



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

Status of the Office of Navajo and Hopi Indian Relocation's Tribal Consultation Process and Activities

This is a revised version of the report prepared for public release.



OFFICE OF
INSPECTOR GENERAL
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MAR 14 2023

Memorandum

To: Deb Haaland
Secretary of the Interior

From: Mark Lee Greenblatt 
Inspector General

Subject: Final ONHIR Review – *Status of the Office of Navajo and Hopi Indian Relocation's Tribal Consultation Process and Activities*
Report No. 2020–WR–016

This report is the last in 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). See Attachment 1 for a list of prior reports in the series.

Our objective for this review was to determine the status of ONHIR's tribal consultation process and activities. Specifically, we sought to answer the following:

1. What is the status of ONHIR's tribal consultation process?
2. What were ONHIR's communication activities with tribes before the COVID–19 pandemic, and what is the status of those communication activities now?
3. What opportunities exist for tribal consultation?
4. What considerations exist for future tribal consultation?

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

About This Report Series

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

We issued 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.

Background

ONHIR is an independent Federal agency responsible for implementing the relocation of Navajo people and Hopi people living within each other's boundaries as a result of U.S. Government partitioning of tribal land. ONHIR reports directly to the President of the United States and is overseen by both the U.S. Office of Management and Budget (OMB) and the U.S. Congress. Pursuant to the Navajo-Hopi Land Settlement Act of 1974 (Pub. L. No. 93-531), as amended, once the President determines that its function has been fully discharged, ONHIR will be dissolved. 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.

Pursuant to the Act, as amended, ONHIR's functions include certifying applicants as eligible for relocation, reviewing appeals, and providing relocation homes. ONHIR is also responsible for administering the land taken into trust for the Navajo Nation under the Act until relocation is complete. To date, 387,000 acres have been acquired pursuant to the Act, including 352,000 acres of land in Arizona that ONHIR refers to as the "New Lands."¹ This acreage now makes up the Navajo Nation's Nahata Dziil Chapter (a unit of local tribal government). The United States holds the legal title to land held in trust, and the tribe holds the beneficial interest. ONHIR administers the land for the sole benefit of the relocatees² until the relocation of Navajo people and Hopi people off each other's designated land is complete. As part of its administrative functions, ONHIR meets with Navajo tribal members to discuss issues such as grazing, homesite leases, and rights-of-way on tribal land.

Executive Order No. 13175, *Consultation and Coordination with Indian Tribal Governments*, issued in November 2000, requires each Federal agency to establish "regular and meaningful" consultation and collaboration with tribal officials when developing regulatory policies that have tribal implications;³ in addition, each Federal agency is responsible for creating an "accountable process" to do so. The order also requires the head of each agency to designate an official with principal responsibility for consultation activities and to submit a description of the agency's consultation process to the OMB. The *2009 Presidential Memorandum on Tribal Consultation* (issued November 2009) directs each agency head to also submit a detailed plan of actions for implementing Executive Order No. 13175 and annual progress reports for the plan. The memorandum also states that "meaningful dialogue between

¹ Amendments to the Navajo-Hopi Land Settlement Act in 1980 authorized the U.S. Government to take a total of 400,000 acres into trust for the Navajo Nation. Land selected in Arizona includes 352,000 acres that ONHIR refers to as the "New Lands." In contrast, the Navajo Nation refers to all lands in Arizona and New Mexico selected and acquired in trust pursuant to the Act as "new lands," totaling about 387,000 acres. The Navajo Nation has stated that there is no legal difference between any lands taken into trust pursuant to the Act. ONHIR acknowledges its own administrative authority over the 387,000 acres but states that use and revenues from lands in Arizona and New Mexico follow different requirements. We acknowledge that ONHIR and the Navajo Nation do not agree on the appropriate definition of "new lands." We do not express an opinion on these issues. This report uses the term "New Lands" pursuant to ONHIR's own definition to maintain consistency with prior reports in this series.

² For the purposes of this report, "relocatees" is defined as individuals who have relocated from Hopi Partitioned Lands to Navajo Partitioned Lands or vice versa using relocation benefits received pursuant to the Act.

³ Per Executive Order No. 13175 Section 1(a), policies that have tribal implications refer to "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Federal officials and tribal officials has greatly improved Federal policy toward American Indian tribes [and that] consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”

In July 2010, the OMB provided additional guidance to “all Federal agencies, except for independent regulatory agencies” on compliance with Executive Order No. 13175.⁴ The OMB identifies the fundamental principles and policymaking criteria specific to an agency’s regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more tribes or on the responsibilities and relationship between the Federal Government and tribes. For example, the OMB’s guidance instructs agencies to:

- Respect tribal self-government and strive to meet the responsibilities of the unique legal relationship between the Federal and tribal governments.
- Grant tribal governments the maximum administrative discretion possible.
- Encourage tribes to develop their own policies to achieve program objectives.
- Defer to tribes to establish standards (where possible).
- Consult with tribal officials as to the need for Federal standards or alternatives to preserve the prerogatives and authority of tribes.

