

# NAVAJO NATION DEPARTMENT OF JUSTICE

**2023 QUARTER 1**  
<OCTOBER TO DECEMBER 2022>

Attorney General: Ethel Branch  
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## STATUS OF THE DEPARTMENT

The Department of Justice (DOJ) was established by statute, 2 N.N.C. §§ 1961 *et seq.*, within the Executive Branch of the Navajo Nation Government. The Navajo Nation Council created the DOJ by Resolution No. CF-8-82 on February 5, 1982. DOJ is comprised of the Office of the Attorney General (OAG), the seven Units of the DOJ, the Office of the Prosecutor and Juvenile Justice (OTP), and the Navajo-Hopi Legal Services Program (NHLSP), all of which are overseen by the OAG. The OTP has offices in Window Rock, Tuba City, and the Prosecutor's Office has 11 district offices throughout the Nation. The NHLSP is located in Tuba City, Arizona. The seven DOJ Units include the Chapter Unit (CU), Economic/Community Development Unit (ECDU), Human Services and Government Unit (HSGU), Litigation Unit (LU), Natural Resources Unit (NRU), Tax and Finance Unit (TFU), and Water Rights Unit (WRU).

The purpose of the DOJ is to provide legal services to the Navajo Nation Government, including the three branches of government, the Executive Branch divisions, the 110 chapters, and entities. 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 Code of Professional Responsibility. The Attorney General is the Chief Legal Officer of the Navajo Nation and is in charge of the DOJ and all legal matters in which the Navajo government has an interest, pursuant to 2 N.N.C. §1964. (Note, however, that the Office of Legislative Counsel also provides legal representation to the Legislative Branch, pursuant to various amendments to the Navajo Nation Code, including 2 N.N.C. § 1964, through CJA-06-10.)

This quarter, DOJ received 700 Requests for Legal Services (RFS) and completed 632. 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

On January 30, 2020, The World Health Organization declared a global pandemic due to the outbreak of coronavirus (COVID-19), a highly contagious and sometimes fatal respiratory virus. On March 11, 2020, the U.S. Department of Health and Human Services declared a Public Health Emergency in the U.S. due to the COVID-19 outbreak. And on March 11, 2020, the Navajo Nation declared a Public Health State of Emergency due to COVID-19 on the Nation.

American Rescue Plan Act (ARPA) Matters: This quarter, all Units remained actively involved in ARPA matters. On March 11, 2021, President Biden signed the American Rescue Plan Act (ARPA). ARPA established the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund, which provided \$362 billion dollars for state, local and tribal governments, including \$20 billion for tribal governments. By August 16, 2021, the United States Department of Treasury made two distributions of Fiscal Recovery Funds (FRF) to the Navajo Nation, totaling approximately \$2.1 Billion. The FRF funds were intended to build upon and expand the relief provided by the CARES Act.

On August 2, 2021, the Nation enacted CJY-41-21, establishing the Navajo Nation’s Fiscal Recovery Fund and the Expenditure Authorization Process. Section 7 of CJY-41-21 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 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 participated in drafting legislation, attended advisory meetings, work sessions, and Naabik’íyáti and Council meetings for an omnibus expenditure plan. In July 2022, the Nation enacted CJN-29-22. The resolution 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. To date, TFU, in consultation with outside counsel, completed a total of **446** preliminary reviews and **386** FRF initial eligibility determination reviews for **330** proposed expenditure plans seeking to utilize NNFRF; **133** of those reviews were completed during the first quarter of FY2023. TFU’s portion of the report herein has additional information about DOJ’s ARPA related activities.

## LITIGATION

Brackeen/YRJ ICWA Litigation: This quarter, DOJ continued to be involved in the *Brackeen v. Haaland* case, concerning the validity of the Indian Child Welfare Act, now pending 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 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, 5) whether ICWA violates the non-delegation doctrine. The Nation is a full party to the case, and collaborated with the other four 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 was held on November 9, 2022. Paul Spruhan, Sage Metoxen and Louis Mallette of LU attended the argument in person. A decision is expected by June, 2023.

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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. Our 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 was to be held in late December, 2022. However, the Brackeens successfully moved the court to stay the hearing until the outcome of the U.S. Supreme Court case discussed above. For the time being then, *YRJ* will be in the custody of the Brackeens.

**ADMINISTRATION**

The current vacancies in DOJ include:

1. Principal Attorney (WRU) - Position vacated on 3/12/21; position being advertised
2. Principal Attorney (HSGU) – Position vacated on 9/3/22; position being advertised
3. Attorney (HSGU) – position being advertised
4. Attorney (HSGU) – Position vacated on 9/9/22; position to be advertised
5. Attorney (LU) – Position vacated 8/5/22; position being advertised
6. Principal Tribal Court Advocate (HSGU) – Position vacated on 3/12/21; position being advertised
7. Administrative Legal Secretary (WRU) – Position vacated on 9/23/22; interview conducted on 12/28/2022
8. Legal Secretary (LU) – Position vacated on 8/26/22; position in process of being advertised
9. Legal Secretary (WRU) – Position vacated on 9/30/22; position to be advertised
10. Principal Attorney (OAG/FRF funded) – New position being advertised
11. Senior Attorney (TFU/FRF funded) – New position to be advertised next quarter
12. Attorney (CU/HSGU/NRU/FRF funded) – Three (3) new positions being advertised
13. Senior Programs & Projects Specialist (OAG/FRF funded) – Applicant referred; pending hire based on OBI

**OTP, NHLSP & DOJ UNIT REPORTS**

Following are the quarterly reports of the Office of the Prosecutor (OTP), the Navajo-Hopi Legal Services Program (NHLSP), and each the seven DOJ Units -- Chapter Unit (CU), Economic/Community Development Unit (ECDU), Human Services and Government Unit (HSGU), Litigation Unit (LU), Natural Resources Unit (NRU), Tax and Finance Unit (TFU), and Water Rights Unit (WRU).

## A. OFFICE OF THE PROSECUTOR

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

### SPECIAL PROSECUTIONS UNIT

At the close of FY 2022 4<sup>th</sup> Quarter Chief Prosecutor Jackson reported on the effort to initiate 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. This report is known as the *Provisional Comprehensive Declination Report related to Federal Declinations between January 1, 2019 to July 15, 2022*. As previously reported, this 40-page report was completed in late July 2022 and documented findings related to the analysis of 231 federal declination letters for that period. These 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 identified and explained trends that exist in the data that could be used to point out where the relationship between the federal government and the Navajo Nation could be improved. Additionally, the report reveals challenges that OTP faces in prosecuting these serious and egregious offenses. The report identified areas where improvement of communication and efforts between the FBI and U.S. Attorney's Offices could be enhanced. 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 provided to Navajo Nation Council Law & Order Committee Chair Eugenia Charles-Newton and Navajo Nation Council Sexual Assault Prevention Subcommittee Chair Amber Kanazbah Crotty. As a result of the findings documented in this federal declination report, the Special Prosecutions Unit (SPU) within OTP began work to effectively deal with these declinations.

The Office of the Chief Prosecutor (OCP) has been working over the past year and a half to lay the groundwork to create dedicated positions within SPU to focus solely on crimes declined for federal prosecution by the US Attorney's Offices (USAOs) with federal jurisdiction over Navajo Nation lands. Specifically, the cases that the SPU focuses on are those that have gone through the following process: (1) the FBI or a Navajo Nation Criminal Investigations program investigates a crime and makes a federal prosecution referral to the relevant USAO.; (2) the USAO reviews the submitted evidence; (3) the USAO declines federal prosecution and sends a declination letter to the Navajo Nation Chief Prosecutor. Cases that have undergone this process are then reviewed for possible prosecution within a Navajo Nation District Court.

At this time, the SPU has two employees who report directly to the Chief Prosecutor. The first is Senior Legal Secretary is Tijuanna F.

Jimm-Faber who has extensive educational experience in law-related fields, including criminal justice. She attended both Navajo Technical University and Grand Canyon University. She previously served as a Clerk for the Honorable Former Chief Justice Robert Yazzie. Her diverse educational and work experiences allow her to effectively blend Navajo concepts of restorative justice with the western thought processes related to criminal justice. The second is Kevin C. Barnett, who was recently hired as a Prosecutor. He is completing his J.D. Degree at the University of Kansas School of Law and will seek admittance to a state bar and the Navajo Nation bar after his graduation in May 2023. He worked as a Law Clerk for the OCP in Summer 2022 and for the 24<sup>th</sup> Navajo Nation Council in Summer 2021. He co-wrote the *Provisional Comprehensive Declination Report related to Federal Declinations between January 1, 2019 to July 15, 2022* this past summer with the Chief Prosecutor.

The SPU is working to hire Navajo-bar-licensed attorneys to serve as trial prosecutors for the federally declined cases. One potential SPU prosecutor is currently in the background investigation phase of his appointment. Funding limitations within OTP has resulted in a delay in advertising for the second SPU prosecutor position. The plan is to assign one SPU prosecutor for the western Navajo Nation major crime cases while the other would cover the eastern portion.

The majority of the SPU's work has been focused on identifying the key trends, issues, and opportunities related to the federally-declined major crime cases. A majority of the cases are not prosecutable due to the constrictive statute of limitations currently applicable to all crimes of violence, including sexual crimes: three years from the date of the offense. There were 261 cases declined for federal prosecution between 2019 and the end of 2022. Approximately 90 of those cases involved child sexual assault or abuse (including sending graphic images to minors), and about 55 involved homicides, including attempted homicides. Most of the child sexual assault cases are barred by the statute of limitations because many children understandably delay disclosure of sexual abuse for several years. By the time children disclose many of these cases, the statute of limitation will have run and prosecution in the Navajo Nation courts is not possible.

OCP has declined Navajo Nation prosecution of 117 major crime cases and is planning to decline 40 more. The major reason these declinations were issued is for the tolling of the statute of limitation. As previously stated, OCP cannot move these cases to prosecution because Navajo law does not allow prosecution after three years. As the SPU clarifies more information from the FBI as to certain cases, it is anticipated more Navajo Nation prosecution declination letters will be issued for that same reason.

To logistically organize these 261 cases, the SPU daily updates an Excel spreadsheet that uses a color-code system to prioritize cases and to keep track of which cases are not prosecutable due to the statute of limitations. It is also anticipated that other contracting services will be expended to assist in developing a data processing system to enhance the way these major crime cases are monitored, processed and reported by OCP. For cases that are prosecutable, the SPU uses a triage system to prioritize cases that are the closest to expiring due to the statute of limitations while keeping cases well within that statute of limitations on the SPU's radar.

The SPU regularly engages with the Navajo Police Department, the Navajo Nation Department of Criminal Investigations, and the FBI and USAOs. The SPU's more recent efforts with the FBI have been clarifying "Yellow Category" cases. For these cases, the federal declination letter failed to provide sufficiently clear information for the SPU to discern one or more of the following pieces of information:

(1) the date of the alleged offense; (2) the location of the alleged offense; or (3) the type of alleged offense. The SPU is requesting and confidentially securing federal and tribal investigative materials for “Red Category” cases. These cases are the closest to expiring for tribal prosecution and will require a prosecutor to accept or deny prosecution of the case.

## AROUND THE NAVAJO NATION

Following are notable reports from each OTP office:

**Shiprock:** The prosecutor in Shiprock recently litigated a case in the Shiprock District Court that resulted in a one-year incarceration sentence involving a family violence case. Staff in the Shiprock OTP office also participated in a local Christmas parade as they continue to establish positive interactions with the public.

**Chinle:** The prosecutor in Chinle reports that there are three (3) pending criminal cases involving defendants who exercised their right to a jury trial. No trials were held in Chinle during this quarter and the three jury trials have not been scheduled due to court closure. The prosecutor also worked with other programs including the Juvenile Healing to Wellness Court Initiative, Department of Health, probation office, and Indian Health Service. Lack of service by the Navajo police related to criminal and children cases remains a substantial problem.

**Tuba City:** The prosecutor in Tuba City is participating in restorative justice efforts related to criminal cases, and this is generating good comments from family members. The prosecutor also reports that lack of service by the Navajo police related to criminal and child cases has become significant. Victims of crime are benefiting from the close coordination of activities between the prosecutor and the Victim-Witness Advocate assigned to the Tuba City office.

**Dilkon:** The prosecutor in Dilkon presented at the *Justice for Victims of Crime (OVC) 17<sup>th</sup> National Indian Nations Conference* in Palm Spring, CA. Since 1988, OVC has sponsored 16 Indian Nations. Justice for Victims of Crime Conferences (Indian Nations Conferences) that have attracted thousands of tribal, state, local and federal personnel responsible for meeting the needs of American Indian/Alaska Native victims of crime. The Indian Nations Conference provides participants with a unique forum for victim advocates, prosecutors, law enforcement officials, judicial personnel, social services personnel, health professionals, survivors, volunteers, and others to share their successes, challenges, lessons, best practices, and visions on behalf of crime victims.

**Crownpoint:** The prosecutor in Crownpoint succeeded in transferring defendants to federal custody in *Navajo Nation v. Johnathan Pablo*, *Navajo Nation v. Erick Watson*, and *Navajo Nation v. Erick Charley*, for offenses under the Major Crimes Act. Efforts to transfer defendants to federal custody has been a routine occurrence since October 1, 2022. OTP partners including the Department of Corrections, Crownpoint Police Department, Department of Criminal Investigations, the Federal Bureau of Investigations, and United States Attorneys’ Office continue to work together to reach these successes.

**Kayenta:** The prosecutor in Kayenta successfully worked with the Navajo Police Department to attain service of court documents related

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to children's cases. On November 6, 2022, an incident involving a homicide that was caused by a stabbing was handled by OTP. The prosecutor filed a criminal complaint and a motion to deny release of the defendant. The defendant was served with a federal detainer that involved a second-degree murder federal charge. The defendant waived his detainer hearing and was released into federal custody. The coordination between Navajo Nation and federal officials was outstanding.

**Window Rock:** The prosecutor reports an effective working relationship between the OTP and the Family Court in Window Rock. He also acts as the supervisor for the White Collar Crime Unit.

**White Collar Crime Unit:** The investigators met with Office of the Controller and Ethics and Rules officials regarding cases under investigation by WCCU. They completed training Justice Web Interface to National Crime Information Center (JWIN), which authorized them to run federal criminal history checks.



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**OMB - PERFORMANCE SCORES FOR FY 2023 1<sup>ST</sup> QUARTER**

At end of FY 2023 1st Quarter, OTP met its program performance goal.

FINAL PROGRAM PERFORMANCE SCORES FOR FY - 2022 SECOND QUARTER					
OFFICE OF THE PROSECUTOR					
	GOAL STATEMENT				
	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 any source	Public Education and collaboration Aimed at Prevention and Intervention	Administrative and support Services Performance
	PROGRAM PERFORMANCE MEASURE				
	File/Decline 80% of every 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 on or decline 95% or every 100 referrals properly made to White Collar Crime Unit (WCCU) via any source	# of public education presentation provided to public safety partners and community members	Upload 90% of every 100 reports and Juvenile referrals into <i>Justware</i>
SCORES BY EACH OFFICE FOR EACH CATEGORY					
Window Rock	100%	95%	N/A	0	100%
Dilkon	100%	100%	N/A	1	100%
Shiprock	100%	91%	N/A	2	100%
Aneth	100%	80%	N/A	0	100%
Crownpoint	100%	100%	N/A	0	100%
Pueblo Pintado	100%	100%	N/A	0	100%
Tuba City	99%	100%	N/A	1	99%
Chinle	99%	100%	N/A	4	99%
Dzil Yijiin	100%	100%	N/A	0	100%
Kayenta	100%	100%	N/A	2	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	N/A	N/A	100%	0	N/A
Major Crimes Unit	N/A	N/A	100%	2	N/A
<b>AVERAGE SCORES:</b>	<b>100%</b>	<b>97%</b>	<b>100%</b>	<b>12</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 attends all Agency Council Meetings. CU routinely listens to Navajo Nation Council Meetings, Committee meetings, and Sub-committee meetings when Chapter matters are being discussed. This quarter, CU completed fifty-four (54) requests for legal services (RFS). CU participated in the following notable projects this quarter:

1. Mineral and Energy Projects: CU asks Navajo Leadership to create policies/regulations that express the extent of Chapter participation and involvement in mineral and energy projects. Throughout the Navajo Nation, there are several helium, solar, hydroplants, and other proposed projects primarily involving other DOJ Units. However, the growing number of Chapters asking CU for legal assistance requires CU to work with other DOJ Units. These projects take a considerable amount of time and resources. More details can be shared in a confidential setting.

