No. 18-15996

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED BEGAY,

Plaintiff-Appellant,

v.

OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION,
an administrative agency of the United States,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
Case No. 3:17-cv-08016-DLR

ANSWERING BRIEF OF DEFENDANT-APPELLEE OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

MISCELLEANOUS:

INTRODUCTION

The federal Navajo-Hopi Land Settlement Act ("Settlement Act") authorized the judicial partition of the Joint Use Area in Arizona between the Navajo Nation and Hopi Tribe. The Settlement Act required tribal members residing in what had been the Joint Use Area to move out of lands partitioned to the other tribe. The Act created an independent federal agency now known as the Office of Navajo and Hopi Indian Relocation ("ONHIR") to provide relocation assistance to each eligible head of a household required to relocate. To qualify for relocation benefits, a Navajo Indian applicant must show that on December 22, 1974, he or she was a resident of land that was later partitioned to the Hopi Tribe.

Plaintiff Fred Begay submitted an application for relocation benefits. ONHIR denied his application for relocation benefits, and he exercised his right to appeal this decision to an Independent Hearing Officer. That officer heard testimony from plaintiff and witnesses called on his behalf. The Independent Hearing Officer affirmed the denial of relocation benefits, noting the lack of any reliable documentary evidence, contradictory testimony by the plaintiff and his witnesses on key facts, and the inconsistencies between testimony and exhibits. For these reasons, he found the plaintiff and his witnesses lacked credibility. The Executive

Director of ONHIR affirmed the Independent Hearing Officer's decision. The plaintiff appealed that decision to the district court, which ruled for ONHIR, finding the agency's decision "reasonable and supported by substantial evidence." For the reasons discussed below, that decision was correct and should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because plaintiff's claims arose under two federal statutes, the Navajo-Hopi Indian Land Settlement Act, formerly codified at 25 U.S.C. §§ 640d et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

(b) The judgment of the district court was final because it resolved all of plaintiff's claims against ONHIR. Excerpts of Record ("ER") 18. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on March 30, 2018. ER 9. Plaintiff filed his notice of appeal on May 29, 2018, or 60 days later. ER 1. The appeal is timely under Federal Rule of Civil Procedure 4(a)(1)(B)(ii).

STATEMENT OF THE ISSUES

1. Whether the district court correctly affirmed the Independent Hearing Officer's decision that Plaintiff had failed to prove he met the regulatory requirements to qualify for relocation benefits.

2. Whether the Court should consider material not before the agency when it made its decision and that is not part of the administrative record.

3. Whether the standard of review for the Independent Hearing Officer's decision should be altered by an alleged failure of ONHIR to give plaintiff personal notice of his possible eligibility for relocation benefits.

4. Whether, if the Court determines that ONHIR's decision was erroneous, it should remand the case to the agency for further proceedings.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in addendum to plaintiff's opening brief.

STATEMENT OF THE CASE

A. Legal Framework: the Navajo-Hopi Land Settlement Act and ONHIR's regulations governing eligibility for relocation benefits

1. The Settlement Act

In 1974, after many years of failed efforts at joint use by members of the Navajo Nation and Hopi Tribe of lands in northern Arizona held in trust by the United States ("Joint Use Area," or "JUA"), Congress directed the judicial partition of these lands in the Navajo-Hopi Land Settlement Act, Pub. L. No. 93–531, 88 Stat. 1712 (formerly codified as amended at 25

U.S.C. §§ 640d to 640d-31).[1] *See generally Clinton v. Babbitt*, 180 F.3d 1081, 1084 (9th Cir. 1999). Under that statute, the District Court for the District of Arizona partitioned the lands in 1977, allocating approximately 900,000 acres (the HPL) to the Hopi Tribe and approximately 900,000 acres (known as the "Navajo Partitioned Lands," or "NPL") to the Navajo Nation. This Court approved the partition in *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980).

The Settlement Act required tribal members residing in what had been the Joint Use Area to move from lands partitioned to the other tribe. The Act also created the independent federal agency now known as ONHIR to pay for the relocation costs for households that relocated. *See Clinton*, 180 F.3d at 1084; *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878

[1] Effective September 1, 2016, the Office of the Law Revision Counsel omitted these provisions from Title 25 of the U.S. Code because they have "special and not general application." *See* http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title25-chapter14-subchapter22&saved=%7CKHRpdGxlOjI1IHNlY3Rpb246NjQwZCBlZGl0aW9uOnByZWxpbSkgT1IgKGdyYW51bGVpZDpVU0MtcHJlbGltLXRpdGxlMjUtc2VjdGlvbjY0MGQp%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim&edition=prelim (last visited Oct. 29, 2018). The Public Law version of the Settlement Act is reprinted in the Addendum to plaintiff's opening brief. Because that version does not use the numbering system of the statute as formerly codified, we have attached as an addendum to this brief a version of the Settlement Act that uses the formerly codified numbering system.

F.2d 1119, 1121 (9th Cir. 1989). ONHIR is responsible for providing relocation benefits under the Settlement Act to each eligible "head of a household whose household is required to relocate." 25 U.S.C. § 640d-14(b). ONHIR's final decisions on eligibility for relocation benefits are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 702, in the District Court for the District of Arizona. 25 U.S.C. § 640d-14(g); *Bedoni*, 878 F.2d at 1120 (recognizing that court as the appropriate jurisdiction for review of ONHIR's relocation decisions).

2. Eligibility for Relocation Benefits

ONHIR's regulations describe the essential eligibility requirements for Relocation Benefits for persons such as Plaintiff. He must have been a head of household on the earlier of when he left the HPL or July 7, 1986. *See* 25 C.F.R. § 700.147. The regulation provides several definitions of "household," but the only one applicable to Plaintiff is a "single person who at the time [of] his/her residence on land partitioned to the Tribe of which he/she is not a member actually maintained and supported him/herself." *Id.* § 700.69(a)(2). ONHIR has accepted as proof that an individual is self-supporting a showing that the individual has earned $1300 in a year or engaged in a subsistence way of life on the HPL. *See Benally v. ONHIR*,

No. 13–CV–8096–PCT–PGR, 2014 WL 523016, at *2 (D. Ariz. Feb. 10, 2014) (Supplemental Excerpts of Record ("SER") 6.

Under 25 C.F.R. § 700.97, the term "residence" "is meant to be given its legal meaning combined [with] an examination of a person's intent to reside combined with manifestations of that intent." 49 Fed. Reg. 22,277, 22,277 (May 29, 1984). "Substantial and recurring contacts [with the partitioned lands] are not enough in and of themselves—they must be coupled with the intent to maintain a home in that area and manifestations of that intent." *Gamble v. ONHIR,* No. CIV-97-1247-PCT-PGR, at 16 (D. Ariz. Sept. 24, 1998) (SER 30); *see also Akee v. ONHIR*, 907 F. Supp. 315, 318 (D. Ariz. 1995), *aff'd,* 107 F.3d 14 (9th Cir. 1997).[2] The preamble to the regulations lists non-exclusive factors that may indicate a manifestation of intent to reside, including "Ownership of improvements", "Homesite leases", "Banking records", the "Joint Use Area Roster", and "any other relevant data."

The applicant has the burden to establish his residence and that he is self-supporting. 25 C.F.R. § 700.147(b); *Jim v. ONHIR*, No. CIV-94-2254-

[2] In 1984, ONHIR issued the final version of 25 C.F.R. § 700.69, and in doing so, inserted the term "legal residence" and eliminated the term "substantial and recurring contacts" as being necessary to meet the residence requirement for relocation benefits. 49 FR 22277-01 (May 29, 1984).

PHX-PGR, at 9 (D. Ariz. Feb. 12, 1996) (SER 42-43) (applicant must offer affirmative evidence, not bare testimony, to establish residency).

B. Factual Background

1. Plaintiff's background and application for relocation benefits.

Plaintiff is a member of the Navajo Nation born in 1960. ER 332. Until sometime in the 1980s, he lived with his family in Coalmine Mesa, Arizona, an area partitioned to the Hopi Tribe in 1980 and thereafter part of the HPL. *Id.* He turned 18 in 1978. His mother and stepfather received funds from ONHIR to relocate from Coalmine to Sanders, Arizona in 1988 to 1989. *Id.* at 260. Plaintiff was not listed as part of his mother's and stepfather's household when they left. *Id.*

In July 2010, Plaintiff completed a form to apply for relocation benefits from ONHIR. The form states that the applicant is submitting information under penalty of perjury. Because he became legally blind in 1996, the writing on the form is by Elvira Chischilly (plaintiff's sister), but it was entered at his direction.[3] For the question on the form, "Did you earn more than $1,300 in any one calendar year before 1986," Plaintiff told his

[3] Throughout the hearing transcript, Plaintiff's sister is referred to "Elvira Chischillie." However, she both signed and printed her last name on the relocation benefits form as "Chischilly" (ER 52), and we use the latter spelling.

sister to check the box marked "No." ER 20, 51. Plaintiff also told his sister to check a box marked "No" for the question asking if he had earned $1300 between January 1, 1986 and July 7, 1986. *Id.* at 51. Questions asking when Plaintiff left the HPL were left blank. *Id.* at 52.

As plaintiff gave no indication in his application that he was self-supporting when he left the HPL, ONHIR's Eligibility and Appeals Branch (the first ONHIR component to rule on Plaintiff's application) denied his application for relocation benefits. Plaintiff appealed this decision, and under ONHIR's procedures, Plaintiff received a hearing before the Independent Hearing Officer.

2. Testimony at the hearing

Leslie Hosteen testified that he worked as a subcontractor for Ramsey Construction building relocation houses, the total of which he estimated at 75. ER 150, 158. He stated that he hired Plaintiff around 1979 to do roofing work on relocation houses. ER 159-60. In his earlier written declaration, however, Hosteen stated that he hired Plaintiff in 1982. ER 353. Hosteen described Plaintiff's work as cleaning up houses about to be occupied, loading packages of shingles on roofs under construction, and constructing roofs. *Id.* Plaintiff testified that he did not do other jobs required to construct a house: "No, I don't drywall, I didn't do nothing. . . . I'm the

roofer. And I always clean up the yard too, that's what I'm talking about and we call it cleanup crew." ER 218. Construction stopped during the winter, ER 165, or at least slowed down, ER 162. Work on roofs would also be stopped during bad weather or high winds. ER 216. Hosteen stated that he paid plaintiff and others working on the crew by cash or check, ER 167, but later said they were "normally" paid by cash, ER. *Id*. at 173. No payments to plaintiff were withheld for income or Social Security taxes. *Id*.

The witnesses gave contradictory testimony on how much plaintiff was paid for his work. Plaintiff testified he was paid "about one and twenty something right there [for a house], one hundred and thirty, depending on how fast I [completed the work]." ER 215. Plaintiff's co-worker, Jonathan Sakiestewa,[4] gave a similar answer of "around $129 or $130" for each house on which they did roofing. ER 181. At the hearing, Hosteen testified that the amount was as high as $150 per house. ER 165. In a declaration Hosteen executed before the hearing, however, he stated that Plaintiff was paid about $85-90, plus another $30 for loading shingles on the roof, making $115-$120 for each house. ER 353.

[4] Jonathan Sakiestewa spelled his name for the recording of the hearing as "Sakiespewa," ER 174, but is referred to in plaintiff's brief (at 12) as "Sakiestewa." Based on trial counsel's familiarity with names and spellings in this area, we believe that the spelling in plaintiff's brief is correct and have followed it here.

Neither Plaintiff nor any of his witnesses testified that Plaintiff earned $1300 in a year prior to July 7, 1986, or between January 1, 1986 and July 7, 1986. When questioned by his counsel, Plaintiff could not remember how much he was paid on an annual or monthly basis—even on average. When asked how many houses he worked on during an average month, he first said "300." ER 229. This was an obviously impossible number given both the records of the number of relocation houses constructed and Hosteen's testimony that he built a total of only 75 relocation houses over the 13-year period he employed Plaintiff. ER 158. When plaintiff was asked the same question again, he changed his answer to "three houses in the month, depending on the contract, how many houses they need." ER 229. ONHIR's attorney tried one more time to get a clear answer to this question:

> [ONHIR Attorney]: Well, I'm just asking for approximate, and it's a very important question for your eligibility, so can you remember approximately how many houses per month, in the summer?
>
> [Plaintiff]: Well, when it's hot [inaudible] too.

ER 229.

Hosteen testified that no records survived showing payments to plaintiff or the other workers for the work done on relocation housing when he had the subcontract from Ramsey Construction. ER 166. Plaintiff produced no records showing any receipt of payments from Hosteen or

anyone else. Government records show that in 1983 plaintiff worked for an unknown employer who withheld required Social Security taxes, and that plaintiff earned a mere $148.00. ER 333. In 1984, plaintiff earned $284.00 from the same or another unknown employer who also withheld Social Security taxes. *Id.* Plaintiff provided no testimony about who his employer was that paid into Social Security. Although the regulations require Plaintiff to show he was self-supporting at the earlier of when he moved off the HPL or by July 7, 1986, no testimony distinguished plaintiff's earnings up to July 7, 1986, from those he received afterwards until 1995, when Plaintiff apparently stopped working for Hosteen.

Plaintiff gave contradictory testimony about when he left the HPL. He claimed to have lived with his mother and stepfather in Coalmine, which is on the HPL, until they relocated to Sanders, an unincorporated area on the Navajo Nation that is part of the "New Lands" development on which relocation houses were built. When first asked by his attorney when his family moved off the HPL, he stated: "Maybe '82, that's what I heard. My brother, Freddie, and my stepdad, they're the ones that move out first." ER 220. He testified that he "always" went to his Uncle Keith George's house in Tuba City (which is on the Navajo Nation, not on the HPL or JUA) from the jobsite, and from there might go to his mother's house in Coalmine for a

night, and then back to the jobsite. ER 218. He often lived with and worked for Keith George as a sheepherder. ER 230. Jonathan Sakiestewa stated: "He was herding sheep between '82 through maybe '87, somewhere in there because he was always herding sheep when I used to come down to Tuba." ER 187.

Plaintiff later stated that he didn't know when his parents relocated off the HPL. ER 223. In contrast to his earlier testimony that his brother Freddie was one of the *first* of the family to move off the HPL, he later testified that Freddie was the *last* to relocate. ER 222.

Plaintiff's older sister, Elvira Chischilly, testified that Plaintiff stayed at the family home in Coalmine until her family relocated to Sanders in 1989. However, she moved to Phoenix in 1978 and based her testimony on visits to the family home, stating that "[m]aybe every other, two weeks or something we'd go back to Coalmine." ER 198.

C. The Independent Hearing Officer's Decision and the district court's affirmance.

On December 4, 2015, the Independent Hearing Officer upheld ONHIR's denial of Plaintiff's application. ER 337. The officer found the testimony of plaintiff, Mr. Hosteen, and Mr. Sakiestewa not credible because it was contradictory and inconsistent. ER 334-36. The officer found Plaintiff not to be credible because he had stated on the application form

for relocation benefits that he had no income prior to July 7, 1986. ER 334. Plaintiff also was not credible because he could not recall the number of houses on which he worked for Ramsey Construction. ER 340. With respect to Mr. Hosteen, the Independent Hearing Officer noted that his estimate of the amount earned by plaintiff on each house given at the hearing ($150) contradicted the amount Mr. Hosteen had stated in his declaration filed earlier in the case ($85-$90). ER 339. Except regarding her testimony about helping Plaintiff file his application for relocation benefits, the officer found Ms. Chischilly's testimony not credible because she lived in Phoenix, Arizona during the relevant period. ER 335.

The Independent Hearing Officer calculated that if Hosteen's testimony about the total of relocation homes he built were true, that would average out to six per year. ER 338. Multiplying six houses by Hosteen's estimate ($150) or by plaintiff's estimate ($130) of how much plaintiff was paid per house would produce an annual income of less than $1300. The Independent Hearing Officer thought that Hosteen's estimates as to the number of houses built were unrealistic based on information submitted by ONHIR at the hearing, which showed that the pace of building relocation houses "began slowly and accelerated over the years." *Id*. The officer noted that Hosteen testified that the bulk of the construction was in the New

Lands area (about 70 homes, ER 158), but that documents provided by ONHIR showed that construction in this area did not begin until 1987 at the earliest. ER 339. Even had Plaintiff worked on construction at other sites, the number of houses constructed as relocation homes "was significantly limited before July 7, 1986." *Id*.

The Independent Hearing Officer found that Plaintiff had not established when he left the HPL, a critical date for obtaining relocation benefits. The officer determined that he likely left the HPL in 1982 to live with his Uncle in Tuba City. E 338. He also concluded that, whether Plaintiff left the HPL in 1982 or later, Plaintiff did not establish that he was self-supporting at any time before July 7, 1986, and therefore was not entitled to relocation benefits. ER 337.

Plaintiff did not ask ONHIR to reconsider the Independent Hearing Officer's decision. On January 12, 2016, ONHIR issued a Final Agency Action letter denying relocation benefits to Plaintiff. ER 343.

Plaintiff sought judicial review of ONHIR's decision in the district court. That court found that the Independent Hearing Officer articulated specific, cogent reasons for his credibility findings, which were supported by substantial evidence. ER 11-12. The court concluded that ONHIR's decision was not contrary to law because the agency's decision was made in

good faith, was based on substantial evidence, and was not arbitrary or capricious. ER 14-17. The court accordingly entered judgment for ONHIR.

SUMMARY OF ARGUMENT

1. The controlling regulation establishing the requirements to obtain relocation benefits squarely places on the applicant the burden of establishing that he was a self-supporting resident of the HPL on no later than July 7, 1986. Plaintiff affirmatively contradicted his eligibility by answering "No," under the penalty of perjury, to the questions on his application necessary to establish that he earned at least $1300 in any year before July 7, 1986, or otherwise demonstrate that he was self-supporting. Neither Plaintiff nor any of his witnesses provided credible and reliable testimony to show that Plaintiff met the requirements for relocation benefits. Neither Plaintiff nor any of his witnesses addressed the crucial question of when Plaintiff had any earnings, and so there is nothing in the record to prove that the income was earned prior to January 7, 1986. While it is not ONHIR's burden to prove that Plaintiff was *not* self-supporting, the testimony of Hosteen as to the number of houses he built and records from ONHIR concerning the construction of relocation houses together showed affirmatively that it was unlikely that Plaintiff was earning income from construction of ONHIR houses prior to July 7, 1986. His only other claim to

income was for work for his uncle in Tuba City, where the record indicates he lived with his uncle and sometimes herded his uncle's sheep.

