HUMAN RIGHTS WATCH

SECRET AND UNACCOUNTABLE

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Summary

Nestled along the bank of the Missouri River in central South Dakota, the Lower Brule Sioux Reservation of around 389 square miles is home to about 1,600 people of the 3,400 member Lower Brule Sioux Tribe. Most reservations in the United States are small and home to fewer than 10,000 people and Lower Brule is among the smallest. More than 40 percent of the population on the reservation lives in poverty. Many tribal members lack access to employment opportunities or an acceptable quality of basic services. As is true of many other reservations, Lower Brule's chronic poverty and the remote nature of its landholdings largely reflect the cumulative impact of myriad historical injustices the tribe has suffered at the hands of the United States government. But in the case of Lower Brule, tribal members' struggles are compounded by a Tribal Government that is characterized by rampant financial mismanagement and is largely unaccountable to the people it governs.

This report describes patterns of debilitating financial mismanagement by the Lower Brule Tribal Government and how these problems are entrenched by its ability to avoid any kind of public accountability. Funds desperately needed to address profound social needs and advance the basic rights of tribal members are instead channeled into highly questionable projects or diverted away from essential services like education or water without explanation. A small circle of political elites with stark conflicts of interest between their public responsibilities and personal interests runs the Tribal Government in an environment largely devoid of transparency. Tribal Government institutions are unresponsive to public concerns about these problems and largely resist meaningful accountability. Meanwhile, external actors with the capacity to mobilize pressure to address some of these problems, including the federal government, have done little to encourage change.

The tribe's opaque six member Tribal Council wields virtually complete control over the political and economic life of the reservation. While the Tribal Council is democratically elected, the chairman of the Tribal Council, Michael Jandreau, and his ruling majority have held power for more than 30 years. This report shows how Tribal Council members have systematically withheld information from the public in order to avoid accountability. That led to a situation in which harmful patterns of mismanagement were able to thrive in secrecy. Funds for key social services were inexplicably diverted at the expense of the

human rights of tribal members, while tribal members lacked effective mechanisms to hold members of the Tribal Council accountable for their actions.

The lack of transparency and accountability has created serious human rights problems at Lower Brule. This report suggests key reforms to better protect tribal members' human rights and improve accountability.

Lower Brule's Tribal Government is now at an important crossroads. Changes in the composition of the Tribal Council after the September 2014 elections may have created an opportunity to break with the past and introduce badly needed reforms. Three new council members have been elected to the six member council and have the opportunity to examine the government's past activities and implement new reforms to safeguard transparency and ensure accountability. It remains an open question whether the council will fulfill these responsibilities and make itself accountable to the tribe.

Although the Lower Brule Tribal Government rebuffed virtually all of our requests for information, Human Rights Watch was able to assemble a fairly detailed picture of mismanagement, human rights abuses, and impunity through dozens of interviews and hundreds of pages of documents, including federal and Tribal Government documents and financial reports.

Human Rights Watch research found that at least US$25 million of Tribal Government expenditures from 2007 to 2014 remain unexplained. Almost that entire amount had been earmarked for programs meant to provide essential services, alleviate poverty, or promote much needed economic development. That is an average of an almost 11 percent loss annually from the Tribal Government's budget for those years.

This report also documents the events surrounding the tribe's disastrous 2009 purchase of Westrock, a now-defunct Wall Street firm. The Westrock affair serves as a clear illustration of the broader patterns of mismanagement and impunity that plague the government.

Chairman Jandreau and others involved in the deal justified Westrock's purchase as an investment that would help alleviate poverty on the reservation, but the firm subsequently collapsed due to mismanagement and fraud. This potentially cost United States taxpayers over $20 million because of a federal loan guarantee for the deal, and also diverted

undisclosed amounts of scarce tribal resources into what was essentially a black hole. The council abused its authority by withholding information about the deal. This information should have been made public according to the Tribal Constitution and Bylaws.

The Westrock affair is emblematic of the broader crisis of governance that the Lower Brule Tribal Council precipitated by exploiting a lack of federal oversight and the absence of any way for tribal members to hold their government accountable.

The Tribal Government has undermined the rights of tribal members, including the right to information, enshrined in international law as well as in the tribe's own constitution. Additionally, the economic and social rights of people on the reservation have been undermined because millions of dollars meant to pay for essential services such as education, water, or key poverty alleviation programs have been diverted by the government without explanation.

Tribal members lack an effective remedy for these violations. Because of the legal contours of tribal sovereignty in the United States, tribal members can only challenge their government in federal courts under very limited circumstances. At the same time, no effective remedies are available through the Lower Brule Tribal Government, which ignores its duties of open government under the Tribal Constitution. Although the right to an effective remedy is protected under the International Covenant on Civil and Political Rights, to which the US is a party, the federal government has limited jurisdiction over tribal internal affairs, and cannot compel a tribe to institute remedies through tribal courts or other institutions. Lower Brule's members have no real way to compel the tribal government to live up to these responsibilities because there are few rules governing these activities and the ones in place are ignored.

Economic and Social Rights

Under international human rights law, governments are obliged to invest in essential social services commensurate to their available resources. Human rights norms do not prescribe exactly how much governments should invest in these areas relative to other competing public priorities. However, when large sums intended to provide basic services are simply lost through mismanagement or corruption rather than allocated to

some other legitimate government purpose, it leaves governments in breach of their human rights obligations.

The Tribal Council has regularly diverted funds intended to provide essential services such as water and education, assistance to the poor, and economic development that would alleviate poverty and provide the sources of revenue to help pay for social services. As such, millions of dollars in desperately needed resources on a very poor reservation have been lost, often without any explanation.

Factors Impeding US Federal Investigation

The federal government has jurisdiction to investigate and prosecute those credibly implicated in the misuse of federal funds and prosecute other federal crimes on reservations, including crimes involving tribal government officials. But it does not have jurisdiction over matters considered to be under the exclusive purview of sovereign tribal governments, such as the questionable allocation of tribal land, unexplained payments, or other uses of tribal resources. While Human Rights Watch recognizes the importance of tribal sovereignty, sovereignty entails human rights responsibilities. The way the Lower Brule Tribal Council has exercised its sovereignty has left tribal members with little way to secure a remedy against official misconduct, secrecy, or abuse.

Even where the federal government has jurisdiction, resource constraints impede the federal government's ability to investigate wrongdoing. Due to limited resources, the Federal Bureau of Investigation (FBI) tends to prioritize a heavy caseload of crimes involving drugs, violence, or sexual offenses over corruption-related criminal investigations. While the Department of Interior's Office of the Inspector General (OIG) typically takes the lead on investigating corruption or other wrongdoing because so much of tribal governments' funding comes from the Bureau of Indian Affairs, both the FBI and OIG are under-resourced. There are only about 85 OIG investigators nationally and just a handful of investigators for the region that includes Lower Brule and at least 13 other reservations in South Dakota, North Dakota, and parts of Montana.

Despite these barriers, the demonstration of political will on the part of tribal governments and the federal government to address these issues could improve human rights and increase accountability, while preserving tribal self-government and control.

Tribal sovereignty means that the principal obligation to protect the rights of tribal members rests with tribal governments. It also requires that tribal governments ensure adequate mechanisms exist to protect those rights. For example, Lower Brule's Tribal Council could abide by and strengthen the access to information provisions in the Tribal Constitution and Bylaws by creating an ombudsman or some other mechanism that could independently and effectively investigate allegations of Tribal Government misconduct or provide a mechanism to examine allegations of human rights abuse. The federal government should publish documentation related to its funding, such as audits, and should devote more resources to the FBI and Bureau of Interior's Office of Inspector General so they can investigate crimes that fall under their jurisdiction.

Such reforms are urgently needed at Lower Brule and would set an important precedent. Until reforms are made, the opaque and unaccountable activities of the Tribal Council will continue to restrict the ability of tribal members to enjoy their human rights.

Recommendations

To the Lower Brule Sioux Tribal Council

- Publish all past and current Tribal Council resolutions, minutes of meetings, and related documentation, as required by the Tribal Constitution.
- Establish an independent body as part of the Tribal Government, such as an ombudsman or inspector general, to investigate allegations of government waste, fraud, or abuse, such as nepotism, other conflicts of interest, or mismanagement of public funds. This entity should have the authority to investigate allegations of wrongdoing in Tribal Government, including by Tribal Council members. Such actions may include but are not limited to taking testimony, compelling relevant documents, and compiling other evidence.
- Publish the names of board members, minutes of meetings, financial records, and other information about the deliberations and activities of businesses owned by the Tribal Government.
- Investigate the diversions of funds from health, water, and other programs as detailed in Tribal Government audits and publish those findings.
- Investigate the Westrock deal to determine the circumstances behind that venture and account for all federal and tribal funds spent in relation to this deal.

To the United States Federal Government

- Investigate allegations of waste, fraud, or abuse involving federal funds used by the Lower Brule Tribal Government, including the Bureau of Indian Affairs loan guarantee used for the Westrock deal.
- Ensure that investigators have adequate resources to investigate allegations of waste, fraud, or abuse.
- Make the full A-133 or federal single audits public with regard to Lower Brule's Tribal Government.
- Consider delaying funding if the Lower Brule Sioux Tribal Council refuses to abide by its constitutional provisions regarding open and transparent government.

- Press the Lower Brule Sioux Tribal Council to publicly disclose the use of federal funds that were diverted from social programs.
- Publicly disclose what steps the US government took to identify what happened to the diverted federal funds and what steps federal agencies took to address those diversions, including requiring reimbursements by the Tribal Government, investigations, or other measures.

To Tribal Governments

- Convene an inter-tribal discussion to develop and implement best practices for transparency and human rights accountability within tribal governments.

Methodology

This report describes patterns of debilitating financial mismanagement by the Lower Brule Tribal Government and its ability to avoid any kind of public accountability. Funds desperately needed to address profound social needs and advance the basic rights of tribal members have instead been channeled into highly questionable projects or diverted away from essential services like education or water without explanation. The report shows how for many years Tribal Council members have systematically withheld information from the public in order to avoid accountability.

Lower Brule is a very small community under the same government leadership since 1980. This leadership has been extremely resistant to openness or other reforms. As such, the situation on this reservation presents a clear example of what Human Rights Watch has documented in many other parts of the world: the lack of governmental transparency and accountability can severely undermine the rights of the governed. Investigating this required individual interviews with persons involved and documentary evidence to show monetary flows, relationships, and legal responsibilities.

One of the reasons Human Rights Watch examined the conduct of Lower Brule's Tribal Government, and in particular its Tribal Council, is because of its failure to put into place meaningful mechanisms to hold officials accountable. That is in contrast to other tribal governments, such as the Grand Traverse Band of Ottawa and Chippewa Indians that have numerous rules and regulations to ensure financial transparency and accountability. Lower Brule's government has ignored its constitutional provisions requiring transparency. In that respect, the situation at Lower Brule is a stark example how protecting the rights of the governed is contingent on transparency and accountability within government.

Research for this report was conducted from December 2012 to September 2014, and included travel to the Lower Brule Sioux Reservation in South Dakota, other parts of South Dakota, New Mexico, New York, and Washington, DC.

Human Rights Watch interviewed more than 50 tribal members, including former Tribal Council members and former government employees who have direct knowledge of the activities detailed in this report. Human Rights Watch notified all interviewees about the

purpose and intent of our research, and all interviewees but three agreed to be identified. Those three people are referred to in this report by pseudonyms. Most interviews were conducted individually in person or by telephone. No compensation or other benefits were provided to interviewees.

Dating back to the 1990s, four former Tribal Council members have made complaints to various federal agencies, including the US Attorney's Office in South Dakota, the US Department of Housing and Urban Development, the US Department of Interior, the Bureau of Indian Affairs, and members of Congress, without any follow up investigations. Human Rights Watch interviewed the four former council members about the complaints they had submitted to federal authorities. One of those individuals, Sonny Ziegler, was subsequently re-elected to the Tribal Council in September 2014.

Human Rights Watch also reviewed letters and other submissions to federal authorities alleging wrongdoing by the Tribal Council and interviewed three tribal members who recounted how they met with federal authorities and submitted complaints.

Human Rights Watch obtained hundreds of pages of Tribal Government documents, including federal audits of its activities. Human Rights Watch also obtained the official criminal records of Paul Pomfret and Mark Casolo, who were respectively convicted by federal and state cases. Those two individuals were involved in some of the transactions involving Westrock, and their criminal cases relate to these activities. These records provided valuable insights into Tribal Government activities.

The tribe and its businesses have been subject to several lawsuits in state and federal courts related to the 2009 acquisition of Westrock, a now-defunct Wall Street firm. The Tribal Government has aggressively tried to seal much of the evidence in one key lawsuit related to the Westrock acquisition. Nonetheless, Human Rights Watch obtained some documents from the Westrock cases, including evidence the Tribal Government submitted about its businesses, sworn affidavits by the principals involved, and court rulings citing such evidence. We also interviewed Dr. Gavin Clarkson, president of one of the tribe's businesses and the person who negotiated a key part of the Westrock deal on its behalf. Human Rights Watch also obtained key documents from two federal bankruptcy proceedings relevant to the Westrock deal.

Human Rights Watch repeatedly sought to meet with the Tribal Council, including in April 2013, when the author of this report was in Lower Brule. At that time, council members were unavailable to meet. The Tribal Government's head administrator, Lee Brennan, asked us to contact the Tribal Council in writing.

Human Rights Watch subsequently did so on four occasions to request further information about government activities, solicit its response to Human Rights Watch's findings, incorporate its perspective on issues covered in this report, and to meet in person. In response to these requests, Tara Adamski, the Tribal Government's general counsel, had two brief telephone conversations with Human Rights Watch in May and June 2013. In those conversations, she initially said that the Tribal Council would provide the information Human Rights Watch requested, but has since refused to provide any information to Human Rights Watch.

In September 2014, Human Rights Watch sent detailed letters to each Tribal Council member requesting comments on each of the specific issues detailed in this report. We also notified Ms. Adamski of our requests and repeatedly contacted the Tribal Government for a response to our letters to the council. At this writing, no one from the Tribal Council or any other representative of the government had responded to any requests for information or for comment.

Human Rights Watch repeatedly and unsuccessfully tried to contact federal government officials to discuss allegations of wrongdoing, including officials at the Department of Interior and the Bureau of Indian Affairs (BIA). The BIA is the principal liaison between the US government and tribal governments and was the federal agency responsible for the program that awarded the $22.5 million loan guarantee to the tribal government-owned Lower Brule Community Development Enterprise (LBCDE) for the purchase of Westrock.

At time of writing the BIA had not responded to repeated requests to meet Human Rights Watch. On September 30, 2013, the BIA said it would not provide information in response to a Freedom of Information Act (FOIA) request related to the Westrock deal because this case was now subject to an investigation by the Office of Inspector General. On November 24, 2014, the BIA told Human Rights Watch that it was trying to provide Lower Brule's federal audits in response to a separate FOIA request, but the Tribal Government was attempting to have information pertaining to the request withheld.

Between February and September 2013, Human Rights Watch filed one dozen FOIA requests with different government agencies including the Department of the Treasury, the BIA, the Substance Abuse and Mental Health Administration, and the Department of Housing and Urban Development in order to obtain key documents about the tribe's use of federal funds. At this writing, only some agencies had provided information. In one instance, the Department of Housing and Urban Development gave information despite Tribal Government efforts to prevent disclosures. At time of writing the US Department of Treasury had not responded to requests for audits or information about Tribal Government programs.

At least three people in three different vehicles followed or monitored Human Rights Watch activities during various trips to the reservation. Human Rights Watch was told by tribal members present when that surveillance occurred that it was likely undertaken by the Tribal Government or their associates. Such surveillance illustrates the Tribal Government's suspicion about outside inquiries into their conduct. For these reasons, Human Rights Watch interviewed people individually and in private to minimize the possibility of retaliation or other adverse consequences if they criticized the government.

The documentary information for this report has been posted on the Human Rights Watch website for reference.

I. The Lower Brule Sioux Tribe

The Lower Brule Sioux Tribe, or *Kul Wicasa Oyate* (Lower … Men … Nation) is a part of the *Sicangu Oyate* or the "Burned Thigh" band of the Lakota Sioux, part of the Great Sioux Nation.[1] A larger branch lives at the Rosebud Reservation, South Dakota.[2]

Like Native Americans throughout the United States, the Lower Brule Sioux have borne the brunt of centuries of hardship, repeated conflicts with the US government, and brutal and misguided US policies, including policies of forced assimilation that began in the early 18th century when European explorers and traders first came into contact with the Lower Brule tribe along the Upper Missouri River.[3]

Tensions between the US government and the Sioux continued through much of the 19th century. The first documented case of open conflict between the US government and the Lower Brule tribe occurred in 1854.[4] In 1866, the Lower Brule Sioux led by Chief Iron Nation negotiated a peace treaty with the government that relegated them to the first Lower Brule reservation.[5] In 1868, the Fort Laramie treaty established a Great Sioux Reservation with a specific Lower Brule Reservation at the mouth of the White River and the federal government's Lower Brule Agency.[6]

New conflicts in the 1870s between the Sioux and the US, largely over gold in the Black Hills, led to President Ulysses S. Grant's order that all Native Americans move to their respective reservations by 1876 under threat of force.[7] Native Americans who resisted were soon overwhelmed, and the US took control of the Black Hills in 1877. Disagreement over the ownership of the Black Hills is still a contentious issue between tribal governments and the US.[8]

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[1] The Dakota and Nakota constitute the other branches of the Great Sioux Nation.

[2] Rosebud Sioux Tribe, "About the Sicangu Oyate," 2013, http://www.rosebudsiouxtribe-nsn.gov/visit-us/culture (accessed November 22, 2013).

[3] Professor Ernest Schusky's history of Lower Brule, published in 1975, remains the sole history of the tribe. See Ernest Schusky, *The Forgotten Sioux: An Ethnohistory of the Lower Brule Reservation* (Chicago, Nelson-Hall, 1975).

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] See Ernest Schusky, *The Forgotten Sioux: An Ethnohistory of the Lower Brule Reservation* (Chicago, Nelson-Hall, 1975).

The last two decades of the 19th century spawned brutal federal policies towards Native Americans. The Dawes Act of 1887 established disastrous land seizures and forced assimilation that effectively gave the US government complete control over Native American lives, culture, and livelihoods by removing traditional land and placing it in trust held by the US.[9]

In 1891 the Lower Brule Reservation and the tribe were moved to an area close to Chamberlain, South Dakota. In the following decades, residents fell further into poverty. In the 1920s many resorted to selling their land to meet basic needs.[10]

In the 1930s, US policy towards Native Americans began to reject assimilation, and the Indian Reorganization Act of 1934 authorized limited tribal government. In 1935, Lower Brule was one of the first tribes to have their constitution and government recognized.[11]

But in the 1940s, members of Congress proposed the "termination policy," under which the US government would eliminate reservations, withdraw recognition of specific tribes, and assimilate Native Americans into the dominant culture.[12] Most Native Americans strongly opposed the policy. Convinced the tribe would be better able to advance its interests if it were terminated, Lower Brule's leadership was the only tribe to volunteer for termination. Its request was never granted for reasons that are still unclear.[13]

Termination was tragic for Native Americans. By the time it was ended under the Johnson and Nixon administrations, 109 tribes had already been terminated, almost 1.4 million acres of land held in trust for the tribes had been relinquished (much of it sold to non-Indians), over 13,000 people had lost official recognition as members of a tribe, and

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid. The reasons for the Tribal Government's decision to volunteer for termination are not entirely clear. Professor Schusky, who lived at Lower Brule and is the author of the only history of the tribe and reservation, attributed it partly to the understandable hostility towards the federal government; suspicion of new government programs due to the repeated failures of past ones; and also partly to the Tribal Council's belief that the federal government's system of limited sovereignty had not led to economic development or improved social conditions on the reservation. By pursuing termination and freeing itself from the federal government, Schusky concluded that the Tribal Government thought it might have more opportunities to succeed and reconstitute itself as a community. Schusky noted, however, that tribal members did not overwhelmingly support termination.

poverty had deepened. Presidents Johnson and Nixon ultimately opposed termination, in part due to strong pressure from Native Americans.[14]

A new series of laws and policies followed that promoted greater tribal sovereignty. The Indian Civil Rights Act of April 1968 enshrined certain rights to individual tribal members derived from the US Bill of Rights, and in 1970, President Richard Nixon articulated further policy changes that repudiated termination.[15]

These changes coincided with increased activism on behalf of Native American rights and serious confrontations with the federal government, including the 71-day siege in 1975 by the American Indian Movement (AIM) at the Pine Ridge reservation.

In 1975, the US government passed the Indian Self-Determination and Education Assistance Act intended to partly negate termination policies, strengthen tribal government sovereignty, and recognize that prior federal government programs had "denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities."[16]

The new laws, policies, and court decisions have defined modern tribal sovereignty in the US and relations between the federal government and tribal governments.

[14] President Lyndon B. Johnson, "Special Message to Congress on the Problems of the American Indian: 'The Forgotten American,'" March 6, 1968, http://www.presidency.ucsb.edu/ws/?pid=28709 (accessed February 10, 2014).

[15] President Richard M. Nixon, "Special Message on Indian Affairs," July 8, 1970, http://www.presidency.ucsb.edu/ws/?pid=2573 (accessed February 10, 2014).

[16] Indian Self Determination and Education Assistance Act, Public Law 93-638 of 1975.

II. Tribal Government's Human Rights Responsibilities

When a particular government exercises control over a society's economic resources without meaningful oversight, there is a significant risk of mismanagement or self-dealing. The absence of meaningful government transparency and accountability compounds this risk.

The Lower Brule Tribal Council controls political life on the reservation and virtually all of the tribe's economic resources. It operates in secret and has withheld key information from tribal members and other key constituencies. Millions of dollars in scarce public funds have been diverted from programs intended to help the poor, provide essential services, or promote development to alleviate poverty. The reasons for the diversion have either not been explained, or have been explained in ways that raise serious questions about mismanagement and possible corruption.

Right to Information

Access to information is enshrined as a right under article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) to which the US is a party. That article states, "[e]very one shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[17]

The UN Committee on Human Rights, the interpretive body for this treaty, has said that the right of information requires states parties to "make every effort to ensure easy, prompt, effective, and practical access to such information," including by ensuring that any fees for such requests do not constitute an "unreasonable impediment" to such information.[18]

Although neither the text of article 19(2) nor the Human Rights Committee explicitly state that access to information includes access to government budgets or financial information,

[17] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976., art. 19(2).

[18] UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (2011), paras. 18-19.

this is typically the type of information to which the public needs access in a democratic society to evaluate government performance and hold their governments accountable.

That perspective is supported by experts, such as several UN special rapporteurs on the promotion and protection of the right to freedom of opinion and expression who have repeatedly emphasized the importance of governments and other "public bodies" in making information public because it allows the governed to "challenge or influence public policies; monitor the quality of public spending; and promote accountability."[19] For example, the former UN Special Rapporteur on Free Expression Frank LaRue repeatedly emphasized the importance of access to information for the poor in order to allow them to make informed decisions about poverty alleviation and to enable them to hold their governments accountable.[20]

In the United States, the protection of the right to information is assisted by principles of open government that mean federal, state, and local government proceedings are usually open and records of their deliberations and decisions are public. Public records, such as budgets or other financial information, are relatively easy to obtain. For example, the US Congress, state legislatures, and city councils typically meet openly and their decisions are made public. Many tribal governments are also open and provide some basic information about their activities.[21]

Additionally, the US Freedom of Information Act (FOIA) provides a right to information about federal government activities.[22] This act affords US citizens, including Native Americans, access to some information about the federal government and the use of public funds. The act also can indirectly provide information to people about tribal

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[19] UN Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Frank La Rue," U.N. Doc. A/HRC/14/23, April 20, 2010, para. 31; and UN Commission on Human Rights, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain," U.N. Doc. E/CN.4/2000/63, January 18, 2000, Annex II, The Public's Right to Know: Principles on Freedom of Information Legislation.

[20] UN Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Frank La Rue," U.N. Doc. A/HRC/14/23, April 20, 2010, paras. 54-58; and UN Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Frank La Rue," U.N. Doc. A/HRC/11/4, April 30, 2009, paras. 51-55 and 59-63.

[21] For example, other Sioux Tribes in South Dakota, such as the Rosebud Sioux Reservation, Cheyenne River Reservation, make information about tribal government activities available on their websites.

[22] US Department of Justice, "About the Freedom of Information Act," undated, http://www.justice.gov/oip/about-foia.html (accessed March 16, 2014).

governments because federal funds flow to tribes. States have their own freedom of information laws, but they are far less relevant to gaining information about tribal governments as states have far fewer areas where jurisdiction or funding intersects with tribal governments.

Freedom of information laws are important for transparency, but obtaining documents through freedom of information requests is often a slow, uneven, and costly process. For example, a number of tribal members at Lower Brule filed Freedom of Information Act (FOIA) requests for documents that had financial information about the tribe, but were told that since they did not meet qualifications for fee waivers, they had to pay almost $1,800 in order to access the documents they had requested. In this case, FOIA fees presented a significant barrier to access to information because $1,800 is roughly equal to 13-18 percent of the average per capita income at Lower Brule.[23] While the federal Freedom of Information Act (FOIA) is very useful, it cannot compensate for or replace tribal government transparency.

Moreover, tribal governments are not obliged to adopt freedom of information laws and may not have legal mechanisms to enforce the disclosure of information. At Lower Brule, tribal constitutional provisions for access to information cannot be enforced without the acquiescence of the Tribal Council.[24]

Economic, Social, and Cultural Rights

The failure to invest in the provision of key government functions and public services such as health, education, and water proportionate to a government's available resources is a failure of governmental obligation to progressively realize core economic, social, and

[23] Letter from the US Department of the Interior to Sheryl Scott regarding a Freedom of Information Act request, May 15, 2014, on file with Human Rights Watch. The census considers an individual to be in poverty if their annual income is less than $11,139. United States Department of Commerce, Bureau of the Census, "Poverty Thresholds by Size and Number of Children, 2010," 2010, http://www.census.gov/hhes/www/poverty/data/threshld/index.html (accessed July 21, 2013). The United States Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, also provides the "HHS Poverty Guidelines," which is an often-used measure for determining poverty. The poverty threshold under those guidelines for an individual is $11,170. See US Department of Health and Human Services, "2012 HHS Poverty Guidelines," 2012, http://aspe.hhs.gov/poverty/12poverty.shtml (accessed July 21, 2013). Human Rights Watch chose to use US census data because we also used other census data to determine poverty and employment.

[24] Lower Brule Sioux Tribe Constitution and Bylaws, art. VI, section 1; and Bylaws art. IV, section 4. For a detailed discussion on the jurisdiction of tribal governments, see Stephen Pevar, *The Rights of Indians and Tribes, Fourth Edition* (New York: Oxford University Press, 2012).

cultural rights.[25] Economic, social, and cultural rights, such as the right to an adequate standard of living, the right to housing, the right to health, and many other similar fundamental guarantees, are integral to the international system of human rights. For instance, they are contained in the Universal Declaration of Human Rights (UDHR),[26] an instrument to which all states belonging to the United Nations are deemed to subscribe. The UDHR is increasingly recognized as having the force of customary international law.

Although the US signed the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the leading international treaty protecting such rights,[27] it has not ratified it.[28] Nevertheless, it is bound by customary international law not to take actions that would undermine the object and purpose of the treaty.[29] The discussion by the UN Committee on Economic, Social, and Cultural Rights on the scope of such rights provides an authoritative guidance on measures governments should be taking to ensure rights in this sphere.

Human Rights Watch research over the years in many countries has demonstrated that the diversion of public resources through corruption and mismanagement will generally

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[25] See for example, the discussion by UN Committee on Economic, Social, and Cultural Rights (CESCR), "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights," General Comment No. 14, U.N. Doc. E/C.12/2000/4 (2000), para. 14; the UN Committee on Economic, Social, and Cultural Rights (CESCR), "Implementation of the International Covenant on Economic, Social, and Cultural Rights," General Comment No. 13, U.N. Doc. E/C.12/1999/12 (1999), para. 59; and UN Committee on Economic, Social, and Cultural Rights (CESCR), "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights," General Comment No. 15, U.N. Doc. E/C.12/2002/11 (2002), paras. 16 and 44.