2. Chapter Policy Reviews: Typically, Chapters will submit more than one (1) chapter policy for DOJ review and generally, those reviews are routine.

- *Summer Youth Employment* – Most policies mirror the 2001 TCDC template policy. CU completed one (1) SYE policy review this quarter. CU has continued to address concerns and answer questions regarding existing policies for those Chapters hiring students during this winter.
- *Chapter Scholarships* - At least one (1) Chapter has properly updated its scholarship policies. This policy aligned with the FY 2023 Budget Instructions Manual and with the ONNSFA policy as required by the BIM.
- *Public Employment Projects* – One governance-certified Chapter requested a thorough review of their existing PEP policy in light of a recent audit finding. The Chapter faced budget challenges hiring a full-time employee with benefits, and requested CU to determine if its current policy would allow the Chapter to fund such a position on a yearly basis. CU is working with the Office of the Auditor General to explore how PEP funds can be maximized to prevent potential audit findings, while also meeting the administrative and budgetary needs of the Chapter. This is an ongoing issue which may require a restructuring of the Chapter's PEP policy.
- *Veteran Organization Plans of Operation (POO)* – CU received at least three (3) policy reviews for POOs for Chapter Veteran Organizations. Each Chapter submitted a distinct POO for its Chapter-recognized committee. Prior to any policy review, CU must first determine whether the Chapter has formally recognized the Veterans Organization as a subcommittee of the Chapter through a valid chapter resolution or whether it is an incorporated entity. In one instance, CU was unable to review a POO because the organization had yet to be recognized as a committee of the Chapter.

3. ARPA-FRF: This quarter, CU received training in order to begin assisting the DOJ Tax & Finance Unit in reviewing ARPA-FRF project applications. CU also provided guidance to Chapters, through the ASC, on memoranda issued by DOJ on FRF procurement requirements based on Treasury Guidelines.

4. Credit/Debit Card Policy Template: Throughout the quarter, various Chapters requested guidance about whether a Chapter may open credit accounts with a vendor or use a credit/debit card to purchase chapter supplies. A total of seven (7) Chapters (both governance and non-governance certified) have specifically requested assistance drafting a comprehensive policy. At this time, CU has begun working with

the Office of the Auditor General to develop internal controls ensuring proper documentation, approval, reconciliation, and safeguarding. Each Chapter shared their unique circumstances, including how the COVID-19 pandemic stressed the need for Chapters to make payments by means other than a check.

5. Chapter Community Land Use Planning Committees (CLUPC): This quarter, CU received five (5) separate RFS for issues related to CLUPCs. One of the more prominent requests from Chapters was to review changes to their respective CLUPC plans of operation. CU noticed great disparities between Chapters' drafts. Therefore, CU is drafting a template POO, expected to be completed in the next quarter, which will provide guidance to Chapters on adopting procedures for existing and incoming CLUPC members. In particular, CU plans to make recommendations on member removal and ensuring that due process is provided for.

6. Chapter Ordinances:

- *Nahata Dzil Commission Governance Ordinance* – CU completed review of the proposed changes to the NDCG's second ordinance by providing revisions and suggestions for the NDCG to complete prior to approving a final draft.
- *Local Tax Ordinance* – CU continued to provide guidance to Chinle Chapter on the laws and procedures for local tax ordinances.

7. Memoranda of Understanding (MOU):

- *Beclabito Chapter and Farmington and Eleventh Judicial District of New Mexico and Magistrate Courts* – The Beclabito Chapter is working with the Farmington Magistrate Courts to offer a space for Navajo residents to attend virtual court appearances. The MOU is still under review. The Magistrate and court staff met with the Chapter on December 28, 2022.
- *Shonto Community Governance (SCG) and Shonto Group, Inc. and Building Communities* – SCG is looking to collaborate with Shonto Group, Inc., a non-profit organization, and Building Communities, an economic development strategic planning company, to implement a master plan and business plan for the future of the Rock the Canyon Art & Music Festival, which was funded by the USDA Rural Business Development Grant for \$99,500.00. CU provided input on the structure of the MOU to strengthen the understanding of each party's role with respect to the grant.
- *Tonalea Chapter and Navajo Hopi Land Commission Office (NHLCO)* – The NHLCO requested CU's assistance in revising the MOU to address Tonalea Chapter's requested revisions based on its status as a governance certified Chapter. Specifically, Tonalea requested updates to the procurement process and the NHLCO's role in processing the Former Bennett Freeze Escrow funds. This item is under review and is expected to be completed in the next quarter.

8. 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:

- *Chilchinbeto Chapter* – The Chapter requested CU's assistance on the processes for procurement and for contract execution for land surveying services. The Chapter solicited land surveying services for 17 homes located within the Chapter's exterior boundaries. Following the procurement process, the Chapter was able to contract with two separate Navajo-owned survey firms for biological and cultural surveying.

- *Churchrock Chapter* – The Chapter timely completed the procurement process and properly drafted a professional services contract for a survey of the Chapter compound. However, the selected vendor was ineligible. CU provided the necessary guidance.
9. To'Hajiilee Chapter and the Canoncito Band of Navajos Health Center, Inc. Board (CBNHC): CU conducted one meeting between the Chapter and CBNHC this quarter. CU emailed an interim plan which both parties accepted. This matter will remain on-going to finalize a permanent plan.
10. Burial Matters: CU worked with the Office of Legislative Counsel which resulted in Legislation 0201-22. First, the Burial/Cemetery statute in Title 13 of the Navajo Nation Code will be amended. In December 2022, the Navajo Nation Council approved the amendments and the resulting resolution will be sent to the President's Office to sign into law or veto. Assuming it is signed, the next step will be to present the comprehensive burial regulations to RDC for their approval.
11. Intragovernmental Office Space Use Agreements (IOSUA): In the fourth quarter of 2022, CU worked with the DOJ Tax and Finance Unit to ensure Chapters received their agreed-upon payments for IOSUAs entered between Chapters and Navajo Nation entities, but payments were still not being made. This quarter, working through administrative channels, CU assisted two Chapters in receiving their payments from OOC. CU also finalized an IOSUA between Red Rock Chapter and the Baca/Gallup ASC to operate out of the Chapter facility. CU also assisted ECDU with finalizing an agreement with Pueblo Pintado Chapter.
12. Insurance Requirements for Chapter Building Rental: The rental of Chapter buildings by community members is not new. CU maintains templates that Chapters can use for various uses which typically require renters to maintain adequate insurance coverage. This quarter, two Chapters submitted requests which were atypical. The Office of Risk Management confirmed with CU that all Chapters should require renters to purchase adequate insurance coverage, and CU provided guidance accordingly.
13. Administrative Service Centers (ASC): The eight (8) ASCs provide technical assistance and other services to all 110 Chapters. Typically, CU participates in bi-weekly calls with ASC Staff which is a great forum to share information. The ASC also submits a fair amount of RFS on various issues, and the following were notable CU projects:
- *ASC Plan of Operation (POO) Amendments* – CU assisted the Office of Legislative Counsel in drafting Legislation 0270-22, which the RDC approved in December 2022. The legislation amended DCD's overall POO, which ECDU spearheaded. CU worked on the portion containing the ASC POO. One amendment to the ASC POO divests Chapter officials' supervision over Chapter staff. If chapter officials wish to regain supervision authority, they will need to obtain training on employment matters. This quarter, CU also assisted seven (7) Chapters on employment-related matters.
  - *Accommodations for Employees with Disabilities* – This quarter, the ASC requested guidance from CU regarding the American with Disabilities Act as applicable to allowing emotional support animals in office buildings at the request of newly hired employees. CU provided guidance to the ASC based on the Navajo Nation Civil Rights of Individuals with Disabilities Act of 2018, which provides a standard of proof for employees and definition of reasonable accommodations for employers.

14. Chapter Meeting Quorum: Some, but not all Chapters, continue to have problems applying the 3-quorum rule originally created under Navajo Nation Council Resolution CMA-09-20 and most recently under CJA-01-22. CU received several odd questions from Chapters demonstrating their confusion about Chapter quorum requirements. At the beginning of the quarter, the public gathering limit was fifty-percent (50%) of the maximum occupancy pursuant to the Emergency Public Health Order (EPHO). That meant Chapters could have in-person chapter meetings up to 50% of the maximum gathering limit for the meeting area, but there still needed to be 6-foot spacing and therefore the limit may not be the full 50%. Then, on November 14, 2022, EPHO 2022-10 was issued which basically eliminated the public gathering limit. For Chapter meetings, there is no longer a numerical limit. Rather, there is no numerical limit on the number of individuals who can attend chapter meetings in-person, so long as the Chapter meeting accommodates attendees at a six-foot spacing and wearing masks. For some Chapters, they can now meet their pre-Pandemic quorum requirement. The question becomes whether the Navajo Leadership needs to amend CJA-01-22.

15. Other:

- Navajo Nation v. ONHIR – CU assisted with various tasks throughout the quarter.
- Presentation at the Local Governance Seminar at Twin Arrows in October 2022.
- Presentation at the Navajo Nation Law Conference in Tempe, AZ in October 2022.
- Matters related to Wastewater Treatment Facility involving Coalmine Canyon Chapter and Tuba City Chapter.

### **ECONOMIC / COMMUNITY DEVELOPMENT UNIT (ECDU)**

The Economic/Community Development Unit (ECDU) is led by Principal Attorney/*Acting* Assistant Attorney General Katherine Belzowski who oversees one (1) Attorney, one (1) Principal Attorney and one (1) Senior 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:

*Indefinite Delivery/Indefinite Quantity Contract Work Order and Supporting Documents (IDIQ)*. DCD will use four architect firms to conduct a broad range of architectural services for the various projects DCD administers through various funding sources. The IDIQ contracts for architectural and engineering services are in the process of being signed. ECDU assisted DCD to process the four contracts through the 164-process, primarily working to focus DCD on the need for internal processes and procedures to implement contracts. The current plan with Dr. Yellowman is to have a Mock Work Order processing session to for DCD and ECDU to identify all necessary processing steps and to assist ECDU in creating a comprehensive instruction and checklist form.

*Construction Contract Reviews*. ECDU continues to perform construction and construction-related contract reviews for DCD. While CPMD remains understaffed, its current project managers have increased the number contracts submitted from the fourth quarter of 2022. ECDU

worked with CPMD in addressing issues with the contracts in a timely manner so they can be deemed legally sufficient and submitted for signature rather than being sent back to the Program.

*DCD Plan of Operations (POO).* ECDU worked with Chapter Unit to finalize DCD's amended POO. ECDU worked closely with Office of Legislative Counsel to address their concerns with the POO and provide strike-through-underline versions of the POO for attaching to the legislation.

*ARPA Agreements.* EDCU worked with DCD to utilize the agreement for bathroom additions and electrical projects under CJN-29-22. DCD is looking to have NTUA complete these projects and has been working to finalize the agreements with NTUA.

## 2. Division of Economic Development:

*Business Site Lease Settlement Agreements.* ECDU continued to assist DED in drafting and executing business site lease settlement agreements. This quarter, ECDU helped processed multiple settlement agreements to address long outstanding issues. Through this process, ECDU recovered some monies for the Nation and allowed businesses to move forward with their business operations on the Nation. Notable settlement agreements are discussed below.

*Wells Fargo Tuba City Settlement Agreement.* Worked with DED and OOC to finalize the settlement agreement with Wells Fargo. As of this writing, Wells Fargo is circulating it for written approval and signature. Completion of this agreement will pave the way to enter into renewal and new leases for Wells Fargo Tuba City and Wells Fargo Shiprock.

*Antelope Point Holding (APH) Settlement Agreement.* Worked with DED and OOC to develop a counteroffer and finalize the settlement term sheet with Lessee. Worked with outside counsel to draft the settlement documents including the Forbearance and Settlement Agreement, Promissory Note, Guaranty, and Intercreditor Agreement, and to negotiate final terms with APH's attorney. Completion of these agreements will enable the parties to negotiate a renewal lease and to coordinate with the National Park Service to facilitate a new concession contract for the marina.

*Antelope Point Holdings Lease (APH) and Concession Contract.* Negotiated, finalized, and coordinated execution and delivery of Section 20.B.ix Agreement for APH to continue operation of the marina through November 18, 2023. Worked with DED to develop a working draft of the renewal lease based on the current Part I Lease form, incorporating provisions and terms requested by APH and acceptable to DED. Together with DED team, met with National Park Service to discuss coordination for renewal of business site lease and concession contract. These meetings will continue throughout 2023, with the next one occurring in person in Page on Thursday, January 19, 2023.

*Thompson's Acquisitions.* It took Lessee a very long time to follow up on DED's delivery of the proposed P3 Agreement as a core component of the Lease Settlement. When they finally responded, they asked to set aside the P3 Agreement and resume settlement negotiations without DOJ's involvement. The issue seems to be that Lessee believes the P3 Agreement is too complicated and punitive rather than a vehicle to

help the company complete the project by clarifying the roles of OOC, DED, and Lessee with respect to funding, construction, and operation of the project. DED is trying to get the negotiation back on track, and ECDU is working in the background to support DED in that effort. Lessee canceled its last meeting with DED.

*CSB Enterprizes.* These settlement discussions were put on hold by DED pending the Lessee's resolution of their funding shortfall for the project. CSB Enterprizes did try to get additional funds from Navajo Nation Council, but that effort did not seem to gain traction.

*Colorado River Interim Guidelines for Lower Basin.* Drafted comments to Bureau of Reclamation regarding the economic impact of the low water level on Navajo economic development projects, and worked with WRU, NRU, Division of Natural Resources, Division of Economic Development, Department of Water Resources, Heritage and Historic Preservation Department, NTUA, NAPI, and others to finalize omnibus comments on 87 FR 69042, Notice of Intent to Prepare a Supplemental Environmental Impact Statement for December 2007 Record of Decision entitled "Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead." The comment letter was delivered by OPVP to the Bureau of Reclamation on December 20, 2022.

*U.S. Treasury's State Small Business Credit Initiative (SSBCI).* Attended Council meetings with DED to respond to questions on Legislation 0151-22, to authorize the SSBCI application and designation of DED as implementing entity. The legislation passed unanimously. Worked with DED and Change Labs to finalize grant narratives, budget, and leverage tables and submit the Navajo Nation's initial SSBCI application. Worked with DED and Dineh Chamber of Commerce to finalize materials to submit for Navajo Nation's Technical Assistance Grant Application. DED and Dineh Chamber of Commerce are working to submit the application well in advance of the March 31, 2023, application deadline. The main holdup is that U.S. Treasury has not provided Tribal allocation amounts yet, so DED cannot prepare a meaningful budget and program plan.

