

THE NAVAJO NATION



BEN SHELLY PRESIDENT
REX LEE JIM VICE PRESIDENT

June 2, 2011

Ken Salazar, Secretary
Office of the Secretary
U.S. Department of Interior
1849 C Street, N.W.
Washington DC 20240

Dear Secretary Salazar,

On May 16, 2011, Director Pizarchik of the Office of Surface Mining Reclamation and Enforcement (OSM), members of his staff, and other Department of the Interior (DOI) representatives met with me and members of my staff to discuss the proposal by OSM, DOI, and the Obama Administration, to eliminate Abandoned Mine Lands (AML) funding pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended in 2006, for certain Tribes and States under the Fiscal Year 2012 Federal Budget, including for the Navajo Nation AML Program. OSM and DOI are now drafting legislation which would implement this proposal and terminate payments to those Tribes and States which are certified as having completed abandoned coal mine land reclamation, payments which have been historically funded from fees collected from each of those sovereigns' coal, and which, in Navajo Indian Country, provide critical funding for reclamation, monitoring, and infrastructure projects in areas most impacted by mining.

Please be aware that the May 16, 2011 meeting was the first consultation by OSM and DOI made pursuant to our government-to-government relationship, regarding this year's proposal, in spite of the requirement for *prior* and *meaningful* consultation with the Navajo Nation on those OSM and DOI policies that have tribal implications. See Executive Order 13175, 65 Fed. Reg. 67249, 67249-67252 (Nov. 6, 2000); see DOI Departmental Manual, Part 512 (2). That is clearly unacceptable where the proposed budget and its implementing legislation in regard to SMCRA funding are obviously policies with tribal implications, defined under EO 13175 as "proposed legislation . . . or actions that have substantial direct effects on one or more Indian tribes . . ." *Id.* at 6249; accordingly, OSM and DOI should have begun consultations with the Navajo Nation prior to formulating budgets terminating our AML funding. Moreover, as the Nation's trustee, OSM and DOI should be carrying our concerns forward to the Administration, including OMB. For this year's budget and proposed legislation, the Nation expects to continue to be consulted as DOI moves forward with any legislation implementing the 2012 Budget Proposal.

As we explained to representatives of OSM and DOI at the May 16, 2011 meeting, the Navajo Nation strongly opposes any initiative by OSM, DOI or the Obama Administration to eliminate critical AML funding for the Navajo Nation. Our specific concerns are as follows:

- AML Funding Provides Critical Funding for Reclamation, Monitoring and Infrastructure Projects for the Most Impacted Communities and People on the Navajo Nation.

AML funds are not used as "general funds" by the Navajo Nation as characterized by OSM in its March 8, 2011 letter (offering after-the-fact "consultation" on the "outcome" of the 2012 budget which

would eliminate the Nation's AML funding). On the contrary, these funds are used by the Navajo Nation, as a certified Tribe under SMCRA, for those lawful purposes as provided for under SMCRA, including for reclamation of abandoned coal and non-coal mine lands, monitoring of reclaimed AML sites (primarily abandoned uranium mines that have radioactive mine waste problems), and for providing critical community infrastructure projects for Navajo People and communities who have been most impacted by mining activities. If AML funds are eliminated, the Navajo Nation will not be able to monitor AML reclaimed sites, let alone address environmental cleanup of subsiding coal mines and other hardrock mines. Indeed, the 2006 SMCRA amendments, which OSM, DOI and this Administration would seek to undo, recognize the clear responsibility of the federal government to address hardrock mining impacts on the Navajo Nation, in addition to coal, and to improve the lives of Navajo People impacted by such hardrock mining. This tremendous federal responsibility is based on the great sacrifice of the Navajo Nation and its People under the federally imposed uranium development on the Navajo Nation, the adverse impacts of which continue to this day, development which directly benefited the federal government and the people of the United States during the Cold War.

- Eliminating AML Funding Would Have Devastating Economic Impacts on the Navajo Nation.

The Navajo Reservation has little economic development and the Navajo people who live there are among the poorest in the United States; indeed, 40% of Navajo families and 42% of Navajo individuals live below the federal poverty line.¹ Compared with the rest of the United States, the Navajo People's living conditions are substandard—31% of Navajo homes do not have complete plumbing; 28% do not have operational kitchen facilities; 38% do not have water services; and 60% of the homes lack basic telephone service, let alone have broadband or internet services.² AML funds provide crucial funds for leveraging infrastructure projects. AML funds provide numerous jobs directly through funded projects, and indirectly through service support jobs on the Navajo Nation, enhancing the Nation's troubled economy, and providing vital economic support to whole extended families.

- AML Funds are Tribal Trust Resources.

AML funds are collected from Navajo coal, a tribal trust resource, and a percentage of all such fees are expressly set aside under SMCRA for the Navajo Nation. AML funds thus rightfully belong to the Navajo Nation as a trust asset, and are clearly not taxpayer "revenues" as mischaracterized by OSM, DOI and OMB. Any attempt by OSM and DOI to take away funds already collected on Navajo coal and set aside under existing federal legislation is a direct abrogation of the federal trust responsibility over the Nation's trust assets, and would constitute a taking of the Nation's property under the federal Constitution.

- DOI and OSM Must Consult with the Navajo Nation on Legislation Eliminating AML Funding to Certified Tribes.

Accordingly, as part of our government-to-government consultation on the proposal to eliminate AML funding, and as our trustee, DOI should coordinate with the Navajo Nation and provide the Nation

¹ 2005-2006 Comprehensive Economic Development Strategy of the Navajo Nation ("CES"), 16, <http://navajobusiness.com/pdf/CEDS/CEDS%202005%20-%202006%20Final.pdf>.

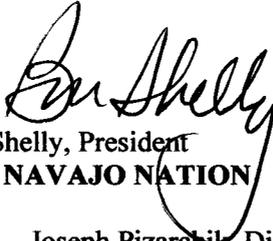
² *Id.* at T2.

with any draft and final proposed legislation eliminating AML funding to the Nation, for the Nation's comments. As a prudent trustee of the Nation's resources, DOI should also communicate our concerns, and any objections, to both the Obama Administration and to Congress.

I am pleased that DOI has taken an important first step in the requisite government-to-government consultation process with the Navajo Nation, and we look forward to working with OSM and DOI, as our trustee, as we continue to seek a more feasible solution to the Administration's budgetary concerns, a solution which does not eliminate critical AML funding to Certified Tribes. As we have previously proposed, the Nation would appreciate having representatives from OSM, DOI and the Obama Administration visit the Navajo Nation to see the impacts of past mining practices firsthand as well as the tremendous benefits to the Navajo Nation and Navajo People as a result of AML funding thus far. I would also like to meet with you personally to discuss this matter.

Regarding scheduling of further consultations, and for coordinating the Nation's comments on any draft and final versions of the proposed legislation, please have your staff contact Ms. Madeline Roanhorse, AML Department Manager, at (928) 871-6982, mroanhorse@frontiernet.net, and Greg Kelly, Attorney, Navajo Nation Department of Justice, (928) 871-6347, gregkelly@nndoj.org, respectively.

Very truly yours,



Ben Shelly, President
THE NAVAJO NATION

cc: Joseph Pizarchik, Director, OSM