Daniel I.S.J. Rey-Bear (pro hac vice)
Timothy H. McLaughlin (pro hac vice)
Rey-Bear McLaughlin, LLP
405 W Riverside Ave, Suite 1004
Spokane, WA 99204-0410
telephone: 509-747-2502
dan@rbmindianlaw.com
tim@rbmindianlaw.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Navajo Nation, a federally recognized Indian Tribe, on its own behalf and on behalf of affected Navajo Nation citizens, Plaintiff, v. Office of Navajo and Hopi Indian Relocation, U.S. Department of the Interior, Defendants.	No. CV-21-08190-PCT-DWL **PLAINTIFF'S RESPONSE TO MOTION TO DISMISS** (Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Plaintiff the Navajo Nation ("Nation"), on behalf of itself and its affected citizens, hereby responds to Defendants' Motion to Dismiss, Doc. 20 ("Defendants' Motion"), which should be denied in its entirety. The first claim in the Verified Complaint for Declaratory and Injunctive Relief, Doc. 1 ("Verified Complaint") properly seeks a declaration under the Declaratory Judgment Act ("DJA") and a sovereign immunity waiver in the Administrative Procedure Act ("APA") that the Relocation Act[1] requires the Office of Navajo and Hopi Indian Relocation ("ONHIR") to assure that community facilities and services, such as water, sewers, roads, schools, and health care facilities, are available for Navajo relocatees. Defendants cannot avoid that claim based on irrelevant APA limits for final agency actions. The second claim, for unreasonable delay under the APA, is actionable because Defendants do not dispute ONHIR's unreasonable almost 36-year failure to comply with the Relocation Act mandate that relocation of Navajos from Hopi-partitioned lands ("HPL") "shall be completed" by July 7, 1986. Next, Defendants cannot avoid the third claim by conceding that ONHIR cannot close until "the President determines that its functions have been fully discharged." That claim also is not subject to an APA final agency action and is supported by an implied private right of action. Finally, Defendants cannot avoid the fourth claim, for ONHIR to obtain and the U.S. Department of Interior ("DOI") to provide reasonable assistance to implement the Relocation Plan. The Relocation Act provides a private right of action for that claim and the Verified Complaint establishes the necessity that ONHIR obtain and DOI provide assistance to fully implement relocation rather than to facilitate ONHIR's premature closure.

[1] Navajo-Hopi Settlement Act of 1974, Pub. L. 93-531, 88 Stat. 1712, as amended by Navajo & Hopi Indian Relocation Amendments Act of 1980, Pub. L. 96-305, 94 Stat. 929, and Navajo & Hopi Indian Relocation Amendments of 1988 ("1988 Amendments"), Pub. L. 100-666, 102 Stat. 3929, previously codified at 25 U.S.C. §§ 640d to 640d-31 (collectively, "Relocation Act"). Because a 2016 editorial decodification did not affect the Relocation Act's validity, the 2015 codification is cited here. *See* Compl. ¶ 1 n.1.

BACKGROUND

The following facts are specifically stated in the Verified Complaint based on personal knowledge. *See Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc) (considering same); Compl. ¶ 19 & n.2. The Relocation Act mandated partition between the Nation and the Hopi Tribe of about 1.8 million acres of a former joint use area. 25 U.S.C. §§ 640d(a), 640d-3, -7(b); Compl. ¶¶ 32, 40-41. The Relocation Act also established ONHIR and its predecessor, the Navajo and Hopi Indian Relocation Commission ("NHIRC"), as their names make clear, to implement required "Relocation" of each tribe's citizens from the other tribe's partitioned lands. 25 U.S.C. §§ 640d-9 to -14; Compl. ¶¶ 42-44, 48. The Relocation Act also prescribed that ONHIR "shall cease to exist when the President determines that its functions have been fully discharged." 25 U.S.C. § 640d-11(e); Compl. ¶ 44. Congress required that relocation be thorough and generous, minimize adverse impacts, and have major costs borne by the federal government, especially to avoid repetition of prior harmful relocation programs, all of which the NHIRC and ONHIR have acknowledged. Compl. ¶¶ 35-39, 43, 46, 51.

Congress required and the NHIRC prepared the "Relocation Plan" to implement this relocation. *Id.* ¶ 45. Congress required that the Relocation Plan "'assure that housing and related community facilities and services, such as water, sewers, roads, schools, and health facilities, for such households shall be available at their relocation sites; and . . . take effect thirty days after the date of submission to the Congress[.]'" Compl. ¶ 46 (quoting Pub. L. 93-531, § 13(c), 88 Stat. 1717-18, superseded by 1988 Amendments, Pub. L. 100-666 § 4(d), 102 Stat. 3931, as previously codified at 25 U.S.C. § 640d-12(c)).

