

**Navajo Utah Commission
of the
Navajo Nation Council**

Utah Navajo Issues & Concerns

Presented to:

Gov. Gary R. Herbert & Utah Legislature

2017 Utah Legislature Tribal Caucus

February 6, 2017

1. S.B. 91: NATIVE AMERICAN CHILD WELFARE AMENDMENTS

The welfare and safety of Indian children coming from unfortunate circumstances has been a continuing concern for tribal nations in the state of Utah. Senator Kevin T. Van Tassell is sponsoring S.B. 91 (Native American Child Welfare Amendments) to address some of the barriers and challenges in delivery of service in the tribal child welfare system. S.B. 91 clarifies full faith and credit of an Indian tribe's licensure of foster homes on and off the reservation. It requires the Utah Division of Child & Family Services (DCFS) to cooperate and share relevant information with Utah tribes and provides access to the Management Information System for said tribes. Dave Carlson, AG Director of Child Protection was instrumental in the crafting of language for this bill. More importantly, the legislation evolved out of concerns and effort by Utah tribes. The Navajo Nation Indian Child Welfare Act Program also expresses support and endorsement. The Navajo Utah Commission and the Utah chapters support Sen. Kevin Van Tassell's sponsorship of S.B. 91 and urge the 2017 Utah Legislature to enact S.B. 91. Gov. Gary R. Herbert is respectfully requested to sign S.B. 91 into law upon legislative approval.

2. H.B. 43: AMERICAN INDIAN AND ALASKAN NATIVE EDUCATION AMENDMENTS

The achievement gap issue has been a major and chronically persistent challenge for schools serving Native American students in Utah. The State Board of Education's decision to begin issuing letter grades for school performance has spotlighted the educational struggles of the San Juan School District (SJSD). The past several years have recorded failing or near-failing grades for almost all of SJSD schools located on the Navajo Nation in San Juan County. The Navajo Utah Commission and the eight and the eight Utah tribes strongly supported H.B. 33 (American Indian-Alaskan Native Education Amendments) during the 2015 Utah legislative session. The enactment of H.B. 33 resulted in establishment of an Indian Education Commission, and eventual recommendation for legislative appropriations to address the achievement gap issue. State-wide tribal support was once again mobilized to support S.B. 14 (American Indian & Alaskan Native Education Amendments) during the 2016 general session. S.B. 14 was partially successful as it appropriated only \$250,000 rather than the \$2 million initially sought. The \$250,000 was granted to the Eagle View Charter School in a competitive process and as reported during the November 14, 2016 Native American Legislative Liaison Committee (NALLC) Meeting, providing urgently needed resources for the benefit of Native American students. The Navajo Utah Commission requested the assistance of the Governor's Office and state legislators in seeking additional legislative appropriations to address the intent of S.B. 14 during the 2016 Utah Native American Summit. The Utah NALLC Committee responded favorably with the announcement that Rep. Mike Noel will be sponsoring legislation. Rep. Noel of District 73 dropped legislation (H.B. 43) early in the legislative process seeking \$500,000 specifically for the San Juan School District to improve the achievement gap. H.B. 43 completed the 3rd House reading on January 27, 2017, and has been forwarded to the Senate. The Navajo Utah Commission understands the greatest challenge will be the appropriate hearings near the end of the legislative session. The Navajo Utah Commission is requesting the support and leadership of

and Procedures for Indian Water Rights Settlements. The Nation and the State reached a general agreement concerning a proposed water rights settlement in 2010 and a federal negotiation team was appointed in 2013. The terms of the settlement documents were finalized in 2015; however, the federal team continues to develop data to inform the Administration's position. The Navajo Nation Council approved the Settlement Agreement on January 16, 2016, pursuant to Legislation CIA-17-16. The State reiterated its support for the settlement by Senate Concurrent Resolution 2, memorialized in the Congressional Record, 161:110 (Wednesday, July 15, 2015) p. H5237 and referred to the House Committee on Natural Resources. The key terms of the draft settlements agreement are:

