

NAVAJO NATION DEPARTMENT OF JUSTICE

QUARTER 4

<JULY TO SEPTEMBER 2021>

Attorney General: Doreen N. McPaul

Deputy Attorney General: Kimberly A. Dutcher

STATUS OF THE DEPARTMENT

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

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

COVID: Since March 2020 and during the current 4th quarter, DOJ has continued to assist the Navajo Nation government with a plethora of legal needs in responding to the myriad of challenges presented by COVID-19. Throughout the past year and during the two closures of the Nation's government, DOJ's attorneys, advocates, and prosecutors worked full time and beyond. OAG prioritized employee safety and adherence to safety protocols when working on site. Currently, over 90% of DOJ's employees have been fully vaccinated against COVID-19.

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

On August 2, Navajo Nation Council Resolution CJY-41-21 was signed into law, establishing the Nation's Fiscal Recovery Fund and the Expenditure Authorization Process, among other things. The enactment of the legislation provides the Nation an unprecedented opportunity to mitigate and contain the COVID-19 pandemic as well as to respond to the health, social, and economic impacts of COVID-19. Determining whether and how best to use these resources to construct water lines and wastewater systems, install power lines, and expand internet capacity to Navajo families and communities is ongoing. This quarter, DOJ has played a significant role in ARPA-related matters, working closely with outside counsel to draft FRF Procedures, determine the Nation's Loss Revenue Calculation, review expenditure plans to determine ARPA eligibility, and other issues. DOJ has also participated in many meetings this quarter including Leadership Meetings, Naabik'iyáti' Committee work sessions, weekly ARPA Support Working Group meetings, and joint ARPA training with the Office of Legislative Counsel. DOJ also held several internal discussions about expedited review of contracts and also created the internal structure to begin FRF eligibility reviews this quarter.

In anticipation of increased legal needs, DOJ has requested additional resources to: 1) hire additional legal staff for DOJ's Litigation, Chapter, and Human Services and Government units as well as additional prosecutors to handle natural resources related offenses; 2) address DOJ's obsolete

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technology, which has not been updated for over a decade; and 3) provide, modify, and repair Prosecutor office spaces that are either non-existent (e.g. Dilkon) or otherwise inadequate to ensure employee safety (e.g. Ramah and Shiprock).

Litigation: This quarter also featured on-going litigation activity. Below are some cases that were decided in which DOJ litigated or participated *as amicus curiae* on behalf of the Nation:

1. Favorable decision in NN v. DOI re: forestry management program. On September 16, a federal judge ruled in the Nation's favor in a lawsuit filed last year against the Department of Interior, under former Secretary David Bernhardt. The case stems from a P.L. 93-638 contract dispute between the Nation and BIA regarding the Nation's forestry management program. In September 2019, the Nation submitted a Successor Annual Funding Agreement (SAFA) proposal to the BIA for the Nation's forestry management program. The proposed SAFA included a modest funding increase and some minor changes to the Scope of Work (SOW). BIA declined the Nation's SAFA in December 2019. BIA's declination was based on: (1) the proposed work could not be properly completed or maintained; and (2) the amount of funding proposed exceeded the established funding level. The Nation appealed BIA's declination through the administrative process. An Informal Conference took place in February 2020 and resulted in a recommended decision in the Nation's favor. The decision stated that BIA's reasons for declining the proposal were "legally insufficient" and did not meet the "statutory threshold requirement." The decision also stated that BIA should "immediately approve and award to the Navajo Nation] funding of \$717,736.77" to resolve the issue. The decision became final in March 2020 and the Nation filed suit a month later asking the court to compel DOI to approve the 2020 SAFA proposal and the SOW as proposed by the Nation, and to immediately award \$717,736.77 to the Nation. The lawsuit is *Navajo Nation v. U.S. Department of the Interior*, Civil Action 20-CV-01093, filed in the U.S. District Court for the District of Columbia and assigned to Judge Dabney Friedrich.

2. Waters of the U.S. (WOTUS) decision in favor of the Navajo Nation. On September 27, a federal judge ruled in the Nation's favor in the WOTUS lawsuit filed last year against the U.S. Environmental Protection Agency (U.S. EPA). The Court granted remand with vacatur. As background, an Executive Order signed by President Trump on February 28, 2017, directed that the U.S. EPA and the Army Corps of Engineers ("the agencies") repeal and replace the 2015 Clean Water Rule without engaging in any established rulemaking process. Specifically, the rule to be repealed defined the "Waters of the United States" which determines what waters are protected by the Clean Water Act (CWA). The Trump Administration's Final Rule is titled the "Navigable Waters Protection Rule," (NWPR) and took effect on June 22, 2020. The Final Rule re-defines WOTUS and excludes many categories of waters that were protected under the 2015 Clean Water Rule and prior regulations, including significantly diminishing the number of Navajo Nation waters from being protected. In June 2020, the Navajo Nation filed suit challenging the repeal and replacement rules, arguing that the agencies violated the Administrative Procedures Act (APA), CWA, treaty rights, and the federal trust responsibility. The Nation filed a brief in January 2021 asking the court to declare that the agencies acted arbitrarily and unlawfully in promulgating the two rules, and to vacate the Trump Administration rules entirely. After taking office, President Biden directed the agencies to review and reconsider the NWPR rules. In June, the agencies decided to begin new rulemaking to repeal and replace the NWPR. Instead of disputing the Navajo Nation's arguments, however, the agencies asked the court to let them voluntarily repeal and replace the rule. The agencies also requested that the court leave the NWPR in place until they can complete the rulemaking and enact a new rule. The Navajo Nation asked the court to vacate the rule in its entirety so that it would not continue to cause harm during the interim period. The court agreed with the Nation that keeping the NWPR in place during rulemaking would "disproportionately suffer from the reductions in protections" according to the agencies own reports, and therefore vacated the Trump era NWPR.

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entirely. The lawsuit is *Navajo Nation v. Michael Regan, et al.*, Case No. 20-CV-602-MV/GJF, filed in the U.S. District Court for the District of New Mexico and assigned to Judge Martha Vazquez.

3. Navajo Nation files federal lawsuits to challenge long-delayed and harmful relocation of Navajo people and federal mismanagement of acquired lands. On August 23, the Navajo Nation filed two lawsuits to challenge significant problems with the federal government's decades-old program to relocate thousands of Navajo people from their traditional homelands and the federal mismanagement of extensive lands acquired to benefit former residents of Hopi-partitioned land. In one case, filed in federal court in Arizona, the Nation on behalf of itself and over 50,000 of its affected citizens has challenged the federal government's failure to complete the relocation of Navajo people from Hopi-partitioned lands – 35 years after the statutory deadline for completing that relocation, which started in the 1970s. That case also challenges federal failures to provide almost \$227 million in community facilities and services that were required by Congress and the relevant federal agency for relocatees. In the second case, filed in the U.S. Court of Federal Claims, the Nation and a congressionally defined group of over 16,000 Navajo people (who resided on Hopi-partitioned land in 1974) have challenged the federal government's mismanagement of almost 400,000 acres of land that were specifically acquired by the U.S. in trust for the Nation to be used to benefit those Navajo members.

4. NHLSP Client prevails in U.S. District Court (AZ). On September 22, a federal district court judge held that an ONHIR decision was arbitrary and capricious and not supported by substantial evidence. At issue was whether a NHLSP client was a legal resident of the HPL as of December 22, 1974. The Hearing Officer found client was never a resident of the HPL, even on 12/22/1974, even though ONHIR's denial letter to client recognized that because his father was certified and determined a legal resident of HPL as of 12/22/1974, that client as a minor was also a legal resident of HPL on that date. The Hearing Officer also disregarded a stipulation with ONHIR on the record at the beginning of the hearing that the client was a legal resident of HPL on 12/22/1974. The Court found this to be arbitrary and capricious and unsupported by substantial evidence. The matter is remanded to ONHIR for further proceedings.

Staffing: This quarter, DOJ bid farewell to two (2) long serving DOJ employees who retired on September 30: Angelina Holtsoi, Senior Secretary, who served DOJ for over 37 years; and Mikki Deerwater, Prosecutor, who has worked on juvenile cases for OTP for over 32 years. DOJ is grateful for these employees and their many years of service to DOJ and the Nation. DOJ also had resignations this quarter. Notwithstanding the pandemic, DOJ filled 7 vacancies this quarter. All of DOJ's new hires are Navajo. In addition, 2 Attorney Candidates took and passed the New Mexico bar exam and were sworn in to the New Mexico State Bar on September 28.

OAG's current vacancies include:

- Principal Attorney (WRU) - Position vacated on 3/12/21; position being advertised
- Senior Attorney (HSGU)- Position vacated on 9/30/21; position being advertised
- Attorney (ECDU) – Position vacated on 9/10/21; position being advertised
- Attorney Candidate (HSGU)- Position vacated on 7/15/21; interview on 9/29; offer pending
- Principal Tribal Court Advocate (HSGU) – Position vacated on 3/12/21; position re-advertised
- Senior Programmer Analyst (OAG) – Position vacated on 8/27/21; position being advertised

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- Senior Legal Secretary (ECDU) – Position vacated on 9/30/21; offer pending for internal transfer
- Legal Secretary (LU) – Position vacated on 8/13/21; position advertised; 2 applicants; interview set for 1 qualified applicant who did not show; position re-advertised

The Chief Prosecutor position has been filled on acting basis since April 2019. This quarter, DOJ initiated legislation 0108-21 to amend 2 N.N.C § 1973 to remove the domicile and tribal membership requirements for the Chief Prosecutor position. On July 12, the Law & Order Committee discussed 0108-21 and voted 3-0 to refer it to the Naabik'iyáti Committee. On July 15, the Naabik'iyáti Committee voted 14-2 to table legislation 0108-21 for no more than 30 days and to have a work session. The work session did not occur, and the legislation expired on August 30. DOJ has since revised the Chief Prosecutor Job Vacancy Announcement (JVA), amending requirements and keeping the domicile and tribal membership requirements, consistent with 2 N.N.C § 1973. The Chief Prosecutor position will be advertised with the revised JVA this quarter.

A quarterly report from the Office of the Prosecutor as well as a report regarding the quarterly work of each unit within DOJ follows.

A. Office of the Prosecutor

The Office of the Prosecutor (OTP) is a criminal justice program within the Navajo Department of Justice (DOJ). The Chief Prosecutor (CP) is under the direct supervision of the Navajo Nation Attorney General. Prosecutors within OTP have the authority to prosecute all cases involving alleged violations of the Navajo Nation Code and to conduct investigations necessary to conduct its affairs. OTP also has certain responsibilities to prosecute civil cases involving matters dealing with children, extraditions and exclusionary proceedings. All the prosecutorial staff within OTP are appointed by the CP serve at his/her pleasure. All support personnel are recruited, hired, and compensated in accordance with the Nation's personnel policies and procedures.

The CP establishes the vision for OTP and implements the goals and objectives of the program. CP is responsible for all administrative and operational matters. The CP is also recognized as the lead criminal justice executive of the Nation for all criminal justice purposes and responsibilities. The CP is responsible for investigating, prosecuting, and disposing of all OTP cases. The CP acts independently within the boundaries of the law and exercises the highest degree of professional ethics in the performance of his duties. Moreover, the CP plans and participates with all law enforcement partners to reach full understanding of the benefits from federal and state programs for technical and financial assistance in the prosecution of criminal and applicable civil cases.

OTP prosecutors who appear before the courts of the Navajo Nation are required to be members of and remain in good standing with the Navajo Nation Bar Association. All OTP Prosecutors and Investigators take an Oath of Office administered by the Court. Each swears an oath to preserve and protect the Navajo Nation and to support the Treaty of 1868.

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The OTP coordinates and works directly with law enforcement programs, including but not limited to, Navajo Division of Public Safety, Navajo Resource Enforcement Services, Navajo Environmental Protection Agency and other Navajo/State law enforcement programs. OTP works with these programs to gather evidence and to conduct investigations. OTP also has the ability to enter into Cooperative Agreements with the various Navajo law enforcement programs to enable OTP to prosecute for violations of criminal and civil laws.

OTP works with the U.S. Attorney offices located in Arizona, Utah, and New Mexico and other federal government offices serving the Nation on behalf of the Navajo people in carrying out its prosecutorial responsibilities.

Furthermore, OTP has complete authority to initiate and conduct investigations into any alleged violations of Navajo Nation Codes. These investigations are for the security of the Navajo Nation government, chapters, courts and any other departments, enterprises and entities of the Nation. OTP has the authority to intervene in civil matters involving the interests of the Navajo Nation government and to initiate civil actions involving damages to Navajo Nation property or deprivation of any Navajo Nation government property or wholly-owned business entity. In this same regard, OTP has the authority to request and initiate extradition proceedings against Indian residents within the Nation. OTP has the authority to request and initiate civil exclusions proceedings to exclude non-members from the Nation pursuant to Navajo Nation Council resolution CO-73-78.

Each OTP office employs a Juvenile Presenting Officer (JPO) to handle children's cases through the Navajo Nation courts. JPOs handle juvenile delinquency cases that can be civil or criminal in nature. They also handle dependency cases in close coordination with Navajo Nation Department of Family Services (DFS) social workers and child protection workers.

OTP has a White-Collar Crime Unit (WCCU) that specializes in criminal investigations dealing with financially motivated crimes and non-violent offenses that are allegedly committed by individuals, businesses, and government professionals. Serious cases are referred to the respective United States Attorney office.

Each OTP office uses a criminal justice computer network system known as *JustWare* that is operated under the auspices of the Navajo Nation Integrated Justice Information Sharing Project (NNIJISP) which integrates and interfaces OTP case records.¹ The use of this case management system allows OTP real-time access to justice and court case information. Additionally, the use of *JustWare* improves the coordination, collaboration, and communication among the various OTP offices. The use of an open information environment enhances information sharing that benefits each OTP office. *JustWare* assists each OTP office in maintaining a log of all cases and their dispositions. *JustWare* also assigns a special case number and allows the integration of case data features such as, but not limited to, name of defendant, court docket number, law enforcement officials involved, and witnesses.

¹ Navajo Nation Council CJY-34-92 mandating the creation of an open information environment among Navajo Nation government entities. Navajo Nation Council CAP-30-02 supporting the development of an integrated criminal justice system and mandating cooperation and coordination in its development.

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OTP prosecutors also have access to National Crime Information Systems through the U.S. Department of Justice, Tribal Access Program for National Crime Information. This system helps prosecutors to more effectively serve and protect Navajo Nation communities through access to critical data such as the National Crime Information Center (NCIC). The NCIC system gives prosecutors access to criminal record databases to obtain national criminal histories. Prosecutors also have access to Next Generation Identification (NGI) which is a database of palm and fingerprints and mugshots, allowing verification of identity and access to fingerprint-based criminal histories. Additionally, prosecutors may access the National Data Exchange (N-DEX) a national investigative information sharing system that gives access to records from across the nation to aid in criminal investigations. Prosecutors can additionally review criminal justice data from state, local, tribal, regional and federal agencies 24/7, from any secure Internet-capable device. Data includes incident reports, arrest reports, book and incarceration reports, pre-trial investigations and probation and parole records. Finally, prosecutors also can use the International Justice and Public Safety Network (Nlets) an interstate justice and public safety network owned by the States which supports inquiries into state systems for criminal history, driver's license and motor vehicle registrations, as well as supporting inquiry into federal systems.

OTP may employ five (5) JPOs (prosecutors) under a *Tiwahe Initiative* grant who are responsible for prosecuting juvenile justice matters. Their main responsibility is to handle dependency, delinquency and child in need of supervision cases as codified under *Alchini Bi Beehaz anni* Act of 2011. *Tiwahe* means family, and family means people – both givers and recipients who form a Circle of Giving that can lead to self-sufficient Indian families and sustainable communities.² Currently, Window Rock, Shiprock and Chinle have full time JPOs. The JPO positions in Crownpoint and Kayenta are currently vacant and applications are now being received by DPM to fill these positions.

OTP also operates a victim advocacy program which provides direct services to victims of crimes. Victim advocates within OTP keep victims informed of court proceedings and provide in-depth services to victims during the progression of their cases through the Navajo Nation court system. These services assist victims in dealing with court processing and provide assistance to ease the impact of trauma caused by crime. The OTP's victim advocacy program is funded by a grant through the courts.

PERSONNEL MANAGEMENT ADMINISTRATION

The OTP Senior Programs and Projects Specialist accomplished the following personnel related tasks:

1. Organized and led the successful completion of eight (8) annual performance evaluations that resulted in eight (8) performance step increases. Seven (7) performance step increases were approved and one (1) is pending. However, due to funding shortages these step increases were not awarded during the quarter. On September 24, 2021, the documentation supporting these increases were submitted to DPM and requests for back pay for each employee were submitted for payment. The awarding of these step increases for deserving OTP staff members is significant because for over ten (10) years, step increases were not awarded.
2. Three (3) prosecutor positions were successfully reclassified to Senior Prosecutor positions for the Tuba City, Dilkon and Crownpoint districts.

² [Grantee Stories - Tiwahe Foundation](#) website.

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3. Five (5) records clerk positions were successfully reclassified to legal secretary positions. Several of the current employees occupying these positions are undergoing background investigations. An interview is scheduled for one (1) position and the other position will be advertised soon.
4. Submitted hazard pay documents allowing for payment to several support personnel.

New Hires during the 4th Quarter, FY2021:

- Chinle: Senior Prosecutor, Date of Hire: August 16, 2021.
- Chinle: Senior Legal Secretary, Date of Hire: August 2, 2021.
- Tuba City: Victim and Witness Advocate, Date of Hire September 27, 2021.
- Window Rock: WCCU Investigator, Date of Hire: August 2, 2021
- Window Rock: WCCU Senior Investigator, Date of Hire: August 16, 2021.

Resignation / Retirement during the 4th Quarter, FY2021:

- Kayenta: Attorney, resigned position effective August 10, 2021.
- Window Rock: Attorney, resigned position effective July 30, 2021.

Vacancies during the 4th Quarter, FY2021:

- Chinle: Legal Secretary, position reclassified.
- Crownpoint: Senior Legal Secretary, position awaiting clearance of PAF.
- Crownpoint: Prosecutor, TIWAHE Grant, JVA posted with DPM.
- Dilkon: Legal Secretary, JVA is advertising OUF, no applicants.
- Kayenta: Attorney, JVA forwarded to DPM. Awaiting clearance and back pay.
- Kayenta: Prosecutor, TIWAHE Grant, JVA posted OUF, no applicants.
- Ramah: Attorney, JVA posted OUF, no applicants.
- Shiprock: Senior Prosecutor, New JVA submitted for re-advertising.
- Window Rock: Attorney, JVA to be forwarded. Awaiting clearance and back pay.
- Office of the Chief Prosecutor: Chief Prosecutor, Revised JVA submitted to DPM for posting.

