

6/19/2008 Written Testimony of Clarence Rockwell, Executive Director, Utah Navajo Commission to Committee on Natural Resources, United States House of Representatives, Concerning Future of Utah Navajo Trust Fund

Clarence Rockwell
Executive Director
Utah Navajo Commission

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RE: Written Testimony for 6/19/2008 Full Committee Oversight Hearing on Utah Navajo Trust Fund

Chairman Rahall, Honorable Members of the Committee,

My name is Clarence Rockwell, and I am the Executive Director of the Navajo Utah Commission, and a resident of the Aneth area of the Utah portion of the Navajo Nation in San Juan County, Utah. I am appearing here today in my official capacity, but I am also a beneficiary of the Utah Navajo Trust Fund. I am honored to have this opportunity to appear before the Committee on Natural Resources on behalf of the Navajo Utah Commission, the Navajo Nation and its citizens, and especially on behalf of the Utah Navajos, including myself, who are beneficiaries of the Utah Navajo Trust Fund.

Navajo Utah Commission

The Navajo Utah Commission is an arm of the legislative branch of the Navajo Nation Government and was created by the Navajo Nation Intergovernmental Relations Committee to give a voice to the Utah Chapters in the administration of local Navajo Nation programs. Specifically, the Commission is “to provide policy and administrative guidance to the development, implementation and operation of the Navajo Utah Office of the Navajo Nation,” and “to develop and maintain efficient governmental services to the Navajo people residing in the Utah portion of the Navajo Nation.” The Navajo Utah Commission is made up of eight Commissioners, either Utah Chapter delegates or other Utah Chapter officials, who have been democratically elected and subsequently appointed to the Navajo Utah Commission by the Utah Chapters. The Navajo Utah Commission has an Executive Director and administrative staff who work out of an office in San Juan County, Utah.

The Navajo Nation seeks to ensure that our government speaks with a single voice in its relations with the United States Congress on this important issue. To that end, on May 19, 2008, the Intergovernmental Relations Committee of the Navajo Nation Council passed a Resolution “Relating to Intergovernmental Relations; Approving the 2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund.” IGRMY-107-08. By this resolution, the Navajo Nation adopted an official position of the Navajo Nation in regard to key terms for future federal legislation affecting the Utah Navajo Trust Fund. See Exhibit A (attached). This resolution also delegated specific authority to the Navajo Utah Commission, the Speaker of the Council and the President, to advocate with the federal government and the State of Utah in

regard to the future of the Utah Navajo Trust Fund, in accordance with the terms of the official Navajo Nation position statement. The Navajo Utah Commission was integrally involved in formulating the terms of the official Navajo Nation position statement. The Commission firmly believes these terms represent the best and fairest outcome for all Navajo beneficiaries involved and the best means to avoid mismanagement and misappropriation of trust funds, while recognizing Navajo Nation sovereignty over its lands, resources and citizens.

Since the Utah Navajo Trust Fund was reorganized in 1992, the Navajo Utah Commission has had a successful working relationship with the Utah Navajo Trust Fund Administration, the Dineh Committee advisory board and the Board of Trustees. The Navajo Utah Commission has considerable expertise in grant acquisition and project management, and has partnered with the Utah Navajo Trust Fund Administration and its boards, other State of Utah agencies, numerous federal agencies and other Navajo Nation entities in providing community development facilities, housing, and other local services to Utah Navajos. In addition to Navajo Nation funds, the Navajo Utah Commission has independently sought out and secured upwards of \$18 million dollars of matching federal and state funds to be used for projects in conjunction with Navajo Trust Fund disbursements.

Navajo Nation as Trustee

The Navajo Utah Commission supports the Navajo Nation as the new trustee of the Utah Navajo Trust Fund. The Navajo Nation manages and has successfully grown its own trust fund monies through the guidance of its Investment Committee. It is imperative that the Utah Navajo Trust Fund be grown and managed successfully not only to pay for needed expenditures in the short term, but for the benefit of future generations of Navajos in San Juan County as well. The trust must be administered so as to survive in perpetuity, and trust fund monies must continue to be available to San Juan County Navajos long after Navajo Nation oil and gas resources in Utah have been depleted. There is substantial evidence of mismanagement and misappropriation of trust funds by past entities entrusted with Utah Navajo Trust Fund monies. The need for accountability by the new trustee is essential; other entities or individuals who have been involved in mismanagement and misappropriation of these and other trust monies in the past must not be involved in future investment and administration of the Utah Navajo Trust Fund.