[26] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), arts. 22, 25, and 26.

[27] International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, art. 2(1). Article 12 provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 13 recognizes "the right of everyone to education." The right to water derives from article 11(1), which provides for the right to an adequate standard of living "including adequate food, clothing and housing," and article 12(1), the right to health. Committee on Economic, Social, and Cultural Rights, General Comment No. 15, The Right to Water, U.N. Doc. E/C.12/2002/11 (2002), para. 3. According to the ESC Committee: "The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water." Committee on Economic, Social, and Cultural Rights, General Comment No. 15, The Right to Water, U.N. Doc. E/C.12/2002/11 (2002), para. 10

[28] See United Nations, "International Covenant on Economic, Social, and Cultural Rights Ratifications," 2014, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (accessed August 13, 2014). Belize, Comoros, Cuba, Palau, San Marino, South Africa, South Sudan, and the United States are the only countries that have not ratified this treaty.

[29] See Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980), art. 18. Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess., p. 1, 1971.

violate a government's obligation to "progressively realize" economic, social, and cultural rights because it reduces the available resources a government has to invest in essential services.[30]

International Human Rights, Lack of Enforcement for Tribal Governments, and the Right to an Effective Remedy

The United Nations Declaration on the Rights of Indigenous Peoples also provides specific guidance on how human rights protections apply to people such as Native Americans. Although the US voted against the declaration in 2007, it subsequently endorsed it in 2010. This declaration makes clear that Indigenous Peoples collectively have the right to "maintain and develop their political, economic, and social systems or institutions."[31]

However, the declaration also states that the rights enumerated in the declaration must respect the "human rights and fundamental freedoms of all" and that the "exercise of the rights set forth in this declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations."[32]

Although the declaration does not explicitly define the human rights obligations of indigenous governments, it does recognize and reaffirm that "indigenous individuals are entitled without discrimination to all human rights recognized in international law." It is increasingly recognized that self-determination entails human rights obligations and the governing institutions of Indigenous Peoples are obliged to respect the human rights of the people they govern.[33]

In the United States, the human rights obligations of tribal governments are hard to enforce due to the complicated nature of tribal sovereignty.

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[30] See for example, Human Rights Watch, *"Chop Fine": The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria*, February 2007, http://www.hrw.org/de/reports/2007/01/31/chop-fine; Human Rights Watch, *Well Oiled: Oil and Human Rights in Equatorial Guinea*, July 9, 2009, http://www.hrw.org/reports/2009/07/09/well-oiled-0; and Human Rights Watch, *Transparency and Accountability in Angola*, April 13, 2010, http://www.hrw.org/reports/2010/04/13/transparency-and-accountability-angola-0.

[31] United Nations Declaration on the Rights of Indigenous Peoples, adopted September 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 20.

[32] Ibid., art. 46(2).

[33] Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable Under International Law* (Surrey: Ashgate Publishing Limited, 2012), pp.243-280.

US law does not incorporate international human rights standards in a manner that is binding upon tribal governments. Additionally, some federal protections do not apply in areas solely under the jurisdiction of tribal governments.[34]

This has led to a situation where it is very difficult to hold tribal governments accountable when they violate their members' rights if they have not themselves provided a mechanism for redress, even in matters where other citizens of the United States would have a remedy under federal or state jurisdiction. Noted Native American jurists and legal scholars, such as Michigan State University law professor Wenona Singel, have detailed this loophole in human rights protections:

> Indian tribes are largely immune from external accountability with respect to human rights. In fact, tribes have effectively slipped into a gap in the global system of human rights responsibility.... This gap in the human rights system exists because tribes do not have direct obligations under public international law, they are largely immune from external accountability under the domestic law of the United States, and they are frequently immune from judicial review within their own systems of tribal law. Furthermore, there is no system apart from the limited federal court review process that allows for external accountability.... The failure of the legal system to provide for tribal accountability for human rights produces serious harms for Indian tribes and their politics.[35]

Article 2(3) of the ICCPR, to which the US is a party, sets out that each state party should undertake to "ensure that any person whose rights or freedoms … are violated shall have an effective remedy" that will be determined before a competent authority and be enforced. The ICCPR explicitly provides that remedy needs to exist when the violation is committed by a person acting in an official capacity.[36]

In its General Comment 31, the Human Rights Committee explains that the ICCPR requires that states establish appropriate judicial and administrative mechanisms for addressing

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[34] Stephen L. Pevar, *The Rights of Indians and Tribes, 4th ed.,* (New York: Oxford University Press, 2012), pp. 221-252, 307-327.

[35] Wenona T. Singel, "Indian Tribes and Human Rights Accountability," *University of San Diego Law Review*, vol. 49, issue 3 (2012), pp. 568-625.

[36] ICCPR, art. 2 (3)(a)

claims of rights violations under domestic law. It notes that "administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly, and effectively through independent and impartial bodies." A failure to investigate allegations of violations may in and of itself give rise to a separate breach of the ICCPR. [37]

Members of Native American tribes, like all other people in the US, are entitled to the protection of international human rights law, including the right to an effective remedy. But US federal law and federal courts have regularly ruled that tribal governments are sovereign and have extensive and largely exclusive jurisdiction over their government structures and tribal affairs such as the allocation of funds, distribution of essential services or benefits, and certain criminal matters.[38] Tribal governments have sole discretion as to whether they will provide remedies or create institutions to hold themselves accountable, but if they do not, tribal members have little recourse if they believe that the government has violated their rights or engaged in other forms of misconduct.

There are limited human rights protections under the Indian Civil Rights Act of 1968 (ICRA) that prohibit tribal governments from violating certain rights such as freedom of speech. The law also provides for certain protections for defendants in criminal cases held in tribal courts. But federal courts have ruled that violations of those rights must first be adjudicated in tribal courts since sovereign immunity of tribes is not waived for ICRA and tribal members cannot sue tribal governments in federal courts under the law unless the action involves habeas corpus or is one that also implicates federal law or federal action.[39]

According to Singel, the status of tribal government can be very problematic for the rights of tribal members and for good governance:

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[37] UN Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

[38] For background on tribal sovereignty and human rights, see Wenona T. Singel, "Indian Tribes and Human Rights Accountability," *University of San Diego Law Review*, vol. 49, issue 3 (2012), pp. 568-625; and Steven L. Pevar, *The Rights of Indians and Tribes, Fourth Edition,* (New York: Oxford University Press, 2012).

[39] Wenona T. Singel, "Indian Tribes and Human Rights Accountability," *University of San Diego Law Review*, vol. 49, issue 3 (2012), pp. 568-625.

> The failure of the legal system to provide for tribal accountability for human rights produces serious harms for Indian tribes and their politics. For example, victims of human rights abuses are often unable to obtain a remedy in any forum; their cases are frequently dismissed because of sovereign immunity or lack of subject matter jurisdiction. In addition, the inability of victims to vindicate their rights prevents tribal governments from being held accountable for their actions and engaging in the reform and development that accountability would foster. A third effect is that dismissals create a growing unease with tribal sovereignty in the public, increasing the risk that Congress or the courts will take steps to change the law in a way that diminishes tribal prerogatives of self-government.[40]

Tribal governments also have discretion to set up their own accountability mechanisms. This is an explicit problem at Lower Brule because the Tribal Council has complete control over all parts of government and has not created any oversight mechanisms that would allow tribal members to hold it accountable.[41]

As a result, the Lower Brule Tribal Government, and the Tribal Council in particular, have engaged in a range of actions that have violated and undermined the rights of tribal members.[42] It has also not informed members of its activities and has not set up accountability mechanisms through which it can be held accountable.

In addition to the human rights implications of its activities, the absence of transparency and accountability has meant that the Tribal Government has not met basic standards of good governance deemed essential to foster development and respect for human rights under the UN Declaration on the Rights of Indigenous Peoples.

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[40] Ibid., pp. 568-625.

[41] Lower Brule Sioux Tribe Constitution and Bylaws, Bylaws art. IV, section 4.

[42] Provisions under the Tribal Constitution enshrine basic rules of open government and transparency, while the rights to information, education, and water, for example, are protected under the International Covenants on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.

The declaration states that the enjoyment of the rights enshrined in it are contingent on governments, such as tribal governments, respecting "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith."[43]

While there is no universal definition of "good governance," governments and multilateral institutions such as the United Nations, World Bank, and International Monetary Fund generally accept that it incorporates four key principles: transparency, accountability, participation, and responsiveness to the needs and expectations of those who are governed.[44] These aspects of governance are absent at Lower Brule and thus make it more difficult for tribal members to enjoy their rights.

[43] United Nations Declaration on the Rights of Indigenous Peoples, art. 46(3).

[44] See for example, UN Commission on Human Rights, "The Role of Good Governance in the Promotion of Human Rights," Resolution 2000/64, U.N. Doc. E/CN.4/RES/2000/64 (2000), http://www.refworld.org/docid/3b00f28414.html (accessed March 15, 2014); and United Nations Office for the High Commissioner for Human Rights, "Good Governance and Human Rights," undated, http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (accessed March 15, 2014.)

III. Lower Brule's Tribal Government

As part of a federally-recognized tribe, the Lower Brule Tribal Government enjoys limited sovereignty but extensive authority over domestic affairs on the reservation. That authority has slowly evolved over decades in response to years of often destructive and misguided federal government policies towards Native Americans.

Tribal governments have an extraordinary level of control over resources and tribal members.[45] It is hard to overstate the importance and influence of the Lower Brule Tribal Government, and the ruling Tribal Council in particular, on the political and economic lives of the residents of the reservation.

As detailed below, many tribal members live in poverty and rely on the Tribal Government for assistance.

- Up to 41 percent of the 1,620-strong population lives in poverty—almost three times the rate of the US as a whole.[46]
- Annual per capita income is $9,802-$13,386, compared to about $27,915 for the US as a whole.[47]

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[45] Human Rights Watch interviewed numerous experts on tribal governments, governance, and the interplay between the federal law and rules who confirmed this dynamic and how Native American sovereignty has legally evolved. The four key laws are the Indian Reorganization Act, 1934; Public Law 83-280, 1953; the Indian Civil Rights Act, 1968; the Indian Self-Determination and Education Assistance Act, 1975; and subsequent interpretations of those laws by the Supreme Court, such as in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) that held federal suits other than habeas corpus petitions are prohibited against tribal governments under the Indian Civil Rights Act, placing the principal responsibility for enforcement of rights with tribal governments and tribal courts.

[46] United States Department of Commerce, Bureau of the Census, "Selected Social Characteristics in the United States, 2007-2011 American Community Survey 5-Year Estimates, Lower Brule Reservation and Off-Reservation Trust Land, SD," 2011, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?fpt=table (accessed July 21, 2013). Per capita income is the figure used by the US census to determine income within a community. It is the total income divided by the number of people over the age of fifteen. This is different than Gross Domestic Product (GDP) per capita which is the total GDP for the country divided by the total number of citizens.

[47] The census considers an individual to be in poverty if their annual income is less than $11,139. United States Department of Commerce, Bureau of the Census, "Poverty Thresholds by Size and Number of Children, 2010," 2010, http://www.census.gov/hhes/www/poverty/data/threshld/index.html (accessed July 21, 2013). The United States Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, also provides the "HHS Poverty Guidelines," which is an often-used statistic for determining poverty. The poverty threshold under those guidelines for an individual is $11,170. US Department of Health and Human Services, "2012 HHS Poverty Guidelines," 2012, http://aspe.hhs.gov/poverty/12poverty.shtml (accessed July 21, 2013).

- Unemployment is 29 percent, more than four times the national rate, making government jobs essential for staying out of poverty.[48] The Tribal Government employs about 70 percent of the reservation's workforce.[49]
- At least 34 percent of the population cannot meet their basic nutritional needs and need supplemental food assistance through the Federal Supplemental Nutrition Assistance Program (SNAP, or "Food Stamps") or the Federal Food Distribution Program on Indian Reservations (FDPIR, or "Commodities" program).[50]

The Tribal Government, and the council in particular, also have extensive authority over the private sector on the reservation. The council oversees tribally-owned businesses, regulates the reservation's nascent private sector, allocates land for farming and ranching, and controls housing and social services. Therefore it has near complete control over all of the institutions that administer services or provide funds for those services.

Tribal Constitution

Native Americans have the same rights under US law as other people in the US in areas subject to federal or state government jurisdiction, but not necessarily with respect to other issues that fall solely under tribal government jurisdiction. For example, tribal constitutions and laws may not extend the same rights to tribal members as they enjoy under the US Constitution or federal law with respect to judicial procedures and the structure of tribal governments.[51]

Lower Brule's Tribal Constitution was ratified in 1935 and amended in 1986 to explicitly recognize that all tribal members "be accorded equal opportunity to participate in the economic resources and activities without prejudice" and "enjoy without hindrance

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[48] United States Department of Commerce, Bureau of the Census, "Selected Social Characteristics in the United States, 2007-2011 American Community Survey 5-Year Estimates, Lower Brule Reservation and Off-Reservation Trust Land, SD," 2011.

[49] Ibid.

[50] United States Department of Commerce, Bureau of the Census, "Selected Social Characteristics in the United States, 2007-2011 American Community Survey 5-Year Estimates, Lower Brule Reservation and Off-Reservation Trust Land, SD," 2011. Eligibility for these programs varies by the size of households and their collective incomes. For example, individuals are eligible if their annual net income is less than $12,960 while households of four are eligible if their annual net income is less than $24,972. See United States Department of Agriculture, Food Distribution Program on Indian Reservations (FDPIR), "FDPIR Eligibility Requirements & How to Apply," undated, http://www.fns.usda.gov/fdd/programs/fdpir/fdpir_eligibility.htm (accessed July 21, 2013).

[51] See for example, the Indian Civil Rights Act, 1968.

freedom of worship, conscience, speech, press, assembly, and association."[52] The constitution specifies that the elected six member Tribal Council is the reservation's supreme governing authority and has specific provisions and rules intended to ensure open government and prevent transgressions by public officials.[53] Under Lower Brule's constitution, the council acts as both the legislative and the executive branch of government. The Tribal Council has granted the judiciary independence, but has said that the judiciary has limited jurisdiction over the Tribal Council.[54] The council has not implemented any other independent oversight mechanisms over its own actions. Its power is virtually unchecked on the reservation and as it pertains to members of the tribe.

Tribal Council Membership and Governance

Tribal Council members are elected every two years.[55] It is not possible to detail the exact terms and tenures of Tribal Council members because of the excessive secrecy of the Tribal Government, which refused to provide this information to Human Rights Watch. Human Rights Watch collated information on terms and tenures from individuals with knowledge of Tribal Government activities, press reports, and the results of the 2010 and 2012 elections.

The chairman of the Tribal Council is Michael Jandreau, who according to his military records, served in the US Navy after graduating from high school in the early 1960s. He left the Navy in the mid-1960s, but little is known about his history between that time and when he joined the Tribal Council in the early 1970s.[56]

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[52] Lower Brule Sioux Tribe Constitution and Bylaws, art. III, sections 1 and 2; and art. IV, sections 4 and 5.

[53] Ibid.

[54] The Lower Brule Tribal Government website is www.lbst.org. Sometime in 2013, information about the Lower Brule Tribal Government was taken off of the page. For instance, on July 8, 2013, Lower Brule Tribal Government webpage stated that "courts are established under a quasi-separation of power relationship with the Tribal Government" and "[w]hile the Tribal Council is the final authority on the Reservation, it has formally acknowledged the legal authority necessarily vested in the Tribal Courts." This information is no longer available on the Lower Brule Tribal Government website. See Kul Wicasa Oyate—Lower Brule Sioux Tribe, http://lbst.org/newsite/files/tribalgovernment.htm (accessed July 8, 2013).

[55] Lower Brule Sioux Tribe Constitution and Bylaws, art. III.

[56] The US Navy court martialed Jandreau twice in special court martial proceedings for desertion. He was eventually sentenced to six months' imprisonment with hard labor, and given a "Bad Conduct" discharge in 1963, which is the equivalent of a misdemeanor offense under military rules. United States Department of the Navy, "Action of Officer Exercising General Court-Martial Jurisdiction, in the Matter of Michael Burdette Jandreau, Transient Personnel Unit, Naval Administration Command, US. Naval Training Center, Great Lakes, Illinois," June 12, 1963, on file with Human Rights Watch.

Human Rights Watch tried unsuccessfully to obtain a list of past Tribal Council members from the Bureau of Indian Affairs and the South Dakota state government's Office of Tribal Relations, which both receive copies of the list. Staff at both institutions recommended contacting the tribe directly for older Tribal Council lists, citing a lack of records due to the fact their state government office was relatively new, or because the federal government had archived the records at another location and would take some time to obtain.[57] Patti Gourneau, then-chief administrative assistant for the Tribal Council and recorder of its meeting minutes, refused to provide information on the identities and tenures of individuals who have served on the Tribal Council to Human Rights Watch because she said Tribal Council critics would misuse that information.[58]

Tribal Council Governance

The Tribal Council oversees almost $35 million of tribal and federal resources annually. The council needs a two-thirds majority to make decisions. The Tribal Chairman only votes in a tie, so three people must vote together to pass resolutions or ordinances.[59] Tribal members told Human Rights Watch that historically the chairman and his allies have had a majority on the council and at most one or two council members might be considered independent.[60]

Human Rights Watch research indicates that Chairman Jandreau has the longest tenure of anyone on the Tribal Council.[61] Several other council members have also had very long tenures, including Boyd Gourneau, (Jandreau's nephew and the current vice-chairman), and Council Treasurer John McCauley (also Jandreau's nephew). Both Gourneau McCauley have been council members for at least a decade.[62] Other council members prior to the September 2014 elections were Orville "Red" Langdeau (a cousin of Jandreau), Darrell

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[57] Human Rights Watch calls with receptionists for the South Dakota Office of Tribal Relations in Pierre, SD and the Bureau of Indian Affairs in Aberdeen, SD, July 23, 2013.

[58] Human Rights Watch conversation with Patti Gourneau, by phone, July 23, 2013.

[59] Constitution and By Laws of the Lower Brule Sioux Tribe, By Laws art. IV, section 4. Under the constitution and in practice, tribal ordinances and resolutions are the vehicles under which the Tribal Council formalizes decisions and gives them legal status. Whether it is to declare a public holiday, change salaries of tribal employees or the Tribal Council, enact new criminal laws, or allocate tribal land or other resources to individuals, an ordinance or resolution is how those decisions come into force. Ordinances are meant for permanent decisions, such as criminal laws, and resolutions are used for temporary measures, such as an annual budget, an order to spend tribal funds, or periodic or recurring measures.

[60] Former Tribal Council members Gayle Ziegler, Alfred "Sonny" Ziegler, Ben Thompson, and a fourth former council member reported this in separate interviews with Human Rights Watch.

[61] Jesse Abernathy, "Michael Jandreau Leads Tribe for 33 Years," *Native Sun News*, February 2, 2012, http://www.indianz.com/News/2012/004463.asp (accessed February 10, 2014).

[62] Numerous interviews between December 2012 and July 2013 with tribal members confirmed these relationships.

Middletent, and Shawn Laroche. Human Rights Watch was unable to officially confirm council members' salaries, but estimates based on documentary evidence suggest that council members receive an average annual compensation of approximately $81,000, around nine times the average annual per capita income at Lower Brule.[63]

On September 2, 2014, a new Tribal Council was elected. Jandreau won the chairmanship by 25 votes, Orville Langdeau was elected secretary-treasurer, and John McCauley won an at large seat. Kevin Wright replaced Boyd Gourneau as vice-chairman and Disirae LaRoche and former council member Sonny Ziegler also won seats.[64]

Tribal Judiciary

The Tribal Constitution authorizes a small tribal court system and nominally independent judiciary. The Tribal Council has explicitly said that "courts are established under a quasi-separation of power relationship with the Tribal Government" and "[w]hile the Tribal Council is the final authority on the reservation, it has formally acknowledged the legal authority necessarily vested in the Tribal Courts."[65] Under federal law and court precedents, tribal courts do not have the inherent ability to exercise judicial review over Tribal Government actions and must be explicitly authorized by the Tribal Government to do so.[66]

Tribal Council members can only be removed if they resign, permanently leave the reservation, or are found guilty of a felony, high misdemeanor, or three low misdemeanors

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[63] The $81,000 salary estimate is generally consistent with compensation of other public servants around the US. Human Rights Watch based its estimate on audits, calculating from the direct and indirect expenses attributed to the Tribal Council. Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, pp. 48-51, on file with Human Rights Watch. The estimate of $81,000 is also generally consistent with what tribal members familiar with the salaries said and payroll stubs from former Council members. We understand that council members are not necessarily all paid the same salaries as those with longer tenures, and that the chairman may receive more than other members of the Tribal Council. The estimate does not include benefits such as the free use of tribal vehicles, stipends, per diems, travel, or other payments Tribal Council members may receive, as discussed later in this report.

[64] "Jandreau re-elected as chairman at Lower Brule," *The Capital Journal*, September 3, 2014, http://www.capjournal.com/news/jandreau-re-elected-as-chairman-at-lower-brule/article_3ff431b8-33e1-11e4-b905-001a4bcf887a.html (accessed September 9, 2014).

[65] The Lower Brule Tribal Government website is www.lbst.org. Sometime in 2013, information about the Lower Brule Tribal Government was taken off of the page. For instance, on July 8, 2013, Lower Brule Tribal Government webpage stated that "courts are established under a quasi-separation of power relationship with the Tribal Government" and "[w]hile the Tribal Council is the final authority on the Reservation, it has formally acknowledged the legal authority necessarily vested in the Tribal Courts." This information is no longer available on the Lower Brule Tribal Government website. See Kul Wicasa Oyate—Lower Brule Sioux Tribe, http://lbst.org/newsite/files/tribalgovernment.htm (accessed July 8, 2013).

[66] See for example, Wenona T. Singel, "Indian Tribes and Human Rights Accountability," *University of San Diego Law Review*, vol. 49, issue 3 (2012), pp. 568-625 for a detailed discussion of accountability in tribal government.

in a twelve month period while in office. The Tribal Council can remove a council member by a unanimous vote. Tribal members must follow a difficult process if they want to recall any government official, including a Tribal Council member for alleged misconduct. The process of recalling a tribal government official requires tribal members to file a petition of charges under the tribal Code of Ethics signed by at least 30 percent of voters eligible in the last tribal election. The Tribal Council itself decides whether the petition has merit. There is a right to appeal in tribal court, but the overall process is difficult for tribal members because of the high threshold of voters needed to initiate that petition, the discretion of the Tribal Council to initiate the removal, and uncertainty that the court would rule against the Tribal Council.[67]

Challenging Tribal Council actions in the federal courts is costly, time-consuming, and often precluded by legal barriers. Tribal members first have to challenge the council through a tribal court and then persuade a federal court that the matter involves an issue that is not reserved exclusively for tribal jurisdiction. There are very limited options for remedies in federal courts because federal law is extremely deferential to tribal governments with regard to tribal governance.[68] The only court case that Lower Brule tribal members have filed against the Tribal Government was related to the 1982 election. This case was subsequently appealed to the US Eighth Circuit Court of Appeals and later dismissed because the appeals court determined that federal courts did not have jurisdiction over tribal elections.[69]

[67] Lower Brule Sioux Tribe Constitution and Bylaws, art. V.

[68] Under the Indian Civil Rights Act and subsequent federal court cases, the jurisdiction over tribal elections rests with the Tribal Government and tribal courts and must be adjudicated with those bodies and not the federal government. Notably, the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) upheld tribal sovereign immunity to suit in the federal courts under the Indian Civil Rights Act.

[69] *Goodface, et al. v. Grassrope, et al.,* 708 F.2d 335 (8th Cir. 1983).

IV. Withholding of Information

The Tribal Council refuses to make official information such as budgets and audits available. It routinely violates provisions that ensure access to information in both international law and the tribe's own federally-recognized constitution and bylaws. Articles I and IV of the Tribal Constitution's bylaws state that decisions of the Tribal Council shall be published "for the information and education of members of the tribe." The articles also stipulate that Tribal Council resolutions, the orders that authorize budgeting and the allocation of resources, "shall be recorded in a special book which shall be open to public inspection." The bylaws also state that the Tribal Council secretary "shall keep an accurate record of all matters transacted at the Tribal Council meetings" and provide the Bureau of Indian Affairs with "copies of all minutes of regular and special meetings of the Tribal Council."[70]

Budgetary and audit information would provide tribal members and the public with information to ascertain what the Tribal Government is doing, how it allocates public resources, and other decisions made on the tribe's behalf. Without this, it is difficult for tribal members to hold their government to account. Moreover, there is no independent body within the Tribal Government to hold the Tribal Council accountable. Under Lower Brule's constitution the Tribal Council has authority over all government activity. Anyone who has a complaint about how tribal officials or agencies operate can only petition the Tribal Council for redress.[71]

Government Secrecy

There is strong evidence to suggest that the Tribal Council became more secretive in 2007-2008 in response to growing scrutiny and criticism over the management of public finances by some tribal members and some Tribal Council members. An individual with knowledge of the tribe's activities and events at the time said:

[70] Lower Brule Sioux Tribe Constitution and Bylaws, Bylaws art. I, section 4 and art. IV, section 4.

[71] Lower Brule Sioux Tribe Constitution and Bylaws, Bylaws art. I, section 7.

> "There were groups of people starting to try to put things on the Internet, documents and things, to expose some of the things going on…. [The Tribal Council] really tightened up on their keeping things secret."[72]

In separate interviews Lee Brennan, the Tribal Government's general manager and most senior civil servant in Tribal Government, and Tara Adamski, its general counsel, justified the council's decision to withhold official information on the grounds that some tribal members are "troublemakers" who "misused" public information to criticize Chairman Jandreau and other council members.[73]

Sometime in 2013, the Tribal Government shut down its website. After it was partially reinstated in May 2014, it had only limited information about the government and its activities. Some basic information such as contact information for the government is no longer available on the website.[74] The websites of other tribal governments such as those at Cheyenne River Reservation, Rosebud, Crow Creek, and Pine Ridge in South Dakota regularly provide at least some information about the members of government and records of their activities and decisions.

Withholding of Information

Access to basic information about tribal governance is generally withheld and information is not just denied to people perceived to be government critics. Withholding information appears to be a systematic practice affecting all who might seek information, including tribal members, the Bureau of Indian Affairs, human rights organizations, and even some members of the Tribal Council. The result is that few if any people outside of certain Tribal Council members and civil servants who oversee the finances of the tribe have a complete and comprehensive picture of how the council makes its decisions, what decisions are made, and how tribal funds are spent.

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[72] Human Rights Watch phone interview with a government official, name withheld, April 14, 2013. This official requested anonymity due to fear of retaliation by the tribe or the BIA.

[73] Human Rights Watch interview with Lee Brennan, the general manager of the Lower Brule Sioux Tribe, Lower Brule Sioux Reservation, South Dakota, April 26, 2013; and Human Rights Watch interview with Tara Adamski, general counsel of the Lower Brule Sioux Tribe, by phone, May 28, 2013.

[74] The Lower Brule Tribal Government website is www.lbst.org. Sometime in 2013, information about the Lower Brule Tribal Government was taken off of the page. See Kul Wicasa Oyate—Lower Brule Sioux Tribe, http://www.lbst.org/newsite/home.html (accessed July 8, 2013).

Some members of the tribe told Human Rights Watch that they were denied basic information about government activities. On August 23, 2013, for example, four prominent members of the tribe wrote a joint letter to formally request copies of meeting minutes, financial records, and a briefing by Tribal Council members in order to assess how public funds were used.

In their letter, they noted that the government had not disclosed information for years and said that they "would like to be informed about the financial status of the tribe to understand what funds we as a tribe have and how it is being expended."[75] Since the Tribal Council is the only body that can release such records, they wrote to John McCauley, then-council secretary who was responsible for keeping such records, but received no reply or documents at time of writing.[76]

The Tribal Council's denial of such information violates tribal members' constitutionally authorized access to such information, undermines their right to information, and makes it very difficult for them to exercise any oversight over their elected public officials' use of tribal and federal resources.