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BUDGET ADMINISTRATION

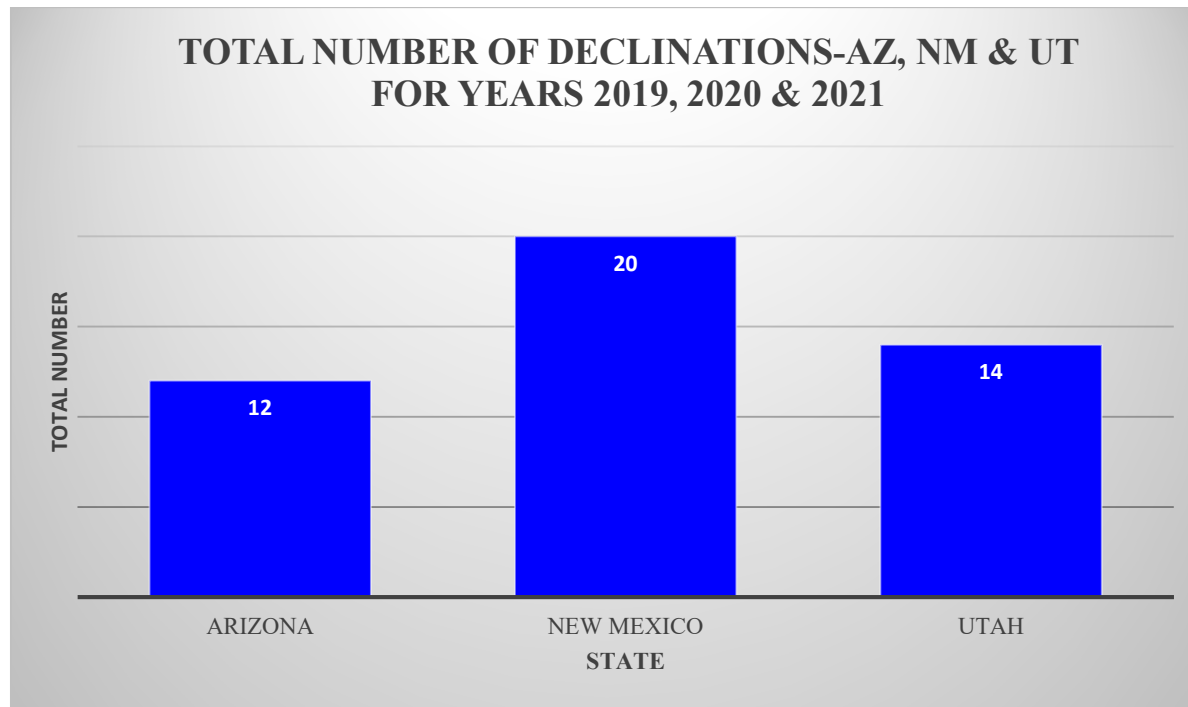
OTP successfully completed a lengthy process of obtaining approval for a budget transfer to fund performance step increases and position reclassifications discussed earlier in the amount of: \$38,503.

The FY 2022 budget process awarded an increase in funding for OTP in the following amounts:

FY 2022 FUNDING OUTLAY	
General Fund	\$2,838,739
GWA Allocation	\$83,838
Original Request FY 2022	\$2,922,577
Unmet Needs Award (Personnel Lapse Fund)	\$268,622
Revised FY 2022 Budget	\$3,191,199
Proposed Carry-Over Award (9/27/2021)	\$320,000
Proposed Bottom Line FY-2022 Budget for OTP	\$3,511,199
FY 2022 Unmet Needs Description	
Original Unmet Needs Request for FY-2022	\$463,691
Total Proposed Increase Funding to OTP in FY-2022	\$588,622
Difference (+)	\$124,931

DECLINATIONS – FEDERAL PROSECUTION OF CASES ON THE NAVAJO NATION

For the years 2019, 2020 and 2021 forty-six (46) cases were declined by U.S. Attorney’s Offices in Utah, Arizona and New Mexico. The chart below depicts number of declined cases for each State.



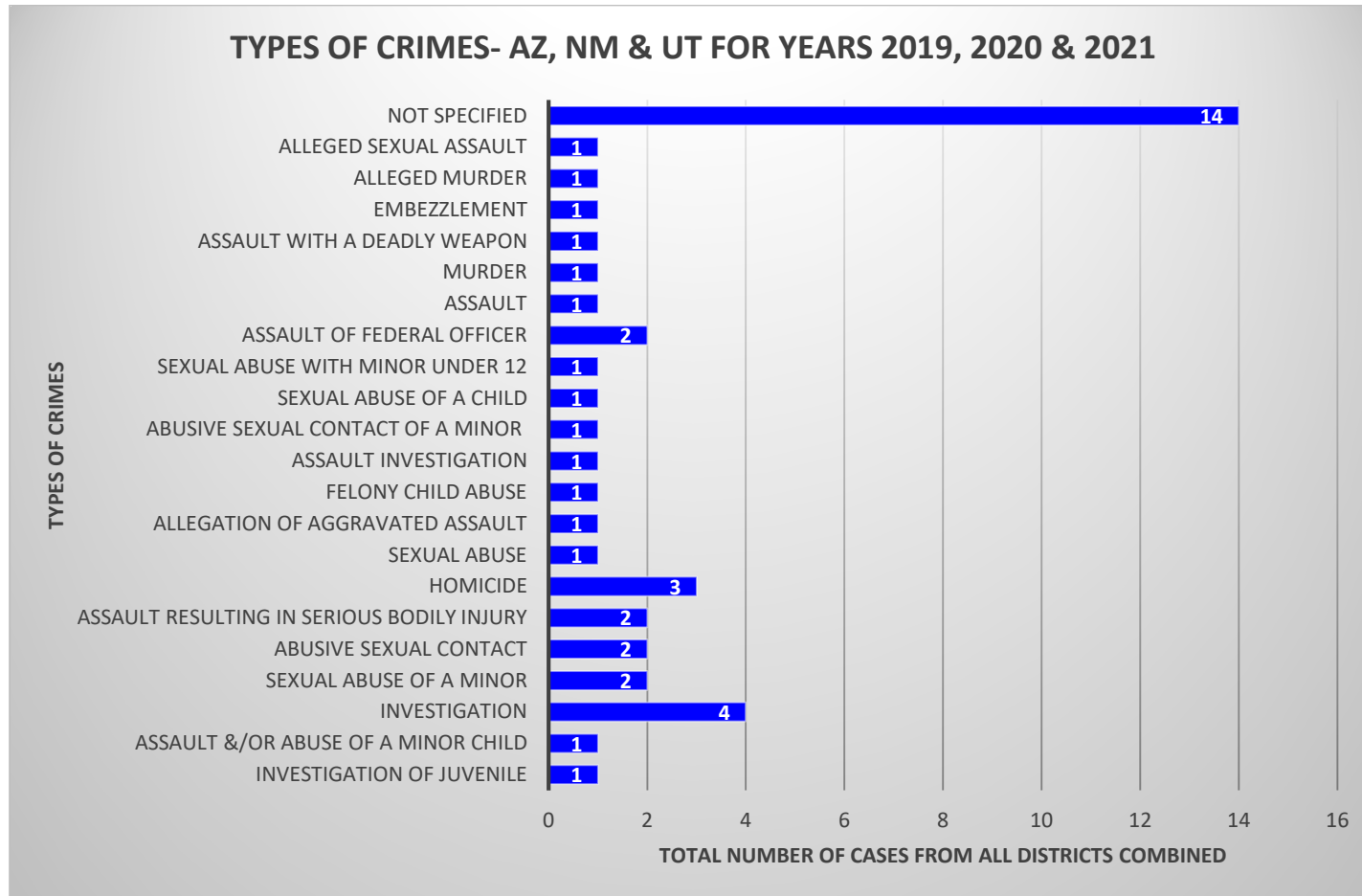
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The chart below depicts the reasons cases were declined. The actual verbiage from the letters is shown in the chart below.

Declination Reasons by Year-AZ, NM & UT for Years 2019, 2020 & 2021	
Lack of sufficient evidence 2019	1
Lack of evidence based on information 2019	1
Review of evidence & possible defenses as presently known 2019	1
Lack of cooperation by the victim 2019	2
Insufficient evidence 2019	9
Insufficiently confident that there is reasonable likelihood of conviction 2019	2
Lack of evidence 2019	2
Based on the evidence currently in the file 2019	1
Do not believe the case has reasonable likelihood of conviction should it proceed to trial 2019	1
The young age of the offender at the time of the offense 2019	1
Insufficient evidentiary basis to have a reasonable likelihood of conviction should this case go to trial 2019	2
The evidence concludes that should this matter proceed to trial there would not be a reasonable likelihood of conviction 2019	1
Insufficient evidence 2020	4
Do not believe that there is sufficient evidence to obtain & sustain a conviction at trial 2020	1
Insufficient evidence 2021	7
Insufficiently confident of a reasonable likelihood of obtaining a conviction 2021	1
Lack of cooperation by the victim/witness 2021	1
Lack of evidence 2021	1
Given current sentence, as well as negligible chance of any restitution this matter should be declined 2021	1
Insufficiently confident that there is a reasonable likelihood of conviction on charges relating to the alleged murder 2021	1
Do not believe there is reasonable likelihood of conviction if this matter proceeded to trial 2021	1
Based on the age of the suspect at the time of the offense this case may result in an unsuccessful certification hearing 2021	1
Based on the incongruences of the facts presents & the federal assault statute 2021	1
Not an evidentiary basis to conclude suspect caused the death 2021	1
Based on the facts presented 2021	1

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The chart below depicts the types of cases that were declined. The actual verbiage from the letters is shown in this chart.



Challenges Associated with the 2019-2021 Declination Letters:

- Most of the cases are not entered into *JustWare*, and as a result, are not currently under consideration for Navajo Nation prosecution;

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- OTP does not have police reports for the majority of the cases because the log numbers are unknown;
- Requesting police report numbers for the cases has been a time consuming and difficult r;
- Navajo Department of Criminal Investigation report numbers are not included in many of the letters;
- Majority of the letters do not identify the offender which complicates data collection on the case;
- The lack of uniformity, relative to information provided on the case, creates difficulties in identifying the case;
- There are some letters that have no information other than a brief reason the case was declined and the name of the alleged offender;
- One particular U.S. Attorney Office provided numerous letters that could not be linked to the cases on the Navajo Nation

PROSECUTORIAL ACTIVITIES

Navajo Nation-wide performance results:

PROSECUTION OF ADULT CRIMINAL OFFENSES	4th Quarter Score:	Goal:
File/Decline 80% of every 100 adult criminal cases presented to OTP by law enforcement (via incident reports)	87%	80%
RESOLUTION OF CHILDREN'S CASES PER ABBA (DELINQUENCY, ABUSE & NEGLECT & CHILDREN IN NEED OF SUPERVISION		
File/Decline 95% of every 100 juvenile referrals made to OTP by Department of Social Services or law enforcement or other entities	99%	95%
PROSECUTION/INVESTIGATION OF WHITE-COLLAR CRIME AND GOVERNMENT CORRUPTION OFFENSES		
Initiate investigation/prosecution or decline 95% of every 100 referrals properly made to White Collar Crime Unit (WCCU) via any source.	87%	95%
PUBLIC EDUCATION AND COLLOBRATION AIMED AT PREVENTION AND INTERVENTION		
# of public education presentations provided to public safety partners	27	27
ADMINISTRATIVE AND SUPPORT SERVICES PERFORMANCE		
Upload 90% of every 100 incident reports and Juvenile (JV) referrals into <i>JustWare</i>	99%	90%

CENTRAL OFFICE – OFFICE OF THE ACTING CHIEF PROSECUTOR

- Engaged in the FY22 budget process and discussed OTP’s lack of funding with several Navajo Nation Council delegates
- Presented to Navajo Nation Council delegates at DOJ’s Litigation Update h in Albuquerque, New Mexico
- Conducted a detailed analysis of cases that have been declined for Federal prosecution
- Conferred with Navajo Division of Public Safety staff concerning on-going issues related to prosecution of cases
- Actively participated in a work group focused on revisions to Title 17 of the Navajo Nation Code
- Presented before the Navajo Nation Council’s Sexual Assault Prevention Sub-committee about cases that were declined for Federal prosecution
- Continued to assist with the prosecution of cases in all OTP districts
- Assisted in modifying the Job Vacancy Announcement for the Chief Prosecutor position
- Assisted in creating a nomination package for non-Federal member for the U.S. Department of the Interior’s Joint Commission on Reducing Violent Crime Against Indians as outlined in Section 4 of the Not Invisible Act of 2019
- Led efforts to assist prosecutors in gaining access to National Crime Information Systems through the Tribal Access Program
- Conferred and interacted with U.S. Attorneys offices in Utah, New Mexico, and Arizona concerning cases originating in the Navajo Nation.

WHITE COLLAR CRIME UNIT (WCCU)

- WCCU lacks a dedicated Prosecutor
- Fiscal year equipment and supplies are in the acquisition process
- WCCU Investigators are reviewing training opportunities
- The WCCU office has property that needs to be decommissioned and removed
- Dated WCCU files need to be archived in accordance with applicable regulations
- The WCCU Office needs to be painted and Investigator offices need window blinds.
- WCCU Investigators need *JustWare* training
- The WCCU requires a physical security assessment to ensure its offices are protected from insider threats and/or outside potential non-authorized penetration

WINDOW ROCK

- A new senior prosecutor is reporting for duty on October 11, 2021

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- The WCCU prosecutor has been temporarily detailed to Window Rock OTP to assist with the prosecution of adult cases. This prosecutor was recently hired by OTP.
- The senior prosecutor assigned to Dilkon OTP is temporarily assigned to Window Rock OTP to supervise the legal and support staff. This legal staff member has contributed significantly to the stability of the office in the absence of a permanent supervisor.

SHIPROCK

On September 7, 2021, attorneys from Rothstein Donatelli, LLP of Tempe, Arizona, began providing coverage for the Shiprock OTP. This assistance will continue until an applicant is hired for the Senior Prosecutor position in Shiprock or other arrangements are made to employ a full-time prosecutor for Shiprock.

- Contract prosecutors handling cases within the Shiprock District are facing difficulties with last minute scheduling of hearings by the court. This prevents them from being adequately prepared for hearings.
- One prosecutor-candidate is waiting for Navajo Bar examination results from the August 2021 testing.
- The senior prosecutor position remains vacant. One applicant applied for the position, but declined the offer.
- The review of arrest reports and criminal complaints by the contract prosecutors is moving at a slow pace. As a result, this office did not meet the goal of completing 90% review of arrest reports and complaints.
- There is currently no prosecutor in Shiprock to focus on adult criminal cases. The support staff is supervised by the Acting Chief Prosecutor.
- The backlog of unserved criminal summons is growing. The Shiprock Police commander has been informed of the situation.
- The next hearing regarding *Navajo Nation vs. Dineh Benally* is scheduled for October 21, 2021 at 2:00 PM. This will be a motion hearing concerning Defendant's move to strike plaintiff's proposed jury instructions, and to, adopt defendant's proposed jury instructions.
- Of the twenty-one (21) criminal complaints filed in the hemp farm operations of Dineh Benally, only one (1) person, has been served a criminal summons. These criminal complaints were filed in October 2020. The Shiprock Navajo police commander advises the constraint on resources caused by the closing of the detention facility in Shiprock is causing the back log of these and other criminal summons.

ANETH

On September 7, 2021, attorneys from Rothstein Donatelli, LLP of Tempe, Arizona, began providing coverage for the Aneth OTP. This assistance will continue until an applicant is hired for the Senior Prosecutor position in Shiprock or other arrangements are made to employ a full-time prosecutor for Shiprock.

- JPO is experiencing continuing problems with the service of summons related to children's cases.
- JPO attended the Four Corner's Indian Country Conference on August 25-26, 2021.
- The review of arrest reports and criminal complaints by the contract prosecutors is moving at a slow pace. As a result, this office did not meet the goal of completing 90% review of arrest reports and complaints.

CROWNPOINT

- The Legal Secretary assigned to this office assisted the Acting Chief Prosecutor to create a Trial Notebook consisting of various types of evidence for the prosecution of an Aggravated Battery case. The Trial Notebook is 165 pages and is an example of the hard work produced by the legal secretary who created it within approximately six months of being hired.
- Attorney-candidate prosecutor met with Navajo Police officials, for the purpose of discussing the Navajo Nation Sex Offender Registration Notification Act. Takeaways include: 1) creating uniformity amongst District Prosecutors for the prosecution of SORNA cases; 2) engaging with the Navajo Nation's federal partners, including the U.S. Marshall's, and; 3) ensuring all SORNA officers and District Prosecutors are engaged in a consistent manner moving forward.
- The Crownpoint District needs at least one additional prosecutor and one Senior Legal Secretary.

TUBA CITY

- Victim/Witness advocate applicants interviewed and hired an applicant who reported for duty in Tuba City.
- One prosecutor-candidate is waiting for Navajo Bar examination results from the August 2021 testing.
- Getting police reports from NPD on emergency bases when victims want Prosecutor to place holds on DV offenders remains an ongoing problem.
- The need for a Bail Schedule is an ongoing problem.
- Public Intoxication offenders with maximum penalty that does not include incarceration is causing many to become repeat offenders .
- Court conducting arraignments and remanding Defendants without findings/justification on remands.
- Lack of service of Court documents by Navajo Police Department often results in case dismissals.
- Inmates represented by legal counsel are filing their own motions, creating a lot of work for prosecution to answer motions that are lacking in merit.
- Navajo Police and Criminal Investigation separation is a problem when NPD (patrol) responds to major crimes and is expected to initiate actions in tribal court with only the initial contact investigatory information; while CI reserves working only with their federal counterparts and not providing their investigative information for tribal prosecution
- Major incidents are not reported to Prosecutor; victims contact Prosecutor, prosecutor lacks knowledge of cases to assist a victim and has to search out details to attempt to help victims.

CHINLE

- Senior Prosecutor received two requests for extradition from State of Arizona. OPVP granted extradition warrants. Extradition Hearing held in one of those cases and are awaiting a written court order about the outcome.

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DZIL YIJINN

- Lack of case managers and Child Protection Services workers has become a problem.
- Senior Prosecutor is handling a criminal homicide case that involves significant issues related to effective and efficient transfer of evidence from the Criminal Investigation Department and the Federal Bureau of Investigation.
- Prosecutor Candidate took NNBA exam and is awaiting results. He has been helpful with drafting motions and preparing discovery in many cases.

KAYENTA

- Received several mental health cases and coordinated acute psychiatric care for at least 2 individuals.

DILKON

- Senior Prosecutor assisted in filing all Ramah criminal complaints this quarter and started their backlog of complaints.
- Senior Prosecutor taught at the Navajo Police Academy this quarter.
- Senior Prosecutor handled all of Ramah Children's Docket.
- Prosecutor now has an office space inside the Police Department administration trailer, but confidentiality is a concern due to police personnel being able to hear prosecutor during telephonic hearings.
- Office space specifically designated for a full functioning prosecutor office is needed.

RAMAH

- Prosecutor's Office does receive police reports and complaints on a regular basis.
- Ramah District does not have a Victim/Witness Advocate in the district.
- Ramah District essentially has their own social services/behavioral health services, police department, and corrections that are not under Navajo Nation. The Courts in Ramah however, are under Navajo Nation Judicial Court Administration.

TO'HAIJILEE

- Continue to have challenges with receiving reports and criminal complaints from Navajo Police Department, even when OTP knows there are arrests, it is not receiving release conditions from the Court.

B. DOJ Units

This quarter, DOJ received 910 Requests for Legal Services and completed 748. These requests do not include other work such as time spent in meetings, court appearances, time spent preparing for litigation, phone calls to work/client email.

Notable projects for each DOJ unit follow. These do not reflect all of the projects that DOJ is currently working on. Some have privileged and confidential elements, and this report provides limited information.

Chapter Unit (CU)

The Chapter Unit (CU) is led by Assistant Attorney General Rodgerick Begay who oversees two (2) Attorney Candidates and a Legal Secretary. The primary CU clients are the Administrative Service Centers (ASC) of the Division of Community Development (DCD) and the 110 Political Subdivisions, which are generally referred to as Chapters. 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). In addition, the CU provides virtual PowerPoint presentations and participates in other various meetings. Needless to say, the amount of work is quite voluminous and this report only contains notable projects. This quarter, CU is pleased to announce the recent hire of Ms. Krista Thompson who is Navajo and a graduate of UNM School of Law.

