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March 19, 2007

Ms. Nancy Theodore
USDA, Food and Nutrition Service
Food Distribution Division
3101 Park Center Drive, Room 506
Alexandria, Virginia 22302
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Dear Ms. Theodore:

Attached hereto please find the comments of the Standing Rock Sioux Tribe Concerning the Proposed FDPIR Funding Methodology. Separately, we will fax the Tribe's comments to you at the above listed fax number. Please file the Tribe's comments and note that they were timely received.

Your assistance in this matter is appreciated.

Sincerely,

Steven C. Emery

Steve Emery



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Comments of the Standing Rock Sioux Tribe

Concerning the Proposed FDPIR Funding Methodology

March 16, 2007

The Standing Rock Sioux Tribe's comments concerning the proposed FDPIR Funding Methodology are herewith submitted to:

Ms. Nancy Theodore
USDA, Food and Nutrition Service
Food Distribution Division
3101 Park Center Drive, Room 506
Alexandria, Virginia 22302
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Do you agree with the guidelines listed in Attachment B for developing a new funding methodology? If not, what guidelines do you suggest?

The Standing Rock Sioux Tribe strongly disagrees with the proposed guidelines for a new funding methodology. As set forth those guidelines impinge on the inherent rights of the Tribe as a sovereign because of the unique, legal, and political relationship the United States has with Indians and their tribal governments. Of course, this relationship has and is defined through treaties¹, statutes, court decisions, and the United States Constitution, Art. I, § 8 cl.3 (Indian Commerce Clause) and Art. VI (Supremacy Clause).

Article X of the 1868 Fort Laramie Treaty between the United States and the Great Sioux Nation is the basis of the United States' trust obligation to provide rations for reservation resident Tribal members of Indian tribes that are constituent members of the Great Sioux

¹ Fort Laramie Treaty of April 29, 1868, 15 Stat. 635; Fort Laramie Treaty of September 17, 1851, 11 Stat. 749.

Nation, e.g., the Standing Rock Sioux Tribe. In Article X, the United States pledged its honor to provide:

each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence. . . .

Now, the Tribe and its Food Distribution Program are being asked to assist the USDA to identify a funding methodology that will fit all Tribes and FDPIRs. This is impossibility because the circumstances of each Tribal program and each FDPIR are different. Notwithstanding the current funding inequities that exist because of the tremendous diversity among Food Distribution programs operated by Indian Tribes and FDPIRs throughout the country, it is clear from the record that the FNS vision of an easy to understand funding methodology that would allocate funds equitably on an objective basis and be efficient to implement is unattainable.

The Standing Rock Sioux Tribe also resists adoption and implementation of the proposed guidelines for a new funding methodology because there has been no requisite, formal government-to-government consultation on the proposed methodology. In USDA Departmental Regulation No. 1340-6, entitled Policies On American Indians And Alaska Natives, October 16, 1992, the Secretary of Agriculture explained in paragraph 1 that:

[t]he purpose of this document is to outline the policies of the United States Department of Agriculture (USDA) in its interactions with Indians, Alaska Natives, tribal governments, and Alaska Native Corporations (ANC). USDA policies are based on and are coextensive with Federal treaties and law. These policies pertain to Federally recognized Tribes and ANCs, as appropriate, and provide guidance to USDA personnel for actions affecting Indians and Alaska Natives.

Thereafter, the then Secretary of Agriculture noted in paragraph 3 of USDA Departmental Regulation No. 1340-6, that:

[t]he United States Government has a unique, legal, and political relationship with Indians and their tribal governments as defined through treaties, statutes, court decisions, and the United States Constitution. The United States Government has obligations under treaties and statutes to protect and maintain the lands, resources, and traditional use areas of Indians. Tribal governments have powers similar to those of State governments.

In paragraph 4 of USDA Departmental Regulation No. 1340-6, the then Secretary of Agriculture noted that:

USDA is the lead agency of the Federal Government for providing effective and efficient coordination of Federal agricultural and rural development programs. USDA recognizes that Indians possess the right to govern themselves and manage

their resources. Therefore, USDA supports and seeks to further the principles of self-governance as delineated in the Indian Self-Determination and Education Assistance Act of 1975.

The Secretary also stated in that paragraph that:

[c]onsistent with applicable law, USDA officials will solicit input from tribal governments and ANCs on USDA policies and issues affecting tribes and will seek to reconcile Indian and Alaska Native needs with the principles of good resource management and multiple use.