Congress also authorized, directed, and required that "[t]he relocation shall take place in accordance with the relocation plan and shall be completed by the end of five years from the date on which the relocation plan takes effect." 25 U.S.C. § 640d-13(a); Compl. ¶¶ 48, 50. To expedite and facilitate relocation, Congress also specified as follows:

> The Commission [, *i.e.*, the NHIRC, now ONHIR,] is authorized to call upon any department or agency of the United States to assist the Commission in implementing its relocation plan and completing relocation within the time required by law, except that control over and responsibility for completing relocation shall remain in the Commission. In any case in which the Commission calls upon any such department or agency for assistance under this section, such department or agency shall provide reasonable assistance so requested.

25 U.S.C. § 640d-11(e)(1); Compl. ¶ 53. Through this provision, Congress expected that the Bureau of Indian Affairs ("BIA") within DOI and other federal agencies coordinate with the NHIRC to aid in implementing relocation. Compl. ¶ 54; *see* Compl. ¶ 8.

The Relocation Plan was submitted on April 8, 1981 and took effect on July 7, 1981, so relocation was required to be completed by July 7, 1986. *Id.* ¶ 56. Among other things, the Relocation Plan and the NHIRC reaffirmed Congress's mandate that relocation will be thorough and generous, minimize adverse impacts, and have major costs borne by the federal government. *Id.* ¶¶ 58, 61. The Relocation Plan and the NHIRC also confirmed Congress's "order" that "'community facilities and services, such as water, sewers, roads, schools, and health facilities . . . shall be available at the[] relocation sites[,]'" including within "host" communities, and especially on "New Lands" acquired in trust under the Relocation Act. *Id.* ¶¶ 42, 59-61. The Relocation Plan and the NHIRC also recognized that interagency coordination for relocation is necessary and intended. *Id.* ¶¶ 57, 60, 67. The NHIRC promulgated regulations to "carry out the directed relocation as promptly and fairly as possible, with a minimum of hardship and discomfort to the relocation, in accordance with the Act." 25 C.F.R. § 700.1(e); *see id.* § 700.93; Compl. ¶¶ 49-50.

After the NHIRC failed to meet the July 7, 1986 deadline for completing relocation, Congress replaced the NHIRC with ONHIR with expanded authority and transferred duties to expedite completion of relocation and assure that "related facilities" such as water, sewers, roads, schools, and health facilities are provided for relocatees. *Id.* ¶¶ 69-72. As the Relocation Plan already had been submitted and become effective, Congress

required submission of another report. *Id.* ¶ 73. In doing that, Congress did not eliminate the relocation completion deadline based on the Relocation Plan's effective date or the requirement that relocation of households be completed in accordance with the Relocation Plan, including "'related facilities to be constructed'" for relocatees. *Id.* ¶¶ 74-76 (quoting Pub. L. 99-190, 99 Stat. 1185, 1236 (1985), referenced in 25 U.S.C. § 640d-11(c)(2)(A)).

Subsequently, ONHIR via its promulgated Management Manual, which governs its operations, has confirmed that it funds New Lands infrastructure and participates in infrastructure projects on the existing Navajo Reservation in proportion to the number of relocatees moving to areas to be served. *Id.* ¶¶ 77-78; 25 C.F.R. § 700.219(a). ONHIR also has reaffirmed that interagency coordination and cooperation is necessary to implement relocation and that provision of adequate infrastructure is badly needed and essential for on-reservation relocation. Compl. ¶¶ 80-82, 97. For example, relocation homes must be "properly connected to hot and cold water, and . . . sewage drainage system[s,]" as well as to electrical services where feasible. 25 C.F.R. § 700.55(a)(3), (8). ONHIR also promised community facilities to relocatees and host communities to induce relocation but has failed to provide those. Compl. ¶¶ 14-15, 18-20, 108-13, 125, 127.

ONHIR still has not completed relocation. *Id.* ¶¶ 90-91, 93-95, 97. Among other outstanding obligations are responsibility for about $227 million in community facilities for relocatees. *Id.* ¶ 91. ONHIR instead has stated that it has substantially completed its duties and that relocation infrastructure should be provided by other agencies. *Id.* ¶¶ 90-91, 93-95, 97. ONHIR also has worked to close even though it lacks authority to do so and DOI has wrongfully assisted to facilitate ONHIR's closure contrary to the Relocation Act mandate for reasonable assistance in implementing relocation. *Id.* ¶¶ 90-92, 98.