- I. **Quantification of Navajo Nation Water Rights.** The Nation's water rights will be held in trust by the U.S.
 - The Nation has the right to deplete 81,500 acre-feet per year (AFY) of surface and ground water from all water supplies in the Upper Colorado River Basin in Utah. This quantity fits within the State's Upper Colorado River basin apportionment. The Nation's rights are not subject to forfeiture and abandonment for non-use.
 - The Nation has the right to divert and store up to 435 cubic feet per second from the San Juan River, so long as total depletions do not exceed 81,500 AFY. This right to divert and store shall not impair existing state-based water rights.
 - Existing Navajo uses will be hydro-surveyed and assigned to priority date based on the date of the Executive Order establishing the part of the Reservation where the water is diverted.

- II. **Water Delivery Projects.** The Navajo Nation Department of Water Resources developed the *Navajo Nation/State of Utah Water Rights Settlement Projects: White Paper* (June 6, 2014) to describe the water supply needs of the Reservation in Utah and to propose a range of alternatives for addressing those needs. The least expensive alternatives were used to determine the appropriate level of funding for a Navajo Water Development Fund. The settlement documents do not describe the projects in detail to allow the Nation flexibility in meeting its water delivery needs and to account for future technological advancements with the potential to reduce costs, these water delivery projects are generally outlined on the following page.
 - *Utah Navajo Regional Water Project.* Major water infrastructure pipelines and water treatment facilities to provide safe, clean drinking water to Utah Navajo communities.
 - *Capital Improvement Plan Projects.* 50 short-term public water system upgrades to accommodate projected demands through 2020.
 - *Remote Community (IHS/SDS) Water Projects.* Completion of 30 projects on the Indian Health Service sanitation deficiency list for remote homesites and communities that will not receive water directly from the water infrastructure projects described above.

Gov. Gary R. Herbert during appropriation hearings for H.B. 43, and urging the 2017 Utah Legislature to enact H.B. 43 at the funding level currently proposed.

3. S.J.R. 5: JOINT RESOLUTION SUPPORTING PROPOSED FEDERAL CHANGES TO DISTRIBUTIONS TO UTAH NAVAJO TRUST FUND

Sen. David P. Hinkins and Rep. Michael Noel are sponsoring a joint resolution for the 2017 Utah Legislature endorsing federal legislation that will transfer the Federal minerals in the subsurface of the McCracken Mesa Extension to the Utah Navajo Trust Fund. The bill number for this legislation is S.J.R. 5, and entitled Joint Resolution Supporting Proposed Federal Changes to Distributions to Utah Navajo Trust Fund. S.J.R. 5 supports passage of United States Representative Jason Chaffetz's bill to transfer all right, title, and interest in and to the Federal minerals located in the subsurface of the McCracken Extension of the Navajo Nation to the Utah Navajo Trust Fund. The Federal Bill HR-5780 setting forth the language to "transfer minerals within the McCracken Mesa Extension of the Navajo Nation to the Utah Navajo Trust Fund" is dated 2015-2016 with U.S. Representative Rob Bishop the sponsor. The Navajo Utah Commission, the seven Utah chapters, the Navajo Nation, and the Utah Navajo Trust Fund have not seen the federal legislation sponsored by Rep. Jason Chaffetz. The Navajo Utah Commission is unable to render endorsement of S.J.R. 5 at this time due to lack of consultation and necessary discussion regarding intent, benefit, and impact. Executive Order(s) currently exist at the federal, and state levels regarding government to government consultation on significant matters. Questions regarding fiscal impact and benefits definitely need to be examined more thoroughly in regard to proposed change in mineral ownership. The Utah Navajo Trust Fund collects royalty fees from the Aneth Extension to capitalize the trust fund. The state of Utah retains ownership of mineral rights for the McCracken Mesa Extension and is thus enable to levy and collect severance taxes. The severance taxes collected from the McCracken Mesa Extension capitalizes the Utah Navajo Revitalization Fund (NRF) and serves the same UNTF beneficiary. The Navajo Utah Commission is assuming without benefit of greater details, that the state of Utah would be unable to collect severance taxes from the McCracken Mesa Extension if the mineral rights are transferred by Congress. It is further assumed that the mineral monies collected by UNTF would be royalty fees, and subject to 37.5% – 62.5% split with the Navajo Nation as is currently the rule with UNTF. The Navajo Utah Commission is respectfully requesting Gov. Gary R. Herbert to seek an analysis by the Utah Tax Commission regarding potential tax implications, and eventual state of Utah determination regarding benefits. The Navajo Utah Commission is also respectfully requesting Sen. Hinkins and Congressman Chaffetz to work directly with their tribal constituency and their government on this important issue.

