Receipt number AUSFCC-7281377

UNITED STATES COURT OF FEDERAL CLAIMS

NAVAJO NATION, a federally recognized Indian Tribe; IDENTIFIABLE GROUP OF RELOCATION BENEFICIARIES, consisting of "Navajo families residing on Hopi-partitioned lands as of December 22, 1974[,]" per Public Law 93-531, § 11(h), 88 Stat. 1712, 1716 (1974), as amended and previously codified at 25 U.S.C. § 640d-10(h),	)	
Plaintiffs,	)	
v.	)	No. 21-1746 L
UNITED STATES,	)	
Defendant.	)	

COMPLAINT

1. Plaintiffs the Navajo Nation ("Nation") and the Identifiable Group of Relocation Beneficiaries ("Relocation Beneficiaries"), which consists of over 4,000 "Navajo families residing on Hopi-partitioned land as of December 22, 1974[,]" bring this action for damages and a remand regarding federal maladministration of grazing, leasing, rights of way, and revenue deposits, investments, and expenditures concerning about 376,000 acres of lands administered by the United States in trust for the Nation and used solely for the benefit of the Relocation Beneficiaries under Section 11 of the 1974 Navajo-Hopi Settlement Act ("Section 11"), Pub. L. 93-531, § 11, 88 Stat. 1712, 1716, as amended by the 1980 and 1988 Navajo and Hopi Indian Relocation Amendments Acts (altogether, the "Relocation Act") and previously codified at 25 U.S.C. § 640d-10.[1]

[1]The Relocation Act was previously codified at 25 U.S.C. §§ 640d to 640d-31 but omitted in a 2016 reclassification of 25 U.S.C. "as being of special and not general application." *See* 25 U.S.C. § 640d note (2016). That "[e]ditorial omission from the Code has no effect on the validity of" the Relocation Act. Office of Law Revision Counsel, U.S. House of Reps., Ed. Reclassif.: Title 25, U.S.C., available at https://uscode.house.gov/editorialreclassification/t25/index.html (last visited Aug. 23, 2021). This Complaint cites the 2015 codification of the Act for ease of reference. *See Rico v. Office of Navajo & Hopi Indian Relocation* ("*ONHIR*"), 2018 WL 3629109, *1 n.2 (D. Ariz. July 31, 2018); *cf. Singer v. ONHIR*, 2020 WL 4530477, *1 (D. Ariz. Aug. 6, 2020).

JURISDICTION

2. This Court has jurisdiction over this action under the Tucker Act because this action involves claims against the United States for money damages founded on the Relocation Act, federal regulations, and binding federal policies. *See* 25 U.S.C. § 640d-10; 28 U.S.C. § 1491(a)(1).

3. This Court also has jurisdiction over this action under the Tucker Act for equitable relief incident and collateral to a money judgment, to remand appropriate matters to the Office of Navajo and Hopi Indian Relocation ("ONHIR"), the U.S. Department of the Interior ("DOI"), and their officials with such directions as the Court deems proper and just. *See* 28 U.S.C. § 1491(a)(2).

4. Finally, this Court also has jurisdiction over this action under the Indian Tucker Act because it involves claims arising under federal laws against the United States accruing after 1946, in favor of a federally recognized Indian tribe and "an identifiable group of American Indians residing within the territorial limits of the United States[.]" *Id.* § 1505.

PARTIES

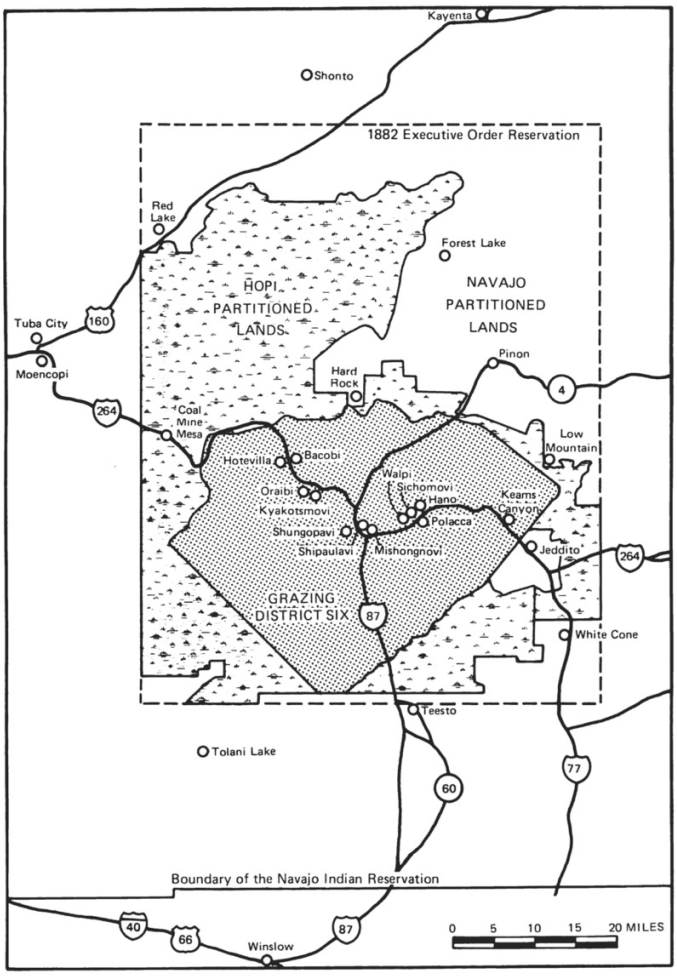
5. The Plaintiff Nation is a federally recognized Indian Tribe, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021), formerly known as the Navajo Tribe, and sole beneficial owner of land transferred to or acquired by "the United States in trust for the benefit of the Navajo Tribe of Indians as a part of the Navajo Reservation" under Section 11(a) of the Relocation Act, 25 U.S.C. § 640d-10(a).

6. The Plaintiff Identifiable Group of Relocation Beneficiaries consists of American Indians identified in Section 11(h) of the Relocation Act as "Navajo families residing on Hopi-partitioned land [("HPL"), which is now part of the Hopi Reservation,] as of [the Act's initial enactment date of] December 22, 1974[,]" such that "[t]he lands transferred or acquired pursuant to" Section 11 in trust for the Nation "shall be used solely for the benefit of" the Relocation Beneficiaries. 25 U.S.C. § 640d-10(h); *see* 88 Stat. 1712 (enactment date).

7. The Relocation Beneficiaries include the later-born children of those families. *Cf.* 25 C.F.R. § 700.145(b) (providing benefits for surviving minor members of households).

8. As the statutorily defined group of sole beneficiaries for use of lands acquired or transferred under Section 11, the Relocation Beneficiaries have a direct, distinct, and common legally protectable interest here that is not merely based on their Navajo citizenship and is separate from the interests of the Nation and other Navajo citizens.

9. The single 1882 Reservation for the Nation and the Hopi Tribe includes Grazing District Six, which was adjudicated for the Hopi Tribe, and the former Joint Use Area ("JUA"), which was adjudicated between what is now Navajo-Partitioned Land ("NPL") and HPL, *see* 25 U.S.C. § 640d(a), where Relocation Beneficiaries or their parents resided in 1974, as shown here:



Sources: U.S. Gov't Accountability Office ("GAO"), ONHIR: Executive Branch and Legislative Action Needed for Closure and Transfer of Activities, No. GAO-18-266, at 6 (April 2018) ("2018 GAO Report"); Navajo and Hopi Indian Relocation Commission ("NHIRC"), Report and Plan at 197 (April 3, 1981) ("Relocation Plan"). *See* Exec. Order of Dec. 16, 1882, in *Healing v. Jones*, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

10. The Relocation Beneficiaries' residency on HPL on December 22, 1974 may be confirmed based on legal residency for heads of households or their immediate families, including parents or guardians for minors. *See* 25 C.F.R. § 700.97. Under that standard, legal residence on HPL existed even if one was temporarily away for education or employment if they continued to have substantial and recurring contact with their HPL residence.

11. The Relocation Beneficiaries comprise at least 3,726 families, including now over 17,000 Navajo citizens, based on the current number of "certified eligible heads of households" identified by ONHIR for purposes of relocation benefits under the Relocation Act, regardless of whether they actually received benefits under the Relocation Act. *See* 25 U.S.C. § 640d-13(a) (authorizing and directing relocation by ONHIR); 25 C.F.R. § 700.49 (defining quoted term).

12. The Relocation Beneficiaries also include about 120 families comprising about 700 Navajo citizens that have remained on HPL via accommodation agreement leases signed with the Hopi Tribe (c.k.a. "AA-Signers") as authorized by the Relocation Act, 25 U.S.C. § 640d-28(d), and about four families comprising about 25 Navajo citizens that have remained on HPL without such leases (c.k.a. "Resisters"), *see* 2018 GAO Report at 19. Thus, the Relocation Beneficiaries include a minimum of 3,871 Navajo families. But there are also likely many more.

13. The Relocation Beneficiaries also include an unknown number of currently 3,208 additional Navajo families that have been denied relocation benefits under the Relocation Act, consisting of those families whose benefits applications were denied because they did not establish a "head of household" under ONHIR's regulations as of when they moved from HPL, but who nonetheless resided on HPL as of December 22, 1974. *See* 25 C.F.R. § 700.69 (defining "household" and "head of household"); *cf. id.* § 700.127(a) (providing for payments for habitations and improvements owned by Navajo HPL residents who have been denied relocation benefits).

