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October 20, 2014

By E-mail to: [pubaffairs@ussc.gov](mailto:pubaffairs@ussc.gov)

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Attention: Public Affairs – Tribal Issues Comment

**Re: Formation of a Tribal Issues Advisory Group to the U.S. Sentencing Commission**

Dear Chief Judge Saris:

I serve as Chairman of the Standing Rock Sioux Tribe and submit these comments on behalf of the Tribe in response to the Sentencing Commission's request for comments on a proposal to form a Tribal Issues Advisory Group. We very much appreciate the Commission's attention to sentencing issues in Indian country and its willingness to consider establishing such an Advisory Group. We believe that a Tribal Issues Advisory Group is urgently needed and strongly recommend that such an Advisory Group be established.

In our view, the Commission should form a Tribal Issues Advisory Group as a standing advisory group that will have an ongoing role in advising the Commission on sentencing issues affecting Tribes and Indians. As to the scope of the Advisory Group's work, we urge that it study sentencing disparities as well as related issues, including the history of harsh federal sentencing in Indian country and its ongoing effects, the potential impact of a lack of effective law enforcement in Indian country on sentencing, the possible role of bias and discrimination in sentencing, and the relationship between tribal and federal courts on criminal jurisdiction and sentencing matters. We also recommend that any Advisory Group include Tribal leaders and provide a continuing means for input from Indian country on these very important issues.

## **I. The Standing Rock Sioux Tribe**

The Standing Rock Sioux Tribe is a federally-recognized Indian tribe, with a rural 2.3 million acre reservation that was a part of the extensive territory originally held by the Great Sioux Nation. The Standing Rock Sioux Reservation straddles the North Dakota and South Dakota border, along the Missouri River. We have eight communities within the Reservation, the largest of which is located at Fort Yates.

Most of our best reservation land was permanently flooded by the United States in the 1950s for the Oahe Dam Project. This was a devastating event for the Tribe and one that destroyed our homes and much of our way of life. The lands flooded for that project were the heart of the Reservation. They were the lands on which most of our people lived and they provided critical resources on which our members depended – timber, wildlife habitat, and grazing lands. The taking of these lands forced tribal members to move from the rich, protected bottomlands, to the harsh, windswept uplands. The effects of this flooding are still felt today, as we still have massive unemployment, poverty, and related problems stemming from that event. The Tribe has worked hard to address these problems by providing essential governmental services and programs (schools, housing, health care, social services, and courts) to the Tribe’s approximately 8,500 Tribal members, as well as an additional 1,500 non-members who reside on the Reservation. But many challenges remain.

## **II. Comments**

The Tribe is very concerned about sentencing disparities between Indians and non-Indians. We believe that these disparities have deep roots and result from a complex set of factors that relate to the history and administration of criminal justice in Indian country.

In our view, the federal sentencing of Indians has a significant historical component. The 1868 Treaty between the Sioux Nation and the United States included a “bad men” clause – under which both sides agreed to deliver up “bad men” who committed wrongs in Indian country to the federal government for punishment. Treaty of April 29, 1868, 15 Stat. 635. While this was supposed to promote peace, the reality was that it led to harsh federal administration of justice for Indian people. During this period, Indian affairs was handled by the War Department. The Standing Rock Reservation was the site of a military base – in Fort Yates – and it was the military that controlled federal relations with our people. Built in 1871, Fort Yates was one of the largest military forts on the Missouri River and also served as Indian agency headquarters. The Fort included a stockade that was used to imprison Indians. Our forefathers found that crimes (or even other actions viewed by military personnel as misdeeds) were met with arbitrary and excessive responses by the military. Beatings, and even executions, without trials were not uncommon for Indians who committed (or were thought to have committed) wrongs. As a result, our people became reluctant to participate in the system: even if an Indian did something very wrong, his Indian neighbors were often unwilling to say anything, because they knew that any wrong would be punished excessively. This history of arbitrary and harsh “justice” from

federal officials on our Reservation provides an important backdrop in understanding our relationship with the federal criminal justice system today.