This guidance also states that the description of the agency’s consultation process should explain how the agency identifies policies that have tribal implications and the procedures it will use to ensure meaningful and timely input from tribal officials.

In a January 2021 Presidential memorandum, [*Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*](#), the Federal Government reaffirmed its commitment to the requirements announced in the 2000 executive order and the 2009 memorandum. The January 2021 Presidential memorandum further required agencies to submit their detailed action plans to the OMB within 90 days and their first progress report within 270 days.

Status of ONHIR’s Tribal Consultation Process

As a Federal agency, ONHIR is required by Executive Order No. 13175 to create an accountable process for regular and meaningful consultation and collaboration with tribal entities. ONHIR’s tribal consultation process document did not include details as to how it would consult with tribal entities in the development of Federal policies that have tribal implications

⁴ [*Guidance for Implementing E.O. 13175, “Consultation and Coordination with Indian Tribal Governments.”*](#) Executive Office of the President, OMB, issued July 30, 2010.

until it was updated in April 2021.⁵ According to ONHIR, this update was in response to the January 2021 Presidential Memorandum, which required agencies to submit detailed action plans to the OMB within 90 days and their first progress report within 270 days. On March 11, 2021, ONHIR sent its updated draft consultation process document to the Navajo Nation and Hopi Tribe for their review before submission to the OMB. The tribal leaders provided no comments within the Executive Order's 90-day timeframe for response, and ONHIR submitted its final consultation process on April 23, 2021.⁶ In this document, ONHIR stated that it is willing to modify its consultation process to consider any tribal comments received at a later time.

According to ONHIR's tribal consultation process, ONHIR:

- Identifies key officials and their contact information.
- Discusses planned agency actions at regular managers' meetings to determine whether tribal consultation is appropriate.
- Requests that the Navajo Nation and Hopi Tribe identify the persons or offices that should be ONHIR's points of contact (and update contact information when needed).
- Determines the appropriate ONHIR official for a given consultation and provides a summary of the consultation to the Executive Director if he or she is not a direct participant.
- Uses the tribally preferred method of consultation (subject to budgetary and COVID-19 constraints) that considers the accessibility and availability of tribal resources.
- Uses the tribally preferred notification method for consultation events and provides as much advance notification as possible.

ONHIR's Communication Activities With Tribes Before and During the COVID-19 Pandemic

ONHIR stated that, before the COVID-19 pandemic, it regularly met in person and communicated in writing and by phone with Navajo and Hopi leadership as well as other relevant entities. In addition, ONHIR's New Lands Range Office staff attended meetings of the Nahata Dziil Chapter or New Lands grazing organizations and ensured permittees' comments and concerns were documented and addressed. The manager of ONHIR's Padres Mesa Demonstration Ranch (a hands-on training and skills facility on the New Lands) also discussed

⁵ *Consultation Process Pursuant to E.O. 13175: Consultation and Coordination With Indian Tribal Governments*, ONHIR, issued April 2021.

⁶ In its September 2, 2022 response to our draft report, the Navajo Nation stated that ONHIR's tribal consultation process document is not a detailed action plan and that this report did not adequately address this point. Executive Order No. 13175 instructs agencies to submit a description of their consultation process to the OMB. We did not evaluate ONHIR's consultation process, as the OMB is responsible for deciding whether that process meets the requirements of the executive order. We have included the Navajo Nation's full response within Attachment 2 of this report.

with the Navajo ranchers (who are relocatees) topics specific to raising and selling livestock and provided demonstrations and training to ranchers.

In its April 2021 tribal consultation process document, ONHIR states that the COVID–19 pandemic has affected its communication methods. In particular, in the document, ONHIR states that “[w]hile previously many of the dialogues and discussions were in-person, given the constraints imposed by the pandemic, many of the dialogues and discussions have had to use a different format – teleconferences and Zoom meetings or exchanges of e-mails (including documents attached to e-mails), texts and correspondence.” ONHIR further states in the document that “[s]everal times a month, members of [ONHIR’s] workforce meet with various Tribal entities on aspects of [ONHIR’s] program. Most of these meetings are with local (Navajo Chapter) groups. [ONHIR] also, as necessary, meets with units of the central governments of the Navajo Nation and Hopi Tribe.” According to our followup communications with ONHIR, the topics for such meetings or discussions include leases, benefits for relocatees, administrative eligibility appeals, mineral development, requests for money from the Nahata Dziil Commission Governance, issues affecting grazing permittees, homesite leases, and rights-of-way.

Additionally, the tribal consultation process document recognizes transition meetings that ONHIR held with the Navajo Nation, components of the Navajo Nation, and representatives from the U.S. Department of the Interior (DOI). The document states that “for years, the direction from the Administration and Congress [has been] that ONHIR should prepare for either closure or transition to another part of the Federal Government.”⁷ During our fieldwork, both ONHIR and the DOI recounted that meetings occurred prior to 2020. ONHIR’s process document states its intention to resume such meetings and to offer comparable meetings with Hopi Leadership.