*BRD Regulation of Non-Profit Entities.* ECDU worked with outside counsel to research non-profit regulation concerns and to propose options for BRD to clarify the scope of the Navajo Business Opportunity Act's (NBOA) application to non-profit entities. BRD decided to recommend NBOA amendments that clarify non-profit entities are subject to the procurement requirements of NBOA, and are eligible for Priority 2 certification if they are Navajo- or Indian-controlled (essentially removing the "ownership" prong from the "owned and controlled" test for priority certification). These changes will be incorporated into the omnibus NBOA amendments that ECDU is working on.

*Business Site Leases and Permits - Modifications and Approvals.* As in previous quarters, ECDU continues to assist the DED with business site leasing transactions, including emergency operating agreements and revocable use permits. ECDU reviewed multiple business site lease modifications and have been able to approve all but one, which required redrafting of the original lease terms to address confusion related to what is accounted for leasehold credit and what is the acknowledged Lessee business investment over the term of the prior, expired lease.

*Intellectual Property.* ECDU provided DED legislation to submit to Office of Legislative Counsel to establish the Intellectual Property Fund. DED submitted the legislation but was unable to meet the year-end deadline for submission of legislation. DED plans to resubmit

legislation to the new Council. The Intellectual Property Fund will house the Urban Outfitters Settlement monies received by the Nation and will fund personnel positions within the DED Intellectual Property Department. ECDU continues to work on trademark registration and enforcement issues for the Nation in collaboration with outside counsel. This includes communication with Navajo Nation program trademark holders, such as the Office of the Miss Navajo Nation, to determine the status of a mark's use and to implement renewal of its registration; and initial follow up on multiple pre-existing enforcement matters or requests for licensure, and outstanding letters to external parties regarding trademark licensing or enforcement. ECDU worked with DED to determine its preferred action on each item.

*Tuba City Partners (TCP)*. In October 2022, discussion of a Navajo Nation buyout of TCP began, which included Navajo Nation assumption of all liabilities attached to TCP and resolution of any outstanding non-payment of rental issues on the part of Navajo Nation programs as lessee and TCP as lessee. Currently, DED and the TCP partners are assembling necessary information needed to formulate a transaction that ECDU will put into writing. This involved multiple meetings with interested parties, in addition to reaching out to various Navajo Nation Departments for records that may be held in those offices. ECDU assembled a comprehensive record of the Navajo Nation's Business Industrial Development Fund investments and bridge loans to TCP, including the reasoning behind each of the three investments and the expected ownership interest change, if any, for the Navajo Nation for the investments/loans. ECDU also assembled multiple tenant leases for Navajo Nation programs, including modifications, that have leased space throughout the years.

### 3. Gaming:

*2021 Arizona Tribal-State Gaming Compact*. Reviewed material and provided support in connection with NABID-49-22, legislation to approve Appendix K to regulate event wagering on Navajo Nation trust land. Oversaw continuing compact trust fund negotiations, which are being coordinated by Navajo Nation Gaming Enterprise's (NNGE) outside counsel. Reviewed proposed memorandum of understanding with Arizona Department of Gaming re cashless wagering. Monitored activities among other Tribes under the 2021 Compact through news alerts.

*Lower Highway 89 FTT*. Completed work with Office of Attorney General, Navajo Hopi Land Commission (NHLC), Navajo Hopi Legal Services Program, and NNGE to finalize the Memorandum of Agreement (MOA) between the Navajo Nation and Office of Navajo-Hopi Indian Relocation, which involved leadership support from Office of the Speaker, NHLC Chairman Otto Tso, and Office of the President and Vice President to conclude negotiations with the Office of Navajo-Hopi Indian Relocation's Executive Director. Worked with NHLC Chairman and Chief Legislative Counsel Dana Bobroff to draft legislation for NHLC approval and recommendation for Naabik'iyati' approval of the MOA (NHLCO-07-2022), and Navajo Nation Council approval of the MOA (Legislation 0231-22), which was approved by RDC, then BFC, Naabik'iyati', and finally by a 12/29/2022 unanimous vote by Navajo Nation Council on a consent agenda. To date, the engrossed legislation has not been uploaded to DIBB.

Attended weekly meetings to coordinate with NNGE to complete the fee-to-trust application and supporting documentation. We have hit a snag in obtaining title commitments for the land because the title companies are requiring a waiver of Navajo Nation sovereign immunity



to issue a title policy. NNGE is preparing a memo and recommendation on this issue. Along with NNGE, met with BIA Regional Office realty team to preview the fee-to-trust application for information regarding their process and recommendations to expedite their review.

#### 4. Election/Voting:

*Election Day.* Worked with 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. Operated an election day command center in conjunction with ASU Native Vote, Election Protection, DCD Administrative Service Center. Filed an emergency action in Apache County to keep the Many Farms polling place open until 9 p.m. because there was a 2-hour delay in opening on election day. Filing was completed with the assistance of ASU Native Vote and ACLU.

*County Consultations.* ECDU continued its Arizona county meetings with Apache, Navajo, Coconino, and the Secretary of State Office leading up to and after Election Day. These meetings provided the Nation an opportunity to protect the interests of Navajo voters. DCD and the Navajo Election Administration were also in attendance at the meetings and helped to coordinate responses and address issues at the Chapter level. ECDU also worked with counties and the New Mexico Secretary to address New Mexico related issues. The counties in New Mexico are not as coordinated in their approach to election matters on the Nation and often times the Nation has to take a county-by-county approach.

*NTUA Support on Election Day.* ECDU worked to facilitate NTUA wireless services for interested counties on Election Day. In order for the Counties to operate vote centers on the Nation their machines need to be able to connect to the internet. This includes having a back-up source for connectivity in case the first source fails. With the assistance of ECDU, NTUA Wireless provided back up wireless services for Navajo County's voter centers. NTUA wireless provide this service free of charge to the Nation and the counties. Navajo County had such a positive experience with NTUA that it encouraged Apache County to look into it for next election cycle. Apache County currently has no voter centers on the Navajo Nation on Election Day due to their alleged lack of internet connectivity. It is likely Apache County's lack of vote centers contributes to them being number one in the state for rejected ballots on Election Day.

*Voting -- Related Legislation and Litigation.* In conjunction with the Litigation Unit, ECDU monitored and advised Navajo leadership on election-related litigation. All of the election-related litigation that took place this election cycle occurred in Arizona. Many cases were filed challenging new election laws passed by the Arizona Legislature during its 2022 term. At this time, ECDU has not advised Navajo leadership to become involved in any pending cases. However, as more problematic laws take effect, ECDU will monitor their implementation by the State to determine if litigation is recommended for the Nation.

### **HUMAN SERVICES AND GOVERNMENT UNIT (HSGU)**

HSGU is DOJ's largest unit and is led by Assistant Attorney General LaTonia Johnson who manages two (2) Principal Attorneys, one (1)

Attorney, 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 (Motor Vehicle Code) and Title 17 (Criminal Code) authorities. DOJ met with DNR and DPS and outlined the issues related to the purpose and implementation of the Agreement. The DNR Attorney noted that he would make necessary revisions to the Agreement. However, concerns remained after HSGU and the Natural Resources Unit (NRU) reviewed DNR's revised Agreement. HSGU and NRU then agreed to draft a joint memorandum to DPS and DNR. HSGU drafted a memorandum that outlined concerns that include whether DNR employees have the authority to carry out Title 14 and 17 authorities, the non-application of the Federal Tort Claims Act (FTCA), and the scope of DNR's P.L. 93-638 contracts. HSGU and NRU are finalizing the memorandum. There may be a number of liability issues if DNR and DPS move forward with the DNR's current draft of the Agreement.

2. Department of Corrections (DOC) Internal Policies: HSGU spent considerable time reviewing and editing DOC internal policies, including, but not limited to training, personnel, and disciplinary actions of detainees. There are numerous internal policies, each containing three (3) parts. The internal policies are to assist DOC in its performance when working internally and with detainees and third parties. HSGU noted that while the DOC are internal policies and only applicable to DOC, there are other applicable Navajo Nation policies that would be applicable.

3. Amendments to the Title 17 of Navajo Nation Code (Criminal Code): In November 2022, the Office of the Prosecutor held a week-long session to review and discuss amendments to the Criminal Code. NPD, DOC, and HSGU attended the session. The proposed amendments extend statutes of limitations for serious offenses, including sexual assault and crimes against children, so that law enforcement has sufficient time to prosecute; recommend mandatory minimum sentences and tiered sentencing for certain serious offenses to deter and promote accountability for repeat and violent offenders; and implement a mandatory safety hold for public intoxication offenders. DOJ reviewed the proposed Title 17 amendments for legal sufficiency, but deferred to the Navajo Nation Council for policy and administrative amendments with recommendations from OTP and DPS. DOJ attended two Naa'bi'k'iyati Committee meetings discussing this matter. The Navajo Nation Council ran out of time during the special Council session in late December 2022, and the amendments were not considered by the Navajo Nation Council.

4. OIG Audit of DPS: DOC used four (4) American Recovery and Reinvestment Act (ARRA) grants (two planning and two construction) to construct new facilities in Tuba City and Kayenta. The grants were awarded to DPS. The ARRA grants were administered through USDOJ, the Office of Justice Programs (OJP), and Bureau of Justice Assistance (BJA). In 2015, the OIG audited the ARRA grants and identified nine (9) findings totaling \$36 million. To date, there is one (1) outstanding finding, which is recommendation 9. While recommendation 9(a) was closed, recommendation 9(b) is still open, outstanding and the remaining outstanding amount is \$20,375,234.00.

This relates to the excessive building cost for the Tuba City correctional facility. For the remaining unclosed costs for Tuba City, OJP informed the Navajo Nation that in order to settle and address recommendation 9, the Navajo Nation may either re-pay \$2,322,776.68 or “reprogram” the funds for another use, such as inmate transition services, chemical dependency services, and state/federal use. While DOC has chosen to reprogram and is working on a reprogram plan, there may be plans to pay out the \$2,322,776.68.

## II. PUBLIC LAW 93-638:

1. P.L. 93-638 contracts with Bureau of Indian Affairs (BIA): HSGU assisted OMB and 638-funded programs in responding to BIA NRO letters related to the 2023 Successor AFA (SAFA) renewal packets. Most of the SAFAs that required a response were for additional reporting requested by BIA NRO. HSGU, OMB and the 638-funded programs met with BIA NRO virtually to discuss the need for the reporting and clarification regarding the programs’ reporting. BIA NRO just recently provided the first award letter with partial declination for the Tribal Courts program. BIA NRO does not agree with a couple of items in the Navajo Nation’s SAFA language. HSGU will work with outside counsel on how to best respond to BIA’s issues. There are five (5) contract renewals – Adult Detention, Juvenile Detention, Forestry Management Program, Water Development Program and the CWA program. HSGU completed 164(A) review and authorizing legislation. HSGU was on standby at the Standing Committee meetings in case there were questions about the contract renewals. The legislations passed. However, due to the untimeliness of the contract renewals, they are still awaiting signature by the President and have not yet been submitted to the BIA NRO for review. Due to the late processing and legislative process, the contract renewals were submitted to BIA in late December. Therefore, the contract renewal will be delayed and not in place for the 2023 calendar year. BIA sent a letter dated December 14, 2022 to the Navajo Nation indicating that the contract renewal proposals have not yet been received for Forestry Management, Water Development, and ICWA, and that those contracts expire on December 31, 2022 with the BIA stating that upon expiration the Navajo Nation will not have authority to continue providing those contracted services.

2. P.L. 93-638 contracts with Indian Health Services (IHS): HSGU attended the virtual negotiations with NAIHS for the 2023 SAFA for all three (3) contracts. NAIHS brought up concerns that will need further discussion. NAIHS provided the completed 2023 SAFAs for signature by the President. OMB returned the executed agreements to NAIHS on December 19, 2022 so the Navajo Nation should be receiving the 2023 funding for the three contracts by the beginning of 2023.

## III. NAVAJO DEPARTMENT OF HEALTH (NDOH):

1. DBMHS Tribal Opioid Response (TOR) Grant: DBMHS provided a final naloxone policy for internal use as NDOH administration determined that the policy is not ready to be provided Navajo Nation-wide. HSGU reviewed the policy and returned it to DBMHS to seek legislation to implement the policy. DBMHS provided several contracts to carry out the work needed by the TOR Task Force with the renewal of the TOR grant. This includes a telephone hotline, database for statistics related to opioid use, and public relations services for general public. HSGU reviewed the contracts for legal sufficiency.

2. 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 if reporting requirements be simplified. The tribal consultation is supposed to include ACL and the three states. So far, NDOH has been successful in discussions with the states regarding what is needed for reporting purposes and a compromise regarding the data system to be used by the Navajo Nation.

3. Behavioral Health Providers Recruiting Navajo Individuals: The Law and Order Committee (LOC) and Health Education and Human Services

Committee (HEHSC) were provided reports regarding some unknown Behavioral Health providers that are recruiting Navajo individuals for services in the Phoenix area. LOC initially asked for a report on the matter for December 12, 2022, but the report was not on the meeting agenda. HSGU met with NDOH regarding how to respond to this matter. It has been noted that this type of recruitment has been occurring for years. HSGU recommended that NDOH provide public education to the general public regarding these recruiters and that if anyone does want to seek behavioral health services, they can work with DBMHS. HSGU further recommended that NDOH contact AHCCCS to request a tribal consultation on the matter. LOC once again requested a report during a regular meeting on December 19, 2022, but the LOC meeting was cancelled due to a Naabikiyati Committee. HSGU will continue to work with NDOH on addressing the matter.

4. Síhasin Funding Agreement with Navajoland Nursing Home Inc. (NNHI) for Navajo Warriors Home: HSGU worked with NDOH and NNHI counsel to finalize the Síhasin funding agreement for funds appropriated by the Navajo Nation Council through Resolution CAP-20-22 for the construction and operation of a veterans nursing home. NDOH has administrative oversight of the funds. NDOH submitted the agreement for 164(B) review.

5. Navajo Women Infants Children Nutrition Program Vendor Agreements: NWIC had to renew their vendor agreements with local Navajo Nation-

area vendors who provide food to NWIC clients. NWIC submitted the agreements to HSGU for review. The vendor agreements will be for three fiscal years starting October 1, 2022. Some vendor agreements did not include all required documentation so they had to be returned to NWIC for correction. HSGU completed a second review of the vendor agreements that were resubmitted.

#### 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. For this quarter, HSGU conducted four case staffings. HSGU will continue to staff cases and answer related legal questions.

2. Utah State-level ICWA Bill: Since fourth quarter of 2022, the ICWA Program and HSGU worked with the State of Utah working group to address the Navajo Nation's concerns and recommendations in the proposed Utah state-level ICWA bill. HSGU attended meetings with the State of Utah and attended the Native American Committee meeting of the Utah Legislature. HSGU drafted resolutions for HEHSC, the Naabik'iyati Committee, and the Navajo Utah Commission to approve and support the Utah ICWA to be considered during the Utah

Legislative session in January 2023.

3. Arizona ICWA Bill: HSGU provided comments on the proposed Arizona state-level ICWA bill to a working group of Tribal Arizona attorneys. However, the Arizona working group is not as active as the Utah working group, and it does not appear that the State of Arizona, either through the Governor's Office or Department of Child Safety, organized the Arizona working group.

4. ICWA Program and Department of Family Services (DFS): HSGU coordinated a meeting between the ICWA Program and DFS to discuss a plan between the ICWA Program, DFS, and DOJ regarding how to handle exclusive jurisdiction for ICWA cases and the transfer of jurisdiction to DFS to avoid untimely and no responses from DFS. It was recommended that DFS develop a written process to ensure that all DFS staff are aware of the process and their responsibilities to protect the best interests of the Navajo Nation and affected Navajo parents, guardians, and/or children.

