

# THE NAVAJO NATION

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JONATHAN NEZ | PRESIDENT   MYRON LIZER | VICE PRESIDENT



June 11, 2020

The Honorable Donald J. Trump  
President of the United States  
The White House  
1600 Pennsylvania Ave NW  
Washington, D.C. 20500

Dear President Trump,

The Navajo Nation looks forward to reopening the Navajo Government in the coming weeks and rebuilding the local economy that has been devastated by the novel Coronavirus Disease 2019 (COVID-19). As of June 10, 2020, the Navajo Nation has 6,275 confirmed cases and 292 deaths.<sup>4</sup> The Navajo Nation has an overwhelming majority of positive cases.<sup>5</sup> In fact, the top five infection rates nationwide are Tribal Nations including the Navajo Nation. However, this is due to the aggressive testing we are conducting in our communities. We have tested almost 42,000 Navajo citizens, approximately 20-percent of the population that resides on the Navajo Nation, with 32,899 negative results. Nearly 3,000 individuals have recovered from the virus as well, with reports still pending.

To ensure the completion of numerous life-saving infrastructure projects within the statutory expenditure deadline of December 30, 2020 for the tribal set-aside of the Coronavirus Relief Fund (CRF) in Title V of the Coronavirus Aid, Relief, and Economic Security Act, (CARES Act), the Navajo Nation, as a sovereign nation must be allowed to exercise self-determination by determining the appropriate level of environmental impact review for projects across the Navajo Nation. The process by which projects are reviewed pursuant to the National Environmental Policy Act (NEPA) process must be streamlined to cut out unnecessary procedures across multiple federal agencies for the immediate construction of critical projects. Many projects, like new service line extensions result in findings of no significant impact.

This White Paper is intended to respond to Executive Order 13924, *Regulatory Relief To Support Economic Recovery* (May 19, 2020) and provide input on plans Federal Agencies' are putting

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<sup>4</sup> Navajo Department of Health, COVID-19, Dikos Ntsaaígíí-19 (COVID-19) Dashboard, Last Updated June 5, 2020, <https://www.ndoh.navajo-nsn.gov/COVID-19> (reporting 6,275 positive cases, 32,899 total negative tests, 292 total confirmed deaths) (last visited June 11, 2020).

<sup>5</sup> See Creede Newton, *Why has Navajo Nation been hit so hard by the coronavirus*, Aljazeera, May 27, 2020, <https://www.aljazeera.com/news/2020/05/navajo-nation-hit-hard-coronavirus-200526171504037.html> (reporting that 14.6% of Navajo citizens have been tested as of May 25, 2020); see also Umair Irfan, *Arizona's new coronavirus spike is worrisome*, Vox, June 11, 2020, <https://www.vox.com/2020/6/11/21286431/coronavirus-arizona-covid-19-cases-deaths-navajo-nation>.

NAVAJO NATION OFFICE OF THE PRESIDENT AND VICE PRESIDENT

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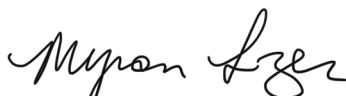
together to carry out the purposes of the Executive Order.<sup>6</sup> The enclosed White Paper details how existing federal laws or regulations and federal policies stymies and complicates the Nation's ability to efficiently start and complete critical infrastructure projects. Additionally, the White Paper proposes changes to the existing procedures as it relates to the NEPA process, the approval of Right-of-Ways, and the abbreviation of specific approval processes. The proposals provided for in this White Paper seek to exercise the Navajo Nation's sovereignty intended to protect the health and welfare of every Navajo citizen and resident. The Navajo Nation cannot afford to delay these critical infrastructure projects any longer at the expense of losing more precious lives to COVID-19.

We are open to further discussing any of these issues at your request. Please contact Santee Lewis, Executive Director, Navajo Nation Washington Office by email at [santeelewis@navajo-nsn.gov](mailto:santeelewis@navajo-nsn.gov) or by phone at (202) 981-4331. Ahéhee', thank you.

Sincerely,



Jonathan Nez, *President*  
**THE NAVAJO NATION**



Myron Lizer, *Vice President*  
**THE NAVAJO NATION**

cc:      The Honorable Mike Pence  
          The Honorable Martin Heinrich  
          The Honorable Mike Lee  
          The Honorable Martha McSally  
          The Honorable Mitt Romney  
          The Honorable Kyrsten Sinema  
          The Honorable Tom Udall  
          The Honorable Andy Biggs  
          The Honorable Rob Bishop  
          The Honorable John Curtis  
          The Honorable Ruben Gallego  
          The Honorable Raúl M. Grijalva  
          The Honorable Paul Gosar

          The Honorable Deb Haaland  
          The Honorable Ann Kirkpatrick  
          The Honorable Debbie Lesko  
          The Honorable Ben Ray Lujan  
          The Honorable Ben McAdams  
          The Honorable Tom O'Halleran  
          The Honorable David Schweikert  
          The Honorable Xochitl Torres Small  
          The Honorable Greg Stanton  
          Mr. William Crozer  
          Mr. Tyler Fish

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<sup>6</sup> Exec. Order No. 13924, 85 Fed. Reg. 31353-56 (May 19, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-11301.pdf> (last visited June 8, 2020).