Tribal Consultation Opportunities

In April 2021, after providing the Navajo Nation and Hopi Tribe with an opportunity for review but receiving no response, ONHIR submitted its consultation process document to the OMB as required by Executive Order No. 13175. It is now incumbent upon ONHIR to use an accountable process for regular and meaningful consultation and collaboration with the Navajo Nation and Hopi Tribe. Our series of reports to help decision makers plan for the future of ONHIR covered a variety of topics related to ONHIR’s operations (see Attachment 1 for a list of our prior reports).⁸ From the work we completed related to those reports, we identified topics

⁷ In various documents (e.g., responses to our other draft ONHIR reviews and a [2019 Resolution of the Naabik’iyáti’ Standing Committee of the 24th Navajo Nation Council](#)), the Navajo Nation has disputed that ONHIR has fulfilled its responsibilities under the law and stated that it believes that ONHIR should not yet close. The Navajo Nation has also repeatedly requested the appointment of a Commissioner to ONHIR. In addition, we acknowledge the Navajo Nation’s two pending lawsuits. First, on August 23, 2021, the Navajo Nation and an Identifiable Group of Relocation Beneficiaries filed a complaint in the U.S. Court of Federal Claims against the United States for alleged maladministration of the New Lands. It is seeking \$40 million in damages and remanding to ONHIR and the DOI with direction to properly maintain records for and administer and use the New Lands and revenues. Second, on August 24, 2021, the Navajo Nation filed a complaint in the U.S. District Court for the District of Arizona naming as defendants ONHIR and the DOI. The complaint states that it seeks declaratory and injunctive relief “to secure prompt and proper conclusion of federal relocation . . . as well as prevention of premature closure of a federal agency before it fully discharges its statutory functions.”

⁸ For each of our reports, we requested comments on the drafts from ONHIR, the Navajo Nation, and the Hopi Tribe. When comments were provided, they were included within our final reports. We have received responses from ONHIR and the Navajo Nation on each report, but we have not received responses to date from the Hopi Tribe on any reports.

that could be considered for future discussions or tribal consultations in the event of ONHIR's closure or transfer of duties. This list is not intended to be all inclusive, and we are not opining on whether each of these topics would be appropriate for formal tribal consultations.

1. Home deficiencies and provision of infrastructure for the New Lands.
2. Application of eligibility standards for relocation benefit qualification.
3. Land selection authority, acreage discrepancies, and options for the status in which future selections may be held.
4. Selection of a successor agency for Padre Mesa Demonstration Ranch operations and the need for leases and grazing permits for continued operation.
5. Grazing authority (specifically, the issuance and enforcement of grazing permits) in the event of ONHIR's closure or transfer of duties.
6. Maintenance of livestock water systems and fencing in the event of ONHIR's closure or transfer of duties.
7. Continued use of the National Environmental Policy Act exemption and completion of any necessary environmental reviews, actions, or analysis of outstanding environmental issues.
8. Use of the trust money ONHIR collected, debt forgiveness from the Navajo Rehabilitation Trust Fund, establishment of leases for the eight ONHIR-managed properties without written leases, and leasing authority.
9. Transfer of assets and official records to a successor agency.

Considerations for Ensuring a Tribal Consultation Process Remains in Place

The Federal Government has stressed the importance of a meaningful and accountable tribal consultation process. In 2019, both the House and Senate appropriations subcommittees with budgetary oversight of ONHIR specifically expressed their belief in the need for tribal consultation between ONHIR and the Navajo Nation and the Hopi Tribe with respect to any decision to close ONHIR.⁹ DOI officials told us that, due to the pending litigation between the DOI and the Navajo Nation, the DOI requested and received an extension to defer consultation until 90 days after the litigation ends. ONHIR currently administers many duties and so has

⁹ S. Rep. No. 115–276 (2019); H. Comm. On Approp., 116th Cong., [Explanatory Statement on H.R.J. Res. 31 \(2019\) \(statement of Rep. Lowey, Chairwoman\)](#).

related tribal consultation opportunities. Accordingly, in the event ONHIR closes or its duties are transferred, decision makers should consider ensuring the successor agency:

- Has an accountable process that fulfills the requirements identified in Executive Order No. 13175 and the Presidential memoranda and provides for meaningful and timely input by tribal officials in the development of policy or actions that have tribal implications.
- Conducts tribal consultation, as appropriate, on the issues we identified throughout our reviews.

Conclusion

We invited ONHIR and Navajo and Hopi officials to provide input on a draft version of this report. ONHIR and the Navajo Nation provided written responses, which are included in Attachment 2. After reviewing these responses, we made revisions and updated information in this report where applicable and appropriate. Hopi officials did not provide a response. In addition, the DOI's Office of the Solicitor provided suggested edits and comments on a courtesy copy of the draft report that we considered to the extent that the suggested edits provided objective corrections on particular items or specific, verifiable clarifying points.