The Nation has brought this case on behalf of itself and approximately 50,000 Navajo citizens who have been and will continue to be seriously harmed by ONHIR's failure to fully and timely complete relocation as the Relocation Act and the Relocation

Plan have required, especially if ONHIR closes before completing relocation. *See id.* ¶¶ 1, 9-27, 97, 100-19. These harms include unreasonably delayed and deficient relocation, including infrastructure, inflicting acute human and financial harm on thousands of Navajo families and the Nation itself. *Id.* ¶¶ 10-27, 97, 100-19.

ARGUMENT

I. The First Claim Properly Seeks to Declare ONHIR's Duty Under the Relocation Act to Ensure Infrastructure for Navajo Relocatees.

The Nation's first claim seeks a declaratory judgment under the DJA on ONHIR's duty under the Relocation Act to ensure community facilities and services for relocatees and only relies on the APA for a sovereign immunity waiver. Compl. ¶¶ 3, 120-28. Defendants misconstrue that claim by mistakenly merging it with the separate, second claim, and then complain that the first claim constitutes an impermissible programmatic attack that seeks wholesale judicial micromanagement of ONHIR without challenging a discrete agency action under the APA. Defs.' Mot. at 6-11. These misplaced defenses overlook the actual nature and valid basis of the first claim and so must be rejected.

A. *The DJA Authorizes the First Claim to Declare ONHIR's Relocation Act Infrastructure Duty Based on the APA's Sovereign Immunity Waiver Regardless of the APA's Final Agency Action Requirements.*

Under the DJA, 28 U.S.C. §§ 2201-02, a court "[i]n a case of actual controversy within its jurisdiction, . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.* § 2201(a). A declaratory judgment is appropriate "'(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986) (citation omitted); *United States v. Washington*, 759 F.2d 1353, 1357, 1358 (9th Cir. 1985) (en banc); *see Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 952 (9th Cir. 2004).

This is more likely when defendants are responsible for challenged actions and plaintiffs represent a class that may be subject to the issue. *Guerra*, 783 F.2d at 1376. All that authorizes the Nation's first claim for itself and about 50,000 Navajo citizens for a declaration to clarify, settle, and afford relief from ONHIR's extended and extensive failure to fulfill its basic duty under the Relocation Act to provide on-reservation infrastructure for Navajos that have been relocated per the Act. *See* Compl. ¶¶ 120-28.

To be sure, the DJA is a "procedural device only; it does not confer an independent basis of jurisdiction on the federal court." *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 511 (9th Cir. 1990); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1382-83 (9th Cir. 1988). However, an Indian tribe may pursue a claim in federal district court so long as "the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362; *see id.* § 1331; *Moe v. Confed. Salish & Kootenai Tribes of Flathead Res.*, 425 U.S. 463, 473 (1976). Also, the second sentence of APA Section 702 provides that a federal action seeking non-monetary relief "and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ." 5 U.S.C. § 702.

That APA provision broadly waives immunity for lawsuits against federal agencies seeking nonmonetary relief that allege "'violations of . . . statutes . . . that do not themselves include causes of action for judicial review.'" *Navajo Nation v. DOI* ("*Navajo I*"), 876 F.3d 1144, 1168 (9th Cir. 2017) (citation omitted); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (concerning Navajo-Hopi claim). That immunity waiver applies to "all non-monetary claims for relief against federal agencies" and not just those concerning "final agency action" under the first sentence of APA Section 702, which are subject to limits under 5 U.S.C. Section 704. *Navajo I*, 876 F.3d at 1171, 1172; *see id.* at 1169-72 & n.36 (addressing additional cases). Thus, Section 702 waives federal sovereign

immunity for non-monetary non-APA claims against federal agencies to enforce specific federal duties, such as Indian breach of trust claims, regardless of Section 704. *Navajo I*, 876 F.3d at 1172-73; *El Paso Natural Gas Co. v. United States* ("*El Paso*"), 750 F.3d 863, 892 (D.C. Cir. 2014); *Cobell v. Norton* ("*Cobell I*"), 240 F.3d 1081, 1094-95 (D.C. Cir. 2001); *see United States v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983) (noting concession). This includes federal duties imposed either """expressly or by implication[.]""" *Navajo Nation v. DOI* ("*Navajo II*"), 26 F.4th 794, 808 (9th Cir. 2022) (citations omitted).