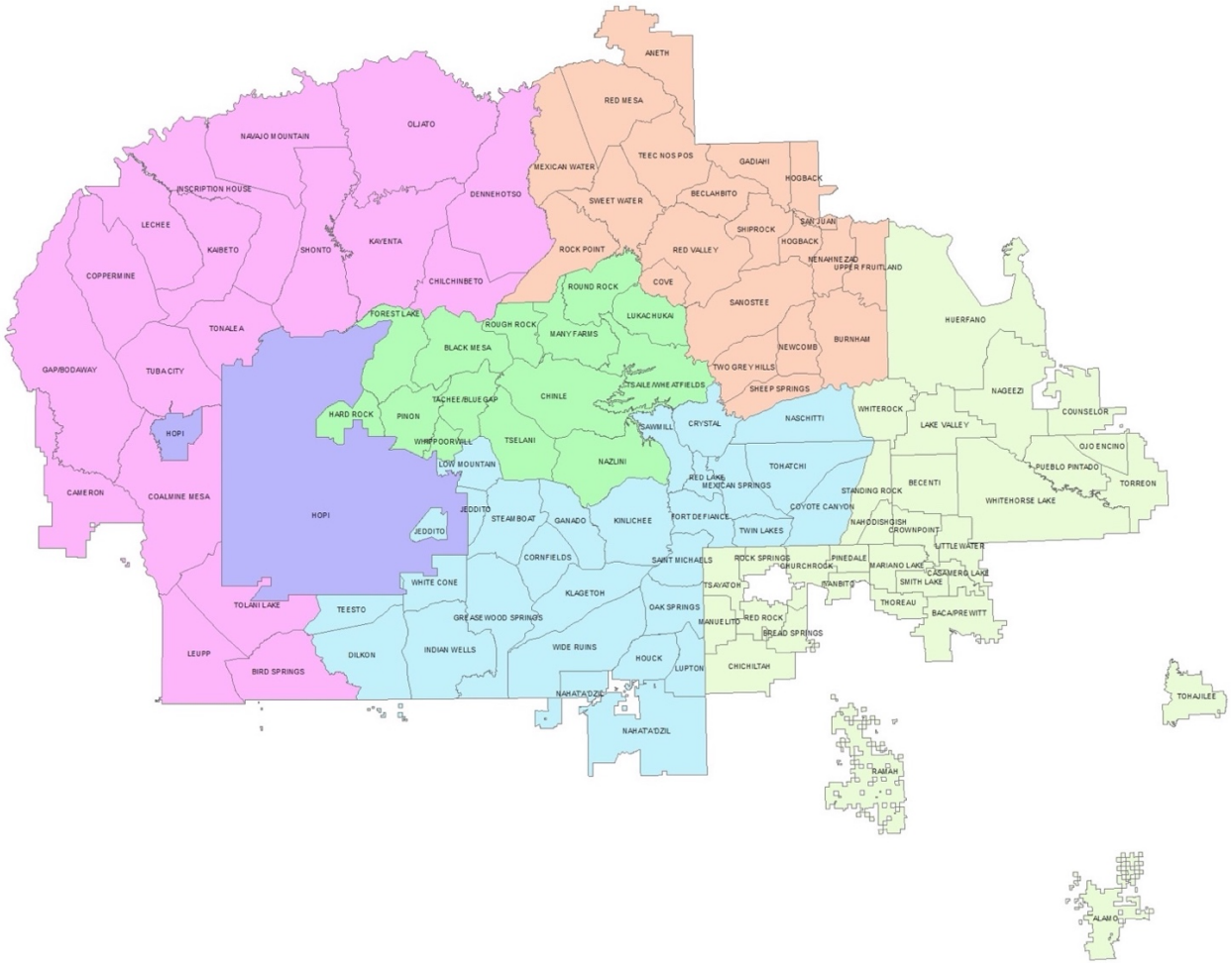
14. The Relocation Beneficiaries also include a currently unknown number of yet additional Navajo families that resided on HPL as of December 22, 1974, but did not apply for relocation benefits under the Relocation Act. *See* 25 C.F.R. §§ 700.138-.139 (addressing persons who did not apply for relocation benefits). Those people and those denied benefits are refugees.

15. An accurate determination of the full membership of the Relocation Beneficiaries should be known and should have been determined by ONHIR and its predecessor, which as trustees have had a fundamental duty since 1980 to promptly ascertain the beneficiaries under Section 11(h). *See* Restatement (Third) of Trusts § 76(2)(a) & cmt. c (2007).

16. Among the 3,726 Navajo families identified above as certified eligible for benefits under the Relocation Act, the Relocation Beneficiaries include over 3,600 families comprising over 16,000 Navajo citizens that have been relocated from HPL by the United States (c.k.a. "Relocatees"), regardless of whether they received related benefits from ONHIR. *See* 25 U.S.C. §§ 640d-13(a) (authorizing and directing relocation); *Manybeads v. United States*, 730 F. Supp. 115, 1520 (D. Ariz. 1989), *aff'd*, 209 F.3d 1164 (9th Cir. 2000) (acknowledging that relocation under the Act "has never been . . . a voluntary undertaking"); 2018 GAO Report at 1.

17. Of the Relocatees, approximately 421 families so far (*i.e.*, less than 11% of the known Relocation Beneficiaries) have relocated to certain lands which have been transferred to or acquired by the United States in trust for the Nation as part of its Reservation under Section 11, located near Sanders, Arizona, about 60 miles southeast of the 1882 Reservation, and which now constitute the Nahata Dziil Chapter ("NDC") of the Nation, while over 2,000 other Relocatee families so far have relocated to other Chapters of the Navajo Reservation besides the NDC, and over 1,200 Relocatee families so far have relocated off-reservation.

18. The Chapters are 110 local government political subdivisions of the Nation, which are similar in function to municipalities, *see* 26 Navajo Nation Code § 2(6), and are shown here:



Source: ArcGIS, Navajo Nation Political Boundaries (April 16, 2019), available at https://www.arcgis.com/sharing/rest/content/items/108d7cbecbca42549c49b1454bfa7c9c/info/thumbnail/thumbnail.JPEG (last visited Aug. 23, 2021).

19. In accordance with established practice under the Indian Tucker Act, the Relocation Beneficiaries are represented here by the following members thereof (collectively, "Beneficiary Representatives"), each of whom is a Navajo citizen residing within the territorial limits of the United States and a member of a Navajo family that resided on HPL as of December 22, 1974:

(1) Glenna Begay is a Resister who lives in the Hard Rock area of HPL, where she has lived her whole life and her family has lived for at least four generations, where her umbilical cord is buried (which reinforces her lifelong connection to the area), who only speaks Navajo and whose children are Relocatees, and whose late husband, Teddy W. Begay, was also a Resister and advocate for the Navajo Nation before the United Nations;

(2) Mary Katherine Smith is an AA-Signer who is familiar with the relocation program history under the Relocation Act, active in the Navajo HPL community, and has lived her entire life in the Big Mountain area on HPL, where her late mother, a Resister, also lived, near the Tsé Dildó'ii (f.k.a. Hard Rock) Chapter of the Nation;

(3) Betty Tso is an AA-Signer who resides with other members of her family in Mosquito Springs on HPL, where they are from, near the Tsé Dildó'ii Chapter of the Nation, and she knows most Navajo HPL families and has been active in their issues dating back to being a lead plaintiff for a dozen years in *Manybeads*, *supra*;

(4) Tim Johnson is an AA-Signer who has been an active member of and advocate for the Navajo HPL community for over 20 years and resides on HPL near the Tsé Dildó'ii Chapter of the Nation, for which he is the Chapter President, and which is bounded on three sides by HPL, as shown in the second figure above;

(5) Joan Chissie is a Relocatee who relocated with her family to Tuba City, Arizona, within the To'Nanees'Dizi (f.k.a. Tuba City) Chapter of the Nation, which is located in an area west of the 1882 Reservation that was added to the Navajo Reservation in 1900, within the Former Bennett Freeze Area, where from 1966 to 2009 the United States imposed a building freeze except for limited areas around Tuba City and the Hopi Moenkopi village, *see Navajo Nation v. United States*, 631 F.3d 1268, 1270-71 (Fed. Cir.

2011) (discussing freeze); Pub. L. 111-18, 123 Stat. 1611 (2009) (repealing freeze previously codified at 25 U.S.C. § 640d-9(f));

(6) Sara Slim is a Relocatee who relocated from the Blue Canyon area on HPL with her family in 1994 when she was a minor to just northwest of HPL, within the Tonalea Chapter of the Nation, for which she subsequently served as Chapter Vice-President, and where she still lives in her family's relocation home on NPL within the 1882 Reservation;

(7) Calvin Tso is a brother of Betty Tso, identified above, and also was born and raised in the Mosquito Springs area of HPL near the Tsé Dildó'ii Chapter of the Nation, but he relocated with his parents to the NDC, where he has been better able to raise and graze livestock and where he still lives in their relocation house with his children;

(8) Tina Glenabah Coleman (born Tso) is a Relocatee who was born in 1958 and lived in the Blue Canyon area of HPL until she was relocated to the NDC in 2005;

(9) Bahe Katenay is a former Resister who is now a Relocatee and resides off the Navajo Reservation in a recently built relocation house in a rural area outside Flagstaff, in Coconino County, Arizona, about 60 miles southwest of the 1882 Reservation; and

(10) Aresta Tsosie-Paddock is a Relocatee to Mesa, Arizona, about 190 miles southwest of the 1882 Reservation, and is associated with the Nation's Leupp Chapter, and is an Assistant Professor of Linguistics at Arizona State University and author of "Second-Generation Navajo Relocatees: Coping with Land Loss, Cultural Dispossession, and Displacement," 33 Wicazo Sa Review 87 (2018).

