



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 1996

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

Thank you for your letter received by the Department of Justice on April 22, 1996, and the opportunity to provide additional information to you and Senator Kyl regarding the Hopi-United States Settlement Agreement. Responses to the questions posed by you and Senator Kyl are listed below.

Question 1. How did the Department of Justice value the claims of the Hopi Tribe against the Federal Government? What specific factors were used? Does the \$50.2 million reflect a reasonable estimate of the Federal Government's liability in these cases?

Response:

The settlement of \$50.2 million is a reasonable settlement of the United States' potential liability in the lawsuits we are settling with the Hopi Tribe. The four lawsuits resolved by the Settlement Agreement all involve claims by the Hopi Tribe concerning the United States' alleged failure to protect the Hopi Tribe from use of their lands by members of the Navajo Nation.

The first lawsuit, Hopi Tribe v. United States, No. 651-89L (Ct. Fed. Cl.) involves an action by the Hopi Tribe seeking damages in the amount of \$281,064,978 based on the alleged failure of the United States to enforce Bureau of Indian Affairs (BIA) grazing regulations and thus to protect the Joint Use Area and Hopi Partitioned Lands from damage by Navajo-owned livestock grazing without a permit. The complaint includes a claim for damages for the BIA's failure to collect (a) trespass penalties, (b) forage consumed fees, and (c) property damage fees on behalf of the Hopi Tribe.

The regulations concerning trespass penalties provide for a penalty of \$1 per day for each animal for each day of trespass, together with the reasonable value of the forage

consumed and damages to property injured or destroyed. See, e.g., 25 C.F.R. 151.21 (1958) (now at 25 C.F.R. 166.24(b)); 25 C.F.R. 153.17 (1976); 25 C.F.R. 153.17 (1978); 25 C.F.R. 168.14 (1983). The general grazing regulations promulgated after 1957 contained language providing that the owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of \$1 per head per day for each animal, together with the reasonable value of the forage consumed and damages to property injured or destroyed. 25 C.F.R. 151.21 (1958). The Claims Court, in its April 21, 1989 Order, stated that the intent of the provision "was clearly to compensate the Hopi Indians financially for damages to its land from overgrazing." The Hopi Tribe asserts that, using Bureau of Indian Affairs numbers for trespassing livestock, the United States owes the Hopi Tribe trespass penalties totalling at least \$190 million for the years 1958 through 1985. The Hopi Tribe presented the Justice Department its calculations of the trespass penalty fines for each year.

The second lawsuit, Secakuku v. Hale, Nos. 94-17032, 95-15092 (pending in the United States Court of Appeals for the Ninth Circuit) involves an action by the Hopi Tribe for damages to the Hopi Partitioned Lands from Navajo overgrazing of those lands prior to partitioning of the Joint Use Area in 1979. The claim is based on two provisions of the 1974 Settlement Act, 25 U.S.C. 640d-5(d) and 17(a). On January 15, 1993, the district court awarded the Hopi Tribe damages in the amount of \$3,168,388 against the Navajo Nation. Both the Navajo Nation and the Hopi Tribe appealed from that decision to the Ninth Circuit. On appeal, the Hopi Tribe sought an increase in the damages award and both Tribes argued that the district court erred in finding the United States not liable.

The third lawsuit, Hopi Tribe v. Navajo Tribe et al., Civ. 85-801 PHX-BHC, is now pending in the United States District Court in Phoenix, Arizona. This case concerns rent owed the Hopi Tribe by the Navajo Nation, pursuant to 25 U.S.C. 640d-15(a), for Navajo use of Hopi Partitioned Lands for homesite, farming and livestock grazing. The Hopi Tribe's claims include an action against the United States for the alleged failure of the Secretary of the Interior to issue the rental value determinations in a timely fashion. The Hopi Tribe threatened to renew its motion alleging a breach of the Secretary's duty to timely issue the rental determinations and seeking monetary compensation for lost use and rent because of the delay in issuance of the rental determinations. The Department of the Interior is many years in arrears in issuing final rental determinations for use of the Hopi Partitioned Lands. The Settlement Agreement bars the Hopi Tribe's claims against the United States for damages caused by the delay -- on condition that the decisions are issued by January 1, 1997. In other words,

under the Agreement, the Department of the Interior has one year to become current with rental determinations.

The final matter resolved by the Settlement Agreement is a threatened action against the United States by the Hopi Tribe that would include a claim alleging a temporary taking without compensation and a claim for breach of trust for failing to remove Navajo residents of the Hopi Partitioned Lands by 1986.

The Justice Department evaluated each of the Hopi Tribe's claims in light of the facts in each case, the legal arguments for the claim, and the likelihood of success on defenses potentially available to the Federal Government, such as the statute of limitations and lack of jurisdiction. The analysis of these claims was reviewed by Justice Department attorneys with many years' knowledge of these cases, by senior attorneys with expertise in the particular fields of law involved, by Assistant Attorney General Lois Schiffer and, because of the large sum involved, by Associate Attorney General John Schmidt.