Given the above, Defendants misplace efforts to dismiss the first claim based on inapplicable cases about discrete and final agency actions and unavailable wholesale or micro-management of agencies. *Navajo II* illustrates this. There, the Ninth Circuit reversed this Court to allow the Nation to seek an injunction compelling DOI to determine the extent to which the Navajo Reservation establishment by treaty "requires water from sources other than the Little Colorado River to fulfill the Reservation's purpose of establishing a permanent homeland for the Nation." *Id.* at 809. So too here, the Nation can seek a declaration of ONHIR's duty under the Relocation Act to ensure relocatee infrastructure without a need to determine the finality of any agency action.

B. *The Relocation Act Establishes ONHIR's Fiduciary Duty to Ensure Community Facilities and Services for Navajo Relocatees.*

Once past the above procedural and jurisdictional hurdles, the Verified Complaint supports the first claim for a declaration of ONHIR's duty under the Relocation Act to provide community facilities and services for Navajo relocatees. The Relocation Act requires that "relocation shall take place in accordance with the relocation plan" and incorporates relocation "duties" that include "related facilities to be constructed" and "road construction projects" for relocatees, 25 U.S.C. §§ 640d-11(c)(2)(A), -13(a); Pub. L. 99-190, 99 Stat. 1185, 1236 (1985). In turn, the Relocation Plan confirms and implements the key congressional mandate to ensure that "related community facilities

and services, such as water, sewers, roads, schools, and health facilities" exist at relocation sites, especially on but not limited to the New Lands, and that relocation be thorough and generous, with major costs borne by the federal government. Compl. ¶¶ 58-60.

This legal mandate under the Relocation Act is well supported. It is confirmed by the NHIRC's, ONHIR's, and DOI's formal testimony, acknowledgements, recognitions of essential needs, and promissory inducements for relocation. Compl. ¶¶ 14-15, 18-20, 61-62, 80-82, 97, 108-13, 125, 127. It is also confirmed by ONHIR's own regulations, which reaffirm that relocation must be thorough and generous and borne by the federal government and require "'a minimum of hardship and discomfort,'" including hot and cold water and sewer services, plus electrical services where feasible. Compl. ¶¶ 51, 63, 82 (concerning 25 C.F.R. §§ 700.1(e), 700.55(a)(3), (8)). ONHIR's own Management Manual, which governs its operations, 25 C.F.R. § 700.219(a), likewise confirms that ONHIR funds infrastructure on the New Lands and funds infrastructure projects on the preexisting Navajo Reservation in proportion to the number of relocatees living in or moving to the areas to be served. Compl. ¶¶ 77-78.

The existence of this infrastructure duty under the Relocation Act is also supported by case law and common sense. Federal fiduciary duties to the Nation may be implied. *Navajo II*, 26 F.4th at 808. Also, the United States has "affirmative" "fiduciary obligations" to Navajos required to relocate from Hopi lands under the Relocation Act. *Bedoni v. ONHIR*, 878 F.2d 1119, 1124-25 (9th Cir. 1989); *United States v. Kabinto*, 456 F.2d 1087, 1092 (9th Cir. 1972). All that and common sense compels the conclusion that relocation includes ensuring related community facilities and services for all relocatees. Moving thousands of Navajo households without running water, sewer services, passable roads, and access to electricity, schools, police, and health care facilities—as many relocatees and their host communities still suffer from, Compl. ¶¶ 14-15, 18-20, 108-13,

125, 127—is hardly thorough, generous, or lacking hardship, with costs borne by the federal government, as Congress required and as federal agencies have recognized.

Defendants cannot avoid all this based on the 1988 Amendments. Defs.' Mot. 4, 6-7. The 1988 Amendments not only created ONHIR with sole authority for New Lands community planning and development, but also transferred "duties" to ONHIR regarding "related facilities to be constructed" for relocatees. 25 U.S.C. §§ 640d-10(h), -11(c)(1)(A), -11(c)(2)(A) (emphasis added); Pub. L. 99-190, 99 Stat. 1236. The 1988 Amendments did not repeal the requirement that relocation "shall take place in accordance with the relocation plan[.]" *Id.* § 640d-13(a). Nor did they eliminate the Relocation Plan's recognition of the federal duty to assure water, sewers, roads, schools, power, and health and other community facilities and services for relocatees, as DOI, the NHIRC, and ONHIR all have acknowledged, including after 1988. Compl. ¶¶ 59-62, 78, 80-82. Finally, the 1988 Amendments did not repeal the relocation completion deadline based on when the Relocation Plan took effect, 25 U.S.C. § 640d-13(a), but replaced the provisions for submission of the Relocation Plan and when it took effect, Compl. ¶ 46. Defendants' "repeal" argument would impossibly mean that the Relocation Plan no longer took effect. For all these reasons, the first claim stands and has merit.

