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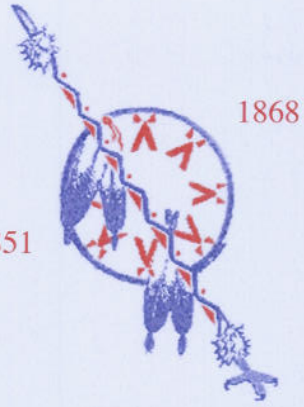

John Yellow Bird Steele

United States Senate Committee on Indian Affairs

Oversight Hearing on New Tax Burdens on Tribal Self-Determination
June 14, 2012

Testimony of John Yellow Bird Steele, President
Oglala Sioux Tribe

Good Morning, Mr. Chairman and Members of the Committee. Thank you for holding this hearing. The question of IRS activities in Indian Country is important because the IRS has been burdening Indian tribes and tribal government efforts to foster a healthy community and a livable homeland on our reservations.

My name is John Yellowbird Steele. I am the President of the Oglala Sioux Tribe, and I submit this testimony on behalf of my people. In our history, our people were a free and prosperous indigenous nation. We were self-governing, with a very democratic system of villages or tiyospayes, who chose our chiefs based upon merit and achievement. Our people are one of the Seven Council Fires, *Oceti Sakowin*. We held a vast territory from southeast Minnesota and Iowa through North and South Dakota, and Nebraska to Wyoming and Montana.

Through our treaties with the United States, we preserved our right to self-government and Federal law protects our original rights to self-government. In the 1815 Treaty with the Teton, for example, the United States pledged "peace and friendship" and its "protection" to our people. In the 1825 Treaty with the Oglala, the United States sought to reaffirm our friendship and establish trade regulations.

Oglala Lakota History and Traditions

Our Nation or *Oyate* always provided for all of our people through sharing and generosity. For example, if a man died and left his wife a widow with orphan children, his brother would take in the family and care for them. If he needed help, the whole community would help them. If tribal elders needed food or aid, the young people would help them. That is our tradition—we care for all of our people. As our great leader Crazy Horse said, "We preferred our own way of living, and we were no expense to the government."

Our outlook is not so different from the rest of America. When President Bush and Senator Kennedy reached an agreement on Education, Congress enacted a law that says, "No

child left behind." Among our Lakota people, when we pass laws to better our community, we say, "No one left behind."

Historically, the United States visited many injustices upon our people. In 1854, when a stray cow left behind by Mormon settlers on the road to Utah was found by a Mnicoujou Lakota man, named High Forehead, travelling from the North, he brought it to his relatives among the Sicangu Lakota. They ate it for dinner. The next day, a U.S. Army platoon led by Lieutenant Grattan came to the Lakota camp and confronted Chief Conquering Bear, demanding surrender of the man. The Chief explained that High Forehead had travelled on, but Chief Conquering Bear then offered three horses to replace the cow. Lt. Grattan and his men opened fire, killing the Chief Conquering Bear's people defended themselves and killed Grattan and his 16 men. The next year, President Pierce sent General Harney and 600 men on a punitive expedition to punish our people for defending ourselves. At the Battle of Ash Hollow, Harney and his men surrounded a sleeping village with cavalry and cannons and killed 86 of our men, women and children, who had nothing to do with the Grattan Affair.

In 1866, the United States sent out a treaty delegation to Fort Laramie to negotiate a peace treaty, but while the treaty delegation was meeting with the chiefs, the Army came with a column of men, horses and cannons to build forts in our Powder River Country. Chief Red Cloud said, "The Great Father sends us presents and wants us to sell him the road." Red Cloud said, "But the White Chief goes with soldiers to steal the road before the Indians say yes or no." That began Red Cloud's War to save the Powder River Country, and in the end, the United States abandoned its forts and sent out a treaty delegation.

In our Sioux Nation Treaty of 1868, western South Dakota including the Black Hills was recognized as our permanent homeland, we reserved 44 million acres in Nebraska, Wyoming and Montana as "unceded Indian territory," and we also reserved our hunting grounds in Nebraska and Kansas. Under the 1868 Treaty, the United States recognized our original rights to self-government.

In Ex *Parte Crow Dog,* 109 U.S. 556 (1883), the Supreme Court held that the United States did not have authority to try Crow Dog for the murder of Spotted Tail, a well recognized Sicangu Lakota Chief, because the treaty reserved crimes by one Indian against another to the tribal justice system. The Supreme Court explained:

> 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 selfgovernment, 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.

The Court held that the general Federal statutes against murder did not apply in the killing of one Lakota Indian by another, since the 1868 Treaty with the Sioux Nation reserved such crimes to tribal law.