1. Amending the Local Governance Act (LGA): In the third quarter, the CU began drafting amendments to the LGA resulting in two different models. This quarter, two more models were drafted by the CU but they are not yet finalized. Basically, option 1 would certify the remaining 65 non-LGA certified chapters based on a Standard Five Management System (FMS) and statutorily allow Chapter Officials to supervise the Chapter Manager. Option 2 would also allow Chapter Officials to supervise the Chapter Manager but would keep the distinctions between LGA and non-LGA certified chapters. More specifically, under option 2, non-LGA certified chapters would not be allowed to exercise authorities under section 103(D) and (E) of the LGA but would be allowed to exercise authorities listed under a new section 103(A), such as being able to contract up to \$50,000. Options 3 and 4 consider the same alternatives. Under option 3, all 110 Chapters would be LGA-certified but Chapter Officials would not supervise. Under option 4, LGA-certified and non-LGA certified distinctions are kept similar to option 2, however Chapter Officials are not allowed to supervise similar to option 3.

In light of the many progressions made since the LGA was passed in 1998, there have been historical and continuing practices by the Navajo Nation Government to support any one of the options above. The CU anticipates giving an update on these models to the Commission on Navajo Government Development in the next quarter. Another noteworthy item is that the CU participated in meetings with the Judicial Branch Peacemaking Program to discuss the peacemaking aspects of the LGA. It may be possible that such efforts may be included in future drafts of the four models. Lastly, the 2010 FMS template requires major updates and, as previously reported, only 2 of the 5 FMS have been updated by the CU. These are all major projects.

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2. Chapter Official Stipend Shortfall for FY 22: During the month of July, CU worked closely with DCD to help clarify the annual budget shortfalls concerning Chapter Official Stipends. During the August joint session with the Budget and Finance Committee (BFC) and Resources and Development Committee (RDC), the CU presented on the history of the budget shortfalls and presented options for FY 22. Due to on-going concerns about the shortfalls, a work session is being planned with both RDC and BFC which may occur next quarter. This is a multi-faceted issue that extends beyond the main issue of the annual shortfall.

3. ARPA Fiscal Recover Funds (FRF) Procedures & Forms: In light of certain timelines and duties listed in CJY-41-21, DOJ has held numerous meetings internally, as well as externally with clients. CU's participation has concentrated on ensuring the procedures and forms are appropriate under the LGA while ensuring sufficient flexibility to allow Chapters to benefit from the FRF. This report does not detail the amount of work that CU has spent on the FRF, and CU anticipates participating in many of the FRF related discussions next quarter.

4. Guidance on Chapter Quorum: On July 12th, CU issued a memorandum to all 110 Chapters that interprets the legal effect of CJN-36-21 which, amongst other things, rescinded the three quorum legislations (CMA-09-20 and CAP-19-20) and gave Chapters 90 days to reintroduce their normal quorum. Basically, most Chapters need to begin holding 25-person chapter meetings (in-person or virtual) by October 4, 2021. Other guidance was provided thorough the DCD Administrative Service Centers about the effect and non-effect of the Navajo Emergency Public Health Orders issued in early August. Recently, legislation 0200-21 was introduced which seeks to extend the deadline with an additional 90 days. If passed, CU anticipates issuing another memorandum to all 110 Chapters.

5. Cellular One Template Agreement for Chapters: Previously, the CU helped coordinate a template agreement to be used by Chapters for internet service agreements provided by NTUA Wireless. Similarly, the CU also helped coordinate a template agreement for internet services provided by Cellular One.

6. Requests for Legal Services (RFS) and other notable work: In addition to the daily RFS that the CU receives from Chapter Officials, Chapter Staff, DCD-ASC Staff, Council Delegates, and others, CU continues to work on the RFS backlog. In other words, the CU is efficiently multitasking its regular work in addition to:
 - a. Attending weekly DCD-ASC meetings to provide various updates;
 - b. Attending the Agency Council meetings which typically occur on Saturdays;
 - c. Attending various Navajo Nation Council and Committee Meetings;
 - d. Presenting PowerPoints to Chapter Officials and Chapter Staff;
 - e. Participating in chapter specific discussions on various topics; and
 - f. Providing internal CU training in order for CU to be more efficient.

Economic / Community Development Unit (ECDU)

The Economic/Community Development Unit (ECDU) is led by Principal Attorney/Acting Assistant Attorney General Katherine Belzowski who oversees an Attorney and a Legal Secretary. This quarter, an ECDU Attorney resigned to accept a lobbying position in Washington, DC. 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. Gaming: ECDU continues to work with NNGE's counsel to finalize the outstanding compact appendices. The appendices govern how specific games that are authorized under the compact, are operated. They are necessary for the Nation to engage in gaming under the Compact. ECDU attended weekly meetings with the Arizona Tribal Regulatory Subcommittee group, comprised of attorneys representing Arizona tribes who entered into the 2021 Arizona Compact, to discuss Appendices within the group and the Arizona Department of Gaming. In July, ECDU worked with NNGE counsel to coordinate approval and execution of necessary appendices for the Nation to engage in event wagering in compliance with the 2021 Arizona Compact. ECDU also attended Naabik'iyáti Gaming Subcommittee meetings to assist NNGRO and NNGE with presentation and approval of Appendices A, C, H, M, and I.

Pursuant to the Arizona Gaming Compact, the Nation is authorized to operate a certain number of gaming devices for its Arizona facilities and authorized to transfer some of its gaming devices that it does not use. Accordingly, with the new gaming compact in place, the Nation amended and executed three (3) transfer agreements. These agreements were approved by Council through Section 3(B) of CAP-19-21, identified as Exhibit K, Exhibit J, and Exhibit I, respectively. ECDU continues to assist NNGE counsel in extending the Transfer Pool Agreements.

ECDU also provided legal advice as necessary to NNGRO to comply with the Navajo Gaming Ordinance and 2021 Arizona Compact.

2. Census/Voting/Redistricting: In New Mexico, Senate Bill 304 (SB 304) created a new process for redistricting in the state that included the creation of the Citizen Redistricting Committee (CRC). To engage in this process, ECDU drafted a comment for OPVP requesting that NM meetings take place on the Nation, as SB 304 requires at least one meeting to be held on tribal land. ECDU drafted talking points for OPVP for the meeting held on the Nation at Navajo Technical University on September 29, 2021. ECDU attended CRC meetings, County meetings, and Native Redistricting Coalition meetings to stay informed of New Mexico redistricting developments.

ECDU has started to meet with New Mexico Chapters regarding potential new polling locations on the Nation for upcoming state and federal elections. New Mexico law allows the Nation to request additional early polling locations. However, these requests need to be submitted to the respective county by November. ECDU is soliciting feedback from the New Mexico chapters on the 2020 federal/state elections to understand whether New Mexico chapters would like additional early voting locations.

ECDU continues to meet with the Arizona counties and Secretary of State office on state and federal election issues. ECDU is working closely with Apache County to discuss the possibility of having more vote center based voting in Apache County. Presently, all voters in Apache County are required to vote in their precinct on Election Day, which has resulted in Apache County having the highest number of rejected voter ballots of all

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the Arizona counties. It has also resulted in a lot of confusion and frustration among voters who are turned away on Election Day for not being at the right precinct. By utilizing vote centers, Apache County allows voters to cast ballots outside of their assigned precinct on Election Day.

ECDU also attended meetings hosted by the Intertribal Council of Arizona (“Native Vote Strategy”) and NARF Native American Voting Rights Coalition to prepare for 2022 State/Federal Elections and discuss the Native American Voting Rights Act.

3. Division of Economic Development (DED): With the assistance of outside counsel, a trademark application was submitted to the U.S. Patent and Trademark Office for the Office of Miss Navajo, the Navajo Nation flag, and the Navajo Nation seal to protect the Nation’s intellectual property rights. ECDU continued to draft the Intellectual Property Department’s Fund and Fund Management Plan with feedback from the Tax and Finance Unit (TFU) and sent cease and desist letters to protect the Nation’s trademarks. ECDU completed legal review for a Project Development Department on Shonto Hotel, a Permanent Trust Fund Project.

4. Division of Community Development (DCD): This quarter, ECDU worked with DCD to develop regulations governing the changing of Sihasin projects (Change Projects). Presently, in order to change a Sihasin project, there must be approval by both BFC) and RDC. Pursuant to 2 N.N.C. §§ 301(B)(19) and 501(B)(11), BFC and RDC have decided to delegate their authority to approve Change Projects to DCD. Accordingly, ECDU with the assistance of TFU, drafted regulations to govern the delegation of authority. BFC and RDC will need to approve the regulation before they are effective.

ECDU finalized a subrecipient agreement for the Community Development and Housing Rehabilitation to use with NTUA. ECDU worked with NTUA to draft a subrecipient agreement that would meet the requirements of the project and funding source. This is one of several subrecipient agreements that ECDU is working to finalize to replace the previously used MOAs.

Human Services and Government Unit (HSGU)

HSGU is DOJ’s largest unit and is led by Assistant Attorney General LaTonia Johnson. Ms. Johnson manages four (4) Attorneys, an Attorney Candidate, A Principal Tribal Court Advocate and two (2) Legal Secretaries. This quarter, an Attorney Candidate and Attorney resigned, and HSGU hired a Principal Attorney and a Legal Secretary. HSGU assists eight (8) Divisions/Departments consisting of over 65 programs. This quarter, notable projects include:

I. NAVAJO DIVISION OF PUBLIC SAFETY (NDPS):

1. Office of Inspector General (OIG) Audit: DOJ’s outside counsel, Jacobson Law Group, has been working with Office of Justice Programs (OJP) regarding the audit status. In a letter dated June 10, 2021, the United States Department of Justice (USDOJ) provided notice to the Navajo Nation that it has closed recommendations 2 and 3. The letter also confirms closure of the \$11,659,389 in open costs under Recommendation #9 pertaining to the Kayenta Facility. However, recommendation 9, Subpart b is still outstanding and the remaining outstanding amount is \$20,375,234.00. This

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relates to the building cost for the Tuba City correctional facility. The Navajo Nation has provided all the information to close-out recommendation 9/subpart b, looks forward to a response from OJP.

2. Privacy Act Guidance Table and Frequently Ask Questions: HSGU is working with the Jacobson Law Group and the NDPS Department's Information Management System (IMS) to draft a Guidance Table and Frequently Asked Questions (FAQ) document to assist the NDPS to respond to information disclosure requests pursuant to the Navajo Nation Privacy Act. HSGU receives numerous requests from NDPS. HSGU has met with the NPD IMS to discuss the continuing need for the Guidance Table and FAQ document. The purpose of the Guidance Table and FAQ is to allow NDPS to review the aforementioned documents and make a decision on disclosure of document based on who the requesting party is and the purpose of the request.

3. Facility Usage Agreement with Window Rock Unified School District (WRUSD) #8: HSGU worked with DPS to draft a Facility Usage Agreement (Agreement) with the WRUSD for office space to accommodate both commissioned executive command management and civilian office staff and the public to provide essential emergency response services and community-based law enforcement services. The Agreement would be for the lease of up to ten (10) classrooms in the WRUSD Administration Building in Fort Defiance, Arizona. HSGU reviewed draft language proposed by WRUSD and recommended amendments for consistency with Navajo Nation law. WRUSD agreed to Draft No. 7 of the Agreement and DPS moved forward.

4. Navajo Police Department (NPD)/Arizona Grant Award for the Purchase of Safety Equipment: HSGU received notice of a grant award that NPD received from the Arizona Office of the Attorney General for the purchase of safety equipment. Through the review process, HSGU learned that the grant application and the grant agreement were both not properly reviewed through the executive review process. HSGU reviewed the grant and funding award agreement and found contract language that is inconsistent with Navajo Nation law. HSGU has been working with NPD and the Arizona Office of the Attorney General to rectify the matter by proposing new contract language that is consistent with Navajo Nation law so that NPD may accept the award and use the funds to purchase safety equipment.

Navajo Police Department – Mutual Aid Agreements (MAA) with Counties and States: HSGU has been working with NPD on determining the current status of all the MAA or Memorandum of Agreements with counties and states on law enforcement services. NPD submitted a MAA with Utah Highway Patrol to DOJ for review, however HSGU determined that the MAA is actually an inter-governmental agreement due to the sharing of governmental powers granted to Utah Highway Patrol to patrol the Utah-side of the Navajo Nation. HSGU advised NPD that the MAA is an IGA and would require committee approval. An attorney with the Utah Attorney General's Office reached out to HSGU to work on proposing language to Utah so that the agreement is consistent with Navajo Nation laws. HSGU reached out to NPD to request client direction on the specifics of an agreement that NPD would agree to. HSGU has not yet received feedback from NPD. HSGU has also requested client direction on a potential agreement with Montezuma County with the State of Colorado and HSGU has not yet received a response from NPD on this matter .

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5. Title 17 amendments: HSGU has been attending Title 17 amendments meetings being spearheaded by Council Delegate Charles-Newton and participated by the Navajo Police Department, Criminal Investigation, and Office of the Prosecutor. During the meetings, HSGU provided guidance on proposed language change and how it may impact the Navajo Nation, as a whole.

II. PUBLIC LAW 93-638:

1. Exploring Self-Governance for the Nation's Current Title I Contracts with Navajo Area Indian Health Service: The legislation related to Navajo Nation programs pursuing self-governance is Legislation 0168-21. The legislation was assigned to several committees before approval by the Naabik'iyáti' Committee. The legislation passed through LOC and HEHSC.

2. P.L. 93-638 CY 2022 Contract Renewals and Successor AFA Proposals: HSGU worked OMB and contracted programs regarding the 2022 SAFAs for their programs. HSGU completed review of all programs' scope of work prior to the programs completing and submitting the full contract renewal and successor AFA proposals for appropriate administrative review. There are six (6) contract renewals this year – Higher Education; Tribal Courts; Tribal Enrollment/Vital Records; Housing Improvement Plan; Archaeological Services; Safety of Dams. The contract renewal for Tribal Courts completed its legislative process on September 23, 2021. The other contract renewals have not yet been acted on by the appropriate committees.

Complications/Concerns: It appears that the other contract renewals will not be ready to submit to BIA NRO by October 1 because they are still in the legislative process. Therefore, the 90-day time period for BIA NRO to review the contract renewal proposals will go into Jan 2022. Those contracts may not be renewed before the new calendar year.

III. NAVAJO DEPARTMENT OF HEALTH (NDOH):

1. DBMHS Medicaid Provider Agreements with Arizona and New Mexico: DBMHS wants to enter into Medicaid Provider Agreements with Arizona and New Mexico in order to receive third party reimbursements for services provided to eligible Navajo members. DBMHS is moving forward with the proposed legislation to authorize these Provider Agreements. In early September, HSGU met with OLC and DBMHS to discuss the matter. OLC has recommended a work session with the HEHSC and the appropriate state agencies regarding the agreement before moving forward with the legislation for limited waiver of sovereign immunity.

IV. DIVISION OF SOCIAL SERVICES (DSS):

1. Indian Child Welfare Act (ICWA) Program: ICWA cases - HSGU continues to work with the ICWA Program (ICWAP) to conduct case staffing of cases that are in state court and require a request for legal intervention, and other related matters. This quarter, HSGU conducted ten (10) case staffings. HSGU will continue to staff cases and answer related legal questions.

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2. Kevin S. Settlement/ New Mexico State ICWA Bill: New Mexico State Representative Georgene Louis, sponsor of the New Mexico ICWA bill, and Bold Futures hosted five (5) virtual meetings to review amendments to the New Mexico State ICWA bill proposed by tribes and pueblos including the Navajo Nation. These meetings were held on: July 15, 2021; July 27, 2021; August 3, 2021; August 10, 2021; and September 22, 2021. Over the course of these meetings, the group, including CYFD and New Mexico Tribes, reviewed proposed amendments recommended by the Navajo Nation and the Pueblo of Acoma and Laguna. At the September 22, 2021 meeting, Rep. Louis reported that she plans on presenting the draft bill to the Courts, Corrections, and Justice (CCJ) Committee on October 12, 2021 or October 13, 2021, and that she hopes to have a draft bill to the CCJ Committee by October 8, 2021. Rep. Louis also reported that she would like to present the draft bill to the Indian Affairs Committee by October 20, 2021 and that she would like to present as early as September 30, 2021, but she does not believe a draft bill will be ready by that time. Also present for the September 22, 2021 meeting was the Acting Secretary of New Mexico's CYFD, Barbara J. Vigil, who is the former Chief Justice of the New Mexico Supreme Court. During the September 22, 2021 meeting, Rep. Louis and Bold Futures reviewed with the group a set of questions provided by the Office of Legislative Counsel on a draft bill. However, the Navajo Nation and the other tribes and pueblos had not received a copy of the draft bill that was shared with Legislative Counsel. HSGU has continued to be involved in coordinated advocacy efforts on amending the draft bill with three (3) other tribes that also were advocating for amendments to the bill and with ICWA Program to identify areas within the ICWA bill that should be amended. HSGU will continue to be involved in the legislative process for the New Mexico ICWA bill.

Complications/Concerns: While these meetings are being held, it appears that CYFD is not internally discussing the proposed amendment before the meeting. There are also times when they bookmark a section and note it needs further discussion yet there is no further discussion. HSGU will be reviewing the updated draft bill to ensure it properly reflects the Navajo Nation's proposed amendments.

3. Brackeen decision: Since the last quarter, HSGU met with the ICWA Program and the Litigation Unit to discuss next steps.

V. BOARD OF EDUCATION (BOE):

1. HEHSC Condition of Appropriation: HEHSC recently issued a Condition of Appropriation to DODE's funding for the upcoming budget year requiring the Department of Dine Education (DODE), through the Superintendent and the BOE, to resume all efforts of the Navajo Nation in implementing all 638 contracting activities for the purposes of assuming complete control over Bureau of Indian Education (BIE) administrative duties and responsibilities over the education of Navajo children within the Navajo Nation. While the day-to-day efforts will be the responsibility of the DODE and the Superintendent, the BOE will be overseeing this effort to ensure that this directive is carried out. BOE has begun a several day (carried out over several weekends) work session to discuss the details of the 638 application goals, process, and model. HSGU prepared guidance for the Board members during their first set of discussions outlining the remaining pieces needing to be addressed before the application is ready for submittal, however HSGU was ultimately unable to present during the conference due to the BOE prioritizing other speakers and limited time.

Complications/Concerns: The decision to implement 638 contracting activities in order to assume complete control over BIE administrative duties and responsibilities related to the education of children on the Navajo Nation is fraught with political considerations not necessarily tied to achievable

outcomes, and the condition of appropriation itself, on its face, fails to take into account the nuance of actually taking over a 638 contract with the BIE, which is limited in many ways. Further discussion between HSGU and BOE will assist in clarifying the potential possibilities for sovereignty in education through the 638 model.

2. HEHSC Legislative Concern: BOE issued two (2) resolutions recommending Dr. Harold Begay as the Superintendent of Schools, which must be approved by HEHSC, and ultimately the Navajo Nation Council. The first of these resolutions, NNBEMA-698-2021, recommended Dr. Begay as the Superintendent without clearly identifying that this recommendation was based on the potential outcome of a background and reference check. Because of the ambiguity in this resolution, BOE issued another Resolution, NNBE-731-2021, clearly stating that the recommendation was contingent on a successful background and reference check. HSGU recommended this language during the drafting of the first of these resolutions, but it was not adopted, prompting the revision.

3. Resolution Requiring All Schools to Adopt Vaccination Requirements: BOE issued Resolution NNBESE-752-2021 requiring all schools operating within the Navajo Nation to adopt vaccination requirements, in support of Council resolution CAU-48-21. Specifically, the Resolution sets forth that all employees of the all schools operating within the Navajo Nation to be fully vaccinated against COVID-19 and that any employees who are not fully vaccinated, for any reason, against COVID-19 are required to provide documentation to their supervisor or school that the employee has tested negative for COVID-19 every seven days. The Resolution sets forth that the requirements must be incorporated into the personnel policies manual applicable to schools, and that each school must amend their manual within 30 days of the enactment of the Resolution.