Due to the COVID-19 pandemic, we had to limit our fieldwork. In particular, we reviewed relevant laws, regulations, procedures, and documents but limited 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 do not require a response to this report. We will notify Congress about our findings, and we will summarize this work in our next *Semiannual Report to Congress*, as required by law. We will also post a public version of this report on our website. If you have any questions, please contact me at 202-208-5745, or your staff may contact Bryan Brazil, Western Region Audit Director, at 916-978-6199.

cc: Christopher J. Bavasi, Executive Director, Office of Navajo and Hopi Indian Relocation
Bryan Newland, Assistant Secretary for Indian Affairs
Darryl LaCounte, Director, Bureau of Indian Affairs
Clint Bowers, Acting Chief of Staff, Bureau of Indian Affairs
Jerry Gidner, Director, Bureau of Trust Funds Administration
Robert Anderson, Solicitor, Office of the Solicitor
Mary Fischietto, Branch Chief, Interior Branch, U.S. Office of Management and Budget
Patrick J. Sandoval, Chief of Staff, Office of the President and Vice President, Navajo Nation
Timothy L. Nuvangyaoma, Chairman, Hopi Tribal Council

Attachments (2)

Attachment 1: Prior Reports in the ONHIR Review Series

[Office of Navajo and Hopi Indian Relocation Background and Functions](#)

(Report No. 2019–WR–039), issued December 17, 2019.

[Status of the Office of Navajo and Hopi Indian Relocation's Administration of Relocation Benefits](#) (Report No. 2020–WR–016–A), issued September 29, 2020.

[Status of the Office of Navajo and Hopi Indian Relocation's Appeals on Denied Eligibility Determination Cases](#) (Report No. 2020–WR–016–B), issued September 29, 2020.

[Status of the Office of Navajo and Hopi Indian Relocation's Land Selection in Arizona and New Mexico](#) (Report No. 2020–WR–016–C), issued September 29, 2020.

[Status of the Office of Navajo and Hopi Indian Relocation's Padres Mesa Demonstration Ranch](#) (Report No. 2020–WR–016–D), issued September 21, 2021.

[Status of the Office of Navajo and Hopi Indian Relocation's Grazing Responsibilities and Activities on the New Lands](#) (Report No. 2020–WR–016–E), issued September 21, 2021.

[Status of the Office of Navajo and Hopi Indian Relocation's Range Maintenance Responsibilities and Activities on the New Lands](#) (Report No. 2020–WR–016–F), issued September 21, 2021.

[Status of Identified Environmental Concerns Related to the Office of Navajo and Hopi Indian Relocation's Administration of Land](#) (Report No. 2020–WR–016–G), issued February 9, 2022.

[Status of the Office of Navajo and Hopi Indian Relocation's Assets and Official Records](#) (Report No. 2020–WR–016–I), issued March 25, 2022.

[Status of the Office of Navajo and Hopi Indian Relocation's Properties and Land Use Agreements](#) (Report No. 2020–WR–016–H), issued March 2, 2023.

Attachment 2: Responses to Draft Report

The Office of Navajo and Hopi Indian Relocation's response to our draft report follows on page 10, and the Navajo Nation's response follows on page 11.



UNITED STATES GOVERNMENT
OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

Christopher J. Bavasi
Executive Director

August 25, 2022

Mark Lee Greenblatt
Inspector General
U.S. Department of the Interior

**Re: ONHIR Draft Review –Status of the Office of Navajo and Hopi Indian Relocation’s
Tribal Consultation Process and Activities, Report No. 2020–WR–016**

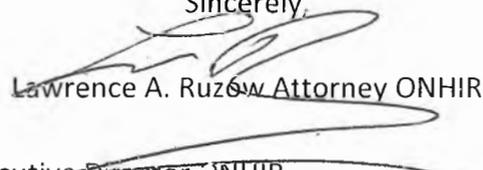
Dear Mr. Greenblatt:

The only comment ONHIR had is on p. 5. of the Draft Report:

There were actually two types of consultation--one led by the Navajo Nation (Karis N. Begaye, Counsel to the Navajo Nation Office of the President and Vice-President) from 2016 through 2018 that included participation by the Navajo Nation, NDCG and other affected Navajo Chapters, some Navajo Nation departments, ONHIR, BIA and occasionally other parts of DOI. These took place on the Navajo Nation. (When the new Navajo Nation President—Jonathan Nez—took office in January 2019, ONHIR was verbally informed by his Counsel Levon Henry that President Nez did not intend to continue these consultations and they were, in fact, not continued.)

The other was the "Federal Partners" discussions in spring and early summer 2018 that were led by OST and involved DOI OST, BIA, DOI Solicitor's Office and ONHIR. These took place at the BIA Offices in Gallup, New Mexico and concerned ONHIR transition and/or closure. During the budget process when the House Appropriations Committee removed \$3,000,000 from the OST budget appropriations and "restored" it to ONHIR's proposed budget appropriations, OST discontinued these discussions.