From the Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) has legal oversight over certain aspects of tribal governments, including the authority to examine Tribal Council resolutions. Article VI of Lower Brule's constitution specifies that the BIA must review and approve Tribal Council resolutions.[77] However, one government official in a position to be familiar with this responsibility said the tribe began withholding some key information from the BIA and started sending only selected resolutions in 2007.[78] Human Rights Watch was unable to confirm whether this was the case with the Bureau of Indian Affairs or the Tribal Council. The Tribal Council did not respond to repeated requests for information and James Two-

[75] Letter from Lakota George Estes, Sheryl (Estes) Scott, Gail Ziegler, and Janice (Bad Horse) Larson to Tribal Council Member and Secretary, John McCauley, August 23, 2013, on file with Human Rights Watch

[76] McCauley is still a member of the Tribal Council, but no longer secretary at this writing.

[77] Lower Brule Sioux Tribe Constitution and Bylaws, art. VI, section 2.

[78] Human Rights Watch interview with a government official, name withheld, by phone, April 14, 2013. This official requested anonymity due to fear of retaliation by the Tribe or the BIA.

Bulls, the superintendent of the Bureau of Indian Affairs at Lower Brule, would not comment on that matter when Human Rights Watch contacted him.[79]

An individual with knowledge of the Tribal Government's activities told Human Rights Watch that the BIA has not objected to the Tribal Government's practice of withholding some key information, and that the bureau believes it does not necessarily need to have all information unless it pertains to areas of BIA involvement or oversight.

On April 11, 2013, Human Rights Watch contacted the regional office of the Bureau of Indian Affairs that is responsible for Lower Brule requesting Tribal Council resolutions and budget documents. They said tribal governments do not always send such information to the BIA and referred Human Rights Watch to James Two-Bulls, the highest-ranking BIA official at Lower Brule.[80] When contacted by telephone on April 11, 2013 to request copies of Tribal Council resolutions and budget documents, Two-Bulls would not release the documents without the Tribal Council's approval. He asked Human Rights Watch to file a Freedom of Information Act request to obtain information about federal funding that the Tribal Government received.[81]

Human Rights Watch filed a Freedom of Information Act request with the BIA for budget and financial information on August 15, 2013, but did not receive a response. A second request was submitted on June 27, 2014. BIA officials telephoned Human Rights Watch in response to that request on November 21, 2014. They said that the Tribal Government's lawyer did not want them to release any information to Human Rights Watch. The BIA suggested that Human Rights Watch could request a more limited amount of information, but Human Rights Watch requested that the BIA continue to negotiate with the Tribal Government for the all of the information requested.[82]

Of the dozens of people Human Rights Watch interviewed who had direct knowledge about the distribution of resolutions, budgets, and audits or who tried to obtain that information as a tribal member, only Tara Adamski, the Tribal Government's general counsel, claimed

[79] Human Rights Watch interview with James Two-Bulls, superintendent of the BIA at Lower Brule, by phone, April 11, 2013.
[80] Human Rights Watch conversation with staff at the Bureau of Indian Affairs regional office in Aberdeen, South Dakota, names withheld, by phone, April 11, 2013.
[81] Human Rights Watch interview with James Two-Bulls, superintendent of the BIA at Lower Brule, by phone, April 11, 2013.
[82] Human Rights Watch conversation with Daniel Largo and Angela Kelsey, Bureau of Indian Affairs, by phone, November 21, 2014.

that they were publicly available.[83] Several current and former tribal and federal government officials told Human Rights Watch that government employees could be fired for publicly disclosing documents, such as federal audits, even if the documents are considered public information or should be disclosed under the Tribal Constitution.[84]

From Independent Tribal Council Members

Tribal Council members have access to general information about government operations, but according to documents reviewed by Human Rights Watch and interviews with former Tribal Council members, specific information about government activity and the use of public funds is withheld from the public.

Four former Tribal Council members told Human Rights Watch that information was withheld from them while serving on the council. Ben Thompson (1992-1996 and 2002-2004) and Sonny Ziegler (2000-2006 and 2014-present) said that they requested detailed information about the state of the tribal government's finances and other issues related to the management of public funds from the chairman or tribal staff. Their requests were refused and they were unable to obtain that information during their tenure on the council. Both Ziegler and Thompson are considered independent of the chairman.[85]

"When we were on the council and we wanted something [such as budget information], we couldn't get it," Thompson said.[86]

From Human Rights Watch

Tribal officials were unresponsive and even hostile to requests by Human Rights Watch for public information. On April 26, 2013, Human Rights Watch went to the Tribal Government offices at Lower Brule and asked for documents in person. The documents requested by Human Rights Watch should be public documents according to the Tribal Constitution. Members of the Tribal Council were not present, but Lee Brennan, the tribe's general manager, said that in order to access the documents, Human Rights Watch would have to

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[83] Human Rights Watch interview with Tara Adamski, general counsel of the Lower Brule Sioux Tribe, by phone, May 28, 2013.

[84] Human Rights Watch interviewed four current and former officials who all independently confirmed that such information was withheld and that disclosure of information like Tribal Council resolutions or budget information would likely get people fired, even though that information is supposed to be public.

[85] Human Rights Watch interview with Ben Thompson, former Tribal Council member, and Sonny Ziegler, Tribal Council member, Lower Brule, South Dakota, April 26, 2013.

[86] Human Rights Watch interview with Ben Thompson, former Tribal Council member, Lower Brule, South Dakota, April 26, 2013.

formally request them from the Tribal Council, which must pass a new resolution authorizing Human Rights Watch to view the documents.[87]

Tribal Council members had not responded at time of writing to four written information requests by Human Rights Watch and two phone calls with the Tribal Government's general counsel for resolutions, minutes of meetings, audits, and budgets from 2002 to 2013. We also requested to meet with the Tribal Council but they did not respond to Human Rights Watch's requests.

The Tribal Government sought to have federal authorities withhold information from Human Rights Watch. Almost all of the Tribal Government's funds for housing come from the US Department of Housing and Urban Development (HUD) and Human Rights Watch filed a Freedom of Information Act request to obtain information about those programs at Lower Brule. The Tribal Council sought to have information pertaining to the request withheld. According to a HUD representative, this constituted the first time that they could recall a tribal government trying to withhold information in response to a FOIA request.[88] The department eventually sent Human Rights Watch hundreds of pages of documents regarding their funding to the Tribal Government, several months after Human Rights Watch's initial request.

[87] Ibid.

[88] Human Rights Watch conversation with US Housing and Urban Development official, by phone, July 29, 2013.

V. Mismanagement of Public Funds

Human Rights Watch obtained government documents and other official records that showed that the Tribal Government engaged in widespread mismanagement of public funds. Those activities led to scarce resources being diverted from essential services and programs intended to help the poor, undermining tribal members' economic and social rights in the process.[89] This section details how such funds were clearly diverted from their intended purposes, often from programs such as water, education, and other services.

The amount of those diverted funds are substantial in the context of the overall tribal budget. According to audit reports and other information detailed below, the Tribal Government has not provided information on how an estimated $25 million was spent between 2007 and 2013. Most of this amount was explicitly for programs meant to provide essential services, alleviate poverty, or promote much needed economic development.

Annual audits of Tribal Government revenues and expenditures and are federally-mandated because Lower Brule receives substantial federal funds. Such audits are key to understanding tribal government's activities.[90] Known as the "single audit," "combined federal audit," or the "A-133 audit,"[91] they are not detailed forensic audits, just a sample of tribal expenditures, but nonetheless provide an invaluable financial picture of the Tribal Government.

The Lower Brule Tribal Government's finances are largely secret, undermining the right of tribal members to information and making it very difficult for them to know the financial

[89] In October 2013, an Associated Press article reported there had been mismanagement or misappropriation of funds in 124 tribal governments and housing authorities since 1997. "Tribes Mismanage Funds, with Few Repercussions," AP, October 7, 2013, http://missoulian.com/news/state-and-regional/ap-investigation-tribes-mismanage-funds-with-few-repercussions/article_38d37fc0-2f4f-11e3-81c2-0019bb2963f4.html (accessed February 10, 2014).

[90] US Office of Management and Budget, "OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations," 2007, http://www.whitehouse.gov/sites/default/files/omb/assets/a133/a133_revised_2007.pdf (accessed July 30, 2013). OMB Circular A-133 are the guidelines that entities such as tribal governments must follow when being audited for the use of federal funds.

[91] That audit is known as the "combined federal audit." The US Office of Management and Budget also refers to it as the A-133 audit, or the "single audit" because a single audit is supposed to monitor the use of federal and other funds, even when they are from different government agencies. The single audit makes the auditing process more efficient, cost-effective, and provides perhaps the most comprehensive view of the Tribal Government's financial activities, including those of some of its related businesses, and any shortcomings in accounting for funds.

state of the government, any key liabilities, or whether the government has applied their limited resources towards providing basic social services.

Human Rights Watch has also found that several tribal entities were not disclosed in these audits, and perhaps to auditors, including material transactions with the Tribal Government worth at least $1 million related to its purchase of the Westrock brokerage firm.

Overview of Government Revenues and Expenditures

The 2012 tribal audit shows that the Tribal Government had annual expenditures of about $33.8 million with about $44.1 million in revenues for the year. The revenues included a one-time federal settlement payment (the Salazar settlement) of about $14.2 million as compensation for the federal government's historical mismanagement of the tribe's natural resources.[92]

Once Salazar funds are subtracted, the Tribal Government's recurring revenue is about $29.9 million. Of that, about $21.6 million comes from US taxpayer funds as grants or other programs. Federal funds comprise about 72 percent of the Tribal Government's recurring revenues and some 64 percent of the tribe's overall expenditures.[93] The tribe has accumulated long-term debt of almost $33 million, most of it (about $26 million) for long term bond issuances to finance the government's operations.[94]

Several tribally-owned businesses are disclosed in the single audit, but a complete picture of their finances is difficult to discern because key financial information is not fully included and the Tribal Government does not disclose many details about their operations. Information that is disclosed in the federal audits includes their revenue contribution to the Tribal Government. For example, the Lower Brule Farm Corporation (LBFC) is a tribally-owned private entity that oversees the government's ranching and farming interests and is managed by the Lucky 7 Ranch, a non-Native owned business. It contributed about $1.2

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[92] *Cobell v. Salazar* was a large class-action suit brought by Native Americans against the US government because of the mismanagement of Native lands and resources held in trust by the US government. It led to a $3.4 billion settlement that was memorialized in the Claims Resolution Act of 2010. Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 8-9, 26.

[93] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 8-9.

[94] Ibid., p. 28.

million in revenue to the Tribal Government. The Golden Buffalo Casino made about $1.6 million that was transferred to the government.[95]

Land leases provide another key source of revenue. The tribe owns much of the land on the reservation and that land is held in trust by the BIA. That land can be leased to individual members or institutions with council approval. In 2012, income from tribal members, the BIA, and others was more than $1.5 million.[96]

A glaring oversight in the audits since 2007 is the lack of mention of the Lower Brule Corporation (LBC), a tribally-owned and controlled entity created in 2007 under a federally approved charter. Through its subsidiaries the corporation undertook almost $1 million in transactions with the Tribal Government in 2009.[97]

In June 2011, almost three months before the reporting period for the 2012 audit ended, an entity LBC purchased through its subsidiaries went bankrupt that had apparently owed the tribal entity more than $8 million, about 25 percent of tribal expenditures that year. The bankruptcy documents were signed by then-Tribal Vice-Chairman Boyd Gourneau who was also on the board of that company. Based on company records, Chairman Jandreau, then-Treasurer McCauley, and Council member "Red" Langdeau were on the board.

Financial Mismanagement

In 2007, the Tribal Government's comptroller told the Tribal Council that the government received "a favorable audit" and called it "a very good review" because no major financial

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[95] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp.36-38. The Tribal Government generally, and Chairman Jandreau in particular, have touted the success of their farming operations and have claimed that they are the largest popcorn producer in the United States. Perhaps the most publicized tribal venture currently is Lakota Foods, a subsidiary of the farm corporation. It is the first Native American-owned business set up to process, package, and sell popcorn and has been the subject of several favorable media stories. While the Farm Corporation is profitable, it is indebted and its financial health is imperiled by other business ventures and the need to help fund the tribe. Lakota Foods, for example, is unprofitable and its finances are opaque. According to its 2011 and 2012 audits, it lost about $148,000 and $383,000, respectively. The *Washington Post* newspaper reported that the Washington Redskins football team planned to sell its popcorn at its stadium, in part as a response to widespread pressure to change the controversial name of the team. Theresa Vargas and Liz Clarke, "Local Redskins owner Dan Snyder makes visits to Indian Country amid name-change pressure," *The Washington Post*, December 21, 2013, http://www.washingtonpost.com/local/redskins-owner-dan-snyder-makes-visits-to-indian-country-amid-name-change-pressure/2013/12/21/5f939266-6777-11e3-a0b9-249bbb34602c_story.html (accessed December 21, 2014).

[96] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch.

[97] See below, section V. Mismanagement of Public Funds. Lower Brule Community Development Enterprise, LLC, "Balance Sheet, Compiled September 15, 2009," on file with Human Rights Watch. For information about other transactions through 2012, see below, section VII. Westrock.

problems were found.[98] Since then, financial oversight and management have deteriorated, according to the magnitude and severity of problems that independent auditors reported in subsequent federal audits of the tribe's finances.[99]

In all of the cases detailed below, Human Rights Watch contacted the Tribal Council for their perspectives on these matters and for an update on any developments related to them. At time of writing, we have not received any response from the Tribal Council or the Tribal Government generally.

The tribe's auditors reported numerous "material weaknesses" in the annual audits of the government. According to the auditors, material weaknesses describe a lack of internal controls so deficient that it would be very difficult to identify or prevent the misuse of funds.[100] That creates a high risk that an entity such as the Tribal Government may materially misstate how such funds were actually used since it does not properly account for them.[101] Such problems require further explanation and could require repayment of federal funds.[102] These activities could also be subject to further federal investigations if there is evidence of waste, fraud, or abuse.

In its 2008 audit, Eide Bailly, the tribe's auditors, reported that Tribal Government had improperly transferred about $780,000 in federal funds meant to pay for the water supply on the reservation to its discretionary accounts instead of keeping them in a

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[98] Lower Brule Sioux Tribal Council, "Minutes of Regular Session," February 5, 2009, on file with Human Rights Watch.

[99] Human Rights Watch reviewed all of the audits of the Tribal Government from 2007 to 2012. The government never received an audit as favorable as the 2007 audit. All subsequent audits revealed serious financial management problems within the Tribal Government.

[100] Human Rights Watch has obtained copies of Tribal Government audits from Fiscal Years 2006 to 2012. In those audit reports, Eide Bailly defined a "material weakness" as a "significant deficiency, or a combination of significant deficiencies, that results in a more than remote likelihood that material noncompliance with a type of compliance requirement of a federal program will not be detected or prevented by the entity's internal control." That definition, while specific to compliance with rules regarding the use of federal funds, is consistent with the generally accepted definition of a material weakness as promulgated by the US Securities and Exchange Commission (SEC). The SEC considers a material weakness to be a serious breach in financial management because it can contribute to fraud or inaccurate assessments of an entity's financial health. The SEC defines it as "a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis." See US Securities and Exchange Commission, "Final Rule, Definition of the Term Significant Deficiency," September 10, 2007, http://www.sec.gov/rules/final/2007/33-8829.pdf (accessed September 25, 2014).

[101] Eide Bailly, "Financial Statements, September 30, 2008, Lower Brule Sioux Tribe," September 18, 2009, on file with Human Rights Watch, p.64.

[102] For example, the US Department of Interior's Bureau of Reclamation requested an explanation and ultimately repayment of funds because of a diversion of funds revealed through one of the audits. That case is detailed below in section V. Mismanagement of Public Funds.

specific account for water expenditures, as required under federal rules. The government then spent the money for other purposes. In this case, the Tribal Government did not disclose the use of funds, but acknowledged they had been improperly transferred and agreed to repay them.[103] In 2009, problems related to the improper transfer of funds increased. Eide Bailly's 2009 audits found five material weaknesses in tribal financial reports, including:

- Several misstated transactions;
- Misstated use of federal funds;
- Improper payments of more than $175,000 in salaries billed to the wrong accounts;
- Improper use of federal funds for water to cover unspecified expenses; and
- Social welfare payments to people without verifying their eligibility.

Auditors also found that the tribe had paid four unidentified employees a total of about $34,000 in bonuses without any policy or system to justify such payments. The Tribal Government did not disagree with those findings. It said it would repay the missing water funds and was working to correct the serious problems that auditors found.[104]

The 2010 audit revealed some of the same problems, and found new ones. Again, the tribe failed to ensure the eligibility of recipients of key welfare programs, continued to divert federal water funds to pay tribal deficits, misstated federal expenditures, used federal funds intended to help the poorest people on the reservation to close a Tribal Government budget deficit, and did not keep or have a system to keep records to justify how government employees used tribally-owned credit cards.

The Tribal Council agreed with the findings, said it was repaying the water funds, and gave assurances that it would correct the other shortcomings.[105] At time of writing Human Rights Watch could not confirm whether the funds were repaid.

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[103] Eide Bailly, "Financial Statements, September 30, 2008, Lower Brule Sioux Tribe," September 18, 2009, on file with Human Rights Watch, p. 64. Specifically, the audit said: "Management [the Tribal Government] concurs with the finding. The Tribe has entered into a repayment plan with the Bureau of Reclamation to reduce the dollar amount of funds included in the Tribe's pooled checking account. It is expected that the full amount will be repaid within the current period."

[104] Eide Bailly, "Financial Statements, September 30, 2009, Lower Brule Sioux Tribe," June 30, 2010, on file with Human Rights Watch, pp. 63-73.

[105] Eide Bailly, "Financial Statements, September 30, 2010, Lower Brule Sioux Tribe," May 31, 2011, on file with Human Rights Watch, pp. 62-73.

In 2011, the Tribal Government had repeated problems that it previously committed to fix. It again failed to ensure recipients were actually eligible for welfare programs, used federal funds from programs to help the poor to pay other expenses and close tribal deficits, and a lack of internal controls led to a tribal government employee "fraudulently writing off charges totaling $6,000."[106] The tribe acknowledged the problems and committed to fix them.[107]

The most recent 2012 audit again showed the Tribal Government taking funds intended to help the poor and using them to cover other expenses and close government deficits and failing to determine whether people were truly eligible for welfare payments. The auditors also questioned more than $150,000 in personnel expenditures that supervisors did not account for properly. The Tribal Government agreed with those findings and promised to do a better job tracking these expenses.[108]

Laws that govern the flow of federal funds to tribal governments, notably the Indian Self-Determination and Education Assistance Act of 1975, allows the federal government to administer social programs on behalf of tribal governments and contract federal funds to tribal governments to administer those programs themselves. The law also allows the federal government to take over social programs from the tribe and administer them directly at the request of a tribal government or because of mismanagement under a process known as "retrocession."[109] However, retrocession can be controversial and is a laborious, expensive, and uncommon process.[110] In September 2012, for example, the Bureau of Indian Affairs indefinitely took over social services of the Spirit Lake Tribal Government in North Dakota after it determined that the allegations by a whistleblower regarding mismanagement and child abuse in the Tribal Social Services program had merit.[111]

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[106] Eide Bailly, "Financial Statements, September 30, 2011, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch, p. 70.

[107] Ibid., pp. 65-73.

[108] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 67-75.

[109] See Indian Self Determination and Education Assistance Act, Public Law 93-638 of 1975, http://www.bia.gov/cs/groups/mywcsp/documents/collection/idc017333.pdf (accessed December 22, 2014); Indian Self Determination and Education Assistance Act, Public Law 93-638 of 1975, Regulations, http://www.bia.gov/cs/groups/mywcsp/documents/collection/idc017334.pdf (accessed December 22, 2014).

[110] See for example, the Indian Self-Determination and Education Assistance Act, 1975.

[111] "Letter of Grave Concern from Michael R. Titus, the Director of Behavioral Health, Spirit Lake Health Center to Sue Settle, Chief, Division of Human Services, Bureau of Indian Affairs," April 3, 2012, http://www.walkingsky.com/restless/Documents/Soc%20Services/Dr%20Tilus%20letter.pdf (accessed February 10, 2014); US Department of Interior, "Spirit Lake Tribe Retrocedes Social Services Management to the Bureau of Indian Affairs," September 17, 2012, http://www.bia.gov/cs/groups/public/documents/text/idc-021564.pdf (accessed February 10, 2014).

There has been no effort by the federal government to take over any social programs at Lower Brule and administer them directly. Nor has there been any request by the Tribal Government to do so.

Missing US Federal Funds

Human Rights Watch investigated two cases where audits found the Tribal Government had diverted federal funds to cover its own unexplained expenditures. The US government knew of both cases. Both led to millions of dollars in diversions from social welfare funds, including those meant for the poorest people on the reservation, and funds intended to provide and maintain the water supply at Lower Brule.

At least $2.6 million in federal funds intended for key social welfare programs were inexplicably diverted. Another $1.2 million in federal funds to ensure the steady flow of water to the reservation was also diverted. The missing funds represented between 12 and 18 percent of the Tribal Government's annual expenditures.

Many financial agreements with the federal government are colloquially known as "638 Contracts" to reflect that they are authorized under the Indian Self-Determination and Education Assistance Act of 1975. This law is meant in part to strengthen tribal sovereignty by allowing tribal governments to manage federal funds that are supposed to pay for essential services like education or health. A substantial portion of those funds may come from the federal government, but tribal governments are responsible for administering the funds.

Almost half of the Lower Brule Tribal Government's annual revenue comes from the federal government. In total, Lower Brule received about $20.3 million in federal funding in 2012 for social programs and other government operations, or about 46 percent of its overall revenue. One factor that should be noted, however, is that the tribe received a one-time legal settlement from the federal government that year for more than $14 million. Without counting this one-time settlement towards the tribe's revenues for that year, other federal funding makes up a significantly higher percentage of total revenue, or around 68 percent, which is consistent with prior years.[112]

[112] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 8, 62.

The federal government often prepays the tribe for the social services and other activities it should administer in the upcoming year, which allows the Tribal Government to draw on the funds as needed for these services and activities. The tribe follows the US government's October 1-September 30 fiscal year.

According to Tribal Government annual audits, some federal funds were diverted into the tribe's opaque general budget, which pools multiple sources of revenue and can be spent at the Tribal Council's discretion, unlike restricted funds such as federal government funds for social services. General fund expenditures are subject to little oversight and the Tribal Government has yet to account for how the money was spent.

Since federal funds can only be used for their intended purposes, they should appear as a surplus or in reserve if they are unspent. However, the FY2011 audit showed that the government diverted about $2.6 million of government funds into its general budget from programs meant to supply essential services to poor tribal members.[113] In this case, Eide Bailly's auditors found that the money was taken from the federal program to fund schools and the cash assistance program to help some of the poorest people on the reservation, including children, the elderly, and disabled meet their basic needs.[114] The auditors found such problems constituted a "Material Weakness" in the tribe's management because it could lead to serious noncompliance with the rules regarding the use of federal funds.[115]

That finding prompted the Bureau of Indian Affairs to send a letter to Chairman Jandreau on November 15, 2012, asking him to provide a plan to correct the situation, a list of accounts that caused the revenue deficit, and to "certify that these funds have since been replaced" so that they would not have to withhold that amount from future funding. The BIA did not ask how the $2.6 million had actually been used or whether the intended beneficiaries were affected by the diversion of funds.[116]

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[113] Eide Bailly, "Financial Statements, September 30, 2011, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch, p. 67.

[114] Ibid., p. 72. Auditors identified the Department of Interior's Indian Social Services and Welfare Assistance Program (CFDA #15.113); the Indian School Equalization Program (CFDA #15.042); and the Indian Education Facilities Operations and Maintenance Program (CFDA #15.048) as some of the programs that had funds diverted.

[115] Eide Bailly, "Financial Statements, September 30, 2011, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch, p. 67.

[116] Letter from Krissanne R. Stevens, awarding official, Bureau of Indian Affairs to Michael Jandreau, Lower Brule Sioux Tribe, November 15, 2012, on file with Human Rights Watch.

The Tribal Government did not account for the diverted funds and the problem remained unresolved the following year, according to the tribe's FY2012 audit.[117] The Tribal Council refused to explain the use of funds to Human Rights Watch. However, one official acknowledged that the Tribal Government did not use the funds for the intended programs and reportedly promised to repay the missing federal funds from a multimillion dollar settlement from the US government.[118] At time of writing, the Tribal Council did not respond to requests by Human Rights Watch regarding the use of those funds or whether the federal government had been repaid.

What Happened to the Money? Two Unexplained Gaps

The Salazar Settlement

The Salazar settlement was an approximately $18 million settlement between the Lower Brule Sioux Tribe and the federal government—part of a $3.4 billion settlement with tribes throughout the country due to federal mismanagement of tribal land and other resources.

Of the $18 million about $3.76 million was allocated to attorney's fees and other legal costs and the Lower Brule tribal government received about $14.2 million. The council spent about $4.3 million to pay government debts and accumulated shortfalls. It allocated $1.8 million to repay land and operations loans, $1 million to cover payroll, and $1.5 million for their general fund. The balance of about $10 million was deposited in account until the Tribal Government decided how to spend it.[119]

It is not clear how all of the money has been spent, and the Tribal Council has not disclosed what it plans to do with it. On December 6, 2012, the council announced that it would distribute $750 to each living tribe member enrolled before November 20, 2012.[120] According to the BIA, there are about 3,410 tribal members on and off the reservation.[121] The per-capita

[117] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p. 72.

[118] Human Rights Watch phone interview with a government official, name withheld, location withheld, April 14, 2013. This official requested anonymity due to fear of retaliation by the tribe or the BIA.

[119] Lower Brule Sioux Tribal Council, "An Open Letter to the Tribal Members of the Lower Brule Sioux Tribe," December 4, 2012, on file with Human Rights Watch.

[120] Lower Brule Sioux Tribal Government, "Memo to All Tribal Members," December 6, 2012, on file with Human Rights Watch.

[121] US Department of Interior, Bureau of Indian Affairs, "Lower Brule Agency," undated, http://www.bia.gov/WhoWeAre/RegionalOffices/GreatPlains/WeAre/Agencies/LowerBrule/index.htm (accessed July 30, 2013).

payment total would have been about $2.56 million, leaving the Tribal Government a balance of approximately $7.44 million. The government did not disclose how it intended to use those funds and has not publicly accounted for it at time of writing.[122]

The Rural Water Program

The *Mni Wiconi* water project was a federal program that began 1988 to build water infrastructure, primarily at the Lower Brule, Rosebud, and Pine Ridge reservations because there was a lack of potable water there and in other parts of rural South Dakota. The program funds the water infrastructure and related operating costs needed to supply residents with adequate water supplies.[123] Planning for the project began in 1993 and the infrastructure was completed in the fall of 2013, but ongoing federal funding is needed to pay for operation and maintenance costs in order to ensure safe supplies of water to an estimated 55,000 people in rural South Dakota.[124]

The completion of the project had been delayed for years due to chronic federal underfunding. Similarly, maintenance of the infrastructure was also underfunded after parts of the water system were completed. For example, the Pine Ridge reservation took its first delivery of water in 2008.[125] At Lower Brule, however, another key reason why potable water supplies were delayed is because the tribal government mismanaged water project funds.

In 1999, the US Department of Interior's Office of the Inspector General (OIG) issued a highly critical report of the Lower Brule tribal government's poor planning related to the project and its mismanagement of *Mni Wiconi* funds. It found that there were cost overruns of some $7.1 million. The Bureau of Reclamation and the Tribal Government decided to expand the scope of the project

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[122] When the payments were distributed at a bank on the reservation, the floor collapsed due to the high volume of people trying to collect their money. No one was injured. See "Rush to Cash Checks Collapses Bank Floor," *Rapid City Journal*, December 20, 2012, http://rapidcityjournal.com/news/rush-to-cash-checks-collapses-bank-floor/article_ef39705e-85e0-5644-9802-d879a81b9922.html (accessed February 20, 2014). Video of the event is also at: "Lower Brule Bank," December 31, 2012, video clip, YouTube, http://www.youtube.com/watch?v=rwJjBdhEOkA (accessed December 10, 2014).