2. a. Plaintiff asks this Court to consider documents that were never before the agency and that are not part of the administrative record. The first group of documents contains decisions by the Independent Hearing Officer in other cases, in which Plaintiff claims that the officer ruled differently for parties similarly situated to Plaintiff. This Court has rejected similar requests that it consider actions by agencies in matters other than the one before the Court. The decisions of the Independent Hearing Officer do not constitute precedent and are not binding. At a minimum, Plaintiff was required to raise this issue before ONHIR, but he did not. Plaintiff invokes none of the exceptions to the general rule restricting review of an agency's decision to the administrative record.

b. Plaintiff also asks the Court to consider two versions of a memorandum written by a former lawyer for ONHIR. Neither version of the memorandum was filed in the administrative proceedings, and neither is part of the administrative record. Nor was either version ever adopted by ONHIR as official policy. Even if these documents were to be considered, they do not help plaintiff. The memoranda suggest that it might be *possible* for an individual to qualify for self-supporting status because he lives a

traditional lifestyle. Plaintiff produced no such evidence, and he did not make this argument in the administrative proceedings.

3. Plaintiff makes an unsupported claim that ONHIR breached a trust duty owed to him, and that the Court should therefore modify its review of ONHIR's decision. Plaintiff relies on a district court decision in which ONHIR was held to have erred in not providing personal notice to someone who achieved his majority during the relevant time period. In reaction to that decision, ONHIR voluntarily reopened the process for qualified applicants to receive relocation benefits, as it had done three times previously. But ONHIR did not change its regulations that put the burden on the applicant to show he met the requirements for relocation benefits. Plaintiff cites no authority for the proposition that this Court should modify its review of ONHIR's decision in response to alleged failure to give plaintiff personal notice of possible benefits. Plaintiff never claimed a lack of notice at the hearing or in his pleadings. Moreover, his experiences as a worker on relocation houses and as a member of a household that received relocation benefits, makes it very unlikely he did not know of the availability of relocation benefits.

4. In the district court, Plaintiff asked that court to award him relocation benefits if it found error in ONHIR's decision. Plaintiff mentions

this argument in a single sentence in its opening brief. His failure to develop the argument beyond that sentence forfeits any consideration of it by this Court. Regardless, the proper procedure in review of an agency decision is to remand that decision to the agency should the Court find the decision erroneous.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment ruling de novo. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 991 (9th Cir. 2014). Review of ONHIR's decision is governed by the APA standards. *Begay v. ONHIR*, 305 F. Supp. 3d 1040, 1045 (D. Ariz. 2018) ("The Administrative Procedure Act ('APA') governs judicial review of agency decisions under the Settlement Act.").

Under the APA, a court may set aside agency action only if that action is "arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). An agency decision is arbitrary or capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

view or the product of agency expertise." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. "It is not the reviewing court's task to 'make its own judgment about' the appropriate outcome." *San Luis*, 776 F.3d at 994 (quoting *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010)). A court must affirm the "agency action if a reasonable basis exists for its decision." *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010) (internal quotations omitted). "A reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (internal quotation marks omitted). Thus, "[e]ven when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may be reasonably discerned.'" *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *San Luis*, 776 F.3d at 994 (same).

An agency's factual findings are reviewed for "substantial evidence." *Alaska Dep't of Health & Social Services v. Centers for Medicare & Medicaid Services*, 424 F.3d 931, 937 (9th Cir. 2005); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076–77 & n.8 (9th Cir. 2003). "Where the agency has relied on 'relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion,' its decision is supported by 'substantial evidence.'" *San Luis & Delta-Mendota Water Auth. v. Jewell* ("*Delta Smelt*"), 747 F.3d 581, 601 (9th Cir. 2014) (quoting *Bear Lake Watch*, 324 F.3d at 1076). Even "[i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] findings." *Id*. Under the substantial evidence standard, to hold the agency's finding invalid, a court "must find that the evidence not only supports" a contrary finding "*but compels it*." *INS v. Elias-Zacharias*, 502 U.S. 478, 481 n.1 (1992) (emphasis in original); *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011) (courts must uphold agency findings unless the record compels a reasonable finder of fact to reach contrary result).

ARGUMENT

I. The district court correctly upheld ONHIR's decision that Plaintiff did not meet his burden of proof to show he qualified for relocation benefits.

A. Plaintiff failed to show he was self-supporting when he left the HPL or by July 7, 1986.

Under the regulations, "the burden of proving residence and head of household status is on the applicant." 25 C.F.R. § 700.147(b). Plaintiff must prove that he "actually maintained and supported him/herself" when he left the HPL or by July 7, 1986, whichever was the earlier. *Id.* § 700.69(a)(2). Usually, this requires evidence that the applicant earned at least $1300 a year when he or she left the HPL. *Benally*, 2014 WL 523016, at *2. SER 6. But ultimately the regulatory requirement that the applicant "supported him/herself" controls.

The testimony of Plaintiff and his witnesses failed to meet the burden of showing that Plaintiff supported himself while he was a legal resident of the HPL. Neither Plaintiff nor any of his witnesses could show he was *ever* self-supporting before he moved from the HPL. At the hearing, Plaintiff could not or did not answer crucial questions to prove that he was self-supporting before July 7, 1986. When asked by his counsel, Plaintiff could not remember how many hours a week he worked (ER 216), how many months of the year he worked (*id.*), or how many hours a day he worked

(ER 217). On cross-examination, counsel for ONHIR returned to the question of the number of houses on which plaintiff worked in a month, and Plaintiff first answered "Maybe three hundred or something?" ER 229. This answer was plainly wrong, as it would have exceeded by more than a factor of four Hosteen's estimate that he built "about 75" houses for Ramsey Construction over a 13-year period. ER 158. Plaintiff immediately corrected himself, saying he meant "three houses in a month, depending on the contract, how many houses they need." ER 229 But when counsel for ONHIR sought to have Plaintiff affirm that number, Plaintiff equivocated: "Well depend on how many houses they build, that's how we work, we not just go around and around ask for a [inaudible] like that." *Id*. Stressing the importance of this question to Plaintiff, counsel for ONHIR returned to the subject one more time and asked, "can you remember approximately how many houses per month, in the summer?" *Id*. Plaintiff's answer was non-responsive: "Well, when it's hot [inaudible] too." *Id*.

The absence of testimony to support Plaintiff's claims to be self-supporting was not cured by the other witnesses. As Plaintiff admits in his brief, "there is nothing in the record to indicate how many houses Ramsey

constructed during the years Plaintiff was employed or how many homes he roofed or worked on in each year." Brief at 33.[5]

The Independent Hearing Officer calculated if Hosteen constructed the same number of houses each year, he would have averaged about six houses per year. ER 338. If Plaintiff worked on all six, this would have generated an income of $900 for Plaintiff, relying on Hosteen's high estimate that Plaintiff was paid $150 per house. Plaintiff would have had to work on nine houses per year to meet the $1300 goal, an increase of 50 percent over the straight-line average.

And the evidence supported a conclusion that Hosteen likely built fewer houses before July 7, 1986. Hosteen stated that most of the construction he oversaw was in an area known as the "New Lands." "Probably in [New Lands], we build about 70, about 70 houses." ER 158; *see also* ER 162-64, 170. The New Lands were 352,000 acres in Apache County, Arizona, taken into trust to benefit Navajo families required to move from the HPL. ER 285. Acquisition of the land was not completed

[5] Plaintiff mentions, but does not emphasize, the testimony of Jonathan Sakiestewa that he earned about $4500 a month or "twelve something" for a year. To earn these amounts at a rate of $150 per house, Sakiestewa would have to work on 30 houses each month and on 80 over the course of a year. As Hosteen testified that he and his crew worked on 75 houses total over a 13-year period (ER 150, 158), Sakiestewa's estimate must have been an error.

until 1986. *Id*. Additionally, ONHIR's post-hearing brief included printouts from ONHIR's records showing all the work Ramsey Construction did on relocation housing prior to July 1986. ER 307-13. All of it was in areas outside of the New Lands. *Id.* For these reasons, the Independent Hearing Officer concluded that it was likely that Plaintiff worked on fewer than six homes a year in the 1982-1986 time period. ER 339.

The absence of testimony or other evidence from the record showing that plaintiff was self-supporting for any year prior to July 7, 1986 is sufficient by itself to support the Independent Hearing Officer's conclusion that Plaintiff was not self-supporting in any year before July 7, 1986. The additional evidence that Plaintiff could not have worked on enough houses to be self-supporting strengthens this conclusion.

B. Plaintiff's failure to provide the necessary evidence cannot be excused with speculation in a brief.

Although Plaintiff repeatedly accuses the Independent Hearing Officer of "speculation," *see* Brief at 33, 34, 36, it is Plaintiff who attempts to fill in the holes of his testimony with speculation. For example, Plaintiff claims to have been self-supporting through earning the minimum wage for his work: "No matter which witnesses' testimony is correct concerning the amount of money Plaintiff was paid for labor, piece-work or roofing, he was able to support himself. This would be true even if he was only paid the

minimum wage." Brief at 33. But Plaintiff provides no citation to evidence supporting these assertions. *Id*. The only time "minimum wage" was mentioned in the hearing was in plaintiff's counsel's opening statement; no witness gave testimony about the payment of minimum wages.[6] The evidence that does exist—taken from the testimony of Plaintiff, Hosteen, and Sakiestewa—is that the main form of payment was on a per house basis, not minimum wage. In his opening statement at the hearing, Plaintiff's counsel stated: "most of the time, Mr. Sakiestewa and Plaintiff did roofing and they were paid *by the house*." ER 156 (emphasis added).

Even if there were evidence that plaintiff regularly was paid the minimum wage—$3.35 per hou in 1986 under federal and Arizona law, ER 156—on an hourly basis, Plaintiff did not provide the testimony to show he would have earned at least $1300 prior to July 7, 1986. ER 156. Plaintiff would have had to work about 338 hours in a year to earn $1300. Assuming a 40-hour week, it would take Plaintiff ten weeks of steady work to earn that much. Assuming a 30-hour week (ER 164), it would take eleven weeks.

[6] Confusing matters even more, the witnesses testified that the amount they were paid for hourly work, such as cleaning the area, was $8. ER 165, 171. This is more than the federal minimum wage is today ($7.25) States are free to set a minimum wage above that required by the federal government, but the Arizona minimum wage was below $8 an hour until 2015. SER XX; See https://www.govdocs.com/arizona-2016-minimum-holds-the-line/.

But as we noted earlier, Plaintiff could not say—or even offer estimates of—how many hours per week he worked, how many weeks he worked, or how many months he worked. ER 216-17. The actual evidence suggests that the roofing work was frequently interrupted for inclement weather and slowed down during the winter. ER 162, 185, 228. The evidence also shows that the work might have been infrequent prior to 1987, and just involved a few homes spread out over several years. There is no evidence that Plaintiff regularly worked 40-hour weeks.

Plaintiff tries to excuse his inability to answer key questions by asserting that he has problems remembering events that occurred so long ago. Brief at 33, 35, and 45. But this does not change the regulatory requirement that Plaintiff must show that he was self-supporting at the relevant times. 25 C.F.R. § 700.147(b) ("The burden of proving residence and head of household status is on the applicant."). If absence of memory were an excuse for not meeting this burden, then it is hard to see how ONHIR could ever deny relocation benefits.

Finally, Plaintiff suggests that his testimony could have been flawed because he was insufficiently fluent in English. Brief at 32, 39. However, an interpreter was used at the beginning of plaintiff's direct testimony, but he was dismissed as unnecessary at *plaintiff's counsel's request* after a few

questions had been asked and answered. ER 54. Plaintiff's counsel also had the opportunity on redirect to clear up any misunderstanding plaintiff might have had of the questions put to him, but he did not do so. If any errors were made in the transcript, moreover, plaintiff's counsel could have raised them in his post-trial briefing. Plaintiff identifies no specific instances in the transcript in which he misunderstood the questions asked of him. The claim that he was hampered by misunderstanding the questions put to him is speculation.

C. Plaintiff failed to prove when he left the HPL.

To receive relocation benefits, Plaintiff must not only prove that he was self-supporting, but he must also show he achieved this status on the earlier of before he moved from the HPL or by July 7, 1986. Plaintiff created considerable doubt about when he moved from the HPL by stating two different times in his testimony. In both versions, he stated that he lived with his family in Coalmine until they relocated from the HPL to Sanders. However, he first said that he "heard" about their relocation in 1982. ER 220. Later, he agreed with a question from his counsel that his family left in 1989 (ER 229), which would make the July 7, 1986 date controlling to show self-sufficiency. Later still, he said he did not know when his family had relocated. ER 223.

It is unnecessary to resolve which of plaintiff's scenarios is more credible. Neither Plaintiff nor any other witness gave testimony showing that plaintiff was self-supporting *either* in 1982 or in any year prior to July 7, 1986. Plaintiff and his witnesses gave, at best, general testimony about how much he was paid, and they made no distinction between earnings up to July 7, 1986 and those he received after that date. Plaintiff testified he worked for Ramsey Construction from around 1982 until 1995, when he began to have problems with his eyesight. His earnings for the nine years after July 7, 1986 through 1995 are irrelevant to his eligibility for relocation benefits. This presents a problem for Plaintiff, because he recognizes in his brief that "the hourly rate of pay, the amount of money paid for piece-work and for roofing changed and increased over the 15 years Plaintiff worked for Ramsey." Brief at 32-33. Because of Plaintiff's poor memory, and given the lack of credible documentation of his claimed earnings from other witnesses, their testimony of how much they were paid could well reflect what Plaintiff was paid *after* July 7, 1986. For this reason, Plaintiff or his witnesses needed to distinguish between those periods, but they could not.

Whether Plaintiff left the HPL in 1982 or after July 7, 1986, his inability to show that he was self-supporting while a resident of the HPL at either time makes him ineligible for relocation benefits.

D. The Independent Hearing Officer's credibility findings are supported by substantial evidence.

Plaintiff claims that the Independent Hearing Officer speculated when he found Plaintiff and his witnesses not to be credible. The record shows that the Independent Hearing Officer's credibility findings were supported by substantial evidence.

- Plaintiff: The Independent Hearing Officer noted that Plaintiff applied for relocation benefits stating under penalty of perjury that he did not earn more than $1300 per year before July 7, 1986. ER 340. In his testimony before the officer, Plaintiff gave two different accounts of when his mother and stepfather left the HPL, which is relevant because he claimed residence with them. ER 338. Plaintiff could remember almost nothing about the income that he received from Hosteen during the period prior to July 1, 1986. ER 340.
- Leslie Hosteen: The Independent Hearing Officer noted that prior to testifying at the hearing, Hosteen had given plaintiff's counsel a signed declaration stating that Plaintiff came to work for him in 1982, and estimating that Plaintiff was paid $85-$90 for each house on

which he worked, plus another $30 for loading shingles on the roof, making a total of $115-$120 for each house. ER 334 (citing ER 353 (Hosteen Declaration)). At the hearing, Hosteen modified his recollection of the amount that plaintiff received by substantially increasing it to $150 per house. ER 339.

- Jonathan Sakiestewa: The Independent Hearing Officer found that Sakiestewa's testimony was inconsistent with the testimony at the hearing and with the Hosteen Declaration. ER 335.
- Elvira Chischilly: The Independent Hearing Officer noted that Chischilly moved to Phoenix in 1978. ER 335. Her knowledge of Plaintiff's residence from that point on was based on weekend visits, and so her testimony about Plaintiff's residence was based on visits she made "[m]aybe every other, two weeks or something." ER 198.

"'An [agency's] credibility findings are granted substantial deference by reviewing courts,' although 'an [administrative law judge] who rejects testimony for lack of credibility must offer a 'specific, cogent reason' for the rejection.'" *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990) (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988)). Deference is appropriate because the administrative judge is actually present during the testimony:

> [The ALJ] is not required to believe the [witness] when his testimony is merely "unrefuted" and is "corroborated" by documentary evidence . . . . [The] judge alone is in a position to observe an [witness]'s tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether a [witness]'s testimony has about it the ring of truth. The courts of appeals should be far less confident of their ability to make such important, but often subtle, determinations.

Sarvia-Quintanilla v. U.S. INS, 767 F.2d 1387, 1395 (9th Cir. 1985).

The Independent Hearing Officer gave specific reasons for each credibility determination he made, reasons supported by the conflicting testimony of the witnesses. The district court did not err in accepting them.

For all of these reasons, the district court correctly upheld ONHIR's decision that Plaintiff did not meet his burden of proof to show he qualified for relocation benefits.

II. Plaintiff does not justify supplementation of the administrative record.

A. Decisions made by the Independent Hearing Officer in other cases about whether other applicants had met their burden of proof are irrelevant.

Plaintiff has sought to bolster his claims in the district court and this Court by filing copies of eleven decisions by the Independent Hearing Officer in other cases. Plaintiff claims that in those cases, the officer "accepted undocumented wage testimony and found applicants heads of household despite lacking documentation." Brief at 40. Plaintiff asserts

that, by not doing the same thing here, ONHIR has failed to follow its own precedent without explanation, such that its decision is arbitrary and capricious. *Id.* (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 US 800, 808 (1973), and *Andrzejewski v. FAA*, 563 F.3d 796, 799 (9th Cir. 2009)).

Initially, Plaintiff's reliance on the decisions in *Atchison, Topeka* and *Andrzejewski* are misplaced. Both cases involved an agency allegedly failing to follow a long-established rule of *law* and failing to give an adequate explanation for doing so. *See Atchison, Topeka*, 412 U.S. at 808 (change by Interstate Commerce Commission regarding when charges could be made on grain shipments); *Andrzejewski*, 563 F.3d at 799 (FAA allegedly failed to follow policy of deferring to factual findings made by Administrative Law Judge and provided no explanation for such failure).

