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Report to Congressional Requesters

April 2018

OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

Executive Branch and Legislative Action Needed for Closure and Transfer of Activities

Accessible Version

GAO-18-266

GAO Highlights

Highlights of GAO-18-266, a report to congressional requesters

April 2018

OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

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Why GAO Did This Study

In 1974, the Settlement Act was intended to provide for the final settlement of a land dispute between the Navajo and Hopi tribes that originated nearly a century ago. The act created ONHIR to carry out the relocation of Navajo and Hopi Indians off land partitioned to the other tribe. ONHIR's relocation efforts were scheduled to end by 1986. However, those efforts continue today.

GAO was asked to review ONHIR's operations. Among other things, this report discusses (1) ONHIR's management and the status of relocation activities and (2) executive branch and legislative actions that may be needed for ONHIR to close and transfer remaining activities. GAO reviewed documentation; interviewed officials at ONHIR and other federal agencies, as well as from the Navajo Nation and Hopi Tribe; and conducted two site visits to ONHIR's offices and the Navajo reservation in Arizona.

What GAO Recommends

GAO is making four matters for congressional consideration; including that Congress provide successor agencies necessary authority to continue ONHIR's remaining activities if it closes. GAO is also making five recommendations to ONHIR, including that it request a closure determination from the President and prepare necessary information to facilitate the transfer of its activities to a successor. ONHIR neither agreed nor disagreed with the five recommendations and stated it had either already taken steps or planned to once a successor is identified. GAO continues to believe the recommendations are valid, as discussed in the report.

View GAO-18-266. For more information, contact William Shear at (202) 512-8678 or shearw@gao.gov or Anne-Marie Fennell at (202) 512-3841 or fennella@gao.gov

What GAO Found

As of December 2017, the Office of Navajo and Hopi Indian Relocation, and its predecessor agency (collectively, ONHIR), has relocated 3,660 Navajo and 27 Hopi families off disputed lands that were partitioned to the two tribes and provided new houses for them. Although the Navajo-Hopi Settlement Act of 1974 (Settlement Act) intended for ONHIR to complete its activities 5 years after its relocation plan went into effect, the agency has continued to carry out its responsibilities for over three decades beyond the original deadline and the potential remains for relocation activities to continue into the future. For example, GAO found that by the end of fiscal year 2018

- at least 240 households whose relocation applications were previously denied could still file for appeals in federal court and if the court rules in their favor these households could become eligible for relocation benefits under the Settlement Act, and
- ONHIR is still responsible for helping homeowners who might request repairs for 52 relocation homes that remain under warranty.

ONHIR believes that it has substantially completed its responsibilities under the Settlement Act and has stated its intent to close by September 2018. However, ONHIR does not have the authority to close its operations and has not yet taken the steps necessary to facilitate such a closure. GAO identified a number of areas where either executive branch or congressional actions would be needed to affect a closure of ONHIR, as shown in these examples:

- The Settlement Act states that ONHIR will cease to exist when the President determines that its functions have been fully discharged. ONHIR, however, has not requested a determination nor provided specific information to the President that could facilitate such a decision.
- ONHIR has prepared a transition plan and identified potential successor agencies that could assume its remaining activities. However, officials at these agencies said they currently do not have authority under the Settlement Act to undertake ONHIR's activities. Without congressional authorization these agencies would not be able to succeed ONHIR.
- ONHIR has prepared an implementation plan to guide its closure but has not yet taken necessary steps to ensure that all the key information about its activities has been compiled. For example, ONHIR's database for tracking warranty requests is missing information, such as the date of warranty repairs and other contractor information. Similarly, ONHIR has not prepared complete information from its files on the remaining denied households who could file for federal appeals. Federal internal control standards state that agencies should identify and respond to risks and use quality information. By not preparing complete information on the relocation activities it has been engaged in, ONHIR places an effective transition of its functions to another agency at risk. This is because any successor agency authorized to continue these activities will not have the complete information needed to effectively fulfill these functions.

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Abbreviations

BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
EPA	Environmental Protection Agency
FAR	Federal Acquisition Regulation
HUD	Department of Housing and Urban Development
Interior	Department of the Interior
NAHASDA	Native American Housing Assistance and Self-Determination Act of 1996
NTUA	Navajo Tribal Utility Authority
ONHIR	Office of Navajo and Hopi Indian Relocation
Settlement Act	Navajo-Hopi Settlement Act of 1974
Treasury	Department of the Treasury
USDA	U.S. Department of Agriculture

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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April 24, 2018

The Honorable John Hoeven
Chairman
The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Rob Bishop
Chairman
Committee on Natural Resources
House of Representatives

The Honorable John McCain
United States Senate

The Honorable Lamar Smith
House of Representatives

The Office of Navajo and Hopi Indian Relocation (ONHIR), an independent entity within the executive branch, was created as a result of the passage of the Navajo-Hopi Settlement Act of 1974 (Settlement Act). This act authorized the partition of disputed lands between the Navajo and Hopi tribes originally set aside by the federal government for a reservation in 1882. Members of one tribe who were living on land designated to the other tribe were to be relocated and provided new homes and cash bonuses. As of December 2017, ONHIR had relocated more than 3,600 Navajo and Hopi families, consisting of about 16,700 individuals, and had expended around $600 million since it was established, according to ONHIR officials.[1]

[1]In 1974, the Navajo and Hopi Indian Relocation Commission was established. Pub. L. No. 93-531, § 12(a), 88 Stat. 1712, 1716 (1974). In 1988, Congress abolished the three-member commission and in its place established the Office of Navajo and Hopi Indian Relocation with a single Commissioner. Navajo and Hopi Indian Relocation Amendments of 1988, Pub. L. No. 100-666, § 4(a), 102 Stat. 3929 (1988). Throughout this report we refer to the entity as ONHIR or the agency.

ONHIR's relocation process was originally scheduled to end in July 1986, but the process is ongoing and ONHIR continues to operate. ONHIR requested nearly $15 million for fiscal year 2018, more than double the amount it had received prior to fiscal year 2016, to facilitate and expedite relocation activities. ONHIR officials have said that the relocation activities ONHIR was charged to administer—certifying applicants as eligible for relocation, reviewing appeals, and providing relocation homes—would be completed by the end of fiscal year 2018. As of December 2017, ONHIR's remaining activities included relocating 20 certified families, resolving 25 active administrative appeals cases, and managing other activities, including a cattle ranch and land held in trust by the federal government for the benefit of the Navajo Nation.[2] ONHIR officials have recognized that some remaining activities and continued responsibilities would need to be transferred to another agency or entity in the event of ONHIR's closure.

You asked us to review issues related to ONHIR and its ongoing activities. This report examines (1) ONHIR's management of the eligibility and appeals processes and the status of these activities; (2) ONHIR's management of the home-building process and the status of these activities; (3) executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities; (4) ONHIR's management of Navajo trust lands and related transition activities; and (5) legislative actions that may be necessary to address other Settlement Act provisions.

To address these objectives, we reviewed our prior related reports and other studies and analyzed relevant laws and regulations. We reviewed policies and procedures for relocation activities—the eligibility and appeals process and home-building activities—and for other key activities, as well as related documentation, including home-building contracts and lease agreements. We interviewed ONHIR officials about relocation and other key activities, and we interviewed ONHIR's hearing officer to better understand his role in the appeals process. We also interviewed federal officials from the Department of the Interior's (Interior) Bureau of Indian Affairs (BIA), Office of Inspector General, and Bureau of Land Management (BLM); Department of Housing and Urban

[2]Applicants who have been determined ineligible for relocation may file an administrative appeal to reverse the determination. The outcome of such cases could affect the number of remaining relocatees, certification determinations, and appeals to be addressed by ONHIR.

Development (HUD); Department of the Treasury (Treasury); and Indian Health Service, within the Department of Health and Human Services. We also conducted interviews with officials from the Navajo Nation and the Hopi Tribe, as well as tribal entities including the Navajo-Hopi Legal Services Program, the Navajo-Hopi Land Commission Office, and the Navajo Nation Human Rights Commission. We conducted two visits to ONHIR's offices and the Navajo region in August 2017, where we interviewed ONHIR staff, observed a transition meeting, took two separate tours of homes (one with ONHIR officials and the other with Navajo Nation officials) and observed rangeland management activities, and attended presentations at three Navajo Nation chapters.[3] Additional information on our methodology is provided in appendix I.

We conducted this performance audit from March 2017 to April 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

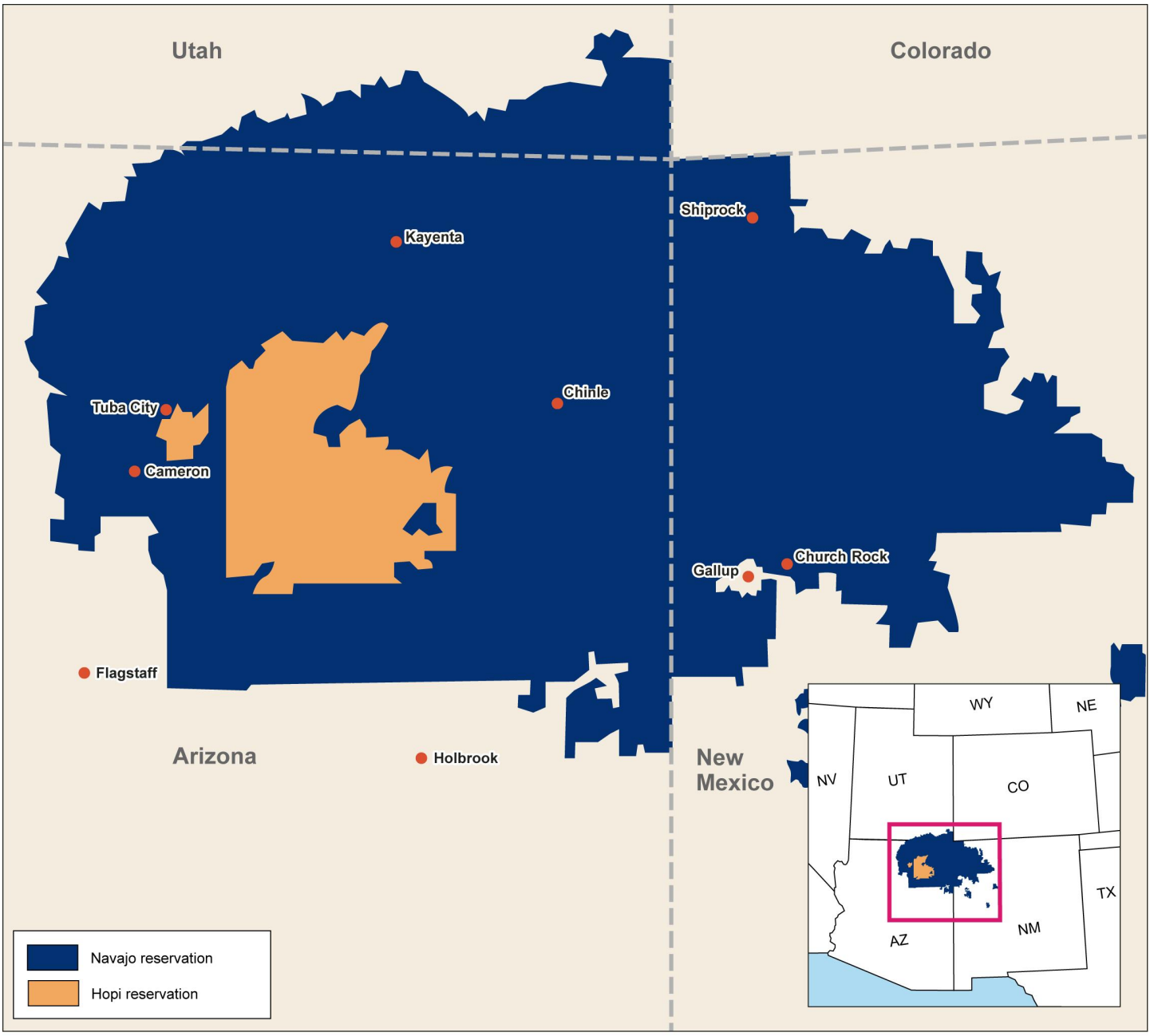
The Settlement Act, enacted on December 22, 1974, was intended to provide for the final settlement of a land dispute between the Navajo and Hopi tribes that originated nearly a century ago. The 1882 Executive Order, signed by President Chester Arthur, set aside approximately 2.5 million acres of land for the Hopi and "such other Indians as the Secretary of the Interior may see fit to settle thereon." Since that time, the Navajo and Hopi tribes have disputed the rights and occupancy of the lands. In a 1962 court case, *Healing v Jones*, the Hopi tribe claimed exclusive rights to the entire reservation, and the Navajo claimed exclusive rights to about 80 percent of the reservation. In 1963, the U.S. Supreme Court affirmed an Arizona District Court decision that set aside about 631,000 acres of the land—known as District Six—as exclusively Hopi and designated the remaining about 1.9 million acres as a joint use area, to be managed and used jointly by the two tribes. The two tribes legally co-owned the joint

[3]The Navajo Nation is divided into chapters, which are political subdivisions with delegated authority to address local issues pertaining to the land and health status of their respective chapter populations. There are 110 Navajo Nation chapters.

use area, but the use of the land remained a source of disputes between the two tribes. The Settlement Act authorized the partitioning of the surface of the joint use area and directed that it generally be split evenly between the tribes. It required Navajo households residing on lands partitioned to the Hopi Tribe (Hopi Partitioned Lands) to relocate and, similarly, Hopi households residing on lands partitioned to the Navajo Nation (Navajo Partitioned Lands) to relocate.[4] Figure 1 illustrates the current Navajo and Hopi reservations.

[4]The Settlement Act provided an opportunity for the tribes to mediate a solution, which was unsuccessful. In February 1977, the U.S. District Court for the District of Arizona issued an order of partition, dividing the joint use area into two parts of equal area—Hopi Partitioned Lands and Navajo Partitioned Lands. As illustrated in the Settlement Act, there is a distinction between the ownership of the surface of the lands and the minerals within or underlying such lands. The minerals (e.g., coal, oil, gas) within or underlying such were to be managed jointly by the two tribes.

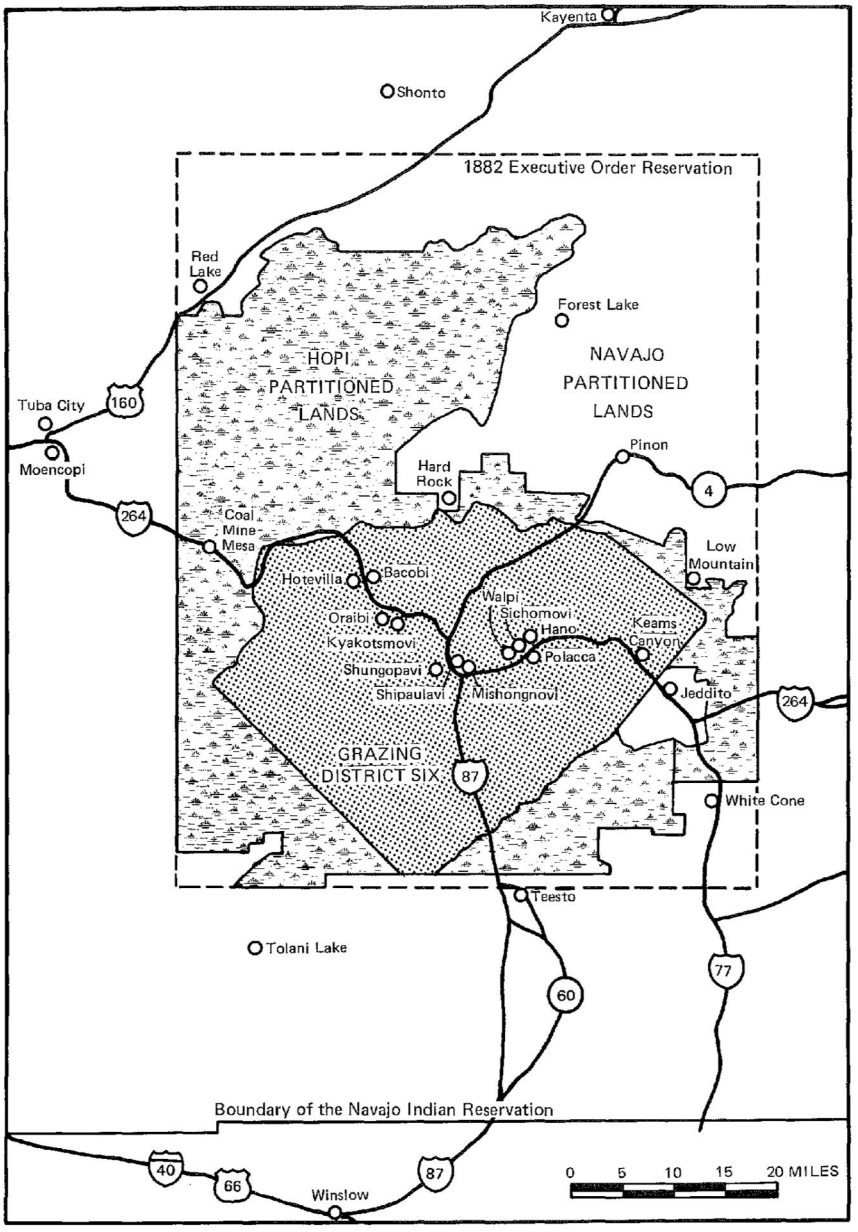
Figure 1: Map of Navajo and Hopi Reservations



Sources: GAO analysis; Map Resources (map). | GAO-18-266

Figure 2 illustrates the portion of the reservation near Tuba City, Arizona, that was subject to the land dispute, the area that was designated as exclusively Hopi (District Six), and the partitioned lands.

Figure 2: Map of Navajo and Hopi Partitioned Lands



Source: Office of Navajo and Hopi Indian Relocation 1981 Plan to Congress. | GAO-18-266

Selected Settlement Act Provisions and ONHIR's Responsibilities and Structure

The Settlement Act and its subsequent amendments contain several key provisions for relocation and other activities.[5]

- **Relocation.** The Settlement Act mandated that ONHIR submit a report, including a detailed plan, to Congress concerning the relocation of households and members of each tribe from lands partitioned to the other tribe. ONHIR stated that it has no authority to require any person to leave the land that was awarded to the other tribe. The act instructed that the relocation process be completed 5 years after the relocation plan took effect. The report and plan, which ONHIR transmitted to Congress in April 1981, provided details on relocation of households and their members, including generating names of those residing on the partitioned lands and identifying sites for relocation, among other things. The relocation was scheduled to be completed by July 1986. Specifically, the relocation benefits include $130,000, adjusted to current construction and housing development costs, for a household of three or fewer and $136,000 for a household of four or more to obtain a decent, safe, and sanitary replacement home, in addition to moving expenses and, within the first few years, bonus payments provided within the first years following the relocation plan.[6] Because there were far fewer Hopi households residing on lands partitioned to the Navajo Nation, almost all of the households relocated (about 99 percent) have been for Navajo families.[7]

[5]The Navajo Hopi Land Settlement Act was amended multiple times including in 1980, 1988, and 1991. See Navajo and Hopi Indian Relocation Amendments Act of 1980, Pub. L. No. 96-305, 94 Stat. 929 (1980); Navajo and Hopi Indian Relocation Amendments of 1988, Pub. L. No. 100-666, 102 Stat. 3929 (1988); Navajo-Hopi Relocation Housing Program Reauthorization Act of 1991, Pub. L. No. 102-180, 105 Stat. 1230 (1991).

[6]In 1974, the housing benefit was $17,000 for a family of three or fewer and $25,000 for a family of four or more. By statute ONHIR's commissioner, in consultation with HUD, can annually increase the specific amount to reflect changes in the cost of housing development and construction costs. Bonus payments of up to $5,000 were limited to families that applied for relocation benefits within a certain time period.

[7]According to ONHIR officials, all Hopis have already been relocated. This report focuses on Navajo households, some of whom have filed appeals on denied application benefits and some of whom are awaiting relocation benefits and home construction. Of the more than 3,800 certified households as of December 2017, only 28 were Hopi households.

- **Resettlement land taken into trust for the Navajo Nation.** The Settlement Act as amended authorizes and directs the Secretary of the Interior to take certain lands into trust for the Navajo Nation, which would become part of the Navajo Reservation. The 1980 amendments to the Settlement Act required the border of any parcel taken into trust to be within 18 miles of the Navajo reservation's then boundary. Most of the lands taken into trust in Arizona pursuant to the Settlement Act as amended are known as the New Lands.[8] Navajos living on Hopi Partitioned Lands could choose to relocate to the New Lands, as well as other areas on the Navajo reservation or off-reservation.
- **Administration and use of acquired trust land.** Pursuant to the Settlement Act as amended, ONHIR administers these lands taken into trust for the Navajo Nation until relocation is complete. In contrast, Interior administers other land the federal government holds in trust for Indian tribes, including the Navajo Nation. In addition, the Settlement Act as amended requires the lands taken into trust for the Navajo Nation to be used solely for the benefit of Navajo families—known as relocatees—that at the time of the Settlement Act's enactment had been residing on lands partitioned to the Hopi.
- **Leasing of acquired trust land.** The Navajo and Hopi Indian Relocation Amendments of 1988 transferred responsibility for issuing leases and rights-of-way for housing and related facilities on the New Lands from Interior to ONHIR.[9] In July 1990, ONHIR issued procedures for the leasing of New Lands, including homesite and business leases, in section 1810 of its management manual.[10]

[8]The New Lands are the 352,000 acres taken into trust in Arizona that are part of the Nahata Dziil chapter of the Navajo Nation. In addition to the New Lands, almost 800 acres in Arizona have been taken into trust for the Navajo Nation pursuant to the Settlement Act as amended.

[9]The Department of the Interior and Related Agencies Appropriations Act, 1986 authorized the Secretary of the Interior to (1) carry out construction and lease approvals or executions without regard to ONHIR's regulations and under such administrative procedures as the Secretary may adopt without regard to the rule-making requirements of any law, executive order, or regulation and (2) after January 1, 1986, issue leases and rights-of-way for housing and related facilities to be constructed on the trust lands administered by ONHIR. Pub. L. No. 99-190, 99 Stat.1224, 1236 (Dec. 19, 1985). The conference report accompanying this bill explained that the authority for the Secretary to issue leases and rights-of-way for housing and related facilities was for the New Lands only. H. Rep. No. 99-450, at 296 (1985).

[10]Section 1810 was amended in 1991, 2002, and 2011.

ONHIR's regulations specify that the agency's operation is to be governed by a management manual.[11]

- **Navajo Rehabilitation Trust Fund.** The 1988 amendments to the Settlement Act established the Navajo Rehabilitation Trust Fund in the U.S. Treasury. The Trust Fund consists of appropriations made for the fund, deposits of income from certain trust assets, and any interest or investment income accrued. The Trust Fund is essentially a loan from the federal government to the Navajo Nation to be repaid from revenues derived from leases of the lands and minerals taken into trust in New Mexico pursuant to the Settlement Act as amended. The tribe assumed responsibility for managing the Trust Fund pursuant to the American Indian Trust Fund Management Reform Act of 1994, according to Interior officials. Under this act, neither Interior, ONHIR, nor Treasury has a role in managing or overseeing the Trust Fund once a tribe has assumed responsibility for managing it.

Aside from administering the relocation activities and the lands taken into trust pursuant to the Settlement Act as amended, ONHIR also operates the Padres Mesa Demonstration Ranch. The ranch was established in fiscal year 2009 on the New Lands and teaches sustainable cattle ranching and modern livestock marketing to the Navajo. According to ONHIR officials, the ranch is on approximately 60,000 acres of trust land acquired pursuant to the Settlement Act as amended. The purpose of the ranch is to teach relocatees methods to maximize income from cattle-raising operations and be good stewards of the land. In addition to purchasing cattle, ONHIR hired an employee to manage the ranch's operations and contract cowboys to work on the ranch. ONHIR sells the cattle raised on the ranch and uses the proceeds to help pay for ranch operations. According to ONHIR documents, from fiscal years 2009 through 2016, ONHIR obligated approximately $1.8 million for the ranch's operation from a mixture of appropriations and cattle sale revenue.[12] Over the same period, cattle sales generated over $1.4 million, according to ONHIR documents.

The Settlement Act established a three-member commission, the Navajo and Hopi Indian Relocation Commission, to administer the relocation

[11]25 C.F.R. § 700.219(a).

[12]ONHIR's use of appropriations to establish and operate a cattle ranch raises questions that we will be addressing in a separate legal opinion. Specifically, the legal opinion will address ONHIR's authority to operate the ranch using a mix of appropriated funds and revenue collected by ONHIR from cattle sales.

program. The 1988 amendment abolished the three-member Relocation Commission and established in its place ONHIR as an independent entity of the executive branch under the authority of a single Commissioner. ONHIR has not had a Commissioner since 1994 and has been under the leadership of its Executive Director. As of December 2017, ONHIR said that they had 31 employees among its three offices in Flagstaff, Sanders, and Chambers, Arizona.[13]

ONHIR was not designed to be a permanent agency, but a specific closing date has not been determined.[14] ONHIR previously developed plans to close out its activities in 2008, according to ONHIR officials, but has continued to operate. The Settlement Act states that ONHIR will cease to exist when the President of the United States determines that its functions have been fully discharged.[15] During a testimony at a congressional hearing in February 2016, ONHIR's Executive Director said that ONHIR was working toward completing its work so the office can close by the end of fiscal year 2018. ONHIR has developed a draft transition plan, dated March 2017, that identifies, among other things, four areas of activity that would need to be transferred to another entity in the event of its closure in September 2018: (1) appeals and eligibility; (2) housing; (3) administration of the New Lands; and (4) the Padres Mesa Demonstration Ranch. In the draft transition plan, ONHIR primarily identified offices within Interior—including BIA, the Office of Hearings and Appeals, and the Office of the Solicitor—to take over several key activities, as well as other entities including the Department of Justice and the Navajo Nation government. In October 2017, ONHIR supplemented the draft transition plan with an implementation plan to outline the transfer of these four areas, among other things.

Other Federal Agencies and Tribal Entities with Responsibilities in Indian Country

BIA is generally responsible for the administration and management of land held in trust by the United States for Indians and Indian tribes. BIA provides services to 573 federally recognized tribes and about 1.9 million

[13]All but 1 of ONHIR's 31 employees will be eligible for regular full retirement by September 2018, according to ONHIR officials.

[14]We discuss ONHIR's plans to close its office later in this report.

[15]25 U.S.C. § 640d-11(f).

individual American Indians and Alaska Natives.[16] BIA's responsibilities include regulating grazing on trust land, leasing trust land, and maintaining roads in Indian country, among other things. BIA administers the vast majority of land held in trust for Indian tribes and has issued regulations governing leasing of and grazing on trust land that it administers, including the Hopi Partitioned Lands and the portions of the Navajo reservation that are not administered by ONHIR.[17] BIA's regulations do not apply to the lands acquired pursuant to the Settlement Act as amended because under the act, ONHIR is responsible for administering those lands. BIA also administers a Housing Improvement Program that funds rehabilitation of housing units.

Other federal agencies, such as HUD and the Indian Health Service, provide housing assistance and infrastructure in Indian country and tribal entities, such as the Navajo Tribal Utility Authority, provide services on the Navajo reservation. HUD, through its Office of Native American Programs, awards block grants (known as the Indian Housing Block Grant program) to tribally designated housing entities, such as the Navajo Housing Authority. These grants can be used to provide housing assistance for tribal members, such as constructing homes.[18] The Indian Health Service is authorized to provide drinking water and sanitation services to Indian homes and communities, among other things. ONHIR and the Indian Health Service have an interagency agreement to share the cost of connecting relocation homes on the reservation to water and sewer lines. Most of the electricity, water, and wastewater on the Navajo reservation are operated by the Navajo Tribal Utility Authority, an enterprise of the Navajo Nation government. Similarly, ONHIR and the Navajo Tribal Utility Authority have an interagency agreement for the construction of electrical power lines and related services for relocation homes.

[16]In this report, we use Indians and American Indians interchangeably.

[17]Interior's regulations governing leasing of trust land do not apply if an Indian tribe has assumed responsibility from Interior for leasing their trust lands.

[18]The Indian Housing Block Grant program was created by the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Prior to NAHASDA, HUD had greater involvement in the development of housing projects, including those providing housing development and modernization grants and rental assistance. NAHASDA fostered self-determination by making grant funds available directly to the Indian tribes or their tribally designated housing entities to administer their housing programs.

The Navajo Nation government makes decisions about allocation of resources, including federal grants it receives. The Navajo Nation Council hosts 24 council delegates representing 110 Navajo Nation chapters. The chapters are political subdivisions of the Navajo Nation with delegated authority to address local issues pertaining to the land and health status of their respective chapter populations. In a March 2014 report, we found each chapter could have different development priorities and approval processes for housing programs and services.[19] In its comments on a draft of this report, ONHIR stated that more than 400 families have moved to the New Lands, and over 1,200 families have moved to locations outside the Navajo Nation. The New Lands are part of the Nahata Dziil Chapter.[20]

Housing Issues in Indian Communities

We have previously found that American Indians have historically faced worse housing conditions than other socioeconomic groups.[21] They disproportionately experience socioeconomic challenges, including high unemployment and extreme poverty, which affect housing conditions on Indian reservations and in Indian communities. Overcrowding, substandard housing, and homelessness are far more common in American Indian communities. For example, a 2017 Urban Institute report prepared for HUD found that 5.6 percent of American Indian households had problems with plumbing, 6.6 percent had problems with the kitchen, and 12 percent had problems with heating. In comparison, 1.3 percent of households in the United States had problems with plumbing, 1.7 percent had problems with the kitchen, and 0.1 percent had problems with heating.[22]

[19]GAO, *Native American Housing: Additional Actions Needed to Better Support Tribal Efforts,* GAO-14-255 (Washington, D.C.: Mar. 27, 2014).

[20]According to Interior officials, the Nahata Dziil chapter primarily comprises the New Lands, but does encompass some Navajo tribal allotments and Navajo trust land that was not acquired pursuant to the Settlement Act as amended.

[21]GAO-14-255.

[22]Urban Institute, *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*, a report prepared for the Department of Housing and Urban Development, Office of Policy Development and Research, January 2017.

As we have previously found, common housing challenges in Indian communities are largely related to remoteness and other geographical factors, lack of adequate infrastructure, land use regulation, and other factors.[23] Some remote areas where Indian tribes are located can present unique logistical challenges, including a lack of buildable land and limited supply of building materials. In some regions, tribes face challenges related to a lack of adequate infrastructure, such as roads, water, and sewer systems. According to Navajo Nation officials, traditionally, tribes lived a lifestyle that was connected to their traditional and ancestral lands, with homes and other structures built from natural materials and constructed in communities with extended families. For example, many of the Navajo who were on the Hopi Partitioned Lands were self-sufficient and lived in traditional homes called hogans, which are made of wooden poles, tree bark, and mud.[24] See figure 3 for an example of a traditional home.

[23]GAO-14-255.

[24]According to Navajo Nation officials, the traditional homes were part of an integrated spiritual and religious lifeway. For example, a hogan is a necessary structure for many traditional ceremonies and practices. The design and construction of the hogan is an element of Navajo spiritual teachings, many of which relate strongly to residing in a particular geographic place. Additionally, part of the Navajo tradition includes simple agrarian lifestyles. Navajo Nation officials said that this lifestyle has been pursued for millennia on lands of sparse water and vegetation.

Figure 3: Example of a Traditional Navajo Home

Traditional Navajo home

Source: GAO (photographs taken in August 2017). | GAO-18-266

ONHIR Has Changed Relocation Eligibility Requirements and Application Deadlines for Various Reasons, and Additional Applicants Could Still File Court Appeals

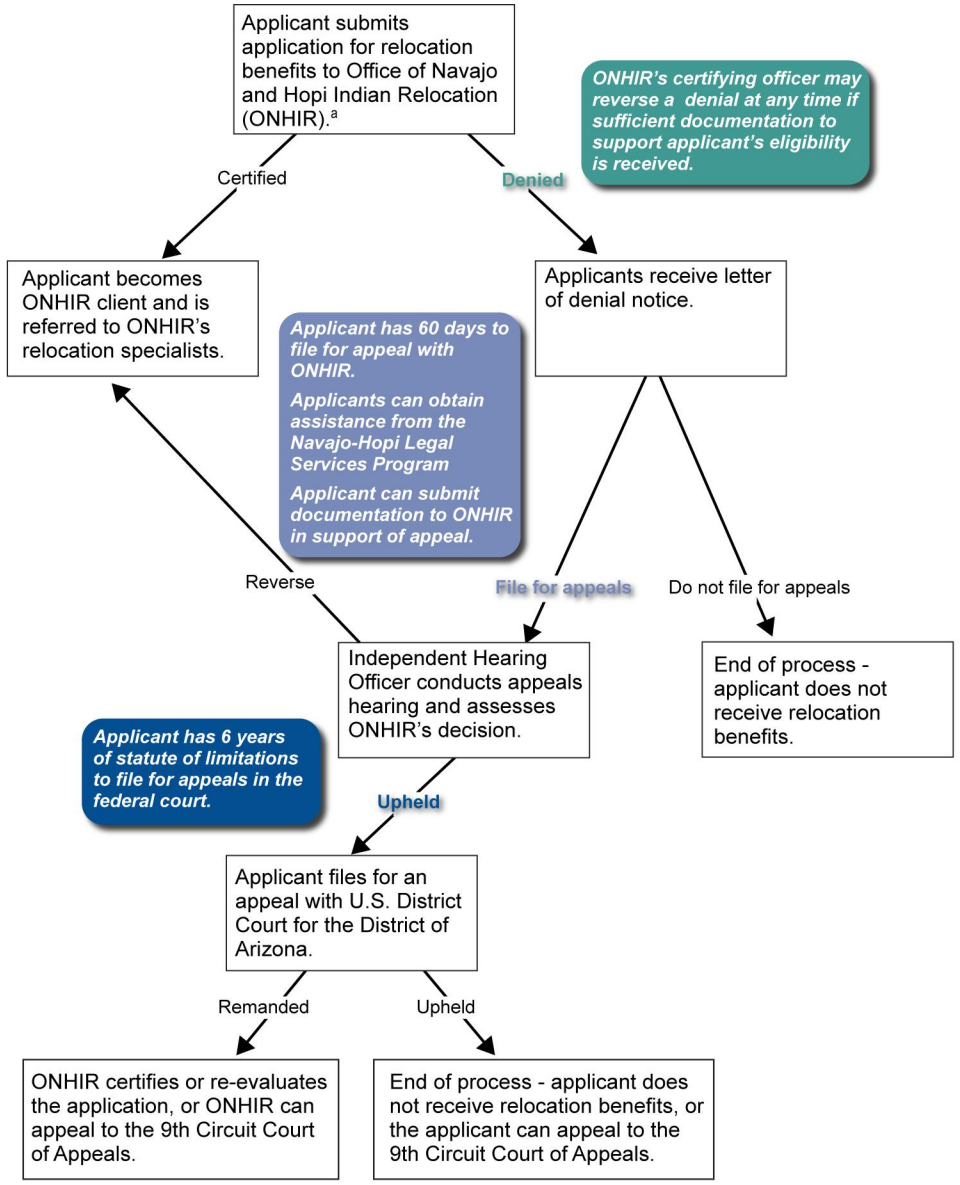
ONHIR Developed an Eligibility Certification Process, and Denied Applicants Can Appeal Their Eligibility Determination

ONHIR's process for certifying applicants' eligibility to receive relocation benefits has generally been consistent over time since ONHIR began accepting applications. All applicants must apply through ONHIR for relocation benefits and demonstrate that they meet eligibility criteria, discussed later in this report. Based on eligibility criteria, in general, a certifying officer determines whether an applicant is certified or denied. If an applicant is certified, the applicant becomes an ONHIR client for relocation. If an applicant is denied, the applicant is eligible to file for

appeals—first, an administrative appeal, then an appeal with the U.S. District Court for the District of Arizona, if the administrative appeal upholds the denial decision.[25] Figure 4 illustrates this process.

[25]ONHIR has one hearing officer, whom ONHIR hired in 1982. The U.S. Attorney's Office for the District of Arizona represents ONHIR in federal court.

Figure 4: Office of Navajo and Hopi Indian Relocation's Process for Certifying Applicants to Receive Benefits for Relocation Homes



Source: GAO analysis of ONHIR information. | GAO-18-266

[a]ONHIR was created as a result of the passage of the Navajo-Hopi Settlement Act of 1974, which authorized the partition of disputed lands between the Navajo and Hopi tribes originally set aside by the federal government for a reservation in 1882. Members of one tribe who were living on land partitioned to the other tribe were to be relocated and provided new homes if they met eligibility criteria for relocation benefits.

If an applicant is denied, he or she can obtain assistance from the Navajo-Hopi Legal Services Program, an entity established in 1983 within the Navajo Nation's Department of Justice to assist individual members of the Navajo and Hopi tribes who were affected by the Settlement Act.[26] Applicants' denial letters indicate that the applicant can seek counsel through this program; however, not all applicants are represented by counsel for the administrative hearing. As of July 2017, ONHIR had spent about $1.5 million on legal services and over $1.2 million on the hearing officer who adjudicates the administrative appeals.[27] In addition, about $285,000 was spent for an attorney salary at the Navajo-Hopi Legal Services Program from 2009 through 2011 and, according to ONHIR officials, about $418,000 was spent on attorney fees for applicants whose eligibility for relocation benefits was reversed in the U.S. District Court.[28]

As of December 2017, ONHIR had certified more than 3,800 households since the agency began reviewing its first applicants in 1977.[29] The certification process on average has taken about 979 days for those who were certified without a need to file for an appeal and 3,301 days for those who were certified through the appeals process (that is, those who had their denied application reversed through the appeals process). Figure 5 illustrates these time frames.

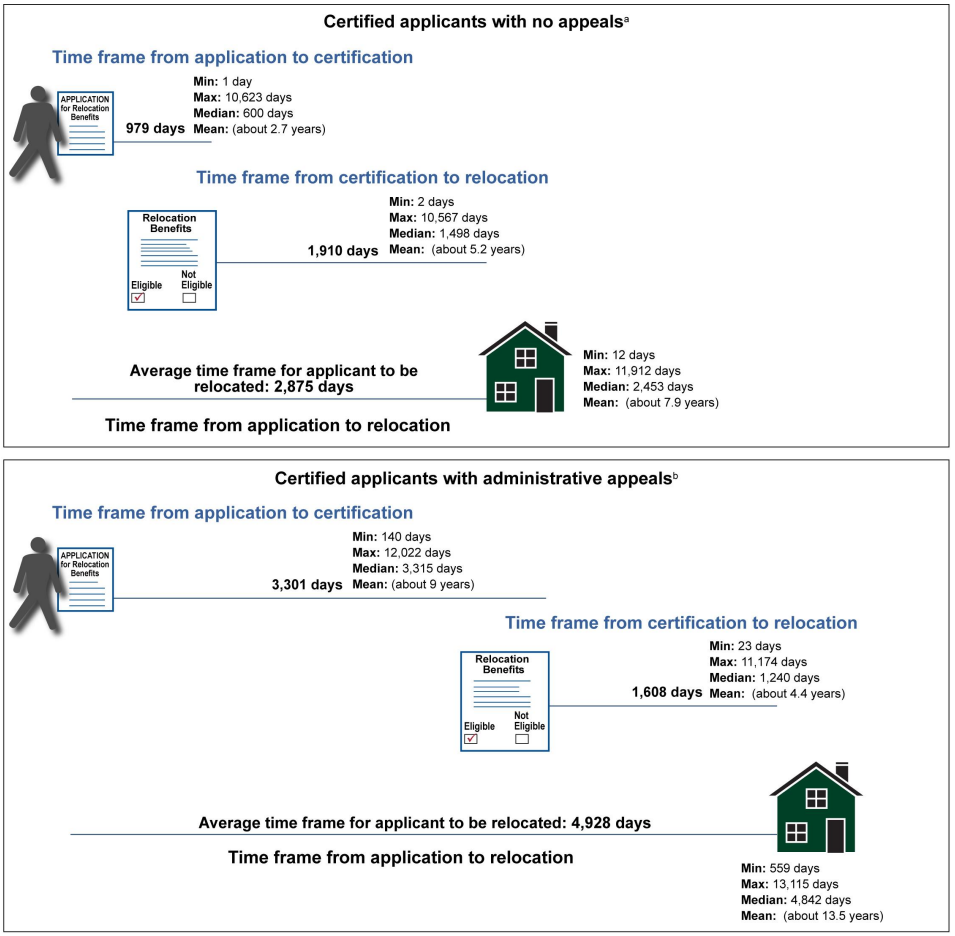
[26]According to a program representative, they have not been contacted by or represented any members of the Hopi Tribe.

[27]In its comments on a draft of this report, ONHIR stated that this was over a 35-year period.

[28]There is no explicit statutory mandate in the Settlement Act for ONHIR to pay legal fees or prohibit such payments. Under the Equal Access to Justice Act, courts can order federal agencies to pay reasonable attorney's fees and expenses of prevailing parties in lawsuits brought by or against the U.S. government or any of its agencies. Pub. L. No. 96-481, § 204, 94 Stat. 2321, 2327 (1980), codified at 28 U.S.C. § 2412.

[29]While ONHIR's original report and plan were transmitted to Congress in April 1981, according to ONHIR officials, the Settlement Act authorized ONHIR to relocate eligible applicants prior to that date.

Figure 5: Time Frames for Office of Navajo and Hopi Indian Relocation (ONHIR) Applicants to Be Certified and Moved into Relocation Homes



Source: GAO analysis of Office of Navajo and Hopi Indian relocation information. | GAO-18-266

[a]In general, ONHIR's certifying officer determines whether an applicant is certified or denied. If an applicant is certified, the applicant becomes an ONHIR client for relocation. If an applicant is denied, the applicant is eligible to file for appeals and if the eligibility determination is reversed, the applicant becomes an ONHIR client for relocation.

[b]Certified applicants with administrative appeals could include applicants who were denied relocation benefits during the administrative appeals but received relocation benefits following successful appeals in a federal court.

ONHIR Has Extended Application Periods and Changed Eligibility Requirements for Varying Reasons

For various reasons, ONHIR provided three additional application periods after the first application period deadline in 1986, which were not included in the plan ONHIR submitted to Congress. After the original deadline, ONHIR provided a second application period from April 1997 through March 2000 after the enactment of a new law, which ratified a formal agreement under which the Hopi tribe agreed to allow traditional Navajo residents to remain living on Hopi Partitioned Lands for 75 years.[30] In conjunction, the formal agreement provided that ONHIR relocate all eligible Navajo residents on Hopi Partitioned Lands who (1) did not sign an individual agreement to remain on the land, or (2) signed but then surrendered their signed individual agreement before the February 2000 deadline.[31]

ONHIR accepted applications again from May 2005 through June 2006 (third application period) based on language in a 2005 Senate bill to provide a last chance for Navajos living on Hopi Partitioned Lands to relocate, which passed the Senate but was not enacted, according to

[30]The Navajo-Hopi Land Dispute Settlement Act of 1996, enacted on October 11, 1996, ratified and adopted the 1995 Settlement Agreement. Pub. L. No. 104-301, 110 Stat. 3649 (1996). The 1995 Settlement Agreement, signed on December 14, 1995, was an agreement between the U.S. government and the Hopi tribe authorizing the Hopi Tribe to grant 75-year leases to certain Navajo families. The leases were called Accommodation Agreements. The 1995 Settlement Agreement further provided that ONHIR would implement provisions related to relocation requirements—specifically, final date for voluntary relocation application (25 C.F.R. § 700.137), persons who have not applied for voluntary relocation by July 7, 1986 (25 C.F.R. § 700.138), and referral action (25 C.F.R. § 700.139)—for all eligible Navajo residing on the Hopi Partitioned Lands who did not submit an application for voluntary relocation assistance by July 7, 1986, and who did not make timely arrangement for a 75-year lease on the Hopi Partitioned Lands.

[31]According to Navajo Nation officials, after the deadline to relinquish the signed individual agreement had passed, several Navajo families expressed an interest in leaving the Hopi Partitioned Lands and accepting relocation benefits. However, they are currently barred from doing so in accordance with the agreement. These Navajo families, with most of their relations and neighbors gone, have concluded that relocation is preferable to living under Hopi jurisdiction.

ONHIR officials.[32] ONHIR was not required to reopen its application process, but it chose to do so.[33] Even though ONHIR issued relocation notices in newspapers and at chapter facilities at the time of the original application period, ONHIR officials said that the additional application periods were in recognition that not all Navajo residing on the Hopi Partitioned Lands had moved, an outcome that was not considered in the original plans.[34]

ONHIR also accepted applications from February 2008 through September 2010 (fourth application period) in response to a federal court decision that concluded that ONHIR had not provided personal notice to a potentially eligible applicant before July 7, 1986 (the deadline for the initial application process) to enable him to apply for relocation benefits.[35] According to ONHIR officials, in consultation with the Department of Justice in Washington, D.C. and the U.S. Attorney's Office in Arizona, ONHIR reopened the process for applications to help ensure that everyone who might be eligible for benefits was given the opportunity to apply, rather than litigating a series of similar cases. ONHIR officials said they worked closely with the Navajo Nation to send out letters of

[32]The Senate Committee Report for the 2005 Bill (S. 1003), for example, stated "The Committee is aware that there are many eligible relocatees who long ago left the partitioned lands in an effort to comply with the Act, but who may not have received their replacement homes for various reasons....If a replacement home has not been provided by the time that the ONHIR ceases to exist, this provision provides a final opportunity for the eligible head of household to receive a replacement home or for his or her heirs to receive their pro-rata share of the replacement home benefit in cash." S. Rep. No. 109-206, at 7-8 (2005).

[33]According to ONHIR officials, ONHIR's decision to reopen applications was consistent with the basic requirement that ONHIR was tasked to relocate Navajos residing on Hopi Partitioned Lands, including those who had not signed the Accommodation Agreement.

[34]A Navajo-Hopi Legal Services Program representative said that of the applicants who were denied in 2005, they filed a notice of appeal for most if not all of them.

[35]In February 2008, the U.S. District Court for the District of Arizona determined that ONHIR knew one potential relocatee to be a member of a family residing on the Hopi Partitioned Lands, who had reached the age of 18 before the benefit application deadline of July 7, 1986, and that he might qualify for relocation benefits on his own. The court further found that ONHIR had not provided what the court found to be legally mandated notice to the applicant before July 7, 1986, so as to enable him to apply for relocation benefits under the regulations applicable to people who applied on or before July 7, 1986.

notification to potential eligible applicants, even though they were not required to reopen the application process.[36]

These three additional application periods have resulted in more applicants and time required for ONHIR to review applications. The numbers of applicants and outcomes across the different application periods are summarized in table 1. The attempts to prompt more Navajos to relocate in the second and third application periods resulted in a limited number of applications, 129 and 167 applicants, respectively. However, ONHIR received nearly 2,300 applicants during the fourth application period.

