

# NAVAJO NATION DEPARTMENT OF JUSTICE

QUARTER 4  
< JULY TO SEPTEMBER 2022 >

Attorney General: Doreen N. McPaul  
Deputy Attorney General: Kimberly A. Dutcher

## STATUS OF THE DEPARTMENT

The express purpose of the DOJ is to provide legal services, subject to available resources, to the Navajo Nation Government, including the three branches of government, the Executive Branch Divisions, the 110 chapters, and entities. DOJ is also charged with administering the Navajo-Hopi Legal Services Program (NHLSP) and the Offices of the Prosecutor (OTP). DOJ is required to perform all duties and responsibilities in accordance with the highest standards of legal ethics as required by the Navajo Nation Bar Association and by the American Bar Association Model Rules of Professional Conduct.

During the current Administration, Doreen N. McPaul has served as Attorney General since February 4, 2019. Kimberly A. Dutcher has served as Deputy Attorney General since April 8, 2019. Within DOJ, there is an Office of the Attorney General (OAG) which oversees the Office of the Prosecutor, seven (7) DOJ units, and the NHLSP. OTP has offices in Window Rock, Tuba City, and the Prosecutor's Office has 11 district offices throughout the Nation.

This quarter, DOJ received 776 Requests for Legal Services (RFS) and completed 650. These requests do not include other work such as time spent in meetings, on calls, court appearances, preparing for litigation, and responding to work/client email.

## COVID-19 MATTERS

Since March 2020 and during this 2nd quarter of FY2022, DOJ has continued to be involved in all legal aspects of assisting the Navajo Nation government in responding to the myriad of ongoing challenges presented by the COVID-19 pandemic. Throughout the past two years and during the Navajo Nation government closures, DOJ's attorneys, advocates, prosecutors, and staff worked tirelessly to meet the legal demands of the government. OAG prioritized employee safety and adherence to safety protocols when working on site. Approximately 90% of DOJ's employees have been fully vaccinated and have received booster shots to help prevent the spread of COVID-19. Nonetheless, this quarter the presence of resistant COVID-19 variants resulted in a high number of cases for our office.

ARPA background. On March 11, 2021, President Biden signed the American Rescue Plan Act (ARPA) into law. Section 9901 of ARPA established the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund, which provides \$362 billion dollars for state, local and tribal governments, including \$20 billion for tribal governments. As of May 29, 2021, the United States Department of Treasury allocated \$1.8 billion to the Navajo Nation under the Fiscal Recovery Funds (FRF) provisions of ARP A. On August 16, 2021, the Navajo Nation received a second allocation of approximately \$218 million in FRF funding, for a total of approximately \$2.1 billion dollars in FRF funds. The FRF funds are intended to build upon and expand the relief provided in the CARES Act.

On August 2, 2021, CJY-41-21 was signed into law, establishing the Navajo Nation's Fiscal Recovery Fund and the Expenditure Authorization Process, among other things. Section 7 of CJY-41-21 also allocated ten percent of FRF dollars for central support and/or regulatory services. Programs receiving such funds are required to use such funding to develop the legal, financial, organizational, managerial, administrative, regulatory, and reporting framework necessary to support the expeditious completion of projects and services funded with the Nation's FRF or otherwise be necessary administrative costs due to the COVID-19 public health emergency and its negative economic impacts. Such funding cannot be used for direct services or other programmatic expenses. DOJ received \$25,446,993.00 of FRF for a five-year budget beginning October 1, 2021 to December 31, 2026. OMB issued the budget transmission and set up the budget in the FMIS on December 16, 2021. The major expense categories for DOJ include Contractual Services (outside

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counsel fees & expenses) budgeted at \$18,581,467 and Personnel Expenses (salary/fringe/adjustments for 6 new positions and 9 cost-shared positions) budgeted at \$6,243,410. Resolution CJN-29-22 was amended to expand the scope of allowable uses of FRF to include administrative costs of the Nation's COVID-19-related programs and projects that are funded from non-FRF sources so long as such use would comply with Treasury Guidance.

Following the passage of CJY-41-21, the Budget and Finance Committee approved the FRF procedures and forms for initial eligibility determination reviews of proposed FRF expenditure plans through the passage of resolution BFS-31-21. DOJ attended and presented at several leadership meetings and Naabik'iyáti work sessions regarding proposed FRF expenditure plans and legislation 0257-21. DOJ participated in the Naabik'iyáti and Council meetings on legislation 0257-21. On April 4, 2022, legislation 0257-21 failed at Council with a vote of 15 to 8. DOJ participated in drafting legislation 0086-22, and suggested amendments to legislation 0087-22. DOJ again attended advisory meetings, work sessions, and Naabik'iyáti and Council meetings on legislations 0086-22 and 0087-22. On June 13, 2022, legislation 0087-22 failed at Council with a vote of 13 to 9. On June 30, 2022, Council passed legislation 0086-22 with a vote of 20 to 2. The legislation appropriates funding to mitigate the COVID-19 pandemic as well as to respond to the health, social and economic impacts of the pandemic by appropriating funding for basic infrastructure including water lines and wastewater systems, bathroom additions, electric capacity and connections, broadband, new housing, hardship assistance, and critical COVID services under public safety and health. Resolution CJN-29-22 was signed into law by President Nez on July 15, 2022.

To date, DOJ has completed 257 FRF initial eligibility determination reviews for 203 proposed expenditure plans seeking to utilize FRF; 6 of those reviews were completed during this quarter. TFU's portion of the report herein has additional information about DOJ's ARPA related activities.

LITIGATION. This quarter featured some important litigation activity, including the following:

1. **NHLSP Clients prevail against ONHIR & Attorney Fees Petition Granted.** On September 2, 2022, the District Court for Arizona issued a decision favorable for four (4) Navajo tribal members represented by DOJ's Navajo Hopi Legal Services Program (NHLSP). DOJ petitioned the Court to award attorney's fees under the Equal Access to Justice Act (EAJA), and the Court granted the petition, rejecting the Office of Navajo Hopi Indian Relocation's (ONHIR) arguments. This case for attorney's fees stems from cases in which the NHLSP represented these Navajo tribal members to obtain relocation benefits, and in which they all prevailed.
2. **Victory in Navajo Hopi Legal Service Program case.** On August 11, the District Court of Arizona issued a decision favorable to a Navajo tribal member represented by NHLSP. At issue was legal residence, the determination of which affects the client's eligibility for relocation benefits. The judge concluded that the Hearing Officer's decision on legal residence was arbitrary and capricious and was not "harmless error" as ONHIR argued. The judge also ruled as an independent grounds for reversal the Hearing Officer's failure to consider evidence regarding legal residence. The judge remanded the case back to ONHIR for the Hearing Officer to consider evidence of the client's legal residence. ONHIR has until October 10 to appeal this decision. This matter was handled by Susan Eastman, Principal Attorney and Director of NHLSP.
3. **Victory in Water Rights case.** On September 29, 2022, the U.S. District Court of New Mexico granted the Navajo Nation's (and other parties) motions to dismiss in a case filed in November 2021 by objectors to the San Juan River Basin Water Rights Settlement. The complaint named a Navajo Nation official as a Defendant, as well as other Defendants including the Secretary of Interior, CEO of NAPI, and the State of New Mexico officials. With NAPI, the Nation filed a joint motion to dismiss based on sovereign immunity, which the Court granted. All claims asserted against the Navajo Nation official were dismissed without prejudice. DOJ's Litigation and Water Rights Unit handled this matter.

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4. **Navajo Nation files joint brief in U.S. Supreme Court.** This quarter, the Nation filed a joint brief with the Cherokee Nation, the Morongo, Oneida and Quinault tribes in *Brackeen v. Haaland*, which involves a challenge to the constitutionality of the Indian Child Welfare Act brought by non-Indian adoptive families and the State of Texas. One of the non-Indian families, the Brackeens, have already adopted a Navajo child and now seek to adopt the child's half-sibling, also a Navajo child. DOJ's Litigation Unit provided much support in the researching and drafting of the brief in collaboration with the Jenner Block law firm, and the Stanford and University of Chicago Law School Supreme Court Clinics. The case is in the merits briefing stage at the U.S. Supreme Court. The United States also filed a response brief and the Brackeens and the State of Texas have filed their reply briefs. The Supreme Court will hear oral argument on November 9, 2022. The Court then will issue a decision at any point between November 2022 and June 2023.

ADMINISTRATION

This quarter, OAG held a Leadership Meeting with its seven (7) Assistant Attorneys General, the Chief Prosecutor, and the Director of the Navajo-Hopi Legal Services Program (NHLSP). The purpose of the meeting was to plan for FY23, including budget issues, various reports, anticipated outside counsel needs, attorney and staff training and continuing legal education (CLE), technology matters, office space issues, and attorney well-being and morale. All participants appreciated the opportunity to gather in person to discuss important DOJ matters.

This quarter, a DOJ Attorney Candidate took and passed the Navajo Nation Bar exam and will be sworn into the Navajo Nation Bar next quarter.

DOJ attorneys are also completing CLE for the Navajo Nation and state bar associations to fulfill licensure requirements for this year. DOJ arranged for voluntary in-house continuing legal education courses for attorneys and staff with the webcast of the following online seminars: *Mindfulness: Retrain the Brain* and *Negotiating and Drafting Dispute Resolution Provisions in Tribal Contracts*.

After reducing vacancies to the lowest levels since 2019, eight (8) DOJ employees, 4 attorneys and 4 support staff, left employment with DOJ this quarter. The employees' reasons for departing are varied, including planned retirement, relocation, tending to family needs, and transferring to another Navajo Nation department. In addition, DOJ's six (6) FRF-funded positions remain vacant, and DOJ did not hire any new employees this quarter. Attracting and retaining qualified legal staff is an ongoing challenge for OAG, with lack of housing being the primary hiring barrier.

The current vacancies in DOJ include:

- Principal Attorney (WRU) - Position vacated on 3/12/21; position being advertised
- Principal Attorney (HSGU) – Position vacated on 9/3/22; position to be advertised
- Attorney (HSGU) – New position after Senior Attorney position was filled by NRU promotion; position being advertised
- Attorney (HSGU) – Position vacated on 9/9/22; position to be advertised
- Attorney (ECDU) – Position vacated on 7/29/22; interview conducted on 9/22/22; offer pending
- Attorney (LU) – Position vacated 8/5/22; position being advertised
- Attorney Candidate (HSGU) – Position vacated on 4/2/22; position being advertised
- Principal Tribal Court Advocate (HSGU) – Position vacated on 3/12/21; position being advertised
- Administrative Legal Secretary (WRU) – Position vacated on 9/23/22; position in process of being advertised
- Legal Secretary (LU) – Position vacated on 8/26/22; position in process of being advertised

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- Legal Secretary (NHLSP) – Position vacated on 8/12/22; candidate interviewed and offer made; pending background check
- Legal Secretary (WRU) – Position vacated on 9/30/22; position to be advertised
- Principal Attorney (OAG/FRF funded) – New position being advertised
- Senior Attorney (TFU/FRF funded) – New position to be advertised next quarter
- Attorney (CU/HSGU/NRU/FRF funded – Three (3) new positions being advertised
- Senior Programs & Projects Specialist (OAG/FRF funded) – Applicant referred; did not respond to request to interview; position re-advertised

**OTP & UNIT REPORTS.** A quarterly report from the Office of the Prosecutor as well as a report regarding the quarterly work of each unit within DOJ follows.

**A. Office of the Prosecutor**

The Office of the Prosecutor was established pursuant to Title 2 NNC § 1971 as a department within the Navajo Department of Justice. The purpose of the Office of the Prosecutor (OTP) is to 1) prosecute, to completion, cases involving alleged violations of the Navajo Nation Code by Indian persons; 2) conduct investigations and other activities necessary for the conduct of its affairs; and 3) handle some civil matters, including extradition and exclusion proceedings. The Chief Prosecutor is the head of the OTP and is appointed by and serves at the pleasure of the Attorney General (AG). Prosecutors within OTP serve at the pleasure of the Chief Prosecutor. All other OTP support staff are hired and compensated pursuant to the Navajo Nation Personnel Policies and Procedures. Mr. Vernon L. Jackson, Sr., was appointed Chief Prosecutor on June 6, 2022.

In May 2022, Chief Prosecutor Jackson began a comprehensive analysis of all federally-declined cases received from the United States Attorney's Offices for the Districts of Arizona, Utah, and New Mexico. A 40-page report was completed in late July 2022 which includes findings from the analysis of 231 federal declination letters from January 1, 2019 through July 15, 2022. The declination letters reveal alleged incidents of serious criminal behavior. The most-common type of alleged offense is child sexual assault or abuse (32.5% of all cases; 75 out of 231 cases). The second-most common type of alleged offense is homicide (21.6% of all cases; 50 out of 231 cases). The report identifies and explains how the federal government and the Navajo Nation could improve prosecution efforts. The report also describes OTP's challenges prosecuting serious and egregious offenses and identifies areas in which communication between the FBI and U.S. Attorney's Offices could be improved. Chief Prosecutor Jackson distributed the 40-page report to command staff at the Navajo Division of Public Safety and the U.S. Attorney offices in New Mexico, Utah, and Arizona. Courtesy copies were also provided to Navajo Nation Council Delegates Eugenia Charles-Newton and Amber Crotty.

In July 2022, Chief Prosecutor Jackson engaged in conversations with DOJ and the Office of the President concerning the U.S. Supreme Court case *Oklahoma v. Castro-Huerta* and its impact on public safety within the Navajo Nation. Several alternatives were discussed about the impact of *Castro-Huerta* and the response of the Navajo people. On August 2, 2022, President Nez and Speaker Damon signed a joint statement regarding *Castro-Huerta* that supports a legislative fix that will affirm Navajo Nation sovereignty.

In August 2022, Chief Prosecutor Jackson filed an appeal with the Navajo Nation Supreme Court involving a children's case originating in the Dilkon Family Court. The Navajo Nation is appealing the court's decision to dismiss the case for alleged failure to substitute parties for deceased parents. A briefing schedule has yet to be issued by the Court as of October 5, 2022.

From August 10, 2022 through August 12, 2022, Navajo Nation prosecutors attended the 29<sup>th</sup> Annual Four Corners Indian Country Conference in

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Glendale, Arizona. During this conference, Chief Prosecutor Jackson met individually with U.S. Attorneys Gary M. Restanio (District of Arizona); Alexander M.M. Uballez (District of New Mexico), and Trina A. Higgins (District of Utah). Discussions with these officials centered on improving the way in which federal declination notifications are made to the Navajo Nation as well as the release of federal investigative material.

The appointments of new U.S. Attorneys for the District of Arizona, New Mexico, and Utah presents an opportunity to seek more cooperation in the transfer of investigative material related to cases declined for Federal prosecution. However, the potential for a lack of uniformity in policy decisions carried out by the various U.S. Attorney's Offices is high. The same is true for the FBI. While it is possible to obtain full cooperation from FBI field offices in Arizona and Utah, the office in New Mexico has a different policy about releasing investigative material.

The lack of service related to criminal summonses is creating a negative perception in the minds of the Navajo people when they think about the Navajo Nation's criminal justice system. For example, the dismissal of criminal complaints for "lack of prosecution" due to lack of criminal summons service is driving this negative community perception. The same situation exists for the service of dependency petitions for abused and neglected children. The lack of service related to dependency cases has resulted in one judge ordering OTP to hire personal process servers. OTP does not have a budget for private process servers. Many of the dependency cases are subject to dismissal due to the time that it takes for the Navajo police to serve a summons.

From October 17, 2022 through October 21, 2022, Navajo Nation prosecutors and victim witness advocates will meet in Flagstaff, Arizona. The purpose of these meetings is to discuss revisions to Title 17 and the integration of new victim rights provisions. Navajo Department of Criminal Investigation, Police Department, DOJ and Department of Corrections will participate in this event. Brief meet and greet sessions will also be held with U.S. Attorneys and FBI officials from Arizona, New Mexico, and Utah.

### **NATURAL RESOURCES – PROSECUTION**

In August 2022, Chief Prosecutor Jackson conferred with DOJ attorneys concerning a proposed Memorandum of Understanding (MOU) authorizing Navajo natural resource officers to enforce Title 14 and 17 provisions. Based on this discussion, there appears to be significant issues and concerns. At this time, OTP will not prosecute cases presented by natural resource officers who are attempting to enforce provisions of Title 17 and Title 14.

In September 2022, OTP received a referral concerning the case *United States of America v. George Skeet* (No. 21-CR-00591 MV). On April 23, 2021, Mr. Skeet was charged by a two-count Indictment. In Count 1 Mr. Skeet was charged with selling and offering to sell red-tailed hawk feathers, in violation of the Migratory Bird Treaty Act citing 16 U.S.C. §§ 703 and 707(b)(2)). In Count 2 Mr. Skeet was charged with selling and offering to sell golden eagle feathers and bald eagle feathers, in violation of the Bald and Golden Eagle Protection Act (a Class A Misdemeanor) citing 16 U.S.C. § 668(a)). On August 26, 2022, the United States District dismissed this case. The OTP is reviewing the matter for possible prosecution in a Navajo Nation court.

In August 2022, the Navajo Resource Enforcement program informed Chief Prosecutor Jackson that it would be conducting health and inspection checkpoints during the Northern and Western Fairs. The Program Manager requested OTP's assistance in providing training for Resource Enforcement officers. NNC Title 3 § 1251(D) provides the legal basis for these health and inspection checkpoints and the statute enables Resource Enforcement officers to stop any person in possession of and who is conveying, shipping or transporting livestock, equine or hides of livestock to examine brands.

### **OTP DISTRICT UPDATES**

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Senior Prosecutors assigned to the various OTP offices around the Navajo Nation supervise the work of the support staff. They also oversee the work of other prosecutors handling child delinquency, dependency and child in need of supervision cases. Senior Prosecutors also handle adult criminal cases.

**Window Rock:** This OTP office is located nearest to the Navajo Nation's government-seat of power. The Senior Prosecutor supervises two (2) legal secretaries and one (1) prosecutor. Notable mentions related to FY 2022 4<sup>th</sup> quarter reporting follows:

The staff in this office continue to search for office space after its office was closed due to structural and environmental issues. The search has been difficult and unfruitful. The Senior Prosecutor in this district assumed collateral duties to assist the Victim Witness Advocate program with the development of policies and procedures.