Additionally, the Utah Navajo Trust Fund is capitalized from royalties paid from Navajo Nation oil and gas leases on Navajo Nation Trust Lands. The Navajo Nation has a well-developed annual comprehensive budgeting process for appropriation of all Navajo Nation funds, which for principles of sovereignty and self-determination should be followed in utilization of proceeds from the Utah Navajo Trust Fund. For years, the Navajo Nation has been the fiscal agent for the pass-through of not only Navajo Nation funds to the Navajo Utah Commission, but also for state and federal grant funds used in conjunction with Utah Navajo Trust Fund monies in local community development projects in Utah. The Navajo Nation has proved its fiduciary capabilities and should be the new trustee.

Local Control and Decision Making

The Navajo Utah Commission is also keenly aware of the importance of local control and decision making in the disbursement of trust fund monies. How this will be best accommodated

should be worked out in close consultation with the beneficiaries through the Chapters. One of the goals of the Navajo Nation is to provide for centralized administration of Navajo Nation service providers in the Utah portion of the Navajo Reservation through a Regional Navajo Nation Office centrally located in Montezuma Creek. The Navajo Nation and Navajo Utah Commission envision a Regional Navajo Nation Office that will be a shared facility for the new Trust Administrator, Navajo Nation service providers, and state programs. A Regional Office facility would improve coordination of projects involving these entities, and provide greater access and participation by local citizens.

Special Considerations for the Aneth Extension

The Navajo Utah Commission and the Navajo Nation believe that special consideration for the Aneth Extension is crucial where oil and gas development and production processes that generate royalties for the trust fund cause environmental and other negative impacts. Under the new terms of the trust, separate monies should be specifically allocated to Aneth Chapter to mitigate the environmental impacts of oil and gas extraction on the Aneth Extension, and to meet its unfunded infrastructure needs.

Utah Concerns

The Navajo Utah Commission and the Navajo Nation are aware of federalism concerns as we move forward in replacing Utah as trustee for the Utah Navajo Trust Fund. However, the Utah Navajo Trust Fund was the result of an agreement between three parties, the Navajo Nation, the federal government, and the State of Utah. Utah must be involved in this process as we move forward in relieving Utah of its fiduciary responsibilities. The Navajo Nation and the Navajo Utah Commission hope that this process will encourage a full accounting of the trust by the State of Utah and lead to a fair and appropriate settlement of unresolved litigation. Incidentally, the Navajo Nation, the State of Utah, and various agencies of the federal government have recently begun negotiations to exchange school trust lands in the Aneth Extension for other federal lands. This exchange is taking place under authority of the 1933 Act that created the Utah Navajo Trust Fund. This highlights the government to government relationships that underlie this federal legislation, and the need for government to government consultations in resolving the new trust terms.

Appropriate Consultation

In closing, the Navajo Utah Commission would like to emphasize that the Navajo Nation has an official position and legally delegated representatives who are authorized to provide testimony to this Committee on behalf of the Nation and its citizens, and to advocate on behalf of the Nation for the terms of new federal legislation in regard to the Utah Navajo Trust Fund. As an official representative of the Navajo Nation appearing before you today, I have highlighted many of the terms that the Navajo Nation believes are critical components of new federal legislation in regard to the Utah Navajo Trust Fund. However, I also encourage the Honorable Chairman and Honorable Members of this Committee to read the official 2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund, attached to this testimony as Exhibit A. The position statement provides an historical backdrop to these issues,

as well as fleshing out further details and other terms that the Navajo Nation believes are vital for our governments to move forward with fair and effective legislation.

Chairman Rahall and Honorable Members of the Committee, on behalf of the Navajo Utah Commission, the Navajo Nation and its citizens, and myself as a trust beneficiary, I express my deep appreciation to the Committee for this opportunity to provide testimony today. Through coordination with the Navajo Nation Washington Office, the Navajo Utah Commission looks forward to working with the Committee on Natural Resources in a government to government relationship as we move forward with this important legislation concerning the future of the Utah Navajo Trust Fund.

Thank you.

Clarence Rockwell
Executive Director
Utah Navajo Commission

2008 Position Statement of the Navajo Nation on the Future of the Utah Navajo Trust Fund

History of Utah Navajo Trust Fund.