Yet, the United States violated the treaty. Just a few years after the treaty was signed, General Sherman sent out the Custer expedition to search for gold in the Black Hills. Later, he ordered us to leave our lands, which were protected under the 1868 Treaty. When our people stood by our rights, President Grant sent out Custer, Crook and Terry with separate armed columns, leading to the Battle of the Rosebud and the Battle of the Little Big Horn. After we won the battles, the United States sent out more armies and our people were hunted in our own lands. We still have relatives who are war refugees in Canada.

We knew the value of the Black Hills, our sacred place and the Center of the Lakota Universe. The gold mine turned out to be the largest and most productive in the Western Hemisphere, with billions of dollars in gold mined. The theft of the gold mine and millions of acres of land left our people in poverty. As an elder, Chief Red Cloud reflected that the U.S. Government "made us many promises, but they only kept one. They promised to take our land and they took it."

We suffer many hardships to remain together as our Oglala Lakota Nation. Shannon County on our Pine Ridge Reservation is the 3rd poorest county in America, measured by per capita income. Over 47% of our people live below the poverty line. Our Lakota relatives on the Cheyenne River Sioux Reservation in Ziebach County, South Dakota live in the poorest county in America. Our Lakota relatives on the Rosebud Sioux Reservation in Todd County, South Dakota live in the 2nd poorest county in America. When our Lakota and Dakota relatives on the Standing Rock Sioux Reservation counties are counted, 5 of the 10 poorest counties in America are located on our Sioux Reservations that were originally part of the Great Sioux Nation under the 1868 Treaty.

In our treaties, we ceded millions of acres of land to the United States in exchange for treaty promises, education, health care, housing, and economic development. The basic pledge is that the United States would help us make our permanent homes on the reservations to be livable homes. Yet, those treaty promises have not been fulfilled.

Chief Red Cloud said, "I am poor … but I am the Chief of a Nation. We do not want riches but we do want to train our children right. Riches would do us no good. We could not take them with us to the other world." Today, although our people are poor, we are proud and we stand on our Treaties. We call upon the United States to respect our Treaties, as part of the Supreme Law of the Land.

In short, the 1868 Treaty sets apart our land for our "absolute and undisturbed use" as a permanent home and recognizes our right to self-government. Under *Ex Parte Crow Dog* (1883), our treaties reserve "the highest and best form of government" to our people, *self-government*. Today, we rely on our original sovereign authority to provide for our people as a Native Nation.

Under Federal law, there is no repeal of a prior law by implication. Our treaties are the Federal laws that deal most specifically with our people. When the United States Congress passes a general law that would interfere with our treaties if the laws were not harmonized, those laws must be read together with our treaties to preserve our rights to self-government.

Since the United States has not fully upheld its treaty obligations to assist our people with education, health care and other government services, we, as a tribal government, must do everything we can to provide to better our tribal community. The IRS violates our treaties when it seeks to tax the basic government services that our tribal government provides to our citizens.

IRS Interference with Tribal Self-Government

Indian tribes are sovereign governments that pre-date the formation of the United States. Indian tribes are the original American democracies. Our right to self-determination as indigenous peoples must be protected under international human rights laws, and indeed, the Constitution of the United States recognizes the original and continuing status of Indian tribes as indigenous sovereigns, implicitly and explicitly, in the Constitution.[1]

The Apportionment Clause excludes "Indians not taxed" from Apportionment of Congress and from the per capita taxation originally levied by the states to fund the United States government in its formative period. Our people were originally not taxed by the states or the United States because they were citizens of our own tribal nations. After almost a century of treaty-making and more than 370 treaties, the 14th Amendment affirmed the original provisions: first, by treating tribal members as citizens of Indian nations, not the United States, in the Citizenship Clause and second, by reaffirming the status of "Indians not taxed" in the Apportionment Clause as amended to do away with the original references to slavery.

The 14th Amendment's Citizenship Clause provides: *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."* In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Supreme Court held that the Citizenship Clause did not automatically make tribal citizens become U.S. citizens.[2] The Court explained:

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[1] The Constitution of the United States recognizes Indian tribes as sovereigns, with authority to enter into Treaties and conduct international relations in the Treaty Clause. By the authority of the Supremacy Clause, our Sioux Nation Treaties are part of "the Supreme Law of the Land." The Apportionment Clause excludes "Indians not taxed," from taxation and apportionment of Congress.