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

1. Johnson O'Malley and Gallup McKinley County Schools (GMCS): The Litigation Unit 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. It appears there was some miscommunication by attorneys for the Department of the Interior to Sanchez, as he was under the impression the Navajo Nation had preconditions to sitting down to discuss the matter, which LU told him was not true. LU informed OPVP and DODE of GMCS interest in meeting to discuss JOM issues. Sanchez said litigation was still on the table as a possible next step, after the voluntary dismissal of the prior case. On September 23, 2022, a meeting was held between OPVP, DODE, and DOJ on the JOM issues and how to approach negotiating with GMCS. The issue of GMCS not having an Indian Education Committee (IEC) is based on a HEHSC Resolution. LU commented on several issues. First, if JOM subcontracting does go to litigation both sides have good arguments and LU is highly unclear as to a litigation outcome. Second, since HEHSC is the committee that passed the IEC policy, it is a consideration that HEHSC could change the policy which could be an important negotiation strategy. This quarter, LU and HSGU updated HEHSC on this matter. There was a meeting on November 23, 2022 with JOM, OPVP, and DOJ to discuss the Navajo Nation's approach to the JOM/GMCS negotiation. LU will write a letter for President Nez to outline that the HEHSC has reasserted that HEHSC wants parent participation in the decision-making of how GMCS spends the JOM funds and that the Nation still expects GMCS to have an IEC to fulfil that expectation. The letter will outline that GMCS could still submit documentation for reimbursement, but would need an Indian Education Committee. Further, the Navajo Nation plans to pursue litigation on the redistricting boundaries, which may further strain the relationship. The Navajo Nation's approach for the JOM/GMCS negotiations is to extend the Navajo Nation's willingness to meet with GMCS to address this matter. It should be noted that GMCS is also considering redistricting the school board representation areas -- this is not a JOM issue. However, one should be aware that there are two separate issues -- JOM subcontracting and redistricting -- that are under consideration.

2. Navajo Head Start (NHS) Audits: In September 2022, DOJ received notice of an unpaid debt to the U.S. 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 in the Navajo Nation's 2018 audit related to questioned costs of Navajo Head Start, which led the Administration for Children and Families (ACF) to disallow costs on an ACF grant to Head Start. The options for a resolution of the Head Start debt were: (1) Head Start can do nothing and the U.S. Treasury would offset the next award of federal funding to any Navajo Nation program, not necessarily Head Start funding; (2) Head Start could ask the Navajo Nation Council to appropriate UUFB to pay the debt; or (3) DOJ could ask OOC to allow use of the CMF. 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 Mark Tilden and Brandy Toelupe, filed a Notice of Appeal of this finding on September 27, 2021, given the Navajo Nation's compelling evidence that it did indeed follow proper protocols regarding Employee Health Benefit revenues. On November 4, 2021, Tilden & Toelupe filed the Navajo Nation's appeal brief. On December 21, 2021, Tilden & Toelupe filed a sur-reply brief. This quarter, the Departmental Appeals Board (DAB) continues to have this issue pending and as such NHS is waiting for DAB to issue its decision. If the DAB sustains the disallowance, interest and penalties will be charged on funds determined as properly disallowed from the date of the disallowance letter.

3. ODAC Criminal Background and Investigations Policy Regarding School Board Members: At the request of DODE, HSGU reviewed for legal sufficiency the proposed policy entitled "Mandatory Criminal Background Checks and Investigations for Local School Board Members." The proposed policy relates to the Indian Child Protection and Family Violence Prevention Act and Navajo Nation law, which requires DODE to conduct background checks on school board members of schools located on the Navajo Nation, including Bureau of Indian Education-operated schools and tribally-controlled schools. Pursuant to 11 N.N.C. § 8 (D)(4)(j), all school board members must maintain all qualifications throughout their terms of office. This is supported by the decision in *Sandoval v. Navajo Election Administration*. HSGU advised that it is imperative to include the requirement of background check in the policy.

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

1. Insurance Services Department (ISD): HSGU provides legal assistance to ISD and its insurance programs -- Risk Management (RMP), Workers Compensation (WCP), and Employee Benefits (EBP) – and to NNIC as ISD is responsible for providing administrative assistance to NNIC.

*Navajo Nation Insurance Commission (NNIC)*. In this quarter, NNIC met on two occasions. NNIC received reports from RMP, WCP and EBP on programmatic issues and activities; accepted other reports; and took the following actions:

- Received and accepted the Employee Benefits Plan Financial Report for September 2022 ending date.
- Approved a three-month premium holiday for all the employer participants and insured members effective October 1 to December 31, 2022 at a cost of \$11.6M which will be paid for by the Employee Health Benefits Funds surplus;
- Approved additional increases in benefit modifications, including but not limited to annual vision benefits from \$250 to \$400; weekly short term disability from \$600 to \$650.00; the modifications also include reduction of annual out-of-pocket for member/family from \$4000 to \$3500 and from \$8000 to \$7000, respectively; reduction of member/family annual dental deductible

from \$150 to \$50 and \$300 to \$250, respectively; and an increase of annual maximum dental benefits from \$1500 to \$2500 for all insured members; and

- Approved the Employee Health Benefits CY 2023 renewal premium rates.

*COVID Related Issues Related to 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. Assessing the compensability of a COVID-related claim generally becomes an issue due to lack of medical records needed to determine an exposure date.

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

*Tribal Cases.* There are 62 cases pending with both the Navajo Supreme Court and Navajo District Courts as follows:

- 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.
- 50 District Court cases continued within this quarter. Out of the 50 cases, four were settled during the fourth quarter of 2022, but are still pending with issuance of dismissal orders. Two bench trials, as previously reported, were held in January and October 2017, respectively, but rulings/judgments have yet to be issued. Arita Yazzie of HSGU assists with the defense of these cases, including discovery, motion practices, and trial preparations. In this quarter, she assisted with and/or attended seven motion/pretrial hearings. Arita also assists with assessing the degree of liability exposures on other cases for settlement purposes.

*State Court (Arizona).* Two cases previously dismissed in favor of the Navajo Nation remained active during this quarter pending the issuance of a dismissal orders.

*FTCA Cases (AZ and NM District Courts).* Six cases continued in this quarter, one of which was settled and another one was dismissed. As the assigned Navajo Nation FTCA Liaison, Arita Yazzie of HSGU assists the United States with preparations of (1) responses to extensive written discovery (Interrogatories and Requests for Production) which also entail 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. In this quarter, Arita assisted with the preparations of responses to written discovery and motion reviews in two cases. In addition, several FTCA administrative claims are pending and included in the pre-litigation count below.

*Pre-litigation Claims.* Approximately 40 pre-litigation claims are pending, 24 of which represents 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.

*Quarterly Cases / Claims Reviews.* One quarterly cases/claims review meeting was held this quarter. The attendees included NNDOJ,

Navajo Nation insurance defense counsel, RMP staff, Navajo Nation insurance investigator/adjustor, and insurance broker of record. Cases/claims reviews include defense strategy discussions and assessment of liability exposures to ensure sufficient reserves are in place and reported to the OOC.

*Risk Management and Workers Compensation Coverage Issues.* HSGU assisted with addressing and assessing a number of general liability and workers compensation coverage and other insurance related issues : (i) a proposed MOU between Navajo Police Department and Navajo Division of Natural Resources law enforcement personnel concerning enforcements of Titles 14 and 17; (ii) waiver of operator liability (road constructions, etc.); (iii) procurement rules as they relate to insurance claims processing for property losses (building structural losses); (iv) Navajo Nation program leased property and liability coverage issues; (v) AZ tribal ranches agreement relating to the state's request for workers compensation subrogation waiver and the provision of employers liability coverage; (vi) Chapter facility usage/rental insurance coverage issues; (vii) records release and subpoena issues; (viii) workers compensation coverage issues; and (ix) FTCA and related 638 contract mandates.

*New Mexico Gaming Compact.* HSGU assisted with (i) a review, analysis and advice provided on the NM Gaming Compact Agreement arbitration provision as it relates to the applicability of the Navajo Sovereign Immunity Act arbitration provision and mandates; (ii) policy reviews of the Risk Management FY 2023 property and casualty insurance coverage policies; and (iii) the negotiation of a Professional Services Contract for actuarial consultant services.

### 3. Workers Compensation Program (WCP):

*COVID Related Claims.* In coordination with ISD, HSGU continues to closely monitor claims that may be filed and pass information back to WCP on matters that HSGU believes may have issues. As such, WCP is aware of the many challenges the Navajo Departments of Police (NPD) and Corrections (NDOC) officers and other front-line responders deal with daily while attending to arrestees who are COVID positive.

*General Workers Compensation Claims.* The Navajo Nation Workers Compensation Program is fully self-funded and governed by the Navajo Workers Compensation Act. HSGU is responsible for assisting with issues that arise in the administration and adjudication of worker's compensation claims, including interpretation and analyzation of the statutory mandates. In this quarter, HSGU assisted with the disposition, acceptance and/or closure of 14 claims, six of which resulted in final settlements. In addition, HSGU continues to assist with one appeal pending before the Office of Hearings and Appeals. HSGU also provided written advice in this quarter on (i) the course and scope of employment (burden of proof, acting under the directions of employers, and substance abuse and alcohol issues); (ii) the maximum medical improvement assessments; (iii) the medical impairment rating and settlement calculation issues; (iv) records retention/release issues, along with the applicability of the Navajo Nation Privacy and Access to Information Act; and (v) subrogation lien issues in third party liability claims.

*Training.* HSGU provided a training for the Workers Compensation Program staff on Traditional Healing, Vocational Rehabilitation and



Appeals Rules and Regulations used as a part of the Navajo Nation Workers' Compensation Act claims administration and adjudication.

4. Employee Benefits Program (EBP): HSGU assisted with the finalization of several third-party liability claim subrogation lien recoveries and with the review and negotiation of a Professional Services Agreement for a third-party administration services.

5. Fleet Management Department: Since the fourth quarter of 2022, HSGU has assisted the Fleet Management Department and the Motor Vehicle Review Board in updating the Navajo Nation Vehicle Operator's Policy Manual.

## VII. DIVISION OF HUMAN RESOURCES (DHR):

1. Department of Child Support Services (DCSS): HSGU continued to work with DCSS and the Office of Hearings and Appeals to comply with the Full Faith and Credit for Child Support Orders Act (28 U.S.C. §1738B). As previously reported, HSGU developed forms and procedures to process foreign child support orders. HSGU plans to schedule a meeting next quarter with all of the parties (HSGU, DCSS, and OHA) to inform them of the processes thus far as well as the forms and getting input.

2. Department of Child Support -- Enforcement Administrative Process: HSGU continued to update and revise this 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.

3. Department of Child Support Services – Policies and Procedures Manual Update: HSGU worked on the DCSS Policies and Procedures Manual update in this quarter. HSGU met with DCSS administration on August 2022; and HSGU, DCSS Staff, and DCSS Administration met via video conference on November 30, 2022. Although substantial effort and time have been extended by HSGU, DCSS wants further meetings and greater input into the updated Manual.

4. Meeting with Navajo Nation Chief Prosecutor (DCSS): Following HSGU's presentation before the Navajo Nation Bar Association's Conference in June of 2022, the Chief Prosecutor of the Navajo Nation, Vernon Jackson, approached HSGU due to the presentation. HSGU told Conference attendees that there is a section of the criminal code that would allow for criminal prosecution of individuals who have continually failed to meet their child support obligation, however, there has never been a prosecution pursuant to 17 N.N.C. §455. Following the presentation, Mr. Jackson approached HSGU because he was interested in criminally prosecuting parents who are not or will not pay their child support obligations. HSGU began looking for an appropriate test case. In October, 2022, HSGU found what a good test case for criminal non-support at DCSS – Fort Defiance. HSGU met with Prosecutor Jackson on November 1, 2023, to discuss. Mr. Jackson requested a copy of the case file, the delinquency calculation, payment history, and information on DCSS procedures. Mr. Jackson agreed to personally prosecute the case.

5. Setting Up Debts Without an Assignment of Rights or An Order from the Office of Hearings and Appeals (DCSS): In November, 2022,

DCSS Administration contacted HSGU regarding a DCSS – Tuba City case that involved a judicial order from a Navajo Family Court establishing a child support obligation. The court order was brought to DCSS – Tuba City for enforcement. Apparently, the assigned case worker had proceeded to set up a debt in the case management system without the custodial parent assigning child support rights to the Navajo Nation and without an order from the Office of Hearings and Appeals. This should not happen. Setting up a debt allows the management system to begin garnishing a non-custodial parent’s wages automatically and without the assignment of rights or an administrative order, such garnishment is not authorized and can lead to liability for DCSS. There was a mandatory video meeting on November 30, 2022 for all DCSS staff and DCSS Administration. HSGU advised all of DCSS that there cannot be debts set up without assignment of rights or an administrative order. HSGU will issue written instructions on this issue.

6. Navajo Nation Office of Occupational Safety and Health (NNOSHA): HSGU 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 reviewed and revised multiple drafts of the amended Act and will meet with the program on September 22, 2022. There were further revisions made following the meetings with NNOSHA.

#### VIII. NAVAJO NATION VETERANS ADMINISTRATION (NNVA):

1. Veterans Trust Fund (VTF) Distribution/Expenditure: On March 1, 2022, Director Zwierlein contacted HSGU regarding the Veterans Trust Fund distribution. In 2018, the Navajo Nation Council amended the VTF and the expenditure of the funds through CJA-02-18. In October 2018, HSGU was asked to provide its interpretation of CJA-02-18. In 2018, HSGU drafted an interpretation. On June 21, 2022, HSGU met with TFU, OOC, and NNVA to prepare the legal interpretation to be presented to HESHC. On June 22, 2022, HSGU presented DOJ’s legal interpretation to HEHSC. At that time, it was discovered that due to the amendments to the VTF in 2021, the distribution formula would result in more than a \$3 Million short fall. DOJ provided recommendations to address the matter. On June 23, 2022, HSGU and NNVA worked on amended language of the VTF statute. Later, HSGU, NNVA, the Tax and Finance Unit, and the OOC met on the interpretation, with the work spearheaded by NNVA and HSGU. On December 6, 2022, NNVA, OOC, TFU, and HSGU met on the proposed amendment to the VTF. OOC and TFU agreed that with minor changes, the amendment would be ready to move forward. Changes were made and the amendment is ready to move forward.

#### **LITIGATION UNIT (LU)**

LU is led by Assistant Attorney General Paul Spruhan who manages one (1) Principal Attorney, one (1) Senior Attorney, one (1) Attorney Candidate, and 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: Please refer to discussion in the OAG-Litigation section above.
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 filed in the Federal District Court of Utah. One was filed by the State of Utah and two 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 Nation, along with three of the four Bears Ears Coalition tribes, successfully moved to intervene in the case. No party opposed the tribes' intervention, though they did oppose the intervention of a number of environmental and conservation groups. The United States just filed a motion to dismiss, and the tribes are discussing the best way to support that motion. In the meantime, the other intervenor groups continue to fight the other parties to get into the case.

### **NATURAL RESOURCES UNIT (NRU)**

NRU is led by Assistant Attorney General Veronica Blackhat who manages two (2) Principal Attorneys, one (1) Senior Attorney, one (1) Attorney, 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 involved in many others matters affecting the Nation's natural resources and environment. In this quarter, notable projects include:

1. Navajo Commercial Forest Carbon Sequestration Project under the California Air Resources Board (CARB) Cap and Trade Program: In accordance with the CARB requirements for tribal carbon sequestration projects, the Nation recently requested a letter from the Bureau of Indian Affairs (BIA), Navajo Region, stating that secretarial approval is not required for the Nation to proceed with its Project and participate in the CARB Program. The Nation is awaiting a response from the BIA after supplemental information was submitted upon request. Weather permitting, field inventory work is underway.