4. UTAH WATER RIGHTS SETTLEMENT AGREEMENT

The Navajo Nation ("Nation") and the State of Utah ("State") are committed to the goal of resolving reserved water rights claims through negotiated settlements rather than litigation. In August 2003, the President of the Nation and the Governor executed a Memorandum of Agreement to commence settlement discussions. The Department of the Interior has also expressed support for negotiated settlements to quantify Indian water rights in its 1990 *Criteria*

- *Agricultural Water Projects.* Funding for an agricultural water conservation and management program to benefit Navajo irrigated lands, which may be water-short as a result of the protections the settlement affords to existing non-Indian uses.

III. **Settlement Funding.** Proposed Costs (in June 2014 \$):

• Navajo Water Development Fund	\$193,300,000
• Navajo OM&R Trust Fund	\$11,100,000
• <u>Programmatic (Hydrographic Survey) Costs</u>	<u>\$1,000,000</u>
TOTAL	\$205,400,000*

*The cost of constructing the projects was estimated in the White Paper. An Operation, Maintenance & Repair (OM&R) Trust Fund is proposed to help to defray OM&R costs in the early years of the projects. The State has proposed to contribute \$8 million to help build these water delivery projects and has begun to appropriate funds in anticipation of the settlement.

5. UTAH NAVAJO VOTING RIGHTS

Background: In 2012, the Navajo Nation and individual plaintiffs brought a lawsuit against San Juan County alleging that the San Juan County Commission and School Board election districting plans violated the United States Constitution and the Voting Rights Act. After years of discovery and lengthy delays, the Court ruled in favor of the Navajo Nation. On December 9, 2015, the Court agreed that the School Board districting plan, which had been in place for over 25 years, violated the one-person, one vote mandate of the Constitution. On February 11, 2016, the Court held that the County Commission plan was based on intentional racial discrimination and therefore also violated the Constitution.

Remedial Redistricting: In late 2015 and early 2016, the Court set forth a plan for developing, evaluating and implementing remedial redistricting plans for the San Juan County Commission and School Board election districts. Unfortunately, the Court found that it could not implement such plans until after the 2016 election cycle and so the remedial redistricting process will continue until 2017 unless parties can come to a resolution beforehand. Despite numerous attempts by the Navajo Nation to engage San Juan County in meaningful and legal redistricting of the Commission and School Board election plans, the County has refused and instead implemented a temporary School Board election plan, which maintains Constitutional and Voting Rights Act violations.

The Path Forward: *Navajo Nation, et al., v. San Juan County* has been in active litigation for almost 5 years and has cost the Navajo Nation millions of dollars to date. Although the Navajo Nation has prevailed on the merits of this case, these wins have not translated to gains on the ground because the temporary School Board plan approved by the County does not comply with the Constitution and violates several federal laws by continuing to dilute the Native American vote. Because the Court was not able to implement a new redistricting plan for the County Commission in time for the 2016 Primary Election, that unconstitutional plan remains in place and Native American voters in San Juan County will have to endure yet another election cycle that does not preserve or respect their fundamental rights. Until San Juan County is willing to

work with the Navajo Nation to develop and implement redistricting plans and election procedures that comply with the Constitution, the Voting Rights Act, and other federal and state laws, the substantive victory is essentially meaningless. With the 2018 elections upcoming, it has never been more important that these issues be resolved. Accordingly, the Navajo Nation respectfully requests that the Governor encourage San Juan County to respect the rights of Native American voters in the County by engaging the Navajo Nation in meaningful redistricting of its Commission and School Board election plans.