Table 1: Number of Certified and Denied Applicants for the Office of Navajo and Hopi Indian Relocation's Relocation Benefits for Each Application Period, as of November 2017

Applicant category	First application period (original deadline)	Second application period	Third application period	Fourth application period	Total
n/a	Feb. 1977 – July 1986	Apr. 1997 – Mar. 2000	May 2005 – June 2006	Feb. 2008 – Sept. 2010	n/a
Number of applicants	4,559	129	167	2,284	**7,139**
Number of certified applicants[a]	3,592	45	62	117	**3,816**
Number of denied applicants[b]	967	84	105	2,167	**3,323**
Number of applicants who filed for administrative appeals	1,800	75	121	640	**2,636**

Source: Office of Navajo and Hopi Relocation (ONHIR) data. | GAO-18-266

[a]Certified applicants could be those who were certified with or without administrative appeals.

[b]Denied applicants could be those who were denied with or without administrative appeals.

Throughout the multiple application periods, applicants demonstrated two key eligibility criteria: (1) head of household status and (2) residency on

[36]A Navajo-Hopi Legal Services Program representative said that in 2009 and 2010, the program advised applicants to submit their own written appeals to ONHIR within the 60-day appeal deadline and that the program decided on a case-by-case basis whether it would represent applicants in their appeals.

the lands partitioned to the other tribe.[37] However, ONHIR chose and applied varying eligibility rules related to residency status over the different application periods.

- **Original application period.** Under the original residency status criterion, applicants had to demonstrate that they were residents of the partitioned lands on December 22, 1974 (the date the Settlement Act was passed) and had not moved there within the previous year.
- **Second and third application periods.** During the second and third application periods, ONHIR used provisions for late applicants—persons who had not applied for relocation benefits before the original deadline—that were established in 1986 amendments to ONHIR's regulations and that revised the residency status eligibility criterion.[38] Unlike the original residency criterion, the agency guidance applicable to applicants during the second and third application period stated that applicants must demonstrate continuous residence on the partitioned lands from December 22, 1974, to July 7, 1986 (the original deadline)

[37]The regulation defines a household as (1) a group of two or more persons living together at a specific location who form a unit of permanent and domestic character, or (2) a single person who at the time of his/her residence on land partitioned to the tribe of which he/she is not a member actually maintained and supported him/herself or was legally married and is now legally divorced. The head of household is the individual who speaks on behalf of the members of the household and who is designated by the household members to act as such. 25 C.F.R. § 700.69. As intended in the original plan, an applicant must have been the head of household as of July 7, 1986, or at the time he or she moved from the partitioned lands.

[38]The 1986 amendments altered the requirements for those who did not apply by the new July 7, 1986, deadline by rewriting 25 C.F.R.§ 700.138. Commission Operations and Relocation Procedures; Final Date for Voluntary Relocation Application; Eligibility, 51 Fed. Reg. 19169 (May 28, 1986). For those who did not apply in a timely manner, ONHIR will request that those heads of household who are full-time residents on land partitioned to the other tribe choose an available area for relocation and contract with ONHIR to relocate. 51 Fed. Reg. 19169. A full-time resident means an individual who is currently residing on the land partitioned to the other tribe who has no other place of residence. 51 Fed. Reg. 19169. An individual who does not agree to relocate once funds are available or a relocation home is constructed will be given a notice with 90 days to vacate the area. 25 C.F.R. § 700.138 (1986). After the 90 days, if the individual has not relocated, ONHIR will use the referral for action provisions whereby the U.S. Attorney or Secretary of the Interior will proceed. 51 Fed. Reg. 19169 and 25 C.F.R. § 700.139. The language of 25 C.F.R. § 700.138 has not been amended since 1986. During the second application period, the head of the household criterion remained the same. Applicants had to demonstrate that they were the head of household, as of July 7, 1986, or at the time they moved from the partitioned lands. According to ONHIR officials, after July 1986, they kept lists of names of people who missed the July 7, 1986, deadline.

and until eligibility determination is rendered.[39] There were exceptions for demonstrating continuous residency as set out in the agency guidelines interpreting the regulations, including for those who were temporarily away for school, prison, medical treatment, and military service.

- **Fourth application period.** During the fourth application period, ONHIR decided to apply the original criterion, without the continuous residency requirement implemented in the guidelines for the second and third application periods, for all applicants. ONHIR officials said they made this decision in response to a federal court decision, discussed previously, that concluded that ONHIR had not provided personal notice to a potentially eligible applicant before the original July 1986 deadline; the U.S. District Court District of Arizona applied the original criterion in this decision.

The applicant has the burden of proof for providing evidence to meet the eligibility criteria. Demonstrating head of household or residency status has been difficult for residents for several reasons, according to a Navajo-Hopi Legal Services Program representative and Navajo Nation chapter officials we interviewed. For example, Navajo is an oral culture that historically existed mostly on a livestock or cash economy in which transactions were not documented, making it difficult to document the source of income or head of household status. In its comments on a draft of this report, ONHIR stated that the legal residence determination was complicated because many Navajos performed seasonal work and lived outside the Hopi Partitioned Lands for extended periods. According to Navajo Nation officials, oral evidence has not been allowed by the ONHIR Hearings Officer, and language and cultural barriers have also been obstacles. Some Navajos have limited English proficiency, although ONHIR offers translators for Navajo speakers. In its comments on a draft of this report, ONHIR stated that oral evidence has always been allowed but has sometimes been found not to be credible. Another unique characteristic of the Navajo is the use of shared mailboxes at trading posts—a place in the community for people to meet and receive their mail—making it difficult to ensure that ONHIR denial letters or other notifications reach individual applicants. For example, in one appeals case a court found that applicants who did not personally sign for the receipt of a denial letter must be notified of the court's decision to allow

[39]In its comments on a draft of this report, ONHIR stated that the requirement was for applicants to maintain legal residency until their contact with ONHIR.

those applicants to file a waiver of the appeal deadline.[40] ONHIR also stated that it offered administrative appeals to Navajos for whom ONHIR could not show actual receipt of denial letters.

[40]Several plaintiffs have filed suit against ONHIR regarding their denial of benefits. In October 1989, the U.S. District Court for the District of Arizona ruled that applicants who were denied relocation benefits but for whom ONHIR had not received a signed return receipt indicating personal delivery of the denial notice were entitled to file a waiver of the appeal deadline under 25 C.F.R. § 700.13(a). Along with the judgment, the court approved a procedure ONHIR agreed to follow regarding notifying applicants who had not returned signed receipts of notice. See Cecelia Sands, et. al. v. Navajo and Hopi Indian Relocation Commission, et. al., 85-CV-1961 (D. Ariz.). For almost 30 years, ONHIR stated that it used only restricted delivery certified mail which requires the actual addressee to sign for the document.

Although ONHIR Officials Believe That Most Eligible Applicants Have Been Processed, the Potential for Future Court Appeals Remains

While ONHIR officials said that eligibility determination has been completed, the potential exists for further federal court appeals, potentially resulting in the need for additional eligibility determinations. As of January 2018, ONHIR officials said that 24 of the remaining 25 households that were denied eligibility benefits have gone through the hearing process and are awaiting their decisions, which officials said should be completed in early 2018.[41] Households whose denials are upheld will be eligible to file for an appeal with the U.S. District Court for the District of Arizona. Additionally, any households that have been denied and are within the 6-year statute of limitations are still eligible to file for appeals in federal court. Eleven cases were pending in the federal district courts and four in federal appeals court as of March 2018, and according to ONHIR officials, at least 240 households that were denied eligibility benefits and whose decisions were upheld by the hearing officer (and are within the 6-year statute of limitation) could potentially file for appeals in federal court before the end of fiscal year 2018.

Any additional court appeals could result in the need for additional eligibility determinations in the future. For example, a federal court recently remanded a case to ONHIR to review the applicant's income information and reevaluate the eligibility determination.[42] According to ONHIR officials, they are taking steps to review the applicant's case file, investigate the evidence of the applicant's income to demonstrate the head of household status, and share the findings with the applicant's attorney. ONHIR officials stated that due to the unique situation of each applicant, they review the information in the applicant's case file to comply with the court's order on eligibility determination.

[41]One household that was denied eligibility benefits has a hearing scheduled in early 2018.

[42]In September 2017, the District Court for the District of Arizona granted a summary judgment motion for the plaintiff, a denied applicant for relocation benefits, and remanded the case back to ONHIR to determine whether the plaintiff met the self-supporting requirement based on assertions of income from a landscaping position. Jason Begay v. Office of Navajo and Hopi Indian Relocation, September 28, 2017, order, 3:16-cv-08221 (D. Ariz.). In November 2017, the District Attorney requested a separate judgment document from the court to be able to properly appeal the case. The document was issued on November 27, 2017. As of January 31, 2018, no appeal has been filed.

ONHIR Has Nearly Completed Home Building but Provided Limited Contractor Oversight, and Outstanding Warranties Remain in Effect

ONHIR Developed Policies and Procedures for the Home-Building Process

ONHIR's policies and procedures are intended to provide certified applicants who are eligible for relocation benefits with decent, safe, and sanitary homes, as mandated in the Settlement Act.[43] For example, ONHIR's management manual includes policies that require ONHIR to provide counseling on the home-building process and home maintenance training for relocatees. Figure 6 shows an example of a relocation home. Prior to moving to relocation homes, many families lived in one-room houses that they constructed themselves with no basic infrastructure, such as electricity, water, or plumbing facilities, and some families were unfamiliar with the features of a modern home. Families lived a spiritual and religious lifestyle that was connected to their traditional culture and ancestral lands, with homes constructed in communities with extended families.

[43]"Decent, safe, and sanitary homes" is defined as a dwelling that is structurally sound and clean and has a separate bathroom that is properly connected to hot and cold water and a flush toilet that is properly connected to a sewage drainage system, among other things. 25 C.F.R. § 700.55.

Figure 6: Example of a Relocation Home

Relocation home constructed in 2017

Source: GAO (photographs taken in August 2017). | GAO-18-266

ONHIR's management manual also includes policies that require employees to work with clients on the home acquisition process starting from the time clients are certified and continue until 2 years after the client has been relocated, including assisting clients with finding contractors, signing home-building contracts, understanding home maintenance, and requesting warranty repairs.[44] ONHIR works with families after they have moved into their relocation home by providing assistance with warranty issues; assistance in adjusting to their new community; and referrals to agencies in the new community that provide health care, supplemental nutrition, financial assistance, behavioral health, employment, and other social services. Relocation homes are the property of the client, and ONHIR has no responsibility for relocation homes after a 2-year warranty period on each home expires. ONHIR wrote a standard template of a

[44]Certified applicants have several choices for the relocation home. For example, a certified applicant can select a newly constructed home on- or off-reservation or purchase a resale house off-reservation. Of the 3,687 families who have relocated, more than 2,800 have moved into newly constructed homes. In its comments on a draft of this report, ONHIR stated that relocatees with existing Navajo homesite lease can have their relocation home built on the homesite lease site if it meets feasibility requirements.

contract that clients and contractors must sign, but ONHIR is not a signatory of the home-building contract.[45] However, ONHIR is a signatory to the 2-year home warranty contract, along with the client and the contractor. Additional policies and procedures required by ONHIR's management manual are summarized in table 2.

Table 2: Office of Navajo and Hopi Indian Relocation (ONHIR) Management Manual Policies and Procedures for Providing Certified Navajo and Hopi Applicants with Relocation Homes

Pre-construction	**Counseling**	ONHIR provides counseling to clients on the home acquisition process, which includes the selection of the homesite, contractor, house design, and features of the house plan.
Pre-construction	**Homesite leases**	ONHIR helps clients to apply for homesite leases for up to 1 acre of land in their new communities in order to secure space to build their home.
Pre-construction	**Feasibility studies**	ONHIR requires a feasibility study by an engineering technician on each homesite to ensure that the soil and infrastructure on each site, among other things, are suitable for home construction.
Pre-construction	**Infrastructure**	ONHIR works with the Indian Health Service and the Navajo Tribal Utility Authority to ensure that homes have access to water and power.
Pre-construction	**Contractor list**	ONHIR provides clients with a list of licensed, bonded and insured contractors clients could choose from or clients may also choose a contractor of their own.
Pre-construction	**Contract signing**	ONHIR schedules a contract signing at which all parties—the client, the contractor, and the inspector—are present.
During construction	**Inspections and payments**	ONHIR makes payment directly to the contractor on behalf of its clients after the contractor passes each code and contract-mandated phase of the six phases of inspection to ensure that the contractor delivers the specifications stated in the contract.
Post-construction	**Home maintenance training**	ONHIR provides clients with training on homeownership, which includes a video on homeownership prior to home construction, a home walk-through with a contractor after construction, and a manual on homeownership.
Post-construction	**Warranty agreement**	ONHIR signs a warranty agreement with both the client and the contractor and withholds a warranty deposit of $1,000 for all new construction on-reservation during the 2-year warranty period, or until all warranty claims are resolved, which is later, to help ensure that warranty defects will be corrected.

Source: GAO analysis of ONHIR's Management Manual. | GAO-18-266

ONHIR's management manual also includes policies for overseeing contractor performance. ONHIR officials provide clients with a list of home-building contractors, but clients may choose any licensed contractor in the jurisdiction where the home is built. ONHIR officials estimate that more than 95 percent of relocation homes have been built by contractors from its list. ONHIR officials said that contractors on the list

[45]Because relocation homes are not built by or for the use of the federal government, contracts and contractors are not subject to the Federal Acquisition Regulation, the principal set of policies and procedures used by executive agencies when acquiring goods and services. Rather, homes constructed under ONHIR's supervision are subject to the International Residential Code.

ONHIR provides to clients must demonstrate good standing and must be licensed by the state of Arizona, as stated in its policy. In addition, ONHIR's policy states that ONHIR may take action against contractors whose work results in an excessive number of warranty complaints.

Most Building Is Complete, but Weaknesses in Oversight Allowed Poor Performing Contractors to Build Homes

The majority of ONHIR's home-building work is now complete. As of December 2017, according to officials, ONHIR had relocated 3,687 families into new homes, and ONHIR officials said they expect construction on the remaining 20 homes to be completed by September 2018.[46]

Although most home-building activities are complete, we found that ONHIR has historically allowed contractors with a history of performance issues to build relocation homes.[47] For example, ONHIR provided us with a report generated from its contractor performance database that shows a contractor who had failed 42 percent of final inspections during a 11-year period—from January 2006 through September 2017—continued to receive home-building contracts.[48] Similarly, we identified homes with multiple warranty complaints in ONHIR's warranty database. Specifically, one home in the warranty file database had 17 warranty defect complaints attributed to the contractor. ONHIR officials said that they do not track complaints by contractor in a database nor do they have a defined number of complaints for removing contractors. ONHIR officials

[46]ONHIR's December 2017 relocation status report indicates that 10 of the remaining relocatees have home-building contracts, 5 are seeking contracts, and 5 have yet to start the process. Based on ONHIR's fiscal year 2017 budget submission, newly certified clients are restricted to relocating to the New Lands, Coalmine Canyon, or subdivisions in Tuba City, Kayenta, and St. Michaels for relocation homes. These numbers do not include any relocatees who win upon appeal in federal court and are ultimately granted relocation benefits in the future.

[47]ONHIR does not use federal contracting databases such as the Contractor Performance Assessment Reporting System and Past Performance Information Retrieval System to track contractor performance. Such databases are typically reserved for major federal contracts, whereas relocation home contracts are below the dollar threshold for the use of these databases.

[48]The final inspection is the last of ONHIR's six phases of inspection in which the construction specialist does a walk-through of the home's interior, exterior, attic, and crawl space and completes a detailed checklist to ensure the home meets building codes and is ready to be occupied.

said that they have not removed a contractor involuntarily from their list since the 1990s.[49]

ONHIR officials explained that these contractors continued building homes because it is difficult to find contractors who want to work on the reservation due to the isolated nature of homesites. Moreover, in recent years they said they did not track complaints by contractor because they would be aware of complaints about a contractor due to the smaller number of relocation homes that have been built. As a result, according to ONHIR officials, they have not needed to take actions to remove contractors from their list since the 1990s or to generate reports on contractor performance. In addition, ONHIR officials said some warranty complaints were trivial, such as peeling paint or visible carpet seams, and thus terminating contractors for such issues was unnecessary. ONHIR officials also noted that all homes eventually passed their final inspections and any failed inspection items were corrected and reinspected before contractors received payments.

Some Tribal Government Officials and Relocatees Said ONHIR Has Not Discharged Its Responsibilities because of Construction, Societal, and Infrastructure Concerns

Although ONHIR said it has nearly completed its relocation obligations, some relocatees, the Hopi tribe, and Navajo Nation government officials said that it has not completed its work.[50] Specifically, Navajo Nation officials and some relocatees said the office should remain open to address various concerns with relocation homes and the societal effects of relocation. Moreover, according to some relocatees and Navajo Nation government officials, these concerns include homes that were built with faulty materials and with unfinished infrastructure, such as electricity. As previously mentioned, ONHIR has no responsibility over relocation homes after the 2-year warranty period on each home expires. However, an official from the Navajo-Hopi Legal Services Program said that homeowners had concerns with their homes beyond the 2-year warranty

[49]Since 2000, ONHIR has placed two contactors on probation for not completing warranty repairs and barred them from signing additional home-building contracts until they had addressed all the repairs that were under the warranty. Both contractors were eventually put back on ONHIR's contractor list.

[50]Individual claims heard were not verified.

period.[51] While ONHIR has attributed such issues to a lack of homeowner maintenance, relocatees have attributed these issues to ONHIR's lack of oversight of the home-building process.[52] Concerns some relocatees and tribal government officials described include the following:

Construction. Navajo Nation officials from three separate chapters told us that relocation homes were not built properly. The President of the Navajo Nation said that homes frequently have construction issues related to cheap materials or poor workmanship, while another official said that ONHIR does not properly oversee contractors. Another official told us that the windows fall out of homes when it gets too windy. One official said that some families have left their relocation homes behind because of structural issues. Hopi tribe officials said relocatees from their tribe were provided the cheapest homes available and that the conditions of mobile homes are substandard. See figure 7 for examples of homes with cracked foundations and broken windows.

[51]ONHIR provides homeowners insurance during the 2-year warranty period and encourages families to purchase insurance after it expires. One Navajo Nation chapter official told us that homes are frequently built on unsuitable sites, which, together with the lack of fire protection in the area, make it difficult for owners to get insurance. A BIA official told us that he did not believe the majority of relocatees would be able to afford insurance for their homes given that the 2016 per capita income in Navajo Nation was around $6,000 to $7,000 and that relocatees are often unemployed.

[52]Navajo Nation officials said many relocatees do not have the financial resources to maintain their homes.

Figure 7: Examples of Homes on the Navajo Reservation with Cracked Foundations and Broken Windows

Source: GAO (photographs taken in August 2017). | GAO-18-266

Note: These homes were shown to us during our site visit. The top home was from a tour with the Navajo Nation officials. They indicated that the home was built by ONHIR. The bottom home was shown to us by ONHIR officials, thereby, we believe the home was built by ONHIR.

ONHIR officials said they inspect all complaints on relocation homes, even after the warranty period has expired. If the investigation reveals an

issue that is a result of a construction defect, ONHIR officials said they will fix the issue, whereas they will not fix issues they deem are the result of poor homeowner maintenance.

Soil settling. Navajo Nation officials from two chapters told us that ONHIR did not conduct soil tests on homesites and others said that some homes have experienced foundation issues.[53] For example, one relocatee said her relocation home has cracks in the walls and the floors. ONHIR helps clients to apply for homesite leases, and according to ONHIR officials, they assigned engineering technicians to conduct feasibility studies to assess the condition of the soil for all on-reservation homesites, as required by ONHIR policy. However, ONHIR officials also acknowledged that expansion and contraction of soil over time in Arizona is common and that shifting soil can lead to cracks in the foundation or walls of homes.[54] As reported by the Interior Inspector General in 2016, 5 relocatee homes on the Navajo reservation experienced cracks and other visible signs of damage due to soil settling and have consequently been replaced by ONHIR.[55] ONHIR officials acknowledged that they have demolished and replaced an additional 9 homes due to foundation issues related to soil expansion and other issues, such as leaks in utility lines and septic tanks. For the homes experiencing foundation issues outside of the 14 homes ONHIR has replaced, ONHIR attributed continued soil collapse to homeowners not maintaining the proper degree of slope around their home to allow for drainage. In addition, they said that homes may now be occupied by three generations of families. According to a 2016 Interior Inspector General report, ONHIR officials said this leads to

[53]ONHIR helps clients to apply for homesite leases for up to 1 acre of land in their new communities in order to secure space to build their home.

[54]According to ONHIR, the site on which the house is constructed, and the siting of the house on the lot, have a significant impact upon the achievement of the standards of ONHIR's quality assurance programs. ONHIR officials said they do not build homes on sites that fail feasibility studies. House construction may be adversely affected or rendered prohibitively expensive by such features as soils; topography; drainage patterns; flood plain location; bedrock; wind-blown sand; the presence of historic artifacts; access to water and power lines; and access to the site.

[55]U.S. Department of the Interior, Office of the Inspector General, *Office of Navajo and Hopi Indian Relocation's Eligibility and Relocation Practices* (Washington, D.C.: Feb. 17, 2016).

increased water use inside the homes which, in their opinion, exacerbates the soil-settling issue.[56]

Societal effects. Relocated families expressed that relocation has contributed to societal ills such as depression; alcoholism; drug abuse; and suicide due to substandard living conditions and homesites away from their family and previous sources of livelihood. The Navajo Nation stated that relocatees experienced hardships adjusting to a new way of life and felt a loss of connection with their culture moving away from their ancestral lands and traditional way of life. According to a report issued by the Navajo Nation Human Rights Commission, relocatees were promised by the federal government, the Hopi Tribe, and the Navajo Nation that relocation would offer a better life that did not materialize.[57] ONHIR officials noted that both the Navajo Nation and the Hopi Tribe have requested extended counseling beyond the warranty period; however, according to the March 2017 transition plan, ONHIR does not believe providing it is within their statutory authority.

Connections to utility infrastructure. According to Navajo Nation officials, some homes are not properly connected to utility infrastructure, such as electricity and water. For example, they stated that a number of relocation homes in the Navajo area do not have electricity. In its comments on a draft of this report, ONHIR stated that some relocatees chose to relocate to remote areas and signed a form to affirm that they wanted solar or cistern rather than grid utilities. A representative from the Hopi Tribe told us that in one home, contractors installed plumbing systems that were subsequently covered in concrete, which made repairs difficult.[58] Another chapter official said that a septic tank in one relocation home continually overflowed because the tank was smaller than the specifications. ONHIR officials said all homes are built to code at the time of construction and have proper connections to infrastructure in terms of

[56]According to a Navajo Nation official, homes may be occupied by multiple generations because there are not enough homesite leases for families to acquire.

[57]Navajo Nation Human Rights Commission, "The Impact of the Navajo-Hopi Land Settlement Act of 1974 P.L 93-531 et al.," *Public Hearing Report* (July 6, 2012).

[58]Representatives from the Hopi Tribe also told us that some relocatees lived in older homes that were not receiving power, while other homes were built without insulation. However, in 2016, Interior's Office of Inspector General investigated the homes of Hopi tribe relocatees and found that all the relocatees' homes were connected to a water line or were provided a cistern tank and had electricity, except for one whose solar equipment was in disrepair.

water and electricity. They said they verify that homes pass necessary inspections, including framing; mechanical; plumbing; and insulation, prior to disbursing payments to the contractors.

Community infrastructure. Some Navajo Nation chapter members and ONHIR officials disagree as to whether ONHIR had an obligation to provide additional community infrastructure under the Settlement Act. Some chapter members said that ONHIR should not close because it has not met its responsibilities to provide infrastructure projects, such as paved roads and running water. The Navajo Nation Human Rights Commission report states that relocatees were told they would be provided with running water and the ability to raise livestock, among other things.[59] Provisions in the Settlement Act directed ONHIR to create a report with a plan to ensure that infrastructure such as water, sewers, and roads would be available at their relocation sites.[60] ONHIR published a report to meet the provision in 1981.[61] This provision was repealed in November 1988. ONHIR officials acknowledged that relocatees have expressed the need for additional infrastructure, but said it is not within ONHIR's statutory responsibility to provide it.[62] The Settlement Act as

[59]Navajo Nation Human Rights Commission, "The Impact of the Navajo-Hopi Land Settlement Act of 1974 P.L 93-531 et al.," Public Hearing Report (July 6, 2012).

[60]Pub. L. No. 93-531, § 13, 88 Stat. 1712, 1717, codified at 25 U.S.C. § 640d-12 until removal by Navajo and Hopi Indian Relocation Amendments of 1988, Pub. L. No. 100-666, § 4(d), 102 Stat. 3929, 3931 (1988).

[61]The 1981 report acknowledges the provision and states "the Commission inventoried existing community facilities and services, both on and off-reservation. …Development concepts are prepared in general planning terms prior to final land selection and acquisition. After acquisition of a particular area is accomplished, the finite planning required for development activities will be prepared." The cover letter of the report to Congress also states "the Commission will continually refine and update this Report and Plan in compliance with the additional reporting requirements specified by the Congress."

[62]Specifically, in its transition plan, ONHIR acknowledges that relocatees have requested road construction in areas where relocation homes were constructed; connection of relocation homes with solar-powered electric service to utility power lines; connection of relocation homes with water cisterns to domestic water lines; and upgrades to water systems in the New Lands area. ONHIR officials said that historically, ONHIR has funded a variety of infrastructure projects using discretionary funds in the New Lands area such as citizen centers, police stations, and shopping centers.

amended does not require ONHIR to provide infrastructure for the New Lands.[63]

Warranty Commitments on Homes Already Built and Homes for Newly Eligible Applicants Are Activities That May Continue into the Future

Although ONHIR's home building for certified applicants is nearly complete, responsibilities remain for existing homes under warranty and any additional homes built for newly certified applicants. As previously discussed, relocation homes are under warranty for 2 years, starting at the time when the house passes final inspection. During this 2-year period, ONHIR is responsible for helping homeowners, who are located on-reservation, request warranty repairs. After September 2018, 52 relocation homes will remain under the 2-year warranty period, according to ONHIR officials. In addition, as previously discussed, ONHIR officials told us that at least 240 denied applicants could still file for appeals in the federal court and become eligible for relocation benefits, which would necessitate the construction of additional homes. A 2-year warranty period would then begin after these houses pass final inspection.

[63]Since ONHIR's inception, BIA and Indian Health Service have provided certain infrastructure support to the New Lands such as for road and sanitation facility construction, respectively, on the New Lands. Other federal agencies have programs that provide infrastructure in Indian country. For example, the Environmental Protection Agency makes grants to tribes for drinking water and wastewater systems.

Executive Branch or Congressional Action May Be Needed to Terminate ONHIR and Effectively Transfer Remaining Relocation Activities

ONHIR Has Not Yet Requested a Presidential Determination for Closure

As previously mentioned, ONHIR was not designed to be a permanent agency. The Settlement Act states that ONHIR will cease to exist when the President of the United States determines that its functions have been fully discharged.[64] Although ONHIR officials have said they are working toward completing their tasks so the office can close by the end of fiscal year 2018, they acknowledge that not all activities will be complete by that time. Federal internal control standards state that management should externally communicate the necessary quality information to achieve the entity's objectives. For example, information necessary to communicate to an agency's oversight body includes significant matters related to risks or changes. However, according to ONHIR officials, they have not specifically communicated with the President about the determination on whether the agency has fully discharged its functions and whether the office should close.

Instead of directly requesting that the President make a determination for ONHIR to cease operations, ONHIR has been making plans to close through other means and transition remaining activities. Specifically, ONHIR officials told us that they anticipate that closure of the office will need to occur through a legislative change or through the termination of program funds through the budget and appropriations process.[65] As stated in the March 2017 transition plan, the plan was developed in

[64]25 U.S.C. § 640d-11(f).

[65]The Consolidated Appropriations Act, 2018 included $15,431,000 for ONHIR to use until expended. Pub. L. No. 115-141 (2018). While the act does not address ONHIR's closure, the explanatory statement crafted along with the law states that the appropriations committees are committed to an orderly conclusion of ONHIR. Further, the explanatory statement states that the determination required by statute to terminate ONHIR requires ONHIR to develop a comprehensive plan. The committees expect ONHIR to provide a progress report on the development of the plan by June 21, 2018. Joint Explanatory Statement, Division G-Department of the Interior, Environment, and Related Agencies Appropriations Act, 2018.

response to direction from the Office of Management and Budget and the Senate and House Appropriations Committees that ONHIR should wind down its activities. Further, in its comments on a draft of this report, ONHIR stated that it has had regular communications with executive and legislative branch offices on completing its work and closing. However, neither the draft transition plan nor the October 2017 implementation plan indicates how ONHIR would request a determination from the President that ONHIR has fully discharged its responsibilities and can be terminated. Without such a presidential determination, ONHIR has not met the explicit requirements for being permitted to cease operation under the Settlement Act.

ONHIR Has Not Developed Complete Information on Its Remaining Activities

Although ONHIR officials anticipate that the agency will close by September 2018, they have not ensured that complete information related to its relocation activities can be made available to other successor agencies. This lack of planning and information could hamper the efforts of a successor agency or agencies to effectively take over these activities.

Eligibility and appeals. As previously mentioned, there is the possibility for 240 or more denied households to appeal their eligibility decision in the future, and the paper case files and client database contain important information regarding eligibility for the continuation of ONHIR's relocation activities. Specifically, paper case files contain comprehensive information on each applicant from the time he or she applied for relocation benefits, including documents submitted to prove head of household or residency status for eligibility determination. In addition, the client database tracks decisions and dates related to the eligibility determination process and is necessary to identify applicants' status.

In its March 2017 transition plan and October 2017 implementation plan, ONHIR has not developed detailed information on how it plans to identify and prepare information in the paper case files and client database for the 240 or more denied households that could file for federal appeals. ONHIR officials said that they have not prepared eligibility determination and appeals information for transfer because they expect eligibility determinations to be completed by the time the office plans to close. In the event that such transfers are needed, they said the transfer of these records will be through an agreement between ONHIR, the National

Archives and Records Administration, and BIA.[66] However, such an agreement has not yet been developed, and discussions on the transfer of records—such as during monthly transition meetings—are high-level and mostly unrelated to information needed for potential eligibility determination responsibilities.[67] In addition, officials said that information about appeals filed in the future in the federal court could be obtained from an online federal database.[68]

Federal internal control standards state that management should use quality information to achieve the entity's objectives.[69] Additionally, the standards state that management should identify, analyze, and respond to risks related to achieving the defined objectives. If ONHIR does not take the steps to ensure that complete information for the 240 or more denied households eligible to appeal their eligibility decision is available to a successor agency, a successor agency could face difficulty in administering eligibility determinations and remaining appeals in the future.

Warranties and contractor performance. As previously discussed, ONHIR's remaining home-building responsibilities include managing the 52 remaining 2-year warranty agreements and assisting in the construction of homes for any newly certified applicants. To fulfill these responsibilities, complete information on home warranties and contractor performance is critical. ONHIR's warranty database has data fields to track relevant information on concerns reported to ONHIR—including warranty expiration date, date warranty complaint received, type of complaint (possible warranty defect or homeowner maintenance issue). However, the database is incomplete. For example, our review found that

[66]The National Archives and Records Administration is authorized to establish, maintain, and operate records centers for federal agencies.

[67]According to Navajo Nation officials, they have organized monthly meetings to discuss the transition of ONHIR's activities in the event of its closure. These meetings include representatives from ONHIR, BIA's Navajo Regional Office, and Navajo Nation representatives such as the Navajo Hopi Land Commission Office, Navajo-Hopi Legal Services Program, and Nahata Dzill Commission Governance. According to BIA officials, they have largely discussed the continuation of land management activities. BIA officials also visited ONHIR's offices to assess the physical footprint of certain files.

[68]The Public Access to Court Electronic Records is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts.

[69]GAO-14-704G.

about 98 percent of warranty complaints in the warranty database have no record of the date of warranty repairs. Moreover, ONHIR does not list the names of contractors in its database. ONHIR officials said the information is not recorded because they rely on memory and paper files to supplement the information in the warranty database about contractors. ONHIR officials also said they do not regularly use the database to monitor contractors' performance because it became too cumbersome to track electronically. However, in its comments on a draft of this report, ONHIR stated that it has the capability in its electronic data system to search for warranty complaints.

In its October 2017 implementation plan, ONHIR suggested BIA's contract office as a potential successor agency for administering the remaining warranty provisions in the event that it closes before these home-building responsibilities are fully discharged. With regard to any newly certified applicants deemed eligible for benefits through the appeals process, the October 2017 implementation plan suggests that these applicants be given the cash equivalent of a relocation home instead of building new homes. However, the Settlement Act provides for no authority to issue cash payments and Congress has not otherwise authorized cash payments, and any future home-building activities may need to be assumed by a successor agency. Because OHNIR does not have complete information on existing warranties and contractor performance, another successor agency could be hampered in its ability to assume ONHIR's remaining home-building responsibilities. Federal internal control standards state that management should identify, analyze, and respond to risks related to achieving the defined objectives.[70] Additionally, the standards state that management should use quality information to achieve the entity's objectives. Without complete warranty and contractor information, a successor agency may have difficulty understanding what warranty issues have already been addressed or have difficulty overseeing contractors to help ensure that newly certified applicants secure decent, safe, and sanitary relocation homes.

[70]GAO-14-704G.

The Settlement Act Does Not Include Provisions for Transferring Remaining Relocation Activities to Successor Agencies

In its transition and implementation plans, ONHIR has identified a number of potential successor agencies that could be selected to take over ONHIR's remaining activities in different areas. However, officials at these agencies said they currently do not have the authority to undertake these activities under the Settlement Act.

Appeals and eligibility. Should ONHIR close before the 6-year statute of limitations has expired for all denied applicants, another agency or agencies would need statutory authority for coordinating eligibility determinations and home-building for any newly certified applicants.[71] As previously discussed, at least 240 households that had been denied relocation benefits as of September 2017 may choose to contest their denial in federal court, according to ONHIR officials. ONHIR's March 2017 transition plan states that the Department of Justice will continue to represent the government on behalf of ONHIR in any federal court hearings, and ONHIR has also identified Interior's Office of Hearing and Appeals to hear any matter remanded to the agency by the federal court for a further hearing.[72]

Home-building. Another entity would need authority to assume remaining home-building activities. Alternatively, ONHIR's October 2017 implementation plan suggests that newly certified applicants be given the cash equivalent of a relocation home.[73] However, as previously

[71]The 6-year statute of limitations begins after ONHIR's decision to uphold the denial of an applicant in the administrative appeals process.

[72]Department of Justice officials said that the Executive Office of the United States Attorneys cannot make a determination on this issue without clarity regarding ONHIR's future and the appeals process governing such future. BIA officials said that they are reviewing whether the agency has the necessary authority for these activities, particularly whether the Interior Board of Indian Appeals' existing jurisdiction could potentially cover these appeals. Except where limited by statute or regulation, the Interior Board of Indian Appeals exercises jurisdiction over administrative appeals of decisions made by BIA officials.

[73]As previously mentioned, ONHIR's March 2017 transition plan identified BIA's Housing Improvement Program to conduct these activities. According to BIA officials, its Housing Improvement Program is not equipped, nor does BIA have the authority, to conduct relocation activities. It is a low-income assistance housing program with a separate regulatory scheme.

mentioned, cash payments are not currently authorized under the Settlement Act and legislation would be needed to provide such payments. Moreover, Navajo Nation officials said they do not approve of using cash payments in place of providing relocatees with a home.[74] In November 2017, ONHIR officials said that, as an alternative to cash payments, they discussed with the Navajo Nation the potential for the Navajo Housing Authority—a recipient of the HUD Indian Housing Block Grant Program—to administer remaining home-building activities. They did not make a decision, however, because the Navajo Nation wanted to inquire about the capacity of the Navajo Housing Authority to assume these activities.[75] Although ONHIR has not identified HUD as an agency with a potential role, such as assuming or providing oversight of Navajo Housing Authority administration of remaining home-building activities, HUD officials told us that HUD would not be able to assume ONHIR housing functions. This is due to the nature of its block grant program, restricted oversight mechanisms, and limited capacity in terms of staff resources and technical skills to supervise construction.[76] In addition, HUD officials said that their current oversight is limited to reviewing a sample of Indian Housing Block Grant program grantees' policies, procedures, and implementation of procurement and environmental regulations, which may not be consistent with the oversight or authority needed should the Navajo Housing Authority administer the remaining ONHIR home-building activities.[77]

Warranties. Should ONHIR close before 2-year home warranties expire on the remaining homes constructed under ONHIR's oversight, another agency would need statutory authority to oversee these home warranties. As previously mentioned, ONHIR is currently a signatory to the warranty along with the contractor and the client, and more than 52 homes will have warranties in effect after ONHIR's proposed closure date of

[74]Navajo Nation officials said a cash payment for the construction costs of a home would be insufficient since construction also requires contracting; construction oversight; site preparation; on- and off-site infrastructure improvements; and other related costs.

[75]Navajo Housing Authority officials said that they provide public rental and homeownership programs throughout the Navajo reservation. Applicants must meet specific eligibility and income criteria for these programs.

[76]According to HUD officials, construction oversight in HUD's current program is the responsibility of grantees.

[77]HUD officials said that due to capacity constraints, they do not review every activity of grantees and instead monitor a sample of activities.

September 2018, according to ONHIR officials. In its draft transition plan, ONHIR suggests transferring warranty-related activities to the BIA Contract Office. However, according to BIA officials, BIA does not currently have the authority to conduct these activities, and BIA is not equipped to implement warranties.

Post-move counseling. Another agency would need statutory authority to provide post-move counseling to the 52 clients who will remain under warranty after ONHIR's proposed closure date of September 2018. Currently, ONHIR provides relocatees with post-move counseling during the 2-year warranty period. According to ONHIR's management manual, the purpose of post-move counseling is to assist families in adjusting to their new house, connect families to local service agencies, and gain understanding about the client's familial and employment situation. ONHIR's March 2017 transition plan suggested that the post-move counseling program could be transitioned to BIA. However, BIA officials said BIA currently does not have the authority to conduct these activities.[78] In November 2017, ONHIR officials said the program would discontinue for any newly certified applicants if cash settlements for relocation benefits were authorized, but they did not address what would happen to the 52 clients that will remain within the 2-year warranty period after September 2018.

The Settlement Act does not include provisions on the transfer of activities after ONHIR's closure, and as described above several activities will remain past ONHIR's planned closure date. Without legal direction to authorize the transfer of ONHIR's remaining activities to other federal entities, the future of these activities remains uncertain and may adversely affect those in the process of relocating.

[78]ONHIR has not identified HUD as an agency with a potential role in post-move counseling; however, HUD officials mentioned HUD's Housing Counseling Program in regard to HUD's potential role in assuming ONHIR activities. The program's mission is to provide counseling to consumers on seeking; financing; maintaining; renting; or owning a home. HUD employees do not provide counseling themselves; the office awards competitive grants to Housing Counseling Agencies.

ONHIR Has Not Always Managed Navajo Trust Land in Accordance with Its Policies

ONHIR Has Entered Into Lease and Other Agreements for Navajo Trust Land but Has Not Properly Managed Them

ONHIR is statutorily required to administer the land taken into trust for the Navajo Nation pursuant to the Settlement Act as amended until relocation is complete. The act also authorizes ONHIR to issue leases for housing and other related facilities on the New Lands. ONHIR's management manual, which governs its operations, states that it will grant appropriate requests for leases of the New Lands—both developed and undeveloped land—for homesites, businesses, and community services facilities, among other things. According to the manual, entities that want to lease property in the New Lands are to submit an application form and supporting documents to ONHIR. Since the 1980s, ONHIR has received applications from and granted leases to various businesses, the New Lands chapter, and other tribal entities.[79] The leases give the lessee permission to occupy and use the land, including, in the case of developed land, any structures on it, for terms varying from 2 to 99 years. In addition, ONHIR has entered into or administered surface use agreements for the New Lands.[80]

Unlike ONHIR's eligibility determinations and home-building activities, which were intended to have a finite end, the Navajo trust land will need to be managed in perpetuity so long as it is held in trust by the federal government. ONHIR's draft transition and implementation plans identify BIA and the Navajo Nation as entities that could assume responsibility for

[79]ONHIR's leasing of Navajo trust land differs from BIA's leasing practices, which are applicable to the vast majority of Indian trust land. BIA has issued regulations governing the leasing of trust land it administers. According to BIA, its leasing regulations substantially promote tribal sovereignty and self-government by requiring significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest. In addition, these regulations and the statute authorizing them impose general fiduciary duties on the government.

[80]When the owner of a subsurface (mineral) estate does not own the surface (land) estate, a surface use agreement allows the owner to use the surface estate to access his or her mineral estate. In this instance, the surface estate is held in trust by the federal government for the Navajo Nation but the mineral estate is owned by private entities.

managing the trust land once ONHIR terminates. However, ONHIR does not have the authority to transition management of the trust land it administers to another entity. Moreover, we identified a number of concerns with how ONHIR has maintained information or established controls for proper administration of leases and agreements for the New Lands, which could further hinder an eventual transition of these responsibilities to another entity.

ONHIR Does Not Have a Complete Inventory of Leased or Occupied Land

ONHIR does not have a comprehensive inventory of leased and vacant properties on or surface use and other agreements for Navajo trust land it administers. ONHIR officials identified 23 properties on trust land they administer through documentation and in interviews. Of these 23 properties, ONHIR possessed the current lease for 15 properties. ONHIR officials also identified 5 surface use agreements for Navajo trust land they administer, 3 of which are listed as active on their transition website. ONHIR officials said they have not maintained a comprehensive inventory because they had a long tenure with the agency and are cognizant of what properties and agreements exist.

Federal internal control standards state that management should design control activities to achieve objectives and respond to risk.[81] For example, as part of control activities, management clearly documents all transactions and other significant events in a manner that allows the documentation to be readily available for examination. Without developing a comprehensive inventory of leased and vacant properties on Navajo trust land that ONHIR administers, the entity which assumes responsibility for leasing the land will not have the information it needs to carry out that responsibility.

As of December 2017, ONHIR Does Not Have Written Leases for Some Occupied Lands

ONHIR has occupied or has allowed others to occupy Navajo trust land it administers without a written lease or agreement, which is inconsistent

[81] GAO-14-704G.

with ONHIR's management manual.[82] Specifically, of the 23 existing properties on trust land ONHIR officials identified, 7 were in use as of December 2017 but did not have a written lease, as required, for various reasons:[83]

- ONHIR issued a permit for the use of one property in 2000 that was valid through 2005 and then, according to ONHIR officials, had an oral agreement to indefinitely extend the permit. The officials also said they had an oral agreement to lease another property.
- ONHIR itself occupies and uses 4 properties without leases, including a headquarters and New Lands office and two structures on the Padres Mesa Demonstration Ranch, discussed below.[84]
- A lease for 1 property expired in 2011 but it has not been renewed and does not include an option to extend the lease beyond its initial termination date. The Navajo Nation is currently working to renew the lease because it has assumed responsibility from BIA for leasing its trust land.[85] In its comments on a draft of this report, ONHIR stated that in the meantime the federal agency using the property has continued to pay rent to ONHIR while a new lease is negotiated.

ONHIR officials said some of these properties do not have written leases because the agency deferred to the tribe's wishes. However, not having written leases for these properties on trust land is inconsistent with

[82]By comparison, under BIA's regulations governing leasing of trust land it administers, persons or legal entities who are not owners of Indian land must obtain a lease from the landowners before taking possession of the land unless they have a land use agreement or permit.

[83]In addition, there is no lease for the buildings located on the Tse Bonito parcel in New Mexico but there is a written use agreement. In lieu of a lease, the Navajo Hopi Land Commission Office entered into an intragovernmental use agreement with the Navajo Division of Transportation for these buildings. According to Navajo Nation officials, its business leasing regulations do not require it to lease trust property to Navajo Nation entities but the tribe enters into agreements to memorialize the use of Navajo trust land.

[84]By comparison, BIA does not enter into leases with the tribe when it locates BIA office buildings or other facilities on Navajo trust land, but it obtains the right of possession from the tribe, which generally withdraws the land for administrative or government purposes.

[85]Pursuant to the Navajo Nation Trust Leasing Act of 2000, the Secretary of the Interior approved the Navajo Nation's leasing regulations in 2014. Pub. L. No. 106-568, tit. XII, §§ 1201-1203, 114 Stat. 2868, 2933-2936 (Dec. 27, 2000) (*codified at* 25 U.S.C. § 415(e)). The tribe assumed responsibility for approval of homesite leases on March 31, 2017, telecommunication leases on May 24, 2017, and all other leases, including business leases, on July 12, 2017.

ONHIR's management manual, which calls for written leases and land use approvals for the New Lands. Without written leases for these properties, the entity which assumes responsibility for leasing the Navajo land that ONHIR has been administering will not know the status of these properties because they are being used without written leases.

For Most of the Leases, ONHIR Is the Lessor Rather than the Tribe and No Successor Has Been Identified

There are at least two parties to every lease of land, the lessor and the lessee. The lessor is generally the landowner, and the lessee is the party to whom the lease grants permission to use or occupy the land. However, the New Lands are held in trust by the federal government for the Navajo Nation, and federal law provides that trust lands may be leased by the Indian owners with the approval of the Secretary of the Interior. ONHIR is the lessor for 20 of the 22 leases that we reviewed.[86] ONHIR officials said the leases were done this way because its management manual called for ONHIR to serve as the lessor.[87] However, ONHIR changed its management manual in 2011 to say the Navajo Nation should serve as the lessor for business; commercial; industrial; and mineral leases unless the tribe requests ONHIR to be the lessor. ONHIR did not revise the leases in effect in 2011 to reflect this change.[88] After the 2011 changes to the management manual, ONHIR became the lessor for the one business lease entered into for the New Lands. ONHIR did not provide documentation that the tribe requested ONHIR to serve as lessor for this lease. Navajo Nation officials said ONHIR informs the tribe about leases out of courtesy and does not seek the tribe's permission to lease Navajo trust land. Moreover, the Navajo Nation Department of Justice has taken the position that ONHIR does not have the authority to lease Navajo trust land.

[86]ONHIR identified 23 properties in use; 15 of those properties had written leases. We reviewed a total of 22 written leases; the 15 current leases and 7 expired leases ONHIR provided to us in response to our request for all leases of Navajo trust land that the agency administers. Of these 22 leases, ONHIR is the lessor for 20 and the Navajo Nation is the lessor for 2. The 22 leases cover different time periods and were entered into from 1984 through 2016.

[87]In contrast, under BIA's regulations, the tribe is the lessor of trust land.

[88]According to the revised management manual, when the Navajo Nation is the lessor, ONHIR serves as a concurring party to the lease.

In addition to these leases, ONHIR identified 5 surface use agreements for Navajo trust land it administers. In 3 of 5 of these agreements, ONHIR, not the tribe, is the party granting the right to access and use the Navajo trust land. However, ONHIR is not the landowner and this is also inconsistent with BIA's leasing practices.[89]

In addition, of the current leases of New Lands with ONHIR as the lessor, 2 leases specify what is to happen should ONHIR close.[90] None of the surface use agreements specify what is to happen should ONHIR close. ONHIR officials said that they have not updated or amended the other leases and agreements because there is no need to do so yet. ONHIR's transition and implementation plans also do not identify which leases and agreements need to be amended or assigned upon ONHIR's closure. In its March 2017 transition plan, ONHIR identified BIA as the successor agency for managing leases on the Navajo trust land ONHIR is currently administering. However, this is inconsistent with the Navajo Nation's assumption of responsibility for leasing its trust land from BIA.