In any event, there are several reasons the other ONHIR decisions should not be considered. First, they were not submitted to the Independent Hearing Officer or to the Executive Director, *see* 25 C.F.R. § 700.317, whose affirmance or reversal of the Independent Hearing Officer's decision is the final agency action. This means these materials were not before the agency when it made its decision, and so they are not part of the administrative record. Judicial review under the APA is based

upon the "full administrative record that was before [the agency] at the time [it] made [its] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Thus, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996). The reviewing court's consideration of extra-record documents is almost always inappropriate because it "inevitably leads the reviewing court to substitute its judgment for that of the agency." *Ranchers Cattlemen Action Leg. Fund United Stockgrowers of America v. U.S. Dept. of Agriculture*, 499 F.3d 1108, 1117 (9th Cir. 2007) (internal quotation marks omitted) (citing *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). This Court has allowed "expansion of the administrative record in four narrowly construed circumstances: (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). None of the exceptions applies here.

This Court relied on the principle of record review in rejecting a similar attempt to introduce results of agency actions in other matters in *Fence Creek Cattle*. There, a plaintiff challenging cancellation of its grazing permit by the Forest Service argued that the Court should consider twenty-five grazing permits *not* canceled by the Forest Service. *Id*. As here, the agency's other decisions were not part of the administrative record. *Id*. Plaintiff asserted that review of the other decisions would "'advance the intuitive notion that the Forest Service dramatically over-reacted[sic].'" *Id*. (extra quotation marks, misspelling, and "sic" in the opinion).

The Court disagreed:

> Fence Creek has not shown that review [of the 25 decisions on other grazing permits] would demonstrate that the Forest Service acted in bad faith in this specific case. Fence Creek has not met its heavy burden to show that the additional materials sought are necessary to adequately review the Forest Service's decision here.

Id. Similarly, Plaintiff here has also not shown that supplementation of the administrative record by these materials is justified.

Second, decisions by an Independent Hearing Officer are not binding and are not precedential. In *Laughter v. ONHIR*, No. CV-16-08196-PCT-DLR, 2017 WL 2806841, at *4 (D. Ariz. June 29, 2017), a plaintiff also alleged that the Independent Hearing Officer had ruled differently in other cases. In declining to consider other decisions made by the Independent

Hearing Officer, the district court correctly held that these decisions "do not constitute binding precedent, and do not show that the IHO acted in an arbitrary or capricious manner in finding not fully credible the witness testimony in this case." SER 4. Indeed, decisions by the Independent Hearing Officer are not published, and they are not (to ONHIR's knowledge) available in any publicly available database such as Westlaw or Lexis. *See Alphonsus v. Holder*, 705 F.3d 1031, 1046 (9th Cir. 2013) ("an unpublished, non-precedential opinion" does not bind agency).

Finally, Plaintiff's purpose in relying on the other decisions—to argue that the Independent Hearing Officer made an error of *fact* in failing to evaluate similar evidence in a similar way—is unjustified. The Hearing Officer must assess the facts and make factual findings and credibility determinations in each specific case. If properly presented as part of the record, ONHIR would present argument to show that the facts in those cases were distinguishable; even Plaintiff concedes that "Certainly, the above cases are not factually identical to Begay's in every respect." Brief at 44. Plaintiff identifies no instance in which an appellate court evaluates the agency's factual and credibility determinations not just in the case in front of it, but also as compared with the factual evidence and credibility determinations in other cases as well. There is no place for any such

procedure, for the proposer standard of review requires evaluation of whether the agency's findings are supported by substantial evidence and its decision is not arbitrary or capricious, based on the administrative record *in the present case*.

B. The "Crystal Memo" was not part of the administrative record and should not be considered by the Court.

In his filings in the district court, Plaintiff included two versions of a memorandum written in the late 1980s by E. Susan Crystal, an attorney for ONHIR, discussing eligibility requirements for relocation benefits. *See* ECF No. 46, Exhibits 3 and 4. Neither version of the Crystal memorandum was filed in the administrative record or otherwise brought to the attention of the agency in the administrative proceedings. Nor was any version of the memo adopted as policy by ONHIR. Indeed, in the version of the memo attached as Exhibit 3, Ms. Crystal clarifies that she is *not* stating agency policy but is merely providing her personal opinion: "The following criteria are, *in my opinion*, to be used in considering self-supporting status." *Id*. at 4 (emphasis added).

And although the version presented as Exhibit 4 looks more official (although the pages are not numbered) and appears to be an attachment to a prior version of ONHIR's Management Manual, ONHIR cannot locate any Crystal Memorandum in any prior version of the Management Manual,

much less in the Management Manual as it existed when Plaintiff filed for benefits on August 5, 2010. Indeed, by the time ONHIR denied his application (May 11, 2012), this section had been changed, and so there was no longer a Section 1230 in the Management Manual. The eligibility section had been revised by ONHIR's Executive Director. Because the controlling policy is that which existed during Plaintiff's application or when the application was denied, and because the memo was not part of the Management Manual or included in the administrative record, there is no basis for this Court to consider the Crystal Memo.

Plaintiff nonetheless quotes the second version of the Crystal Memo for the following proposition: "A non-cash economy exists for a large segment of the [Indian] population. The Commission must therefore allow for the possibility of an individual demonstrating self-support at a lower figure than the $1300 floor established herein." Brief at 29 (quoting ECF No. 46, Exhibit 4). ONHIR does not categorically rule out the possibility that an applicant could satisfy the self-sufficiency requirement and earn less than $1300. However, Plaintiff made no effort to demonstrate that he was self-sufficient by living a traditional lifestyle and engaging in a barter economy as discussed in the Crystal Memo. Plaintiff mentions that his uncle Keith George paid him for sheep herding by giving him a "Navajo

Blanket, two hundred dollars, a bracelet, that's what they pay." ER 210. Plaintiff did not resell these items: "I give it to my mom. I didn't want nobody to take, I give some money to my mom, I give that bracelet to my mom, and I give the blanket to my mom." ER 230. Even if the Crystal Memorandum could be relevant in the Court's consideration of this appeal, Plaintiff has not proved he was self-sufficient through an alternative or traditional life-style as contemplated by the memorandum.

In sum, Plaintiff's attempts to supplement the administrative record should be rejected.

III. The United States has not breached a duty owed to Plaintiff.

Plaintiff next argues that the Independent Hearing Officer's factual findings should be addressed in light "the general trust relationship between Navajo applicants and ONHIR." Brief at 45. Plaintiff has forfeited this argument by not having raised it in the administrative proceedings or in his opening summary judgment brief in district court. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) ("arguments not raised by a party in its opening brief are deemed waived").

Even if the argument is not forfeited, the Supreme Court has made clear that any specific obligations the United States may have in its trust relationship with Indians are "governed by statute rather than the common

law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) ("*Jicarilla*"); *Menominee Indian Tribe of Wisconsin v. United States,* 136 S. Ct. 750, 757 (2016) (same). The Supreme Court has "noted that the relationship between the United States and the Indian tribes is distinctive, 'different from that existing between individuals whether dealing at arm's length, as *trustees and beneficiaries*, or otherwise.'" *Jicarilla*, 564 at 173 (emphasis in original) (quoting *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244, 254 (1935)). "[I]n fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Id.*

Here, ONHIR's administration of relocation benefits fulfills statutory duties created by Congress. Congress did not charge ONHIR to hold assets in trust for Indians or to otherwise act as trustee for Indians. To the extent that this Court has indicated that the agency has obligations of a fiduciary nature under the Settlement Act, *Bedoni,* 878 F.2d at 1124-25, those are obligations to individuals who are determined to be eligible for relocation benefits, not to all persons who *apply* for benefits.

In effort to shore up his argument, Plaintiff incorrectly paraphrases *Herbert v. ONHIR*, No. CV06-03014-PCT-NVW, 2008 WL 11338896, at *6 (D. Ariz. Feb. 27, 2008), as holding that "'ONHIR must assume

responsibility' for the defects in that plaintiff's application." Brief at 46, citing and partially quoting 2008 WL 11338896, at *8. SER 13.The court's full statement was: "ONHIR must assume responsibility for Herbert's *failure to apply for benefits* before July 7, 1986, and it should evaluate Herbert's eligibility for Benefits under criteria in effect before July 7, 1986." 2008 WL 11338896, at *8 (emphasis added). SER 13. There is no mention of ONHIR's "assum[ing] responsibility" for "defects" in the application, as the court concluded that the factual record showed that the plaintiff in *Herbert* could receive relocation benefits. *Id.*

Following the *Herbert* decision, ONHIR in 2008 reopened the application process for relocation benefits using its regulatory power to extend deadlines. 25 C.F.R. § 700.13(a). This allowed Plaintiff and many others to apply for relocation benefits, and it cured any conceivable failure to give proper notice earlier. But ONHIR did not waive the regulatory requirements for being awarded relocation benefits, and the burden of proof remained on the applicant. Thus Plaintiff's argument must be rejected. Nor can plaintiff explain his own lack of diligence in pursuing relocation benefits, or show that ONHIR caused an unnecessary delay in the processing of his application. Even if he could do that, delay does not rise to the level of a breach of a fiduciary duty. *See Laughter*, 2017 WL

2806841, at *5 n.3 (rejecting a breach of fiduciary duty claim based on a delay in proceedings). SER 4.

Thus, Plaintiffs' breach-of-duty argument is forfeited and meritless.

IV. Plaintiff's relief is limited to a remand for further proceedings before the agency.

In the district court, Plaintiff argued that ONHIR should be ordered to grant Plaintiff relocation benefits. A generous reading of Plaintiff's brief to this Court suggests that he meant to present this argument in this appeal. In the Summary of Argument, he argues that ONHIR's "decision denying benefits to Mr. Begay must be reversed." Brief at 19. Additionally, the table of contents for his brief lists the last heading as "Conclusion and Relief Sought." *Id.* at ii. However, the wording of that heading as it appears in the text of the brief is simply "Conclusion." *Id.* at 50. The Conclusion consists of a parable and asks for no specific relief.

To the extent that Plaintiff asks this Court not to merely reverse the district court decision but also to order ONHIR to award Plaintiff relocation benefits, such relief is unwarranted. This Court has repeatedly held that a party failing to develop an argument in its opening brief has forfeited or waived the argument. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a brief which are not supported by argument are deemed abandoned. . . . We will only review an issue not properly presented if our

failure to do so would result in manifest injustice."); *see also United States v. Kimble*, 107 F.3d 712, 715 n. 2 (9th Cir. 1997).

Regardless, the request for judgment and not remand has no merit. Except in "rare circumstances" plainly not present here, "the proper course of action where 'the record before the agency does not support the relevant agency action' is to remand to the agency for additional investigation and explanation." *UOP v. United States*, 99 F.3d 344, 351 (9th Cir. 1996) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Abramowitz v. EPA*, 832 F.2d 1071, 1078 (9th Cir. 1987) ("The general rule is that when an administrative agency has abused its discretion or exceeded its statutory authority, a court should remand the matter to the agency for further consideration."). Therefore, if the Court finds that ONHIR's decision is in error, the Court should remand the matter to ONHIR for further proceedings in accord with this Court's ruling.

CONCLUSION

For these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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October 29, 2018
90-2-4-1528

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2.6, the undersigned counsel for the Federal Appellant is are aware of three related cases within the meaning of Ninth Circuit Rule 28-2.6(c) pending in this Court: *Charles v. ONHIR*, No. 17-17258, *Tsosie v. ONHIR*, No. 18-15145, and *Begay v. ONHIR*, No. 18-15489, raise closely related issues regarding challenges to ONHIR's denial of relocation benefits based on a determination that the applicant failed to demonstrate legal residence on the HPL on the relevant dates.

/s/ Robert H. Oakley
Robert H. Oakley

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. described in Fed. R. App. P. 32(f) because it contains 9820 words. The word-count feature in Microsoft Word 2013 was used to make this determination.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Georgia font.

/s/Robert H. Oakley
Robert H. Oakley

9th Circuit Case Number(s) 18-15996

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Addendum

SUBCHAPTER XXII—NAVAJO AND HOPI TRIBES: SETTLEMENT OF RIGHTS AND INTERESTS

§ 640d. Mediator

(a) Appointment; duties; qualifications; termination of duties

Within thirty days after December 22, 1974, the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator (hereinafter referred to as the ''Mediator'') who shall assist in the negotiations for the settlement and partition of the relative rights and interests, as determined by the decision in the case of Healing v. Jones (210 F. Supp. 125, D. Ariz., 1962, aff'd 363 U.S. 758, 1963) (hereinafter referred to as the ''Healing case''), of the Hopi and Navajo Tribes (hereinafter referred to as the ''tribes'') to and in lands within the reservation established by the Executive order of December 16, 1882, except land management district no. 6 (such lands hereinafter referred to as the ''joint use area''). The Mediator shall not have any interest, direct or indirect, in the settlement of the interests and rights set out in this subsection. The duties of the Mediator shall cease upon the entering of a full agreement into the records of the supplemental proceedings pursuant to section 640d–2 of this title or the submission of a report to the District Court after a default in negotiations or a partial agreement pursuant to section 640d–3 of this title.

(b) Nature of proceedings

The proceedings in which the Mediator shall be acting under the provisions of this subchapter shall be the supplemental proceedings in the Healing case now pending in the United States District Court for the District of Arizona (hereinafter referred to as ''the District Court'').

(c) Interagency committee

(1) The Mediator is authorized to request from any department, agency, or independent instrumentality of the Federal Government any information, personnel, service, or materials he deems necessary to carry out his responsibilities under the provisions of this subchapter. Each such department, agency, or instrumentality is authorized to cooperate with the Mediator and to comply with such requests to the extent permitted by law, on a reimbursable or nonreimbursable basis.

(2) To facilitate the expeditious and orderly compilation and development of factual information relevant to the negotiating process, the President shall, within fifteen days of December 22, 1974, establish an interagency committee chaired by the Secretary of the Interior (hereinafter referred to as the ''Secretary'') to develop relevant information and to respond to the requests of the Mediator.

(d) Liaison with Secretary

The Secretary shall appoint a full-time representative as his liaison with the Mediator to facilitate the provision of information and assistance requested by the Mediator from the Department of the Interior.

(e) Staff assistants and consultants

The Mediator may retain the services of such staff assistants and consultants as he shall deem necessary, subject to the approval of the Director of the Federal Mediation and Conciliation Service.

(Pub. L. 93–531, § 1, Dec. 22, 1974, 88 Stat. 1712.)

SHORT TITLE OF 1991 AMENDMENT

Pub. L. 102–180, § 1, Dec. 2, 1991, 105 Stat. 1230, provided that: ''This Act [amending sections 640d–11 and 640d–24 of this title and section 5315 of Title 5, Government Organization and Employees, and enacting provisions set out as notes under section 640d–11 of this title] may be cited as the 'Navajo-Hopi Relocation Housing Program Reauthorization Act of 1991'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–666, § 1, Nov. 16, 1988, 102 Stat. 3929, provided that: ''This Act [enacting sections 640d–29 and 640d–30 of this title, amending sections 640d–7, 640d–9 to 640d–14, 640d–22, 640d–24, 640d–25, and 640d–28 of this title, and enacting provisions set out as a note under section 640d–11 of this title] may be cited as the 'Navajo and Hopi Indian Relocation Amendments of 1988'.''

SHORT TITLE OF 1980 AMENDMENT

Pub. L. 96–305, § 1, July 8, 1980, 94 Stat. 929, provided: ''That this Act [enacting sections 640d–25 to 640d–28 of this title and amending sections 640d–4, 640d–7, 640d–9 to 640d–12, 640d–14, 640d–18, 640d–22, and 640d–24 of this title] may be cited as the 'Navajo and Hopi Indian Relocation Amendments Act of 1980'.''

NAVAJO-HOPI LAND DISPUTE SETTLEMENT ACT OF 1996

Pub. L. 104–301, Oct. 11, 1996, 110 Stat. 3649, as amended by Pub. L. 105–256, § 3, Oct. 14, 1998, 112 Stat. 1897, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Navajo-Hopi Land Dispute Settlement Act of 1996'.

''SEC. 2. FINDINGS.

''The Congress finds that—

''(1) it is in the public interest for the Tribe, Navajos residing on the Hopi Partitioned Lands, and the United States to reach a peaceful resolution of the longstanding disagreements between the parties under the Act commonly known as the 'Navajo-Hopi Land Settlement Act of 1974' (Public Law 93–531; 25 U.S.C. 640d et seq.);

''(2) it is in the best interest of the Tribe and the United States that there be a fair and final settlement of certain issues remaining in connection with the Navajo-Hopi Land Settlement Act of 1974, including the full and final settlement of the multiple claims that the Tribe has against the United States;

''(3) this Act, together with the Settlement Agreement executed on December 14, 1995, and the Accommodation Agreement (as incorporated by the Settlement Agreement), provide the authority for the Tribe to enter agreements with eligible Navajo families in order for those families to remain residents of the Hopi Partitioned Lands for a period of 75 years, subject to the terms and conditions of the Accommodation Agreement;

''(4) the United States acknowledges and respects—

''(A) the sincerity of the traditional beliefs of the members of the Tribe and the Navajo families residing on the Hopi Partitioned Lands; and

''(B) the importance that the respective traditional beliefs of the members of the Tribe and Navajo families have with respect to the culture and way of life of those members and families;

''(5) this Act, the Settlement Agreement, and the Accommodation Agreement provide for the mutual respect and protection of the traditional religious beliefs and practices of the Tribe and the Navajo families residing on the Hopi Partitioned Lands;

''(6) the Tribe is encouraged to work with the Navajo families residing on the Hopi Partitioned Lands

to address their concerns regarding the establishment of family or individual burial plots for deceased family members who have resided on the Hopi Partitioned Lands; and

"(7) neither the Navajo Nation nor the Navajo families residing upon Hopi Partitioned Lands were parties to or signers of the Settlement Agreement between the United States and the Hopi Tribe.