## **NAVAJO NATION WHITE PAPER:**

### **Proposed Revisions to Federal Laws or Regulations and Policy**

**June 11, 2020**

#### **Introduction**

On May 19, 2020 President Trump issued an Executive Order No. 13924 to combat the economic consequences of COVID-19. The policy directed federal government agencies to address the economic emergency *by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.*

The President's Executive Order also directed that *[T]he heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements with respect to those requirements, for the purpose of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in [the Policy] section 1 of this order.*

#### **Navajo Nation COVID-19 Update**

The novel Coronavirus Disease 2019, or COVID-19, has hit the Navajo Nation hard since it was first detected within Navajo's borders on March 17, 2020. As of June 9, 2020, there were a total of 6,150 confirmed COVID-19 positive cases and 285 deaths. Of the positive cases, there are approximately 2,872 recoveries, with more reports still pending. Due to our high testing rate, we are one of the top five Tribal Nations with reported COVID-19 cases. We are working tirelessly with our Navajo Health Command Operation Center (HCOC) to be proactive and help bring relief to those impacted by working closely with our local, State, and Federal partners.

#### **Background**

The Navajo Nation ("Nation" or "NN") is the largest land-based Tribe in the United States, encompassing over 27,000 square miles across Arizona, New Mexico, and Utah and several federal service regions. With over 350,000 enrolled members and an unemployment rate of about 42 percent and a median income annual household income of approximately \$20,000, the Navajo

Nation is in dire need of adequate infrastructure to grow our economy. These infrastructure projects address the construction of water and wastewater lines, housing, and transportation corridors; and placement of electric lines, telecommunication and broadband networks, and other critical needs across the Nation. The construction and placement of these essential necessities will greatly improve the health, well-being and quality of life for the Navajo people and other residents of Navajo Nation. Completing these infrastructure projects will greatly benefit Navajo health standards, provide employment to curtail the high unemployment, promote attendance at Navajo Nation schools, and enhance the economic prosperity and sustainable self-sufficiency of the Nation as we face this pandemic.

Currently, federal laws/policies/regulations stifle the completion of projects that address the critical and basic needs of our people—some projects are more than 3 years old because of these obstructions. The Nation’s leaders strongly believe that by addressing certain National Environmental Policy Act requirements and Right-of-Way processes, by either elimination or truncation, many critical infrastructure projects will advance to completion in a more efficient and economical way.

In this White Paper, the Nation explains and suggests adjusting, shortening or eliminating steps that exist within Federal laws or regulations (Section I) and Federal policy (Section II) that stifle the process of infrastructure project completion. This Paper begins the conversation to working with our federal partners.

## **I. List of Proposed Revisions in Federal Law or Regulation**

**A. NEPA Process—Deference to Navajo Nation Clearances or Studies:** The National Environmental Policy Act (NEPA) covers three areas: Environmental Assessments (EA), Environmental Impact Statements (EIS) and Categorical Exclusions (CatEx). Inter-federal departmental deference is given by federal departments to each other but not to Navajo Nation departments. For example, the Navajo Department of Transportation (Navajo DOT) is currently required to complete two environmental documents to address the federal action of funding the project (as required by Federal Highway Administration (FHWA)) and the federal action of granting a right-of-way (as required by the Bureau of Indian Affairs (BIA)). The Bureau of Indian Affairs - Navajo Regional Office’s Realty Office will not accept the FHWA CatEx document because it is not considered to be in a BIA format. However, the FHWA CatEx is an acceptable document to complete the NEPA process. It would be helpful if the BIA Regional Director would honor and accept Navajo DOT’s environmental documents that are approved by FHWA.

25 CFR Part 170 states that the Secretary of the Interior gives the road system responsibility to the Secretary of Transportation and their agent, which is Navajo DOT. Navajo DOT is completing NEPA responsibility, but the BIA is not allowing these documents based on formatting issues and this is causing major delays in completing projects. The Indian Health Service (IHS) is also experiencing the same issues with BIA environmental review on their NPEA documents that are develop according to IHS environmental guidelines and requirements.

Proposed change in regulation: Bureau of Indian Affairs shall accept and incorporate into its analysis a study performed by or for another federal agency regarding a federal major action unless it identifies a substantive need to provide a supplemental clearance study for which the Bureau shall undertake in cooperation with the applicant.