Legislation Nos. 0250-22 and 0252-22 were introduced during the first quarter of 2023, and would amend the Plan of Operation for the NFD to explicitly include administration of revenues from the sale of carbon offset credits and the establishment of the Forest Carbon Enterprise Fund and Fund Management Plan. As set forth in the Fund Management Plan, the NFD recommends ten percent (10%) of the first-year of net revenue and thirty percent (30%) of all following years' revenue be used only for purposes necessary or related to compliance with the Program, including administrative costs. These allocations are necessary to ensure Project sustainability and the Nation fulfilling its obligations pursuant to Program requirements and the Carbon Development and Marketing Agreement (CDMA). The Resources and Development and Budget and Finance Committees passed the resolutions.

2. Department of Water Resources: Work related to large-scale water infrastructure projects continued, and is anticipated to increase as

funding remains available through the passing of the American Rescue Plan Act of 2021 (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. While various sources of funds remain available for water infrastructure projects, inflation continues to impact the cost of supplies and personnel and contractor availability remains limited.

*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. Additional congressional appropriations are necessary to complete the project, and lobbying efforts may be unsuccessful before the current congress. Current funding limitations notwithstanding, the estimated project completion date is still December 31, 2024 with water deliveries increasing as project features are completed. Additional information is available from the Bureau of Reclamation at <https://www.usbr.gov/uc/progact/navajo-gallup/index.html>.

*To'hajiilee Water Project.* Work on this essential project continued, including concurrent construction and upgrades to the system within the chapter boundary, and the projected seven-mile 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 completed Section 164 Review and is awaiting President's signature. The To'hajiilee Chapter will be a wholesale customer, and the rates and charges for the treatment of raw water (provided by the Nation through the water lease agreement with the Jicarilla Apache Nation) and delivery of potable water to a bulk meter at the Chapter boundary will be calculated based on the services provided.

3. Navajo Parks and Recreation Department (NPRD) -- Updating Park Rules and Regulations: In light of the resumption of 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, including amendments to Title 19 of the Navajo Nation Code and updates to the Tour and Guide Services Rules and Regulations. These updates and amendments are a significant undertaking. NPRD has the optimistic goal to develop and present proposed Code amendments and corresponding rules and regulations to its oversight committee by the end of 2023.

4. Chaco Canyon: 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, 2021, of the Department's new efforts to protect the 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 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. BLM initiated a 90-day public comment period and hosted several public meetings and formal Tribal consultation. The public comment period was extended an additional 30 days and concluded on May 6, 2022. Additional public meetings were scheduled at San Juan College,

Nageezi Chapter House, and the Nation Indian Programs Training Center in April 2022. NRU attended the 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, 2022. 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. Department of Fish & Wildlife:

*Horseshoe Bend Holdings Project.* NRU reviewed a Request for Services (RFS) 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 documents and whether they were ready to be included in the final biological resource clearance form determination letter for HBH. The documents consisted of (1) a draft golden eagle mitigation plan, (2) a hotel occupancy tax, and (3) a legislative amendment proposal. NRU and TFU issued a memorandum which identified legal concerns and provided recommendations to remedy the concerns. Thereafter, NHP resubmitted the RFS and memorandum regarding the HBH project. NHP and HBH proposed a mitigation plan that adequately addressed the concerns from NHP through a two-part approach. The first is a short-term amount that will assist in research. The long-term amount will help create a full-time position within DFW to continue research, education, and monitoring. The plan was finalized and resubmitted under the 164-process. The review was deemed legally sufficient. HBH will reach out to ECDU so that they can review business site lease templates for the proposed development by HBH.

*Navajo Nation Climate Program (NNCP) and New Mexico State University Agreement.* The NNCP and NMSU were initially interested in creating weather stations across parts of eastern and northern Navajo and housing them on 19 various locations, 15 of which were near Chapter buildings. NCCP submitted a RFS to review a no-rent lease agreement between NNCP & Chapters to allow NMSU to place a weather station within various Chapters locations. Paulene met with the Chapter Unit to discuss the no-rent lease agreement and other options. The no-rent lease agreement was deemed legally insufficient, and Paulene met with NNCP to discuss alternative options such as intragovernmental agreements between NCCP and the Chapters.

6. Utah Hunting Agreement: NRU updated the Navajo Utah Commission (NUC) about the Hunting Agreement with the state of Utah twice this quarter. Utah representatives have met with DOJ and are open to receiving proposed amendments. DOJ recently received confirmation from OPVP of its support of the NUC's position on the agreement. During the last update Brian requested the NUC meet with the OPVP and full Council to get a better sense of the Navajo Nation's position on bolstering Navajo treaty hunting rights. OPVP confirmed interest in proposing amendments to the hunting agreement. Brian was not successful in meeting with the NUC to finalize asking points. Proposed amendments need to be completed prior to January 2023, since the existing agreement allows for amendments through the end of the month of January. If no written requests for amendments are requested, then the existing Hunting Agreement will control for the duration of the year. Due to the lack of client communication and guidance, DOJ has not begun drafting any amendments and it is unknown whether a request to amend the existing agreement before the end of January 2023 will be submitted.

7. Heritage & Historic Preservation Department (HHPD):

*Bears Ears Inter-Tribal Coalition/Commission (BEITC).* Non-litigation matters involving the BEITC are handled by NRU. NRU attended weekly Zoom meetings along with Commission Representative Hank Stevens and the Mr. Begay, the HHPD Department Manager who also serves as the BEITC Tribal Historical Preservation Officer (TPO). The Naa'bik'iyati Committee passed NABIJY-24-22 on July 14, 2022, which supports the Bears Ears Land Management Plan for the Bears Ears National Monument. The BEITC inserted the Navajo Nation resolution in the final land management plan, which 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 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 provides guidance and serves as a template on co-management strategies and plans between multiple agencies. This quarter, NRU, Mr. Stevens, and Mr. Begay discussed the transition of administrations and the newly appointed BEITC commissioner. Mr. Begay and Mr. Stevens have both expressed interest in hosting a transition meeting and orientation session with the incoming administration. The meeting will also serve as an introduction for the BEITC staff to meet and educate the new commissioner.

*Bears Ears Living Land Museum Project.* The Navajo Nation HHPD provided a letter in support of the Natural History Museum of Los Angeles County's request for an extension of the National Endowment for the Humanities planning grant originally awarded in May 2021 for the project *Bears Ears: Living Land*. *Bears Ears: Living Land* will be the first comprehensive exhibition about the Bears Ears region of southeastern Utah co-developed by representatives from the Navajo Nation along with representatives from the Hopi Tribe, the Pueblo of Zuni, the Ute Indian Tribe of the Uintah Ouray, and the Ute Mountain Tribe. The goals for the project are to enhance understanding of Indigenous lands and traditional lifeways; to work with NHMLAC to produce resources to bring the exhibition content to our membership; and to set new standards for collaborative co-curation between Native groups and museums. The deadline to exhaust the \$5000 funding was December 31, 2022. The reason for the extension request was due to HHPD's inability to complete the phase 1 commitments.

*Grand Staircase Escalante Agreement / Memorandum of Understanding (MOU).* NRU reviewed a MOU with the US Bureau of Land Management (BLM) titled the Grand Staircase Escalante Agreement. The MOU establishes a cooperating agency relationship between the BLM's Grand Staircase-Escalante National Monument / BLM and the Navajo Nation for the purpose of conducting an environmental analysis and preparing the draft resource management plan and draft environmental impact statement (EIS) and the proposed RMP and final EIS for GSENM. After reviewing the agreement, NRU had issues with seven provisions and made comments and suggested alternative language. Concerns included requests from BLM seeking names of traditional Navajo medicine practitioners in the area, location of sacred sites, limited protection of the practitioner and sacred site information, BLM's ability to share sensitive information with third parties, and making changes to the agreement without input from Navajo Nation and/or a limited time frame to make comments to changes in the agreement. All of NN's comments and suggestions were accepted and included in the next draft of the agreement by BLM.

#### 8. Navajo Land Department (NLD):

*Proposed Acquisition of Goulding's Lodge and Tours.* DNR/NLD submitted emergency legislation for approval by the Navajo Nation

Council pertaining to the proposed acquisition of Goulding’s Lodge and Tours in Monument Valley, Utah. NRU reviewed the packet for legal sufficiency and noted some issues and corrections that needed to be made to the documents before submittal to the Navajo Nation Council. The proposed legislation was added to Council’s agenda the last week of December 2022, but Council ran out of time before the legislation was considered

*Begay-Hood v. Halona (NLD) WR-CV-07-22.* NLD received notice of suit. Neither NLD nor DOJ received notice of a hearing, and Defendants did not attend. Plaintiff requested a three-hour bench trial. Window Rock District Court scheduled the Hearing for June 22, 2023. Brian and Louie are assisting NLD, and recently had a call to discuss preliminary information about the case. DOJ continues to schedule meetings with DOA to gather additional information and records.

*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 and collocations on non-tower structures. NRU and HSGU provided comments on NNTRC’s proposed telecommunication regulations and leases. The first version of the regulations was submitted over a year ago by GLDD, and NRU issued a memo regarding concerns and recommended changes. GLDD did not resubmit the regulations for NRU’s review. However, there was a second version submitted by NNTRC. This quarter, NRU met with Vertical Bridge to discuss amendments to the proposed regulations.

#### 9. General Land Development Department (GLDD):

*Mission Site Permit Regulations.* 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 10 years. RDC held two work sessions with GLDD and NLD on December 21, 2021 and March 15, 2022, to discuss the proposed amendments to the regulations. RDC scheduled a Leadership meeting for April 23, 2022, to get input from church leaders; however, the meeting was cancelled and not rescheduled. RDC took no further action regarding the mission site permit regulations.

*Cemetery Lease / Regulations.* NRU reviewed and edited the lease. NRU raised questions such as whether GLDD would charge a fee and the term of the lease. NRU recommended to GLDD that the lease should reference the burial regulations once they are approved and that GLDD should delay processing the leases. GLDD processed the cemetery leases with the understanding that after the regulations are approved, the leases will be amended to refer to the regulations. NRU reviewed two leases that were not approved by RDC. The problem was the language in Title 13 (Cemeteries) is unclear and needs to be amended to reflect the current needs of the Nation. RDC held a leadership meeting and a two-day work session in May 2022 with DOJ, OLC, the Human Rights Commission, DNR, NLD, GLDD, HHPD, NNDA and the Navajo Land and Farm Boards to discuss and address private family cemeteries. Legislation to amend Title 13 was introduced and was on Council’s agenda the last week of December 2022, but Council ran out of time and did not consider the legislation. It should also be noted that legislation to approve the regulations has not been introduced by RDC.

10. Navajo Nation Department of Agriculture (NNDA):

*San Juan River Farm Board.* NRU continued to attend regular meetings with the Farm Board. Legal issues range from illegal blocking of water access, general administration of permits and the relevant laws, communication with the BIA, and preparing and presenting presentations. NRU advised the Farm Board that many of its issues are administrative, not legal, so the Farm Board must seek technical support from NNDA. The day-to-day functions of a Farm Board involve making administrative decisions, addressing permittee disputes, participating in ongoing litigation as a governmental entity, issuing fee assessments, and issuing Notices to ALUP holders. NRU also researched and advised the Farm Board of laws pertaining to the transfer of ALUPs.

*James v. District 12 Grazing Committee (DGC12).* Brian and Irvin filed an entry of appearance before the Office of Hearings and Appeals on behalf of DGC12. The case was dismissed for ripeness concerns and the lack of a record on the matter. DGC12 will need to revise its Resolution to BIA and serve it upon James if they wish to obtain a court order for compliance. DGC12 will need to coordinate additional arbitrations on each legal issue for which OHA determined there was a lack of adequate record on appeal. As of the date of this report, NRU has not received further communications from NNDA and the DGC12 as to whether any additional action is needed.

*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 which is not taking responsibility but is instead telling the Grazing Committee to issue a resolution. The DGC Chair is refusing because he is taking it upon himself to bring in a disputing party who also wants to claim some right to the ALUP. Brian assisted NNDA and the District 11 Grazing Committee with an appeal of decision to the Navajo Office of Hearings and Appeals (OHA). A Motion to Dismiss for lack of subject matter jurisdiction and improper forum was filed. At the heart of the case is a Quiet Title order from Chinle District Court. Brian drafted a Reply to the Petitioner's Response to the Motion to Dismiss. OHA vacated the hearing on the motion scheduled for November 22, 2022, due to OHA handling numerous election appeals. To date, OHA has not rescheduled the Motion Hearing.

*Russell v. Prowes, NN (Real Parties of Interest), OHA-LAD-001-22.* Brian is assisting NLD, NNDA, and District 18 Grazing Committee with an appeal of a decision to dismiss Petitioner's complaint against NLD. Petitioner is not a valid permit holder entitled to oppose homesite lease applications within the meaning of the NLD regulations. OHA vacated the evidentiary hearing set for October 3, 2022. OHA re-scheduled the hearing for January 18, 2023. Brian has filed all discovery documents in preparation of the hearing.

*Tsaile-Wheatfields Grant Agreement.* Brian is handling a Directive from the Budget and Finance Committee to assist DNR in implementing a grant agreement for the Tsaile-Wheatfields Agriculture Project. Brian attended regular group meetings with DNR, the Tsaile-Wheatfields Farm Board, Delegate Slater, and the Dineh Water User's Association. It is now unclear whether the Navajo Nation will continue its collaboration with the Dine Water Users Association. The Farm Board and Association do not agree with one another and DNR has been predominately silent.



*State Grazing Leases.* NRU assisted NNDA with various Arizona Grazing Leases. DOJ has been corresponding with the AZ Attorney General's office and DOA to resolve longstanding grazing lease issues. Brian reviewed Arizona Legislation that may resolve aspects of the issues involved with this project. NNDA acknowledged that the waiver of sovereign immunity requires Navajo Nation Council approval, but NNDA has yet to seek a sponsor. The leases cannot be signed without approval. DOJ met with Arizona State Land Department and Counsel in October 2022. Arizona received proposed changes. After the meeting, Brian and Dan worked with Arita Yazzie and Risk Management to finalize proposed changes, which were emailed to Arizona on December 16, 2022. DOJ is awaiting a response.

*Livestock Hauling Laws and Regulation.* NRU attended an RDC meeting in which RDC sought clarification on the laws and regulations regarding hauling of livestock. Delegate Stewart raised concerns that arose during the 2022 Navajo Nation fair and other fairs across the Navajo Nation. RDC wanted to know what laws it could amend to address the issues. NRU reminded RDC that the purpose of the laws and regulations the prevention of the spread of diseases in animals on the Navajo Nation. The Department of Resource Enforcement (DRE) did not believe amending the laws would be appropriate. Brian recommended RDC first have DRE conduct community outreach and education, because that might resolve any confusion anyone may have about the laws.

#### 11. Minerals Department:

*Nation and the Navajo Nation Oil and Gas Company (NNOGC).* Legislation No. 0232-21 approved three operating agreements between the Nation and NOGC for exploration and production of oil and gas, primarily helium. Two of the operating agreements involve lands in Sanostee Chapter and the third involves lands in the Teec Nos Pos Chapter. Council had directed DOJ to assist with the negotiation of the underlying chapter agreements for approval at Council's 2022 Spring Session. Negotiations were still ongoing at that time, and the legislation was referred back to the Naa'bik'iyati' Committee. A draft Memorandum of Agreement was negotiated for the Sanostee Chapter, and the negotiations for the Teec Nos Pos Chapter had not begun. The Chapters then voted to rescind their support for NNOGC's operating agreements, and things came to a halt. The legislation was then placed on the Naa'bik'iyati' Committee agenda in December 2022. April attended the meeting, explained the delay in negotiating the chapter agreements, and responded to questions from the delegates. April also had a call with Delegate Amber Crotty regarding her proposed amendment to the legislation and provided input to OLC regarding Crotty's amendment and an amendment by Delegate Daniel Tso. After seven hours of debate, the legislation was approved 17-6 at Council the last week of December 2022.

