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IN THE UNITED STATES DISTRICT COURT
FOR THE 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, and United States Department of the Interior, Defendants.	No. CV-21-08190-PCT-DWL **REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS**

Defendants Office of Navajo and Hopi Indian Relocation ("ONHIR") and United States Department of the Interior ("DOI") submit the following reply to Plaintiff's Response (Doc. 25) ("Response") to Defendants' Motion to Dismiss (Doc. 20) ("Motion").

INTRODUCTION

The Court should dismiss this action because the Navajo Nation (the "Nation") fails to state a cognizable claim against Defendants. The Nation's "Unreasonable Delay" Claim (Claim 2) fails to challenge discrete agency action, instead seeking to direct the entirety of ONHIR's functions. This is the definition of an impermissible programmatic attack under 5 U.S.C. § 706(1) and must be dismissed. The Nation's "Infrastructure" Claim (Claim 1), which the Nation's Response (at 5-8) recasts as a breach of trust claim, should be dismissed because the Nation cannot identify a substantive federal law – a statute, regulation, or treaty – that establishes a specific, enforceable trust duty mandating ONHIR to provide the kind of infrastructure the Nation seeks.

The Nation's "Premature Closure" and "Interagency Assistance" Claims (Claims 3 and 4) should be dismissed because the provisions that they seek to enforce, 25 U.S.C §§ 640d-11(e) and (f), do not create a private right of action. And while the APA does provide a right of action for the Nation's claim, the Nation's Response (at 13, 16) expressly disclaims reliance on the APA's right of action. Alternatively, these claims should be dismissed because both claims are foreclosed by the Settlement Act's plain terms.

ARGUMENT

I. The Nation's Unreasonable Delay Claim Is Not Cognizable Under the APA.

The Nation's Unreasonable Delay Claim (Claim 2) seeks to compel ONHIR under § 706(1) to "promptly" perform the entirety of its remaining functions under the Settlement Act. The Supreme Court's decisions in *Lujan v. National Wildlife Federation (Lujan)*, 497 U.S. 871 (1990) and *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004), foreclose the Nation's broad, programmatic attack on ONHIR as a whole.

"It is axiomatic that Plaintiffs must identify an 'agency action' to obtain review under the APA." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011 (9th Cir. 2021). Agency action encompasses only "circumscribed, discrete" actions, such as a "rule, order, license, sanction, [or] relief." *SUWA*, 542 U.S. 55; 5 U.S.C. § 551(13). In turn, the *SUWA* Court explained, a suit seeking to compel agency action under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is [legally] *required* to take." *SUWA*, 542 U.S. at 64.

Invoking these principles, Defendants' Motion argued that the Nation's claim to compel ONHIR to provide "community facilities and services"[1] and complete relocation does not challenge discrete "agency action" that can be compelled under § 706(1).[2] *See* Mot. at 9. The Nation does not address this argument or otherwise explain how seeking to compel an

[1] ONHIR disputes that a duty to provide "community facilities and services" exists in light of the 1988 Amendments to the Settlement Act. Mot. at 6-7.

[2] Defendants' Motion addressed the Nation's Infrastructure and Unreasonable Delay Claims (Claims 1 and 2) together because the claims overlap; both claims seek a mandatory injunction to compel ONHIR to provide infrastructure and correspond with the same requests in the Nation's Prayer for Relief. Compl, Prayer ¶¶ 2, 5.

agency to perform the entirety of its functions could possibly be considered discrete. *See* Resp. at 9-12. Instead, the Nation argues that, aside from ONHIR's failure to complete relocation by the 1986 deadline, "[a]ll additional details," including the APA's discrete action requirement, are "irrelevant." Resp. at 10, 12. This argument misunderstands the APA. In *SUWA*, the Court held that plaintiffs must identify discrete, legally required action *as a threshold* requirement to proceeding under § 706(1). *SUWA*, 542 U.S. at 64. "Taken together, the[se] limitations" serve separation of powers interests, "allowing courts to review only those acts that are specific enough to avoid entangling the judiciary in programmatic oversight, clear enough to avoid substituting judicial judgments for those of the executive branch, and substantial enough to prevent an incursion into internal agency management." *City of New York v. United States Dep't of Def.*, 913 F.3d 423, 432 (4th Cir. 2019); *Whitewater Draw*, 5 F.4th at 1011-12.