As a longstanding policy matter, the Justice Department does not provide its assessment of the litigation risk involved in each of the lawsuits. It would be especially imprudent to do so in a context such as this, where the lawsuits are still "live" because the dismissals are contingent on events that have not yet transpired and, hence, have not become final. I hope that the above description of the claims will help the Committee better understand the litigation risks faced by the United States.

Question 1a. What other outstanding claims does the Hopi Tribe or the Navajo Nation have against the United States? Why are these claims not included in this settlement proposal?

Response:

The Hopi Tribe has no other outstanding claims against the United States.

The Navajo Nation has one outstanding claim against the United States concerning the 1882 Reservation. This claim is in the lawsuit Secakuku v. Hale, 9th Cir. Nos. 94-17032 and 95-1502 (the "Damages Case," described above). The Navajo Nation claims that the United States is exclusively liable for harm its members caused to the Hopi range. According to the Navajo Nation, Congress intended that the United States bear all the costs of harm caused to the Hopi by Navajo livestock grazing. We do not share that reading of the 1974 Act. Even if the Navajo Nation were to prevail,

at most, the United States' exposure on the Navajo claim approximates \$2 million.

That claim by the Navajo Nation is not included in the settlement because the Navajo Nation did not want to discuss settlement of the Secakuku v. Hale case or other monetary issues between the Navajo Nation and the United States during the period from 1993 to late 1995, while the Navajo families and the Hopi Tribe were negotiating the terms of the Accommodation Agreement and while the United States and Hopi Tribe were working to restructure the compensation provisions. In the fall of 1995, shortly after oral argument in Secakuku v. Hale, we expressed to the Navajo Nation that we thought the optimal time for resolution of their claims was upon us, in part because we did not know how soon after argument the Ninth Circuit would issue a decision and in part because we were about to resolve the Hopi Tribe's claims against us in that lawsuit. The Navajo Nation did not want to negotiate that issue.

There are no other outstanding claims by the Hopi Tribe or the Navajo Nation against the United States concerning the land dispute.¹

¹ For the sake of completeness, we note that the United States and the Hopi Tribe have an outstanding claim against the Navajo Nation concerning the Navajo-Hopi Land Dispute which is not resolved as part of the settlement. This case involves an approximately \$800,000 contempt fine against the Navajo Nation in Masayesva v. Zah, 9th Cir. No. 90-15304 (the "New Construction Case"). The fine was imposed for failure to remove a structure that had been constructed in violation of the court's earlier order. This matter is now under the Mediator's direction and settlement proposals have been exchanged. Any contemplated settlement would not require Congressional action.

The Navajo-Hopi Land Dispute concerns the use of the 1882 Reservation lands and the 1974 Settlement Act's relocation provisions which apply to those lands. The 1934 Act lands are located to the west of the 1882 Reservation. The United States, Navajo Nation, and Hopi Tribe are litigating disagreements concerning use of those lands in lawsuits that have not been a part of the negotiations that have been directed by the Ninth Circuit Court of Appeals, and have led to the settlement agreements.

Question 1b. Can we expect a subsequent action by the Navajo Nation or the Navajo families in the event of non-performance by the Federal Government?

Response:

It is common in any settlement that one party may have recourse against another in the event of non-performance of an agreed obligation. In this Settlement Agreement, the United States has certain obligations to the Hopi Tribe. If the United States defaults on those obligations, the Hopi Tribe has remedies against the United States. Default by the United States does not relieve the Hopi Tribe of its obligations to Navajo families who are living on the Hopi Partitioned Lands pursuant to the terms of an Accommodation Agreement. We are committed to upholding our end of the bargain. But if we should fail to meet our responsibilities, our non-performance will not result in harm to the Navajo Nation or Navajo families. Thus, we do not anticipate an action by the Navajo Nation or the Navajo families in the event of non-performance by the Federal Government.

Question 1c. What problems will these settlement agreements resolve? What parts of the dispute will these agreements not resolve?

Response:

Under these historic consensual agreements, the Hopi Tribe will allow Navajo families, whose names appear on the list appended to the agreement, to remain on the Hopi Partitioned Lands lawfully. This central issue, which has caused conflict between the Tribes for over a century and which has consumed an enormous amount of the resources of the executive, judicial and legislative branches of the United States government for the last 50 years, will be resolved. These agreements allow for relief from the construction freeze so that Navajo families may repair and improve their homes, transfer grazing permits and increase grazing allocations. They also provide for a return to the Hopi Tribe of jurisdiction over range units now under Bureau of Indian Affairs authority.