"SEC. 3. DEFINITIONS.

"Except as otherwise provided in this Act, for purposes of this Act, the following definitions shall apply:

"(1) ACCOMMODATION.—The term 'Accommodation' has the meaning provided that term under the Settlement Agreement.

"(2) HOPI PARTITIONED LANDS.—The term 'Hopi Partitioned Lands' means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on the date of enactment of this Act [Oct. 11, 1996]).

"(3) NAVAJO PARTITIONED LANDS.—The term 'Navajo Partitioned Lands' has the meaning provided that term in the proposed regulations issued on November 1, 1995, at 60 Fed. Reg. 55506.

"(4) NEW LANDS.—The term 'New Lands' has the meaning provided that term in section 700.701(b) of title 25, Code of Federal Regulations.

"(5) SECRETARY.—The term 'Secretary' means the Secretary of the Interior.

"(6) SETTLEMENT AGREEMENT.—The term 'Settlement Agreement' means the agreement between the United States and the Hopi Tribe executed on December 14, 1995.

"(7) TRIBE.—The term 'Tribe' means the Hopi Tribe.

"(8) NEWLY ACQUIRED TRUST LANDS.—The term 'newly acquired trust lands' means lands taken into trust for the Tribe within the State of Arizona pursuant to this Act or the Settlement Agreement.

"SEC. 4. RATIFICATION OF SETTLEMENT AGREEMENT.

"The United States approves, ratifies, and confirms the Settlement Agreement.

"SEC. 5. CONDITIONS FOR LANDS TAKEN INTO TRUST.

"The Secretary shall take such action as may be necessary to ensure that the following conditions are met prior to taking lands into trust for the benefit of the Tribe pursuant to the Settlement Agreement:

"(1) SELECTION OF LANDS TAKEN INTO TRUST.—

"(A) PRIMARY AREA.—In accordance with section 7(a) of the Settlement Agreement, the primary area within which lands acquired by the Tribe may be taken into trust by the Secretary for the benefit of the Tribe under the Settlement Agreement shall be located in northern Arizona.

"(B) REQUIREMENTS FOR LANDS TAKEN INTO TRUST IN THE PRIMARY AREA.—Lands taken into trust in the primary area referred to in subparagraph (A) shall be—

"(i) land that is used substantially for ranching, agriculture, or another similar use; and

"(ii) to the extent feasible, in contiguous parcels.

"(2) ACQUISITION OF LANDS.—Before taking any land into trust for the benefit of the Tribe under this section, the Secretary shall ensure that—

"(A) at least 85 percent of the eligible Navajo heads of household (as determined under the Settlement Agreement) have entered into an accommodation or have chosen to relocate and are eligible for relocation assistance (as determined under the Settlement Agreement); and

"(B) the Tribe has consulted with the State of Arizona concerning the lands proposed to be placed in trust, including consulting with the State concerning the impact of placing those lands into trust on the State and political subdivisions thereof resulting from the removal of land from the tax rolls in a manner consistent with the provisions of part 151 of title 25, Code of Federal Regulations.

"(3) PROHIBITION.—The Secretary may not, pursuant to the provisions of this Act and the Settlement Agreement, place lands, any portion of which are located within or contiguous to a 5-mile radius of an incorporated town or city (as those terms are defined by the Secretary) in northern Arizona, into trust for benefit of the Tribe without specific statutory authority.

"(4) EXPEDITIOUS ACTION BY THE SECRETARY.—Consistent with all other provisions of this Act, the Secretary is directed to take lands into trust under this Act expeditiously and without undue delay.

"SEC. 6. ACQUISITION THROUGH CONDEMNATION OF CERTAIN INTERSPERSED LANDS.

"(a) IN GENERAL.—

"(1) ACTION BY THE SECRETARY.—

"(A) IN GENERAL.—The Secretary shall take action as specified in subparagraph (B), to the extent that the Tribe, in accordance with section 7(b) of the Settlement Agreement—

"(i) acquires private lands; and

"(ii) requests the Secretary to acquire through condemnation interspersed lands that are owned by the State of Arizona and are located within the exterior boundaries of those private lands in order to have both the private lands and the State lands taken into trust by the Secretary for the benefit of the Tribe.

"(B) ACQUISITION THROUGH CONDEMNATION.—With respect to a request for an acquisition of lands through condemnation made under subparagraph (A), the Secretary shall, upon the recommendation of the Tribe, take such action as may be necessary to acquire the lands through condemnation and, with funds provided by the Tribe, pay the State of Arizona fair market value for those lands in accordance with applicable Federal law, if the conditions described in paragraph (2) are met.

"(2) CONDITIONS FOR ACQUISITION THROUGH CONDEMNATION.—The Secretary may acquire lands through condemnation under this subsection if—

"(A) that acquisition is consistent with the purpose of obtaining not more than 500,000 acres of land to be taken into trust for the Tribe;

"(B) the State of Arizona concurs with the United States that the acquisition is consistent with the interests of the State; and

"(C) the Tribe pays for the land acquired through condemnation under this subsection.

"(b) DISPOSITION OF LANDS.—If the Secretary acquires lands through condemnation under subsection (a), the Secretary shall take those lands into trust for the Tribe in accordance with this Act and the Settlement Agreement.

"(c) PRIVATE LANDS.—The Secretary may not acquire private lands through condemnation for the purpose specified in subsection (a)(2)(A).

"SEC. 7. ACTION TO QUIET POSSESSION.

"If the United States fails to discharge the obligations specified in section 9(c) of the Settlement Agreement with respect to voluntary relocation of Navajos residing on Hopi Partitioned Lands, or section 9(d) of the Settlement Agreement, relating to the implementation of sections 700.137 through 700.139 of title 25, Code of Federal Regulations, on the New Lands, including failure for reason of insufficient funds made available by appropriations or otherwise, the Tribe may bring an action to quiet possession that relates to the use of the Hopi Partitioned Lands after February 1, 2000, by a Navajo family that is eligible for an accommodation, but fails to enter into an accommodation.

"SEC. 8. PAYMENT TO STATE OF ARIZONA.

"(a) AUTHORIZATION OF APPROPRIATIONS.—Subject to subsection (b), there are authorized to be appropriated to the Department of the Interior $250,000 for fiscal year 1998, to be used by the Secretary of the Interior for making a payment to the State of Arizona.

"(b) PAYMENT.—The Secretary shall make a payment in the amount specified in subsection (a) to the State

of Arizona after an initial acquisition of land from the State has been made by the Secretary pursuant to section 6.

"SEC. 9. 75-YEAR LEASING AUTHORITY.

"[Amended section 415 of this title.]

"SEC. 10. REAUTHORIZATION OF THE NAVAJO-HOPI RELOCATION HOUSING PROGRAM.

"[Amended section 640d–24 of this title.]

"SEC. 11. EFFECT OF THIS ACT ON CASES INVOLVING THE NAVAJO NATION AND THE HOPI TRIBE.

"Nothing in this Act or the amendments made by this Act shall be interpreted or deemed to preclude, limit, or endorse, in any manner, actions by the Navajo Nation that seek, in court, an offset from judgments for payments received by the Hopi Tribe under the Settlement Agreement.

"SEC. 12. WATER RIGHTS.

"(a) IN GENERAL.—

"(1) WATER RIGHTS.—Subject to the other provisions of this section, newly acquired trust lands shall have only the following water rights:

"(A) The right to the reasonable use of groundwater pumped from such lands.

"(B) All rights to the use of surface water on such lands existing under State law on the date of acquisition, with the priority date of such right under State law.

"(C) The right to make any further beneficial use on such lands of surface water which is unappropriated on the date each parcel of newly acquired trust lands is taken into trust. The priority date for the right shall be the date the lands are taken into trust.

"(2) RIGHTS NOT SUBJECT TO FORFEITURE OR ABANDONMENT.—The Tribe's water rights for newly acquired trust lands shall not be subject to forfeiture or abandonment arising from events occurring after the date the lands are taken into trust.

"(b) RECOGNITION AS VALID USES.—

"(1) GROUNDWATER.—With respect to water rights associated with newly acquired trust lands, the Tribe, and the United States on the Tribe's behalf, shall recognize as valid all uses of groundwater which may be made from wells (or their subsequent replacements) in existence on the date each parcel of newly acquired trust land is acquired and shall not object to such groundwater uses on the basis of water rights associated with the newly acquired trust lands. The Tribe, and the United States on the Tribe's behalf, may object only to the impact of groundwater uses on newly acquired trust lands which are initiated after the date the lands affected are taken into trust and only on grounds allowed by the State law as it exists when the objection is made. The Tribe, and the United States on the Tribe's behalf, shall not object to the impact of groundwater uses on the Tribe's right to surface water established pursuant to subsection (a)(1)(C) when those groundwater uses are initiated before the Tribe initiates its beneficial use of surface water pursuant to subsection (a)(1)(C).

"(2) SURFACE WATER.—With respect to water rights associated with newly acquired trust lands, the Tribe, and the United States on the Tribe's behalf, shall recognize as valid all uses of surface water in existence on or prior to the date each parcel of newly acquired trust land is acquired and shall not object to such surface water uses on the basis of water rights associated with the newly acquired trust lands, but shall have the right to enforce the priority of its rights against all junior water rights the exercise of which interfere with the actual use of the Tribe's senior surface water rights.

"(3) RULE OF CONSTRUCTION.—Nothing in paragraph (1) or (2) shall preclude the Tribe, or the United States on the Tribe's behalf, from asserting objections to water rights and uses on the basis of the Tribe's water rights on its currently existing trust lands.

"(c) APPLICABILITY OF STATE LAW ON LANDS OTHER THAN NEWLY ACQUIRED LANDS.—The Tribe, and the United States on the Tribe's behalf, further recognize that State law applies to water uses on lands, including subsurface estates, that exist within the exterior boundaries of newly acquired trust lands and that are owned by any party other than the Tribe.

"(d) ADJUDICATION OF WATER RIGHTS ON NEWLY ACQUIRED TRUST LANDS.—The Tribe's water rights on newly acquired trust lands shall be adjudicated with the rights of all other competing users in the court now presiding over the Little Colorado River Adjudication, or if that court no longer has jurisdiction, in the appropriate State or Federal court. Any controversies between or among users arising under Federal or State law involving the Tribe's water rights on newly acquired trust lands shall be resolved in the court now presiding over the Little Colorado River Adjudication, or, if that court no longer has jurisdiction, in the appropriate State or Federal court. Nothing in this subsection shall be construed to affect any court's jurisdiction: *Provided*, That the Tribe shall administer all water rights established in subsection (a).

"(e) PROHIBITION.—Water rights for newly acquired trust lands shall not be used, leased, sold, or transported for use off of such lands or the Tribe's other trust lands: *Provided*, That the Tribe may agree with other persons having junior water rights to subordinate the Tribe's senior water rights. Water rights for newly acquired trust lands can only be used on those lands or other trust lands of the Tribe located within the same river basin tributary to the main stream of the Colorado River.

"(f) SUBSURFACE INTERESTS.—On any newly acquired trust lands where the subsurface interest is owned by any party other than the Tribe, the trust status of the surface ownership shall not impair any existing right of the subsurface owner to develop the subsurface interest and to have access to the surface for the purpose of such development.

"(g) STATUTORY CONSTRUCTION WITH RESPECT TO WATER RIGHTS OF OTHER FEDERALLY RECOGNIZED INDIAN TRIBES.—Nothing in this section shall affect the water rights of any other federally recognized Indian tribe with a priority date earlier than the date the newly acquired trust lands are taken into trust.

"(h) STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to determine the law applicable to water use on lands owned by the United States, other than on the newly acquired trust lands. The granting of the right to make beneficial use of unappropriated surface water on the newly acquired trust lands with a priority date such lands are taken into trust shall not be construed to imply that such right is a Federal reserved water right. Nothing in this section or any other provision of this Act shall be construed to establish any Federal reserved right to groundwater. Authority for the Secretary to take land into trust for the Tribe pursuant to the Settlement Agreement and this Act shall be construed as having been provided solely by the provisions of this Act."

EXECUTIVE ORDER NO. 11829

Ex. Ord. No. 11829, Jan. 6, 1975, 40 F.R. 1497, as amended by Ex. Ord. No. 11853, Apr. 17, 1975, 40 F.R. 17537, which established the Hopi-Navajo Land Settlement Interagency Committee and provided for its membership, functions, etc., was revoked by Ex. Ord. No. 12379, § 11, Aug. 17, 1982, 47 F.R. 36099, set out as a note under section 14 of the Federal Advisory Committee Act in the Appendix to Title 5, Government Organization and Employees.

§ 640d–1. Negotiating teams

(a) Appointment; time; membership and certification; nature of authority

Within thirty days after December 22, 1974, the Secretary shall communicate in writing with

the tribal councils of the tribes directing the appointment of a negotiating team representing each tribe. Each negotiating team shall be composed of not more than five members to be certified by appropriate resolution of the respective tribal council. Each tribal council shall promptly fill any vacancies which may occur on its negotiating team. Notwithstanding any other provision of law, each negotiating team, when appointed and certified, shall have full authority to bind its tribe with respect to any other matter concerning the joint use area within the scope of this subchapter.

(b) Failure to select and certify

In the event either or both of the tribal councils fail to select and certify a negotiating team within thirty days after the Secretary communicates with the tribal council under subsection (a) of this section or to select and certify a replacement member within thirty days of the occurrence of a vacancy, the provisions of section 640d–3(a)[1] of this title shall become effective.

(c) First negotiating session; time and place; chairman; suggestions for procedure, agenda, and resolution of issues in controversy

Within fifteen days after formal certification of both negotiating teams to the Mediator, the Mediator shall schedule the first negotiating session at such time and place as he deems appropriate. The negotiating sessions, which shall be chaired by the Mediator, shall be held at such times and places as the Mediator deems appropriate. At such sessions, the Mediator may, if he deems it appropriate, put forward his own suggestions for procedure, the agenda, and the resolution of the issues in controversy.

(d) Failure to attend two consecutive sessions or bargain in good faith

In the event either negotiating team fails to attend two consecutive sessions or, in the opinion of the Mediator, either negotiating team fails to bargain in good faith or an impasse is reached, the provisions of section 640d–3(a)[1] of this title shall become effective.

(e) Disagreements within team

In the event of a disagreement within a negotiating team the majority of the members of the team shall prevail and act on behalf of the team unless the resolution of the tribal council certifying the team specifically provides otherwise.

(Pub. L. 93–531, § 2, Dec. 22, 1974, 88 Stat. 1712.)

REFERENCES IN TEXT

Section 640d–3 of this title, referred to in subsecs. (b) and (d), was amended by Pub. L. 98–620, title IV, § 402(27), Nov. 8, 1984, 98 Stat. 3359, by striking out subsec. (b) and redesignating subsec. (a) as the entire section.

§ 640d–2. Implementation of agreements

(a) Full agreement

If, within one hundred and eighty days after the first session scheduled by the Mediator under section 640d–1(c) of this title, full agreement is reached, such agreement shall be put in such form as the Mediator determines best expresses the intent of the tribes and shall then be submitted to the Secretary and the Attorney General of the United States for their comments as they relate to the interest of the United States in the proceedings. These comments are to be submitted to the Mediator and the negotiating teams within thirty days. The negotiating teams and the Mediator shall then consider the comments and, if agreement can still be reached on terms acceptable to the negotiating teams and the Mediator within sixty days of receipt by him of the comments, the agreement shall be put in final written form and shall be signed by the members of the negotiating teams and the Mediator. The Mediator shall then cause the agreement to be entered into the records of the supplemental proceedings in the Healing case. The provisions of the agreement shall be reviewed by the District Court, modified where necessary, and put into effect immediately thereafter.

(b) Partial agreement

If, within the one hundred and eighty day period referred to in subsection (a) of this section, a partial agreement has been reached between the tribes and they wish such partial agreement to go into effect, they shall follow the procedure set forth in subsection (a) of this section. The partial agreement shall then be considered by the Mediator in preparing his report, and the District Court in making a final adjudication, pursuant to section 640d–3 of this title.

(c) Consistency with existing law

For the purpose of this section, the negotiating teams may make any provision in the agreement or partial agreement not inconsistent with existing law. No such agreement or any provision in it shall result in a taking by the United States of private property compensable under the Fifth Amendment of the Constitution of the United States.

(Pub. L. 93–531, § 3, Dec. 22, 1974, 88 Stat. 1713.)

§ 640d–3. Default or failure to reach agreement; recommendations to District Court; final adjudication

If the negotiating teams fail to reach full agreement within the time period allowed in section 640d–2(a) of this title or if one or both of the tribes are in default under the provisions of section 640d–1(b) or (d) of this title, the Mediator, within ninety days thereafter, shall prepare and submit to the District Court a report containing his recommendations for the settlement of the interests and rights set out in section 640d(a) of this title which shall be most reasonable and equitable in light of the law and circumstances and consistent with the provisions of this subchapter. Following the District Court's review of the report and recommendations (which are not binding thereon) and any further proceedings which the District Court may schedule, the District Court is authorized to make a final adjudication, including partition of the joint use area, and enter the judgments in the supplemental proceedings in the Healing case.

(Pub. L. 93–531, § 4, Dec. 22, 1974, 88 Stat. 1713; Pub. L. 98–620, title IV, § 402(27), Nov. 8, 1984, 98 Stat. 3359.)

[1] See References in Text note below.

AMENDMENTS

1984—Pub. L. 98–620 struck out designation "(a)" before "If the negotiating", and struck out subsec. (b) which provided that any proceedings as authorized in this section had to be assigned for hearing at the earliest possible date, would take precedence over all other matters pending on the docket of the District Court at that time, and had to be expedited in every way by the Court.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

§ 640d–4. Authorized recommendations for facilitation of agreement or report to District Court; discretionary nature of recommendations

(a) For the purpose of facilitating an agreement pursuant to section 640d–2 of this title or preparing a report pursuant to section 640d–3 of this title, the Mediator is authorized—

(1) notwithstanding the provisions of section 211 of this title, to recommend that, subject to the consent of the Secretary, there be purchased or otherwise acquired additional lands for the benefit of either tribe from the funds of either tribe or funds under any other authority of law;

(2) to recommend that, subject to the consent of the Secretary, there be undertaken a program of restoration of lands lying within the joint use area, employing for such purpose funds authorized by this subchapter, funds of either tribe, or funds under any other authority of law;

(3) to recommend that, subject to the consent of the Secretary, there be undertaken a program for relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area;

(4) Repealed. Pub. L. 93–531, § 30(a), as added Pub. L. 96–305, § 11, July 8, 1980, 94 Stat. 934.