Federal internal control standards state that management should design control activities to achieve objectives and respond to risk, for example, to ensure that transactions such as leases are properly executed.[91] In addition, federal internal control standards state that management should design control activities to identify, analyze, and respond to change, including changes to the entity's activities. Without ONHIR identifying which leases and other agreements need to be amended or assigned because they identify ONHIR as the lessor, any entity that assumes responsibility for leasing these trust lands in the event that OHNIR closes will not be able to effectively manage these properties.

ONHIR Has Collected and Retained Revenues from These Lands

Half of the 22 leases we reviewed required the lessee to pay a non-nominal amount (i.e., more than $1 a year) of annual rent to ONHIR. In addition, annual payments for 3 of 5 surface use agreements are made to ONHIR, according to ONHIR officials. According to agency documents,

[89]Under BIA's regulations, the tribe is the lessor of trust land and BIA reviews and approves leases.

[90]One lease provides that when ONHIR ceases to exist the Navajo Nation will become the lessor and the other lease terminates when ONHIR sunsets.

[91]GAO-14-704G.

since the 1990s, ONHIR has collected and retained over $1 million in revenue from these leases of and surface use agreements for Navajo trust land it administers. ONHIR deposits the lease revenue into ONHIR's Treasury account.[92] ONHIR officials said they have used the revenue to aid relocation efforts by renovating facilities located on Navajo trust land ONHIR administers, providing grants to Navajo chapters, and funding other activities to benefit the relocatees. However, the Settlement Act as amended does not state that ONHIR may collect, retain, and use revenue from leases of Navajo trust land, and ONHIR officials have not identified another statute authorizing the agency to do so. ONHIR officials said the agency retained this revenue to ensure that all net revenues from these trust lands are used exclusively for the benefit of relocatees because the Settlement Act as amended requires the trust lands be administered for the benefit of relocatees. However, this statutory provision does not authorize ONHIR to receive lease revenues.

ONHIR Is Operating the Padres Mesa Demonstration Ranch without a Land Use Agreement and Grazing Permit

ONHIR is operating the Padres Mesa Demonstration ranch on Navajo trust land, but has not leased the land, which is inconsistent with ONHIR's management manual. As mentioned previously, ONHIR's management manual calls for written leases for and land use approvals of the New Lands. According to ONHIR officials, there is no requirement for them to have a lease or obtain permission from the tribe to occupy the structures on the ranch, including a range office, or operate a ranch on Navajo trust land.[93]

[92]In contrast, under BIA's regulations, revenue from leases is to be either paid directly to the tribe whose trust land is being leased or to BIA, which deposits the revenue in the tribe's trust account that generally earns interest. Moreover, BIA officials said a lease of trust land that provided for BIA to retain lease revenue would be counter to its trust responsibility. ONHIR officials said the tribe could have chosen to receive the revenue from these leases. In written comments, some tribal officials said rental payments from these leases must be paid into the Rehabilitation Trust Fund.

[93]In contrast, under BIA's regulations governing leasing of trust land it administers, persons or legal entities that are not owners of Indian land must obtain a lease from the landowners before taking possession of the land unless they have a land use agreement or permit. BIA does not lease trust land from tribes for BIA buildings or facilities but obtains permission from the tribe to possess the land and the tribe generally withdraws it for government purpose.

In addition, ONHIR's grazing of the ranch's cattle on the New Lands without a grazing permit is inconsistent with ONHIR's regulations.[94] ONHIR's grazing regulations require a grazing permit for all livestock grazed on the New Lands, but ONHIR does not have a grazing permit for the cattle on the ranch because ONHIR officials decided it was not necessary to issue a permit to itself. Moreover, ONHIR is not eligible for a grazing permit under its regulations because it is a federal entity and only enrolled Navajo tribal members are eligible for permits. We are examining ONHIR's use of appropriations to establish and operate a cattle ranch in a separate legal opinion.

ONHIR has identified two different entities to assume operation of the ranch in the event of its closure. ONHIR's March 2017 transition plan identified BIA as the entity to oversee the continued operation of the Padres Mesa Demonstration Ranch. However, BIA officials said the agency does not have the statutory authority to operate a for-profit ranch. Moreover, these officials said they are not interested in doing so because it is a role for the tribe and would be a conflict of interest for the agency since BIA regulates grazing on trust land. In addition, ONHIR's October 2017 implementation plan indicates that the Navajo Nation would assume responsibility for the ranch after ONHIR's closure and after negotiating an agreement with the chapter. Because the ranch is located on Navajo Nation trust land, the tribe could choose to continue its operation after ONHIR closes. Navajo officials said they are interested in operating the ranch but they have not determined how the for-profit ranch would be managed if the tribe also regulated grazing on the New Lands, which it is also interested in doing.

Congressional Action May also Be Needed to Address Other Provisions in the Settlement Act as Amended

Congressional action may also be needed to address other provisions in the Settlement Act as amended regarding (1) the use of the acquired trust lands, (2) trust acquisition, and (3) the Navajo Rehabilitation Trust Fund.

[94]ONHIR's grazing program developed regulations for the New Lands based on a range study that determined the land's grazing capacity. Under the regulations, each permittee may graze 80 sheep or 20 cattle on a grazing unit. There are 14 grazing units and currently about 80 permittees.

Use of Acquired Trust Lands to Benefit Relocatees and Regulation of Grazing

Trust land is generally held in trust for the benefit of an Indian tribe or individual Indian. However, the Settlement Act as amended requires the land taken into trust pursuant to the Settlement Act, including the New Lands, to be used solely for the benefit of relocatees. The New Lands chapter government wants this restriction to continue if and when ONHIR terminates. However, without congressional action to continue this restriction, it is likely the trust lands acquired in Arizona pursuant to the Settlement Act as amended would be administered for the benefit of the tribe as a whole rather than to solely benefit the relocatees.

In addition, as part of its administration of the New Lands, ONHIR's regulations governing grazing of livestock on the New Lands are different from how grazing is regulated by BIA for other Indian trust land.[95] The purpose of ONHIR's regulations was to aid in the resettlement of Navajo Indians residing on Hopi Partitioned Lands to the New Lands and to preserve the New Lands' forage, land, and water resources. Under these regulations, grazing permit holders must be permanent residents of the New Lands. In contrast, under BIA's regulations that apply to the portions of the Navajo reservation not under ONHIR's administration, any Navajo tribal member is eligible for a grazing permit. Navajo Nation and chapter officials told us they would like ONHIR's grazing regulations to continue if ONHIR were to close.

ONHIR's implementation plan identifies BIA as the entity to regulate grazing on the New Lands after ONHIR closes. ONHIR's implementation plan also says BIA officials have agreed to regulate grazing on the New Lands in accordance with ONHIR's regulations. However, BIA officials said Interior currently does not have the authority to regulate grazing on the New Lands, so they cannot make any decisions on how to do so.[96] In

[95]BIA has multiple grazing regulations, including regulations governing grazing on the Navajo Partitioned Lands (25 C.F.R. pt. 161), grazing on Navajo trust lands within the boundaries of the Navajo Reservation (25 C.F.R. pt. 167), and grazing on Indian land in general (25 C.F.R. pt. 166).

[96]If they received such authority, BIA officials said they would comprehensively assess grazing on the New Lands to determine if regulatory changes are necessary. In addition, Interior officials said they are reviewing whether BIA's current grazing regulations for the Navajo reservation (25 C.F.R. pt. 167) would apply to the New Lands in the absence of ONHIR's grazing regulations.

addition, Navajo Nation officials said they want to assume responsibility for regulating grazing on the New Lands and prefer to have ONHIR's grazing regulations, which are stricter than BIA's, remain in place at least at the Padres Mesa Demonstration Ranch. Should ONHIR close, Congress will need to consider addressing how grazing on the New Lands will be regulated after ONHIR's closure.

Mandatory Trust Acquisition Provision for the Navajo Nation

The Settlement Act as amended provides for two categories of land to be taken into trust for the Navajo Nation: (1) up to 250,000 acres of BLM land in Arizona and New Mexico that is transferred to the tribe (category 1) and (2) up to 150,000 acres of land held in fee by the Navajo Nation (category 2). No more than 35,000 of the 400,000 acres selected could be in New Mexico. The tribe was authorized to select the lands in both categories for 3 years after the 1980 amendments' enactment, and then ONHIR was authorized to select the lands after consultation with the Navajo Nation. Once the lands are selected, the Settlement Act as amended provides for the mandatory acquisition of these selected lands as land held in trust by the federal government for the Navajo Nation. Mandatory trust acquisitions are not subject to BIA's regulatory requirements for discretionary trust acquisitions under the Indian Reorganization Act.

As of December 2017, about 12,000 of the 400,000 acres had yet to be selected, and about 24,000 acres that had been selected had yet to be taken into trust (see table 3).

Table 3: Status of Land Acquisitions under the Navajo and Hopi Settlement Act as amended, as of December 2017

n/a	Category 1 acreage	Category 2 acreage	Total acreage
Acreage authorized in the Settlement Act as amended	250,000.00	150,000.00	**400,000.00**
Land selections: Acreage selected	249,871.24	137,550.59	**387,421.83**
Land selections: Acreage not yet selected	128.76[a]	12,449.41	**12,578.17**
Land into trust: Acreage taken into trust	238,365.59	137,550.59	**375,916.18**
Land into trust: Potential additional acreage yet to be taken into trust	11,634.41	12,449.41	**24,083.82**

Source: GAO analysis of land records from the Office of Navajo and Hopi Indian Relocation and the Bureau of Land Management. | GAO-18-266

Note: The Settlement Act as amended provides for two categories of land to be taken into trust for the Navajo Nation: (1) up to 250,000 acres of Bureau of Land Management land in Arizona and New Mexico that is transferred to the tribe (category 1) and (2) up to 150,000 acres of land held in fee by the Navajo Nation (category 2).

[a]Navajo Nation officials said a BLM survey error resulted in the tribe acquiring about 700 acres that it was not interested in and is seeking to have the error corrected and the land deselected and taken out of trust so that the tribe can reselect additional land.

The over 11,000 acres of category 1 land selected but not yet taken into trust are located in New Mexico. These lands have not been taken into trust because of unprocessed coal preference right lease applications.[97] Congress will need to determine whether the Navajo Nation should be able to select the entire 400,000 acres and have that land taken into trust as a mandatory trust acquisition, as provided for in the Settlement Act as amended. Without congressional action, any additional land the tribe acquired and wanted taken into trust would be a discretionary trust acquisition subject to BIA's regulations.

Furthermore, the Navajo Nation has raised two additional issues regarding the trust acquisition provision that Congress may also need to address.

- **Deselection and reselection.** The Navajo Nation would like to make changes to some of the land it has selected and make new selections, but the Settlement Act as amended does not authorize deselection of land the tribe previously selected to be taken into trust pursuant to the act's mandatory trust acquisition provision.[98] Deselection had not occurred as of January 2018, but bills have been introduced in Congress that would cancel some of the tribe's land selections and authorize the tribe to replace those with new selections.[99] Without statutory authorization, the Navajo Nation cannot deselect these lands and make new selections to reach the 400,000 acres provided for in the Settlement Act as amended.

[97]Prior to 1976, the Mineral Leasing Act of 1920 authorized the Secretary of the Interior to issue coal prospecting permits on public lands that gave the permittee the ability to file a preference right lease application if the exploration uncovered coal. The Federal Coal Leasing Amendments Act of 1975 repealed this authority but allows permittees who had a prospecting permit issued prior to August 4, 1976, to submit preference right lease applications. BLM has processed all of the preference right lease applications except for 11 applications by a company for land in northern New Mexico.

[98]In 1996, the tribe requested that ONHIR deselect over 12,000 acres of land previously selected but not taken into trust and select over 13,000 of other land to be taken into trust. In 2001, the Interior Board of Land Appeals ruled that neither the tribe nor ONHIR had authority under the Settlement Act as amended to deselect the land the tribe originally selected and then reselect additional lands. San Juan Coal Co., 155 IBLA 389 (2001).

[99]H.R. 2402, 115th Cong. (2017); S. 436, 115th Cong. (2017).

- **Trust status versus restricted fee status.** The Navajo Nation has indicated that it is interested in having a statutory option for the selected land to be held in restricted fee status rather than held in trust.[100] In 2016, a law was enacted that mandated a trust acquisition for certain parcels of land unassociated with the Settlement Act unless the Navajo Nation elected to have the land conveyed to it in restricted fee status.[101] The President of the Navajo Nation has testified before Congress that the tribe is interested in having this option in future legislation involving the Settlement Act.[102] Without statutory authorization, the land not yet selected pursuant to the Settlement Act as amended could not be held in restricted fee status if the tribe so chooses. However, without congressional action this cannot be changed.

The Navajo Rehabilitation Trust Fund

Established in the U.S. Treasury by the 1988 amendments to the Settlement Act, the Navajo Rehabilitation Trust Fund is essentially a loan from the federal government to the Navajo Nation to be paid back from revenues derived from leases of the lands and minerals taken into trust in New Mexico pursuant to the Settlement Act as amended.[103] From fiscal years 1990 through 1995, Congress appropriated approximately $16 million to the Trust Fund.[104] The Settlement Act as amended requires all net income derived by the Navajo Nation from the surface and mineral estates of lands in New Mexico taken into trust pursuant to the act to be deposited into the Trust Fund. Moreover, the net income is required to be

[100]Restricted fee status means that title to the land is held by an Indian tribe or individual Indian and that the land can only be alienated or encumbered by the owner with the approval of the Secretary of the Interior.

[101]Pub. L. No. 114-328, § 2829F, 130 Stat. 2000, 2734-2738 (Dec. 23, 2016).

[102]*Hearing Before the Subcommittee on Indian, Insular and Alaska Native Affairs of the House Natural Resources Committee on Three Tribal Bills*, 115th Cong. (Oct. 4, 2017) (statement of Russell Begaye, President, Navajo Nation).

[103]The Settlement Act as amended specifies that the Trust Fund, including any interest or investment accruing thereon, is available to the Navajo Tribe solely for purposes which will contribute to the continuing rehabilitation and improvement of the economic, educational, and social condition of certain Navajo families and communities, including those affected by the act. The tribe has used the Trust Fund primarily for land purchases and the construction of homes and infrastructure.

[104]The Trust Fund consists of appropriations made for the Fund, deposits of income from certain trust assets, and any interest or investment income accrued on those funds.

used to reimburse the general fund of the Treasury for the amounts originally appropriated to the Trust Fund. According to leasing and other documents from the Navajo Nation and BLM, several of these parcels have been generating modest income since at least the 1990s. Specifically, BLM identified several parcels of the New Mexico trust land with grazing allotments or oil and gas leases. In addition to these sources of revenue, the tribe entered into an agreement for use of a parcel of the New Mexico trust land that requires, beginning in 2015, annual rent payments of $25,000 to be paid to the Trust Fund.

The Navajo Nation has not reimbursed the general fund of the Treasury for the approximately $16 million appropriated to the fund, contrary to the statutory requirement to do so. While the Navajo Nation acknowledges its legal obligation to repay the Treasury, the tribe is seeking loan forgiveness because the Trust Fund's purpose was to aid the relocatees and the tribe views such aid as an unfulfilled federal obligation, according to tribal officials. Further, these officials said repaying the Treasury would eliminate any benefit the relocatees received from the land because the revenue generated from the New Mexico trust lands and minerals has not been sufficient to justify partial payment.

Because much of the land the Navajo Nation selected in New Mexico has not been taken into trust and the land that has been taken into trust is generating modest income, Congress will need to consider whether to continue the statutory repayment requirement or repeal it. If Congress decides to repeal the repayment requirement, it will need to consider specifying whether revenues from the trust lands acquired in New Mexico pursuant to the Settlement Act as amended are to be used by the tribe exclusively for the benefit of relocatees.

Conclusions

The relocation of Navajo and Hopi families has taken more time than originally anticipated when the Settlement Act was enacted in 1974, extending ONHIR operations more than 30 years beyond the original estimates. ONHIR has proposed to close by the end of fiscal year 2018 and initiated steps to identify agencies to handle the remaining activities. However, the Settlement Act does not give other agencies the authority to undertake various ONHIR responsibilities. Therefore, if ONHIR closes without congressional actions, any potential successor agency will not have the appropriate authority to administer any remaining activities. As a result, newly certified applicants and clients who remain under the 2-year

warranty period will not have an entity to assist with securing decent, safe, and sanitary relocation homes, as intended in the Settlement Act. Further, several other provisions in the Settlement Act as amended may need congressional action. These include (1) the requirement for the trust lands acquired in Arizona pursuant to the Settlement Act as amended to be used solely for the benefit of relocatees and whether grazing on the New Lands should be regulated consistent with ONHIR's current regulations; (2) the mandatory trust acquisition provision for the Navajo Nation; and (3) the requirement for the Navajo Nation to repay the U.S. Treasury for appropriations made to the Navajo Rehabilitation Trust Fund.

In addition, although ONHIR believes it has completed most of its responsibilities under the act and believes it can close by September 2018, it does not have the authority to make this decision. Rather, the Settlement Act states that ONHIR will cease to exist when the President of the United States determines that its functions have been fully discharged. However, ONHIR has yet to request that the President make this determination. Moreover, OHNIR has not prepared complete information about its various activities, such as eligibility determinations, appeals, and home building, which increases the risk that successor agencies will not be able to effectively assume ONHIR's activities.

Finally, ONHIR has not appropriately managed leases and other agreements for Navajo trust land it administers or identified changes that would need to be made in leases in the event that it closes. Because the land ONHIR administers is held in trust by the federal government, another entity will need to assume these responsibilities if ONHIR closes. However, OHNIR does not maintain a complete inventory of leased or occupied land and does not have written agreements for some occupied land. Further, ONHIR has not identified which leases will need to be amended to identify the appropriate lessor and the entity to receive the lease revenue. Without these actions, the entity that assumes responsibility for leasing the New Lands will not have the information it needs to effectively manage the properties.

Matters for Congressional Consideration

We are making the following four matters for congressional consideration for when ONHIR closes:

Congress should consider providing necessary authority for other agencies to continue remaining activities when ONHIR closes. (Matter for Consideration 1)

Congress should consider determining (1) whether the requirement for the land acquired pursuant to the Settlement Act as amended to be used solely for the benefit of relocatees should continue and (2) how grazing on the New Lands should be regulated. (Matter for Consideration 2)

Congress should consider addressing the mandatory trust acquisition provision for the Navajo Nation in the Settlement Act as amended. (Matter for Consideration 3)

Congress should consider whether the requirement for the Navajo Nation to repay the U.S. Treasury for appropriations made to the Navajo Rehabilitation Trust Fund should continue. (Matter for Consideration 4)

Recommendations for Executive Action

We are making the following five recommendations to ONHIR.

The Executive Director of ONHIR should request a presidential determination as to whether ONHIR has fully discharged its responsibilities and whether it should close. (Recommendation 1)

The Executive Director of ONHIR should prepare complete information on the remaining denied households who could still file for federal appeals. Such information could include paper case files and information in ONHIR's client database for those households. (Recommendation 2)

The Executive Director of ONHIR should prepare complete information on warranties and contractors. Such preparation should include linking warranty complaints to the relevant contractor, completing missing warranty information, and completing information on contractors' past performance. (Recommendation 3)

The Executive Director of ONHIR should establish a comprehensive inventory of (1) properties located on trust land it administers, (2) leases of those properties, and (3) surface use and other use agreements for trust land it administers. (Recommendation 4)

The Executive Director of ONHIR should identify which leases and other agreements need to be amended or assigned because (1) ONHIR is the lessor, (2) the lease or agreement provides for annual payments to be made to ONHIR, and/or (3) the lease or agreement terminates upon ONHIR's closure. (Recommendation 5)

Agency Comments and Our Evaluation

We provided a draft of this report to the Office of Navajo and Hopi Indian Relocation (ONHIR); Department of the Interior; Department of Justice; Department of Housing and Urban Development (HUD); Department of Health and Human Services; Department of the Treasury; the Navajo Nation; and the Hopi Tribe for review and comment. The Department of Justice, Department of the Treasury, and the Hopi Tribe did not provide comments. The Department of the Interior and the Department of Health and Human Services provided technical comments that we incorporated as appropriate.

We received comments via e-mail from HUD's Acting Director of Grants Evaluation in the Office of Native American Programs. In this e-mail, the Acting Director stated that HUD believes the report should clearly state that HUD would not be an appropriate agency to continue ONHIR's housing functions, because it does not provide direct services to tribes, review or approve actions or transactions, or have the technical capacity to assume ONHIR housing functions. We have acknowledged this in the report and our objective was to identify legislative actions that may be necessary to transition remaining relocation activities. Therefore, our focus was on whether or not additional authorities might be needed if ONHIR were to close. Although we present background information about other federal agencies and tribal entities with responsibilities in Indian Country as well as perspectives from various agencies on the transition and remaining activities, we did not independently evaluate these agencies' authorities or capacity and do not draw conclusions about which agencies and tribal entities including HUD should be provided the necessary authority by Congress to continue ONHIR's remaining activities.

In ONHIR's comments, which are summarized below and reproduced in appendix II, ONHIR did not explicitly agree or disagree with our five recommendations but stated that it had either already taken steps or had plans to once a successor is identified.

- With regard to the draft report's first recommendation to request a presidential determination as to whether ONHIR has fully discharged its responsibilities and whether it should close, ONHIR stated that it has worked for decades with the Office of Management and Budget within the Executive Office of the President on completing its work. While this may be the case, our review found that no presidential determination for ONHIR to cease operation has been requested, and no such decision has been communicated, therefore we believe our recommendation is valid.

- With regard to the second recommendation to prepare complete information on the remaining denied households that could still file for federal appeals, ONHIR stated that it has a solid grasp of potential appeals. Specifically, ONHIR said that case files have been identified and all needed information already exists in the case files and in its database. ONHIR stated that it will provide potential successor agencies with any information they request. However, because it is unclear when ONHIR will close and which

agency will assume ONHIR's remaining eligibility and appeals activities at that time, a successor agency will not have the institutional knowledge to follow and connect the information needed for determining eligibility and providing support for cases for which appeals were filed in federal court. Therefore, we maintain that ONHIR should proactively prepare the necessary information associated with these appeals for any successor agency. Preparing complete and readily available information could minimize the challenges the successor agency may encounter in administering future appeals and eligibility determinations.

- With regard to the third recommendation to prepare complete information on warranties and contractors, ONHIR stated that up-to-date and complete information on warranty status appears in the existing case files. We maintain our concern about the accuracy of ONHIR's warranty database because in its comment letter ONHIR acknowledged that some complaints were entered multiple times due to data entry issues. Moreover, ONHIR states that its staff know which relocatee homes will still be under warranty as of September 30, 2018, and have compiled a list of such homes. However, preparing the case file and list of such homes does not address the deficiencies that we found in the warranty database. While we revised the report by including ONHIR's statement that its system has the capability to search warranty complaints, we continue to believe that the information available through searches will be incomplete for a successor agency because the information is disconnected. Without linking warranty complaints to the relevant contractor, completing missing warranty information, and completing information on contractors' past performance, any successor agency may have difficulty understanding what warranty issues have already been addressed or have difficulty overseeing contractors to help ensure that newly certified applicants secure decent, safe, and sanitary relocation homes.

- With regard to the fourth recommendation to establish a comprehensive inventory of (1) properties located on trust land it administers, (2) leases of those properties, and (3) surface use and other use agreements for trust land it administers, ONHIR stated that such documentation exists and is maintained and updated. However, this statement is inconsistent with what we found during our review. We reviewed information provided by

ONHIR from various sources as part of our review, and the information available did not include a comprehensive inventory of leased and vacant properties on or surface use and other agreements for Navajo trust land ONHIR administers. We continue to believe that without developing a comprehensive inventory of leased and vacant properties on Navajo trust land that ONHIR administers and leases and agreements for those properties, the entity that assumes responsibility for leasing the land will not have the information it needs to carry out that responsibility.

- With regard to the fifth recommendation to identify which leases and other agreements need to be amended or assigned because (1) ONHIR is the lessor; (2) the lease or agreement provides for annual payments to be made to ONHIR, and/or (3) the lease or agreement terminates upon ONHIR's closure, ONHIR stated that it will move forward with specific transition activities after a successor entity is identified. We believe that such an approach is risky because it assumes that ONHIR staff will be available to work closely with staff from a new successor entity to personally transfer their knowledge to the new staff. However, there is no guarantee that ONHIR will continue operating or that its many retirement-eligible employees will be available to assist any successor entities during a transition period. We, therefore, maintain that the Executive Director of ONHIR should identify which leases and other agreements need to be amended or assigned.

ONHIR also made other comments in its letter, which we have responded to in appendix II.

The Navajo Nation and the Navajo Nation Human Rights Commission also submitted comments on a draft of this report, which are reproduced in appendix III and IV.

We are sending copies of this report to the appropriate committees and the Office of Navajo and Hopi Indian Relocation, Department of the Interior, Department of Justice, Department of Housing and Urban Development, Department of Health and Human Services, Department of the Treasury, the Navajo Nation, and the Hopi Tribe. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact us at (202) 512-8678 or shearw@gao.gov or (202) 512-3841 or fennella@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.

William B. Shear
Director, Financial Markets and Community Investment

Anne-Marie Fennell
Director, Natural Resources and Environment

Appendix I: Objectives, Scope, and Methodology

This report examines (1) ONHIR's management of the eligibility and appeals processes and the status of these activities; (2) ONHIR's management of the home-building process and the status of these activities; (3) executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities; (4) ONHIR's management of Navajo trust lands and related transition activities; and (5) legislative actions that may be necessary to address other Settlement Act provisions.

To address these objectives, we reviewed our prior related reports and other studies and analyzed relevant laws and regulations.[1] We interviewed ONHIR officials on relocation and other key activities, and we interviewed ONHIR's hearing officer to better understand his role in the appeals process. We also interviewed federal officials from the Department of the Interior's (Interior) Bureau of Indian Affairs (BIA), Office of Inspector General, and Bureau of Land Management (BLM); Department of Housing and Urban Development (HUD); Department of the Treasury (Treasury); and Indian Health Services within the Department of Health and Human Services. We also conducted interviews with tribal government officials from the Navajo Nation and the Hopi Tribe including officials from the Navajo-Hopi Legal Services Program, the Navajo-Hopi Land Commission Office, and the Navajo Nation Human Rights Commission. Additionally, we conducted two visits in August 2017 to ONHIR's offices in Flagstaff and Sanders, Arizona, and the Navajo region where we interviewed ONHIR staff, observed a transition meeting, took two separate tours of homes (one with ONHIR officials and the other with Navajo Nation officials) and observed rangeland management activities, and attended presentations in three Navajo Nation chapters.

[1]See, for example, GAO, *Indian Relocation: Navajo and Hopi Indian Relocation Commission Estimated Relocation Cost,* GAO/RCED-86-43FS (Washington, D.C.: Oct. 25,1985); *Indian Program: Navajo-Hopi Resettlement Program,* GAO/RCED-91-105BR (Washington, D.C.: Mar. 6, 1991); *Navajo-Hopi Relocation Program,* GAO/RCED-95-155R (Washington, D.C.: Apr. 27, 1995); and *Native American Housing: Additional Actions Needed to Better Support Tribal Efforts,* GAO-14-255 (Washington, D.C.: Mar. 27, 2014).

Additionally, to address the first, second, and third objectives, we reviewed ONHIR's management manual, policy memorandums, the 1981 Report and Plan, and the 1990 Plan Update on relocation activities, including the eligibility and appeals processes, and home-building activities. We obtained two data files as of June 2017 from ONHIR's Client Database—Client Master and Hearing File—to analyze the time frame for becoming certified for relocation benefits and relocating to the house provided by ONHIR. Using the case numbers in the Hearing File, we identified those applicants that were certified for relocation benefits through the administrative appeals process. We assessed the reliability of ONHIR's data files by conducting a file review of a random sample of 30 case numbers, which we selected based on the distribution of two factors: (1) application date, and (2) type of determination. We recorded the relevant information in the paper files— such as date applied, date of determination, determination code, and date relocated—and compared it to the data fields in the electronic files. We determined that ONHIR's data files were sufficiently reliable for the purpose of our report. We also reviewed home-building-related documentation, including contractor lists, contracts, warranty information, and contractor performance reports, to understand ONHIR's oversight of home-building activities. In addition, we reviewed ONHIR's transition-related documentation including transition guiding principles, the draft transition plan, and the draft "From Transition Plan to Transition Implementation" document to understand ONHIR's planned closure. We also reviewed and assessed the original statute to determine the extent to which ONHIR has the authority to transfer those activities. We interviewed ONHIR and Interior officials to identify any opportunities for modifying or continuing other Settlement Act provisions.

To address the fourth and last objectives, we obtained from ONHIR copies of all leases and use agreements for Navajo trust land it administers pursuant to the Settlement Act as amended from the 1980s to the present. We reviewed the terms of the leases and agreements provided to identify specific elements, such as the identity of the lessor, lessee, and any concurring parties; start and end dates; required rental payments, if any; and any provisions on the leases' continuation or termination in the event that ONHIR closes. We compared the leases to ONHIR's list of properties on Navajo trust land it administers to determine if all of the properties were covered by leases. We also reviewed information, such as summary spreadsheets, on sources of revenue ONHIR collects, retains, and uses, including documentation of Treasury accounts where such revenue is deposited. We cross-checked the revenue information ONHIR provided with information from Treasury about deposits into ONHIR's Treasury account and we interviewed

ONHIR officials regarding discrepancies. Revenues from the Padres Mesa Demonstration Ranch were included as part of the revenue information and ONHIR provided a separate accounting of the obligations, expenditures, and revenues for the ranch. We reviewed ONHIR's regulations and management manual for policies and procedures on leasing and grazing on the New Lands and compared them to the agency's practices.[2] We also reviewed BIA's regulations on leasing and grazing on Indian trust lands under the agency's administration to identify comparable grazing and leasing policies and procedures. Furthermore, we interviewed ONHIR, Interior, BLM, Treasury, and Navajo Nation officials and reviewed documents from the agencies and tribe to identify any opportunities for modifying or continuing other Settlement Act provisions.

We conducted this performance audit from March 2017 to April 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[2]ONHIR's use of appropriations to establish and operate the Padres Mesa Demonstration Ranch raises questions that we will be addressing in a separate legal opinion. Specifically, the legal opinion will address ONHIR's authority to operate the ranch using a mix of appropriated funds and revenue collected by ONHIR from cattle sales.

Appendix II: Comments from the Office of Navajo and Hopi Indian Relocation

Note: GAO comments supplementing those in the report text appear at the end of this appendix. Page numbers cited in ONHIR's letter refer to a draft version of our report and may not correspond to page numbers in the published report. In addition, we have not included the exhibits.

UNITED STATES GOVERNMENT
OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

Christopher J. Bavasi
Executive Director

March 09, 2018

William Shear
Anne-Marie Fennell
United States Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Re: GAO-18-266, Office of Navajo and Hopi Indian Relocation, Executive Branch and Legislative Action Needed for Closure and Transfer of Activities: ONHIR Formal Response

Dear Mr. Shear and Ms. Fennell –

The Office of Navajo and Hopi Indian Relocation ("ONHIR") respectfully submits this formal response letter in response to the above-referenced draft report ("the Report"). While ONHIR appreciates the GAO's efforts and comments, ONHIR takes exception to certain findings and characterizations set forth in the Report.

Specifically, the GAO's unverified acceptance of claims regarding homes built for relocatees is inconsistent with accepted auditing and investigative practice. In some areas, the Report fails to provide the detail concerning certain matters, but uses language which creates an impression some issues are far more significant than the detail would show to be the case. In other areas, the Report references statutes, regulations, and policies, which do not apply to ONHIR. The Report also takes issue with various aspects of ONHIR's land administration, including the use of lease revenues and the operation of the Padres Mesa Demonstration Ranch. ONHIR's activities in these regards, however, are consistent with its statutory mandates and its role as trustee over the lands.

This letter provides ONHIR's perspective and insight on the issues raised in the Report. Thank you for your consideration.

P.O. Box KK • 201 E. Birch • Flagstaff, Arizona 86002 • (928) 779-2721 • Fax (928) 774-1977

Letter to William Shear and Anne-Marie Fennell, GAO
Re: GAO Draft Report 18-266: ONHIR Formal Response:
March 9, 2018

I. Background Regarding ONHIR and Relocation[1]

A thorough analysis of ONHIR's efforts, as mandated by Congress in 1974, requires understanding of the bitter fight waged by the Navajo Nation to prevent any Relocation. Central to this understanding is the fact that the Relocation, as mandated by the Navajo-Hopi Settlement Act ("the Act")[2] came on the heels of the 1972 forced eviction of members of the Navajo Nation from the Echo Canyon region of the Hopi Reservation.[3] As a result of the lawsuit, which was brought by the United States Department of Justice, those subject to the eviction were required to leave their homes.[4] Many of the Navajo people evicted from Echo Canyon were "relocated" by the Navajo Nation to the Navajo Fairgrounds where they lived in tents. This experience was fresh in the minds of many Navajos two years later when the Act was passed and ONHIR began encouraging them to apply for Relocation Benefits.

Additional resentment and animosity were created after, pursuant to the Act, the Navajo Nation selected Bureau of Land Management ("BLM") lands in House Rock Valley, Arizona; but when the non-Indian ranchers who grazed livestock—but did not live in House Rock Valley—protested the selection, House Interior and Insular Affairs Committee Chairman Morris K. Udall, persuaded Congress to forbid any land acquisition west of the Colorado River, thus sparing the House Rock Valley ranchers.[5]

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[1] ONHIR recognizes that GAO is quite familiar with ONHIR. In fact, GAO has reviewed various issues related to ONHIR at least nine times in the past. *See, e.g.*, *Financial Review of the Navajo and Hopi Indian Relocation Commission, June 30, 1976*, FGMSD-77-13 (Aug. 5, 1977); B-114868.18 (Aug. 9, 1978); *Review of the Anti-Deficiency Act Violations of the Navajo and Hopi Indian Relocation Comission*, FGMSD-80-17 (Feb. 29, 1980); *Navajo and Hopi Indian Relocation Commission's Program*, CED-81-139 (Jul. 2, 1981); *Indian Relocation Benefits*, B-203827 (May 6, 1985); *INDIAN RELOCATION: Navajo and Hopi Indian Relocation Commission Estimated Relocation Cost*, RCED-86-43FS (Oct. 25, 1985); *In re Compensation of Former NHIRC Commissioners*, B-236241 (Feb. 25, 1991); *INDIAN PROGRAMS: Navajo-Hopi Resettlement Program*, RCED-91-105BR (Apr. 5, 1991); *Navajo-Hopi Relocation Program*, RCED-95-155R (Apr. 27, 1995). Please note that none of these past reviews identified problems that are raised for the first time in the current Report.

[2] P.L. 93-531 (1974) Section 14 of the Act directed relocation of persons living on lands partitioned

[3] *United States v. Kabinto*, 456 F.2d 1087 (9th Cir. 1972).

[4] *Id.*

[5] P.L. 96-305, Section 4. (1980).

See comment 1.

In addition, the Navajo Nation fought unsuccessfully against partition of the Joint Use Area ("JUA") from the late 1960's through most of the 1980's and discouraged its members from cooperating with Relocation under the Act.[6] During most of this period, the official policy of the Navajo Nation was that the Act would be repealed and thus there was no need to apply for Relocation Benefits.

Nonetheless, The Navajo—Hopi Indian Relocation Commission ("NHIRC") and later ONHIR [7] were created and tasked with accomplishing the relocation of Navajos residing on lands partitioned to the Hopi Tribe (the Hopi Partitioned Land, or "HPL") as well as the Hopis living on the lands partitioned to the Navajo Nation (the Navajo Partitioned Land, or "NPL") without any authority to require that any person actually leave the lands awarded to the other Nation or Tribe. To make matters worse, when ONHIR began operations there was no successful American model relocation. No American agency had ever successfully relocated human beings.[8]

As a result of these and other issues, relocation experts warned Congress that any relocation program would take longer time and cost more resources than estimated. The experts also warned that program could create resentment and jealousy between relocatees and residents of the communities where they were settled ("Host communities").[9] It was against this backdrop that NHIRC (and later ONHIR) began its efforts as mandated by statute.

This history must be appreciated when evaluating ONHIR and its Relocation Program, including the Relocation Program's time and costs. Given the history and background of the above-explained issues, and the lack of prior success in this area, a certain amount of trials and

[6] The Report confusingly states both that the Act partitioned the Joint Use Area ("JUA") and that it authorized the District Court to partition the JUA. *See* Report, p. 3. In reality, the Act did not partition the JUA. Rather, the Act authorized, but did not require, a judicial partition of the JUA, if the mediation provided for in the Act were unsuccessful.
[7] In this letter both NHIRC and ONHIR are generally referred to as "ONHIR."
[8] Instead, the American history was replete with 19th Century forced relocations of Indians to Reservations; the Japanese removal from the west coast in World War II and the legacy of Urban Renewal which was referred to as "Negro Removal." *See* Interview by Kenneth Clark with James Baldwin (1963).
[9] *See, e.g.*, Letter from Thayer Scudder, Prof. of Anthropology, Cal. Inst. of Tech., to Abdelfattah Amor, Special Rapporteur of the United Nations Comm'n on Human Rights (Jan. 30, 1998) (*available at* http://eclectic.ss.uci.edu/~drwhite/scudder.html).

See comment 2.

tribulations were inevitable. The overall success of the Relocation Program is a tribute to the hard work and creativity of the many people both within and outside ONHIR who have been committed to such success.

II. Issues Related to the Report's Underlying Procedure.

Prior to engaging in a full analysis of the Report's substance and various issues, ONHIR feels compelled to point out several apparent errors or omissions in the Report. Respectfully, it is critical to identify and clarify some of these matters to allow a fair evaluation of the substantive issues.

One of ONHIR's primary concerns is GAO's position that it prepared the Report pursuant to appropriate methodology for providing a fair and accurate report.[10] Unfortunately, as discussed in other areas of this letter, there are many instances in which GAO seems to have failed to distinguish between facts and opinions, and may have neglected to undertake sufficient investigation to reveal those opinions as unsubstantiated.

This is particularly true with regard to claims made by Navajo and Hopi leaders as to construction quality and response to and corrections of homeowner complaints. GAO's acceptance of such unsupported assertions belies the claims that the Report is based on "sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions..." [11] As discussed further in later sections, many such opinions are simply untrue.

In addition, some areas of the Report seem to reflect a misunderstanding of certain basic facts related to ONHIR and to the Navajo Nation. For instance, the Report misstates and oversimplifies the authority of Navajo Nation Chapters.[12] The authority of individual chapters varies considerably depending on grants of authority from the Navajo Nation Council and whether the chapter is "governance certified" and has an approved Community Land Use Plan. Also related to Navajo Nation governance, the Report states that the Navajo Nation Council

[10] Report, p. 3.
[11] Report, p. 3.
[12] *See* Report, p. 3, n. 3; Report, p. 10.

See comment 3.

"hosts 24 council delegates . . ."[13] The Navajo nation Council is composed of its members; it does not "host" delegates.

With regard to financial resources, the Report details the monies ONHIR has expended on legal fees, but its analysis is misleading because it fails to mention that the sum identified was expended over a 35-year period.[14] Regardless, the Report also fails to note that there is no statutory prohibition on such payments or clearly clarify that the legal fees supported the statutory mandate.

III. Substantive Issues Identified in the Report.

As mentioned, ONHIR recognizes some existing areas for improvement. The Report, however, takes issue with certain of ONHIR's activities and procedures that not only comply with controlling law, but in some cases are required under the Act. These areas are discussed separately below.

A. The Eligibility And Appeals Process

ONHIR began its operations in 1977 with the Navajo Nation fundamentally opposed to relocation and discouraging its members from cooperating with ONHIR or the relocation process.[15] In fact, the Navajo Nation had adopted an official policy of seeking repeal of the Act. Problems arising from the nature of Navajo residency in the JUA and Former Joint Use Area ("FJUA") only added to the difficulties caused by this opposition.[16]

1. Clarifying issues with regard to the application and eligibility process.

The Report states that ONHIR officials reported that "not enough" Navajos had applied during the second and third Application periods.[17]

[13] Report, p. 10.
[14] Report, p. 14, n. 27.
[15] Despite Navajo Nation claims to the contrary, Relocation from the JUA-HPL has always been voluntary—there has never been an eviction of a Navajo from the FJUA. Indeed, ONHIR never had legal authority to require a Navajo to move from the HPL.
[16] The Report overstates the consequence of an individual being included in the JUA list that was part of ONHIR's 1981 Report and Plan. *See* Report, p. 6. Being listed in the 1981 Report and Plan was not an ONHIR determination of eligibility for Relocation Benefits. *See Walker v. NHIRC*, 728 F.2d 1276 (9th Cir. 1984).
[17] Report, p. 17.

To be clear, for Navajos who had signed Accommodation Agreement Leases and then relinquished them on a timely basis, ONHIR had no "quota" regarding the number of persons seeking relocation benefits. Such persons' legal status on the HPL had been established through the Accommodation Agreement Lease process discussed below.

On the other hand, as to Navajos who remained on the HPL without legal authority, a more accurate statement would be that ONHIR appreciated that its principal mission was providing relocation homes for Navajos on the HPL and Hopis on the NPL. All relocation was voluntary—ONHIR never had, nor sought the authority to evict Navajos or Hopis from lands partitioned to the other tribe. Simply, if Navajos remained on the HPL (without leases), then ONHIR's mission was not deemed complete. Thus, ONHIR acted to fulfill its mission by encouraging such persons to apply for relocation benefits and leave the HPL.

It is also important to fully understand the eligibility requirements. The Report suggests that applicants had demonstrated two key eligibility criteria. Actually, this is what applicants had to demonstrate. [18] The Report also states that applicants had to demonstrate "residency on the partitioned land." [19] The requirement was for applicants to demonstrate legal residence on the lands that had been portioned to the other tribe (Navajo people living on HPL, and vice versa).

The Report also states that during the third application period, applicants had to demonstrate residency on the HPL until their eligibility had been completed. [20] The requirement, rather, was for applicants to maintain legal residency until their contact with ONHIR.

See comment 4.

2. Complexities in communication and with applications and eligibility determinations.

Specifically, there were no street addresses in the JUA. The people received mail at trading posts because there was no home delivery. The Report touches on this issue with its discussion of "the shared mailbox

[18] Report, p. 18.
[19] Report, p. 18.
[20] Report, p. 19.

See comment 5.

See comment 6.

problem." [21] ONHIR dealt this by offering Administrative Appeals to Navajos for whom ONHIR could not show actual receipt of denial letters. In addition, for almost 30 years, ONHIR has used only Restricted Deliver Certified Mail—which requires the actual addressee to sign for the document. But there remained another issue because virtually none of the JUA residents had any document granting them residential land use rights to any part of the JUA.[22]

As a result of these issues, ONHIR used the 1974-1975 BIA Enumeration which consisted of aerial photos of the JUA followed by a house-to-house survey conducted by BIA teams. Unfortunately, while ONHIR has the survey results, the original data entry documents were destroyed by a flood while still in the possession of the BIA.

Other aspects of Navajo culture added to the complexities facing ONHIR. For example, Navajos tended to move with their livestock (principally sheep and goats in the 1970's and early 1980's) and often would maintain two "camps." If this were the case, then there would be eligibility issues if one camp was in the HPL, but the other camp was outside the HPL.

Determining eligibility was also made more difficult because there was virtually no wage work available in the FJUA. As a result, many Navajos left the FJUA for employment. This often meant that a family who claimed HPL residence actually worked outside the FJUA in the Navajo Nation or in many instances outside the Navajo Nation. Many Navajos also performed seasonal work, such as railroad work or working on construction projects or seasonal agricultural labor. This complicated the legal residence determination for these seasonal workers, many of whom lived outside the HPL for extended periods while working.

Communication with those potentially eligible for relocation was also difficult. In the 1970's and 1980's most FJUA Navajos had limited ability to communicate in English. Combined with the common economic conditions, this meant that most Navajo families did not possess the documents necessary to establish eligibility for Relocation Benefits.

[21] Report, pp. 19-20.
[22] Many Navajos had BIA-issued grazing permits, but beyond listing the Navajo Nation Chapter where they might be used, these permits did not designate a particular grazing location.

This combination of factors caused many Navajos not to apply for Relocation Benefits during the first period when Applications were accepted (1977 to July 7, 1986). When such persons did apply or were permitted to request an eligibility determination later, the time that had passed since the critical eligibility date of December 22, 1974[23] meant that memories had faded, witnesses had died and often the few previously available documents related to residence or income had been lost.

3. Litigation and legal challenges have further complicated and slowed the eligibility process.

To complicate matters, the Navajo Nation, after opposing relocation for many years, changed its policy and began advocating for as many Navajos as possible to apply for and receive Relocation Benefits. Thus, hundreds of Navajos whose connection with the HPL was minimal, such as visiting relatives on holidays, began claiming to be residents of the HPL. Many of these claims then had to be litigated before ONHIR's Independent Hearing Officer.

The Navajo Nation has provided free legal services to Navajos seeking relocation homes (or certain other relocation benefits) since 1983 through the Navajo—Hopi Legal Services Program ("NHLSP").[24] When there have been eligibility disputes that could not be worked out through discussion and compromise, they have been heard through the ONHIR administrative appeal process. This process has been slowed by the number of administrative appeals taken by or encouraged by the NHLSP and then the NHLSP's requests to delay the scheduling of appeal hearings because the NHLSP is "understaffed" or "has not had time to develop the case to be presented at a hearing."

ONHIR believes that many of these appeals were frivolous. Nonetheless, any timely appeal must go through the administrative

[23] The date the Act was signed into law.

[24] The Report overlooks the fact that some of the NHLSP practices have delayed ONHIR's completion of the Administration eligibility process. While the Report notes that NHLSP does not represent all persons seeking their help, in a number of administrative appeals, NHLSP withdrew shortly before scheduled hearings. This required ONHIR to place the denied Applicant on the "self-represented appeal track." These late withdrawals by NHLSP significantly delayed the administrative appeal process.

appeal process. Of course, this requires ONHIR's time, money, and other resources.

Other delays have arisen as a result of the legal challenges themselves. For example, while ONHIR originally set a July 7, 1985, deadline for receipt of applications, the Navajo Nation sued ONHIR to extend the deadline. As a result, the deadline was extended to July 7, 1986.

Overall, the eligibility and appeals process has been a lengthy one, not because ONHIR wanted to delay the process, but rather because of the actions and inactions of the other parties involved in the process. The Report provides information on the average time from Application to Final Agency Action, but fails to explain the factors that influence the time taken.[25] For example, the GAO Draft Report fails to mention that for many years and through 2013, the Independent Hearing Officer permitted the NHLSP to determine when Appeal Hearings would be held based on when NHLSP was prepared for a hearing. Thus, much of the time for the appeal process arose from actions (or inaction) by NHLSP.

See comment 7.