The Senior Prosecutor handled a case which involved an alleged aggravated assault and battery of an on-duty Navajo Nation firefighter. Mr. Elroy King is accused of brandishing a firearm that resulted in its discharge near the ear of the firefighter. The accused is also alleged to have pistol-whipped the firefighter in the facial area causing physical injury. Mr. King currently has an outstanding warrant for failure to appear at a pre-trial conference scheduled for September 1, 2022.

**Shiprock/Aneth:** This OTP office receives the highest number of criminal complaints making them the busiest office. The Senior Prosecutor supervises two (2) legal secretaries and one (1) prosecutor. This quarter, a Senior Prosecutor was recently hired and is transitioning from her previous position as a Prosecutor handling children's cases. In addition to the Senior Prosecutor, a prosecutor and legal secretary were recently hired and assigned to this office. Another individual will be hired to as a children's prosecutor. The transfer of prosecutorial functions from contract counsel to the new Shiprock prosecutors is now on-going.

**Crownpoint/Ramah/Alamo/Tojaiilee:** This OTP office has only one prosecutor handling all the cases in this district. The Attorney-Prosecutor supervises four (4) legal secretaries. In September 2022, Attorney-Candidate Prosecutor in the Crownpoint office recently made a request to have an investigating FBI Special Agent testify at a federal detainer proceeding involving *Navajo Nation v. Evan Haceesa*. On September 19, 2022, the Special Agent-in-Charge of the Albuquerque Field Office approved the Crownpoint prosecutor's request and authorized the investigating FBI agent's testimony. This is a significant development that has the potential to strengthen the success of federal detainer hearings throughout the Navajo Nation.

**Tuba City:** This OTP office is located in the furthest western portion of the Navajo Nation. The Senior Prosecutor supervises two (2) legal secretaries. The Senior Prosecutor assigned to this office handles both adult criminal and children's cases. In August 2022, the Senior Prosecutor handled *Navajo Nation vs. Daryus Explain*. In this case, the accused was charged with Aggravated Battery of a Peace Officer after an incident that occurred in Kaibeto, Arizona. The accused is alleged to have thrown a knife at the Navajo officer causing serious physical injuries. The accused also was charged with Criminal Damage, Theft, Criminal Damage Involving Family Violence and Threatening of a Family Member. The case was accepted for federal prosecution and the accused is now in federal custody.

**Chinle/ Dzil Yijiin:** The Senior Prosecutor assigned to this district supervises three (3) legal secretaries and a children's case prosecutor.

**Kayenta:** The Prosecutor assigned to this office is the sole prosecutor handling both children and adult cases. This quarter, the Prosecutor met

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extensively with federal and tribal criminal justice partners.

**Dilkon:** There is only one Senior Prosecutor handling all the cases in this district. The Senior Prosecutor supervises one legal secretary. In July 2022, the Senior Prosecutor taught at the National Tribal Trial College certificate training program at the University of Wisconsin law school. The Senior Prosecutor was one of the main instructors at the training program. She proudly represented the Navajo Nation in an intensive litigation certificate program for tribal legal practitioners who attended the training from many locations across the U.S.

**White Collar Crime Unit (WWCU):** There are two investigators assigned to this unit. The investigators are responsible for investigating complaints received from various sources that involve allegations of white-collar crime. These crimes are not violent, but they do involve victims. Typically, white-collar criminals take property from their employers, investors or others and can erode the public's trust in government institutions. As the lead agency on the Navajo Nation, the WWCU investigators solve complex criminal investigations that involve government officials and professionals in all fields of service. The WWCU investigators work closely with law enforcement and regulatory agencies from the Office of Ethics and Rules, Navajo Nation Office of Auditor General, Navajo Criminal Investigation Department, U.S. Department of the Interior-Office of Inspector General, and the FBI.

This quarter the WWCU made the following accomplishments:

In July 2022, WWCU investigators assisted the assigned special prosecutor in discovery matters related to *Navajo Nation vs. Dineh Benally*. It took two years to serve criminal summons on Benally. WWCU investigators also attended the arraignment in the Shiprock District Court on June 22, 2022 in which Benally pled not guilty to the charges. These filings represent new charges against Benally.

In September 2022, WCCU investigators initiated action to effect the arrest of Evelyn Segay on numerous alleged theft charges. Ms. Segay was arraigned on September 7, 2022 and she pled not guilty to all the charges. The alleged theft incidents involve a series of activities that resulted in \$16,850 that was unlawfully taken from Church's Chicken in Kayenta. Ms. Segay was arrested on an outstanding warrant for failure to appear at a scheduled arraignment related to these charges.

In August 2022, the WCCU received a request from the Navajo Office of the Auditor General concerning an inquiry about recent or on-going criminal investigations involving an eastern agency chapter. WCCU responded to this inquiry.

In June 2022, the WCCU received a complaint from the Navajo Office of the Controller revealing twenty-five (25) alleged incidents of Hardship check fraud involving ARPA funds. WWCU investigators created target letters to the alleged offenders informing each individual that criminal charges were pending and each person was invited to seek legal counsel to schedule a meeting for possible settlement.

In June 2022, the WWCU investigators met with Internal Auditors with the Navajo Office of the Controller regarding a 2017 case involving the FBI and the WWCU. The case involves the Credit Services Department. KPMG created and submitted a report dated July 17, 2017 entitled Navajo Nation Credit Services Investigation. WWCU investigators are reviewing the case to determine if the matter should be referred for criminal prosecution.

In September 2022, WWCU investigators worked with the U.S. Department of Interior, Office of Inspector General special agents in closing a case involving theft of food and computer equipment from a Bureau of Indian Education school located on the Navajo Nation.



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In September 2022, Navajo Election Administration requested prosecution of individuals who failed to submit campaign expense reports as mandated by 11 NNC § 203(A)&(B). It is alleged that a number of candidates failed to file required campaign expense reports. She asserted that these individuals were never prosecuted for violating the Navajo Nation election code. In her most recent complaint, Ms. Kelly alleges that thirteen (13) candidates from Ft. Defiance Agency and two (2) candidates from Northern Navajo Agency have not filed their required campaign expense reports that were due on August 12, 2022. OTP is reviewing the complaint.

**Victim Witness Advocate Program:** This quarter the following important activities occurred under this grant:

The U.S. Department of Justice approved and extension of an OTP grant to April 24, 2023. The grant funds seven (7) Victim-Witness Advocate positions in OTP. VWA policies and procedures are near completion. The purchase of vehicles for VWAs is a slow process that now involves modifying the grant budget to facilitate purchasing instead of leasing vehicles.

OTP is involved in discussions about building out system-based victim services involving Navajo law enforcement and OTP using ARPA Tribal Consistency Funds for years FY 2022 and 2023.

**DECLINATIONS** From Arizona, the U.S. Attorney's Office issued twelve (12) federal prosecution declinations this quarter for cases including allegations of Child Sexual Assault/Abuse, Homicide, Kidnapping, and Transmitting of Obscene Material to a Minor. In New Mexico, the U.S. Attorney's Office issued no federal declinations this quarter. In Utah, the U.S. Attorney's Office issued two (2) federal prosecution declinations for cases involving allegations of Child Sexual Assault/Abuse.

**OMB - PERFORMANCE SCORES  
FOR 4TH QUARTER FY 2022**

At end of FY 2022 4<sup>th</sup> quarter, OTP has met its program performance goal.

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<b>FY 2022 - 4TH QUARTER - OFFICE OF THE PROSECUTOR</b>					
↓	<b>GOAL STATEMENT</b>				
	Prosecution of Adult Criminal Cases	Resolution of Children's Cases per ABBA	Prosecution and/or investigation of white collar and government corruption offenses properly made to White Collar Crime Unit (WCCU) via	Public Education and Collobration Aimed at Prevention and Intervention	Administrative and Support Services Perfomance
	<b>PROGRAM PERFORMANCE MEASURE</b>				
	File/Decline 80% of every 100 adult criminal cases presented to OTP by law enforcement	File/Decline 95% of every 100 juvenile referrals made to OTP by DFS or law enforcement	Initiate investigation/prosecution or decline 95% or every 100 referrals properly made to White Collar Crime Unit (WCCU) via any source	# of public education presentations provided to public safety partners and community members	Upload 90% of every 100 reports and Juvenile referrals into <i>JustWare</i>
<b>SCORES BY EACH OFFICE FOR EACH CATEGORY</b>					
Window Rock	100%	79%	N/A	2	100%
Dilkon	100%	100%	N/A	4	100%
Shiprock	100%	97%	N/A	2	100%
Aneth	100%	100%	N/A	1	100%
Crownpoint	100%	100%	N/A	0	100%
Pueblo Pintado	100%	100%	N/A	0	100%
Tuba City	99%	100%	N/A	0	99%
Chinle	99%	99%	N/A	2	99%
Dzil Yiljiiin	100%	100%	N/A	2	100%
Kayenta	100%	100%	N/A	4	100%
Tohajiilee	100%	100%	N/A	0	100%
Alamo	100%	100%	N/A	0	100%
Ramah	100%	100%	N/A	0	100%
White Collar Crime Unit	100%	N/A	100%	0	N/A
<b>AVERAGE SCORES:</b>	<b>100%</b>	<b>98%</b>	<b>100%</b>	<b>17 Total</b>	<b>100%</b>

**B. DOJ Units**

**Chapter Unit (CU)**

The Chapter Unit (CU) is led by Assistant Attorney General Rodgerick Begay who oversees two Attorneys and one Legal Secretary. The primary CU clients are the 110 Chapters and the Administrative Service Centers (ASC) of the Division of Community Development (DCD). The CU also receives work from any Navajo Nation governmental client that has a Chapter related issue or question(s) regarding the Local Governance Act (LGA). CU continues to participate in the bi-weekly ASC calls and virtually attending all Agency Council Meetings. CU typically listens to NN Council Meetings, Committee meetings, and Sub-committee meetings when Chapter matters are being discussed. This quarter, CU completed sixty-seven (67) requests for legal services (RFS). CU participated in the following notable projects this quarter:

1. Internal Chapter Conflict: CU continues to participate trying to help resolve conflict at six (6) Chapters. Some conflicts are deeply embedded generating repeated or additional conflict. Oftentimes, these conflict resolution events are confidential and are not counted as an RFS. Additionally, the amount of time dedicated to these unplanned events is significant.

2. Chapter Policy Reviews. Whether a Chapter submits one (1) or eight (8) chapter policies for review, it counts as one (1) RFS. Typically, Chapters will submit more than one policy for DOJ review. The following are a few notable policy reviews:

a. *Heavy Equipment and Vehicles* - Under CJA-01-21, the Navajo Nation Council approved Sihasin funds to allow DCD to purchase heavy equipment and vehicles for Chapters. DCD developed a template policy and while some Chapters have adopted the DCD template, many Chapters have chosen to develop their own policy. There is growing budgetary concerns amongst Chapters of whether a Chapter can afford to pay the insurance minimums and purchase fuel for the Chapter equipment and vehicles. Several Chapters are facing difficulties hiring a reliable and certified heavy equipment operator even after CU determined that CDLs are not required for heavy equipment operators. For LGA Certified Chapters, Chapters also have had to make sure that their policies are consistent with their Property Management Policy which was previously certified by RDC. Also noteworthy is that it may be difficult to reconcile how Non-LGA Certified Chapters could obtain such equipment without a property management policy certified by RDC.

b. *Summer Youth Employment* – Most policies mirror the old template policy created by the former TCDC in 2001. CU completed at least three (3) SYE policies this quarter. In addition, CU attended a HEHSC meeting to answer various questions about summer youth employment. This quarter, CU also conducted legal research to determine that the Federal Child Labor Laws would likely not apply to the SYE.

c. *Chapter Scholarships* - At least five (5) Chapters have properly updated their scholarship policies. Most policies align with the FY23 Budget Instructions Manual (BIM), and also with the ONNSFA policy as required by the BIM. Four (4) of the Chapters have attempted to adopt time requirements for scholarship applicants and/or to require applicants to have either registered with or lived in the Chapter for a specific amount of time. Some of time requirements listed a minimum of six (6) months, while others up to two (2) years. Per Title 26, these requirements were stricken from the policies before being deemed legally sufficient.

d. *Housing Discretionary* - Many of the housing discretionary policies mirror the old TCDC template. The changes by Chapters are typically progressive. For example, Chapters might create more defined categories for how the funds may be used by award recipients or creating a separate

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category for pre-construction surveys and archeological studies. Some Chapters have sought to utilize these funds for other uses which CU tries to help make legally sufficient.

3. ARPA-FRF: This quarter, CU participated in weekly group meetings regarding the ARPA FRF including: a.) finalizing the sub-recipient agreement template; b.) DCD meetings; c.) internal DOJ meetings; and d.) various other meetings that involved Chapters.

4. Chapter Community Land Use Committees: This quarter, CU received eight (8) separate RFS for issues related to the Community Land Use Planning Committee (CLUPC). One of the more prominent requests from Chapters was to review changes to their respective CLUPC plans of operation. CU noticed great disparities between drafts and therefore CU began drafting a template POO this quarter. Hopefully the template will be completed in the next quarter. Other legal requests regarding CLUPCs have also come in such as questions about the appropriate budget accounts that can be used for CLUPC stipends. This quarter, CU also issued guidance on the non-applicability of the I.R.S. Revenue Ruling 59-354 for CLUPC stipends. On September 21, 2022, CU provided a presentation at the Pinedale Chapter Land Summit to the Pinedale Planning and Zoning Commission and Chapter public. The presentation discussed how the CU interprets Title 26 (LGA regarding Zoning and Chapter Ordinances). CU was able to explain the full process as well as the history and applicability of other titles within the Navajo Nation Code which may be referenced when a Chapter is developing a zoning ordinance.

5. Chapter Ordinances: Local Tax Ordinance – This quarter, CU continued to provide guidance to various entities including Chinle Chapter on the ordinance procedures for tax ordinances. Chapter Quorum Reduction – Another ordinance topic this quarter pertained to the Chapter Quorum Reduction procedures. In 2012, the RDC created policies to allow any Chapter to reduce their 25-member quorum based on their voter registration. This quarter, CU advised the ASC, various Chapters, and the Navajo Board of Election Supervisors on the correct procedures.

6. Memorandums of Understanding (MOU): a.) Eastern Agency Chapters and McKinley County - McKinley County is currently working to renew right-of-ways with the Bureau of Indian Affairs (BIA) for several roads within the Churchrock, Iyanbito, and Thoreau Chapters. The County sought assistance of three (3) Chapters in providing technical assistance for roads located within each Chapter. The MOU allows the Chapters to work directly with the BIA Roads – Navajo Region, to gather the necessary paperwork for the County to obtain a right-of-way. Although the MOU is not legally binding, the Chapters will be working with the County so that the County can continue to provide road maintenance. The three (3) Chapters signed the MOU with McKinley County on September 20, 2022. b.) Naa Tsis’ Aaan Chapter and BIA Roads - The Chapter is currently considering whether to sign a MOU with BIA Roads in order for their heavy equipment operator to receive training that will satisfy federal standards, at no cost to the Chapter. CU was able to revise and redraft portions of the MOU so that the Chapter is not subject to any liability and the cost of training remains with the BIA.

7. Chapter Procurement and Contract: At least eight (8) Chapters required more than the typical amount of assistance on procurement or contract related matters. A notable few are:

a. Nazlini Chapter - The Chapter is working on a project for their Senior and Veterans Center. Although the Chapter received a prior Sihasin appropriation, there remained a funding shortfall for the design build project proposal. Initially there was a lack of funding but the Chapter received additional funding through CJY-30-22. CU expects to review the RFP for legal sufficiency once CPMD completes the technical component.

b. Wide Ruins Chapter – This project is an example of why Chapters need additional training on the use of the standard Professional Services Contract and the use of other Construction related contracts that are more appropriate for construction related projects. CU was able to work with

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the Chapter to ensure the contract was legally sufficient prior to the end of FY 2022. As a result, 12 homes were able to receive house wiring. CU also began to update the template for small construction projects to be used by Chapters for relatively small projects such as house wiring.

c. Bodaway-Gap Chapter – This matter is confidential as it relates to a breach of contract matter that could lead to litigation. Thus, while a significant amount of time has been spent on this matter this quarter, further details can only be provided only in a confidential setting.

8. To'Hajiilee Chapter and the Canoncito Band of Navajos Health Center, Inc. Board (CBNHC): In 2021, various issues arose when the Chapter attempted to replace CBNHC Board members. During this quarter, additional vacancies needed to be filled which revived many of the same issues from last year. CU has met in-person with the Chapter and communicated numerous times by email with the Chapter. Currently, there are efforts to schedule a meeting with the CBNHC, which will likely take place in the next quarter. Many of the issues require a fair amount of research stretching back to the 1970s. CU expects to continue meeting with CBNHC and its legal counsel.

9. Burial Matters: Various matters involving death has plagued various NN governmental entities including Chapters. In 2020, efforts led to the initial draft regulations. In 2021, additional meetings and work sessions were conducted to generate more awareness and comment. In the last quarter, another work session was held which brought additional comments. In this quarter, CU collected those comments and incorporated them into the latest drafts: a.) amendments to the Title 13 Burial-Cemetery Statute; and b.) Proposed Burial-Cemetery Regulations. CU continues to assist Chapters on issues surrounding burials and cemetery matters. Also in this quarter, CU drafted Title 13 amendments which incorporated some of the provisions in the draft Regulations as additional alternatives to the drafts completed in June. Beyond burials and cemeteries are issues related to roadside memorials, family plots, cremation, and communicable diseases. Some of these are likely to generate a lot of debate but until these matters are legislated, our governmental clients like Chapters, Grazing Officials, DNR, NLD, Council Delegates, OPVP, and others will continue to deal with issues that currently has no law or regulation to help guide our Government and the Navajo People.

10. Intragovernmental Office Space Use Agreements (IOSUA): In prior years, CU has developed template IOSUAs for Headstart, DALTCS, and other governmental entities who occupy space within a Chapter building. Last quarter, the IOSUA for Headstart was updated with participation from DODE and Headstart. In this quarter, the Headstart IOSUA was finalized and is now ready for use by all Chapters.

11. Administrative Service Centers (ASC): The 8 ASCs provide technical assistance and other services to all 110 Chapters and maintains a great working relationship with the ASC. The ASC has calls bi-weekly (formerly every week) wherein the staff can inform CU of chapter issues. Additionally, CU is able to distribute legal information that serves to benefit all Chapters that the ASC can help communicate to the Chapters. The ASC also submits a fair number of RFSs on various issues.

12. Other Significant Chapter Matters: Two Grey Hills Chapter – A proposal by the Chapter to build the Chuska Mountain Skate Park on land withdrawn by the Chapter and led by an external non-profit organization has raised several issues which can be provided in a more confidential setting.