20. The Beneficiary Representatives can fairly and adequately protect the interests of the Relocation Beneficiaries, including seeking appropriate relief for the Relocation Beneficiaries.

21. Defendant the United States holds in trust for the Nation all lands transferred or acquired under Section 11(a) of the Relocation Act. 25 U.S.C. § 640d-10(a). Under Section 11(h) of the Relocation Act, the United States exclusively administers those lands, uses them solely for the benefit of Relocation Beneficiaries, and has sole planning authority for final planning decisions regarding development thereof, all through the ONHIR Commissioner. *Id.* § 640d-10(h).

22. ONHIR is an independent federal executive branch entity established under the Relocation Act in 1988 as successor to the NHIRC. *Id.* §§ 640d-11(a), (c). Also, in 1994, ONHIR's full authority was delegated to its Executive Director (who has served in that position since 1985) and ONHIR has not had a Commissioner since 1994. Therefore, NHIRC and ONHIR and their officials are each and collectively referred to here as "ONHIR" except where relevant.

23. The U.S. Department of the Interior ("DOI") is a federal executive department that is legally responsible to administer, manage, and maximize earnings from funds held in trust for American Indian Tribes, individual American Indians, and identifiable groups of American Indians. *See* 25 U.S.C. §§ 161, 161a, 162a, 4011; 43 U.S.C. § 1451.

NEW LANDS ACQUISITIONS UNDER THE RELOCATION ACT

24. The Relocation Act mandated the now-completed partition between the Nation and the Hopi Tribe of the former JUA lands within the 1882 Reservation, 25 U.S.C. §§ 640d(a), 640d-7(b), 640d-9, as well as the still-pending relocation of Navajos from HPL and the completed relocation of 28 Hopi families from NPL, pursuant to the NHIRC's 1981 Relocation Plan, *see* Pub. L. 93-531, § 13(a), (c), 88 Stat. 1717-18 (previously codified at 25 U.S.C. §§ 640d-12(a), (c)); 25 U.S.C. § 640d-13(a); NHIRC, Report and Plan: 1983 Update, at 2 (June 1983); 2018 GAO Report at 7 n.7. *See Masayesva v. Hale*, 118 F.3d 1371, 1375-76 (9th Cir. 1997).

25. In addition, Section 11 provides for transfer of up to 250,000 acres of land in Arizona and New Mexico from the Bureau of Land Management ("BLM") and acquisition of up to 150,000 acres of private land close to the Navajo Reservation, for a total of 400,000 acres, all in trust for the Nation as part of the Navajo Reservation, to compensate the Nation for the loss of almost 900,000 acres of land previously occupied and used by the Nation within the JUA. *See* 25 U.S.C. § 640d-10(a)-(b); *Bedoni v. NHIRC*, 878 F.2d 1119, 1124 (9th Cir. 1989).

26. Since 1987, the United States has transferred and acquired in trust for the Nation about 375,900 acres out of the total allowable limit of 400,000 acres of land under Section 11. *See* DOI, Office of Inspector General, Report No. 2020-WR-016-C, Status of ONHIR's Land Section in Arizona and New Mexico (Sept. 2020) ("2020 DOI Selection Report") at 4-5. These lands are referred to in the previously codified version of the Relocation Act as the "Resettlement lands[,]" *see* 25 U.S.C. § 640d-10 (title), but are collectively referred to by ONHIR and the Nation as the "New Lands[,]" 25 C.F.R. § 700.701(b). The Hopi Tribe has no interest in these lands.

27. About 352,000 acres of the New Lands were acquired in trust in 1987 and are located near the unincorporated communities of Sanders and Chambers, in Apache County, in eastern Arizona, and comprise land within the NDC. *See* 2020 DOI Selection Report at 3.

28. Most of the NDC lands are used for residences and grazing for the less than 11% of known Relocation Beneficiaries who relocated to the NDC, while other New Lands within the NDC are used for various governmental and commercial purposes.

29. Approximately 60,000 acres of the New Lands within the NDC constitute the Padres Mesa Ranch, which ONHIR has used since fiscal year ("FY") 2009 for non-Navajo cattle ranching and livestock marketing and demonstration of those practices to Relocatees. *See* 2018

GAO Report at 9; GAO, Decision B-329446, Re: ONHIR—Compliance with the Purpose Statute and the Miscellaneous Receipts Statute (Sept. 17, 2020) ("GAO Ranch Decision") at 4.

30. Additional New Lands acquired under Section 11 located outside the NDC are:

(1) the Paragon Ranch, consisting of over 34,000 acres south of Farmington, New Mexico (including about 11,000 acres not yet taken in trust);

(2) the Tse Bonito parcel, consisting of about 86 acres located in New Mexico about three miles east of Window Rock, Arizona, acquired in trust for the Nation in 2016, of which only about 13 acres are used by the Navajo Division of Transportation;

(3) the Twin Arrows parcel, consisting of about 433 acres located on I-40 about 24 miles east of downtown Flagstaff, Arizona, acquired in trust for the Nation in 2011, and of which 406 acres have been leased by the Nation to the Navajo Nation Gaming Enterprise ("NNGE") for development and operation of the Twin Arrows Navajo Casino Resort; and

(4) the Turquoise Ranch, consisting of about 374 acres near Winslow, Arizona, and acquired in trust for the Nation in 2012. *See* 2020 DOI Selection Report at 3.

NEW LANDS ADMINISTRATION UNDER THE RELOCATION ACT

31. Section 11(h), 25 U.S.C. § 640d-10(h), provides thus:

> The lands transferred or acquired pursuant to this section shall be administered by the Commissioner [i.e., ONHIR] until relocation under the Commission's [1981 relocation] 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[, *i.e.*, the Relocation Beneficiaries]; 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.

Because there has been no ONHIR Commissioner since 1994, all these authorities and duties have been administered since then by and for ONHIR via its Executive Director. Section 11(h) requires ONHIR to administer all the New Land acquired pursuant to the Relocation Act and held in trust

for the Navajo Nation until the still-ongoing relocation under the Relocation Act is complete.

32. Under Section 12(c)(2)(A) of the Relocation Act, ONHIR also possesses "all powers and duties" that previously were assigned to DOI in Public Law 99-190, 99 Stat. at 1236, that relate to relocation of Navajos from Hopi lands. 25 U.S.C. § 640d-11(c)(2)(A). Under those powers and duties, ONHIR "may issue leases and rights of way for housing and related facilities to be constructed on the lands which are subject to Section 11(h) of the Act of December 22, 1974, as amended (25 U.S.C. 640d-10(h))." Pub. L. 99-190, 99 Stat. 1185, 1236 (1985).

33. All these specific provisions of the Relocation Act individually and collectively establish comprehensive and exclusive control over the New Lands by the United States and bear the hallmarks of a conventional fiduciary relationship, including specific affirmative, enforceable fiduciary duties regarding administration of the New Lands by the United States for the benefit of the Nation and the Relocation Beneficiaries.

34. The establishment of these duties under the Relocation Act is confirmed and reinforced by federal regulations and the ONHIR Management Manual ("OMM"), each of which reiterate and implement federal administration responsibilities for the New Lands, respectively regarding grazing under the regulations and rights-of-way, leasing, and surface use agreements under the OMM, and both of which provide additional bases for trust maladministration claims.

35. Because ONHIR's regulations expressly prescribe that ONHIR's operations "shall be governed by" the OMM, 25 C.F.R. § 700.219(a), ONHIR intended the OMM to be binding on ONHIR, and the OMM constitutes a fundamental document that provides an additional substantive source of law for enforceable fiduciary duties here. *See* 2018 GAO Report at 42.

36. ONHIR has federal trust responsibilities under the Relocation Act to administer the New Lands for the benefit of the Nation and the Relocation Beneficiaries. Also, in carrying out those statutory duties, ONHIR must act consistent with the most exacting fiduciary standards.

37. As ONHIR has acknowledged to the Nation in 2009, if the duties under the Relocation Act are not complied with regarding the New Lands, the Relocation Beneficiaries would be able to successfully litigate their rights under the Act.

CLAIM 1: NEW LANDS GRAZING TRESPASS AND MALADMINISTRATION

38. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

39. Under the Relocation Act, ONHIR has promulgated regulations that govern New Lands grazing. 25 C.F.R. Part 700, subpart Q, §§ 700.701-.301. Those regulations, entitled "New Lands Grazing[,]" serve to aid Navajos in preserving the forage, the land, and the water resources of the New Lands and in relocation of Navajos from the HPL to the New Lands. *Id.* § 700.705.

40. ONHIR's New Lands grazing program serves the goal of incorporating traditional Navajo grazing practices with the federal trust responsibility for long-term sustained yield management of rangeland resources, as ONHIR reported to the Nation in January 2016.

41. Among other things, ONHIR's grazing regulations provide that "[a]ll livestock grazed on the New Lands must be covered by a grazing permit authorized and issued by" ONHIR. *Id.* § 700.711(a). ONHIR's grazing regulations also restrict eligibility or qualifications to receive grazing permits. *Id.* § 700.709(a); *see* OMM § 1846 at 1. Such permit holders must be Relocatees from the HPL. 25 C.F.R. § 700.709(a); *see* OMM § 1846 at 1. New Lands grazing permittees also must be "enrolled Navajo" citizens and maintain "permanent residency on the New Lands Range Unit of permit issue[.]" 25 C.F.R. § 700.711(b); *see* OMM §§ 1841.1.2, 1850 at 1.

