



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Status of the Office of Navajo and Hopi Indian Relocation's Administration of Relocation Benefits



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Memorandum

SEP 29 2020

To: David Bernhardt
Secretary, U.S. Department of the Interior

From: Mark Lee Greenblatt 
Inspector General

Subject: Final ONHIR Review – *Status of the Office of Navajo and Hopi Indian Relocation's Administration of Relocation Benefits*
Report No. 2020-WR-016-A

This report is part of a series of reports to help decision makers plan for the future of the Office of Navajo and Hopi Indian Relocation (ONHIR). We launched our review in December 2019 with an initial report that provided an overview of ONHIR's background and functions (Report No. 2019-WR-039).

Our objective for this review was to determine the status of ONHIR's completion of its core mission to relocate individuals affected by the Federal Government's Navajo-Hopi land partitioning. Specifically, we sought to answer the following:

1. What is the status of ONHIR's administration of relocation benefits?
2. How many home warranties are active, and when do they expire?
3. What is the condition of the relocation case files?
4. What documented complaints, if any, exist for relocation homes under warranty and those no longer under warranty?
5. What congressional considerations and potential liabilities exist for a successor agency in the event of ONHIR's closure or transfer of duties?

About This Report Series

ONHIR's FY 2019 appropriation required a transfer of funds to our office to review ONHIR's finances and operations in preparation for its possible closure.

We are issuing a series of reports that describes ONHIR's responsibilities, functions, and current operations. Each report addresses a key topic and the related considerations for ONHIR's closure or transfer of duties to a successor agency or agencies.

Due to the COVID-19 pandemic, we had to limit our fieldwork. In particular, we reviewed relevant laws, regulations, procedures, and documents but had to limit our site visits and interviews.

Background

ONHIR is an independent Federal agency responsible for assisting with the relocation of Navajo people and Hopi people living within each other's boundaries. ONHIR reports directly to the President of the United States and is overseen by both the U.S. Office of Management and Budget and the U.S. Congress. Pursuant to the Navajo-Hopi Land Settlement Act of 1974 (Pub. L. No. 93-531), as amended, a presidentially appointed Commissioner serves as the head of ONHIR, but this position has been vacant since 1994. A Senior Executive Service Executive Director who has been acting under delegated legal authority manages the agency.

ONHIR's primary mission is to relocate individuals affected by the 1974 Act. Figure 1 shows an example relocation home.

Figure 1: Example of a Newly Constructed Relocation Home



Source: Office of Inspector General.

To help the Navajo and Hopi people relocate off each other's designated lands, ONHIR established a series of beginning-to-end relocation benefits to aid eligible recipients through the relocation process. Broadly, these relocation benefits are:

- Pre-move counseling
- Assistance with obtaining a homesite lease
- Assistance with home design and contracting
- Assistance with obtaining home infrastructure (i.e., power and water)

- Replacement home construction
- Home construction inspection
- Post-move counseling
- 2-year home warranty and repairs

ONHIR included these specific benefits in its policy based on its interpretation of the establishing legislation, but they are not all explicitly enumerated in the 1974 Act. The 1980 amendments (Pub. L. No. 96-305) to the Act directed the Navajo and Hopi Indian Relocation Commission (later renamed as ONHIR) to provide “relocation assistance” to relocatees but did not define or specify how it should provide such assistance.

Further, subsequent amendments to the Act have led to a disagreement between the Navajo Nation and the Federal Government as to what services are ONHIR’s responsibility. This issue is discussed in the later section, “Congressional Considerations and Potential Liabilities in the Event of ONHIR’s Closure or Transfer of Duties.”

The application period for relocation benefits closed in 2010, and initial eligibility determinations were completed in 2018. Relocatees whose original denied eligibility decisions were reversed through the appeals process via the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit, however, could be eligible for relocation benefits in the future. As of March 2020, ONHIR had 7 active appeal cases in court and 212 cases that fell within the 6-year window of time allowed for appeal.¹ This report focuses on the cases of individuals who have been certified as eligible for relocation benefits.

Status of ONHIR Administration of Relocation Benefits

Relocations for all but one Hopi individual certified as eligible were completed in 2013 (that case was administratively closed in 2004). Figure 2 shows the status of all remaining Navajo individuals who have been certified as eligible and could still qualify for relocation benefits.²

¹ For additional information regarding appeals, see OIG Report No. 2020-WR-016-B, *Status of the Office of Navajo and Hopi Indian Relocation’s Appeals on Denied Eligibility Determination Cases*, issued September 2020.