13. Grants to Chapters: A few Chapters have pursued grants which has raised a few issues. a.) clarification regarding the proper procedure for a governance-certified Chapter to apply and accept external federal funding using the Chapters individual UEI number; and b.) while Title 26 allows for governance-certified Chapters to simply seek approval from the Naabik'i'yati' Committee to accept certain external funding, the BIM requires a governance-certified Chapter to seek approval from the OMB's Contracts and Grants section for "pre-approval."

**Economic / Community Development Unit (ECDU)**

The Economic/Community Development Unit (ECDU) is led by Katherine Belzowski who oversees two (2) Attorneys, one (1) Principal Attorney and a Legal Secretary. ECDU assists the Division of Economic Development (DED), the Division of Community Development (DCD), Navajo Gaming Regulatory Office, and monitors State and Federal election issues that affect the Nation. Below is a summary of ECDU's notable work this quarter:

1. Division of Community Development: ECDU spent time this quarter working on the Indefinite Delivery Indefinite Quantity (IDIQ) contract for DCD to use for architectural services. DCD has procured four (4) architectural firms for IDIQ contracts. DCD will use these firms to conduct a broad range of architect services for the various projects it administers through various funding sources. ECDU worked on drafting the master contract for each firm and the work orders that DCD will utilize to assign work to the various firms. ECDU provided an overview and training to DCD on the drafted documents and solicited their input. ECDU has also shared the document with OOC and TFU to ensure compliance with FRF funding requirements and to solicit any concerns OOC may have with the structure of the contract. ECDU has also provided the contract to New Mexico Indian Affairs Department to solicit their approval for use of the contract for New Mexico Capital Outlay funds.

ECDU worked with other DOJ units to finalize the FRF subrecipient agreement. ECDU also provided advice this quarter on the implementation of the Defunded CARES subrecipient agreement. ECDU continues to work with DCD on FRF and Defunded CARES Act projects and issues as needed.

ECDU continues to advise DCD and CPMD on general contract related matters including revising contracts to account for Navajo law and the specific project requirements. ECDU is working with CPMD to provide NTUA a list of power line and electric service line projects. Continental Divide has become reluctant to comply with Navajo Nation contracting laws. In order to keep these projects moving forward, discussions have begun with NTUA to determine their capacity to take these projects over.

2. Division of Economic Development: ECDU continues to work closely with DED to submit their SSBCI application including assisting DED with drafting components of the SSBCI application. The application deadline for Tribal governments to submit a capital program application was extended from September 1, 2022 to October 31, 2022. ECDU prepared a presentation to the Investment Committee on potentially including Venture Capital programs within the Navajo SSBCI Program Model. ECDU reviewed drafted agreements required by SSBCI and drafted legislation required to authorize DED to submit the SSBCI application. ECDU attended and presented before RDC and BFC regarding the proposed legislation. ECDU provided a summary of SSBCI to NNWO and communicated with Treasury staff on SSBCI-related questions.

ECDU spent significant time this quarter working on settlement agreements for various business site leases. ECDU has worked to coordinate on best practice for settlement agreement procedures and negotiations. In working on the settlement agreements for Thompson Acquisitions and CSB Enterprise, ECDU has developed a new tool called a Public Private Partnership Agreement (P3). This document allows the Nation to enter into agreements with private entities who receive money from the Nation for private business development. ECDU has worked closely with OOC, TFU, and Navajo stakeholders to draft this agreement to address various concerns of the Navajo stakeholders. ECDU provided our first P3 to Thompson's Acquisitions as part of the lease settlement agreement and awaits a response. ECDU has also been working on a P3 for CSB Enterprise/Crownpoint hotel. However, settlement discussions have been paused while Lessee resolves the project funding shortfall.

Another lease settlement agreement that ECDU spend a lot of time on this quarter involved Antelope Point Holdings, LLC. ECDU worked with the Real Estate Department to spearhead internal stakeholder analysis of APH's proposed settlement offer, i.e., to provide a preferred member interest in the

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Lessee entity, Antelope Point Holdings, LLC. Internal stakeholders included DED Support Services and Small Business Development Department, OOC Investment Section and Accounts Receivable. ECDU coordinated and conducted due diligence with Kutak Rock, OOC Investment Section, and TFU. ECDU attended RDC leadership meeting at Antelope Point Marina with TFU, RED Manager, and SBDD Manager and fielded questions on legal status of land and lease status. RED is on the cusp of making a decision on APH's offer, which will trigger a next round of settlement negotiations. APH's lease terminates November 18, 2022. ECDU is working on an agreement to memorialize APH's legal right to continue operations pending conclusion of settlement negotiations. Other next steps include working with a staff person identified by DED to draft renewal lease terms.

ECDU finalized grant agreement revisions with the Arizona Office of Tourism and Arizona Attorney General's Office (AGO) Chief Counsel for Public Law Section to incorporate agreed-upon concepts and language negotiated in 2010 by DOJ and AZ AGO, ratified in 2015 by AZ AG Mark Brnovich. The 2010 agreed-upon language stated it did not apply to Arizona procurement contracts. This negotiation did result in application of the agreed-upon language to procurement contracts, which can serve as precedent for any future procurement contract negotiations with the State. In 2023, after the State of Arizona elects a new AG, DOJ can request another ratification of the 2010 agreement to ensure it applies through the next administration.

ECDU is reviewing the scope of Business Regulatory Department's authority to regulate non-profit entities and provide preference status to non-profits. ECDU has conducted a legal analysis of the current law on the matter. In the next quarter, ECDU will continue working with BRD to recommend amendments to Navajo law relating to non-profit entities.

ECDU continues to work with DED to monitor the Navajo trademark. ECDU sent out multiple cease and desist letters to a variety of entities that were inappropriately using the Navajo trademark. ECDU assisted DED in trademarking the Navajo Nation Flag and Seal for the Nation. It also assisted the Miss Navajo Nation Office in successfully applying for its own trademark. ECDU finalized a draft Intellectual Property Fund and provided it to DED for legislation.

3. Gaming: ECDU worked with Arizona Tribal Regulatory Subcommittee and Arizona Department of Gaming to implement the 2021 Arizona Compact Trust Fund provisions of the Compact. Based on recent comments from Arizona Department of Gaming's legal counsel, it appears the Compact Trust Fund will not have enough revenue this year to provide for a distribution to the Navajo Nation. We also monitored the negotiation of Appendix K for on-reservation mobile wagering and presented it with Navajo Gaming Regulatory Office to the Navajo Gaming Subcommittee. The Gaming Subcommittee has considered and recommended the Appendix for Naabik'iyati Committee approval.

ECDU attended training, and received certification on, sports wagering from the UNLV International Center for Gaming Regulation. ECDU continues to have bi-weekly meetings with Navajo Gaming Regulatory Office (NGRO) and assist NGRO in its reports to Council.

ECDU continues to work on issues regarding the Horsemen's Lodge property. ECDU worked closely this quarter with OAG, Navajo Hopi Land Commission (NHLC), NHLSP, and NNGE to finalize the MOA between the Nation and ONHIR. After receiving multiple revisions from ONHIR that sought revisions with significant policy implication, OAG and ECDU spearheaded an all-hands Navajo stakeholder meeting to coordinate a unified approach to resolve outstanding issues and conclude MOA negotiations. To that end, Office of the Speaker, NHLC Chairman, and OPVP presented the Navajo position and a plan to conclude negotiations to ONHIR's Executive Director. Concurrent with work on the MOA, we continue coordination with NNGE and Lewis Roca to complete the fee-to-trust application and supporting documentation.

4. Election/Voting: ECDU continues to meet with Apache, Navajo, and Coconino counties to protect interests of Navajo Nation voters. We continue to work with NTUA to provide internet services for voting centers on Election Day in Navajo County. While ECDU and NTUA have approached

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Apache County to provide internet services for voting centers, the County refuses to talk to the Nation on the matter. We prepared a letter from Navajo leadership to seek their support for voting centers in Apache County, and a letter from DOJ to coordinate communications with Apache County for election matters.

ECDU has been monitoring troubling voter registration efforts by grassroots organizations on the Nation, including reports that these organizations are incorrectly registering voters, resulting in the voter being placed on the County's suspense list. A majority of these reports are coming out of Apache County. We are working with ASU Indian Law Clinic to support developing training for poll workers on the Nation. We have also met with these groups' attorneys to express the Nation's concern about their continued activity on the Nation.

ECDU continues to monitor and assess Arizona legislation and lawsuits that threaten to circumscribe Navajo voting rights and to consult with US DOJ re concerns with Arizona HB 2492. ECDU completed an analysis of HB 2492's potential effects on the Nation and consulted with the Litigation Unit. ECDU continues to advise and update leadership on the analysis results and new developments.

ECDU also continues its work in New Mexico, communicating with staff of the New Mexico Secretary of State's Office as needed to receive information related to state voting on the Nation and available language access. ECDU participated in weekly San Juan County, NM calls to prepare for developments in its litigation and attended in-person events hosted by NNHRC for to meet with each individual named Plaintiff. ECDU also monitored redistricting of Gallup-McKinley County School District and provided legal analysis on its effect.

ECDU continues to work with DCD Administrative Service Center, Chapter Unit, and Human Services Government Unit to provide updated guidance for polling sites and individuals coming onto the Navajo Nation for election-related purposes. ECDU drafted language to amend guidance issued by NDOH to address voting during COVID.

ECDU also researched the possible designation of 638 and IHS facilities as voter registration sites under the National Voter Registration Act and met with staff from the Department of Interior Office of Solicitor to discuss their action steps in pursuing the 638 designation in New Mexico. This project is ongoing as ECDU determines the requirements of the designation and the potential benefits of receiving this designation through either New Mexico or Arizona.

### **Human Services and Government Unit (HSGU)**

HSGU is DOJ's largest unit and is led by Assistant Attorney General LaTonia Johnson. Ms. Johnson manages two (2) Attorneys, two (2) Attorney Candidates, one (1) Principal Tribal Court Advocate, and two (2) Senior Legal Secretaries. HSGU assists eight (8) Divisions/Department consisting of over 65 programs. This quarter, notable projects include:

#### **I. NAVAJO DIVISION OF PUBLIC SAFETY (NDPS):**

1. Agreement between Division of Natural Resources (DNR) and NDPS: HSGU reviewed an Agreement between DNR and DPS which provides DNR the authority to enforce the laws of the Navajo Nation as law enforcement peace officers of the Navajo Nation and carry out all Title 14 and 17 authorities. Initially, DOJ met with the parties and verbally outlined the issues related to the purpose and implementation of the Agreement. Thereafter, DNR Attorney noted that he would update the Agreement. However, in reviewing the updated Agreement, there are still concerns related to the



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Agreement. HSGU and NRU are drafting a joint memorandum to DPS and DNR outlining concerns that include, but not limited to whether DNR employees have the authority to carry out Title 14 and 17 authorities, non-application of FTCA, and scope of DNR's P.L. 93-638 contracts, and other issues that NRU has identified.

2. Department of Corrections (DOC) internal policies: HSGU has spent a considerable amount of time reviewing and editing DOC internal policies including, but not limited to training, personnel, and disciplinary actions of detainees. These internal policies assist in DOC in its performance when working internally, with detainees, and with third parties. HSGU noted that the DOC internal policies are applicable to it, there are other applicable Navajo Nation policies that would also apply to DOC. HSGU recommends that each internal policy include a reference that, in the event DOC internal policies are inconsistent with other applicable Navajo Nation law or policy (e.g. the Privacy Act and Personnel Policy Manual), the other applicable Navajo Nation law or policy would govern.

II. PUBLIC LAW 93-638:

1. P.L. 93-638 contracts with Bureau of Indian Affairs: HSGU reviewed the Scope of Work (SOW) for 638 programs that would need to start the Successor AFA and contract renewal process. Once that was completed, the 638 programs had to complete their Successor AFA (SAFA) and contract renewal packets. Most of the SAFAs have been processed for appropriate review and should be submitted to BIA by the October 1<sup>st</sup> deadline. There are five (5) contract renewals – Adult Detention, Juvenile Detention, Forestry Management Program, Water Development Program and ICWA program. However, only the two (2) Detention programs completed 164(A) review and have pending legislation. Due to the late processing, the contract renewals will be submitted to BIA after the deadline.

2. P.L. 93-638 contracts with Indian Health Services: HSGU reviewed the Successor AFA packets for the three (3) contracts that the Navajo Nation has. They completed administrative review to be submitted to Navajo Area IHS by Oct. 1, 2022. This provides the NAIHS with 90 days to review before the end of the current year.

3. BIA's claim of "expired" P.L. 93-638 contracts: The Navajo Nation has not received further notice from BIA on this matter since the last discussion in March 2022. BIA appears to be requesting additional documentation from the Navajo Nation to be able to carryover and use funds from "expired" P.L. 93-638 contracts. BIA indicated that it would provide a response to an October 2021 letter that the Navajo Nation sent to BIA on the matter. There has been no update on this matter during this quarter but it may come up again next quarter due to the contract renewals that will be submitted to BIA later than October 1. Consequently, the BIA's 90-day review will go into the 2023 calendar year.

III. NAVAJO DEPARTMENT OF HEALTH (NDOH):

1. NDOH Plan of Operation revision: NDOH withdrew the prior proposed revisions to the Plan of Operation to transfer of Emergency Medical Services into the Division of Public Health Services and to transfer of Navajo Treatment Center for Children and Their Families into the Division of Behavioral and Mental Health Services. However, NDOH still had some changes to the NDOH Plan of Operation regarding all programs. HSGU reviewed and provided some recommendations to NDOH.

2. DBMHS Tribal Opioid Response (TOR) Grant: The Task Force completed a draft of opioid overdose and naloxone policy for the NDOH. HSGU reviewed the proposed policy for legal sufficiency, and provided recommended revisions along with many questions related to the policy. HSGU returned

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the proposed policy to DBMHS for further discussion and revision. HSGU will continue to provide appropriate legal assistance with DBMHS on this matter. HSGU also attends the monthly meetings. DBMHS submitted the continuing grant application for 2023. HSGU completed review of the grant application prior to submission to funding agency by DBMHS.

3. Division of Aging and Long Term Care Services (DALTCS): Older Americans Act Title III Funding From Surrounding States: HSGU continued participating in the biweekly meetings between NDOH, ACL, and the states. NDOH sent a request for tribal consultation to determine if the funding can be increased and reporting requirements be simplified and continue conversations in the biweekly meetings with ACL and the states. The tribal consultation is supposed to include the ACL and the three (3) states. So far, NDOH has been successful in discussions with the states regarding what is needed for reporting purposes and working on a compromise regarding the data system to be used by the Navajo Nation.

#### IV. DIVISION OF SOCIAL SERVICES (DSS):

1. Indian Child Welfare Act (ICWA) Program: ICWA cases - HSGU continues to work with the ICWA Program (ICWAP) to conduct case staffing of cases that are in state court and require a request for legal intervention, and other related matters. This quarter, HSGU conducted four (4) case staffing and has filed a Petition for Transfer of Jurisdiction from the State of Texas to the Navajo Nation. The Crownpoint District Court scheduled a hearing regarding the transfer and accepted jurisdiction. HSGU will continue to staff cases and answer related legal questions.

2. Utah State-level ICWA bill: The State of Utah reached out to the ICWA Program and HSGU to note that the State would be introducing a proposed state level ICWA bill. ICWA Program and HSGU reviewed the proposed ICWA bill and provided comments to the State Working Group.

3. Department of Child Care and Development (DCCD) handbook and agreement: HSGU has spent a considerable amount of time reviewing, editing, and providing comments to the DCCD handbook and agreement that are applicable to child care providers (CCP) and these CCPs are providing child care services for parents/guardians. HSGU has reviewed the handbook at least four (4) times with requests to make edits and clarify areas in the handbook. The handbook has not yet been finalized. The agreement was recently provided, and HSGU also identified issues similar to those in the handbook.

#### V. BOARD OF EDUCATION (BOE):

1. Assumption of school-DODE and Many Farms Community School: In an August 4, 2022 directive from Dr. Harold G. Begay, DODE Superintendent of Schools, Many Farms Community School Board (Many Farms) was to appoint a licensed and qualified chief school administrator(s) by August 11, 2022. Many Farms failed to comply with the directive and the BOE, through an August 16, 2022 letter, commenced with a due process hearing, and provided the required 14-day notice to Many Farms for the hearing. On August 31<sup>st</sup>, a due process hearing for the assumption of Many Farms was held. On September 6, 2022, Many Farms and DODE reached a settlement agreement to address the concerns raised in the August 16, 2022 letter. BOE recognized the settlement agreement and provided an order on September 7, 2022 for the submission of a.) a detailed final settlement agreement, b.) assumption of Many Farms, and c.) training for Many Farms governing board and school administrators for micromanagement, governance policy making, and finance. On September 16, 2022, DODE and Many Farms submitted a Joint Notice of Request for Extension, which the BOE approved on September 20, 2022. BOE ordered the final settlement agreement was due to BOE the morning of September 29, 2022 with a BOE hearing in the afternoon to discuss the final settlement agreement.

#### VI. DEPARTMENT OF DINE EDUCATION (DODE):

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1. Johnson O'Malley GMCS matter: Since the last quarter, GMCS asked the New Mexico District Court to dismiss its JOM-related complaint against Interior Secretary Haaland. The Navajo Nation moved to intervene and to dismiss the case shortly before GMCS moved for dismissal. The court dismissed the case without prejudice. The Litigation Unit (LU) spoke with Andrew Sanchez, attorney for the GMCS, to discuss the possibility of a discussion between the Navajo Nation and the GMCS concerning the ongoing JOM funding issue. LU informed OPVP and DODE of GMCS interest of having a meeting concerning JOM issues. On September 23, 2022, a meeting was held between OPVP, DODE, and DOJ to update what the JOM issues are and how to approach negotiating with GMCS. The issue of GMCS not having an IEC is based on a HEHSC Resolution. LU commented on several litigation and negotiation strategy issues. President Nez requested that the JOM issue be placed on the HEHSC committee agenda to include HEHSC on this issue.