*Oil and Gas Activities in New Lands – Ranger Development.* NRU continued working on the draft Surface Use Agreement with Ranger Development. After several calls and in-person discussions, NRU had a final version and hoped President Nez could sign it before he leaves office. The sticking point is the involvement of the Nahata Dzil Governance Commission and their opposition. We tried to explain things in a call with the chair of the NDGC, but President Nez wants a meeting with DOJ, NDGC, DNR and the Navajo-Hopi Land Commission very early January 2023 to see if NRU can address any outstanding concerns.

*Minerals “Primacy.”* NRU reviewed and edited the Minerals Department's draft “Navajo Nation Surface Mining and Reclamation Act,”

which would allow the Navajo Nation to serve as the primary regulator of surface coal mining and reclamation operations on Navajo Nation lands. Currently, the primary regulator is the federal Office of Surface Mining and Regulatory Enforcement (OSM). OSM's approval of the tribal program will give the Navajo Nation the ability to become the primary regulator. This is sometimes referred to as the Navajo Nation receiving "primacy." NRU responded to questions from the Council delegates as the legislation moved through the legislative process, which included approval by RDC, the Law and Order Committee, the Naa'bik'iyati' Committee, and the Navajo Nation Council. Additionally, NRU provided a summary to OPVP and discussed the legislation with their office.

*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 we believe there needs to be some sort of agreement among the Nation, NTEC and the Four Corners Power Plant owners about who will be responsible for the coal ash going forward. quarter, we continued to provide legal assistance related to NTEC's application for the relinquishment of certain lands at the Navajo Mine. We remain concerned that the land contains coal ash and there is no agreement about who will be responsible for the coal ash after the land is relinquished.

12. Navajo Division of Transportation (NDOT): NRU reviewed contracts, MOAs, grant applications, and agreements with the Federal Highway Administration, Federal Aviation Administration, and the New Mexico Department of Transportation. NRU reviewed construction contracts and professional service contracts for NDOT.

*Proposed Memorandum of Agreement (MOA) – U.S. Army Corps of Engineers (USACE).* Around 2021, USACE representatives from the Albuquerque District wanted to formalize coordination and project management efforts across the Nation and between the three districts that comprise the South Pacific Division of the USACE. The MOA was submitted in 2021, and NRU and NDOT provided comments and edits, but none were incorporated in the MOA. NDOT resubmitted the MOA for NRU review; however, it had been amended significantly, leading to more questions. NRU deemed the MOA as legally insufficient. There were numerous issues. The MOA was one-sided, mostly to the benefit of USACE. The MOA was intended to cover all projects on the Navajo Nation and to involve other Divisions/Departments; however, there was no showing in the submittal that other Divisions/Departments had been consulted or what their responsibilities would be under the MOA. NRU recommended discussions directly with USACE regarding the MOA and obtaining clarification on the amendments. NDOT met with USACE on November 16, 2022, and USACE provided an overview of the Program they are working to establish with the Navajo Nation and did not discuss the proposed MOU.

*Intergovernmental Agreement (IGA) - Apache County.* NRU reviewed the IGA which added six road projects (C492, C590, N9402, Houck Cemetery Access Road, N39 and N203) that would be funded by Sihasin and the Navajo Nation Road Funds. The County would address drainage issues, subgrade preparation, gravel placement and soil stabilization.

*Memorandum of Understanding (MOU) - Navajo County.* NRU reviewed the MOU which establishes the framework between the Navajo Nation and Navajo County in cooperating on transportation projects of mutual interest and benefit to the parties. The MOU also identifies the roles and responsibilities of the parties, how they will coordinate on projects and establishes contacts.

13. Navajo Nation Environmental Protection Agency (NNEPA): NRU's 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.

*Navajo Nation Fiscal Recovery Funds (NNFRF) for Administrative Expenses.* Upon issuing multiple memoranda and various phone and video calls on the proper procurement and use of NNFRF, including appropriate contracts for the sought Goods and Services, it is still unknown if NNEPA's planned use of NNFRF for administrative expenses is an eligible use of NNFRF and whether NNEPA has proceeded with procuring goods and/or services or executing contracts because, to date, NRU has received no additional contracts or agreements through Section 164 Review.

*Legislation No. 0110-22 Allocation of \$5,000,000 Sihasin Funds for Ongoing Assessment at the Former Navajo Forest Products, Inc. (NFPI) Site.* This Legislation and appropriation 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 Division of Transportation to erect road closure while assessment continues. NSP Brownfields Program estimates the actual costs of remediation to exceed this initial appropriation of five million dollars; however, any amount of funding would supplement present efforts and help leverage additional funds. As of this report, the legislation received the necessary two-thirds (2/3) vote of the 24th Navajo Nation Council to approve the appropriation during a Special Session.

*Navajo Uranium Workers Program (NUWP).* NNEPA proposed restructuring of its organization to include the NUWP, which was originally part of the Navajo Department of Health. NRU met with NNEPA to discuss NNEPA's power and authority granted in the Navajo Nation Code, which are geared toward regulatory and enforcement authority. NRU identified the Code provisions that will likely need to be amended. Brian assisted NNEPA with draft amendments to its Plan of Operation (POO) to incorporate the NUWP; and the POO would potentially conflict with the Navajo Nation Code if not amended. The Office of Legislative Counsel had been following up on the change; however, NNEPA postponed the restructuring until after the 2022 General Election. The new administration will need to decide if the change is going to move forward.

*RECA Reauthorization (U.S. Congress).* NRU attended meetings that the Navajo Nation Washington Office (NNWO) held to update the Nation about the lobbying of Congress to reauthorize and expand the Radiation Exposure Compensation Act. Brian reviewed proposed language to place the Navajo Uranium Mine Workers program within NNEPA, which is relevant because RECA reauthorization could impact NNEPA's future responsibility. As of June 7, 2022, the President Biden signed the RECA Extension Act of 2022, which extends the program deadline for an additional two years. The NNWO and others are advocating for Congress to expand the program to include individuals that don't currently qualify, including those exposed after 1971, whom are currently not covered under the statute. Senator Mike

Crapo proposed a full expansion of the law in S. 2798, and introduced the Bill, but no other further action with the Bill have taken place.

14. Old Church Rock Mine (OCRM) – Section 17: USEPA is leading assessments of past mining contamination for a possible Time Critical Removal Action. NuFuels, Inc., formerly Hydro Resources, Inc. and Uranium Resources, Inc., is the mineral rights holder and Nuclear Regulatory Commission (NRC) licensee for the site. During site assessments, NNEPA and USEPA learned of NuFuels intent to exercise their mineral rights and conduct exploratory drilling of the uranium ore body beneath the surface of Section 17. An agreement for the limited-duration exploratory drilling activities completed Section 164 Review and is awaiting President's signature. As of this report, preliminary legal analysis concluded the Nation does not have the authority to stop the exploratory drilling; however, information gathering and analysis of applicable Navajo laws and regulations is ongoing as the exploratory drilling activities are subject to the Nation's regulatory jurisdiction.

15. Cyprus Amax (CYPRUS) Access Forms and Letter: Over the course of two years, DOJ drafted access forms geared towards standardizing access protocols for NAUM Responsible Parties. NRU has discussed the access issues with Cyprus for some time. They pushed back on our proposed standard templates. Cyprus argued that their current actions are sufficient. NRU then discovered that Cyprus was sending their public outreach coordinator to Chapters, and requesting Chapters identify or inform grazing permittees of the work. Once Cyprus found out that NRU knew what Cyprus was doing, Cyprus accepted the forms, but they want us to represent that the forms fulfill their obligations under the Consent Decree. Along with outside counsel, Brian met with Cyprus and USEPA. However, the agencies, DOJ, and outside Counsel all agreed there was nothing required in the forms that any PRP would not be able to complete.

16. Applicable, Relevant & Appropriate Requirements (ARAR): NRU continues to develop a comprehensive list of Navajo Nation laws and regulations related to uranium mine clean-up to be designated as the Nation's Applicable, Relevant & Appropriate Requirements (ARAR). The ARAR table is all-inclusive, and intended to be tailored to the circumstances of each individual mine site. The challenge NRU faced in developing the ARAR table was determining ways that Navajo fundamental law could be couched as an ARAR by providing specifics on how fundamental law applies to uranium mine clean-up. NRU's 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 clean-up activities. This approach will allow consideration of site-specific conditions and concerns in formulating any clean-up plans. USEPA asked the Nation to develop Navajo-specific ARARs that include Navajo Fundamental Law considerations. NRU, with the assistance of outside counsel, submitted a table of laws and regulations as proposed ARARs. The table underwent a final review from USEPA's managers and agencies will look to apply approved laws and regulations in the Engineering Evaluation / Cost Analysis (EE/CAs). The various Responsible Parties or Potentially Responsible Parties have responded with comments of the proposed ARARs for the Eastern Agency. NNEPA, USEPA, and DOJ have been having regular meetings with the Responsible Parties on the ARARs table which USEPA introduced to PRPs. A final table of ARARs will be selected and the laws and regulations will be applied in the remedy selection stage. The current list of Navajo Laws is going to be used in a set of EE/CAs, but is still amendable until the Response Action Selection/ Action Memo stage at the very end before removal actions actually take place.

17. Natural Resource Damages (NRD):

*The Navajo Nation as Trustee for Natural Resources.* The Navajo Nation acts as a trustee for natural resources belonging to, controlled by, or appertaining to the Navajo Nation, or held in trust for the benefit of the Navajo Nation, or belonging to a member of the Navajo Nation if such resources are subject to a trust restriction on alienation (allotted lands), for matters pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 107(f)(1), 42 U.S.C. §§ 9601 *et seq.*, the Oil Pollution Act (OPA) § 1006(c), 33 U.S.C. §§ 2701 *et seq.*, and the Clean Water Act (CWA) § 311(f)(5), 33 U.S.C. §§ 1251 *et seq.* See 40 CFR § 300.610. Under the Navajo Nation CERCLA, 4 N.N.C. § 2503(C), the President is the natural resource trustee and may designate Navajo Nation officials to act on behalf of the public as trustees for natural and cultural resources under the jurisdiction of the Navajo Nation, including for purposes of federal law. Accordingly, in September 2010, the Navajo Nation President designated the following as the Nation’s Trustees:

- For impacted lands and/or ecosystems within the jurisdiction of the Navajo Nation, the Department Manager for the Land Department;
- For biota, including plants and wildlife, the Department Manager for the Department of Fish & Wildlife;
- For cultural resources, the Department Manager for the Heritage and Historic Preservation Department; and
- For water and water resources, the Department Manager for the Department of Water Resources.

This designation remains the model and method for the Navajo Nation in carrying out the Trustees’ responsibilities for NRD assessment and restoration matters, though final decision-making authority rests with the President.

*Fort Wingate Depot Activity (FWDA) Consent Decree.* The settlement involves the natural resource damage claims of the Navajo Nation, the Pueblo of Zuni, and the State of New Mexico, against the U.S. and the U.S. Army for injuries to natural resources caused by releases of hazardous substances from the FWDA, which was used for storage and disposal of explosives and munitions until 1993. Separate from the settlement agreement, portions of the Depot will be transferred to the BIA to be held in trust for the Navajo Nation and Zuni Pueblo. It is important to distinguish that some parcels of the former Army Depot will remain under the U.S. Army or Missile Defense Agency control for continued defense-related operation and those parcels are not subject to the settlement and Consent Decree. In December 2021, the Naa'bik'iyati' Committee through NABID-55-21 approved the Consent Decree memorializing the settlement agreement, which was executed by President Nez and Attorney General McPaul. In 2022, the proposed Consent Decree was filed with the U.S. District Court for the District of New Mexico, and the court stayed the proceeding pending the 30-day public comment period. The Litigation Unit entered an appearance on behalf of the Nation. On August 9, 2022, the court issued the Consent Decree and an order to deposit the money in the court registry account. The Co-Trustees modified previous selection criteria and are reviewing past project proposals for current feasibility. Those project proposals no longer feasible were removed, the selection criteria were finalized, and the next meeting of the Co-Trustees will involve applying the remaining project proposals to the criteria for restoration project selection.

*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 Contractor recently completed cultural interviews in Cameron and Black Mesa. The five (5) draft reports are scheduled to be submitted to the Nation’s Trustees by the end of January 2023.

18. 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. In late 2021, 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.

The ACC staff developed a Recommended Order based on all the information collected in the Generic Docket. The order was confusing, it basically said Navajo should receive the money it negotiated with APS (i.e., the full \$100 million), but kicked the can on who should pay for it. Basically, they said APS needed to work with the Nation to find other sources of funding and that the APS ratepayers shouldn't be on the hook. Outside counsel put together a response from the Nation to file with the ACC. The ACC took the Recommended Order and made amendments in at least one previous meeting. There were a lot of amendments, but it's our understanding that the revised order made it so that no money whatsoever would come from the ratepayers. It's basically a prohibition on using ratepayer money for CCT. The ACC didn't vote on the order, but instead kept the issue going until the December 2022.

One of the Commissioners who supports the Nation, Commissioner Tovar, proposed an amendment that tried to help get the swing vote of ACC Chairwoman Marquez Peterson onboard. The amendment included language directly from a previous document put together by Marquez Peterson in the Generic Docket. Our outside counsel Todd Kimbrough and others spoke out in favor of the amendment, including RUCO who is our biggest opponent on CCT. Marquez Peterson asked Hopi's attorney that if Tovar's amendment was adopted, would Hopi agree to put their appeal of the ACC's previous order in the APS rate case on hold -- not drop the appeal; just put it on hold while the issues contained in Tovar's amendment played out. Hopi's attorney said she couldn't answer that question. That was all Marquez Peterson needed to hear to vote against Tovar's amendment. The amendment failed 2-3.

The ACC then voted on the revised order stating that no ratepayer money would be used for CCT. Apparently, one of the Commissioners who is strongly opposed to CCT, voted against the revised order. They think he got confused about what he was voting on. The revised order failed 2-3. The ACC then went into executive session for a long time without any resolution and just moved on. We're now basically back to square one. We need to continue our participation in both APS's rate cases and Tucson Electric's rate case. We need to make our arguments in those rate cases about why we should get more CCT dollars. Those cases have been on hold pending what happened in the Generic Docket. Now that we know the Generic Docket was unsuccessful, we need to see what we can get in the rate cases. APS filed another rate case this quarter and the Nation will need to intervene in the case at some point.

### **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 who supervises one (1) Principal Tribal Court Advocate and one (1) Legal Secretary. New Legal Secretary Laura King was hired and began work in early November 2022. Ms. King is a certified relocate, lives in the Coalmine Canyon subdivision created for relocatees, is familiar with the relocation program, and is bi-lingual in

Navajo and English. NHLSP 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 edited and finalized administrative child support orders after the hearings and submitted final orders to OHA. NHLSP filed a motion to dismiss an appeal filed by a NCP in the Navajo Nation Supreme Court to challenge paternity findings made in 2012, as well as a response to NCP counsel's notice of appeal to the NNSC.