These settlement agreements also resolve the United States' liability to the Hopi Tribe in several existing and threatened lawsuits enumerated above. These settlements do not resolve various claims between the Tribes for money damages, as described above in response to question 1a.

In addition, these settlement agreements have paved the way for a final resolution of injunctive, non-monetary claims

brought on First Amendment and other grounds by some Navajo individuals residing on the Hopi Partitioned Lands in Jenny Manybeads v. United States, 9th Cir. No. 90-15003. Under the Mediator's direction the United States and the Manybeads Plaintiffs are negotiating the process for bringing those claims to final resolution, in recognition of the existing agreements. This is strictly a procedural issue; no additional funds or compensation would be involved.

Question 1d. What does the United States get by settling these claims in this manner?

Response:

The United States gains in several ways through the settlement agreements. The settlement provides Navajo residents of the Hopi Partitioned Lands who wish to remain at their homesites in a relationship of mutual respect with their Hopi neighbors an alternative that allows them to do so. It relieves the United States of the obligation to relocate Navajo residents who wish to remain and may now do so under the Accommodation Agreement terms. The settlement also resolves most of the litigation that has been a drain on all the parties' resources, including those of the United States.

Question 1e. What can the Congress do to help support and effectuate this Settlement Agreement?

Response:

Congress can help support and effectuate this settlement by expanding the Hopi Tribe's leasing authority through amendment of 25 U.S.C. 415, as it has done for numerous other tribes. The Hopi Tribe currently may not enter into leases of its lands for a term in excess of 25 years with one renewal. In order to give effect to this consensual resolution, the Hopi Tribe is seeking from Congress 75-year leasing authority.

Question 2. What happens if the Hopi Tribe receives significantly less than 500,000 acres of land into trust? Isn't it quite likely that the amount of land taken into trust will be significantly less than 500,000 acres?

Response:

The United States will take land into trust for the Hopi Tribe only on certain conditions:

► The Hopi Tribe must purchase the land from its own funds from a willing seller. If the land that the Hopi Tribe

seeks to purchase is owned by the State of Arizona, the State must indicate that it concurs in the condemnation of the land by the United States. (The State has informed us that condemnation is the appropriate means under Arizona law for such a conveyance to be made.)

► The land must be land in Northern Arizona that is used substantially for ranching, agricultural and other similar rural uses. Moreover, any State lands acquired must be lands that are interspersed with private lands already acquired by the Hopi Tribe.

► The Hopi Tribe must ask that specific parcels of land (not exceeding 500,000 acres in total) be taken into trust.

► The Department of the Interior must follow all applicable regulations in considering requests to take particular parcels of land into trust.

If the Hopi Tribe does not purchase land or does not request that land be taken into trust, there is no further obligation on the United States. Under that circumstance, Hopi claims under 28 U.S.C. § 1491 or 1505 cannot be resurrected.

If, however, the Hopi Tribe's efforts to acquire State lands or to have lands taken into trust, as provided for in the Settlement Agreement, are defeated because the United States cannot or will not take up to 500,000 acres in trust or because the State does not concur in the acquisition of interspersed State lands and the purchase of private lands is not a viable alternative, then the Hopi Tribe has a narrowly circumscribed remedy against the United States. Specifically, the Hopi Tribe's release of the United States' liability, if any, for circumscribed damages, under 28 U.S.C. § 1491 or 1505, becomes ineffective.

Because the Hopi Tribe will decide how much land, if any, to purchase with its own funds and how much to request be taken into trust (not exceeding 500,000 acres), we cannot determine the likelihood that significantly less than 500,000 acres will be taken into trust for the Hopi Tribe under these agreements.

Question 2a. Does the 500,000 acres of land described in the settlement agreement accurately reflect the amount of land that will be used by the Navajo families residing on the HPL? Why do these figures differ so dramatically?

Response:

The 500,000 acres is a number based upon equity and hard bargaining. It is substantially less than the Hopi Tribe originally sought. This was a good faith, but tough, series of negotiations.

The Hopi Partitioned Lands are approximately 900,000 acres in extent. Under the Accommodation Agreement, a significant amount of the Hopi Partitioned Lands would be under use by Navajo residents. The Navajo residents would use not only the homesite lands that they live on, but also lands that they use for farming and grazing. Navajo livestock generally graze near the homesites.

The actual acreage in direct use by the Navajo families under the Accommodation Agreement terms would approximate 101,000 to 102,000 acres. This is calculated as three acres per homesite, plus ten acres of farmland per homesite, plus 36 acres per sheep unit year long for 2800 sheep units. The agreement contemplates 112 homesites. The attorney for the Navajo families reports that some families have moved off the Hopi Partitioned Lands, leaving approximately 80 homesites (which would yield a direct use figure closer to 101,000 than to 102,000).