² According to ONHIR, an additional 43 individuals were originally certified as eligible but are no longer eligible to receive benefits. These individuals signed 75-year accommodation agreements with the Hopi Tribe to stay on the Hopi partitioned lands. ONHIR explained that, by entering those agreements, they waived their eligibility to receive relocation benefits. In response to our draft report, the Navajo Nation stated that it believes these individuals “are still eligible for benefits under the law (though the application period has expired) and are only barred from doing so as a contractual matter, not a statutory one.”

Figure 2: Relocation Status of Navajo Individuals Who Are Certified and May Be Eligible for Benefits

No. Certified as Eligible	Relocation Status	Definition of Relocation Status
1	Contract in process	Family or individual in the process of building or buying a home who has not yet occupied the home.
1	Seeking a home	Family or individual who has received home acquisition counseling, is selecting a home, and has not signed a contract.
3	Remaining	Family or individual who has been certified as eligible for relocation benefits but has not yet signed a contract or begun seeking a home.
85	Closed not relocated	Family or individual who has been certified as eligible for relocation benefits but has had the case closed by ONHIR. Benefits for applicants who are deceased or are otherwise unable to occupy their relocation home may pass to family members. Some applicants have had their cases closed administratively due to inaction, incarceration, or other circumstances affecting their ability to relocate.

Source: ONHIR status report dated May 1, 2020.

In March 2020, ONHIR officials anticipated the two applicants in “contract in process” and “seeking a home” status would be relocated in 2020. Due to delays related to the COVID-19 pandemic, however, it is unclear when these relocation homes will be completed. Nevertheless, these individuals are in the process of relocating and will likely see their homes completed once the pandemic measures ease and construction resumes.

The three individuals in “remaining” status are eligible to receive benefits, but ONHIR officials told us that attempts to communicate and cooperate with two of them have proven difficult. Over several years, ONHIR officials have made attempts to make key decisions with the two individuals, such as selecting the location for a homesite, but these attempts have been unsuccessful. The third person in “remaining” status is the spouse of a deceased applicant who was certified as eligible in March 2020 as the result of a District Court appeal. There is currently no timeline for relocation homes to be built for these three eligible individuals.

The 85 applicants in “closed not relocated” status may be eligible to receive benefits, depending on their individual circumstances. According to ONHIR officials, the status of these applicants is as follows:

- 66 are deceased. ONHIR policy allows for the estates or families of deceased certified applicants to receive relocation benefits on a case-by-case basis.

- 13 cases were closed administratively. These applicants can request to have their cases reopened and receive relocation benefits.
- 5 individuals currently reside in nursing homes. ONHIR policy states that there must be some reasonable likelihood that the certified applicant is able to “use and enjoy” the replacement home. If these individuals come forward to request that their cases be reopened, they will be considered on a case-by-case basis.
- 1 is incarcerated. This applicant can request to receive benefits upon release.

It is uncertain how many of the currently eligible applicants will come forward to claim benefits. This uncertainty makes it difficult to project a timeline for completion of ONHIR’s mission to provide benefits to all eligible households. Pending appeals make such a projection even more complicated. The 7 active appeals and 212 cases that remain within the 6-year appeal window create additional uncertainty regarding the potential liabilities for a successor agency should ONHIR close before appeals are resolved and before the window of time for appeals expires.

Status of Home Warranties

ONHIR requires that contractors who build relocation homes on the Navajo or Hopi reservations or off-reservation in the State of Arizona warranty their work for 2 years after construction is completed.³ ONHIR performs warranty inspections and resolves warranty disputes on behalf of relocation clients on the reservations. Repairs to homes are warranted for 1 year. In its response to our draft report, the Navajo Nation stated that the length of these warranties is shorter than those applicable to other federally funded housing and that many of the homes suffered from a range of deficiencies that became evident only after the 2-year period expired.

As of March 2020, there are 14 homes with active warranties.⁴ The last of these warranties is set to expire in December 2021. This does not include the five certified eligible individuals in “contract in process,” “seeking a home,” or “remaining” status. It is also unknown how many new warranties will come from newly eligible individuals resulting from the 7 active appeals or 212 potential appeals. Therefore, we could not determine how long warranties will be in effect. Upon ONHIR’s closure, it will be the responsibility of a successor agency to determine to what extent it will honor existing warranties and require warranties for any new home construction, if new homes are built.