42. In addition, grazing permit holders must "[o]wn livestock which graze on the range unit of permit issue" and grazing permits "will be issued for a base of 80 SUYL (20 AU)[, *i.e.*, 80 "Sheep Units Grazed Yearlong" or 20 "Animal Units,"] and may not be divided or transferred for less than 80 SUYL." 25 C.F.R. § 700.711(b)(4), (c); *see id.* § 700.701(i), (k) (defining AU and SUYL). Those specific AU and SUYL requirements are "base permits" that are "indivisible" and "of a size to permit responsible livestock management by permit holders." ONHIR, Final New Lands Grazing Regulations, 56 Fed. Reg. 13,396, 13,396-97 (April 2, 1991). In contrast, "[s]ub-permitting is unacceptable as it provides a method for official division of permits and invites the unacceptable practice of absentee grazing." *Id.* at 13,397.

43. The grazing of livestock on "any of the New Lands without a current approved grazing . . . permit" is prohibited and constitutes livestock trespass. 25 C.F.R. § 700.725(a). Also,

> [t]he owner of any livestock grazing in trespass on the New Lands is liable to a civil penalty of $1 per head per day for each cow, bull, horse, mule, or donkey and 25¢ per head per day for each sheep or goat in trespass and a reasonable value for damages to property injured or destroyed. The Commissioner may take appropriate action to collect all such penalties and damages and seek injunctive relief when appropriate. All payments for such penalties and damages shall be paid to the Commissioner for use as a range improvement fund.

Id. § 700.725. ONHIR has not waived or amended these regulatory provisions.

44. Because that regulation has clear standards for paying civil penalties, specifies precise amounts to be paid, and compels payment of penalties and damages for livestock trespass, the collection of those penalties is mandatory rather than discretionary for the United States.

45. ONHIR's grazing regulations also govern the tenure, assignment, modification, and cancellation of grazing permits, stocking rates, grazing fees, range management plans, grazing associations, control of livestock disease and parasites, livestock trespass, and impoundment and disposal of unauthorized livestock. *Id.* §§ 700.713-.727.

46. These detailed regulations governing New Lands grazing, in conjunction with their authorizing mandate in Section 11(h), individually and collectively establish comprehensive and exclusive federal control over New Lands grazing and bear the hallmarks of a conventional fiduciary relationship, including specific affirmative, enforceable fiduciary duties regarding New Lands grazing administration.

47. This detailed federal regulatory control is significant because "livestock . . . was and is an important aspect of the Navajo economy and way of life[,]" dating back to before 1680. *Navajo Tribe v. United States*, 9 Cl. Ct. 336, 343 (1986). Because of this, Navajo people "depend on their sheep for economic and spiritual well-being." Hollis A. Whitson, A Policy Review of the Federal Government's Relocation of Navajo Indians under P.L. 93-531 and P.L. 96-305, 27 Ariz. L. Rev. 371, 387 (1985); *id.* at 387 n.125 (citing additional authorities). In addition, ONHIR acknowledged to the GAO in 2018 that the Relocation Act "directs ONHIR to exercise elaborate control over New Lands grazing – a resource that belongs to the [T]ribe and relocatees [sic, should be Relocation Beneficiaries]. Therefore, ONHIR has a fiduciary responsibility to manage this property and related resources for the benefit of these beneficiaries."

48. Notwithstanding this acknowledgement, the United States has failed to comply with its specific fiduciary duties to administer New Lands grazing as established by the Relocation Act and ONHIR's grazing regulations.

49. For example, among other New Lands, ONHIR has exclusively operated the Padres Mesa Ranch including maintaining grazing land, purchasing, grazing, and raising cattle, organizing and conducting cattle sales, doing outreach with New Lands ranchers, and using cattle sales proceeds to help pay for ranch operations. *See, e.g.,* OMM § 1870.

50. Among its operations at the Padres Mesa Ranch, ONHIR has grazed livestock there for many years without a grazing permit. 2018 GAO Report at 47. This has been done in violation of ONHIR's own grazing regulations, which require grazing permits and limit the eligibility for them to individual adult, enrolled Navajo citizens who are New Lands Relocatees. *See id.*; 25 C.F.R. §§ 700.709 -.710. These circumstances subject ONHIR to grazing trespass damages of at least "$1 per head per day for each cow, bull, horse, mule, or donkey" that ONHIR has had on the Padres Mesa Ranch, plus a reasonable value for damages to the property injured, for the entire period that those livestock have been on the Ranch. *See* 25 C.F.R. § 700.725.

51. ONHIR still had not addressed that grazing trespass two years after that was noted by the GAO. Instead, as of March 2020, ONHIR had 237 cows, 78 calves, and 8 bulls at the Padres Mesa Ranch, or 323 cattle total, plus five bulls leased from the Nation, and had a recommended level of 480 head of cattle. On information and belief, ONHIR also keeps horses at the Ranch.

52. ONHIR purportedly maintains an inventory of its cattle at the Padres Mesa Ranch on a whiteboard and additional data online. ONHIR plans to download and retain the online data before its access is discontinued but does not maintain hardcopy files of the online data.

53. In addition, ONHIR has long allowed the practice of wholesale "livestock leasing" under grazing permits on other New Lands, in which grazing permittees only graze livestock leased from others rather than own livestock which graze on the range unit of permit issue as required by ONHIR's regulations. This has allowed non-Indians who are not eligible for grazing permits to commit grazing trespass and benefit from these trust resources, and ONHIR has failed to assess or collect trespass penalties for such unpermitted livestock.

54. Furthermore, on information and belief, ONHIR has allowed non-Navajos to graze at least 80 cattle on the Paragon Ranch and has improperly not allowed grazing on the New Lands when to do so would benefit the Relocation Beneficiaries.

55. The United States has without authorization or legal right grazed livestock in trespass on the New Lands, failed to promptly pay trespass penalties and damages therefor, and otherwise failed to properly administer grazing on the New Lands, including without limitation by improperly allowing livestock leasing and other unauthorized trespass livestock grazing, without collecting required trespass penalties and damages therefor, and improperly not allowing or not properly administering grazing on the New Lands. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

56. These failures have directly harmed and will continue to directly harm the Plaintiffs by depriving them of valuable grazing land and additional trust revenue that should have been earned from grazing on the New Lands.

57. As a direct and proximate result of the United States' past and continuing grazing trespass on and grazing maladministration of the New Lands, the United States has damaged and continues to damage Plaintiffs and will continue to do so unless and until such trespass and maladministration are remedied.

58. These injuries are redressable by a favorable decision by this Court compensating the Plaintiffs for unauthorized grazing and lost revenues.

CLAIM 2: NEW LANDS LEASING MALADMINISTRATION

59. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

60. ONHIR possesses full authority to administer the New Lands as well as all powers and duties that before 1988 were assigned to DOI to "issue leases and rights-of-way for housing and related facilities" on the New Lands. 25 U.S.C. §§ 640d-10(h), 640d-11(c)(2)(A) (citing Pub. L. 99-190, 99 Stat. 1185, 1236 (1985), quoted here); OMM § 1810 at 1; 2018 GAO Report at 8.

61. Those "related facilities" have been long recognized to have a broad scope, encompassing a variety of facilities incidental to relocation, including commercial facilities and facilities for economic development. As ONHIR acknowledged in its 1990 update, economic development is essential to mitigating the adverse impacts of relocation.

62. Pursuant to the Relocation Act, the OMM provides for development, approval, and execution of business, commercial, industrial, and mineral leases for the New Lands. OMM § 1810.3. Individuals and entities that want to lease within the New Lands must apply to ONHIR including submitting required information and documents. *Id.*; 2018 GAO Report at 42.

63. To conduct a for-profit enterprise on the New Lands, an individual or entity must develop and lease with the Nation as Lessor and ONHIR as a concurring party, consult with the appropriate department of the Nation, execute the lease following the Nation's policy and procedure, and provide copies of all documents to ONHIR. OMM § 1810.325.1.

64. If the Nation requests ONHIR to be the Lessor, a lease applicant will work with ONHIR to develop the lease with the Nation as a concurring party. *Id.* § 1810.325.2. However, on information and belief, the Nation through properly authorized official action has never requested ONHIR to be the Lessor for leases.

65. Additional OMM provisions govern non-profit leases, with ONHIR's New Lands Manager negotiating leases and determining their durations and fees and any royalty and ONHIR

Legal Counsel drafting leases. *Id.* §§ 1810.321-.323. Since there are not separate OMM provisions for "surface use" agreements, those also are governed by the OMM provisions governing leases.

66. For all these New Lands land use conveyances, the OMM further provides "[i]n general, the forms and documentation used by ONHIR for land use approvals will be similar to those used by the Bureau of Indian Affairs [("BIA")] and the Navajo Nation on the remainder of the Navajo Indian Reservation[,]" OMM § 1810 at 1. Also, ONHIR requires that leases be recorded with the BIA Southwest Regional Land Titles and Records Office ("LTRO") and that ONHIR will file each original lease with ONHIR's records on the lease. *Id.*

67. Through these provisions of the OMM, as well as ONHIR's general statutory mandate to administer all the New Lands, 25 U.S.C. § 640d-10(h), and its reassigned authority over New Lands leasing, *id.* § 640d-11(c)(2)(A), ONHIR directly controls all New Lands leasing.