(5) to make any other recommendations as are in conformity with this subchapter and the Healing case to facilitate a settlement.

(b) The authorizations contained in subsection (a) of this section shall be discretionary and shall not be construed to represent any directive of the Congress.

(Pub. L. 93–531, § 5, Dec. 22, 1974, 88 Stat. 1714; Pub. L. 93–531, § 30(a), as added Pub. L. 96–305, § 11, July 8, 1980, 94 Stat. 934.)

AMENDMENTS

1980—Subsec. (a)(4). Pub. L. 96–305 struck out par. (4) which authorized the Mediator to recommend, in exceptional cases where necessary to prevent hardship, a limited tenure for residential use, not exceeding a life estate, and a phased relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area.

§ 640d–5. Considerations and guidelines for preparation of report by Mediator and final adjudication by District Court

The Mediator in preparing his report, and the District Court in making the final adjudication, pursuant to section 640d–3 of this title, shall consider and be guided by the decision of the Healing case, under which the tribes have joint, undivided, and equal interests in and to all of the joint use area; by any partial agreement reached by the parties under section 640d–2(b) of this title; by the last best offer for a complete settlement as a part of the negotiating process by each of the tribes; and by the following:

(a) The rights and interests, as defined in the Healing case, of the Hopi Tribe in and to that portion of the reservation established by the Executive order of December 16, 1882, which is known as land management district no. 6 (hereinafter referred to as the "Hopi Reservation") shall not be reduced or limited in any manner.

(b) The boundary lines resulting from any partitioning of lands in the joint use area shall be established so as to include the higher density population areas of each tribe within the portion of the lands partitioned to such tribe to minimize and avoid undue social, economic, and cultural disruption insofar as practicable.

(c) In any division of the surface rights to the joint use area, reasonable provision shall be made for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

(d) In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: *Provided*, That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: *Provided further*, That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

(e) Any lands partitioned to each tribe in the joint use area shall, where feasible and consistent with the other provisions of this section, be contiguous to the reservation of each such tribe.

(f) Any boundary line between lands partitioned to the two tribes in the joint use area shall, insofar as is practicable, follow terrain which will facilitate fencing or avoid the need for fencing.

(g) Any claim the Hopi Tribe may have against the Navajo Tribe for an accounting of all sums collected by the Navajo Tribe since September 17, 1957, as trader license fees or commissions, lease rental, or proceeds, or other similar charges for doing business or for damages in the use of lands within the joint use area, shall be for a one-half share in such sums.

(h) Any claim the Hopi Tribe may have against the Navajo Tribe for the determination and recovery of the fair value of the grazing and agricultural use of the lands within the joint use area by the Navajo Tribe and its individual

members, since September 28, 1962, shall be for one-half of such value.

(Pub. L. 93–531, §6, Dec. 22, 1974, 88 Stat. 1714.)

§ 640d–6. Joint ownership and management of coal, oil, gas and other minerals within or underlying partitioned lands; division of proceeds

Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas, and all other minerals within or underlying such lands. All such coal, oil, gas, and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes, share and share alike.

(Pub. L. 93–531, §7, Dec. 22, 1974, 88 Stat. 1715.)

§ 640d–7. Determination of tribal rights and interests in land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Allocation of land to respective reservations upon determination of interests

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c) Actions for accounting, fair value of grazing, and claims for damages to land; determination of recovery; defenses

(1) Either as a part of or in a proceeding supplementary to the action authorized in subsection (a) of this section, either tribe, through the chairman of its tribal council for and on behalf of the tribe, including all villages, clans, and individual members thereof, may prosecute or defend an action for the types of relief, including interest, specified in section 640d–17 of this title, including all subsections thereof, against the other tribe, through its tribal chairman in a like representative capacity, and against the United States as to the types of recovery specified in subsection (a)(3) of section 640d–17 of this title and subject to the same provisions as contained in said subsection, such action to apply to the lands in issue in the reservation established by the Act of June 14, 1934 (48 Stat. 960).

(2) In the event the Hopi Tribe or Navajo Tribe is determined to have any interest in the lands in issue, the right of either tribe to recover hereunder shall be based upon that percentage of the total sums collected, use made, waste committed, and other amounts of recovery, which is equal to the percentage of lands in issue in which either tribe is determined to have such interest.

(3) Neither laches nor the statute of limitations shall constitute a defense to such proceedings if they are either prosecuted as a part of the action authorized by this section or in a proceeding supplemental thereto, if instituted not later than twenty-four months following a final order of partition and exhaustion of appeals in an action filed pursuant to this section.

(d) Denial of Congressional interest in merits of conflicting claims; liability of United States

Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

(e) Payment of legal fees, court costs and other expenses

The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo, San Juan Southern Paiute or Hopi Tribe under this section.

(f) Provision of attorney fees for San Juan Southern Paiute Tribe

(1) Any funds made available for the San Juan Southern Paiute Tribe to pay for attorney's fees shall be paid directly to the tribe's attorneys of record until such tribe is acknowledged as an Indian tribe by the United States: *Provided*, That the tribe's eligibility for such payments shall cease once a decision by the Secretary of the Interior declining to acknowledge such tribe becomes final and no longer appealable.

(2) Nothing in this subsection shall be interpreted as a congressional acknowledgement of the San Juan Southern Paiute as an Indian tribe or as affecting in any way the San Juan Southern Paiute Tribe's Petition for Recognition currently pending with the Secretary of the Interior.

(3) There is hereby authorized to be appropriated not to exceed $250,000 to pay for the legal expenses incurred by the Southern Paiute Tribe on legal action arising under this section prior to November 16, 1988.

(Pub. L. 93–531, §8, Dec. 22, 1974, 88 Stat. 1715; Pub. L. 96–305, §2, July 8, 1980, 94 Stat. 929; Pub. L. 100–666, §9, Nov. 16, 1988, 102 Stat. 3933.)

REFERENCES IN TEXT

Act of June 14, 1934, referred to in subsecs. (a) and (c)(1), is act June 14, 1934, ch. 521, 48 Stat. 960, which was not classified to the Code.

The Indian Claims Commission, referred to in subsec. (d), terminated Sept. 30, 1978. See Codification note set out under former section 70 et seq. of this title.

AMENDMENTS

1988—Subsec. (e). Pub. L. 100–666, §9(a), inserted ", San Juan Southern Paiute" after "Navajo".

Subsec. (f). Pub. L. 100–666, §9(b), added subsec. (f).

1980—Subsec. (c). Pub. L. 96–305 substituted provision authorizing, as part of the determination of tribal rights and interests in land, actions for accounting, fair value of grazing, and claims for damages, specifying the formula for determining recovery, and limiting defenses for provision authorizing exchange of reservation lands.

§ 640d–8. Allotments in severalty to Paiute Indians now located on lands; issue of patents declaring United States as trustee

Notwithstanding any other provision of this subchapter, the Secretary is authorized to allot in severalty to individual Paiute Indians, not now members of the Navajo Tribe, who are located within the area described in the Act of June 14, 1934 (48 Stat. 960), and who were located within such area, or are direct descendants of Paiute Indians who were located within such area, on the date of such Act, land in quantities as specified in section 331[1] of this title, and patents shall be issued to them for such lands having the legal effect and declaring that the United States holds such land in trust for the sole use and benefit of each allottee and, following his death, of his heirs according to the laws of the State of Arizona.

(Pub. L. 93–531, §9, Dec. 22, 1974, 88 Stat. 1716.)

REFERENCES IN TEXT

Act of June 14, 1934, referred to in text, is act June 14, 1934, ch. 521, 48 Stat. 960, which was not classified to the Code.

Section 331 of this title, referred to in text, was repealed by Pub. L. 106–462, title I, §106(a)(1), Nov. 7, 2000, 114 Stat. 2007.

§ 640d–9. Partitioned or other designated lands

(a) Lands to be held in trust for Navajo Tribe; exception

Subject to the provisions of sections 640d–8 and 640d–16(a) of this title, any lands partitioned to the Navajo Tribe pursuant to sections 640d–2 and 640d–3 of this title and the lands described in the Act of June 14, 1934 (48 Stat. 960), except the lands as described in section 640d–7 of this title, shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.

(b) Lands to be held in trust for Hopi Tribe

Subject to the provisions of sections 640d–8 and 640d–16(a) of this title, any lands partitioned to the Hopi Tribe pursuant to sections 640d–2 and 640d–3 of this title and the lands as described in section 640d–7 of this title shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation.

(c) Protection of rights and property of individuals subject to relocation

The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation pursuant to this subchapter, or any judgment of partition pursuant thereto, including any individual authorized to reside on land covered by a life estate conferred pursuant to section 640d–28 of this title.

(d) Protection of benefits and services of individuals subject to relocation

With respect to any individual subject to relocation, the Secretary shall take such action as may be necessary to assure that such individuals are not deprived of benefits or services by reason of their status as an individual subject to relocation.

(e) Tribal jurisdiction over partitioned lands

(1)[1] Lands partitioned pursuant to this subchapter, whether or not the partition order is subject to appeal, shall be subject to the jurisdiction of the tribe to whom partitioned and the laws of such tribe shall apply to such partitioned lands under the following schedule:

(A) Effective ninety days after July 8, 1980, all conservation practices, including grazing control and range restoration activities, shall be coordinated and executed with the concurrence of the tribe to whom the particular lands in question have been partitioned, and all such grazing and range restoration matters on the Navajo Reservation lands shall be administered by the Bureau of Indian Affairs Navajo Area Office and on the Hopi Reservation lands by the Bureau of Indian Affairs Phoenix Area Office, under applicable laws and regulations.

(B) Notwithstanding any provision of law to the contrary, each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon, not in conflict with the laws and regulations referred to in paragraph (A) above, to the same extent as is applicable to those other portions of its reservation. Such jurisdiction and authority over partitioned lands shall become effective April 18, 1981.

The provisions of this subsection shall be subject to the responsibility of the Secretary to protect the rights and property of life tenants and persons awaiting relocation as provided in subsections (c) and (d) of this section.

(Pub. L. 93–531, §10, Dec. 22, 1974, 88 Stat. 1716; Pub. L. 96–305, §3, July 8, 1980, 94 Stat. 929; Pub. L. 100–666, §6, Nov. 16, 1988, 102 Stat. 3932; Pub. L. 111–18, §1, May 8, 2009, 123 Stat. 1611.)

REFERENCES IN TEXT

Act of June 14, 1934, referred to in subsec. (a), is act June 14, 1934, ch. 521, 48 Stat. 960, which was not classified to the Code.

[1] See References in Text note below.

[1] So in original. No par. (2) has been enacted.

AMENDMENTS

2009—Subsec. (f). Pub. L. 111–18 struck out subsec. (f), which related to development of lands in litigation.

1988—Subsec. (f). Pub. L. 100–666 designated existing provisions as par. (1) and added pars. (2) and (3).

1980—Subsecs. (c) to (f). Pub. L. 96–305 added subsecs. (c) to (f).

§ 640d–10. Resettlement lands for Navajo Tribe

(a) Transfer of lands under jurisdiction of Bureau of Land Management; State and private land exchanges; valuation; acquired private lands; lands to be held in trust

The Secretary is authorized and directed to—

(1) transfer not to exceed two hundred and fifty thousand acres of lands under the jurisdiction of the Bureau of Land Management within the State[1] of Arizona and New Mexico to the Navajo Tribe: *Provided*, That, in order to facilitate such transfer, the Secretary is authorized to exchange such lands for State or private lands of equal value or, if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands transferred out of Federal ownership. The Secretary shall try to reduce the payment to as small an amount as possible.

(2)[2] on behalf of the United States, accept title to not to exceed one hundred and fifty thousand acres of private lands acquired by the Navajo Tribe. Title thereto shall be taken in the name of the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation.

Subject to the provisions of the following sentences of this subsection, all rights, title and interests of the United States in the lands described in paragraph (1), including such interests the United States as lessor has in such lands under the Mineral Leasing Act of 1920, as amended [30 U.S.C. 181 et seq.], will, subject to existing leasehold interests, be transferred without cost to the Navajo Tribe and title thereto shall be taken by the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation. So long as selected lands coincide with pending noncompetitive coal lease applications under the Mineral Leasing Act of 1920, as amended, the Secretary may not transfer any United States interests in such lands until the noncompetitive coal lease applications have been fully adjudicated. If such adjudication results in issuance of Federal coal leases to the applicants, such transfer shall be subject to such leases. The leaseholders rights and interests in such coal leases will in no way be diminished by the transfer of the rights, title and interests of the United States in such lands to the Navajo Tribe. If any selected lands are subject to valid claims located under the Mining Law of 1872 the transfer of the selected lands may be made subject to those claims.

(2)[2] Those interests in lands acquired in the State of New Mexico by the Navajo Tribe pursuant to subsection 2[3] of this section shall be subject to the right of the State of New Mexico to receive the same value from any sales, bonuses, rentals, royalties and interest charges from the conveyance, sale, lease, development, and production of coal as would have been received had the subsurface interest in such lands remained with the United States and been leased pursuant to the Mineral Lands Leasing Act of 1920, as amended [30 U.S.C. 181 et seq.], or any successor Act; or otherwise developed. The State's interest shall be accounted for in the same manner as it would have been if a lease had issued pursuant to the Mineral Lands Leasing Act of 1920, as amended.

(b) Proximity of lands to be transferred or acquired to Navajo Reservation; lands to be used for exchanges

A border of any parcel of land so transferred or acquired shall be within eighteen miles of the present boundary of the Navajo Reservation: *Provided*, That, except as limited by subsection (g) of this section, Bureau of Land Management lands anywhere within the States of Arizona and New Mexico may be used for the purpose of exchanging for lands within eighteen miles of the present boundary of the reservation.

(c) Selection of lands to be transferred or acquired; time period; consultation; restriction of New Mexico lands

Lands to be so transferred or acquired shall, for a period of three years after July 8, 1980, be selected by the Navajo Tribe after consultation with the Commissioner: *Provided*, That, at the end of such period, the Commissioner shall have the authority to select such lands after consultation with the Navajo Tribe: *Provided further*, That not to exceed thirty-five thousand acres of lands so transferred or acquired shall be selected within the State of New Mexico.

(d) Progress and status of land transfer program; reports to Congressional committees

The Commissioner, in consultation with the Secretary, shall within sixty days following the first year of enactment of this subsection report to the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs, on the progress of the land transfer program authorized in subsection (a) of this section. Sixty days following the second year of enactment of this subsection the Commissioner, in consultation with the Secretary, shall submit a report to the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs giving the status of the land transfer program authorized in subsection (a) of this section, making any recommendations that the Commissioner deems necessary to complete the land transfer program.

(e) Entitlement lands payments

Payments being made to any State or local government pursuant to the provisions of chapter 69 of title 31, on any lands transferred pursuant to subsection (a)(1) of this section shall continue to be paid as if such transfer had not occurred.

[1] So in original. Probably should be "States".

[2] So in original. Two pars. designated (2) have been enacted.

[3] So in original. Probably should be "paragraph (1)".

(f) Acquisition of title to surface and subsurface interest; time period; public notice; report to Congressional committees; rights of subsurface owner

(1) For a period of three years after July 8, 1980, the Secretary shall not accept title to lands acquired pursuant to subsection (a)(2)[4] of this section unless fee title to both surface and subsurface has been acquired or the owner of the subsurface interest consents to the acceptance of the surface interest in trust by the Secretary.

(2) If, ninety days prior to the expiration of such three year period, the full entitlement of private lands has not been acquired by the Navajo Tribe and accepted by the Secretary in trust for the Navajo Tribe under the restrictions of paragraph (1) of this subsection, the Commissioner, after public notice, shall, within thirty days, make a report thereon to the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs.

(3) In any case where the Secretary accepts, in trust, title to the surface of lands acquired pursuant to subsection (a)(2)[4] of this section where the subsurface interest is owned by third parties, the trust status of such surface ownership and the inclusion of the land within the Navajo Reservation shall not impair any existing right of the subsurface owner to develop the subsurface interest and to have access to the surface for the purpose of such development.

(g) Lands not available for transfer

No public lands lying north and west of the Colorado River in the State of Arizona shall be available for transfer under this section.

(h) Administration of lands transferred or acquired

The lands transferred or acquired pursuant to this section shall be administered by the Commissioner until relocation under the Commission's[5] plan is complete and such lands shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands as of December 22, 1974: *Provided*, That the sole authority for final planning decisions regarding the development of lands acquired pursuant to this subchapter shall rest with the Commissioner until such time as the Commissioner has discharged his statutory responsibility under this subchapter.

(i) Negotiations regarding land exchanges or leases

The Commissioner shall have authority to enter into negotiations with the Navajo and Hopi Tribes with a view to arranging and carrying out land exchanges or leases, or both, between such tribes; and lands which may be acquired or transferred pursuant to this section may, with the approval of the Commissioner, be included in any land exchange between the tribes authorized under section 640d–22 of this title.

(Pub. L. 93–531, §11, Dec. 22, 1974, 88 Stat. 1716; Pub. L. 96–305, §4, July 8, 1980, 94 Stat. 930; Pub. L. 98–603, title I, §106, Oct. 30, 1984, 98 Stat. 3157; Pub. L. 100–666, §§4(b), 8, Nov. 16, 1988, 102 Stat. 3930, 3933.)

[4] See References in Text note below.

[5] So in original. Probably should be "Commissioner's".

