

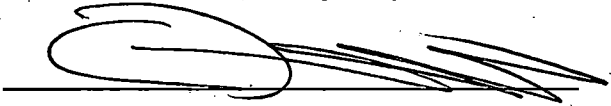


NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

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To: Sarah Slim
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From: 
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Date: October 26, 2023

Re: RFS 23-1575 Distribution of FBFA Escrow Funds to Non-LGA Certified Chapters

The Navajo Hopi Land Commission Office ("NHLCO") asked for a review of Resolution No. NHLCMY-03-2022 passed by the Navajo-Hopi Land Commission ("NHLC") which directed the NHLCO and the Office of the Controller ("OOC") to distribute the Escrow Funds ("Funds") to the nine Chapters within the Former Bennett Freeze Area ("FBFA"). For the reasons set forth below, the Funds can only be distributed to Governance Certified Chapters. Although the Funds cannot be distributed directly to non-Governance Certified Chapters, these Chapters can proceed with eligible projects but the Funds will need to be administered with coordination with the NHLCO and the OOC. This was originally communicated to clients in late 2021 but in light of the NHLC Resolution, the DOJ submits this explanation in writing.

The history of the Navajo-Hopi Land Settlement Act of 1974, P.L. 93-531, is quite extensive. For purposes of this memorandum, it is crucial to know that from the onset of the litigation, there were funds placed in escrow ("Escrow Funds"). In 2006, the Navajo and Hopi Tribe entered into an Intergovernmental Compact which, among other things, divided Escrow Funds equally between the two Tribes. The Escrow Funds were initially placed in Navajo Nation fund accounts under the oversight of the NHLCO and the NHLC. In 2013, the NHLC passed Resolution No. NHL CJY-23-13 to approve the Navajo Hopi Land Commission Escrow Fund Use Plan which, among other things, approved the distribution of a portion of the Escrow Funds to the nine (9) Chapters within the FBFA. The Resolution also proposed that a Memorandum of Understanding ("MOU") be executed between the Navajo Nation and the FBFA Chapters in order to receive the distributions.

On November 09, 2021, the NHLCO submitted a draft Memorandum of Agreement (“MOA”) for Department of Justice (“DOJ”) review. Due to the definitions of MOU and MOA in the Navajo Nation Code,¹ the DOJ redrafted the MOA and created two MOUs. One for Governance Certified Chapters (a.k.a., LGA Certified Chapters) and one for non-Governance Certified Chapters (a.k.a., non-LGA Certified Chapters). The drafts were completed on June 17, 2022 and provided to the NHLCO to begin using. Prior to that, on May 5th, the NHLC passed NHLCMY-03-2022 to amend NHL CJY-23-13 by: 1) eliminating the MOU requirement; and 2) to distribute the Escrow Funds to all nine Chapters regardless of LGA Certification status.

All Resolutions by the NHLC must comply with Navajo Nation law. The laws within the Local Governance Act (“LGA”) makes it very clear that a Chapter needs to be Governance Certified in order to receive Navajo Nation funds by contract. In particular, section 102(B) states that in order for any Chapter to gain the ability to exercise any of the authorities listed in section 103, the Chapter needs to have their Five Management System (“FMS”) certified by the Resources and Development Committee (“RDC”). One of the authorities is under section 103(D)(6) of the LGA which allows Governance Certified Chapters to “[e]nter into contracts or subcontracts with the Navajo Nation for federal, state, county and other funds, subject to the approval of the [Naabikiyati] Committee.” This provision would apply to the Escrow Funds if the Escrow Funds were to be considered “other funds” in light of the fact that the source of the Escrow Funds comes from the 2006 Intergovernmental Compact. Additionally, the Escrow Funds are deposited into the Navajo Nation’s (“Nation”) account. Thus, a “contract”, such as a MOA or non-binding MOU would need to be executed between the Nation and a Governance Certified Chapter.

If the Escrow Funds are not “other funds” under section 103(D)(6), it is nevertheless a Navajo Nation fund. Accordingly, section 103(D)(7) would apply. Under that section, Governance Certified Chapters can “[e]nter into contracts or subcontracts for Navajo Nation general funds, with appropriate Navajo Nation divisions, programs or agencies for service delivery programs.” Whether or not the Escrow Funds is “general funds” is not as important as the fact that since the law requires a contract or subcontract for general funds, then it would make legal and logical sense to require the same for the Escrow Funds. Thus, the Governance Certified Chapters within the FBFA can enter into a MOA or a MOU with the Nation for the distribution of the Escrow Funds.

The negative implication from sections 103(D)(6) and (7) is that non-Governance Certified Chapters are unable to enter into MOAs for Navajo Nation funds which also includes the Escrow Funds. How then can these Chapters benefit from the Escrow Funds? The answer is through a MOU. In 2013, the Navajo Nation Council passed Resolution No. CJA-03-13 which amended Title

¹ 2 N.N.C. §110(N) and (O) respectively.

Memo to: Navajo-Hopi Land Commission
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Two of the Navajo Nation Code. In particular, it defined MOU as a non-binding written agreement and when MOUs are executed between the Navajo Nation and a non-Governance Certified Chapter, such agreements are not subject to review under section 164(B) and can be executed between the Chapter President and the Division/Program Director. The purpose of the distinction was to formally recognize certain non-binding agreements executed with non-Governance Certified Chapters such as Intragovernmental Office Space Use Agreements. Such intragovernmental agreements were never used as a mechanism to distribute Navajo Nation Funds to non-Governance Certified Chapters. If such were the case, then there would be no reason for Chapters to become Governance Certified if they could bypass the FMS certification requirement and still obtain Navajo Nation funds through a MOU. In other words, the definition for MOU has to be read and applied consistently with the LGA.

As mentioned, the DOJ created two separate drafts of MOUs. One for Governance Certified Chapters and the other for non-Governance Certified Chapters. Both drafts include the participation of Choice Humanitarian ("Choice") which is a 501(c)(3) organization from West Jordan, Utah. Choice is not an entity of the Navajo Nation which adds some complexity but because they have their own helpful resources and contributions to bring to housing projects, the MOUs were strategically drafted to account for their participation in the Chapter projects to be funded by the Escrow Funds.

The application of both NHL CJY-27-13 and NHL C MY-03-2002 must adhere to Navajo law. Through this memorandum, the interpretations of Navajo laws cited in this memorandum creates a necessary result that the Escrow Funds can be distributed directly to Governance Certified Chapters but cannot be distributed to non-Governance Certified Chapters. For non-Governance Certified Chapters, the MOU outlines what their duties are in regards to projects selected by their Chapters. While they cannot receive funds directly, their projects may proceed immediately after execution of the appropriate MOU with the understanding that financial duties, such as payment of invoices, will need to be maintained and coordinated with the NHLCO and OOC.