions from the Lakota Nation. Does the United States feel that it has fulfilled the provisions of this article of the treaty? If so, when? and How?

Answer No. 12

Article 12 of the 1868 Treaty provides:

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article VI of this treaty.

Insofar as we can presently ascertain, this provision has not been repealed and accordingly is applicable to transfers made of the Sioux reservation lands. However, the treaty provision does not bar the United States from taking such lands without consent, the same as it takes lands from non-Indian owners without their consent, i.e., under its powers of eminent domain.



The treaty also does not bar Congress from taking Indian lands under its plenary powers to manage Indian affairs. The opinion in Sicax Tribe v. United States, 97 Ct. Cl. 613 (1942), goes to great length in explaining the distinction between these two exceptions to consensual land transfers. Note particularly these words from pages 668-669:

There was inherent in the treaty of 1868, as one of the necessarily implied conditions thereof, the undeniable right of Congress, if it deemed the interests of the Indians as well as those of the Government and the existing circumstances dictated or required, to legislate under the act of 1871 in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians.

The Court went on to show the reason for the rule as also its limitations (pp. 669-689) and concluded that, under the facts and laws pertaining thereto, the Sioux were not entitled to further recovery for the 1877 transfers of the Black Hills and the Sioux hunting rights. See also the cases cited in Answer No. 1(c), above.

This claim, of course, is one of those which the Sioux have brought to the Indian Claims Commission, and is one of the pending dockets before that Commission.

We conclude that the provisions of Article 12 of the 1868 Treaty are still applicable and that except for eminent domain takings or transfers made under the plenary powers of Congress, Sioux reservation lands cannot be transferred without the consent of three-fourths of the adult male Indians.

Question No. 13

With respect to Article XV of this treaty, we maintain that when the Lakota people accepted the reservation outlined in this treaty as a permanent home such acceptance thereby foreclosed any cession of jurisdiction by the United States over the Lakota Nation. How does the United States interpret the phraseology "permanent home"?

Answer No. 13

Article 15 of the 1868 Treaty provides as follows:

The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article 11 hereof.

With respect to the "permanent home" concept, Article 2 should also be considered:

The United States agrees that the following district * * * shall be, and the same is, set apart for the absolute and undisturbed use of the Indians herein named * * * and the United States now solemnly agrees that no persons except those herein designated and authorized so to do * * * shall ever be permitted to pass over, settle upon, or reside in the territory described * * *.

Conveyances of land in the United States may be made for a period of time or may be permanent transfers of the land. Parties to a permanent transfer may select such words as they choose to show the permanency. Other choices, besides those used in Article 2 and 15 above, would include the term "fee simple," "heirs and assignees forever," etc. Regardless, however, of the words used to designate the permanency of the transfer, one should keep in mind that the permanency as therein stated is always subject to the United States' right to take such lands under its power of eminent domain or under the plenary powers of Congress (see Answer No. 12, above), as well as subject to subsequent voluntary transfers made by the owners thereof.

Question No. 14

With respect to Article XVI, how does the United States interpret the phrase "unceded Indian territory"?

Answer No. 14

The meaning of this phrase and the rights of the tribe under it are in litigation in Docket No. 74-B before the Indian Claims Commission. The matter is complicated and we do not feel that it would be proper for us to express an opinion on the meaning of this provision at this time. The tribe is represented by competent attorneys, and we feel that under the circumstances we should await the decision of the Commission before expressing any opinion.

Question No. 15

With respect to Article XVII of this treaty, how does the United States interpret this article insofar as it only abrogates those portions of previous treaties and agreements that obligate the United States to provide money, clothing, or other articles of property?

Answer No. 15

Article XVII reads as follows:

It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians who are parties to this treaty, but no further.

As we read the provision it abrogates United States' obligations of prior treaties and agreements only insofar as obligations of money, clothing, and other property are concerned. Other provisions, to the extent they were not otherwise changed or satisfied, would continue past the 1868 Treaty.