Sincerely,


Lawrence A. Ruzow Attorney ONHIR

Cc: Christopher J. Bavasi, Executive Director ONHIR

THE NAVAJO NATION

JONATHAN NEZ | PRESIDENT MYRON LIZER | VICE PRESIDENT



September 2, 2022

Mark L. Greenblatt, Inspector General
U.S. Department of the Interior
Office of Inspector General
1849 C Street NW - Mail Stop 4428
Washington, D.C. 20240

Re: Navajo Nation Comments on Office of Inspector General Draft Report “Status of the Office of Navajo and Hopi Indian Relocation’s Consultation Process and Activities,” Report No. 2020-WR-016

Dear Inspector General Greenblatt:

On behalf of the Navajo Nation (“Nation”) thank you for the opportunity to comment on the Office of Inspector General (“OIG”) draft report titled *“Status of the Office of Navajo and Hopi Indian Relocation’s Consultation Process and Activities.”*

The draft OIG report essentially reviews the Office of Navajo and Hopi Indian Relocation’s (“ONHIR’s”) compliance with Executive Order No. 13175 (“EO 13175”), regarding tribal consultation, and the January 2021 Presidential Memorandum on Tribal Consultation (“Biden Memo”), which required each federal agency to submit to the White House Office of Management and Budget (“OMB”) “a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175” [Pres. Mem. on Tribal Consultation & Strengthening Nation-to-Nation Relationships, § 1(a), 86 Fed. Reg. 7491, 7491 (Jan. 29, 2021)]. This includes reporting on the [April 2021 ONHIR Consultation Process Statement](#) (“OCPS”), which ONHIR prepared in response to the Biden Memo. Unfortunately, as explained below, ONHIR is not sufficiently complying with either EO 13175 or the Biden Memo and the draft OIG report does not, but should, report those failures.

1. **In the Absence of a Commissioner Appointed by the President, True Consultation Cannot Take Place.** Just as a U.S. ambassador to a foreign nation is appointed by the President to be his personal representative in government-to-government consultations, the Commissioner of the Office of Navajo and Hopi Indian Relocation is a presidential appointee with direct responsibility to the President for the implementation of the Navajo-Hopi Settlement Act of 1974 (“Relocation Act.” [Pub. L. 93-531, as amended]). It is unacceptable and impertinent to expect the Nation to consult with a federal civil servant who is simply delegated the Commissioner’s authorities but has not been directly empowered by presidential appointment to engage in meaningful consultation and dialogue at a government-to-government level with the Nation.

By statute, ONHIR is led by a single commissioner, but *there has been no commissioner in place since 1994*. Without the oversight of an appointed commissioner, ONHIR employees

have been non-responsive to the principal concerns of the Nation and the relocated Navajo families. ONHIR has also had limited consultations about the future of ONHIR and how ONHIR can be shutdown, when the Nation has sought to consult on how ONHIR can fulfill federal promises and obligations. ONHIR employees are not presidentially empowered to craft a vision, in consultation with the Nation, for a more humane program; rather, they simply carry out their bureaucratic responsibilities under the Relocation Act.

In the view of the Nation, the agency has regularly violated the due process rights of Navajo individuals seeking relocation benefits, ignored its statutory duty to properly manage lands acquired for the benefit of the Navajo people, and failed to produce the infrastructure and development projects promised to the Navajo people by Congress in hearings and in the Relocation Act. The Nation seeks appointment of a commissioner to consult with the Navajo Nation on a true government-to-government basis, and to oversee a reevaluation of ONHIR and its responsibilities, as well as coordinate an inter-agency effort to “assure that housing and related community facilities and services, such as water, sewers, roads, schools, and health facilities, for such households shall be available at their relocation sites...” in accordance with the original Relocation Act. An empowered commissioner can help bring some measure of justice and equity that has left a black mark on American history.

2. **The Description of the Navajo-Hopi Land Commission is not accurate.** On page 4 of the draft report, there is a short description of the Navajo-Hopi Land Commission. For clarity, it is important to note that the Navajo Nation Council established the Navajo-Hopi Land Commission within the legislative branch of the Navajo government [2 Navajo Nation Code Section 851(A)]. The Navajo-Hopi Land Commission’s purpose is to “monitor, collect, and update information on any and all land use conflicts between the Navajo Nation and the Hopi Tribe, and any claimants in and to lands within the area described in the Act of June 14, 1934 (48 Stat. 960) and to speak and act for the Navajo Nation with respect to the land selection and land exchange provisions of P.L. 96-305” [2 Navajo Nation Code Section 851(B)]. The Navajo-Hopi Land Commission consists of Navajo Nation Council Delegates who represent areas affected by the Navajo-Hopi Land Dispute.
3. **The OCPS Must Be Revised to Provide the Required Detailed Action Plan to Implement Tribal Consultation.** As the draft OIG report notes on page 5, “ONHIR is required by Executive Order No. 13175 to create an accountable process for regular and meaningful consultation and collaboration with tribal entities.” Also, as noted on page 3 of the draft report, the OCPS was prepared in response to the Biden Memo requirement for a detailed action plan for tribal consultation implementation. Like any action plan, the OCPS must be capable of being used to measure specific progress, since each federal agency must submit to OMB three quarters later and annually thereafter progress reports “on the status of each action included in the agency’s plan, together with any proposed updates to its plan” [*Id.* § 1(c), 86 Fed. Reg. at 7491-92].