6. BEARS EARS NATIONAL MONUMENT

The Bears Ears National Monument continues to be a source of controversy and heated debate among Utah politicians but for the majority of Utah Navajo, the Navajo Nation and the Diné, the Monument is a symbol of hope and healing, as well as a path that allows us to move forward together toward a better future. In past communications and discussions, the Navajo Utah Commission has consistently stated our position and support for the recently declared Bears Ears National Monument. We cannot make it any clearer.

We are deeply offended by the insolvent characterization of this designation as a “political ATM”¹ by House Speaker Hughes. This historical, ancestral Diné homeland you know as the Bears Ears region is of great significance to our people. This designation is the result of years of hard work and a true call to authentic land stewardship that is inclusive of the Native perspective. The congressional path failed us. This Monument is an answer to our prayers and a message to all tribal nations that our voices were finally heard and tribes can be politically relevant. We have a vision for this land. We have ideas on how to collaboratively manage this land with ALL local residents. But our vision cannot be achieved without protection. Even you, Governor, acknowledged that “All who have looked at this issue know that the Bears Ears area deserves greater protection than what the [] Bureau of Land Management ha[d] chosen to provide.”²

We continue to be concerned over the continued portrayal of a County Commission as the voice for tribal interests. This must not continue. When speaking of tribal interests, please remember and respect tribal sovereignty. Only duly elected tribal officials can speak with authority when it comes to tribal interests. The continued portrayal by Utah elected officials that they know what is best for the Native Americans in their state drawn political boundaries mistakenly omits a critical aspect of the inherent fundamental ideological differences between state and local governments and tribal governments. Such state officials must reexamine such assumptions and should consult with the appropriate tribal officials with respect and subsequently, properly acknowledge those perspectives, even if they feel otherwise.

While we can respect the right of the state of Utah to enact resolutions, as is their right to do as a sovereign state, we ask that you respect our tribal sovereignty. These resolutions should not have proceeded without consulting the Navajo Nation and allowing our perspective to be heard. The

¹ *Utah House to President Trump: Take Eraser to National Monuments*, Fox 13, (Jan. 31, 2017)

<http://fox13now.com/2017/01/31/utah-house-to-president-trump-take-eraser-to-national-monuments/>.

² *Reactions to Utah's New Bears Ears National Monument, From Scathing to Celebratory*, SALT LAKE TRIBUNE (Dec. 28, 2016) <http://www.sltrib.com/news/4758522-155/live-reaction-to-utahs-new-bears>.

Navajo Utah Commission is a quasi-governmental organization established under the Navajo Nation. It has broad interests and addresses all issues affecting the quality of life among Utah Diné. We expect the state of Utah to meet with us over issues that concern us and not do it behind our back.

Finally, we request assistance in understanding how things are working in San Juan County, how fairness, equality, and standards of living can be improved, and how we can work together to solve these issues. Specifically, Native Americans in San Juan County need a voice in county and state politics. We suggest an independent assessment of race relations in SJC, a county-wide audit of government expenses (including the \$36 million SJC "Rainy Day Fund"), and trainings on how tribal and state governments are structured so that proper procedures can be followed.

These steps would be a start, but relations can only improve when the state of Utah learns and respects the Navajo governmental structure and begins to work with the proper tribal officials of the Navajo Nation and tribal Chapter Houses and vice versa. Please join us for the better path forward searching for a common solution rather than continue down a path that ignores our common concerns.