NLWJC- Kagan

Counsel - Box 014 - Folder 008

Navajo-Hopi

THE WHITE HOUSE
WASHINGTON

Mike –

Do you do Indian affairs? If not, could you please pass this on to the DPC person who does? Thanks

Elena

THE WHITE HOUSE
WASHINGTON

Ben –

As we discussed, could you plean give this to the person handling S. 1973?

Thanks

Elena Kagan

U.S. Department of Justice

Environment and Natural Resources Division

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

August 29, 1996

TO: Elena Kagan
Associate Counsel to the President

FROM: Jim Simon
Deputy Assistant Attorney General

SUBJECT: S.1973: The Navajo-Hopi Land Settlement Act of 1996

As we discussed, here is a brief overview of S.1973, the "Navajo-Hopi Land Dispute Settlement Act of 1996." A copy of the bill is attached.

The bill was introduced by Senator McCain in July 1996 to ratify settlement of a centuries-old land dispute between the Hopi Tribe and the Navajo Nation in Arizona. The Justice and Interior Departments have been working on this settlement for approximately five years, and the resolution of this matter is a priority of the Attorney General's. Carol Rasco has been generally aware of the settlement efforts. Senator McCain's bill was voted out of the Senate Indian Affairs Committee by unanimous consent on July 30, 1996. In September, the bill is expected to reach the Senate floor, to be introduced in the House, and hopefully also to reach the House floor. It is important for the success of the settlement that the bill be enacted during this coming month.

The issues raised by the bill are not partisan. As described below, there have been three potential sources of controversy: Senator Kyl has had some concerns, which we hope have been resolved through negotiation with Senator McCain; the Navajo Nation has been sending some mixed signals about its support of the bill; and a group of Navajo residents loosely called the Dineh Alliance continue to seek settlement terms that the Hopi Tribe will not agree to.

The Hopi Tribe's reservation is entirely in Arizona and is landlocked by the much larger and more populous Navajo Reservation, which straddles Arizona and New Mexico (and also extends a short distance into Utah). The Hopi live in pueblos, some of which are villages that have been located in the same place since pre-Columbian times. They generally do not disperse

their residences and would be content to leave large portions of their reservation as open land. By contrast, the Navajos, many of whom are also sheep herders, follow their animals to grazing land and tend to sprawl as they build homesites throughout the grazing range. Through the nineteenth and into the twentieth centuries, the Navajo Reservation grew and many Navajo families moved into the Hopi Reservation, leading to conflict and animosity.

The Hopi Reservation is, of course, federal land held in trust for the Hopi. For many decades, the United States allowed this unfortunate situation to develop. Beginning in the 1930's, Congress tried several legislative solutions. None succeeded. Finally, in 1974, Congress decreed that the disputed land would be partitioned and that the Navajo families living on the "Hopi Partition Land" (HPL) must relocate, voluntarily or involuntarily. Congress provided relocation benefits to those who move voluntarily.

Several thousand Navajos relocated, but approximately 200 Navajos, many of them elderly, remain on the HPL. The settlement that we have achieved would allow the remaining Navajos to stay in their homes by signing a renewable 75-year lease with the Hopi Tribe. It would thus confirm Hopi jurisdiction over the land. And it would reduce the number of people who will be trespassers on Hopi land and may be subject to involuntary relocation.

This settlement was achieved through a mediation ordered by the Ninth Circuit involving the Navajo Nation, Hopi Tribe, and Navajo families who live on the Hopi Reservation. Several lawsuits in that circuit concern claims for money damages by the Hopi Tribe against the Navajo Nation for damages caused by trespassing Navajos, and against the United States for alleged breach of trust in failing to protect the HPL from Navajo use and occupation. Some Navajo families have also appealed the district court's dismissal of their claims that involuntary relocation would interfere with the practice of their religion -- which is tied closely to the use of their land -- and would thus violate the First Amendment and various statutes.

In December 1995, the United States entered into a settlement agreement with the Hopi Tribe. Under the settlement, the Hopi Tribe committed to offer the 75-year lease to remaining Navajo families through the end of 1996. Also, the United States agreed to pay the Tribe $50.2 million to settle monetary claims. Payment of the compensation is tied to the Hopi Tribe's progress in signing up Navajo families to leases. In order for the Hopi Tribe to receive the full $50.2 million, 75 percent of eligible Navajo families must have either entered into an accommodation agreement or voluntarily relocated from the HPL. Also, if the 75 percent threshold is met, the Secretary of the Interior has committed to take into trust for the Tribe up to 500,000 acres of

rural land purchased by the Hopi Tribe in northern Arizona, thus compensating the Tribe for the loss of effective use of the land leased to the Navajo families.