VI. DEPARTMENT OF DINE EDUCATION (DODE):

1. Navajo Nation's Plan to re-open schools: Last summer, DODE updated its School Reopening Plan and School Readiness Assessment based on NDOH's new Framework for schools: a document created by local healthcare practitioners in partnership with NDOH. The updated Plan removes a required phased re-opening, and instead allows the opening of schools under any status level, except for purple, which is the most severe. Parental choice remains in place for any parents who do not want to send their children back to in-person learning. The BOE affirmed this updated plan in Resolution NNBEJA-727-2021 as described above. Of note, the Plan requires students and employees of schools to wear masks.

Complications/Concerns: As acknowledged above, the State of Arizona has issued several new laws that prohibit mask and vaccination mandates in schools. This conflict between Arizona and Navajo Nation directives will likely result in many schools being unsure about what guidelines to follow and will potentially result in unsafe learning environments for students in schools operated by the State of Arizona.

2. Educational Sovereignty Efforts: DODE is working to establish a path forward for the Education Sovereignty of the Navajo Nation. In so doing, considerations as to how best to achieve this remain unclear. HSGU is providing research support for several options, such as establishing a 638 contract for Bureau of Indian Education functions over schools, (which as described above, is now concretely established as a path forward for the Nation), establishing the Dine School Accountability Plan to govern all schools on the Navajo Nation, as well as looking at more direct ways to

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work with the federal government to overtake education functions across all schools on the Navajo Nation. HSGU prepared guidance for the BOE evaluating the current items still needing to be addressed in DODE's 638 proposal.

Complications/Concerns: This research assignment is a substantial undertaking that requires creative thinking about how to forge a path ahead that has not been taken before. There remains division within DODE, and among BOE members, of how best to do this. The research conducted so far by the TED Grant consultants has been one sided (promoting the 638 path) without much direction from DODE staff, who do not have the time to be intimately involved in the research or planning. DODE needs to designate an official position to take on this project. Given these challenges, HSGU is working closely with DODE to begin comprehensive documentation of the different options and the pros and cons of each.

3. ERATE: The Navajo Nation successfully received its ERATE award, which will provide extensive support for internet technology, infrastructure, and service across Navajo Nation Head Start centers. HSGU is currently working to ensure that Head Start is complying with the corresponding requirements regarding internet safety. HSGU has also been assisting DODE administration in ensuring the library Plan of Operation accurately captures the new structure which allows for the Chapter libraries to benefit from ERATE funding. One aspect of the ERATE funding also relates to the designation of Chapter Houses across the Nation as libraries, as they will be supplying public access to the internet for research purposes.

Complications/Concerns: HSGU issued a memorandum to DODE and provided notice of USAC's tactics to recoup money from recipients many years later. The Navajo Nation is already engaged in litigation against USAC trying to appeal USAC findings against the Navajo Nation. Further, a recent court case (Bianca v. FCC) ruled that there is no statute of limitations for the FCC to recoup funding. This creates a risk that USAC may try to recoup the funding recently awarded to the Navajo Nation in future years, as they do not conduct due diligence on eligibility prior to issuing awards, but instead usually scrutinize awards years later. HSGU is doing its best to ensure Head Start is fully informed throughout the process. HEHSC issued a legislative concern that the ERATE project is not being properly planned for on the part of the Navajo Nation. Specifically, the concern requires the Attorney General to report, verbally and in writing, to the Navajo Nation Council, in Executive Session if necessary, on (1) the status on any appeals or litigation, past or present, concerning ERATE funding or eligibility funding; (2) what Navajo Nation government entities, specifically Chapters, are eligible to apply for ERATE funding; and (3) the result or status of any litigation related to OnSat by no later than the end of the 1st Quarter of FY 2022. This directive will allow DOJ the opportunity to fully explain to HEHSC that the ERATE application and administration is being undertaken in a cautious and well-researched manner, and that the Chapter Houses, through proposed amendments to the Library Operating Procedures, will appropriately qualify for ERATE funding.

4. Office of Dine Youth (ODY): ODY is currently involved in a construction project with Navajo Housing Authority (NHA) for the development of a youth complex in Crownpoint. According to the agreement between ODY and NHA, NHA is responsible for the construction, but must keep ODY informed throughout the process. The construction has started, but due to the continual inability of the hired contractor (Arviso Construction) to meet design specifications, the project is 5 months behind schedule.

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5. Scholarship Office Amendment to Higher Education Policies: ONNSFA requested HSGU assistance with amending the Higher Education Policies for the Office of Scholarship & Financial Assistance. HSGU thoroughly reviewed the amendments and provided significant feedback to ONNSFA. HEHSC is very interested in these amendments and has been requesting an update for several months.

6. Head Start Audits: This past September, DOJ received notice of an unpaid debt to the Department of Health and Human Services from a Disallowed Costs letter sent to Head Start on October 14, 2020, that has accrued to a debt of \$1,913,006.18. The debt is a result of audit findings with questioned costs against Navajo Head Start in the Navajo Nation's 2018 audit that led ACF to disallow costs on an ACF grant to Head Start. Now, the options are: 1) Head Start can do nothing and Treasury will offset the next award of federal funding to any NN program, not necessarily Head Start funding; 2) Head Start can ask Council to appropriate UUFB to pay the debt; or 3) DOJ can ask OOC to allow use of the CMF. HSGU has instigated several conversations to inquire how Head Start wants to pay the debt.

Head Start also received a more recent 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, but that the impact of COVID-19 affected the ability of employees to seek health care support, thus affecting revenue rates.

Complications/Concerns: Head Start generally denied any knowledge of the disallowed costs letter, before admitting that they were aware of the letter and thought that it would be paid out by someone else or that they did not need to pay it. After much back and forth, Head Start agreed that they need to pay the debt out of Head Start matching fund budget codes if possible, and if not, that they will need to ask the Navajo Nation Council for general funds. They are working with OOC/OMB to determine the path forward. It is concerning that the Disallowed Costs letter was not shared with NNDOJ, and as pointed out by TFU, the Navajo Nation needs to have a system so that DOJ receives notices of disallowed cost from funding agencies in time for DOJ to file appeals.

7. Office of Navajo Nation Scholarship and Financial Aid (ONNSFA)-UNM Rainforest Agreement: The Navajo Nation OPVP, former President Begaye Administration, entered into a three-year agreement with the University of New Mexico in 2018 wherein the Nation agreed to pay a flat fee for the reservation of two floors in the Lobo Rainforest Building to be used by Navajo Nation students. The agreement specified that the Nation would pay for the rooms on behalf of all students, which would not be charged a fee, and that this payment would not be contingent on residency. In August 2020, the Navajo Nation OPVP sent a letter requesting termination of the Agreement. As of June 28, 2021, OPVP Legal Counsel informed DOJ of OPVP's position that the previous letter effectively ended the contract and further determined that the Navajo Nation will not pay for the last year of the agreement nor will it move forward with a new agreement.

Complications/Concerns: The Agreement terminated by its own terms on July 31, 2021. DODE is firm in its stance that the agreement not continue in future years. The original Agreement did not go through the 164 process and was never assigned a contract number. Therefore, there was no long

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term funding identified to pay out the agreement. HSGU recommends that any further agreements of this nature go through the full 164 review process.

8. S.O.A.R.S. Unpaid Invoices: DODE received invoices from the vendor S.O.A.R.S. for services provided during the periods of 2010-2011 for an unpaid amount of \$7,173.31; 2013-2013 for the unpaid amount of \$6,760.15; and 2018-2019 for the unpaid amount of \$28,557.63. S.O.A.R.S. provides the following services: professional investigations, litigation support services, skip tracing and pre/post-employment suitability inquiries. DODE submitted, for 164 review, new contracts for the above amounts. HSGU requested to review the original contracts for the services and any documentation that services were actually performed. DODE and S.O.A.R.S. were unable to locate any documentation. After consultation with OOC, HSGU recommended the new contracts be signed and an explanatory memorandum be included in the file explaining the “after-the-fact” nature of the contracts. S.O.A.R.S. sent letters warning of escalated tactics to receive these unpaid funds.

Complications/Concerns: It appears none of the services were properly procured or contracted. HSGU recommended that all goods and services be procured in compliance with Navajo Nation Law. S.O.A.R.S. services are still being utilized by DODE, and other departments of the Navajo Nation.

VII. DIVISION OF GENERAL SERVICES:

1. Insurance Services Department (ISD):

a. Navajo Nation Insurance Commission (NNIC): Not only is legal assistance provided to ISD and its insurance programs Risk Management (RMP), Workers Compensation(WCP), and Employee Benefits (EBP), HSGU provides legal assistance to NNIC, and in this respect, ISD is responsible for providing administrative assistance to NNIC. This quarter, NNIC met on two (2) occasions and in addition to receiving insurance programs (RMP, WCP and EBP) reports and employee health benefits financial and actuarial reports on September 2, 2021, NNIC authorized RMP to bind, among others, the master commercial general liability renewal coverage for FY 2022. The master property coverage and other standalone policies (fidelity bond, etc.) in the meantime are pending with renewal quotes; another NNIC meeting is thus scheduled for September 28, 2021 to complete the binding of the remaining FY 2022 coverage renewals.

b. COVID Related Issues Related to Employee Exposures: HSGU continues with its assistance to ISD and its insurance programs to ensure workers compensation or employee health benefits claims related to insured members who may have been exposed to COVID-19 and/or self-quarantining are not unnecessarily delayed or denied should such claims be filed. This quarter, a workers' compensation COVID-related claim was fully settled; and a second one is pending with compensability issue. 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: Currently, there are seventy-one (71) pending litigation cases (federal, state, and tribal courts) as follows:

a. Tribal Cases: There are sixty-two (62) pending cases as follows:

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- Twelve (12) appeals pending with the Navajo Nation Supreme Court: Although all the cases have been fully briefed, oral arguments have yet to be scheduled.
 - Fifty (50) District Court cases, two (2) of which were served this quarter. Two (2) bench trials were held in January and October 2017, respectively, but rulings/judgments have not yet been issued. The District Court cases are activated and this quarter, two (2) motion hearings and seven (7) pretrial conferences were conducted. In addition to appearances at hearings, HSGU continues to assess the degree of liability exposures on other cases where settlement evaluations are pending as well.
- b. State Court: Two (2) state court cases are pending, one in Arizona and the other in New Mexico. In both cases, Navajo Nation employees are sued in their individual capacities; and the defense of the Nation's sovereign immunity could be impacted by the United States Supreme Court ruling in *Lewis v. Clarke* ruling.
- c. FTCA Cases (AZ and NM District Courts): Currently, there are seven (7) ongoing cases, three (3) of which were filed this quarter. As the assigned Navajo Nation FTCA Liaison, Arita Yazzie of HSGU is heavily involved with federal litigation. She assists the United States with preparations of (1) responses to extensive written discovery (Interrogatories and Requests for Production) which also entails the identification, compilation, and production of relevant tribal/program documentation; and (2) Motions, some with attachments of Declarations or Affidavits for the clients' signatures. More specifically this quarter, HSGU assisted with preliminary reviews and responses to the three (3) new lawsuits; and coordinated and participated in a series of a three-day interviews (8 Navajo Nation employees) conducted by the assigned AUSA in one of the cases. In addition to these federal cases, there are several FTCA administrative claims which are pending and included within the pre-litigation count below.
- d. Pre-litigation Claims: in addition to the above litigation cases, approximately fifty-one (51) pending pre-litigation claims, seven (7) of which represents FTCA administrative claims filed within this quarter. HSGU assists both the U.S. Department of the Interior/Regional Solicitor's Office staff attorney and the U.S. Department of Health & Human Services Branch Claims attorney in assessing the FTCA administrative claims, some of which are now moving toward potential litigation.

Complications/Concerns: Issues that arise in both the litigation and pre-litigation cases/claims are voluminous, i.e., sovereign immunity jurisdictional issues (both tribal and federal), statute of limitations, causations, insurance policy coverages and exclusions, P.L. 93-638 contract requirements/scope of work mandates, failure to exhaust other administrative remedies, etc.

- e. Quarterly Cases/Claims Reviews: Two (2) quarterly cases/claims reserve meetings were held within this quarter. The attendees include NNDOJ, Navajo Nation insurance defense counsel, RMP staff, Navajo Nation insurance investigator/adjustor, and insurance broker of record, and case/claim reviews include defense strategy discussions and assessment of liability exposures to ensure sufficient reserves are in place and reported to the Office of the Controller.

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f. FY 2022 Property and Casualty Coverage Renewal: HSGU assisted with the FY2022 property and casualty coverage renewals covering over fifty (50) varying coverage, not only for the government, but other stand-alone coverage for the enterprises. In this respect and as reported above, on September 2, 2022, NNIC authorized RMP to immediately bind, among others, the master commercial general liability coverage renewal, and another NNIC meeting is scheduled to take place on September 28th for finalization of the renewal binding of the remaining policies, including, but not limited to the master property coverage.

3. Workers Compensation Program (WCP):

a. COVID Related Claims: In coordination with ISD, HSGU continues to closely monitor claims that may be filed and pass information back to WCP with any information or issues 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 deal with daily while attending to arrestees who are COVID-19 positive, and other front-line responders.

b. General Workers Compensation Claims: The Navajo Nation Workers Compensation Program is fully self-funded and governed by the Navajo Workers Compensation Act. Accordingly, HSGU is responsible for assisting with any and all issues that arise in the administration and adjudication of worker's compensation claims, including interpretation and analyzation of the statutory mandates. This quarter, HSGU assisted with the disposition and closure of ten (10) claims, seven (7) of which resulted in final settlements. In addition to the foregoing, HSGU continues to monitor and assist with a pending appeal. Some issues HSGU provided advice on within this quarter relate to (i) course and scope of employment (burden of proof); (ii) gross average weekly wages for settlement calculations pursuant to the schedule of benefits; (iii) maximum medical improvement assessments; and (iv) medical impairment rating issues.

4. Employee Benefits Program (EBP):

a. Subrogation Liens and Life Insurance Distributions: HSGU continues to assist with subrogation lien recoveries/waiver issues and distribution of life insurance proceeds. Within this quarter, three (3) subrogation lien recoveries were effectuated, and a life insurance distribution issue is pending.

b. Employee Health Benefits Proposed Changes: HSGU continues to assist with work sessions relating to EBP's recommended additional proposed employee health benefit changes with an effective date of January 1, 2022. The proposals included decreases in medical deductibles and out-of-pocket expenses, including co-pays for emergency room and hospital stay co-pays; reduction in in-network/out-network coinsurance; increases in Native Healing and Alternative Care benefits; and decreases in annual deductibles for dental and pharmacy benefits. Part of the discussions included estimated annual costs and impacts which were presented to the NNIC during its meeting on August 6, 2021.

- c. **Head Start Audit Findings:** Head Start was sanctioned with an audit finding relating to group health benefits “overcharged premiums.” HSGU is assisted EBP with responses and compilation of all relevant documentation relating to corrective actions taken by the Navajo Nation to bring the Employee Health Benefits Funds out of a severe deficit to a comfortable reserve setting which has now become the subject of an audit finding.

VIII. DIVISION OF HUMAN RESOURCES:

1. **Department of Child Support Services (DCSS):** Since the last quarter, there has not been much change on the Full Faith and Credit for Child Support for Child Support Orders to bring the Navajo Nation into compliance with the Full Faith and Credit for Child Support Act. HSGU continues to work on this issue without Office of Hearing and Appeal’s assistance. HSGU plans to enlist the assistance of DCSS, however, there have been some complications in that COVID-19 has prevented larger meetings that would involve all of the agency offices and all of the Child Support Enforcement Officers. While meetings could be set-up with the four agency offices individually, it would be more efficient to meet with all of the aforementioned simultaneously.

Complications/Concerns: OHA is no longer assisting with this issue and there has not been any meetings as noted above. HSGU would like to meet with all DCSS personnel rather than piecemeal with the several agency offices. However, that has been complicated by the COVID-19 related shutdowns as well as retirements of Program Managers and many of the personnel at DCSS Administration at the end of fiscal year 2021.

2. **Navajo Nation Department of Child Support Enforcement Administrative Process:** HSGU previously created a manual on the administrative process for DCSS. The manual contains the Navajo Child Support Enforcement Act, the Child Support Guidelines, some important decisional law from the Navajo Supreme Court on child support matters, and some rudimentary direction through the child support administrative process. However, since the Child Support Enforcement Act has been amended, the Child Support Guidelines are about to be amended, and DCSS is adding policies like the Full Faith and Credit Policy, the manual is out of date. HSGU has begun updating the manual. In addition to the amended Child Support Act and Guidelines, HSGU sees this as an opportunity to incorporate attorney/advocate instructions and advice. The vision is to make the manual a complete bench book for DCSS and HSGU/DOJ. This is a long range goal, but HSGU began work on this project this quarter.

3. **Office of Child Support Enforcement Letter of Inquiry:** Since the last quarter, HSGU assisted DCSS with addressing the “child” definition and the Navajo Nation Council amended 9 N.N.C §1703(C) to change the definition of “child.”

4. **Navajo Nation Office of Occupational Safety and Health (NNOSHA):** HSGU reviewed amendments to the Navajo Occupational Health and Safety Act of 2000 (the Act), its plan of operations, its organizational chart, and a fund management plan. HSGU initially provided edits and NNOSHA recently submitted the document for an additional review. HSGU review is ongoing.

Litigation Unit (LU)

LU is led by Assistant Attorney General Paul Spruhan who manages three (3) attorneys, an attorney candidate and a legal secretary. LU handles many of the Nation's internal and external litigation matters. This quarter, an Attorney Candidate joined LU and a legal secretary departed. This quarter's notable projects include:

1. Chavez v. Navajo Nation election case: This is an ongoing case filed some time ago concerning apportionment of school board seats under Navajo Nation law. The Health, Education, and Human Services Committee (HEHSC) is tasked under the Navajo Nation Code with apportioning seats for community schools boards, and is required to engage in public consultation prior to doing the apportionment. Mr. Chavez, a school board member, filed an action in the Window Rock District Court after HEHSC apportioned school board seats, arguing the HEHSC failed to conduct appropriate consultation under the Code. DOJ represented the Navajo Nation as defendant through LU attorney Louis Mallette. Judge Malcolm Begay of the Window Rock District Court denied the Nation's motion to dismiss on sovereign immunity grounds, despite the clear language in the Sovereign Immunity Act that the Council, its Committees, and its Delegates, cannot be sued for declaratory and injunctive relief. Judge Begay also issued a preliminary injunction against the HEHSC, concluding it failed to conduct appropriate consultation, as it had not given the public adequate time to comment on the proposed apportionment plan. However, Judge Begay declined to issue a permanent injunction, deciding the HEHSC apportionment plan would be valid once it conducted consultation consistent with the Navajo Nation Code. Chavez attempted to appeal that ruling, but the Supreme Court dismissed the appeal, concluding Judge Begay's second order denying the permanent injunction was not a "final order" that could be appealed.

One issue complicating the case is that school board elections applying the HEHSC's apportionment plan had been held in 2020. Judge Begay had originally ordered the votes not to be counted, though voters could and did vote for the candidates. In his second order, Judge Begay ruled that the votes could be counted and the board candidates sworn in after the HEHSC does appropriate consultation, though the Nation should allow voters to withdraw their votes if they wanted to.