In addition, when the Hopi Tribe and the United States reached an agreement in 1995 on 75-year Accommodation Agreement leases for some Navajos who lived on the HPL, the Agreement included an option for Navajos signing such leases to have three years to relinquish the leases and seek Relocation Benefits.[26] The GAO Draft Report noted that the Navajo Nation said that after the three-year period for relinquishing the (Accommodation Agreement) Lease had expired, some Navajos wanted to relinquish the lease and seek Relocation Benefits.[27]

The Report does not mention, however, that ONHIR had proposed that if such individuals would be allowed to apply for Relocation Benefits it would be in return for the Hopi Tribe agreeing to permit a few "resisters" who continued to live on the HPL but had never singed the

See comment 8.

[25] Report, p. 15.
[26] The Report criticizes ONHIR for its 1981 Report and Plan not mentioning ONHIR permitting Navajos who signed Accommodation Agreement leases in 1997 from being able to apply for Relocation Benefits if they relinquished the lease and chose to seek Relocation Benefits instead. Of course, ONHIR could not have known in 1981 that there would be an agreement in 1995 between the United States and the Hopis which would impose such a requirement on ONHIR.
[27] Report, p. 16, n. 30.

Accommodation Agreement Leases to continue to live on the HPL. The Hopi Tribe never agreed to this proposal.

The Navajo Nation later sued ONHIR claiming that denial notices sent by ONHIR but not signed for the Applicant her/himself were defective, thus entitling the Applicant to another opportunity to appeal the denial of Relocation Benefits.[28] The decision, which was issued in 1989, required ONHIR to reopen hundreds of closed Application files.

Similarly, the 2008 decision in *Noller v. Herbert* caused ONHIR to reopen the application process.[29]As a result, ONHIR received over 2,200 applications, each of which had to be individually reviewed and an eligibility decision made. Given the six-year statute of limitations for challenging an ONHIR final agency action denying relocation benefits, the time for final eligibility determinations is often very long.

See comment 9.

In its discussion of the *Herbert* decision, the Report states that ONHIR told GAO that it had consulted with the United States Department of Justice and the "U.S. District Court for the District of Arizona" before deciding to reopen Applications in 2008.[30] To be clear, ONHIR's consultation was with the U.S. Department of Justice in Washington, D.C. and the U.S. Attorney's Office in Arizona. There could not have been a "consultation" with the U.S. District Court for the District of Arizona.

See comment 10.

The Report also mischaracterizes the *Herbert* decision by suggesting that ONHIR was only required to give personal notice of the opportunity to apply to persons eligible for Relocation Benefits.[31] What the court held was that ONHIR was required to provide such notice to all persons "potentially eligible" for Relocation Benefits.

In addition, the Report misstates the reason ONHIR applied its original eligibility criteria during the period it accepted *Herbert* Applications from October 2008 through August 31, 2010. [32] The

[28] *Cecelia Sands et al. v. Navajo and Hopi Indian Relocation Commission* CIV-85-1961-PCT-RCB (Nov. 2, 1989).
[29] CV06-03014-PCT-NVW, 2008 WL 1133889 (Feb. 27, 2008).
[30] Report, p. 17.
[31] Report, p. 17.
[32] Report, p. 19.

rationale was, had ONHIR given the required personal notice before the application deadline of July 7, 1986, the applicant would probably have applied before July 7, 1986 and would have been subject to the original "voluntary relocation" eligibility criteria. Thus, the initial eligibility criteria should be applied.

4. ONHIR has a solid grasp of potential appeals.

See comment 11.

ONHIR notes GAO's "finding" that "ONHIR has not prepared complete information from its files on the remaining denied households who could file for federal appeals."[33] But this is inaccurate. ONHIR has identified the case files whose applicants may file future appeals. And ONHIR's eligibility case files are complete and up-to-date, as is its AS 400 database. Thus, the necessary information is not only complete, but easily accessible.

See comment 12.

Importantly, the Report does not clearly set forth the difference between administrative appeals within ONHIR and Administrative Procedure Act ("APA") appeals to the Federal District Court. It appears that the Report has confused administrative appeals within ONHIR that will be concluded shortly, with Federal District Court Appeals under the Administrative Procedure Act, which are subject to a six-year statute of limitations and may not even be filed for a considerable period of time and then take a year or more to be resolved; longer if there is an appeal.

See comment 13.

Another misconception in the Report with regard to the appeals process is the apparent statements from Navajo Officials that the Independent Hearing Officer ("IHO") who heard Administrative Appeals would not allow oral evidence from Applicants.[34] Oral evidence has always been allowed,[35] but has sometimes been found not to be credible. For example, the IHO has declined to accept undocumented claims of earnings when it would have been reasonable to expect that if true, such earnings would have given rise to appropriate documentation.

5. The risk of a high volume of APA Appeals.

[33] Report, "What GAO Found."
[34] Report, p. 19.
[35] *See* 25 C.F.R. § 700.313(a)(1).

The Report notes the risk that many APA appeals may still be filed.[36] ONHIR recognizes this risk. As of this writing, there are twelve APA Appeals pending and three Appeals in the Court of Appeals for the 9th Circuit—two of which were filed by NHLSP from decisions adverse to the Applicant by the District Court.

There is a greater risk, however, of additional eligibility certifications. Each such certification will cost about $150,000 per Relocation Home plus the costs of administering the Relocation Housing program, and the time associated with providing a Relocation Home.

B. RELOCATION HOMES, COUNSELING, CONTRACTING, WARRANTIES AND HOME MAINTENANCE

1. Location and building of relocation homes.

See comment 14.

The Report gives an inaccurate picture of the communities to which relocatees have moved.[37] ONHIR's data reflects that more than 400 families have moved to the New Lands, and over 1200 families have moved to locations outside the Navajo Nation.

See comment 15.

The Report's statement regarding location choices for newly certified applicants is also incorrect.[38] Relocatees with existing Navajo Home site Leases can have their Relocation Home built on the Home site Lease site if it meets feasibility requirements. The Report quotes a Navajo Nation official who attributes homes containing multi-generational families to not enough home site leases. Navajo Home site Leases are for one acre, and the Navajo Nation contains more than 17,500,000 acres. Thus, a shortage of Home site Leases does not seem possible.

See comment 16.

Similarly, the Report complains about some Relocation Homes being "off the grid." ONHIR strongly urged all relocatees to relocate to an area with electricity and running water.[39] Some relocatees, however, insisted on relocating to remote areas without such utilities—often to be near family members. In these cases, alternatives such as cisterns and solar power were provided. Those are "utilities." In addition, relocatees

[36] Report, p. 20.
[37] Report, p. 10.
[38] Report, p. 24, n. 44.
[39] *See* 25 C.F.R. § 700.55.

who chose such locations signed a form (which was explained to them in Navajo before signing) to affirm that they wanted solar/cistern rather than grid utilities.

See comment 17.

In fact, all relocation homes are built in accordance with, or exceeding industry best practices. The Report is not clear on ONHIR's contractor licensing requirements.[40] ONHIR requires every contractor to be state licensed in the state where the relocation home will be built.[41]

Relatedly, the Report states that ONHIR allows contractors with a history of performance issues to build relocation homes.[42] Finding contractors willing to build homes in the Navajo Nation for the amount of the ONHIR Housing benefit is difficult. However, ONHIR requires such contractors to resolve all warranty issues and be in good standing in order to be permitted to contract with relocatees to build additional homes.

See comment 18.

Indeed, the majority of the building and construction related complaints cited in the Report are unsubstantiated and inaccurate. The comments with regard to soil settling, for example, are simply not correct.[43] Prior to choosing home sites, feasibility studies are conducted to assess the site conditions. ONHIR engineering technicians do not, and did not attempt to classify soils. As such, they did not sample soils; they made observations and comments about soil conditions from visual observations.

See comment 19.

ONHIR takes exception to the fact that its comments, including those from residential building professionals regarding site conditions and the problems encountered therein, are relegated to the Report's footnotes, while the unsubstantiated allegations of chapter politicians get main body paragraphs. This is not appropriate.[44]

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[40] Report, p. 23.

[41] Although the Report does not clarify the relocation homes' infrastructure with which IHS and NTUA are involved, those agencies are involved only with relocation homes in the Navajo Nation.

[42] Report, p. 24.

[43] Report, p. 27.

[44] Separately, the GAO Draft Report offers unsubstantiated claims of the societal effects of relocation provided by persons without any professional training or real-world expertise on the matter. Report at 27-28. Again, these are matters capable of being studied by independent investigators, but which were not studied. Instead, the Report includes only the opinions of persons without training to make such judgments.

Letter to William Shear and Anne-Marie Fennell, GAO
Re: GAO Draft Report 18-266: ONHIR Formal Response:
March 9, 2018

In reality, and as noted in the Report, around 2800 homes have been constructed under the relocation program. As also noted, ONHIR has replaced 14 houses. But, this replacement constitutes only ½ of 1% of the total number of homes constructed. This reflects a track record of success that is not clearly acknowledged in the Report.

See comment 20.

ONHIR notes the photos of homes that were included in the Report.[45] It is not clear, however, whether GAO confirmed that the photographed houses were in fact built by ONHIR. If these homes were built by ONHIR, a full investigation would include a review of the warranty sections of the case file, which does not seem to have been done.[46] If for some reason it is not possible to determine and include basic information on such houses, then ONHIR respectfully asserts that these photos and examples should be removed from the Report.

See comment 21.

In addition, the Report gives weight to similarly meritless claims from the Hopi Tribe regarding a Relocation Home's utilities passing through the foundation slab, and an allegedly inadequately sized septic tank.[47] The common requirement is that residential slab floor construction has the drain, waste, and vent plumbing installed through and under the floor slab.

Only in areas where freezing temperatures do not occur are any water supply lines placed in attics. The site elevations at which ONHIR builds range from 4000 to 7500 feet above sea level. Water lines are placed under floor slabs for protection from freezing. Both drain lines and water supply lines are also in interior plumbing walls within the building thermal envelope to keep them from freezing. Thus, the location of the home's utilities was consistent with applicable Code provisions and construction "best practices."

Septic tanks are sized based on the number of plumbing fixture units in the house. The septic tank is where "solids" are broken down by bacterial action. The drain field is where the "blackwater" is absorbed and cleaned by bacteria in the soil. If a septic tank is never pumped, it will "continually overflow." The problem is not the size of the tank, but

[45] *See* Report, p. 26.
[46] Such review would include investigation into matters such as when the clients were certified, when the house was built, where the houses are located, the identity of the contractor, whether there have even been any warranty claims, and whether such claims were resolved, etc.
[47] Report, p. 28.

See comment 22.

the fact that the system is not being serviced regularly. (Pumped every 3-4 years.) The tank size difference is usually 250 gallons per step. i.e.: 1000 gallons to 1250, or 1250 gallons to 1500. Even with a larger tank, a family of four to six people would use that much more water in a day or two, and the tank would again be "overflowing."

ONHIR has documentation on every Relocation Home to support these statements.

The Report repeats other unsubstantiated claims of relocation housing problems.[48] To the extent tribal complaints have merit, ONHIR would be pleased to address them. Prior to inclusion in the Report, however, ONHIR respectfully requests that GAO provide an independent technical investigation into the issues complained of.

It seems, for example, that GAO failed to investigate the question of whether housing issues were due to poor construction or design or lack of homeowner maintenance.[49] It is important that GAO determine the truth of these matters prior to including them in any final report or analysis.

It appears that, rather than conduct such independent analysis, the Report relies on unsubstantiated claims from Navajo chapter officials about relocation homes and claims that houses with problems were built for relocatees by ONHIR contractors.[50] The nature of the Report's citation to such claims creates the appearance that these officials have some authority with regard to residential construction. To avoid creating such an unfair impression, GAO should determine whether the complained of homes were in fact built by ONHIR, and if so, when they were built as well as if the claims of construction defects have merit. In addition, the Report's recognition that these types of allegations are uncorroborated should be moved to the body of the Report, to ensure there is no confusion on this point.[51]

2. ONHIR has properly prepared for and addressed warranty issues.

[48] *See* Report, p. 25.
[49] Report, p. 25.
[50] Report, p. 25, n. 49.
[51] Likewise, the comments from the Navajo Nation President about housing construction should also note that he is a pastor, not a builder.

Letter to William Shear and Anne-Marie Fennell, GAO
Re: GAO Draft Report 18-266: ONHIR Formal Response:
March 9, 2018

Contrary to intimations in the Report,[52] ONHIR's relocatee case files are complete and up-to-date. In particular, ONHIR has identified the case files whose applicants might have future warranty claims. Thus, ONHIR has assembled the relevant and required information.

The GAO Draft Report erroneously assumes that ONHIR has not compiled complete and accurate warranty information.[53] All current information is in the relevant client case files. ONHIR knows which relocatee Homes will still be under warranty as of September 30, 2018, and has compiled a list of such homes. Whatever agency takes over the warranty issue will have the needed information in the Casefiles that will be provided. As discussed below, the "problems" GAO identified from the ONHIR warranty database arise from coding or data entry errors by ONHIR staff many years ago. No potential successor agency with respect to warranty issues has come forward to discuss how best to handle warranty issues.

The Report references a particular file as having 17 warranty complaints.[54] A review of that file, however, reveals that ONHIR only received six complaints from that client. The total appears to be 17 complaints, but that is due to data entry issues wherein the same complaint seems to have been entered repeatedly, creating the appearance of far more complaints than were actually received.[55]

See comment 23.

The Report also contains the incorrect assertion that ONHIR does not track warranty by contractor. ONHIR's AS-400 Warranty Complaint inquiry lists the contractor of record along with complaint data, and other pertinent data such as final inspection date, warranty expiration date, and the date the client received Homeowner Maintenance Training. While it may be true that one contractor failed the first inspection 42% of the time, that does not mean the house did not pass the final inspection. Most items noted on any final inspection report are items related to fit, finish, and workmanship, and are therefore subjective. In fact, no house EVER reached final inspection stage and

[52] Report, "What GAO Found."
[53] Report, p. 32.
[54] *See* Report, p. 24.
[55] Further investigation has revealed that other files have the same problem, creating the appearance of far greater complaints than were actually received.

then had to be torn down or was deemed unfit for unsafe occupancy. All houses eventually passed final inspection.

3. Concerns related to post-move counseling can be readily addressed.[56]

The Report notes that, upon ONHIR's closure, "[a]nother agency would need statutory authority to provide post-move counseling during the 2-year warranty period."[57] To be clear, there are 16 clients out of the 52 remaining that have signed contracts that will still be within the two-year warranty period. The rest (36) will have had the warranty expired by September 30, 2018.

See comment 24.

The "regular" ONHIR post-move counseling for these remaining clients could be contracted out by ONHIR or ONHIR's successor. In fact, during a time of staff overload ONHIR contracted with Native Americans for Community Action to handle the post move counseling for a 2-3 year period. The contract worked out well and might be an option again for the remaining clients.

A frequent problem ONHIR has encountered over the years is the Navajo Nation excluding relocatees from Tribal benefits provided to other Navajos. If relocatees have issues where counseling is needed, they ought to be able to access the same facilities and programs as other, non-Relocatee tribe members.

[56] Report, p. 35. Moreover, the Report paints an inaccurate picture of the typical Relocatee by suggesting that prior to relocation, relocatees were "self-sufficient." Report, p. 11. Unfortunately, this is often untrue. The reality of the typical relocatees' lack of education and significant reliance on social welfare programs complicates ONHIR's already difficult task of preparing relocatees for the responsibilities inherent in owning and residing in a modern home with various systems that require repair and maintenance over time and the financial capability to acquire material and services needed to maintain such a residence.
[57] Report, p. 35.

C. Administering The New Lands[58]

Understanding real property issues in the New Lands requires a knowledge of the New Lands history—both before and after the lands were selected to be taken into trust by the Navajo Nation acting pursuant to 25 U.S.C. § 640d-10. The area in eastern Apache County, Arizona adjacent to old Route 66 (now Interstate 40) consisted of cattle ranches with a ribbon of some commercial activity along Route 66—I-40. There were two Navajo Nation-owned ranches—the Chambers Ranch and the Bar N Ranch which had been bought by the Navajo Nation and were kept as fee land, rather than taken into Trust status. There were also three privately owned cattle ranches—the Spurlock Ranch, the Wallace Ranch and the Roberts Ranch.

In addition to the route 66—I-40 corridor the area included the main line of the Santa Fe Railroad—now the BNSF. While the railroad had originally owned most of the land along its right-of-way, by the time of the Act's approval in 1974 most of the surface had been sold, with the railroad retaining a mineral reservation. Under the Act, once the Navajo Nation had made its land selections, it fell to the BLM to accomplish the actual land acquisition. BLM chose not to seek acquisition of the railroad's mineral reservation (or the mineral reservation held by the State of Arizona for some sections) and BLM successfully fended off a challenge by the Santa Fe Railroad in the Interior Board of Land Appeals.[59]

The Navajo Nation contributed the Chambers and Bar N Ranches to the New Lands. The lands were taken into trust status by the BIA and administrative authority was originally and ultimately given to ONHIR, though BIA had principal administrative responsibility in the mid-

[58] The real property issues that ONHIR has had to confront and manage include: (1) Pre-existing land uses and agreements; (2) Infrastructure to support the relocatee population that has and will move to the New Lands; (3) Rights-of-way for such infrastructure.; (4) Home site leases for relocatees; (5) Home site leases requested for children and other relatives of relocatees; (6) Governmental facilities to serve the relocatee population, including: (i) Federal; (ii) State; (iii) Navajo Nation; (iv) NDCG Chapter; (v) Education; (vi) Nonprofit; (vii) Commercial Development; (vii) Surface developments; (ix) Development of the subsurface/mineral reservation including its effect on surfaced uses; (x) Range Use—Managing Livestock Grazing; (xi) Water and other resources; (xii)Environmental contamination monitoring and remediation.

[59] *See* IBLA 85-584, 85-786.

1980's when many important decisions about the lands were made. As cattle ranches, the infrastructure on the New Lands when they were taken into trust was minimal and designed to support cattle ranches where very few people lived; not a population of over 2,000 Navajos, as these lands have become. There were some wells, fencing, some structures related to ranching (ranch headquarters and corrals), and a few commercial facilities.

As noted, ONHIR did not select the lands that became the New Lands, but was charged with making these lands a suitable place for relocatees to live. This responsibility included developing needed infrastructure, insuring the availability of governmental services, and trying to attract commercial entities both to provide employment as well as to provide goods and services. Significantly, ONHIR never had any legal authority to require other entities—federal, state or Navajo— to provide any service or resources. Nor did ONHIR have the funding to provide all of what was needed or even—for the most part—to provide subsidies to encourage others to locate such resources and services on the New Lands

ONHIR appreciates that the Real Property Management function will continue after ONHIR closes. What is not clear is how much of this function (and which parts) will be managed by the Department of the Interior, other federal entities, the Navajo Nation (including Navajo Nation created entities) and the local Navajo Chapter—Nahata Dziil Commission Governance ("NDCG"). While ONHIR has pointed this out to these other entities, they have yet to decide whether and how to allocate these responsibilities. Importantly, ONHIR has no legal authority to force such decisions on these other governmental entities.

Similarly, ONHIR appreciates that transitioning responsibility to these other entities will require development and approval of some documents, such as lease or ROW modifications or assignments or novations or assignments from ONHIR to its successor. ONHIR is prepared to move forward with this, once the other governmental entities have sorted out which will be responsible for each existing agreement or program. Again, however, ONHIR has no legal authority to require these other governmental entities to act or move the process forward.

Likewise, although federal trust responsibility with respect to the New Lands will continue after ONHIR closes, determining a successor entity is not within ONHIR's authority.[60] Only Congress or the President, if Congress delegates him the authority to do so, can designate ONHIR's successor with respect to Trust land management issues. In the absence of a designated successor, ONHIR cannot complete Transition work in this area.

See comment 25.

The Report erroneously criticizes ONHIR for not having a complete inventory of leased or occupied land.[61] ONHIR has a list of all existing active leases on the New Lands. ONHIR does not maintain a list of vacant properties, as management of those properties does not require such list.

See comment 26.

The Report similarly criticizes ONHIR for permitting some uses of the New Lands without written leases, including use by ONHIR.[62] The Navajo Nation and NDCG are fully aware of the uses to which these New Lands properties are being put, and have never requested that formal leases be entered. Had the Navajo Nation requested leases for these properties—or were it to request such leases—ONHIR would use written leases.

See comment 27.

Regardless, the Draft GAO Report fails to appreciate that there is an easy solution to any properties in use without a written lease.[63] Once a successor entity is identified, ONHIR will inform the new entity of the status. If the new entity wants a written lease, ONHIR will work with the new entity and the lessee to develop a written lease.

The Report also seems to miscomprehend the Tse Bonito, New Mexico Intergovernmental Agreement.[64] The Intergovernmental Agreement used for this property was explicitly requested by the Navajo Nation. The Agreement provides for payment for the benefit of relocatees. Because the land is located in New Mexico and not Arizona,

[60] Report, pp. 35-36.
[61] Report, pp. 36-37.
[62] Report, pp. 37-38
[63] Report, p. 38.
[64] Report, p. 37, n. 78.

revenues from this parcel are administered by the Navajo Nation, rather than ONHIR and for an enlarged class of beneficiaries.[65]

See comment 28.

The Report fails to appreciate that ONHIR has permitted the lessee to continue to use an improvement for an Federal Aviation Administration ("FAA") navigational beacon; thus obscuring the public health and safety aspect of ONHIR's actions.[66] The FAA has continued to pay rent until the Navajo Nation negotiates and issues a new lease. The beacon continues to function.

See comment 29.

D. ONHIR's Current Use of Lease Revenues Complies with the Act.[67]

The Report seems to take issue with ONHIR's collection and retention of lease revenues from the New Lands.[68] The Report incorrectly characterizes ONHIR using funds derived from the New Lands for ONHIR New Lands' projects as "retention" of funds. The Report comments that "the Settlement Act as amended does not state that ONHIR may collect, retain, and use revenue from leases of Navajo trust land . . ."[69] As recognized in the Report, however, ONHIR has "used" the revenue to aid relocation efforts by renovating facilities located on Navajo trust land ONHIR administers, providing grants to Navajo chapters, and funding other activities to benefit relocatees."[70] There can be no doubt that such uses support ONHIR's duty to administer the land.[71]

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[65] 25 U.S.C. § 640d-30(b),(d).
[66] Report, p. 38.
[67] In a separate, but related issue, the Report notes that the Navajo Nation planned to reimburse the United States for advances to the Rehabilitation Trust Fund from leases of lands and minerals on New Mexico lands taken into Trust pursuant to the Act. *See* Report, pp. 7-8. The Report fails to mention, however, that the Navajo Nation's plans to use the New Mexico lands for a coal mine and mine-mouth coal-fired electric generating plant never came to fruition.
[68] *See* Report at p. 40.
[69] *Id.*
[70] Report at 40.
[71] *See* 25 U.S.C. § 640d-10(h); *U.S. v. Sinnott*, 26 F. 84, 86 (D. Ore. 1886) (finding that administering a program for the benefit of Indians includes using money derived from Indian resources for program development, and stating: "even if the deposition of the money received . . . was a technical violation of [the relevant statute], there is no pretense but that the

Since 1980, Congress has made clear that the lands authorized to be acquired pursuant to the Act were to be administered by ONHIR and for the benefit of members of the Navajo Nation who have been subject to relocation.[72] While Congress temporarily delegated this authority to BIA in 1986,[73] by 1988 Congress returned authority over the New Lands to ONHIR with even clearer authority to administer these lands for the benefit of relocatees.[74] Congress' actions to remove and then restore ONHIR's authority over the New Lands—and with enhanced authority—underscores the point that sole authority over these lands properly rests with ONHIR.

The same proposition is supported by the Interior Board of Land Appeals' ("IBLA") decision in *Santa Fe Pacific Railroad Co.*[75] In that case, the IBLA upheld BLM's decision not to acquire mineral reservations (subsurface interests) held by the railroad in lands selected pursuant to the Act. In reaching its decision, the IBLA noted that the purpose of the land acquisition was to assist the relocation process by providing a place for relocatees to live. Had the goal of the Act been simply to provide assets to the Navajo Nation, then providing the mineral interest would have been required. Because ONHIR had no need of the mineral interests to fulfill its statutory responsibility to provide land on which relocatees could live and graze livestock, however, such acquisition was not necessary.

Thus, it is clear that Congress did not intend that the New Lands be used by the Navajo Nation as a source of income. Rather, it is Congress' clear intent that the New Lands be used to help carry out

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defendant acted in good faith, and the Indians to whom the money really belonged had the benefit of it.").

[72] P.L. 96-305, Sec. 4(h) (July 8, 1980) ("The lands transferred or acquired pursuant to this section shall be administered by the Commission until relocation under the Commission's plan is complete and such lands shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands as of the date of this subsection who are awaiting relocation under this Act.").

[73] Pub. L. No. 99-190, 99 Stat.1224, 1236 (1985).

[74] *See* Pub. L. 100-666, Section 8 (November 16, 1988) "Subsection (h) of section 11 of Public Law 93-531 (25 U.S.C. 640d-l(h)) is amended by striking out 'the date of this subsection who are awaiting relocation under this Act' and inserting in lieu thereof 'the date of enactment of this Act: *Provided*, That the sole authority for final planning decisions regarding the development of lands acquired pursuant to this Act shall rest with the Commissioner until such time as the Commissioner has discharged his statutory responsibility under this Act'".).

[75] IBLA 85-584, 85-776

See comment 30.

relocation as authorized by the Act. Congress' intent is also clear that ONHIR, not the Navajo Nation, has been delegated the authority to administer these lands.

In its discussion of ONHIR's leasing practices, the Report consistently refers to or compares ONHIR's practices with those of BIA.[76] ONHIR is not part of BIA and never has been. The Act gave ONHIR the authority to administer the New Lands.[77] The real issue is whether ONHIR's administration—land management of the New Lands has been consistent with ONHIR's Trust Responsibilities. While the Report cites a number of unsubstantiated complaints, it cites to no complaints concerning ONHIR's management of the New Lands.

Furthermore, the Report's criticism that the Act "does not authorize ONHIR to receive lease revenues"[78] overlooks the fact that ONHIR is specifically required to engage in precisely these activities.[79] As an independent administrative agency, ONHIR has broad authority to determine the most appropriate method of carrying out its statutory duties.[80]

In fact, contrary to intimations in the Report, there is no independent statutory authority for ONHIR to provide lease revenues directly to the Navajo Nation.[81] Indeed, given the limited purposes for which revenues from the New Lands may be used, it would have been a breach of the statute for ONHIR to simply turn over New Lands revenues to the Navajo Nation.

As a result, and in contrast to its discretion to use the revenues to fulfill its statutory obligations, ONHIR would not be permitted to direct

[76] See, e.g., Report, pp. 36, n. 74; 37, n. 77, 79; 38, n. 80, 82; 39, n. 84; 40, n. 87; 41, n. 88.
[77] 25 U.S.C. § 640d-10(h).
[78] *Id.*
[79] *See, e.g.*, 25 U.S.C. § 640d-10(h) (giving ONHIR sole planning and decision making authority with regard to land development); 25 U.S.C. 640-25(b) ("Funds appropriated under the authority of this subsection (a) may be used by the Commissioner for grants, contracts, or expenditures which significantly assist the Commissioner or assist the Navajo Tribe or Hopi Tribe in meeting the burdens imposed by this subchapter.").
[80] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
[81] *See, e.g.*, Report at pp. 38-39.

lease revenues to the Navajo Nation.[82] Although the Act requires that certain funds be "available to the Navajo Tribe, with approval of the Secretary," this provision applies only to mineral revenues from lands in New Mexico which, by statute go to the Rehabilitation Trust Fund, which is administered by the Navajo Nation and which, by statute has a far broader class of beneficiaries.[83]

Moreover, ONHIR's use of lease revenues is consistent with its status as trustee over the lands. As referenced, title to the lands acquired under the Act was "taken in the name of the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation."[84] Arizona law provides guidance as to ONHIR's generally accepted authorities and responsibilities as trustee. As clearly recognized, ONHIR has specific powers and duties with regard to management of trust property.[85]

ONHIR's powers as trustee generally include "powers appropriate to achieve the proper investment, management and distribution of trust property."[86] More specifically with regard to comments in the Report, ONHIR has the power to "[d]eposit trust money in an account in a regulated financial service institution."[87] In addition, ONHIR has broad power as trustee to manage real property, including the power to "[e]nter into a lease for any purpose as lessor . . ."[88]

See comment 31.

ONHIR's actions with regard to leased property, as described in the Report match perfectly with ONHIR's duties and powers as Trustee. In particular, ONHIR has exercised its discretion to ensure the proper management and administration of the lands through overseeing lease revenues. Again, while the Report takes issue with ONHIR's deposit of lease revenues into its own account, the power to do so is specifically granted to ONHIR as trustee.[89]

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[82] *See Louisiana Public Svc. Com'n v. F.C.C.*, 476 U.S. 355, 374 (1986) (A federal "agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers such power upon it.").
[83] *See* 25 U.S.C. § 640d-30(h).
[84] 25 U.S.C. § 640d-10(a)(2).
[85] *See, e.g., In re Naarden Trust*, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999) (trustee's duties arise under state law).
[86] Ariz. Rev. Stat. § 14-10815(A)(2)(b).
[87] Ariz. Rev. Stat. § 14-10816(4).
[88] Ariz. Rev. Stat. § 14-10816(8)-(9).
[89] *See* Ariz. Rev. Stat. § 14-10816(4).

See comment 32.

See comment 33.

ONHIR also has the specific power to act as lessor over the lands, which it has done effectively. In addition, the Report does not reflect the realities as to the decision of whether ONHIR or the Navajo Nation will be the lessor for commercial leases. ONHIR has become lessor on some of the leases at the request of the Navajo Nation; while others have been jointly negotiated and approved by the Navajo Nation Department of Justice. Additionally, the Navajo Nation Department of Justice has recommended that the Navajo Nation President sign off on various agreements, which he has done. As a result, ONHIR has retained control as the lessor and uses lease revenues in appropriate support of congressionally mandated duties and consistent with its role as trustee.

The Report's complaints regarding ONHIR's preparation of leases and lease information for transition are premature. [90] Once it is determined who will assume ONHIR's role with the New Lands, and when, any needed lease amendments will be processed. In addition, ONHIR will prepare lease and surface agreement files for each lease in effect when responsibility for the New Lands passes from ONHIR to the successor entity. At this point, however, it is not clear when a successor entity will take responsibility for the New Lands.

E. Padres Mesa Demonstration Ranch Eases the Burden of Relocation.

The Senate Report that accompanied the Act included several guiding principles. Among these, the Act intended for there to be "a thorough and generous relocation program to minimize the adverse social, economic, and cultural impacts of relocation on affected tribal members." [91] In addition, Act's original Section 13 required that the relocation process "take into account the adverse social, economic, cultural, and other impacts of relocation on the persons involved in such relocation and be developed to avoid or minimize, to the extent possible, such impacts." [92]

A thorough analysis of ONHIR's New Lands grazing program must begin with an appreciation of the grazing issues on the HPL in the FJUA

[90] *See* Report, p. 39.
[91] S. Rep. No. 93-1177 at pp. 19-20 (1974).
[92] This section was repealed in 1988, by which time more than 4,000 members of the Navajo Nation had applied for relocation benefits.

from which the New Lands residents, including the grazing permittees, were relocated.[93]

These lands were so badly overgrazed that Congress enacted the following language in an effort to remedy this situation:

> Notwithstanding any provision of this Act, or any order of the District Court pursuant to section 3 or 4, the Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after the date of enactment of this Act. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.[94]

Even the Ninth Circuit Court of Appeals became involved by upholding district court orders mandating livestock reduction. In its decision, the Court of Appeals noted: "This is poor men against other poor men, fighting against a long historical backdrop for an over-grazed, harsh, and inhospitable area which yields little above a subsistence living."[95] Recognizing the severe overgrazing problem, the Court of Appeals upheld the District Court's finding

> that members of appellant Tribe have so extensively overgrazed the range that 80 per cent of the joint use area is producing only 0 per cent to 25 percent of its maximum forage, and that the range is still deteriorating. That

[93] The Report refers to Navajo Nation Human Rights Commission complaints concerning livestock grazing by relocatees. *See* Report at 28. Such complaints have no basis in fact or law. In reality, the only area where relocatees are permitted to have livestock is the ONHIR administered Range Units on the New Lands. ONHIR has never had any authority to take Navajo Reservation lands outside the New Lands and the Navajo Nation has never offered to provide Relocatees sufficient acreage to allow relocatees to have livestock at their relocation site.

[94] Pub. L. 93-531 (Dec. 22, 1974).
[95] *Hamilton v. MacDonald*, 503 F. 2d 1138, 1145 (9th Cir. 1974).

condition constitutes waste.[96]

Given this history, ONHIR had a clear responsibility to insure that New Lands grazing would not repeat the mistakes of the past which had resulted in environmental destruction. At the same time, ONHIR was tasked with insuring that relocation was as successful as possible. Thus, ONHIR set out to create and implement a grazing system which both preserved and enhanced the range resource and provided significant economic benefits to the relocatees with grazing permits on the New Lands.

Other areas of the Act further indicate Congress' intent that ONHIR take actions to permit some members of the Navajo Nation to raise livestock following relocation.[97] In fact, ONHIR's New Lands program, which has been regularly reviewed by Congress and by the Office of Management and Budget ("OMB"), provides for "Range Units," a grazing regime. In addition, ONHIR has developed and published regulations to implement this program.[98] Thus, it is clear that, as part of its relocation activities, ONHIR is authorized to provide for livestock grazing.

The grazing regulations also make clear that those relocatees who had grazing rights on the HPL receive priority in ONHIR's decision to award New Lands grazing permits. Specifically, those eligible for New Lands grazing permits include those who"[h]ave a current HPL grazing permit, or have had an HPL permit issued since 1980, or are current HPL residents and can show documentation of a past grazing permit issued in their name for grazing on an area now on the HPL..."[99] The regulations also make clear that New Lands grazing is intended to be carried out in a manner consistent with best practices and exists to insure the success of the Permittees' relocation.[100]

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[96] *Id.* at 1147.*Hamilton v. MacDonald,* 503 F. 2d 1138, 1145, 1147 (9th Cir. 1974) (The Navajo Nation was grazing 88,000 sheep units in the FJUA, the capacity of which the BIA determined was 22,000 sheep units).

[97] *See, e.g.,* 25 U.S.C. § 640d-13(a) (allowing relocation of entire households, "including livestock").

[98] *See* 25 C.F.R. § 700(Q).

[99] 25 C.F.R. § 700.709(a)(1)

[100] *See* 25 C.F.R. § 700.705 ("It is the purpose of the regulations in this part to aid the Navajo Indians in achievement of the following (a) The preservation of the forage, the land, and the

Because of its duties to ease the economic burden of relocation and to responsibly administer the lands, ONHIR must ensure that relocatees' grazing practices are economically successful while preserving grazing resources. Through trials with multiple programs, ONHIR determined that a "demonstration ranch" would be the most effective way of accomplishing these potentially competing mandates. [101] Therefore, beginning in fiscal year 2009, ONHIR's budget proposals to OMB and to Congress have clearly proposed funds for the Padres Mesa Demonstration Ranch ("PMDR"). [102] OMB's approval and Congress' funding of such proposals are clear indications that the ranch program has been duly approved and funded.

Perhaps more importantly, the ranch program is a success in support of ONHIR's mandate. The program has enhanced the lands, provided previously unrealized economic advantages to members of the Navajo Nation, and has been enthusiastically supported by the local Navajo government as well as the Navajo Nation itself. Moreover, the cost has been minimal and well within best practices related to procurements, and ONHIR is confident that an in-depth cost-benefit analysis would reveal that the benefits far exceed the costs. This is largely due to the economic success of the PMDR, which has become nearly self-sufficient. [103] For these reasons, it is clear that the PMDR not only satisfies ONHIR's statutory obligations, it has far exceeded even ONHIR's performance expectations.

F. PMDR and the Use of Lease Revenues Comply With Appropriations Law.

As noted, PMDR was and is critical to ONHIR's successful approach to range management education. ONHIR has used PMDR to demonstrate that best practices range management is both possible from

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water resources on the New Lands. (b) The resettlement of Navajo Indians physically residing on the HPL to the New Lands.").

[101] Successful New Lands range management required not only effective enforcement of grazing regulations and limiting grazing to range capacity, but ultimately ONHIR had to achieve buy-in from the permittees themselves. After decades of working with Navajo relocatees, ONHIR concluded that a "show me, don't tell me" approach was far more effective. And this required ONHIR to operate an actual working ranch in the same area as permittees were engaged in their own livestock operations. This led to the establishment of PMDR.

[102] *See, e.g.*, FY2010 OMB Budget Submission Exhibit A; FY 2010 Appropriation Summary Statement Exhibit B.

[103] *See* PMDR Costs Spreadsheet, Exhibit C.

a technical sense, and the route to economic success for permittees. Thus, like every rancher, PMDR uses revenues from cattle sales to offset PMDR operating expenses. This approach is a practical necessity and one of the keys to permittees' acceptance of the PMDR example.[104]

Under 31 U.S.C. § 1301(a), appropriated funds may be used only for authorized purposes. According to published GAO decisions,

> The general rule is that where an authorized appropriation is not specifically available for a particular item, its purchase may be authorized as a necessary expense if there is a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated, so long as the expenditure is not otherwise prohibited by law.[105]

As demonstrated above, OMB and Congress have both at least tacitly approved of ONHIR's specific use of lease revenues and other funds. Simply, ONHIR has disclosed the disbursements as a part of its budget and no issue has arisen concerning utilization of appropriations in support of a program that is within the clear statutory mandate. Thus, no further analysis is necessary.

Nonetheless, under GAO's analytic framework, the determination of "whether an appropriation is available for certain expenses recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses that are necessary or incident to the accomplishment of that purpose."[106] Agencies, such as ONHIR, are given broad discretion with regard to the scope of what is "necessary or incident to" the purpose of its appropriations.[107] As explained more fully above, there can be no doubt

[104] This has also been one of the principal reasons that the PMDR has proved so attractive to other relocatees living outside the New Lands.
[105] *Matter of: Commodity Futures Trading Com'n – Availability of Appropriations for Inspector Gen. Overhead Expenses*, B-327003 (Sept. 29, 2015).
[106] *Matter of: Commodity Futures Trading Com'n – Customer Prot. Fund*, B-324469 (Nov. 8, 2013).
[107] *See* B-245541, 71 Comp. Gen. 402 (May 21, 1992) ("The determination of whether a particular expense is necessary for an authorized purpose is, in the first instance, a matter of agency discretion. Accordingly when [GAO] consider[s] whether an expense is necessary, [it] determines only whether it falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.").

that using lease revenues to improve lands and provide grants, and operating PMDR to ease the social and economic burden of relocation are "necessary" and "incident to" the purpose of ONHIR's appropriations in allowing the agency to ensure the success of relocatees.

Furthermore, to the extent there is any doubt, as you are aware, GAO has developed a three-part test to evaluate "whether a specific expenditure is a necessary expense of an appropriation: (1) the expenditure must bear a logical relationship to the appropriation sought to be charged; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation."[108] There is no prohibition against ONHIR's use of the lease revenues and there is no prohibition against the operation of PMDR. In addition, neither of these programs is funded by a different appropriation source. Thus, the only analysis is in regard to the logical relationship between these programs and ONHIR's duties under the Act.

Both the operation of PMDR, and the identified uses of lease revenues bear more than a "logical relationship" to ONHIR's clear obligations to administer acquired lands[109] and to assist with improving the economic, educational, and social conditions of relocatees and their families.[110] The lease revenues and PMDR help people who have been relocated under the Act by empowering them to improve their social and economic conditions. It is irrelevant that some other agency or branch of government may have chosen different methods of accomplishing these goals.[111] ONHIR is given the discretion to make these determinations. This analysis under GAO's framework makes clear that PMDR and the lease revenues are appropriately used as incident to ONHIR's duties under the Act.

[108] B-324469.
[109] 25 U.S.C. § 640d-10(h).
[110] *See* 25 U.S.C. § 640d-30(d).
[111] *See Valley Const. Co. v. Hoffman*, 417 F. Supp. 926, 929 (S.D. Ga. 1976) ("Administrative agencies are not held to a standard of perfection that would render them unique among organs of government; it is enough if they have substantially performed their assigned tasks and have not abused the discretion confided to them.").

IV. The Transition Process—ONHIR Cannot Accomplish Transition Without Cooperation[112]

The Report is correct that the Act does not identify a successor entity to ONHIR, but it is wrong to criticize ONHIR and its transition-related actions for that omission.[113] ONHIR cannot remedy statutory omissions. ONHIR notes, however, and as it has advised BIA, that 25 U.S.C. § 640d-11(e)(1) provides:

> The Commissioner is authorized to provide for the administrative, fiscal, and housekeeping services of the Office of Navajo and Hopi Indian Relocation and is authorized to call upon any department or agency of the United States to assist him in implementing the relocation plan, except that the control over and responsibility for completing relocation shall remain in the Commissioner. In any case in which the Office calls upon any such department or agency for assistance under this section, such department or agency shall provide reasonable assistance so requested.

The House Interior Appropriations Subcommittee instructed ONHIR to work on transition and seek to identify statutory changes, if any, that might be needed. ONHIR has done this.

ONHIR has moved forward in developing and revising transition plans with the realization that ONHIR will close and that federal obligations will not end simply because ONHIR is no longer in existence. Such plans and actions involve a combination of completing ONHIR's work which is subject to being completed and making provisions for how ONHIR's ongoing activities will be continued. The fundamental principle of ONHIR's transition is, at some point in the near future, ONHIR will no longer exist and some federal agency or agencies will be required to carry out ongoing federal responsibilities and complete uncompleted federal tasks.

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[112] The Report notes that ONHIR had planned to complete its work in 2008, but has continued to operate. As you are aware, however, the 2008 Arizona Federal District Court decision in *Noller Herbert v. ONHIR*, CV06-03014-PCT-NVW, 2008 WL 1133889 (Feb. 27, 2008) caused ONHIR to reopen Applications and over 2,200 Applications were received from potentially eligible Applicants and had to be processed. Thus, the continued operation of ONHIR was caused by an action external to ONHIR—the Federal District Court decision.

[113] Report, p. 33.

Letter to William Shear and Anne-Marie Fennell, GAO
Re: GAO Draft Report 18-266: ONHIR Formal Response:
March 9, 2018

ONHIR notes the Report's assertion that ONHIR has not yet taken the necessary steps to facilitate its closure.[114] On the contrary, ONHIR has taken significant steps to facilitate and implement closure, but closure will require the cooperation of federal and tribal entities that ONHIR does not control. In many areas, what remains for ONHIR to do is at least partially dependent on other federal entities and on tribal entities.

While there has been a reduction in BIA oversight with respect to Navajo Lands, BIA remains the representative of the United States for its trust responsibilities with respect to Navajo Trust Lands (except for the Trust Lands administered by ONHIR), as it does throughout Indian Country in the United States. Thus, ONHIR's transition plans have suggested that the trust responsibilities exercised by ONHIR in the New Lands and other lands acquired pursuant to the Act should be assumed by BIA. While adding to the trust land base would create additional costs, virtually all of ONHIR's trust responsibilities for the New Lands are similar, if not identical to the responsibilities that BIA has with respect to other Navajo Trust Lands.

The ONHIR work to be completed includes any remaining eligibility and appeals work and any remaining work related to providing relocation homes (or the cash equivalent) for persons either administratively or judicially determined to be entitled to a Relocation Housing Benefit. ONHIR is working diligently to complete action on all administrative appeals. As of this writing, there are 25 administrative appeals in which ONHIR has yet to enter final agency action. There is also one adverse District Court decision on appeal and one APA appeal remanded to ONHIR for further proceedings.

As previously referenced, federal law gives persons wishing to challenge agency action six years from final agency action to file an Administrative Procedure Act complaint.[115] Thus, it is possible that if ONHIR were to close on September 30, 2018, about 170 APA actions could be filed after ONHIR's closure. While the "conduct of litigation" is handled by the United States Department of Justice,[116] some entity

[114] Report, "What GAO Found."
[115] 28 U.S.C. § 2401(a).
[116] 28 U.S.C. § 516.

within the United States Government would be expected to assume ONHIR's role as client in such litigation. The most likely entity is BIA.[117]

With respect to completing counseling and other work related to providing a relocation home for persons who are or become certified as eligible for relocation benefits, the only disagreement over what needs to be done is whether such persons ought to be provided a relocation home, or provided the cash equivalent of such a home. The Act requires a relocation home.[118] If Congress wanted to expedite the process, however, it could authorize a cash payment in lieu of the counseling and relocation home construction.

See comment 34.

If ONHIR closes before all needed relocation homes have been constructed and the two-year post-move counseling and (in many instances) two-year warranty period has not ended, then some other entity must assume these responsibilities. The GAO Draft Report erroneously criticizes ONHIR for not finding a federal agency willing to complete whatever homebuilding is needed after ONHIR closes.[119] That other federal agencies are not willing to take on additional responsibilities is not a reflection on ONHIR. In its Transition Plan, ONHIR has suggested BIA for this role because of its extensive interface with the Navajo Nation and Navajos or, alternatively, the Navajo Nation or some Navajo entity.[120] ONHIR would note that at this point no entity has proposed its own plan for how ONHIR's transition and closure should take place.

See comment 35.

The Report incorrectly states that ONHIR has not communicated with President Trump requesting a determination that ONHIR should cease to exist.[121] ONHIR has provided whatever information has been

[117] The Report notes that BIA administers the Housing Improvement Program. Report, p. 10. OMB and Interior have informed ONHIR that the Housing Improvement Program is not being funded in FY18 and the Administration has no intent to fund this Program in the future.
[118] 25 U.S.C. § 640d-14(d).
[119] Report, pp. 33-34.
[120] GAO states that ONHIR's Transition Plan would require other federal agencies to undertake programs and work for which they lack authority. *See* Report, "What GAO Found." If true, this is not something that ONHIR can fix. If the work must be done after ONHIR closes and there is currently no federal agency with authority to do this work, then the President should recommend and the Congress should authorize the appropriate federal agency to do this work.
[121] Report, "What GAO Found."

See comment 36.

See comment 37.

requested to the President through OMB. ONHIR has been working with OMB on closure scenarios and strategies for many years and OMB is part of the Executive Office of the President.

Relatedly, The Report is misleading in its criticism of ONHIR for not requesting a determination from the President on when ONHIR will close.[122] ONHIR has worked with the President's representatives in the OMB for years on ONHIR completing its work and closing. The Report also unfairly criticizes ONHIR's regular communications with the Executive and Legislative Branches of the government.[123] ONHIR regularly communicates with OMB—at least once a month and usually more frequently, and responds promptly to their requests. ONHIR provides monthly reports to the House and Senate Appropriations Interior Subcommittees and responds promptly to all their inquiries. ONHIR also meets and/or communicates with BIA at least once a month and responds promptly to all their requests.

The Report is similarly inaccurate in faulting ONHIR for not having "complete information" available to "successor agencies."[124] ONHIR has made sure its files are updated and complete. ONHIR has developed an extensive and publicly accessible "Transition" section of its website with detailed information about its activities.[125] Unless and until "successor agencies" are determined by the President and/or Congress, ONHIR cannot complete its efforts to gather information needed by such successor entities. Whatever potentials successor agencies have asked of ONHIR has been provided.