2. Head Start Audits: In September, DOJ received notice of an unpaid debt to the Department of Health and Human Services from a Disallowed Costs letter sent to Head Start on October 14, 2020, that has accrued to a debt of \$1,913,006.18. The debt is a result of audit findings with questioned costs against Navajo Head Start in the Navajo Nation's 2018 audit that led ACF to disallow costs on an ACF grant to Head Start. This debt was paid. Head Start also received a disallowed costs letter on August 26, 2021, citing noncompliance due to improper monitoring of cost allocations and internal charges related to the Health Benefits internal service fund during the fiscal year. HSGU, through outside counsel, filed a Notice of Appeal of this finding on September 27, 2021, based on the Nation's compelling evidence that it followed proper protocols regarding Employee Health Benefit revenues. On November 4, 2021, the Nation's appeal brief was filed and on December 21, 2021 a sur-reply brief was filed. This quarter, NHS is waiting for the Departmental Appeals Board (DAB) to schedule a hearing on the merits of the briefs or for an order.

3. NABI Directive for Resolution 0004-22: At the April 22, 2022 NABI Summer Session, NABI gave a directive to OLC and DOJ to meet with NNC to discuss whether to pursue legal intervention or actions related to underfunding of Minor Improvement and Repair, Facilities Improvement and Repair, and Operations and Maintenance line items for BIE-funded schools and to specifically discuss legal intervention in the Ramah High Voltage matter. HSGU researched this issue, including relevant case law to identify potential arguments and burdens.

## VII. DIVISION OF GENERAL SERVICES (DGS):

### 1. Insurance Services Department (ISD):

a. HSGU provides legal assistance to ISD and its insurance programs Risk Management (RMP), Workers Compensation(WCP), and Employee Benefits (EBP), as well as the Navajo Nation Insurance Commission (NNIC). Within this quarter, NNIC met on two (2) occasions and in addition to receiving insurance programs (RMP, WCP and EBP) reports on programmatic issues and activities, the NNIC accepted other reports and took actions as follows:

- Received and accepted the Employee Benefits Plan Financial Report for June 2022, ending date;
- Received and accepted a report on the Employee Health Benefits Fund reserve, along with recommendations provided (1) for a decrease on the projected premium rates for CY 2023; (2) additional group health benefits enhancements; and (3) another round of premium holiday;
- Received and accepted RMP's report on the FY 2023 policy coverage renewals, including line-by-line premium exposure summaries; and projected premium rates for FY 2023
- Approved a contract modification to the EBP actuarial consultant for special services performed on the Head Start audit issues;
- Approved a Service Contract relating to ISD office clean-up; and

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- Provided the RMP with authorization to bind all lines of property and casualty insurance coverage annual renewals and recommended premium rates for FY 2023 with an effective date of October 1, 2022.

b. COVID Related Issues Regarding Employee Exposures: HSGU continues to assist ISD and its insurance programs to ensure workers compensation or employee health benefits claims related to insured members who may have been exposed to the virus and/or self-quarantining are not unnecessarily delayed or denied, should such claims be filed. Assessing the compensability of a COVID-related claim generally becomes an issue due to lack of medical records needed to determine an exposure date. This quarter, the Employee Benefits Program, through its third-party administrator, also provided the CY 2021 COVID claims statistics to the NNIC.

2. Risk Management Program: A total of seventy-two (72) litigation cases (federal, state, and tribal courts) continued within this quarter as highlighted below:

a. Tribal Cases: There are Sixty-Two (62) cases pending with both the Navajo Supreme Court and Navajo District Courts as follows:

- Twelve (12) appeals pending with the Navajo Nation Supreme Court: Although all, but one, of the cases have been fully briefed, oral arguments have yet to be scheduled.
- Fifty (50) District Court cases continued, one (1) of which was served within this quarter. Out of the 50 cases, four (4) were settled, but still pending with issuance of dismissal orders; and one was dismissed. Two (2) bench trials, as previously reported, were held in January and October 2017, respectively, but rulings/judgments have yet to be issued. Arita Yazzie, HSGU Advocate, assists with the defense of these cases, including but not limited to discovery and motion practices and trial preparations. Within this quarter, she attended seven (7) motion hearings; two (2) pretrial conferences; a Navajo Supreme Court hearing relating to a Writ of Prohibition; and a mediation conference in another case. Ms. Yazzie also assists with assessing the degree of liability exposures on other cases for settlement purposes.

b. State Court (Arizona): Two (2) cases which were dismissed in favor of the Nation remained active within this quarter pending dismissal orders.

c. FTCA Cases (AZ and NM District Courts): Eight (8) cases continued this quarter, one of which was filed this quarter, and two of which were recently settled. Ms. Yazzie is the assigned Navajo Nation FTCA Liaison and assists the United States to prepare (1) responses to extensive written discovery (Interrogatories and Requests for Production) which also entails the identification, compilation, and production of relevant tribal/program documentation; and (2) Motions, some with attachments of Declarations or Affidavits for the Navajo Nation clients. This quarter, Ms. Yazzie assisted with preparing responses to written discovery and motion reviews in four (4) cases. In addition to these federal cases, there are several FTCA administrative claims which are pending and included within the pre-litigation count below.

d. Pre-litigation Claims: Approximately forty (40) pre-litigation claims are pending, at least twenty-five (25) of which represent FTCA administrative claims. HSGU assists both the U.S. Department of the Interior/Regional Solicitor's Office staff attorney and the U.S. Department of Health & Human Services Branch Claims attorney in assessing the FTCA administrative claims, some of which are now moving toward potential litigation. Issues that arise in both the litigation and pre-litigation cases/claims are voluminous, i.e., sovereign immunity jurisdictional issues (both tribal and federal), statute of limitations, causations, insurance policy coverages and exclusions, P.L. 93-638 contract requirements/scope of work mandates, failure to exhaust other administrative remedies, etc.

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e. Quarterly Cases/Claims Reviews: One (1) quarterly cases/claims reserve meeting was held this quarter. The attendees include NNDOJ, Navajo Nation insurance defense counsel, RMP staff, Navajo Nation insurance investigator/adjustor, and insurance broker of record, and case/claim reviews include defense strategy discussions and assessment of liability exposures to ensure sufficient reserves are in place and reported to the Office of the Controller.

f. Risk Management and Workers Compensation coverage issues: HSGU assisted with addressing several liability, Workers compensation coverage and other insurance issues (including FTCA) relating to: (i) a proposed modification to an existing MOU between DPS and NNGE on Navajo police officers assignments at the casinos; (ii) a proposed MOU between NPD and DNR law enforcement personnel concerning enforcements of Titles 14 and 17; (iii) proposed NPD mutual aid agreements; (iv) Navajo Nation Fair contracts and related insurance issues; (v) liability and workers compensation coverage for Chapter officials, employees and PEP workers. As a specific response on FTCA issues, a legal analysis was provided on the application of the Indian Self Determination and Education Act, Public Law 93-638 contracts, Navajo Sovereign Immunity Act, relevant FTCA case laws, and Navajo Nation commercial liability coverage to FTCA.

3. Workers Compensation Program (WCP):

a. COVID Related Claims: In coordination with ISD, HSGU continues to closely monitor claims that may be filed and pass information back to WCP with any information or issues. As such, WCP is aware of the many challenges NPDDOC officers and other front-line responders deal with daily while attending to arrestees who are COVID positive.

b. General Workers Compensation Claims: WCP is fully self-funded and governed by the Navajo Workers Compensation Act. HSGU assists with issues that arise in the administration and adjudication of worker's compensation claims, including interpretation and analysis of the statutory mandates. Within this quarter, HSGU assisted with the disposition, acceptance and/or closure of nine (9) claims, five (5) of which resulted in final settlements. HSGU also continues to assist with one (1) pending appeal. Some issues HSGU provided written advice on this quarter relate to (i) course and scope of employment (burden of proof, acting under the directions of employers, and substance abuse (alcohol) issues); (ii) maximum medical improvement assessments; (iii) medical impairment rating and settlement calculation issues; (iv) aggravation of pre-existing coverage issues; (v) occupational disease assessments; (vi) records retention issue; and (vii) the applicability of workers compensation coverage for traditional healing services and ceremonies.

c. Training: HSGU provided a training to WCP staff relating to the mandates of the Navajo Nation Workers' Compensation Act (Section by Section), along with an internal claims handling policies and procedures.

4. Employee Benefits Program (EBP): Assisted with finalizing a third-party liability claim subrogation lien issue.

5. Employee Housing Program/Committee: HSGU continues to assist the Employee Housing Program and Committee in editing the Navajo Nation Employee Housing Rules and Regulations (Rules and Regulations). The edits and update to the Rules and Regulation are necessary to provide a sufficient process for the maintenance of employee housing units and assignments. The update is necessary due to issues with ambiguous provisions and unclear processes. Since the last quarter and during work-sessions, HSGU has requested direction from the Committee to address current, past, and potential future issues.

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6. Fleet Management Department: Since last quarter, HSGU has continued assisting the Fleet Management Department and the Motor Vehicle Review Board in updating the Navajo Nation Vehicle Operator's Policy Manual. HSGU has made steady progress with monthly work sessions to edit the current version from 2018.

VIII. DIVISION OF HUMAN RESOURCES (DHR):

1. Department of Child Support Services (DCSS): HSGU continues working to come into compliance with the Full Faith and Credit for Child Support Orders Act. (28 U.S.C. §1738B). HSGU and Office of Hearings and Appeals continues working on forms and to develop procedures to process foreign child support orders from other jurisdictions. HSGU expects to finalize the forms and procedures by the end of the first quarter of FY 2023.

2. Navajo Nation Department of Child Support Enforcement Administrative Process: HSGU continues working on updating and revising the manual. The manual includes the amended Navajo Nation Child Support Enforcement Act, the Navajo Nation Child Support Guidelines, child support decisional law, along with a *Practitioner's Guide for Practicing Before the Office of Hearings and Appeals In Child Support Matters*. HSGU hopes that once this manual is completed, all of these documents can be combined as a training manual for both HSGU and DCSS employees. This project is complete for the most part, however, DCSS is pursuing amendments to the *Navajo Nation Child Support Guidelines*. DCSS has identified a sponsor for the amendments, but the legislation has yet to be considered by the Navajo Nation Council or any committee.

3. Department of Child Support Services – Policies and Procedures Manual Update: HSGU began working on the DCSS Policies and Procedures Manual update this quarter. Initially, HSGU believed that the various DCSS agency offices would be assisting in this effort, but that has not occurred. HSGU has been working on this effort and has made substantial progress. DCSS administration met with HSGU regarding this effort in August. It was agreed that there should be a meeting with all of the agency office personnel along with DCSS, DCSS-administration, and HSGU in order to get input and inform everyone that DOJ has begun work on the project and is progressing. The update to the Manual will involve a substantial amount of time. HSGU still hopes to complete this project by the end of calendar year.

4. Navajo Nation Office of Occupational Safety and Health (NNOSHA): HSGU has continued assisting NNOSHA with amending the Navajo Occupational Health and Safety Act of 2000, NNOSHA's plan of operation, its organizational chart and fund management plan. HSGU has reviewed and revised more drafts of the amended Act and was scheduled to meet with the program in late September. DHR would like to complete this project quickly to have the amendments before Navajo Nation Council.

IX. NAVAJO NATION VETERANS ADMINISTRATION (NNVA):

1. Veterans Trust Fund Distribution/expenditure: NNVA met with OOC regarding distribution questions. In 2018, the Navajo Nation Council amended the VTF and the expenditure of the funds. (CJA-02-18). In October 2018, HSGU was asked to provide its interpretation of CJA-02-18. In 2018, several HSGU attorneys worked on the interpretation. On June 21, 2022, HSGU met with TFU, OOC, and NNVA to prepare the report for the legal interpretation that would be presented to HEHSC. On June 22, 2022, HSGU attended the HEHSC meeting to discuss DOJ's legal interpretation. At that time, due to the amendments to the VTF in 2021, the distribution formula was going to result in more than a 3-million-dollar short fall. DOJ provided recommendations on how to address this matter. During the meeting, it was recommended that the amendments be in an existing legislation that was already in the legislative pool. However, following the meeting, NNVA preferred that there be a standalone legislation to address the short fall by amending the VTF, and not add it to the current legislation.

### **Litigation Unit (LU)**

LU is led by Assistant Attorney General Paul Spruhan who manages two (2) Attorneys, one (1) Attorney Candidate, one (1) Senior Legal Secretary. LU handles many of the Nation's internal and external litigation matters. This quarter's notable projects include:

1. Brackeen/YRJ ICWA Litigation: The litigation concerning the validity of the Indian Child Welfare Act, *Brackeen v. Haaland* is now before the U.S. Supreme Court. The other parties to the litigation, though not the Navajo Nation, filed cert. petitions asking the Court to review the en banc decision of the Fifth Circuit Court of Appeals. The Supreme Court has granted all four petitions, and will take up all the issues presented by the parties: 1) whether the plaintiffs have standing to bring the case; 2) whether Congress has the constitutional authority to pass ICWA; 3) whether ICWA violates the equal protection guarantee of the Constitution; 4) Whether ICWA violates the "anti-commandeering" doctrine arising out of the Tenth Amendment of the Constitution; and 5) whether ICWA violates the non-delegation doctrine. The Nation is a full party to the case, and collaborated with the other four (4) tribal nation intervenors to file a joint response brief on August 12, 2022. Texas and the Brackeens filed their reply briefs on October 3, 2022. Oral argument in-person before the Supreme Court will be held on November 9, 2022. LU attorneys will attend the argument in person. A decision would then be issued sometime between November 2022 and June 2023.

The separate YRJ case involving the Brackeens' attempt to adopt a second Navajo child continues in the Texas district court. After the Texas Supreme Court denied review of all petitions seeking a review of the Texas Court of Appeals decision in the case, it was remanded back to the Texas District Court. Pursuant to the Texas Court of Appeals' opinion, the Texas District Court was to hold a new trial on the custody issues, whether or not the Brackeens or the Navajo family placement would be the custodian of the child. However, the judge decided to issue a new custody order without a trial awarding permanent conservator status to the Brackeens. The Nation's Texas counsel filed a motion for new trial along with several other motions to try to get that defective order vacated. This quarter, a different Texas district court judge granted the new trial, which will be held on December 20-21, 2022.

2. Bears Ears Monument: The issue of the size of the Bears Ears Monument continues without definitive resolution. The Nation along with four other tribal nations, Ute Mountain Ute, Northern Ute, and the Zuni and Hopi tribes, filed a lawsuit in the D.C. Federal Court challenging the reduction of the Obama Monument by President Trump, in December 2017. After several rounds of briefing, the judge in the D.C. litigation has yet to issue any substantive rulings on whether the Trump reduction was valid, and the case is now in administrative status, because President Biden issued a new Proclamation restoring the Obama Monument, plus adding some acreage that was included in the Trump Monument, on October 8, 2021.

There are ongoing settlement discussions with US DOJ towards resolving and dismissing the case. US DOJ sent a settlement offer, and the plaintiffs, including the tribal plaintiffs, sent back a counter-offer. US DOJ recently sent a new draft of a settlement agreement, and discussions are ongoing.

In the meantime, two separate lawsuits challenging the Biden Monument were recently filed in the Federal District Court of Utah. One was filed by the State of Utah and two (2) Utah counties. The second was filed by several individuals who claim to have been negatively affected by the Biden Monument, including an individual with grazing rights and a member of the Ute Mountain Ute tribe. The tribal attorneys and attorneys for several environmental and conservation organizations are discussing potential intervention in the Utah cases. A decision will be made soon whether we will file for intervention, which might or might not be opposed by the Utah plaintiffs.

**Navajo-Hopi Legal Services Program (NHLSP)**

NHLSP is located in Tuba City, Arizona and is charged with representing relocation applicants before the Office of Navajo-Hopi Relocation (ONHIR). NHLSP is led by Principal Attorney and Director Susan Eastman and she supervises one (1) Principal Tribal Court Advocate. NHLSP's Legal Secretary retired this quarter. NHLSP interviewed the two (2) applicants and offered the position to the more qualified applicant, who is bilingual and also a certified relocatee. NHLSP also continued to assist the Tuba City Child Support Services Office by attending staffing meetings and representing DOJ before OHA at the monthly child support hearings this quarter. NHLSP also edited and finalized administrative child support orders after the hearings and submitted final orders to OHA. NHLSP is also assisting the Office of the Prosecutor with research assignments on amnesty and eagle protection. NHLSP staff also continue to assist and advise the Navajo-Hopi Land Commission Office ("NHLCO") by participating NHLCO's regular and special meetings. This quarter NHLSP staff attended three (3) regular and five (5) special NHLCO meetings. At the September 13, 2022 special NHLCO meeting, NHLSP gave a report and answered questions from NHLCO Commissioners regarding the need to amend the NHLCO's January 2019 resolution approving the Dine' Relocatee Fund Policy ("DRF") so that it is consistent with the DRF enabling legislation and Fund Management Plan approved in 2022. The NHLCO and NHLCO were also updated on efforts to coordinate and support a strategy to elevate Navajo-Hopi and construction freeze issues through legislative, executive and judicial efforts.

1. Federal appeals of ONHIR relocation benefit denial determinations: There are a total of twelve (12) cases pending in the federal District Court of Arizona for relocation benefit appeals. Of these, NHLSP has five (5) individual relocation benefit appeals cases for eight (8) Plaintiffs pending the federal District Court of Arizona (FD-AZ) and two (2) cases pending in the Ninth Circuit Court of Appeals (9<sup>th</sup> Circuit). There are also a total of eight (8) cases pending in the 9th Circuit for relocation benefit denials, and one (1) EAJA Fees petition denial pending for a successful relocation appeal applicant. In one 9th Circuit case, Plaintiff/Appellant's opening brief was filed by DOJ on November 15, 2021, and Appellee's Answering Brief was filed on March 15, 2022, and our Reply Brief was filed on April 4, 2022. Oral argument for this case is scheduled for November 15, 2022. For the other pending 9th Circuit case, the Notice of Appeal was filed on September 29, 2022. In addition, on August 2, 2022, DOJ filed an appeal of the District Court's denial of an Equal Access to Justice Act (EAJA) Fees petition for the 9th Circuit case that overturned Judge Rayes' decision and ordered ONHIR to provide relocation benefits to a Navajo Nation beneficiary applicant.

On July 28, 2022, NHLSP filed a Complaint for a relocation client whose FAA statute of limitations was to expire on August 15, 2022. Service of the Summons and Complaint was complete as of September 12, 2022, and ONHIR's Answer is due on November 11, 2022. A favorable ruling from the FDC-AZ on August 11, 2022, where Judge Logan granted Plaintiff's Motion for Summary Judgment, denied ONHIR's, and remanded back to ONHIR on the legal residency issue. NHLSP will file an EAJA Fees petition for this matter. Judge Humetewa denied Plaintiff's Motion for Summary Judgment in a ruling also issued on August 11, 2022, and that is the case for which a Notice of Appeal was filed on September 29, 2022.