[123] The Mni Wiconi Project Act, Public Law 100-516 of 1988.

[124] US Congressional Budget Office, Cost Estimate S.684, Mni Wiconi Project Act Amendments of 2013, July 11, 2013, http://www.cbo.gov/sites/default/files/cbofiles/attachments/s684.pdf (accessed August 15, 2014); and US Department of Interior, "Budget Justifications and Performance Information Fiscal Year 2015," http://www.usbr.gov/budget/2015/FY%202015%20Reclamation%20Budget%20Justifications.pdf (accessed August 15, 2014), pp. GPR51-52.

[125] US Department of Interior, Bureau of Reclamation, "Mni Wiconi Water Project to Celebrate First Water Delivery to Pine Ridge Reservation," August 18, 2008 http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=24041 (accessed December 21, 2014).

and the Inspector General's report concluded some of the estimated $7.1 million in overruns were justified expenses.[126] However, the OIG also found that unlike other tribal governments involved in the project, Lower Brule's government made no effort to design or hire experts to design a water system that would actually meet the needs of people on the reservation when the project was first planned.[127] As a result, the true cost of providing water to Lower Brule was much higher than estimated and led to millions of dollars in cost overruns for the project.[128]

Even though the project was already underfunded due to mismanagement, funds were even scarcer because the Lower Brule Tribal Government improperly spent at least $155,451 on vehicles, salaries, and travel for staff, office equipment, and other costs that were not used for the water project. It also paid $73,074 in salary and benefits to a person that the OIG report said the tribe did not provide any documentation to justify or "identi[fy] the work performed and how it related to the [*Mni Wiconi*] System."[129]

The most critical finding by the Inspector General was that Tribal Council members had paid themselves a total of $22,000 out of those funds and another $3,000 for secretarial services from February 1995 to April 1996, purportedly as payments to members of a water oversight board known as the "*Mni Wiconi* Steering Committee." But the OIG could not find any evidence that such a Steering Committee ever met to perform any work related to the water project. Instead, the OIG reported that the committee "conducted its business during Tribal Council meetings." The report also stated, "we could not find, and the tribe did not provide, separate minutes of meetings for the Steering Committee showing that business related to the System was conducted to justify the payment of stipends."[130] The OIG reported that stipends were paid throughout 1996 without any supporting documentation showing any meetings were held.[131]

Ultimately, the OIG and Bureau of Reclamation agreed that $98,074 of those funds should be paid back to the federal government unless the Tribal Government could provide justification for those expenses. The OIG did not recommend any other course of action.[132] Human Rights Watch could not determine whether they had been repaid.

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[126] US Department of the Interior, Office of Inspector General, "Audit Report: Lower Brule Sioux Rural Water System, Mni Wiconi, Rural Water Supply Project, Bureau of Reclamation," Report Number 99-I-588, June 1999, on file with Human Rights Watch, p. 5.

[127] Ibid.

[128] Ibid.

[129] Ibid., p. 14.

[130] Ibid.

[131] Ibid.

[132] Ibid.

In 2009, almost 10 years after the OIG's report, the US Department of the Interior's Bureau of Reclamation in a letter to Chairman Jandreau asked for a meeting with the Tribal Government to discuss 2006 and 2007 audits that revealed $1.2 million in federal funds designated for water projects "were used for other purposes and were not returned to the project."[133] The bureau asked for the meeting "due to the seriousness of this issue and the magnitude of money involved," to determine the use of such funds, their repayment, and how to avoid future problems.[134]

Several months of discussions between the Bureau of Reclamation and the Tribal Government followed. The stalemate held up the disbursement of funds available to the tribe under the American Recovery and Reinvestment Act (ARRA), also known as the Obama administration's "stimulus package," which came into force in February 2009.[135]

The obligation to repay those diverted funds to the federal government could potentially lead to a further loss of $1.2 million to the Tribal Government and undermine its ability to maintain the water supply and other social welfare projects from which funds were originally diverted. Gayle Ziegler, a member of the Tribal Council at that time, alleged in letters to the Bureau of Indian Affairs that funds from other social programs were diverted from other essential social programs to repay the funds, but she did not receive a reply.[136] Later, the tribal government agreed to repay the funds to the US government at a rate of $25,000 a month because it did not have enough money to repay all of the funds at once.[137] To Human Rights Watch's knowledge, there was no further investigation into the use of those funds, or the impact of repayment on the programs from which they were diverted. The Tribal Government did not respond to requests for clarification.

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[133] Letter from Dennis Breitzman, Area Manager for the US Department of Interior's, Bureau of Reclamation to Michael Jandreau, Chairman of the Lower Brule Sioux Tribe, March 4, 2009, on file with Human Rights Watch.

[134] Ibid.

[135] American Recovery and Reinvestment Act, Public law 111–5 of 2009. See US Library of Congress, "THOMAS Legislation locator for Public Law 111-5," http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00001:@@@S (accessed July 15, 2013).

[136] Letter from then-Tribal Council member Gayle Ziegler to Mike Black, area director for the US Department of Interior, Bureau of Indian Affairs, April 8, 2009, on file with Human Rights Watch.

[137] Email from Arlene Erdahl, US Department of Interior, Bureau of Reclamation to Linda Lurken, Lower Brule Sioux Tribe Comptroller, May 29, 2009, on file with Human Rights Watch. In that email, a tribal official said they consulted with Chairman Jandreau and would repay the funds at a rate of $25,000 a month, then asked Erdahl about the implications of that plan. Erdahl said, "Yes, if you deposit a repayment of at least $25,000 per month into the rural water savings account, you can pay 100% of the o&m [operations and management] out of that account. LBST [the Lower Brule Sioux Tribe] can deposit more than $25,000 if they are able and wish to have the balance repaid sooner."

The Human Rights Impact of Diverted Funds

There is evidence to suggest that increasing secrecy and the diversion of funds may have correlated with a decline in the quality of education available at Lower Brule, and has had a negative impact on the rights of tribal members, especially children, because of the impact on the education system.

As noted above, an unspecified amount of the $2.6 million in federal funds that were diverted came from federal funds that are the main source of funding for the Lower Brule school system.[138] That meant that the Tribal Government did not invest its available resources into education, even when those funds were solely designated for that purpose. The total amount of federal funding from the Departments of Interior and Education designated for Lower Brule's education system in fiscal year 2012 was approximately $5.5 million.[139]

During the 2007-08 school year, the same year when the Tribal Council began to withhold information about its activities, approximately 54.7 percent of students were proficient or advanced readers and about 39.8 percent were proficient or advanced in math at Lower Brule's schools.[140] By the 2011-12 school year, the last available for Lower Brule and more than a year after the Tribal Council diverted education funds, only about 25 percent of students were proficient or advanced in reading and only about 25.7 were proficient or advanced in math.[141]

Lower Brule's school system at all levels is run by the Tribal Government but funded by the federal government through 638 Contracts. Lower Brule's schools are among the 183

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[138] The two programs where funds were diverted were the Department of Interior's Indian School Equalization Program which provides funding to tribal governments to operate their K-12 schools; and for the Indian Educations Facilities Operations and Maintenance program to fund the upkeep of school infrastructure. In the year funds were diverted, funding for those programs at Lower Brule was approximately $2.1 million and $405,000, respectively. See, Eide Bailly, "Financial Statements, September 30, 2011, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch, pp., 9, 52, and.67.

[139] Eide Bailly, "Financial Statements September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 58, 61.

[140] US Department of Interior, Bureau of Indian Education, Division of Performance and Accountability, "Annual School Report, Lower Brule Day School SY2007-2008," http://www.bie.edu/cs/groups/xbie/documents/text/idc-008156.pdf (accessed August 13, 2014).

[141] US Department of Interior, Bureau of Indian Education, Division of Performance and Accountability, "Annual School Report, Lower Brule Day School SY2011-2012," http://www.bie.edu/cs/groups/xbie/documents/text/idc1-024081.pdf (accessed August 13, 2014). Unlike 172 other tribal schools, at time of writing, Lower Brule did not report performance scores for the 2012-2013 school year.

tribally-run schools that fall under the jurisdiction of the US Department of Interior's Bureau of Indian Education (BIE) instead of state and local governments as is typical for public school systems in the United States.[142]

Lower Brule's schools had higher achievement rates than the national average for all BIE funded and tribally-run schools in the 2007-08 school year. Nationally, 38.4 percent of students were proficient or advanced in reading while 32.6 percent were proficient or advanced in math.[143]

The BIE's most recent national data that analyzes performance during the 2010-11 school year showed that Lower Brule had fallen well below performance average by the 2011-12 year. National averages showed that approximately 41.4 percent of students at tribally-run schools were advanced or proficient in reading while 32.8 percent were proficient or advanced in math—much higher than the declining performance levels at Lower Brule schools.[144]

Human Rights Watch spoke to parents of school-age children at Lower Brule and educators about the quality of Lower Brule schools.[145] People consistently said that the quality of education and the environment at Lower Brule schools were very poor and that many parents sent their kids to the closest state public schools in Lyman and Brule Counties because that was the only reasonable way for their children to get an adequate education. However, the closest schools outside the Lower Brule Reservation are 40-50 miles away, and in difficult winter weather conditions it becomes extremely challenging for children to go to school.

Theresa M.[146] told Human Rights Watch that she was considering quitting her job to home school her five-year-old daughter because she did not want such a young child commuting 80-100 miles every day to school. She also noted that it was "survival of the fittest" at Lower Brule schools, but it would be "miraculous" if they worked properly. In her view,

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[142] US Department of Interior, Bureau of Indian Education, "Schools," 2014, http://www.bie.edu/Schools/index.htm (accessed August 14, 2014).

[143] US Department of Interior, Bureau of Indian Education, "Bureau-Wide Annual Report Card 2007-2008," http://www.bie.edu/cs/groups/xbie/documents/text/idc-008152.pdf (accessed December 22, 2014).

[144] US Department of Interior, Bureau of Indian Education, "Bureau-Wide Annual Report Card 2010-2011," http://www.bie.edu/cs/groups/xbie/documents/text/idc016697.htm (accessed August 14, 2014).

[145] Human Rights Watch interviewed several parents and educators about Lower Brule schools between December 2012 and August 2014.

[146] This is a pseudonym used at the individual's request to protect her from potential retaliation. Human Rights Watch interview, name withheld, by phone, August 13, 2014.

children on the reservation, including those too poor to commute or those who come from very challenging home environments who have little or no adult supervision, do not have access to quality education.[147]

Amanda R., another member of the tribe and mother of two small children, said that she would never have attended Lower Brule's schools, and would not send her children to schools or daycare there:

> The possibility of getting a decent education in Lower Brule is slim to none and a lot of kids go to school in Chamberlain or Kennebec.… I don't know if funds are managed well, but I know a cousin of mine went there and said 'we don't even have enough math books.' Another cousin went to school in Colorado and then went back as a freshman in high school or eighth grader to Lower Brule and they were two years behind her public school in Colorado as far as math was concerned. They [school officials] even asked her whether she wanted to move ahead a grade because they were so far behind.… No place is trustworthy there to take my kids.[148]

South Dakota state education statistics illustrate the discrepancies between Lower Brule's schools and schools in adjacent counties. In the Chamberlain school district in Brule County, 70 percent of children in all grades were proficient or advanced in reading while 76 percent were proficient or advanced in math during the 2011-12 school year. Native American students in Chamberlain also performed far better than their counterparts at Lower Brule, with 57 percent proficient or advanced in reading and 68 percent proficient or advanced in math.[149] At a minimum, school performance levels were more than double that at Lower Brule. Many parents at Lower Brule send their children to schools in adjacent counties instead of their local schools because they feel they are better for their children.

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[147] Human Rights Watch interview Theresa M., by phone, August 13, 2014.

[148] Human Rights Watch interview with Amanda R., by phone, March 8, 2013. Human Rights Watch used a pseudonym to protect this individual from potential retaliation.

[149] South Dakota Department of Education, "No Child Left Behind 2011 Report Card Chamberlain 07-1," 2011, http://www.doe.sd.gov/NCLB/reports/2011/reportcard/2011district07001.pdf (accessed August 14, 2014).

The discrepancy between Lyman County, where Kennebec is located, and Lower Brule schools is even greater. Student performance in Lyman County schools was more than three times higher than Lower Brule's. In Lyman County, 76 percent of children in all grades were proficient or advanced in reading and 86 percent were proficient or advanced in math. 71 percent of Native American students in Lyman County schools were proficient or advanced in reading and 81 percent were proficient or advanced in math.[150]

By the end of 2013, the decline of Lower Brule's schools was so severe that the school system was forced into "restructuring" as required by the 2001 No Child Left Behind Act. Under that law, any school that fails to make adequate progress in student achievement for five years must restructure in order to be eligible for federal funds. Restructuring can include replacing all or most of school staff, contracting with a management company to take over administration of schools, or turning a school into a public charter school.[151]

In December 2013, the Tribal Government removed much of the school administration, dissolved the school board, and contracted with the American Indian Institute for Innovation, a nonprofit educational firm, to help restructure and take over administration of the schools.[152]

[150] South Dakota Department of Education, "No Child Left Behind 2011 Report Card Lyman 42-1," 2011, http://www.doe.sd.gov/NCLB/reports/2011/reportcard/2011district42001.pdf (accessed August 14, 2014).

[151] No Child Left Behind Act, Public Law 107-110 of 2001, title I, section 1116(8).

[152] Human Rights Watch interview with Stacy Phelps, Chief Executive Officer of the American Indian Institute for Innovation, by phone, August 14, 2014.

VI. Conflicts of Interest

Lack of access to information, inadequate accounting for federal funds, unexplained transfers that suggest budgetary mismanagement, and lax federal oversight has made it difficult for tribal members to secure their rights. Conflicts of interest between the personal economic interests of Tribal Council members and their public responsibilities are another element that has made government accountability difficult to achieve. In particular, when council members are principals of tribally-owned companies, their personal interests may not align with the interests of tribal members who are the stakeholders of these enterprises and on whose behalf they are supposed to function.

In Lower Brule, tribal businesses have been set up in a manner that allows individual Tribal Government officials or their business associates to personally profit from the use of public resources, thus diverting scarce funds away from activities that could help to realize the rights of tribal members. The 1999 Office of Inspector General's report on the *Mni Wiconi* Water Project first exposed and criticized this practice when Tribal Council members apparently appointed themselves to a water oversight board and paid themselves thousands of dollars as members, but could not produce any evidence that the water board did any work.[153]

From a human rights perspective, these practices violate tribal members' right to information since they are largely secret. They also may affect economic and social rights as these arrangements involve the use of public funds that could be used to provide for essential services on the reservation.

Since these activities involve the tribe's own resources under Tribal Council jurisdiction, there is little if any oversight by the federal government, and tribal members who want to allege wrongdoing have little recourse to do so. As noted earlier, these are decisions that, if officially authorized, are very difficult to challenge.

Chairman Jandreau and other Tribal Council members can officially create or control tribally-owned business, allocate Tribal Government funds and resources to and from

[153] US Department of the Interior, Office of Inspector General, "Audit Report: Lower Brule Sioux Rural Water System, Mni Wiconi, Rural Water Supply Project, Bureau of Reclamation," Report Number 99-I-588, June 1999, on file with Human Rights Watch, p. 5.

those businesses, and can profit from those transactions as board members of those businesses. When information on these financial and fiduciary relationships is withheld from the public, there is little check on the perception of self-dealing. For people both within and outside the government, the perception that the Tribal Council, its family members, and allies benefit from tribal largesse while others are ignored is a common source of dissatisfaction and distrust on the reservation.

Ben "Bugsy" Thompson, a former Tribal Council member from 1992-96 and 2002-04 explained that he was concerned that there was "no fair play" on the council. Instead, those seen as close to the council benefited while others did not. "If you're just a little person you don't get any help at all," said Thompson. "That's why you have so many disgruntled people—pissed off people."[154]

Two areas where there is a strong perception of bias are in the allocation of land and alleged self-dealing by council members and their associates. Tribal Council members exercise control over tribally-owned businesses and other agencies for which the tribe has fiduciary responsibility.[155] These include the Lower Brule Farm Corporation and the Lower Brule Housing Authority, which run the tribe's agricultural business and manage maintenance and allocation of housing on the reservation.[156] Legally separate from the Tribal Government, they do not have to disclose their deliberations or all of their detailed financial information to tribal members or to the public.[157]

Each entity has its own board of directors. In its audits, the Tribal Council has said it is independent from these entities and that its sole authority over them is to appoint an independent board to exercise oversight on its behalf.[158] In reality, council members appoint themselves as paid directors of the boards, which Tribal Council members oversee. For example, Chairman Jandreau and Vice-Chairman Gourneau chair the boards of the Lower Brule Corporation and its subsidiaries.

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[154] Human Rights Watch interview with Ben Thompson, former Tribal Council member, Lower Brule, April 26, 2013.

[155] See for example, Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p. 16.

[156] Ibid., p. 16.

[157] Human Rights Watch interview with Tara Adamski, general counsel of the Lower Brule Sioux Tribal Government, by phone, May 28, 2013.

[158] See for example, Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p. 16.

The individual cases below do not involve enormous sums of money, but collectively demonstrate how an entrenched council can control sizeable tribal resources without meaningful oversight.

Lower Brule Corporation

The tribe formed the Lower Brule Corporation (LBC) in 2007 ostensibly to function as a lucrative venture that would acquire new businesses and profit from them tax-free. As this report will explain in greater detail below, LBC ultimately made the ill-fated acquisition of the Westrock Group through LBC's wholly owned subsidiaries.

A key issue in forming the LBC was the composition, role, and benefits of its board of directors. Its formation provides insight into how council members institutionalized a governance structure that would almost certainly lead to conflicts of interest between individual council members and the tribe's overall interests.

Federal law requires that such a company is wholly owned by a tribe, but the company can have an independent board of directors. Independence is advised to avoid politics and conflicts of interest, and to allow the business to operate independent of the Tribal Government and in the tribe's best interests.[159] Under the rules the council devised, however, the LBC's board would have to be Tribal Council members. Therefore, Lower Brule's Tribal Council chose to retain control over the business—a potentially lucrative move for the board if the venture succeeded, albeit with potentially serious conflicts of interest for them as elected public servants.

LBC's charter and other governance documents authorize compensation for board members, including Tribal Council members. It also allows board members or their families to do business with the company or to hold financial interests in companies that do business with LBC.[160] The charter specifies that public officials who sit on its board should act in the corporation's best interest.[161] LBC can also create subsidiaries with their own

[159] See Karen J. Atkinson and Kathleen M. Nilles, "Tribal Business Structure Handbook, 2008 Edition," US Department of the Interior, Office of the Assistant Secretary of the US Bureau of Indian Affairs, 2008, http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf (accessed February 10, 2014).

[160] Federal Charter of Incorporation Issued by the United States of America: Lower Brule Sioux Tribe for Lower Brule Corporation, a Federally Chartered Corporation, April 2007, on file with Human Rights Watch.

[161] Ibid.

boards.[162] Without strong conflict of interest regulation, that can potentially allow the same people to receive compensation from several subsidiary boards and to profit from business with those subsidiary companies too. This is what happened in the ill-fated Westrock investment described in further detail below.

Lower Brule Farm Corporation

The Lower Brule Farm Corporation (LBFC) is a multimillion dollar operation that manages the tribe's farming operations and is wholly owned by the Tribal Government and controlled by the Tribal Council. In the 2012 fiscal year, it contributed at least $1.2 million to the Tribal Government out of approximately $29.8 million in recurring revenue.[163]

Although the Tribal Government owns it, LBFC's deliberations and activities are not publicly disclosed or even disclosed to members of the tribe. LBFC's financial records and other key information about its activities are not available to tribal members, and detailed financial information about LBFC is not included in Tribal Government audits.[164]

Structurally, the LBFC shares 25 percent of its profits with the Lucky Seven Ranch, a private farming company, because Lucky Seven is contracted to manage LBFC's operations.[165] That arrangement has been under federal investigation since 2009 over possible improprieties in the management of tribal lands and livestock.[166] Members of the LBFC board have included Chairman Jandreau, other council members, and business associates of the tribe.[167]

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[162] See for example, Lower Brule Corporation, "Resolution Approving the Formation and Chartering of Lower Brule Community Development Enterprise, LLC, a Delaware For-Profit Limited Liability Company," September 9, 2009, on file with Human Rights Watch; Lower Brule Community Development Enterprise, "Articles of Organization of the Company," September 9, 2009, on file with Human Rights Watch; and Lower Brule Community Development Enterprise, "Lower Brule Community Development Enterprise, LLC Operating Agreement," undated but submitted as evidence by the Tribe in *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, on file with Human Rights Watch.

[163] An Eide Bailly audit reported that the Lower Brule Farm Corporation has been under federal investigation for unspecified reasons. In that audit, the Tribal Government has denied any wrongdoing. See Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, pp. 8, 16, and 38. Recurring revenue does not include about $14.2 million from the one-time Salazar settlement.

[164] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p. 16

[165] Lower Brule Farm Corporation, Minutes of the Executive Board Meeting, June 16, 2001.

[166] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p. 46.

[166] Ibid.

[167] In 2001, the board included Chairman Jandreau and Council member Boyd Gourneau who is also Jandreau's nephew. R. Dennis Ickes and Bill Thompson, the brother of former Chairman Joseph Wayne "Jiggs" Thompson, were also on the board.

According to documents obtained by Human Rights Watch, representatives of the Lucky Seven Ranch are also on the LBFC board, but constitute a minority on the board. The Tribal Council refused to provide Human Rights Watch with a current list of board members.

Human Rights Watch requested board meeting minutes from the Tribal Council members on the Lower Brule Farm Corporation board, but they did not respond to these requests. However, Human Rights Watch obtained some minutes of board meetings from other sources that illustrate instances when the LBFC board authorized payments to themselves, even as some also served as public officials overseeing this publicly-owned corporation. These transactions, while not large, are considered significant in a tribe where the average yearly income is approximately $10,000. At the least, they raise questions about the perception of self-dealing in a small governing body where many individuals are related through family and business ties. Some examples include:

- At a June 16, 2001 board meeting, Chairman Jandreau who also served on the board of LBFC said he wanted to be paid by LBFC at the rate of $28 an hour for the 80 hours of work he said was required to secure a loan for the Farm Corporation. In effect, the head of government wanted the government-owned farm corporation to pay him additional funds for work he did on its behalf. The board authorized payment of $2,240. Bill Thompson, then a board member on LBFC, noted that he was paid $1,500 a month by the farm board and wanted a 5 percent salary increase. The board agreed.[168]
- During an October 2002 board meeting, Scott Jones, the chairman's half-brother and a Tribal Government employee, proposed that members who have served on the Farm Corporation board for at least 15 years should receive $7,000 "cash compensation." Chairman Jandreau, Dennis Ickes, and Bill Thompson qualified for that payment. He also proposed that they should receive an additional $1,000 annually as long as they served on the board. The resolution passed, though Ickes, Jandreau, and Thompson abstained from the vote.[169]

The minority members of the board included the owners of the Lucky Seven Ranch. Lower Brule Farm Corporation, "Minutes of the Executive Board Meeting," June 16, 2001, on file with Human Rights Watch.

[168] Lower Brule Farm Corporation, "Minutes of the Executive Board Meeting," June 16, 2001, on file with Human Rights Watch.

[169] Lower Brule Farm Corporation, "Fall Board Meeting Minutes," October 23, 2002, on file with Human Rights Watch.

Lower Brule Water Authority

The Lower Brule Water Authority is the Tribal Government agency that ensures that water flows properly throughout the reservation. It is at least partly funded by the federal government as part of the Department of Interior's *Mni Wiconi* Rural Water Supply Project.[170] Since at least 2004, Tribal Council members have appointed themselves to the Lower Brule Steering Committee for the Water Authority, for which they were paid at least $300 per meeting. For example, in 2003 the water authority allocated $14,400 to Tribal Council members for the board meetings they were supposed to attend in 2004.[171]

Land

At Lower Brule the Tribal Council is the sole authority that can allocate land to tribal members, including Tribal Council members. This creates the possibility of conflicts of interest and the perception of self-dealing, especially because these transactions are not publicly disclosed. Land is often the most valuable commodity on a reservation. The federal government holds land in trust on behalf of the tribe on reservations. Tribal land cannot be bought and sold to individuals and must instead be leased from the tribe. Once an individual has a lease in good standing, that person can use the land or can sublease the land to another party for a higher price.[172] If these transactions are done without disclosure, especially if the beneficiaries are Tribal Council members or their relatives, it can lead to at least a perception of conflicts of interest regarding the use of tribal resources.

The complexity of managing land on reservations underscores the need for transparency and public disclosure. Management and ownership of tribal lands is complicated due to the fact that different lands have different ownership or trust status. Some land is the property of tribes through tribal governments, but held in trust by the Bureau of Indian Affairs. Non-tribal land may be interspersed with tribal lands. In some cases, tribal governments may purchase new lands that can eventually be brought into their trust holdings. In other cases, individuals

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[170] US General Services Administration, "Catalog of Federal Domestic Assistance, Mni Wiconi Rural Water Supply Project," undated, https://www.cfda.gov/index?s=program&mode=form&tab=core&id=2cddb3948ffe2e0f4dd1cdaca0285228 (accessed October 7, 2013).

[171] Lower Brule Sioux Tribe, "Lower Brule Rural Water Supply System, Design and Construction Budget, Fiscal Year 2004," Cooperation Agreement 5-FC-60-05740, July 29, 2003, on file with Human Rights Watch.

[172] Human Rights Watch interview with a government official who is directly knowledgeable of these matters, name withheld, by phone, August 23, 2013. At Lower Brule, the Tribal Council authorizes land leasing to individuals and entities like the Lower Brule Farm Corporation. Once those leases are obtained, the lessee has to pay the tribe, through the Bureau of Indian Affairs, the annual lease amount or risk forfeiting the lease. In FY2012, the Tribal Government received about $2.73 million in such lease payments.

have land title due to the Dawes Act, in force from 1887 to 1934, when individual land title was granted as a means of assimilating Native Americans and ultimately eliminating reservations. The impacts of Dawes Act policies are still felt today because as individual land allotments are inherited from generation to generation, the land is divided into smaller land holdings among an increased number of descendants. This "fractionation" has resulted in land holdings so small they are virtually worthless for use or sale. It also makes land management by the tribes and the Bureau of Indian Affairs very difficult since keeping track of these parcels of land and administration often costs more than the land is worth.[173]

The Tribal Council prioritizes buying fractionalized land from individuals as part of a long-term goal to restore original lands to the tribe. It also purchases other land to add to tribal holdings. The tribe cannot add land into trust until it has been fully paid for by the tribe. In some cases, it will take a mortgage out on lands and repay it over years before incorporating lands into trust.[174]

There is some evidence that tribal lands are leased to tribal members who then lease them back to the tribe at a higher rate. This practice creates the perception of a conflict of interest because the Tribal Council is the only authority that decides who may receive tribal land, can authorize land leases to its members, and can also authorize payments to those members so the government can re-lease the land. The Tribal Council does not publicly disclose these decisions. As such, there is no oversight over this process to ensure that the Tribal government does not mismanage tribal lands and lose scarce revenue.

The BIA keeps records of such transactions but does not control how the council awards land. This creates an inherent conflict since the council can authorize leases to its own council members that they in turn can re-lease at a higher price, including to the tribe itself. A government official with direct knowledge of these practices said that representatives of the Bureau of Indian Affairs have repeatedly and unsuccessfully urged the Tribal Council to allow an independent body to oversee land allocation in order to avoid real or perceived conflicts of interest.[175]

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[173] See for example, Jacob W. Russ and Thomas Stratmann, "Creeping Normalcy: Fractionation of Indian Land Ownership," George Mason University Working Paper in Economics, Number 13-28, PERC Research Paper Number 13-9, December 2013, http://ssrn.com/abstract=2353711 or http://dx.doi.org/10.2139/ssrn.2353711 (accessed March 27, 2014).

[174] Human Rights Watch interview with a government official who is directly knowledgeable of these matters, name withheld, by phone, August 23, 2013.

[175] Ibid.

