



THE NAVAJO NATION

RUSSELL BEGAYE, PRESIDENT
JONATHAN NEZ, VICE PRESIDENT

Testimony of Russell Begaye
President
The Navajo Nation

Before the
Senate Committee on Indian Affairs

**Oversight Hearing on “Emergency Management in Indian Country: Improving FEMA’s
Federal-Tribal Relationship with Indian Tribes”**

Held on Wednesday, February 8, 2017

Yá’át’ée’h Chairman Hoeven, Ranking Member Udall, and Members of the Committee. My name is Russell Begaye. I am the elected President of the Navajo Nation. Thank you for this opportunity to present testimony to discuss the Navajo Nation’s experience in working with Federal Emergency Management Agency (FEMA). I want to talk about two request for declarations that we worked on during my administration: a request for emergency declaration relating to the Gold King Mine spill in August 2015 and a request for a major disaster declaration concerning the Shiprock Flooding that occurred in August of 2016. Unfortunately, both of these requests for declarations were denied. We hope to provide testimony that will prevent tribes in similar situations from being denied federal emergency management resources in times of need.

Gold King Mine, August 2015

As this Committee is aware, on August 5, 2015, the U.S. Environmental Protection Agency (“USEPA”) and its contractors triggered a release of at least three million gallons of toxic mine waste in the waters directly upstream of the Navajo Nation. The toxic waste flowed into the Animas River and the San Juan River. The San Juan River runs approximately 250 miles along the northern border of the Navajo Nation. Thirteen Navajo Chapters were affected. Upon notice of the spill, the Navajo Nation took action immediately to shut down all intakes into the Shiprock, Upper Fruitland-Cambridge and Hogback irrigation canal systems. The Navajo Nation Department of Emergency Management (“DEM”) identified livestock watering points in the affected area. Our teams worked with the BIA to haul water and set up water tanks at these

watering points. The Navajo Nation DEM provided ranchers and farmers information about safe water intake for livestock and for preserving crop fields. The Navajo Nation's EPA monitored water quality at eleven strategic points along the San Juan River. The Nation's DEM activated the Emergency Operations Center ("EOC") to coordinate the Nation's response to this toxic spill. In all, approximately 200 Navajo Nation DEM and Navajo EPA employees and volunteers assisted in the response to this disastrous federal EPA-triggered spill. No federal FEMA employees were ever on the ground.

The Nation submitted its FEMA application for an emergency application on October 2, 2015. FEMA notified the Nation on October 20, 2015 that it denied our application for an emergency declaration. FEMA's justification for the denial was that the agency determined that "the vast majority of the response and recovery efforts for this event fall under the authorities of other federal agencies." The "other federal agency" referred to by FEMA was the USEPA, the agency responsible for causing the emergency situation, and with a strong self-interest in minimizing the response in order to minimize potential liability for its actions. Despite this strong conflict of interest, the Obama administration designated USEPA as the lead federal agency for spill response. We believe the designation of the USEPA as the lead agency blocked assistance from other federal agencies including FEMA and the U.S. Department of Agriculture ("USDA"). For example, in discussions with FEMA staff, we were informed that FEMA's "federal mission" does not include livestock and crop fields, and livestock and crop fields were the most affected by the toxic spill. FEMA staff also informed us that USDA assistance for livestock and crop fields are provided under major disaster declarations, not under emergency declarations. When we reached out to the USDA we were informed their regulations prohibited them from assisting us here because the livestock and crop fields were impacted by an emergency, not a major disaster. As you know, the USEPA recently declared that they are not legally responsible for the spill – just days before the Obama administration left office. The bottom line is that the USEPA caused this spill, and our Navajo people who have suffered greatly as a result of the spill have yet to be compensated for their damages.

In addition to the above roadblocks, we were also informed that FEMA does not generally get involved in emergency assistance when an actual or potentially liable party is involved, as was the case with the Gold King Mine spill.