For NHLSP's other pending FDC-AZ cases, briefing is complete and we now await decisions from Judge Liburti and Judge Humetewa for two (2) of these cases.

NHLSP also reviewed three (3) cases for possible federal appeal for clients who have statutes of limitations that expire in August and November 2022.

DOJ/NHLSP counsel are representing relocation clients for the seven (7) other federal appeals pending in the FDC-AZ, one case appealed by ONHIR to the 9th Circuit; the other five (5) cases are in the 9th Circuit Court of Appeals. NHLSP filed three (3) new Complaints in the FDC-AZ for four (4) Plaintiffs who are challenging ONHIR's denial determinations for their relocation benefits applications. NHLSP also filed Notices of Appeal to the 9th



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Circuit for three (3) cases denied by the FDC-AZ. For two (2) other cases filed in the FDC-AZ, NHLSP received one adverse decision for a client and upon review decided not to pursue further appeal to the 9th Circuit. NHLSP received a favorable ruling from Judge Logan in another case granting Plaintiff's MSJ and remanding the case back to ONHIR.

EAJA fee petitions were filed for in those cases which prevailed, and Judges Silver, Logan, and Lanza have granted their EAJA fee petitions and rejected ONHIR's argument in each of these cases that the Navajo Nation is the "real party in interest" in these cases, and that the Navajo Nation is ineligible to recover attorney's fees pursuant to EAJA. The U.S. Attorney for ONHIR has advised that ONHIR intends to appeal each of these EAJA fees cases to the 9th Circuit.

For the NHLSP case filed on July 5, 2022 regarding ONHIR's refusal to accept a marriage validation decree issued by the Window Rock Judicial District, which validated the marriage of a NHLSP relocation client and her former husband, ONHIR filed its Answer and the Certified Administrative Record on September 23, 2022. Plaintiff's Motion for Summary Judgment is due on November 22, 2022. Judge Murray Snow is assigned to this case.

2. Remands from federal court: Remands from the 9th Circuit and FDC-AZ continue pending without remand/supplementary proceedings scheduled or re-scheduled to date. The two cases for a group of seven (7) sibling Plaintiffs that were remanded to ONHIR continue pending. NHLSP's request for supplementary evidentiary hearings for their clients to present evidence of their legal residency were rejected by ONHIR and the Hearing Officer. Instead, the Hearing Officer wrote a new 80-page decision denying the seven Plaintiffs' appeal again, and continues to reject the same stipulation regarding the existence of the HPL homesite as of December 22, 1974 that Judges Logan and Lanza took issue with in their rulings against ONHIR. NHLSP is considering taking these cases back to FDC-AZ. Another remanded has been a pending remand for a year since the FDC-AZ ruling by Judge Silver, and ONHIR has taken no action to either schedule a supplementary hearing, for the Hearing Officer to issue a new decision, or to certify the client as eligible for benefits.

3. Assistance to Certified Applicants: For a NHLSP client who was certified eligible for relocation benefits in summer 2019 after a successful 9th Circuit Appeal, NHLSP has drafted a petition and plans to file the petition for divorce upon client's approval. NHLSP will advise and assist a family on transferring the homesite lease of the relocation home via probate for a certified relocatee whom NHLSP represented in a 2011 administrative appeal before ONHIR. The relocatee passed away in early 2021 and had no surviving spouse or children, but has a younger sister who has not received relocation benefits.

4. Advice and Assistance to the Navajo-Hopi Land Commission and NHLCO by NHLSP: This quarter, NHLSP staffed three (3) regular and five (5) special meetings of the Navajo-Hopi Land Commission ("NHLCO"). Now that the DRF enabling legislation has been signed into law and the Fund Management Plan approved by BFC in June 2022, the next steps by NHLCO and NHLCO are to amend the NHLCO's January 2019 DRF Policy resolution so that it is consistent with the 2022 legislation and FMP. The amending resolution has been submitted to ONHIR for its concurrence, which ONHIR has given. The amending resolution will be considered for approval by the NHLCO at their first regular meeting in October.

In addition, the Office of the Controller has confirmed that a separate DRF account has been set up. NHLSP has advised NHLCO to work with OOC to ensure that payments and revenues from Arizona New Lands, such as lease payments from NNGE for Twin Arrows, are transferred from the NRTF and/or General Fund to the DRF account. Other payments will need to be traced and transferred to the DRF account. In addition, the NHLCO is in the process of developing the DRF Administration Manual to govern the administration, eligibility determinations, and disbursements of DRF monies, to which ONHIR is to be a concurring party. Once the DRF Administration Manual is complete and approved by ONHIR, it also will be submitted to

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NHLC for approval, after which the NHLCO can implement the DRF pursuant to the Administration Manual. NHLSP anticipates reviewing and editing the Administration Manual before it is submitted to ONHIR and/or the NHLC.

5. Federal Legislative Policy and Advocacy for Navajo Relocates by the NHLC and outside counsel: Greg Smith of Hobbs Straus Dean & Walker (“HSDW”) continues to coordinate and support a strategy to elevate Navajo-Hopi and construction freeze issues through legislative, executive, and judicial efforts. HSDW participated in numerous calls with the NHLC regarding overall strategy and held weekly calls with the NNWO, as well as provided regular detailed email updates to Navajo leadership, including OPVP, NNDOJ, NNWO and NHLC.

HSDW coordinated with NNWO to set and participate in meetings between Navajo leadership and White House and Congressional staff and prepared updated briefing materials and draft letters for these meetings. They have engaged in continued follow-up in support of a hearing and of appointment of an ONHIR commissioner.

HSDW will continue to follow up with Hopi and San Juan Southern Paiute representatives regarding their issues, including most especially Hopi opposition to the technical amendments, as well as opposition to the appointment of an ONHIR commissioner. HSDQ engaged in research and related calls regarding Hopi claims that the Navajo Nation has hindered Hopi land acquisitions promised them in 1996 as part of agreeing to the Accommodation Agreements.

HSDW continued to review and work on proposed amendments from the NPL chapters and from Second Generation representatives and participated in several calls where these representatives presented on their proposals and worked on legislative language and researched infrastructure promises in 1990 Relocation plan in relation to these additional requests.

6. Litigation against ONHIR, the Department of Interior, and the United States: DOJ, through contract counsel Rey-Bear McLaughlin (RBM), also represents Navajo Nation and Relocation Beneficiaries (defined as Navajo citizens who resided on the HPL on December 22, 1974, the date of passage of the original Relocation Act) in two (2) lawsuits filed in the Court of Federal Claims in Washington, D.C. and the FDC-AZ in August 2021. The CFC case seeks monetary damages in the amount of \$40 million from the U.S. for mis-handling and maladministration of New Lands revenues and trust assets by ONHIR and DOI, as well as a remand to these agencies to ensure they properly manage, administer, and deposit revenues and income for the benefit of the Relocation Beneficiaries. FDC-AZ lawsuit seeks declaratory and injunctive relief (no money damages) seeking to require ONHIR to carry out and complete its relocation functions and not prematurely close with DOI’s assistance.

Last quarter involved continuing litigation regarding ONHIR and related non-litigation matters, including discovery-related work by co-counsel. For the two lawsuits that were filed in August 2021, RBM followed up regarding implementation of a litigation record hold to avoid spoliation. RBM also followed up with consultants regarding database coding, issues, and administration. Reports regarding the litigation and reviewed relevant recent decisions in other cases have been provided to DOJ. For the CFC case, RBM also addressed scheduling a hearing on Defendant’s partial motion to dismiss and followed up regarding communications with designated representatives for the plaintiff identifiable group of relocation beneficiaries. For the FDC-AZ case, outside counsel also prepared for and participated in oral argument on Defendants’ motion to dismiss and reviewed, consulted, and reported and advised on a tentative decision, oral argument, and a revised ruling on the motion.

7. HPL Rent: DOJ continues to wait for separate decisions by the Assistant Secretary – Indian Affairs (“ASIA”), the Interior Board of Indian Appeals (“IBIA”), and Hopi Superintendent (“Superintendent”). Those decisions involve the following HPL rents: 1) The appeal of 1979 to 1995 HPL rents

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pending on remand before the ASIA; 2) the appeals of 1998 to 1999 and 2000 to 2009 HPL rents pending before the IBIA; and 3) the appeal of 2010 to 2014 HPL rents pending on remand before the Superintendent.

Due to the ASIA's unreasonable delay, contract counsel Meyer Walker & Walker (MWW) prepared a draft letter requesting a meeting with Assistant Secretary Newland in June 2022. Due to the IBIA's unreasonable delay on the 1998 to 1999 HPL rents, MWW called the IBIA on July 20, 2022 and was informed by the IBIA's legal assistant that even though this was the second oldest case on the IBIA docket, the matter was not under active consideration. MWW suggested several options to resolve the delay. MWW then contacted IBIA via email on September 8, 2022 to establish a written record, and the IBIA legal assistant responded that the IBIA had taken this case under active consideration, but could not estimate when the IBIA would issue a decision. If the IBIA's delay continues and the Navajo Nation concurs, MWW is prepared to seek a court order or take other action to compel the IBIA to act.

In addition, the IBIA also has not issued a final decision on HPL rents from 2000 to 2009 even though briefing on the matter concluded in October 2020. HPL Rents from 2010 to 2014 remain unresolved by the Superintendent as the Superintendent still has not issued a decision on remand. MWW will continue to monitor these matters and keep the Nation informed as new information becomes available.

### **Natural Resources Unit (NRU)**

NRU is led by Assistant Attorney General Veronica Blackhat who manages four (4) Attorneys, one (1) Attorney Candidate, one (1) Principal Tribal Court Advocate and two (2) Legal Secretaries. Primarily, NRU provides legal assistant to Division of Natural Resources and the Navajo Environment Protection Agency. However, NRU is also involved in many others matters affecting the Nation's natural resources and environment. In this quarter, notable projects include:

1. Department of Forestry's Carbon Sequestration Project: Administrative progress on the carbon sequestration project continued. The Department of Forestry obtained a delegation of administrative authority from the Executive Director of the Division of Natural Resources (DNR), in accordance with Section Four of CAP-17-22, to effectuate account establishment and other CARB administrative requirements. Forestry is also drafting a Fund Management Plan for the projected revenue, which is challenging because projected revenue is unknown and will ultimately depend on the carbon credit market at the time of sale and the project is at least two years away from the Nation realizing any revenue from the sale of its carbon credits. However, Forestry recognizes the interests of the twenty-three (23) chapters within and adjacent to the Navajo Commercial Forest boundary and is exploring revenue-sharing and fund management options presently available under Navajo law, while also considering the Department's administrative personnel limitations and existing obligations under its 638 Contract.

2. Department of Water Resources. Work related to large-scale water infrastructure projects continued, and is anticipated to increase as funding remains available through ARPA, including the establishment of the Navajo Nation Fiscal Recovery Fund (NNFRF) and Office, and the Infrastructure Investment and Jobs Act (IIJA), also referred to as the Bipartisan Infrastructure Law (BIL). Various climate resilience initiatives have made other state and federal funds available as well.

a. Navajo Gallup Water Supply Project. Work on this essential project continued, including construction on the Navajo Code Talkers Sub-Lateral which may be easily viewed along Highway 264 from Yah-ta-hey, New Mexico to Window Rock, Arizona. As previously indicated, additional

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congressional appropriations are necessary to complete the project and lobbying efforts are underway. As could be expected, rising inflation and supply costs significantly impact project costs and budgets, and project participants continue to explore solutions to address the rising figures. Current funding limitations notwithstanding, the estimated project completion date is still December 31, 2024 with water deliveries increasing as project features are completed.

b. To'hajiilee Water Project. Work on this essential project continued, and the projected waterline completion date is Spring 2024. The Rate Agreement between the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and the Nation on behalf of the To'hajiilee Chapter is almost complete and should be executed next quarter. The To'hajiilee Chapter will be a wholesale customer, and the rates and charges for the treatment and delivery of raw water to a bulk meter at the Chapter boundary will be calculated based on the services provided, as reflected in the ABCWUA Rate Ordinance. The Nation will provide the raw water for this project via the water lease agreement with the Jicarilla Apache Nation.

c. Westwater Community Water Project. A memorandum of understanding (MOU) between the Nation, the State of Utah, and the affected municipalities was signed by the Navajo Nation. The availability of federal funds for water infrastructure and the MOU will help the parties realize this important water project. NTUA will operate and maintain the water and wastewater system upon its completion.

3. Navajo Parks and Recreation Department (NPRD):

a. Updating Park Rules and Regulations. In light of resuming park operations and specific requests from NPRD to address pressing legal concerns, there is a need to update and standardize rules and regulations for the operation and management of the Nation's parks, monuments, and recreation areas. Amendments to Title 19 of the Navajo Nation Code are also likely needed. These updates and amendments are a significant undertaking. The proposed amendments and updated rules and regulations must be developed, then approved by the RDC and the Council. NPRD personnel will also need training on any changes to implement and enforce the amendments and changes consistently across areas under its management responsibility. An optimistic date to introduce proposed Code amendments and associated rules and regulations is Spring 2024. The first necessary updates are to the Tour and Guide Services Rules and Regulations, promulgated pursuant to NPRD's authority at Title 5, Chapter 13 of the Code and their Plan of Operation. The goal of these updates is to ensure current and future tour and guide service permittees clearly understand their responsibilities, NPRD park staff can effectively address violations, and all customers safely enjoy the scenic and cultural beauty of Tribal Parks.

b. Air Tour Management Plan for Canyon de Chelly. NRU participated in a meeting with OPVP, DNR and the National Park Service (NPS) regarding the Air Tour Management Plan. NPS provided an update on the progress regarding discussions with NDOT and HHPD and a summary of the litigation that led up to FAA and NPS working together to create Air Tour Management Plans for various Parks across the United States. NPS wanted to know the NN's position regarding air tours over Canyon de Chelly. The local chapters passed resolutions opposing all air tours within the Canyon de Chelly National Monument. It is unclear if the Nation will support this position, or make exceptions (e.g. Navajo-owned operator on approved routes and times), but a Navajo Nation position statement is needed. The unique nature of the Monument, i.e., its location on Navajo trust land and the fact that tribal members reside within the Monument boundary, may also speak to the weight of the Nation's position statement on air tours.

4. Chaco Canyon: (On-going) On January 6, 2022, the Bureau of Land Management formally proposed to withdraw approximately 351,479.97 acres of public lands surrounding Chaco Culture National Historical Park for a 20-year term by filing a petition/application to the Secretary of the Interior. This action, published in the Federal Register, follows President Biden's announcement on November 15 of the Department's new efforts to protect the

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Chaco Canyon and the greater connected landscape, and to ensure that public land management better reflects the sacred sites, stories, and cultural resources in the region. The proposed withdrawal of federal lands within a 10-mile radius around Chaco Culture National Historical Park would bar new federal oil and gas leasing on those lands. According to the Interior, the potential withdrawal would not affect existing valid leases or rights and would not apply to minerals owned by private, state, or Tribal entities. The BLM initiated a 90-day public comment period and hosted several public meetings as well as undertaking formal Tribal consultation. The public comment period was extended an additional 30 days and concluded on May 6. Additional public meetings were scheduled at San Juan College on April 27th, Nageezi Chapter House on April 28<sup>th</sup>, and at the Nation Indian Programs Training Center on April 29th. NRU attended the April 28th and 29th meetings. NRU and LU coordinated with HHPD, NLD, and the Minerals Department on drafting talking points for the President and submitting comments on behalf of the Navajo Nation on May 6. As of this report we have not received any updates from BLM regarding the status of their request to withdraw public lands surrounding Chaco Culture National Historical Park.

5. Horseshoe Bend Holdings Project: NRU reviewed a request regarding the Horseshoe Bend Holdings (HBH) project that was submitted by the Department of Fish & Wildlife-Natural Heritage Program. Natural Heritage Program (NHP) sought a review of several documents and whether they were ready to be included in the final biological resource clearance form determination letter for HBH. The documents consisted of a.) a draft golden eagle mitigation plan, b.) a hotel occupancy tax, and c.) a legislative amendment proposal. There are concerns regarding the funding amounts listed in the mitigation plan, specifically the initial funding amount and the projected amounts to be paid annually for the golden eagle species. The current plan does not satisfy the best interest of the protected species and NHP's mission. DOJ staffed this matter internally in March to discuss a prior legal review and findings for the project including the hotel occupancy tax proposal, which first requires HBH to secure a biological clearance from the NHP. A meeting was held on June 30, 2022 with the developer and the NHP on June 30, 2022 to discuss concerns regarding the project. NRU collaborated with TFU to complete the legal review and memorandum regarding the HBH project which identified legal concerns and provided recommendations to address the concerns.

6. Utah Hunting Agreement: NRU updated the Navajo Utah Commission (NUC) about the Hunting Agreement with the state of Utah twice this quarter. NUC passed a resolution requesting OPVP and DOJ amend the hunting agreement to bolster Navajo treaty hunting rights. Utah representatives have met with DOJ and are open to receiving proposed amendments. DOJ recently received direction its support of the NUC's position on the agreement. Meetings going forward will be confidential – NRU will meet with the NUC to finalize asking points before reaching out to Utah. Potential templates for an amended agreement were reviewed, the most recent potential model is a Shoshone agreement. Proposed amendments or a new draft needs to be completed prior to January, when the existing agreement allows for amendments through the end of the month of January. If no written requests for amendments are submitted, then the existing Hunting Agreement will control for the duration of the year.