The HEHSC has yet to do the complete the required consultation, but worked with the Department of Diné Education to issue notice to the public to seek comments. In the meantime, the school board members elected in the last election before 2020 remain in their seats as hold-overs, though it has been reported some of them are resigning, creating the potential that those vacancies will create quorum problems for those schools. It is unclear how long it will take for the HEHSC to hold the consultation, and therefore how long before the new school board members elected in 2020 will take their seats. There is also the possibility even after the HEHSC does its consultation that Mr. Chavez will appeal the case again, and potentially seek a stay from the District Court or the Supreme Court of the implementation of the election. DOJ continues to monitor the situation, and continues to discuss the case with the HEHSC and DODE. We also are consulting with the Board of Election Supervisors and the Navajo Election Administration on the election-related portions of Judge Begay's order, and will soon decide how to implement those parts of the order, or seek clarification of reconsideration.

2. Brackeen/YRJ ICWA Litigation: The litigation concerning the validity of the Indian Child Welfare Act, *Brackeen v. Haaland*, is currently pending before the U.S. Supreme Court on four separate petitions for certiorari. The Nation, though a party to the case, did not file a petition or join

the ones filed by the United States and the other four tribes, as the Nation's official position is that the case should not go the Supreme Court. However, as we remain a party, we have the opportunity to respond to the four petitions. In consultation with OPVP, the Council, and the Nation's ICWA Program, the Nation intends to file a freestanding Brief in Opposition to the Brackeen cert. petition, potentially join in a Brief in Opposition to the State of Texas's petition with the other four tribes, and not respond or file an affirmative waiver of responses to the U.S. and tribal petitions.

In the meantime, the underlying child custody case involving the Brackeens and the Navajo child YRJ remains pending on three petitions for review with the Texas Supreme Court. That court appears to be waiting to see what the U.S. Supreme Court does with the cert petitions in the federal case, but could issue a ruling at any time, or simply not issue a ruling until after cert. is granted or denied in the federal case. In the meantime, the Nation's proposed placement for YRJ, her Great Aunt, visited YRJ and her brother ALM, her brother who had previously been adopted by the Brackeens, in Texas with an ICWA Program case worker.

3. Bears Ears Monument: With the inauguration of President-elect Joe Biden, there has been much work among the five tribes who advocated the original Bears Ears National Monument to restore the original Obama Monument and add new land. LU, through Jason Searle and Paul Spruhan, have been working with the Native American Rights Fund, other tribal attorneys, and attorneys for allied environmental groups to advocate to the new administration to issue a proclamation again protecting the 1.3 million acres set aside by President Obama, and add .6 million acres originally proposed by the tribes. Soon after his inauguration, President Biden issued an Executive Order requesting the Department of Interior submit a report on monument boundaries and recommendations on what actions, if any, to take on those boundaries. Last quarter, Secretary Haaland submitted her recommendations in a report to the White House. Though some information on her recommendations was leaked in the press (restoration of the Obama Monument boundaries), the report itself has not been publicly released. Though various rumors of an imminent Biden proclamation have been spread for several months, there has been no public announcement yet.

It is currently unclear what effect a new proclamation changing the boundaries of the current monument would have on the litigation challenging the revocation of the Obama monument by President Trump. That litigation is still pending before the D.C. District Court. Judge Chutkan issued a stay in the case, and denied without prejudice the cross-motions for summary judgment that had been pending for some time. The parties have submitted several joint status reports, repeating that Biden has yet to issue a proclamation. Further, a new Biden proclamation might trigger new litigation in the Federal District Court of Utah by the State of Utah and other parties hostile to the new proclamation. DOJ will continue to participate in any litigation concerning the old or new Monument, and update leadership as appropriate.

Navajo-Hopi Legal Services Program (NHLSP)

NHLSP is located in Tuba City, Arizona and is charged with representing relocatee applicants before the Office of Navajo-Hopi Relocation (ONHIR). We are pleased to report that NHLSP is fully staffed and has been since November 2019. NHLSP is overseen by Principal Attorney and Director Susan Eastman and she supervises an Attorney Candidate and a Legal Secretary. This quarter's notable projects include:

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1. Federal appeals of ONHIR relocation benefit denial determinations: NHLSP has two (2) cases for clients pending in FDC-AZ and one in the 9th Circuit. As cases are filed pursuant to the federal Administrative Procedure Act, NHLSP cases are decided for its clients or ONHIR through Motion for Summary Judgment. For the new 9th Circuit case, Judge Humetewa issued a ruling denying our client's MSJ and granting ONHIR's. After consultation with outside counsel, NHLSP decided to file a Notice of Appeal to the 9th Circuit in the FDC-AZ on August 16, 2021. For the Complaint filed on March 10, 2021, ONHIR filed its Answer and Certified Administrative Record on August 5, 2021, and Plaintiff's Motion for Summary Judgment is due on October 4, 2021. The most recent Complaint was filed on June 30, 2021 and service of the Summons and Complaint was complete as of September 13, 2021. Because the federal National Archives is closed, ONHIR's counsel requested to stipulate to an extension for ONHIR to file its Answer and Certified Administrative Record within 60 days of notice of the re-opening of NARA, to which NHLSP agreed. In addition, this quarter NHLSP reviewed cases for possible federal appeal for three (3) other NHLSP clients, and recommend FDC appeal for two of them. It is anticipated that the Complaints for these two cases will be filed in the first quarter of FY 2022.

Including these appeals, there are currently 11 cases pending in FDC-AZ for individual relocation benefits applicants and the Complaint for Declaratory and Injunctive Relief filed against ONHIR and the U.S. Department of the Interior filed on August 25, 2021, for a total of 12 cases pending in the FDC-AZ and two cases pending in the 9th Circuit. Outside counsel filed a new Complaint for a NHLSP client on July 1, 2021 and NHLSP received an adverse ruling for a relocation benefits appeals in FDC-AZ and NHLSP is reviewing the case for possible 9th Circuit appeal. A favorable ruling for a relocation benefits clients was recently issued (see page 4 of this report for more information about this case). NHLSP met with outside counsels to discuss strategy for pending and planned federal appeals and updated the master list of cases that are currently pending and those that require review with FAA statutes of limitations that expire in late 2021 and 2022, and eliminated the cases from our master list that have been either decided on the merits in federal court or cases with expired statutes of limitations that we recommended against appeal. Thirty-three (33) cases on the master list have statutes of limitations that expire in 2022.

2. Remands from federal court: The case that was remanded from the FDC by Judge Humetewa in July 2019 regarding a NHLSP's client's claim for legal residency was scheduled for a hearing in January 2020 still has not been heard. The Hearing Officer tried to re-schedule the hearing for June 2020, but NHLSP has been unable to reach the client since March 2020. NHLSP has sent letters, text messages and phone calls to the client without response. Another letter was sent to this client via certified mail on September 20, 2021 and we await a response.

The case of a NHLSP client remanded by the 9th Circuit back to ONHIR is still pending. The 9th Circuit remand was actually back to the District Court to provide an order with instructions to ONHIR on what the remand proceedings should be. NHLSP has asked outside consultant Betsy Lynn Snow to represent the client in the remand proceedings before ONHIR because she was counsel for the client at the original administrative hearing in August 2013 and is very familiar with the case. She has requested an in-person supplemental evidentiary hearing and has rejected ONHIR's offer to have a Zoom hearing for our client because of our client's limited access to the Internet, and Betsy wants a clear hearing record for the remand. A hearing will not likely be scheduled until it is feasible to schedule an in-person hearing at ONHIR in Flagstaff for the Hearing Officer, NHLSP and our client, and ONHIR counsel and staff.

3. Assistance to Certified Applicants: DOJ retained outside counsel to assist and advise a NHLSP client who was certified eligible for relocation benefits in summer 2019 after a successful 9th Circuit Appeal. The client is now willing to seek divorce from her husband to ensure that her relocation

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benefits remain her sole and separate property, which she was previously unwilling to do. ONHIR had requested her to initiate divorce proceedings in order to move her relocation benefits case forward toward completion.

4. Advice and Assistance to the Navajo-Hopi Land Commission and NHLCO by NHLSP: This quarter, NHLSP participated in five regular and two special meetings of the Navajo-Hopi Land Commission (“NHLCO”). At the July 1, 2021 meeting, NHLCO Executive Director Robert Black and Acting Controller Elizabeth Begay gave a presentation on the status of the Navajo Rehabilitation Trust Fund (“NRTF”) and FBFA Escrow Funds as well as the Administrative Policies and Procedures for the Dine’ Relocatee Fund (“DRF”). After consultation with OOC, we learned that the DRF is not established to receive revenue payments from the Arizona New Lands, and OOC advised of the steps to set up such a special account and NHLSP will draft the DRF legislation and submit the draft legislation for review by DOJ and OLC on October 8, 2021.

The two special NHLCO meetings held on July 29 and September 24, 2021 concerned the issuance of a check by Silica Sands to NDCG for about \$35,000 anticipated on August 5, 2021 and how that revenue payment should be handled. ONHIR initiated a lease with Silica Sands’ predecessor company and directed payments go to the Nahata Dzil Commission Governance rather than to Navajo relocatees generally as required by the 1974 Settlement Act. NHLCO Executive Director Robert Black sent NDCG president Darryl Ahasteen a letter explaining that the check funds should be for Navajo relocatees generally and not only for NDCG relocatee residents. The letter was sent and Mr. Ahasteen acknowledged receipt of the letter, but it was unclear what happened with the payment from Silica. We had another special meeting with NHLCO on September 24, 2021 to discuss this issue, but Mr. Ahasteen was not present. DOJ and outside counsel had a conference call on September 28, 2021 to discuss next steps. NDCG Secretary Lavonne Tsosie had advised DOJ and outside counsel that a regular NDCG meeting is scheduled for October 8, 2021, but it is uncertain if the meeting will take place given the status of the NDCG’s administration and budget. Meanwhile, Chapter Unit followed up with ASC, which has taken control of the NDCG finances due to allegations of misappropriation of funds by NDCG officials. CU requested a meeting with the NDCG Commissioners for the week of October 4, 2021 to discuss the pending federal court litigation and the status of the past Silica Sands payments to NDCG. OAG has followed up directly with the Silica Services CEO regarding their scheduled payments to NDCG and whether future payments can be re-directed.

5. Federal Legislative Policy and Advocacy for Navajo Relocatees by the NHLCO and outside counsel Hobbs Straus Dean & Walker: During this period, outside counsel continued to work with Interior in anticipation of a consultation on the future of ONHIR and related issues and has been following up with Interior on planning for the consultation. They reviewed and developed a detailed response to two OIG draft reports for Nation leadership. The Nation reached internal agreement on the substance of the technical amendments and outside counsel has been working with Rep. O’Halloran and House legislative counsel to complete an introduction-ready draft. This quarter, outside counsel continued to follow closely and report extensively on various funding sources, as well as proposals for a major national infrastructure initiative, and how these opportunities could benefit relocation and freeze-impacted communities.

Regarding the federal budget FY 2022 appropriations process, in follow up to the Nation’s appropriations testimony given in April 2021, which outside counsel helped develop, outside counsel has kept in contact with Congressional offices about supporting the requests to fund Navajo areas affected by the Navajo-Hopi land dispute, including the relocation and construction-related freezes. The appropriations request included a request to forgive the “loan” from the federal government to the Navajo Nation in the Navajo Rehabilitation Trust Fund (NRTF) and to transfer \$15 million

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appropriated to ONHIR in the FY 2021 budget to the NRTF without such funds being subject to repayment. Outside counsel has responded to proposals from Navajo Thaw and held discussions with the Hopi lobbyist in DC about the possibility of coordinated action. Outside counsel participated in several lengthy calls with the NHLC regarding overall strategy and commented on the draft complaints for the two cases against the U.S., the Department of Interior and ONHIR.

6. Litigation against ONHIR, the Department of Interior, and the United States: This quarter, outside counsel Rey-Bear McLaughlin continued to address certain non-litigation matters concerning ONHIR and completed preparation and filing of and initial work on litigation regarding ONHIR. The former included work on ONHIR-related “technical” legislation that should be introduced soon. Outside counsel also reviewed and prepared comments on draft relevant DOI OIG reports regarding ONHIR, while awaiting additional reports.

For the litigation, outside counsel completed and filed a complaint in the U.S. Court of Federal Claims (“CFC”) by the Navajo Nation and the Identifiable Group of Navajo families residing on Hopi-partitioned lands as of December 22, 1974 (“Relocation Beneficiaries”, now consisting of over 17,000 people) against the United States, seeking \$40 million for maladministration of grazing, leasing, rights of way, and related revenue deposits, investments, and expenditures regarding the New Lands acquired and administered under Section 11 of the Navajo-Hopi Settlement Act, as amended (a.k.a., the “Relocation Act”). We also completed and filed a complaint in the U.S. District Court for Arizona (“DAZ”) by the Nation on behalf of itself and over 50,000 affected Navajos against ONHIR and the U.S. Department of the Interior (“Interior”), seeking a declaratory judgment and a permanent injunction to compel completion of relocation under the Relocation Act, 35 years past its statutory deadline, including obtaining and providing reasonable interagency assistance and provision of community facilities for relocatees, and prevention of premature closure of ONHIR before fully discharging its functions.

In support of the litigation, outside counsel has followed up regarding reporting to OPVP as well as communications with representatives of the Relocation Beneficiaries and named affected Navajos. For the CFC case, they also have followed up on efforts to set up and establish policies for the Diné Relocatee Fund (“DRF”) and followed up with the NHLC and the NDCG regarding payments from Silica Services regarding their processing plant lease on the New Lands. For the DAZ case, outside counsel also have continued work to identify relocatee locations and populations as well as their respective community facilities needs. For that case, they also have followed up regarding service issues for the complaint for Interior.

For both cases, outside counsel also have prepared and proposed a Navajo Executive Order and a memo by the Attorney General to require and implement preservation of relevant Navajo records. Outside counsel also have continued work with discovery co-counsel on record access, collection, scheduling, and logistics issues. Outside counsel also negotiated and entered into contracts with Nube Group, to collect and scan approximately 1 million pages of relevant Navajo records, and International Litigation Services, to set up and maintain a database to contain, search, and access the Nation’s own records for the litigation as well as records produced by the United States, ONHIR, and Interior. Finally, outside counsel began work on a proposed protective order and joint case management report for the DAZ case and a confidentiality agreement and protective order and a joint preliminary status report for the CFC case, to respectively provide for the process of and schedule for discovery in the cases.

7. HPL Rent Dispute Appeal by the Hopi Tribe: The Navajo Nation and outside counsel Meyer Walker and Walker await decisions in two separate appeals of HPL rents: (1) the Hopi Tribe's appeal of 2000 to 2009 HPL rents before the Interior Board of Indian Appeals (“IBIA”); and (2) both

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tribes' appeal of 2010 to 2014 HPL rents currently on remand with the Hopi Agency Superintendent ("Superintendent"). As a result, there were no work activities directly related to the appeals during the fourth quarter.

In September 2021, counsel for the United States notified MWW that it planned to file the administrative record for 1998 HPL rents with the U.S. District Court in Arizona, which retained continuing jurisdiction for HPL rent matters in Case No. 85-801. Pursuant to a 1988 stipulation in that case, the administrative record must be filed with the court within thirty days after a final rent determination is issued. The BIA issued a final decision on 1998 HPL rents in June 2017, which neither the Navajo Nation nor the Hopi Tribe appealed, so those rents became final and the United States was required to file the administrative record for those rents with the court. Because it failed to do so, the United States now seeks to file the administrative record out of time. The Navajo Nation did not oppose the filing.

8. Navajo HPL residents/Accommodation Agreement signers: Local outside counsel Lee Phillips and Bob Malone continued this quarter to work with HPL residents, consultants with Tolani Lake Enterprises, and others, on preparing proposals to submit to the Navajo Nation to access funds provided under the American Rescue Plan Act (ARPA) for assistance to Navajo families residing on the Hopi Partitioned Lands. Most of the effort is directed at obtaining funding for resources to improve access to potable water at AA homesites. An additional effort is to obtain funding for housing improvements.

Because there has been some uncertainty on the part of some Navajo Nation officials regarding the legality of the Nation providing assistance to Navajo HPL residents, Bob Malone conferred with the NHLCO, the Navajo-Hopi Land Commission Office (NHLCO), and the President of the Hardrock Chapter, to explain the provisions of the AA that afford signers the right to make improvements at their homesites. Outside counsel has also communicated with AA signers and the NHLCO regarding requests from certain AA signers to make adjustments in the configuration of their homesites, or to transfer their AA lease to the homesite of a relative. They will be making these specific requests to the Office of Hopi Lands on behalf of the AA signers.

9. Navajo Thaw/Former Bennett Freeze Area: The Navajo Thaw team had monthly staffing meetings on July 14, August 11, and September 14, 2021, which NHLSP staff attended. The last meeting was an in-person meeting between the Navajo Thaw team members, including NHLCO, and Cameron Chapter President. The purpose of the meeting was to discuss the need for FBFA Cameron Chapter to engage its members to support development of the "Envision Cameron" economic development plan, which is supported by a 2-year grant by the U.S. Department of Agriculture that was issued in September 2020. The prior Cameron Chapter president approved receipt of the federal grant, but in January 2021 newly-elected chapter officials, did not take action to engage the community or implement the grant. Grant writer Brian Cole of Building Communities, who had applied for and written the grant to benefit the Cameron Chapter, advised that Cameron Chapter could have the grant rescinded and the funds awarded to another Navajo Nation chapter if Cameron Chapter does not take steps to engage the community and implement the grant by December 2021.

In addition, NHLCO asked NHLSP to review Memoranda of Agreement between NHLCO and the 9 FBFA chapters for each of the chapters to expend FBFA Escrow funds allocated to each chapter for housing repair and rehabilitation (including new housing if recommended). The new MOA's would give each chapter 6 months to expend the FBFA Escrow funds allocated to each chapter for housing, or unexpended funds would revert back to the FBFA Escrow Fund. At the September 14 Navajo Thaw staffing meeting, it was discussed that non-profit/non-governmental

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entity Choice Humanitarian and Building Communities would like to serve as advisors and participate in housing inspections, so the MOA would have to be amended to reflect the roles of these entities (neither of which will receive FBFA Escrow Funds; Choice Humanitarian has received its own separate USDA grant). The new MOA will be discussed by the Navajo Thaw team on October 7, 2021.

In addition, Susan Eastman's article on the impact of the COVID-19 pandemic and the history of the FBFA was published in the *Arizona Attorney* magazine's Indian Law issue in July/August 2021. The article provides a legal history of the FBFA, discusses the specific impacts of the pandemic on the residents of the FBFA, and highlights the current administration's efforts through Navajo Thaw to address these impacts as well as rehabilitate the area after decades of no development or improvements.

Natural Resources Unit (NRU)

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

1. Department of Forestry's Carbon Sequestration Project: The final Carbon Development and Marketing Agreement (CDMA) completed Section 164 review. The Carbon Development and Marketing Agreement (CDMA) remains with the Office of Legislative Counsel for legislation drafting, which will include a limited waiver of sovereign immunity to enter the market and regulatory scheme managed by the California Air and Resources Board. It is anticipated that the Project will generate substantial revenue for the Nation. The Department was advised that all proceeds will be deposited into the General Fund absent additional action. The Department will develop a Fund Management Plan, or other appropriate financial mechanism, to ensure that a percentage of the proceeds are allocated for ongoing project management.

2. Department of Water Resources: Reviews for DWR mostly concerned large-scale water infrastructure projects. These projects are multi-phased (design, planning, and construction) and funded from various tribal, state, and/or federal sources. The projects include irrigation and earthen dam maintenance and repairs, increasing community access to potable water through water delivery or community access points, the Navajo-Gallup Water Supply Project (NGWSP), and the construction of a water pipeline to the To'hajiilee community.