1. Federal appeals of ONHIR relocation benefit denial determinations: There are 11 cases pending in the federal District Court of Arizona for relocation benefit appeals. Of these, Susan has four individual relocation benefit appeals cases for seven Plaintiffs pending the federal District Court of Arizona and one case pending in the Ninth Circuit Court of Appeals. There are also six cases pending in the 9<sup>th</sup> Circuit for relocation benefit denials, and one EAJA Fees petition denial pending in the 9<sup>th</sup> Circuit for a successful 9<sup>th</sup> Circuit relocation appeal applicant. Outside counsel Barry Paisner is lead counsel for the 9<sup>th</sup> Circuit appeal. The 9<sup>th</sup> Circuit panel issued a ruling on November 18, 2022 denying the appeal for Susan's relocation client, and no further appeal will be pursued. For the other pending 9<sup>th</sup> Circuit case, Mr. Paisner filed the Appellant's Opening Brief on December 22, 2022. In addition, on December 9, 2022 Mr. Paisner filed Appellant's Opening Brief arguing for reversal of District Court Judge Rayes' denial of his EAJA Fees petition for the 9<sup>th</sup> Circuit case that overturned Judge Rayes' decision and ordered ONHIR to provide relocation benefits to that applicant.

For a District Court case that Susan filed on July 28, 2022, ONHIR filed its Answer on November 10, 2022. Plaintiff's Motion for Summary Judgment in this case is due on February 3, 2023. Susan filed a Motion for Summary Judgment for the four sibling Plaintiffs on December 23, 2022. ONHIR's response and cross-MSJ is due on January 22, 2023. Mr. Paisner is lead counsel for the other pending FDC-AZ case for which Judge Murray Snow and counsel had a telephonic status conference on October 21, 2022. Plaintiff's Motion for Summary Judgment for this case is due on or before January 25, 2023.

Susan received a favorable ruling from Judge Roslyn Silver for one of her FDC-AZ cases on December 29, 2022, where Judge Silver granted Plaintiff's Motion for Summary Judgment, denied ONHIR's, and remanded back to ONHIR to explain why it didn't follow the Hearing Officer's prior precedents which gave at least partial credit of an applicant's receipt of Social Security benefits towards satisfying head-of-household requirement of relocation benefits eligibility. Susan will file an EAJA Fees petition within 30 days after ONHIR's 60-day 9<sup>th</sup> Circuit appeal period expires, and also plans to request ONHIR to certify this applicant on remand rather than engaging in further proceedings.

On October 28, 2022 Susan filed a petition for attorney's fees per the EAJA for the case for NHLSP relocation client for whom Judge Logan granted Plaintiff's Motion for Summary Judgment on August 11, 2022. Initially, ONHIR counsel advised Susan that ONHIR intended to file a motion for limited discovery and asked Susan to stipulate to such discovery, but Susan objected because three other District Court Judges had ruled in favor of Plaintiffs who were granted their EAJA fee petitions, and these Judges rejected ONHIR's "real party in interest" arguments against EAJA fees liability. ONHIR counsel backed off and advised that ONHIR would agree to pay the \$31,141.12 in attorney's fees and costs if Susan withdrew Plaintiff's EAJA fees petition. Susan did withdraw the EAJA fees petition and coordinated between NNDOJ and ONHIR for ONHIR to pay those attorney's fees and costs to NNDOJ.

Bob Malone received an adverse ruling from the 9<sup>th</sup> Circuit panel assigned to his case, and he filed a Petition for Panel Rehearing, arguing that the 9<sup>th</sup> Circuit panel did not address the facts and legal issues of his relocation client's case. Bob also filed the Appellant's Opening Brief for his other pending 9<sup>th</sup> Circuit Appeal on December 15, 2022. Lee Phillips filed Appellant's Opening Brief for one of his 9<sup>th</sup> Circuit appeals on December 12, 2022. Lee has two other pending 9<sup>th</sup> Circuit appeal cases for which opening briefs are due to be filed in January and February 2023.

For Bob and Lee's cases pending in the District Court of Arizona, Lee has three cases pending, with one case fully briefed and for the other two, Plaintiffs' Motions for Summary Judgment or Replies/Responses will be due in the next quarter. For Bob Malone's four (4) District Court cases, two Motions for Summary Judgment have been filed; one Plaintiff's Reply/Response was filed, and Plaintiff's Motion for Summary Judgment for the fourth case is due on March 3, 2023. For the cases Lee and Bob's clients prevailed in the FDC-AZ, they each filed EAJA fee petitions which were granted. ONHIR had filed appeals of these Judges' rulings for Plaintiffs in the EAJA fee petitions, but then withdrew its appeals.

2. Remands from federal court: Remands from the 9<sup>th</sup> Circuit and FDC-AZ continue to be in pending status with no remand/supplementary proceedings scheduled or re-scheduled to date. Lee Phillips and Bob Malone are considering taking the two cases remanded to ONHIR by Judges Logan and Lanza back to District Court because on remand, the Hearing Officer continued to refuse to recognize the parties' on-record hearing stipulation in his remand decisions. These two cases are for a group of seven sibling Plaintiffs. Another remanded case for a client of Lee Phillips has been a pending remand for over a year since the FDC-AZ ruling by Judge Silver in September 2021, 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. The remand for another one of Lee's cases should proceed with ONHIR as ONHIR withdrew its 9<sup>th</sup> Circuit appeal on December 27, 2022.

Betsy Snow transferred her case remanded by the 9<sup>th</sup> Circuit to Bob Malone. On October 12, 2022, ONHIR's counsel filed a motion with the Hearing Officer to request a non-evidentiary hearing. Bob responded requesting a supplemental hearing with additional evidence to be taken, given the 9<sup>th</sup> Circuit's Order. Hearing Officer Merkow denied the request for a supplemental hearing but ordered briefing based on the 9<sup>th</sup> Circuit's remand order. ONHIR filed its opening brief on December 5, 2022; Bob filed the response on December 23, 2022, and ONHIR filed its reply brief on January 3, 2023. Bob now awaits a decision from the Hearing Officer.

Susan was contacted by an attorney representing Hearing Officer Merkow regarding re-scheduling the supplementary evidentiary hearing on remand for a case remanded from the District Court in July 2019. The supplementary evidentiary hearing for this case was originally scheduled for January 31, 2020, but was vacated by the Hearing Officer that week due to the unavailability of witnesses to testify, including the NHLSP's relocation client. Due to delays caused by the COVID-19 pandemic, the supplemental evidentiary hearing has not been re-scheduled, but may be re-scheduled by the Hearing Officer for April 2023. Susan has informed the client and the outside counsel/investigator regarding the possible re-scheduling of the hearing by the Hearing Officer.

Susan also has two other pending remanded cases – one from the order from Judge Logan dated August 11, 2022 granting Plaintiff's Motion



for Summary Judgment and remanding to ONHIR on the issue of the client's legal residency with his grandparents; the other from the December 29, 2022 order from Judge Silver to ONHIR to require ONHIR to explain why it disregarded its own precedent on crediting an applicant's receipt of Social Security benefits towards the head of household requirement of relocation benefits eligibility. Susan will follow up with ONHIR on these remands in the next quarter.

3. Assistance to Certified Applicants: The AG retained outside counsel Colin Bradley to assist and advise a NHLSP client who was certified eligible for relocation benefits in summer 2019 after a successful 9<sup>th</sup> Circuit Appeal. Mr. Brady contacted the client this quarter and is ready to file applicant's petition for divorce from her husband (who is not a relocatee) so that she can receive her relocation benefits from ONHIR as separate property. He plans to file the petition in Window Rock in early January 2023. Once the divorce is final, this client's case can move forward to complete her relocation with ONHIR.

4. Advice and Assistance to the Navajo-Hopi Land Commission (NHLC) and the Navajo-Hopi Land Commission Office (NHLCO): This quarter, NHLSP staff attended by telephone six regular and one special meetings of the NHLC in October, November, and December 2022. After obtaining ONHIR's concurrence, at their October 6, 2022 regular meeting, the NHLC approved a resolution amending their January 2019 Dine' Relocatee Fund ("DRF") Policy so that it is consistent with the 2022 DRF enabling legislation and the Fund Management Plan approved by BFC in June 2022. The Office of the Controller confirmed that a separate DRF account has been set up and that rent payments received NNGE for Twin Arrows have been transferred to this account. Payments generated from Arizona New Lands will need to be traced and transferred to the DRF account. 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 will be submitted to NHLC for approval, after which the NHLCO can implement the DRF pursuant to the Administration Manual. Susan and outside counsel Dan Rey-Bear will review and edit the Administration Manual before it is submitted to ONHIR for concurrence and then to the NHLC for review and approval.

5. Federal Legislative Policy and Advocacy for Navajo Relocates by the NHLC and outside counsel Hobbs Straus Dean & Walker (HSDW): HSDW continue to coordinate and support a strategy to elevate Navajo-Hopi and construction freeze issues through legislative, executive and judicial efforts, although judicial efforts are primarily handled by NNDOJ. As in prior quarters, outside counsel participated in numerous calls with the NHLC regarding overall strategy, etc. They also held weekly calls with the NNWO, and provided regular email updates to Navajo leadership, including OPVP, NNDOJ, NNWO and NHLC.

Outside counsel provided talking points for use in connections with meetings associated with the White House Tribal Nations Conference, and to support Congressional meetings during this period, and maintained constant contact with Rep. O'Halleran's office and other Arizona delegation offices regarding opportunities to advance legislation, although Hopi opposition made this difficult.

Outside counsel has regular communications 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. Outside counsel had several discussions with the Paiute lobbyist, as the Paiute tribe prepared to have their treaty implementation legislation

introduced. During this quarter, outside counsel proposed ideas for a legislative strategy that all three Tribal Nations can support.

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

Outside counsel also advised the Nation on problematic issues with Navajo Thaw's continued lobbying for a \$4 billion funding for the Navajo Thaw initiative itself. Their lobbying affects the Nation's own lobbying effort to achieve a realistic outcome.

6. Litigation against ONHIR, the Department of Interior, and the United States: Outside counsel Dan Rey-Bear and Tim McLaughlin ("RBM") are the lead attorneys representing the 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 lawsuits filed in the Court of Federal Claims (CFC) in Washington, D.C. and the District Court of Arizona on August 23 and 24, 2021 respectively. The CFC case seeks monetary damages in the amount of \$40 million from the U.S. in its 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. The District Court of Arizona ("DAZ") 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.

Over the fourth quarter of 2022, outside counsel worked on continuing litigation regarding ONHIR and related non-litigation matters, including discovery-related work by co-counsel, Barnhouse Keegan Solimon & West. For the two lawsuits that were filed in August 2021, respectively in the CFC and the DAZ, outside counsel followed up with NN DOJ and co-counsel regarding implementation of a litigation record hold to avoid spoliation. They followed up with co-counsel and oversaw their work with consultants regarding database coding, issues, and administration. They prepared an updated transition report to the Nation regarding the litigation and related work and reviewed relevant recent decisions in other cases.

For the CFC case, outside counsel participated in and reported on a three-hour oral argument on Defendant's partial motion to dismiss. They filed a supplemental brief as required by the CFC. In addition, they worked with the Nation regarding confirmation of establishment and funding of the Diné Relocatee Fund ("DRF"). Outside counsel also worked with the Nation and others regarding communications with designated representatives for the plaintiff identifiable group of relocation beneficiaries.

For the DAZ case, outside counsel prepared and filed an amended complaint in follow up to a ruling dismissing three of four claims in our initial complaint and a motion to dismiss the remaining claim. Among other things, that included work with the Nation and co-counsel on identification of additional Chapters with substantial relocatee-related infrastructure needs for reference in the amended complaint and for record collection. They briefed a motion for leave to file the amended complaint, which was granted. Related work included follow up regarding New Lands leasing and development issues and the DRF Administration Manual.

7. HPL Rent: Meyer, Meyer, and Walker (“MWW”) represents the Navajo Nation in multiple rent disputes involving the Hopi Tribe and the Bureau of Indian Affairs (BIA) regarding the use of Hopi Partitioned Lands (HPL) by Navajo individuals for homesite, farming, and grazing purposes. In this quarter, MWW performed no substantive work, as the Navajo Nation continues to wait for separate decisions from the Assistant Secretary – Indian Affairs (“Assistant Secretary”), Interior Board of Indian Appeals (“IBIA”), and Hopi Agency Superintendent (“Superintendent”).

There is still a pending appeal from January 2017 to the IBIA of the 1999 HPL rent determinations, but to date the IBIA has not issued a final decision. Also pending before the IBIA is the Hopi Tribe’s appeal of the BIA Regional Director’s final HPL rent decision issued in February 2020. Briefing is complete, but the IBIA still has not issued a final decision. Regarding HPL rents for 2010 to 2014, the Regional Director remanded the appeals back to the Superintendent in April 2020 with instructions to correct certain errors and to better explain the initial rent assessments. To date, however, the Superintendent has not issued a decision on remand. The Navajo Nation and Hopi Tribes still await a final decision from the Assistant Secretary regarding rents for the period 1979 to 1995. Comments were submitted to the Assistant Secretary by both tribes in September 2011, but there has been no final decision issued by the Assistant Secretary.

Because of these unreasonable delays by the Assistant Secretary and IBIA, President Nez sent a letter to Assistant Secretary Newland on June 8, 2022, requesting a meeting with Assistant Secretary Newland, but the Assistant Secretary has not responded. If the delay continues, outside counsel will seek Navajo Nation concurrence to request a court order or take other steps to compel the Assistant Secretary to act.

### **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. During the first quarter of FY 2023, Principal Attorney Kristen Lowell provided leadership to TFU while Mr. Rodis was on medical leave. Ms. Lowell has resigned from TFU and will transfer to the Office of Legislative Counsel in late January 2023. Therefore, TFU will operate with two vacancies, including a Principal Attorney and Senior Attorney position. 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 (FRF): This quarter, TFU provided guidance on the FRF procedures and updates on FRF eligibility reviews of proposed expenditure plans to Council Delegates, Legislative District Assistants, the DCD, and the NNFRF Office (FRFO). TFU maintained regular communication with the OPVP, the FRFO, and their consultants, on FRF matters including resolution CJN-29-22. TFU participated in phone calls with the FRFO, DCD, and OOC regarding the implementation of CJN-29-22. TFU advised several programs about the eligibility of proposed FRF administrative cost budgets and budget revision requests for central support and regulatory offices. TFU advised the OOC with respect to issues involving the NNFRF Hardship Assistance Program, a disbursement schedule for a proposed NNFRF

subrecipient agreement, and use of NNFRF subrecipient agreements versus services contracts. To date, TFU, in consultation with outside counsel, has completed a total of **446** preliminary reviews and **386** FRF initial eligibility determination reviews for **330** proposed expenditure plans seeking to utilize NNFRF; **133** of those reviews were completed during the first quarter of FY2023. Although section three of CJN-29-22 allows DOJ 10 working days to respond to requests for initial eligibility determination reviews of Chapter NNFRF project proposals included in a Delegate's Regional Project Plan, TFU's average response time is five (5) working days, and often fewer, while still responding to our other assigned client needs. 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 issued a memorandum providing guidance on FRF procurement in compliance with the federal Uniform Guidance in 2 C.F.R. Part 200, and provided a training to TFU's clients on FRF procurements. TFU also issued a memorandum and trained TFU's clients on when to use a NNFRF subrecipient agreement versus the standard Navajo Nation services contract.