7. Heritage & Historic Preservation Department (HHPD):

a. Bears Ears Inter-Tribal Coalition/Commission (BEITC): Non-litigation matters are handled by NRU, and including attending weekly Zoom meetings along with Commission Representative and the HHPD Department Manager who also serves as the BEITC Tribal Historical Preservation Officer (TPO). Legislation (NABIJY-24-22) supporting the Bears Ears Land Management Plan for the Bears Ears National Monument was approved by the Naa'bik'iyati Committee on July 14, 2022. The signed resolution was sent to the BEITC and inserted in the final land management plan. This resolution was the final piece needed to complete the plan. This is significant because the Navajo Nation is supporting every effort for co-management of the Bears Ears National Monument (BENM) area. Additionally, the HHPD recommended that the land management plan be made available for public view so that pending agreements for Navajo, other tribes, and other organizations can see the way Navajo Nation was a part of this specific agreement. The agreement is a living document that not only provides guidance on co-management strategies and plans, but it also serves as a

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template for future agreements for other areas between multiple agencies. In addition, HHPD applied for special funding for the co-management of BENM from the United States in the amount of \$500,000 for five (5) years. This was a non-competitive application for funding and its intended purpose is to fund collaboration of the five (5) tribes and their co-management efforts with U.S.F.S. and BLM per President Biden's proclamation.

b. Bears Ears Museum Project: The Los Angeles Museum is interested in collaborating with Tribes involved in the protection of Bears Ears through a MOA which would involve a Museum exhibit in Los Angeles and each of the tribal nations. With the Nation's support, the plan is to open Bears Ears: Living Land as the first exhibition in Summer 2023 or possibly Spring 2024. A meeting with the staff of the LANH-Museum was held in August to narrow down the timeline for the contractual obligations under the grant. The parties agreed that a letter of agreement between HHPD and the LANH-Museum will be created to outline the work and compensation of Navajo experts assisting with this Project.

c. San Francisco Peaks. The group is comprised of various professionals representing 11 tribes, grassroots organizers, and NGO's from the area. The group is currently in a structuring and strategic phase. The group is organizing to respond to USFS Section 106 re-initiation on the expired 2005 MOA. Bi-Weekly tribal meetings continue. The group met at Twin Arrows in August to discuss how to organize the larger group of all tribes who have an interest in protecting the San Francisco Peaks. The latest government to government (all tribes and federal) meeting was to review the draft San Francisco Peaks Multi-Tribal Working Group Charter. The overall outcome was that the group is trying to find consensus on organizing their methods for meetings and positions for advocating for protection. HHPD will be hosting a meeting on October 4, 2022 in Window Rock to discuss the current status and proposed plans for continued protection of the San Francisco Peaks. HHPD, other members of USFS, Council, OPVP, and the Navajo Nation Human Rights Commission have been invited.

8. Navajo Land Department:

a. Legislation delegating Navajo Land Department the authority to approve rights-of-way (ROW). NRU assisted the NLD and GLDD in drafting rules to cover the proposed delegation. The delegation would be fashioned in the same manner as the delegation for approval to ROWs under RDCJN-17-20. RDC would approve rules and regulations as well as terms and conditions that govern the approvals. The delegation was approved by RDC on September 28, 2022. There was an amendment to the legislation that would require RDC to reexamine the delegation on or before December 31, 2026 to determine whether to continue with the delegation.

b. Telecommunication Siting Regulations. The purpose of the regulations is to streamline policies and procedures for the issuance of telecommunication tower lease and permits as they relate to surface land use for telecommunications, as well as collocations on non-tower structures. NRU and HSGU provided comments regarding the proposed telecommunication regulations and leases submitted by NNTRC. The first version of the regulations had been submitted over a year ago by GLDD and a memo was issued regarding concerns and recommended changes; GLDD did not resubmit the regulations for review. However, there was a second version submitted by NNTRC. This quarter, NRU met with Vertical Bridge to discuss amendments to the proposed regulations.

c. Begay-Hood v. Halona (NLD) WR-CV-07-22. NLD received notice of suit. Neither NLD nor DOJ received notice of a hearing. Plaintiff, through counsel, requested a three (3)-hour bench trial. A Hearing has been scheduled for June 22, 2023. DOJ is assisting and recently had a call with NLD to discuss preliminary information about the case. DOJ needs to schedule a meeting with NNDA to gather additional information and records.

9. General Land Development Department (GLDD):

a. Mission Site Permit Regulations. (On-going) NRU first reviewed these regulations in 2018; however, they were not approved by the RDC at that time. GLDD reinitiated attempts to get the regulations approved. The goal of the regulations is to simplify and expedite the permitting process for mission site permit applications; eliminate costly aspects of the mission site permitting process; give local churches more possessory interest over the land and to double the term of the permit to ten (10) years. There were two RDC work sessions held on December 21, 2021 and March 15, 2022, with GLDD and the NLD to further discuss the regulations and proposed amendments. RDC scheduled a Leadership meeting for April 23 to get input from church leaders; however, the meeting was cancelled and not rescheduled. An issue came up with a renewal of a mission site. The Code and terms and conditions of the permit are not clear with respect to renewals of permits which created confusion. As a result, there was legislation introduced that sought clarification on this and a delegation to NLD to review permits. RDC indicated that they would get back to review of the regulations and work on getting them approved.

b. Cemetery Lease/Regulations. NRU reviewed the lease and suggested edits (took out provisions that were not applicable) and condensed the lease as much as possible. There are additional questions such as whether GLDD will be charging a fee, term of the lease, etc. GLDD moved forward processing cemetery leases with the understanding that after the regulations have been approved, the lease will require additional amendments referencing relevant sections of the proposed burial regulations. To date the regulations have not been approved by RDC. There have been two leases that have been reviewed but have not been approved by RDC. The problem is the language contained in Title 13 (Cemeteries) is unclear and needs to be amended to reflect the current needs of the Nation. RDC held a leadership meeting on May 5th with DOJ, DNR, NLD, and Navajo Land and Farm Boards to discuss and address private family cemeteries. RDC conducted a two (2)-day work session on May 19-20 with the OLC, Human Rights Commission, DOJ, DNR, NLD, GLDD, HHPD, NNDA, Farm and Land Boards and Grazing Officials, and the BIA to discuss the draft Navajo Nation Burial and Cemetery Regulations as well as possible amendments to Title 13. To date legislation has not been introduced for RDC to approve the regulations.

c. One Stop Shop Plan of Operation. NRU reviewed the proposed Plan of Operation for the Navajo Nation “One-Stop Shop”. The initial purpose of the One Stop Shop is to provide regulatory review of ARPA funded projects; however, GLDD would like it to include all projects. Some of the approvals sought under the Plan would require delegations from the Council and RDC. DOJ had several calls with GLDD to discuss the Plan of Operation and edits were based on DOJ’s recommendations. RDC approved the One Stop Shop Plan of Operation on September 28, 2022.

10. Navajo Nation Department of Agriculture (NNDA):

a. San Juan River Farm Board. NRU attended regular meetings with the Farm Board to work through legal issues. The issues range from illegal blocking of water access, general administration of permits and the relevant laws, communication with the BIA, preparing and presenting presentations. NRU continues to advise the Farm Board many of its issues are administrative, not legal, so the Farm Board must seek technical support from NNDA. Many of the day-to-day functions of a Farm Board involve making administrative decisions, permittee disputes, participating in ongoing litigation as a governmental entity, fee assessments, and issuing Notices to ALUP holders. NRU provided a presentation to the Farm Boards regarding AG-01-13 (Farm Board Authorities) and responded to questions from the Farm Board members.

b. James v. DGC12. (On-going). NRU attorneys entered a notice of appearance before OHA on behalf of the District 12 Grazing Committee

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(“DGC”). The case was dismissed for ripeness concerns, and due to a lack of a record on the matter. The District 12 Grazing Committee will need to revise its Resolution to BIA and serve it if they wish to obtain a court order for compliance. The DGC will need to coordinate additional arbitrations on each legal issue for which OHA deemed to have lacked adequate record on appeal. As of the date of this report, DOJ has not received any further information on this matter.

c. O’Daniel (Pro Se) v. DOA and DGC 11, OHA-LAD-002-22. The case is complex, OHA does not have jurisdiction as the Petitioner is filing to get the DGC Chair to issue a resolution to the Probate Court confirming the disposition of an Agriculture Land Use Permit (ALUP). It’s a probate issue so the District Courts have jurisdiction. It involves a clerical error by the BIA who is not taking responsibility and is telling the Grazing Committee to issue a resolution. The DGC Chair is refusing and brought in a disputing party that is also now wanting to claim rights to the ALUP. NRU assisted NNDA and the District 11 Grazing Committee with an appeal of decision to OHA. The heart of the case is a Quiet Title order from Chinle District Court. A Motion to Dismiss is fully briefed as of September 30, 2022.

d. Russell v. Prowes, NN (Real Parties of Interest), OHA-LAD-001-22. NRU is assisting NLD, NNDA, and District 18 Grazing Committee with an appeal of a decision to dismiss Petitioner’s complaint with NLD. Records reflect that Petitioner is not a valid permit holder within the meaning of the NLD Regulations and requirements for opposing homesite lease applications. OHA recently issued a decision to vacate an earlier order establishing the evidentiary hearing for October 3, 2022, and requested new dates for the evidentiary hearing. NRU filed all discovery documents in preparation for the evidentiary hearing.

e. Tsaile-Wheatfields Grant Agreement. NRU is handling a Directive from BFC to assist DNR with bolstering a grant agreement for the Tsaile-Wheatfields Agriculture Project. NRU has provided two (2) updates to BFC, reached out to the new project assignee within DNR, met with the Tsaile-Wheatfields Farm Board president, and provided the standard legal template to the individuals overseeing the project. NRU participated in a follow-up meeting on September 23 to identify what issues remain between the Farm Board (FB) and the Dine Water Users Association (DWUA). The Division Director and OMB will determine what funds remain and how those remaining funds will be drawn down.

11. Minerals Department:

a. Oil and Gas Activities in New Lands. NRU provided assistance to the Minerals Department regarding the issue of oil and gas inspections in the New Lands. There is a question of who should be handling existing oil and gas operations and inspections related to any operations. The Minerals Department would like to assume responsibility for the inspections. NRU is also working on the surface agreement for a company called Ranger to develop additional oil and gas wells in New Lands.

b. 32 Point Agreement. Back in the 1970’s, various Navajo Nation Chapters and the Navajo central government entered into an agreement with various oil and gas companies in the Aneth area. The agreement was amended in the 1990’s. Various chapters are upset with the oil and gas companies and believe that the companies are not complying with the terms of the agreement. These Chapters are members of the Navajo Utah Commission (NUC). NUC has requested review of the agreement to see whether it is legally enforceable and if it is not, then how they can enter into an enforceable agreement with these oil and gas companies. This issue is complicated for several reasons, including the fact that the original companies who entered into the agreement no longer have oil and gas leases in the Aneth area or the leases have changed hands. This quarter, NRU provided a report to RDC on August 31st in executive session regarding the 32 Point Agreement. We are still waiting for a list of asks from the NUC regarding what they want to happen moving forward. RDC is also going to schedule a meeting with DOJ, NUC, and others regarding the issue.



c. NTEC Land Relinquishment. NTEC is applying to the Nation and BIA to have a portion of the Navajo Mine site relinquished back to the Nation. Minerals wrote a letter for the President to sign accepting the relinquishment, but noting there should be land use restrictions on the land going forward. The land to be relinquished contains coal ash and there needs to be agreement among the Nation, NTEC, and the Four Corners Power Plant owners about who will be responsible for the coal ash going forward. This quarter, NRU continued to provide legal assistance related to NTEC's application for the relinquishment of certain lands at the Navajo Mine and remain concerned that the land contains coal ash and that there is no agreement about who will be responsible for the coal ash after the land is relinquished. NRU participated in a meeting with the RDC, NTEC, the local community, BIA and various Navajo departments to discuss the issue on September 1, 2022. There will be a follow up meeting on October 3rd.

BIA's treatment of coal cessation at the Kayenta Mine is completely different than how BIA is handling cessation at Chevron's McKinley mine. Although Chevron's lease is similar to Peabody's, BIA has told Chevron that their lease is expired because coal activities have ceased and Chevron is in trespass because they do not have a valid lease with the Nation. It is unclear why BIA is treating the mines differently. What BIA does with these mines will also affect what happens when the Navajo Mine shuts down.

12. Navajo Division of Transportation (NDOT): Reviewed contracts, MOAs, grant applications and agreements with the Federal Highway Administration (FHWA), Federal Aviation Administration and the New Mexico Department of Transportation (NMDOT), construction contracts and professional service contracts on behalf of NDOT.

a. Proposed MOA with the United States Army Corps of Engineers (USACE). USACE representatives from the Albuquerque District wanted to formalize coordination and project management efforts across the Nation and between the three (3) districts that comprise the South Pacific Division. The MOA was submitted in 2021; comments and edits were provided, none of which were incorporated. NDOT resubmitted the MOA for review; however, it had been amended significantly, leading to more questions. The MOA was deemed insufficient. There were numerous issues with the MOA and it is one-sided to the benefit of USACE. The MOA was intended to cover all projects on the Navajo Nation and would involve other Divisions/Departments; however, there was nothing in the submittal showing that other Divisions/Departments had been consulted or what their responsibilities would be under the MOA. Recommended discussions directly with USACE regarding the MOA and get clarification on the amendments.

b. NMDOT Funding Agreements. NRU reviewed two (2) NMDOT agreements this quarter, including a proposed agreement with NMDOT that would be used to plan, design and construct, purchase and install a traffic signal and related road work, including widening the intersection of New Mexico Highway 371 and Navajo Route 36 in San Juan County. The second agreement with NMDOT is for planning, design and construction of Pine Drive in the Pinedale Chapter.

c. Intergovernmental Agreement (IGA) - Navajo County. Reviewed a proposal that would allow for NDOT to utilize its contractor to conduct a drainage study and analysis for Navajo Route 8065 within Navajo County. The costs for the work would be covered by HURF funds.

d. Intergovernmental Agreement (IGA) - Sandoval County. The IGA added the N474 Project wherein Sandoval County would perform patching and blade patching work on Navajo Route N474 in the Encino Chapter. Under the IGA, the Nation will provide funding for the Project.

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13. Navajo Nation Environmental Protection Agency (NNEPA): Work this quarter involved reviewing documents, grant applications, contracts, legal and historical research, gathering of pertinent information, working with outside counsel, reviewing legal documents including Administrative Settlements, and other documents regarding the various Navajo Abandoned Uranium Mines (NAUM) as well as attending weekly, bi-weekly, and monthly meetings regarding NAUMs.

a. Navajo Nation Fiscal Recovery Funds (NNFRF) for Administrative Expenses. NRU is working with NNEPA on its central government support allocation of NNFRF dollars for administrative expenses to ensure NNEPA's planned use remains an eligible expenditure of NNFRF.

b. Legislation No. 0110-22, Proposed Allocation of \$5,000,000 Sihasin Funds for Ongoing Assessment at the Former Navajo Forest Products, Inc. (NFPI) Site. The above-mentioned legislation and corresponding appropriation request is to supplement ongoing assessment at the former NFPI site, which continues to pose a hazard to human health and the environment and has been the subject of remedial action to abate asbestos in the abandoned buildings. In addition to gathering data to effectively evaluate existing hazards, NSP Brownfields Program is concerned that ongoing access near and through the NFPI site risks exacerbating these hazards, including the dumping of household waste on top of the existing waste pile. Accordingly, NNEPA is coordinating with the NDOT to erect road closure while assessment continues. NSP Brownfields Program estimates the actual costs of remediation to exceed this initial appropriation of \$5 million dollars; however, any amount of funding would supplement present efforts and help leverage additional funds. As of this report, the legislation has passed all committees and is awaiting final decision before the Navajo Nation Council.

c. Navajo Uranium Workers Program. NNEPA is proposing a restructuring of their organization to include the NUWP. NUWP was originally part of NDOH. NRU met with NNEPA to discuss the Navajo Nation Code provision for power and authority of NNEPA is geared toward regulatory and enforcement authority. NRU did identify NNEPA's code provisions that will likely need amendments. NRU assisted NNEPA with draft amendments to the Plan of Operation and the Code that could potentially conflict with the new Plan of Operation if not amended.

d. RECA Reauthorization (US Congress). NRU occasionally attend meetings that the NNWO coordinates to update the Nation about the lobbying of Congress to reauthorize and expand the Radiation Exposure Compensation Act. NRU reviewed proposed language to place the Navajo Uranium Mine Workers program within NNEPA, that is relevant because RECA reauthorization would impact NNEPA's possible future responsibility. As of June 7, 2022, President Biden signed the RECA Extension Act of 2022 extending the program deadline for an additional two (2) years. The NNWO and others are advocating for Congress to expand the program to include individuals that do not currently qualify, including those exposed after 1971, whom are currently not covered under the statute. The amendment would extend the period to include worker who worked in mines through 1990, as well as increase the geographic areas for eligible downwinders and the number of eligible diseases.

14. Northeast Church Rock Mine Site (NECR) Cleanup: (On-going) For historical context, the United States Environmental Protection Agency (USEPA) issued the Action Memorandum for the Non-Time-Critical Removal Action (selected removal action) on September 29, 2011, in accordance with its authorities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR § 300.415. The selected removal action was contingent upon two additional approvals: an USEPA Record of Decision for the United Nuclear Corporation (UNC) Mill Site to accept the NECR Mine Site waste, issued March 29, 2013; and an amendment to the Nuclear Regulatory Commission (NRC) license of the UNC Mill Site, which UNC requested in September 2018 upon completion of the NECR Mine Site waste repository design.

At the request of the Navajo Superfund Program, NRU completed a historical timeline of OCRM, also referred to as Sections 8 and 17, to identify the

current status and possible cleanup actions. The historical timeline was supplemented with a memorandum that included general legal analysis and discussion questions to address contamination at the former mining site. A second memorandum was issued that addressed the available enforcement actions with a more detailed analysis of the Navajo Nation Comprehensive Environmental Response, Compensation, and Liability Act (NNCERCLA), 4 N.N.C. §§ 2101 et seq. It is clear that there are two available options regarding the cleanup of hazardous waste from past mining activities: (1) an action pursuant to federal CERCLA or (2) an action pursuant to NNCECLA. The first option would be similar to other efforts to address NAUMs, where the USEPA, Region IX serves as the lead agency, while the second option would be the Nation's first attempt to use its own laws (outside of NNEPA's general authorities for USEPA-led actions).

During a reconnaissance visit for an ablation pilot study, USEPA learned that radiation levels at the site are much higher than previously believed, which has yet to undergo any remediation efforts beyond fencing the former operation area. USEPA and NNEPA have begun discussing time-critical response actions as it is likely needed due to the current risk to human health and the environment. NRU had internal discussions regarding NNEPA's decision to potentially proceed with an NNCECLA action, though the urgency of the matter may be a significant factor in the decision-making. USEPA, under current contracts and funding mechanisms, could deploy personnel in a matter of weeks. After internal discussions, NNEPA determined that it was best to proceed with a USEPA-led action, and the agencies will meet with one of the former operators, UNC/GE, next week to discuss next steps. USEPA initiated discussions with the PRP, UNC/GE, to discuss their responsibilities and capacity to address the significant amount of what is thus far known as surface contamination. Once the immediate threats are addressed, NNEPA may be in a position to reassert the Lead Agency role, or at least take a larger role in settlement discussions. The discussion and uncertainty with NNEPA's capacity to take more lead roles in the future is on ongoing discussion both externally with USEPA and internally with NNEPA. This quarter, we met with USEPA to review and share historical information on the Old Church Rock Mine. USEPA is leading a time-critical removal action and conducting PRP research, as there are multiple PRPs for the site.