Clearly, the USDA has failed to meet its duty to consult with the Standing Rock Sioux Tribe. In fact, notwithstanding that the Tribal Council Representative Jay Taken Alive and the Director of the Standing Rock Sioux Tribe's Food Distribution Program, Red Gates, Vice President of the NAFDPIR Mountain Plains Region, were present at the so-called Tribal Consultation Meeting held in Rapid City, South Dakota on January 24, 2007, the Tribe avers that this was not a government-to-government consultation. In fact, it is clear from the transcript of that meeting that Council Representative Taken Alive said then "I want to state for the record that we reserve the right to – from Standing Rock – attend this consultation under protest for the mere fact that we didn't have players at the table when this plan was being put together." Tribal Consultation Meeting Transcript, p. 9, January 24, 2007. The Tribe repeats and renews that protest.

The USDA has a duty to consult with the Tribe itself, not a single Tribal Council Representative and a Tribal employee. This means that the Secretary of Agriculture or his delegate should schedule a formal consultation and meet with the elected officials of the Tribe on agricultural and food distribution issues that potentially affect the Tribe and its members. Neither the Secretary or the USDA Food and Nutrition Service, Food Distribution Division have attempted to contact Tribal officials to initiate the formal consultation on such issues that should and must be conducted on a government to government basis consonant with USDA Departmental Regulation No. 1340-6.

In addition, the USDA has utterly failed to act in a manner consistent with the United States' government to government relationship with Indian Tribes. President Clinton set forth an Executive Memorandum, on September 23, 2004, entitled "Government-to-Government Relationship with Tribal Governments." Therein, President Clinton declared: "My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States." President Clinton followed this with his Executive Order On Indian Tribal Governments, § 3(c) (3) 2000 WL 1665066, November 7, 2000, where he proclaimed "Federal agencies are required to consult with Tribal governments on a government to government basis in determining whether to establish Federal standards 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."

The Standing Rock Sioux Tribe views the new funding methodology as an instrument to reduce funding to smaller Tribes and programs. The likely result will be the elimination of the smaller programs. For these reasons, on behalf of itself, its sister Tribes and the smaller programs, the Tribe protests the adoption and implementation of the proposed new funding methodology.

Instead, the USDA Food and Nutrition Service, Food Distribution Division should visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes should identify their administrative needs, operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants. This would be consistent with the trust obligations of the United States towards all Treaty Tribes.

Do you think that the work group's preliminary recommendation is an appropriate approach to fund FDPIR in the future?

No, the Tribe does not view the preliminary recommendation as an appropriate approach to funding FDPIR in the future. The Food Distribution Programs on Indian Reservations were created by the Food Stamp Act of 1977. The need for FDPIR was clear on remote reservations where access to Food Stamps and stores to redeem them was limited. In remote locations, direct food distribution better met the needs of reservation residents. In addition, FDPIR was consistent with United States' obligations under Art. X of the Fort Laramie 1868 Treaty, 15 Stat. 635.

Do you have alternative funding methodologies that you wish to propose?

As noted above, the USDA Food and Nutrition Service, Food Distribution Division should visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes should identify their administrative needs, operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants. This would be consistent with the trust obligations of the United States towards all Treaty Tribes.

Do you have suggestions for changes to the proposed funding methodology?

The Standing Rock Sioux Tribe rejects the proposed funding methodology for the reasons set forth above. The Tribe suggests that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes should identify their administrative needs, operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants. This would be consistent with the trust obligations of the United States towards all Treaty Tribes.

Do you recommend a base amount other than \$10,000 for Component 1 of the Basic Grant Amount? If so, what amount do you recommend?

Consonant with the Tribe's recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs, there shouldn't be a base funding amount. Instead, after the Tribes identify their administrative needs and operational costs these costs should be fully funded by USDA. In the event that Tribes and FDPIRs have other costs unique to their respective programs, these costs should be directly negotiated with USDA on an individual, government-to-government basis with the Tribes and on an agency-to-program basis with the FDPIRs.

Do you agree with the approach used in Component 2 of the Basic Grant Amount? If not, what approach do you recommend?

No, the Standing Rock Sioux Tribe disagrees with the approach used in Component 2 of the Basic Grant Amount. This is because the Tribes and FDPIRs have never been informed as to the basis for historical funding for regular operational needs. Moreover, the amount of funding has never been adequate to purchase requisite program equipment or to serve all areas of large reservations. For example, the Standing Rock Indian Reservation, Act of March 2, 1889, § 3, 25 Stat. 888 (Reservation boundaries), is a larger land area than the State of Rhode Island. It seems clear that the USDA needs to visit Indian Country, 18 U.S.C. § 1151, and see first-hand the extraordinary circumstances under which Tribes and FDPIRs operate food distribution programs. As set forth, the approach used in Component 2 is basically a shell game². Arithmetic formulas are no substitute for on-site assessments of programmatic needs where Tribes and FDPIRs are providing the most basic service of all, i.e., distributing food to those who truly need it.

The Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes should identify their administrative needs, operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you agree with the approach used in Component 3 of the Basic Grant Amount? If not, what approach do you recommend?

No, the Standing Rock Sioux Tribe disagrees with the approach used in Component 3 of the Basic Grant Amount. It is proposed that Tribes and FDPIRs would receive funding based on their percentage share of the national participation level averaged for the most recent three-year period. However, in Tribes and FDPIRs serving relatively small populations in remote areas, the costs for delivering services to participants is

² In this context, the term "shell game" refers to a scheme for defrauding or deceiving people.

dramatically higher than in more heavily populated areas closer to urban centers. Hence, the so-called percentage share of the national participation level averaged for the most recent three-year period could not possibly be applied equitably to the Standing Rock Sioux and other Indian Tribes and FDPIRs who are remotely located and serve populations comparatively small in numbers. Our Tribal membership may not be as high as that of the Navajo or the Cherokee, but unlike those Tribes, our Great Sioux Nation was divided under the force of American law. Great Sioux Nation constituent Tribes and other Indian Tribes and FDPIRs ought not to be penalized through the imposition of a funding formula that fails to consider our unique logistics and the actual costs of service delivery to participants.

The Standing Rock Sioux Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes should identify their administrative needs, operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you recommend a percentage other than 15 percent for Component 4, the Regional Negotiated Funding Amount? If so, what percentage do you recommend?

The Standing Rock Sioux Tribe believes that setting aside funds for the FNS regional offices for allocation of these funds to the ITOs/State agencies based on need as determined through a negotiation process would put Tribes and FDPIRs at an extreme disadvantage in negotiations because their bargaining power would always be less than that of the state agencies, e.g., population and geographic location. In addition, USDA Departmental Regulation No. 1340-6, ¶ 4, provides:

USDA is the lead agency of the Federal Government for providing effective and efficient coordination of Federal agricultural and rural development programs. USDA recognizes that Indians possess the right to govern themselves and manage their resources. Therefore, USDA supports and seeks to further the principles of self-governance as delineated in the Indian Self-Determination and Education Assistance Act of 1975.

Those principles are set forth in 25 U.S.C. § 450a, entitled “Congressional declaration of policy:

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Under 25 U.S.C. § 450a(a), under USDA's own policy, USDA is required to "assur[e] maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." However, Component 4, which proposes that a set percentage of the federal appropriated amount would be set aside and allocated to the FNS Regional Offices for allocation by the regional offices to the ITOs/State agencies based on need as determined through a negotiation process does nothing to render USDA services more responsive to the needs and desires of Tribal communities. Instead, it facially makes the FNS Regional Offices more responsive to the needs of state agencies. This clearly violates Departmental Regulation No. 1340-6.

The Secretary of Agriculture mandated in Departmental Regulation No. 1340-6, ¶ 4, that the USDA act in a manner harmonious with 25 U.S.C. § 450a(b), declaration of Congress' ongoing "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes" by ensuring that federal agencies end federal domination of programs for, and services to, Indians and ensure that there is effective and meaningful participation by the Indian people in the planning, conduct, and administration of federal programs and services in which they participate. This proposal that the USDA delegate regional offices the authority to invite Indian tribes and state agencies to negotiate for funding will create competition for the funding. This will reduce the effective and meaningful participation by the Indian people in the planning, conduct, and administration of USDA programs and services. There can be little doubt that Indian Tribes and FDPIRs have a unique relationship with the United States that demands that they be treated differently than state agencies.

Compliance with USDA Departmental Regulation No. 1340-6, would require that the USDA reject Component 4, the Regional Negotiated Funding Amount proposal, in favor of the Tribe's recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes

would identify their administrative needs and operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you have suggestions for guidelines to be used for the negotiation process related to Component 4, the Regional Negotiated Funding Amount?

No, the Standing Rock Sioux Tribe rejects Component 4 because it violates USDA Departmental Regulation No. 1340-6 as set forth above. Instead, the Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes would identify their administrative needs and operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you have suggestions for guidelines for the reallocation of funds if an ITO/State agency requests a reduction of its Basic Grant Amount or if an ITO/State agency finds prior to the end of the fiscal year that it is unable to spend its Basic Grant Amount and/or the supplemental funds it receives under Component 4, the Regional Negotiated Funding Amount?