The Biden Memo requirements to develop and implement a tribal consultation action plan are not new concepts. As page 2 of the draft OIG report recounts, the 2009 Presidential

Memorandum on Tribal Consultation [74 Fed. Reg. 57,881 (Nov. 9, 2009) (the “Obama Memo”)], previously directed each agency to submit a detailed plan of actions for implementing EO 13175 and annual progress reports for the plan, while EO 13175 itself requires each agency to establish an “accountable process” for “meaningful” tribal consultations. As the Obama Memo noted, “history has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes” [74 Fed. Reg. at 57,881]. Unfortunately, ONHIR continues to fail to include the voices of tribal officials or comply with any of those presidential mandates.

The OCPS is not a detailed action plan, and the draft OIG report fails to recognize that the OCPS is not. Instead, apart from background, the OCPS provides brief narrative descriptions of how ONHIR consults and various categories of recurring tribal consultations, mostly regarding relocatee homesites, New Lands administration, and closure of ONHIR or transition of its functions. The OCPS’s only stated plan is that “as we plan for transition of remaining ONHIR functions to other entities of the federal government, our plan is to continue collaborating with both these (Navajo and Hopi) Native American governments on a regular basis, at all levels of their governments.” That is not a detailed action plan, nor a plan against which progress on each action can be reported with any proposed updates. Rather than report these failings, the draft OIG report only summarizes ONHIR’s tribal consultation process and opportunities.

For comparison, the DOI tribal consultation action plan to implement the Biden Memo is 18 single-spaced pages long and contains six entire sets of actions items, and target dates for each of those six actions and 11 additional action subitems. *See* [DOI, Detailed Plan for Improving Interior’s Implementation of E.O. 13175 \(2021\)](#). To be sure, DOI has a multitude of offices whose purposes do not always relate to Tribal Nations and almost 600 federally recognized tribes across the country with which to consult, and this is relevant. In contrast, almost everything that ONHIR does has tribal implications and there are only two—and most often only one—Tribal Nations that must be consulted with. This should make preparation of ONHIR’s detailed action plan for implementing tribal consultation straightforward. However, ONHIR still must comply with the essential mandate of the Biden memo to provide a detailed action plan that can be used to measure progress on each specified action, but the OCPS does not. The OIG report therefore must be revised to report that the OCPS fails to comply with the Biden Memo.

- 4. The OCPS Must Be Revised to Require Consultation Before Undertaking Policies with Tribal Implications Generally.** EO 13175 requires “meaningful and timely” consultation “when formulating” or “in development of Federal policies that have Tribal implications” so that relevant federal actions are only taken “after consultation by the agency with Tribal Nations” [Biden Memo, 86 Fed. Reg. at 7491; EO 13175: Consultation & Coord. With Indian Tribal Govts., §§ 3, 5, 65 Fed. Reg. 67,249, 67,249-50 (Nov. 9, 2000)]. Instead of complying, the OCPS is mostly background and only apparently commits to respecting the Nation-to-Nation relationship in the consultation process by publishing major proposals in the Federal

Register and formally consulting with the public, as federal law and policy require. Merely recognizing that Tribal Nations can participate in public comment periods is not a meaningful commitment to respect the nation-to-nation relationship. The draft OIG report must be corrected to address this material misapplication of EO 13175.

- 5. The OCPS Must Be Revised to Require Consultation Before Continuing Efforts for Closure of ONHIR or Transfer of Its Functions.** While the OCPS asserts that ONHIR will continue consulting and collaborating with Tribal Nations on a regular basis, there has been no consultation for three years on the pertinent issues of when and how ONHIR will complete discharge of all of its functions, which is not a “regular basis.” Instead, the draft OIG report notes on page 5 that those meetings stopped because consensus could not be reached, but that ONHIR intends to resume such meetings at some unspecified time and in an unspecified manner. The Nation has no idea when or how any such critical, meaningful consultation will resume, or even how it can. ONHIR has lacked a presidentially appointed commissioner since 1994 and the Nation has been rebuffed regarding its repeated requests for that appointment. If ONHIR really wants to consult meaningfully with the Nation, ONHIR must first strongly support the prompt presidential appointment of a new ONHIR Commissioner