Finally, the Report's discussion of ONHIR's Eligibility and Appeals Branch transfer preparation is inaccurate.[126] ONHIR has prepared reports showing which administrative appeals will still be subject to an APA appeal as of the end of FY 2018. ONHIR is working diligently to complete all pending administrative appeals. As referenced above, all relevant casefiles are up to date, thus allowing a successor agency to assume control over any potential ongoing litigation. No other agency has come forward indicating a willingness to finish the ONHIR

[122] Report, p. 30.
[123] Report, p. 30.
[124] Report, p. 30.
[125] https://www.onhir.gov/transition/index.html (last visited March 5, 2018)
[126] Report, p. 31.

administrative appeal process. The process includes the potential for remands from the district court. However, no other agency has come forward indicating a willingness to provide "client functions" and assistance to the Department of Justice after ONHIR closes.

V. GAO RECOMMENDATIONS AND ONHIR'S RESPONSES

A. Matters for Congressional Consideration.

This section provides ONHIR's input with regard to the matters GAO has submitted for congressional consideration upon ONHIR's closing.[127]

Matter for Consideration 1: "Congress should consider providing necessary authority for other agencies to continue remaining activities when ONHIR closes."[128]

Response: ONHIR agrees. The Department of the Interior and BIA both claim they lack the authority and resources to complete those aspects of ONHIR's work which will probably not be completed by the time ONHIR closes. A clear Congressional direction would overcome this reluctance by DOI and BIA.

Matter for Consideration 2: "Congress should consider determining (1) whether the requirement for the land acquired pursuant to the Settlement Act as amended to be used solely for the benefit of relocatees should continue and (2) how grazing on the New Lands should be regulated."[129]

Response: ONHIR's experience is that the Navajo Nation, and to a lesser extent the Hopi Tribe, has different standards in regard to the treatment of relocatees. As such, the tribes have been reluctant to provide relocatees the same level of support and benefits they provide to other tribal members. Continuing the requirement that lands acquired pursuant to the Act would at least provide some minimal level of funding for the post-ONHIR needs of Navajo relocatees.

ONHIR's experience is that the ONHIR grazing regulations together with Range Unit Management Plans and PMDR have resulted

[127] *See* Report, pp. 47-48.
[128] Report, p. 47.
[129] *Id.*

in land management practices and range conditions in the New Lands far superior to what exists in the rest of the Navajo Nation. Continuing these practices and the PMDR is therefore in the best interests of the ranchers of the New Lands and the preservation of the range resource.

Matter for Consideration 3: "Congress should consider addressing the mandatory trust acquisition provision for the Navajo Nation in the Settlement Act as amended."[130]

Response: Authority for remaining land selections should be given to the Navajo Nation.

Matter for Consideration 4: "Congress should consider whether the requirement for the Navajo Nation to repay the U.S. Treasury for appropriations made to the Navajo Rehabilitation Trust Fund should continue."[131]

Response: Given that repayment was premised on the construction of a mine mouth coal-fired steam generating power plant that will never be built, waiver of repayment would be appropriate.

B. Recommendations for Executive Action

This section provides ONHIR's responses to the Report's recommendations to ONHIR.[132]

Recommendation 1: "The Executive Director of ONHIR should request a presidential determination as to whether ONHIR has fully discharged its responsibilities and whether it should close."[133]

Response: ONHIR has worked for decades with OMB—the Executive Office of the President—on completing our work. We will continue to do so and will continue to promptly and accurately respond to all requests from OMB.

Recommendation 2: "The Executive Director of ONHIR should prepare complete information on the remaining denied households who

[130] Report, p. 48.
[131] Report, p. 48.
[132] Report, p. 48.
[133] *Id.*

could still file for federal appeals. Such information could include paper case files and information in ONHIR's client database for those households."[134]

Response: As referenced, the casefiles have been identified and all needed information already exists in the casefiles and in the AS 400 database. Such information will be provided to whatever entity takes over the Eligibility and Appeals function from ONHIR or will be supporting the Department of Justice with respect to APA Appeals.

Recommendation 3: "The Executive Director of ONHIR should prepare complete information on warranties and contractors. Such preparation should include linking warranty complaints to the relevant contractor, completing missing warranty information, and completing information on contractors' past performance."[135]

Response: Up-to-date and complete information on warranty status appears in the existing casefiles. It will be provided to whatever entity takes over the warranty function from ONHIR.

Recommendation 4: "The Executive Director of ONHIR should establish a comprehensive inventory of (1) properties located on trust land it administers, (2) leases of those properties, and (3) surface use and other use agreements for trust land it administers."[136]

Response: All such documentation exists and is maintained and updated. It will be provided to whatever entity takes over the real property function of ONHIR.

Recommendation 5: "The Executive Director of ONHIR should identify which leases and other agreements need to be amended or assigned because (1) ONHIR is the lessor; (2) the lease or agreement provides for annual payments to be made to ONHIR; and/or (3) the lease or agreement terminates upon ONHIR's closure."

[134] *Id.*
[135] *Id.*
[136] *Id.*

Response: Once an entity is identified to handle real property functions, appropriate amendments or assignments will be prepared and executed.

VI. CONCLUSION / THE ROAD AHEAD

That ONHIR will close is not in doubt; nor is it in doubt that some entity or entities will need to assume responsibility for those activities of ONHIR that are either not concluded or are ongoing federal activities. ONHIR welcomes input from GAO, from other federal entities, and from stakeholders so that this transition is a smooth and efficient as possible. ONHIR is also aware that there are some questions that have been raised about a small number of relocation homes. While GAO has not provided guidance on the question of the source of problems with a relatively few Relocation Homes, ONHIR would welcome an independent study of this question by trained and competent professionals.

In a broader sense, such a study should also look at the question of how homeowner maintenance is handled in the Navajo Nation and, perhaps, the Hopi Reservation. Perhaps such a study could also look at the question of how fire and casualty insurance is and could be provided on the Navajo and Hopi Reservations.

With respect to counseling in a social services sense, a professional study directed at the identification of unmet needs should be welcomed by all, since unmet counseling needs affects the quality of life of those with such needs and also may threaten the lives or health or well-being of other persons whom those with unmet needs interact with.

ONHIR appreciates GAO's Report, and the opportunity to provide these comments. Please do not hesitate to contact me if there are any questions, or if additional information that would be helpful.

Very truly yours,

Christopher J. Bavasi
Executive Director, ONHIR

GAO Comments

1. We revised the report to state that ONHIR has no authority to require any person to leave the land that was awarded to the other tribe.
2. We disagree with the Office of Navajo and Hopi Indian Relocation's (ONHIR) characterization of our report and did not make a change based on this comment. Our report focuses on ONHIR's management of the home building process and the status of these activities. To appropriately address our audit objective on the home building process, we included the experiences of the population that was being served by ONHIR. While ONHIR states that the information included in our report is unsubstantiated, we do not assert that the views on home building from those we attributed—tribal government officials and relocatees—are accurate or draw conclusions about the reasons for the condition of the homes. Further, we presented ONHIR's counterargument to the concerns raised by the relocatees to provide context and balance, with additional details explained in footnotes. Throughout our report, we ensured a balanced presentation with an objective tone, consistent with generally accepted government auditing standards and our quality assurance framework. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Moreover, our description of Navajo Nation chapters was reviewed and verified by the Navajo Nation, therefore we believe it accurately states the views of Navajo Nation officials.
3. We revised the report to indicate the attorney fees reported were over a 35-year period.
4. We revised the report to state that, for the third application period, the requirement was for applicants to maintain legal residency until their contact with ONHIR.
5. We made revisions to the report to include ONHIR's efforts related to eligibility determination, such offering administrative appeals to Navajos for whom ONHIR could not show actual receipt of denial letters and using restricted delivery certified mail for almost 30 years.
6. We made revisions to the report to include ONHIR's perspective on the difficulties in determining residency because of the nature of Navajos' employment opportunities.
7. Our report does not evaluate the reasons that have affected the length of the appeal process because it is not pertinent to our

objectives. Therefore, we did not make a change to the report in response to this comment.

8. Although this is new information that was not presented to us during our review, it does not materially affect our findings, therefore we did not make a change in the report.
9. We clarified the report to state that ONHIR consulted with the Department of Justice in Washington, D.C, and the U.S. Attorney's Office in Arizona.
10. We clarified the report to indicate that, in response to the Herbert decision, ONHIR was required to provide notices to "potentially" eligible applicants.
11. Our report focuses on actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities. We did not make a change in the report in response to ONHIR's comment because ONHIR had not identified and compiled the case files during our review that would be necessary or easily accessible for a successor agency. While ONHIR states in its letter that case files have been identified and all needed information already exists in the case files and in its database, because these activities may have occurred subsequent to our review, we cannot confirm the accuracy of this comment. We maintain our concerns about ONHIR's database given its admission of data entry issues as stated in the comment letter.
12. We revised the headings of two report sections to emphasize the distinction between administrative appeals and appeals to the federal court.
13. We revised the report to include ONHIR's perspective on allowing oral evidence.
14. We revised the report to incorporate information ONHIR provided related to the communities to which relocatees have moved.
15. We clarified the report to state that relocatees with existing Navajo homesite leases can have their relocation home built on the homesite lease site if it meets feasibility requirements.
16. We revised the report to incorporate information ONHIR provided on relocatees who chose to relocate to remote areas.
17. Our report focuses on ONHIR's management of the home building process. We did not make a change to the report in response to ONHIR's comment because we already describe several procedures related to home building, including contractor licensing requirements

and feasibility studies. The report also acknowledges that houses have passed final inspection.

18. As described in comment 2, we disagree with ONHIR's characterization of our methodology. We did not make a change in the report because we maintain that including the experiences of the population served by ONHIR is appropriate for balance.

19. We disagree with ONHIR's characterization of our report and did not make a change to the report based on this comment. Throughout the body of the report, we have included ONHIR's policies, its implementation of activities, as well as the statements of officials related to relocatees' home-building concerns.

20. We have made revisions to clarify the figure title. The two photographed houses are on the Navajo reservation, shown to us during our site visit. Because one of the houses was shown to us by ONHIR officials, we believe the home was built by ONHIR. The other home was from a separate tour with Navajo Nation officials. The Navajo Nation officials indicated that the home was built by ONHIR.

21. As described in comment 2, we disagree with ONHIR's characterization of our methodology. We did not make a change in the report because we maintain that including the experiences of the population served by ONHIR is appropriate for balance.

22. As described in comment 2, we disagree with ONHIR's characterization of our methodology. Throughout the report, we specifically attribute all the views on home building to those we interviewed—tribal government officials and relocatees. We also do not draw conclusions about the reasons for the condition of the homes. We did not make a change in the report because we maintain that including the experiences of the population served by ONHIR is appropriate for balance.

23. We revised the report to include ONHIR's statement about the search capability of its electronic data system.

24. During our review, ONHIR officials did not identify contracting for post-move counseling services as an option that they have considered nor did we find any such reference in transition documents we reviewed. Therefore we have not made any changes to the report based on this comment.

25. We disagree with ONHIR's characterization of our report. We reviewed information provided by ONHIR from various sources, and accurately reported that ONHIR does not have a comprehensive inventory of leased and vacant properties or surface use and other

agreements for Navajo trust land it administers. Therefore, we made no changes in response to this comment.

26. We disagree with ONHIR's characterization of our report and did not make a change in the report based on this comment. ONHIR's management manual calls for written leases and land use approvals for the New Lands, whether or not the Navajo Nation requests these. It is not the responsibility of the trust beneficiary to request a written lease. The trustee has a duty to maintain clear, complete, and accurate books and records regarding trust property.

27. We disagree with ONHIR's statement that it will wait until a successor is identified to inform it of the leases. Moving forward with specific transition activities only after a successor entity is identified is a risky approach because it assumes that ONHIR staff will be available to work with staff from a successor entity to transfer their knowledge to the new staff. However, there is no guarantee that ONHIR will continue to be operating at that time or that its many retirement-eligible employees will be available to assist any successor entities during a transition period. ONHIR has proposed closing on September 30, 2018. As of March 2018, no successor entities have been designated or authorized to assume any ONHIR activities. As we recommended, clearly documenting what needs to happen as part of the transition will help ensure a smoother transition in the event that there is not a transition period between ONHIR and a new successor entity.

28. We revised the report to indicate that, according to ONHIR, Federal Aviation Administration has continued to pay rent to ONHIR while a new lease is negotiated.

29. We disagree with ONHIR's characterization of the report and did not make a change based on this comment. As we reported, the Settlement Act as amended does not specifically authorize ONHIR to collect, retain, and use revenues from leases of Navajo trust land it administers. The Settlement Act as amended also does not specify whether ONHIR, the Navajo Nation, or the relocatees should receive lease revenues. However, as we reported, under BIA's regulations for trust land it administers, revenue from leases is to be either paid directly to the tribe whose trust land is being leased or to BIA, which deposits the revenue in the tribe's trust account that generally earns interest. BIA officials told us leases of trust land that provide for BIA to retain lease revenue would not be consistent with the agency's trust responsibility.

30. We recognize that ONHIR is not, and has never been, part of BIA. As we note in the report, the comparison to BIA is instructive because BIA administers the vast majority of Indian trust land. In addition, ONHIR in its comments and draft transition plan identify BIA as a possible successor entity for some activities.

31. As described in comment 29, we disagree with ONHIR's characterization of its duties and powers as a trustee and did not make a change to the report. The Settlement Act as amended does not specifically authorize ONHIR to collect, retain, and use revenues from leases of Navajo trust land it administers. Moreover, BIA officials told us leases of trust land that provide for BIA to retain lease revenue would not be consistent with the agency's trust responsibility.

32. We disagree with ONHIR's characterization of the realities of leasing Navajo trust land and did not make a change to the report. ONHIR did not provide documentation of requests from the Navajo Nation for ONHIR to serve as the lessor on some commercial leases. When ONHIR served as the lessor, ONHIR provided the Navajo Nation with some leases for "technical review" or for "review and comment". However, only one of the leases we reviewed includes the Navajo Nation President's signature when the tribe, or a tribal entity, is not the lessee. Moreover, as we reported, the Navajo Nation Department of Justice repeatedly informed ONHIR that it lacked the authority to lease Navajo trust land.

33. As described in comment 27, we disagree with ONHIR's planned approach to wait until a successor is identified and did not make a change in the report. Moving forward with specific transition activities only after a successor entity is identified is a risky approach because it assumes that ONHIR staff will be available to work with staff from a successor entity to transfer their knowledge to the new staff. However, there is no guarantee that ONHIR will continue operating or that its many retirement-eligible employees will be available to assist any successor entities during a transition period.

34. We clarified the report to note that another entity is needed to assume remaining home building activities.

35. We clarified the report to include ONHIR's statement that it has had regular communications with executive and legislative branch offices on completing its work and closing.

36. We disagree with ONHIR's comments that the report is misleading related to a presidential determination. Although we included ONHIR's statement on its communications about closure in the report, we maintain that without a presidential determination, ONHIR has not met

the explicit requirements for being permitted to cease operations under the Settlement Act.

37. As described in comment 11, during the course of our review, ONHIR did not have complete information readily available for use by a successor agency. We cannot assure that any efforts ONHIR has taken subsequently to compile this information as stated in its comment letter are accurate. We continue to believe that ONHIR should proactively compile necessary information rather than waiting for a successor to request it. Moreover, we maintain our concerns about ONHIR's database given its admission of data entry issues in its comment letter. Therefore, we did not make a change in the report based on this comment.

Appendix III: Comments from the Navajo Nation

THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

March 15, 2018

Government Accountability Office
441 G St., NW
Washington, DC 20548

Re: Navajo Nation Response to Draft GAO Report: "Office of Navajo and Hopi Indian Relocation: Executive Branch and Legislative Action Needed for Closure and Transfer of Activities"

Article 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it.

Treaty with the Navaho, 1868
Currently on Public Display at the
National Museum of the American Indian,
Smithsonian Institution, Washington, DC[1]

I. INTRODUCTION

1868 Treaty. In 1868, by treaty signed at Fort Sumner, New Mexico, where the Navajo people had been imprisoned for a period of 4 years, the United States government pledged its honor to keep the peace with the Navajo and allowed the Navajo people to return to their homeland within the bounds of their four sacred mountains.[2]

The United States acts dishonorably. Despite the pledge of its honor to keep the peace, in 1974, by Act of Congress,[3] the United States ordered the removal of some 16,000 Navajos off of land that they had lived on for generations and that had been set aside by presidential executive order for these Navajos (as well as for the Hopis, though only about 100 Hopi were ordered removed). If this action had been taken against a foreign nation, it would have been clearly

[1] See https://www.smithsonianmag.com/smithsonian-institution/old-paper-navajo-nation-treaty-1868-lives-american-indian-museum-180968235/

[2] William Tecumseh Sherman negotiated the treaty, which recognizes the importance to the Navajo people of their ancestral homelands, with such legendary Navajo leaders as Barboncito and Manuelito.

[3] Navajo Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974). The Act was formerly codified at 25 U.S.C. 640d. The Act is referred to throughout this document as the "Relocation Act."

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order for these Navajos (as well as for the Hopis, though only about 100 Hopi were ordered removed). If this action had been taken against a foreign nation, it would have been clearly recognized as a treaty violation and, ultimately, an act of war. But the Navajo Nation did not go to war with the United States, having learned through a long and bitter history that it is not possible to use force against the United States to assure justice and liberty for the Navajo people. Instead, for decades, the Navajo Nation urged the repeal of this unjust and extremely harmful law, but to no effect as the United States implemented its relocation provisions while failing to keep its promise of a humane relocation. There are still actions the United States can take to mitigate in some measure the harmful consequences of the relocation law. One important action would be to issue an apology for this massively ill-conceived and destructive policy. Another would be to fulfill the promises the United States made when it mandated relocation.

So-called "benefits" were a mere sop to Navajo families whose lives and lifeways were about to be destroyed. The United States promised a "generous and humane" relocation process, with great benefits for the relocatees, including the provision of a home as well as infrastructure and economic development. These promises were unpersuasive to the affected Navajo families, who strongly opposed this mandatory relocation, despite the supposed "generosity" of the United States. This resistance was rooted in an overwhelming belief that what would be lost would far exceed what would be gained; and for the Navajo relocatees this fear has proved all too well founded. The promised benefits, despite their economic worth in the non-Indian world, were no more significant to the relocatees than the various token "gifts" that have been offered to Native peoples going all the way back to Christopher Columbus, even as their land was taken. But what they lost was virtually everything they valued in life, and many of the promised benefits that might have mitigated some of these harms were never delivered.

Many of those Navajos were among the most traditional Indians left in the United States, speaking only Navajo, living a traditional subsistence lifestyle in harmony with the land and their beliefs. They were descended from Navajos who had resided in the same location from long before the establishment of the 1882 reservation. The requirement that these Navajo families relocate is totally without precedent since the World War II internment of Japanese-Americans. In contrast, where Indian tribes have successfully sued to recover land from non-Indians, the tribes have only received a cash payment; relocation of the non-Indians was never considered an option.

Navajo relocatees, meanwhile, have become separated from the land and lifeway that mandated they follow traditional practices and live in traditional homes. However, as relocatees, they were also displaced from their ability to earn a living because they lost their grazing and farmlands and were given up to one-acre sites instead. Thus, relocation resulted in forced poverty, both spiritually and economically.

The law, despite its draconian relocation provision, was supposed to be administered in a "generous and humane" manner, with families receiving cash benefits and a new relocation home. In reality, as discussed further below, the relocation and housing program—inhumane in its very conception—has also been bedeviled by bureaucratic ineptitude with great hardships imposed on those families who, under great Federal government pressure, relocated.

Regrettably, the draft GAO report elevates economic values over social, spiritual, and cultural harms to the Navajo people.[4] Over the years, representatives of the United States have characterized the relocation as providing an extraordinary, once-in-a-lifetime opportunity for Navajo families to have a modern home and to participate in the modern economy. This overwhelming emphasis on material gain is always used to devalue Navajo cultural and spiritual views. Indeed, the promise of material gain for Native peoples has long been used as the conscience-salving justification for dislodging Native peoples from their lands, even though time and again it is the non-Indians who realize all the gain.[5]

The GAO report emphasizes the Anglo-American bias that having a modern home is a significant improvement over living in a way mandated by one's gods. The draft report discusses past findings on other reservations about the difficulties in constructing homes, leaving the reader with the assumption that the same conditions are true in the Navajo Nation. That is an oversimplification that leads to misconceptions and prejudice.

On page 21 of the draft report, the GAO juxtaposes two photos: one is of a home constructed of mud built into the side of a small hill that the GAO characterizes as a "[t]raditional Navajo home prior to relocation"; the other is of a "[r]elocation home constructed in 2017." From a Navajo perspective, that structure may hold great significance. However, the juxtaposition to non-Indian eyes is strongly suggestive of diet program "before" and "after" pictures, illustrating the extraordinary benefits that result from following the program. The message is not lost: GAO is using these photos to illustrate to a Washington, D.C. audience that the Navajo relocatees have had an incredibly positive outcome from participating in the relocation program, going from modest dwellings a little bigger than a garden shed, to a crisp looking modern home, with striking eaves and an ADA-compliant ramp to the front door.

But this supposedly wondrous outcome is belied by the tremendous opposition that the Navajo Nation and the Navajo people have mounted in an effort to prevent just this result! Indeed, the structure in GAO's photo of a "traditional" home belonged to Leo Yellowhair. This photo is not representative of most relocatees' homes and appears chosen to create a biased impression in the

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[4] The Navajo Nation appreciates that GAO staff travelled to the Navajo Nation and have spent many hours seeking to understand the complexities of the mass relocation of Navajos. The Navajo Nation also appreciates that the GAO is bound to some degree by the questions put to it by Congress (although, as described below, the Navajo Nation believes that there was room in those questions to address the deeper concerns of the Navajo people and the ongoing harmful effects of relocation). With all that said, it is a serious matter to the Navajo Nation that its spiritual and cultural values tend to have no bearing on Federal actions and assessments, and are not reflected in GAO's recommendations.

[5] These attitudes persist:

> I don't feel we did wrong in taking this great country away from them, if that's what you're asking. Our so-called stealing of this country from them was just a matter of survival. There were great numbers of people who needed new land, and the Indians were selfishly trying to keep it for themselves.

John Wayne (Academy Award winning actor), May 1971.

reader. Like a number of other Navajo heads of household living on the Hopi Partitioned Land, Mr. Yellowhair was eligible for relocation benefits, *but rejected them*, instead signing the Accommodation Agreement, which allowed him to remain on his ancestral and familial lands for up to 75 years. (This 75-year limitation sets up the potential for another relocation in a few decades of the children and grandchildren of today's Accommodation Agreement signers.)

For someone steeped in Western economic and cultural values, the juxtaposed photos make an apparently irrefutable argument that relocation has been a great success and that Mr. Yellowhair (and all the others who resisted) were crazy not to accept this "deal." And yet, Mr. Yellowhair did not accept this "deal" and he was not crazy. Something else is going on here, which the Navajo Nation insists be recognized and articulated in the GAO report.

The Navajo families who lived in traditional homes did so as part of an integrated spiritual and religious lifeway and as part of self-sustaining communities. Most lived in hogans, which are a necessary structure for many Navajo traditional ceremonies and practices. The design and construction of the traditional hogan is an element of Navajo spiritual teachings, many of which relate strongly to residing in a particular geographic place. For Navajo relocatees, physically relocating from their ancestral lands results in a loss of this traditional lifeway.

When the traditional lifeway is lost, the relocatees must replace it with a viable alternative. The generous and humane relocation plan mandated by Congress would not have solved the issues of loss of the Navajo traditional culture and spiritual link to their ancestral land, but it would have given relocatees a way to keep their families together and provide for their children and elders. Because the program has not been delivered, the relocatees' cultural, spiritual, family, and economic lives have been, in many cases, destroyed. Some host communities have over 90% of school-age children homeless.

The GAO report suffers from the same flaw as all prior US efforts—an embrace of the economic value of the relocation law to the Navajo people, as weighed against the terrible social, spiritual, and cultural costs. Because the GAO report misses the truth of what has happened, many of its recommendations, discussed in greater detail below, are mechanistic in character, rather than humane, and will not lead to a just outcome.

II. THE RELOCATION PROGRAM

> It is like being buried alive.
>
> – 64-year-old woman relocatee.[6]

Devastating effects of relocation. The effort to relocate over 16,000 Navajos off of their ancestral lands has resulted in enormous hardship and heartache for a proud people. Many of the so-called "relocatees" have been traumatized by the attempt to adjust to a cash economy from their subsistence lifestyles. Few had marketable skills, employment history, training, education, or any other means to pay such common expenses in a Western economy as taxes and utility bills. A 1979

[6] Orit Tamir, Relocation of Navajo from Hopi Partitioned Land in Pinon, 50 Human Organization 173, 175 (1991).

survey of relocated Navajos revealed that 25% of them were doing poorly, either having lost their homes to loan sharks or otherwise struggling with severe family instability, health problems, suicide attempts, and depression. A 1982 Relocation Commission survey found that at least one-third of the relocatees no longer owned their relocation homes. A follow-up survey in 1983 found that one-half of Navajos relocated to border towns had either lost their homes or accumulated significant debts due to their unfamiliarity with a cash economy and the unscrupulous actions of lenders. By March, 1984, almost 40% of the relocatees who were put in off-reservation communities no longer owned their relocation homes (these Navajos refer to themselves as the "homeless Navajos," a reflection of their predicament of having no off-reservation home and nowhere on the Navajo Nation to return to); evidence of fraud was so great that an FBI investigation was begun. Over time these types of issues were addressed to varying degrees, but never the underlying harm caused by the relocation itself.

In 1982, a prominent social scientist predicted that continued relocation of the Navajos would result in: (1) the undermining of the relocatees' faith in themselves, (2) the dependency of the relocatees on the Federal relocation agency, (3) the breakup of families due to the increased stress and alienation caused by the relocation, (4) increased depression, violence, illness, and substance abuse, and (5) stress on the other Navajo communities which volunteered to make room for the relocatees.[7] Every expert who testified on the probable effects of the relocation before the law was passed predicted similar dire consequences. Tragically, the intervening years have shown that all of these predictions have come to pass. There has even been a significant rise in death rates among the relocatees after they relocated.

Relocation for these Navajo families was not just a matter of changing address. It was an end to their way of life. Truly, they felt "buried alive." For those who remained on the land, resisting the relocation program, a Federally imposed construction freeze, along with a freeze on almost all Federal assistance, created nothing short of government-enforced squalor. Reduction of livestock by the Bureau of Indian Affairs (BIA), authorized to the "carrying capacity" level of the land, actually cut much deeper and has led to accusations that the BIA was trying to "starve out" the Navajo families. For Navajo families now living on the Hopi-Partitioned Lands (often referred to as the "HPL") under Accommodation Agreements, life is extremely difficult. For instance, the heavy-handed impoundment of livestock by the Hopi and the BIA remains a critical issue.[8]

Even greater hardship has been inflicted upon the Navajo "refugees"—Navajo families who left the Hopi land under Federal pressure and in accordance with the law—who have yet to be provided relocation housing and other Federal benefits. Increased Federal funding in recent years has cut into this backlog, but there remain more than a score of certified applicants without homes, and over 200 denied applicants who have not yet exhausted their appeal rights. ONHIR's mishandling of defect and repair claims, and its failure to maintain records, leaves an unknown number of incomplete and

[7] Thayer Scudder, No Place To Go, (Philadelphia: Institute for the Study of Human Issues), p. 10.

[8] Unlike the Uniform Relocation Act (42 U.S.C. §§ 4601-55 (1970), the Navajo-Hopi Relocation Act does not provide support for the relocation of businesses and the impact on farm operations. And, yet, the Navajo relocation heavily impacted what were effectively the businesses of these families, which allowed for their self-sustaining lifestyle. This business-impact on these families has never been properly addressed.

defective housing units, many of which are uninhabitable. Over the years, a significant number of the refugees awaiting housing were living in substandard conditions that often did not even meet the minimum Federal requirements for temporary housing for migratory farm workers. Some were living under conditions that posed an extreme risk to personal health and safety. Many had to move in with extended family members on other parts of the Navajo reservation and, as a result, are living in severely overcrowded homes. During a Congressional oversight hearing on the implementation of the relocation law, the Relocation Commission (now called the Office of Navajo and Hopi Indian Relocation) testified regarding the plight of the Navajo refugees:

> We think, frankly, that it's been a travesty that we have not been able to provide benefits to those relocatees that complied in good faith with the order of the courts and the instruction of Congress to leave the area of controversy.[9]

The tragedy of the relocation policy is all the more poignant because it is not the first time the Navajos have been relocated on a massive scale by the Federal government. In 1863, the United States Government dispatched Kit Carson to subdue the Navajos. To force the Navajos out of hiding, Carson engaged in a systematic "scorched earth" policy, killing or setting fire to Navajo livestock, orchards, fields, and homes. Over 8,500 Navajos were captured and marched 300 miles to their "new home" at Fort Sumner, New Mexico. Hundreds died on the march, and thousands died in captivity at Fort Sumner, where living conditions were abominable. The Navajos who escaped capture hid out in remote portions of their land including the Grand Canyon and the top of Black Mesa, in the heart of the disputed area. Finally, in 1868 the Army, realizing that its effort to transplant the Navajos was a failure, let them return to their homeland in Northern Arizona and Northwest New Mexico. Navajo families still pass down tales of horror and courage from that experience—now supplemented by stories of the ongoing relocation.

Generational impact of relocation. The impact of the relocation reaches down to the third and fourth generations of relocated families, because they have no place to return to and no benefits from the relocation. Many if not most have lost their language and much of their cultural foundation. Many live in Navajo host communities, especially on the Navajo Partitioned Lands (often referred to as the "NPL"), in which people made room for their grandfather or grandmother, but they did not contemplate and have received no support for addressing the growing impact of children and grandchildren. This impact on limited chapter resources, such as land, creates tremendous cultural and societal stress. These later generations have suffered great harm from the relocation.

Another generational injustice to relocatees who are fighting for their relocation benefits is found in ONHIR's regulations. 25 C.F.R. § 700.145 provides that ONHIR will not pay relocation benefits to the estate of deceased applicants if the applicant died before signing a relocation contract. This includes all denied applicants who have contested their denial and lodged appeals—as they are not able to sign a relocation contract before being certified. As the GAO report shows, the average time frame for a certified application with administrative appeals is

[9] Testimony of Relocation Commission before the House Committee on Interior and Insular Affairs, July 19, 1986.

3,301 days—over nine years, with the maximum being 12,022 days—taking nearly 33 years to complete the process. As a result of this unacceptable delay, the Navajo Hopi Legal Services Program has represented at least three applicants who have passed away either after their administrative appeals or with pending federal appeals. Even if these individuals obtain a favorable ruling reversing ONHIR's denial determinations, ONHIR's regulations still bar the applicants' families from being able to receive the relocation benefits that they have waited for. Essentially, as the direct result of ONHIR's incredible delays with its administrative appeals process, successful applicants who have died during the appeals process will still not be able to collect the promise made to them when they were forced from their traditional lands and way of life.

III. ASSESSMENT OF GAO REPORT

Issues addressed by the GAO. In its report, the GAO examined the following:

(1) ONHIR's management of the eligibility and appeals processes and the status of these activities;

(2) ONHIR's management of the home-building process and the status of these activities;

(3) Executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities;

(4) ONHIR's management of Navajo trust lands and related transition activities; and

(5) Legislative actions that may be necessary to address other Relocation Act provisions.

On the mechanistic issues, GAO was fairly accurate, but on the issues that mattered most, GAO failed to express the essence of what has transpired on the land and what is needed for the United States to live up to its obligations.

(1) ONHIR's management of the eligibility and appeals processes and the status of these activities. GAO accurately details the long history of neglectful implementation of the eligibility and appeals process, requiring the application period to be reopened three times. Although derivable from GAO's chart summarizing the number of applications submitted and the number approved, GAO did not note that in the fourth and final application period denial rates shot to 94%. The Navajo Nation believes that this is because ONHIR's administrative judge has changed his evidentiary standards so he can quickly deny most cases. Notably, there are a number of examples of applicants being denied who had essentially identical facts as applicants who were certified eligible for benefits. In recent months, the Federal district court has overturned two of his decisions.[10] Some relocatees have waited over thirty years to have their benefits adjudicated and delivered. The average is over eleven years.

[10] The two cases are *Rosita Charles v. ONHIR,* 16-CV-08188-SPL (September 5, 2017) and *Jason Begay v. ONHIR*, 16-CV-08221-DGC (September 28, 2017). In the *Jason Begay* case, the Hearings Officer was

(2) *ONHIR's management of the home-building process and the status of these activities.* The GAO has summarized ONHIR's history of mismanagement of the home-building process and identified numerous incidents where poorly supervised contractors have done shoddy work. The GAO failed to note that the two-year warranty on these poorly built homes is dramatically less than that required for other federally funded housing. Notably, HUD through the FHA loan program requires that a 10-year warranty be in place to allow for maximum financing. This is the only contract related to construction to which ONHIR is a party. This provision seems designed to limit unconscionable the U. S. Government's potential future costs. Such a limitation isa breach of the federal trust responsibility. ONHIR has not explained why it adopted such a short warranty period for federally financed housing, but this has been a major issue as many of the houses suffered from a range of deficiencies that only became evident after the two-year period had passed. At Coalmine Chapter, not only were more than 20 houses found deficient, the chapter house itself is structurally defective.[11]

Moreover, ONHIR has acted outside the standards set by Arizona state law. In 1989, Arizona adopted the Statute of Repose for construction defects. A.R.S. §12-552. The 1989 statute allows eight years for homeowners to bring claims for defects in engineering, design, workmanship, materials, etc. Prior to that, the Arizona Supreme Court held that a much longer period of time was appropriate for such issues, in part because of the difficulty of discovery of defects. The GAO Report did note that ONHIR has failed in its mandatory obligation, to maintain adequate records of warranty claims, contractor performance, and the status of repairs. Contractors who failed to perform or who had excessive warranty claims that were their fault were not removed but instead continued to be recommended by ONHIR. One of the many tragic ironies of the Federal relocation process is that without jobs at the relocation sites, many relocatees, despite having construction and other relevant skills, have to find a way to maintain their homes without the financial resources available to other homeowners. From the perspective of the relocatees, ONHIR has set them up to fail and then sought to shift the burden of relocation failures onto their backs. Meanwhile, ONHIR has had exorbitant costs associated with the management and appeals process. Indeed, for many years, ONHIR was building houses at an average cost of $500,000 (and the land was free) when you

overturned by a Federal District Court judge for being arbitrary and capricious. The Hearings Officer refused to accept the sworn testimony of an applicant as to the man's annual income because the Navajo testified that he had been paid in cash for landscaping work. The Hearings Officer determined that the employer was of the Mormon religion, and concluded that a Mormon would be honest and would not pay a Navajo under-the-table. Even though the employer was not present in the hearing and there was no actual evidence contrary to the Navajo man's testimony, the Navajo claimant's testimony as to his total gross income was disregarded and benefits were not allowed. ONHIR has hired a private investigator to try to create proof of what the Mormon employer's practices were thirty years ago, rather than accept the Navajo person's sworn testimony. ONHIR ultimately settled the case on remand but without conceding Mr. Begay is eligible for relocation benefits.

[11] Chapters are the local form of government on the Navajo Nation, and chapter houses play a critical role in community governance and are often a focal point of the community.

divide ONHIR's budget by the number of houses ONHIR actually built. A major part of the problem has been lack of oversight. ONHIR has not had a commissioner since 1994. Instead, ONHIR has operated under the leadership of its Executive Director with no oversight.

(3) *Executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities.* It is completely inappropriate for GAO to address this question beyond noting that the relocation process is not yet completed, that a number of families are still in the process or have appeal rights, and that there are serious questions regarding whether the United States has fulfilled its obligations (see discussion below regarding infrastructure).

(4) *ONHIR's management of Navajo trust lands and related transition activities.* The GAO report was very illuminating to the Navajo Nation regarding ONHIR's shoddy practices with regard to the management of Navajo trust lands. The Navajo Nation does note, however that ONHIR has one shining success, which is the Padres Mesa Ranch and related livestock operation. The Navajo Nation is very satisfied with the development of the Padres Mesa Ranch and strongly supports its continued funding and operation.

(6) *Legislative actions that may be necessary to address other Relocation Act provisions.* The GAO report is seriously deficient by failing to recommend several congressional actions that are essential to "generous and humane" implementation of the relocation law. For examples, see discussion below.

IV. ONHIR'S INFRASTRUCTURE OBLIGATIONS

Infrastructure Promises. ONHIR's statutory responsibilities extend beyond mere construction of replacement housing, to include the basic infrastructure required to make relocatee communities livable. Today, however, many relocatees are fifty miles or more from medical services, commercial goods, and community services. New Relocatee communities were built in areas absent water, power, telecommunications, wastewater, road, or community infrastructure. For instance, there are approximately 78 miles of dirt-track byways in the Hardrock area alone, which leaves residents stranded in their homes during inclement weather and makes them unable to get to schools, grocery stores, pharmacies, or medical care. Additionally, 414 Relocatee homes are known now to need electricity and 75% of homes on Navajo Partitioned Land lack any kind of wastewater service compared with 48% for the rest of the Navajo Nation and 1% of all housing units in the United States.

Additionally, when relocatees were placed in so-called "host communities," the infrastructure of these communities were overburdened. Part of the Navajo tradition includes simple agrarian lifestyles, rich in culture, pride, spiritual practices, and family. This lifestyle has been pursued for millenia on lands of sparse water and vegetation—high desert. The Navajo people learned how to do this successfully without overburdening grazing or other resources, but relocatees were taken off of established grazing lands and incorporated into the host communities. The existing infrastructure in the host communities was adequate for the residents, but not when the

population was doubled by the insertion of relocatee families. Roads, water, waste treatment, schools, power, and telecommunications in these communities are now urgently needed.

Congress clearly intended that ONHIR provide housing "and related community facilities and services, such as water, sewer, roads, schools, and health facilities" in order that the relocation be undertaken in a "thorough and generous" manner. The provision of adequate infrastructure to make relocatee communities livable is an essential part of ONHIR's statutory obligations and cannot be treated as if it is a duty that is either nonexistent or peripheral to the construction of replacement homes. Any assessment of ONHIR's progress in completing its mandate must include an assessment of the infrastructure needs of relocatees to ensure that these needs are met prior to ONHIR's closure.[12]

GAO Misunderstands Congressional Report Requirement. In the draft report, GAO notes that some community members state that the promised infrastructure has not been provided. GAO correctly states that "provisions in the Settlement Act directed ONHIR to create a report with a plan to ensure that infrastructure such as water, sewers and roads would be available at their relocation sites. ONHIR published a report to meet the provision in 1981." GAO makes it sound like the requirement was not to complete infrastructure, but to do a report on planned infrastructure. Once the requirement to do that report was met, and the reporting requirement fulfilled, GAO concluded that "[t]he Settlement Act as amended does not require ONHIR to provide infrastructure for the New Lands."[13]

GAO completely failed to note that the 1981 report *did not* provide a plan for infrastructure development as mandated by Congress. Instead, it said that infrastructure plans would be developed as needed. This evasion of responsibility set the stage for greatly reducing the cost of relocation by downplaying the infrastructure commitment.

During deliberations on the Relocation Act, the Senate Committee on Interior and Insular Affairs set forth guiding principles for the relocation program. Of particular importance were principles 9 and 11:

> 9. That any such division of the lands of the joint use area ***must be undertaken in conjunction with a thorough and generous relocation program to minimize the adverse social, economic, and cultural impacts of relocation on affected tribal members*** and to avoid any repetition of the unfortunate results of a number of early, official Indian relocation efforts;
>
> ...

[12] The magnitude of ONHIR's remaining infrastructure obligations has not been examined by any federal agency.

[13] Draft Government Accountability Office, Draft Report GAO-18-266 at pp. 29–29 (March 2018).

> 11. That because of the Federal Government's repeated failure to resolve the land disputes, ***the major costs of resolution should be properly borne by the United States.***[14]

With these principles in mind, when Congress enacted Pub. L. 93-531 it ordered the original Navajo Hopi Indian Relocation Commission to prepare and submit to Congress a report and plan. Congress ordered that the detailed plan should:

> (2) take into account the adverse social, economic, cultural, and other impact of relocation on persons involved in such relocation and be developed to avoid or minimize, to the extent possible, such impacts;
>
> ...
>
> (4) assure that housing ***and related community facilities and services***, such as water, sewers, roads, schools, and health facilities, for such household shall be available at their relocation sites; and
>
> (5) take effect thirty days after the date of submission to Congress....[15]

The original Navajo Hopi Indian Relocation Commission acknowledged its obligations in its 1981 Report and Plan:

> Congress was greatly concerned that relocation of Indian families be to areas where community facilities and services exist or will exist. The Commission's plan for relocation shall:
>
> > *'assure that housing and related community facilities and services, such as water, sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites....'*[16]

The Commission stated, at the time of the Report and Plan, that lands had yet to be selected and it was too early to begin "finite planning."[17] Nevertheless the Commission stated that "[t]he magnitude of responsibility embodied in this particular section of the Act bears heavily upon the Commission. Assuring the actual physical amenities necessary in community type resettlements

[14] *See* Senate Committee on Interior and Insular Affairs, Rep. on the Resolution of Navajo-Hopi Land Dispute, S. Rep. No. 93-1177, at 19–20 (1974) (emphasis added).

[15] Pub. L. 93-531 § 13(c)(2), (4–5) (emphasis added).

[16] *See* Navajo and Hopi Indian Relocation Commission, Report and Plan pp. 4, 185, 237 (1981) (emphasis in original).

[17] *Id.* at p. 185 ("After acquisition of a particular area is accomplished, the finite planning required for development activities will be prepared.")

will not be a small undertaking."[18] The Commission recognized that Congress included in the "legislation provisions for the Navajo Tribe to acquire 400,000 acres of new lands for the benefit of Navajo families subject to relocation[]" and "[r]elocation to these new lands will necessitate the assurance of schools, roads, power, and other facilities."[19]

In the 1981 Report and Plan the Commission recognized that they were authorized "to call upon any department or agency of the United States to assist the Commission in implementing its relocation plan and completing relocation."[20] Additionally, the Relocation Commission was aware that Congress mandated that "[i]n any case in which the Commission calls upon any such department or agency for assistance ... such department or agency shall provide reasonable assistance so requested."[21] The Commission committed to act as the federal coordinator and submit plans to Congress in September of 1982.[22]

In the Commission's 1983 Report and Plan Update (not even referenced by the GAO), the agency stated that it was still unable to make plans because of the non-availability of land selections. But, in each of its contingencies it stated its plan to "[i]nitiate coordination effort to establish joint governmental agency involvement for future relocation to deal with such areas as employment, roads, utilities, and like areas of need."[23] Despite the mandate from Congress and planning to "assure that housing and related community facilities and services, such as water, sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites," these commitments never came to fruition, and they only saw partial fruition in the New Lands Chapter.

ONHIR rarely budgeted or undertook infrastructure projects, though the agency did use some of its discretionary funds for the kinds of site development infrastructure necessary for housing projects that might be thought of as subdivision-style work, and for some individual homesites. Some other relocation-related infrastructure has been done by the BIA within its general programmatic expenditures. Overall, ONHIR has not viewed the comprehensive community infrastructure required by the Relocation Act as its mission and has not undertaken the work.

This provision requiring a report was repealed in November 1988, but the promise of infrastructure was not repealed. Navajo families were induced to participate in relocation in part due to the promise of infrastructure. GAO strongly implies that there is no infrastructure promise, but if the repeal of the reporting requirement in 1988 also would have meant the repeal of the underlying commitment to infrastructure, the Navajo Nation would have gone on the

[18] *Id.* at 273.

[19] *Id.* at 278.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Navajo and Hopi Indian Relocation Commission, Report and Plan Update pp. 31–36 (1983).

record in absolute and total opposition. That did not occur because Congress did not intend to eliminate one of the central promises made to the Navajo of the relocation policy.

ONHIR Close-Out Costs: What would it cost for the Federal government to fulfill its obligations under the relocation law? Office of Management and Budget officials have stated that there are constraints on the Federal budget in terms of addressing these concerns. However, recently Congress unexpectedly lifted budget caps by tens of billions of dollars for FY 2018 and FY 2019, which creates an opportunity to address remaining needs. To truly fulfill its obligations, the cost could run into the billions, but the Navajo Nation knows that funding at that level is not a possibility. The Nation has set forth a proposed funding scheme, attached as Appendix A, in an effort to address the most critical concerns.

V. RECOMMENDATIONS: SEEKING A HUMANE OUTCOME

The major legal struggles between the Navajo Nation and the Hopi Tribe are largely over,[24] but there remain significant humanitarian issues resulting from the forced relocation of thousands of traditional Navajos and the multi-generational construction freezes that have locked many other Navajo families in the deepest poverty. The relocation law and construction freezes have left the Navajo Nation with: a population of relocatees who continue to suffer from the harsh impact of the relocation process (hundreds of whom have yet to receive any of the promised benefits); a smaller population within the Hopi-Partitioned Lands that struggles to maintain its lifeways under Hopi superintendence; and a large population in the 1.6-million-acre Former Bennett Freeze Area (FBFA), which has not yet recovered from the effect of a 45-year construction freeze that was the effective equivalent of government-imposed economic sanctions for living on their own land.[25]

After decades of resistance, the Navajo Nation no longer seeks to overturn the relocation law. Although there remain strong sentiments within the Navajo people that the relocation law should be overturned and those who so chose should be allowed to return to their ancestral and familial lands, the Navajo government has accepted the bitter pill that it is no more likely that the United States will act honorably today than it did in 1974. The Navajo Nation has turned to the task of addressing the consequences of the relocation, while also assuring that those Navajo heads of household who are eligible to receive "benefits" do in fact receive those benefits.

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[24] There remain issues that relate to the administration of the Accommodation Agreements for those Navajo families still residing on the Hopi Partitioned Land including, notably, disputes regarding the size of lease payments and livestock grazing rights. For Navajo families the impoundment of livestock by the Hopi and the BIA is a source of great frustration and tension. While sometimes individual livestock holders may have exceeded their limit, in the aggregate, with the departure of many families, the overall Navajo livestock holdings are well below the overall limit. Yet, impoundments occur in an almost "police-state" manner. That Navajo Nation is not a signatory to the Accommodation Agreements. Recently, these families have been negotiating with the Hopi a new arrangement, but the Navajo Nation is also not involved in this negotiation.

[25] Indeed, the Navajo Nation recommends that ONHIR's responsibilities be enlarged to encompass rehabilitation of the FBFA. Given the Navajo Nation's criticism of ONHIR this may seem ironic, but at this point ONHIR is better positioned to carry out this work than the BIA.

The Navajo Nation has several broad objectives that it would like to achieve in partnership with the Federal government:

- First, the Navajo Nation seeks to have the Federal government provide the promised relocation benefits to all eligible Navajos within a reasonable time frame (as in less than five years) and in a just and humane fashion, including acknowledging and fulfilling the United States' obligation to provide infrastructure;

- Second, the Navajo Nation seeks greater support for the security and well-being of the relatively small number of Navajo families who remain on the Hopi Partitioned Land, including support for a rationale grazing and livestock policy and, for those families who now wish to rescind their Accommodation Agreements with the Hopi Tribe, the right to Federal relocation benefits;

- Third, the Navajo Nation seeks to have the Federal government acknowledge and fulfill its responsibility to address the dire housing, health, social, education, and economic development needs in the former Bennett Freeze area and the relocation impacted areas (including the Navajo Partitioned Lands and the relocation communities), which are a direct result of Federal relocation and construction-freeze laws; and

- Fourth, the Navajo Nation seeks passage of technical provisions that would improve the relocation process and encourage redevelopment in the FBFA.