II. The Second Claim Properly Challenges ONHIR's Unreasonable Delay In Completing Relocation Almost 36 Years Past Its Explicit Statutory Deadline.

Similar to Defendants' challenges to the first claim, they oppose the second claim, for unreasonable delay, by materially misstating it and then beating a straw man with much effort and many adjectives. As above, that effort fails. The second claim does not assert a "wholesale, broad programmatic attack" with a "staggering" burden for the Court to "micromanage" "day-to-day operations." Defs.' Mot. at 9-10. Rather, the second claim seeks one thing: to compel completion of relocation since it is already more than 35 years past the date by when the Relocation Act required that "[t]he relocation shall take place

. . . and shall be completed[.]" 25 U.S.C. § 640d-13(a); Compl. ¶¶ 129-37. All additional details are merely context and do not detract from that sole warranted and viable relief.

The APA empowers federal courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). A court can act thereunder "if there is 'a specific, unequivocal command' placed on the agency to take a 'discrete agency action,' and the agency has failed to take that action." *Vietnam Veterans of Am. v. C.I.A.* ("*VVA*"), 811 F.3d 1068, 1075 (9th Cir. 2016) (quoting *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 63-64 (2004)). Therefore, "'when an agency is compelled by law to act within a certain time period,'" a court can compel an agency "'to take action upon a matter, without directing how it shall act.'" *Center for Biological Diversity v. Veneman* ("*CBD*"), 394 F.3d 1108, 1112 (9th Cir. 2005) (quoting *SUWA*, 542 U.S. at 64, 65).

For example, a court can compel compliance with a regulation that "unequivocally commands the Army" to identify "more than 60,000" former test subjects, provide them "with current information about their health," and "provide medical care for harm and diseases caused" even though all that "necessarily entail[s] some discretionary judgment" "in the manner in which the duty may be carried out[.]" *VVA*, 811 F.3d at 1071, 1076, 1079. Likewise, a court can compel "issuance of a plan for future trust administration as a whole" based on specific findings of failure to comply with governing statutory duties, *see Cobell v. Norton* ("*Cobell II*"), 392 F.3d 461, 464-65 (D.C. Cir. 2004), where a federal agency has been under a clear statutory duty for decades, the delay in discharging the duty is unreasonable, and further delay would unduly prejudice plaintiffs, *Cobell I*, 240 F.3d at 1095. Those contrast with claims for wholesale, programmatic improvement or for matters not required, *SUWA*, 542 U.S. at 63-64 & n.1; *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990); *In re A Community Voice* ("*ACV*"), 878 F.3d 779, 784 (9th Cir. 2017).

The second claim here is like the one allowed in *VVA*, which Defendants overlook, and unlike those in *SUWA*, *Lujan*, and *CBD*, on which Defendants misplace reliance. *Cf.*

Defs.' Mot. at 8-11. *Lujan* held that a challenged "so-called 'land withdrawal review program'" was "not derived from any authoritative text" and just referenced continuing and constantly changing agency operations, which were not a "final agency action" under the APA. *Lujan*, 497 U.S. at 890. That differs greatly from the Nation's second claim, to compel compliance with Relocation Act's explicit command that "[t]he relocation . . . shall be completed by" July 7, 1986, 25 U.S.C. § 640d-13(a); Compl. ¶ 56.

Next, *SUWA* rejected claims to compel (1) "total exclusion" of off-road vehicle ("ORV") use even though the relevant statute "does not mandate" that, and (2) "an intensive ORV monitoring program" despite a lack of such "binding commitment" in the relevant land use plan. *SUWA*, 542 U.S. at 65-66, 68-69. That proves nothing here since "a land use plan is generally a statement of priorities" and usually does not prescribe actions, "[q]uite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date[.]" *Id.* at 71. Only the latter describes the second claim here.