Instead, over the last three years, ONHIR apparently has continued to plan and work with DOI to prepare to close and transfer ONHIR’s functions to another agency. This is despite a lack of further consultations, the failure to appoint a commissioner, and the fact that ONHIR legally cannot transfer its functions and legally cannot close until “its functions have been fully discharged” [25 U.S.C. § 640d-11(f)], which has been well reported. *See generally* U.S. Government Accountability Office (“GAO”), Report 18-266, ONHIR: Executive Branch and Legislative Action Needed for Closure and Transfer of Activities (April 2018) (“GAO Report”). Meaningful and timely consultation is not just a box to be checked to reflect that an agency previously spoke to tribal officials years ago and then leaving the agency free to continue its desired illegal course of action regardless of tribal concerns. The draft OIG report therefore must be revised to reflect that the OCPS fails to comply with EO 13175 regarding meaningful tribal consultation, both generally and regarding the fundamental issues of its continued existence and completion or transfer of its functions.

- 6. Correct the Required Timing for Suggested Tribal Consultation Topics.** On pages 5 and 6 of the draft OIG report, the section entitled “Tribal Consultation Opportunities” lists nine numbered topics of “potential tribal consultation opportunities for ONHIR or its successor agency in the event of ONHIR’s closure or transfer of duties.” As explained above, EO 13175 requires meaningful and timely tribal consultation, which means before an event takes place. As also noted above, the GAO has already reported that ONHIR legally cannot close or transfer its functions. Therefore, the nature of the consultation opportunities list in the draft OIG report must be revised from concerning “in the event of” to “before” those matters. It makes no logical, legal, or temporal sense to consult with Tribes “in the event of” rather than “before” matters that cannot and must not yet happen.
- 7. Correct the Scope of Consultation for Home Deficiencies and Infrastructure to Concern All Chapters with Relocates.** The list of “potential tribal consultation opportunities” on

pages 5 to 6 of the draft OIG report also requires revision and augmentation to properly address the full discharge of ONHIR's functions. Most significantly, item 1, "Home deficiencies and provision of infrastructure for the New Lands", must be revised to replace "the New Lands" with "relocatees throughout the Navajo Reservation." This erroneously presumes that Navajos only have been relocated to the New Lands and that this is the only place where infrastructure for relocatees is required. Only about 421 families, or less than 11% of Navajos eligible for relocation benefits, relocated to the Nataha Dziil Chapter ("NDC"), which is included within but not synonymous or coextensive with the New Lands, as addressed further separately in comment 8 below. In contrast, over 2,000 other Navajo families relocated to other parts of the Nation. The significant housing and infrastructure needs for the majority of on-reservation relocatee families must not be ignored.

The governing Relocation Act mandates that "the relocation shall take place in accordance with the 1981 relocation plan" prepared by ONHIR's predecessor, the former Navajo Hopi Indian Relocation Commission ("NHIRC") [25 U.S.C. § 640d-13(a)]. In testifying to Congress about that plan, the NHIRC acknowledged the "congressional mandate to achieve relocation in a manner which avoids or minimizes the impacts," that "Congress requires the Commission to assure that community facilities and services are available at relocation sites," and that the NHIRC (now, ONHIR) will have to deal with community facilities in the New Lands, as well as in partitioned Navajo Chapters where community facilities are needed. *See* Hearing before the Senate Select Comm. on Indian Affairs on Report and Plan of the NHIRC, 96th Cong. 79 (1981) at 4, 10, 16.

ONHIR also still must and has committed to provide "adequate infrastructure . . . essential to the successful relocation of families" and which is "badly needed by the relocatee population" throughout the Navajo Reservation [1990 Update at 10, 59]. This includes providing community facilities and services, such as water, power, sewers, roads, schools, and health facilities, for the New Lands fully and for other areas of the Navajo Reservation "in proportion to the number of relocatees living in or moving to the areas to be served" [ONHIR Management Manual ("OMM") §§ 1530 at 1, 1645.41.1 at 15]. Those duties are reinforced by promises that the NHIRC and then ONHIR made to relocatees and host communities on the Navajo Reservation to induce relocation, and upon which relocatees and host communities have substantially relied on. Despite all that, relocatees throughout the Nation lack sufficient housing or adequate infrastructure. The OIG report needs to be revised to address these deficiencies in the OCPS rather than gloss over or perpetuate them.

8. **Correct the Reference to Consultation on Leasing Authority to Leasing Administration.** Item 8 of tribal consultation opportunities on page 6 of the draft OIG Report lists various matters related to the administration of the New Lands and revenue therefrom. Among those is "leasing authority." That term is unduly vague and may be misconstrued to refer only to who has approval to enter into leasing agreements for the New Lands. That is not appropriate. The Relocation Act categorically provides that ONHIR administers all the New Lands [25 U.S.C. § 640d-110(h)] and that ONHIR possesses all powers and duties that before 1988 were assigned to DOI to "issue leases and rights-of-way for housing and related facilities" on the New Lands [Pub. L. 99-190, 99 Stat. 1185, 1236 (1985), incorporated in 25 U.S.C. § 640d-

11(c)(2)(A)]. There is no doubt that ONHIR has New Lands leasing authority.