15. Phase Two Trust: (On-going). The Phase Two Removal Site Evaluation (RSE) trust continues its work toward issuance of removal site evaluation (RSE) reports for multiple mine sites, as well as performing risk assessments. The Phase Two Trust was amended and expanded to include clean-up of Priority Orphan Mines, as contemplated under the Phase Two Trust settlement agreement. NRU continues to participate in regular conference calls regarding work being done by the Phase Two Trust for investigation and remediation of these uranium mines. Our role in these settlements has been to review documents and reports to ensure the funds allocated are being spent in accordance with the agreement and the objectives are achieved. The Phase One remediations were achieved under budget and NNEPA was given the remaining money in two different transfers. Unfortunately, the recent surge in inflation is causing expenses to exceed original cost estimates. This has caused NNEPA to have to return the funds so they can be used in Phase Two.

16. Tronox Settlement – ARAR: (On-going) NRU continues working on completing a comprehensive list of Navajo Nation ARARs to be used for uranium mine clean-up. The draft ARARs table will be used as a template for incorporation in cleanup decisions. The table is all-inclusive, and is intended to be tailored to the circumstances of each individual mine site. It is most likely to be used to develop Action Memoranda for several Tronox mine clean-ups in the Eastern Agency in the next few months. The challenge we faced in the ARAR effort was determining ways Navajo fundamental law can be couched as an ARAR by providing specifics on how it applies to uranium mine cleanups. Our current plan is to incorporate fundamental law concepts by including a hataalii, or traditional practitioner, in the cultural resources survey that is required for each site prior to any invasive site investigation or cleanup activities. This approach will allow consideration of site-specific conditions and concerns in formulating any cleanup plans. USEPA asked the Nation to develop Navajo-specific ARARs that include Navajo Fundamental Law considerations. DOJ, with the assistance of outside counsel, submitted a table of laws and regulations as proposed ARARs. Various Responsible Parties or Potentially Responsible Parties (PRP) have begun responding with comments on the list of proposed ARARs for the Eastern Agency. NNEPA, USEPA, and DOJ have been meetings with the Responsible Parties on a regular basis on the ARARs table. A final table of ARARs will be selected and the laws and regulations will be applied in the remedy

selection stage.

17. Cree Administrative Settlement Agreement: (On-going) NRU has been negotiating with USEPA on the terms of a new settlement agreement for investigation of contamination at two former uranium mines near Teec Nos Pos in northeastern Arizona. The responsible party, Cree Production Company, formerly operated Tsosie No. 1 and Richard King No. 1 mines. The draft settlement agreement is intended to greatly enhance NNEPA's role in the oversight of clean-up investigations. Moreover, NNEPA will be a formal signatory to the settlement agreement for the first time. Substantial revisions are being made to the settlement agreement (called an Administrative Settlement Agreement and Order on Consent for Removal Actions, or "AOC") and to the Statement of Work.

This quarter, NRU finalized a proposed AOC and that was given that to Cree to review. Cree are still exploring their options with USEPA, including a Cashout settlement instead of an AOC. A cash out would allow them to pay one lump sum, but the Nation and USEPA would need to agree to the extent Cree would be let off the hook for any further present and future liabilities. Due to the small nature of the company, Cree has opted to file for lack of Financial Ability to pay. USEPA will be gathering information to determine what amount Cree can pay and limit liability to that amount. NNEPA and DOJ will be reviewing any determinations from USEPA.

18. Natural Resource Damages (NRD): Pursuant to the NNCERCLA, 4 N.N.C. §§ 2101 et seq., the President of the Navajo Nation serves as the Natural Resource Trustee. In accordance with this authority and responsibility, former President Russell Begay designated the Department Managers for the Departments of Water, Land, Fish and Wildlife, and Historic Preservation as the "Resource Trustee Committee" and this designation continues to serve as the model for Natural Resource Trustee decision-making.

a. Fort Wingate Depot Activity (FWDA) Consent Decree. The proposed consent decree for the FWDA was lodged with the District Court of New Mexico and proceedings stayed pending a thirty (30) day public comment period. The sole public comment received did not address the settlement itself; rather, it indicated concern for the history of atomic energy, its use for defense-related purposes, and the long-term impacts of radiation in the State of New Mexico. It is important to distinguish that some parcels of the former Army Depot will remain under U.S. Army or Missile Defense Agency control for continued defense-related operations and those parcels are not subject to the NRD settlement and consent decree. Furthermore, the known contamination is contained to the former TNT leach beds, groundwater monitoring is ongoing and managed by State, and there was no evidence in the historical record of atomic energy or radiation at the site that is subject to the settlement. The judge issued the consent decree on August 9, 2022 and issued an order to deposit the money in the court registry account. Account information was provided to the U.S. Department of Justice to reimburse the Nation's Past Costs in accordance with the Consent Decree. The Co-Trustees modified previous selection criteria and are reviewing past project proposals for current feasibility. The next Co-Trustee meeting is scheduled for October 11.

b. Trust Orphan Sites Pre-Assessment Screening (PAS). As previously reported, the PAS for potential NRD claims is under development for identified orphan sites under the Phase 1 and 2 Removal Site Evaluation (RSE) Trust Settlements and related Addenda with the United States. The next meeting is tentatively scheduled for the first week of October.

c. Rio Algom Mining, LLC (RAML) Mill and Mine Sites Tolling Agreement. The President signed another tolling agreement to extend the tolling period for potential NRD claims at the RAML sites, generally located in the Grants Mining District, for another two years to July 1, 2024. Rio Algom Mill and Mines provided an update to the Co-Trustees; data gathering is slow, and the PRP identified delays related to the pandemic, data gaps, and administrative challenges (USEPA Region VI). An attorney meeting for the Co-Trustees is anticipated to follow-up on this update and the

tolling agreement.

19. APS Rate Case/ ACC Generic Docket: DOJ intervened in the Arizona Public Service Company (APS)'s ongoing rate case being heard by the Arizona Corporation Commission (ACC). Representatives from Arizona State University (ASU) are assisting the Nation with these efforts, along with outside counsel. Late last year, the ACC issued an order granting the Nation \$10 million in assistance related to the "just energy transition" or "coal community transition" (CCT), rather than the \$100 million that the Nation and APS agreed to and are seeking ACC approval for. The ACC also said that additional information could be presented to demonstrate that the Nation should receive more money for CCT assistance. The ACC referred the CCT issue to a "Generic Docket" where additional information can be submitted. This quarter, NRU worked with outside counsel on filing an Amicus Brief with the Arizona Court of Appeals supporting APS's recovery of its investment on emission control technology at the Four Corners Power Plant. Also listened in to an ACC stakeholder meeting about the CCT issue. NRU participates in monthly calls with APS to discuss various things related to their rate case and the Generic Docket. The ACC staff is set to issue a report providing recommendations to the ACC Commissioners September 28 and DOJ will discuss next steps based on what is contained in that report.

### **Tax and Finance Unit (TFU)**

The Tax and Finance Unit is headed by Assistant Attorney General Mel M. Rodis who supervises one (1) Principal Attorney, one (1) Attorney, one (1) Attorney Candidate, and one (1) Senior Legal Secretary. TFU is assigned to advise the Budget and Finance Committee (BFC); the Office of the Controller (OOC); the Office of Management and Budget (OMB); the Investment Committee (IC); the Navajo Tax Commission (NTC); the Office of Navajo Tax Commission (ONTC); the Navajo Department of Retirement Services (NDRS); and the Administration Committees for the Retirement Plan (RPAC), the 401(k) Savings Plan (RSPAC), and the Deferred Compensation Plan (DCPAC). Below are some of TFU's noted projects for this quarter:

1. Fiscal Recovery Funds: This quarter, TFU provided guidance on the FRF procedures and updates on FRF eligibility reviews of proposed expenditure plans to several Council Delegates. TFU maintained regular communication with the OPVP, the NNFRF Office (FRFO), and their consultants, on FRF matters including resolution CJN-29-22. TFU participated in multiple phone calls with the RFRO, DCD, and OOC regarding the interpretation and implementation of CJN-29-22. TFU advised the Office of the Speaker, OPVP, and FRFO about the eligibility of proposed FRF administrative cost budgets and budget revision requests for central support and regulatory offices. TFU advised the OOC, OPVP, and BFC with respect to issues involving the NNFRF Hardship Assistance Program. TFU issued a memo to Council regarding the possible FRF-eligibility of septic tank cleanouts. TFU participated in meetings among the OPVP, FRFO, DCD, NTUA, NECA, and ECDU regarding the implementation of the FRF bathroom additions expenditure plan. To date, TFU, in consultation with outside counsel, has completed a total of 257 FRF initial eligibility determination reviews for 203 proposed expenditure plans seeking to utilize NNFRF, and 6 of those reviews were completed during the fourth quarter of FY2022. Although the NNFRF Procedures approved through BFS-31-21 allow DOJ five (5) working days to respond to requests for initial eligibility determination reviews, TFU's average response time is four (4) working days, and often fewer, while still responding to our other assigned client needs. TFU drafted the template FRF subrecipient agreement to be used for NTUA and other subrecipients receiving FRF for expenditure plans approved through resolution CJN-29-22. TFU also continued to advise and assist other units of DOJ with FRF-related needs presented by their respective clients, such as responding to questions on proposed modifications to FRF subrecipient agreements, and FRF procurement and contracting issues. TFU also drafted a memorandum to provide guidance on FRF procurement in compliance with the federal Uniform Guidance in 2 C.F.R. Part 200. In addition to its work on NNFRF matters, TFU has also participated in several meetings with and advised the OPVP, Division of Social Services (DSS), and HSGU, with respect to the Homeowners Assistance Fund under ARPA.

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2. Coronavirus Relief Funds (CRF): The U.S. Department of Treasury's Office of the Inspector General commenced a desk review on the Nation's use of CRF under the CARES Act. The desk review is being conducted by a contracted auditing firm, Castro & Company. TFU has participated in numerous meetings with the OOC and Castro. TFU advised the OOC regarding its responses to Castro's requests for information and documents required for the desk review. TFU advised the OOC regarding returned, stale-dated CRF/CARES Hardship Assistance checks. TFU advised OOC on how to address the legal issues regarding questioned and disallowed costs incurred by the Nation's CRF subrecipient, Tolani Lake Enterprises (TLE). TFU provided draft notices for OOC to issue to Tolani Lake Enterprises. TFU presented to BFC in executive session and issued a memo to BFC regarding the OOC's review of questioned costs. TFU assisted the OOC with drafting reports to Castro regarding TLE. In anticipation of the September 30, 2022 deadline for expenditure of CRF, TFU met with Castro and the OOC to obtain clarification that the Nation must issue all remaining CRF Hardship Assistance checks by September 30, 2022 but that Hardship Assistance recipients do not need to deposit or cash their checks by that date. TFU met with Treasury and the OOC to get clarification from Treasury that the Nation is allowed to replace disallowed costs with CRF-eligible expenses from the Nation's General Funds or internal trust funds rather than having to repay any CRF to Treasury. TFU advised OOC on options to reimburse the UUFB and/or S'hasin Fund using CRF/CARES funds for replacement of disallowed expenses of a subrecipient and for unexpended CRF Hardship Assistance Program funds.

3. Navajo Nation Comprehensive Budget Process: TFU attended all budget hearings and meetings of the BFC, Naabik'iyáti Committee, and Council and provided advice pertaining to budget matters. TFU responded to questions regarding requirements of the Appropriations Act and the Budget Instructions Manual (BIM). TFU communicated with the OMB and OOC regarding the budget process and advised the OMB, OOC, BFC, Naabik'iyáti Committee, and Council.

4. Office of the Controller (OOC): TFU advised the OOC with respect to issues involving the NNFRF Hardship Assistance Program, such as returned, expiring, and stale-dated checks; checks for deceased individuals; and Privacy Act issues. TFU consulted with the OOC regarding the TFU-drafted FRF subrecipient agreement template. TFU reviewed for legal sufficiency proposed service contracts between the OOC and Saintsbury Consulting; Jaeho Jang; Verity Management Consulting; Carolyn Atcitty; Noon and Associates; and Diné Protection Agency. TFU also reviewed and edited the OOC's corresponding sole source procurement memoranda for most of the above-named consultants. TFU communicated with the OOC and external auditor KPMG regarding the single audit and provided an update to the Attorney General's FY2021 attorney audit letter. TFU helped the OOC with aspects of the Nation's annual audit process, including assisting in the drafting of responses to the audit report and developing features of the Nation's Corrective Action Plan. TFU advised the OOC on tax issues involving New Mexico Non-Taxable Transaction Certificates. TFU issued a memorandum to the OOC in response to the Controller's question regarding the Judicial Branch's special duty pay. TFU issued a memo to the OOC's Accounts Payable Section regarding OOC Policies on electronic signatures. TFU also advised the OOC's Purchasing Section with regard to various procurement issues, and assisted the OOC in determining the sufficiency of procurement processes used by other Navajo Nation programs. TFU reviewed and proposed edits to the procedure documents on the use of the Gaming Revenue Distribution Fund. TFU advised the OOC with respect to the Veterans Trust Fund. TFU consulted with and advised the OOC regarding the Crownpoint Hotel and Crownpoint C-Store projects. TFU worked on various procurement issues with the OOC staff, involving the use of Navajo Nation general funds, FRF, federal grants, and other federal funds. TFU supported work done by the OOC's Investment Section related to the administrative management of the Navajo Nation's investments. TFU reviewed a proposed ONNSFA investment plan regarding the Margaret Sussman Trust. TFU worked with the OOC's Cashiers Section to modify the Navajo Nation contract with Wells Fargo governing the short-term investment of royalty payments deposited in the Minerals Department's lockbox. TFU reviewed a draft Indefinite Quantity/Indefinite Delivery master contract submitted to the OOC for review by the DCD. TFU advised the Accounts Receivable Section regarding business site lease settlement agreements. TFU worked on updating internal documents pertaining to various trust funds and accounts. TFU continues

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to advise the OOC with respect to the U.S. Treasury - OIG's desk review of the Nation's Coronavirus Relief Funds to review for compliance with the CARES Act.

5. Investment Committee (IC): TFU drafted resolutions for the IC and attended all IC meetings. TFU participated in meetings between the OOC and NNGE involving continued negotiations regarding loan repayment forbearance and proposed debt restructuring. TFU drafted another extended forbearance letter agreement between the Nation and NNGE. TFU participated in meetings regarding a proposed bond issuance to fund judicial and public safety facilities. TFU supported and advised the OOC on the solicitation of a Financial Advisor. TFU also assisted other Navajo Nation government programs with proposed investment tasks, including set-up of the Navajo Nation's SSBCI program, and a proposed investment stake in a business. TFU drafted an IC resolution, related to award of Finance and Accounting Scholarship Program scholarship awards for the 2022-2023 academic year. TFU drafted modification documents memorializing amendments to the Navajo Nation contract with investment manager Barrow Hanley. TFU drafted modification documents memorializing amendments to the Navajo Nation contract with Wells Fargo regarding short-term investment of revenues paid on mineral leases.

6. Office of Management and Budget (OMB): At the OMB's request, TFU reviewed Navajo Nation grant agreements between DODE and Diné College, Navajo Technical University, Navajo Preparatory School, and the Phoenix Indian Center. TFU also advised the OMB on the need to conform current practices in processing grant applications and agreements to the requirements as set forth in the BIM. TFU discussed with the OMB interim amendments to Appendix L of the BIM on external funding. TFU communicated with OMB regarding FRF matters and comprehensive budget matters. TFU consulted with the OMB regarding the TFU-drafted FRF subrecipient agreement template. TFU met with the OMB regarding requirements for OMB review of grant applications and awards per the BIM and OMB's enabling statute and plan of operation.

7. Office of the Navajo Tax Commission (ONTC): TFU advised the ONTC on the Navajo Nation Tax Code and corresponding regulations. TFU reviewed and advised the ONTC about proposed local chapter tax ordinances. TFU assisted the ONTC on procurement matters. TFU advised the ONTC regarding its expenditure plan and plan of operation. TFU discussed a presentation with the ONTC staff regarding the Possessory Interest Tax. TFU advised the ONTC on a taxpayer matter involving franchisors operating within the Navajo Nation. TFU advised the ONTC regarding the statute of limitations under the Uniform Tax Administration Statute. TFU advised on the rules for taxpayer appeals of ONTC decisions. TFU advised the ONTC on the requirement for taxpayers to register with the ONTC regardless of whether a tax exemption applies. TFU began researching the issue of taxing the gross receipts of remote sellers of software licenses. TFU reviewed taxpayers' appeal letters, participated in taxpayer conferences, and drafted decisions. TFU drafted private rulings for the ONTC.

8. Department of Retirement Services (NDRS) and Retirement Committees: TFU advised the NDRS on 401(k) Plan, Retirement Plan, and Deferred Compensation Plan matters. TFU generally advised the NDRS and the Retirement Plan Administrative Committee (RPAC), Retirement Savings Plan Administrative Committee (RSPAC), and Deferred Compensation Plan Administration Committee (DCPAC). TFU drafted proposed resolutions for RPAC/RSPAC/DCPAC, and attended monthly Committee meetings. TFU worked with the NDRS staff and outside consultants to draft and present proposed alternatives for amending the Retirement Plan with respect to the definition of Delegate salary, and final average earnings calculations for Delegates under the Plan. TFU researched and presented to the DCPAC on plan document requirements for resolutions related to including new eligible staff members in the Nation's Deferred Compensation Plan. TFU participated in multiple meetings with the NDRS, OOC, and Principal Financial Group to address needed updates to NDRS' files, including those related to Internal Revenue Code limitations. TFU advised the NDRS in response to Requests for Service involving individual (k) Plan and Deferred Compensation participants. TFU participated in meetings with the NDRS and Willis Towers Watson staff on the ongoing project to locate terminated vested participants of the Retirement Plan. TFU advised the NDRS on the 401(k) Plan

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informational flyer and the auto escalation notice. TFU advised the NDRS on procurement matters and completed legal reviews of NDRS' proposed contracts. TFU provided trainings to the NDRS staff. TFU was deeply saddened by the recent passing of the NDRS' long-tenured and beloved Retirement Officer, Delphine Martinez, and recognizes that the NDRS will need additional support and legal services moving forward as a result of this terrible loss. TFU extends sincere and heartfelt condolences to Ms. Martinez's family and NDRS colleagues. TFU stands ready to assist the NDRS as needed.