In turn, *CBD* rejected a claim to compel an agency "to consider" many potential scenic rivers while planning land and water use and development where there was no legal duty to perform that review. *CBD*, 394 F.3d at 1110, 1113. Unlike that, there is an explicit congressional command for ONHIR to complete relocation almost 36 years ago, 25 U.S.C § 640d-13(a), which ONHIR has unreasonably failed to do, Compl. ¶¶ 90-91, 93-95, 97.

The Verified Complaint supports the claim for unreasonable agency delay under the factors governing such claims, *ACV*, 878 F.3d at 786. For example, a delay is unreasonable and warrants relief when a matter has been pending for eight years, there is harm to health, only a roadmap for further delay, and no concrete timeline for resolution. *Id.* at 786, 787; *Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809, 811 (9th Cir. 2015). Similarly, a "'six-year-plus delay is nothing less than egregious.'" *ACV*, 878 F.3d at 787 (citation omitted). Under the governing six factors, the almost 36-year delay here is (1) six times as unreasonable, especially given (2) the explicit statutory deadline, (3)

intolerable impacts to health and welfare, (4) no higher competing priority, (5) the nature and extent of prejudiced interests, and (6) the irrelevance of no impropriety. *Compare id.* at 786 *with* Compl. ¶¶ 10-27, 97, 100-19. The fact that relocation has many components is irrelevant. Where there has been an unreasonable agency delay, "courts have power and discretion to enforce compliance within some form of timeline" for a remedy, including deadlines subject to modification based only on new information with the court retaining jurisdiction to ensure compliance pending completion. *ACV*, 878 F.3d at 788. All this supports the viability of the second claim and the relief sought. *See* Compl. at 58-59.

III. Defendants' Concessions, the DJA, and an Implied Right of Action Under the Relocation Act Support the Third Claim, to Prevent ONHIR's Premature Closure.

Defendants assert that the third, "early closure," claim fails because the Relocation Act does not create a private right of action, the claim is based on an "intention" to close rather than actionable final action under the APA, and only the President can close ONHIR. Defs.' Mot. at 11-14. All three of these defenses fail. The first is legally wrong, the second is misplaced, and the third is a concession that supports the claim.

A. *APA Requirements for Final Agency Action Do Not Apply to the Third Claim, and Defendants' Concession that ONHIR Cannot Close On Its Own Confirms That ONHIR Cannot Continue Trying to Do That.*

Addressing the last defense first, the assertion that only the President can terminate ONHIR's operations concedes that ONHIR lacks that authority. *Id.* at 14. That supports rather than undermines the Nation's third claim because, without fully discharging its functions or a Presidential determination, ONHIR may not take further actions to close. *See* Compl. ¶¶ 138-42. That also establishes that Defendants misplace reliance on *Clayton v. Chertoff*, 2007 WL 2904049 (N.D. Cal. Oct. 1, 2007), and *Konchitsky v. Chertoff*, 2007 WL 2070325 (N.D. Cal. July 13, 2007), Defs.' Mot. at 14. Those cases held that "the APA does not confer jurisdiction over the FBI in connection with an action for judicial review

of [another agency]'s failure to act on an adjustment of [immigration] status application." *Clayton*, 2007 WL 2904049 at *3 (citing *Konchitsky*, 2007 WL 2070325 at *6). That is not surprising, but is nothing like this claim, which is properly against the agency that has acted illegally. The Nation properly brings this claim for a declaration that ONHIR does not have authority to close, so that ONHIR must stop taking actions to close when it has not yet completed relocation as required almost 36 years ago. Indeed, one of the cited cases noted that a two-year delay in agency action there was unreasonable. *Id.* at *6.

Next, the "APA final agency action" defense here fails for the same reason that defense fails for the first claim. As above, Defendants misconstrue this claim as being under the APA when it instead seeks a declaratory judgment for a non-monetary, non-APA claim against a federal agency for compliance with a specific federal duty, here based on violation of a specific federal proscription. *See* Compl. ¶ 142. This claim is not subject to the APA's final agency action restriction, so Defendants' defense on that basis is misplaced. *See Navajo II*, 26 F.4th at 808; *Navajo I*, 876 F.3d at 1171-73 & n.36.