Many projects faced budgetary challenges when they could not meet the reversion deadline for CARES Act Funds, and many of the same projects are presently faced with funding deadlines pursuant to CJA-01-21 (though Legislation No. 0204-21 includes amendments to extend some deadlines). The Fiscal Recovery Funds allocated to the Nation may bridge some of these funding gaps and increase project capacity for the next few years.

3. Navajo Parks and Recreation Department's Reopening Tribal Parks: All Tribal Parks reopened in accordance with CJN-33-21 and the Public Health Emergency Orders. We do not know what current staffing levels are; however, we do know that many Tribal Park employees were furloughed at the beginning of the pandemic and on-boarding training started earlier this Quarter in preparation for the reopening.

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4. Chaco Canyon: Last quarter, NRU responded to a request from the Navajo Nation Washington Office for review of the proposed “Chaco Cultural Heritage Area Protection Act of 2021”. NRU raised concerns and had questions regarding the proposed legislation. It was recommended that the Navajo Nation not support the proposed legislation as drafted until the Nation has been adequately consulted and receives further clarification regarding the intent of Section 4(c) and Section 6 as it relates to allottees with respect to their mineral rights. More specifically:

- Whether the legislation would prohibit Navajo allottees from leasing or developing their mineral rights for oil and gas production if they are within the 10-mile buffer area;
- Whether the legislation would prohibit infrastructure development on federal lands which can potentially impact communities adjacent to or in the vicinity of the federal line; and
- Whether the legislation would impact payments to an Indian Tribe or allottees for existing mineral development.

Similar Bills (H.R. 2181 and S. 1079) were originally introduced in 2019 and the Navajo Nation Council passed legislation (NABIJA-05-20) opposing H.R. 2181 and S. 1079 and recommended the buffer zone be reduced to five miles. NRU noted that the concerns raised in NABIJA-05-20 are still valid. The proposed Act does not recognize the Navajo Nation’s cultural connection and affiliation to the Greater Chaco Canyon area. With respect to allottees and their oil and gas resources, the Federal Indian Minerals Office identified concerns they had regarding the proposed Act and provided data on how many oil and gas leases may be impacted by the 10-mile buffer. It was also recommended that the Navajo Land Department (NLD) and the Heritage and Historic Preservation Dept (HHPD) be consulted and provide input regarding this proposed Act with respect to Section 4(c) in relation to the land and the Nation’s cultural affiliation to the Greater Chaco Canyon area. Also, during the fall of 2020, the Nation (HHPD) was awarded funds to complete a cultural resources investigation to identify culturally and historically significant areas and sites within the Chaco Canyon area, which has not yet been completed.

On July 29, 2021, the Department of Interior met with Navajo Nation leadership and allottees to discuss a variety of issues which also included Chaco Canyon. Allottees opposed the proposed 10-mile buffer and requested that the Navajo Nation contest the legislation at the state and federal level. The primary concern is that it would impact their ability to lease their land for oil and gas development, which is a primary source of income for these families.

5. Arizona Snowbowl Ski Area MOA: This pertains to an MOA from 2005 with several different agencies to deal with Section 106 of the Historic Preservation Act requirements as they relate to potential expansion at the Snowbowl ski resort. The MOA expired, but expansion activities have been going on at the Snowbowl, and it is not clear what Section 106 consultation has been occurring both during the time of the MOA or after the expiration of the MOA. Hualapai apparently brought this to the attention of the Advisory Council of Historic Preservation, who then issued a letter to the U.S. Forest Service (USFS) noting that the USFS did not fulfil the terms of the MOA and expressed concern to learn that expansion and improvement activities at the Snowbowl Resort appear to have continued despite the expiration of the MOA. Attended the Indigenous Sacred Peaks Virtual Leadership Summit, a day-long virtual meeting was held on September 21, 2021 and attended by 13 tribal nations comprised of leaders, tribal heritage and historical representatives, traditional medicine protectors, legal counsel, grassroots organizations, non-government organizations, and non-native allies. The consensus of the gathering supported a united position to advocate for a renewed MOA with the United States Forest

Service listing tribes (and Navajo Chapters) as full signatories to the document. Other recommendations for advocacy included the partnership and collaboration with Jose Francisco Cali Tzay United Nation Special Rapporteur on the rights of Indigenous People using the UNDRIP Articles and Rights, and having the students at the University of Arizona Indigenous Peoples Law & Policy Program to assist with the writing and submission of legal documents to the United Nations. A follow up meeting will be held in October. The meeting time and date will be shared when it becomes available.

6. Navajo Land Department

Allowed uses of the Land Acquisition of Trust Fund (LATF): Issued memorandum with TFU in response to the Office of Management and Budget request for advice on whether various operational costs, included in the proposed Navajo Land Department fiscal year 2022 budget can be covered using the LATF. The Navajo Land Department submitted a proposed fiscal year 2022 budget to OMB, which included costs for land taxes, personnel travel, communications, utilities and special transaction expenses. The statute and regulations enumerate allowable uses so the omission of certain costs were not intended for such uses under the LATF. NRU recommended that the Navajo Nation leadership consider amending the statute and regulations to allow use of the LATF for broader costs in the future to eliminate any confusion that may arise.

Allotment Appeals: Coordinate with the Litigation Unit on the filing of Notices of Appeal for several allotments. Navajo Nation filed its Notice of Appeal from the Decision of Acting Regional Director rejecting the proposed sale of several allotments. The owners of the allotments submitted to BIA applications to sell their interests to the Nation between the years 1991 and 2000, and no apparent action was taken on the applications until BIA sought confirmation from the landowners of their consent to sell in 2003. The Nation authorized the purchases by tribal resolution in 2003, the lands were appraised in 2004, the Nation tendered payments for the allotments to BIA in 2004, and no apparent action was taken until BIA sought meetings with the Nation about the proposed sales in 2017. In eight of the nine decisions, the Regional Director rejected the proposed sales for “lack of adequate evidence of the owner's consent to the sale.” In the ninth decision, the Regional Director rejected the proposed sale for “lack of evidence that fair market value was paid for the allotment.” NLD is also going to check on whether any of the allotments subject to this Appeal were included in the Land Buyback Program.

7. General Land Development Department (GLDD)

Telecommunication Siting Regulations: The purpose of the regulations is to streamline policies and procedures for the issuance of telecommunication tower lease and permits as they relate to surface land use for telecommunications, as well as collocations on non-tower structures. NRU and HSGU provided comments regarding the proposed telecommunication regulations and leases submitted by GLDD. HSGU reviewed the regulations in relation to the Navajo Nation Telecommunications Regulatory Commission (NNTRC). We met with GLDD, NLD and Vertical Bridge to go over our comments and concerns and told the group that they need to coordinate with the NNTRC in the development of these regulations. The NNTRC is working on scheduling public hearings in relation to the regulations. As of this report, the NNTRC is looking at October 20 and 25 for those public hearings. The regulations have not yet been submitted to RDC for approval.

Proposed Cemetery Lease: Reviewed the lease and suggested edits (took out provisions that were not applicable) and condensed the lease as much as possible. NRU recommended to GLDD that the lease should reference the burial regulations once they are approved and had additional questions such as whether GLDD will be charging a fee, term of the lease, etc. GLDD decided to process cemetery leases with the understanding that after the regulations have been approved, the lease will require additional amendments referencing relevant sections of the proposed regulations. A follow up meeting to discuss the leases will be held next week.

8. Navajo Nation Department of Agriculture (NNDA)

Update of District Grazing Committee's (GGC) Operating Manual: NRU is assisting NNDA to update its DGC Operating Manual. Brian has researched Navajo Nation Supreme Court case law for a definition of the term "beneficial use" for the NNDA to be used in the updated DGC operating manual. The NNDA is seeking guidance from NNDOJ on defining beneficial use in reference to agricultural permits in the definition section of the Manual. In the *Estate of Benally*, the Navajo Nation Supreme Court stated that Title 3 of the Navajo Tribal Code give Courts discretion in the division of estates so that tracts of land are kept intact and so that the most beneficial use of the land is encouraged. Brian is in the process of finalizing a memo to define beneficial use.

San Juan River Farm Board: Brian has had monthly meetings with the Farm Board to work through legal issues that stem from the previous Farm Board's hemp business venture. The Farm Board passed a resolution to recommend cancellation of Agricultural Land Use Permits (ALUP), but it was determined that there are limitations with respect to the Farm Board's authority to issue an administrative decision. In general, major irrigation Farm Boards do not have any authority to issue administrative decisions. A Farm Board may only mediate disputes between ALUP holders as long as they don't purport to issue final decisions on the disputed matter. Furthermore, NNDA does not have an internal administrative hearing process that the Farm Board may use to initiate hearings. Presently, the BIA is not acting on any Farm Board recommendations without a final administrative decision regarding ALUPs, and the Farm Board nor the NNDA have a system to issue administrative decisions. An option is for the District Grazing Committee ("DGC") to take the lead, with Farm Board support, since DGCs have authority to arbitrate matters before they issue a decision that may be appealed to OHA. Further planning meetings with BIA and NNDA will take place to determine the best approach to administering ALUPs.

James v. DGC12: (On-going). Brian and Irvin entered a combined motion of appearance before the Office of Hearings and Appeals on behalf of the District 12 Grazing Committee ("DGC"). The case was dismissed for ripeness concerns, and due to a lack of a record on the matter. Brian and Irvin will now work with the DGC to establish a record that supports that Due Process (notice and opportunity to be heard) was afforded. Brian assists Irvin with planning and Irvin updates the DGC accordingly. New resolutions will need to be drafted, and the DGC will need to conduct additional arbitrations on each legal issue.

Pete et. al. v. Chee, NLD, and DGC10 (Chinle Dist. Ct): Navajo Land Department and the District 10 Grazing Committee (collectively the Nation) are Defendants in an ongoing land dispute between two Navajo tribal members. The Nation's Co-Defendant has been in previous litigation with the Plaintiff for decades. The Nation is being sued for injunctive relief and declaratory judgment to issue the Plaintiff a homesite lease. Brian and LU are representing the Nation, and have filed an initial Response and raised affirmative defenses. The case was dismissed because the Plaintiff failed

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to overcome a sovereign immunity defense. The Navajo Land Department and the District 10 Grazing Committee (collectively the Nation) were dismissed as Co-Defendants in and on-going land dispute between two Navajo tribal members.

9. Navajo Division of Transportation (NDOT): NRU reviewed various agreements, grant applications and agreements with the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), the Arizona Department of Transportation (ADOT) and the New Mexico Department of Transportation (NMDOT), contracts and professional service contracts on behalf of NDOT.

Local Government Road Fund Cooperative Agreements: There were two agreements processed this quarter. The first agreement provided funds (to the Navajo Nation for the Design of Various Tribal Roads. The second agreement provided Local Government Funds to the Navajo Nation for the Reconstruction and Pavement Rehabilitation/Improvements of Tribal Roads.

Arizona DOT –IGA: The purpose of the IGA between NDOT and Arizona is to specify each party’s responsibilities associated with the State’s installation of lighting, within the State’s right of way at US160 and State Route 98. The Nation will be responsible for all costs associated with connection to a power supply and the ongoing power costs associated with the Project.

San Juan County, Utah – IGA: The purpose of the IGA between NDOT and San Juan County, Utah is for the County to provide the Nation assist with project planning, road maintenance and improvement projects. The latest project under this IGA is cover routine maintenance including snow removal and flood repairs on a quarterly and as-needed basis in adverse weather conditions to provide an adequate network of roads for residents and visitors.

Federal Aviation Administration – Airport Coronavirus Response Grant Program (ACRGP) Grant Agreement: NDOT applied for and received ACRGP funding for the airports located on the Navajo Nation. NDOT was awarded \$9,000 in funds to use for costs related to operations, personnel, cleaning, sanitization, janitorial services, combating the spread of pathogens at the airport and debt service payments for Window Rock, Chinle, Tuba City, Shiprock and Crownpoint.

Proposed Amendments to NDOT’s Master Plan of Operation: Reviewed and provided comments to HSGU regarding a request from General Services to move the NN Transit System from General Services to NDOT. The amendments proposed by General Services were sufficient; but recommended that NDOT also work on amending their Master Plan of Operation. This quarter, NDOT submitted amendments to their Master Plan of Operation to add the Transit System within NDOT and create a Sand and Gravel Program. What they did not include was a proposed Plan of Operation for the Sand and Gravel Program so NRU will be following up with NDOT as to when they expect to submit those for review.

10. Northeast Church Rock Mine

Northeast Church Rock Mine Site (NECR) Cleanup: (On-going) For historical context, the United States Environmental Protection Agency (USEPA) issued the Action Memorandum for the Non-Time-Critical Removal Action (selected removal action) on September 29, 2011, in accordance with

its authorities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR § 300.415. The selected removal action was contingent upon two additional approvals: an USEPA Record of Decision for the United Nuclear Corporation (UNC) Mill Site to accept the NECR Mine Site waste, issued March 29, 2013; and an amendment to the Nuclear Regulatory Commission (NRC) license of the UNC Mill Site, which UNC requested in September 2018 upon completion of the NECR Mine Site waste repository design.

These administrative steps, including the repository design process, resulted in significant delays between the issuance of the Action Memorandum and the start of cleanup construction for the selected removal action. In the interim, USEPA increased its response cost ceiling to provide voluntary alternative housing and other community outreach measures. The voluntary alternative housing program offered nearby residents the opportunity to move away from the mine site and avoid construction-related disruptions, anticipated to last over several years once cleanup construction begins. The Red Water Pond Road (RWPR) community is the community most impacted by the NECR Mine Site and selected removal action. The RWPR community was and remains heavily involved in USEPA's decisions and actions related to the NECR Mine Site. All eligible residents, primarily comprised of the RWPR community, selected a voluntary housing option or decided to not participate in the program. NNEPA asked for additional review of a disclaimer and acceptance letter for a person receiving their home as part of the program. A future issue that may arise is if a person who selected the on-reservation VAH option, meaning they have a current Homesite Lease in a community away from RWPR, wishes to return to RWPR at the end of the clean-up. Fortunately, the clean-up timeline is currently projected at about ten (10) years so there is time for NNEPA to discuss options with the families and submit ideas to RDC.

Public comments on the Draft Environmental Impact Statement (DEIS): (On-going) For context, the selected cleanup action for NECR is to move the mine site waste on top of the existing UNC mill site waste. In order for USEPA to perform this action, the NRC license must be amended to allow for the additional waste. The license amendment process requires public comment period for the DEIS. NRC held virtual public comment hearings on December 2 and 9, 2020. As evidenced throughout the COVID-19 pandemic, the significant lack of telecommunication services and broadband access for many communities across the Nation adversely impacted the public's ability to participate in these virtual hearings. Related concerns were raised at both hearings. Furthermore, the virtual hearings were not designed to be conversational; rather, the comments made during the hearings would be compiled with those received in writing and NRC would issue summary responses. This raised cultural concerns regarding respectful engagement of the public and those who would be most affected by NRC's decision. The Nation submitted a formal request to extend the public comment period for the DEIS issued by the U.S. Nuclear Regulatory Commission (NRC); a necessary step to move the NECR waste on top of the existing mill site waste licensed by the NRC. The DEIS public comment period was recently extended to October 31, 2021, upon a second extension request from the Navajo Nation. The Diné Uranium Remediation Advisory Commission (DURAC) submitted comments on the DEIS. NNEPA submitted comments within the prior deadline of May 27, 2021. NNEPA indicated they would provide supplemental comments; however, we have not received any other requests related to NECR/DEIS.

11. Navajo Area Uranium Mines (AUM) Work

Access Issues: NNEPA and DOJ are developing a more comprehensive and cohesive approach to addressing access to all AUM sites. We determined three thresholds to obtain consent: notice, acknowledgement, or consent, which are primarily determined by the type of interest in the

site or surrounding area. The standard forms were completed and are pending USEPA review for the Phase 2 Trust Sites. The forms will be used for all sites once finalized.

Institutional Controls: As progress is made toward the cleanup of Eastern Agency AUM sites, USEPA tasks NNEPA and DOJ with various projects to prepare for the selection of a remedy. This is not to say that a remedy has been pre-selected; rather, the goal is to have the necessary mechanisms in place to facilitate the implementation of the selected remedy. The identification or development of Institutional Controls is one such task. BIA and USEPA presented a conservation easement as an Institutional Control. As of this report, we are still trying to schedule meeting with the Navajo Land Department to discuss Institutional Controls.

Diné Uranium Remediation Advisory Commission (DURAC): Participated in a meeting of the Diné Uranium Remediation Advisory Commission. Topics of discussion included the existing USEPA contracts and research data that DURAC has compiled. NRU reviewed an MOA and proposed resolution that would extend the MAO with a technical advisor. The work is being carried out as volunteer services.

12. Fort Wingate NRC Settlement: The settlement covers natural resource damages (NRD) claims held by the State of New Mexico, through the Office of Natural Resources Trustee (ONRT), the Pueblo of Zuni, and the Navajo Nation, against the U.S. and the U.S. Army for injuries to natural resources caused by releases of hazardous substances at or from the Fort Wingate Depot Activity (Depot). The Depot, in McKinley County near Gallup, was used for storage and disposal of explosives and munitions, and ceased operations in 1993. Environmental remediation of the Depot is on-going under the authority of the New Mexico Environment Department Hazardous Waste Bureau. The Zuni Pueblo and Navajo Nation have longstanding historical interests in the area occupied by and surrounding the Depot. Separately and apart from this agreement, certain portions of the Depot will be transferred to the Bureau of Indian Affairs to be held in trust for the Zuni Pueblo and Navajo Nation. New Mexico also has trustee interests in natural resources injured by Depot activities, including groundwater. The parties have agreed, subject to final approval by their decision makers, to the terms of the settlement as memorialized in a proposed consent decree. Once executed, the proposed consent decree would be lodged in federal district court and subjected to public comment. The consent decree would become effective and binding on the parties upon approval of the court.

NRU sought assistance from the Office of Legislative Counsel to draft legislation for approval by the Resources & Development Committee of the proposed settlement of Natural Resource Damages (NRD) for the Fort Wingate Depot Activity. The Attorney General has authority to sign the settlement agreement after consultation with, and consent by, the Trustee(s) for the affected media, and the Resources & Development Committee. Approval by the Natural Resource Trustee Committee is also desirable. The Natural Resource Trustee Committee was established by memoranda issued in 2010 by President Joe Shirley, and consists of the Department Managers of four departments of the Division of Natural Resources: the Land, Fish & Wildlife, Historic Preservation, and Water Resources departments. All of the Navajo Nation Natural Resource Trustees, and the Natural Resource Trustee Committee, have consented to the settlement. The approval of RDC is required, prior to signature of the settlement by the Attorney General. As of this report, the legislation is still pending with the Office of Legislative Counsel.

13. Tronox Settlement. (On-going)

ARAR: NRU continues working on completing a comprehensive list of Navajo Nation ARARs to be used for uranium mine clean-ups. The draft ARARs table will be used as a template for incorporation in cleanup decisions. The table is all-inclusive, and is intended to be tailored to the circumstances of each individual mine site. It is most likely to be used to develop Action Memoranda for several Tronox mine clean-ups in the Eastern Agency in the next few months. The challenge we faced in the ARAR effort was determining ways Navajo fundamental law can be couched as an ARAR by providing specifics on how it applies to uranium mine cleanups. Our current plan is to incorporate fundamental law concepts by including a *hataa [ii, or traditional practitioner]*, in the cultural resources survey that is required for each site prior to any invasive site investigation or cleanup activities. This approach will allow consideration of site-specific conditions and concerns in formulating any cleanup plans. USEPA asked the Nation to develop Navajo-specific ARARs that include Navajo Fundamental Law considerations. We submitted a more detailed analysis of the Navajo-specific ARARs at the request of USEPA Headquarters. USEPA wants DOJ to confirm Navajo Nation laws that are more stringent by identifying specific provisions or standards within the laws. USEPA also would like internet links to all the laws and regulations that we are citing so that they can have easy access to those. We continue to have recurring monthly calls on this issue.