9. 24th Navajo Nation Council and Committees and Legislative Offices: TFU attended regular and special BFC meetings, and attended Council and Naabik'iyáti Committee meetings as needed, particularly related to budget and NNFRF matters. TFU attended several other Standing Committee meetings and work sessions. TFU responded to various questions by Council Delegates regarding NNFRF and related legislations. TFU participated in meetings on the Crownpoint Hotel and C-Store projects. TFU consulted with OLC on various draft legislations and legislative amendments, provided feedback, and suggested edits. TFU participated in calls with OLC to discuss budget legislations. TFU drafted legislations for the BFC's consideration related to investment and retirement matters. TFU provided a report and issued a memorandum to the BFC regarding questioned costs incurred by TLE. TFU presented a report to the BFC regarding DOJ's previous work drafting proposed amendments to the Procurement Act. TFU met with a Delegate, OLC, and the OOC regarding a Navajo Nation grant to the Navajoland Nursing Home for the Navajo Warriors Home. TFU assisted the OOC with providing reports to the HEHSC, the Naabik'iyáti Committee, and Council regarding Veterans Trust Fund issues. TFU communicated with the OOS regarding Legislative Branch's planned submissions of proposed FRF administration budgets. TFU issued a memorandum to Council regarding the possible FRF-eligibility of septic tank cleanouts. TFU met with the OLC, OLS, and DCD regarding requirements for FRF Delegate Region Project Plans. TFU responded to a Delegate's question on funding utility assistance for tribal members.

10. Miscellaneous Matters: TFU assisted and advised the Office of the Attorney General (OAG) on various NNFRF matters and procurement matters. TFU communicated with KPMG regarding the Attorney General's update to the FY2021 attorney audit letter. TFU frequently advised and assisted other units of the DOJ with various requests for services for their respective clients, particularly with respect to questions on FRF and other funds, contracts and procurement, payments to vendors, matters involving the OOC and/or OMB, and taxation. TFU drafted a memorandum regarding the requirements of sole source procurement and the need for compliance with the NBOA. TFU worked with the LU and the OOC on issues involving opening an escrow account for the Gold King Mine spill settlement. TFU communicated with the HSGU, outside counsel, OOC, and Navajo Nation programs regarding Treasury offsets. At the HSGU's request, TFU assisted in drafting proposed amendments to the Veterans Trust Fund statute. TFU attended meetings with the HSGU, OPVP, and DSS on DSS' Homeowners Assistance Fund program. At the NRU's request, TFU issued a memorandum to OOC regarding OOC Policies on electronic signatures. At the NRU's request, TFU drafted a memorandum regarding the applicability of the Navajo Hotel Occupancy Tax to a proposed mitigation package. At the NRU's request, TFU proposed amendments to the Acquisition of Lands Act and the Land Acquisition Trust Fund the statute. TFU advised the ECDU and CU on tax issues involving New Mexico Non-Taxable Transaction Certificates. TFU assisted the ECDU by proposing edits to the draft legislation to establish a new fund, and to a subrecipient agreement for administration of the DED's SSBCI program. At the ECDU's request, TFU communicated with the OMB and OOC regarding funding disbursement from the State of Arizona for capital projects. A TFU attorney participated in drafting a report to the United Nations. TFU attorneys attended continuing legal education webinars and conferences to satisfy licensure requirements.

**Water Rights Unit (WRU)**



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WRU is led by Assistant Attorney General G. Michelle Brown-Yazzie who supervises one (1) Attorney Candidate. WRU works to secure the water rights of the Navajo Nation whether by litigation or negotiation. WRU works with the Water Rights Commission, Department of Water Resources-Water Management Branch. Below is a summary of WRU's work for this quarter:

1. Colorado River Basin (AZ). *Navajo Nation v. Department of the Interior (DOI)*. As previously reported, DOI, the State of Arizona and other parties opposed the Navajo Nation's claims and the Ninth Circuit Court of Appeal's April 28, 2021 Opinion in this matter. In mid-February of this year, the Ninth Circuit denied the opposing parties' Petition for Rehearing En Banc. In July, the U.S. Solicitor General, on behalf of DOI, filed a petition for a writ of certiorari to review the issue of whether the federal government owes the Nation an enforceable fiduciary duty to assess and address the Nation's need for water from particular sources. Opposing parties filed a separate, yet related, petition for a writ of certiorari. During this quarter, the Skadden Arps law firm, which specializes in Supreme Court cases, joined the Navajo Team that includes WRU, DOJ's Litigation Unit, Sacks Tierney (ST), and the Meyer Walker and Walker firm. On September 23, 2022, the Nation filed responses to both petitions and awaits replies as well as the US Supreme Court's decision on certiorari.

2. Other Colorado River Matters/ Colorado River Tribes. In late March, DOI Secretary Haaland held a listening session in Albuquerque with all Colorado River Basin tribes and committed to working with the tribes on water issues affecting the Basin. In June, the Ten Tribes Partnership issued a letter to Secretary Haaland inviting her to meet with the Colorado River Tribes in August to build upon the topics discussed at the March. Secretary Haaland was unable to attend this meeting but the Bureau of Reclamation (BOR) officials met with the tribes and discussed potential coordination efforts to include the tribes in these water discussions. In light of the recent BOR announcement regarding river shortages, the Colorado River Basin tribes and other users are eager for federal action. This quarter, WRU represented the Nation at two Upper Colorado River Commission meetings in August and September. WRU continues to attend meetings for tribes on Drought Response Operations hosted by BOR.

3. Rio Grande Basin:

a. Augustin Plains Ranch (APR). After having its revised permit application dismissed by the OSE hearing officer in August 2018, APR filed an appeal with the 7<sup>th</sup> Judicial District Court of New Mexico, case no. D-728-CV-2018-00026. On August 23, 2019, the Seventh Judicial District Court granted the summary judgment motion of the New Mexico Environmental Law Center, in which WRU, on behalf of the Nation joined, and dismissed the Augustin Plains Ranch matter with prejudice. On September 23, 2019, APR filed an appeal. On November 26, 2019, OSE filed a cross-appeal that it subsequently dismissed and APR submitted its Brief-in Chief on October 26, 2020. On September 11, 2020, WRU filed a Notice of Appearance. WRU filed a Joinder in the Community Protestants' Answer Brief. This quarter, the Court of Appeals of the State of New Mexico issued an opinion reversing and remanding the State Engineer's decision to deny APR's application. In September, Catron County filed a petition for a writ of certiorari and the Carol Pittman Protestants Group filed a cross-petition for a writ of certiorari. WRU is reviewing these pleadings and preparing an action plan. The Nation first joined this matter due to the impact to the Alamo Reservoir water supply.

b. State Engineer v. Gray. No activity this quarter but the case is fully briefed and argued, and WRU is hopeful that the New Mexico Court of Appeals or Supreme Court will clarify the legal standard for finding abandonment.

4. Little Colorado River Basin (AZ):

a. In re Hopi Reservation HSR, 6417-203. Hopi Future Claims. Closing arguments in the Hopi contested case occurred September 30-October 1,

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2021. The Special Master released her findings and Recommended Decree on May 25, 2022. WRU, WMB, and contract counsel ST have reviewed and analyzed the report. The Recommended Hopi Decree gives insight to the Navajo Nation of how the Special Master may make decisions in the Nation's case. All written objections must be filed by November 21, 2022. The State District Court shall hold hearings and may adopt, modify, or reject the Master's report in whole or in part.

b. *In re Navajo Nation, 6417-300.* WRU, ST and the Nation's experts are continuously working to prepare for the Navajo Nation's case. With the Phase I trial scheduled to begin in April of 2023, WRU and ST continue to work on pre-trial matters. Depositions of the majority of witnesses were completed at the end of July 2022 with a general close of discovery on July 29, 2022. The discovery deadline for other specified fact witnesses and experts has been extended to October 14, 2022 and December 16, 2022. Considering ongoing population analysis issues, ST and the U.S. moved the court to amend the Case Management Order to Defer Consideration of Future Population until Phase II in late July that the Special Master denied on August 11, 2022. The Nation and objectors are continuously discussing issues that can be settled through joint stipulations to be approved by the court. Stipulations allow the parties to settle individual issues presented in this case thereby resolving the need for evidence to prove or disprove the issue.

- Phase II and Phase III. The Trial date for Phase II and III is scheduled for September 20, 2027. There is a stipulated scheduling order for pre-trial deadlines and hearings.

c. *In re Lower Little Colorado River Subwatershed, 6417-400.* No specific activity this quarter, but this proceeding has been focused on the preparation of the ADWR Technical Report on *de minimis* uses. The Nation objected to a number of matters addressed in the Report, but did not dispute that summary adjudication was appropriate for certain small uses. At a hearing on May 28, 2020, no party objected to the *de minimis* treatment of all stock and wildlife water claims and stock ponds with a capacity of less than 4 acre-feet as recommended by ADWR, and the Special Master entered her Report on October 30, 2020. Objections to the Report were filed on April 28, 2021. ADWR sought, and was granted, an extension to complete the preliminary watershed HSR to March 31, 2022. ADWR filed another request for an extension.

5. Zuni River Basin: Zuni Pueblo plans to submit a proposed fund based water rights settlement for Congressional approval this calendar year and would like the Navajo Nation to be a part of the proposed settlement. This quarter, Zuni Pueblo transmitted a draft settlement proposal to NN. WRU and WMB are reviewing the proposal and scheduled a meeting with Zuni legal counsel to discuss it. Both tribes' legal counsel agreed to continue monthly settlement discussions. Parties continue to work on a consensus hydrologic model that will allow the parties to evaluate impacts of various claims and future pumping scenarios as settlement proposals are discussed. WRU continues to work with WMB to obtain complete available data on water use and to update maps on the trust lands.

6. Gila River Basin. *No specific activity this Quarter.*

7. San Juan River Basin (UT) Settlement Legislation, Funding and Implementation: WRU and DWR/WMB continue to participate in NUWRSA implementation efforts. This quarter, WRU attended the monthly Navajo-Utah Water Rights Settlement Coordination meeting with Utah state and federal parties. In late July, the Utah Division of Water Rights mailed notice to file claims to the U.S. for the Navajo Nation Adjudication (09-1), part of the Southeastern Colorado River Adjudication in the State of Utah. The end of the 90-day filing period is on October 26, 2022. This is another step in the adjudication process, which is required to complete the implementation of NUWRSA. USDOJ-ENRD prepared a draft of the Nation's claims and WRU

is reviewing it.

Westwater. WRU and WMB participate in meetings with the Utah State Engineer's office, City of Blanding, NTUA and others to address an electric and water project for the community. This quarter, the project received the needed funding to commence and complete both portions of the project. In addition, the San Juan County Conservancy District approved the City of Blanding's request for 50 afy of water rights to serve the area, including the Westwater community. WRU facilitated the submission of a Letter of Support from the Navajo Nation for the water rights application, which was signed by President Nez in early June. The electrification of the Westwater community occurred this quarter. WRU continues to monitor and assist with the overall project's progress.

8. San Juan River Basin (NM):

a. Adjudication (Main Case 75-184). On April 5, 2021, the NM Supreme Court dismissed cert petitions challenging the New Mexico Court of Appeals decision, affirming the entry of the settlement decrees by the court in the San Juan River Basin Adjudication in 2013. A motion to reconsider was filed by objectors and on December 6, 2021, the NM Supreme Court denied the objectors' motion to reconsider. The NM Supreme Court remanded the matter to the NM District Court to address any outstanding matters. Since the ruling, WRU filed two Motions for Order to Show Cause against Victor Marshall, Intervener's Attorney, for failure to pay the Navajo Nation's court costs as ordered in this matter. To date, there has been not been any movement on the motions. As previously reported, Mr. Marshall was indefinitely suspended from practicing law in the State of NM. On May 26, 2022, the NM Supreme Court held him in Contempt of Court for practicing law without a license.

b. Clark v. Haaland. This matter was filed in the U.S. District Court for the State of New Mexico and is related to the Navajo Nation – New Mexico Water Rights Settlement regarding the San Juan River. The complaint was filed in early November of 2021 by objectors to the settlement who were represented by Mr. Marshall, who is the suspended attorney, mentioned above, that represented water user objectors in the cases filed in the New Mexico court system. In this matter, Dr. Rudy Shebala in his official capacity as the former DNR Executive Director is named as a Defendant. Other Defendants include the DOI Secretary Haaland, CEO of NAPI, and officials representing the State of New Mexico. The Navajo Nation, represented by WRU and DOJ's Litigation Unit, filed a joint motion to dismiss with NAPI counsel on January 14, 2022. The San Juan Water Users Association were dismissed as a Plaintiff in the matter without prejudice due to not having new counsel to represent them. On April 18th, the Navajo Nation filed a reply to Plaintiff's Response to the Motion to Dismiss. This quarter, the New Mexico District Court issued a final judgment granting motions to dismiss, including the Nation's. All claims asserted against Dr. Shebala and Mr. Zeller are dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity.

c. Ute Mountain Ute Sub proceeding. The litigation of the claims of the Ute Mountain Ute Tribe (UMUT) have been stayed while the Tribe is in negotiations with the State of New Mexico and the U.S. In March 2022, the UMUT and State filed a motion to extend the March 2022 deadline to file procedures concerning the UMUT sub proceedings. The deadline was extended to November 30, 2022.

d. Implementation of the Navajo Nation San Juan River Basin Settlement.

- Navajo-Gallup Water Supply Project (NGWSP). The Cutter Lateral is online and is delivering water to Huerfano, Counselor, Ojo Encino, Nageezi, Torreon, and White Horse Lake Chapters through the Cutter Lateral system.

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- Congressional Requests. Currently, the NGWSP has a cost shortfall of approximately \$500M. The Navajo Nation and other Project Participants' proposed amendments to PL 111-11 that are currently in the federal review process with Senator Ben Ray Lujan planning to be the sponsor of the legislation. On behalf of the Navajo Nation, WRU and NNWO are taking the lead working with Senator Lujan's office to move the proposed amendments through Congress. This quarter, WRU traveled to DC, at RDC's request, and met with the NM Congressional delegation to continue discussions on this matter. Senator Lujan's office hopes to introduce the proposed amendments this month.
- Double Taxation Issue. The U.S. contractors are being taxed by the Navajo Nation and the State of New Mexico while constructing the project on Navajo Nation lands in New Mexico. The proposed PL 111-11 amendments contain language that would address this double taxation issue if they remain in the bill and are passed. NM is not supportive of the language in the bill addressing the double taxation matter. WRU recommends that this matter be addressed by Navajo Nation leadership. The double taxation is an additional cost of \$50M to \$100M that is not budgeted. If the matter remains unresolved, the project and its completion date may be affected.

9. Rio San Jose Basin (NM), Settlement/Mediation: Settlement negotiations through mediation continue with meetings occurring on a weekly basis. Ramsey Kropf, former Deputy Solicitor at Interior and Special Master in the Wyoming general stream adjudication, serves as the mediator.

10. NMOSE Matters:

a. City of Farmington. As previously reported, the State Engineer through the assigned Hearing Examiner found the water rights intended for transfer under the City of Farmington's Application had been abandoned, resulting in the denial of the Application for a permit to change Place and Purpose of Use and Point of Diversion. The City of Farmington appealed the decision to the 11th Judicial District Court on August 27, 2021. The issues will be reviewed de novo. In March 2022, the NM District Court granted the U.S. motion to intervene in the matter. WRU and LU represent the Navajo Nation. The matter is scheduled for trial in February 2023. WRU and LU are working on pre-trial matters in accordance with the scheduling order. In early July, WRU and LU filed Expert Witness Disclosure Statement and Responses and Objections to Appellant City of Farmington's First Set of Interrogatories and Request for Production. WRU and LU also met with a contract consultant to complete a site visit to the Golden Meadows area for further case research. Parties agree on participating in mediation to avoid litigation and selected Ramsey Kropf as the mediator. WRU and LU continue to meet internally to prepare for mediation. Mediation is scheduled to begin in October 2022.

b. Diamond K. Bar Ranch L.L.C. and Kysar Living Trust. No activity this quarter, but the Navajo Nation, represented by WRU, has protested the application to change the diversion point of a multitude of water rights by this applicant. The U.S. also protests the application. WRU and the U.S. attorneys and technical experts have been meeting with the applicant's attorney and technical experts to find a solution and agreement. If the parties cannot come to an agreement, this matter may proceed to an administrative hearing in the next quarter.

11. Other Activities:

a. NN Water Rights Commission. WRU participates in WRC regular and special meetings providing updates and overviews of settlement and litigation activities regarding the Nation's water rights in all three states. This quarter, WRU attended and presented its monthly report to the Commission in July, August, and September.

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- b. RDC. WRU participates in the RDC regular, leadership and work session meetings in order to provide litigation and settlement negotiation updates regarding the Nation's water rights in AZ, NM, and UT. This quarter, WRU and WMB presented to RDC on matters related to the Rio San Jose Water Rights Settlement negotiations as well as the Arizona Water Rights Settlement negotiations.
- c. FERC Pump Storage Applications. No activity this quarter, but several applications to develop pumped hydro-storage facilities proposed to be located on the Nation have been filed with the Federal Energy Regulatory Commission (FERC). WRU will continue to monitor and respond to such applications.
- d. Recoup of NN-NM Settlement Fund Interest. WRU and NNWO continue to work with Rep. Leger-Fernandez's Office and the U.S. House Committee on Natural Resources Subcommittee on Water, Oceans, and Wildlife on amendments to address the water settlement funds authorized for the NN-NM settlement of the SJR. The interest earned on the funds were mistakenly deposited into an interest earning Trust Fund in 2009 and then inadvertently reverted to the Treasury in 2019. The proposed amendments would authorize the earned interest to be restored to the Nation's Trust Fund. Duck Valley and three other tribes are in a similar situation as the Nation. The proposed amendments are intended to be a "fix". The amount expected to be returned to the NN Trust Fund is over \$6 million. Once the bill is introduced, a hearing on the matter will be scheduled. Rep. Leger-Fernandez is expected to sponsor the Nation's bill in this matter.
12. DROA/DROP: WRU and DWR/WMB continue to participate in various weekly meetings hosted by USBOR, the State of New Mexico and others regarding drought impacts, operations management, interim guidelines and more.