[2] "Senator Jacob Howard of Ohio, the author of the Citizenship Clause, defended the new language against the charge that it would make Indians citizens of the United States. Howard assured skeptics that 'Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States.' Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, supported Howard, contending that 'subject to the jurisdiction thereof' meant 'not owing allegiance to anybody else . . . subject to the complete jurisdiction of the United States.' Indians, he concluded, were not 'subject to the jurisdiction' of the United States because they owed allegiance—even if only partial allegiance—to their tribes. Thus, two requirements were set for United States citizenship: born or naturalized in the United States and subject to its jurisdiction." E Erler, *Defining Citizens: Congress, Citizenship, and the Meaning of the Fourteenth Amendment* (Feb. 17, 2011).

> Under the constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.... Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that 'representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' ... Indians not taxed are still excluded from the count, for the reason that they are not citizens.

The United States has, since the first days of the Republic, recognized Indian tribes as native nations, under treaty protection. As a result, Indian tribes are recognized as governments and not taxable entities under the Internal Revenue Code. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The Tribal Government Tax Status Act, 26 U.S.C. sec. 7871, is a reflection of our government status.

Although Indian tribes were not made citizens by the 14th Amendment's Citizenship Clause, Congress acted early in the 20th Century to confer citizenship on American Indians. In 1924, under the Indian Citizenship Act, non-citizen Indians were made U.S. citizens:

> *That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."*

Act of June 2, 1924, Public Law 68-175. The Indian Citizenship Act was not intended to disturb tribal citizenship or the rights of individual Indians to tribal property or lands.

Accordingly, the Supreme Court has held that individual Indian income that is derived from trust lands is not subject to income taxation. *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883, (1956). Taken together, the Constitution, treaties, and statutes of the United States make clear that our tribal citizens should not be taxed by the Federal Government, our Trustee, based upon tribal government programs or services derived from tribal trust property or designed to make our reservations livable as "permanent homes."

In its regulations, the IRS explains that individual Indians, though generally subject to Federal income taxation, should not be taxed upon:

22.41.1.6 (10-14-2011) Nontaxable Income of Tribal Members

1.) The following items are specifically excluded from the taxable income of individual tribal members:

Income directly derived by the Indian allottee from restricted allotted land that is held in trust by the United States Government,

Income derived from a fishing rights-related activity that is exempt under IRC section 7873,

Income that is exempt under treaty or statute, and

Income received from land claim settlements and judgments pursuant to 25 U.S.C. 1407.

We believe that the IRS has recognized the right principle—Federal tax laws are not intended to interfere with tribal self-government or treaty rights. Yet, the IRS does not apparently understand that tribal government programs and services are the essence of tribal self-government because tribal self-government is only realized through tribal government action on behalf of its citizens.

Because of this failure of vision, the IRS has become a menacing, interfering and overwhelming bureaucracy in Indian Country. The IRS apparently has an unspoken plan to audit each and every Indian tribe in the country, in a harassing manner that negates Indian sovereignty and interferes with our relationship with our tribal members. Will any tribal member want to work with tribal government when the IRS hands them a tax bill any time they receive government services or participate in government programs?

The IRS has sent an incredibly burdensome audit form to our Oglala Sioux tribal government, which seeks records of:

- Payments to employees, Council Members, tribal members, including expense reimbursement, distributions from gaming revenue, fringe benefits, bonuses, and accountable plan documentation.

- Petty Cash records.

- Gifts and loans to tribal members and/or employees with related documents.

- Health care, educational benefits, legal advice/representation, utility assistance, housing assistance, recreational activities provided on behalf of tribal members and employees.

- Pow-wow prizes and related tribal contest prizes.

- All bank records, credit card statements, expense receipts, and tribal government program plans.

This is what we would call a fishing expedition. There is nothing that says that the Oglala Sioux Tribe has not complied with the IRS, but the IRS is imposing a burden—a tremendous burden—on us. That burden interferes with our self-governance.

In 2009, just as Congress was preparing to pass the Obama Health Care Plan, the IRS was seeking to tax health care benefits provided by Indian tribes to tribal members. Federal employee benefits were not taxed. Veteran's benefits were not taxed. The Indian Health Service programs were not taxed. Federal prisoner's health care benefits were not taxed. State employee health care benefits were not taxed. State citizen's health care benefits were not taxed. Medicare, Medicaid, and children's health care benefits were not taxed. Yet, the IRS wanted to tax tribal government health care. Congress rejected that, enacting a law that says the IRS may not tax health care benefits, insurance, or care provided by tribal governments to tribal members and their dependents.