"We've tried to get them to set up an independent land committee since the current system is crooked as Hell," said the official. "But they don't want to do it, they want control for themselves."[176]

It is very difficult for tribal members to assess how such public resources are allocated or whether such transactions are problematic since these proceedings are closed to the public and the Tribal Council resolutions and minutes of those meetings are not made public.[177] The only public disclosure that ties individuals to particular parcels of land is the annual hunting map on the reservation. That map identifies the individuals who allow hunting and where their parcels are located. The hunting map does not detail how those individuals obtained the land or whether they own it or lease it from the tribal government.[178]

A government official familiar with the Tribal Council's allocation of land noted the opacity of these decisions.

"The people don't know [about land deals] since they don't make resolutions or minutes public," said the official. "So people don't know when council members are giving themselves land."[179]

The land leases detailed below exemplify the problem of how opaque land deals can fuel a perception of cronyism and are another example of how scarce tribal resources have been diverted at the expense of tribal members. The land deals were done in closed meetings and information about how public lands were allocated have not been made public. The available information suggests that these transactions raise questions that would benefit from public explanation by the Tribal Council and Farm Corporation. The Tribal Council had not responded at time of writing to requests for minutes of meetings or an explanation of the deals.

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[176] Ibid.

[177] Ibid.

[178] Lower Brule Sioux Tribe, Department of Wildlife, Fish, and Recreation, "Hunting on the Lower Brule Sioux Reservation: 2013 Season Guide Regulations and Map," http://lowerbrulewildlife.com/image/cache/34582_Map_001_eps__2_.pdf (accessed September 10, 2013).

[179] Human Rights Watch interview with a government official who is directly knowledgeable of these matters, name withheld, by phone, August 23, 2013.

Land Lease and Land Payment Discrepancies

A 2008 Bureau of Indian Affairs record of land leases at Lower Brule obtained by Human Rights Watch shows that members of Chairman Jandreau's immediate family held four leases known as Bear Butte, the Dorman Land Purchase, the Gilman Purchase, and Tract 1 of the Karlan Exchange. It is not clear from these records whether these individuals leased all of those lands or a smaller part of those tracts. The Tribal Government did not respond to Human Rights Watch's inquiries on this matter.

According to the BIA records, the Jandreau family's annual lease payments in 2008 were about $62,000.[180] The lessees made the lease payments to the tribe through the BIA.

Tribal Government audits show that the government spent a total of $471,856 between 2008 and 2012 to pay for the same lands that members of Chairman Jandreau's family leased according to 2008 BIA records.[181] It is possible that that the tribe may have re-leased land it gave to tribal members. In 2008 alone, the tribe spent $80,198 on those lands.[182] And in the case of the land payments identified as the Gilman Purchase, the Lower Brule Farm Corporation also noted it made payments for that land in 2011 and 2012 totaling $253,836.[183]

The secrecy surrounding the leasing of land to individuals while the Tribal Government pays for the same land raises questions about the propriety of the leases even if some may be justifiable transactions. For example, individuals might be leasing smaller portions of land from a larger area with the same name so payments by the Tribal Government are not related to the leases individuals hold. For example, the Lower Brule Wildlife Department pays rent on lands that are similar to the tracts held by individuals and may be part of the same tracts.[184]

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[180] Bureau of Indian Affairs, "Fee Contracts for the Lower Brule Reservation," November 24, 2008, on file with Human Rights Watch. The lease numbers are 23-FE8-0712, 123-FE13-0712, 23-FE9-0313, 23-FE16-0810, respectively.

[181] See Eide Bailly, "Financial Statements, September 30, 2008-2012, Lower Brule Sioux Tribe," on file with Human Rights Watch. Those payments appear on pp. 42-43 (2008), p. 47 (2009), pp. 46-47 (2010), p. 48 (2011), and pp. 48-49 (2012).

[182] Eide Bailly, "Financial Statements, September 30, 2008, Lower Brule Sioux Tribe," September 18, 2009, on file with Human Rights Watch, pp. 42-43.

[183] See Eide Bailly, "Financial Statements," September 30, 2011 and 2012, Lower Brule Sioux Tribe, on file with Human Rights Watch, pp. 44-45 (2011) and pp. 44-45 (2012).

[184] Bureau of Indian Affairs, "Fee Contracts for the Lower Brule Reservation," November 24, 2008, on file with Human Rights Watch. The Lower Brule Wildlife Authority gets free use of some land, but apparently pays for the following tracts: 23-FEE-9910, 22-FE1-0010, and 22-FE4-0413.

Since the Tribal Government does not generally disclose or explain land transactions to the public and there is no independent body that allocates land, it is very difficult to determine whether land deals are legitimate or whether they may constitute a conflict of interest.[185] In the case of the Dorman Land lease, there is some evidence that the transaction may have been an insider lease that benefited Chairman Jandreau's immediate family. Human Rights Watch obtained the minutes of a September 2008 Tribal Council meeting when the Dorman Land was allocated. In that meeting, Jandreau recused himself from the vote and seceded control of the session to Vice-Chair Sandy Lacroix. Due to council rules, Lacroix was unable to vote on this matter while presiding as chair. The meeting minutes state that Lacroix said she would have voted against allocating the land to Jandreau because it should have been subject to an open bid. Since Jandreau and Lacroix did not vote, it passed by a vote of three in favor and one abstention.[186]

Opaque Land Payments

According to Tribal Government annual audits, since at least 2006, the Tribal Council has paid more than $1 million for unspecified land payments to anonymous individuals without disclosing the purpose of those purchases or the recipients of those funds. There is no description of the type of land purchased or the reason for those transactions. The audits do not identify the individuals who were paid. That lack of disclosure makes it very difficult for a tribal member or anyone else to assess whether these funds were spent appropriately.

Every year, the Tribal Council budgets for land purchases, and often pays far more for land from anonymous individuals than it actually budgeted and does so without any clear explanation of these purchases. On average, the tribe has paid approximately $150,129 a year for such purchases, primarily because of sizable payments in FY2006, FY2011, and FY2012. The annual breakdown of payments is on the following page:

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[185] Minutes of the meeting when the Tribal Council allocated the land in September 2008 show that Jandreau recused himself from the vote, leaving Vice-Chair Sandy Lacroix in charge of the session. Due to council rules, she would be unable to vote on this matter while presiding as chair. The minutes state that she said she would have voted against allocating the land to Jandreau because it should have been subject to an open bid. But she could not vote. Since Jandreau and Lacroix did not vote, it passed with three in favor and one abstention. Lower Brule Sioux Tribal Council, "Minutes of Tribal Council Meeting," September 2008, on file with Human Rights Watch.

[186] Lower Brule Sioux Tribal Council, minutes of Tribal Council Meeting, September 2008, on file with Human Rights Watch.

Fiscal Year	Budgeted ($)	Actual ($)
2006	32,000	181,195
2007	32,000	53,665
2008	32,000	76,879
2009	45,000	35,764
2010	30,000	96,460
2011	100,000	105,333
2012	500,000	501,604
TOTAL	**771,000**	**1,050,900**
ANNUAL AVERAGE	**110,142**	**150,129**

Figure 1: Anonymous Individual Land Payments 2006-2012

VII. Westrock

The "Westrock" deal that was announced in 2009 is perhaps the largest and most blatant example of the Tribal Council secretly diverting millions of dollars of scarce public funds intended for poverty alleviation and economic development towards extremely questionable business activities. The details of this deal have not been disclosed to tribal members. This disastrous investment into a failing brokerage firm helped to undermine the economic and social rights of tribal members because these public funds could have been invested in basic services such as health, education, and other critical assistance to the poorest people on the reservation.

In this complex deal, members of the Tribal Council and their business partners set up a series of shell companies, including one under federal rules explicitly intended to help alleviate poverty on reservations, and used them to secure a $22.5 million federal loan guarantee intended to promote economic development on the reservation. Those funds were used to buy a dubious New York-based brokerage firm, Westrock Advisors. Less than two years later, Westrock went bankrupt.[187] The circumstances under which the Bureau of Indian Affairs provided the loan guarantee are under investigation by the US Department of the Interior's Office of Inspector General.[188]

Chairman Jandreau told Bloomberg News in 2009 that the Westrock deal would "serve the members of our tribe in the areas of education, health, and employment."[189] That did not happen. According to documents, affidavits, and interviews with those that negotiated the deal, the Tribal Government did not have the funds to pay for Westrock and thus had to divert other scarce government resources to this purpose. At time of writing, none of the money had been used to provide basic services, alleviate poverty, or foster economic development at Lower Brule. Nor had the individuals involved in these transactions fully accounted for how the funds were spent.

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[187] Westrock Group, "Voluntary Petition for Bankruptcy filed in the US Bankruptcy Court," Southern District of New York, filed September 6, 2012.

[188] US Department of the Interior, Office of the Secretary, Letter to Human Rights Watch, September 30, 2013.

[189] Josh Fineman, "Sioux Indian Tribe Buys Broker-Dealer Westrock Group (Update 1)," Bloomberg News, September 9, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aN2P6fAe87ck (accessed December 12, 2014).

The magnitude of this project and subsequent loss of tribal and federal funds is enormous relative to the size of the Tribal Government's budget. The $20 million in funds raised is equivalent to about 63 percent of the Tribal Government's expenditures in FY 2013, an enormous amount of money that could have generated valuable benefits to the reservation.

In order to undertake this deal, the Tribal Government set up a special type of lending institution authorized under a federal program so that it can lend money on the reservation with the ultimate goal of alleviating poverty and promoting economic development. The Tribal Government did not use it for this purpose. Instead, it used the institution to secure millions of dollars in federal funds that were used for questionable and opaque business deals that did not involve lending on the reservation. Ultimately, scarce tribal funds and proceeds of a federal loan guarantee were used to pay some of Westrock's investors and business partners, including some Tribal Council members.[190]

The deal originated with the desire of Tribal Council members to start a special type of tribally-owned company that is exempt from federal taxes in order to promote Native American economic development.[191] But council members and their business partners wanted to take the unprecedented step of structuring the company as a private equity firm or holding company because they believed it would allow them to sell shares in the company to attract private capital.[192] This new company would be called the Lower Brule Corporation (LBC) and it received federal approval in April 2007.[193]

The idea was billed as an almost risk and cost-free path to prosperity.[194] Investors would enjoy tax-free profits on their investments due to company's special federal status, while

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[190] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, Memorandum Decision, October 28, 2013.

[191] The Indian Reorganization Act, 1934 authorizes such corporations.

[192] Lower Brule Corporation, Confidential Business Record prepared for the Board of Directors, "Lower Brule Corporation Report Through the Week of June 16, 2006," June 2006, on file with Human Rights Watch; and "Executive Summary of the Fairplains Presentation to the Lower Brule Tribal Council on July 22, 2005 at Lower Brule Sioux Tribal Council Chambers from R. Dennis Ickes to members of the Lower Brule Sioux Tribal Council," on file with Human Rights Watch.

[193] "Executive Summary of the Fairplains Presentation to the Lower Brule Tribal Council on July 22, 2005 at Lower Brule Sioux Tribal Council Chambers from R. Dennis Ickes to members of the Lower Brule Sioux Tribal Council," on file with Human Rights Watch; Confidential Memo to the Board of Directors of the Lower Brule Corporation from R. Dennis Ickes, president, Fairplains LLC, December 11, 2007, on file with Human Rights Watch; Federal Charter Issued by the United States of America, Lower Brule Sioux Tribe for Lower Brule Corporation, a Federally Chartered Corporation, April 17, 2007, on file with Human Rights Watch; and interview with Alfred "Sonny" Ziegler, a Tribal Council member who objected to the deal, Lower Brule, South Dakota, April 26, 2013.

[194] Ibid.

investors' money would allow the tribal corporation to make multimillion-dollar acquisitions of other companies without committing tribal funds.[195]

In 2007, a business consultant for the tribe met representatives of Westrock Advisors, a New York based brokerage firm.[196] In business since 1995, Westrock claimed to have $1.4 billion in assets under management and 150 employees.[197] Throughout 2007 and 2008, LBC and Westrock negotiated the firm's purchase. If completed, it would be the first wholly Native American-owned brokerage firm in US history.

As alluring as the deal was, it was also risky for a small, rural tribe with limited financial resources and no Wall Street experience. And by trying to constitute the venture as an investment firm that would enjoy tax-free status, it was also an unprecedented use of a tribal company, and thus inherently risky to prospective investors. It was also unclear whether it was legal, since selling shares would dilute the ownership of the company, which the law said must be wholly owned by the tribe.

Ultimately, the legality of such a venture would likely hinge on the views of the IRS.[198] Moreover, the scheme completely relied on outside investment since the tribe lacked the money and expertise for such a venture.[199] In 2007, when the Westrock project was first proposed, the tribe had a more than $10 million deficit with expenses of about $41 million.[200] Other factors made the deal even riskier and should have been fully apparent to Chairman Jandreau and other LBC board members after even a cursory due diligence process during the period from when they first began to negotiate with Westrock in 2007 to the time that they publicly announced the purchase in 2009. Some of these risk factors included:

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[195] Ibid.

[196] *PDP Special Situation Fund, LP v. Westrock Group, Inc.*, Case No. 10 CIV 1303 (SHS), Declaration of Anthony Fenton in Support of Plaintiff's Motion for Summary Judgment, February 24, 2011.

[197] Westrock Group, "Westrock Asset Management and Creighton Capital Management Form Joint Venture: Subsidiary of 100% Native-American-Owned Financial Services Firm Joins Forces with Asset Management Firm," September 9, 2009, http://www.businesswire.com/news/home/20090909005521/en/Westrock-Asset-Management-Creighton-Capital-Management-Form#.Uvl422LMR8E (accessed February 10, 2014).

[198] Executive Summary of the Fairplains Presentation to the Lower Brule Tribal Council on July 22, 2005 at Lower Brule Sioux Tribal Council Chambers from R. Dennis Ickes to members of the Lower Brule Sioux Tribal Council.

[199] Ibid.

[200] Eide Bailly,"Lower Brule Sioux Tribe Financial Statements for the Year Ended September 30, 2007," February 2, 2009, on file with Human Rights Watch, pp. 9-11.

- The period of negotiations coincided with the start of a global economic crisis and the worst US financial crisis since the Great Depression.
- Westrock's near financial insolvency for years. Westrock made an annual profit only twice from 2003-2008, years in which it lost about $2.36 million. [201]
- Westrock's serious accounting errors that forced it to restate its accounts in 2008 because it did not meet the $50,000 minimum capital reserves the US Securities and Exchange Commission require for brokerage firms. By the end of 2008, Westrock reported $143,047 in capital reserves, but really had negative reserves of $6,440.[202]
- Repeated sanction by government and industry regulators for dubious practices. Between 2005 and 2008, the National Association of Securities Dealers (NASD), an industry regulatory body, and its successor, the Financial Industry Regulatory Authority (FINRA), cited and sanctioned Westrock for at least 12 serious violations of industry rules.[203]
- Fines in 2008 by Connecticut's Department of Banking, which barred it from certain types of state business after determining that Westrock repeatedly "engaged in dishonest or unethical business practices."[204] Alabama's State Securities Commission started investigating the company in 2007 over allegations it illegally traded in securities as an unlicensed broker. Alabama state regulators had refused a Westrock a license since 2001, partly due to past transgressions.[205]
- Westrock made about $130,000 in 2008 and lost $570,000 in 2009, nowhere near the profits claimed.[206] In addition, the company had at least $5 million in other

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[201] Westrock Advisors Inc., Annual Audited Report, Form X17A-5, 2002-2007, filed with the US Securities and Exchange Commission, http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001145138&owner=exclude&count=40&hidefilings=0; and http://www.sec.gov/Archives/edgar/vprr/09/9999999997-09-022078 (accessed on August 6, 2013).

[202] Ibid.

[203] National Association of Securities Dealers (NASD), Letter of Acceptance, Waiver, and Consent Number 20060037272-01 regarding Westrock Advisors Inc., June 4, 2007, on file with Human Rights Watch; and Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 20060067191-08 Regarding Westrock Advisors Inc., November 21, 2008, on file with Human Rights Watch.

[204] State of Connecticut, Connecticut Department of Banking, In the Matter of Westrock Advisors Inc. (CRD No.114338): Consent Order CO-2008-7530-S, August 20, 2008, on file with Human Rights Watch.

State of Alabama, Alabama Securities Commission, In the Matter of Westrock Advisors, Inc. et. al, Administrative Order No. CD-2009-0027, September 25, 2009.

[206] Westrock's businesses were divided into two subsidiaries: Westrock Advisors Inc. and Monarch Financial Corporation. The revenues, profits and losses came from those entities and the source of those revenues is: Westrock Advisors Inc., Annual Audited Report, Form X17A-5, 2008 and 2009, filed with the US Securities and Exchange Commission,

debts, missed interest payments to investors, and had defaulted on promissory notes it had sold in 2007 and 2008.[207]

- Arbitration proceedings against Westrock that FINRA initiated in February and October 2008 because it had engaged in "fraudulent activity" and other transgressions when it sold products to unsuspecting customers. FINRA ultimately fined and sanctioned the company for those activities.[208]
- A ban dating from September 2009 by the Alabama State Securities Commission that permanently barred Westrock from selling securities. Since 2001, the commission had repeatedly denied Westrock a license to do so because it was concerned about past problems with the company, which continued to sell securities illegally.[209]

Despite those factors, the tribe offered to buy Westrock, a firm on the brink of insolvency, for about $17.5 million in February 2008.[210] Neither Westrock nor the tribe had cash to finalize the purchase.[211] By March 2009, the deal still had not been finalized due to the lack of funds. As a result, the tribal company was also negotiating a loan guarantee from the US Bureau of

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http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001145138&owner=exclude&count=40&hidefilings=0; and http://www.sec.gov/Archives/edgar/vprr/09/9999999997-09-022078 (accessed August 20, 2013); and Monarch Financial Corporation of America, Annual Audited Report, Form X17A-5, 2008 and 2009, filed with the US Securities and Exchange Commission, http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000841667&owner=exclude&count=40&hidefilings=0 (accessed August 20, 2013).

[207] Financial Industry Regulatory Authority (FINRA), Disciplinary Proceeding Number 2011026346206, Order Accepting Offer of Settlement, June 20, 2013, on file with Human Rights Watch.

[208] Financial Industry Regulatory Authority (FINRA), Stipulated Award, FINRA Dispute Resolution, Case Number 08-00294, February 23, 2009; and Stipulated Award, FINRA Dispute Resolution, Case Number 08-03632, March 23, 2009, on file with Human Rights Watch.

[209] State of Alabama, Alabama Securities Commission, In the Matter of Westrock Advisors, Inc., et.al., Cease and Desist Administrative order, Number CD-2009-0027, September 25, 2009, on file with Human Rights Watch.

[210] Letter from Michael Jandreau, Chairman Lower Brule Sioux Tribe and Chairman Lower Brule Corporation to Donald Hunter, president Westrock Group, March 13, 2009, on file with Human Rights Watch.

[211] According to Westrock's lawyers in a related lawsuit, the company was saddled with debt and "was in desperate need of funds to stay afloat." One of its largest debts was $3 million it owed to the major shareholder in the company who wanted cash for his interests before the Tribe bought the company. See, *PDP Special Situation Fund v. Westrock Group, Inc.*, Defendant Westrock Group, Inc.'s Memorandum of Law in Opposition to PDP Special Situation Fund, LP's Motion for Summary Judgment, Case No. 10 CIV 1303(SHS), February 25, 2011, p.2; see also Exhibit 8 of this case: Deposition of Anthony Fenton; and Exhibit 9, emails from Anthony Fenton to Paul Pomfret and email from Jay Carlson, Windwright LLC to Anthony Fenton. Fenton was formerly the Chairman and Chief Executive Officer of the Westrock Group; and Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013. The company ultimately borrowed some of the funds to buy out its main shareholder from Paul Pomfret, a Florida-based investor operating a Ponzi scheme billed as a hedge fund. In 2013 he was convicted and sentenced to five years imprisonment for defrauding investors, including by fraudulently investing their funds in Westrock. See, *US vs. Paul D. Pomfret*, US District Court for the District of South Carolina, Case Number 3:12-853 (001 CMC), Judgment in a Criminal Case, September 13, 2013.

Indian Affairs under a program intended to help promote economic development for individual Native Americans and tribes.[212] Without financing, the tribe's company and Westrock agreed to a paper transaction in which Westrock's shareholders (largely the principals of the company) would "sell" their shares to a subsidiary of the tribe's company known as LBC Western, Inc. (LBC Western) in exchange for promissory notes from LBC Western.[213] LBC Western would repay the notes later with cash to finalize the purchase.

Although Westrock's precarious state rendered it a highly questionable investment before, during, and after the tribe's purchase, Chairman Jandreau repeatedly said that the tribe had done considerable due diligence before buying the company.[214]

© AP Images for Westrock Group,2009

[212] *PDP Special Situation Fund v. Westrock Group, Inc.*, Defendant Westrock Group, Inc.'s Memorandum of Law in Opposition to PDP Special Situation Fund, LP's Motion for Summary Judgment, Case No. 10 CIV 1303(SHS), February 25, 2011, p.2; see also Exhibit 8 of this case: Deposition of Anthony Fenton; and Exhibit 9, emails from Anthony Fenton to Paul Pomfret and email from Jay Carlson, Windwright LLC to Anthony Fenton. Fenton was formerly the Chairman and Chief Executive Officer of the Westrock Group.

[213] Letter from Dennis Ickes, President Windwright LLC to Michael Jandreau, Chairman, Lower Brule Corporation regarding Westrock Advisors, March 12, 2009, on file with Human Rights Watch.

[214] "Sioux Tribe Buys Financial Services Firm," *CNBC*, September 9, 2009. http://www.cnbc.com/id/32758153 (accessed August 1, 2013).

On September 9, 2009, members of the Tribal Council and principals of Westrock announced that the Lower Brule Sioux Tribe bought the Westrock Group through its shell company, LBC Western Holdings, making Westrock the first 100 percent Native-owned financial services group in the US. The board of directors for Westrock was a mix of Tribal Council members and Westrock executives. The board included Michael Jandreau, John McCauley, and Darrell Middletent from the Tribal Council. Anthony Fenton, the chairman of Westrock's board, and Donald Hunter, its president and chief executive officer, were the company's representatives on the board.[215]

"We believe that Westrock will make a powerful contribution to the lives of the Lower Brule Sioux Tribe," Hunter said.[216] But the actual terms of the deal were not disclosed.[217] Gayle Ziegler, then a Tribal Council member, told Human Rights Watch she was unaware that the deal was being finalized.[218]

The actual terms of the purchase were the same as before: LBC Western acquired all of the shares in the company in exchange for promissory notes. No cash was paid, but some shareholders expected to get paid after a Bureau of Interior loan guarantee was finalized.[219]

Shell Companies

It was not a simple purchase. To complete the deal, the tribe created a series of subsidiary shell companies to the Lower Brule Corporation (LBC) that would be used as holding companies and to finance the purchase of Westrock. One of these companies was started to finance the purchase and was known as the Lower Brule Community Development Enterprise (LBCDE). LBCDE's stated mission was to alleviate poverty and promote economic development on the reservation. In reality, its main purpose was to obtain

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[215] "Westrock Group Acquired by Lower Brule Sioux Tribe: Creates First 100% Native-American Tribally Owned Financial Services Firm," Reuters, September 9, 2009, http://www.reuters.com/article/2009/09/09/idUS106943+09-Sep-2009+BW20090909 (accessed February 10, 2014).

[216] "Westrock Group Acquired by Lower Brule Sioux Tribe: Creates First 100% Native-American Tribally Owned Financial Services Firm," Reuters, September 9, 2009, //www.reuters.com/article/2009/09/09/idUS106943+09-Sep-2009+BW20090909 (accessed February 10, 2014).

[217] Charles Michael Ray, "Wall Street Now Home to American Indian Firm," *National Public Radio*, November 17, 2009, http://www.npr.org/templates/story/story.php?storyId=120472035 (accessed February 10, 2010); and Josh Fineman, "Sioux Indian Tribe Buys Broker-Dealer Westrock Group (Update 1), *Bloomberg News*, September 9, 2009.

[218] Human Rights Watch interviews with Gayle Ziegler, by phone, February 11, 2013 and at Lower Brule, South Dakota, April 23, 2013.

[219] *PDP Special Situation Fund, LP, v. Westrock Group Inc.*, Case No. 10 CIV 1303(SHS), Deposition of Donald Hunter, October 14, 2010 and Deposition of Anthony Fenton November 12, 2010.

special tax credits from the US government, as well as a loan guarantee to provide a risk-free loan to another of the tribe's shell companies that would be used to buy Westrock.[220]

LBC Western and the other companies were essentially shell companies registered in Delaware between April 17 and April 22, 2008.[221] All were subsidiaries of the tribe's main company, LBC.[222] It is not clear why LBC chose to form the companies this way. The structure meant that LBC Western, Inc. would be the purchaser of Westrock and issue the promissory notes for the Westrock stock while the rest served as intermediary shell companies.

Lower Brule Community Development Enterprise (LBCDE)

One of the most problematic aspects of the Westrock deal was the formation and use of the Lower Brule Community Development Enterprise (LBCDE). LBCDE was created under federal rules that authorize federal funding to specialized financial institutions to enable lending to people in the poorest communities throughout the US, such as some Indian reservations or distressed areas in cities. Instead of doing that, members of the Tribal Council and their business partners set LBCDE up as a shell company in order to secure federal funds, but not necessarily to alleviate poverty, despite its mandate to do so.

The principals of LBC hired Dr. Gavin Clarkson, a Choctaw tribe member and academic who specializes in tribal finance to secure the loan guarantee and undertake other business on their behalf, such as securing a special type of federal tax credits.[223]

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[220] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten.

[221] LBC registered three Delaware based shell companies for the transaction: LBC Capital Markets, LLC, LBC Western Holdings, LLC, and LBC Western Inc. See, State of Delaware, Department of State, Division of Corporations Entity Details for LBC Capital Markets, LLC, LBC Western Holdings, LLC, and LBC Western, Inc., file numbers 4536894, 4535555, and 453552. Basic information about these companies can be accessed at: https://delecorp.delaware.gov/tin/GINameSearch.jsp. LBC Western Holdings LLC and LBC Western, Inc. were previously named Westrock Acquisition, LLC and Westrock Acquisition, Inc., respectively.

[222] *Gregory Martino v. Westrock Group, Inc, et al*, Supreme Court of the State of New York, Country of Westchester, Case No. 54644/12, Affidavit of R. Dennis Ickes in Opposition to Petition to Confirm Arbitration Award and In Support of Cross Motion to Stay, May 5, 2011.

[223] See "Gavin Clarkson," undated, www.gavinclarkson.com (accessed August 20, 2013). This is Dr. Clarkson's academic website that lists his curriculum vitae, publications, and experience. Clarkson earned a bachelor's degree and Masters of Business Administration from Rice University and a doctorate and law degree from Harvard University. He has written extensively on tribal financing and economic issues and taught at the University of Michigan and University of Houston. Clarkson is now a professor in the business school of New Mexico State University. But Clarkson's record as a businessperson was questionable. He had been sued repeatedly over failed business ventures and declared bankruptcy in 2012.

He and the tribe decided to start a Native Community Development Financial Institution and a Community Development Entity.[224] Community Development Financial Institutions (CDFIs) and Community Development Entities (CDEs) were established under a 1994 law to promote economic development and alleviate poverty in poor communities. The US Treasury Department certifies CDFIs, which have a mandate to promote economic development by supporting businesses, job creation, affordable housing, basic banking services, financial literacy, and alternatives to predatory lending.[225] Native CDFIs are a subset of these institutions. Their focus is "to increase the access to credit, capital, and financial services in Native Communities by creating and expanding CDFIs primarily serving Native Communities."[226]

The day the tribe announced it was buying Westrock, the board of the Lower Brule Corporation (LBC) formed their CDFI, known as the Lower Brule Community Development Enterprise (LBCDE), a for-profit Native CDFI and a subsidiary of LBC, the tribe's tax-exempt company.[227] On September 10, LBCDE was formally incorporated in Delaware as a shell company, with a president (Gavin Clarkson) based in New Mexico.[228] On October 3, 2009, the US Department of Treasury formally certified LBCDE.[229] Treasury certification is mandatory for such an institution, but is largely a "pro-forma" process.[230]

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[224] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[225] US Department of the Treasury, Community Development Financial Institutions Fund, "What We Do," http://www.cdfifund.gov/what_we_do/programs_id.asp?programID=7 (accessed August 20, 2013).

