THE NAVAJO NATION

JOE SHIRLEY, JR.
President

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June 4, 2003

The Honorable Pete V. Domenici
Chairman, Senate Energy Development and Natural Resources Committee
United States Senate
328 Hart Senate Office Building
Washington, D.C. 20510

RE: Proposed "Indian Tribal Energy Development and Self-Determination Act of 2003"

Dear Chairman Domenici:

The Navajo Nation fully supports the concept and goals of the "Indian Tribal Energy Development and Self-Determination Act of 2003", as stated in Section 2602(a), which is "to assist Indian tribes in the development of energy resources and further the goal of Indian self-determination." However, the Navajo Nation is keenly disappointed that the proposed Act still contains language that is highly objectionable from the Navajo Nation's point of view.

The controversy over elimination of the federal trust responsibility is not a new challenge facing Navajo Nation. In the debate over the Indian Mineral Development Act of 1982, the Reagan Administration opposed the bill, which would have strengthened tribal self-determination, unless the proposed act contained language protecting the Secretary from liability. Congress responded more appropriately by confirming that Secretarial approval must promote the "best interests of the Indian tribe" by providing that nothing in the statute would absolve the Secretary of trust duties.

This new bill authorizes, but does not appropriate, federal monies for a variety of laudable goals, including the improvement of tribes' capacity to negotiate and administer energy development initiatives. Indeed the Navajo Nation's experience has shown that federal financial and technical assistance is critical, if tribes are to successfully navigate in the high-stakes energy resource arena. Unfortunately, the Navajo Nation is not confident that the grants, loans, and other financial authorizations contained in the bill will eventually materialize. The Nation's infrastructure deficit is over $4 billion due primarily to continuing federal budgetary shortfalls and improper administration of federal funds by state governments often opposed to tribal interests. Moreover, the Department of Interior is currently facing severe financial and administrative constraints and cannot be expected to successfully administer the monies authorized, even if the needed funds are subsequently appropriated. The Department has demonstrated a failure to properly distribute funds for Indian projects, as evidenced by the lack of an Indian lands bill under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), even after 25 years following its passage, although that Act provided for a 150-day timeframe for the Indian lands legislation. Furthermore, the Department has failed to comply with its own court-approved settlement regarding the promulgation of Indian land regulations under SMCRA.

The Navajo Nation is currently analyzing this legislation as compared to the federal statutes and regulations at issue in United States v. Navajo Nation. Although the formal analysis has not yet been

finalized through the Nation's governmental protocol, at this time the Navajo Nation's position is that this tribal energy proposal must be defeated. In our view, since the bill allows tribes to convey trust assets without secretarial approval, but then relieves the Secretary of trust duties in the event that the tribe's interests are, for example, intentionally subverted by actions of the Secretary in secret collaboration with the corporate developer (as was the case in United States v. Navajo Nation), the bill is thus a grievous attempt by certain factions in Washington to codify the decision in United States v. Navajo Nation. If successful, this attempt would be a virtual endorsement by the Indian tribes' trustee itself, of the fraud, dishonesty, and unethical treatment that was the subject of the Navajo Nation's claim against the United States, and would open the door for future similar conduct by federal officials.

While the Navajo Nation appreciates the efforts of various tribal organizations at crafting substitute language for the Senate bill, the most recent draft amendments (which we understand to be dated as of May 22, 2003) are still unacceptable to the Nation, since the alternate language does nothing to protect the general federal trust responsibility that the Supreme Court did not do away with, despite its pronouncements in United States v. Navajo Nation.

The Supreme Court in United States v. Navajo Nation reversed the judgment of the United States Court of Appeals for the Federal Circuit, whose decision was in favor of the Navajo Nation, and remanded the case for further proceedings consistent with its opinion of March 4, 2003. The Supreme Court's decision rested on the seminal trust case United States v. Mitchell, 455 U.S. 535 (1980) (Mitchell I), in which individual Indian allottees were denied an award of money damages against the United States because the Supreme Court felt that the General Allotment Act (GAA), which was the subject of the trust duty in Mitchell I, did not create a substantial enough trust duty such that the United States should be liable for damages for breach of trust.

The Supreme Court in its March 4, 2003 decision analyzed the Navajo Nation's claim under the Mitchell I holding only, comparing the GAA to the Indian Mineral Leasing Act of 1938. Thus, the Nation's claim failed as did the allottees' claim in Mitchell I. However, the Court did not specifically address the Nation's claim under United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II), which was the follow-up case to Mitchell I that was decided in favor of the allottees. Rather, the Court's March 4, 2003 ruling left open the possibility that a Mitchell II-type claim could possibly be the basis for a damages remedy against the United States. In fact, the Court quoted Mitchell II, stating: "[a]lthough 'the undisputed existence of a general trust relationship between the United States and the Indian people' can 'reinforc[e]' the conclusion that the relevant statute or regulation imposed fiduciary duties, . . . that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act. Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred." Since the decision of March 4, 2003, the Navajo Nation is currently pursuing its claim under a Mitchell II posture, in concert with the analysis of the proposed legislation as mentioned above.

Thus, as the Navajo Nation sees it, this bill if passed into law would be a severe weakening of the existing trust relationship between the United States and tribal governments, and therefore will be firmly resisted by the Navajo Nation.

Sincerely,

Joe Shirley, Jr.

CC: Chairman Pete V. Domenici

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