Defendants' authorities for this defense are unavailing. Defs.' Mot. at 12-13. The Nation does not seek "judicial review over everything done" by ONHIR, unlike dam operations in *Wildlife Fish Conservancy v. Jewell*, 730 F.3d 791, 800-01 (9th Cir. 2013). Nor is this a claim about "vague, undefined corrective measures" for "day-to-day" project implementation, as in *Village of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186, 193-94 (4th Cir. 2013). In turn, *Bennet v. Spear*, 520 U.S. 154, 179 (1997), aptly recognizes that recommendations and a presentation to the President are not final agency actions, but that is irrelevant since this claim is not subject to that APA requirement.

B. *The Relocation Act Authorizes an Implied Right for the Nation to Protect Itself and Its Affected Citizens from ONHIR's Premature Closure.*

Like for the non-APA claim in *Navajo I* and *Navajo II* to enforce a Navajo treaty, a private right of action is not required here. Even if that is required, there is one. A statute

provides an implied right of action where (1) there is evidence of legislative intent to confer rights on beneficiaries, (2) the plaintiff is of the class for whose special benefit the statute was enacted, (3) an implied private cause of action is consistent with the statutory purposes, and (4) the cause of action is not traditionally relegated to state law. *Lil' Man in the Boat v. City & County of San Francisco*, 5 F.4th 952, 958 (9th Cir. 2021) (quoting *Logan v. U.S. Bank Natl. Ass'n*, 722 F.3d 1163, 1170 (9th Cir. 2013) and *Sandoval* and *UFCW* cases relied on by Defendants). Intent especially exists where the statute's text and structure focus on "'beneficiaries whose welfare Congress intended to further'" and not a "'regulated party[.]'" *Id.* at 959 (quoting *Logan*, 722 F.3d at 1171).

Here, the Relocation Act settled the Navajo-Hopi land dispute, directs ONHIR to relocate Navajos from HPL, including providing benefits to them, and authorizes acquisition of the New Lands for the Nation and construction of housing and related community facilities for those Navajos. *See* 25 U.S.C. §§ 640d to -7, -10, -11, 13, -14; Pub. L. 99-190, 99 Stat. 1236. Congress required that this relocation be thorough and generous, minimize adverse impacts, assure the availability of community facilities at relocation sites, and have major costs borne by the federal government, all to avoid repetition of prior Indian relocation efforts. Compl. ¶¶ 43, 46, 51 (citing authorities). The Relocation Act also prescribes that ONHIR shall only "cease to exist when the President determines that its functions have been fully discharged." 25 U.S.C. § 640d-11(f). All this establishes that the Relocation Act was specially enacted to benefit the Nation and Navajos subject to relocation, including host communities, and that an implied cause of action for the Nation on behalf of itself and affected Navajos is consistent with the purposes of the Relocation Act. Also, there are exclusively federal affirmative fiduciary obligations to Navajos required to relocate from HPL under the Relocation Act, *see Bedoni*, 878 F.2d at 1124-25; *Kabinto*, 456 F.2d at 1092, so enforcement of those is not relegated to state law.

On top of all that, the Relocation Act provides for remedial litigation by the Nation and the Hopi Tribe on behalf of their citizens. The Relocation Act provides that "[e]ither tribe may institute . . . original, ancillary, or supplementary actions against the other tribe . . . to fully accomplish all objects and purposes of" the Act. 25 U.S.C. § 640d-17(c). "Such actions may be commenced in the [U.S.] District Court [for Arizona] by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all . . . individual members thereof." *Id.* Those provisions are not "directly implicated in" but "nonetheless inform" jurisdictional analysis for non-intertribal litigation under the Relocation Act. *Benally v. Hodel*, 940 F.2d 1194, 1196 (9th Cir. 1991). That "broad right of action" implies that "Congress meant" and "vests" "a procedural right in tribal chairmen to challenge government compliance with the dictates of the [Relocation] Act" "on behalf of the generalized rights of relocatees." *Id.* at 1199-1200.

All the above supports this claim. The Navajo office of "tribal council chairman" no longer exists, as there is now a Speaker of the Navajo Nation Council and the President of the Nation. 2 Navajo Nation Code §§ 281-82, 285, 1002(B), 1005. Participation of that nonexistent official is not essential since that role was only as a relator, "for and on behalf of the tribe," 25 U.S.C. § 640d-17(c), "'to sue in the government's name for the violation of a public right.'" *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 675 (9th Cir. 2021) (citation omitted). This case is thus properly brought for the Nation by its Attorney General pursuant to her authority over all legal matters in which the Nation has an interest and to represent the Nation's interests in dealings and relations with others, including through retained law firms. 2 Navajo Nation Code §§ 1963(B), (C), (G), 1964(A). All this, the DJA, and the second sentence of 5 U.S.C. Section 702 support this claim by the Nation on behalf of itself and its severely affected citizens to stop ONHIR's ongoing efforts to close before it has "fully discharged" its core, multifaceted "Relocation" function without the required presidential determination. *See* Compl. ¶¶ 89-95.