The U.S. Government Accountability Office (GAO) reported in April 2018 that ONHIR has historically allowed contractors with a history of performance issues to build relocation homes. The GAO recommended that ONHIR prepare complete information on warranties and

³ ONHIR policy requires contractors building relocation homes on the Navajo or Hopi reservations or in the State of Arizona to adhere to building standards according to Arizona State law, and the homes are warranted according to those laws. Homes built in other States are warranted according to applicable State law.

⁴ ONHIR provided updated warranty numbers in response to the draft report. As of June 2020, ONHIR reports there are nine active warranties and one expired warranty that has not yet been closed out. We did not verify these numbers.

contractors, including linking warranty complaints to the relevant contractor, completing missing warranty information, and completing information on contractors' past performance. In response to this recommendation, ONHIR told us that it has properly prepared for and addressed warranty issues and that a successor agency will have access to the necessary warranty information in the client case files. ONHIR further asserted that the problems with the warranty database identified by the GAO arose from coding or data entry errors by ONHIR staff many years ago. ONHIR provided us with screenshots showing that it has remedied some of the database errors (for example, by removing duplicate entries). ONHIR officials also told us that, although ONHIR lists the contractor of record with each warranty complaint, warranty complaints are not tracked by contractor. This is an issue highlighted in the GAO report. Due to the pandemic, we had limited time for onsite record review and therefore were unable to review warranty case files in detail to further follow up on the GAO findings related to the home warranty program. Accordingly, beyond noting that ONHIR still does not track warranty complaints by contractor, we could not determine whether the concerns identified by the GAO have been addressed.

Condition of Relocation Case Files

During a site visit to ONHIR's main office in Flagstaff, AZ, in March 2020, we confirmed that some relocation case files are kept onsite. We found that ONHIR had 79 client case files at that office, and more than 7,000 case files dating back to the inception of ONHIR were stored at the National Archives and Records Administration (NARA) office in Perris, CA. Due to the pandemic, the NARA office was closed, so we were unable to access additional files to include in our review. We found the case files we were able to review to be in good physical condition, and stored securely.

We reviewed a sample of eight relocation case files, or approximately 10 percent of the case files available to us.⁵ ONHIR officials identified 17 documents that generally should be present in a completed relocation case file. Four of the case files we reviewed were missing one or more of the 17 documents, specifically:

- We did not find contact information, an eligibility notice, a relocation contract, and evidence of water and sanitation access in one file. In response to the draft report, ONHIR provided the eligibility notice, relocation contract, and documentation of water and sanitation access.
- We did not find a relocation contract in one file. In response to the draft report, ONHIR provided this contract.
- We did not find a certificate of occupancy in one file. In response to the draft report, ONHIR provided the letter sent to the client requesting a signature on the certificate of occupancy and a note stating that the client did not sign and return the certificate.
- We did not find a certificate of occupancy, a feasibility study, and evidence of power, water, and sanitation access in one file. In response to the draft report, ONHIR

⁵ We selected every tenth file in the available universe starting from a randomly generated number; we therefore believe the files we selected constitute a representative sample of available case files.

provided the certificate of occupancy. ONHIR stated that a feasibility study is not needed for clients moving to subdivisions. ONHIR explained that the case file is missing the “as built” drawing of utilities access that contractors are required to submit to the Navajo Tribal Utilities Authority at inspection and that it has requested this drawing. ONHIR told us that the utilities are working at the relocation home.

We concluded that, although ONHIR can improve its case file management, the missing documents we noted in four case files did not preclude the certified applicants from receiving a home. Further, as summarized above, ONHIR was later able to locate most of the missing documents. Although the missing documents did not have an impact on relocating the eligible applicants, in the event of ONHIR’s closure and transfer of functions it will be vital that a successor agency observe proper records management practices. A successor agency may need to reference ONHIR records for reasons such as potential future lawsuits or Freedom of Information Act requests.