The lands being used by Navajo residents are scattered throughout the Hopi Partitioned Lands. The attached map indicates the distribution of Navajo homesites on the Hopi Partitioned Lands. (Although a few of the families have subsequently moved, the overall distribution has not changed significantly.) Because the Navajo homesite areas are interspersed throughout the Hopi Partitioned Lands, the effective impingement on Hopi use is more than the acres in direct use by the Navajo families. As a practical matter, it is difficult for the Hopi to use the interstices between the Navajo homesites and grazing lands for their own purposes, such as cattle grazing. Hence, we believe the 500,000 acres reasonably recompenses the Hopi Tribe for the lost use to them of significant portions of the Hopi Partitioned Lands.

Finally, in the negotiations the Hopi Tribe sought equity in relation to the amount of land acquired by the United States for the Navajo Nation. The Navajo, unlike the Hopi, have exclusive use of the approximately 900,000 acres partitioned to them. In addition, to address the Navajo Nation's loss

of use of the Hopi Partitioned Lands and to provide lands to which Navajo residents of the Hopi Partitioned Lands could relocate, Congress acquired 250,000 acres of land for the Navajo Nation and took into trust an additional 150,000 acres of land already owned in fee by the Navajo Nation. The Hopi families who resided on the Navajo Partitioned Lands moved without provision of additional lands. At that time, no lands were acquired or taken into trust for the Hopi Tribe.

Question 2b. Why does the Department of Justice support a settlement agreement that appears to have so many escape clauses for the Hopi Tribe?

Response:

It is common for settlement agreements to provide for a remedy for the signatories if a party fails to perform an obligation or if the agreement should fail in part. These settlement agreements provide some remedies to the Hopi Tribe in the event of non-performance by the United States of specified obligations. These remedies are circumscribed, and consist of provisions that certain releases by the Hopi Tribe of claims against the United States are rendered ineffective. The United States is not liable under the agreements if the Navajo Nation fails to pay rent to the Hopi Tribe for the Navajo families residing on the Hopi Partitioned Land.

The settlement agreements do not allow the Hopi Tribe to alter, void, or otherwise "escape" its obligations to the United States or the Navajo families pursuant to the agreements.

Question 4. Can the Hopi Tribe decide to use the \$50.2 million for purposes other than land acquisition? If the Hopi Tribe elects to use the funds for purposes other than land acquisition and is therefore unable to acquire the 500,000 acres, would the Hopi Tribe still retain a cause of action under 28 U.S.C. 1491 and 1505?²

Response:

The Hopi Tribe may use the \$50.2 million for purposes other than land acquisition. Nothing in the Agreement constrains the Tribe's use of those funds. Nor does the Agreement retain a cause of action for the Hopi Tribe under 28 U.S.C. 1491 and 1505 under any circumstance where the Hopi Tribe

² The numbering of the questions in our response tracks the numbering in the incoming letter.

does not acquire 500,000 acres of land. (See response to question 2 above).

Question 5. What opportunity will the general public have to participate in the process if the United States takes into trust additional lands acquired by the Hopi Tribe?

Response:

The settlement agreements specify that, in considering the Hopi Tribe's request, if any, to take up to 500,000 acres of land into trust, the Department of the Interior will comply with "all existing applicable laws and regulations." The relevant regulations provide for:

- ▶ notice to State and local governments about the request to take land into trust, 25 C.F.R. 151.11 (60 Fed. Reg. 32,874-79, June 23, 1995);
- ▶ a comment period of at least 30 days before a decision is made whether to take land into trust, id.;
- ▶ consideration of issues that may be of interest to the State and local governments, such as potential impacts on regulatory jurisdiction, real property taxes, and special assessments, id.; and
- ▶ if a decision is made to take land into trust, notice in the Federal Register of the final agency determination and a time period of at least 30 days during which legal challenges as allowed by law may be brought against the final determination to take land into trust, see 61 Fed. Reg. 18,082-83 (April 24, 1996).

Question 6. Why does the Justice Department support this settlement when several groups of Navajo families appear to oppose it?

Response:

The Justice Department supports this settlement because it is a consensual resolution of a long-standing dispute achieved after several years of mediation and of hard work by all the parties. The settlement has been unanimously approved by the negotiating representatives of the Navajo families residing on the Hopi Partitioned Lands. We are hopeful that a great majority of these families will sign the Accommodation Agreement with the Hopi Tribe after Congress approves the 75-year leasing authority and the Hopi Tribe can formally offer the Accommodation Agreement to the families.

As in many protracted disputes, individuals for whom settlement is most difficult to accept may be more vocal than individuals who are trying to preserve a compromise that, although not perfect, promises a vast improvement over an existing, acrimonious situation. The objections raised now are ones that were raised and discussed in the course of negotiations. The fact that these concerns were not fully redressed does not represent a failure to have heard or understood the significance of the concerns.