REFERENCES IN TEXT

The Mineral Leasing Act of 1920, as amended, and the Mineral Lands Leasing Act of 1920, as amended, referred to in subsec. (a), are act Feb. 25, 1920, ch. 85, 41 Stat. 437, as amended, known as the Mineral Leasing Act, which is classified generally to chapter 3A (§181 et seq.) of Title 30, Mineral Lands and Mining. For complete classification of this Act to the Code, see Short Title note set out under section 181 of Title 30 and Tables.

The Mining Law of 1872, referred to in subsec. (a), is act May 10, 1872, ch. 152, 17 Stat. 91, as amended. That act was incorporated into the Revised Statutes as R.S. §§2319 to 2328, 2331, 2333 to 2337, and 2344, which are classified to sections 22 to 24, 26 to 28, 29, 30, 33 to 35, 37, 39 to 42, and 47 of Title 30. For complete classification of R.S. §§2319 to 2328, 2331, 2333 to 2337, and 2344 to the Code, see Tables.

The first year of enactment of this subsection and the second year of enactment of this subsection, referred to in subsec. (d), probably mean the first and second year after the date of enactment of this subsection, which was July 8, 1980.

Subsection (a)(2) of this section, referred to in subsec. (f)(1), (3), means the first paragraph (2) of subsec. (a), relating to acceptance of title to private lands.

CODIFICATION

In subsec. (e), "chapter 69 of title 31" substituted for "the Act of October 20, 1976 (90 Stat. 2662; 31 U.S.C. 1601 et seq.)" on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1988—Subsecs. (c), (d), (f)(2). Pub. L. 100–666, §4(b), substituted "Commissioner" for "Commission" wherever appearing.

Subsec. (h). Pub. L. 100–666, §§4(b), 8, substituted "by the Commissioner" for "by the Commission" and "December 22, 1974: *Provided*, That the sole authority for final planning decisions regarding the development of lands acquired pursuant to this subchapter shall rest with the Commissioner until such time as the Commissioner has discharged his statutory responsibility under this subchapter" for "July 8, 1980, who are awaiting relocation under this subchapter".

Subsec. (i). Pub. L. 100–666, §4(b), substituted "Commissioner" for "Commission" in two places.

1984—Subsec. (a). Pub. L. 98–603, §106(2), inserted provisions relating to transfer without cost to the Navajo Tribe with title taken by the United States in trust for the benefit of the Navajo Tribe as part of the Navajo Reservation of all rights, title, and interests of the United States in the lands described in par. (1), subject to existing leaseholds.

Subsec. (a)(1). Pub. L. 98–603, §106(1), struck out provisions requiring transfer of lands without cost to the Navajo Tribe with title taken by the United States in trust for the benefit of the Navajo Tribe as part of the Navajo Reservation.

Subsec. (a)(2). Pub. L. 98–603, §106(3), added the par. (2) relating to interests in lands acquired in New Mexico.

1980—Subsec. (a). Pub. L. 96–305 substituted provision authorizing the Secretary to transfer not more than 250,000 acres of land under the jurisdiction of the Bureau of Land Management to the Navajo Tribe, at no cost to the Navajo Tribe, and in order to facilitate this transfer, exchange Bureau of Land Management land, at equal valuation, for State and private land, and to accept title to not more than 150,000 acres of private lands acquired by the Navajo Tribe, with title to both the transferred and privately acquired lands to be held by the United States in trust for the benefit of the Navajo Tribe for provision authorizing the Secretary to

transfer not more than 250,000 acres of land under the jurisdiction of the Bureau of Land Management to the Navajo Tribe providing the Navajo Tribe pay the fair market value of the land transferred and providing that title to the transferred land be held by the United States for the benefit of the Navajo Tribe.

Subsec. (b). Pub. L. 96–305 substituted provision requiring a border of any parcel of land transferred or acquired to be within 18 miles of the present boundary of the Navajo Reservation and providing that, with the exception of the lands unavailable for transfer, any Bureau of Land Management lands within Arizona and New Mexico be available for exchange for lands within 18 miles of the present boundary of the reservation for provision authorizing the United States to take in trust for the benefit of the Navajo Tribe any private lands acquired by the Navajo Tribe which are contiguous or adjacent to the Navajo Reservation and restricting the total acreage of lands transferred or acquired to not more than 250,000 acres.

Subsecs. (c) to (i). Pub. L. 96–305 added subsecs. (c) to (i).

CHANGE OF NAME

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, One Hundred Third Congress.

Select Committee on Indian Affairs of the Senate redesignated Committee on Indian Affairs of the Senate by section 25 of Senate Resolution No. 71, Feb. 25, 1993, One Hundred Third Congress.

§ 640d–11. Office of Navajo and Hopi Indian Relocation

(a) Establishment; Commissioner

There is hereby established as an independent entity in the executive branch the Office of Navajo and Hopi Indian Relocation which shall be under the direction of the Commissioner on Navajo and Hopi Relocation (hereinafter in this subchapter referred to as the "Commissioner").

(b) Appointment; term of office; compensation

(1) The Commissioner shall be appointed by the President.

(2) The term of office of the Commissioner shall be 2 years. An individual may be appointed Commissioner for more than one term. The Commissioner serving at the end of a term shall continue to serve until his or her successor has been confirmed in accordance with paragraph (1) of this subsection.

(3) The Commissioner shall be a full-time employee of the United States, and shall be compensated at the rate of basic pay payable for level IV of the Executive Schedule.

(c) Transfer of powers, duties, and funds to Commissioner

(1)(A) Except as otherwise provided by the Navajo and Hopi Indian Relocation Amendments of 1988, the Commissioner shall have all the powers and be responsible for all the duties that the Navajo and Hopi Indian Relocation Commission had before November 16, 1988.

(B) All funds appropriated to the Navajo and Hopi Indian Relocation Commission before the date on which the first Commissioner on Navajo and Hopi Indian Relocation is confirmed by the Senate that have not been expended on such date shall become available to the Office of Navajo and Hopi Indian Relocation on such date and shall remain available without fiscal year limitation.

(2) There are hereby transferred to the Commissioner, on January 31, 1989—

(A) all powers and duties of the Bureau of Indian Affairs derived from Public Law 99–190 (99 Stat. at 1236) that relate to the relocation of members of the Navajo Tribe from lands partitioned to the Hopi Tribe, and

(B) all funds appropriated for activities relating to such relocation pursuant to Public Law 99–190 (99 Stat. at 1236): *Provided*, That such funds shall be used by the Commissioner for the purpose for which such funds were appropriated to the Bureau of Indian Affairs. (B)[1]: *Provided further*, That for administrative purposes such funds shall be maintained in a separate account.

(d) Powers of Commissioner

(1) Subject to such rules and regulations as may be adopted by the Office of Navajo and Hopi Indian Relocation, the Commissioner shall have the power to—

(A) appoint and fix the compensation of such staff and personnel as the Commissioner deems necessary in accordance with the provisions of title 5 governing appointments in the competitive service, but at rates not in excess of a position classified above a GS–15 of the General Schedule under section 5108 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, but at rates not to exceed $200 a day for individuals.

(2) The authority of the Commissioner to enter into contracts for the provision of legal services for the Commissioner or for the Office of Navajo and Hopi Indian Relocation shall be subject to the availability of funds provided for such purpose by appropriations Acts.

(3) There are authorized to be appropriated for each fiscal year $100,000 to fund contracts described in paragraph (2).

(e) Administrative, fiscal, and housekeeping services; implementation of relocation plan; reasonable assistance by Federal departments or agencies; report to Congress

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

(2) On failure of any agency to provide reasonable assistance as required under paragraph (1) of this subsection, the Commissioner shall report such failure to the Congress.

[1] So in original. The period followed by the designation "(B)" probably should not appear.

(f) Termination

The Office of Navajo and Hopi Indian Relocation shall cease to exist when the President determines that its functions have been fully discharged.

(Pub. L. 93–531, §12, Dec. 22, 1974, 88 Stat. 1716; Pub. L. 96–305, §5, July 8, 1980, 94 Stat. 932; Pub. L. 100–666, §4(a), Nov. 16, 1988, 102 Stat. 3929; Pub. L. 100–696, title IV, §406, Nov. 18, 1988, 102 Stat. 4592; Pub. L. 102–180, §3(a)–(c), Dec. 2, 1991, 105 Stat. 1230; Pub. L. 112–166, §2(u), Aug. 10, 2012, 126 Stat. 1288.)

REFERENCES IN TEXT

Level IV of the Executive Schedule, referred to in subsec. (b)(3), is set out in section 5315 of Title 5, Government Organization and Employees.

The Navajo and Hopi Indian Relocation Amendments of 1988, referred to in subsec. (c)(1)(A), is Pub. L. 100–666, Nov. 16, 1988, 102 Stat. 3929, which enacted sections 640d–29 and 640d–30 of this title, amended sections 640d–7, 640d–9 to 640d–14, 640d–22, 640d–24, 640d–25, and 640d–28 of this title, and enacted provisions set out as a note under sections 640d and 640d–11 of this title. For complete classification of this Act to the Code, see Short Title of 1988 Amendment note set out under section 640d of this title and Tables.

Public Law 99–190, referred to in subsec. (c)(2), is Pub. L. 99–190, Dec. 19, 1985, 99 Stat. 1185. The provisions of Pub. L. 99–190 (99 Stat. 1236) relating to the relocation of members of the Navajo Tribe are not classified to the Code. For complete classification of Pub. L. 99–190 to the Code, see Tables.

AMENDMENTS

2012—Subsec. (b)(1). Pub. L. 112–166 struck out "by and with the advice and consent of the Senate" before period at end.

1991—Subsec. (b)(2). Pub. L. 102–180, §3(a), inserted at end "The Commissioner serving at the end of a term shall continue to serve until his or her successor has been confirmed in accordance with paragraph (1) of this subsection."

Subsec. (b)(3). Pub. L. 102–180, §3(b), amended par. (3) generally. Prior to amendment, par. (3) read as follows: "The Commissioner shall be a full time employee of the United States and shall be paid at the rate of GS–18 of the General Schedule under section 5332 of title 5."

Subsec. (d)(1). Pub. L. 102–180, §3(c), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "The Commissioner shall have the power to—

"(A) appoint and fix the compensation of such staff and personnel as he deems necessary, without regard to the provisions of title 5 governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title; and

"(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, but at rates not to exceed $200 a day for individuals."

1988—Pub. L. 100–666 amended section generally, substituting subsecs. (a) to (f) relating to the Office of Navajo and Hopi Indian Relocation, for former subsecs. (a) to (j) which related to the Navajo and Hopi Relocation Commission.

1980—Subsec. (g)(1). Pub. L. 96–305, §5(1), inserted "an independent legal counsel," after "an Executive Director,".

Subsec. (h). Pub. L. 96–305, §5(2), substituted provision authorizing Commission to provide for its own administrative, fiscal, and housekeeping services for provision authorizing Department of the Interior, on a nonreimbursable basis, to furnish necessary administrative and housekeeping services for Commission.

Subsecs. (i), (j). Pub. L. 96–305, §5(3), added subsec. (i) and redesignated former subsec. (i) as (j).

EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by Pub. L. 112–166 effective 60 days after Aug. 10, 2012, and applicable to appointments made on and after that effective date, including any nomination pending in the Senate on that date, see section 6(a) of Pub. L. 112–166, set out as a note under section 113 of Title 6, Domestic Security.

SEPARATION OR REDUCTION IN GRADE OR COMPENSATION OF EMPLOYEE

Pub. L. 102–180, §3(d), Dec. 2, 1991, 105 Stat. 1230, provided that: "The amendments made by this section [amending this section and section 5315 of Title 5, Government Organization and Employees] shall not cause any employee of the Office of Navajo and Hopi Indian Relocation to be separated or reduced in grade or compensation for 12 months after the date of enactment of this Act [Dec. 2, 1991]."

POSITIONS IN SENIOR EXECUTIVE SERVICE

Pub. L. 102–180, §3(e), Dec. 2, 1991, 105 Stat. 1230, provided that: "The position of Executive Director of the Office of Navajo and Hopi Indian Relocation and Deputy Executive Director of such Office shall on and after the date of the enactment of this Act [Dec. 2, 1991], be in the Senior Executive Service."

EMPLOYEES OF OFFICE AS GOVERNMENT EMPLOYEES

Pub. L. 102–180, §3(f), Dec. 2, 1991, 105 Stat. 1231, provided that: "Any employee of the Office of Navajo and Hopi Indian Relocation on the date of the enactment of this Act [Dec. 2, 1991], shall be considered an employee as defined in section 2105 of title 5, United States Code."

CONTINUATION OF RELOCATION COMMISSION AND RETENTION OF EXISTING COMMISSIONERS PENDING CONFIRMATION OF COMMISSIONER; TRANSFER OF EXISTING PERSONNEL; CHANGE OF NAME

Pub. L. 100–666, §4(c), Nov. 16, 1988, 102 Stat. 3930, provided that:

"(1) Notwithstanding any other provisions of law or any amendment made by this Act [see Short Title of 1988 Amendment note under section 640d of this title]—

"(A) the Navajo and Hopi Indian Relocation Commission shall—

"(i) continue to exist until the date on which the first Commissioner is confirmed by the Senate,

"(ii) have the same structure, powers and responsibilities such Commission had before the enactment of this Act [Nov. 16, 1988], and

"(iii) assume responsibility for the powers and duties transferred to such Commissioner under section 12(c)(2) of Public Law 93–531 [25 U.S.C. 640d–11(c)(2)], as amended by this Act, until the Commissioner is confirmed,

"(B) the existing Commissioners shall serve until the new Commissioner is confirmed by the Senate, and

"(C) the existing personnel of the Commission shall be transferred to the new Office of Navajo and Hopi Indian Relocation.

"(2) The Navajo and Hopi Relocation Commission shall become known as the Office of Navajo and Hopi Indian Relocation on the date on which the first Commissioner is confirmed by the Senate."

§640d–12. Report concerning relocation of households and members of each tribe

(a) By no later than the date that is 6 months after the date on which the first Commissioner is confirmed by the Senate, the Commissioner shall prepare and submit to the Congress a report concerning the relocation of households

and members thereof of each tribe and their personal property, including livestock, from lands partitioned to the other tribe pursuant to this subchapter.

(b) The report required under subsection (a) of this section shall contain, among other matters, the following:

(1) the names of all members of the Navajo Tribe who reside within the areas partitioned to the Hopi Tribe and the names of all members of the Hopi Tribe who reside within the areas partitioned to the Navajo Tribe;

(2) the names of all other members of the Navajo Tribe, and other members of the Hopi Tribe, who are eligible for benefits provided under this subchapter and who have not received all the benefits for which such members are eligible under this subchapter; and

(3) the fair market value of the habitations and improvements owned by the heads of households identified by the Commissioner is[1] being among the persons named in clause (1) of this subsection.

(Pub. L. 93–531, §13, Dec. 22, 1974, 88 Stat. 1717; Pub. L. 96–305, §6, July 8, 1980, 94 Stat. 932; Pub. L. 100–666, §4(d), Nov. 16, 1988, 102 Stat. 3931; Pub. L. 101–121, title I, §120, Oct. 23, 1989, 103 Stat. 722.)

AMENDMENTS

1989—Subsec. (b)(4). Pub. L. 101–121 struck out cl. (4) which required a report on how funds in the Navajo Rehabilitation Trust Funds would be expended to carry out the purposes described in section 640d–30(d) of this title.

1988—Pub. L. 100–666 amended section generally, substituting subsecs. (a) and (b) for former subsecs. (a) to (c).

1980—Subsec. (c)(5). Pub. L. 96–305 substituted "ninety" for "thirty".

§ 640d–13. Relocation of households and members

(a) Authorization; time of completion; prohibition of further settlement of nonmembers without written approval; limit on grazing of livestock

Consistent with section 640d–7 of this title and the order of the District Court issued pursuant to section 640d–2 or 640d–3 of this title, the Commissioner is authorized and directed to relocate pursuant to section 640d–7 of this title and such order all households and members thereof and their personal property, including livestock, from any lands partitioned to the tribe of which they are not members. The 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. No further settlement of Navajo individuals on the lands partitioned to the Hopi Tribe pursuant to this subchapter or on the Hopi Reservation shall be permitted unless advance written approval of the Hopi Tribe is obtained. No further settlement of Hopi individuals on the lands partitioned to the Navajo Tribe pursuant to this subchapter or on the Navajo Reservation shall be permitted unless advance written approval of the Navajo Tribe is obtained. No individual shall hereafter be allowed to increase the number of livestock he grazes on any area partitioned pursuant to this subchapter to the tribe of which he is not a member, nor shall he retain any grazing rights in any such area subsequent to his relocation therefrom.

(b) Additional payments to heads of household; time

In addition to the payments made pursuant to section 640d–14 of this title, the Commissioner shall make payments to heads of households identified in the report prepared pursuant to section 640d–12 of this title upon the date of relocation of such households, as determined by the Commissioner, in accordance with the following schedule:

(1) the sum of $5,000 to each head of a household who, prior to the expiration of one year after the effective date of the relocation plan, contracts with the Commissioner to relocate;

(2) the sum of $4,000 to each head of a household who is not eligible for the payment provided for in clause (1) of this subsection but who, prior to the expiration of two years after the effective date of the relocation plan, contracts with the Commissioner to relocate;

(3) the sum of $3,000 to each head of a household who is not eligible for the payments provided for in clause (1) or (2) of this subsection but who, prior to the expiration of three years after the effective date of the relocation plan, contracts with the Commissioner to relocate; and

(4) the sum of $2,000 to each head of a household who is not eligible for the payments provided for in clause (1), (2), or (3) of this subsection but who, prior to the expiration of four years after the effective date of the relocation plan, contracts with the Commissioner to relocate.

(c) Payments to or for any person moving into partitioned area after May 29, 1974

No payment shall be made pursuant to this section to or for any person who, after May 29, 1974, moved into an area partitioned pursuant to section 640d–7 of this title or section 640d–2 or 640d–3 of this title to a tribe of which he is not a member.

(Pub. L. 93–531, §14, Dec. 22, 1974, 88 Stat. 1718; Pub. L. 100–666, §4(b), Nov. 16, 1988, 102 Stat. 3930.)