Condition of Relocation Homes

During site visits to the New Lands⁶ and ONHIR’s main office in Flagstaff, AZ, we observed relocation homes, interviewed ONHIR officials, and reviewed documented warranty complaints to determine whether any structural issues existed with the relocation homes. The documentation we reviewed did not reveal evidence of any systemic structural issues. Some residents have filed warranty complaints, but they are chiefly for cosmetic or routine maintenance issues. We acknowledge that the Navajo Nation’s response to the draft report suggested that structural issues would not necessarily manifest themselves within the 2-year warranty period.

During our visit to the New Lands, an ONHIR official told us that one home in East Mill, a New Lands community with 21 relocation homes, may have justifiable complaints for structural repairs. In a 2016 evaluation, we reported that some relocation homes in the East Mill community had problems with soil subsidence (soil settling issues) that resulted in cracks and other visible signs of soil movement and damage to the homes.⁷ ONHIR has taken considerable measures to address the issue of soil subsidence, such as installing helical piers to support the home foundations in 2006. The home in question has had continued subsidence issues since the remediation was performed in 2006. ONHIR officials anticipate that the home will at minimum need cosmetic repairs, although they were unable to provide a documented estimate of the cost.

While ONHIR officials did not provide evidence of any new documented complaints for any other homes, subsidence issues present a risk of future settling and damage that may necessitate significant repair or even replacement of some homes. Our 2016 report also highlighted two other New Lands communities with complaints about subsidence. If ONHIR closes before these homes are replaced or repaired, a successor agency will need to determine the extent of the repairs and replacement to be performed.

⁶ The 1980 amendments to the Act authorized 352,000 acres of land in Arizona to be taken into trust for the Navajo, which are referred to by ONHIR as the “New Lands.”

⁷ OIG Report No. 2015-WR-067, *Office of Navajo and Hopi Indian Relocation’s Eligibility and Relocation Practices*, issued February 2016.

ONHIR and the Navajo Nation expressed differing perspectives on these issues. In particular, in its response to the draft report, the Navajo Nation reported there are more than 20 additional homes in the Coalmine Chapter that “were found deficient.” ONHIR told us it has received no complaints from the Navajo Nation concerning the Coalmine homes but acknowledged that it had performed repairs on some of the homes.

Congressional Considerations and Potential Liabilities in the Event of ONHIR’s Closure or Transfer of Duties

In addition to the particular issues we have summarized in this document, we note that a disagreement between the Navajo Nation and the Federal Government as to what services are ONHIR’s responsibility could further complicate completion of the relocation mission. In August 2019, the Naabik’íyáti Committee, a standing committee of the Navajo Nation Council, proposed a tribal resolution opposing the termination of ONHIR, citing unfulfilled obligations to relocatees, including an estimated \$227 million in infrastructure.⁸ The Navajo-Hopi Land Settlement Act specified that the relocation plan must ensure that “housing and related community facilities and services, such as water, sewers, roads, schools, and health facilities” are available for relocatees at the relocation sites. The 1988 amendments to the Act, however, removed the language describing requirements for a relocation plan. The Naabik’íyáti Committee believes that ONHIR should address the infrastructure needs before it closes or use its authority to call on other Federal agencies to help. Additionally, in its response to the draft report, the Navajo Nation contended that the 1988 amendments did not remove the Federal duty to provide these services and that ONHIR has been substantially deficient in providing infrastructure and community facilities for relocatees.

ONHIR has stated that it has fulfilled the duties it was legislatively assigned by providing relocation benefits to all individuals who were found eligible and that other services such as infrastructure should be provided by another permanent agency. The GAO reported in 2018 that it is not within ONHIR’s statutory responsibility to provide infrastructure.⁹ In its response to the draft report, the Navajo Nation strongly disagreed with the GAO’s finding that ONHIR is not responsible for additional infrastructure and expressed the belief that the Federal Government still has a duty to provide community facilities and infrastructure for relocatees.

We cannot resolve any disagreements between ONHIR and the Navajo Nation regarding relocation administration, but we emphasize the below considerations for Congress as it determines how to proceed.

In the event of ONHIR’s closure or transfer of duties, legislation may be needed to:

- Identify a successor agency to provide any remaining eligible applicants with relocation benefits

⁸ Navajo Nation Council Legislation No. 0251-19 (August 19, 2019).

⁹ GAO Report No. GAO-18-266, *Office of Navajo and Hopi Indian Relocation: Executive Branch and Legislative Action Needed for Closure and Transfer of Activities*, issued April 2018.