In addition to the recommendations described above, GAO should have included as recommendations that Congress:

- **Provide funds for ONHIR to complete its work, including fulfilling federal infrastructure obligations to relocatees. As described above,** the United States made certain critical commitments, including infrastructure commitments, to induce relocatees off the land. Instead of fulfilling these commitments, the federal government has forced into poverty a once self-sufficient people living on the ancestral lands in their traditional ways. Congress must fulfill its obligations to the relocatees prior to ONHIR closure.

- **Direct a study of the larger impact of the relocation law and the Bennett Freeze including not only the economic impact, but also the mental and social impact.** The Federal government, at a cost in excess of $600 million, has relocated over 16,000 Navajos and hundreds of Hopis off their traditional lands to surrounding communities and towns. At the same time, at an unknown cost to the Navajo families living there, the Federal government has effectively prevented all development in the FBFA. No comprehensive study has been undertaken to assess the long-term effects of these actions, much less the strain they have put on the affected communities. Such a study should be

authorized and, based on its findings' funds should be appropriated for remediation.[26]

- **Hold oversight hearings (perhaps even a field hearing).** Congress should schedule oversight hearings in Washington or on the Navajo Nation in order to deepen Congress' understanding of the long-lasting effects of the relocation law.

- **Expand grant funding for ONHIR.** More funds should be allocated for grants "which significantly assist the Commissioner or assist the Navajo Tribe or Hopi Tribe in meeting the burdens" of the law.[27] Pursuant to this provision in the relocation law, the Navajo Nation has proposed a number of projects such as a community center for the Navajo families that have signed accommodation agreements with the Hopi Tribe, range and road improvements, power line extensions, and some housing improvements for heavily impacted Navajo Partitioned Land host communities.[28] Few of these projects have been approved by ONHIR, but they are exactly the kind of project that brings humanity to the relocation process.

- **Fund the Navajo Rehabilitation Trust Fund (NRTF) and Forgive Past Debt.** NRTF should be reauthorized and fully funded, or equivalent funding should be provided to the Nation. Established by the Relocation Act, the NRTF provided resources to the Navajo Nation to address the "rehabilitation and improvement of the economic, educational, and social condition of families and Navajo communities that have been affected by" the relocation law.[29] The NRTF was authorized to $60 million through 1995, reflecting the size of the need it was to address. However, the Navajo Nation only received $16 million, which was provided in the form of a loan. The $16 million has been insufficient to address the need. The NRTF should be reauthorized and fully funded or equivalent funding should be provided to the Navajo Nation. Further, the obligation of the Navajo Nation to repay NRTF funds should be waived. These funds, provided to the Navajo Nation over 20 years ago, were to be repaid from coal resources in New Mexico. However, those resources have not been developed and no significant development is anticipated in the foreseeable future. As the NRTF was intended to address conditions that arise from the relocation law, the cost of addressing those conditions should more properly fall fully on the Federal government.

- **Allow Navajo families to relinquish the Accommodation Agreement and receive the benefits to which they were originally entitled.** There are a small number of Navajo

[26] Notably, in the 107th Congress, the Senate Committee on Indian Affairs included language authorizing a report to study relocation impacts in one of its bills, although the measure never became law (S. 2711, 107th Congress).

[27] Formerly codified at 25 U.S.C. 640d-25.

[28] Notably, the Navajo Partitioned Land suffered its own construction freeze from 1958–1979. Additionally, Navajo Partitioned Land host communities have absorbed relocatee populations but have not received funding to address the need for expanded services and infrastructure or the need for a new range management plan.

[29] Formerly codified at 25 U.S.C. 640d-30.

families (about 35) who are entitled to receive relocation benefits but who initially chose to sign the Accommodation Agreement with the Hopi Tribe. These families have discovered that life on their ancestral lands is no longer the same, with relocation of most of their neighbors and an increasing sense of isolation living under Hopi superintendence. The Accommodation Agreement provided a deadline for them to rescind which has passed. That deadline needs to be extended so that these families can access the Federal relocation benefits which are their due.

- **Allow the Navajo Nation to Sign the Accommodation Agreement on behalf of Navajo Families.** There remain a small number of Navajo families (about 4) that reside on the Hopi Partitioned Land that have not signed the Accommodation Agreement. To the best of the Navajo Nation's understanding, these families, due to deeply held spiritual beliefs, do not intend to leave, notwithstanding that they are ultimately under the threat of forced eviction. To prevent this, the Navajo Nation seeks the authority to sign accommodation agreements on behalf of this small group of families.

- **Fund a reconstruction/redevelopment program for the former Bennett Freeze area.** The Bennett Freeze was a sibling to the relocation program and should also be addressed by directing funds to reconstruction/redevelopment of the FBFA.[30] A reconstruction program would be consistent with the findings of the Interior Appropriations Subcommittee of the Senate Appropriations Committee in a field hearing held in Tuba City, Arizona on July 9, 1993. Going back to the "War on Poverty" and the "Great Society Program" and continuing through numerous Federal economic and anti-poverty initiatives, as well as programs directed at Indians in particular, this area was ineligible for aid due to the 45-year freeze. The results have been devastating with most homes lacking electricity and running water, limited infrastructure, few schools, and no economic development. Congress should establish a trust fund or other mechanism to facilitate redevelopment of the area.[31]

- **Direct additional study of and support for the Navajo families who were forcefully evicted from District VI prior to passage of the relocation law.** Initially, these families received no relocation benefits; eight years later, when they became theoretically eligible for benefits, only half were certified to receive those benefits. Many were relocated during World War II, while family members were serving the United States oversees. The process itself was very rough, with people essentially being thrown out of their homes, with the homes subsequently burned down. In the interest of fairness, their situation should be reviewed and appropriate benefits provided.

[30] For 45 years, Navajo families in this area suffered under a Federal development freeze. A Federal court eventually determined that the vast majority of this area belonged to the Navajo Nation. For the 5,000 Navajo families who live there this means that the freeze served no real purpose other than to bring them misery and hardship. The freeze has now been lifted in its entirety pursuant to a settlement agreement between the tribes and subsequent act of Congress.

[31] This trust fund could be operated by the Navajo Nation either on its own or in partnership with ONHIR, if the agency's authority was extended to the FBFA.

- **Review BIA Lease Payment Calculations**. Provide for a study of the BIA's process for determining the lease payments that the Navajo Nation pays to the Hopi Tribe for Navajo families living on Hopi lands. The Bureau of Indian Affairs has taken up to 10 years to make these rental determinations, which the Navajo Nation has thought were high and which are further increased by the effect of compound interest at a rate of 6% per year.

- **Provide for Boundary Clarification.** The Navajo Nation is entitled to select lands in New Mexico as reparation for lands lost due to the Navajo-Hopi Relocation Act. Such land selections are subject to a restriction on distance from the Navajo Reservation boundary. While it seems logical that the reservation boundary is the boundary of any of the Navajo Nation chapters that make up the Navajo Nation, Federal officials have expressed uncertainty on this point. The Navajo Nation seeks clarification that the Navajo boundary includes the boundary of Navajo chapters in New Mexico.

- **Authorize Navajo Nation Sovereignty Empowerment Zones.** The Navajo Nation has proposed the establishment of Navajo Nation Sovereignty Empowerment Zones, where Navajo sovereign laws would supersede certain Federal laws. This would address unnecessary and harmful duplication in various review processes for projects within these limited zones, including renewable energy development and infrastructure.

- **Correct Surveying Error.** The Navajo Nation and the Bureau of Land Management's Arizona State Office ("BLMAZ") disagree about the acreage remaining to be selected for trust acquisition by the BLMAZ under the Relocation Act.[32] The difference stems from a surveying error.[33] The Navajo Nation seeks authority to deselect and reselect acreage in order to assure that the Nation obtains the full benefit of its selection rights.

- **Conduct and independent audit of ONHIR records and remediate OHNIR's failure to maintain records.** The GAO report acknowledges that ONHIR has failed to maintain records as to housing repair. The Navajo Nation is aware that ONHIR has failed to maintain records of its other tasks. This failure is a clear abrogation of ONHIR's legal duty as an agency, and must be addressed before ONHIR can close. Records that exist must be preserved, and properly organized. No destruction of records should be permitted.

Conclusion. ONHIR has failed to fulfill its trust obligations both in the programs it has actually attempted (delay, mismanagement; bias in adjudication and negligence) and in the

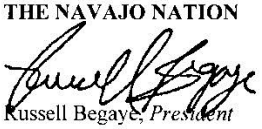
[32] The Relocation Act currently allows 250,000 total acres. *See former* 25 U.S.C. 640d-10(a)(1).

[33] The amount of land transferred in trust to the Navajo Nation in Arizona turned out, after an updated survey was completed, to be 756-757 acres more than the Navajo Nation was told it would be acquiring. The result is that the BLMAZ believes that there are only approximately 127 acres remaining to be acquired at no cost to the Nation, while the Nation believes it is still entitled to approximately 884 acres. Therefore, the Nation and the BLMAZ have a difference of between 756 and 757 acres in their respective understandings of the acreage remaining for selection/acquisition.

responsibilities it never fully addressed (e.g., infrastructure and economic development). Notably, no agency is interested in assuming ONHIR's responsibilities and, at this late date, the Navajo Nation is concerned that a transfer of those responsibilities, at great cost, would be a debacle. ONHIR should remain open until it has fulfilled all of the obligations and promises of the United States.

Sincerely,

THE NAVAJO NATION



Russell Begaye, *President*

APPENDIX A

NAVAJO NATION'S ESTIMATE OF REMAINING FINANCIAL COSTS RELATED TO RELOCATION

DETERMINABLE COSTS – $286,729,357

A. Infrastructure Projects and Costs – Total $226,729,357

As a part of Congress' commitment to a humane relocation process, Congress directed the Relocation Commission to develop a plan to "ensure that housing and related community facilities and services, such as water, sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites…" The Commission largely did not fulfill this obligation. The following basic infrastructure needs remain:

Community Infrastructure (developed by impacted communities) Total – $109,729,357

- Roads – $42,384,300
- Power – $7,391,000
- Water – $13,240,000
- Community Building (Chapter Houses, Head Start Buildings, Senior Centers) – $14,777,888
- Water/Sewer/Electricity to existing Relocation homes – $1,768,000
- Telephone lines – $1,650,000
- Economic Development – $2,000,000
- Sewage and Solid waste – $518,169
- Planning, Oversight, Predevelopment Costs, and Project Administration – $26,000,000

Non-Community Identified Infrastructure – $117,000,000

- Roads – $80,000,000
- Telecommunication – $15,000,000
- Livestock/economic development – $22,000,000. (*This number does not truly represent the economic harm done to Relocatees. Navajo families that were relocated were essentially self-sufficient and able to survive by grazing livestock before relocation. These self-sufficient families were moved into locations where they were denied the necessary permits to graze enough livestock to support themselves. ONHIR has not provided enough economic development to replace the lost economic self-sufficiency for relocated families*)

B. Repair or Replacement of Faulty Construction: Total estimated costs $60,000,000

A substantial number of homes were constructed with faulty workmanship or on unsuitable sites. Any final resolution of ONHIR's responsibilities must include inventory, evaluation, inspection, and repair of these construction and planning defects. Because ONHIR refuses to

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acknowledge fault for structural damage to the homes, the Navajo Nation is preparing to spend $100,000 of its own money to hire an independent inspector to begin assessing relocation homes.

UNKNOWN AND OTHER COSTS

A. **Remaining houses for certified applicants** – As of December 2017, ONHIR stated that there are 29 certified applicants awaiting houses. These houses, not including overhead, which historically for ONHIR has been extremely high, cost between $150,000-$175,000 to construct (the Navajo Nation provides land at no cost) for the dwelling unit alone. That figure does not take into account the administrative costs of managing a construction contract or providing site development, including utilities and proper grading. ONHIR's failure to properly manage these issues has resulted in millions of dollars of needed repair and replacement.

B. **New housing for Navajo heads of household that succeed on appeal** – There are a number of appeals in the courts, or likely to proceed to court. ONHIR historically has denied half of all cases, and in recent years that rate has soared to a suspiciously high 95%. It is likely given recent successful appeals, that a number of applicants will be successful and entitled to full relocation benefits.

C. **Impartial review of denied applications** – Because ONHIR has rejected so many applicants (over 3,000), using questionable practices and raising serious due process and discrimination concerns, an impartial review of the entire eligibility determination process should be undertaken before ONHIR closes.

D. **Peabody mining contamination** – Environmental contamination affects Relocatees. Mine reclamation and restoration is needed, especially considering Peabody's recent bankruptcy.

E. **Uranium mining waste contamination** – Thousands of Navajo people have been relocated to Nahata Dziil (the "New Lands"). Unacceptable levels of uranium contamination have been found in the ground water at Nahata Dziil, with the likely source being the largest uranium mine spill in the United States' history. The fact of the spill, and that its plume of contamination was moving toward the land the United States and State of Arizona transferred to the Navajos, was known to them but not to the Navajos. This affirmative misrepresentation has resulted in uranium contaminant poisoning of Navajos and their children.

Appendix IV: Comments from the Navajo Nation Human Rights Commission

Office of Navajo Nation Human Rights Commission
P.O. Box 129 | St. Michaels, Navajo Nation (AZ) 86511
Phone: (928) 871-7436 | Fax: (928) 871-7437

MEMORANDUM

TO : William Shear, Government Accounting Office
Anne-Marie Fennell, Government Accounting Office

FROM : _____
Leonard Gorman, Executive Director
Navajo Nation Human Rights Commission

SUBJECT: Submission of comments on Draft Report on the Office of Navajo And Hopi Relocation (GAO-18-266)

DATE : March 12, 2018

The Navajo Nation Human Rights Commission ("Commission") submits the following comments regarding the closure and transfer of activities of the Navajo Hopi Office of Relocation ("OHNIR"). The draft report in its entirety fails to recognize the root cause for the failure of the implementation of P.L. No. 93-531 et al. The human rights of the Navajo people and the blatant disregard for the peoples' Navajo lifeway is central as to why the Office of the Navajo-Hopi Relocation has failed.

In the course of the Commission's work since 2008, it is evident that Navajo relocatees and Navajo resisters continue to suffer mentally, physically, socially, and financially from the restrictive guidelines imposed by P.L. 93-531, et al, and the stringent standards imposed by leadership at OHNIR. The Commission stands by its report, *The Impact of the Navajo-Hopi Settlement Act of 1974 P.L. 93-531 et al.*,[1] that no amount of compensation can restore the atrocious actions of removing individuals and families from their homelands. To this day, while they are relocated, the Diné[2] have strong ties to their lands, ceremonies and families. The Diné lifeway is interwoven and entwined since time immemorial that define the values and unique virtues of the people today. It is baffling to surmise that the imposition of linear western values would free the Diné of a lifeway that was considered uncivilized and substandard to the American dream. This basic supposition for improving Navajo lives, if they relocated, was ill configured from the very beginning.

At this time in history, the Navajo Nation finds itself at the cross roads of reclaiming remnants of broken Navajo lives with little hope that whatever federal government agency or

[1] The Impact of the Navajo-Hopi Settlement Act, P.L. 93-531, et al., Navajo Nation Human Rights Commission Report, July 6, 2012
[2] In this response correspondence we use Diné and Navajo interchangeably.

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program that assumes the responsibilities of completing OHNIR's mission will make the people whole again. The sense of wholeness is best articulated by a spiritual wellness that is balanced and in harmony with its surroundings. The relationships to the earth, the cosmos, the natural elements and the ecosystem that exist with humanity perpetuate Navajo's view of life and the responsibility to life for all. This is the core to the Diné place in history[3]. OHNIR failed to recognize and incorporate Diné wellbeing into its services in order to redress by revitalizing the relocatees if possible.

One significant example is the western legal standard that continues to be the jurisprudence to determine whether an individual was eligible for relocation benefits. Because all applicants had to prove they were heads of households and had some sustainable income to validate their existence for benefits, OHNIR determined that Navajo traditional knowledge of time and place were irrelevant and are grounds for denial of benefits. Exact months, dates, time and written evidence were not significant to Navajo families who depended on seasonal, word of mouth and life changing events, as references to time for Navajo families to draw upon. This is especially true to elder family members who served as witnesses but whose testaments were disregarded because they lack the linear knowledge of exact legal timeframes. Equally discerning include a) not knowing that the non-use of the English language would undermine future benefits, b) the inability to write in the English language and c) the lack of maintaining personal records would come back years later to further repress Navajo applicants. OHNIR failed to recognize a core number of applicants that come from the era in time when documentation, preserving evidence were not available; this is a gross error that exasperated the denial of relocation benefits to Navajo families. Additionally, the resident criteria changes OHNIR instituted to determine eligibility deserves more scrutiny. This raises the question, *how much to the actual appropriation directly benefited the relocatees*?

Even today, OHNIR has refused to address the right to religious practice which is principle to the Navajo lifeway. Accommodation Agreement signers and Navajo resisters cannot conduct traditional Navajo ceremonies that require large gatherings by family and relatives. Too seek permission from Hopi leaders or Hopi administrators to approve a ceremony, its location and the material resources necessary to carry out a five to nine day ceremony is an extension of regulations that infringe on Navajo religious rights. The right to practice religious ceremonies is not guaranteed nor is it supported in accordance to Navajos needs and interests.

The case of the 240 applicant denials are problematic. Applicants who were denied benefits may want an administrative appeal to OHNIR's denial. Applicants may not have an opportunity to exercise their right to due process. Moreover, the amendments to P.L. 93-531 in 1988 removed a significant legislative mandate referred to as Section 13. Relocatees and their families held this piece of legislation significant and critical to their future and the future of Navajo children. At the urging of OHNIR officials, heads of household reluctantly signed agreements with the understanding that roads, hospitals, electricity and water and sanitation lines would be available at every home. The prospects of a better opportunity for future generations were guaranteed under Section 13. Sadly today, third and fourth generations seek assistance from existing Navajo chapter programs but are turned away, because of the added referrals OHNIR has placed on Navajo programs.

Since this Act requires authorization directly from the President of the United States to determine whether OHNIR has met its federal obligations and therefore can shut down is an

[3] Sacred Sites. The Preservation; Protection and Use of Sacred Sites Report., Navajo Nation Human rights Commission, July 22, 2012

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abdication of federal trust responsibility. To cede the closure of services that OHNIR is responsible for would be immoral and criminally unconscionable. There exists more reasons to complete the trust obligations the United States government has to the Navajo people, especially to families that continue to suffer irreparable harm that relocation has brought upon them. The Navajo people have suffered far too long from historical injustices. The dispossession of lands, territories and resources, the right to exercise and practice religious ceremonies and the right to prompt decisions through just and fair procedures for the resolution of conflicts and disputes are just a few of the human rights standards that are articulated in the United Nations Declaration on Rights of Indigenous Peoples[4]. It is clear the rights to redress and remedy have not been achieved.

In conclusion, the draft report, GAO-18-266 must incorporate the human rights of the Navajo people, without a clear articulated understanding of the Diné this report does not demonstrate the enormous needs that remain and that have emerged from the results of relocation. In December 2010, the United States supported the United Nations Declaration on the Rights of Indigenous Peoples. Our Navajo traditional laws are recognized by UNDRIP. However, continuously the United States government continues to trounce on not only its trust responsibilities to indigenous peoples but more importantly the human rights of the indigenous peoples.

XC: Karis Begay, Attorney, Office of the Navajo Nation President/Vice President
Roman Bitsuie, Consultant, Navajo Hopi Land Commission
Susan Eastman, Principal Attorney/Director, Navajo-Hopi Legal Services Office
Jackson Brossy, Executive Director, Navajo Nation Washington Office
Ethel Branch, Attorney General, Navajo Nation Department of Justice
Wenona Benally, Executive Director, Navajo Hopi Land Commission Office
File

[4] United Nations Declaration on Rights of Indigenous Peoples, UN G.A. Res 61/295, UN H.R.C., 61st Sess., Annex, Agenda Item 68, UN doc.A/RES?61/295 (2007).

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Appendix V: GAO Contacts and Staff Acknowledgments

GAO Contacts

William B. Shear, (202) 512-8678 or shearw@gao.gov, or
Anne-Marie Fennell, at (202) 512-3841 or fennella@gao.gov

Staff Acknowledgments

In addition to the contact named above, Jill Naamane and Jeffrey Malcolm (Assistant Directors), Chir-Jen Huang (Analyst in Charge), Susan Baker, William Chatlos, Brad Dobbins, Justin Fisher, Randi Hall, Erik Kjeldgaard, Ellie Klein, Jessica Sandler, Jennifer Schwartz, Jena Sinkfield, and Jeanette Soares made key contributions to this report.

Appendix VI: Accessible Data

Agency Comment Letters

Accessible Text for Appendix II: Comments from the Office of Navajo and Hopi Indian Relocation

Page 1

UNITED STATES GOVERNMENT

OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

March 09, 2018

Christopher J. Bavasi

Executive Director

William Shear

Anne•Marie Fennell

United States Government Accountability Office

441 G Street, NW

Washington, D.C. 20548

Re: GAO-18-266, Office of Navajo and Hopi Indian Relocation, Executive Branch and Legislative Action Needed for Closure and Transfer of Activities: ONHIR Formal Response

Dear Mr. Shear and Ms. Fennell -

The Office of Navajo and Hopi Indian Relocation (“ONHIR”) respectfully submits this formal response letter in response to the above- referenced draft report (“the Report”). While ONHIR appreciates the GAO's efforts and comments, ONHIR takes exception to certain findings and characterizations set forth in the Report.

Specifically, the GAO's unverified acceptance of claims regarding homes built for relocatees is inconsistent with accepted auditing and investigative practice. In some areas, the Report fails to provide the detail concerning certain matters, but uses language which creates an impression some issues are far more significant than the detail would show to be the case. In other areas, the Report references statutes, regulations, and policies, which do not apply to ONHIR. The Report also takes issue with various aspects of ONHIR's land administration, including the use of lease revenues and the operation of the Padres Mesa Demonstration Ranch. ONHIR's activities in these regards, however, are consistent with its statutory mandates and its role as trustee over the lands.

This letter provides ONHIR's perspective and insight on the issues raised in the Report. Thank you for your consideration.

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I. Background Regarding ONHIR and Relocation[1]

A thorough analysis of ONHIR's efforts, as mandated by Congress in 1974, requires understanding of the bitter fight waged by the Navajo Nation to prevent any Relocation. Central to this understanding is the fact that the Relocation, as mandated by the Navajo-Hopi Settlement Act ("the Act")[2] came on the heels of the 1972 forced eviction of members of the Navajo Nation from the Echo Canyon region of the Hopi Reservation. [3] As a result of the lawsuit, which was brought by the United States Department of Justice, those subject to the eviction were required to leave their homes.[4] Many of the Navajo people evicted from Echo Canyon were "relocated" by the Navajo Nation to the Navajo Fairgrounds where they lived in tents. This experience was fresh in the minds of many Navajos two years later when the Act was passed and ONHIR began encouraging them to apply for Relocation Benefits.

Additional resentment and animosity were created after, pursuant to the Act, the Navajo Nation selected Bureau of Land Management ("BLM") lands in House Rock Valley, Arizona; but when the non-Indian ranchers who grazed livestock—but did not live in House Rock Valley— protested the selection, House Interior and Insular Affairs Committee Chairman Morris K. Udall, persuaded Congress to forbid any land acquisition west of the Colorado River, thus sparing the House Rock Valley ranchers.[5]

[1] ONHIR recognizes that GAO is quite familiar with ONHIR. In fact, GAO has reviewed various issues related to ONHIR at least nine times in the past. See, e.g., Financial Review of the Navajo and Hopi Indian Relocation Commission, June 30, 1976, FGMSD-77-13 (Aug. 5, 1977); B-114868.18 (Aug. 9, 1978); Review of the Anti-Deficiency Act Violations of the Navajo and Hopi Indian Relocation Comission, FGMSD- 80-17 (Feb. 29, 1980); Navajo and Hopi Indian Relocation Commission's Program, CED-81-139 (Jul. 2, 1981); Indian Relocation Benefits, B-203827 (May 6, 1985); INDIAN RELOCATION: Navajo and Hopi Indian Relocation Commission Estimated Relocation Cost, RCED-86-43FS (Oct. 25, 1985); In re Compensation of Former NHIRC Commissioners, B-236241 (Feb. 25, 1991); INDIAN PROGRAMS: Navajo- Hopi Resettlement Program, RCED-91-105BR (Apr. 5, 1991); Navajo-Hopi Relocation Program, RCED- 95-155R (Apr. 27, 1995). Please note that none of these past reviews identified problems that are raised for the first time in the current Report.

[2] P.L. 93-531 (1974) Section 14 of the Act directed relocation of persons living on lands partitioned

[3] United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972).

[4] Id.

[5] P.L. 96-305, Section 4. (1980).

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In addition, the Navajo Nation fought unsuccessfully against partition of the Joint Use Area ("JUA") from the late 1960's through most of the 1980's and discouraged its members from cooperating with Relocation under the Act.[6] During most of this period, the official policy of the Navajo Nation was that the Act would be repealed and thus there was no need to apply for Relocation Benefits.

Nonetheless, The Navajo—Hopi Indian Relocation Commission ("NHIRC") and later ONHIR [7] were created and tasked with accomplishing the relocation of Navajos residing on lands partitioned to the Hopi Tribe (the Hopi Partitioned Land, or "HPL") as well as the Hopis living on the lands partitioned to the Navajo Nation (the Navajo Partitioned Land, or "NPL") without any authority to require that any person actually leave the lands awarded to the other Nation or Tribe. To make matters worse, when ONHIR began operations there was no successful American model relocation. No American agency had ever successfully relocated human beings.[8]

As a result of these and other issues, relocation experts warned Congress that any relocation program would take longer time and cost more resources than estimated. The experts also warned that program could create resentment and jealousy between relocatees and residents of the communities where they were settled ("Host communities").[9] It was

against this backdrop that NHIRC (and later ONHIR) began its efforts as mandated by statute.

This history must be appreciated when evaluating ONHIR and its Relocation Program, including the Relocation Program's time and costs. Given the history and background of the above-explained issues, and the lack of prior success in this area, a certain amount of trials and

[6] The Report confusingly states both that the Act partitioned the Joint Use Area ("JUA") and that it authorized the District Court to partition the JUA. See Report, p. 3. In reality, the Act did not partition the JUA. Rather, the Act authorized, but did not require, a judicial partition of the JUA, if the mediation provided for in the Act were unsuccessful.

[7] In this letter both NHIRC and ONHIR are generally referred to as "ONHIR."

[8] Instead, the American history was replete with 19th Century forced relocations of Indians to Reservations; the Japanese removal from the west coast in World War II and the legacy of Urban Renewal which was referred to as "Negro Removal." See Interview by Kenneth Clark with James Baldwin (1963).

[9] See, e.g., Letter from Thayer Scudder, Prof. of Anthropology, Cal. Inst. of Tech., to Abdelfattah Amor, Special Rapporteur of the United Nations Comm'n on Human Rights (Jan. 30, 1998) (available at http://eclectic.ss.uci.edu/~drwhite/scudder.html).

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tribulations were inevitable. The overall success of the Relocation Program is a tribute to the hard work and creativity of the many people both within and outside ONHIR who have been committed to such success.

II. Issues Related to the Report's Underlying Procedure.

Prior to engaging in a full analysis of the Report's substance and various issues, ONHIR feels compelled to point out several apparent errors or omissions in the Report. Respectfully, it is critical to identify and clarify some of these matters to allow a fair evaluation of the substantive issues.

One of ONHIR's primary concerns is GAO's position that it prepared the Report pursuant to appropriate methodology for providing a fair and accurate report.[10] Unfortunately, as discussed in other areas of this letter, there are many instances in which GAO seems to have failed to distinguish between facts and opinions, and may have neglected to undertake sufficient investigation to reveal those opinions as unsubstantiated.

This is particularly true with regard to claims made by Navajo and Hopi leaders as to construction quality and response to and corrections of homeowner complaints. GAO's acceptance of such unsupported assertions belies the claims that the Report is based on "sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions…" [11] As discussed further in later sections, many such opinions are simply untrue.

In addition, some areas of the Report seem to reflect a misunderstanding of certain basic facts related to ONHIR and to the Navajo Nation. For instance, the Report misstates and oversimplifies the authority of Navajo Nation Chapters. [12] The authority of individual chapters varies considerably depending on grants of authority from the Navajo Nation Council and whether the chapter is "governance certified" and has an approved Community Land Use Plan. Also related to Navajo Nation governance, the Report states that the Navajo Nation Council

[10] Report, p. 3.

[11] Report, p. 3.

[12] See Report, p. 3, n. 3; Report, p. 10.

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"hosts 24 council delegates . . ."[13] The Navajo nation Council is composed of its members; it does not "host" delegates.

With regard to financial resources, the Report details the monies ONHIR has expended on legal fees, but its analysis is misleading because it fails to mention that the sum identified was expended over a 35-year period.[14] Regardless, the Report also fails to note that there is no statutory prohibition on such payments or clearly clarify that the legal fees supported the statutory mandate.

III. Substantive Issues Identified in the Report.

As mentioned, ONHIR recognizes some existing areas for improvement. The Report, however, takes issue with certain of ONHIR's activities and procedures that not only comply with controlling law, but in some cases are required under the Act. These areas are discussed separately below.

A. The Eligibility And Appeals Process

ONHIR began its operations in 1977 with the Navajo Nation fundamentally opposed to relocation and discouraging its members from cooperating with ONHIR or the relocation process.[15] In fact, the Navajo Nation had adopted an official policy of seeking repeal of the Act. Problems arising from the nature of Navajo residency in the JUA and Former Joint Use Area ("FJUA") only added to the difficulties caused by this opposition.[16]

1. Clarifying issues with regard to the application and eligibility process.

The Report states that ONHIR officials reported that "not enough" Navajos had applied during the second and third Application periods.[17]

[13] Report, p. 10.

[14] Report, p. 14, n. 27.

[15] Despite Navajo Nation claims to the contrary, Relocation from the JUA-HPL has always been voluntary—there has never been an eviction of a Navajo from the FJUA. Indeed, ONHIR never had legal authority to require a Navajo to move from the HPL.

[16] The Report overstates the consequence of an individual being included in the JUA list that was part of ONHIR's 1981 Report and Plan. See Report, p. 6. Being listed in the 1981 Report and Plan was not an ONHIR determination of eligibility for Relocation Benefits. See Walker v. NHIRC, 728 F.2d 1276 (9th Cir. 1984).

[17] Report, p. 17.

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To be clear, for Navajos who had signed Accommodation Agreement Leases and then relinquished them on a timely basis, ONHIR had no "quota" regarding the number of persons seeking relocation benefits. Such persons' legal status on the HPL had been established through the Accommodation Agreement Lease process discussed below.

On the other hand, as to Navajos who remained on the HPL without legal authority, a more accurate statement would be that ONHIR appreciated that its principal mission was providing relocation homes for Navajos on the HPL and Hopis on the NPL. All relocation was voluntary—ONHIR never had, nor sought the authority to evict Navajos or Hopis from lands partitioned to the other tribe. Simply, if Navajos remained on the HPL (without leases), then ONHIR's mission was not deemed complete. Thus, ONHIR acted to fulfill its mission by encouraging such persons to apply for relocation benefits and leave the HPL.

It is also important to fully understand the eligibility requirements. The Report suggests that applicants had demonstrated two key eligibility criteria. Actually, this is what applicants had to demonstrate. [18] The Report also states that applicants had to demonstrate "residency on the partitioned land."[19] The requirement was for applicants to demonstrate legal residence on the lands that had been portioned to the other tribe (Navajo people living on HPL, and vice versa).

The Report also states that during the third application period, applicants had to demonstrate residency on the HPL until their eligibility had been completed. [20] The requirement, rather, was for applicants to maintain legal residency until their contact with ONHIR.

2. Complexities in communication and with applications and eligibility determinations.

Specifically, there were no street addresses in the JUA. The people received mail at trading posts because there was no home delivery. The Report touches on this issue with its discussion of "the shared mailbox

[18] Report, p. 18.

[19] Report, p. 18.

[20] Report, p. 19.

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problem."[21] ONHIR dealt this by offering Administrative Appeals to Navajos for whom ONHIR could not show actual receipt of denial letters. In addition, for almost 30 years, ONHIR has used only Restricted Deliver Certified Mail—which requires the actual addressee to sign for the document. But there remained another issue because virtually none of the JUA residents had any document granting them residential land use rights to any part of the JUA.[22]

As a result of these issues, ONHIR used the 1974-1975 BIA Enumeration which consisted of aerial photos of the JUA followed by a house-to-house survey conducted by BIA teams. Unfortunately, while ONHIR has the survey results, the original data entry documents were destroyed by a flood while still in the possession of the BIA.

Other aspects of Navajo culture added to the complexities facing ONHIR. For example, Navajos tended to move with their livestock (principally

sheep and goats in the 1970's and early 1980's) and often would maintain two "camps." If this were the case, then there would be eligibility issues if one camp was in the HPL, but the other camp was outside the HPL.

Determining eligibility was also made more difficult because there was virtually no wage work available in the FJUA. As a result, many Navajos left the FJUA for employment. This often meant that a family who claimed HPL residence actually worked outside the FJUA in the Navajo Nation or in many instances outside the Navajo Nation. Many Navajos also performed seasonal work, such as railroad work or working on construction projects or seasonal agricultural labor. This complicated the legal residence determination for these seasonal workers, many of whom lived outside the HPL for extended periods while working.

Communication with those potentially eligible for relocation was also difficult. In the 1970's and 1980's most FJUA Navajos had limited ability to communicate in English. Combined with the common economic conditions, this meant that most Navajo families did not possess the documents necessary to establish eligibility for Relocation Benefits.

[21] Report, pp. 19-20.

[22] Many Navajos had BIA-issued grazing permits, but beyond listing the Navajo Nation Chapter where they might be used, these permits did not designate a particular grazing location.

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This combination of factors caused many Navajos not to apply for Relocation Benefits during the first period when Applications were accepted (1977 to July 7, 1986). When such persons did apply or were permitted to request an eligibility determination later, the time that had passed since the critical eligibility date of December 22, 1974[23] meant that memories had faded, witnesses had died and often the few previously available documents related to residence or income had been lost.

3. Litigation and legal challenges have further complicated and slowed the eligibility process.

To complicate matters, the Navajo Nation, after opposing relocation for many years, changed its policy and began advocating for as many Navajos as possible to apply for and receive Relocation Benefits. Thus, hundreds of Navajos whose connection with the HPL was minimal, such

as visiting relatives on holidays, began claiming to be residents of the HPL. Many of these claims then had to be litigated before ONHIR's Independent Hearing Officer.

The Navajo Nation has provided free legal services to Navajos seeking relocation homes (or certain other relocation benefits) since 1983 through the Navajo—Hopi Legal Services Program ("NHLSP").[24] When there have been eligibility disputes that could not be worked out through discussion and compromise, they have been heard through the ONHIR administrative appeal process. This process has been slowed by the number of administrative appeals taken by or encouraged by the NHLSP and then the NHLSP's requests to delay the scheduling of appeal hearings because the NHLSP is "understaffed" or "has not had time to develop the case to be presented at a hearing."

ONHIR believes that many of these appeals were frivolous. Nonetheless, any timely appeal must go through the administrative

[23] The date the Act was signed into law.

[24] The Report overlooks the fact that some of the NHLSP practices have delayed ONHIR's completion of the Administration eligibility process. While the Report notes that NHLSP does not represent all persons seeking their help, in a number of administrative appeals, NHLSP withdrew shortly before scheduled hearings. This required ONHIR to place the denied Applicant on the "self-represented appeal track." These late withdrawals by NHLSP significantly delayed the administrative appeal process.

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appeal process. Of course, this requires ONHIR's time, money, and other resources.

Other delays have arisen as a result of the legal challenges themselves. For example, while ONHIR originally set a July 7, 1985, deadline for receipt of applications, the Navajo Nation sued ONHIR to extend the deadline. As a result, the deadline was extended to July 7, 1986.

Overall, the eligibility and appeals process has been a lengthy one, not because ONHIR wanted to delay the process, but rather because of the actions and inactions of the other parties involved in the process. The Report provides information on the average time from Application to Final Agency Action, but fails to explain the factors that influence the time taken.[25] For example, the GAO Draft Report fails to mention that for many years and through 2013, the Independent Hearing Officer permitted the NHLSP to determine when Appeal Hearings would be held based on

when NHLSP was prepared for a hearing. Thus, much of the time for the appeal process arose from actions (or inaction) by NHLSP.

In addition, when the Hopi Tribe and the United States reached an agreement in 1995 on 75-year Accommodation Agreement leases for some Navajos who lived on the HPL, the Agreement included an option for Navajos signing such leases to have three years to relinquish the leases and seek Relocation Benefits.[26] The GAO Draft Report noted that the Navajo Nation said that after the three-year period for relinquishing the (Accommodation Agreement) Lease had expired, some Navajos wanted to relinquish the lease and seek Relocation Benefits.[27]

The Report does not mention, however, that ONHIR had proposed that if such individuals would be allowed to apply for Relocation Benefits it would be in return for the Hopi Tribe agreeing to permit a few "resisters" who continued to live on the HPL but had never singed the

[25] Report, p. 15.

[26] The Report criticizes ONHIR for its 1981 Report and Plan not mentioning ONHIR permitting Navajos who signed Accommodation Agreement leases in 1997 from being able to apply for Relocation Benefits if they relinquished the lease and chose to seek Relocation Benefits instead. Of course, ONHIR could not have known in 1981 that there would be an agreement in 1995 between the United States and the Hopis which would impose such a requirement on ONHIR.

[27] Report, p. 16, n. 30.

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Accommodation Agreement Leases to continue to live on the HPL. The Hopi Tribe never agreed to this proposal.

The Navajo Nation later sued ONHIR claiming that denial notices sent by ONHIR but not signed for the Applicant her/himself were defective, thus entitling the Applicant to another opportunity to appeal the denial of Relocation Benefits.[28] The decision, which was issued in 1989, required ONHIR to reopen hundreds of closed Application files.

Similarly, the 2008 decision in Noller v. Herbert caused ONHIR to reopen the application process.[29] As a result, ONHIR received over 2,200 applications, each of which had to be individually reviewed and an eligibility decision made. Given the six-year statute of limitations for challenging an ONHIR final agency action denying relocation benefits, the time for final eligibility determinations is often very long.

In its discussion of the Herbert decision, the Report states that ONHIR told GAO that it had consulted with the United States Department of Justice and the "U.S. District Court for the District of Arizona" before deciding to reopen Applications in 2008.[30] To be clear, ONHIR's consultation was with the U.S. Department of Justice in Washington, D.C. and the U.S. Attorney's Office in Arizona. There could not have been a "consultation" with the U.S. District Court for the District of Arizona.

The Report also mischaracterizes the Herbert decision by suggesting that ONHIR was only required to give personal notice of the opportunity to apply to persons eligible for Relocation Benefits.[31] What the court held was that ONHIR was required to provide such notice to all persons "potentially eligible" for Relocation Benefits.

In addition, the Report misstates the reason ONHIR applied its original eligibility criteria during the period it accepted Herbert Applications from October 2008 through August 31, 2010. [32] The

[28] Cecelia Sands et al. v. Navajo and Hopi Indian Relocation Commission CIV-85-1961-PCT-RCB (Nov. 2, 1989).

[29] CV06-03014-PCT-NVW, 2008 WL 1133889 (Feb. 27, 2008).

[30] Report, p. 17.

[31] Report, p. 17.

[32] Report, p. 19.

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rationale was, had ONHIR given the required personal notice before the application deadline of July 7, 1986, the applicant would probably have applied before July 7, 1986 and would have been subject to the original "voluntary relocation" eligibility criteria. Thus, the initial eligibility criteria should be applied.

4. ONHIR has a solid grasp of potential appeals.

ONHIR notes GAO's "finding" that "ONHIR has not prepared complete information from its files on the remaining denied households who could file for federal appeals."[33] But this is inaccurate. ONHIR has identified the case files whose applicants may file future appeals. And ONHIR's eligibility case files are complete and up-to-date, as is its AS 400 database. Thus, the necessary information is not only complete, but easily accessible.

Importantly, the Report does not clearly set forth the difference between administrative appeals within ONHIR and Administrative Procedure Act ("APA") appeals to the Federal District Court. It appears that the Report has confused administrative appeals within ONHIR that will be concluded shortly, with Federal District Court Appeals under the Administrative Procedure Act, which are subject to a six-year statute of limitations and may not even be filed for a considerable period of time and then take a year or more to be resolved; longer if there is an appeal.

Another misconception in the Report with regard to the appeals process is the apparent statements from Navajo Officials that the Independent Hearing Officer ("IHO") who heard Administrative Appeals would not allow oral evidence from Applicants. [34] Oral evidence has always been allowed,[35] but has sometimes been found not to be credible. For example, the IHO has declined to accept undocumented claims of earnings when it would have been reasonable to expect that if true, such earnings would have given rise to appropriate documentation.

5. The risk of a high volume of APA Appeals.

[33] Report, "What GAO Found."

[34] Report, p. 19.

[35] See 25 C.F.R. § 700.313(a)(1).

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The Report notes the risk that many APA appeals may still be filed.[36] ONHIR recognizes this risk. As of this writing, there are twelve APA Appeals pending and three Appeals in the Court of Appeals for the 9th Circuit—two of which were filed by NHLSP from decisions adverse to the Applicant by the District Court.

There is a greater risk, however, of additional eligibility certifications. Each such certification will cost about $150,000 per Relocation Home plus the costs of administering the Relocation Housing program, and the time associated with providing a Relocation Home.

B. RELOCATION HOMES, COUNSELING, CONTRACTING, WARRANTIES AND HOME MAINTENANCE

1. Location and building of relocation homes.

The Report gives an inaccurate picture of the communities to which relocatees have moved.[37] ONHIR's data reflects that more than 400 families have moved to the New Lands, and over 1200 families have moved to locations outside the Navajo Nation.

The Report's statement regarding location choices for newly certified applicants is also incorrect.[38] Relocatees with existing Navajo Home site Leases can have their Relocation Home built on the Home site Lease site if it meets feasibility requirements. The Report quotes a Navajo Nation official who attributes homes containing multi- generational families to not enough home site leases. Navajo Home site Leases are for one acre, and the Navajo Nation contains more than 17,500,000 acres. Thus, a shortage of Home site Leases does not seem possible.

Similarly, the Report complains about some Relocation Homes being "off the grid." ONHIR strongly urged all relocatees to relocate to an area with electricity and running water.[39] Some relocatees, however, insisted on relocating to remote areas without such utilities—often to be near family members. In these cases, alternatives such as cisterns and solar power were provided. Those are "utilities." In addition, relocatees

[36] Report, p. 20.

[37] Report, p. 10.

[38] Report, p. 24, n. 44.

[39] See 25 C.F.R. § 700.55.

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who chose such locations signed a form (which was explained to them in Navajo before signing) to affirm that they wanted solar/cistern rather than grid utilities.

In fact, all relocation homes are built in accordance with, or exceeding industry best practices. The Report is not clear on ONHIR's contractor licensing requirements.[40] ONHIR requires every contractor to be state licensed in the state where the relocation home will be built.[41]

Relatedly, the Report states that ONHIR allows contractors with a history of performance issues to build relocation homes. [42] Finding contractors willing to build homes in the Navajo Nation for the amount of the ONHIR Housing benefit is difficult. However, ONHIR requires such contractors to

resolve all warranty issues and be in good standing in order to be permitted to contract with relocatees to build additional homes.

Indeed, the majority of the building and construction related complaints cited in the Report are unsubstantiated and inaccurate. The comments with regard to soil settling, for example, are simply not correct.[43] Prior to choosing home sites, feasibility studies are conducted to assess the site conditions. ONHIR engineering technicians do not, and did not attempt to classify soils. As such, they did not sample soils; they made observations and comments about soil conditions from visual observations.

ONHIR takes exception to the fact that its comments, including those from residential building professionals regarding site conditions and the problems encountered therein, are relegated to the Report's footnotes, while the unsubstantiated allegations of chapter politicians get main body paragraphs. This is not appropriate.[44]

[40] Report, p. 23.

[41] Although the Report does not clarify the relocation homes' infrastructure with which IHS and NTUA are involved, those agencies are involved only with relocation homes in the Navajo Nation.

[42] Report, p. 24.

[43] Report, p. 27.

[44] Separately, the GAO Draft Report offers unsubstantiated claims of the societal effects of relocation provided by persons without any professional training or real-world expertise on the matter. Report at 27-28. Again, these are matters capable of being studied by independent investigators, but which were not studied. Instead, the Report includes only the opinions of persons without training to make such judgments.

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In reality, and as noted in the Report, around 2800 homes have been constructed under the relocation program. As also noted, ONHIR has replaced 14 houses. But, this replacement constitutes only ½ of 1% of the total number of homes constructed. This reflects a track record of success that is not clearly acknowledged in the Report.

ONHIR notes the photos of homes that were included in the Report. [45] It is not clear, however, whether GAO confirmed that the photographed houses were in fact built by ONHIR. If these homes were built by ONHIR, a full investigation would include a review of the warranty sections of the case file, which does not seem to have been done.[46] If for some reason it is not possible to determine and include basic information on such

houses, then ONHIR respectfully asserts that these photos and examples should be removed from the Report.

In addition, the Report gives weight to similarly meritless claims from the Hopi Tribe regarding a Relocation Home's utilities passing through the foundation slab, and an allegedly inadequately sized septic tank. [47] The common requirement is that residential slab floor construction has the drain, waste, and vent plumbing installed through and under the floor slab.

Only in areas where freezing temperatures do not occur are any water supply lines placed in attics. The site elevations at which ONHIR builds range from 4000 to 7500 feet above sea level. Water lines are placed under floor slabs for protection from freezing. Both drain lines and water supply lines are also in interior plumbing walls within the building thermal envelope to keep them from freezing. Thus, the location of the home's utilities was consistent with applicable Code provisions and construction "best practices."

Septic tanks are sized based on the number of plumbing fixture units in the house. The septic tank is where "solids" are broken down by bacterial action. The drain field is where the "blackwater" is absorbed and cleaned by bacteria in the soil. If a septic tank is never pumped, it will "continually overflow." The problem is not the size of the tank, but

[45] See Report, p. 26.

[46] Such review would include investigation into matters such as when the clients were certified, when the house was built, where the houses are located, the identity of the contractor, whether there have even been any warranty claims, and whether such claims were resolved, etc.

[47] Report, p. 28.

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the fact that the system is not being serviced regularly. (Pumped every 3-4 years.) The tank size difference is usually 250 gallons per step. i.e.: 1000 gallons to 1250, or 1250 gallons to 1500. Even with a larger tank, a family of four to six people would use that much more water in a day or two, and the tank would again be "overflowing."

ONHIR has documentation on every Relocation Home to support these statements.