AMENDMENTS

1988—Subsecs. (a), (b). Pub. L. 100–666 substituted "Commissioner" for "Commission" wherever appearing.

§ 640d–14. Relocation housing

(a) Purchase of habitation and improvements from head of household; fair market value

The Commissioner shall purchase from the head of each household whose household is required to relocate under the terms of this subchapter the habitation and other improvements owned by him on the area from which he is required to move. The purchase price shall be the fair market value of such habitation and improvements as determined under section 640d–12(b)(2)[1] of this title.

[1] So in original. Probably should be "as".

[1] See References in Text note below.

(b) Reimbursement for moving expenses; payment for replacement dwelling; limitations

In addition to the payments made pursuant to subsection (a) of this section, the Commissioner shall:

(1) reimburse each head of a household whose household is required to relocate pursuant to this subchapter for the actual reasonable moving expenses of the household as if the household members were displaced persons under section 202 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894) [42 U.S.C. 4622];

(2) pay to each head of a household whose household is required to relocate pursuant to this subchapter an amount which, when added to the fair market value of the habitation and improvements purchased under subsection (a) of this section, equals the reasonable cost of a decent, safe, and sanitary replacement dwelling adequate to accommodate such household: *Provided*, That the additional payment authorized by this paragraph (2) shall not exceed $17,000 for a household of three or less and not more than $25,000 for a household of four or more, except that the Commissioner may, after consultation with the Secretary of Housing and Urban Development, annually increase or decrease such limitations to reflect changes in housing development and construction costs, other than costs of land, during the preceding year: *Provided further*, That the additional payment authorized by this subsection shall be made only to a head of a household required to relocate pursuant to this subchapter who purchases and occupies such replacement dwelling not later than the end of the two-year period beginning on the date on which he receives from the Commissioner final payment for the habitation and improvements purchased under subsection (a) of this section, or on the date on which such household moves from such habitation, whichever is the later date. The payments made pursuant to this paragraph (2) shall be used only for the purpose of obtaining decent, safe, and sanitary replacement dwellings adequate to accommodate the households relocated pursuant to this subchapter.

(c) Establishment of standards consistent with other laws; payments to or for any person moving into partitioned area after specified time

In implementing subsection (b) of this section, the Commissioner shall establish standards consistent with those established in the implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894) [42 U.S.C. 4601 et seq.]. No payment shall be made pursuant to this section to or for any person who, later than one year prior to December 22, 1974, moved into an area partitioned pursuant to section 640d–7 of this title or section 640d–2 or 640d–3 of this title to a tribe of which he is not a member.

(d) Methods of payment

The Commissioner shall be responsible for the provision of housing for each household eligible for payments under this section in one of the following manners:

(1) Should any head of household apply for and become a participant or homebuyer in a mutual help housing or other homeownership opportunity project undertaken under the United States Housing Act of 1937 (50 Stat. 888) as amended [42 U.S.C. 1437 et seq.], or in any other federally assisted housing program now or hereafter established, the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section shall be paid to the local housing agency or sponsor involved as a voluntary equity payment and shall be credited against the outstanding indebtedness or purchase price of the household's home in the project in a manner which will accelerate to the maximum extent possible the achievement by that household of debt free homeownership.

(2) Should any head of household wish to purchase or have constructed a dwelling which the Commissioner determines is decent, safe, sanitary, and adequate to accommodate the household, the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section shall be paid to such head of household in connection with such purchase or construction in a manner which the Commissioner determines will assure the use of the funds for such purpose.

(3) Should any head of household not make timely arrangements for relocation housing, or should any head of household elect and enter into an agreement to have the Commissioner construct or acquire a home for the household, the Commissioner may use the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section for the construction or acquisition (including enlargement or rehabilitation if necessary) of a home and related facilities for such household: *Provided*, That, the Commissioner may combine the funds for any number of such households into one or more accounts from which the costs of such construction or acquisition may be paid on a project basis and the funds in such account or accounts shall remain available until expended: *Provided further*, That the title to each home constructed or acquired by the Commissioner pursuant to this paragraph shall be vested in the head of the household for which it was constructed or acquired upon occupancy by such household, but this shall not preclude such home being located on land held in trust by the United States.

(e) Disposal of acquired dwellings and improvements

The Commissioner is authorized to dispose of dwellings and other improvements acquired or constructed pursuant to this subchapter in such manner, including resale of such dwellings and improvements to members of the tribe exercising jurisdiction over the area at prices no higher than the acquisition or construction costs, as best effects section 640d–7 of this title and the

order of the District Court pursuant to section 640d–2 or 640d–3 of this title.

(f) Preferential treatment for heads of households of Navajo Tribe evicted from Hopi Reservation by judicial decision; restriction

Notwithstanding any other provision of law to the contrary, the Commissioner shall on a preferential basis provide relocation assistance and relocation housing under subsections (b), (c), and (d) of this section to the head of each household of members of the Navajo Tribe who were evicted from the Hopi Indian Reservation as a consequence of the decision in the case of United States v. Kabinto (456 F.2d 1087 (1972)): *Provided*, That such heads of households have not already received equivalent assistance from Federal agencies.

(g) Appeals of eligibility determinations

Notwithstanding any other provision of law, appeals from any eligibility determination of the Relocation Commission, irrespective of the amount in controversy, shall be brought in the United States District Court for the District of Arizona.

(Pub. L. 93–531, §15, Dec. 22, 1974, 88 Stat. 1719; Pub. L. 96–305, §7, July 8, 1980, 94 Stat. 932; Pub. L. 100–666, §§4(b), 10, Nov. 16, 1988, 102 Stat. 3930, 3934.)

REFERENCES IN TEXT

Section 640d–12 of this title, referred to in subsec. (a), was amended generally by Pub. L. 100–666, §4(d), Nov. 16, 1988, 102 Stat. 3931, and as so amended, section 640d–12(b)(2) does not relate to fair market value of habitations and improvements. Provisions formerly contained in section 640d–12(b)(2) are covered in section 640d–12(b)(3).

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894), referred to in subsec. (c), is Pub. L. 91–646, Jan. 2, 1971, 84 Stat. 1894, which is classified principally to chapter 61 (§4601 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4601 of Title 42 and Tables.

The United States Housing Act of 1937, referred to in subsec. (d)(1), is act Sept. 1, 1937, ch. 896, as revised generally by Pub. L. 93–383, title II, §201(a), Aug. 22, 1974, 88 Stat. 653, which is classified generally to chapter 8 (§1437 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 1437 of Title 42 and Tables.

AMENDMENTS

1988—Subsecs. (a) to (f). Pub. L. 100–666, §4(b), substituted "Commissioner" for "Commission" wherever appearing.

Subsec. (g). Pub. L. 100–666, §10, added subsec. (g).

1980—Subsec. (f). Pub. L. 96–305 added subsec. (f).

§ 640d–15. Payment of fair rental value for use of lands subsequent to date of partition

(a) Payment by Navajo Tribe

The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d–7 and 640d–2 or 640d–3 of this title subsequent to the date of the partition thereof.

(b) Payment by Hopi Tribe

The Hopi Tribe shall pay to the Navajo Tribe the fair rental value as determined by the Secretary for all use by Hopi individuals of any lands partitioned to the Navajo Tribe pursuant to sections 640d–7 and 640d–2 or 640d–3 of this title subsequent to the date of the partition thereof.

(Pub. L. 93–531, §16, Dec. 22, 1974, 88 Stat. 1720.)

§ 640d–16. Title, possession, and enjoyment of lands

(a) Covered lands; jurisdiction of respective tribes over nonmembers

Nothing in this subchapter shall affect the title, possession, and enjoyment of lands heretofore allotted to Hopi and Navajo individuals for which patents have been issued. Such Hopi individuals living on the Navajo Reservation shall be subject to the jurisdiction of the Navajo Tribe and such Navajo individuals living on the Hopi Reservation shall be subject to the jurisdiction of the Hopi Tribe.

(b) Relocation of Federal employees

Nothing in this subchapter shall require the relocation from any area partitioned pursuant to this subchapter of the household of any Navajo or Hopi individual who is employed by the Federal Government within such area or to prevent such employees or their households from residing in such areas in the future: *Provided*, That any such Federal employee who would, except for the provisions of this subsection, be relocated under the terms of this subchapter may elect to be so relocated.

(Pub. L. 93–531, §17, Dec. 22, 1974, 88 Stat. 1720.)

§ 640d–17. Actions for accounting, fair value of grazing, and claims for damages to land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d–2 or 640d–3 of this title:

(1) for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for

damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: *Provided*, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of title 28 shall not be applicable to such action.

(b) Defenses

Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within two years from December 22, 1974, or one hundred and eighty days from the date of issuance of an order of the District Court pursuant to section 640d–2 or 640d–3 of this title, whichever is later.

(c) Further original, ancillary or supplementary actions to insure quiet enjoyment

Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

(d) United States as party; judgments as claims against the United States

Except as provided in clause (3) of subsection (a) of this section, the United States shall not be an indispensable party to any action or actions commenced pursuant to this section. Any judgment or judgments by the District Court in such action or actions shall not be regarded as a claim or claims against the United States.

(e) Remedies

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

(Pub. L. 93–531, §18, Dec. 22, 1974, 88 Stat. 1721.)

§ 640d–18. Reduction of livestock within joint use area

(a) Institution of conservation practices

Notwithstanding any provision of this subchapter, or any order of the District Court pursuant to section 640d–2 or 640d–3 of this title, the Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after December 22, 1974. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.

(b) Survey location of monuments and fencing of boundaries

The Secretary, upon the date of issuance of an order of the District Court pursuant to sections 640d–7 and 640d–2 or 640d–3 of this title, shall provide for the survey location of monuments, and fencing of boundaries of any lands partitioned pursuant to sections 640d–7 and 640d–2 or 640d–3 of this title.

(c) Completion of surveying, monumenting, and fencing operations and livestock reduction program

(1) Surveying, monumenting, and fencing as required by subsection (b) of this section shall be completed within twelve months after July 8, 1980, with respect to lands partitioned pursuant to section 640d–3 of this title and within twelve months after a final order of partition with respect to any lands partitioned pursuant to section 640d–7 of this title.

(2) The livestock reduction program required under subsection (a) of this section shall be completed within eighteen months after July 8, 1980.

(Pub. L. 93–531, §19, Dec. 22, 1974, 88 Stat. 1721; Pub. L. 96–305, §8, July 8, 1980, 94 Stat. 932.)

AMENDMENTS

1980—Subsec. (c). Pub. L. 96–305 added subsec. (c).

§ 640d–19. Perpetual use of Cliff Spring as shrine for religious ceremonial purposes; boundary; piping of water for use by residents

The members of the Hopi Tribe shall have perpetual use of Cliff Spring as shown on USGS 7½ minute Quad named Toh Ne Zhonnie Spring, Arizona, Navajo County, dated 1968; and located 1,250 feet west and 200 feet south of the intersection of 36 degrees, 17 minutes, 30 seconds north latitude and 110 degrees, 9 minutes west longitude, as a shrine for religious ceremonial purposes, together with the right to gather branches of fir trees growing within a 2-mile radius of said spring for use in such religious ceremonies, and the further right of ingress, egress, and regress between the Hopi Reservation and said spring. The Hopi Tribe is hereby authorized to fence said spring upon the boundary line as follows:

Beginning at a point on the 36 degrees, 17 minutes, 30 seconds north latitude 500 feet west of its intersection with 110 degrees, 9 minutes west longitude, the point of beginning;

thence north 46 degrees west, 500 feet to a point on the rim top at elevation 6,900 feet;

thence southwesterly 1,200 feet (in a straight line) following the 6,900 feet contour;

thence south 46 degrees east, 600 feet;

thence north 38 degrees east, 1,300 feet to the point of beginning, 23.8 acres more or less: *Provided*, That, if and when such spring is fenced, the Hopi Tribe shall pipe the water therefrom to the edge of the boundary as hereinabove de-

scribed for the use of residents of the area. The natural stand of fir trees within such 2-mile radius shall be conserved for such religious purposes.

(Pub. L. 93–531, § 20, Dec. 22, 1974, 88 Stat. 1722.)

§ 640d–20. Use and right of access to religious shrines on reservation of other tribe

Notwithstanding anything contained in this subchapter to the contrary, the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

(Pub. L. 93–531, § 21, Dec. 22, 1974, 88 Stat. 1722.)

§ 640d–21. Payments not to be considered as income for eligibility under any other Federal or federally assisted program or for assistance under Social Security Act or for revenue purposes

The availability of financial assistance or funds paid pursuant to this subchapter may not be considered as income or resources or otherwise utilized as the basis (1) for denying a household or member thereof participation in any federally assisted housing program or (2) for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled to under the Social Security Act [42 U.S.C. 301 et seq.] or any other Federal or federally assisted program. None of the funds provided under this subchapter shall be subject to Federal or State income taxes.

(Pub. L. 93–531, § 22, Dec. 22, 1974, 88 Stat. 1722.)

REFERENCES IN TEXT

The Social Security Act, referred to in text, is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended, which is classified generally to chapter 7 (§ 301 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

§ 640d–22. Authorization for exchange of reservation lands; availability of additional relocation benefits; restrictions

The Navajo and Hopi Tribes are hereby authorized to exchange lands which are part of their respective reservations. In the event that the tribes should negotiate and agree on an exchange of lands pursuant to authority granted herein the Commissioner shall make available 125 per centum of the relocation benefits provided in sections 640d–13 and 640d–14 of this title to members of either tribe living on land to be exchanged to other than his or her own tribe, except that such benefits shall be available only if, within one hundred and eighty days of the agreement, a majority of the adult members of the tribe who would be eligible to relocate from exchanged lands sign a contract with the Commissioner to relocate within twelve months of the agreement or such later time as determined by the Commissioner and such additional benefits shall only be paid to those who actually relocate within such period.

(Pub. L. 93–531, § 23, Dec. 22, 1974, 88 Stat. 1722; Pub. L. 96–305, § 9, July 8, 1980, 94 Stat. 933; Pub. L. 100–666, § 4(b), Nov. 16, 1988, 102 Stat. 3930.)

AMENDMENTS

1988—Pub. L. 100–666 substituted "Commissioner" for "Commission" wherever appearing.

1980—Pub. L. 96–305 inserted provision authorizing the Commission, in the event that the tribes agree on an exchange of lands, to make available 125 per centum of the relocation benefits provided in sections 640d–13 and 640d–14 of this title to members of either tribe living on lands to be exchanged to other than his or her own tribe, provided that within 180 days of the agreement, a majority of the adult members of the tribe who would be eligible to relocate from exchanged lands contract with the Commission to relocate within 12 months of the agreement or such later time as the Commission determines and to pay these additional benefits only to those who actually relocate within such period.

§ 640d–23. Separability

If any provision of this subchapter, or the application of any provision to any person, entity or circumstance, is held invalid, the remainder of this subchapter shall not be affected thereby.

(Pub. L. 93–531, § 24, Dec. 22, 1974, 88 Stat. 1722.)

§ 640d–24. Authorization of appropriations

(a) Purposes; amounts

(1) For the purpose of carrying out the provisions of section 640d–14 of this title, there is hereby authorized to be appropriated not to exceed $31,500,000.

(2) For the purpose of carrying out the provisions of section 640d–18(a) of this title, there is hereby authorized to be appropriated not to exceed $10,000,000.

(3) For the purpose of carrying out the provisions of section 640d–18(b) of this title, there is hereby authorized to be appropriated not to exceed $500,000.

(4) For the purpose of carrying out the provisions of section 640d–13(b) of this title, there is hereby authorized to be appropriated not to exceed $13,000,000.

(5) There is hereby authorized to be appropriated annually not to exceed $4,000,000 for the expenses of the Commissioner.

(6) There is hereby authorized to be appropriated not to exceed $500,000 for the services and expenses of the Mediator and the assistants and consultants retained by him: *Provided*, That, any contrary provision of law notwithstanding, until such time as funds are appropriated and made available pursuant to this authorization, the Director of the Federal Mediation and Conciliation Service is authorized to provide for the services and expenses of the Mediator from any other appropriated funds available to him and to reimburse such appropriations when funds are appropriated pursuant to this authorization, such reimbursement to be credited to appropriations currently available at the time of receipt thereof.

(7) For the purpose of carrying out the provisions of subsection (i) of section 640d–28 of this title, there is authorized to be appropriated, effective in fiscal year 1981, not to exceed $1,000,000 annually.

(8) For the purposes of carrying out the provisions of section 640d–14 of this title, there is authorized to be appropriated not to exceed $30,000,000 for each of fiscal years 2003 through 2008.

(b) Availability of sums

The funds appropriated pursuant to the authorizations provided in this subchapter shall remain available until expended.

(Pub. L. 93–531, §25, Dec. 22, 1974, 88 Stat. 1722; Pub. L. 96–40, July 30, 1979, 93 Stat. 318; Pub. L. 96–305, §10, July 8, 1980, 94 Stat. 933; Pub. L. 98–48, July 13, 1983, 97 Stat. 244; Pub. L. 100–666, §§2, 4(b), Nov. 16, 1988, 102 Stat. 3929, 3930; Pub. L. 102–180, §2, Dec. 2, 1991, 105 Stat. 1230; Pub. L. 104–15, §1, June 21, 1995, 109 Stat. 189; Pub. L. 104–301, §10, Oct. 11, 1996, 110 Stat. 3652; Pub. L. 108–204, title I, §102, Mar. 2, 2004, 118 Stat. 543.)

AMENDMENTS

2004—Subsec. (a)(8). Pub. L. 108–204 substituted "for each of fiscal years 2003 through 2008" for "annually for fiscal years 1995, 1996, 1997, 1998, 1999, and 2000".

1996—Subsec. (a)(8). Pub. L. 104–301 substituted "1996, 1997, 1998, 1999, and 2000" for "1996, and 1997".

1995—Subsec. (a)(8). Pub. L. 104–15 substituted "1995, 1996, and 1997" for "1989, 1990, 1991, 1992, 1993, 1994, and 1995".

1991—Subsec. (a)(8). Pub. L. 102–180 substituted "1991, 1992, 1993, 1994, and 1995" for "and 1991".