68. The specific provisions of the Relocation Act and the OMM individually and collectively establish comprehensive and exclusive federal control over New Lands leasing and bear the hallmarks of a conventional fiduciary relationship, including specific affirmative, enforceable fiduciary duties regarding New Lands leasing. ONHIR's exercise of leasing authority therefore must comply with federal trust duties to the Nation and the Relocation Beneficiaries.

69. However, "ONHIR Has Not Always Managed Navajo Trust Lands in Accordance with Its Policies" and "Has Entered Into Lease and Other Agreements for Navajo Trust Land but Has Not Properly Managed Them[.]" 2018 GAO Report at 42 (section titles).

70. As a first example of ONHIR's New Lands leasing maladministration, ONHIR does not have a full inventory of leased and vacant New Lands or of the leases or surface use agreements that ONHIR has entered into regarding the New Lands. *Id.* at 43. This violates ONHIR's duty under the Federal Records Act ("FRA") to "make and preserve records containing

adequate and proper documentation of the . . . decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101; 36 C.F.R. § 1220.30(a). The latter concern is acute here for the Nation and the Relocation Beneficiaries because the United States has a fiduciary duty to make and maintain "clear, complete, and accurate" records regarding Indian trust asset management. 2018 GAO Report at 104 n.26.

71. For example, ONHIR reported in 1990 that it continued to operate the Painted Desert Inn and other businesses that were acquired as part of a 1985 land selection for the New Lands, including a motel, restaurant/truck stop, coffee shop, gift shop, gas station, and campground/recreational vehicle park. That also includes the Sanders Post Office, which is an income-producing property on approximately 40 acres at the Sanders I-40 interchange, including frontage on old U.S. 66 and local roads, including the post office and five houses.

72. ONHIR has reported that through FY2013 it collected over $130,000 in rent from the Painted Desert Inn, over $59,000 in rent from the Sanders Post Office, and over $276,000 in rent for an industrial building. However, ONHIR has failed to maintain New Lands leasing records, including without limitation those for the Painted Desert Inn and the Sanders Post Office, even though records on those and other New Lands uses and administration are needed to ensure that ONHIR has properly discharged governing federal duties under the Relocation Act and the OMM.

73. Second, ONHIR has occupied or allowed others to occupy at least seven New Lands properties without a written lease, as required by the OMM. 2018 GAO Report at 43-44. Moreover, the OMM "calls for written leases and land use approvals for the New Lands, whether or not the Navajo Nation requests these. It is not the responsibility of the trust beneficiary to request a written lease." *Id.* at 104 n.26. Neither the Nation nor the Relocation Beneficiaries have duly

affirmatively authorized or consented to those lands uses, which are ultra vires. It is also unclear what lease payments, if any, are being made and what unauthorized representations ONHIR has made regarding those unauthorized land uses.

74. For example, ONHIR issued a permit for the use of one property in 2000 that was valid through 2005, and then had an oral agreement to extend the permit indefinitely. *Id.* at 44. However, the OMM provides for leases, not permits. Also, ONHIR only has a verbal agreement for use of a Head Start building. In addition to violating the OMM, these circumstances violate the FRA requirement to create records and to document substantive decisions and commitments made orally. *See* 36 C.F.R. § 1222.22(e).

75. Also, ONHIR failed to obtain leases for at least four New Lands properties that it occupies, including a headquarters and office, as well as the Padres Mesa Ranch and the buildings used there for Ranch operations. 2018 GAO Report at 43. Those properties include the ONHIR Sanders Office, the ONHIR Range Office in the Marty House/Chambers Office, and the Chambers Ranch/Padres Mesa Ranch headquarters. In addition, the Ranch buildings occupied by ONHIR without a lease include a house where meetings and trainings are held and where the Ranch manager stays at no charge for five or more nights per week in accordance with his hiring agreement. By comparison, when BIA uses tribal trust land for BIA buildings or facilities, BIA obtains a right of possession from the Tribe, which generally withdraws the land for administrative or governmental purposes. *Id.* at 44 n.84.

76. Also, ONHIR has allowed continued occupation or use or New Lands without a lease by the Federal Aviation Administration ("FAA") since September 2011. The prior FAA lease from 1987 to 2011 required annual rent payments of $3,000 from 1987 to 1991 and $5,357.89 for 1991 to 2011. Through FY2018, ONHIR has collected over $151,000 in rent from the FAA lease.

However, without records, it is uncertain what rents have been required or collected over the decade since the prior lease expired while the FAA has continued to occupy and use that land.

77. Also, ONHIR has allowed a Bashas' Diné (Super)Market to occupy and operate at the Nahata Dziil Shopping Center on New Lands in Sanders, Arizona, without a lease since at least 2018, without requiring rent. ONHIR also has allowed a Pizza Edge and a laundromat to occupy and operate at the Nahata Dziil Shopping Center without a lease or requiring rent.

78. Also, on information and belief, ONHIR has allowed the Arizona Department of Public Safety ("AZ-DPS") to occupy or use of New Lands without a lease since October 2020.

79. All these purported leases and other unauthorized conveyances of interests in the New Lands are void based on failure to execute required written leases as required by law. Any such purported conveyances do not create implied rights such as license or tenancy at sufferance because those would impermissibly contravene the Non-Intercourse Act, 25 U.S.C. § 177. Therefore, all those land users are trespassers.

80. Third, ONHIR has improvidently allowed New Lands to remain vacant and unused for extended periods. This includes at least the remainder of the Nahata Dziil Shopping Center not used by Bashas', the Pizza Edge, or the laundromat, as well as a Sale Barn or auction yard, an old clinic and administration building, and other commercial and industrial buildings. On information and belief, ONHIR also has improvidently allowed New Lands mineral interests to remain undeveloped while nearby non-Indian mineral rights have been developed and provided substantial returns for their owners. All this has caused additional harm and losses for Plaintiffs.

81. Fourth, for at least about 20 leases and three surface use agreements that ONHIR has for various New Lands parcels, ONHIR has acted as the lessor of those Navajo trust lands, contrary to the OMM and without due affirmative authorization by the Nation under Navajo law

and even though ONHIR does not have authority to lease the New Lands on its own. *See* 2018 GAO Report at 45. Those governing legal requirements cannot be waived or ignored, so all those leases and agreements are ultra vires and void.

82. Fifth, ONHIR has leased and otherwise allowed others to use multiple parcels of the New Lands with only approval by the NDC rather than the Nation itself, even though the NDC has not been authorized under Navajo law to have that authority and ONHIR has known about this issue at least since it acknowledged it in a July 2009 memorandum of understanding ("MOU") with the Nation regarding the Nahata Dziil Shopping Center. Specifically, neither the Navajo Nation Council's Resources Development Committee, nor its predecessor the Economic Development Committee, has adopted a resolution authorizing delegation of final approval authority for business site leases and approving an Administrative and Business Site Leasing Management Plan, as required under Section 201.3 of the Nation's Uniform Business Leasing Regulations. Therefore, all those leases and agreements are ultra vires and void.

83. For example, in 2015, ONHIR entered into a surface use agreement with Ranger Development LLC ("Ranger") for use of about 320 acres of New Lands for helium production ("Ranger Helium Agreement" or "RHA"), with only concurrence by the NDC and not the Nation as required under the OMM and Navajo law. The RHA authorizes helium or oil or gas wells and related roads, well sites, tank batteries, power lines, and well compression and gas gathering equipment and pipelines, for a term for the shorter of 20 years or the duration of leases for the underlying mineral rights. The RHA provides for an initial payment of $2,500 per well, plus $2,500 per acre for any surface disturbance, and then, beginning one year after the initial payment, if helium is produced commercially, annual payments to the NDC of $1,000 per well.

84. Similarly, in 2016, ONHIR entered into a surface use agreement with Vision Energy, LLC, since assigned to Evolution Exploration, LLC, for use of about 50 acres of New Lands for helium production ("Evolution Helium Agreement" or "EHA"), with only concurrence by the NDC and not the Nation as required under the OMM and Navajo law. The EHA authorizes helium or oil or gas wells and related roads, well sites, tank batteries, power lines, and well compression and gas gathering equipment and pipelines, for a term for the shorter of 20 years or the duration of leases for the underlying mineral rights. The EHA provides for initial payments totaling $6,838 and then, beginning one year after the initial payments, if helium is produced commercially, annual payments to the NDC of $5,000 per gas plant.

85. In addition, in 2006, ONHIR leased 30 acres of New Lands to Englehard Corporation ("Englehard") for maintaining an office and shop and constructing and operating a sand processing and storage facility (collectively, "Silica Plant"). That lease was only concurred in by the NDC and not the Nation itself as required under the OMM and Navajo law, and that lease provided for payment of annual rent to the NDC starting at $50,000, with annual adjustments based on the Consumer Price Index.

86. In 2012, ONHIR amended the Silica Plant lease with Englehard's successor, Preferred Sands of Arizona, LLC ("Preferred Sands"), again with only the concurrence of the NDC and not the Nation as required under the OMM and Navajo law, increasing the subject land by an additional 34.5 acres and increasing the annual base rent to $107,500.