Executive Order of May 17, 1884, “withheld from sale and settlement and set apart as a reservation for Indian purposes” land in the Utah Territory that lay south of the San Juan and Colorado rivers. This land has been historically and continuously occupied by Navajo people since long before the captivity of Navajos in 1864. Four years before Utah was awarded statehood, Executive Order of November 19, 1892, put Navajo lands in the Utah Territory west of the 110° parallel (“the Paiute Strip”) back in the public domain. Lands in the Utah Territory east of the 110° parallel remained part of the Navajo Reservation. Executive Order of May 15, 1905, added the Aneth area in Utah to the Navajo Reservation. In 1908, the Department of the Interior withdrew the Paiute Strip from the public domain for use of the Navajo. In 1922, the Department of the Interior again put the Paiute Strip back into the public domain.

In 1930 and 1931, the Navajo Nation Council asked the Commissioner of Indian Affairs to negotiate on behalf of Navajo Nation to permanently restore the Paiute Strip to the Navajo Reservation, based on the previous set aside in the Executive Order of 1884 and historic Navajo occupation of the area. On July 7 and 8, 1932, at its annual meeting in Fort Wingate, the Navajo Tribal Council gave its support to proposed federal legislation which would restore the Paiute Strip and add land between Montezuma Creek and the Colorado border to the Aneth area of the Reservation. This legislation was passed by the United States Congress in 1933, as Pub. L. No. 403, 47 Stat. 1418 (1933) (hereafter “1933 Act”).

The 1933 Act was the result of an agreement between three parties: the Navajo Nation, the State of Utah, and the United States Government. After Utah citizens voiced opposition to the proposed addition to the Navajo Reservation, the Commissioner of Indian Affairs negotiated on behalf of the Navajo Nation with a Utah committee made up of San Juan County representatives. Several concessions were made to the Utah committee in order to gain its support for the 1933 Act, including prohibitions on further Indian homesteads or Indian allotments in San Juan County, fencing of Indian allotments outside the new reservation boundaries, fencing of the Aneth extension’s northern boundary, and agreement that state game laws would apply to off reservation hunting by Navajos.

The 1933 Act provided that “should oil or gas be produced in paying quantities,” the State of Utah would receive 37 ½ % of net oil and gas royalties derived from Navajo Tribal Leases on the newly added Navajo Trust Lands. In return, the State of Utah would act as trustee of the funds, and expend the funds “in the tuition of Indian children in white schools and/or in the building of roads across [the newly added lands], or for the benefit of the Indians residing therein.” The 1933 Act also provided that Utah could exchange state school trust lands inside

the new Reservation boundaries for equivalent federal lands and that any fees or commissions for the exchange would be waived.

In 1968, Congress amended the 1933 Act, redefining the purposes of the trust and expanding the class of beneficiaries. The amended legislation provided that the trust be used “for the health, education and general welfare of the Navajo Indians residing in San Juan County.” The 1968 Amendments also provided that trust funds be used for projects and facilities in San Juan County that were not of exclusive benefit to the designated beneficiaries provided that the benefits to the beneficiaries were in proportion to the amount of trust funds used for the projects and facilities.

Over the course of the last 75 years, through legislation, executive acts and other governmental conduct, the State of Utah accepted its federally appointed role as trustee of the Utah Navajo Trust Fund (UNTF). During Utah’s tenure as trustee, funds from UNTF have been used to create and/or acquire significant fixed assets on state lands. These assets include two medical buildings, a government services building, two housing subdivisions, and fairgrounds.

Substantial evidence exists that Utah failed to properly administer Utah Navajo Trust Funds over many decades, and Utah has yet to make a full and complete accounting of its administration and use of trust funds, as required by law. Utah, as UNTF trustee, has been the defendant in several lawsuits. In 1991, serious allegations of mismanagement and misappropriation of trust funds by Utah and other entities using trust monies were made in a 1991 report by the State of Utah, Legislative Auditor General. In Pelt v. Utah, the State of Utah is the defendant in a class action lawsuit brought on behalf of UNTF beneficiaries over these issues.