- B. **Environment Assessments.** NEPA compliance requirements could be reduced to eliminate Environmental Assessment (EA) requirements and only require a modified and brief or simple cultural resources and biological compliance form review and certification process on the Navajo Nation.

Proposed Recommendation: The Navajo Nation would like to work with DOI to develop a more streamlined process for reviewing projects on the Nation.

- C. **Disturbed Grounds:** Adopt a CatEx stating that clearance studies need not be done for disturbed grounds or provide exemptions for disturbed grounds. For example, an old public dirt road need not be restudied before construction.

Proposed change in federal laws: If the ground has been disturbed by a previous construction of an infrastructure; or a right-of-way exists; or an old roadway is used by the Navajo people; and these are registered with the Navajo Nation Land Department, no further environmental review needs to be performed, provided that the proposed new project stays within the confines of the disturbed ground or right-of-way. If the construction activity goes outside area, then an environmental clearance document of an appropriate level will need to be completed.

“Old roadway” means a dirt road or trail used by the Navajo people for more than forty (40) years and is registered with Navajo Nation Land Department.

- D. **Adjacent BLM land.** If a U.S. Bureau of Land Management (BLM) land parcel is adjacent to Navajo trust land or another federal land, federal regulations should be changed to have BLM accept the environmental clearance study on an adjacent Navajo trust land or federal land and not require a separate study if the project does not physically touch BLM land. This avoids situations like what happened in Littlewater Chapter, New Mexico, where a proposed powerline went over the tip of a BLM land section without touching the land itself, but the BLM required a separate clearance which took almost a year to complete.

Proposed Recommendation: For infrastructure projects located within Navajo Nation boundaries, BLM shall accept a clearance study performed on Navajo trust land or federal land in lieu of a separate BLM study if the infrastructure project does not physically touch or alter BLM land.

- E. **Short Infrastructure Line.** Service lines have historically been found to have a “Finding of No Significant Impact” (FONSI). BIA should not complicate the process if the determination is always that utility service lines are never big enough to cause any significant environmental issue. The BIA typically categorizes this type of work as “no environmental required.” For

example, in the instance of the Mesa Verde cactus, a pipeline trench was constructed and only a narrow amount of land was impacted. After backfilling, the native vegetation generally reseeded and reinstated itself over the pipeline. No appreciable damage occurred in the long term.

Proposed change in federal Law: A service line agreement should be classified as a CatEx. The precedent is set and has not caused any significant or questionable issues to date.

- F. **Sovereign Immunity Waiver.** Federal agencies like U.S. Housing and Urban Development (HUD) require a waiver of Navajo Nation sovereign immunity before approving funds for Navajo Nation. This requirement should be removed.

Proposed change in federal/NN policy or law: Waiver of Navajo Nation sovereign immunity shall not be required and the federal agency shall consult with Navajo Nation to develop an agreement for the accounting of the funds.

## II. List of Proposed Changes in Federal Policies

- A. **ROW Application Process:** Regarding the current ROW application process, the Navajo Nation recommends the BIA Realty Office review and approve the BIA Navajo Region Division of Transportation (NRDOT) ROW application before the BIA Regional Director formally submits this application to the Nation for approval by tribal resolution.

To our knowledge this internal BIA review does not take place and the Nation has encountered the instances where the application and tribal resolution is presented to the BIA Regional Director, who then hands the application and tribal resolution to the BIA Realty Office for review. What often occurs is the application is returned to the Nation to address discrepancies between the application and the tribal resolution as determined by the BIA Realty Office. In order to streamline the process and be more effective, it would be helpful if the BIA Realty Office reviewed the application before it was committed to legislation (the Nation could possibly even include a DRAFT version of the legislation with the ROW application). In this manner, the draft version of both documents would be reviewed together before they are finalized and wouldn't need to go back and forth for revisions which causes further time delays.

A secondary part of this request would be that the BIA Realty Office review the ROW application before the environmental clearance document is finalized and signed off by the lead agency. By allowing the ROW application and the environmental document process to run simultaneously, it would greatly reduce the overall project development process. In conjunction with the proposed process revisions above, the BIA Regional Director would receive the final/reviewed ROW application, the Nation's DRAFT legislative action and the signed/approved environmental document as part of his final review before submittal to the Nation for their final legislative revisions and approval action.

In some cases, for most FHWA projects, the current ROW application process with the BIA as described above may take anywhere from one to three years right now for final construction readiness. This process must be shortened.

Proposed change in federal policy: It appears that this action could be done by an agreement between the Navajo Nation and Bureau of Indian Affairs. The agreement clause could state as follows:

For all FHWA projects, BIA Realty Office shall first review the ROW application before approval by BIA Regional Director and submission to Navajo Nation for legislative approval.