Tronox Settlement Prioritization and Allocation: The settlement covers 54 AUM sites, both on and of the Nation, within Regions 6 and 9 of USEPA. USEPA proposed a prioritization list for sites based on factors mostly associated with risk to human health. Anecdotally, NNEPA is not pleased with the prioritization list because it is their opinion that all sites on the Nation should be prioritized above those off the Nation (in NM). The settlement will not fund the complete cleanup of all the sites. In light of the budgetary shortfall, USEPA is proposing equal allocation for all of the sites. We participated in a call with USEPA regional counsel on the proposed allocation. The allocation is not tied to prioritization and is modeled after bankruptcy proceedings when assets are insufficient to meet creditor claims.

Cove Day School: This is an issue pertaining to a dispute between the BIA and NNEPA over uranium contamination at the school and adjacent to the Tronox and Cyprus Amax sites. The two main issues of NNEPA are the safety of children attending the school and the impact that final construction will have on any future uranium contamination remedial efforts. The area is not presently part of a remediation settlement but is between two areas and is known to have areas of high radioactivity. An interim clean-up plan and efforts to prevent radon build-up at the school were discussed. USEPA, NNEPA and the contractors hired by BIA proceeded with plans to conduct sampling at the school. A plan with testing guidelines was submitted to NNEPA by the clean-up contractor for review and comment. NNEPA's preliminary comments do not seem to raise any serious issues. CERCLA radiation clean-up standards will be utilized at the site. Radioactive scans went well, and no areas of concern were found.

14. Cree Administrative Settlement Agreement: (On-going) We have been negotiating with USEPA on the terms of a new settlement agreement for investigation of contamination at two former uranium mines near Teec Nos Pos in northeastern Arizona. The responsible party, Cree Production Company, formerly operated Tsoosie No. 1 and Richard King No. 1 mines. The new draft settlement agreement will be presented to Cree Production Company for signature after we reach agreement with USEPA on draft language. The draft is intended to greatly enhance NNEPA's role in the oversight of clean-up investigations. Moreover, NNEPA will be a formal signatory to the settlement agreement for the first time. Substantial revisions are being made to the settlement agreement (called an Administrative Settlement Agreement and Order on Consent for Removal Actions, or "AOC") and to the Statement of Work. This quarter, we continued working with USEPA on revisions to the draft settlement and Statement of Work for investigation of uranium mines by Cree Production Company and have come up with a final draft that everyone is comfortable with. One

area we were getting a lot of push back on pertains to coordination of oversight of work performed. The attorney for USEPA does not want to agree to any language that purports to be mandatory language. She didn't state why, even though other documents like the MOA between NN and USEPA have similar language. The ten-year plan also states USEPA will partner with the NN through NNEPA. The USEPA attorney is now sharing it with superiors for final approval before we approach Cree Production to negotiate the settlement and SOW with them.

15. Arizona Corporation Commission Rate Cases

APS Rate Case: 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. This quarter, April worked with APS and outside counsel to finalize the "settlement agreement" between the parties. She also assisted with, and provided edits to the Nation's "exceptions" to the ACC Administrative Law Judge (ALJ)'s Recommended Opinion and Order (ROO), which is a brief filed with the ACC noting our objections to certain provisions of the ROO. Our exceptions focused on the ALJ's treatment of the \$100 million that the Nation and APS are asking for via our "settlement agreement" (the ALJ said the Nation should receive \$50 million, not \$100 million) and the ALJ's denial of APS's request to recover funding for the emission control technology at the Four Corners Power Plant. NRU advocated for the full \$100 million and APS's recovery for the emission control technology and assisted President Nez with a letter that was filed with the ACC advocating for the recovery of the full \$100 million and APS's recovery of the emission control technology at Four Corners. NRU provided RDC Chairman Rick Nez a briefing on the APS rate case and discussed the possibility of him providing comments during the ACC's "opening meeting" regarding the case; comments during the "open meeting" were given on October 4th.

ACC Generic Docket: The Nation needed to provide written comments into a "generic docket" opened by the ACC. This generic docket focused solely on the issue of a "just energy transition" for coal communities. Provided edits to comments drafted by our outside counsel. The comments were executed by President Nez and submitted to the generic docket on July 23rd. The comments focused on the negative impacts to the Nation caused by the shutdown of coal-fired power plants on or near the Nation, our involvement in the APS and Tucson Electric Rate Cases and our overarching concepts concerning the "just energy transition" issue.

16. PNM Rate Case: Per the request of President Nez, drafted comments to be submitted in Public Service Company of New Mexico (PNM)'s ongoing rate case with the New Mexico Public Regulation Commission (PRC). PNM's case focuses on PNM selling their interest in the Four Corners to the Navajo Transitional Energy Company (NTEC). The comments focused on President Nez's support for the transaction and the ongoing operations of Four Corners and NTEC's Navajo Mine. The comments also note that the continued operations of the power plant and mine are a key component of the Nation's "glidepath" away from coal and into other forms of revenue generation, including renewable energy development. The comments were filed with the PRC on August 30th.

17. Congresswoman Leger Fernández's Draft Bill: The Navajo Nation Washington Office (NNWO) asked for DOJ assistance in reviewing a draft congressional bill that was going to be introduced by Congresswoman Leger Fernández titled "Just Transition for Energy Communities Act." The bill focused on compensation to commu**nities negatively impacted by the shutdown of coal mines. We provided comments about the bill and the

way it was structured. We also sought input from our outside counsel who is assisting with the utility rate cases. The comments were sent to the NNWO on August 27.

18. NTUA Penalty Letter: Outside counsel Jill Grant assisted Navajo EPA's Surface and Groundwater Program draft a penalty letter to NTUA for ongoing violations related to wastewater at certain wastewater treatment facilities. NTUA has failed to comply with conditions and requirements that were components in two previous administrative compliance orders issued in 2014 and 2017. We provided comments and edits to the draft penalty letter. The letter was issued to NTUA and they ended up paying the \$100,000 fine that was issued by Navajo EPA via the letter.

19. NTEC & Navajo Mine

Surface Lease: NTEC has a surface lease related to its mining activities at the Navajo Mine and is in the process of trying to extend the term of that lease with the Nation. BIA was fine with treating NTEC as a "holdover" tenant pursuant to 25 C.F.R. § 162.471, since the Nation and NTEC are in the process of negotiating a new lease. NTEC's general counsel was provided a template surface lease and NTEC sent proposed edits to the document for review. NRU is still in the process of reviewing their edits and will be following up with them shortly. NTEC also needs to start negotiating the lease compensation piece with the Minerals Department.

Land Relinquishment & Coal Ash: NTEC wants to relinquish certain lands at the Navajo Mine back to the Nation. They submitted the application to BIA, who then told NTEC to discuss it with the Nation. Minerals reviewed NTEC's application and conducted site inspections and made recommendations. It is our understanding that Minerals also consulted the Land Department. A letter was drafted for the President's signature and submitted to DOJ for review. NRU has concerns with the fact that the land that is going to be relinquished back to the Nation contains coal ash. The letter from the President notes there is coal ash and that both NTEC and the Four Corners owners believe monitoring of the coal ash should continue. However, there is no mention of who will be responsible for what and who is liable for the coal ash in the future. One of the overarching concerns is that U.S. EPA could deem the Nation the owner of the coal ash like they are proposing to do with coal ash found at coal-fired power plant sites. NRU discussed this issue with the Minerals Department and they seem confident there is no leakage of the ash into the groundwater or off-site. However, one concern is the ongoing liability piece. It is NRU's preference there be an agreement with NTEC and the Four Corners owners about who will be responsible for what going forward. April met with RDC Chairman Rick Nez last week and our concerns were conveyed to him and he suggested a leadership meeting with the President and a couple of the Chapters around the mine site to see how we want to proceed. There could be issues with this going forward because one of the chapters wants to use this land, but apparently NTEC also wants to use the land for a solar project. Either way, we need to discuss potential uses of the land, land use restrictions and liability concerns, among other things.

Tax and Finance Unit (TFU)

The Tax and Finance Unit is headed by Assistant Attorney General Mel Rodis who supervises one Principal Attorney, two Attorney Candidates, and one legal secretary. TFU is assigned to advise the Budget and Finance Committee (BFC); the Office of the Controller (OOC); the Office of Management and Budget (OMB); the Investment Committee (IC); the Navajo Tax Commission (NTC); the Office of Navajo Tax Commission

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(ONTC); the 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 this quarter:

1. American Rescue Plan Act: The American Rescue Plan Act (ARPA), included \$20 billion of the Coronavirus State Fiscal Recovery Fund for Tribal Governments (Fiscal Recovery Fund or FRF). The U.S. Department of Treasury (Treasury) divided the first \$1 billion equally among all federally recognized tribes. Treasury allocated 65% of the remaining \$19 billion (\$12.35 billion) based on self-certified tribal enrolment data, and 35% of the \$19 billion (\$6.65 billion) will be allocated based on employment numbers of tribal governments and tribally-owned entities for 2019. As of August 16, 2021, the United States Department of Treasury had allocated a total of \$2,079,461,464.93 to the Navajo Nation. In the first disbursement of FRF on May 29, 2021, Treasury allocated \$1,861,554,458.43 to the Navajo Nation. In the second disbursement of FRF on August 16, 2021, Treasury allocated an additional \$217,907,006.50 to the Nation. Pursuant to the ARPA and Treasury's Interim Final Rules and other guidance in the form of Frequently Asked Questions detailing allowable expenditures of the FRF, Tribes may use the FRF to respond to the public health emergency with respect to COVID-19 or its negative economic impacts; to respond to workers performing essential work; for the provision of government services to the extent of reduction in revenue of the tribal government due to COVID-19; and to make necessary investments in water, sewer, or broadband infrastructure.

TFU reviewed and provided feedback on the Office of Legislative Counsel's (OLC) draft legislation establishing the Navajo Nation Fiscal Recovery Fund and creating the framework and process for approval of future FRF expenditure plans, which was finalized when Council passed resolution CJY-41-21. TFU issued memos to the Office of the President and Vice President (OPVP) in response to questions about CJY-41-21 and about FRF emergency procurement. TFU drafted an FRF expenditure plan template and proposed FRF procedures for initial eligibility determination reviews of proposed FRF expenditures. TFU collaborated with the OLC in several rounds of revisions and then TFU presented these proposed procedures to the BFC and to OPVP. The BFC approved the FRF procedures and forms through passage of resolution BFS-31-21. TFU provided trainings on the final FRF procedures to OPVP, Division Directors, and Council Delegates. TFU has presented multiple reports on a weekly basis to OPVP's ARPA Support Work Group. TFU coordinated DOJ's preliminary review of OPVP's proposed FRF project listing. TFU participated in a leadership meeting among OPVP and Council regarding preliminary FRF plans. TFU reviewed and advised OPVP about the eligibility of proposed FRF administrative cost budgets for central support and regulatory offices, and issued memos to OPVP on the same subject. TFU, in consultation with outside counsel, has completed numerous FRF initial eligibility determination reviews for defunded CARES projects, and for projects funded through the Sihasin Fund and the Unreserved, Undesignated Fund Balance (UUFB), as well as for newly proposed projects seeking to utilize FRF. TFU attended a Treasury tribal consultation on FRF, a Treasury tribal consultation on the Homeowner Assistance Fund, and a Treasury training on the State Small Business Credit Initiative for tribal governments. TFU worked with outside counsel to draft a comment letter for OPVP presenting the Nation's feedback on the FRF Interim Final Rule. TFU worked with outside counsel to advise OOC on the lost revenue calculation for FRF. TFU reviewed and proposed edits to OPVP's draft Plan of Operation for the OPVP FRF Office.

2. Office of the Controller (OOC): TFU advised OOC with respect to ongoing issues involving the Hardship Assistance Program funded with CARES funds. TFU worked with OOC and outside counsel to obtain necessary information and documentation from OOC's former consultant, Baker Tilly, in order to implement the Phase Two Hardship Assistance Program, which Council approved through resolution CJN-35-21. TFU reviewed for legal sufficiency proposed Services Contracts between OOC and Cogent Communications, Inc.; Select Organizational &

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Administrative Resource Services; Saintsbury Consulting, Inc.; Carolyn Atcitty; Verity Management Consulting; Jaeho Jang; and Luberta Corporation. TFU also advised the Purchasing Section of OOC with regard to various procurement issues, and assisted OOC in determining the sufficiency of procurement processes used by other Navajo Nation programs. TFU advised the Purchasing Department of OOC regarding an after the fact contract with a consultant who performed services for the Office of the Speaker in a prior fiscal year, and advised about the applicability of the Navajo Nation Sales Tax to leasing of personal property. TFU advised OOC regarding possible duplicative payments of Special Duty Pay for particular employees and discussed the option of offsetting future payments of Hazard Duty Pay for such employees. TFU assisted the Investment Section of OOC to prepare tax forms related to the Nation's investments in Korea and Germany. TFU communicated with OOC, its consultants, and the external auditor, Moss Adams, regarding audit-related issues. TFU advised OOC regarding its contract with Moss Adams and drafted a letter to Moss Adams providing notice that OOC would not exercise its option for a third year of services. TFU advised the Payroll Department of OOC regarding completion of a Kansas Department of Revenue form for withholding payroll taxes. TFU assisted the Credit Services Department of OOC with a leasehold mortgage document, and advised regarding the write-off of a delinquent home loan. TFU researched an issue for the Property Management Department of OOC regarding disposal of office trailers. TFU participated in a call with Treasury regarding CARES funding to a subrecipient and assisted in drafting OOC's written responses to Treasury's questions. TFU proposed revisions to a draft Síhasin Fund grant agreement for a grant to the Cañoncito Band of Navajos Health Center, Inc.

3. Investment Committee (IC): TFU reviewed and provided edits to a draft forbearance letter agreement between the Nation and NNGE, and participated in meetings between OOC and NNGE. TFU reviewed and proposed edits to a proposed agreement with a new investment manager selected by the IC to manage investment of the Nation's FRF. TFU drafted multiple resolutions for the IC related to the Nation's various investment positions, and attended all IC meetings.

4. Office of Management and Budget (OMB): TFU advised OMB on multiple issues involving indirect costs. TFU participated in calls with OMB, OOC, the Department of Childcare Development, and Health and Human Services regarding use of the Nation's approved IDC rate in light of the administrative cost cap. TFU provided draft responses to questions on the draft FY21 and FY22 Indirect Cost Rate Proposals (ICRP) from the Department of Interior, Interior Business Center, regarding why DOJ and certain other offices were included in the Indirect Cost Pool. TFU reviewed and proposed substantive edits to several proposed grant agreements between the Nation and its grantees such as the Phoenix Indian Center, Little Folks Day Care, Diné College, and Navajo Technical University. TFU consulted with OMB on the legality of fourth quarter budget transfers within the 2110 object code for personnel costs. TFU advised OMB on FRF eligibility for defunded CARES non-capital projects and programs. TFU advised OMB on budget matters during the comprehensive budget process.

5. Office of the Navajo Tax Commission (ONTC): TFU participated in multiple taxpayer conferences with ONTC and taxpayers. TFU drafted an administrative subpoena for ONTC to issue to a tax payer to begin the tax audit process. TFU drafted memos from ONTC to taxpayers on the applicability of Navajo Nation taxes. TFU drafted a private ruling for ONTC to issue to a taxpayer and helped draft a Consent Agreement. TFU represented ONTC before the Office of Hearings and Appeals with respect to taxpayers' appeals of tax assessments. TFU negotiated favourable settlements on behalf of ONTC in two matters currently pending before the Office of Hearings and Appeals. TFU participated in a meeting with ONTC, and the Utah Department of Transportation and its contractors, and responded to questions on the applicability of the Navajo Nation Sales

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Tax and Business Activity Tax. TFU participated in a meeting with ONTC, DED, OPVP, and a Navajo business regarding the concerns of small business owners about the proposed increase to the maximum range for the rate of Navajo Nation Sales Tax.

6. Department of Retirement Services (NDRS): TFU advised NDRS on 401(k) Plan, Retirement Plan, and Deferred Compensation Plan matters. The Unit advised NDRS and facilitated contract modifications and other actions related to the transition of 401(k)-related services from Wells Fargo to Principal Financial Group. TFU generally advised NDRS and the Retirement Plan Administrative Committee (RPAC), drafted proposed RPAC resolutions, and attended monthly RPAC meetings. TFU advised NDRS on sole source procurement matters pertaining to proposed and existing contracts. TFU advised NDRS on Navajo Nation Privacy Act matters. TFU advised RSPAC, NDRS, the Division of Human Resources, and OPVP regarding loan repayments of a particular 401(k) Plan participant. TFU has continued to help NDRS in the implementation phase of the Enhanced Retirement Program, which the BFC approved through passage of BFMY-13-21 and assisted NDRS and actuarial consultant, Willis Towers Watson, in addressing an issue of newly discovered ERP-eligible employees. TFU is currently assisting NDRS to address issues with the implementation of auto enrolment of new employees into the 401(k) Plan and auto escalation of employee contributions to the 401(k) Plan.

7. 24th Navajo Nation Council and Committees: TFU participated in a meeting with Council and OLC regarding travel and Purchase Card policies. TFU responded in writing to various questions by Delegates regarding FRF and related legislations. TFU reported to and advised the BFC on the proposed FRF procedures and FRF expenditure plan template, which BFC then approved through passage of BFS-31-21. TFU responded to questions by the RDC and Council regarding the Land Acquisition Trust Fund and Land Department's budget, and issued a memo on the same topic. TFU attended an RDC work session on payment of agricultural officials at the chapter level and advised RDC regarding a 2011 IRS settlement agreement and the mandatory reclassification of agricultural officials from independent contractors to Navajo Nation employees for federal employment tax purposes. TFU advised the Health Education and Human Services Committee (HEHSC) regarding amendments to the Navajo Veterans Housing Program Policies and Housing Action Plan with respect to the Tribal General Welfare Exclusion Act. TFU advised BFC and Council on budget matters during the comprehensive budget process. TFU consulted with the OLC on various draft legislations and legislative amendments, provided feedback and suggested edits.

8. Miscellaneous Matters: TFU assisted the Attorney General in the drafting of a third update to the Attorney Audit Letter, which was issued to external auditors, Moss Adams, and to OOC. TFU advised and assisted the OAG on various procurement matters. TFU advised the Navajo Board of Election Supervisors and Chinle Chapter regarding requirements for Chinle Chapter to enact a local sales tax ordinance through a chapter referendum election. TFU drafted a memo to OPVP on balanced budget requirements under the Appropriations Act. TFU reviewed and proposed edits to the draft Síhasin regulations. TFU researched the history of Navajo Nation initiatives to establish a bank. TFU corresponded with OOC and Navajo Nation programs regarding Treasury offsets. TFU met with the Navajo Department of Transportation regarding the Arizona Transaction Privilege Tax. TFU reviewed and proposed edits to three policies of the Navajo Nation Veterans Administration. TFU advised and assisted other units of DOJ with various requests for services.

Water Rights Unit (WRU)

The Water Rights Unit (WRU) is led by Assistant Attorney General Michelle Brown-Yazzie. Ms. Brown-Yazzie supervises an attorney 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), Lower Basin

Navajo Nation v. Department of the Interior. The matter was fully briefed in the Nation's second appeal to the Ninth Circuit Court of Appeals with the filing of the Nation's reply brief in July 2020. The Ninth Circuit held a virtual oral argument on October 16, 2020. A decision was issued on April 28, 2021, in which the Ninth Circuit reversed the district court's dismissal, based on lack of jurisdiction, of the Nation's breach of trust claim alleging that the Federal Appellees failed to consider the Nation's as-yet-to-be determined water rights in managing the Colorado River. The WRU and the Litigation Unit will be handling the Ninth Circuit case moving forward. On July 29, DOI filed a *Petition for Rehearing En Banc*. On July 29, the Intervenor-Appellees filed a *Petition for Rehearing En Banc and to Correct Opinion*. On August 10, the Nation was ordered by the Court to file a response to the Petitions for Rehearing. The Nation filed an *Unopposed Motion for 30-Day Extension of Time* to file its Response, which the Ninth Circuit granted. The Nation filed its Response to the Petitions for Rehearing on September 30th.