The IRS explains the meaning of Section 139(d) of the Patient Protection and Affordable Health Care Act:

> Section 139D provides, in general, that gross income does not include the value of any qualified Indian health care benefit. Section 139D defines the term "qualified Indian health care benefit" to mean:
>
> - any health service or benefit provided or purchased, directly or indirectly, by the Indian Health Service (IHS) through a grant to, or contract or compact with, an Indian tribe or tribal organization, or through a third-party program funded by the IHS;
>
> - medical care provided or purchased by, or amounts to reimburse for medical care

provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of the member;

- coverage under accident or health insurance (or an arrangement having the effect of accident or health insurance), or an accident or health plan, provided by an Indian tribe or tribal organization for medical care to a member of an Indian tribe, including a spouse or dependent of the member; and

- any other medical care provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian tribes or their members.

"Frequently Asked Questions (FAQs) about new Section 139D," IRS Website. I mention this to show that the IRS does not even follow Congress's guidance when there is a clear mandate to stop taxing tribal government health care, health insurance and medical assistance programs—the IRS included an audit of tribal health programs in its notice, which we were recently asked to answer!

The IRS is now asking Indian tribes throughout the country to submit justifications for not taxing tribal government programs for child care, elder care, education, housing, heating assistance, burial assistance, and cultural activities, such as pow-wows and tribal celebrations. We believe that the IRS is employing a discriminatory double standard. For example, the United States provides housing to the President, the White House and Camp David, etc. Is the President taxed for his housing benefits? No.

Yet, the IRS wants to audit housing benefits, such as surplus FEMA trailers provided to tribal members, who have no access to a real house. My daughter's family lives in a house with no running water—they have to use an outhouse for sanitation. Our people are found by the Census Bureau to be the poorest people in the country, with 47.3% of our people living below the poverty line.

We do not mean to suggest that the President should be taxed for living in the White House. We support the President and the Congress, and the United States has good reason for not taxing the President's housing benefits. Naturally, we have good reasons for seeking FEMA trailers for our people, who otherwise would not have a home. Similarly, the United States has good reasons for providing for the President's travel expenses aboard Air Force One, Marine One, in limousines, etc. Those are not taxed. We have good reasons for providing per diem payments to our Tribal Council Representatives. We should not be harassed about providing for our Tribal Council because it is our governing body, central to our treaty-protected original, inherent rights to self-government.

For another example, Indian tribes often have burial programs to assist our tribal citizens. In the past, Native Nations gathered to help our communities and families send their loved ones on the journey to the spirit world. Today, Indian tribes honor that tradition by assisting with burials and, typically, Tribal Leaders will make strong efforts to attend funerals of tribal citizens. Also, it is important for tribal elders and ceremonial leaders to attend and participate in the

funeral events. The United States should not interfere with our cultural and community traditions, whether it acts through the IRS or any other agency. Yet, the IRS wants to review tribal government burial assistance programs. Who would the IRS tax? The deceased husband and father? Or the grieving widow and children?

The United States pays for Veteran funerals at a price that may exceed $15,000. Yet, the IRS does not seek to tax the Veterans or their families because the United States has a very good reason for providing the funeral assistance. We do not question the United States Veteran's policy--in fact, we agree with it and support it. All we ask is that the IRS provides us with the same courtesy to tribal citizens when we provide tribal government burial assistance.

Churches provide funeral assistance to parishioners. Is the IRS seeking to tax the church or its members for the food service that they provide to support families burying their relatives? Is the IRS seeking to tax church members for the church plots that may be provided in the church yard? No.

Indian tribes are singled out by the IRS for discriminatory tax treatment due to the IRS's curious and short-sighted focus on Indian tribes.

The Indian Self-Determination Policy Mandates Respect for Indian Sovereignty

President Franklin D. Roosevelt initiated a policy of respect for tribal self-government in the Indian Reorganization Act. Although we went through a terrible period under the so-called Termination Policy in the 1950s, led by Senator Arthur Watkins from Utah, President Eisenhower called for Public Law 280 to be amended to require tribal consent to state assumptions of jurisdiction in Indian Country.

Presidents Kennedy and Johnson turned away from the Termination Policy and began the Indian Self-Determination Policy. President Johnson included Indian tribes in the War on Poverty, establishing a Cabinet level working group on Indian self-determination and economic assistance. President Johnson signed the Indian Civil Rights Act into law, securing basic civil rights for tribal citizens and requiring tribal consent to any further assumption of jurisdiction under Public Law 280.

President Nixon brought forth the Indian Self-Determination and Education Assistance Act and officially repudiated the Termination Policy, in a Special Message to Congress supporting Indian Self-Determination. President Reagan supported tribal economic development, self-determination and self-sufficiency and sought to cut the bureaucratic red-tape that has historically been imposed on Indian tribes. He initiated the Federal tribal government-to-government relations policy. President Reagan also signed the Indian Gaming Regulatory Act into law. President George H.W. Bush continued President Reagan's policies.