The Nation also argues that *Lujan* and *SUWA* are distinguishable because neither involved a statutory deadline. Resp. at 11. This argument fails for the same reason discussed above—it ignores the fact that a "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *SUWA*, 542 U.S. at 64. In *SUWA*, the plaintiffs sought declaratory and injunctive relief under § 706(1), arguing that BLM violated its mandate to manage certain wilderness areas in a manner not to impair them—the nonimpairment command. *Id.* at 65. Although the "nonimpairment" command "is mandatory as to the object to be achieved," the Court reasoned, "it leaves BLM a great deal of discretion in deciding how to achieve it" and thus does not give rise to a discrete, mandatory duty required "to support judicial action under § 706(1)." *Id*. at 66.

Like the nonimpairment command in *SUWA*, the Settlement Act's command to prepare and implement a plan to "assure … community facilities and services" leaves ONHIR "a great deal of discretion in deciding how to achieve it." *Id.* at 65. If anything, the Nation's challenge is even more broad than the plaintiffs' challenge in *SUWA* because, in addition to "community facilities and services," the Nation seeks to compel ONHIR to perform the entirety of its remaining relocations activities. "Courts have repeatedly held that similar 'broad programmatic attacks' cannot be brought under the APA." *Arizona v. Mayorkas*, No.

CV-21-00617-PHX-DWL, 2022 WL 357348, at *4 (D. Ariz. Feb. 7, 2022).[3]

The Nation's sweeping request for relief underscores the programmatic nature of its challenge. Mot. at 9-10. In addition to seeking to compel ONHIR to "comply" with all provisions of the Settlement Act and Relocation Plan, Compl. ¶ 1, the Nation requests that the Court micromanage ONHIR's compliance through an order setting a "strict timeline" for action by ONHIR "with specific deadlines" and with "the Court retaining jurisdiction to ensure compliance pending completion of relocation," *id.*, Prayer ¶ 7. However, the APA "do[es] not empower a court to supervise an agency's compliance with a broad statutory mandate." *Murray Energy Corp. v. Adm'r of EPA*, 861 F.3d 529, 537 n.4 (4th Cir. 2017); *see also, e.g.*, *Vill. of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186, 194 (4th Cir. 2013) (noting "the obvious inability for a court to function in such a day-to-day managerial role over agency operations"). Courts cannot "simply enter a general order compelling compliance with [a statutory] mandate" and then "determine whether compliance was achieved." *SUWA*, 542 U.S. at 66. But the relief the Nation seeks—an injunction that would end only when the Court finds "completion of relocation," Compl., Prayer ¶ 7—amounts to exactly that.

II. The Nation's Infrastructure Claim Should Be Dismissed Because It Has Not Identified a Substantive Federal Law That Establishes a Trust Duty.

Defendants' Motion argued that the Nation's Infrastructure Claim ("Claim 1") should be dismissed because it fails to challenge discrete agency action under the APA.[4] In its Response, the Nation jettisons reliance on the APA and recasts its Infrastructure Claim as a breach of trust claim. *See* Resp. at 5-7. According to the Nation, the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-02,[5] "[a]uthorizes" its claim and the Settlement Act establishes a

[3] The cases that the Nation relies on in its Response are all distinguishable. *In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809 (9th Cir. 2015), did not involve a "programmatic attack." *Vietnam Veterans of Am. v. Cent. Intel. Agency,* 811 F.3d 1068, 1076 (9th Cir. 2016), involved an action to compel a discrete duty to provide mandatory notice to medical test subjects, in contrast to the broad programmatic attack here.

[4] Claim 1 seeks declaratory relief and a mandatory injunction. Compl. ¶ 137. Defendants assumed that this claim relied on the APA because the portion of the Nation's Prayer for Relief that seeks the relevant injunction cites § 706(1). *Id.*, Prayer ¶ 5.

[5] The Nation cannot rely on the DJA to create jurisdiction or a cause of action. "[T]he Declaratory Judgment Act is procedural only and does not confer arising under jurisdiction." *California Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 543 (9th Cir.

"[f]iduciary [d]uty" to "[e]nsure [c]ommunity [f]acilities and [s]ervices." *Id.* The Nation's repackaged breach of trust claim should be dismissed because the Nation fails to identify a substantive federal law that establishes a specific, enforceable fiduciary duty.