In regards to FEMA and other agencies lack of involvement in the Gold King Mine spill, we ask whether FEMA applies this policy selectively because it is our understanding that FEMA provided assistance during the BP oil spill that occurred in the Gulf of Mexico where many federal departments became involved and there were liable parties. Why did President Obama's FEMA engage in the BP-caused Gulf of Mexico spill, yet shy away from the USEPA-caused Gold King Mine spill? We ask the Committee to explore the difference in assistance and response between these two cases.

FEMA's denial of an emergency declaration also effectively denied the Nation assistance for its people through counseling services. We received many requests from the local chapters and individuals for counseling services. We would have applied for counseling services assistance from the U.S. Department of Health and Human Services ("DHHS") for those affected by the spill as well as responders to the spill. However, when we requested this assistance from DHHS, it informed us that it can only provide this service if an emergency declaration is made and approved by FEMA. We request this policy be reviewed – our people should not be denied access to federal counseling services that would normally have been available under different political circumstances.

Our Navajo DEM is made up of only 3 employees. When a disaster occurs, they must take the lead in organizing the response. This is a lot of work and yet at the same time, they have to make assessments, develop all the documentation, and submit all the required documents to FEMA. As such, our resources are stretched thin. Comparable State emergency departments are made up of 50 or more people. I imagine that a smaller Tribe than the Navajo Nation, who has limited or no resources will have even greater difficulty in getting any type of declaration approved by FEMA. I therefore urge Congress to review FEMA funding for Tribes so that our people can be better served in the event of a disaster. Our emergency response teams should have the same resources as State teams, and Congress can help ensure this parity.

Because the USEPA caused this spill, it effectively prevented FEMA from taking the lead and engaging with the Navajo Nation. The USEPA then denied our claims a year-and-a-half after the spill and only days before the Obama administration left office. I find it appalling that a federal agency can cause a spill, testify before this Committee that it takes full responsibility, then prevent FEMA from engaging, then finally deny liability. This should never be allowed to happen again.

Shiprock Flooding, August 2016

From August 3-5, 2016, flooding occurred in northwest Shiprock, New Mexico on the Navajo reservation. Three hours after the rainstorm reached its peak, residents in the affected area began calling public rescue agencies who responded immediately. Individuals and families were evacuated to the Shiprock Chapter ("Chapter") House. Red Cross had supplies and bedding set up in the Chapter House. The local emergency response team, entitled the Shiprock ALERT Team, set up a command post in the Chapter House. DEM provided technical assistance to the Shiprock ALERT Team. In the early morning of August 6th, breakers and water lines were shut down; roads were cleared of flood debris so that residents and rescuers could travel in and out of the area. A loader and bar screen was used to clear flood debris from the demolished houses. Trash bins were donated so that debris could be quickly removed, thus reducing risks to public

health. Donations were being continuously received at the Chapter and distributed to affected residents. Temporary housing was found for those whose homes had washed away. Public meetings were held at the Chapter House to keep the community regularly informed. The Nation's Division of Health staff assisted affected residents by providing them with safety and health information and monitoring them for days.

The primary area where flooding occurred was approximately three square miles. Twenty-seven homes were affected and all were surveyed for damage by DEM and FEMA. Ten were deemed to be affected but habitable, two had minor damage and five sustained major damage. Ten homes were destroyed. Eleven vehicles were destroyed and five of these washed away. The damage to the affected families was documented and estimated at \$967,516. Five months after the flooding seven families have been re-settled, nine families continue living in temporary homes, three have been provided trailers by the Navajo Nation, one person is homeless, one family purchased their own home, and one family is renovating their home to make it habitable.

The Navajo Nation submitted its FEMA major disaster declaration application on September 21, 2016. On October 12, 2016, FEMA denied our application because FEMA "determined that the impact to individuals and households from this event was not of such severity and magnitude as to warrant supplemental federal disaster assistance." The Nation appealed FEMA's denial on November 9, 2016. Our appeal emphasized the individual assistance factors applied by FEMA pursuant to 44 CFR 206.48(b): (1) concentration of damages, (2) trauma, (3) special populations, (4) voluntary agency assistance, and (5) insurance.¹ On November 28, 2016, FEMA notified the Nation that its appeal was denied. The denial simply reaffirmed FEMA's original conclusion that the "impact to individuals and households from this event is not of the severity and magnitude as to warrant supplemental federal assistance."