2. Other Colorado River Matters

Ten Tribes Partnership: This quarter, there was a TTP meeting in August; however, WRU had other commitments and was only able to participate in the last hour of the meeting. There was discussion on how difficult it is for the TTP to gain the approval of all ten tribes to sign on to various letters of support, where time is of the essence. The Legal-Technical Committee was tasked with drafting a framework for a structure to expedite the process so that the TTP is able to sign onto various letters with other organizations on future issues. The leadership also authorized the Legal-Technical Committee to draft the Scope of Work for an Executive Director position that would be paid for by the New Venture Fund.

3. Rio Grande Basin

a. Augustin Plains Ranch: After having its revised permit application dismissed by the OSE hearing officer in August 2018, APR filed an appeal with the 7th Judicial District Court of New Mexico, case no. D-728-CV-2018-00026. On August 23, 2019, the Seventh Judicial District Court granted the summary judgment motion of the New Mexico Environmental Law Center, in which WRU had joined, and dismissed the Augustin Plains Ranch matter with prejudice. On September 23, 2019, an appeal was filed by APR. On November 26, 2019, OSE filed a cross-appeal, which it subsequently dismissed APR submitted its Brief-in Chief on October 26, 2020. On September 11, 2020, WRU filed a Notice of Appearance. The Answer Briefs were due on March 12 and Reply Briefs are due on April 23. WRU filed a Joinder in the Community Protestants' Answer Brief. No activity this quarter.

b. State Engineer v. Gray: WRU moved for the right to file an amicus curiae brief in May of 2019. The NM Court of Appeals granted the motion and accepted the brief on November 5, 2021. Oral argument occurred in the matter 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 NM Supreme Court will clarify the legal standard for finding abandonment. No activity this quarter.

5. Little Colorado River Basin (AZ)

- a. *In re Hopi Reservation HSR, 6417-203*: Hopi Future Claims. The virtual trial began on September 14, 2020. The testimony presented by the Hopi Tribe and the U.S. concluded on December 2, 2020 after a COVID-19 related stay from November 19 to November 30, 2020. Due to the postponement, the Nation presented its case in early December, followed by the LCR Coalition. The Court recessed for the holidays from December 23 through January 8, 2021. The trial concluded on February 16, 2021. Closing briefs and Proposed Findings of Fact and Conclusions of Law were filed by the Nation's Attorneys on June 25, the scheduled deadline. Closing arguments in the Hopi contested case occurred September 30-October 1, 2021.

- b. *In re Navajo Nation, 6417-300*: Phase I. WRU and Sacks Tierney continue to work with the Nation's experts to develop their expert reports concerning the Nation's DCMI, stock pond, livestock and wildlife watering claims. The Nation has significant plans for future DCMI water development, much of it within the Sihasin funding plan that will support a claim based on a future population projection by the Nation's demographic expert. At a status conference on October 23, 2020, the San Juan Southern Paiute Tribe (SJSPT) sought direction concerning how its claims for water within the Navajo Reservation would be addressed. The U.S. recognized that it had a duty to assert claims on behalf of the SJSPT in a footnote to its amended SOC on behalf of the Nation, and the SJSPT filed objections to the Navajo Nation HSR. The Nation, the U.S. and SJSPT engaged in several discussion seeking a resolution acceptable to all parties, but could not reach agreement. The Special Master heard from the parties on the matter at a status conference on December 4, 2020. The Court issued an order requiring the SJSPT to submit a proposal for resolving its water rights claims in the LCR Adjudication by March 31, with responses due on July 30, and argument set for August 18. The Phase I trial is scheduled to begin on February 10, 2023.

Phase II and Phase III: As previously reported, much work has already been done on the Navajo Phase II and III claims. The Nation and the U.S. have retained experts to develop reports on past, present, and future Navajo heavy industrial and commercial uses for Phase II and historic irrigation and PIA for Phase III, and again are working collaboratively with the U.S. to develop these claims. WRU's work with HPD, as described above, includes efforts to develop the Nation's claims for cultural uses of water. WRU retained a riparian/wetlands expert to develop claims associated with riparian areas, including collecting medicinal plants. WRU is working with NN Fish & Wildlife, to develop its claims for recreational uses of water on the LCR lakes, and for fisheries in LCR lakes and streams. WRU has retained a renewable energy expert to evaluate future economic development, and retained an economist to look more broadly at development to foster a future Navajo permanent homeland. Given the delay by ADWR in producing the Phase II HSR (until the summer of 2022), there has been some discussion about consolidating Phases II and III, particularly given that certain claims are no longer part of those Phases. The Court set a status conference to consider this issue for April 8, however, a decision was not made to consolidate and another status conference was held on June 10. The Nation and U.S. filed their respective amended SOCs for Phase II on October 7, 2020. No trial date is set for Phase II or Phase III claims.

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- c. *In re Lower Little Colorado River Subwatershed, 6417-400*: This proceeding has been focused on the preparation of the ADWR Technical Report on *de minimis* uses. The Nation objected to a number of matters addressed in the Report, but did not dispute that summary adjudication was appropriate for certain small uses. At a hearing on May 28, 2020, no party objected to the *de minimis* treatment of all stock and wildlife water claims and stockponds with a capacity of less than 4 acre-feet as recommended by ADWR, and the Special Master entered her Report on October 30, 2020. Objections to the Report were filed on April 28. ADWR sought, and was granted, an extension to complete the preliminary watershed HSR to March 31, 2022.
6. Zuni River Basin: The parties continue to work on a consensus hydrologic model that will allow the parties to evaluate impacts of various claims and future pumping scenarios continues as the settlement proposals are discussed. WRU is working with WMB to obtain complete available data on water use and to update maps on the trust lands given substantial trust acquisitions since the U.S. prepared its claims. During the last quarter, the Technical Committee was able to run a predictive transient model with the worst case scenarios (meaning the highest numbers for all parties). The Zuni Tribe provided its maximum pumping claim, which is their settlement claim. The Navajo Nation also provided its highest water use claim so that it may see whether there is any impairment with the Zuni Tribe at the highest water use for both tribes. The good news is that the model did not show any impairment between the tribes at their maximum pumping numbers. No activity this quarter.
7. Gila River Basin: No activity this quarter with the exception of monitoring developments with the potential to impact the Nation's rights, particularly in the LCR Adjudication.
8. San Juan River Basin (UT)
- a. Settlement Agreement and Legislation: WRU continues to work with the Nation's lobbyists and the NNWO to secure appropriations to fund the congressionally authorized Navajo Utah Water Rights Settlement Act (NUWRSA). NURWSA was included as Section 1102 of the Consolidated Appropriations Act, Public Law 116-94, approved by Congress December 21, 2020, and signed by the President on December 27, 2020. That Act ratifies the proposed settlement agreement previously approved by the Navajo Nation Council. WRU is a part of the NUWRSA Implementation Team and is on the subcommittee working on conforming the language of the settlement to the be consistent with the Act prior to execution by the Secretary of the Interior, the Governor of Utah and the President of the Navajo Nation. WRU worked with the Utah Attorney General's office to discuss the passage of SJR 14 (State of Utah resolution in support of settlement) and SB 0225 (State of Utah resolution to support appropriation of funding for the settlement) and implementation of the settlement. The Utah Governor signed a law authorizing an additional \$6 million dollars to be allocated to the trust fund for the settlement. However, Utah will not release that \$6 million until the settlement agreement has been conformed to the Congressional Act. WRU continued to work with Brownstein lobbyists to secure necessary funding to implement the settlement.
9. San Juan River Basin (NM)
- a. Adjudication (Main Case 75-184): On April 5, the New Mexico Supreme Court dismissed the 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. This is a huge victory for the Navajo Nation. It should put the validity of the Nation's water rights in the San Juan River Basin to rest. The State of New Mexico filed a Motion for Reconsideration because the New Mexico Supreme Court "improperly [found] that the federal government,

not the State, controls the public waters of the State, and incorrectly concludes that passage by Congress of the act approving the Settlement Agreement transformed into federal law [pre-empting] state law.” The Albuquerque Bernalillo County Water Utility Authority and the City of Gallup also filed a Motion for Reconsideration for the same reasons. On July 28, Movants Chris Velasquez, Linda Corwin, and the San Juan Agricultural Water Users Association filed a *Motion for Deposition of Peterson Zah*. On August 8, Judge Wechsler entered an order denying the deposition of Peterson Zah. On August 10, the same Movants filed a *Motion for Deposition of Peter Macdonald*, in a continuing attempt to get Judge Wechsler to recuse himself from the case and to overthrow the Nation’s settlement agreement. Stanley Pollack, Contract attorney for the Nation, filed a *Response to Motion for Deposition of Peter Macdonald* arguing that the Movant’s Motion should be denied. The Court has not yet issued an order on this Motion.

- b. Ute Mountain Ute Subproceeding: The litigation of the claims of the Ute Mountain Ute Tribe (UMUT) have been stayed while the Tribe is in negotiations with the State of New Mexico and the U.S. The Nation has been invited to participate in those negotiations to resolve the Tribe’s water rights claims in New Mexico. On behalf of the Nation and WRU, Mr. Pollack executed a nondisclosure agreement on behalf of the Navajo Nation and will participate in settlement discussions. Mr. Pollack participated in a meeting via telephone on June 16 to discuss formulation of fund-based settlements. Mr. Pollack advised that the Nation should be concerned about the use of Permit 2883 to settle Ute Mountain Ute Tribe water rights claims. No activity this quarter.
- c. Implementation of the Navajo Nation San Juan River Basin Settlement
- Navajo-Gallup Water Supply Project (NGWSP). The Cutter Lateral is online and is delivering water to the Huerfano, Counselor, Ojo Encino, Nageezi, Torreon, and White Horse Lake Chapters through the Cutter Lateral system.
 - 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. WRU has met with Reclamation, the U.S. contractors, and the State of New Mexico to discuss the impact of the double taxation on the Project as well as how to remedy the issue. WRU researched this issue and found that the NM Supreme Court held that the State of New Mexico can impose gross receipts taxes on entities providing services on tribal land when the agreement is not with the tribe. The State of New Mexico has entered into agreements with a majority of tribes in New Mexico that authorizes the State to share GRT revenues; however, the Nation has not entered into such an agreement.
 - Value Planning (VP). As of May 27, 2021, Reclamation is estimating a project cost shortfall of \$330M for the NGWSP. Reclamation sought the input of all project participants in a VP exercise to address the projected cost overruns. Reclamation released the Draft Value Planning Report. The Nation provided feedback on the draft Value Planning Report on June 29. No activity this quarter.
 - Ability-to-Pay OM&R (ATP) Methodology. Reclamation released a Deliberative Draft of the ATP Study on April 24, 2020. The Nation has been waiting for Reclamation to finalize this draft. Reclamation has informed the Nation that it will finalize this draft within the next year in order to assist the federal team with OM&R discussions.

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- San Juan Generating Station (SJGS) Reservoir Alternative. PNM is planning to shut down the SJGS and approached Reclamation about incorporating the river diversion, raw water transmission pipeline, and reservoir storage facilities into the NGWSP. After months of investigations, Reclamation selected the SJGS facilities for use as the intake for the San Juan Lateral of the NGWSP. The SJGS intake offers a large reservoir storage, which will provide a reliable and high quality water supply for the Water Treatment Plant. In addition, the SJGS intake has an approximate \$50M in capital cost savings over the other intake alternative. Due to this selection, initial water deliveries will be delayed by approximately four years. Pursuant to Public Law 111-11, the completion deadline for the NGWSP is December 31, 2024. The deadline will need to be extended to 2029.
- NGWSP Depletion Guarantee (DG). The DG arises out of the Biological Opinion for the Project which requires the Nation to cut back on depletions of up to 20,782 AFY to avoid the total of all previously authorized depletions in the San Juan River basin from exceeding 752,127 AFY. Mr. Pollack has had numerous discussions with New Mexico Interstate Stream Commission staff and other stakeholders regarding the DG. WRU is concerned that the DG not be used to offset the depletion impacts from future non-Navajo water development not included in the 752,127 AFY baseline. Accordingly, WRU is working to remove the DG requirement. Last quarter, Mr. Pollack drafted a briefing paper for the Regional Director of the U.S.F.W.S. on this issue.
- Cutter Lateral Operations, Maintenance, and Replacement (OM&R) Contract. WRU determined that the Nation should be a signatory to the contract. Reclamation questioned whether the Nation should be added to the indemnity provisions, currently limited to NTUA. In response, WRU requested that Reclamation secure an interpretation from the Solicitor's Office of language in the Settlement legislation that appears to limit the Nation's liability. WRU engaged in several conversations with the Solicitor's Office and the U.S. agreed to change its Standard Article (which the U.S. says can never be changed) to state that the liability is exactly as the Settlement Act (P.L. 111-11) reads. Reclamation informed us during a negotiation meeting on September 16 that that language was approved and the Standard Article was changed to reflect that revision. WRU participated in Technical Meetings as well as Negotiation Meetings. Reclamation sent a letter to the Navajo Nation President informing the Navajo Nation that in accordance with Article 22 and Article 23 of the Settlement Contract, the Navajo Nation's allocated Project water is available for beneficial use by the Navajo Nation. The date of the declaration of Substantial Completion will be October 6, 2021. This means that Reclamation will transfer Operations, Maintenance & Repair expenses to the Nation (and NTUA) on October 6, 2021. Reclamation intends to declare the Cutter Lateral substantially complete even if the OM&R contract is not in place. Reclamation does not know how much the OM&R will cost the Nation/NTUA; however, Reclamation is working to put together a budget for billing the Nation/NTUA. However, the United States will be waiving the Navajo Nation's proportionate share of OM&R costs for a period of three years. This three-year waiver will count towards the possible ten-year waiver of O&M costs that the Nation negotiated with the United States in its settlement agreement. (WRU is currently seeking an extension of that waiver from ten years to fifteen years.)
- Water Development Trust Fund. The Nation's settlement includes a \$50 million trust fund that was fully funded October 1, 2020. DWR developed the Water Resources Development Trust Fund Expenditure Plan in consultation with the federal implementation team. WRU reviewed and revised the Expenditure Plan and drafted a supporting resolution for Council approval. WRU made edits to the Expenditure

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Plan and the supporting resolution. WMB requested another review of both documents by WRU, so they can start moving the legislation. WRU provided a final round of edits to the Expenditure Plan and supporting resolution. No activity this quarter.

- Congressional Requests. As of April 8, 2021, the NGWSP has a cost shortfall of \$330M, thus there is a need to request an increase in the project ceiling as well as a request for additional funding to cover the cost overrun of the project. The Navajo team would also like to request that Congress make the discretionary waiver of O&M payments mandatory, extend the waiver from 10 years to 15 years, and provide the Jicarilla Apache Nation and the City of Gallup with an O&M waiver. There is also a need to extend the deadline for the completion of the NGWSP from Dec. 31, 2024 to 2029. WRU hired lobbyist Michael Connor (former Deputy Secretary of the Interior), to assist with the congressional requests that the Navajo Nation will need to complete the projects. During this quarter, WRU continued drafting proposed amendments to P.L. 111-11 with the requests that the Nation would like to make. WRU also drafted Talking Points for our lobbyist to use when approaching the New Mexico delegation. WRU participated in weekly meetings with our lobbyist, with the Navajo Nation team, and with the attorneys for the Project Participants to discuss the proposed amendments and the Talking Points and strategize on how to approach Congress. WRU included the NNWO so that they are able to assist with the lobbying of these Congressional requests going forward. WRU and NNWO provided briefing on the matter to congressional staff and provided the proposed amendments and talking points to the Nation’s congressional delegation.

10. NMOSE Matters

- a. City of Farmington. WRU filed its protest to Farmington’s re-advertised permit application on May 22, 2020. The City of Farmington seeks a permit to change the purpose from irrigation and domestic use to irrigation and municipal use. WRU alleges on behalf of the Nation, that the current owners abandoned the subject water rights by non-use and that the transfer of the water rights would be detrimental to the public welfare and contrary to the constitutional requirement that “beneficial use shall be the basis, the measure and the limit to the right to the use of the water.” WRU asserts that the water rights owners stopped beneficially using their water rights in 1995, when they stopped growing alfalfa. In addition, the laterals to deliver water to the subdivision are no longer in working condition thus, there is no way that the water rights owners could have been using water on the lots. Nevertheless, the Water Rights Division found no abandonment or forfeiture. WRU represented the Navajo Nation in an administrative hearing on December 8-9, 2020. WRU filed its *Proposed Findings of Fact and Conclusions of Law* on February 10. WRU received a positive decision from the OSE in the City of Farmington matter on July 29th. The Hearing Examiner found that the water rights intended for transfer under the Application had been abandoned, which caused him to deny the Application for a permit to change Place and Purpose of Use and Point of Diversion. The City of Farmington appealed this decision to the 11th Judicial District Court on August 27. The issues will be reviewed *de novo*. WRU wrote a letter to the U.S. requesting their intervention in the appeal, in order to assist the Nation to protect its water rights in the San Juan River Basin, NM.
- b. Diamond K. Bar Ranch L.L.C. and Kysar Living Trust. On March 3, 2021 WRU protested an application to change the diversion point of a multitude of water rights. The U.S. has also protested this application. WRU spoke with the U.S. about their protest.

11. Other Activities:

- a. NN Water Rights Commission. WRU provided legal assistance, including drafting new language and providing comments, to the Commission in their efforts to amend their Plan of Operation. WRU also provided a lengthy overview of settlement and litigation activities for the LCR and Colorado river matters to the Commission and RDC on September 16-17, during a public Work Session. WRU also provided a presentation on the proposed PL 111-11 amendments to increase the funding cap for the NGWSP to ensure the project's completion and the fulfillment of the Navajo Nation's Water Rights Settlement in the SJRB with the State of New Mexico and the U.S.
- b. NARF/WSWC Symposium. WRU attended the 2021 Symposium on the Settlement of Indian Reserved Water Rights Claims. Stanley Pollack presented on the Navajo Utah Water Rights Settlement Agreement. WRU learned more about the CSKT settlement, the Aamodt settlement, and the Kickapoo Settlements as well as information on U.S. Settlement Policy.
- c. Resources and Development Committee. On July 26, WRU participated in the RDC Leadership meeting in order to provide a litigation and settlement negotiation update regarding the Nation's water rights in Arizona as well as to inform RDC that there is a funding shortfall for the NGWSP and to answer any questions following NDWR's update on that issue. On September 16-17, WRU provided an update on Arizona water settlement and litigation activities to RDC during a public work session. On September 23, WRU, NDWR, and the NNWRC provided an update to RDC on the NGWSP shortfall and actions taken by NDWR and WRU to remedy the shortfall for the Project.
- d. FERC Pump Storage Applications. Several applications to develop pumped hydro-storage facilities proposed to be located on the Nation have been filed with the Federal Energy Regulatory Commission (FERC). However, there was no further activity this quarter.
- e. Water Settlements Funding. For many years, Mr. Pollack has participated in the Ad Hoc Working Group for Funding Indian Water Rights Settlements. He and Brownstein Hyatt Farber Schreck are working with NARF/WSWC to support President Biden's request for mandatory funding of enacted Indian water settlements.