Some Navajo HPL residents oppose recognition of Hopi jurisdiction. Some state that they are not answerable to the laws of the United States but need only comply with the strictures of their religion. Many Navajo families, however, have indicated support for this settlement. This settlement provides a means for those families to continue to reside lawfully on the Hopi Partitioned Lands. The choice of whether to accept this option will belong to each of the eligible Navajo families.

In a settlement of any complex and historical dispute, one can expect some opposition to compromise. Like any compromise, this settlement does not give any party all of what it asked for. The settlement agreements represent, however, the best that the parties could fashion after four years of tough negotiations in which the concerns of all parties were thoroughly discussed.

Question 7. Have any Navajo families on the list of those eligible for leases already received relocation benefits from the Office of Navajo and Hopi Indian Relocation? How many Navajo families are eligible for leases under the terms of the Settlement but are not eligible for relocation benefits?

Response:

The list of those eligible for leases, List A of the Accomodation Agreement, is a list of full-time Navajo residents of the HPL which was negotiated by the Tribes in 1992, as part of the mediation. Nothing in the settlement terms changes the eligibility standards for relocation benefits.

During the last four years, since List A was prepared in mid-1992, some individuals or families have accepted relocation benefits, deceased or moved. According to the Office of Navajo and Hopi Indian Relocation's records, of the 253 Navajo families on "List A," 49 now have received relocation benefits. All but three of these families received the relocation benefits since List A was prepared. The receipt of relocation benefits by these nearly 50 families on List A helps explain the reduction in full-time

HPL Navajo residents reported by Mr. Phillips at the Hearing on March 28, 1996. (See question 8 below).

Ten of the families on List A have been denied relocation benefits. In some instances, appeals of the denials are pending. Ninety-seven of the families on List A have not applied for relocation benefits. Because those families have not applied for benefits, the ONHIR does not currently have sufficient information to determine whether the families are eligible for benefits. Under the terms of the Settlement Agreement, in 1997, the ONHIR will begin acquiring information concerning the eligibility for relocation benefits of List A families who have not entered into an Accommodation Agreement and have not previously applied for benefits.

Question 7a. Will Navajo families on the list of those eligible for leases under the Accommodation Agreement remain eligible for relocation benefits from the Office of Navajo and Hopi Indian Relocation?

Response:

Families that sign up for an Accommodation Agreement, and were eligible for relocation benefits when they signed an Accommodation Agreement, will remain eligible for relocation benefits for three years in the event that a family decides to move. This allows families a three-year trial period for the Accommodation Agreement. The passage of three years following entrance into an Accommodation Agreement will constitute a waiver of any and all rights a Navajo family may have to relocation benefits.

Question 8. How have you arrived at the number "between 100 and 200 Navajo families" residing on the Hopi Partitioned Lands, and why is this number so imprecise after all these years of negotiating?

Response:

The imprecision in the numbers reflects an existing ambiguity in defining or describing a homesite versus a family. In 1992, the parties identified 112 Navajo homesites on the Hopi Partitioned Lands. At that same time, the parties identified a list of Navajo full-time residents of the Hopi Partitioned Lands which included 253 families living at the 112 homesites, comprised of 374 adults and 241 children. The numbers of homesites and families are different because more than one family may live at a homesite.

A recent Navajo Nation enumeration of Navajo residents of the Hopi Partitioned Lands determined that there currently are approximately 80 occupied homesites, inhabited by 155 families comprised of 356 individuals.

Question 9. What happens if the Navajo Nation does not pay rent to the Hopi Tribe sometime during a Navajo family's 75-year lease term?

Response:

Under the agreements, if the Navajo Nation fails to pay rent the Hopi Tribe will have recourse in the federal courts against the Navajo Nation, as they have in the past. Navajo signatories of Accommodation Agreements would not be subject to eviction or other adverse action for failure of the Navajo Nation to pay rent.

Question 10. Does the Justice Department believe that forcible relocation still will be required? For how many Navajo families? And who would carry out such a task?

Response:

The purpose of the agreements is to reduce to an absolute minimum the necessity for involuntary relocations. The families can sign an Accommodation Agreement to avoid the necessity for relocation. If a family does not sign an agreement and remains on the Hopi Partitioned Lands, then that family (if eligible for relocation benefits) would be subject to an action in trespass once a house is provided for that family. If a family that is not eligible for relocation benefits does not sign an agreement and remains on the Hopi Partitioned Lands, the family will be subject to an action in trespass once the time for signing an Accommodation Agreement expires.

It appears that some involuntary relocation may be required because some families may not be willing to live with the constraints of the Accommodation Agreement terms. We must defer to Mr. Attakai's and Mr. Phillips' assessment of how many Navajo families will decline to enter into an Accommodation Agreement. We understand that many families are undecided at this time.

An action for eviction of Navajo residents of the Hopi Partitioned Lands who have not chosen to relocate and have not entered into an Accommodation Agreement could be initiated by the Hopi Tribe or by the United States.