For years, Senator McCain offered to support any consensual resolution of the Navajo-Hopi dispute. Congressional action on the settlement is necessary because current law restricts leases on the Hopi Reservation to 25 years. Senator McCain has been true to his word and has been very supportive of the settlement.

Although we sought a bill that would do nothing other than provide 75-year leasing authority, Senator McCain has added other provisions to address concerns expressed by Senator Kyl. Three of these provisions deviate from the terms of the settlement agreement. Sections 5(2)(A) and 5(3) of the bill change terms to the detriment of the Hopi Tribe by increasing the 75 percent acceptance threshold to 85 percent, and by precluding the Secretary of the Interior from taking lands within five miles of an incorporated town into trust for the Hopi Tribe. Section 8 of the bill provides for compensation to the State of Arizona that is not included in the settlement agreement. Notwithstanding these changes, the Departments of Justice and Interior support quick passage of the bill.

In July, the Navajo Nation stirred up some controversy by seeking changes to the settlement through amendments to the bill. We think, however, we have resolved these issues. As reported out of committee, the bill includes an amendment introduced by Senator Inouye at the request of Senator Domenici, and we anticipate that Senator Domenici will offer two additional amendments on the floor. These amendments will together resolve the Navajo Nation's concerns in a way acceptable to all the parties.

The Dineh Alliance continues to press for terms that were rejected by the Hopi Tribe in the negotiations. This settlement is the result of hard bargaining. Each party made concessions; none received everything it wants. The continuing demands by this group for additional terms could erode the support of members of Congress who are not familiar with the context of, and difficulty in, achieving this compromise. We believe it is unfair for some Navajo residents now to seek from Congress more from the Hopi Tribe than they could obtain through negotiations. We are in the process of getting information from Congressional staff about whether the Dineh Alliance has succeeded in raising concerns on the Hill.

We recently provided an informational briefing on the settlement and the bill to staffers for Representatives Stump and Hayworth of Arizona. Our impression from that briefing is that the House side of the Arizona delegation will follow Senator McCain's lead, provided that Senators Kyl and McCain remain in

agreement. The Arizona Governor's Office continues to support the negotiated resolution of this heretofore intractable problem.

It is important that we obtain legislation supporting the settlement in September, so that the Hopi Tribe will have time to offer the leases to the Navajo families. If the negotiated resolution unravels, our cases will be returned to court and -- more importantly -- we will face the specter of continued conflict and the possible involuntary removal of many elderly Navajo residents of the Hopi Reservation.

We would be pleased to provide you with additional information or to brief others in the Administration who may have an interest in this matter.

att.

O:\CAB\CAB96.291 S.L.C.

AMENDMENT NO. ____ Calendar No. ____

Purpose: To provide a substitute.

IN THE SENATE OF THE UNITED STATES—104th Cong., 2d Sess.

S. 1973

To provide for the settlement of the Navajo-Hopi land dispute, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. MCCAIN

Viz:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Navajo-Hopi Land Dispute Settlement Act of 1996".

SEC. 2. FINDINGS.

The Congress finds that—

(1) it is in the public interest for the Tribe, Navajos residing on the Hopi Partitioned Lands, and the United States to reach a peaceful resolution of the longstanding disagreements between the par-

ties under the Act commonly known as the "Navajo-Hopi Land Settlement Act of 1974" (Public Law 93-531; 25 U.S.C. 640d et seq.);

(2) it is in the best interest of the Tribe and the United States that there be a fair and final settlement of certain issues remaining in connection with the Navajo-Hopi Land Settlement Act of 1974, including the full and final settlement of the multiple claims that the Tribe has against the United States;

(3) this Act, together with the Settlement Agreement executed on December 14, 1995, and the Accommodation Agreement (as incorporated by the Settlement Agreement), provide the authority for the Tribe to enter agreements with eligible Navajo families in order for those families to remain residents of the Hopi Partitioned Lands for a period of 75 years, subject to the terms and conditions of the Accommodation Agreement;

(4) the United States acknowledges and respects—

(A) the sincerity of the traditional beliefs of the members of the Tribe and the Navajo families residing on the Hopi Partitioned Lands; and

(B) the importance that the respective traditional beliefs of the members of the Tribe and Navajo families have with respect to the culture and way of life of those members and families;

(5) this Act, the Settlement Agreement, and the Accommodation Agreement provide for the mutual respect and protection of the traditional religious beliefs and practices of the Tribe and the Navajo families residing on the Hopi Partitioned Lands; and

(6) the Tribe is encouraged to work with the Navajo families residing on the Hopi Partitioned Lands to address their concerns regarding the establishment of family or individual burial plots for deceased family members who have resided on the Hopi Partitioned Lands.