President Clinton issued Executive Order 13175 (2000), Consultation and Collaboration with Indian Tribal Governments, to respect Indian sovereignty, self-government and self-determination. Accordingly, the Executive Order explains: "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." The Executive Order states further that:

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.

Both President George W. Bush and President Obama have reaffirmed Executive Order 13175. The Executive Order provides direction to Federal agencies on agency rulemaking:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments....

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve pro- gram objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

In sum, the Department of the Treasury and the IRS are directed by the President to "preserve the prerogatives and authority of Indian tribes."

In general, treaties protect tribal self-government and the courts construe subsequent statutes as not impacting tribal self-government unless Congress has evinced an express intention to do so. Tribal government provision of programs and services is protected as an aspect of self-government by the Indian Gaming Regulatory Act, which mandates the provision of such services prior to payment of any per capita payments to individual members. IGRA makes the per capita payments taxable, drawing a clear distinction from tribal government programs and services, which are not taxable. 25 U.S.C. sec. 2710.

The IRS should respect the traditional areas of tribal self-government, including:

- **Housing**. Wars, non-Indian encroachment and Indian treaties limited aboriginal tribal homelands, typically making it necessary for native peoples to abandon traditional housing and adopt American-style housing to deal with different climate conditions. Recognizing that Indian tribes have typically been relegated to remote and often uneconomic reservations, the IRS should acknowledge that Indian tribes as governments must provide assistance to tribal citizens in the area of housing in accordance with

reasonable standards of American housing to make our reservations livable homelands. This is vitally important to the general welfare of Native Nations and tribal communities.[3]

- **Education**. The United States destroyed traditional Native American lifeways by limiting our territory, killing the buffalo, taking our hunting, fishing and farming areas, taking our natural resources and taking our lands for numerous Federal purposes—including non-Indian homesteading, park lands, forest lands, national grass lands, wilderness preserves and military bases, among other things. The treaties promised education in return for huge takings of lands and the United States has not fulfilled those promises. More recent statutes establish new pledges to promote the education of tribal children, youth and adults. Accordingly, it is the policy of the United States to promote education. When tribal governments provide education services through tribal colleges and universities or grants and scholarships to attend state or local colleges and universities, the United States should recognize that tribal governments are providing for the general welfare of tribal citizens. Our tribal educational services should not be subject to taxation by the United States.

- **Child Care and Elder Care**. The United States provides child care through programs such as Headstart and those are not taxable. The IRS should recognize that Indian tribes have unique traditions of child care, where the community was typically involved in providing assistance to raise Indian children in accordance with Indian culture. As the Indian Child Welfare Act acknowledges, Indian children are the most precious resource of Indian tribes and due to a history of taking Indian children away from family homes through boarding schools and forced adoption, Indian tribes need to assist Indian children in growing up in a nurturing environment. Elders are venerated in Indian tradition and provide the critical repository of culture, language and religion for Indian societies, who rely on our oral traditions. Accordingly, tribal governments traditionally provide care for elders, such as hot meals, access to education programs, heating assistance and small subsistence payments. Tribal government program choices should be respected, even though they may not precisely mirror Federal programs, and should not be subject to taxation by the United States.

- **Cultural Programs**. Tribal governments must foster tribal cultures because our native cultures are unique and have a great value to Native Nations and tribal communities. The United States over a period of generations has spent billions of dollars to strip us of our cultures through unconstitutional religious proselytizing, outlawing our religions, forbidding our children to speak our languages, forcible separation of our children from our families, and programs to replace native cultures with "American" culture. None of these efforts were taxed by the IRS. Nor should the IRS tax tribal cultural programs. Congress has evinced a policy to promote native cultures and languages through the American Indian Religious Freedom Act, the Native American Graves Repatriation Act, native language acts, and the establishment of the National Museum of the American

[3] Typically, Indian tribes provide adjunct services to make reservations liveable homes for tribal citizens, as envisioned in treaties, statutes, and executive orders. For example, many tribes provide adjunct heating assistance to deal with freezing cold climates, water to assist in making homes liveable, or sewer and sanitation services to make reservation lands habitable. These programs should not be interfered with by the Federal Government.

Indian. The IRS would not tax a field trip to Washington, D.C. to go to NMAI. It must not tax trips to pow-wows, tribal gatherings and celebrations, trips to historic sites, or trips to neighboring Indian tribes.

There are many other programs that Indian tribes provide to tribal members that are traditional and cultural in nature.

The IRS General Welfare Doctrine Review

Due to numerous complaints from Indian tribes around the country, the IRS has requested comments on its General Welfare Doctrine and the tribal government programs that may qualify for exclusion from income under its provisions. Yet, we do not trust the IRS to recognize tribal rights because the IRS has minimized tribal government rights. When one Tribal Leader raised objections to IRS intrusion based upon tribal treaty rights, he was told, "You can read your treaties in prison, if you like."