Question 11. What purpose is served by conditioning payment of almost one-half of the Hopi Tribe's funds under the settlement on whether the Congress passes a 75-year lease authority? Is this supposed to somehow encourage the Congress to act?

Response:

Under the Settlement Agreement, payments by the United States are tied to progress in achieving a consensual resolution of the land dispute: specifically, the United States' payments will be made in stages marking progress toward the goal of accommodating a super-majority of Navajo families who wish to remain on the Hopi Partitioned Lands. The first milestone will be the Hopi Tribe's making the Accommodation Agreement available to the Navajo families for signing; the Accommodation Agreement cannot be offered, however, unless the Hopi Tribe has 75-year leasing authority. Therefore, one of the United States' payments can only be made if such authority is granted by Congress and the Hopi Tribe offers the Accommodation Agreement to the families. This provision, like other aspects of the settlement, was reached after intense negotiations. We respectfully request that Congress grant the Hopi Tribe 75-year leasing authority like it has for other tribes.

Question 12. As a practical matter, how does the Justice Department expect the Office of Navajo and Hopi Indian Relocation to build and keep ready but vacant housing for an unknown number of Navajo families and, given the time it may take to carry out eviction procedures, for an unknown length of time?

Response:

The 1974 Settlement Act, the annual Appropriations Acts and the Office of Navajo and Hopi Indian Relocation's (ONHIR) implementing regulations establish the requirements for providing housing to Navajo families who are eligible for relocation benefits but do not make a site selection. The Settlement Agreement merely clarifies the timetable for effectuating those provisions.

The ONHIR will not begin providing housing for non-signatories of the Accommodation Agreement until the period for signing an Accommodation Agreement has ended. Thus, at the time the ONHIR begins building housing, the number of Navajo families who have not entered into an Accommodation Agreement and have not made timely application for relocation benefits will be a known number. If persons eligible for relocation benefits do not enter into the Accommodation Agreement and do not make a site selection for homes, they will surrender the decision of site selection to the ONHIR.

The Justice Department and the ONHIR will coordinate their actions concerning eviction, consistent with the notice requirements set forth in ONHIR's regulations. Once the house is constructed and the keys are delivered, the use of the house is the responsibility of the person for whom it was constructed. That person has the same choices available to any home owner; he or she may occupy it, rent it, sell it or abandon it. The construction of a house ensures that a person that is to be evicted as a trespasser has a home to go to, in compliance with the 1974 Settlement Act's provisions which contemplated such a circumstance. See 25 U.S.C. 640d-14 (d) (3).

Question 13. Has the Department of Justice commenced negotiations with the Navajo Nation to settle their claims against the Federal Government for their part in the land dispute? If not, why not?

Response:

The only outstanding claim by the Navajo Nation against the United States concerning the land dispute is the Damages Case, as explained in our answer to question 1a above.

Question 14. Many Navajo families have expressed their concern that the Accommodation Agreement does not provide them the right to have family burials on the HPL. What is the Department's position on this issue? Should they be afforded this right?

Response:

The Justice Department took no formal position on burial in the negotiations. The goal of the Department in these negotiations has been to help facilitate a consensual resolution that addresses the Navajo families' interests in remaining on the Hopi Partitioned Lands and addresses the Hopi Tribe's concerns regarding sovereignty and jurisdiction over the Hopi Reservation. The Mediator and the United States concurred that the details of the Accommodation Agreement, including burial, were issues that needed to be resolved between the Tribes. We did not think we had a basis for siding with one position over another on particular issues concerning the accommodation, including burial.

In meetings between Navajo HPL residents and the Hopi Tribe during the spring and summer of 1993, the Navajo families voiced concerns about burial. In these meetings, the Hopi negotiating team made clear their concerns that burial sites not be scattered all over the HPL, which would pose problems as the Hopi Tribe tries to make improvements such as agricultural or road developments. In the course of

negotiations, the Hopi negotiating team expressly stated at numerous meetings with HPL residents that they would negotiate about burial sites, that they hoped the Navajo Nation would commit to assisting with the problem by expanding the availability of burial sites or cemeteries on nearby parts of the Navajo Reservation, and that the Hopi negotiating team was confident they could arrive at a resolution.

The issue of burial was again discussed at negotiation sessions during 1995. It was a central issue between the Navajo families and the Hopi Tribe in a three-day negotiation session in August 1995, which was mediated by the Chief Mediator for the Ninth Circuit Court of Appeals, David Lombardi. While recognizing the importance of this issue to the Navajo families, the Mediator concluded that the positions had hardened and that no further progress could be made on the issue in the immediate future.

Question 15. What steps is the Department of Justice taking to assist the Hopi Tribe and the Navajo Nation in educating Navajo families residing on the HPL on the terms and conditions of the Accommodation Agreement?