2. Coronavirus Relief Funds (CRF): The U.S. Department of Treasury's Office of the Inspector General (OIG) continued its desk review of the Nation's use of CRF under the CARES Act. The desk review is being conducted by a contracted auditing firm, Castro & Company (Castro). TFU assisted the OOC by participating in meetings with Castro and advising the OOC regarding its responses to Castro's requests for information and documents. TFU also advised the OOC regarding CRF/CARES Hardship Assistance checks. TFU advised OOC on the disallowed costs incurred by the Nation's CRF subrecipient, Tolani Lake Enterprises (TLE). TFU reviewed draft determination letters for the OOC to issue to TLE. TFU presented to BFC in executive session and issued a memo to BFC regarding TLE's request to BFC to override the OOC's determination of disallowed costs.

3. Office of the Controller (OOC): TFU advised the OOC with respect to issues involving the NNFRF and CRF/CARES Hardship Assistance Programs. 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 Noon & Associates, Carolyn Atcitty, Ernie Abeita, Saintsbury Consulting, Jaeho Jang, Big Byte, Gallup Fire Extinguisher, Shirlee Anne Rejdali, Ruth Ann Benally, Cogent Communications, and Luberta Corporation. TFU reviewed and edited OOC's corresponding sole source procurement memoranda for most of the above-named consultants. TFU advised the OOC about payments owed to vendors in the absence of services contracts. TFU participated in a meeting with the OOC, NNWO, and an OPVP-contracted consultant regarding options to finance judicial and public safety facilities across the Navajo Nation. TFU advised the OOC on the sale of Navajo Nation surplus vehicles and computers to employees in accordance with property management policies. TFU met with the Property Management Department regarding delinquent Maricopa County taxes on a Navajo Nation-owned trailer located in Chandler, Arizona. 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 advised the OOC with respect to amendments to the Veterans Trust Fund proposed by the Veterans Administration Director. TFU worked on procurement issues with the OOC staff involving the use of Navajo Nation general funds, FRF, federal grants, and other federal funds. TFU reviewed a proposed ONNSFA investment plan regarding the Margaret Sussman Trust, and provided advice on receiving funds from a deceased donor. TFU worked on updating internal documents pertaining to various Navajo Nation trust funds and accounts. TFU advised the OOC on Arizona Department of Revenue Form 5000 and the OOC tax exemption certificate.

4. Investment Committee (IC): TFU drafted resolutions for the IC and attended all IC meetings, including the annual investment meeting in New York. TFU supported work done by the OOC's Investment Section related to the administrative management of the Navajo Nation's investments. TFU participated in meetings between the OOC and NNGE involving continued negotiations regarding loan repayment forbearance and proposed debt restructuring of NNGE's debt to the Navajo Nation. TFU participated in meetings regarding a proposed bond issuance to fund judicial and public safety facilities. TFU advised the OOC on contracting with a Financial Advisor.

5. Office of Management and Budget (OMB): TFU consulted with the OMB regarding the lapse of funds allocated through DODE to Navajo Nation grantees Diné College, Navajo Technical University, Navajo Preparatory School, and the Phoenix Indian Center. TFU provided a training to the OMB and OOC regarding the TFU memo on FRF procurements in compliance with the Uniform Guidance. TFU communicated with OMB regarding FRF matters and indirect cost matters. TFU met with and advised the OMB regarding requirements for legislative approval of the Indirect Cost Rate Negotiation Agreement with the U.S. Department of the Interior, per the Naabik'iyáti Committee's Title 2 authority.

6. 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 the process to enact proposed local chapter tax ordinances. TFU consulted with the ONTC regarding proposed improvements to the business registration process and section 134 of the Uniform Tax Administration Statute. TFU assisted the ONTC on procurement matters. TFU advised the ONTC regarding review of proposed amendments to its expenditure plan and plan of operation. TFU gave a presentation to the ONTC staff regarding the Possessory Interest Tax. TFU advised the ONTC on taxpayer matters involving royalty fees collected by franchisors, as well as gross receipts of 501(c)(3) non-profit organizations 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 and gross receipts collected by contractors building on non-Indian owned fee land located within the Navajo Nation. TFU consulted with the ONTC regarding NTEC's proposed solar tax statute to tax solar projects within the Nation.

7. 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, and 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 Navajo Nation's Deferred Compensation Plan. The proposed amendments to the Retirement Plan were approved by the BFC, at a meeting at which TFU was present. TFU advised the NDRS in response to Requests for Service involving individual 401(k) Plan and Deferred Compensation Plan 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 and a proposal to extend the contracting relationship between the Navajo Nation and Willis Towers Watson. TFU

advised the NDRS regarding Chapter participation as affiliates in the Nation's Retirement and 401(k) Plans. TFU advised the NDRS on procurement matters and completed legal reviews of NDRS' proposed contracts. TFU provided trainings to the NDRS staff.

8. 24th Navajo Nation Council, Committees, and Legislative Offices: TFU attended regular and special BFC meetings, and attended Council and Naabik'iyáti Committee meetings as needed, particularly related to financial and NNFRF matters. TFU attended several other Standing Committee meetings and work sessions. TFU answered questions in a committee meeting regarding legislation to temporarily suspend portions of the Acquisition of Lands Act, the Land Acquisition Trust Fund statute, and related regulations to facilitate the acquisition of the Chaves Ranch. TFU worked with OLC on proposed amendments to a legislation establishing the Opioid Litigation Fund. TFU responded to questions by Council Delegates regarding NNFRF and related 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 communicated with the Legislative Branch regarding its planned submissions of proposed FRF administration budgets. TFU met with the OLC, OLS, and DCD regarding requirements and legislation for FRF Delegate Region Project Plans.

9. Miscellaneous Matters: TFU assisted and advised the Office of the Attorney General (OAG) on various NNFRF and procurement matters. TFU frequently advised and assisted other DOJ Units 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, OMB, and taxation. TFU met with multiple units of DOJ regarding contract modifications to NNFRF subrecipient agreements. TFU communicated with the HSGU, outside counsel, the OOC, and Navajo Nation programs regarding Treasury offsets. At HSGU's request, TFU assisted in drafting proposed amendments to the Veterans Trust Fund statute. TFU advised the HSGU regarding OSERS' proposed blanket purchase and distribution of gift cards for a federally funded program. TFU discussed with the NRU a subrecipient's requests for modifications to its NNFRF subrecipient agreements. TFU assisted NRU on a matter involving the Agriculture Infrastructure Fund. TFU communicated with and assisted ECDU and OOC regarding a proposed subrecipient agreement with NTUA and a services contract with Building Nations. TFU advised the ECDU regarding funding for an architectural/engineering contract overseen by CPMD. TFU advised ECDU on the applicability of the Navajo Nation's Sales Tax to lease payments received by the DED. TFU and the ECDU discussed legislation appropriating funds to the DED's Tourism Department, particularly when unexpended and unencumbered funds from this appropriation would lapse to the HOT/Tourism Fund. TFU met with the ECDU on New Mexico non-taxable transaction certificates and Navajo Nation tax exemption certificates. TFU attorneys attended continuing legal education webinars and conferences to satisfy licensure requirements.

### **WATER RIGHTS UNIT (WRU)**

The Water Rights Unit (WRU) is led by Assistant Attorney General Michelle Brown-Yazzie. In addition to the Assistant Attorney General Position, WRU consists of two (2) additional attorneys and two (2) support staff. WRU is charged with securing and protecting the Nation's water rights. In doing so, WRU works closely with the Water Rights Commission and the Navajo Nation 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: As previously reported, the Department of Interior, 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 February 2022, the Ninth Circuit issued its denial of Intervenor-Appellees Petition for Rehearing En Banc. In July 2022, the U.S. Solicitor General, on behalf of the Department of Interior, filed a petition for a writ of certiorari to review the issue of whether the federal government owes the Navajo Nation an enforceable fiduciary duty to assess and address the Nation's need for water from particular sources. The Intervenor-Appellees (States and Water User Organizations) filed a separate, yet related, petition for a writ of certiorari. The team representing the Navajo Nation includes WRU, LU, the Law Firm of Skadden Arps which specialize in Supreme Court cases, Kate Hoover of Sacks Tierney Law Firm, and the Walker-Meyer firm. On September 23, 2022, the Navajo Nation filed responses to both petitions. In October, Petitioners filed their respective replies. The U.S. Supreme Court granted certiorari on November 4, 2022, consolidated the petitions, and ordered a one-hour argument. The Petitioners filed their Opening Briefs on December 19, 2022, and the Nation's team is preparing its response brief due February 1, 2023, with amicus briefs in support of the Nation due shortly thereafter. Petitioner's reply briefs are due March 2, 2023. The one-hour argument before the Supreme Court will most likely occur mid to late March of 2023.

2. Other Colorado River Matters/ Colorado River Tribes: Under the leadership of the Department of Interior Secretary, BOR and other Interior officials committed to working with the Tribes on water issues affecting the basin. WRU attends weekly update meetings hosted by Bureau of Reclamation officials to discuss potential coordination efforts and to receive announcements regarding river shortages and conservation efforts that include compensation plans. WRU represented the Nation at the Upper Colorado River Commission meeting held in December 2022. The Navajo Nation will be hosting the next Tribal -UCRC meeting to be held in February or March of 2023.

3. Rio Grande Basin:

*Augustin Plains Ranch*. In the fourth quarter of 2022, 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 2022, 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 monitoring the matter and will join a New Mexico Supreme Court matter, if appropriate. The Nation first joined this matter due to the impact to the Alamo Reservoir water supply.

*State Engineer v. Gray*. WRU motioned for the right to file an amicus curiae brief in May 2019. The New Mexico Court of Appeals granted the motion and accepted the brief on November 5, 2021. Oral argument occurred on April 1, 2021. WRU coordinated oral argument preparation with cross-appellant Turner Ranch LLC. The brief filed by WRU addressed abandonment issues after protracted non-use. WRU hopes that this tribunal's decision or after an appeal to the New Mexico Supreme Court will clarify the legal standard for finding abandonment.

4. Little Colorado River Basin (AZ).

*In re Hopi Reservation HSR, 6417-203.* Hopi Future Claims. Closing arguments in the Hopi contested case occurred September 30-October 1, 2021. The Navajo Nation continues to be represented by Sacks Tierney (ST). The Special Master released her findings and Recommended Decree on May 25, 2022. WRU, WMB, and contract counsel reviewed and analyzed the report. The Recommended Hopi Decree gives insight on how the Special Master may decide the Nation's case. The Nation and other parties filed objections to the Recommended Decree on November 21, 2022. The State District Court will hold hearings and may adopt, modify, or reject the Master's report in whole or in part.

*In re Navajo Nation, 6417-300.* WRU, Sacks Tierney litigation attorneys (ST) and the Nation's experts are continuously working to prepare for the Navajo case.

- Phase I. The Phase I Trial of the Nation's case will begin on April 10, 2023. Depositions and other discovery matters continued through to December 16, 2022.
- 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.

5. Zuni River Basin. Zuni Pueblo and the State of New Mexico plan to submit a proposed fund-based water rights settlement for Congressional approval in early 2023 and would like the Navajo Nation to be a part of a proposed settlement. The Zuni Pueblo transmitted a draft settlement proposal to WRU for consideration. WRU and WMB are currently reviewing the proposal and have met and will continue to meet with Zuni legal counsel to discuss and negotiate further. 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 negotiations continue. WRU continues to work with WMB to obtain complete available data on water use and to update maps on the trust lands.

6. San Juan River Basin (UT) Settlement Legislation, Funding and Implementation.

*NUWRSA 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.

*Westwater.* WRU continues to 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. The project received the needed funding to commence and complete both portions of the project and 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, that was signed by the President. The electrification of the Westwater community occurred in the fourth quarter of 2022. WRU continues to monitor and assist with the progress of the water project.

7. San Juan River Basin (NM):

*Adjudication (Main Case 75-184).* On April 5, 2021, the New Mexico 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 Supreme Court denied objectors' motion to reconsider. The New Mexico Supreme Court remanded the matter to the New Mexico District Court to address any outstanding matters. Since the New Mexico Supreme Court's ruling, WRU filed two Motions for Order to Show Cause against Victor Marshall, Intervener's Attorney, for failure to pay court costs to the Navajo Nation court costs as ordered. To date, there has been no movement on the motions. As previously reported, Victor Marshall was indefinitely suspended from practicing law in the State of NM. On May 26, 2022, the NM Supreme Court held Victor Marshall in Contempt of Court for practicing law without a license.

*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 2021 by objectors to the settlement who were represented by Victor Marshall. Victor Marshall is the suspended attorney that represented water user objectors in the cases filed in the State of New Mexico Court System. In this matter, Dr. Rudy Shebala in his official capacity as DNR Executive Director was named as a Defendant. Other Defendants include the Secretary of Interior, CEO of NAPI, and officials representing the State of New Mexico. The Navajo Nation, represented by WRU and the Litigation Unit, filed a joint motion to dismiss with NAPI counsel on January 14, 2022. In the fourth quarter of 2022, the New Mexico District Court issued a final judgment granting the Defendant's motions to dismiss, including the Nation's. All claims asserted against Messrs. Shebala and Zeller were dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity. Unfortunately, this quarter Plaintiff's filed an appeal to the 10<sup>th</sup> Circuit Court of Appeals, and all parties were ordered to mandatory mediation to occur on January 9, 2023. WRU and LU represent the Nation in this matter.

*Implementation of the Navajo Nation San Juan River Basin Settlement Navajo-Gallup Water Supply Project (NGWSP).*

- Construction. The Cutter Lateral is online and is delivering water to Huerfano, Counselor, Ojo Encino, Nageezi, Torreon, and White Horse Lake Chapters. Water lines are being constructed throughout the project, including from Yatahey towards Window Rock. The pipeline will end at the New Mexico border. WRU continues to pursue efforts for congressional approval to eliminate conditions that prevent the release of 6,411 afy of water for the Window Rock area communities as approved with conditions by PL 111-11.
- Congressional Requests. The NGWSP has a cost shortfall of approximately \$500M to \$800M. The Navajo Nation and other Project Participants' proposed amendments to PL 111-11 that were introduced late in the last Congress by Senator Ben Ray Lujan. WRU will continue working with Sen. Lujan's office to reintroduce the bill in the new Congress. BOR informed WRU that the working cost estimate has been updated due to inflation costs and the new amount will be announced in early 2023. The shortfall is expected to reach \$800M or more.
- 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 contained language to address this double taxation, however, the State of New Mexico was not supportive of the language in the bill, and it was eliminated from the proposed amendments. The double taxation adds \$50M to \$100M that is not budgeted for. If the matter remains unresolved, the project and its completion date may be affected.

8. 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.

9. NMOSE Matters.

*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 11<sup>th</sup> Judicial District Court on August 27, 2021. The issues will be reviewed *de novo*. In March 2022, the New Mexico District Court granted the U.S. motion to intervene in the matter. The matter was scheduled for trial to begin February 2023, however, parties attempted settlement through mediation that failed in December 2022. The matter will be set for trial, most likely in the Summer of 2023. WRU and LU represent the Navajo Nation.

*Diamond K. Bar Ranch L.L.C. and Kysar Living Trust.* The Navajo Nation, represented by WRU, continues to protest 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 met with the applicant's attorney and technical experts and in this quarter, reached a proposed settlement agreement.

10. Other Activities:

*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.

*Resources and Development Committee.* 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 all three states.

*Federal Energy Regulatory Commission (FERC) Pump Storage Applications.* Several applications to develop pumped hydro-storage facilities proposed to be located on the Nation have been filed with FERC. This quarter WRU assisted NRU in filing formal objections to an application.

*Recoup of Navajo Nation-New Mexico Settlement Fund Interest.* WRU and NNWO continue to work with Representative 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 Navajo Nation-New Mexico settlement of the San Juan River. The interest earned

on the funds was 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. This past Congress, Representative Leger-Fernandez sponsored a bill, which did not pass. The plan is to reintroduced the bill early in the new Congress.