[226] US Department of the Treasury, Community Development Financial Institutions Fund, Native American Initiatives Program, "What We Do," http://www.cdfifund.gov/what_we_do/programs_id.asp?programID=3 (accessed August 20, 2013).

[227] Lower Brule Corporation, "Resolution Duly Adopted by the Lower Brule Corporation Approving the Formation and Chartering of the Lower Brule Community Development Enterprise, LLC, a Delaware For-Profit Limited Liability Company," September 9, 2009, on file with Human Rights Watch.

[228] State of Delaware, Department of State, Division of Corporations, Registration of the Lower Brule Community Development Enterprise, LLC, File Number 4729454; and *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten; Lower Brule Corporation, "Resolution Duly Adopted by the Lower Brule Corporation Approving and Appointing the Lower Brule Community Development Enterprise, LLC. Board," September 9, 2009; and Lower Brule Community Development Enterprise, "Resolution to Appoint Gavin Clarkson as Board Member and Liaison to Appoint Officers, to Establish Bank Accounts, to Authorize Signators, to Indemnify Clarkson and Ickes, to Authorize Development of Offering," December 20, 2010. Human Rights Watch visited the Tribal Government offices on April 26, 2013 where LBCDE is supposed to be headquartered and asked several government employees at random where to find or whether they knew about LBCDE. None was aware of such an entity.

[229] US Department of the Treasury, Community Development Financial Institutions Fund, "List of Certified CDFIs with Recertification Application Due Dates (Updated March 26, 2013)," www.cdfifund.gov/docs/certification/cdfi/CDFI_Recert_Dates_Jan_2013_updated_032613.xlsx (accessed August 22, 2013). LBCDE was also certified as a Community Development Enterprise in August 2010. See, US Department of the Treasury, Community Development Financial Institutions Fund, "5780 Certified Community Development Entities (with Subsidiaries) as of March 31, 2012," http://www.cdfifund.gov/docs/certification/cde/CDE%20List%20-%20by%20Name%20with%20Subs%20-%2007-31-12.pdf (accessed August 23, 2013). Treasury certification is mandatory

This structure was very unusual for a Native CDFI, especially for one on a reservation in South Dakota, because LBCDE has no physical presence, no discernible staff, does not lend money to tribal members, has no website, and does not produce annual reports or other documentation showing that it operates at Lower Brule.[231]

Even though it did not engage in actual lending activity on the reservation, the Tribal Council transferred $100,000 in cash and $929,000 in mostly non-performing small loans from a tribally-run small loans program to LBCDE to show on paper that it did lend.[232]

The tribe's annual federal audits did not reflect the transfers, even though they were substantial and the Tribal Government (not LBCDE) still reports that it operates the loan programs from which the funds were apparently transferred.[233] A New York state judge in a Westrock-related lawsuit against LBCDE later described its activities as "murky."[234]

In contrast, the other three Native CDFIs on South Dakota reservations that provide financial services in some of the poorest places in the US have a physical presence, staff,

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for such an institution, but largely a "pro-forma" process. Obtaining federal funds is lengthier and more complicated. See, Human Rights Watch interview with Muktaar Kamara, Office of Certification, Compliance, Monitoring, and Evaluation, Community Development Finance Institution Fund, US Department of the Treasury, by phone, July 28, 2013.

[230] Human Rights Watch interview with Muktaar Kamara, Office of Certification, Compliance, Monitoring, and Evaluation, Community Development Finance Institution Fund, US Department of the Treasury, by phone, July 28, 2013.

[231] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten; Lower Brule Corporation, "Resolution Duly Adopted by the Lower Brule Corporation Approving and Appointing the Lower Brule Community Development Enterprise, LLC. Board," September 9, 2009; and Lower Brule Community Development Enterprise, "Resolution to Appoint Gavin Clarkson as Board Member and Liaison to Appoint Officers, to Establish Bank Accounts, to Authorize Signators, to Indemnify Clarkson and Ickes, to Authorize Development of Offering," December 20, 2010. Human Rights Watch visited the Tribal Government offices on April 26, 2013 where LBCDE is supposed to be headquartered and asked several government employees at random where to find or whether they knew about LBCDE. None of them were aware of such an entity.

[232] Lower Brule Community Development Enterprise, Balance Sheet, September 15, 2009; and Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[233] Human Rights Watch interviews with a member of the Tribe and a government employee who is familiar with the program, name withheld, by phone, April 13, 2013 and August 6, 2013. This person asked for anonymity out of fear of retaliation. For details of the loan programs, see Eide Bailly, "Financial Statements, September 30, 2009, Lower Brule Sioux Tribe," June 30, 2010, on file with Human Rights Watch; Eide Bailly, "Financial Statements, September 30, 2010, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch; Eide Bailly, "Financial Statements, September 30, 2011, Lower Brule Sioux Tribe," June 21, 2012, on file with Human Rights Watch; and Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch.

[234] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten. It is not clear where these loans came from since neither the audits reflect their source and Human Rights Watch interviewed a number of individuals involved with the government loan programs who could not identify these programs.

are well-known nationally, and lend to individuals and small businesses on their reservations. They also have websites, publish annual reports about the types and amounts of their lending, and are public and transparent about their activities.[235]

Towards Insolvency

By mid-2010, Westrock was rapidly headed towards insolvency and it became increasingly clear that LBCDE's activities were not going to alleviate poverty at Lower Brule. Despite this, Gavin Clarkson said that Tribal Council members in charge of the deal asked him to save Westrock.

"Basically I was tasked with building a lifeboat," he said. "I came aboard the Titanic after the iceberg had hit."[236]

On behalf of LBCDE, Clarkson obtained the $22.5 million loan guarantee from the Bureau of Indian Affairs by mid-2010 to allow the LBCDE to loan the money to its sister company in order to pay for the Westrock purchase, and inject new capital into the company.[237] LBCDE intended to sell the guaranteed part of the loan to another bank for cash, a common practice for loans generally, but more difficult for BIA loan guarantees.[238]

Those plans fell apart in the fall of 2010. Westrock Group had effectively stopped doing business and owed more than $9.6 million to investors and other creditors.[239] The board of LBCDE then authorized Clarkson to "lend" the money to its sister company, LBC Western, for the purchase of the insolvent Westrock in a paper transaction by December 2010. Then they authorized Clarkson to sell the federally guaranteed part of the loan for cash.[240]

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[235] The three other CDFIs on Reservations are Four Bands Community Fund at the Cheyenne River Reservation, Lakota Funds at the Pine Ridge Reservation, and Hunkpati Investments at the Crow Creek Reservation. Human Rights Watch has worked with those institutions and their staff extensively since 2012.

[236] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[237] Ibid.

[238] Ibid.

[239] Financial Industry Regulatory Authority (FINRA), Disciplinary Proceeding Number 2011026346206, Order Accepting Offer of Settlement, June 20, 2013, on file with Human Rights Watch; Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012, on file with Human Rights Watch.

[240] Lower Brule Corporation, "Resolution Duly Adopted by the Lower Brule Corporation Approving and Appointing the Lower Brule Community Development Enterprise, LLC Board," September 9, 2009, on file with Human Rights Watch; and Lower Brule Community Development Enterprise, "Resolution to Appoint Gavin Clarkson as Board Member and Liaison to Appoint

"My goal was to find a guarantee and have some third party bank take over the guarantee," Clarkson said. "LBCDE didn't have money. We didn't have the money to make a $22.5 million loan."[241]

Westrock and the tribe tried to keep the company solvent while awaiting cash from the loan guarantee, so they approached investors who already lost their money in Westrock and made them a new offer sometime in the second half of 2010: settle for pennies on the dollar or invest new funds into the company with a promise the full investment would be repaid with the funds obtained after LBCDE sold the federal loan guarantee for cash.[242] Clarkson said:

> [W]e went back to the existing investors and said, 'Look, everything is dead, you've lost all your money…. The only way you're going to get any money rescued is if we put new money in, but it will be a 100 percent protected by the BIA guarantee.' So we raised $3.5 million…. For the people who put in money—we were able to give them 100 percent protection, not only of their new investment, but to help them protect part of their old investment as well…. We said 'I know this is going to sound weird but we need you to throw good money after bad to make your bad money good.'[243]

In effect, the solution to bail out Westrock and pay back investors was to have one of the tribe's shell companies obtain an economic development loan guarantee from the US government, then lend that guaranteed money to another tribal shell company in a paper transaction to finance the purchase of an insolvent brokerage. Then they would sell the guaranteed loan for cash to a third party, and use the new cash to try to keep Westrock solvent, pay investors, and perhaps profit.

Officers, to Establish Bank Accounts, to Authorize Signators, to Indemnify Clarkson and Ickes, to Authorize Development of Offering," December 20, 2010, on file with Human Rights Watch.

[241] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[242] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013; and Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012, on file with Human Rights Watch.

[243] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013. To get the new funds from investors, LBCDE sold notes to them that would later be repaid for cash. Originally they wanted to raise about $5.6 million, but only received $3.5 million. See Lower Brule Community Development Enterprise, US Securities and Exchange Commission Form D, "Notice of Exempt Offering of Securities, December 13, 2010, on file with Human Rights Watch.

Charles Ireland III, from Birmingham, Alabama, was one of the people Clarkson called to reinvest in the venture. He is in his 60s and said he was an heir to the Vulcan Materials construction company fortune.[244] An accredited investor under SEC rules, Ireland lost more than $70,000 to Westrock.[245]

Around August 2010, he said Clarkson called him and asked him to reinvest in the company, telling him he could rollover the amount of his lost investment into the new one, or do that and add new matching funds. If he did the latter, his money would be guaranteed.[246] Ireland said Clarkson told him by phone the new investment would be more secure than prior ones because of the federal loan guarantee. Although the offer was "pretty damn attractive," Ireland said he was skeptical. A lawyer advised him not to commit new money before recovering his prior investment, which he ultimately wrote off.[247]

Selling the part of the loan covered by the federal loan guarantee would make the US government, not the tribal companies, responsible for repaying the loan if the tribe's company defaulted on it. The US government had effectively guaranteed a toxic loan since the tribe had no money and the transaction's only asset, Westrock, was likely to be insolvent. But if the tribe sold the loan, it would get millions in cash while the US government would ultimately be responsible for repaying it. It is not clear why the Bureau of Indian Affairs would guarantee such a loan in these circumstances, and the bureau did not respond to Human Rights Watch's repeated requests for information. It is now precluded from responding due to an official investigation into the awarding of that loan guarantee.[248]

Westrock went out of business in January 2011 after the State of Connecticut revoked one of its subsidiaries' licenses to operate and levied a $250,000 fine against it for illegally selling securities.[249] The Financial Industry Regulatory Authority (FINRA), the industry body that regulates and licenses individual brokers and firms, then expelled it, effectively forcing it to stop operating as a licensed broker for failing to pay prior fines the same

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[244] Human Rights Watch interview with Charles Ireland III, by phone, August 9, 2013.

[245] US Bankruptcy Court, Southern District of New York, "Notice of Chapter 7 Bankruptcy Westrock Group-Summary of Schedules," Case No. 12-13837, September 7, 2012.

[246] Human Rights Watch phone interview with Charles Ireland III, by phone, August 9, 2013.

[247] Ibid.

[248] US Department of the Interior, Office of the Secretary, Letter to Human Rights Watch, September 30, 2013.

[249] State of Connecticut, Connecticut Department of Banking, In the Matter of Westrock Advisors, Inc., CRD Number 114338, Docket Number RCF-10-7887-S, January 10, 2011, on file with Human Rights Watch.

month.[250] Westrock Group, a subsidiary, declared chapter 7 bankruptcy for complete liquidation on September 6, 2012, almost exactly three years after the tribe bought it. Neither the company nor any of its subsidiaries still exist.[251]

Even though Westrock was effectively insolvent, Clarkson sold the loan guarantee for approximately $20 million in April 2012 to the Great American Insurance Group, an Ohio-based subsidiary of the multibillion dollar American Financial Group.[252] More than a year after Westrock stopped doing business and five months before it formally declared bankruptcy, the tribe's business obtained millions of dollars by selling a federal loan guarantee meant to promote economic development and alleviate poverty.

Clarkson acknowledged that the third party bank was basically dealing with the Bureau of Indian Affairs for repayment instead of the tribe or its businesses after he sold the loan.[253] He said that money from the sale of the loan guarantee was used to pay back all investors, towards whom the tribe felt responsibility.[254] But according to court documents and interviews, only some preferred investors who held notes in the failed Westrock transaction were repaid. Others, including those who lost their life's savings and did not fully consent to reinvest, got nothing.[255]

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[250] Financial Industry Regulatory Authority (FINRA), Expulsion of Westrock Advisors Inc., for Failure to Pay Fines and Costs in Case Number 2007008162201, January 12, 2011, on file with Human Rights Watch.

[251] Westrock Group, Voluntary Petition for Bankruptcy filed in the US Bankruptcy Court, Southern District of New York, Case Number 12-13837-jmp, filed September 6, 2012

[252] *Eagle Private Equity, LLC v. Lower Brule Community Development Enterprise, et.al*, US District Court for the Eastern District of Missouri, April 19, 2012; *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, May 2, 2012; and Human Rights Watch interview with Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013. Westrock formally declared bankruptcy on September 6, 2012 and was subsequently liquidated. See US Bankruptcy Court, Southern District of New York, "Notice of Chapter 7 Bankruptcy Westrock Group," Case No. 12-13837, September 7, 2012. See also, Great American Insurance Group, "About Us," http://www.greatamericaninsurancegroup.com/Pages/About-Us.aspx (accessed December 12, 2013).

[253] *Eagle Private Equity, LLC v. Lower Brule Community Development Enterprise, et.al*, US District Court for the Eastern District of Missouri, April 19, 2012; *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, May 2, 2012; and Human Rights Watch interview with Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013. Westrock formally declared bankruptcy on September 6, 2012 and was subsequently liquidated. See US Bankruptcy Court, Southern District of New York, "Notice of Chapter 7 Bankruptcy Westrock Group," Case No. 12-13837, September 7, 2012.

[254] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[255] See below, section VII. Westrock Victims. Human Rights Watch interviewed four people who lost money in these transactions and who were subsequently contacted by Tribal and Westrock representatives who urged them to reinvest. In three cases, the people had lost their savings, had no money to invest, were highly skeptical about putting more money into the venture. In one, the person was independently wealthy but was skeptical about further investment after they had already lost more than $50,000 to Westrock. See the following section for these details. *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC vs. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case

Personal Profit

There is evidence that suggests Tribal Council members may have personally profited, along with Clarkson and others involved in the deal, despite claims to the contrary.[256]

Clarkson, for example, initially told Human Rights Watch that he did not receive any "commissions" for his work with LBCDE and later said he received "no compensation whatsoever" from this deal.[257] However, Judge Eileen Bransten concluded in a related lawsuit against LBCDE in New York state courts that he and his company received more than $300,000 in compensation.[258] When Human Rights Watch asked Clarkson about this discrepancy, he said that he stood by his initial statement that he did not receive any commissions for his work.[259] Clarkson's compensation was more than 300 percent higher than the salaries of the heads of larger, more established Native CDFIs.[260]

According to Judge Bransten's ruling, LBCDE paid $366,764 in fees and other payments.[261] It is not clear who received this compensation or for what purpose.

There is evidence from Judge Bransten's ruling and other official documents that suggests Tribal Council members who served on the LBCDE's board may have personally enriched themselves by obtaining free shares in the company and then paying themselves using the proceeds of the sale of the federal loan guarantee.

No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten.

[256] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces New Mexico, March 18, 2013 and email from Dr. Clarkson, April 12, 2013.

[257] Ibid.

[258] Before Clarkson and LBCDE sold the loan to Great American Insurance, he agreed to sell it to another set of financiers, but instead sold it to Great American Insurance. The first group of financiers has sued LBCDE in New York State Court because of that failed sale. The suit is ongoing and in October 2013 the court said LBCDE paid Clarkson and his company, Native American Capital, $327,500 in 2012. *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC,* Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten.

[259] E-mail from Dr. Gavin Clarkson to Human Rights Watch, October 16, 2014. Clarkson also did not report this income in federal bankruptcy documents, but Clarkson insisted that this was compensation paid after he declared bankruptcy and therefore not subject to those proceedings in the October 14, 2014 e-mail.

[260] For example, in 2012, Four Bands Community Fund, one of the largest Native CDFIs located on the Cheyenne River Reservation in South Dakota, paid its executive director $83,137 in salary and $12,743 in benefits and other compensation. Four Bands Community Fund Inc., Internal Revenue Service Form 990 for 2012.

[261] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten.

Judge Bransten concluded that LBCDE used more than $12 million of the cash from the sale of the guaranteed loan to pay some of the preferred company shareholders including for shares "held by members of LBCDE's board."[262] At the time, LBCDE's board consisted of seven people, five of whom were also Tribal Council members. Three of these individuals still serve on the Tribal Council at time of writing.[263]

As noted, the tribe did not pay cash for Westrock and there is no evidence that board members of LBCDE or other tribal entities paid for Westrock shares. This raises the question of whether LBCDE board members who also served on the Tribal Council received cash for the shares they awarded themselves for free to their own personal benefit but to the detriment of public coffers, impoverished tribal members who were the intended beneficiaries of the federal loan program, and the unprivileged shareholders of Westrock who ultimately lost their investment.

Since LBCDE's finances are not publicly disclosed, it is difficult to determine what funds it has other than the money it received from the sale of the federal loan guarantee. LBCDE may have received commissions of approximately $500,000 from its participation in a federal New Markets Tax Credit Program.[264] LBCDE also lent the Tribal Government about $800,000 to avert an emergency default on debt.[265] It is not clear whether those funds have been repaid. The total amount of LBCDE's known expenditures is approximately $13.5 million, leaving at least $6.5 million of the proceeds from the sale of the federally guaranteed loan remaining.

On May 21, 2014, LBCDE reported that it had offered $6.8 million in shares in LBCDE in exchange for shares in Westrock held by some investors, according to a filing with the US

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[262] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013, by Judge Ellen Bransten.

[263] Michael Jandreau, Darrell Middletent, Boyd Gourneau, Orville "Red" Langdeau, John McCauley, Gavin Clarkson, and, Walter Hillabrant, Clarkson's business partner. Lower Brule Corporation, "Approving and Appointing the Lower Brule Community Development Enterprise (LBCDE), LLC Board," September 9, 2009. This document was submitted as evidence of the board composition in Seaport Loan Seaport Loan Products, LLC and Aldwych Capital Partners, LLC vs. Lower Brule Community Development Enterprise, LLC in the Supreme Court of New York. In this document, the five council members are signatories to the appointment of Clarkson and Hillabrant to the LBCDE board.

[264] Native American Capital, "NAC and LBCDE: A Double New Market Tax Credit Success," September 12, 2012, http://www.nativeamericancapital.com/news/nac-and-lbcde-double-new-market-tax-credit-success (accessed December 14, 2014); and Human Rights Watch interview with Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

[265] Eide Bailly, "Financial Statements, September 30, 2012, Lower Brule Sioux Tribe," June 27, 2013, on file with Human Rights Watch, p.33; and Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013.

Securities and Exchange Commission. However, it did not explain how these shares would be worth $6.8 million since LBCDE has not disclosed its finances or assets. It has also not disclosed which investors received these shares.[266]

At time of writing, current and former Tribal Council members involved in this transaction because they were also principals of LBCDE had not responded to Human Rights Watch inquiries about the funds they received from selling the guaranteed portion of the loan for about $20 million.

No Benefit to the Reservation

Millions of dollars have been spent since at least 2009, but none have benefited people on the reservation even though the public justification of this deal was to promote economic development and alleviate poverty at Lower Brule, or in effect, to help realize tribal members' economic and social rights. Judge Bransten said in a ruling in the New York state lawsuit against LBCDE that there was "no proof" that money had made it back to the tribe.[267]

Human Rights Watch has repeatedly and unsuccessfully tried to find the IRS ruling that authorized this venture for the Tribal Government's company. Nor has it found any ruling reversing it. By law, the IRS must make such rulings public so it is not clear whether the IRS ever formally endorsed it since we could not locate any such determination.[268] Human Rights Watch contacted the IRS by phone and email on several occasions, but had not received a response at time of writing.[269]

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[266] Lower Brule Community Development Enterprise, "Form D: Notice of Exempt Offering of Securities," May 21, 2014. http://www.sec.gov/Archives/edgar/data/1507994/000150799414000001/xslFormDX01/primary_doc.xml (accessed July 8, 2014).

[267] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC v. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013.

[268] Under the Internal Revenue Code, the IRS is required to make such rulings in writing and must make them public. They are known as "Written Determinations." Information about these rulings is available at: IRS, "About IRS Written Determinations" undated, http://www.irs.gov/uac/About-IRS-Written-Determinations (accessed December 12, 2014). The database of those rulings can be found at: IRS, "IRS Written Determinations," undated, http://apps.irs.gov/app/picklist/list/writtenDeterminations.html.

[269] Human Rights Watch requested to meet with Christie Jacobs, the Director of the Office of Indian Tribal Governments at the IRS in April 2013. Instead, Grant Williams, a spokesperson for the IRS contacted us and promised a response. After we spoke, we sent Mr. Williams our questions by email at his request on April 9, 2013. We resent the questions on August 1, 2013, but have not received a reply from Mr. Williams or the IRS. Human Rights Watch also filed a Freedom of Information Act request with the IRS to obtain documents related to this ruling and the Westrock transaction. The IRS responded to the request and confirmed that, "the documents you request are within the jurisdiction of the Department of the Interior, Bureau of Indian

It is also not clear whether LBC Western has defaulted on the loan. If LBC Western defaulted on the loan the US government would be forced to pay it. LBC Western's only asset was the Westrock Group and its subsidiaries, and it is not clear how it could repay LBCDE or Great American Insurance. However, since the US government guaranteed the loan, Great American Insurance will get its money from US taxpayers if the loan defaults.[270] Neither Clarkson nor the Tribal Government would comment on whether LBC Western had defaulted on its loan.[271]

Lack of Answers

Other than the disclosure of the loan from LBCDE to the tribe in the 2012 audit, Tribal Government audits have never disclosed the existence of the Lower Brule Corporation, LBC Western, Westrock, or LBCDE, even though the Lower Brule Corporation was formed in 2007 and almost $1 million in Tribal Government loans were transferred to LBCDE in 2009. To the knowledge of Human Rights Watch, the Tribal Government has never released specific audits of LBC, LBC Western, or LBCDE. Human Rights Watch requested the 2013 audit from the Bureau of Indian Affairs through a Freedom of Information Act (FOIA) request but has not yet received it. Tribal audits through 2012 have also not accounted for more than $1 million in transactions between the tribe and LBCDE that were a combination of cash transactions and the transfer of unidentified non-performing loans. Information about the venture only became known once Westrock's purchase was announced publicly and the company went bankrupt.[272]

The Department of Interior's Office of Inspector General is now investigating this case because the Bureau of Indian Affairs issued the loan guarantee.[273] At time of writing, Human Rights Watch had not received a response to requests to meet with officials at the Bureau of Indian Affairs about the Westrock deal.

Affairs…. [The BIA] will respond to this portion of your request." Letter from Corrina Smith, Tax Law Specialist, IRS, to Human Rights Watch, December 18, 2014.

[270] *Seaport Loan Products, LLC and Aldwych Capital Partners, LLC vs. Lower Brule Community Development Enterprise, LLC*, Supreme Court of the State of New York, Case No. 651492/12, ruling on Motion to Dismiss (denied), Motion Date July 29, 2013, ruling date October 22, 2013.

[271] Human Rights Watch interview with Dr. Gavin Clarkson, Las Cruces, New Mexico, March 18, 2013; and email from Dr. Gavin Clarkson to Human Rights Watch August 29, 2013. Tribal Council members who were involved in these transactions have not responded to Human Rights Watch at this writing.

[272] Human Rights Watch interviewed numerous members of the tribe who all said they were completely unaware of this venture.

[273] Letter from the US Department of Interior to Human Rights Watch, September 30, 2013.

Human Rights Watch also filed a FOIA request on documentation related to the loan guarantee and Westrock. On September 30, 2013, the Department of Interior informed Human Rights Watch that they could not provide any documentation related to the loan guarantee because the Office of the Inspector General had initiated an investigation into it. Federal law therefore prohibits disclosure of documents that are subject to a current investigation.[274]

Westrock Victims

Tribal members were not the only victims of the Tribal Government's business activities. Unsuspecting investors in Westrock suffered too. The company repeatedly sold questionable notes in the company in an attempt to raise cash. In many cases, it meant that these investors would unwittingly lose key funds that made it very difficult for them to meet their basic needs.

For example, according to FINRA's consent decree against Donald Hunter, the former president of Westrock, the company sold more than $4.1 million in such notes between March 2009 and September 2010 to investors who should not have been solicited under US Securities and Exchange Commission rules because the investments were so risky.[275] Nonetheless, Westrock sold them to unsuspecting investors and those activities ultimately led to sanctions against some of the company's staff. [276]

According to documents from enforcement and disciplinary actions by FINRA, Westrock representatives deceived investors, falsely telling them that Westrock notes were safe investments with high returns. In fact, the investment was so risky that they were only supposed to be sold to "accredited investors," or those who could afford such risks. Under Securities and Exchange Commission (SEC) rules, individual accredited investors should

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[274] Ibid.

[275] Under Securities and Exchange Commission Rule 501-D, highly risky investments such as Westrock's should only be sold to "accredited investors" which are individuals and institutions with large enough assets or income to be able to withstand losses from such investments. They should not be sold to people who cannot withstand losses. Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012; and United States Securities and Exchange Commission (SEC), Notice of Exempt Offering of Securities, Westrock Group, Inc, CIK Number 0001340270, August 6, 2010.

[276] Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012; and United States Securities and Exchange Commission (SEC), Notice of Exempt Offering of Securities, Westrock Group, Inc, CIK Number 0001340270, August 6, 2010.

have had at least $1 million in net worth or should have consistently earned at least $200,000 a year.[277]

However, Westrock sold at least hundreds of thousands of dollars' worth of notes to dozens of people who clearly did not meet those standards. In some cases, these were people who wanted to invest their life's savings safely, who did not want to make high risk investments, and who would not be able to recover from those losses according to FINRA.[278] In one case, Westrock sold a retiree $100,000 in notes when she was seeking a safe investment for her child's college education even though she had an annual income of just $10,000.[279]

The deceptive sale of these notes was so egregious that in 2012, FINRA permanently banned Donald Hunter, then-president and CEO of Westrock, from selling securities or working at any firm that sells securities.[280] At least five other brokers have been suspended and fined for selling these notes to unsuspecting investors.[281] To Human Rights Watch's knowledge, no one working at Westrock has faced criminal charges for these activities.[282]

Clarkson and other members of Westrock approached some of these same investors to provide more funds to the company with the promise that they would recoup their investments because the federal government guaranteed it.[283]

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[277] Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012.

[278] Ibid.

[279] Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver and Consent, Number 2011026346204, Regarding Neil Arne Evertsen, January 30, 2013; and Financial Industry Regulatory Authority (FINRA), Department of Enforcement v. Juan Carlos Parets, Jaoshiang Luo, and Shawn Charles Haynes, Disciplinary Proceeding Number 2011026346206, Order Accepting Offer of Settlement, June 20, 2013.

[280] Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver, and Consent Number 2011026346203, Regarding Donald Horton Hunter Jr, Former President and Chief Executive Officer of Westrock Advisors, Inc., CRD Number 1849030, August 16, 2012. Under Securities and Exchange Commission Rule 501-D, highly risky investments such as Westrock's should only be sold to "accredited investors" – individuals and institutions with large enough assets or income to be able to withstand losses from such investments. They should not be sold to people who cannot withstand losses.