The original FEMA denial stated only that the impact to the individuals and families was not severe enough and the magnitude was not sufficient enough. In our appeal, we gave more details about the impact experienced by the affected individuals and families in accordance with the factors applied by FEMA for individual assistance. Nonetheless, FEMA denied our appeal on the same basis of insufficient severity and magnitude.

The Nation requests clearer guidance from FEMA to Indian tribes who apply for individual assistance. Because FEMA did not explain how and why it reached the conclusion that it did, we can only speculate about the basis of their conclusion with questions such as the following. Was the 3 square-mile area not of sufficient magnitude? Given the census population numbers we included for the Shiprock community, were 21 families not sufficient to warrant a declaration? Were the estimated total damage costs of \$967,516 not severe enough or of sufficient magnitude? The Nation does not know what thresholds apply under each factor that FEMA

¹ The 6th factor applies primarily to states.

considers in deciding whether a major disaster event qualifies for federal assistance. In addition, the Nation wonders whether the scope of the disaster response might have worked against a declaration decision because the locally-based Shiprock ALERT Team functioned as the primary responder, not the Nation's DEM. Shiprock ALERT Team was right there in the community and could respond immediately and coordinate services for rescue, repair, and aid. Because the affected area was a residential area, the flooding did not impact any government operations or facilities. This experience with unclear guidance from FEMA about its individual assistance determinations leads us to request that FEMA provide clear guidance for Indian tribes with respect to applications for individual assistance.

The Nation also recommends that FEMA consider a class of disaster relief that would allow for assistance for individuals who have disaster damages that are localized in scope even if tribal government functions and facilities are not affected. Given the limited resources of all types for Indian tribes, even a localized disaster event will greatly challenge the internal resources of most Indian tribes.

Other Declarations

Prior to my Presidency, there were two other Navajo Nation declarations approved by FEMA. One declaration was for a freeze that occurred across the Navajo Nation around December 2012 to January 2013. The Nation had filed a request for a major disaster declaration and FEMA approved the declaration. This declaration was filed shortly after the Stafford Act was changed to allow Indian tribes to file declarations for themselves rather than go through the state. Navajo was one of the first few tribes to file pursuant to this new law.

The other declaration was made as a result of severe storms, flooding and mudslides that occurred in New Mexico from July through September of 2013, but this assistance did not come from Navajo's own declaration. Initially, from our understanding, Navajo was denied assistance from FEMA because the cumulative amount of Navajo's documented damages did not exceed the \$1 million threshold. In the alternative, the Nation filed as a subgrantee of the State of New Mexico under their declaration since their cumulative damages would then exceed the \$1 million threshold. The tribal threshold has since been reduced to \$250,000, which now makes it easier for tribes to receive assistance.

If you need further information on these declarations, we can provide it upon your request.

Conclusion

FEMA recently published a Tribal Declarations Pilot Guidance dated January 2017. We provided comments to the draft of this guidance. However, at this time, we are working to see if any of our comments were incorporated into that Guidance. When the flooding and the Gold King Mine spill occurred, we did not have this guidance and we had to rely on specialized expertise and navigate the complex maze of federal regulations. Since it is in the pilot phase, we shall see how this will help us out in the future.

The Nation places a spotlight on the difficulties Indian tribes confront when attempting to apply for emergency declaration assistance, especially when federal guidelines and regulations require criteria that do not apply to an emergency event such as the toxic spill that contaminated the San Juan River and yet caused damage to vitally important tribal resources. As a result, many of the individual farmers and ranchers affected by the toxic spill remain uncompensated almost two years after the event. The fact that farmers have not been compensated for their EPA-caused losses and the fact that FEMA was prevented from engaging is absolutely unacceptable. I commend this Committee for focusing on tribes' difficulties in obtaining disaster assistance from the federal government.