These historical concerns about the severity of punishment for criminal offenses are reinforced by the modern-day experience of our Tribal members who have seen many cases in which an Indian prosecuted in the federal courts is then subject to a very severe sentence – a sentence that often seems considerably more harsh than those imposed against non-Indians committing similar offenses. The scope of this problem has been the subject of considerable academic examination, including a recent study focusing on sentencing disparities facing tribal members in North and South Dakota. Jones and Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.Dak.L.Rev.53 (2013).

The severity of federal sentencing of Indian offenders raises other questions. One of these is whether the severity of federal sentencing of Indian defendants is related to a more pervasive problem of a lack of effective law enforcement in Indian country. Indian communities often lack the resources needed for basic law enforcement. This problem is extensive and well-documented. For example, before 2008, Standing Rock had only 7 law enforcement officers to cover the entire Reservation, an area approximately the size of Connecticut, and crime was rampant. We saw some decreases in crime with the BIA's Operation Dakota Peacekeeper in 2008 and the Department of Justice's High Priority Performance Goals initiative in 2009. Both efforts, which focused on infusing a surge of additional police officers to patrol the Reservation, were very successful in helping our people feel safe and deterring crime. But limited federal funds prevent us from maintaining this level of law enforcement.

Compounding the problem is that federal law enforcement, investigators, and Assistant U.S. Attorneys also face limited resources and competing demands on their time. As a result, our experience has been that significant crimes have often gone unprosecuted – and the communities have become frustrated. While we appreciate the positive impacts of recent efforts by the Department of Justice and others to respond to the continued high rate of violent reservation crime in the face of limited resources, it remains the case that federal investigations and prosecutions are often delayed or do not occur at all.

Our experience suggests that the Advisory Group should also consider whether these two issues – lack of law enforcement and harsh sentencing – might somehow be related. For example, is harsh federal sentencing in part a reaction to the lack of generally effective law enforcement? Is it possible that because many crimes go unprosecuted in Indian country, when the federal government does prosecute, there is a tendency to show that they are tough on crime? In other words, is harsh sentencing in specific cases an overreaction to lax prosecution in general? And if so, what steps can be taken in the context of the federal sentencing guidelines to address this problem?

Another issue that should be examined is the relationship between tribal and federal courts. We believe that tribal courts are in many respects better able to determine appropriate sentencing, including alternative sentencing. Tribal courts know the community and are in the

best position to evaluate an offense in light of the circumstances surrounding its occurrence as those bear on an appropriate sentence. The federal courts, in contrast, may seem distant and remote from our Reservation, and may be less aware or sensitive to particular concerns that may be appropriately considered in sentencing. Here too, a Tribal Issues Advisory Group could aid the Sentencing Commission in looking for ways in which the tools and resources available to tribal courts can be brought to bear on Indian country sentencing decisions by federal courts.

In addition, while the issue of sentencing disparities concerning Indian country is usually framed in terms of whether Indians in federal court are receiving harsher sentences than non-Indians in state court, we are concerned that there may be additional dimensions to the problem. For example, it is important that the scope of the work to be done by a Tribal Issues Advisory Group include a consideration of whether harsh sentencing of Indians may also result – whether intentionally or not -- from bias or discrimination against Indians. One measure of this may be to examine whether Indians in federal court are receiving harsher sentences than non-Indians in federal court for similar crimes. Since discrimination unfortunately remains a significant problem in our society at large, we believe it is important to determine the extent to which it may play a role in sentencing disparities.

Finally, we recommend both that 1) the Advisory Group include some Tribal leaders because that will provide an important perspective, and 2) the Advisory Group be a standing group (rather than an ad hoc group) so that there is an ongoing mechanism for input on sentencing and related issues as they affect Indian country.

### **III. Conclusion**

We strongly support the formation of a standing Tribal Issues Advisory Group to the U.S. Sentencing Commission. We recommend that the proposed Advisory Group have a broad scope that would include an examination of sentencing disparities as well as factors related to the causes of and possible solutions for such sentencing disparities, including history, a lack of resources for basic law enforcement, discrimination, and the relationship between tribal and federal courts. In addition, we recommend that membership in the Advisory Group include Tribal leaders and have a continuing mechanism for receiving and acting on input regarding sentencing and related issues affecting Indian country.

Respectfully submitted,



Dave Archambault, II