[281] Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver and Consent, Number 2011026346205, Regarding William Howard Coons, December 21, 2012; Financial Industry Regulatory Authority (FINRA), Letter of Acceptance, Waiver and Consent, Number 2011026346204, Regarding Neil Arne Evertsen, January 30, 2013; and Financial Industry Regulatory Authority (FINRA), Department of Enforcement v. Juan Carlos Parets, Jaoshiang Luo, and Shawn Charles Haynes, Disciplinary Proceeding Number 2011026346206, Order Accepting Offer of Settlement, June 20, 2013.

[282] Mark Casolo and Paul Pomfret were respectively convicted of financial fraud that related to these activities in state and federal courts. Casolo was not an employee of Westrock during the period when the tribe bought Westrock or when some of the notes were sold. Pomfret never worked for Westrock.

[283] Human Rights Watch has obtained a copy of one of the promissory notes and it clearly states that the federal loan guarantee applies to the note or they might repay it over 20 years.

Human Rights Watch spoke to two people who were listed as some of the largest individual creditors to Westrock in its bankruptcy filings. They had not consented to these investments, but had lost their life's savings due to them. Human Rights Watch also spoke to the son of a deceased investor who was owed more than $100,000 from Westrock and the tribe. They all said that they were sold the questionable notes. Only one has received any money for the lost investment (less than 25 percent of the loss). All were asked to reinvest for a greater return by tribal or Westrock representatives, but refused. Those who had lost life savings were skeptical and did not have the money to reinvest. Some also received legal advice to avoid the investment because it seemed questionable. All were suspicious of the deal after losing prior investments with Westrock.[284]

[284] Human Rights Watch interviews with Marilyn Disimony, by phone, August 5, 2013; Human Rights Watch interview with Patricia Bachan, by phone, August 8, 2013; and Human Rights Watch interview with Brian Clancy, by phone, August 5, 2013. Disimony and Bachan both lost their life's savings due to the Westrock deal. Brian Clancy's mother, Bertha Mae Clancy, lost her savings due to Westrock. She passed away on April 19, 2013. Mr. Clancy managed her estate and financial affairs prior to her death.

Acknowledgments

This report was researched and written by Arvind Ganesan, director of the Business and Human Rights Division at Human Rights Watch. The report was reviewed and edited by Chris Albin-Lackey, senior researcher in the Business and Human Rights Division; Alison Parker, director of the US Program; Antonio Gianatta, advocacy director of the US Program; and Zama Coursen-Neff, executive director of the Children's Rights Division. Program review was provided by Danielle Haas, senior program editor, and Babatunde Olugboji, deputy program director. Legal review was provided by Dinah PoKempner, general counsel at Human Rights Watch, and Matthew Kelley and David Schulz, attorneys at Levine, Sullivan, Koch, & Schulz. Darcy Milburn, senior associate in the Business and Human Rights Division, provided additional research and production assistance. The report was prepared for publication by Grace Choi, publications director; Kathy Mills, production specialist; and Fitzroy Hepkins, production manager.

Human Rights Watch would also like to thank Professors Barbara Creel, Matthew L.M. Fletcher, and Wenona Singel, for their advice, analysis, and insights.

Finally, we want to thank the representatives of the Lower Brule Sioux Tribal Government, Dr. Gavin Clarkson, and members of the Lower Brule Sioux Tribe who generously provided their time and perspectives.

Annex

Human Rights Watch Correspondence with the Lower Brule Sioux Tribe

- Letter From Human Rights Watch to Chairman Jandreau, Lower Brule Sioux Tribe, May 23, 2013
- Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, May 31, 2013
- Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, June 25, 2013
- Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, July 22, 2013
- Letter from Human Rights Watch to Chairman Jandreau, Lower Brule Sioux Tribe, September 8, 2014

The other five Tribal Council Members in office until October 1, 2014 also received the abovementioned letters. For reasons of brevity, the letters addressed to Chairman Jandreau and Tara Adamski are appended to this report.

Human Rights Watch Correspondence with Freedom of Information Act Liaison, US Department of Housing and Urban Development

- Letter from Mr. Randy Akers, FOIA Liaison, US Department of Housing and Urban Development, to Human Rights Watch, August 29, 2013

Human Rights Watch Correspondence with Bureau of Indian Affairs Regarding Freedom of Information Act Request for the $22.5 Million Loan Guarantee for the Westrock Purchase

- Letters from Ms. Karen J. Atkinson, Director, Office of Indian Energy and Economic Development, Bureau of Indian Affairs to Human Rights Watch, September 30, 2013

Human Rights Watch Letter Tribal Council Chairman Michael Jandreau, Lower Brule Sioux Tribe, May 23, 2013

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May 23, 2013

Chairman Michael B. Jandreau
Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, SD

Cc: Mr. James Two Bulls, Superintendent, Lower Brule Agency, Bureau of Indian Affairs
Mr. Weldon B. Loudermilk, Regional Director, Bureau of Indian Affairs, Great Plains Regional Office

Dear Chairman Jandreau and members of the Lower Brule Tribal Council,

I am writing on behalf of Human Rights Watch to request that the Tribal Council authorize the release of certain budget and audit documents to our staff for the purposes of our research.

Human Rights Watch is an international human rights organization that works on some 90 countries and has staff based in more than 40 countries. We are an independent, nongovernmental organization that does not accept funds directly or indirectly from governments.

I am the Director of the Business and Human Rights Division of Human Rights Watch. Our division looks at issues where business or economic activity may have an impact on human rights. For the last several months, I have been undertaking an investigation into human rights and governance issues related to the Lower Brule Sioux Tribe. As part of this ongoing inquiry, I am requesting documents from the tribal council that pertain to its operations in order to better understand tribal budgeting, how public funds are used at Lower Brule, and the level of transparency and accountability over use of such funds. In particular, I am requesting that the Tribal Council furnish Human Rights Watch with the following documents:

- The budgets of the Lower Brule Sioux Tribe from 2002 to 2013;
- The combined Federal Audits for the tribe from 2002 to 2013;

- Copies of all minutes of regular and special meetings of the Tribal Council from 2002 to 2013, such as those detailed in Article 1, Section 4 of the By Laws of the Lower Brule Sioux Tribe's Constitution; and
- All tribal council resolutions from 2002 to 2013.

I had the opportunity to visit the tribal council building on the afternoon of April 26, 2013 to request these documents in person. However, no council members were available at the time I was there. Fortunately, Mr. Lee Brannan, the general manager of the tribal government met with me and notified me that in order to obtain such documents, I would have to submit a formal request in writing to the Tribal Council and that the Council would have to pass a resolution authorizing the release of the information to me.

It is my understanding that such documents should be publicly available as stated in Article IV, Section 4 of the Bylaws of the Lower Brule Sioux Tribe's Constitution. Similarly, the tribal budget and combined federal audits detail the use of public funds, including US Federal funds, and thus should also be publicly available. Nonetheless, I was informed that such information is not disclosed to the public or even to members of the tribe without prior approval from the Tribal Council. I have also learned that all tribal resolutions and minutes may not be furnished to the Bureau of Indian Affairs (BIA), but that only selected resolutions and minutes are made available to the BIA.

Mr. Brannan told me that the Tribal Council meets regularly at the beginning of every month and that this would be the best time for the council to consider our request and to authorize the release of the information. I hope that this request can be expeditiously approved as you meet in June 2013 and that the information we are requesting can be made available shortly thereafter. I would welcome any clarifications about how or whether the Tribe makes such information available to the public as well.

Thank you for your expeditious consideration of this matter and I look forward to discussing our work with you. If you wish further information or have any comments or questions, I can be reached at the contact information below or through my assistant, Darcy Milburn, whose contact information is also provided.

Sincerely,

Arvind Ganesan
Director, Business and Human Rights Division
Human Rights Watch
ganesaa@hrw.org
(202) 612-4329

Darcy Milburn
milburd@hrw.org
(202) 612-4357

Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, May 31, 2013

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May 31, 2013

Ms. Tara Adamski
General Counsel
Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, SD

And

c/o Adamski Law Offices
P.O. Box 866
Pierre, SD 57501

Cc: Lower Brule Tribal Chairman Michael B. Jandreau and members of the Lower Brule Tribal Council
Mr. Lee Brannan, General Manager, Lower Brule Sioux Tribe
Mr. James Two Bulls, Superintendent, Lower Brule Agency, Bureau of Indian Affairs
Mr. Weldon B. Loudermilk, Regional Director, Great Plains Regional Office, Bureau of Indian Affairs

Dear Ms. Adamski,

Thank you for contacting me in response to the letter that I sent to the Tribal Council dated May 23, 2013.

As per our telephone discussion on May 28, I am modifying my request for information. I am doing this with the understanding that these documents are considered publicly available under the Constitution, rules, and practices of the Lower Brule Sioux Tribe; that the Tribal Council is willing to provide the requested information to me; and that the Tribal Council will approve a Resolution authorizing the release of this information to me and will also facilitate my access to this information from the relevant tribal government employees and tribal institutions.

I understand from our conversation that the principal purpose of this modified request is to help expedite the request since my original request of tribal government budgets, audits, minutes and resolutions from 2002 to 2013 would have involved a large number of documents that could be challenging to collate and copy. However, it does appear that this modified request may actually take more time and effort on the

part of tribal government staff members because it requires them to go through all of the documentation in order to identify specific documents. In contrast, the original request would place the burden of reviewing documents on me and would seemingly save tribal government staff time and effort. I am submitting a modified request, but the original request would also be acceptable if that is more efficient for the tribal government.

Based on the understanding that the Tribal Council is prepared to provide the information, as detailed above, I am requesting that the Tribal Council furnish Human Rights Watch with the following documents, in either hardcopy or electronic format:

1. The budgets of the Lower Brule Sioux Tribe from 2002 to 2013. It is my understanding that these budgets are consolidated documents available in hardcopy and electronic formats and thus it should be possible to provide in either format.

2. The combined Federal Audits for the tribe for the years 2002 to 2011. I understand that these documents are provided annually from the auditors in an electronic and hardcopy format. I also understand that the audit for 2012 is currently underway and therefore unavailable.

3. Tribal Council Resolutions from 2002 to 2013 and minutes of regular and special meetings of the Tribal Council from 2002 to 2013, such as those minutes detailed in Article 1, Section 4 of the By Laws of the Lower Brule Sioux Tribe's Constitution. However, since this request covers an unknown number of resolutions and minutes of meetings, I am also requesting specific minutes as well. In particular I am interested in minutes of meetings and Tribal Council Resolutions pertaining to the following:

    - The Lower Brule Corporation, the Lower Brule Community Development Enterprise (LBCDE), Westrock Financial, Fairplains, meetings at which R. Dennis Ickes and/or Gavin Clarkson attended or were discussed;
    - The Lower Brule Farm Corporation;
    - Lakota Foods;
    - Staff appointments, finances, and management of the Lower Brule Housing Authority;
    - Staff appointments, management, and finances Lower Brule Tribal Mental Health Program;
    - The Lower Brule Sioux Tribe Commodities Program;
    - The Native American Heritage Association (NAHA);
    - Salaries, bonuses, stipends, or other payments to Tribal Council members from 2002 to 2013, including any reimbursements or other payments related to inaccurate tax withholdings;
    - Allocation of tribal land leases, including to Bill Thompson, or any members of the Tribal Council from 2002 to 2013;
    - All tribal small loans programs to individuals or businesses from 2002-2013; and
    - A $105,333 payment to an individual for land that was apparently authorized in 2011.

This is an initial request and I may submit subsequent requests for information. As we also discussed, I will submit further questions to members of the Tribal Council, employees, or other individuals as part of our research in order to ensure accurate and comprehensive reporting.

Thank you for your expeditious consideration of this matter. To help facilitate the process, we will be sending a hardcopy of this letter by mail with a USB drive and return shipping to Human Rights Watch in order to help expedite the transfer of electronic documents.

As I mentioned on May 28, I am also happy to travel to Lower Brule to scan documents in person. I would also welcome the opportunity to speak with Chairman Jandreau and other Tribal Council members about the issues I am examining or other matters.

If you have any comments or questions, I can be reached at the contact information below or through my assistant, Darcy Milburn, whose contact information is also provided.

Thank you and the Tribal Council in advance for your assistance.

Sincerely,

Arvind Ganesan
Director, Business and Human Rights Division
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Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, June 25, 2013

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HRW.org

June 25, 2013

Ms. Tara Adamski
General Counsel
Lower Brule Sioux Tribe
1801 E Wells Ave, #3,
Pierre, SD 57501
(605) 945-0890

Cc: Mr. Michael B. Jandreau, Chairman, Lower Brule Sioux Tribe
Mr. Lee Brannan, General Manager, Lower Brule Sioux Tribe
Mr. James Two Bulls, Superintendent, Lower Brule Agency, Bureau of Indian Affairs
Mr. Weldon B. Loudermilk, Regional Director, Bureau of Indian Affairs, Great Plains Regional Office

Dear Ms. Adamski,

Thank you again for taking the time to speak with me. Below please find a background document on Human Rights Watch and its work, along with some examples of our publications and impact. I have also included a copy of our most recent Annual Report.

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. Our rigorous, objective investigations and strategic, targeted advocacy build intense pressure for action and raise the cost of human rights abuse. For more than 30 years, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world. We work on some 90 countries worldwide and global thematic issues such as Business and Human Rights, Women's Rights, and Children's Rights.

The Business and Human Rights (BHR) Division

Since 1998, the Business and Human Rights (BHR) Division has addressed the human rights impacts of business and economic activity globally. The division is comprised of some of the most experienced and effective investigators within the organization.

BHR has investigated patterns of human rights abuse linked to multinational companies around the world, such as in the oil, gas, and mining sector. We have undertaken in many countries such as Angola, Azerbaijan, Burma, Colombia, the Democratic Republic of Congo, India, Mali, Nigeria, Papua New Guinea, Tanzania, and Zambia.

For more than a decade, we have looked at issues related to a lack of transparency and accountability in governments' use of public funds in places like Angola, Azerbaijan, Burma, Equatorial Guinea, Indonesia, and Nigeria.

The division has investigated the role of internet and telecommunications companies for the impact on human rights abroad. We have documented the activities of companies such as Google, Microsoft, and Yahoo![1], while also being instrumental in developing standards that companies follow to protect human rights online.

We also examine labor rights issues globally. We have undertaken work in the United States, Russia, the United Arab Emirates, Ecuador, and El Salvador on how governments and companies treat workers, including major reports on Wal-Mart in the United States.[2] We have also looked at the role of construction companies and their treatment of workers globally.

We investigate the human rights responsibilities of International financial institutions (IFIs) such as the World Bank and International Monetary Fund (IMF). We have documented activities related to these institutions in countries like Angola, Burma, Cambodia, and Ethiopia.

In the wake of the US financial crisis, BHR has also researched how government and company practices can violate the rights of economically vulnerable Americans.[3] This theme of work currently includes undertaking research on predatory practices against the poor, including by private lenders loaning to people in Native communities.

For more information, please visit: http://www.hrw.org/category/topic/business

Advocacy Impacts

Human Rights Watch's Business and Human Rights Division has a history of successful advocacy campaigns that have resulted in national and international media attention; criminal investigations

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[1] Human Rights Watch, *Race to the Bottom, Corporate Complicity in Chinese Internet Censorship*, August 10, 2006, http://www.hrw.org/reports/2006/08/09/race-bottom.

[2] Human Rights Watch, *Discounting Rights: Wal-Mart's Violation of US Workers' Right to Freedom of Association*, May 1, 2007, http://www.hrw.org/reports/2007/04/30/discounting-rights.

[3] Human Rights Watch, *Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law*, February 5, 2013, http://www.hrw.org/reports/2013/02/04/pay-rent-or-face-arrest.

(including by the US Department of Justice and US Senate); asset seizures; and the disclosure of company audits and politically-sensitive government budget documents.

Addressing a Lack of Transparency and Accountability by Governments

We have worked closely with the US Senate Permanent Subcommittee on Investigations since 2004. Our work on Angola[4] and Equatorial Guinea[5] was critical to a February 2010 US Senate report *Keeping Foreign Corruption Out of the United States.*[6] The Senate report details how government officials in Angola, Equatorial Guinea, Gabon, and Nigeria have used US professionals and financial institutions to bring stolen state assets into the United States.

Due to the concerns prompted by the US Senate report, US banks closed accounts held by the Angolan embassy. Some bank accounts have since been reinstated, but it created a serious problem for the Angolan government and increased the pressure on them to act in a more transparent manner.

The report also helped lead to the establishment of an anti-kleptocracy task force in the US Department of Justice (DOJ). Human Rights Watch has facilitated an ongoing DOJ investigation into Teodorin Obinag, the son of the President of Equatorial Guinea.[7] On October 25, 2011, the US Department of Justice announced that it had filed two civil asset forfeiture suits, in California and in Washington, D.C., for more than $70.8 million in alleged proceeds of corruption. [8] Similar proceedings are underway in Spain and France.[9]

International Financial Institutions

After Human Rights Watch documented[10] how the government of Angola could not account for approximately $4.22 billion from 1997 to 2002, we successfully persuaded the Intrnational Monetary Fund to delay lending to Angola for seven years until the government agreed to make its revenues and budgets more transparent and to conduct and publish an audit of Sonangol, a powerful state-owned oil company. We urged the IMF to condition the release of future tranches of the loan on the public release of the

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[4] Human Rights Watch, *Transparency and Accountability in Angola*, April 13, 2010, http://www.hrw.org/reports/2010/04/13/transparency-and-accountability-angola-0.

[5] Human Rights Watch, *Well Oiled: Oil and Human Rights in Equatorial Guinea*, July 9, 2009, http://www.hrw.org/reports/2009/07/09/well-oiled-0.

[6] US Senate Permanent Subcommittee on Investigations, "Keeping Foreign Corruption Out of the United States: Four Case Histories," February 04, 2010, http://www.hsgac.senate.gov/subcommittees/investigations/hearings/-keeping-foreign-corruption-out-of-the-united-states-four-case-histories.

[7] "United States: Act Swiftly on Equatorial Guinea Corruption Probe," Human Rights Watch News Release, October 19, 2011, http://www.hrw.org/news/2011/10/19/united-states-act-swiftly-equatorial-guinea-corruption-probe.

[8] "Department of Justice Seeks to Recover More Than $70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea," October 25, 2011 http://www.justice.gov/opa/pr/2011/October/11-crm-1405.html.

[9] "France: Move Quickly on Equatorial Guinea Warrant," Human Rights Watch News Release, April 12, 2012, http://www.hrw.org/news/2012/04/12/france-move-quickly-equatorial-guinea-warrant.

[10] Human Rights Watch, Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights, January 13, 2004, http://www.hrw.org/reports/2004/01/12/some-transparency-no-accountability-0.

Sonangol audit. The 2007 and 2008 Sonangol audits were made public soon after, and the Angolan government pledged to release the 2009 audit as well.

Barrick Gold

In February 2011, Human Rights Watch released a report that documented horrific abuses taking place at a gold mine in Porgera, a remote part of Papua New Guinea's central highlands.[11] We found that private security personnel employed at Barrick Gold—the world largest gold mining company and owner of the mine—were implicated in alleged gang rapes and other violent abuses.

When confronted with Human Rights Watch's research findings, Barrick acknowledged for the first time that the allegations had substance and took a number of steps to rein in the abuses we uncovered. Barrick launched a thorough internal investigation at the mine in Porgera, which echoed and confirmed our findings; and has committed to taking a broad range of measures to prevent abuses by security personnel at the mine in the future. Papua New Guinea police forces opened a criminal investigation into the allegations we documented, and several security guards accused of gang rape and other serious crimes were arrested by the police. Barrick also promised to establish new, viable channels that community members can use to report abuses without fear of retribution, an initiative that has already had some positive outcomes for the company's international operations.[12] The company is currently working on implementing a remediation framework to compensate victims and combat violence against women in the Porgera Valley.

I have enclosed copies of selected reports and the public response by Barrick and the US release for asset forfeiture. I hope this helps better explain our work. I will send a separate letter modifying our request for public documents from the tribal government.

Sincerely,

Arvind Ganesan
Director, Business and Human Rights Division
Human Rights Watch
ganesaa@hrw.org
(202) 612-4329

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[11] Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, February 1, 2011, http://www.hrw.org/reports/2011/02/01/gold-s-costly-dividend-0.

[12] Barrick Gold Corporation, "Response to Human Rights Watch Report," February 1, 2011, http://www.barrick.com/investors/news/news-details/2011/Response-to-Human-Rights-Watch-Report/default.aspx.

Human Rights Watch Letter to Ms. Tara Adamski, General Counsel, Lower Brule Sioux Tribe, July 22, 2013

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July 22, 2013

Ms. Tara Adamski
General Counsel
Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, SD 57548

And

c/o Adamski Law Offices
P.O. Box 866
Pierre, SD 57501

Cc: Lower Brule Tribal Chairman Michael B. Jandreau and members of the Lower Brule Tribal Council
Mr. Lee Brannan, General Manager, Lower Brule Sioux Tribe
Mr. James Two Bulls, Superintendent, Lower Brule Agency, Bureau of Indian Affairs
Mr. Weldon B. Loudermilk, Regional Director, Great Plains Regional Office, Bureau of Indian Affairs

Dear Ms. Adamski,

This letter is a follow up to my original written requests for information on May 26, May 31, and June 25, as well as our two telephone conversations during that time.

As per those discussions, I am submitting a third request for information regarding the Tribal Council Resolutions, budgets, and audits from 2002 to 2013. As with my previous requests, this request is being made with the understanding, after speaking to you, that: these documents are considered publicly available under the Constitution, rules, and practices of the Lower Brule Sioux Tribe; that the Tribal Council is willing to provide the requested information to me; and that the Tribal Council will approve a Resolution authorizing the release of this information to me and will also facilitate my access to this information from the relevant tribal government employees and tribal institutions.

I understand that the minutes of such meetings may take some time to obtain, but the Resolutions, annual budgets, and the combined annual federal audits should be readily available electronically and in hardcopy. I also understand that the most

recent audit may not be completed. Therefore, I am modifying my request to only include the Resolutions, budgets, and combined federal audits from 2002 to the present. Based on a review of those documents, I may subsequently request minutes of specific Tribal Council meetings.

This is an initial request and I may submit subsequent requests for information. As we also discussed, I will submit further questions to members of the Tribal Council, employees, or other individuals as part of our research in order to ensure accurate and comprehensive reporting.

Thank you for your expeditious consideration of this matter. As I previously noted, we have mailed a USB drive for electronic documents to your office and a prepaid return envelope to facilitate the transfer of such documents.

I am also happy to travel to Lower Brule to scan documents in person and would welcome the opportunity to speak with Chairman Jandreau and other Tribal Council members about the issues I am examining or other matters.

If you have any comments or questions I can be reached at the contact information below or through my assistant, Darcy Milburn, whose contact information is also provided.

Thank you and the Tribal Council in advance for your assistance.

Sincerely,

Arvind Ganesan
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(202) 612-4329

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Letter from Human Rights Watch to Chairman Jandreau, Lower Brule Sioux Tribe, September 8, 2014

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HUMAN RIGHTS WATCH

HRW.org

September 8, 2014

The Honorable Michael B. Jandreau
Chairman, Lower Brule Sioux Tribe
187 Oyate Circle
Lower Brule, SD

Dear Chairman Jandreau and members of the Lower Brule Tribal Council,

I am writing on behalf of Human Rights Watch to request further information on issues that we have been researching related to the activities of the Lower Brule Sioux Tribal Government. In the interests of obtaining a balanced, objective, and thorough understanding of the issues we have examined, we are writing a fourth letter to you and your colleagues to get your perspective on these matters and to incorporate your views into our forthcoming report. We would welcome your response by September 22, 2014 in order to account for our publications schedule.

Since May 2013, we have repeatedly written you and your colleagues on the Tribal Council requesting information and documents that would be relevant to our research. We have repeatedly requested to meet with you or your colleagues to get your perspective on these issues, but at this writing, we have not received any response to our requests from members of the Tribal Council. We have also spoken to Ms. Tara Adamski, the general counsel for the Lower Brule Sioux Tribal Government, on several occasions requesting information or meetings with you. Those requests were also not fulfilled.

We welcome your views on the issues we have examined and would welcome the opportunity to meet with you and your colleagues. We would also welcome any other information that you choose to provide. We have included a detailed set of questions in this letter for which we would welcome your response.

I. History of the Tribal Council

1. Can you provide details of your overall tenure and number of terms that you have served on the Tribal Council, both as Chairman and in any other capacity?

2. It is our understanding that you left military service sometime in 1963 or 1964 after serving six months in prison for desertion before you were elected Lower Brule Tribal Council Chairman in 1980. Could you detail your activities and occupation between 1963 and 1980?

3. It is our understanding that Boyd Gourneau, the current Vice-Chairman of the Tribal Council is your nephew; Secretary John McCauley is also your nephew; and councilmember Orville "Red" Langdeau Jr. is your cousin. Can you confirm these relationships and detail any other familial relationships on the Tribal Council?

4. Can you provide information on any other employment that you have or had while you served on the Tribal Council? If so, please detail those positions.

5. Can you provide information on any boards of directors or other entities for which you have served or currently serve, such as, but not limited to, the Lower Brule Farm Corporation, the Lower Brule Housing Authority, the Lower Brule Corporation, or Lower Brule Community Development Enterprise? Please also detail any type of compensation you received while serving in those positions.

6. Can you detail or describe any Tribal Government entities that exercise oversight over the Tribal Council or that are empowered to address allegations of misconduct by Tribal Council members?

II. Operations of the Tribal Council and Government

1. We estimate that salaries for Tribal Councilmembers are approximately $81,000, exclusive of any other benefits such as per diems and travel allowances. Can you disclose and provide detail on the compensation and benefits that Tribal Councilmembers receive?

2. It is our understanding that the open records provisions in the Tribal Constitution have not been followed since at least 2007 and tribal members and the public cannot obtain information regarding Tribal Council resolutions, minutes of meetings, or other information. Human Rights Watch was repeatedly denied access to the same records as well as budget information, despite assurances from Ms. Adamski that we would be able to view them. Can you detail why the Tribal Council appears to withhold public records?

3. It is our understanding that the Tribal Council became concerned with individual tribal members who may have been publicizing or releasing government information and that this may have contributed to the withholding of public information. Is this correct? If so, please explain the rationale behind this approach.

4. We understand that some Tribal Council resolutions are shared with the Bureau of Indian Affairs, but not all, and that this is a change in practice. Can you confirm whether this is the case and when this change occurred?

5. We understand that some information about government activities may have been withheld from some Tribal Council members, but was not withheld from other councilmembers. For example, we understand that financial information, such as audits of government departments and other information pertaining to the revenues and expenditures of the Tribal Government and tribally-owned businesses were not made available to some councilmembers. Can you detail any instances where that occurred?

6. Human Rights Watch repeatedly sought the aforementioned documents in question 5 about the Tribal Government's activities, beginning in February 2013. We corresponded with the Tribal Council in letters, and spoke to Tara Adamski the Tribe's general council at least twice, but did not receive any requested information. Can you detail the basis for withholding such information from Human Rights Watch?

III. Financial Activities

1. We understand that the annual audits of the Tribal Government have repeatedly found "Material

Weaknesses" in the management of public funds. Can you detail what steps, if any, have been taken to address those issues since Fiscal Year 2008?

2. In the Fiscal Year 2009 audit, we understand that auditors found four employees were paid a total of $34,000 in bonuses without any policy or system to justify such payments. Can you describe who received those payments, for what purpose, and what steps, if any, were taken to address the auditors' findings?

3. We understand that auditors determined in FY2011 that at least $2.6 million in federal funding under the Indian Social Services and Welfare Assistance Program, the Indian School Equalization Program, the Indian Education Facilities Operations and Maintenance Program, and perhaps others, was diverted by the Tribal Government from these programs to the tribal general budget. We understand that this issue was not resolved, according to the FY2012 audit. Can you detail the purpose of that diversion and the ultimate use of those funds? We understand that the Bureau of Indian Affairs requested a remediation plan regarding these funds. We would welcome the remediation plans and an update on their implementation. Please also detail any actions that the federal government may have taken regarding these diversions.