The Constitution is clear: Indian treaties have the force of law. There is no repeal of law by implication, so our treaties are still in force on our Indian reservation lands. Congress seeks to promote a better community life on Indian reservations by providing programs for:

- Children—Headstart, Healthy Start, Youth programs, Boys & Girls Clubs.
- Education—Pre-School, Elementary, Secondary, Post-Secondary, Technical Schools, Scholarship programs, among others.
- Culture—Native American Graves Protection and Repatriation Act, Native Languages Act, National Museum of the American Indian Act, American Indian Religious Freedom Act.
- Elderly—Older Americans Act Native American Program.
- Economic Development—SBA Indian Programs, Commerce MBDA, BIA Office of Energy and Economic Development, USDA RUS.
- Health Care—IHS.
- Housing—Native American Housing and Self-Determination Act HUD, FHA.
- Transportation—BIA Roads, USDOT Native American Highways Program.
- Justice—COPS, Tribal Jails, Tribal Courts.

The problem is that the Federal Government never appropriates enough money to carry out the laudable mandates.

Therefore, the IRS should say to itself, if the Federal Government is doing all of these programs to promote better reservation community life in accordance with Indian treaties and failing due to immeasurable need and impossibly limited funding, then Indian tribes should do whatever they can to better their communities. Congress should enact a simple straightforward statutory provision to remedy the IRS mistakes:

> ***When a tribal government program is designed to better tribal community life and make an Indian reservation "livable" as a permanent home for tribal citizens, then it is in the "general welfare" of the United States because it furthers the Federal trust responsibility and treaty pledges to Indian tribes. Benefits from such tribal government***

programs are not subject to taxation. Indian income derived from tribal trust or individual Indian trust property, land or resources is not subject to taxation.

Alternatively, tribal governments will need more detailed legislation to protect tribal self-government, treaty rights, the undisturbed use and occupancy of our reservations as "permanent homes." Specific legislation should include the following elements:

Findings. The United States has entered into hundreds of treaties with Indian tribes, which guarantee tribal self-government, tribal lands as permanent homelands, and establish a Federal trust to protect tribal property.

The United States must not tax income derived from tribal or individual Indian trust property or trust land.

The United States encourages tribal self-government and tribal self-sufficiency, so the Federal agencies should not interfere with tribal government efforts to provide tribal government programs and services to tribal members.

The United States should not burden Tribal Executives or Tribal Legislative Councils with taxation for tribal per diem, expenses and stipends because that burdens tribal self-government.

Specifically, the following tribal government programs should not be burdened or taxed by the IRS:

- **Child Care**. The United States recognizes that our children are our most precious resource and there are many Federal programs, so tribal government child care programs should be excluded from taxation.

- **Elder Care**. Our elders hold the cultural knowledge and history of our people. We must support them in their later years because they are our past, present and provide the traditional base for our future.

- **Education**. The United States promised in our treaties to provide education, instead our children were ripped away from parents and family support to go to government boarding schools far from home. They were stripped of language and culture and returned home as strangers. As we seek to educate our children and redress these historical wrongs, the IRS should not burden us with taxes for services that the Federal Government pledged to provide.

- **Housing.** Our people have suffered substandard housing for many generations in our alternating freezing winter cold (sometimes 20 degrees below zero) and high summer heat (sometimes over 110 degrees). Tribal governments must be able to provide decent housing for our people, including utility assistance, insulation and home repairs, without Federal taxation of these essential government services.

- **Police, Fire Protection, and Transportation**. Public safety is a public good, including police and fire protection, and transportation. Because we have inadequate medical facilities on our reservation, we often have to medevac patients out to Rapid City or other regional centers. We need to support their families to travel with them to help in these crises. Police and firemen sometimes are first responders to accidents and medical emergencies. The IRS should not burden these programs.

This more specific legislation should follow the guidelines set forth in 26 U.S.C. section 139D, Indian Health Care Benefits, enacted to stop the IRS from taxing Indian health care and health insurance.[4]

The Great Plains Tribal Chairman's Association has passed a resolution calling for such legislation (attached), and we request your support to enact the legislation. Stop the IRS from