IV. The Relocation Act Authorizes the Fourth Claim, for Failure by ONHIR to Obtain and DOI to Provide Reasonable Interagency Assistance to Implement Relocation, Based on the Necessity of That and DOI's Improper Assistance to ONHIR for Premature Closure.

Defendants assert that the Relocation Act does not confer a private right of action for the "interagency assistance" claim and that the claim is not cognizable under the APA without any discrete required action that ONHIR, let alone DOI, are required but have failed to take under 25 U.S.C. Section 640d-11(e). Defs.' Mot. at 14-16. These arguments fail in the same way that Defendants' corresponding arguments against the other claims fail, reinforced by governing law and undisputed allegations in the Verified Complaint.

First, as explained above for the third claim, the Relocation Act "vests an implicit procedural right" in the Nation "to challenge government compliance with the dictates of the [Relocation] Act" on behalf of the "generalized rights of relocatees." *Benally*, 940 F.2d at 1199-1200. That applies equally to the fourth claim, for federal agencies' failures to obtain and provide necessary assistance in implementing relocation under 25 U.S.C. Section 640d-11(e), as it applies to *ultra vires* premature efforts to close ONHIR contrary to 25 U.S.C. Section 640d-11(f) for the third claim.

Second, as for the first and third claims, the fourth claim expressly seeks a declaratory judgment under the DJA and is not brought pursuant to the APA other than for a sovereign immunity waiver. *See* Compl. ¶¶ 147-48. Therefore, this claim is not subject to the APA's final agency action restriction, so Defendants' defense on that basis is misplaced. *See Navajo II*, 26 F.4th at 808; *Navajo I*, 876 F.3d at 1171-73 & n.36.

Finally, the defense that there are no required duties to obtain or provide interagency assistance to implement relocation contravenes relevant undisputed facts in the Verified Complaint and the reviewability of otherwise discretionary agency actions. "'[T]he mere fact that a statute contains discretionary language does not make agency action unreviewable.'" *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 751 (9th Cir. 2021)

(citation omitted). "'Even where statutory language grants an agency unfettered discretion, its decision may nonetheless be reviewed if regulations or agency practice provide a meaningful standard by which this court may review its exercise of discretion.'" *Id.* (citation omitted). For that, the court can determine if there is law to be applied only in the context of the complaint. *Id.* at 752. And "[i]n ruling on a motion to dismiss, . . . courts 'must take all of the factual allegations in the complaint as true,' but 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Wood v. Moss*, 572 U.S. 744, 755 n.5 (2014) (citation omitted).

In enacting Section 640d-11(e), Congress expected that DOI and other federal agencies coordinate with the NHIRC (now ONHIR) to aid in implementing relocation. Compl. ¶¶ 53-54. Also, the Relocation Plan and the NHIRC recognized that interagency coordination for relocation is necessary and planned, *id.* ¶¶ 57, 60, 67, and ONHIR has reaffirmed that interagency coordination and cooperation is necessary and being provided to implement relocation, *id.* ¶¶ 80, 82. That assistance is needed now more than ever. *Id.* ¶¶ 14-16, 18-20, 100-19. ONHIR has asked and obtained assistance from DOI, but to facilitate premature, *ultra vires* closure of ONHIR rather than relocation implementation. *Id.* ¶ 8, 90-92, 98. That constitutes an abuse of discretion by ONHIR and a failure by DOI to provide required reasonable assistance under the Relocation Act. All this supports a declaration that ONHIR must obtain and DOI must provide reasonable assistance in implementing the Relocation Plan under the Relocation Act.

CONCLUSION

Based on all the foregoing, Defendants' motion to dismiss must be fully denied.

Respectfully submitted March 30, 2022,

/s/Daniel I.S.J. Rey-Bear
Daniel I.S.J. Rey-Bear
Timothy H. McLaughlin
Rey-Bear McLaughlin, LLP

421 W Riverside Ave, Suite 1004
Spokane, WA 99201-0410
telephone: 509-747-2502
dan@rbmindianlaw.com
tim@rbmindianlaw.com

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

Christina S. West (pro hac vice)
Tierra N. Marks (pro hac vice)
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

Counsel for Plaintiff