87. In 2019, Preferred Sands changed its name to Silica Services Mining, LLC ("Silica Services"), and in February 2021, ONHIR entered into a second Silica Plant lease amendment with now Silica Services, again with only the concurrence of the NDC and not the Nation as required

under the OMM and Navajo law, providing for payment of the annual rent to the NDC for 2021 in four equal installments of $35,206.25, for a total of $140,825.

88. In contrast, in 2017 and 2018, ONHIR entered into a second and third surface use agreements with Ranger for helium production from additional areas of the New Lands, but those agreements were expressly approved by the Nation.

89. On information and belief, ONHIR has allowed to be paid to the NDC, where less than 11% of known Relocation Beneficiaries are residents, over $1.5 million under the Silica Plant lease and thousands of additional dollars under the RHA and the EHA, all without the consent of the Nation or the rest of the Relocation Beneficiaries.

90. Separately, in 2016, ONHIR entered into a 15-year surface land use agreement with Preferred Sands with the concurrence of both the Nation and the NDC for over 350 acres of New Lands, for mining silica sands from the mineral estate there, for a total sum of $700,000 to be paid into an escrow account approved by the Nation, ONHIR, and the NDC until the Nation and the NDC agree on allocation and use of the funds solely for the benefit of all Relocation Beneficiaries. However, on information and belief, ONHIR allowed those funds to be paid to and used by the NDC rather than be deposited and held in trust for the Relocation Beneficiaries.

91. Sixth, ONHIR as lessor, without authorization by the Nation as required under the OMM, has leased New Lands to others without the consent of the Nation, as also required under the OMM, improvidently with below-market rent, including no more than nominal rent (i.e., not more than $1 per year). This has been done for at least 11 New Lands leases, 2018 GAO Report at 46, and fails to provide proper consideration for the benefit of the Nation and the Relocation Beneficiaries in accordance with ONHIR's fiduciary duty to properly administer the New Lands.

92. For example, from 1996 through 2005, ONHIR leased to the U.S. Indian Health Service ("IHS") a 4.11-acre tract and a 1.80-acre tract including a 4,380-square foot Health Clinic Building with related space and 20 parking spaces in Sanders, Arizona (a.k.a., "Sanders Health Center") for only $1 per year. For 2005 to 2011, ONHIR and IHS entered a new lease for the same facility with no rent, asserting that "consideration for this lease shall be the health care services to be provided to the Indian people at this location." Failure to require IHS to pay market rent violates federal law because IHS has a preexisting "statutory mandate to provide health care to Indian people[.]" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993); *see* 25 U.S.C. §§ 13, 1601, 1602, 1661.

93. Similarly, in 1991, ONHIR as lessor entered into a 99-year lease with the Sanders Unified School District, a district of the State of Arizona School System, for approximately 69 acres of the New Lands in Sanders, Arizona, for the purpose of constructing, maintaining, and using a school and related buildings, for annual rent of $1. ONHIR did not justify its failure to require proper fair-market rent and could not because Arizona law requires that a school be established and maintained in every school district for at least six months in each year, open to all pupils between the ages of six and 21 years, Ariz. Const. art. XI, § 6, and that every child between the ages of six and 16 years shall be provided school instruction, Ariz. Rev. Stat. § 15-802(A).

94. Similarly, from 1997 through at least 2020, ONHIR has leased land to AZ-DPS for a radio communications site for only $240 per year. In contrast, ONHIR leases for $200 per month the Nichol House at the Padres Mesa Ranch to a cowboy who works there.

95. Finally, ONHIR in 2015 improvidently authorized the RHA with annual payments of $1,000 per well, which is substantially below market value.

96. Through all the above, the United States has failed to properly administer New Lands leasing in multiple ways and directly harmed and will continue to directly harm the Plaintiffs

by depriving them of additional trust revenue that should have been earned and collected from properly leasing the New Lands. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

97. As a direct and proximate result of the United States' past and continuing maladministration of New Lands leasing, the United States has damaged and continues to damage Plaintiffs and will continue to do so unless and until that maladministration is remedied.

98. All these injuries are redressable by a favorable decision by this Court compensating the Plaintiffs.

CLAIM 3: NEW LANDS RIGHTS OF WAY MALADMINISTRATION

99. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

100. The mandate of Section 11(h) of the Relocation Act that the New Lands "shall be administered" by ONHIR establishes comprehensive and exclusive federal control over New Lands rights of way. Also, ONHIR possesses all powers and duties that before 1988 were assigned to DOI to "issue leases and rights-of-way for housing and related facilities" on the New Lands. *See* 25 U.S.C. § 640d-11(c)(2)(A) (referencing Pub. L. 99-190, 99 Stat. 1185, 1236 (1985), quoted here); 2018 GAO Report at 8.

101. To implement those statutory directives, the OMM provides that "[a]pplications for rights-of-way (ROW) on the New Lands shall conform to the requirements of 25 CFR 169." OMM § 1810.11 at 1. For this, the OMM provides for submission of relevant information to ONHIR for an application for a right of way, *id.* § 1810.11, followed by review by the BIA Navajo office, the Nation, and the NDC, *id.* § 1810.13, and then final approval by ONHIR, *id.* § 1810.14.

102. Among other things, the incorporated regulatory requirements for rights of way in effect during relevant periods provided that no right of way shall be granted over and across any tribal land without the prior written consent of the tribe. 25 C.F.R. § 169.3 (1971, redesignated 1982, superseded 2016). That consent requirement still applies for rights of way issued on or after April 21, 2016. *Id.* §§ 169.7(a), 169.107(a) (2016).

103. In contrast, any unauthorized occupancy, possession, use of, or action on tribal trust land is trespass. *Id.* § 169.413 (2016).

104. The governing right-of way regulations also long provided the following:

> Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary [of the Interior], the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.

Id. § 169.12 (1980, redesignated 1982, superseded 2016). The requirement for fair market value absent tribal consent still applies. *See id.* §§ 169.110, 169.114 (2016). Also, "[u]pon satisfactory compliance with the regulations in this part 169, the Secretary is authorized to grant the right-of-way by issuance of a conveyance instrument in the form approved by the Secretary." *Id.* § 169.15 (1968, redesignated 1982, superseded 2016). Since 2016, those regulations also have specifically required protection of the best interests of the Indian landowners. *Id.* § 169.124(a)(1)-(2) (2016).

105. All these specific statutory and regulations impose enforceable fiduciary duties for federal administration of rights of ways on and across the New Lands notwithstanding the requirement for consent by the Nation. The United States breached its fiduciary duties to exercise due care and prudence for trust property by realizing values for rights-of-way far below their fair market values without the consent of the Nation or waiver of fair market consideration.

106. For example, in 1990, ONHIR approved an unlimited-term communication-line right of way to Mountain States Telephone & Telegraph Co. d.b.a. US West Communications ("US West") across eight miles of New Lands without consideration or the Nation's approval, in Recording No. 790-962-91. In 1992, ONHIR approved an extended- or unlimited-term right of way for Continental Electric Cooperative, Inc. ("CDEC") for a power line extension across a portion of the New Lands for the Hard Scrabble and Blue Bird Project, in Recording No. 790-818-92. And in 2008, ONHIR approved a 15-year right of way for Bluebird Resources Company, LLC ("BRC") for a temporary access road across a portion of the New Lands.

107. ONHIR failed to create or preserve adequate and proper records for the US West, CDEC, or BRC rights of way necessary to protect the legal and financial rights of persons directly affected, contrary to its obligation under the FRA. 44 U.S.C. § 3101; 36 C.F.R. § 1220.30(a).

108. On information and belief, ONHIR improvidently and impermissibly granted rights of way or allowed right-of-way trespass across New Lands involving US West, CDEC, and BRC, the Arizona Department of Transportation, and others without the consent of the Nation or either fair market consideration or written waiver thereof as required under the governing regulations.

109. The United States has failed to properly administer New Lands rights of way and directly harmed and will continue to directly harm the Plaintiffs by depriving them of additional trust revenue that should have been earned and collected from properly administering rights of way over and across the New Lands. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

110. As a direct and proximate result of the United States' past and continuing maladministration of New Lands rights of way, the United States has damaged and continues to damage Plaintiffs and will continue to do so unless and until that maladministration is remedied.

111. All these injuries are redressable by a favorable decision by this Court compensating the Nation and the Relocation Beneficiaries for those lost revenues.

CLAIM 4: FAILURE TO PROMPTLY COLLECT AND DEPOSIT IN TRUST AND PROPERLY ADMINISTER AND ACCOUNT FOR NEW LANDS REVENUE

112. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

113. Per its statutory fiduciary duty to administer the New Lands under Section 11(h) of the Relocation Act, 25 U.S.C. § 640d-10(h), the United States has complete statutory authority over revenue from the New Lands and has exercised complete, overriding control over generation and disposition of all New Lands revenue except for New Mexico New Lands net income that has been deposited in the Navajo Rehabilitation Trust Fund ("NRTF") for investment and disposition per Section 32 of the Relocation Act, *id.* § 640d-30.

114. As the GAO has reported, the Relocation Act "does not state that ONHIR may collect, retain, and use revenue from . . . Navajo trust land, and ONHIR officials have not identified another statute authorizing the agency to do so." 2018 GAO Report at 47. Therefore, as the GAO concluded in 2020, "Congress did not give ONHIR statutory authority to retain the proceeds of cattle sales" from Padres Mesa Ranch, GAO Ranch Decision at 7. The same also applies for other New Lands revenue.