- B. Create Utility Corridors.** The Nation recommends developing utility corridors for running utilities parallel to each other in a single right-of-way (ROW). All utility corridors will be filed/classified as utility corridors and thereafter more than one utility infrastructure can be constructed at the initial time or a future additional utility could be run inside the same corridor. Industry spacing design guidelines should be followed to allow for acceptable joint-use and maintenance of the facilities.

The Nation also recommends implementing a procedure to use current highway ROWs as utility corridors that would have a waterline on one side of the road and a powerline on the other side of the road. Current BIA practice is to restrict new utility lines from the proposed roadway corridor and/or ROW limits, only allowing the utility company to initiate perpendicular crossings. Federal regulations can be designed or modified specifically for NN projects. This can further be addressed by an applicant proposing a utility corridor in the application for land use from the outset. A utility can be placed within a highway ROW with the approval of the ROW grantee and Navajo Nation.

Proposed change in federal policy: If more than one utility infrastructure is being proposed to be constructed, the applicant for a right-of-way may apply for sufficient right-of-way width to construct multiple utility infrastructures. An existing right-of-way may be turned into a utility corridor upon the application for such changes. Utility corridors shall be registered with Navajo Nation Land Department.

- C. BIA Needs To Return Copies of Approved Documents To Appropriate NN Departments.** Projects that need BIA clearance for ROW projects are water, roads and fiber optic lines. Leases don't go to BIA. For ROW, the Navajo Nation General Land Development Department (GLDD) staff usually sends packets to BIA that have completed the Nation's internal review, have approval of the Nation's Resources and Development Committee and the president's signature. These are the paper manual documents and are sent by staff to the BIA Regional Office in Gallup. GLDD keeps a scanned copy. Unfortunately, when BIA approves the packet, GLDD does not get a copy back or any notification from BIA that the ROW was approved.

Proposed change in federal & NN laws: It appears that this could be done by an agreement between the NN and BIA RDO as follows: BIA shall return a copy of the approved ROW application to OPVP, NLA and GLDD.

- D. **Update Grazing Permittee Information:** This is the number one hindrance or obstacle that exists for numerous reasons. One reason is that BIA does not currently have an “up-do-date” grazing permittee information and neither do the Grazing Officers. They don’t have permit areas mapped out.

Proposed change in federal & NN policy: BIA shall update all grazing permittee information within 90 days.

- E. **Use of Old BIA Forms.** The use of old BIA forms “Field Clearance Checklist” that has BIA requirements on them. As a result of this, there are many packets that finished the electronic review but have been sitting in the GLDD office for several months now waiting on Grazing Officers and Grazing Committee members to sign it, including BIA Operations department. It is unknown if these will ever get signed. (Although many packets were processed and approved by the tribe without this – these packets unfortunately got denied). All that is needed is the Grazing Officer letter with the valid permittee names on the letter so the Land Support Agent can get consent but due to different individual’s preferences, backward unnecessary steps are being taken.

Proposed change in federal/NN policy: BIA and NN shall consult regarding the updating of all forms used for processing or approving infrastructure project development. Current forms should be kept on a designated website with the Navajo Nation.

- F. **Telecom Signals.** Navajo Nation airspace should be recognized. U.S. Federal Communication Commission (FCC) managed radio frequencies such as the Educational Broadcast Service (EBS), Citizen’s Band Radio Service (CBRS), Television White Space and other frequencies (scanner and radio) across the Navajo Nation to belong to the Navajo Nation and not the telecommunication companies. Oversight and deployment of wireless services using these frequency allocations should be managed by the Nation in cooperation with service providers. Access to and management of these assets should be used to primarily support public safety, healthcare, municipal government, and education.

Proposed change in federal law or policy: The FCC should assign all available EBS 2.5 Ghz spectrum that covers the Navajo Nation to the Office of the President/Tribal Council; and this shall be designated for use by the Navajo Nation and its entities.

- G. Allow for co-locations of all wireless or fiber carriers on a single tower.

Proposed change in federal law or policy: This may already exist at the federal level. Providers or carriers shall share towers via sharing agreements or space rental or pursuant to a Navajo Nation law or regulation.

- H. Allow for the Nation to own all communication towers. Navajo Technical University (NTU) has been teaching tower site maintenance as part of their curriculum. NTU worked with a contractor to build towers. NTU can be authorized to enter into partnership agreements to



develop and maintain towers with a contractor of its choosing. All towers that do not have a valid lease or no tribal authorization or no payments received should be reexamined by the Navajo Nation for continued use the by telecom company.

Proposed change in federal/NN policy: Navajo Nation may be allowed to own communication towers pursuant to its own laws and not state laws.