- Determine whether any changes are needed to the relocation benefits that can be given to eligible applicants
- Determine whether to provide funding to address infrastructure needs for relocatees as requested by the Navajo Nation

Predicting estimated costs and liabilities associated with relocation is difficult because it is not known how many denied applicants will successfully appeal their cases, resulting in additional applicants who are eligible to receive relocation benefits. As of December 2019, the relocation benefit for a certified applicant was set by ONHIR (after consultation with the U.S. Department of Housing and Urban Development) at \$134,000 for a household of three or fewer and \$140,000 for a household of four or more. Additional costs for relocations include infrastructure payments (for establishing access to utilities), travel payments, and incentive payments to contractors. ONHIR officials estimated the total cost of each additional relocation at roughly \$200,000, using the maximum cost levels and not including ONHIR personnel costs. Although it is unlikely that all the closed cases will be reopened and result in a certified claim of benefits, we estimate that the cost of relocating all of the remaining currently eligible applicants totals \$18.2 million, specifically:

- \$1 million to relocate the 5 open cases
- \$13.2 million to provide benefits to families or estates of all 66 deceased certified applicants
- \$2.8 million to relocate the 13 Navajo and 1 Hopi administratively closed cases
- \$1 million to relocate the 5 individuals in nursing homes
- \$200,000 to relocate the individual who is incarcerated

In the unlikely event that all 212 cases currently eligible for appeal are appealed and are successful, they would present an additional \$63.6 million in potential cost liability under the current benefit package, as described in our report on ONHIR appeals.¹⁰ The estimate does not account for the potential risk of one of these appeal cases affecting cases outside those eligible for appeal and resulting in a class action or ruling to reopen the application period. In addition, the 7 active appeal cases carry a potential total cost of up to \$2.1 million if their eligibility determinations are reversed.

¹⁰ ONHIR estimates that its costs when a denial of eligibility is reversed typically amount to \$300,000, which includes appeal costs for the independent hearing officer and any co-counsel, outside counsel, hearing interpreter, hearing transcript, any investigations, and payments for the applicant's counsel. For more information on appeals, see OIG Report No. 2020-WR-016-B, *Status of the Office of Navajo and Hopi Indian Relocation's Appeals on Denied Eligibility Determination Cases*, issued September 2020.

Conclusion

Due to the COVID-19 pandemic, we had to limit our fieldwork. In particular, we reviewed relevant laws, regulations, procedures, and documents but had to limit our site visits and interviews. We conducted our review in accordance with the *Quality Standards for Inspection and Evaluation* as put forth by the Council of the Inspectors General on Integrity and Efficiency. We believe that the work performed provides a reasonable basis for our conclusions.

We invited ONHIR and Navajo and Hopi officials to provide input on a draft version of this report. ONHIR provided updated warranty and appeal case numbers, additional background and narrative information, and supplemental case file documentation, which we have noted in the report where applicable. The Navajo Nation provided a written response; we have incorporated some information in this report where applicable and included the full response in the attachment. Hopi officials did not provide a response.

If you have any questions, please contact me at 202-208-5745.

The legislation creating the Office of Inspector General requires that we report to Congress semiannually on reports issued.

cc: Christopher J. Bavasi, Executive Director – Office of Navajo and Hopi Indian Relocation
Tara Sweeney, Assistant Secretary – Indian Affairs
Richard Myers, Chief of Staff, Bureau of Indian Affairs
Jerold Gidner, Director, Bureau of Trust Funds Administration
Dan Jorjani, Solicitor, Office of the Solicitor
Craig Crutchfield, Chief of the Interior Branch, U.S. Office of Management and Budget
Milton Bluehouse, Jr., Deputy Chief of Staff to the President and Vice President, Navajo Nation
Clark Tenakhongva, Vice Chairman, Hopi Tribal Council

Attachment

Attachment: Response to Draft From the Navajo Nation

The Navajo Nation's response to our draft report follows on page 12.

THE NAVAJO NATION

JONATHAN NEZ | PRESIDENT MYRON LIZER | VICE PRESIDENT



MEMORANDUM

To: Office of the Inspector General, Department of the Interior

From: Navajo Nation

Re: Navajo Nation Comments on Office of Inspector General Draft Report Current Status of the Office of Navajo and Hopi Indian Relocation's Administration of Relocation Benefits, Report No. 2020-WR-016-A

Date: July 31, 2020

Introduction. Thank you for the opportunity to comment on the OIG draft report titled Current Status of the Office of Navajo and Hopi Indian Relocation's Administration of Relocation Benefits. Although the report is largely descriptive in character, there are certain statements that the Nation does not agree with or that otherwise would benefit from additional context.