Beyond just leasing authority, there have been substantial issues and consultation is required regarding how ONHIR administers its statutory leasing powers and duties beyond the lack of leases for eight ONHIR-managed properties as noted in this item in the draft OIG report. First, ONHIR lacks a full inventory of leased and vacant New Lands or of leases or surface use agreements that ONHIR has entered into regarding the New Lands (GAO Report at 43). Second, ONHIR has allowed others to occupy New Lands properties without a written lease, as required by the OMM (*Id.* at 43-44). Third, ONHIR has improvidently allowed New Lands to remain vacant and unused for extended periods. Fourth, ONHIR numerous times has acted as the lessor of New Lands contrary to the OMM and without affirmative authorization by the Nation and even though ONHIR does not have authority to lease the New Lands on its own (*Id.* at 45). Fifth, ONHIR has leased and otherwise allowed others to use multiple parcels of the New Lands with only approval by the NDC rather than the Nation itself, even though ONHIR has acknowledged that NDC lacks that authority since 2009. Finally, ONHIR has acted as lessor without authorization or consent by the Nation as required under the OMM with below-market rent, including no more than nominal rent (*Id.* at 46). All these matters must be addressed, so the draft OIG report must be revised to change the reference to consultation about “leasing authority” in item 8 on page 6 to “leasing administration.”

9. **Add Rights of Way Administration to the List of Consultation Opportunities.** Item 8 of tribal consultation opportunities on page 6 of the draft OIG Report seems to be a catch-all laundry list of various matters related to New Lands administration. As such, that item omits but must be revised to include Rights of Way administration. ONHIR administers New Lands rights of way under its prescribed complete administration of the New Lands, along with administration of New Lands leasing. *See* 25 U.S.C. §§ 640d-110(h), 640d-11(c)(2)(A) (the latter incorporating Pub. L. 99-190, 99 Stat. 1185, 1236 (1985)); OMM § 1810.11-14. The draft OIG report therefore must be revised to clarify that ONHIR also must consult about future implementation of that administration.
10. **Use the Correct, Legal Definition of the “New Lands.”** The draft OIG report in footnote 1 on page 2 asserts that “this report uses the term ‘New Lands’ pursuant to ONHIR’s own definition” to mean only 352,000 acres of the New Lands acquired under the Relocation Act within Arizona, even though ONHIR acknowledges its administrative responsibility over a total of about 387,000 acres located in both Arizona and New Mexico. The former, narrow mis-definition of the “New Lands” is legally and factually impermissible and must be changed because it conflicts with the latter acknowledgement and ONHIR’s own regulation as well as ONHIR’s additional acknowledgement in the OCPS that is the subject of the draft OIG report. ONHIR’s actual own, official definition of “New Lands” is codified in 25 C.F.R. § 700.701(b) and categorically encompasses all lands acquired under former 25 U.S.C. § 640d-10, without regard to location in New Mexico or Arizona, and totals approximately 387,000 acres, as the draft report notes that ONHIR has acknowledged. Any other definition of the “New Lands” contravenes ONHIR’s own regulations. In addition, the OCPS that is the subject of the draft OIG report acknowledges the broader scope of the New Lands. Namely, items 5 and 6 under

“Navajo Collaborative and Consultative Activities” in the OCPS state that only about 12,000 of the 400,000 acres of authorized New Lands remain to be selected, and that the New Lands include lands in New Mexico. Thus, the ONHIR statement that the OIG report reviews itself acknowledges that the New Lands consist of about 387,000 acres, including in New Mexico. The final OIG report therefore should as well.

11. **Correctly Reference Pending Relevant Litigation.** Footnote 6 on page 5 acknowledges the Nation’s “two pending claims” respectively in the U.S. Court of Federal Claims (“CFC”) and the U.S. District Court for the District of Arizona (“DAZ”). That reference should be to “two pending lawsuits” since each has multiple claims, namely, six in the CFC and three in the DAZ. Also, the statement there that the CFC case was filed by the Nation on behalf of the relocation beneficiaries is inaccurate. That case has been brought by the Nation on behalf of itself and separately also by the plaintiff identifiable group of relocation beneficiaries that are expressly defined in 25 U.S.C. Section 640d-10(h).

The United States promised a generous and humane relocation and that the United States would bear the costs of that relocation—promises that have not been kept. Before ONHIR is officially closed, all of the issues identified by OIG and by the Navajo Nation need to be fully and adequately addressed, in close consultation and coordination with the Navajo Nation.

If you have any further questions, please contact Lashawna R. Tso, Executive Director of the Navajo Nation Washington Office at (202) 682-7390 or [REDACTED]. *Ahéhee’* (thank you).

Sincerely,



Jonathan Nez, *President*
THE NAVAJO NATION



Myron Lizer, *Vice President*
THE NAVAJO NATION



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