Response:

The federal negotiators have met with the Navajo families to respond to questions concerning the settlement. The Office of Navajo and Hopi Indian Relocation has also provided funds to both Tribes to assist with non-attorney expenses of the mediation process, such as rental of a meeting room in Flagstaff. We also anticipate that the Justice Department will bear some of the costs of notifying the Navajo families of the settlement hearing in the Manybeads case. This will also involve educating the Navajo HPL residents about the terms of the Accommodation Agreement.

Question 16. Many Navajo families have expressed concern that their religious practices are not adequately protected under the Accommodation Agreement. Specifically, many Navajos object to the fencing on Star Mountain because it directly impacts their religious practices. What is the Department's view on this problem?

Response:

The Justice Department took no formal position in the negotiations on this issue. As with burial and other specifics of the Accommodation Agreement terms, we determined, with the Mediator's concurrence, that the Federal Government should not side with one party or the other on this issue.

QUESTIONS SUBMITTED BY SENATOR KYL

Question 1. Is the Department of Justice confident that the \$50 million in monetary compensation to be awarded to the Hopi is in line with the government's exposure in those civil actions?

Response:

Yes, we are confident that the \$50 million in monetary compensation to be awarded to the Hopi Tribe is a reasonable settlement of our exposure in the pending and threatened litigation which the settlement resolves. A detailed description is provided in response to Senator McCain's first question above.

Question 2. Does the Federal Government have sufficient existing authority to acquire State lands pursuant to the Agreement -- through condemnation or other means? Would the Department of Justice or the Department of the Interior object to writing stipulations into any implementing legislation to protect the State of Arizona's right to receive fair market value for, and to concur in the selection of, any State lands chosen by the Hopi and acquired by the Federal Government through condemnation?

Response:

The Department of the Interior has authority to acquire State lands through condemnation under existing law. The relevant statutory provisions are: 40 U.S.C. 257, which generally authorizes officials of the Federal Government who have been authorized to procure real estate for public uses to make such acquisitions for the United States by condemnation; 25 U.S.C. 465, which authorizes the Secretary of the Interior to acquire land for Indians; and 25 U.S.C. 451, which authorizes the Secretary of the Interior to use donated property in furtherance of any program authorized by other provision of law for the benefit of Indians (in this instance the funds would be donated by the Hopi Tribe for acquisition of the State lands). Read together, these statutes provide the Department of the Interior sufficient authority to acquire State lands pursuant to the Settlement Agreement.

The Takings Clause of the Fifth Amendment of the United States Constitution assures the State of Arizona fair market value for any State lands the Federal Government might condemn. Accordingly, no implementing legislation is necessary regarding that aspect of the settlement. The Justice and Interior Departments do not support inclusion of a provision assuring the State's concurrence because that restriction is already present in our binding agreement with the Hopi Tribe.

Question 3. Does the Administration have any objection to writing into implementing legislation other stipulations made in the settlement agreement -- among them, the dismissal of lawsuits, the monetary compensation to be paid to the Hopi Tribe, the lease arrangement to be offered to the Navajo families, the character of lands that may be acquired by, and taken into trust for, the Hopi Tribe?

Response:

The disadvantages of writing the terms of the settlement agreements into implementing legislation outweigh any advantages. Legislation is not required to give effect to the binding agreements concerning dismissal of the lawsuits, monetary compensation and other terms. The only facet of the agreements that requires legislative action concerns the 75-year lease term, for which the Hopi Tribe seeks a minor amendment, similar to amendments received by many other Tribes. Legislation with these additional, unnecessary provisions might entail delay, which may threaten the momentum vital to the success of these historic settlements.

Question 4. During the term of the 75-year lease, the population of Navajo families in the area may grow substantially. Is the Federal Government obligating itself to provide a sufficient water supply to meet future needs -- is it, in effect, creating a new water right?

Response:

We do not expect that the Accommodation Agreement allowing Navajo families to remain on the Hopi Partitioned Lands will create a new water right. Federal reserved rights for Indian reservations are measured by the amount of water necessary to fulfill the purposes for which the land was made a reservation. Nothing in the settlement changes the purposes for which the Hopi Reservation was established, which would include general domestic and agricultural uses. Moreover, domestic uses generally comprise a minor percentage of the reserved water.

Question 5. (a) How does the 500,000 acres to be taken into trust for the Hopi Tribe compare to the amount of land occupied and/or used by the Navajo families who are still residing on the Hopi Partitioned Lands? (b) Could the Justice Department comment on the case out of the Eighth Circuit Court of Appeals, South Dakota v. Interior, that held that the section of the Indian Reorganization Act authorizing the Secretary to acquire lands in trust was unconstitutional? (c) Is the Indian Reorganization Act the statutory authority that the Secretary would cite to take land into trust pursuant to the Agreement with the Hopi?