Navajo Nation Rejects the Implication that It Is "In Part" Responsible for the Relocation. In the Background section, the draft report states: "ONHIR is an independent Federal agency responsible for assisting *with the relocation of Navajo people* and Hopi people living within each other's boundaries *as a result, in part, of a longstanding land dispute between the tribes.*" (Emphasis added.) The draft report never explains the reference to "in part," however, the Navajo Nation strongly disputes the notion that the cause of the relocation is in any part the responsibility of the Navajo people or, in its origin, the result of a "longstanding land dispute" between the Navajo and the Hopi given the generations of peaceful coexistence between our peoples before outside forces "created" the land dispute. Notably:

- The actual origin of the land dispute was federal policy towards the Church of Jesus Christ of Latter Day Saints. In 1882, at the request of the local Bureau of Indian Affairs agent who was seeking authority to evict two Mormon missionaries working among the Hopi, President Chester Arthur signed an executive order establishing a reservation "for the use and occupancy of Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon."¹ At the time the reservation was created there were 300 to 600 Navajos living within its boundaries and approximately 1800 Hopis.² President Arthur's order, by its broad reference to "such other Indians," clearly encompassed the Navajos who made up to one-quarter of the population. Even so, it was evident that little thought had been given to the actual land usage of the two tribes as the boundaries of the new reservation (known as the

¹ *Healing v. Jones (II)*, 210 F. Supp. 125, 129 (D. Ariz., 1962).

² Emily Benedek, *The Wind Won't Know Me* (1992) at 34; Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 *Arizona Law Review* 371, 372-373, 375 n.30 (1985).

1882 Reservation) were artificially designated as a rectangle--one degree of latitude in width and one degree of longitude in height. Inside this artificial reservation there were over 900 Indian sites--the majority of which were Navajo.³

- After creating an irrational reservation designation, for suspect purposes, the Federal government then sought to divide the land for energy development. According to a history of the land dispute “[i]t was not repeated Hopi complaints about Navajo encroachment onto uninhabited 1882-area lands that drove the [Federal] government to action. It was the pressure of oil and gas companies to determine ownership of the area.” The “disputed lands” lie on top of one of the richest coal beds in the Western United States.⁴
- The Navajo Nation strongly opposed the relocation, which was not voluntary in nature, and offered numerous alternatives, generally in the form of land exchanges, that would have allowed Navajo families to remain on the land that they had inhabited for many generations. In light of Navajo opposition to the relocation, it is notable that the draft report uses “Settlement Act” as an abbreviation for the Navajo-Hopi Settlement Act of 1974 (Pub. L. No. 93-531, as amended), reinforcing the false concept that the Navajo Nation agreed to a settlement that included mandatory relocation of Navajo people, even though the only “settlement” was imposed by Congress and court order.⁵ In these comments, the Act will be referred to as the “Relocation Act” since its central purpose was to impose a mandatory relocation on approximately 15,000+ traditional Navajos from their ancestral land, consistent with titles of the 1980 and 1988 amendments to the Act.

Relocation Benefits Were Expressly Enumerated in the Relocation Act. The draft report correctly notes that the relocation benefits are based on ONHIR’s interpretation of the Relocation Act, but incorrectly states “that these benefits are not explicitly enumerated in the Settlement Act.” As detailed below, the Relocation Act expressly provided 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” ONHIR largely failed to provide these benefits, shrugging them off by pointing to existing Navajo or BIA infrastructure, as if the promise to the relocatees was only to move them to new homes in some of the worst infrastructure conditions in the United States.⁶ This was not what the governing law provided nor what relocatees were promised.

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:

³ Whitson, *supra*, at 375 n.30, citing *Healing v. Jones (II)*, 210 F. Supp. at 137 n.8 (“As revealed by extensive archeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located. Most of these were Navajo sites. Tree ring or dendrochronological studies show that of a total of 125 of these Indian sites within the executive order area for which data was successfully processed, the wood used in the structures was cut during a range of years from 1662 to 1939. A considerable number of these specimens were cut and presumably used in structures prior to 1882. There is no convincing evidence of any mass migration of Navajos either into or out of the executive order area at any time for which the tree ring data were available.”).