In 2007, the State of Utah announced that it wished to resign as trustee of UNTF. On March 17, 2008, Bills HCR4 and HB352 (“Sunset Act”) were signed into law. This legislation purports to cause the resignation of Utah from its role as federally appointed trustee of UNTF effective June 30, 2008. The Sunset Act provides that from March 17 until May 5, 2008, the UNTF administrator can only commit to new projects capped at \$100,000, and only to projects that will be completed by January 1, 2010. From May 5 until June 30, the UNTF administrator cannot commit any monies to new projects. After July 1, 2008, all assets of the trust after liabilities are paid will be placed in a New Fund created by the Utah Division of Finance. The New Fund will be managed according to the Utah State Money Management Act. No disbursements will be made from this fund except to pay for maintenance of the fixed assets of the expired UNTF and to continue any educational scholarships awarded through June 30, 2010. The Sunset Act also provides that the State of Utah shall purchase the fixed assets of the Navajo Trust Fund, existing as of May 5, 2008, consistent with the trust obligations of the state in “arms length” transactions and providing “fair market compensation” to the trust. Based on provisions in the Sunset Act and Utah Code 63-55-104 and 63-55-263, the UNTF Administrator probably can continue to function until January 1, 2010. It is expected that the UNTF will maintain a small staff to administer existing UNTF projects until they are completed.

The Fiscal Year 2008 budget for UNTF is \$3,879,300.00. Administrative costs are approximately 14.5% of the entire budget at \$551,800.00. \$650,000.00 is earmarked for chapter projects. Nearly \$595,000.00 is budgeted for higher education, primarily scholarships. The remainder of the 2008 budget goes to a variety of specific projects, as well as providing matching grants for housing construction.

The Navajo Nation is an Independent Sovereign Nation.

The Navajo Nation is an independent sovereign nation. The Navajo Nation has the right to self-determination, to freely determine its own political status and to freely pursue its economic, social and cultural development. In exercising its right to self-determination, the Navajo Nation has the right to autonomy and self-government in matters relating to its internal and local affairs, as well as a right to the ways and means for financing its autonomous functions.

In 1933, when the Navajo Utah Trust Fund was created, the Navajo Nation tribal government was only 10 years old. Today, the Navajo Nation is the largest and most sophisticated American Indian government. The Navajo Nation has developed a substantial body of both statutory and decisional law to complement the fundamental laws of the Diné. The Navajo Nation has a well-developed annual comprehensive budgeting process for appropriation of all Navajo Nation funds which should be followed in utilization of all Navajo Nation generated funds, including the proceeds from the Utah Navajo Trust Fund.

1. New Federal Legislation Affecting the Utah Navajo Trust Fund Should Be the Result of Government to Government Negotiations Between Navajo Nation, United States Government, and State of Utah and Should Require Consent of Navajo Nation.

Federal legislation amending or repealing the 1933 Act and designating a new trustee for the Utah Navajo Trust Fund should be the result of good faith government to government negotiations between the Navajo Nation, the State of Utah, and the United States Government. Consistent with the Navajo Nation's status as an independent sovereign nation, any federal legislation that affects royalties generated by Navajo Nation Trust Lands must be made with the consent of the Navajo Nation.

2. Beneficiaries Should Remain "Navajos in San Juan County" Subject to Certain Conditions.

The beneficiaries of the Utah Navajo Trust Fund should remain Navajos in San Juan County, through the Navajo Nation annual budget process. Provided; that special consideration should be made in the annual budget process to use Utah Navajo Trust Fund proceeds for the benefit of Navajos residing within the Aneth Extension for mitigation of environmental impacts and other negative impacts associated with the development and production processes of oil and gas resources located within the Aneth Extension, and for development of needed infrastructure.

Navajos living outside of Navajo Indian Country shall be eligible for educational assistance from Utah Navajo Trust Fund proceeds. Capital outlay funding and housing assistance shall not be provided from Utah Navajo Trust Fund proceeds for projects located outside of Navajo Indian Country. Provided; that all existing and future health facilities funded by Utah Navajo Trust Fund proceeds and any other facilities funded by Utah Navajo Trust Fund proceeds located outside of Navajo Indian Country shall continue to be operated for the benefit of all Navajos.

3. Consultation of Beneficiaries.

Negotiations to designate a new trustee shall be in close consultation with the existing beneficiaries through the chapters, keeping the best interests of the beneficiaries in mind at all times.

4. New Federal Legislation for Allocation of Royalties Shall Maintain the Status Quo.

The beneficiaries of the Utah Navajo Trust shall continue to receive the benefit of 37 ½% of all royalties generated by oil and gas production from leases on Reservation lands added in 1933. 62 ½% of all royalties generated by oil and gas production from leases on Reservation lands added in 1933 shall continue to go to the Navajo Nation.