1988—Subsec. (a)(4). Pub. L. 100–666, §2(1), substituted "$13,000,000" for "$7,700,000".

Subsec. (a)(5). Pub. L. 100–666, §4(b), substituted "Commissioner" for "Commission".

Subsec. (a)(8). Pub. L. 100–666, §2(2), substituted "$30,000,000 annually for fiscal years 1989, 1990, and 1991" for "$15,000,000 annually for fiscal years 1983 through 1987".

1983—Subsec. (a)(4). Pub. L. 98–48, §1, substituted "$7,700,000" for "$5,500,000".

Subsec. (a)(8). Pub. L. 98–48, §2, added par. (8).

1980—Subsec. (a)(5). Pub. L. 96–305, §10(a), substituted "$4,000,000" for "$1,000,000".

Subsec. (a)(7). Pub. L. 96–305, §10(b), added par. (7).

1979—Subsec. (a)(5). Pub. L. 96–40 substituted "$1,000,000" for "$500,000".

§ 640d–25. Discretionary fund to expedite relocation efforts

(a) Authorization of appropriations

To facilitate and expedite the relocation efforts of the Commissioner, there is hereby authorized to be appropriated annually, effective in fiscal year 1981, not to exceed $6,000,000 as a discretionary fund.

(b) Authorized uses

Funds appropriated under the authority of subsection (a) of this section may be used by the Commissioner for grants, contracts, or expenditures which significantly assist the Commissioner or assist the Navajo Tribe or Hopi Tribe in meeting the burdens imposed by this subchapter.

(c) Funding and construction of Hopi high school and medical center

The Secretary of the Interior and the Secretary of Health and Human Services, as appropriate, shall assign the highest priority, in the next fiscal year after July 8, 1980, to the funding and construction of the Hopi high school and Hopi medical center consistent with any plans already completed and approved by appropriate agencies of the respective departments.

(Pub. L. 93–531, §27, as added Pub. L. 96–305, §11, July 8, 1980, 94 Stat. 933; amended Pub. L. 100–666, §§3, 4(b), Nov. 16, 1988, 102 Stat. 3929, 3930.)

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–666, §4(b), substituted "Commissioner" for "Commission".

Subsec. (b). Pub. L. 100–666, §3, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Such funds may only be used by the Commission to—

"(1) match or pay not to exceed 30 per centum of any grant, contract, or other expenditure of the Federal Government, State or local government, tribal government or chapter, or private organization for the benefit of the Navajo or Hopi Tribe, if such grant, contract, or expenditure would significantly assist the Commission in carrying out its responsibilities or assist either tribe in meeting the burdens imposed by this subchapter;

"(2) engage or participate, either directly or by contract, in demonstration efforts to employ innovative energy or other technologies in providing housing and related facilities and services in the relocation and resettlement of individuals under this subchapter.

Not to exceed 5 per centum of such funds may be used for the administrative expenses of the Commission in carrying out this section."

§ 640d–26. Implementation requirements

(a) Environmental impact provisions

No action taken pursuant to, in furtherance of, or as authorized by this subchapter, shall be deemed a major Federal action for purposes of the National Environmental Policy Act of 1969, as amended [42 U.S.C. 4321 et seq.].

(b) Transfer of public lands

Any transfer of public lands pursuant to this subchapter shall be made notwithstanding the provisions of sections 1782 and 1752(g) of title 43.

(Pub. L. 93–531, §28, as added Pub. L. 96–305, §11, July 8, 1980, 94 Stat. 933.)

REFERENCES IN TEXT

National Environmental Policy Act of 1969, as amended, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 640d–27. Attorney fees, costs and expenses for litigation or court action

(a) Payment by Secretary; authorization of appropriations

In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States or any of its officials, departments, agencies, or instrumentalities, arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable. For each tribe, there is hereby authorized to be appropriated not to exceed $120,000 in fiscal year 1981, $130,000 in fiscal year 1982, $140,000 in fiscal year 1983, $150,000 in fiscal year 1984, and $160,000 in fiscal year 1985, and each succeeding year thereafter until such litigation or court action is finally completed.

(b) Award by court; reimbursement to Secretary

Upon the entry of a final judgment in any such litigation or court action, the court shall award

reasonable attorney's fees, costs and expenses to the party, other than the United States or its officials, departments, agencies, or instrumentalities, which prevails or substantially prevails, where it finds that any opposing party has unreasonably initiated or contested such litigation. Any party to whom such an award has been made shall reimburse the United States out of such award to the extent that it has received payments pursuant to subsection (a) of this section.

(c) Excess difference between award of court and award of Secretary treated as final judgment of Court of Claims

To the extent that any award made to a party against the United States pursuant to subsection (b) of this section exceeds the amount paid to such party by the United States pursuant to subsection (a) of this section, such difference shall be treated as if it were a final judgment of the Court of Claims under section 2517 of title 28.

(d) Litigation or court actions applicable

This section shall apply to any litigation or court action pending upon July 8, 1980, in which a final order, decree, judgment has not been entered, but shall not apply to any action authorized by section 640d–7 or 640d–17(a) of this title.

(Pub. L. 93–531, § 29, as added Pub. L. 96–305, § 11, July 8, 1980, 94 Stat. 934.)

REFERENCES IN TEXT

The Court of Claims, referred to in subsec. (c), and the Court of Customs and Patent Appeals were merged effective Oct. 1, 1982, into a new United States Court of Appeals for the Federal Circuit by Pub. L. 97–164, Apr. 2, 1982, 96 Stat. 25, which also created a United States Claims Court [now United States Court of Federal Claims] that inherited the trial jurisdiction of the Court of Claims. See sections 48, 171 et seq., 791 et seq., and 1491 et seq. of Title 28, Judiciary and Judicial Procedure.

§ 640d–28. Life estates

(a) Omitted

(b) Application for lease; contents; filing date; extension

Any Navajo head of household who desires to do so may submit an application for a life estate lease to the Commissioner. Such application shall contain such information as the Commissioner may prescribe by regulation, such regulation to be promulgated by the Commissioner within ninety days of July 8, 1980. To be considered, such application must be filed with the Commissioner on or before April 1, 1981: *Provided*, That the Commissioner may, for good cause, grant an extension of one hundred and eighty days.

(c) Application groupings

Upon receipt of applications filed pursuant to this section, the Commissioner shall group them in the following order:

(A) Applicants who are determined to be at least 50 per centum disabled as certified by a physician approved by the Commissioner. Such applicants shall be ranked in the order of the severity of their disability.

(B) Applicants who are not at least 50 per centum disabled shall be ranked in order of their age with oldest listed first and the youngest listed last: *Provided*, That, if any applicant physically resides in quarter quad Nos. 78 NW, 77 NE, 77 NW, 55 SW, or 54 SE as designated on the Mediator's partition map, such applicant shall be given priority over another applicant of equal age.

(C) Applicants who did not, as of December 22, 1974, and continuously thereafter, maintain a separate place of abode and actually remain domiciled on Hopi partitioned lands, and who, but for this subsection would be required to relocate, shall be rejected by the Commissioner.

(D) Applicants who were not at least forty-nine years of age on December 22, 1974, or are not at least 50 per centum disabled, shall also be rejected by the Commissioner.

(d) Number of leases; priorities

The Commissioner shall have authority to award life estate leases to not more than one hundred and twenty applicants with first priority being given to applicants listed pursuant to subsection (c)(A) of this section and the next priority being given to the applicants listed pursuant to subsection (c)(B) of this section, in order of such listing.

(e) Area; allowable livestock; assistance by Secretary in feeding livestock

Each life estate lease shall consist of a fenced area not exceeding ninety acres of land which shall include the life tenant's present residence and may be used by the life tenant to feed not to exceed twenty-five sheep units per year or equivalent livestock. The Secretary, under existing authority, shall make available to life estate tenants such assistance during that tenure, as may be necessary to enable such tenant to feed such livestock at an adequate nutritional level.

(f) Individuals permitted to reside; regulations

No person may reside on a life estate other than the life tenant, his or her spouse, and minor dependents, and/or such persons who are necessarily present to provide for the care of the life tenant. The Commissioner shall promulgate regulations to carry out the intent of this subsection.

(g) Termination

The life estate tenure shall end by voluntary relinquishment, or at the death of the life tenant or the death of his or her spouse, whichever occurs last: *Provided*, That each survivorship right shall apply only to those persons who were lawfully married to each other on or before July 8, 1980.

(h) Relocation benefits upon voluntary relinquishment; compensation upon death of life tenant or surviving spouse; relocation of dependents

Nothing in this section shall be construed as prohibiting any such applicant who receives a life estate lease under this section from relinquishing, prior to its termination, such estate at any time and voluntarily relocating. Upon voluntary relinquishment of such estate, by such means or instrument as the Secretary shall pre-

scribe, such applicant shall be entitled to relocation benefits from the Secretary comparable to those provided by section 640d–14 of this title. For life estates terminated by the death of the life tenant or his or her surviving spouse, compensation shall be paid to the estate of the deceased life tenant or surviving spouse based on the fair market value of the habitation and improvements at the time of the expiration of such tenure and not before. Such payment shall be in lieu of any other payment pursuant to subsection (a) of section 640d–14 of this title. Assistance provided pursuant to section 640d–14(b) of this title, shall be paid to any head of household lawfully residing on such life estate pursuant to subsection (f) of this section who is required to move by the termination of such life estate by the death of the life tenant and his or her surviving spouse and who does not maintain a residence elsewhere. Compensation under section 640d–14(a) of this title shall be paid and distributed in accordance with the last will and testament of the life tenant or surviving spouse or, in the event no valid last will and testament is left, compensation shall be paid and distributed to his or her heirs in accordance with existing Federal law. Upon termination of a life estate by whatever means, the dependents residing with the individuals having such life estate so terminated shall have ninety days following such termination within which to relocate.

(i) Payment of fair market rental value

The Secretary shall pay, on an annual basis, the fair market rental value of such life estate leases to the tribe to whom the lands leased were partitioned.

(j) Improvements

Nothing in this subchapter or any other law shall be construed to prevent a life tenant from making reasonable improvements on the life estate which are related to the residence and agricultural purposes of the life tenancy.

(k) Additional leases for Hopi heads of household

The Commissioner is authorized to grant not to exceed ten additional life estate leases to Hopi heads of household residing on Navajo-partitioned lands under such terms of this section as may be appropriate.

(Pub. L. 93–531, § 30, as added Pub. L. 96–305, § 11, July 8, 1980, 94 Stat. 934; amended Pub. L. 100–666, § 4(b), Nov. 16, 1988, 102 Stat. 3930.)

CODIFICATION

Subsec. (a) provided for the repeal of section 640d–4(a)(4) of this title.

AMENDMENTS

1988—Subsecs. (b) to (d), (f), (k). Pub. L. 100–666 substituted "Commissioner" for "Commission" wherever appearing.

§ 640d–29. Restrictions on lobbying; exception

(a) Except as provided in subsection (b) of this section, no person or entity who has entered into a contract with the Commissioner to provide services under this subchapter may engage in activities designed to influence Federal legislation on any issue relating to the relocation required under this subchapter.

(b) Subsection (a) of this section shall not apply to the Navajo Tribe or the Hopi Tribe, except that such tribes shall not spend any funds received from the Office in any activities designed to influence Federal legislation.

(Pub. L. 93–531, § 31, as added Pub. L. 100–666, § 5, Nov. 16, 1988, 102 Stat. 3931.)

§ 640d–30. Navajo Rehabilitation Trust Fund

(a) Establishment

There is hereby established in the Treasury of the United States a trust fund to be known as the "Navajo Rehabilitation Trust Fund", which shall consist of the funds transferred under subsection (b) of this section and of the funds appropriated pursuant to subsection (f) of this section and any interest or investment income accrued on such funds.

(b) Deposit of income into Fund

All of the net income derived by the Navajo Tribe from the surface and mineral estates of lands located in New Mexico that are acquired for the benefit of the Navajo Tribe under section 640d–10 of this title shall be deposited into the Navajo Rehabilitation Trust Fund.

(c) Secretary as trustee; investment of funds

The Secretary shall be the trustee of the Navajo Rehabilitation Trust Fund and shall be responsible for investment of the funds in such Trust Fund.

(d) Availability of funds; purposes

Funds in the Navajo Rehabilitation Trust Fund, including any interest or investment accruing thereon, shall be available to the Navajo Tribe, with the approval of the Secretary, solely for purposes which will contribute to the continuing rehabilitation and improvement of the economic, educational, and social condition of families, and Navajo communities, that have been affected by—

(1) the decison[1] in the Healing case, or related proceedings,

(2) the provision[2] of this subchapter, or

(3) the establishment by the Secretary of the Interior of grazing district number 6 as land for the exclusive use of the Hopi Tribe.

(e) Conceptual framework for expenditure of funds

By December 1, 1989, the Secretary of the Interior, with the advice of the Navajo Tribe and the Office of Navajo and Hopi Indian Relocation, shall submit to the Congress a conceptual framework for the expenditure of the funds authorized for the Navajo Rehabilitation Trust Fund. Such framework is to be consistent with the purposes described in subsection (d) of this section.

(f) Termination of Trust Fund

The Navajo Rehabilitation Trust Fund shall terminate when, upon petition by the Navajo Tribe, the Secretary determines that the goals of the Trust Fund have been met and the United States has been reimbursed for funds appropriated under subsection (f) of this section. All

[1] So in original. Probably should be "decision".

[2] So in original. Probably should be "provisions".

funds in the Trust Fund on such date shall be transferred to the general trust funds of the Navajo Tribe.

(g) Authorization of appropriations; reimbursement of General Fund

There is hereby authorized to be appropriated for the Navajo Rehabilitation Trust Fund not[3] exceed $10,000,000 in each of fiscal years 1990, 1991, 1992, 1993, 1994 and 1995. The income from the land referred to in subsection (b) of this section shall be used to reimburse the General Fund of the United States Treasury for amounts appropriated to the Fund.

(Pub. L. 93–531, § 32, as added Pub. L. 100–666, § 7, Nov. 16, 1988, 102 Stat. 3932; amended Pub. L. 101–121, title I, § 120, Oct. 23, 1989, 103 Stat. 722.)

CODIFICATION

Another section 32 of Pub. L. 93–531 was enacted by Pub. L. 100–696, title IV, § 407, Nov. 18, 1988, 102 Stat. 4593, and is classified to section 640d–31 of this title.

AMENDMENTS

1989—Subsecs. (e) to (g). Pub. L. 101–121 added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

§ 640d–31. Residence of families eligible for relocation assistance

Nothing in this subchapter prohibits the Commissioner from providing relocation assistance to families certified as eligible, regardless of their current place of residence, with funds appropriated to implement this subchapter.

(Pub. L. 93–531, § 32, as added Pub. L. 100–696, title IV, § 407, Nov. 18, 1988, 102 Stat. 4593.)

CODIFICATION

Another section 32 of Pub. L. 93–531 was enacted by Pub. L. 100–666, § 7, Nov. 16, 1988, 102 Stat. 3932, and is classified to section 640d–30 of this title.

SUBCHAPTER XXIII—HOPI TRIBE: INDUSTRIAL PARK

§ 641. Congressional findings and declaration of purpose

For the purpose of assisting in the economic advancement and contributing to the general welfare of the Hopi Indian Tribe of Arizona, the Congress hereby finds it to be fitting and appropriate to provide the Hopi Tribal Council with certain powers of self-determination that are necessary to enable the Hopi people to carry out the effective development and operation of the Hopi Industrial Park, which is located in the counties of Navajo and Coconino in the State of Arizona.

(Pub. L. 91–264, § 1, May 22, 1970, 84 Stat. 260.)

§ 642. Powers of Tribal Council

The Hopi Tribal Council shall have the following powers:

(a) Sale of lands

To sell any part of the lands within the Hopi Industrial Park.

(b) Mortgages or deeds of trust; law governing mortgage foreclosure or sale; United States as party; removal of cases; appeals

To execute mortgages upon, or deeds of trust to, the lands within said Hopi Industrial Park. Such lands shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State of Arizona. The United States shall be an indispensable party to, and may be joined in, any such proceeding involving said lands with the right to remove the action to the United States district court for the district in which the land is situated, according to the procedure in section 1446 of title 28, and the United States shall have the right to appeal from any order of remand entered in such action.

(c) Pledge of revenue or other income to secure indebtedness for development of park; law governing action to enforce pledge; United States as party

To pledge any revenue or other income from lands within said Hopi Industrial Park, and the improvements situated thereon, and any other revenue or income that may be available to the Hopi Tribe without regard to source, to secure any indebtedness of the Hopi Tribe incurred in the development of said Hopi Industrial Park, and any action to enforce said pledge shall be in accordance with the laws of the State of Arizona, and the United States shall be an indispensable party thereto to the same extent and under the same conditions as hereinbefore provided in the case of mortgage foreclosures.

(d) Issuance of bonds and payment of costs thereof; sale of bonds at public or private sale

To issue bonds for and on behalf of the Hopi Tribe, and pay the costs thereof, to accomplish the purposes of this subchapter, in one or more series, in such denomination or denominations, maturing at such time or times, and in such amount or amounts, bearing interest at such rate or rates, in such form either coupon or registered, to be executed in such manner, payable in such medium of payment, at such place or places, subject to such terms of redemption, with or without premium, and containing such other restrictive terms as may be provided by tribal ordinance. Such bonds may be sold at not less than par at either public or private sale and shall be fully negotiable.

(e) Appointment of bank or trust company as trustee for purposes of authorization and creation of issue of bonds; authority to commence action to enforce obligations to tribe without joining United States as party

To appoint a bank or trust company with its home office in the State of Arizona having an officially reported combined capital, surplus, undivided profits and reserves aggregating not less than $10,000,000 as trustee for all of the purposes provided in the ordinance authorizing and creating any issue of bonds. Any trustee so appointed may be authorized to commence an action for and on behalf of, or on relation of, the Hopi Tribe to enforce any obligation to the tribe pledged to secure payment of the bonds without joining the United States as a party thereto.

[3] So in original. Probably should be "not to".