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[4] 26 U.S.C. sec. 139D. Indian Health Care Benefits.
(a) General rule
Except as otherwise provided in this section, gross income does not include the value of any qualified Indian health care benefit.
(b) Qualified Indian health care benefit
For purposes of this section, the term "qualified Indian health care benefit" means—
(1) any health service or benefit provided or purchased, directly or indirectly, by the Indian Health Service through a grant to or a contract or compact with an Indian tribe or tribal organization, or through a third-party program funded by the Indian Health Service,
(2) medical care provided or purchased by, or amounts to reimburse for such medical care provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of such a member,
(3) coverage under accident or health insurance (or an arrangement having the effect of accident or health insurance), or an accident or health plan, provided by an Indian tribe or tribal organization for medical care to a member of an Indian tribe, include a spouse or dependent of such a member, and
(4) any other medical care provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian tribes or members of such a tribe.
(c) Definitions
For purposes of this section—
(1) Indian tribe
The term "Indian tribe" has the meaning given such term by section 45A (c)(6).
(2) Tribal organization
The term "tribal organization" has the meaning given such term by section 4(l) of the Indian Self-Determination and Education Assistance Act.
(3) Medical care
The term "medical care" has the same meaning as when used in section 213.
(4) Accident or health insurance; accident or health plan
The terms "accident or health insurance" and "accident or health plan" have the same meaning as when used in section 105.
(5) Dependent
The term "dependent" has the meaning given such term by section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof.
(d) Denial of double benefit
Subsection (a) shall not apply to the amount of any qualified Indian health care benefit which is not includible in gross income of the beneficiary of such benefit under any other provision of this chapter, or to the amount of any such benefit for which a deduction is allowed to such beneficiary under any other provision of this chapter.

wrongfully interfering with tribal self-government, treaty rights, trust lands and resources, and Indian homelands.

Conclusion

The IRS has embarked on audits of Indian tribes that we believe are very discriminatory. These audits seek to identify tribal government programs that are providing government services to tribal members and to assess them as income to be subject to Federal taxation. We do not believe that the same audits are being conducted on Federal, State and local governments or foreign nations.

The IRS should halt this discriminatory auditing of Indian Country. Instead, consistent with the Constitution, treaties, statutes, and executive orders of the United States, the IRS should defer to Indian tribal governments providing tribal government services to tribal citizens. The IRS should recognize that Indian tribes as governments have long sought to promote the health and vitality of Native Nations and tribal communities, including tribal languages, cultures and religions. Treaties, statutes, and executive orders establish indigenous homelands, where tribal self-government is protected. The IRS should not interfere with Indian tribes' governmental programs and services designed to provide a decent way of life for tribal citizens, especially when such programs and services supplement Federal programs, where the United States' treaty promises and trust responsibility duties are underfunded or lacking.

Congress must enact a new law to put the IRS back on track. The legislation can be simple and straightforward: The IRS should not tax tribal government programs that are intended to make our Indian reservations livable homes for our tribal citizens. Alternatively, our essential tribal government programs can be spelled out and protected in a manner, similar to tribal health care and health insurance.

On behalf of the Oglala Sioux Tribe and the Great Plains Tribal Chairman's Association, I respectfully request that you support legislation to direct the IRS not to interfere with tribal self-government, treaty rights, trust lands and resources, and the absolute and undisturbed use of our Indian reservations as permanent homes. Federal law requires as much, but the IRS refuses to listen. As Chief Red Cloud said, "They made us many promises, more than I can remember, but they kept only one; they promised to take our land, and they did."

Please act now. Our need is urgent. Thank you for your thoughtful consideration of this important government-to-government request for assistance.

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

2040 West Main St., Suite 112, Rapid City, SD 57702 Phone: 605-791-4050 Fax: 605-791-4051

Resolution No. 9-3-16-12

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

TO HONOR OUR TREATIES, AGREEMENTS AND THE EXECUTIVE ORDERS ISSUED IN ORDER TO HONOR OUR TREATIES AND AGREEMENTS BY CEASING AND DESISTING THE IRS EFFORTS TO TAX OUR TRIBAL GOVERNMENT PROGRAMS AND SERVICES TO TRIBAL CITIZENS WHICH INTERFERES WITH OUR TRIBAL GOVERNMENT RELATIONSHIP WITH OUR TRIBAL CITIZENS, VIOLATES OUR HOMELANDS, AND VIOLATES OUR RIGHT TO TRIBAL SELF-GOVERNMENT.