115. Instead, as ONHIR acknowledged in 2020, under Section 11(h) of the Relocation Act, "ONHIR has a fiduciary responsibility to manage . . . . any revenue from those [New Lands] resources for the sole benefit of the Navajo tribal members generally and . . . [Relocation Beneficiaries] specifically. Accordingly, revenue[s] received . . . do not constitute 'money for the Government.' Rather, they are received for the benefit of the trust corpus . . . ."

116. ONHIR's fundamental duty to "administer" the New Lands under Section 11(h) includes a duty to "deposit trust money" in an account "in the trustee's name as trustee[,]" consistent with the fiduciary duty to segregate and identify trust property "separate from the trustee's own property and . . . other property not subject to the trust." Restatement (Third) of Trusts §§ 76 cmt. d(1), 84 (2007). Thus, under Section 11(h), New Lands revenues are received as trust property of the Navajo Nation and relevant beneficiaries, who retain beneficial ownership of that revenue, as ONHIR has implicitly acknowledged in the Nahata Dziil Shopping Center MOU and the Preferred Sands surface land use agreement.

117. In addition to the duties under the Relocation Act, the Permanent Appropriation Repeal Act ("PAR Act") prescribes that all "Indian moneys, proceeds of labor, . . . and so forth[,]" "Miscellaneous trust funds of Indian tribes[,]" and amounts "that are analogous to the funds named [above] and are received by the United States Government as trustee" are "trust funds" and "shall be deposited in the appropriate trust fund account in the Treasury." PAR Act, ch. 756, § 20, 48 Stat. 1224, 1233 (1934) (codified as amended at 31 U.S.C. § 1321(a)(20), (a)(67), (b)(1)).

118. Under the Relocation Act and the PAR Act, the United States has a legal, fiduciary duty to promptly deposit all revenue from the Arizona New Lands in a federally held trust account for the Navajo Nation and the Relocation Beneficiaries, and to deposit New Mexico New Lands net income in the NRTF. Neither the Relocation Act nor any other federal law authorizes ONHIR to retain New Lands revenues.

119. For all such Indian trust funds held by the United States, the United States must keep clear and accurate accounts, provide adequate controls over receipts and disbursements, provide periodic, timely reconciliations to assure the accuracy of accounts, and prepare and supply

account holders with periodic statements of their trust fund balances and account performance. 25 U.S.C. § 162a(d).

120. Consistent with the above fiduciary duties, the OMM—which governs ONHIR's operations per 25 C.F.R. § 700.219(a)—mandates that all "revenues from the 'New Lands' . . . received . . . by the ONHIR" be deposited with the Federal Reserve System and held there until payments are issued from the U.S. Treasury. *See* OMM §§ 2230 (payment vouchers), 2300 (deposits), 2310 (deposit handling).

121. In addition, rents collected in administering the New Lands are

> assigned the vendor number 1980 "New Lands Revenues" in order to maintain the funds under one easily researched vendor number regardless of changes in the tenants . . . . [and] must be accounted for in such a way as to enable the ONHIR to provide full information . . . to the Navajo Nation when the time comes to turn the administration of the New Lands over to the Nation.

OMM § 2320.3. This recognizes ONHIR's duty to account for New Lands revenue as trustee.

122. Furthermore, the OMM requires that that New Lands revenues shall be deposited at least weekly, and more promptly if receipts total over $1,000, and that deposits be timed to avoid the last few days of a month to allow transfers from the local bank to a Treasury depository so that ONHIR deposit records will agree with U.S. Treasury records when ONHIR submits a monthly transaction report. *Id.* § 2320.1 (referencing SF-224); *see id.* § 2530 (accounting reporting); U.S. Dep't of Treasury, Bureau of Fiscal Service, Treasury Financial Manual pt. 2, ch. 3300, available at https://tfm.fiscal.treasury.gov/v1/p2/c330.html (same).

123. As with administration of the New Lands themselves, ONHIR has an obligation but failed to make and clear, complete, and accurate records of financial transactions arising from or related to the New Lands, to furnish information necessary to protect the legal and financial rights

of the Nation and the Relocation Beneficiaries. 44 U.S.C. § 3101; 36 C.F.R. § 1220.30(a); 2018 GAO Report at 104 n.26.

124. As DOI reported to Congress in May 2020, ONHIR failed to create or maintain auditable financial statements because "ONHIR management demonstrated a lack of knowledge related to Federal financial reporting and accounting standards" and "could not provide basic accounting records that are necessary to audit financial statements, such as an accounting of basic transactions and necessary reconciliations."

125. In addition, as DOI reported to Congress in March 2021, "[b]ecause ONHIR does not have auditable records at this time and . . . ONHIR cannot compile the records that it does have to meet relevant standards, . . . it is not possible to conduct a comprehensive audit of ONHIR's finances." Also, "ONHIR's information system is obsolete and cannot be configured or updated to complete financial recording and reporting that complies with Treasury and OMB guidelines."

126. Accordingly, the United States has failed to administer, account for, keep records, or report as necessary to comply with the governing standards of care and the United States' fiduciary obligations, as established under federal statutes and regulations and the OMM. Furthermore, ONHIR is "in the process of procuring a financial and business management system" but that is not expected to be operational until "late summer 2022" and "would not address any issues associated with the existing underlying financial records."

127. From the inception of the Padres Mesa Ranch in June 2009 until March 2020, the Ranch had $2,256,060 in revenues from livestock sales and otherwise. This included over $1.4 million from selling cattle over FY2009 to FY2016, 2018 GAO Report at 9, as well as over $292,150 in FY2018 and $196,536 in FY2019. However, rather than deposit that money in trust for the Relocation Beneficiaries, ONHIR wrongfully deposited those proceeds in its own account

and used those proceeds to help pay for Ranch operations. *Id.* at 5. Those improper, unauthorized deposits violated ONHIR's duties to the Nation and the Relocation Beneficiaries under the Relocation Act and the PAR Act.

128. In addition, and contrary to its duties under the Relocation Act and its own regulations, ONHIR failed to collect and promptly deposit in trust for the Nation and the Relocation Beneficiaries substantial penalties and the reasonable value of damages to property for New Lands grazing trespass, including without limitation at the Paragon Ranch and by ONHIR at the Padres Mesa Ranch. Based on the level of ONHIR's recent grazing there and the extended duration of that grazing trespass, those penalties may exceed $1.2 million and the additional damages may equal or exceed that amount.

129. Also, contrary to its duties under the Relocation Act and the PAR Act, ONHIR collected but retained and failed to promptly deposit in trust for the Nation and the Relocation Beneficiaries over $1.3 million from various New Lands grazing trespass penalties, leases, land uses, surface use agreements, and rights of way. Among other improperly retained New Lands revenue, this includes over $276,000 in rent for an industrial building, over $195,000 from a void lease by ONHIR to the Navajo Nation Hospitality Enterprise for the Navajo Travel Center in Sanders, Arizona, over $162,000 in rent from the FAA lease, over $145,000 from housing rent, over $130,000 in rent for the Painted Desert Inn, over $96,000 in miscellaneous revenues, over $82,000 in royalties, and over $59,000 in rent for the Sanders Post Office.

130. Furthermore, on information and belief, ONHIR improperly and without authorization required by the Non-Intercourse Act, the OMM, and Navajo law, allowed payment of over $2.2 million in New Lands revenue to the NDC (where less than 11% of known Relocation Beneficiaries reside), rather than collecting and depositing that revenue in trust for the Nation and

all Relocation Beneficiaries as required under the Relocation Act and the PAR Act. That includes without limitation payments under the Silica Plant lease, the Ranger Helium Agreement, and the Evolution Helium Agreement.

131. Through the above and other similar maladministration, the United States has failed to promptly collect and deposit in trust and properly administer and account for substantially over $6.2 million in revenues from the New Lands in violation of specific enforceable fiduciary duties.

132. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

133. As a direct and proximate result of these past and continuing failures by the United States, the United States has damaged and continues to damage Plaintiffs and will continue to do so unless and until that maladministration is remedied. All these failures by the United States have directly harmed and will continue to directly harm the Plaintiffs by depriving them of trust revenue that should have been earned, collected, deposited, administered, and accounted for.

134. All these injuries are redressable by a favorable decision by this Court compensating the Plaintiffs.

CLAIM 5: UNAUTHORIZED EXPENDITURES OF NEW LANDS REVENUE

135. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

136. Once money is deposited into the U.S. Treasury, regardless of the name on the account in which it is deposited, it is bound by the constitutional inhibition that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. Const. art. I, § 9, cl. 7. In addition, the Anti-Deficiency Act bars federal agencies from undertaking obligations or spending money without legal authorization. 31 U.S.C. § 1341(a)(1)(A).

137. More specifically, tribal trust funds held by the United States, like all New Lands revenue under the PAR Act, "shall not be expended without specific appropriation by Congress" except for equalization of allotments, education of Indian children, and per capita and other payments, 25 U.S.C. § 123, or for purchasing insurance for protection of tribal property, *id.* § 123a. However, none of those authorizations apply to or authorize ONHIR's use of New Lands revenue for other purposes, and especially not to cover or offset its general operations or expenses.

138. The Relocation Act does not generally appropriate or authorize expenditure of New Lands revenue. Rather, it only authorizes New Mexico New Lands net income deposited in the NRTF to be expended for certain purposes pursuant to a conceptual framework submitted to Congress by DOI with the advice of the Navajo Nation and ONHIR. 25 U.S.C. § 640d-30(d), -30(g). Apart from that, the Relocation Act only authorizes appropriations of the United States' own funds, not New Land revenue, for ONHIR expenses, including but not limited to those for relocation, livestock reduction, HPL life estate leases, and a discretionary fund. *See id.* § 640d-24(a)(1)-(8) (concerning Sections 640d-13(b), -14, -18(a), -18(b), -28); *id.* § 640d-25(a).