Tribes and FDPIRs serving relatively small populations in remote areas, the costs for delivering services to participants is dramatically higher than in more heavily populated areas closer to urban centers. The Standing Rock Indian Reservation, Act of March 2, 1889, § 3, 25 Stat. 888 (Reservation boundaries), is a larger land area than the State of Rhode Island. It seems clear that the USDA needs to visit Indian Country, 18 U.S.C. § 1151, and see first-hand the extraordinary circumstances under which Tribes and FDPIRs operate food distribution programs. Thus, the Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes would identify their administrative needs and operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you agree with the work group's proposed recommendation for a gradual implementation plan?

The Standing Rock Sioux Tribe strongly disagrees with the work group's proposed recommendation for a gradual implementation plan. The proposed gradual implementation plan appears to be an apologia³ for a potential but likely reduction in program funding. The calculation of the Basic Grant Amount for an ITO/State agency appears to be another shell game. Even if ITOs were calculated to be eligible to receive an in funding, ITOs/State agencies due to receive an increase in funding under the new

³ An apologia is a formal, usually written, defense or justification of a belief, theory, or policy.

funding methodology would not receive their full increase during the gradual implementation period. In addition, it may be necessary to adjust the amount of funds available under the Regional Negotiated Funding Amount during the gradual implementation period to ensure that sufficient funds are available to supplement the calculated Basic Grant Amount of those ITOs/State agencies that would otherwise experience a reduction in funds under the new funding methodology. This requires robbing Peter to pay Paul. The United States has a trust obligation to Indian Tribes that is recognized by the United States in Article X of the 1868 Fort Laramie Treaty, 15 Stat. 635, as well as in USDA Departmental Regulation No. 1340-6 and other relevant federal laws. Indian Tribes and FDPIRs are entitled to the services they receive from USDA. Indian Tribes have given up more resources to the United States than the U.S. can ever repay. In addition, our young people continue to serve in the Armed Services at a higher percentage than any other racial or ethnic group in the United States. As our grandparents said “We have kept the Treaty, now the United States should keep its word.” As Justice Hugo Black wrote in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) “I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.”

The Standing Rock Sioux Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes would identify their administrative needs and operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

Do you agree with the work group’s proposed recommendation (see Attachment E) to allow those ITOs that currently receive commodities through warehouses maintained by the North Dakota and Montana State agencies, but are not administered by either State agency, to be incorporated under the forthcoming National Multi-food Warehouse Contract?

The Standing Rock Sioux Tribe believes that this question overlooks the real concern of Indian Tribes and FDPIRs that the costs for these functions should be funded under the FDPIR food cost account, rather than the administrative funds account. The Tribe is greatly concerned that the ND and MT State agencies are receiving FDPIR administrative funds for ordering, receiving, storing, and transporting commodities to seven ITOs that are not under their direct administration. The Tribe opposes a decision by the USDA that ITOs currently receiving commodities through warehouses maintained by the North Dakota and Montana State agencies, not administered by either state agency, be incorporated under the forthcoming National Multi-food Warehouse Contract because it is a pilot program and the warehouse is located a great distance away from the reservation in Albuquerque, New Mexico.

In any event, North Dakota and Montana state agencies should not receive administrative costs for Tribal and FDPIR programs they do not administer. Thus, the costs for ordering, receiving, storing, and transporting commodities from the warehouse to the ITOs should and must be exclusively paid from the FDPIR food cost account. This is a Tribal self-determination issue. See USDA Departmental Regulation No. 1340-6; and 25 U.S.C. § 450a, above. The USDA has a duty under its own policy to end USDA domination of programs for, and services to, Indians and ensure that there is effective and meaningful participation by the Indian people in the planning, conduct, and administration of USDA programs and services.

The Standing Rock Sioux Tribe repeats and renews its recommendation that the USDA Food and Nutrition Service, Food Distribution Division visit each reservation and FDPIR to better understand the unique logistics of program operation by the individual Tribes and FDPIRs. Then the Tribes would identify their administrative needs and operational costs and these should be fully funded by USDA. In addition, there should be full funding for each eligible program participant so that the food distributed fully meets the needs of those participants.

In the event that the USDA would like additional information concerning the Tribe's position on proposals for change to Tribal and FDPIR programs, please contact the Standing Rock Sioux Tribe, Attn: Steven C. Emery, Tribal Attorney, P.O. Box D, Fort Yates, ND 58538; (701) 854-2025 x115; e-mail: steve_emery1989@hotmail.com