5. Disposition of Trust Assets on State Lands.

Negotiations must address UNTF assets on state lands and provide either for fair market value purchase of the assets by Utah, or for acquisition of the state lands in question by Navajo Nation. The Sunset Act provides that the State of Utah Division of Facilities Construction and Management can purchase UNTF assets on state land. Because acquisition of state lands by Navajo Nation could implicate a land exchange involving the federal government, all three governments should be involved in negotiations to dispose of these assets and/or convey, exchange, or purchase lands. In addition, negotiations currently under way to exchange Utah School Trust Lands in the Aneth extension with BLM lands outside the reservation, pursuant to Section 2 of the 1933 Act, should be coordinated with the disposition of UNTF assets.

6. Navajo Nation Would Be Best Trustee.

As a sophisticated tribal government, the Navajo Nation has the resources and expertise to administer the UNTF on behalf of Utah Navajo beneficiaries. The UNTF is generated by royalties from leases entered into by the Navajo Nation on Navajo Nation Trust Lands. Trusteeship of these funds by the Navajo Nation on behalf of the Utah beneficiaries would be consistent with principles of sovereignty and self-determination. The Navajo Nation, through management of its own trust funds, has proved its fiduciary capabilities. The Controller of the Navajo Nation is the general fiduciary of Navajo Nation funds, and trust funds should be invested consistent with the recommendations of the Investment Committee. A Trust Fund

Administrator should be centrally located in San Juan County and trust fund administration should provide for local decision making in how funds are spent.

7. State of Utah Navajo Trust Fund Administrator Should Remain in Existence Until It Winds Up Its Affairs.

The UNTF Administrator has the legal authority under Utah law to continue to administer existing projects until January 1, 2010. The UNTF Administrator should continue to administer existing projects and programs to prevent any gaps in existing services until an interim administrator is designated or a new trustee has been selected.

8. Where Aneth Chapter Suffers Environmental Harms Disproportionate to Its Receipt of Trust Funds, Special Monies Should Be Allocated to Aneth Chapter to Mitigate Environmental Impacts and Develop Needed Infrastructure.

On the Aneth Extension, oil and gas development and production processes that generate royalties for the UNTF cause environmental and other negative impacts. The new terms of the trust should ensure that separate monies are specifically allocated to Aneth Chapter to mitigate the environmental impacts of oil and gas extraction on the Aneth Extension. Additionally, infrastructure needs at Aneth Chapter have not been adequately funded in the past. Future trust administration should provide sufficient funds to develop needed infrastructure at Aneth Chapter.

9. Trust Fund Monies Should Not Be Used in Off-Reservation Projects “Proportional” to the Benefit Received.

Under the 1968 amendments, UNTF monies were allowed to be used in off reservation projects if they were allegedly “proportional” to benefits enjoyed by beneficiaries. This provision has been one of the causes of mismanagement and waste of trust funds. Except for educational endowments, no trust funds shall be used outside Navajo Indian Country without at least 50% matching funds provided by other participating entities.

10. Funds from the Sale of Utah Navajo Trust Fund Administrative Offices Should be Designated Specifically For New Trust Fund Administration Facilities.

One of the goals of the Navajo Nation is to provide for centralized administration of Navajo Nation service providers in the Utah portion of the Navajo Reservation through a Regional Navajo Nation Office centrally located in Montezuma Creek. At present, Navajo Nation services are scattered and not as efficient as they could be in a centralized space.

The State of Utah generally limits its services to the county seat in Monticello. A Regional Navajo Nation Office should be a shared facility for the new UNTF Trust Administrator, Navajo Nation service providers, and state programs. Along with Navajo Nation and state funds, UNTF should provide matching funds from the sale of the current UNTF administrative offices to help

fund the construction of a Regional Office Facility. A Regional Office Facility would improve coordination of projects involving the UNTF Trust Administrator, Navajo Nation service providers, and state entities.

11. Full Accounting by State of Utah.

The State of Utah should provide a full and complete historical accounting of the Utah Navajo Trust Fund before a new trustee is designated. A full and complete historical accounting will specify *how* all UNTF funds were used by both state and non-governmental entities and not merely what entities received UNTF funds and in what amounts.

12. Settlement of Existing Lawsuits.

The State of Utah should use its best good faith efforts to settle the litigation in Pelt v. Utah before a new trustee is designated.