The Report repeats other unsubstantiated claims of relocation housing problems.[48] To the extent tribal complaints have merit, ONHIR would be pleased to address them. Prior to inclusion in the Report, however, ONHIR respectfully requests that GAO provide an independent technical investigation into the issues complained of.

It seems, for example, that GAO failed to investigate the question of whether housing issues were due to poor construction or design or lack of homeowner maintenance.[49] It is important that GAO determine the truth of these matters prior to including them in any final report or analysis.

It appears that, rather than conduct such independent analysis, the Report relies on unsubstantiated claims from Navajo chapter officials about relocation homes and claims that houses with problems were built for relocatees by ONHIR contractors. [50] The nature of the Report's citation to such claims creates the appearance that these officials have some authority with regard to residential construction. To avoid creating such an unfair impression, GAO should determine whether the complained of homes were in fact built by ONHIR, and if so, when they were built as well as if the claims of construction defects have merit. In addition, the Report's recognition that these types of allegations are uncorroborated should be moved to the body of the Report, to ensure there is no confusion on this point.[51]

2. ONHIR has properly prepared for and addressed warranty issues.

[48] See Report, p. 25.

[49] Report, p. 25.

[50] Report, p. 25, n. 49.

[51] Likewise, the comments from the Navajo Nation President about housing construction should also note that he is a pastor, not a builder.

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Contrary to intimations in the Report,[52] ONHIR's relocatee case files are complete and up-to-date. In particular, ONHIR has identified the case files whose applicants might have future warranty claims. Thus, ONHIR has assembled the relevant and required information.

The GAO Draft Report erroneously assumes that ONHIR has not compiled complete and accurate warranty information. [53] All current information is in the relevant client case files. ONHIR knows which

relocatee Homes will still be under warranty as of September 30, 2018, and has compiled a list of such homes. Whatever agency takes over the warranty issue will have the needed information in the Casefiles that will be provided. As discussed below, the "problems"

GAO identified from the ONHIR warranty database arise from coding or data entry errors by ONHIR staff many years ago. No potential successor agency with respect to warranty issues has come forward to discuss how best to handle warranty issues.

The Report references a particular file as having 17 warranty complaints.[54] A review of that file, however, reveals that ONHIR only received six complaints from that client. The total appears to be 17 complaints, but that is due to data entry issues wherein the same complaint seems to have been entered repeatedly, creating the appearance of far more complaints than were actually received.[55]

The Report also contains the incorrect assertion that ONHIR does not track warranty by contractor. ONHIR's AS-400 Warranty Complaint inquiry lists the contractor of record along with complaint data, and other pertinent data such as final inspection date, warranty expiration date, and the date the client received Homeowner Maintenance Training. While it may be true that one contractor failed the first inspection 42% of the time, that does not mean the house did not pass the final inspection. Most items noted on any final inspection report are items related to fit, finish, and workmanship, and are therefore subjective. In fact, no house EVER reached final inspection stage and

[52] Report, "What GAO Found."

[53] Report, p. 32.

[54] See Report, p. 24.

[55] Further investigation has revealed that other files have the same problem, creating the appearance of far greater complaints than were actually received.

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then had to be torn down or was deemed unfit for unsafe occupancy. All houses eventually passed final inspection.

3. Concerns related to post-move counseling can be readily addressed.[56]

The Report notes that, upon ONHIR's closure, "[a]nother agency would need statutory authority to provide post-move counseling during the 2-year warranty period."[57] To be clear, there are 16 clients out of the 52 remaining that have signed contracts that will still be within the two- year warranty period. The rest (36) will have had the warranty expired by September 30, 2018.

The "regular" ONHIR post-move counseling for these remaining clients could be contracted out by ONHIR or ONHIR's successor. In fact, during a time of staff overload ONHIR contracted with Native Americans for Community Action to handle the post move counseling for a 2-3 year period. The contract worked out well and might be an option again for the remaining clients.

A frequent problem ONHIR has encountered over the years is the Navajo Nation excluding relocatees from Tribal benefits provided to other Navajos. If relocatees have issues where counseling is needed, they ought to be able to access the same facilities and programs as other, non- Relocatee tribe members.

[56] Report, p. 35. Moreover, the Report paints an inaccurate picture of the typical Relocatee by suggesting that prior to relocation, relocatees were "self-sufficient." Report, p. 11. Unfortunately, this is often untrue. The reality of the typical relocatees' lack of education and significant reliance on social welfare programs complicates ONHIR's already difficult task of preparing relocatees for the responsibilities inherent in owning and residing in a modern home with various systems that require repair and maintenance over time and the financial capability to acquire material and services needed to maintain such a residence.

[57] Report, p. 35.

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C. Administering The New Lands[58]

Understanding real property issues in the New Lands requires a knowledge of the New Lands history—both before and after the lands were selected to be taken into trust by the Navajo Nation acting pursuant to 25 U.S.C. § 640d-10. The area in eastern Apache County, Arizona adjacent to old Route 66 (now Interstate 40) consisted of cattle ranches with a ribbon of some commercial activity along Route 66—I-40. There were two Navajo Nation-owned ranches—the Chambers Ranch and the Bar N Ranch which had been bought by the Navajo Nation and were kept as fee land, rather than taken into Trust status. There were also three privately owned cattle ranches—the Spurlock Ranch, the Wallace Ranch and the Roberts Ranch.

In addition to the route 66—I-40 corridor the area included the main line of the Santa Fe Railroad—now the BNSF. While the railroad had originally owned most of the land along its right-of-way, by the time of the Act's approval in 1974 most of the surface had been sold, with the railroad retaining a mineral reservation. Under the Act, once the Navajo Nation had made its land selections, it fell to the BLM to accomplish the actual land acquisition. BLM chose not to seek acquisition of the railroad's mineral reservation (or the mineral reservation held by the State of Arizona for some sections) and BLM successfully fended off a challenge by the Santa Fe Railroad in the Interior Board of Land Appeals.[59]

The Navajo Nation contributed the Chambers and Bar N Ranches to the New Lands. The lands were taken into trust status by the BIA and administrative authority was originally and ultimately given to ONHIR, though BIA had principal administrative responsibility in the mid-

[58] The real property issues that ONHIR has had to confront and manage include: (1) Pre-existing land uses and agreements; (2) Infrastructure to support the relocatee population that has and will move to the New Lands; (3) Rights-of-way for such infrastructure.;

(4) Home site leases for relocatees; (5) Home site leases requested for children and other relatives of relocatees; (6) Governmental facilities to serve the relocatee population, including:

(i) Federal; (ii) State; (iii) Navajo Nation; (iv) NDCG Chapter; (v) Education; (vi) Nonprofit;

(vii) Commercial Development; (vii) Surface developments; (ix) Development of the subsurface/mineral reservation including its effect on surfaced uses; (x) Range Use—Managing Livestock Grazing; (xi) Water and other resources; (xii)Environmental contamination monitoring and remediation.

[59] See IBLA 85-584, 85-786.

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1980's when many important decisions about the lands were made. As cattle ranches, the infrastructure on the New Lands when they were taken into trust was minimal and designed to support cattle ranches where very few people lived; not a population of over 2,000 Navajos, as these lands have become. There were some wells, fencing, some structures related to ranching (ranch headquarters and corrals), and a few commercial facilities.

As noted, ONHIR did not select the lands that became the New Lands, but was charged with making these lands a suitable place for relocatees to live. This responsibility included developing needed infrastructure,

insuring the availability of governmental services, and trying to attract commercial entities both to provide employment as well as to provide goods and services. Significantly, ONHIR never had any legal authority to require other entities—federal, state or Navajo— to provide any service or resources. Nor did ONHIR have the funding to provide all of what was needed or even—for the most part—to provide subsidies to encourage others to locate such resources and services on the New Lands

ONHIR appreciates that the Real Property Management function will continue after ONHIR closes. What is not clear is how much of this function (and which parts) will be managed by the Department of the Interior, other federal entities, the Navajo Nation (including Navajo Nation created entities) and the local Navajo Chapter—Nahata Dziil Commission Governance ("NDCG"). While ONHIR has pointed this out to these other entities, they have yet to decide whether and how to allocate these responsibilities. Importantly, ONHIR has no legal authority to force such decisions on these other governmental entities.

Similarly, ONHIR appreciates that transitioning responsibility to these other entities will require development and approval of some documents, such as lease or ROW modifications or assignments or novations or assignments from ONHIR to its successor. ONHIR is prepared to move forward with this, once the other governmental entities have sorted out which will be responsible for each existing agreement or program. Again, however, ONHIR has no legal authority to require these other governmental entities to act or move the process forward.

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Likewise, although federal trust responsibility with respect to the New Lands will continue after ONHIR closes, determining a successor entity is not within ONHIR's authority. [60] Only Congress or the President, if Congress delegates him the authority to do so, can designate ONHIR's successor with respect to Trust land management issues. In the absence of a designated successor, ONHIR cannot complete Transition work in this area.

The Report erroneously criticizes ONHIR for not having a complete inventory of leased or occupied land.[61] ONHIR has a list of all existing active leases on the New Lands. ONHIR does not maintain a list of vacant properties, as management of those properties does not require such list.

The Report similarly criticizes ONHIR for permitting some uses of the New Lands without written leases, including use by ONHIR.[62] The Navajo Nation and NDCG are fully aware of the uses to which these New Lands properties are being put, and have never requested that formal leases be entered. Had the Navajo Nation requested leases for these properties—or were it to request such leases—ONHIR would use written leases.

Regardless, the Draft GAO Report fails to appreciate that there is an easy solution to any properties in use without a written lease.[63] Once a successor entity is identified, ONHIR will inform the new entity of the status. If the new entity wants a written lease, ONHIR will work with the new entity and the lessee to develop a written lease.

The Report also seems to miscomprehend the Tse Bonito, New Mexico Intergovernmental Agreement. [64] The Intergovernmental Agreement used for this property was explicitly requested by the Navajo Nation. The Agreement provides for payment for the benefit of relocatees. Because the land is located in New Mexico and not Arizona,

[60] Report, pp. 35-36.

[61] Report, pp. 36-37.

[62] Report, pp. 37-38

[63] Report, p. 38.

[64] Report, p. 37, n. 78.

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revenues from this parcel are administered by the Navajo Nation, rather than ONHIR and for an enlarged class of beneficiaries.[65]

The Report fails to appreciate that ONHIR has permitted the lessee to continue to use an improvement for an Federal Aviation Administration ("FAA") navigational beacon; thus obscuring the public health and safety aspect of ONHIR's actions.[66] The FAA has continued to pay rent until the Navajo Nation negotiates and issues a new lease. The beacon continues to function.

D. ONHIR's Current Use of Lease Revenues Complies with the Act.[67]

The Report seems to take issue with ONHIR's collection and retention of lease revenues from the New Lands. [68] The Report incorrectly

characterizes ONHIR using funds derived from the New Lands for ONHIR New Lands' projects as "retention" of funds. The Report comments that "the Settlement Act as amended does not state that ONHIR may collect, retain, and use revenue from leases of Navajo trust land . . ." [69] As recognized in the Report, however, ONHIR has "used" the revenue to aid relocation efforts by renovating facilities located on Navajo trust land ONHIR administers, providing grants to Navajo chapters, and funding other activities to benefit relocatees."[70] There can be no doubt that such uses support ONHIR's duty to administer the land.[71]

[65] 25 U.S.C. § 640d-30(b),(d).

[66] Report, p. 38.

[67] In a separate, but related issue, the Report notes that the Navajo Nation planned to reimburse the United States for advances to the Rehabilitation Trust Fund from leases of lands and minerals on New Mexico lands taken into Trust pursuant to the Act. See Report, pp. 7-8. The Report fails to mention, however, that the Navajo Nation's plans to use the New Mexico lands for a coal mine and mine-mouth coal-fired electric generating plant never came to fruition.

[68] See Report at p. 40.

[69] Id.

[70] Report at 40.

[71] See 25 U.S.C. § 640d-10(h); U.S. v. Sinnott, 26 F. 84, 86 (D. Ore. 1886) (finding that administering a program for the benefit of Indians includes using money derived from Indian resources for program development, and stating: "even if the deposition of the money received

. . . was a technical violation of [the relevant statute], there is no pretense but that the

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Since 1980, Congress has made clear that the lands authorized to be acquired pursuant to the Act were to be administered by ONHIR and for the benefit of members of the Navajo Nation who have been subject to relocation.[72] While Congress temporarily delegated this authority to BIA in 1986,[73] by 1988 Congress returned authority over the New Lands to ONHIR with even clearer authority to administer these lands for the benefit of relocatees. [74] Congress' actions to remove and then restore ONHIR's authority over the New Lands—and with enhanced authority—underscores the point that sole authority over these lands properly rests with ONHIR.

The same proposition is supported by the Interior Board of Land Appeals' ("IBLA") decision in *Santa Fe Pacific Railroad Co*.[75] In that case, the IBLA

upheld BLM's decision not to acquire mineral reservations (subsurface interests) held by the railroad in lands selected pursuant to the Act. In reaching its decision, the IBLA noted that the purpose of the land acquisition was to assist the relocation process by providing a place for relocatees to live. Had the goal of the Act been simply to provide assets to the Navajo Nation, then providing the mineral interest would have been required. Because ONHIR had no need of the mineral interests to fulfill its statutory responsibility to provide land on which relocatees could live and graze livestock, however, such acquisition was not necessary.

Thus, it is clear that Congress did not intend that the New Lands be used by the Navajo Nation as a source of income. Rather, it is Congress' clear intent that the New Lands be used to help carry out

defendant acted in good faith, and the Indians to whom the money really belonged had the benefit of it.).

[72] P.L. 96-305, Sec. 4(h) (July 8, 1980) ("The lands transferred or acquired pursuant to this section shall be administered by the Commission until relocation under the Commission's plan is complete and such lands shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands as of the date of this subsection who are awaiting relocation under this Act.").

[73] Pub. L. No. 99-190, 99 Stat.1224, 1236 (1985).

[74] See Pub. L. 100-666, Section 8 (November 16, 1988) "Subsection (h) of section 11 of Public Law 93-531 (25 U.S.C. 640d-l(h)) is amended by striking out 'the date of this subsection who are awaiting relocation under this Act' and inserting in lieu thereof 'the date of enactment of this Act: Provided, That the sole authority for final planning decisions regarding the development of lands acquired pursuant to this Act shall rest with the Commissioner until such time as the Commissioner has discharged his statutory responsibility under this Act'".).

[75] IBLA 85-584, 85-776

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relocation as authorized by the Act. Congress' intent is also clear that ONHIR, not the Navajo Nation, has been delegated the authority to administer these lands.

In its discussion of ONHIR's leasing practices, the Report consistently refers to or compares ONHIR's practices with those of BIA.[76] ONHIR is not part of BIA and never has been. The Act gave ONHIR the authority to administer the New Lands.[77] The real issue is whether ONHIR's administration—land management of the New Lands has been consistent with ONHIR's Trust Responsibilities. While the Report cites a number of

unsubstantiated complaints, it cites to no complaints concerning ONHIR's management of the New Lands.

Furthermore, the Report's criticism that the Act "does not authorize ONHIR to receive lease revenues"[78] overlooks the fact that ONHIR is specifically required to engage in precisely these activities.[79] As an independent administrative agency, ONHIR has broad authority to determine the most appropriate method of carrying out its statutory duties.[80]

In fact, contrary to intimations in the Report, there is no independent statutory authority for ONHIR to provide lease revenues directly to the Navajo Nation.[81] Indeed, given the limited purposes for which revenues from the New Lands may be used, it would have been a breach of the statute for ONHIR to simply turn over New Lands revenues to the Navajo Nation.

As a result, and in contrast to its discretion to use the revenues to fulfill its statutory obligations, ONHIR would not be permitted to direct

[76] See, e.g., Report, pp. 36, n. 74; 37, n. 77, 79; 38, n. 80, 82; 39, n. 84; 40, n. 87; 41, n. 88.

[77] 25 U.S.C. § 640d-10(h).

[78] Id.

[79] See, e.g., 25 U.S.C. § 640d-10(h) (giving ONHIR sole planning and decision making authority with regard to land development); 25 U.S.C. 640-25(b) ("Funds appropriated under the authority of this subsection (a) may be used by the Commissioner for grants, contracts, or expenditures which significantly assist the Commissioner or assist the Navajo Tribe or Hopi Tribe in meeting the burdens imposed by this subchapter.").

[80] See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[81] See, e.g., Report at pp. 38-39.

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lease revenues to the Navajo Nation.[82] Although the Act requires that certain funds be "available to the Navajo Tribe, with approval of the Secretary," this provision applies only to mineral revenues from lands in New Mexico which, by statute go to the Rehabilitation Trust Fund, which is administered by the Navajo Nation and which, by statute has a far broader class of beneficiaries.[83]

Moreover, ONHIR's use of lease revenues is consistent with its status as trustee over the lands. As referenced, title to the lands acquired under the Act was "taken in the name of the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation."[84] Arizona law provides guidance as to ONHIR's generally accepted authorities and responsibilities as trustee. As clearly recognized, ONHIR has specific powers and duties with regard to management of trust property.[85]

ONHIR's powers as trustee generally include "powers appropriate to achieve the proper investment, management and distribution of trust property."[86] More specifically with regard to comments in the Report, ONHIR has the power to "[d]eposit trust money in an account in a regulated financial service institution."[87] In addition, ONHIR has broad power as trustee to manage real property, including the power to "[e]nter into a lease for any purpose as lessor . . ."[88]

ONHIR's actions with regard to leased property, as described in the Report match perfectly with ONHIR's duties and powers as Trustee. In particular, ONHIR has exercised its discretion to ensure the proper management and administration of the lands through overseeing lease revenues. Again, while the Report takes issue with ONHIR's deposit of lease revenues into its own account, the power to do so is specifically granted to ONHIR as trustee.[89]

[82] See Louisiana Public Svc. Com'n v. F.C.C., 476 U.S. 355, 374 (1986) (A federal "agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers such power upon it.").

[83] See 25 U.S.C. § 640d-30(h).

[84] 25 U.S.C. § 640d-10(a)(2).

[85] See, e.g., In re Naarden Trust, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999) (trustee's duties arise under state law).

[86] Ariz. Rev. Stat. § 14-10815(A)(2)(b).

[87] Ariz. Rev. Stat. § 14-10816(4).

[88] Ariz. Rev. Stat. § 14-10816(8)-(9).

[89] See Ariz. Rev. Stat. § 14-10816(4).

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ONHIR also has the specific power to act as lessor over the lands, which it has done effectively. In addition, the Report does not reflect the realities as to the decision of whether ONHIR or the Navajo Nation will be the

lessor for commercial leases. ONHIR has become lessor on some of the leases at the request of the Navajo Nation; while others have been jointly negotiated and approved by the Navajo Nation Department of Justice. Additionally, the Navajo Nation Department of Justice has recommended that the Navajo Nation President sign off on various agreements, which he has done. As a result, ONHIR has retained control as the lessor and uses lease revenues in appropriate support of congressionally mandated duties and consistent with its role as trustee.

The Report's complaints regarding ONHIR's preparation of leases and lease information for transition are premature. [90] Once it is determined who will assume ONHIR's role with the New Lands, and when, any needed lease amendments will be processed. In addition, ONHIR will prepare lease and surface agreement files for each lease in effect when responsibility for the New Lands passes from ONHIR to the successor entity. At this point, however, it is not clear when a successor entity will take responsibility for the New Lands.

E. Padres Mesa Demonstration Ranch Eases the Burden of Relocation.

The Senate Report that accompanied the Act included several guiding principles. Among these, the Act intended for there to be "a thorough and generous relocation program to minimize the adverse social, economic, and cultural impacts of relocation on affected tribal members." [91] In addition, Act's original Section 13 required that the relocation process "take into account the adverse social, economic, cultural, and other impacts of relocation on the persons involved in such relocation and be developed to avoid or minimize, to the extent possible, such impacts."[92]

A thorough analysis of ONHIR's New Lands grazing program must begin with an appreciation of the grazing issues on the HPL in the FJUA

[90] See Report, p. 39.

[91] S. Rep. No. 93-1177 at pp. 19-20 (1974).

[92] This section was repealed in 1988, by which time more than 4,000 members of the Navajo Nation had applied for relocation benefits.

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from which the New Lands residents, including the grazing permittees, were relocated.[93]

These lands were so badly overgrazed that Congress enacted the following language in an effort to remedy this situation:

Notwithstanding any provision of this Act, or any order of the District Court pursuant to section 3 or 4, the Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after the date of enactment of this Act. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.[94]

Even the Ninth Circuit Court of Appeals became involved by upholding district court orders mandating livestock reduction. In its decision, the Court of Appeals noted: “This is poor men against other poor men, fighting against a long historical backdrop for an over-grazed, harsh, and inhospitable area which yields little above a subsistence living.” [95] Recognizing the severe overgrazing problem, the Court of Appeals upheld the District Court’s finding

that members of appellant Tribe have so extensively overgrazed the range that 80 per cent of the joint use area is producing only 0 per cent to 25 percent of its maximum forage, and that the range is still deteriorating. That

[93] The Report refers to Navajo Nation Human Rights Commission complaints concerning livestock grazing by relocatees. See Report at 28. Such complaints have no basis in fact or law. In reality, the only area where relocatees are permitted to have livestock is the ONHIR administered Range Units on the New Lands. ONHIR has never had any authority to take Navajo Reservation lands outside the New Lands and the Navajo Nation has never offered to provide Relocatees sufficient acreage to allow relocatees to have livestock at their relocation site.

[94] Pub. L. 93-531 (Dec. 22, 1974).

[95] Hamilton v. MacDonald, 503 F. 2d 1138, 1145 (9th Cir. 1974).

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condition constitutes waste.[96]

Given this history, ONHIR had a clear responsibility to insure that New Lands grazing would not repeat the mistakes of the past which had resulted in environmental destruction. At the same time, ONHIR was

tasked with insuring that relocation was as successful as possible. Thus, ONHIR set out to create and implement a grazing system which both preserved and enhanced the range resource and provided significant economic benefits to the relocatees with grazing permits on the New Lands.

Other areas of the Act further indicate Congress' intent that ONHIR take actions to permit some members of the Navajo Nation to raise livestock following relocation. [97] In fact, ONHIR's New Lands program, which has been regularly reviewed by Congress and by the Office of Management and Budget ("OMB"), provides for "Range Units," a grazing regime. In addition, ONHIR has developed and published regulations to implement this program.[98] Thus, it is clear that, as part of its relocation activities, ONHIR is authorized to provide for livestock grazing.

The grazing regulations also make clear that those relocatees who had grazing rights on the HPL receive priority in ONHIR's decision to award New Lands grazing permits. Specifically, those eligible for New Lands grazing permits include those who"[h]ave a current HPL grazing permit, or have had an HPL permit issued since 1980, or are current HPL residents and can show documentation of a past grazing permit issued in their name for grazing on an area now on the HPL…"[99] The regulations also make clear that New Lands grazing is intended to be carried out in a manner consistent with best practices and exists to insure the success of the Permittees' relocation. [100]

[96] Id. at 1147.Hamilton v. MacDonald, 503 F. 2d 1138, 1145, 1147 (9th Cir. 1974) (The Navajo Nation was grazing 88,000 sheep units in the FJUA, the capacity of which the BIA determined was 22,000 sheep units).

[97] See, e.g., 25 U.S.C. § 640d-13(a) (allowing relocation of entire households, "including livestock").

[98]See 25 C.F.R. § 700(Q).

[99] 25 C.F.R. § 700.709(a)(1)

[100] See 25 C.F.R. § 700.705 ("It is the purpose of the regulations in this part to aid the Navajo Indians in achievement of the following (a) The preservation of the forage, the land, and the

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Because of its duties to ease the economic burden of relocation and to responsibly administer the lands, ONHIR must ensure that relocatees' grazing practices are economically successful while preserving grazing resources. Through trials with multiple programs, ONHIR determined that

a “demonstration ranch” would be the most effective way of accomplishing these potentially competing mandates. [101] Therefore, beginning in fiscal year 2009, ONHIR’s budget proposals to OMB and to Congress have clearly proposed funds for the Padres Mesa Demonstration Ranch (“PMDR”). [102] OMB’s approval and Congress’ funding of such proposals are clear indications that the ranch program has been duly approved and funded.

Perhaps more importantly, the ranch program is a success in support of ONHIR’s mandate. The program has enhanced the lands, provided previously unrealized economic advantages to members of the Navajo Nation, and has been enthusiastically supported by the local Navajo government as well as the Navajo Nation itself. Moreover, the cost has been minimal and well within best practices related to procurements, and ONHIR is confident that an in-depth cost-benefit analysis would reveal that the benefits far exceed the costs. This is largely due to the economic success of the PMDR, which has become nearly self-sufficient.[103] For these reasons, it is clear that the PMDR not only satisfies ONHIR’s statutory obligations, it has far exceeded even ONHIR’s performance expectations.

F. PMDR and the Use of Lease Revenues Comply With Appropriations Law.

As noted, PMDR was and is critical to ONHIR’s successful approach to range management education. ONHIR has used PMDR to demonstrate that best practices range management is both possible from

water resources on the New Lands. (b) The resettlement of Navajo Indians physically residing on the HPL to the New Lands.”).

[101] Successful New Lands range management required not only effective enforcement of grazing regulations and limiting grazing to range capacity, but ultimately ONHIR had to achieve buy-in from the permittees themselves. After decades of working with Navajo relocatees, ONHIR concluded that a “show me, don’t tell me” approach was far more effective. And this required ONHIR to operate an actual working ranch in the same area as permittees were engaged in their own livestock operations. This led to the establishment of PMDR.

[102] See, e.g., FY2010 OMB Budget Submission Exhibit A; FY 2010 Appropriation Summary Statement Exhibit B.

[103] See PMDR Costs Spreadsheet, Exhibit C.

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a technical sense, and the route to economic success for permittees. Thus, like every rancher, PMDR uses revenues from cattle sales to offset PMDR operating expenses. This approach is a practical necessity and one of the keys to permittees' acceptance of the PMDR example.[104]

Under 31 U.S.C. § 1301(a), appropriated funds may be used only for authorized purposes. According to published GAO decisions,

The general rule is that where an authorized appropriation is not specifically available for a particular item, its purchase may be authorized as a necessary expense if there is a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated, so long as the expenditure is not otherwise prohibited by law.[105]

As demonstrated above, OMB and Congress have both at least tacitly approved of ONHIR's specific use of lease revenues and other funds. Simply, ONHIR has disclosed the disbursements as a part of its budget and no issue has arisen concerning utilization of appropriations in support of a program that is within the clear statutory mandate. Thus, no further analysis is necessary.

Nonetheless, under GAO's analytic framework, the determination of "whether an appropriation is available for certain expenses recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses that are necessary or incident to the accomplishment of that purpose." [106] Agencies, such as ONHIR, are given broad discretion with regard to the scope of what is "necessary or incident to" the purpose of its appropriations.[107] As explained more fully above, there can be no doubt

[104] This has also been one of the principal reasons that the PMDR has proved so attractive to other relocatees living outside the New Lands.

[105] Matter of: Commodity Futures Trading Com'n – Availability of Appropriations for Inspector Gen. Overhead Expenses, B-327003 (Sept. 29, 2015).

[106] Matter of: Commodity Futures Trading Com'n – Customer Prot. Fund, B-324469 (Nov. 8, 2013).

[107] See B-245541, 71 Comp. Gen. 402 (May 21, 1992) ("The determination of whether a particular expense is necessary for an authorized purpose is, in the first instance, a matter of agency discretion. Accordingly when [GAO] consider[s] whether an expense is necessary, [it] determines only whether it falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.").

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that using lease revenues to improve lands and provide grants, and operating PMDR to ease the social and economic burden of relocation are "necessary" and "incident to" the purpose of ONHIR's appropriations in allowing the agency to ensure the success of relocatees.

Furthermore, to the extent there is any doubt, as you are aware, GAO has developed a three-part test to evaluate "whether a specific expenditure is a necessary expense of an appropriation: (1) the expenditure must bear a logical relationship to the appropriation sought to be charged; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation."[108] There is no prohibition against ONHIR's use of the lease revenues and there is no prohibition against the operation of PMDR. In addition, neither of these programs is funded by a different appropriation source. Thus, the only analysis is in regard to the logical relationship between these programs and ONHIR's duties under the Act.

Both the operation of PMDR, and the identified uses of lease revenues bear more than a "logical relationship" to ONHIR's clear obligations to administer acquired lands[109] and to assist with improving the economic, educational, and social conditions of relocatees and their families.[110] The lease revenues and PMDR help people who have been relocated under the Act by empowering them to improve their social and economic conditions. It is irrelevant that some other agency or branch of government may have chosen different methods of accomplishing these goals.[111] ONHIR is given the discretion to make these determinations. This analysis under GAO's framework makes clear that PMDR and the lease revenues are appropriately used as incident to ONHIR's duties under the Act.

[108] B-324469.

[109] 25 U.S.C. § 640d-10(h).

[110] *See* 25 U.S.C. § 640d-30(d).

[111] *See Valley Const. Co. v. Hoffman*, 417 F. Supp. 926, 929 (S.D. Ga. 1976) ("Administrative agencies are not held to a standard of perfection that would render them unique among organs of government; it is enough if they have substantially performed their assigned tasks and have not abused the discretion confided to them.").

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IV. The Transition Process—ONHIR Cannot Accomplish Transition Without Cooperation[112]

The Report is correct that the Act does not identify a successor entity to ONHIR, but it is wrong to criticize ONHIR and its transition- related actions for that omission. [113] ONHIR cannot remedy statutory omissions. ONHIR notes, however, and as it has advised BIA, that 25 U.S.C. § 640d-11(e)(1) provides:

The Commissioner is authorized to provide for the administrative, fiscal, and housekeeping services of the Office of Navajo and Hopi Indian Relocation and is authorized to call upon any department or agency of the United States to assist him in implementing the relocation plan, except that the control over and responsibility for completing relocation shall remain in the Commissioner. In any case in which the Office calls upon any such department or agency for assistance under this section, such department or agency shall provide reasonable assistance so requested.

The House Interior Appropriations Subcommittee instructed ONHIR to work on transition and seek to identify statutory changes, if any, that might be needed. ONHIR has done this.

ONHIR has moved forward in developing and revising transition plans with the realization that ONHIR will close and that federal obligations will not end simply because ONHIR is no longer in existence. Such plans and actions involve a combination of completing ONHIR's work which is subject to being completed and making provisions for how ONHIR's ongoing activities will be continued. The fundamental principle of ONHIR's transition is, at some point in the near future, ONHIR will no longer exist and some federal agency or agencies will be required to carry out ongoing federal responsibilities and complete uncompleted federal tasks.

[112] The Report notes that ONHIR had planned to complete its work in 2008, but has continued to operate. As you are aware, however, the 2008 Arizona Federal District Court decision in Noller Herbert v. ONHIR, CV06-03014-PCT-NVW, 2008 WL 1133889 (Feb. 27, 2008) caused

ONHIR to reopen Applications and over 2,200 Applications were received from potentially eligible Applicants and had to be processed. Thus, the continued operation of ONHIR was caused by an action external to ONHIR—the Federal District Court decision.

[113] Report, p. 33.

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ONHIR notes the Report's assertion that ONHIR has not yet taken the necessary steps to facilitate its closure.[114] On the contrary, ONHIR has taken significant steps to facilitate and implement closure, but closure will require the cooperation of federal and tribal entities that ONHIR does not control. In many areas, what remains for ONHIR to do is at least partially dependent on other federal entities and on tribal entities.

While there has been a reduction in BIA oversight with respect to Navajo Lands, BIA remains the representative of the United States for its trust responsibilities with respect to Navajo Trust Lands (except for the Trust Lands administered by ONHIR), as it does throughout Indian Country in the United States. Thus, ONHIR's transition plans have suggested that the trust responsibilities exercised by ONHIR in the New Lands and other lands acquired pursuant to the Act should be assumed by BIA. While adding to the trust land base would create additional costs, virtually all of ONHIR's trust responsibilities for the New Lands are similar, if not identical to the responsibilities that BIA has with respect to other Navajo Trust Lands.

The ONHIR work to be completed includes any remaining eligibility and appeals work and any remaining work related to providing relocation homes (or the cash equivalent) for persons either administratively or judicially determined to be entitled to a Relocation Housing Benefit. ONHIR is working diligently to complete action on all administrative appeals. As of this writing, there are 25 administrative appeals in which ONHIR has yet to enter final agency action. There is also one adverse District Court decision on appeal and one APA appeal remanded to ONHIR for further proceedings.

As previously referenced, federal law gives persons wishing to challenge agency action six years from final agency action to file an Administrative Procedure Act complaint.[115] Thus, it is possible that if ONHIR were to close on September 30, 2018, about 170 APA actions could be filed after ONHIR's closure. While the "conduct of litigation" is handled by the United States Department of Justice, [116] some entity

[114] Report, "What GAO Found."

[115] 28 U.S.C. § 2401(a).

[116] 28 U.S.C. § 516.

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within the United States Government would be expected to assume ONHIR's role as client in such litigation. The most likely entity is BIA.[117]

With respect to completing counseling and other work related to providing a relocation home for persons who are or become certified as eligible for relocation benefits, the only disagreement over what needs to be done is whether such persons ought to be provided a relocation home, or provided the cash equivalent of such a home. The Act requires a relocation home.[118] If Congress wanted to expedite the process, however, it could authorize a cash payment in lieu of the counseling and relocation home construction.

If ONHIR closes before all needed relocation homes have been constructed and the two-year post-move counseling and (in many instances) two-year warranty period has not ended, then some other entity must assume these responsibilities. The GAO Draft Report erroneously criticizes ONHIR for not finding a federal agency willing to complete whatever homebuilding is needed after ONHIR closes.[119] That other federal agencies are not willing to take on additional responsibilities is not a reflection on ONHIR. In its Transition Plan, ONHIR has suggested BIA for this role because of its extensive interface with the Navajo Nation and Navajos or, alternatively, the Navajo Nation or some Navajo entity.[120] ONHIR would note that at this point no entity has proposed its own plan for how ONHIR's transition and closure should take place.

The Report incorrectly states that ONHIR has not communicated with President Trump requesting a determination that ONHIR should cease to exist.[121] ONHIR has provided whatever information has been

[117] The Report notes that BIA administers the Housing Improvement Program. Report, p. 10. OMB and Interior have informed ONHIR that the Housing Improvement Program is not being funded in FY18 and the Administration has no intent to fund this Program in the future.

[118] 25 U.S.C. § 640d-14(d).

[119] Report, pp. 33-34.

[120] GAO states that ONHIR's Transition Plan would require other federal agencies to undertake programs and work for which they lack authority. See Report, "What GAO Found." If true, this is not something that ONHIR can fix. If the work must be done after ONHIR closes and there is currently no federal agency with authority to do this work, then the President should recommend and the Congress should authorize the appropriate federal agency to do this work.

[121] Report, "What GAO Found."

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requested to the President through OMB. ONHIR has been working with OMB on closure scenarios and strategies for many years and OMB is part of the Executive Office of the President.

Relatedly, The Report is misleading in its criticism of ONHIR for not requesting a determination from the President on when ONHIR will close.[122] ONHIR has worked with the President's representatives in the OMB for years on ONHIR completing its work and closing. The Report also unfairly criticizes ONHIR's regular communications with the Executive and Legislative Branches of the government. [123] ONHIR regularly communicates with OMB—at least once a month and usually more frequently, and responds promptly to their requests. ONHIR provides monthly reports to the House and Senate Appropriations Interior Subcommittees and responds promptly to all their inquiries. ONHIR also meets and/or communicates with BIA at least once a month and responds promptly to all their requests.

The Report is similarly inaccurate in faulting ONHIR for not having "complete information" available to "successor agencies." [124] ONHIR has made sure its files are updated and complete. ONHIR has developed an extensive and publicly accessible "Transition" section of its website with detailed information about its activities. [125] Unless and until "successor agencies" are determined by the President and/or Congress, ONHIR cannot complete its efforts to gather information needed by such successor entities. Whatever potentials successor agencies have asked of ONHIR has been provided.

Finally, the Report's discussion of ONHIR's Eligibility and Appeals Branch transfer preparation is inaccurate. [126] ONHIR has prepared reports showing which administrative appeals will still be subject to an APA appeal as of the end of FY 2018. ONHIR is working diligently to complete all pending administrative appeals. As referenced above, all relevant casefiles are up to date, thus allowing a successor agency to assume

control over any potential ongoing litigation. No other agency has come forward indicating a willingness to finish the ONHIR

[122] Report, p. 30.

[123] Report, p. 30.

[124] Report, p. 30.

[125] https://www.onhir.gov/transition/index.html (last visited March 5, 2018)

[126] Report, p. 31.

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administrative appeal process. The process includes the potential for remands from the district court. However, no other agency has come forward indicating a willingness to provide "client functions" and assistance to the Department of Justice after ONHIR closes.

V. GAO RECOMMENDATIONS AND ONHIR'S RESPONSES

A. Matters for Congressional Consideration.

This section provides ONHIR's input with regard to the matters GAO has submitted for congressional consideration upon ONHIR's closing.[127]

Matter for Consideration 1: "Congress should consider providing necessary authority for other agencies to continue remaining activities when ONHIR closes."[128]

Response: ONHIR agrees. The Department of the Interior and BIA both claim they lack the authority and resources to complete those aspects of ONHIR's work which will probably not be completed by the time ONHIR closes. A clear Congressional direction would overcome this reluctance by DOI and BIA.

Matter for Consideration 2: "Congress should consider determining (1) whether the requirement for the land acquired pursuant to the Settlement Act as amended to be used solely for the benefit of relocatees should continue and (2) how grazing on the New Lands should be regulated."[129]

Response: ONHIR's experience is that the Navajo Nation, and to a lesser extent the Hopi Tribe, has different standards in regard to the treatment of relocatees. As such, the tribes have been reluctant to provide relocatees

the same level of support and benefits they provide to other tribal members. Continuing the requirement that lands acquired pursuant to the Act would at least provide some minimal level of funding for the post-ONHIR needs of Navajo relocatees.

ONHIR's experience is that the ONHIR grazing regulations together with Range Unit Management Plans and PMDR have resulted

[127] See Report, pp. 47-48.

[128] Report, p. 47.

[129] Id.

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in land management practices and range conditions in the New Lands far superior to what exists in the rest of the Navajo Nation. Continuing these practices and the PMDR is therefore in the best interests of the ranchers of the New Lands and the preservation of the range resource.

Matter for Consideration 3: "Congress should consider addressing the mandatory trust acquisition provision for the Navajo Nation in the Settlement Act as amended."[130]

Response: Authority for remaining land selections should be given to the Navajo Nation.

Matter for Consideration 4: "Congress should consider whether the requirement for the Navajo Nation to repay the U.S. Treasury for appropriations made to the Navajo Rehabilitation Trust Fund should continue."[131]

Response: Given that repayment was premised on the construction of a mine mouth coal-fired steam generating power plant that will never be built, waiver of repayment would be appropriate.

B. Recommendations for Executive Action

This section provides ONHIR's responses to the Report's recommendations to ONHIR.[132]

Recommendation 1: “The Executive Director of ONHIR should request a presidential determination as to whether ONHIR has fully discharged its responsibilities and whether it should close.”[133]

Response: ONHIR has worked for decades with OMB—the Executive Office of the President—on completing our work. We will continue to do so and will continue to promptly and accurately respond to all requests from OMB.

Recommendation 2: “The Executive Director of ONHIR should prepare complete information on the remaining denied households who

[130] Report, p. 48.

[131] Report, p. 48.

[132] Report, p. 48.

[133] Id.

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could still file for federal appeals. Such information could include paper case files and information in ONHIR’s client database for those households.”[134]

Response: As referenced, the casefiles have been identified and all needed information already exists in the casefiles and in the AS 400 database. Such information will be provided to whatever entity takes over the Eligibility and Appeals function from ONHIR or will be supporting the Department of Justice with respect to APA Appeals.

Recommendation 3: “The Executive Director of ONHIR should prepare complete information on warranties and contractors. Such preparation should include linking warranty complaints to the relevant contractor, completing missing warranty information, and completing information on contractors’ past performance.”[135]

Response: Up-to-date and complete information on warranty status appears in the existing casefiles. It will be provided to whatever entity takes over the warranty function from ONHIR.

Recommendation 4: “The Executive Director of ONHIR should establish a comprehensive inventory of (1) properties located on trust land it

administers, (2) leases of those properties, and (3) surface use and other use agreements for trust land it administers."[136]

Response: All such documentation exists and is maintained and updated. It will be provided to whatever entity takes over the real property function of ONHIR.

Recommendation 5: "The Executive Director of ONHIR should identify which leases and other agreements need to be amended or assigned because (1) ONHIR is the lessor; (2) the lease or agreement provides for annual payments to be made to ONHIR; and/or (3) the lease or agreement terminates upon ONHIR's closure."

[134] Id.

[135] Id.

[136] Id.

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Response: Once an entity is identified to handle real property functions, appropriate amendments or assignments will be prepared and executed.

VI. CONCLUSION / THE ROAD AHEAD

That ONHIR will close is not in doubt; nor is it in doubt that some entity or entities will need to assume responsibility for those activities of ONHIR that are either not concluded or are ongoing federal activities. ONHIR welcomes input from GAO, from other federal entities, and from stakeholders so that this transition is a smooth and efficient as possible. ONHIR is also aware that there are some questions that have been raised about a small number of relocation homes. While GAO has not provided guidance on the question of the source of problems with a relatively few Relocation Homes, ONHIR would welcome an independent study of this question by trained and competent professionals.

In a broader sense, such a study should also look at the question of how homeowner maintenance is handled in the Navajo Nation and, perhaps, the Hopi Reservation. Perhaps such a study could also look at the question of how fire and casualty insurance is and could be provided on the Navajo and Hopi Reservations.

With respect to counseling in a social services sense, a professional study directed at the identification of unmet needs should be welcomed by all, since unmet counseling needs affects the quality of life of those with such needs and also may threaten the lives or health or well-being of other persons whom those with unmet needs interact with.

ONHIR appreciates GAO's Report, and the opportunity to provide these comments. Please do not hesitate to contact me if there are any questions, or if additional information that would be helpful.

Very truly yours,

Christopher J. Bavasi

Executive Director, ONHIR

Accessible Text for Appendix III: Comments from the Navajo Nation

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THE NAVAJO NATION RUSSELL BEGAYE

March 15. 2018

Government Accountability Office

Washington, DC 20548

Re: Navajo Nation Response to Draft GAO Report: “Office of Navajo and Hopi Indian Relocation: Executive Branch and Legislative Action Needed for Closure and Transfer or Activities”

Article I. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it.

Treaty with the Navaho, 1868

Currently on Public Display at the

National Museum of the American Indian,

Smithsonian Institution, Washington, DC[1]

I. INTRODUCTION

1868 Treaty. In 1868, by treaty signed at Fort Sumner, New Mexico, where the Navajo people had been imprisoned for a period of 4 years, the United States government pledged its honor to keep the peace with the Navajo and allowed the Navajo people to return to their homeland within the bounds of their four sacred mountains.[2]

The United States acts dishonorably. Despite the pledge of its honor to keep the peace, in 1974, by Act of Congress,[3] the United States ordered the removal of some 16,000 Navajos off of land that they had lived on for generations and that had been set aside by presidential executive order for these Navajos (as well as for the Hopis, though only about 100 Hopi were ordered removed). If this action had been taken against a foreign nation, it would have been clearly

[2] William Tecumseh Sherman negotiated the treaty, which recognizes the importance to the Navajo people of their ancestral homelands, with such legendary Navajo leaders as Barboncito and Manuelito.

[3] Navajo Hopi Land Settlement Act, Pub. L. No. 93-531. 88 Stat.1712 (1974). The Act was formerly codified at 25 U.S.C. 640d. The Act is referred to throughout this document as the “Relocation Act.”

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order for these Navajos (as well as for the Hopis, though only about 100 Hopi were ordered removed). If this action had been taken against a foreign nation, it would have been clearly recognized as a treaty violation and, ultimately, an act of war. But the Navajo Nation did not go to war with the United States, having learned through a long and bitter history that it is not possible to use force against the United States to assure justice and liberty for the Navajo people. Instead, for decades, the Navajo Nation urged the repeal of this unjust and extremely harmful law, but to no effect as the United States implemented its relocation provisions while failing to keep its promise of a humane relocation. There are still actions the United States can take to mitigate in some measure the harmful consequences of the relocation law. One important action would be to issue an apology for this massively ill-conceived and destructive policy. Another would be to fulfill the promises the United States made when it mandated relocation.

So-called “benefits” were a mere sop to Navajo families whose lives and lifeways were about to be destroyed. The United States promised a "generous and humane" relocation process, with great benefits for the relocatees, including the provision of a home as well as infrastructure and economic development. These promises were unpersuasive to the affected Navajo families, who strongly opposed this mandatory relocation, despite the supposed "generosity" of the United States. This resistance was rooted in an overwhelming belief that what would be lost would far exceed what would be gained; and for the Navajo relocatees this fear has proved all too well founded. The promised benefits, despite their economic worth in the non-Indian world, were no more significant to the relocatees than the various token "gifts" that have been offered to Native peoples going all the way back to Christopher Columbus, even as their land was taken. But what they lost was virtually everything they valued in life, and many of the promised benefits that might have mitigated some of these harms were never delivered.

Many of those Navajos were among the most traditional Indians left in the United States, speaking only Navajo, living a traditional subsistence lifestyle in harmony with the land and their beliefs. They were descended from Navajos who had resided in the same location from long before the establishment of the 1882 reservation. The requirement that these Navajo families relocate is totally without precedent since the World War JI internment of Japanese-Americans. In contrast, where Indian tribes have successfully sued to recover land from non-Indians, the tribes have only received a cash payment; relocation of the non-Indians was never considered an option.

Navajo relocatees, meanwhile, have become separated from the land and lifeway that mandated they follow traditional practices and live in traditional homes. However, as relocatees, they were also displaced from their ability to earn a living because they lost their grazing and farmlands and were given up to one-acre sites instead. Thus, relocation resulted in forced poverty, both spiritually and economically.

The law, despite its draconian relocation provision, was supposed to be administered in a "generous and humane" manner, with families receiving cash benefits and a new relocation home. In reality, as discussed further below, the relocation and housing program-inhumane in its very conception- has also been bedeviled by bureaucratic ineptitude with great hardships imposed on those families who, under great Federal government pressure, relocated.

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Regrettably, the draft GAO report elevates economic values over social, spiritual, and cultural harms to the Navajo people.[4] Over the years, representatives of the United States have characterized the relocation as providing an extraordinary, once-in-a-lifetime opportunity for Navajo families to have a modern home and to participate in the modern economy. This overwhelming emphasis on material gain is always used to devalue Navajo cultural and spiritual views. Indeed, the promise of material gain for Native peoples has long been used as the conscience-salving justification for dislodging Native peoples from their lands, even though time and again it is the non-Indians who realize all the gain.[5]

The GAO report emphasizes the Anglo-American bias that having a modern home is a significant improvement over living in a way mandated by one's gods. The draft report discusses past findings on other reservations about the difficulties in constructing homes, leaving the reader with the assumption that the same conditions are true in the Navajo Nation. That is an oversimplification that leads to misconceptions and prejudice.