⁴ Benedek, *supra*, at 134.

⁵ See former 25 U.S.C. § 640d-3; *Sekaquaptewa v. MacDonald*, 626 F.3d 113 (9th Cir. 1980).

⁶ As the draft report notes on page 7, the GAO reached a different conclusion.

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;

...

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.*⁷

With these principles in mind, when Congress enacted Pub. L. 93-531, it required the original Navajo Hopi Indian Relocation Commission ("NHIRC") to prepare and submit to Congress a report and a Relocation Plan. Congress mandated that the Relocation Plan shall:

(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....⁸

The NHIRC acknowledged its obligations in the 1981 Relocation 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....'*⁹

The Relocation Plan recognized that the impact of relocation on existing host communities where relocates would be moved was within the Commission's "proper purview and responsibility" and that "[r]elocation to . . . new lands will necessitate the assurance of schools, roads, power, and other facilities."¹⁰ Thus, the Relocation Plan recognized the federal duty to provide schools, roads, power, and other facilities for relocation to new lands.¹¹

The Relocation Plan took effect 90 days after it was submitted to Congress, and it remains a

⁷ See S. Comm. on Interior & Insular Affairs, Rep. on Res. of Navajo-Hopi Land Dispute, S. Rep. No. 93-1177, at 19-20 (1974) (emphasis added).

⁸ Pub. L. 93-531 § 13(c)(2), (4)-(5) (emphasis added).

⁹ See NHIRC, Report and Plan at 4, 185, 237 (1981) (emphasis in original).

¹⁰ *Id.* at 278.

¹¹ *Id.* at 235-37, 270, 278.

binding, governing document, “in accordance with” which “[t]he relocation shall take place[.]”¹² Consistent with the Relocation Plan, the ONHIR Management Manual recognizes that ONHIR participates in infrastructure projects on the Navajo reservation in proportion to the number of relocatees living in or moving to those areas and that ONHIR funds infrastructure on the new lands acquired pursuant to the Relocation Act.¹³ The draft report therefore must be revised to acknowledge the original and ongoing federal duty to provide infrastructure and community facilities for relocatees as a fundamental part of ONHIR’s administration of relocation benefits.

The Statutory Provision Requiring the Relocation Plan Was Replaced in 1988, but the Federal Duty to Provide Infrastructure and Community Facilities for Relocatees Was Not. In 1988, Congress replaced the statutory requirement for the creation and submission of the 1981 Report and the Relocation Plan with a requirement for a new, updated report to address then outstanding issues.¹⁴ Some have asserted that this repeal eliminated the federal duty to provide community facilities for relocatees.¹⁵ But Congress did not repeal the requirement that “[t]he relocation shall take place in accordance with the relocation plan and shall be completed by the end of five years from the date on which the relocation plan takes effect.”¹⁶

In addition, in the same legislation, Congress expressly prescribed ONHIR’s “sole authority for final planning decisions regarding the development of lands acquired” pursuant to the Relocation Act.¹⁷ Congress did that

out of concerns that the development of the new lands not be unnecessarily slowed down. . . . [and that] such development should be done in conformity with, and in accordance with, section 13(c)(4) which directs the Commissioner to assure that the acquisition of housing shall be provided to the relocatees simultaneously with related community facilities and services such as water, sewers, roads, schools and health facilities. Such directive is especially important in cases where the creation of a whole new community of relocatees is contemplated such as is the case with . . . the New Lands.

H.R. Rep. 100-1032, at 9 (1988).

Consistent with that, ONHIR shortly thereafter confirmed that “the program has long identified a variety of facilities which are necessarily incident to relocation housing such as; roads, water, power, utilities, schools, community and chapter facilities, recreational facilities, commercial facilities, range facilities and facilities for economic development.”¹⁸ And in fulfillment of Congress’s 1988 report requirement, ONHIR recognized that “[t]he provision of adequate infrastructure support (water, wastewater disposal, and power) is essential to the successful

¹² Pub. L. 93-531, § 12(c)(5), amended by Pub. L. 96-305, § 6 (changing 30-day effective date after congressional submission to 90 days); Pub. L. 93-531, § 14(a).

¹³ ONHIR Management Manual §§1530 at 1, 1645.41.1 at 15.