SEC. 3. DEFINITIONS.

Except as otherwise provided in this Act, for purposes of this Act, the following definitions shall apply:

(1) ACCOMMODATION.—The term "Accommodation" has the meaning provided the term "Accommodation" under the Settlement Agreement.

(2) HOPI PARTITIONED LANDS.—The term "Hopi Partitioned Lands" means lands located in the Hopi Partitioned Area, as defined in section

168.1(g) of title 25, Code of Federal Regulations (as in effect on the date of enactment of this Act).

(3) NAVAJO PARTITIONED LANDS.—The term "Navajo Partitioned Lands" has the meaning provided that term in the proposed regulations issued on November 1, 1995, at 60 Fed. Reg. 55506.

(4) NEW LANDS.—The term "New Lands" has the meaning provided that term in section 700.701(b) of title 25, Code of Federal Regulations.

(5) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(6) SETTLEMENT AGREEMENT.—The term "Settlement Agreement" means the agreement between the United States and the Hopi Tribe executed on December 14, 1995.

(7) TRIBE.—The term "Tribe" means the Hopi Tribe.

SEC. 4. RATIFICATION OF SETTLEMENT AGREEMENT.

The United States approves, ratifies, and confirms the Settlement Agreement.

SEC. 5. CONDITIONS FOR LANDS TAKEN INTO TRUST.

The Secretary shall take such action as may be necessary to ensure that the following conditions are met prior to taking lands into trust for the benefit of the Tribe pursuant to the Settlement Agreement:

1 (1) SELECTION OF LANDS TAKEN INTO
2 TRUST.—
3 (A) PRIMARY AREA.—In accordance with
4 section 7(a) of the Settlement Agreement, the
5 primary area within which lands acquired by
6 the Tribe may be taken into trust by the Sec-
7 retary for the benefit of the Tribe under the
8 Settlement Agreement shall be located in north-
9 ern Arizona.
10 (B) REQUIREMENTS FOR LANDS TAKEN
11 INTO TRUST IN THE PRIMARY AREA.—Lands
12 taken into trust in the primary area referred to
13 in subparagraph (A) shall be—
14 (i) land that is used substantially for
15 ranching, agriculture, or another similar
16 use; and
17 (ii) to the extent feasible, in contig-
18 uous parcels.
19 (2) ACQUISITION OF LANDS.—Before taking
20 any land into trust for the benefit of the Tribe
21 under this section, the Secretary shall ensure that:
22 (A) At least 85 percent of the eligible Nav-
23 ajo heads of household (as determined under
24 the Settlement Agreement) have entered into an
25 accommodation or have chosen to relocate and

1 are eligible for relocation assistance (as deter-
2 mined under the Settlement Agreement).
3 (B) The Tribe has consulted with the State
4 of Arizona concerning the lands proposed to be
5 placed in trust, including consulting the State
6 concerning the impact of placing those lands
7 into trust on the State and political subdivisions
8 thereof resulting from the removal of land from
9 the tax rolls in a manner consistent with the
10 provisions of part 151 of title 25, Code of Fed-
11 eral Regulations.
12 (3) PROHIBITION.—The Secretary may not,
13 pursuant to the provisions of this Act and the Set-
14 tlement agreement, place lands, any portion of
15 which are located within or contiguous to a 5-mile
16 radius of an incorporated town (as that term is de-
17 fined by the Secretary) in northern Arizona, into
18 trust for benefit of the Tribe without specific statu-
19 tory authority.
20 SEC. 5. ACQUISITION THROUGH CONDEMNATION OF CER-
21 TAIN INTERSPERSED LANDS.
22 (a) IN GENERAL.—
23 (1) ACTION BY THE SECRETARY.—
24 (A) IN GENERAL.—The Secretary shall
25 take action as specified in subparagraph (B), to

1 the extent that the Tribe, in accordance with
2 section 7(b) of the Settlement Agreement—
3 (i) acquires private lands; and
4 (ii) requests the Secretary to acquire
5 through condemnation interspersed lands
6 that are owned by the State of Arizona
7 and are located within the exterior bound-
8 aries of those private lands in order to
9 have both the private lands and the State
10 lands taken into trust by the Secretary for
11 the benefit of the Tribe.
12 (B) ACQUISITION THROUGH CONDEMNA-
13 TION.—With respect to a request for an acqui-
14 sition of lands through condemnation made
15 under subparagraph (A), the Secretary shall,
16 upon the recommendation of the Tribe, take
17 such action as may be necessary to acquire the
18 lands through condemnation and, with funds
19 provided by the Tribe, pay the State of Arizona
20 fair market value for those lands in accordance
21 with applicable Federal law, if the conditions
22 described in paragraph (2) are met.
23 (2) CONDITIONS FOR ACQUISITION THROUGH
24 CONDEMNATION.—The Secretary may acquire lands
25 through condemnation under this subsection if—