On page 21 of the draft report, the GAO juxtaposes two photos: one is of a home constructed of mud built into the side of a small hill that the GAO characterizes as a “[t]raditional Navajo home prior to relocation”; the other is of a “[r]elocation home constructed in 2017.” From a Navajo perspective, that structure may hold great significance. However, the juxtaposition to non-Indian eyes is strongly suggestive of diet program “before” and “after” pictures, illustrating the extraordinary benefits that result from following the program. The message is not lost: GAO is using these photos to illustrate to a Washington, D.C. audience that the Navajo relocatees have had an incredibly positive outcome from participating in the relocation program, going from modest dwellings a little bigger than a garden shed, to a crisp looking modem home, with striking eaves and an ADA-compliant ramp to the front door.

But this supposedly wondrous outcome is belied by the tremendous opposition that the Navajo Nation and the Navajo people have mounted in an effort to prevent just this result! Indeed, the structure in GAO's photo of a “traditional” home belonged to Leo Yellowhair. This photo is not representative of most relocatees' homes and appears chosen to create a biased impression in the

[4] The Navajo Nation appreciates that GAO staff travelled to the Navajo Nation and have spent many hours seeking to understand the complexities of the mass relocation of Navajos. The Navajo Nation also appreciates that the GAO is bound to some degree by the questions put to it by Congress (although, as described below, the Navajo Nation believes that there was room in those questions to address the deeper concerns of the Navajo people and the ongoing harmful effects of relocation). With all that said, it is a serious matter to the Navajo Nation that its spiritual and cultural values tend to have no bearing on Federal actions and assessments, and are not reflected in GAO's recommendations.

[5] These attitudes persist:

I don't feel we did wrong in taking this great country away from them, if that's what you're asking. Our so-called stealing of this country from them was just a matter of survival. There were great numbers of people who needed new land, and the Indians were selfishly trying to keep it for themselves.

John Wayne (Academy Award winning actor), May 1971.

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reader. Like a number of other Navajo heads of household living on the Hopi Partitioned Land, Mr. Yellowhair was eligible for relocation benefits, but rejected !hem, instead signing the Accommodation Agreement, which allowed him to remain on his ancestral and familial lands for up to 75 years. (This 75-year limitation sets up the potential for another relocation in a few decades of the children and grandchildren of today's Accommodation Agreement signers.)

For someone steeped in Western economic and cultural values, the juxtaposed photos make an apparently irrefutable argument that relocation has been a great success and that Mr. Yellowhair (and all the others who resisted) were crazy not to accept this "deal." And yet, Mr. Yellowhair did not accept this “deal” and he was not crazy. Something else is going on here, which the Navajo Nation insists be recognized and articulated in the GAO report.

The Navajo families who lived in traditional homes did so as part of an integrated spiritual and religious lifeway and as part of self-sustaining communities. Most lived in hogans, which are a necessary structure for many Navajo traditional ceremonies and practices. The design and construction of the traditional hogan is an element of Navajo spiritual teachings, many of which relate strongly to residing in a particular geographic place. For Navajo relocatees, physically relocating from their ancestral lands results in a loss of this traditional lifeway.

When the traditional lifeway is lost, the relocatees must replace it with a viable alternative. The generous and humane relocation plan mandated by Congress would not have solved the issues of loss of the Navajo traditional culture and spiritual link to their ancestral land, but it would have given relocatees a way to keep their families together and provide for their children and elders. Because the program has not been delivered, the relocatees' cultural, spiritual, family, and economic lives have been, in many cases, destroyed. Some host communities have over 90% of school-age children homeless.

The GAO report suffers from the same flaw as all prior US efforts-an embrace of the economic value of the relocation law to the Navajo people, as weighed against the terrible social, spiritual, and cultural costs. Because the GAO report misses the truth of what has happened, many of its recommendations, discussed in greater detail below, are mechanistic in character, rather than humane, and will not lead to a just outcome.

II. THE RELOCATION PROGRAM

It is like being buried alive.

- 64-year-old woman relocatee.[6]

Devastating effects of relocation. The effort to relocate over 16,000 Navajos off of their ancestral lands has resulted in enormous hardship and heartache for a proud people. Many of the so-called “relocatees”' have been traumatized by the attempt to adjust to a cash economy from their subsistence lifestyles. Few had marketable skills, employment history, training, education, or any other means to pay such common expenses in a Western economy as taxes and utility bills. A 1979

[6] Orit Tamir, Relocation of Navajo from Hopi Partitioned Land in Pinon, 50 Human Organization 173, 175 (1991).

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survey of relocated Navajos revealed that 25% of them were doing poorly, either having lost their homes to loan sharks or otherwise struggling with severe family instability, health problems, suicide attempts, and depression. A 1982 Relocation Commission survey found that at least one-third of the relocatees no longer owned their relocation homes. A follow-up survey in 1983 found that one- half of Navajos relocated to border towns had either lost their homes or accumulated significant debts

due to their unfamiliarity with a cash economy and the unscrupulous actions of lenders. By March, 1984, almost 40% of the relocatees who were put in off-reservation communities no longer owned their relocation homes (these Navajos refer to themselves as the “homeless Navajos,” a reflection of their predicament of having no off-reservation home and nowhere on the Navajo Nation to return to); evidence of fraud was so great that an FBI investigation was begun. Over time these types of issues were addressed to varying degrees, but never the underlying harm caused by the relocation itself.

In 1982, a prominent social scientist predicted that continued relocation of the Navajos would result in: (1) the undermining of the relocatees' faith in themselves, (2) the dependency of the relocatees on the Federal relocation agency, (3) the breakup of families due to the increased stress and alienation caused by the relocation, (4) increased depression, violence, illness, and substance abuse, and (5) stress on the other Navajo communities which volunteered to make room for the relocatees.[7] Every expert who testified on the probable effects of the relocation before the law was passed predicted similar dire consequences. Tragically, the intervening years have shown that all of these predictions have come to pass. There has even been a significant rise in death rates among the relocatees after they relocated.

Relocation for these Navajo families was not just a matter of changing address. It was an end to their way of life. Truly, they felt “buried alive.” For those who remained on the land, resisting the relocation program, a Federally imposed construction freeze, along with a freeze on almost all Federal assistance, created nothing short of government-enforced squalor. Reduction of livestock by the Bureau of Indian Affairs (BIA), authorized to the “carrying capacity” level of the land, actually cut much deeper and has led to accusations that the BIA was trying to “starve out” the Navajo families. For Navajo families now living on the Hopi-Partitioned Lands (often referred to as the “HPL”) under Accommodation Agreements, life is extremely difficult. For instance, the heavy-handed impoundment of livestock by the Hopi and the BIA remains a critical issue.[8]

Even greater hardship has been inflicted upon the Navajo “refugees”—Navajo families who left the Hopi land under Federal pressure and in accordance with the law—who have yet to be provided relocation housing and other Federal benefits. Increased Federal funding in recent years has cut into this backlog, but there remain more than a score of certified applicants without homes, and over 200 denied applicants who have not

yet exhausted their appeal rights. ONHIR's mishandling of defect and repair claims, and its failure to maintain records, leaves an unknown number of incomplete and

[7] Thayer Scudder, No Place To Go, (Philadelphia: Institute for the Study of Human Issues), p. 10.

[8] Unlike the Uniform Relocation Act (42 U.S.C. §§ 4601-55 (1970), the Navajo-Hopi Relocation Act does not provide support for the relocation of businesses and the impact on farm operations. And, yet, the Navajo relocation heavily impacted what were effectively the businesses of these families, which allowed for their self-sustaining lifestyle. This business-impact on these families has never been properly addressed.

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defective housing units, many of which are uninhabitable. Over the years, a significant number of the refugees awaiting housing were living in substandard conditions that often did not even meet the minimum Federal requirements for temporary housing for migratory farm workers. Some were living under conditions that posed an extreme risk to personal health and safety. Many had to move in with extended family members on other parts of the Navajo reservation and, as a result, are living in severely overcrowded homes. During a Congressional oversight hearing on the implementation of the relocation law, the Relocation Commission (now called the Office of Navajo and Hopi Indian Relocation) testified regarding the plight of the Navajo refugees:

We think, frankly, that it's been a travesty that we have not been able to provide benefits to those relocatees that complied in good faith with the order of the courts and the instruction of Congress to leave the area of controversy.[9]

The tragedy of the relocation policy is all the more poignant because it is not the first time the Navajos have been relocated on a massive scale by the Federal government. In 1863, the United States Government dispatched Kit Carson to subdue the Navajos. To force the Navajos out of hiding, Carson engaged in a systematic “scorched earth” policy, killing or setting fire to Navajo livestock, orchards, fields, and homes. Over 8,500 Navajos were captured and marched 300 miles to their “new home” at Fort Sumner, New Mexico. Hundreds died on the march, and thousands died in captivity at Fort Sumner, where living conditions were abominable. The Navajos who escaped capture hid out in remote portions of their land including the Grand Canyon and the top of Black Mesa, in the heart of the disputed area. Finally, in 1868 the Anny, realizing that its effort to transplant the Navajos was a failure, let them return to their homeland in

Northern Arizona and Northwest New Mexico. Navajo families still pass down tales of horror and courage from that experience-now supplemented by stories of the ongoing relocation.

Generational impact of relocation. The impact of the relocation reaches down to the third and fourth generations of relocated families, because they have no place to return to and no benefits from the relocation. Many if not most have lost their language and much of their cultural foundation. Many live in Navajo host communities, especially on the Navajo Partitioned Lands (often referred to as the “NPL”), in which people made room for their grandfather or grandmother, but they did not contemplate and have received no support for addressing the growing impact of children and grandchildren. This impact on limited chapter resources, such as land, creates tremendous cultural and societal stress. These later generations have suffered great harm from the relocation.

Another generational injustice to relocatees who are fighting for their relocation benefits is found in ONHIR's regulations. 25 C.F.R. § 700.145 provides that ONHIR will not pay relocation benefits to the estate of deceased applicants if the applicant died before signing a relocation contract. This includes all denied applicants who have contested their denial and lodged appeals-as they are not able to sign a relocation contract before being certified. As the GAO report shows, the average time frame for a certified application with administrative appeals is

[9] Testimony of Relocation Commission before the House Committee on Interior and Insular Affairs, July 19, 1986.

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3,301 days--over nine years, with the maximum being 12,022 days-taking nearly 33 years to complete the process. As a result of this unacceptable delay, the Navajo Hopi Legal Services Program has represented at least three applicants who have passed away either after their administrative appeals or with pending federal appeals. Even if these individuals obtain a favorable ruling reversing ONHIR's denial determinations, ONHIR's regulations still bar the applicants' families from being able to receive the relocation benefits that they have waited for. Essentially, as the direct result of ONHIR's incredible delays with its administrative appeals process, successful applicants who have died during the appeals process will still not be able to collect the promise made to them when they were forced from their traditional lands and way of life.

III. ASSESSMENT OF GAO REPORT

Issues addressed by the GAO. In its report, the GAO examined the following:

(1) ONHIR's management of the eligibility and appeals processes and the status of these activities;

(2) ONHIR's management of the home-building process and the status of these activities;

(3) Executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities;

(4) ONHIR's management of Navajo trust lands and related transition activities; and

(5) Legislative actions that may be necessary to address other Relocation Act provisions.

On the mechanistic issues, GAO was fairly accurate, but on the issues that mattered most, GAO failed to express the essence of what has transpired on the land and what is needed for the United States to live up to its obligations.

(1) *ONHIR's management of the eligibility and appeals processes and the status of these activities*. GAO accurately details the long history of neglectful implementation of the eligibility and appeals process, requiring the application period to be reopened three times. Although derivable from GAO's chart summarizing the number of applications submitted and the number approved, GAO did not note that in the fourth and final application period denial rates shot to 94%. The Navajo Nation believes that this is because ONHIR's administrative judge has changed his evidentiary standards so he can quickly deny most cases. Notably, there are a number of examples of applicants being denied who had essentially identical facts as applicants who were certified eligible for benefits. In recent months, the Federal district court has overturned two of his decisions.[10] Some relocatees have waited over thirty years to have their benefits adjudicated and delivered. The average is over eleven years.

[10] The two cases are Rosita Charles v. ONHIR, 16-CV-08188-SPL (September 5, 2017) and Jason Begay v. ONHIR, 16-CV-08221-DGC (September 28, 2017). In the Jason Begay case, the Hearings Officer was

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(2) *ONHIR's management of the home-building process and the status of these activities*. The GAO has summarized ONHIR's history of mismanagement of the home-building process and identified numerous incidents where poorly supervised contractors have done shoddy work. The GAO failed to note that the two-year warranty on these poorly built homes is dramatically less than that required for other federally funded housing. Notably, HUD through the FHA loan program requires that a IO-year warranty be in place to allow for maximum financing. This is the only contract related to construction to which ONHIR is a party. This provision seems designed to limit unconscionable the U.S. Government's potential future costs. Such a limitation is a breach of the federal trust responsibility. ONHIR has not explained why it adopted such a short warranty period for federally financed housing, but this has been a major issue as many of the houses suffered from a range of deficiencies that only became evident after the two-year period had passed. At Coalmine Chapter, not only were more than 20 houses found deficient, the chapter house itself is structurally defective. [11]

Moreover, ONHIR has acted outside the standards set by Arizona state law. In 1989, Arizona adopted the Statute of Repose for construction defects. A.R.S. §12-552. The 1989 statute allows eight years for homeowners to bring claims for defects in engineering, design, workmanship, materials, etc. Prior to that, the Arizona Supreme Court held that a much longer period of time was appropriate for such issues, in part because of the difficulty of discovery of defects. The GAO Report did note that ONHIR has failed in its mandatory obligation, to maintain adequate records of warranty claims, contractor performance, and the status of repairs. Contractors who failed to perform or who had excessive warranty claims that were their fault were not removed but instead continued to be recommended by ONHIR. One of the many tragic ironies of the Federal relocation process is that without jobs at the relocation sites, many relocatees, despite having construction and other relevant skills, have to find a way to maintain their homes without the financial resources available to other homeowners. From the perspective of the relocatees, ONHIR has set them up to fail and then sought to shift the burden of relocation failures onto their backs. Meanwhile, ONHIR has had exorbitant costs associated with the management and appeals process.

Indeed, for many years, ONHIR was building houses at an average cost of $500,000 (and the land was free) when you

overturned by a Federal District Court judge for being arbitrary and capricious. The Hearings Officer refused to accept the sworn testimony of an applicant as to the man's annual income because the Navajo testified that he had been paid in cash for landscaping work. The Hearings Officer determined that the employer was of the Mormon religion, and concluded that a Mormon would be honest and would not pay a Navajo under-the-table. Even though the employer was not present in the hearing and there was no actual evidence contrary to the Navajo man's testimony, the Navajo claimant's testimony as to his total gross income was disregarded and benefits were not allowed. ONHIR has hired a private investigator to try to create proof of what the Mormon employer's practices were thirty years ago, rather than accept the Navajo person's sworn testimony. ONHIR ultimately settled the case on remand but without conceding Mr. Begay is eligible for relocation benefits.

[11] Chapters are the local form of government on the Navajo Nation, and chapter houses play a critical role in community governance and are often a focal point of the community.

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divide ONHIR's budget by the number of houses ONHIR actually built. A major part of the problem has been lack of oversight. ONHIR has not had a commissioner since 1994. Instead, ONHIR has operated under the leadership of its Executive Director with no oversight.

(3) *Executive branch or legislative actions that may be necessary to terminate ONHIR in an orderly manner and transition remaining relocation activities*. It is completely inappropriate for GAO to address this question beyond noting that the relocation process is not yet completed, that a number of families are still in the process or have appeal rights, and that there are serious questions regarding whether the United States has fulfilled its obligations (see discussion below regarding infrastructure).

(4) *ONHIR's management of Navajo trust lands and related transition activities*. The GAO report was very illuminating to the Navajo Nation regarding ONHIR's shoddy practices with regard to the management of Navajo trust lands. The Navajo Nation does note, however that ONHIR has one shining success, which is the Padres Mesa Ranch and related livestock operation. The Navajo Nation is very satisfied with the development of the Padres Mesa Ranch and strongly supports its continued funding and operation.

(6) *Legislative actions that may be necessary to address other Relocation Act provisions*. The GAO report is seriously deficient by failing to recommend several congressional actions that are essential to “generous

and humane" implementation of the relocation law. For examples, see discussion below.

IV. ONHIR'S INFRASTRUCTURE OBLIGATIONS

Infrastructure Promises. ONHIR's statutory responsibilities extend beyond mere construction of replacement housing, to include the basic infrastructure required to make relocatee communities livable. Today, however, many relocatees are fifty miles or more from medical services, commercial goods, and community services. New Relocatee communities were built in areas absent water, power, telecommunications, wastewater, road, or community infrastructure. for instance, there are approximately 78 miles of dirt-track byways in the Hardrock area alone, which leaves residents stranded in their homes during inclement weather and makes them unable to get to schools, grocery stores, pharmacies, or medical care. Additionally, 414 Relocatee homes are known now to need electricity and 75% of homes on Navajo Partitioned Land lack any kind of wastewater service compared with 48% for the rest of the Navajo Nation and 1% of all housing units in the United States.

Additionally, when relocatees were placed in so-called "host communities," the infrastructure of these communities were overburdened. Part of the Navajo tradition includes simple agrarian lifestyles, rich in culture, pride, spiritual practices, and family. This lifestyle has been pursued for millenia on lands of sparse water and vegetation—high desert. The Navajo people learned how to do this successfully without overburdening grazing or other resources, but relocatees were taken off of established grazing lands and incorporated into the host communities. The existing infrastructure in the host communities was adequate for the residents, but not when the

population was doubled by the insertion of relocatee families. Roads, water, waste treatment, schools, power, and telecommunications in these communities are now urgently needed.

Congress clearly intended that ONHIR provide housing "and related community facilities and services, such as water, sewer, roads, schools, and health facilities" in order that the relocation be undertaken in a "thorough and generous" manner. The provision of adequate infrastructure to make relocatee communities livable is an essential part of ONHIR's statutory obligations and cannot be treated as if it is a duty

that is either nonexistent or peripheral to the construction of replacement homes. Any assessment of ONHIR's progress in completing its mandate must include an assessment of the infrastructure needs of relocatees to ensure that these needs are met prior to ONHIR's closure.[12]

GAO Misunderstands Congressional Report Requirement. In the draft report, GAO notes that some community members state that the promised infrastructure has not been provided. GAO correctly states that "provisions in the Settlement Act directed ONHIR to create a report with a plan to ensure that infrastructure such as water, sewers and roads would be available at their relocation sites. ONHIR published a report to meet the provision in 1981." GAO makes it sound like the requirement was not to complete infrastructure, but to do a report on planned infrastructure. Once the requirement to do that report was met, and the reporting requirement fulfilled, GAO concluded that "[t]he Settlement Act as amended does not require ONHIR to provide infrastructure for the New Lands." [13]

GAO completely failed to note that the 1981 report *did not* provide a plan for infrastructure development as mandated by Congress. Instead, it said that infrastructure plans would be developed as needed. This evasion of responsibility set the stage for greatly reducing the cost of relocation by downplaying the infrastructure commitment.

During deliberations on the Relocation Act, the Senate Committee on Interior and Insular Affairs set forth guiding principles for the relocation program. Of particular importance were principles 9 and 11:

9. That any such division of the lands of the joint use area **must be undertaken in conjunction with a thorough and generous relocation program to minimize the adverse social, economic, and cultural impacts of relocation on affected tribal members** and to avoid any repetition of the unfortunate results of a number of early, official Indian relocation efforts;

[12] The magnitude of ONHIR's remaining infrastructure obligations has not been examined by any federal agency.

[13] Draft Government Accountability Office, Draft Report GAO-18-266 at pp. 29-29 (March 20I8).

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11. That because of the Federal Government's repeated failure to resolve the land disputes, **the major costs of resolution should be properly borne by the United States**.[14]

With these principles in mind, when Congress enacted Pub. L. 93-531 it ordered the original Navajo Hopi Indian Relocation Commission to prepare and submit to Congress a report and plan. Congress ordered that the detailed plan should:

(2) take into account the adverse social, economic, cultural, and other impact of relocation on persons involved in such relocation and be developed to avoid or minimize, to the extent possible, such impacts;

(4) assure that housing **and related community facilities and services**, such as water, sewers, roads, schools, and health facilities, for such household shall be available at their relocation sites; and

(5) take effect thirty days after the date of submission to Congress [15]

The original Navajo Hopi Indian Relocation Commission acknowledged its obligations in its 1981 Report and Plan:

Congress was greatly concerned that relocation of Indian families be to areas where community facilities and services exist or will exist. The Commission's plan for relocation shall:

'assure that housing and related community facilities and services, such as water. sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites .... '[16]

The Commission stated, at the time of the Report and Plan, that lands had yet to be selected and it was too early to begin “finite planning.”'[17] Nevertheless the Commission stated that “[t]he magnitude of responsibility embodied in this particular section of the Act bears heavily upon the Commission. Assuring the actual physical amenities necessary in community type resettlements

[14] See Senate Committee on Interior and Insular Affairs, Rep. on the Resolution of Navajo-Hopi Land Dispute, S. Rep. No. 93-1177, at 19-20 (l 974) (emphasis added).

[15]Pub. L. 93-531 § 13(c)(2), (4-5) (emphasis added).

[16] See Navajo and Hopi Indian Relocation Commission, Report and Plan pp. 4,185,237 (1981) (emphasis in original).

[17] Id. at p. 185 ("After acquisition of a particular area is accomplished, the finite planning required for development activities will be prepared.")

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will not be a small undertaking."[18] The Commission recognized that Congress included in the "legislation provisions for the Navajo Tribe to acquire 400,000 acres of new lands for the benefit of Navajo families subject to relocation[]" and "[r]elocation to these new lands will necessitate the assurance of schools, roads, power, and other facilities."[19]

In the 1981 Report and Plan the Commission recognized that they were authorized "to call upon any department or agency of the United States to assist the Commission in implementing its relocation plan and completing relocation."[20] Additionally, the Relocation Commission was aware that Congress mandated that "[i]n any case in which the Commission calls upon any such department or agency for assistance ... such department or agency shall provide reasonable assistance so requested." [21] The Commission committed to act as the federal coordinator and submit plans to Congress in September of 1982.[22]

In the Commission's 1983 Report and Plan Update (not even referenced by the GAO), the agency stated that it was still unable to make plans because of the non-availability of land selections. But, in each of its contingencies it stated its plan to "[i]nitiate coordination effort to establish joint governmental agency involvement for future relocation to deal with such areas as employment, roads, utilities, and like areas of need."[23] Despite the mandate from Congress and planning to --assure that housing and related community facilities and services, such as water, sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites," these commitments never came to fruition, and they only saw partial fruition in the New Lands Chapter.

ONHIR rarely budgeted or undertook infrastructure projects, though the agency did use some of its discretionary funds for the kinds of site development infrastructure necessary for housing projects that might be thought of as subdivision-style work, and for some individual homesites. Some other relocation-related infrastructure has been done by the BIA within its general programmatic expenditures. Overall, ONHIR has not viewed the comprehensive community infrastructure required by the Relocation Act as its mission and has not undertaken the work.

This provision requiring a report was repealed in November 1988, but the promise of infrastructure was not repealed. Navajo families were induced to participate in relocation in part due to the promise of infrastructure. GAO strongly implies that there is no infrastructure promise, but if the repeal of the reporting requirement in 1988 also would have meant the repeal of the underlying commitment to infrastructure, the Navajo Nation would have gone on the

[18] *Id* at 273.

[19] *Id* at 278.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] Navajo and Hopi Indian Relocation Commission, Report and Plan Update pp. 31-36 (1983).

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record in absolute and total opposition. That did not occur because Congress did not intend to eliminate one of the central promises made to the Navajo of the relocation policy.

ONHIR Close-Out Costs: What would it cost for the Federal government to fulfill its obligations under the relocation law? Office of Management and Budget officials have stated that there are constraints on the Federal budget in terms of addressing these concerns. However, recently Congress unexpectedly lifted budget caps by tens of billions of dollars for FY 2018 and FY 2019, which creates an opportunity to address remaining needs. To truly fulfill its obligations, the cost could run into the billions, but the Navajo Nation knows that funding at that level is not a possibility. The Nation has set forth a proposed funding scheme, attached as Appendix A, in an effort to address the most critical concerns.

V. RECOMMENDATIONS: SEEKING A HUMANE OUTCOME

The major legal struggles between the Navajo Nation and the Hopi Tribe are largely over,[24] but there remain significant humanitarian issues resulting from the forced relocation of thousands of traditional Navajos and the multi-generational construction freezes that have locked many other Navajo families in the deepest poverty. The relocation law and construction freezes have left the Navajo Nation with: a population of

relocatees who continue to suffer from the harsh impact of the relocation process (hundreds of whom have yet to receive any of the promised benefits); a smaller population within the Hopi-Partitioned Lands that struggles to maintain its lifeways under Hopi superintendence; and a large population in the 1.6-million-acre Former Bennett Freeze Area (FBFA), which has not yet recovered from the effect of a 45-year construction freeze that was the effective equivalent of government-imposed economic sanctions for living on their own land.[25]

After decades of resistance, the Navajo Nation no longer seeks to overturn the relocation law. Although there remain strong sentiments within the Navajo people that the relocation law should be overturned and those who so chose should be allowed to return to their ancestral and familial lands, the Navajo government has accepted the bitter pill that it is no more likely that the United States will act honorably today than it did in 1974. The Navajo Nation has turned to the task of addressing the consequences of the relocation, while also assuring that those Navajo heads of household who are eligible to receive “benefits” do in fact receive those benefits.

[24] There remain issues that relate to the administration of the Accommodation Agreements for those Navajo families still residing on the Hopi Partitioned Land including, notably, disputes regarding the size of lease payments and livestock grazing rights. For Navajo families the impoundment of livestock by the Hopi and the BIA is a source of great frustration and tension. While sometimes individual livestock holders may have exceeded their limit, in the aggregate, with the departure of many families, the overall Navajo livestock holdings are well below the overall limit. Yet, impoundments occur in an almost “police-state” manner. That Navajo Nation is not a signatory to the Accommodation Agreements. Recently, these families have been negotiating with the Hopi a new arrangement, but the Navajo Nation is also not involved in this negotiation.

[25] Indeed, the Navajo Nation recommends that ONHIR's responsibilities be enlarged to encompass rehabilitation of the FBFA. Given the Navajo Nation's criticism of ONHIR this may seem ironic, but at this point ONHIR is better positioned to carry out this work than the BIA.

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The Navajo Nation has several broad objectives that it would like to achieve in partnership with the Federal government:

- First, the Navajo Nation seeks to have the Federal government provide the promised relocation benefits to all eligible Navajos within a reasonable time frame (as in less than five years) and in a just and humane fashion, including acknowledging and fulfilling the United States' obligation to provide infrastructure;

- Second, the Navajo Nation seeks greater support for the security and well-being of the relatively small number of Navajo families who remain on the Hopi Partitioned Land, including support for a rationale grazing and livestock policy and, for those families who now wish to rescind their Accommodation Agreements with the Hopi Tribe, the right to Federal relocation benefits;

- Third, the Navajo Nation seeks to have the Federal government acknowledge and fulfill its responsibility to address the dire housing, health, social, education, and economic development needs in the former Bennett Freeze area and the relocation impacted areas (including the Navajo Partitioned Lands and the relocation communities), which are a direct result of Federal relocation and construction-freeze laws; and

- Fourth, the Navajo Nation seeks passage of technical provisions that would improve the relocation process and encourage redevelopment in the FBFA.

In addition to the recommendations described above, GAO should have included as recommendations that Congress:

- **Provide funds for ONHIR to complete its work, including fulfilling federal infrastructure obligations to relocatees. As described above,** the United States made certain critical commitments, including infrastructure commitments, to induce relocatees off the land. Instead of fulfilling these commitments, the federal government has forced into poverty a once self-sufficient people living on the ancestral lands in their traditional ways. Congress must fulfill its obligations to the relocatees prior to ONHIR closure.

- **Direct a study of the larger impact of the relocation law and the Bennett Freeze including not only the economic impact, but also the mental and social impact.** The Federal government, at a cost in excess of $600 million, has relocated over 16.000 Navajos and hundreds of Hopis off their traditional lands to surrounding communities and towns. At the same time, at an unknown cost to the Navajo families living there, the Federal government has effectively prevented all development in the FBFA. No comprehensive study has been undertaken to assess

the long-term effects of these actions, much less the strain they have put on the affected communities. Such a study should be

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authorized and, based on its findings' funds should be appropriated for remediation.[26]

- **Hold oversight hearings (perhaps even a field hearing).** Congress should schedule oversight hearings in Washington or on the Navajo Nation in order to deepen Congress" understanding of the long-lasting effects of the relocation law.

- **Expand grant funding for ONHIR.** More funds should be allocated for grants “which significantly assist the Commissioner or assist the Navajo Tribe or Hopi Tribe in meeting the burdens” of the law.[27] Pursuant to this provision in the relocation law, the Navajo Nation has proposed a number of projects such as a community center for the Navajo families that have signed accommodation agreements with the Hopi Tribe, range and road improvements, power line extensions, and some housing improvements for heavily impacted Navajo Partitioned Land host communities. [28] Few of these projects have been approved by ONHIR, but they are exactly the kind of project that brings humanity to the relocation process.

- **Fund the Navajo Rehabilitation Trust Fund (NRTF) and Forgive Past Debt.** NRTF should be reauthorized and fully funded, or equivalent funding should be provided to the Nation. Established by the Relocation Act, the NRTF provided resources to the Navajo Nation to address the “rehabilitation and improvement of the economic, educational, and social condition of families and Navajo communities that have been affected by” the relocation law.[29] The NRTF was authorized to $60 million through 1995, reflecting the size of the need it was to address. However, the Navajo Nation only received $16 million, which was provided in the form of a loan. The $16 million has been insufficient to address the need. The NRTF should be reauthorized and fully funded or equivalent funding should be provided to the Navajo Nation. Further, the obligation of the Navajo Nation to repay NRTF funds should be waived. These funds, provided to the Navajo Nation over 20 years ago, were to be repaid from coal resources in New Mexico. However, those resources have not been developed and no significant development is anticipated in the foreseeable future. As the NRTF was intended to address conditions

that arise from the relocation law, the cost of addressing those conditions should more properly fall fully on the Federal government.

- **Allow Navajo families to relinquish the Accommodation Agreement and receive the benefits to which they were originally entitled.** There are a small number of Navajo

[26] Notably, in the 107th Congress, the Senate Committee on Indian Affairs included language authorizing a report to study relocation impacts in one of its bills, although the measure never became law (S. 2711, 107th Congress).

[27] Formerly codified at 25 U.S.C. 640d-25.

[28] Notably, the Navajo Partitioned Land suffered its own construction freeze from 1958-1979. Additionally, Navajo Partitioned Land host communities have absorbed relocatee populations but have not received funding to address the need for expanded services and infrastructure or the need for a new range management plan.

[29] Formerly codified at 25 U.S.C. 640d-30.

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families (about 35) who are entitled to receive relocation benefits but who initially chose to sign the Accommodation Agreement with the Hopi Tribe. These families have discovered that life on their ancestral lands is no longer the same, with relocation of most of their neighbors and an increasing sense of isolation living under Hopi superintendence. The Accommodation Agreement provided a deadline for them to rescind which has passed. That deadline needs to be extended so that these families can access the Federal relocation benefits which are their due.

- **Allow the Navajo Nation to Sign the Accommodation Agreement on behalf of Navajo Families.** There remain a small number of Navajo families (about 4) that reside on the Hopi Partitioned Land that have not signed the Accommodation Agreement. To the best of the Navajo Nation's understanding, these families, due to deeply held spiritual beliefs, do not intend to leave, notwithstanding that they are ultimately under the threat of forced eviction. To prevent this, the Navajo Nation seeks the authority to sign accommodation agreements on behalf of this small group of families.

- **Fund a reconstruction/redevelopment program for the former Bennett Freeze area.** The Bennett Freeze was a sibling to the relocation program and should also be addressed by directing funds to reconstruction/redevelopment of the FBFA.[30] A reconstruction program would be consistent with the findings of the Interior

Appropriations Subcommittee of the Senate Appropriations Committee in a field hearing held in Tuba City, Arizona on July 9, 1993. Going back to the "War on Poverty" and the "Great Society Program" and continuing through numerous Federal economic and anti-poverty initiatives, as well as programs directed at Indians in particular, this area was ineligible for aid due to the 45-year freeze. The results have been devastating with most homes lacking electricity and running water, limited infrastructure, few schools, and no economic development. Congress should establish a trust fund or other mechanism to facilitate redevelopment of the area.[31]

- **Direct additional study of and support for the Navajo families who were forcefully evicted from District VI prior to passage of the relocation law.** Initially, these families received no relocation benefits; eight years later, when they became theoretically eligible for benefits, only half were certified to receive those benefits. Many were relocated during World War II, while family members were serving the United States oversees. The process itself was very rough, with people essentially being thrown out of their homes, with the homes subsequently burned down. In the interest of fairness, their situation should be reviewed and appropriate benefits provided.

[30] For 45 years, Navajo families in this area suffered under a Federal development freeze. A Federal court eventually determined that the vast majority of this area belonged to the Navajo Nation. For the 5,000 Navajo families who live there this means that the freeze served no real purpose other than to bring them misery and hardship. The freeze has now been lifted in its entirety pursuant to a settlement agreement between the tribes and subsequent act of Congress.

[31] This trust fund could be operated by the Navajo Nation either on its own or in partnership with ONHIR, if the agency's authority was extended to the FBFA.

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- **Review BIA Lease Payment Calculations.** Provide for a study of the BIA's process for determining the lease payments that the Navajo Nation pays to the Hopi Tribe for Navajo families living on Hopi lands. The Bureau of Indian Affairs has taken up to 10 years to make these rental determinations, which the Navajo Nation has thought were high and which are further increased by the effect of compound interest at a rate of 6% per year.

- **Provide for Boundary Clarification.** The Navajo Nation is entitled to select lands in New Mexico as reparation for lands lost due to the Navajo-Hopi Relocation Act. Such land selections are subject to a

restriction on distance from the Navajo Reservation boundary. While it seems logical that the reservation boundary is the boundary of any of the Navajo Nation chapters that make up the Navajo Nation, Federal officials have expressed uncertainty on this point. The Navajo Nation seeks clarification that the Navajo boundary includes the boundary of Navajo chapters in New Mexico.

- **Authorize Navajo Nation Sovereignty Empowerment Zones.** The Navajo Nation has proposed the establishment of Navajo Nation Sovereignty Empowerment Zones, *where* Navajo sovereign laws would supersede certain Federal laws. This would address unnecessary and harmful duplication in various review processes for projects within these limited zones, including renewable energy development and infrastructure.

- **Correct Surveying Error.** *The* Navajo Nation and the Bureau of Land Management's Arizona State Office ("BLMAZ") disagree about the acreage remaining to be selected for trust acquisition by the BLMAZ W1der the Relocation Act.[32] The difference stems from a surveying error.[33] The Navajo Nation seeks authority to deselect and reselect acreage in order to assure that the Nation obtains the full benefit of its selection rights.

- **Conduct and independent audit of ONHIR records and remediate OHNIR's failure to maintain records.** The GAO report acknowledges that ONHIR has failed to maintain records as to housing repair. The Navajo Nation is aware that ONHIR has failed to maintain records of its other tasks. This failure is a clear abrogation of ONHIR's legal duty as an agency, and must be addressed before ONHIR can close. Records that exist must be preserved, and properly organized. No destruction of records should *be* permitted.

Conclusion. ONHIR has failed to fulfill its trust obligations both in the programs it has actually attempted (delay, mismanagement; bias in adjudication and negligence) and in the

[32] The Relocation Act currently allows 250,000 total acres. *See former* 25 U.S.C. 640d- l 0(a)(1).

[33] The amount of land transferred in trust to the Navajo Nation in Arizona turned out, after an updated survey was completed, to be 756-757 acres more than the Navajo Nation was told it would be acquiring. The result is that the BLMAZ believes that there are only approximately 127 acres remaining to be acquired at no cost to the Nation, while the Nation believes it is still entitled to approximately 884 acres. Therefore, the Nation and the BLMAZ have a difference of between 756 and 757 acres in their respective understandings of the acreage remaining for selection/acquisition.

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responsibilities it never fully addressed (e.g., infrastructure and economic development). Notably, no agency is interested in assuming ONHIR's responsibilities and, at this late date, the Navajo Nation is concerned that a transfer of those responsibilities, at great cost, would be a debacle. ONHIR should remain open until it has fulfilled all of the obligations and promises of the United States.

Sincerely,

THE NAVAJO NATION

Russell Begaye, *President*

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APPENDIX A

NAVAJO NATION'S ESTIMATE OF REMAINING FINANCIAL COSTS RELATED TO RELOCATION

DETERMINABLE COSTS - $286,729,357

A. Infrastructure Projects and Costs - Total $226,729,357

As a part of Congress' commitment to a humane relocation process, Congress directed the Relocation Commission to develop a plan to "ensure that housing and related community facilities and services, such as water, sewer, roads, schools, and health facilities, for such households shall be available at their relocation sites... " The Commission largely did not fulfill this obligation. The following basic infrastructure needs remain:

Community Infrastructure (developed by impacted communities) Total -

$109,729,357

- Roads - $42,384,300
- Power- $7,391,000
- Water- $13,240,000
- Community Building (Chapter Houses, Head Start Buildings, Senior Centers) -$14,777,888
- Water/Sewer/Electricity to existing Relocation homes - $1,768,000
- Telephone lines- $1,650,000
- Economic Development - $2,000,000
- Sewage and Solid waste - $518,169
- Planning, Oversight, Predevelopment Costs, and Project Administration -$26,000,000

Non-Community Identified Infrastructure - $117,000,000

- Roads - $80,000,000
- Telecommunication- $15,000,000
- Livestock/economic development - $22,000,000. (*This number does not truly represent the economic harm done to Relocalees. Navajo families that were relocated were essentially self-sufficient and able to survive by grazing livestock before relocation. These self-sufficient families were moved into locations where they were denied the necessary permits to graze enough livestock to support themselves. ONHJR has not provided enough economic development to replace the lost economic self-sufficiency for relocated families*)

B. Repair or Replacement of Faulty Construction: Total estimated costs $60,000,000

A substantial number of homes were constructed with faulty workmanship or on unsuitable sites. Any final resolution of ONHIR's responsibilities

must include inventory, evaluation, inspection, and repair of these construction and planning defects. Because ONHIR refuses to

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acknowledge fault for structural damage to the homes, the Navajo Nation is preparing to spend $100,000 of its own money to hire an independent inspector to begin assessing relocation homes.

UNKNOWN AND OTHER COSTS

A. Remaining houses for certified applicants -As of December 2017, ONHIR stated that there are 29 certified applicants awaiting houses. These houses, not including overhead, which historically for ONHIR has been extremely high, cost between $ I50,000-$175.000 to construct (the Navajo Nation provides land at no cost) for the dwelling unit alone. That figure does not take into account the administrative costs of managing a construction contract or providing site development, including utilities and proper grading. ONHIR's failure to properly manage these issues has resulted in millions of dollars of needed repair and replacement.

B. New housing for Navajo heads of household that succeed on appeal -There are a number of appeals in the courts, or likely to proceed to court. ONHIR historically has denied half of all cases, and in recent years that rate has soared to a suspiciously high 95%. It is likely given recent successful appeals, that a number of applicants will be successful and entitled to full relocation benefits.

C. Impartial review of denied applications - Because ONHIR has rejected so many applicants (over 3,000), using questionable practices and raising serious due process and discrimination concerns, an impartial review of the entire eligibility determination process should be undertaken before ONHIR closes.

D. Peabody mining contamination - Environmental contamination affects Relocatees. Mine reclamation and restoration is needed, especially considering Peabody's recent bankruptcy.

E. Uranium mining waste contamination - Thousands of Navajo people have been relocated to Nahata Dziil (the "New Lands"'). Unacceptable levels of uranium contamination have been found in the ground water at Nahata Dziil, with the likely source being the largest uranium mine spill in the United States' history. The fact of the spill, and that its plume of

contamination was moving toward the land the United States and State of Arizona transferred to the Navajos, was known to them but not to the Navajos. This affirmative misrepresentation has resulted in uranium contaminant poisoning of Navajos and their children.

Accessible Text for Appendix IV: Comments from the Navajo Nation Human Rights Commission

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Office of Navajo Nation Human Rights Commission

P.O. Box 129 | St. Michaels, Navajo Nation (AZ) 86511 Phone: (928) 871-7436 | Fax: (928) 871-7437

MEMORANDUM

TO: William Shear, Government Accounting Office

Anne-Marie Fennell, Government Accounting Office

FROM :

Leonard Gorman, Executive Director Navajo

Nation Human Rights Commission

SUBJECT: Submission of comments on Draft Report on the Office of Navajo And Hopi Relocation (GAO-18-266)

DATE: March 12, 2018

The Navajo Nation Human Rights Commission (“Commission”) submits the following comments regarding the closure and transfer of activities of the Navajo Hopi Office of Relocation (“OHNIR”). The draft report in its entirety fails to recognize the root cause for the failure of the implementation of P.L. No. 93-531 et al. The human rights of the Navajo people and the blatant disregard for the peoples’ Navajo lifeway is central as to why the Office of the Navajo-Hopi Relocation has failed.

In the course of the Commission’s work since 2008, it is evident that Navajo relocatees and Navajo resisters continue to suffer mentally,

physically, socially, and financially from the restrictive guidelines imposed by P.L. 93-531, et al, and the stringent standards imposed by leadership at OHNIR. The Commission stands by its report, *The Impact of the Navajo-Hopi Settlement Act of 1974 P.L. 93-531 et al*.,[1] that no amount of compensation can restore the atrocious actions of removing individuals and families from their homelands. To this day, while they are relocated, the Diné[2] have strong ties to their lands, ceremonies and families. The Diné lifeway is interwoven and entwined since time immemorial that define the values and unique virtues of the people today. It is baffling to surmise that the imposition of linear western values would free the Diné of a lifeway that was considered uncivilized and substandard to the American dream. This basic supposition for improving Navajo lives, if they relocated, was ill configured from the very beginning.

At this time in history, the Navajo Nation finds itself at the cross roads of reclaiming remnants of broken Navajo lives with little hope that whatever federal government agency or

[1] The Impact of the Navajo-Hopi Settlement Act, P.L. 93-531, et al., Navajo Nation Human Rights Commission Report, July 6, 2012

[2] In this response correspondence we use Diné and Navajo interchangeably.

program that assumes the responsibilities of completing OHNIR's mission will make the people whole again. The sense of wholeness is best articulated by a spiritual wellness that is balanced and in harmony with its surroundings. The relationships to the earth, the cosmos, the natural elements and the ecosystem that exist with humanity perpetuate Navajo's view of life and the responsibility to life for all. This is the core to the Diné place in history[3]. OHNIR failed to recognize and incorporate Diné wellbeing into its services in order to redress by revitalizing the relocatees if possible.

One significant example is the western legal standard that continues to be the jurisprudence to determine whether an individual was eligible for relocation benefits. Because all applicants had to prove they were heads of households and had some sustainable income to validate their existence for benefits, OHNIR determined that Navajo traditional knowledge of time and place were irrelevant and are grounds for denial of benefits. Exact months, dates, time and written evidence were not significant to Navajo families who depended on seasonal, word of mouth and life changing events, as references to time for Navajo families to

draw upon. This is especially true to elder family members who served as witnesses but whose testaments were disregarded because they lack the linear knowledge of exact legal timeframes. Equally discerning include a) not knowing that the non-use of the English language would undermine future benefits, b) the inability to write in the English language and c) the lack of maintaining personal records would come back years later to further repress Navajo applicants. OHNIR failed to recognize a core number of applicants that come from the era in time when documentation, preserving evidence were not available; this is a gross error that exasperated the denial of relocation benefits to Navajo families. Additionally, the resident criteria changes OHNIR instituted to determine eligibility deserves more scrutiny. This raises the question, *how much to the actual appropriation directly benefited the relocatees*?

Even today, OHNIR has refused to address the right to religious practice which is principle to the Navajo lifeway. Accommodation Agreement signers and Navajo resisters cannot conduct traditional Navajo ceremonies that require large gatherings by family and relatives. Too seek permission from Hopi leaders or Hopi administrators to approve a ceremony, its location and the material resources necessary to carry out a five to nine day ceremony is an extension of regulations that infringe on Navajo religious rights. The right to practice religious ceremonies is not guaranteed nor is it supported in accordance to Navajos needs and interests.

The case of the 240 applicant denials are problematic. Applicants who were denied benefits may want an administrative appeal to OHNIR's denial. Applicants may not have an opportunity to exercise their right to due process. Moreover, the amendments to P.L. 93-531 in 1988 removed a significant legislative mandate referred to as Section 13. Relocatees and their families held this piece of legislation significant and critical to their future and the future of Navajo children. At the urging of OHNIR officials, heads of household reluctantly signed agreements with the understanding that roads, hospitals, electricity and water and sanitation lines would be available at every home. The prospects of a better opportunity for future generations were guaranteed under Section 13. Sadly today, third and fourth generations seek assistance from existing Navajo chapter programs but are turned away, because of the added referrals OHNIR has placed on Navajo programs.

Since this Act requires authorization directly from the President of the United States to determine whether OHNIR has met its federal obligations and therefore can shut down is an

[3] Sacred Sites. The Preservation; Protection and Use of Sacred Sites Report., Navajo Nation Human rights Commission, July 22, 2012

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abdication of federal trust responsibility. To cede the closure of services that OHNIR is responsible for would be immoral and criminally unconscionable. There exists more reasons to complete the trust obligations the United States government has to the Navajo people, especially to families that continue to suffer irreparable harm that relocation has brought upon them. The Navajo people have suffered far too long from historical injustices. The dispossession of lands, territories and resources, the right to exercise and practice religious ceremonies and the right to prompt decisions through just and fair procedures for the resolution of conflicts and disputes are just a few of the human rights standards that are articulated in the United Nations Declaration on Rights of Indigenous Peoples[4]. It is clear the rights to redress and remedy have not been achieved.

In conclusion, the draft report, GAO-18-266 must incorporate the human rights of the Navajo people, without a clear articulated understanding of the Diné this report does not demonstrate the enormous needs that remain and that have emerged from the results of relocation. In December 2010, the United States supported the United Nations Declaration on the Rights of Indigenous Peoples. Our Navajo traditional laws are recognized by UNDRIP. However, continuously the United States government continues to trounce on not only its trust responsibilities to indigenous peoples but more importantly the human rights of the indigenous peoples.

XC: Karis Begay, Attorney, Office of the Navajo Nation President/Vice President Roman Bitsuie, Consultant, Navajo Hopi Land Commission

Susan Eastman, Principal Attorney/Director, Navajo-Hopi Legal Services Office Jackson Brossy, Executive Director, Navajo Nation Washington Office

Ethel Branch, Attorney General, Navajo Nation Department of Justice Wenona Benally, Executive Director, Navajo Hopi Land Commission Office File

[4] United Nations Declaration on Rights of Indigenous Peoples, UN G.A. Res 61/295, UN H.R.C., 61st Sess., Annex, Agenda Item 68, UN doc.A/RES?61/295 (2007).

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