¹⁴ Pub. L. 100-666, § 4(d), previously codified at 25 U.S.C. § 640d-12.

¹⁵ See, e.g., Government Accountability Office (“GAO”), *ONHIR: Executive Branch and Legislative Action Needed for Closure and Transfer of Activities*, GAO-18-266 (April 24, 2018) (“2018 GAO Report”) at 33-34 & n.62.

¹⁶ Pub. L. 93-531, § 14(a), previously codified at 25 U.S.C. § 640d-13(a).

¹⁷ Pub. L. 100-666, §§ 4(b), 8, previously codified at 25 U.S.C. § 640d-10(h).

¹⁸ Memo from Paul Tessler, NHIRC, to Mike McAlister, NHIRC (June 5, 1990) (concerning authority to issue rights-of-way and leases on the New Lands).

relocation of families.”¹⁹ ONHIR also reported there that it “is committed to further development of various infrastructure projects which are badly needed by the relocatee population.”²⁰ Thus, the United States indisputably still has a duty to provide community facilities for relocatees.

Yet despite all this, those needs remain woefully unaddressed. The draft report therefore must be revised to reflect that the current status of ONHIR’s administration of relocation benefits is substantially deficient in implementation of the federal duty to provide necessary infrastructure and community facilities for relocatees.

Housing and Home Warranties. 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.²¹ The GAO failed to emphasize that the two-year warranty on these poorly built homes is dramatically less than that historically required for other federally funded housing. Notably, HUD through the FHA loan program, until only last year, required a 10-year warranty for maximum financing. ONHIR has not explained why it adopted such a short warranty period, 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 expired. At Coalmine Chapter, not only were more than 20 houses found deficient, the Chapter House itself built by ONHIR for use by the entire relocated community of Navajos is so structurally defective that it is unusable.²²

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 noted that ONHIR failed in its mandatory obligation to maintain adequate records of warranty claims, contractor performance, and the status of repairs.²³ 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.

Accommodation Agreements. The draft report at footnote 2 states that the Navajos who signed Accommodation Agreements had “by signing those agreements ... waived their eligibility to receive benefits.” The Navajo Nation believes that these individuals are still eligible for benefits under the law (though the application period has expired) and are only barred from doing so as a contractual matter, not a statutory one.

Condition of Relocation Homes. The draft report notes that the “documentation reviewed did not reveal evidence of systemic structural issues with the relocation homes” and that warranty complaints have been “chiefly for cosmetic or routine maintenance issues.” The Navajo Nation is not confident that ONHIR has retained documentation that would show a more systemic failure.

¹⁹ ONHIR, Plan Update (Nov. 22, 1990) at 59 (“1990 Update”).

²⁰ *Id.* at 10.

²¹ See 2018 GAO Report at 27-32.

²² See also 1990 Update at 93 (“Suggestions that have been implemented in developing the rural community include constructing a chapter house; paving roads . . .”). 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.

²³ 2018 GAO Report at 27-28.

As for the warranty complaints, with the warranties only in place for two years the most likely claims are going to be cosmetic and routine issues, with more serious structural issues taking longer to manifest themselves.

The draft report notes that the OIG had reported in 2016 that there were problems in East Mill and two New Lands communities with subsidence issues. It is a sad sign that those issues were noted in 2016 despite ONHIR remediation in 2006 and are still outstanding, with ONHIR now only acknowledging a need for “at minimum” cosmetic repairs. Issues such as this should not fester for a decade and then another four years without a clear plan for final resolution.

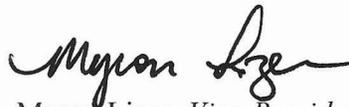
Congressional Considerations. The Navajo Nation appreciates that the draft report sets forth the Nation’s position that there are still unfulfilled infrastructure obligations and that Congress should “[d]etermine whether to provide funding to address infrastructure needs for relocatees as requested by the Navajo Nation.” However, the Nation strongly disagrees with GAO’s finding referenced in the draft report that it is not within ONHIR’s statutory responsibility to provide infrastructure.

Conclusion. The United States promised a generous and humane relocation—a promise that was not kept. Before ONHIR is closed, all of the issues identified in the report and this memorandum should be fully addressed in close consultation and coordination with the Navajo Nation.

Sincerely,



Jonathan Nez, *President*
THE NAVAJO NATION



Myron Lizer, *Vice-President*
THE NAVAJO NATION