WHEREAS, The Great Plains Tribal Chairman's Association (GPTCA) is composed of the elected Chairs and Presidents of the 16 Sovereign Indian Tribes and Nations recognized by Treaties with the United States that are within the Great Plains Region of the Bureau of Indian Affairs; and

WHEREAS, The Great Plains Tribal Chairman's Association was formed to promote the common interest of the Sovereign Tribes and Nations and their members of the Great Plains Region which comprises the states of North Dakota, South Dakota, Nebraska; and

WHEREAS, Indian Tribes are sovereign that pre-date the United States, with prior and treaty protected rights to self-government and to our Indian lands, and

WHEREAS, the constitution of the United States, through the Treaty, Commerce, Supremacy, and Apportionment Clauses and the 14th Amendment, recognizes the sovereign status of Indian Tribes as Naïve nations established prior to the United States; and

WHEREAS, Federal Agencies have a responsibility to respect the letter and spirit of the United States Constitution, Treaties, current Federal laws, and Executive Orders, regarding the Federal Government's relationship with Tribal Governments; and

WHEREAS, Our reservations are part of the original homeland of our people and under our traditional law, we have been struggling to lead our community back to self-determination and self-sufficiency after the devastating, genocidal campaigns against us in the 19th Century; and

WHEREAS, The United States undertook many treaty obligations in exchange for the cession of hundreds of millions of acres of land, yet the Federal Government has fallen far short in meeting theses solemn obligations; and

WHEREAS, Through our treaties, agreements, and executive orders, the United States recognized and affirmed our inherent rights to self-government and correspondingly, limited the access of Federal officials to our reservations in the absence of our consent; and

WHEREAS, After many years Tribes in Indian Country have instituted programs to provide governmental benefits to their Tribal citizens; and

WHEREAS, Internal Revenue Service is auditing the benefits provided to individual Tribal citizens by their Tribal Government; and

WHEREAS, the Internal Revenue Service is violating our treaty rights to the absolute and undisturbed use and occupancy of our reservations as permanent homelands and is interfering with the governmental relationship between our Tribal Governments and tribal citizens; and

WHEREAS, The IRS discriminatory approach to the auditing of Indian tribes is a severe problem given the fact that the 5 of the 10 poorest counties in the country are within our Indian reservations in South and North Dakota; and

WHEREAS, The Internal Revenue Code Section 61 states that, except as otherwise provided, gross income includes all income from whatever source derived, and the Internal Revenue Service and federal courts have consistently held that payments made under similar social benefit programs for the promotion of general welfare are not includable in gross income; and

WHEREAS, the General Welfare Doctrine provides a common law (or statutory interpretation by implication) exclusion for government social welfare programs, the test is based on facts and circumstances (or a IRS agent's personal value judgment) and is difficult to apply; and

WHEREAS, The General Welfare Doctrine as applied by the IRS interferes with treaty rights, self-government, and the absolute and undisturbed use and occupancy of our homelands and discriminates in favor of Federal and state programs and against tribal government programs based upon the non-Indian value judgments of IRS agents; and

WHEREAS, Statutory language is needed to clarify that governmental benefits provided by Indian tribal governments for their members is not subject to income taxation; and

WHEREAS, Federal legislation to amend the Internal Revenue Code is needed that would clarify that governmental benefits provided by an Indian tribe to its members is not subject to income taxation; and

WHEREAS, This legislation would apply to governmental benefits provided after the date of enactment. It also includes language to prohibit the IRS or the courts from assuming or inferring that benefits provided by Indian tribes that are not within the scope of the bill were taxable prior to the legislation's effective date; and

NOW THEREFORE BE IT RESOLVED, The Great Plains Tribal Chairman's Association calls upon the United States to honor our treaties, agreements, and the executive orders issued in order to honor our treaties and agreements by ceasing and desisting the IRS efforts to tax our tribal government programs and services to tribal citizens which interferes with our Tribal Government relationship with our tribal citizens, violates our homelands, and violates our right to tribal self-government;

BE IT FURTHER RESOLVED, The Great Plains Tribal Chairman's Association supports legislation to treat tribal government educational and other benefits as an aspect of tribal self-government and tribal civic life, not personal income to individual tribal members;

BE IT FURTHER RESOLVED, The Great Plains Tribal Chairman's Association calls upon National Congress of American Indians, National Indian Gaming Association, Native American Finance Officers Association and other national Indian organizations to support legislation to honor tribal self-government by stopping the IRS interference with our Tribal Government relationship with our tribal citizens by seeking to tax Tribal Government programs and services provided to tribal citizens under the so-called General Welfare Doctrine;

BE IT FINALLY RESOLVED, that this resolution shall be policy of the Great Plains Tribal Chairman's Association until withdrawn or modified by subsequent resolution.

CERTIFICATION

This resolution was enacted at a duly called meeting of the GPTCA at a meeting held at the Standing Rock Sioux Tribe in South Dakota, at which a quorum was present, with 10 members voting in favor, 0 members opposed, 0 members not abstaining, and 6 members not present.

Dated this 16th day of March, 2012.

Secretary,
Great Plains Tribal Chairman's Association

Attest:

Chairman, Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nations (Three Affiliated Tribes)
Great Plains Tribal Chairman's Association