(A) that acquisition is consistent with the purpose of obtaining not more than 500,000 acres of land to be taken into trust for the Tribe;

(B) the State of Arizona concurs with the United States that the acquisition is consistent with the interests of the State; and

(C) the Tribe pays for the land acquired through condemnation under this subsection.

(b) DISPOSITION OF LANDS.—If the Secretary acquires lands through condemnation under subsection (a), the Secretary shall take those lands into trust for the Tribe in accordance with this Act and the Settlement Agreement.

(c) PRIVATE LANDS.—The Secretary may not acquire private lands through condemnation for the purpose specified in subsection (a)(2)(A).

SEC. 7. ACTION TO QUIET POSSESSION.

If the United States fails to discharge the obligations specified in section 9(e) of the Settlement Agreement with respect to voluntary relocation of Navajos residing on Hopi Partitioned Lands, or section 9(d) of the Settlement Agreement, relating to the implementation of sections 700.137 through 700.139 of title 25, Code of Federal Regulations, on the New Lands, including failure for rea-

son of insufficient funds made available by appropriations or otherwise, the Tribe may bring an action to quiet possession that relates to the use of the Hopi Partitioned Lands after February 1, 2000, by a Navajo family that is eligible for an accommodation, but fails to enter into an accommodation.

SEC. 8. PAYMENT TO STATE OF ARIZONA.

(a) AUTHORIZATION OF APPROPRIATIONS.—Subject to subsection (b), there are authorized to be appropriated to the Department of the Interior $250,000 for fiscal year 1998, to be used by the Secretary of the Interior for making a payment to the State of Arizona.

(b) PAYMENT.—The Secretary shall make a payment in the amount specified in subsection (a) to the State of Arizona after an initial acquisition of land from the State has been made by the Secretary pursuant to section 6.

SEC. 9. 75-YEAR LEASING AUTHORITY.

The first section of the Act of August 9, 1955 (69 Stat. 539, chapter 615; 25 U.S.C. 415) is amended—

(1) in subsection (a), by inserting before the period at the end of the second sentence the following: ", and except leases of land by the Hopi Tribe to Navajo Indians on the Hopi Partitioned lands, which may be for a term of years not to exceed seventy-five years"; and

1 (2) by adding at the end the following new sub-
2 section:
3 "(c) For purposes of this section—
4 "(1) the term 'Hopi Partitioned Lands' means
5 lands located in the Hopi Partitioned Area, as de-
6 fined in section 168.1 (g) of title 25, Code of Fed-
7 eral Regulations (as in effect on the date of enact-
8 ment of this subsection); and
9 "(2) the term 'Navajo Indians' means members
10 of the Navajo Tribe.".
11 SEC. 10. REAUTHORIZATION OF THE NAVAJO-HOPI RELO-
12 CATION HOUSING PROGRAM.
13 Section 25(a)(8) of Public Law 93–531 (25 U.S.C.
14 640d–24(a)(8)) is amended by striking "1996, and 1997"
15 and inserting "1996, 1997, 1998, 1999, and 2000".

AMENDMENT NO. Ex. Calendar No.

Purpose: To make technical and conforming amendments.

IN THE SENATE OF THE UNITED STATES-- 104th Cong., 2d Sess.

S. 1973

To provide for the settlement of the Navajo-Hopi Land Dispute

( ) Referred to the Committee on
and ordered to be printed
( ) Ordered to lie on the table and be printed

INTENDED to be proposed by Mr. DOMENICI to the Committee substitute

Viz:

On page 9, strike lines 20 through 25, and insert in lieu thereof:

"(1) Add the following new subsection:

"(c) Leases Involving the Hopi Tribe and the Hopi Partitioned Lands Accommodation Agreement.

"Leases of land by the Hopi Tribe to Navajo Indians on the Hopi Partitioned Lands may be for a term of 75 years, and may be extended at the conclusion of the term of the Lease"; and"

Navajo Hopi Telecon 8/28
All parties on board with bill
Interior/DOJ/OWHIR/Rasco generally aware

Leg Affs Office - needs to be kept informed.

Materials - Bill
Testimony by Lois.