139. The lack of Relocation Act authorization for federal expenditure of New Lands revenue held by ONHIR complies with Congress's guiding principle and expressed intent for that law that, "'because of the Federal Government's repeated failure to resolve the land disputes, the major costs of resolution' . . . . of the whole problem of partition and relocation should be properly borne by the United States rather . . . than by the individual Indians affected." NHIRC, Proposed Rules for Commission Operations and Relocation Procedures, 43 Fed. Reg. 59,400, 59,4001 (Dec. 20, 1978) (quoting S. Rep. 93-1177, at 20 (1974)).

140. Instead, for New Lands revenues besides those properly deposited in the NRTF and now managed by the Navajo Nation, the Secretary of the Interior may approve disbursements from

tribal trust funds that are "approved by the appropriate Indian tribe" and "accompanied by a resolution from the tribal governing body[.]" 25 U.S.C. § 4022(b)(1); *see id.* § 4022(b); 25 C.F.R. § 1200.11. Here, that resolution would have to be by the Navajo Nation Council, which is the Nation's governing body, 2 N.N.C. § 102(A). But on information and belief, the Navajo Nation Council has never approved the United States' use or expenditure of New Lands revenues.

141. Notwithstanding the lack of statutory authorization for New Lands trust revenue expenditures, since FY2009, ONHIR has collected, deposited in its own Treasury account, retained, and used to supplement its appropriations over $2.2 million in revenues from livestock sales and otherwise from the Padres Mesa Ranch, plus over $1.3 million since the 1990s in revenue from New Lands leases and surface use agreements administered by ONHIR, unlike how revenue from BIA-administered leases for other tribal trust lands is handled. *See* 2018 GAO Report at 46 & n.92 (referencing over $1 million as of April 2018).

142. The United States has improperly expended and spent without legal authorization over $3.5 million in revenues from the New Lands. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

143. As a direct and proximate result of these past and continuing failures by the United States, the United States has damaged and continues to damage Plaintiffs and will continue to do so unless and until that maladministration is remedied. All these failures by the United States have directly harmed and will continue to directly harm the Plaintiffs by depriving them of trust funds that should have been retained.

144. All these injuries are redressable by a favorable decision by this Court compensating the Plaintiffs.

CLAIM 6: FAILURE TO PROMPTLY INVEST OR EARN INTEREST ON AND TO MAXIMIZE RETURNS FROM NEW LANDS REVENUES

145. The Plaintiffs reallege and reincorporate by reference all allegations in each of the preceding paragraphs.

146. For all relevant times here, federal law has required that all funds held by the United States in trust for Indian tribes or individual American Indians shall be invested by the U.S. Department of the Treasury ("Treasury") in public debt securities with maturities suitable to the needs of the fund involved, as determined by DOI, and bearing interest at rates determined by Treasury, taking into consideration current market yields on outstanding federal marketable obligations of comparable maturities. 25 U.S.C. § 161a(a)-(b).

147. Furthermore, the interest accruing on Indian tribal trust funds pursuant to the forgoing authorization is subject to the same disposition as prescribed by law for those principal funds. *Id.* § 161d. Thus, any interest accrued on trust fund deposits of New Lands revenue must be treated the same way as the principal deposits.

148. Also, in lieu of depositing tribal and individual Indian trust funds in the U.S. Treasury, the United States is authorized to invest those funds in interest-bearing bank accounts or Treasury bonds, mortgage-backed securities, and certificate of deposits ("CDs"). *Id.* § 162a(a).

149. Under the foregoing statutes and their implementing regulations, the United States owes fiduciary duties to the Nation and the Relocation Beneficiaries to promptly and prudently invest or earn interest from New Lands revenues in order to maximize the rate of return on those revenues. The United States has failed to comply with those duties regarding New Lands revenues.

150. The United States has failed to promptly invest or earn interest from and maximize returns from New Lands revenues that have been or should have been collected and promptly

deposited in trust by the United States. The Plaintiffs have not expressly consented, ratified, or released the United States from liability regarding these actions.

151. As a direct and proximate result of these past and continuing failures by the United States, the United States has directly harmed and damaged and continues to harm and damage Plaintiffs and will continue to do so unless and until those failures are remedied.

152. These injuries are redressable by a favorable decision by this Court compensating the Plaintiffs for those lost trust fund investments and interest.

CLAIM ACCRUAL TOLLING, LIMITED WAIVER, AND EXHAUSTION

153. In 2020, ONHIR admitted to the Nation by letter that it was unaware of any communications before 2015 with the Relocation Beneficiaries. On information and belief, the United States has never fully and properly identified the Relocation Beneficiaries or communicated with them as such regarding administration of the New Lands.

154. The Relocation Beneficiaries and the Nation have never been furnished with any accounting of federal administration of the New Lands or revenues generated by the New Lands, from which they could determine whether there have been losses regarding them.

155. Under the Indian Trust Accounting Statute that has been enacted repeatedly as part of annual DOI appropriations, *see, e.g.,* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 305-06 (Jan. 17, 2014), the United States' failure to provide a meaningful accounting for New Lands revenue to the Relocation Beneficiaries also delays the commencement of limitations periods for claims here regarding the United States' maladministration thereof including its failure to promptly collect, deposit in trust, and invest and maximize returns from amounts due and owing from the New Lands.

156. At most, only the Nation received notice of potential claims regarding maladministration of the New Lands and resulting revenue from the 2018 GAO Report.

157. Nonetheless, the Nation entered into a settlement agreement with the United States effective August 26, 2014, which waived any claims for it before that date and required the Nation to exhaust administrative remedies for its future claims regarding trust funds.

158. The Nation exhausted that sole administrative remedy on September 28, 2020, by sending a certified letter to DOI's then Office of the Special Trustee for American Indians—now known as the DOI Bureau of Trust Funds Administration—with a copy to DOI's BIA Navajo Regional Director. That letter asserted claims that the United States failed to promptly deposit, hold in trust, and timely invest New Lands revenues, failed to obtain an appropriate return on those trust funds, and improperly disbursed those moneys without proper authorization by the Navajo Nation Council.

159. The Nation has not received any response to that letter other than a certified mail receipt from the BIA. No other administrative exhaustion is required for the claims here.

160. There has been no prior settlement or waiver for the Relocation Beneficiaries that limits the temporal extent of their claims. In particular, the *Cobell* individual Indian trust mismanagement class-action settlement concerned certain "'Individual Indian Money' ('IIM') trust accounts" held by the United States for individual Indians and land administration claims for individual Indians with "'a recorded or other demonstrable ownership interest in land held in trust or restricted status[.]'" *See Cobell v. Salazar*, 679 F.3d 909, 913, 914 (D.C. Cir. 2012) (affirming settlement and describing and quoting class terms).

161. The *Cobell* litigation and settlement do not encompass the New Lands, which are expressly held in trust for the Nation, not individual Indians. *See* 25 U.S.C. § 640d-10(a). Nor does

Cobell encompass Arizona New Lands revenues, which are or should be held in trust for the Nation and the Relocation Beneficiaries as an Identifiable Group, or New Mexico New Lands net income that must be deposited and held in the NRTF, *id.* § 640d-30(b), rather than in IIM accounts.

162. Even if any claims are barred by limitations, the claims here can be broken down into a series of independent and distinct events or wrongs, so that all such maladministration within the limitations periods remains actionable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask for a judgment in their favor and against the United States as follows:

1. award Plaintiffs monetary damages in an amount of $40 million or otherwise to be determined by the Court, including interest as part of the damages;

2. remand to ONHIR and DOI per 28 U.S.C. Section 1491(a)(2) as the Court deems proper and just with directions to properly maintain records for and administer and use New Lands held in trust for the Nation and to promptly collect, deposit in trust, and invest or earn interest on, and not expend without Navajo Nation Council authorization all revenues from such lands, including without limitation pursuing actions for trespass, damages, and ejectment against third parties for unauthorized possession or use of New Lands;

3. award costs for the Plaintiffs and attorney fees for the Relocation Beneficiaries under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

4. any and all other relief the Court may deem proper and just.

Dated: August 23, 2021

Respectfully submitted,

/s/Daniel I.S.J. Rey-Bear
Daniel I.S.J. Rey-Bear, Attorney of Record

Timothy H. McLaughlin, Of Counsel
Rey-Bear McLaughlin, LLP
421 W Riverside Ave, Suite 1004
Spokane, WA 99201-0410
telephone: 509-747-2502
dan@rbmindianlaw.com
tim@rbmindianlaw.com

Of Counsel

Doreen N. McPaul, Attorney General
Kimberly A. Dutcher,
Deputy Attorney General
Office of the Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Navajo Nation (AZ) 86515
telephone: 928-871-6345
dmcpaul@nndoj.org
kdutcher@nndoj.org

Susan Eastman
Principal Attorney/Director
Navajo-Hopi Legal Services Program
Navajo Nation Department of Justice
117 Main Street, P.O. Box 2990
Tuba City, Navajo Nation (AZ) 86045
telephone: 928-283-3301
seastman@nndoj.org

Christina S. West
Tierra N. Marks
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
telephone: 505-938-9144
cwest@indiancountrylaw.com
tmarks@indiancountrylaw.com