Responses:

a. See response to question 2a posed by Senator McCain.

b. The Justice Department believes South Dakota v. Interior, 69 F.3d 878 (8th Cir. 1995), was wrongly decided by the panel in the Eighth Circuit Court of Appeals, as we explained in our petition for rehearing en banc. The Justice Department is now considering whether to seek certiorari in the United States Supreme Court. In any event, any challenge to the settlement in this case is likely to arise in the Ninth Circuit, where the statutory provision remains valid.

In addition, the Secretary of the Interior has recently promulgated new regulations that provide for judicial review of agency decisions to take land into trust. See 61 Fed. Reg. 18082-83 (April 24, 1996) (revising 25 C.F.R. 151.12). This new regulation vitiates a fundamental assumption underlying the Eighth Circuit's determination that the statute is unconstitutional.

c. The Indian Reorganization Act is the statutory authority the Secretary would cite to take land into trust for the Hopi Tribe, pursuant to the Settlement Agreement.

Question 6. In the event that some Navajo families choose not to sign an Accommodation Agreement, we will be no closer to a final resolution of the dispute than we are today. What is the remedy if some families choose not to sign Accommodation Agreements yet refuse to leave the Hopi Partitioned Lands?

Response:

Any families who choose not to sign the Accommodation Agreement and who remain on the Hopi Partitioned Lands without authorization will be in trespass and, as mentioned above, an action in trespass may be brought against them by the United States or the Hopi Tribe. We are hopeful that a super-majority of Navajo families now residing on the Hopi

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Partitioned Lands will sign the Accommodation Agreement or choose, instead, to accept their relocation benefits and move away from the Hopi Partitioned Lands. For those families that wish to sign an Accommodation Agreement, the creation of this alternative represents a vast change from the land dispute circumstances that face them today. In light of these agreements, if some Navajo families choose not to sign an Accommodation Agreement, it will be by their own election that they cannot remain at their homes on the Hopi Partitioned Lands and not because the circumstances provided no alternative.

In this respect, the Accommodation Agreement brings closure to the situation the Navajo families have faced for the last two decades, by presenting an option for people lawfully to remain on the Hopi Partitioned Lands and to continue their traditional way of life at homesites which, in many instances, have been occupied by their families for many generations. In addition, the agreements also bring closure to the land dispute by providing an end date for provision of relocation benefits to residents of the Hopi Partitioned Lands who are eligible for such benefits. (See the response to question 6 posed by Senator McCain).

Question 7. In 1980, Congress approved legislation that allowed 400,000 acres of land to be taken into trust for the Navajo Tribe and used for the benefit of Navajo families residing on the Hopi Partitioned Lands. That measure was intended to resolve the dispute, yet many Navajo families still chose not to move. Now Congress is being asked to approve legislation that will facilitate 500,000 acres of land being taken into trust for the Hopi. Is the Administration confident that this represents final resolution? If so, would it recommend legislative language to relieve the Federal Government of any further obligations if this proposal ultimately fails?

Response:

The prior commitment of lands to the Navajo Nation was intended to provide lands to which Navajos could be relocated. Many families have relocated, some to those lands. The current settlement compensates the Hopi Tribe for its land losses. If some families decline to enter into an Accommodation Agreement and do not move after receipt of relocation benefits provided pursuant to the 1974 Settlement Act, they are subject to an action for trespass. Such a circumstance would not invite further land transfer to the Navajo Nation. Nor would renewal of the Accommodation Agreement at the end of 75 years invite further contribution from the United States. Rent or other compensation negotiated between the Tribes at that juncture would

constitute the only compensation anticipated by the parties.

We recommend against inclusion at this time of legislative language that relieves the Federal Government of any further obligations. The Office of Navajo and Hopi Indian Relocation continues to have obligations to Navajo families that already have moved from the Hopi Partitioned Lands but have not yet received their benefits. This settlement addresses the land dispute problem. The Senate Committee on Indian Affairs has indicated that a separate subsequent hearing process will address issues relating to relocation benefits for Navajo who have already moved from the Hopi Partitioned Lands. We would not favor merging of that separate and fact intensive issue with the land dispute issues in these settlement agreements.

* * * *

We very much appreciate your sustained support of efforts to reach a consensual resolution of this problem. This has been a long and difficult process and we have learned a great deal since our first effort at settlement in late 1992. That proposed settlement, which would have required broad Congressional legislation, has been revised in response to many objections that were voiced in 1992 and 1993. We look forward to working with you on this issue.

The Office of Management and Budget has advised this Department that it has no objection to the presentation of these responses from the standpoint of the Administration's program.

Please do not hesitate to contact us if we may be of additional assistance.

Sincerely,


Andrew Fois
Assistant Attorney General

CC: The Honorable Daniel K. Inouye
Ranking Minority Member

✓ The Honorable Jon L. Kyl