4. Prior to, during, and following those diversions, we note that Lower Brule school performance has declined. We understand that the school system went into restructuring in 2013 as required by the No Child Left Behind Act, 2001 and that the American Indian Institute for Innovation (AIII) has been contracted to assist in restructuring. We also understand that you may have been a Trustee of AIII. Please provide details for the reasons behind the restructuring, the role of AIII, any payments made to AIII, and confirmation of your role with AIII.

5. We understand that the US Department of Interior's Bureau of Reclamation contacted the Tribal Government in March 2009 about the diversion of approximately $1.2 million in federal funds for the rural water program. Can you detail why those funds were diverted, how they were used, whether they were repaid, and what, if any, measures the federal government took in this regard?

6. We understand that the US Department of Interior's Inspector General also found that water funds were misused in the 1990s and recommended that approximately $100,000 should be repaid. What is the status of those repayments?

7. The Tribal Government has not made its annual A-133 audits public and did not provide them to Human Rights Watch after Ms. Adamski said that they would be made available. Since these audits detail the Tribal Government's use of public funds, including federal and tribal funds, can you explain the rationale for not disclosing the annual audits?

IV. Tribal Corporation Governance

1. We understand that the Tribal Government has ultimate control over a number of tribally-owned corporations and their subsidiaries, including but not limited to the Lower Brule Corporation, the Lower Brule Community Development Enterprise, LBC Western, the Lower Brule Farm Corporation, and Lakota Foods. In such entities, Tribal Council members may serve as members of the board, may receive compensation for those positions, and may profit as business partners of those entities. Can you detail which Tribal Council members serve on the boards or as principals of these or other tribally-

owned entities, their tenures, and whether and how much compensation they may have received in those positions, or as business partners with those entities?

2. Can you provide a list of board members for tribally-owned entities and their tenures? Please include non-tribal members or non-councilmembers.

3. We understand that in 2001, you sought and received $2,240 in compensation from the Lower Brule Farm Corporation while you sat on its board of directors. Can you confirm this payment and detail the basis for it?

4. We understand that in 2001, Lower Brule Farm Corporation board member Bill Thompson was being paid approximately $1,500 a month as salary. Can you confirm this amount and detail past and current compensation for Lower Brule Farm Corporation board members?

5. We understand that in 2002, the Lower Brule Farm Corporation board approved a proposal by Scott Jones to pay Lower Brule Farm Corporation board members $7,000 cash compensation after serving fifteen years on the board and an additional $1,000 annually. You, current Vice-Chairman Boyd Gourneau, and Bill Thompson received those payments. Can you confirm these payments and detail and current compensation arrangements for the Lower Brule Farm Corporation Board?

V. Other Governmental Entities

1. We understand that independent government agencies, such as the Lower Brule Housing Authority or Lower Brule Water Authority, also have governing boards. Those board positions are compensated. Can you confirm that since at least 2004, members of the Water Authority Steering Committee were paid at least $300 per meeting and can you provide the details of any other compensation they might have received?

2. Could you provide details about the members of the board of the Lower Brule Housing Authority and any compensation they received?

VI. Land Transactions

1. It is our understanding that the Lower Brule Sioux Tribal Council retains sole authority to allocate and purchase tribal lands. Can you confirm this is the case and whether there is any independent entity that oversees land allocation? If so, can you detail this entity's role and if not, has the Tribal Council considered creating such an entity?

2. We understand that land transactions are memorialized in Tribal Council resolutions. Are records of land transactions, payments, and leases available to the public or tribal members?

3. It is our understanding that Bill Thompson, a board member of the Lower Brule Farm Corporation, has had a longstanding subleasing arrangement with the Farm Corporation. It is our understanding that he had leased hundreds of acres of land from the Tribe and in 2002 subleased that land to the Lower Brule Farm Corporation for $50 an acre or a total of $26,550 per year. By 2012, the Lower Brule Farm Corporation was paying him $45,500 a year. Can you confirm this arrangement and provide details about whether land Thompson leased from the Tribal Government was or is subleased to the Lower Brule Farm Corporation and the sums paid for such transactions? If this is tribal land that Thompson

subleased to the Farm Corporation, can you provide the amount he paid for the lease?

4. We understand that at least since 2008, members of your family held four land leases, known as Bear Butte, the Dorman Land Purchase, the Gilman Purchase, and Tract 1 of the Karlan Exchange. The lessees paid approximately $62,000 for that land in 2008. At the same time, we understand that the Tribal Government paid $471,856 for the same parcels of land from 2008 to 2012. Can you provide details on the Jandreau family leases, the purpose of the Tribal Government payments, and whether Jandreau family members received payments from the Tribal Government for those leased lands?

5. We understand that since at least 2006, the Tribal Government has paid approximately $1,050,900 to unidentified, anonymous individuals for unspecified land payments. These are separate from leases or other recorded land payments. Can you detail to whom such payments were made and for what purpose?

VIII. Westrock

1. It is our understanding that R. Dennis Ickes first told you and councilmember Boyd Gourneau that a Section 17 Corporation under the Indian Reorganization Act could be formed to acquire companies with equity in 2005. Can you confirm this and provide any details about those discussions or decisions? Please also provide details about Mr. Ickes's relationship to the Tribal Council and his role.

2. We understand that the Bureau of Indian Affairs approved the Charter of the Lower Brule Corporation (LBC) sometime in April 2007, but that the Internal Revenue Service had not authorized the use of a Section 17 corporation as a vehicle to attract outside investors or to sell equity in the company. Can you confirm this and provide any additional details about these issues?

3. We understand that Anthony Fenton, a business associate of R. Dennis Ickes, and the Tribal Government first introduced the principals of the Lower Brule Corporation to principals of Westrock Advisors sometime in 2007. Can you confirm this and provide any details about how Westrock was introduced to members of the Lower Brule Sioux Tribal Council or Tribal Councilmembers who also served as board members of the Lower Brule Corporation and its subsidiaries?

4. In 2007, or at any other point between 2007 and 2014, did members of the Tribal Council, the board of the Lower Brule Corporation, or anyone on their behalf, conduct financial or other due diligence on Westrock Advisors prior to the purchase of the company by the Tribe through subsidiaries of the Lower Brule Corporation? If so, please provide any details on that due diligence.

5. We understand that the Tribe offered to buy Westrock for approximately $17.5 million in 2008. Can you please detail the basis for this decision and how the Tribe planned to pay for this acquisition?

6. Can you detail any meetings, discussions, or business activities with Paul Pomfret? If so, please provide any details of those interactions.

7. We understand that the Tribe began to negotiate a loan guarantee with the Bureau of Indian Affairs for the purchase of Westrock sometime in 2009. Can you confirm this and provide details on this effort, including who was designated or authorized to secure the loan guarantee?

8. We understand that principals or associates of the Lower Brule Corporation set up a series of companies registered in Delaware, ostensibly to facilitate the purchase of Westrock. These include The

Lower Brule Corporation, LBC Capital Markets, LLC, LBC Western Holdings, LLC, and LBC Western Inc. Can you detail why these companies were formed and for what purpose?

9. Can you detail whether the deliberations regarding the formation of the Lower Brule Corporation, any of its subsidiaries, or the purchase of Westrock were ever discussed with all of the members of the Tribal Council or the Tribe prior to the purchase of Westrock? If so, please provide details of those discussions.

10. Can you provide the details and basis for hiring Dr. Gavin Clarkson by the Lower Brule Corporation or any of its subsidiaries?

11. Can you provide details about the formation and purpose for the Lower Brule Community Development Enterprise?

12. We understand that approximately $100,000 in cash and a $929,000 portfolio of mostly non-performing loans were transferred from the Tribal Government to the Lower Brule Community Development Enterprise. Can you provide details about the recipients of those loans, whether they have been repaid, and for what purpose they were given? Please also detail the source of the $100,000 cash and the overall purpose of transferring these assets and liabilities to the Lower Brule Community Development Enterprise.

13. We understand that there is no record of these transfers in the Tribal Government audits. Can you provide any details about these transactions or why they did not appear in the audits?

14. Can you detail when the Tribe, board members, or principals of the Lower Brule Corporation, its subsidiaries, or Westrock recognized that Westrock and its subsidiaries had serious financial difficulties?

15. We understand that the Lower Brule Community Development Enterprise received a $22.5 million loan guarantee sometime in 2010 and that Dr. Clarkson was appointed to sell it for cash in order to capitalize Westrock. Can you provide details of his appointment, the loan guarantee, and the intended use of funds?

16. We understand that sometime during or after the third quarter of 2010, prior investors in Westrock were notified that they had lost their original investment. We also understand that they were offered the opportunity to reinvest in the company with the promise that their investment would be repaid with interest and the investment was guaranteed by the Bureau of Indian Affairs loan guarantee. Can you provide details of this arrangement and the specific offers made to investors?

17. We understand that Dr. Clarkson secured approximately $20 million in cash for the sale of the loan guarantee. Can you detail how those funds were used?

18. Can you provide details of any conversations that members of the Tribal Council, representatives of Westrock, or the Lower Brule Corporation or any of its subsidiaries had with representatives of the Bureau of Indian Affairs regarding the acquisition and sale of the loan guarantee?

19. We understand that some of the beneficiaries of notes or shares related to Westrock were members

of the board of directors of the Lower Brule Community Development Enterprise, and that the board consisted of yourself, Vice-Chairman Boyd Gourneau, Darrell Middletent, Orville "Red" Langdeau, John McCauley, Gavin Clarkson, and Walter Hillabrant. Can you confirm whether this was the board and provide details of any compensation they received for serving on this board, including through the sale or purchase of notes or shares in Westrock or other companies?

20. Can you provide details about other creditors or shareholders that were paid for their investment in Westrock, including the names of those people and the amount of money they received?

21. Please provide details of any compensation received for board members or officers of the Lower Brule Corporation or any of its subsidiaries, including the LBC Western Holdings, LBC Western, or the Lower Brule Community Development Enterprise.
22. Has the board of Lower Brule Corporation and subsidiaries or members of the Tribal Council ever made documentation, records of deliberations, or any other information public about the activities of the Lower Brule Corporation or its subsidiaries?

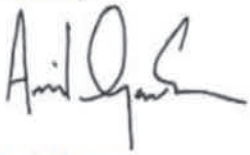
23. Does the Lower Brule Community Development Enterprise provide loans to members of the Lower Brule Sioux Tribe? If so, please provide details about those activities.

24. Does the Lower Brule Community Development Enterprise make an annual report or other documentation that details its financial activities? If so, are these documents public and can they be provided to us?

25. We understand that the Lower Brule Community Development Enterprise filed documents with the US Securities and Exchange Commission reporting that it had sold $6,818,546 in shares because LBCDE intended to "exchange cash and Class B Membership Interests in exchange for outstanding indebtedness of the Issuer held by current security holders that are accredited investors." Please provide details regarding the purpose of this transaction, the source of the cash to be exchanged (e.g. is it part of the cash from the sale of the BIA loan guarantee), and the identity of the current security holders.

We appreciate your attention to these matters and look forward to your response. Please feel free to contact me if you have any questions. My email address is ganesaa@hrw.org and my phone numbers are 202.612.4329 (office) and 202.255.8305 (mobile). You can also reach me through my associate, Darcy Milburn, at milburd@hrw.org or 202.612.4357.

Sincerely,



Arvind Ganesan
Director, Business and Human Rights Division
Human Rights Watch
ganesaa@hrw.org
(202) 612-4329

Letter from Mr. Randy Akers, FOIA Liaison, US Department of Housing and Urban Development, August 29, 2013

U. S. Department of Housing and Urban Development

Northern Plains Office of
Native American Programs

Region VIII, Denver
1670 Broadway Street
Denver, Colorado 80202-4801

Phone: 303-672-5465
Fax: 303-672-5003
Web: www.hud.gov

August 29, 2013

Ms. Darcy Milburn
Senior Associate
Human Rights Watch
1630 Connecticut Avenue
Washington DC 20009

SUBJECT: Freedom of Information Act Request FOIA Control Number: 13-FI-R08-00890

Dear Ms. Milburn:

This letter follows up on and amends a letter the Northern Plains Office of Native American Programs (NPONAP) wrote to you on August 1, 2013, concerning its intended disclosures in response to your above referenced Freedom of Information Act (FOIA) request. The request asked for the following documents:

> All documents related to grants received by the Lower Brule Sioux Tribe from HUD through its Indian Community Development Block Grant (ICDBG) Program since 2004. These include grant applications, self-monitoring information, Annual Status and Evaluation Report (ASER), and audits of each grant.

Pursuant to the Department's FOIA regulations published at 24 CFR Part 15, if HUD has reason to believe that FOIA Exemption 4 may protect certain information, HUD must notify the submitter of the information about the request. NPONAP did so and, on June 18, 2013, received a request from the Lower Brule Sioux Tribe (LBST) that NPONAP withhold the following information from the documents under FOIA Exemption 4:

1. All narrative sections of the ICDBG applications for all years headed "Budget and Cost," including "breakdowns" of budget and cost estimates;
2. All attachments and exhibits to the ICDBG applications for all years titled "Cost Summary," including all material and labor cost estimates, construction and demolition cost estimates, and unit and quantity itemized cost estimates.

As stated in NPONAP's letter dated August 1, 2013, HUD is required by the FOIA to make an independent determination concerning release of the requested information. NPONAP conducted a thorough review of the documents and determined that the narrative and cost summary portions of the cited request for withholding are not protected by FOIA. This determination is based on 42 USC 3545(a)(4)(C)(i)(111), which states that the dollar amount of the funding for each project, activity, or undertaking shall be public information. Additionally, the HUD Reform Act, § 102, and implementing regulations at 24 CFR § 4.9(b)(3) requires applicants that receive assistance in excess of $200,000 to disclose a report of the sources and uses of funds for the project or activity including governmental and non-governmental sources of

funds. NPONAP also determined that the cost estimates for the 2004 through 2011 ICDBG grants are not protected, because these amounts have already been spent and therefore are not reasonably likely to cause competitive harm to the Lower Brule Tribe.

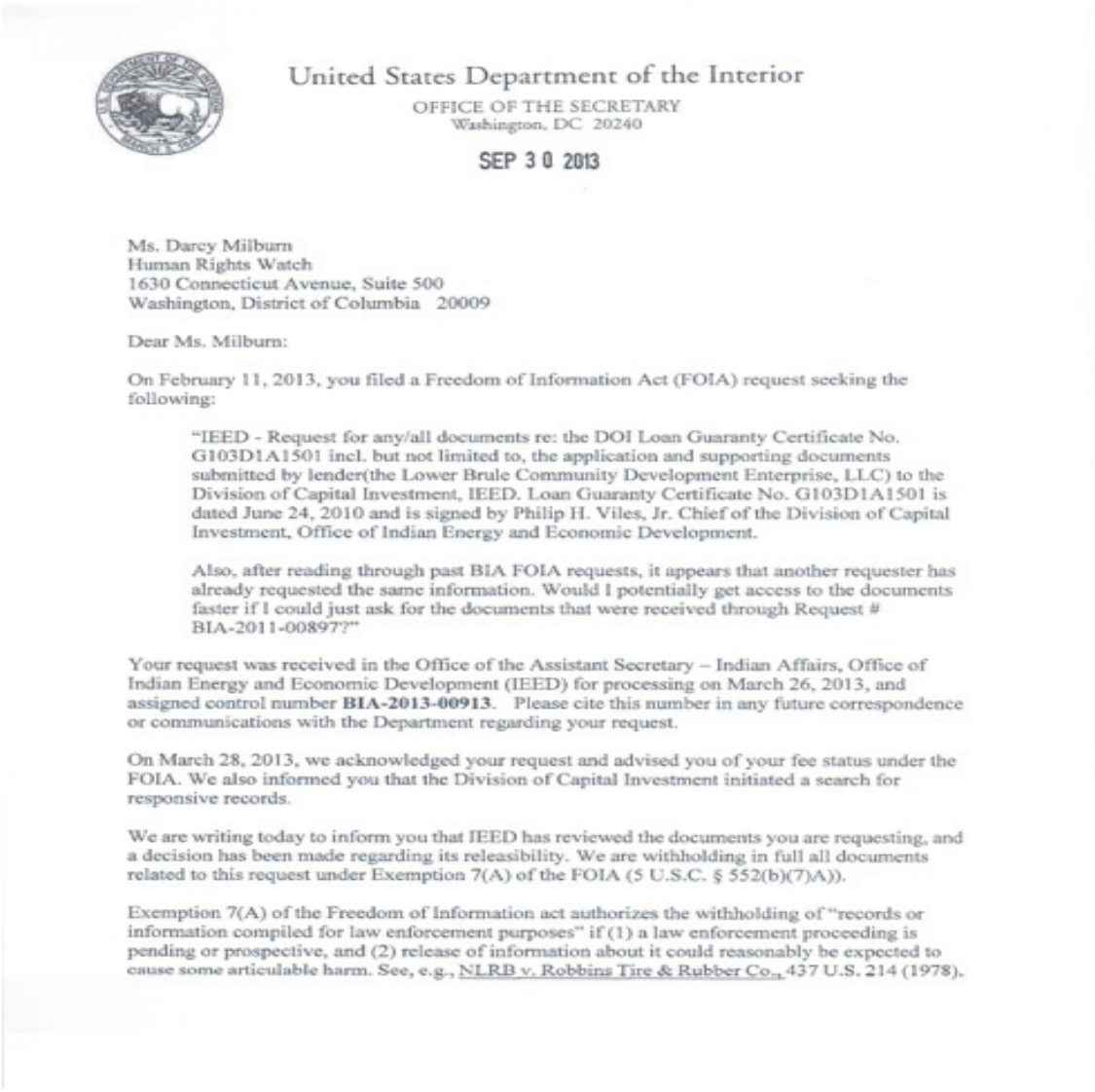
After further research, however, NPONAP has determined that the cost estimate for materials and labor for the 2012 ICDBG grant should be withheld consistent with LBST's reasoning that making the information public could interfere with the competitive bidding process in future procurements. NPONAP will also be withholding the names of key personnel under FOIA Exemption 4. The names of beneficiaries, and signatures and addresses of bid opening attendees are being withheld under FOIA Exemption 6. NPONAP's August 1, 2013, determination is thus amended to reflect these withholdings. Otherwise, the information you requested will be disclosed on or about September 9, 2013.

Should you have any further questions about this request under FOIA, please contact Katie Starcevich, Grants Evaluation Specialist, at (303) 672-5147, or on the Internet at katie.e.starcevich@hud.gov.

Sincerely,

Randy Akers
FOIA Liaison

Letters from Ms. Karen J. Atkinson, Bureau of Indian Affairs to Human Rights Watch, September 30, 2013



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

SEP 30 2013

Ms. Darcy Milburn
Human Rights Watch
1630 Connecticut Avenue, Suite 500
Washington, District of Columbia 20009

Dear Ms. Milburn:

On February 11, 2013, you filed a Freedom of Information Act (FOIA) request seeking the following:

> "IEED - Request for any/all documents re: the DOI Loan Guaranty Certificate No. G103D1A1501 incl. but not limited to, the application and supporting documents submitted by lender(the Lower Brule Community Development Enterprise, LLC) to the Division of Capital Investment, IEED. Loan Guaranty Certificate No. G103D1A1501 is dated June 24, 2010 and is signed by Philip H. Viles, Jr. Chief of the Division of Capital Investment, Office of Indian Energy and Economic Development.
>
> Also, after reading through past BIA FOIA requests, it appears that another requester has already requested the same information. Would I potentially get access to the documents faster if I could just ask for the documents that were received through Request # BIA-2011-00897?"

Your request was received in the Office of the Assistant Secretary – Indian Affairs, Office of Indian Energy and Economic Development (IEED) for processing on March 26, 2013, and assigned control number **BIA-2013-00913**. Please cite this number in any future correspondence or communications with the Department regarding your request.

On March 28, 2013, we acknowledged your request and advised you of your fee status under the FOIA. We also informed you that the Division of Capital Investment initiated a search for responsive records.

We are writing today to inform you that IEED has reviewed the documents you are requesting, and a decision has been made regarding its releasibility. We are withholding in full all documents related to this request under Exemption 7(A) of the FOIA (5 U.S.C. § 552(b)(7)A)).

Exemption 7(A) of the Freedom of Information act authorizes the withholding of "records or information compiled for law enforcement purposes" if (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

In the current matter, there is a pending investigation by the Office of the Inspector General (OIG) for the Department of the Interior. These records constitute part of the investigative files complied pursuant to this investigation for law enforcement purposes. Therefore, step 1 of the Exemption 7(A) analysis is clearly met.

Second, this investigation is ongoing, and the OIG has determined that the release of these records during the pendency of this investigation would cause harm to the investigation.

In conclusion, all of the three prongs required under 7(A) of the FOIA have been met: the records in question have been compiled as part of an ongoing investigation by the OIG for the Department of the Interior, the investigation is for law enforcement purposes, and their release could reasonably be expected to interfere with this investigation. They are therefore withholdable under Exemption 7(A) of the Freedom of Information Act.

Finally, in those instances where we have withheld the names of individuals, we have done so under Exemption 7(C) of the FOIA (5 U.S.C. § 552(b)(7)C)) and Exemption 6 of the FOIA(5 U.S.C. § 552(b)(6).

Angela Kelsey, Attorney-Adviser, Division of Indian Affairs, in the Office of the Solicitor, was consulted in reaching this decision.

By law, we are required to advise you of your appeal rights when informing you that that we have withheld information or when we believe we have no records responsive to portions of your FOIA request. Therefore, if you have additional information (not provided in your request letter) that would lead you to believe that there are records in files maintained by IEED that were not located in our search for records responsive to your request, you may appeal this denial to the FOIA Appeals Officer. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and addressed to:

Freedom of Information Act Appeals Officer

Department of the Interior
Office of the Solicitor
1849 C Street, NW, MS 6556
Washington, DC 20240

You must include with your appeal copies of all correspondence between you and the bureau concerning your FOIA request, including a copy of your original FOIA request and this denial letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and the face of the letter, with the legend, "FREEDOM OF INFORMATION APPEAL." Your letter should include in as much detail as possible any reason(s) why you believe the bureau's response is in error.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services

National Archives and Records Administration
(OGIS) 8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: http://ogis.archives.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes our response to your request.

If you have any questions concerning your request, or any of the issues discussed in this letter, please contact Ashley Rychak by telephone at 202-513-7680, by fax at 202-208-4564, or email Ashley.Rychak@bia.gov, or by mail at U.S. Department of the Interior, Office of Indian Energy and Economic Development, 1951 Constitution Avenue, NW., Mailstop 20-SIB, Washington, DC 20245.

Within the Office of Indian Energy and Economic Development, we are committed to providing you, our customer, with the highest quality of service possible.

Sincerely,

Karen J. Atkinson
Director, Office of Indian Energy
and Economic Development

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

SEP 30 2013

Ms. Darcy Milburn
Human Rights Watch
1630 Connecticut Avenue, Suite 500
Washington, District of Columbia 20009

Dear Ms. Milburn:

On September 16, 2013, you filed a Freedom of Information Act (FOIA) request seeking the following:

> All correspondence between BIA staff and Great American Insurance Group regarding a 2010 DOI Loan Guaranty (Certificate No. G103D1A1501) issued to the Lower Brule Community Development Enterprise, LLC (LBCDE) through the Division of Capitol Investment, IEED. The Loan Guaranty Certificate No. G103D1A1501 was for approx. $22.5 million, is dated June 24, 2010, and is signed by Philip H. Viles, Jr. Chief of the Division of Capital Investment, Office of Indian Energy and Economic Development.

Your request was received in the Office of the Assistant Secretary – Indian Affairs, Office of Indian Energy and Economic Development (IEED) for processing on September 16, 2013, and assigned control number **BIA-2013-02085**. Please cite this number in any future correspondence or communications with the Department regarding your request.

We are writing today to inform you that IEED has reviewed the documents you are requesting, and a decision has been made regarding its releasibility. We are withholding in full all documents related to this request under Exemption 7(A) of the FOIA (5 U.S.C. § 552(b)(7)A)).

Exemption 7(A) of the Freedom of Information act authorizes the withholding of "records or information compiled for law enforcement purposes" if (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978). In the current matter, there is a pending investigation by the Office of the Inspector General (OIG) for the Department of the Interior. These records constitute part of the investigative files complied pursuant to this investigation for law enforcement purposes. Therefore, step 1 of the Exemption 7(A) analysis is clearly met.

Second, this investigation is ongoing, and the OIG has determined that the release of these records during the pendency of this investigation would cause harm to the investigation.

In conclusion, all of the three prongs required under 7(A) of the FOIA have been met: the records in question have been compiled as part of an ongoing investigation by the OIG for the Department of the Interior, the investigation is for law enforcement purposes, and their release could reasonably be expected to interfere with this investigation. They are therefore withholdable under Exemption 7(A) of the Freedom of Information Act.

Finally, in those instances where we have withheld the names of individuals, we have done so under Exemption 7(C) of the FOIA (5 U.S.C. § 552(b)(7)C)) and Exemption 6 of the FOIA(5 U.S.C. § 552(b)(6).

Angela Kelsey, Attorney-Adviser, Division of Indian Affairs, in the Office of the Solicitor, was consulted in reaching this decision.

By law, we are required to advise you of your appeal rights when informing you that that we have withheld information or when we believe we have no records responsive to portions of your FOIA request. Therefore, if you have additional information (not provided in your request letter) that would lead you to believe that there are records in files maintained by IEED that were not located in our search for records responsive to your request, you may appeal this denial to the FOIA Appeals Officer. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and addressed to:

Freedom of Information Act Appeals Officer
Department of the Interior
Office of the Solicitor
1849 C Street, NW, MS 6556
Washington, DC 20240

You must include with your appeal copies of all correspondence between you and the bureau concerning your FOIA request, including a copy of your original FOIA request and this denial letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and the face of the letter, with the legend, "FREEDOM OF INFORMATION APPEAL." Your letter should include in as much detail as possible any reason(s) why you believe the bureau's response is in error.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
(OGIS) 8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: http://ogis.archives.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes our response to your request.

If you have any questions concerning your request, or any of the issues discussed in this letter, please contact Ashley Rychak by telephone at 202-513-7680, by fax at 202-208-4564, or email Ashley.Rychak@bia.gov, or by mail at U.S. Department of the Interior, Office of Indian Energy and Economic Development, 1951 Constitution Avenue, NW., Mailstop 20-SIB, Washington, DC 20245.

Within the Office of Indian Energy and Economic Development, we are committed to providing you, our customer, with the highest quality of service possible.

Sincerely,

Karen Atkinson

Karen J. Atkinson
Director, Office of Indian Energy
and Economic Development

SECRET AND UNACCOUNTABLE

The Tribal Council at Lower Brule and its Impact on Human Rights

Millions of dollars in public funds are missing for the Lower Brule Sioux, an impoverished tribe located on a small, extremely poor reservation in central South Dakota. Some 40 percent of the local population requires food assistance and the reservation's poverty level is almost three times the national average.

Secret and Unaccountable documents how about US$3.6 million meant for essential services such as education, water, or key poverty alleviation programs have been diverted, and as a result the economic and social rights of people on the reservation have been undermined. Funds desperately needed to address profound social needs and advance the basic rights of tribal members have been channeled into highly questionable projects, including the Tribe's disastrous 1999 purchase of the Westrock Group, a troubled Wall Street brokerage firm that went bankrupt about two years later.

A small circle of Tribal Council members runs the government in an environment largely devoid of transparency and there is little tribal members can do to access information about their actions or hold them accountable. This secretive environment also fosters the appearance of conflict of interest, especially when government members stand to benefit financially from acts of the council or the bodies it controls.

The lack of transparency and accountability has created serious human rights problems in Lower Brule. The report suggests key reforms to better protect tribal members' human rights and improve accountability. These measures could also help protect the rights of other sovereign tribes and avoid the types of problems that have occurred at Lower Brule

Human Rights Watch calls on the Tribal Government to open its records and be accountable to its citizens while urging the federal government to investigate the misuse of public funds. The federal government should publish documentation related to its funding of Lower Brule, including audits, and devote more resources to the Federal Bureau of Investigations and the Bureau of Interior's Office of Inspector General to enable them to conduct meaningful investigations.

Lower Brule Tribal Government Building.

hrw.org