To bring a breach-of-trust claim, the Nation "must identify a substantive source of law that establishes specific fiduciary or other duties" and "allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). "[A] tribe must identify statutes or regulations that both impose a specific obligation on the United States and bear the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (internal quotations and alteration omitted). "[A] statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Id.* Accordingly, the trust analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v. Navajo Nation*, 556 U.S. 287, 296 (2009) (quotations and citation omitted) (*Navajo II*).

Here, the Nation seems to claim that ONHIR breached a fiduciary duty to ensure community facilities and services for Navajo relocatees. Resp. at 7.[6] According to the Nation, this duty can be found in two provisions of the Settlement Act – 25 U.S.C. §§ 640d-11(c)(2)(A) and 640d-13(a). *Id.* The first provision transferred authority over appropriated funds to construct housing, related facilities, and roads to ONHIR. *See* 25 U.S.C. §§ 640d-11(c)(2)(A); Pub. L. No. 99-190, 99 Stat. 1185, 1236 (1985) ("Appropriations Act"). The Appropriations Act contains no express trust language and the simple act of appropriating funds for a particular purpose does not evidence an intention on Congress's part to create a legal relationship. In

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2011); *see also Doc's Dream, LLC v. Dolores Press, Inc.*, 959 F.3d 357, 363 (9th Cir. 2020).

[6] The Nation's Complaint does not plead a breach-of-trust-claim; it does not identify the substantive federal law creating a specific, enforceable trust duty; and it does not even allege that ONHIR has a trust duty to provide infrastructure. *See generally* Compl. Had Defendants been on notice that the Nation's Infrastructure Claim is based on a breach of trust theory, Defendant's Motion would have raised a number of different arguments, including for example, that the Complaint fails to comply with Fed. R. Civ. P. 8(a)(2).

Wolfchild v. United States, 559 F.3d 1228 (Fed.Cir.2009), the Federal Circuit rejected a claim that similar acts appropriating funds to be paid to Indians established an enforceable trust relationship. There, Congress enacted a series of appropriations acts, authorizing funds to be used for the benefit of the Mdewakantons, which the plaintiffs argued created a trust for the Mdewakantons and their descendants. *Id.* at 1233-34, 1236. The Federal Circuit disagreed:

> Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose. The simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal [trust] relationship.

Id. at 1238. Similarly, in *Flute v. United States*, 808 F.3d 1234 (10th Cir. 2015), the Tenth Circuit held that "t[h]e simple act of appropriating funds for a particular purpose does not imply that Congress intended to create an enforceable trust relationship." 808 F.3d at 1246-47. "Were we to hold otherwise," the court reasoned, "any act in which Congress directed funds to be expended in a particular manner would create enforceable fiduciary obligations," which would flout "the Supreme Court's direction that the statute must contain express language creating such fiduciary obligations." *Id.* The same is true here.

The Nation also relies on language in the Settlement Act requiring that "relocation take place in accordance with the relocation plan." 25 U.S.C. § 640d-13(a); Resp. at 7. But the curt directive does not use the word trust or otherwise establish any "specific fiduciary or other dut[y]." *Navajo I*, 537 U.S. at 506. While the Nation argues that this directive incorporates the original relocation plan, the U.S. Court of Claims examined the Settlement Act in *Begay v. United States*, 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988), holding that Congress did not intend to create a trust relationship in enacting § 640d-12(c) (relocation plan), nor did Congress spell out the duties of such a trust relationship in the provision. *Id*. at 126.

The Nation further relies on three regulations – 25 C.F.R. §§ 700.1(e), 700.55(a)(3), 700.55(a)(8). The first states an objective to carry out relocation promptly, fairly, and with a minimum of hardship and discomfort. 25 C.F.R. § 700.1(e). The second and third relate to the

provision of decent, safe, and sanitary housing. 25 C.F.R. §§ 700.55(a)(3), 700.55(a)(8). None evidences an intent – express or implied – to create an enforceable trust relationship.[7]

Perhaps recognizing that federal law does not create an enforceable trust duty, the Nation contends that an infrastructure duty can be implied under *Navajo Nation v. U.S. Department of the Interior*, 26 F.4th 794 (9th Cir. 2022) and "common sense." Resp. at 7-8. In *Navajo Nation*, the Ninth Circuit held that the Nation could maintain a breach of trust claim based on implied treaty rights under the *Winters* doctrine. 26 F.4th at 812. The court went out of its way to "stress" (1) the case involved water rights, (2) the government's "long established" fiduciary obligations under *Winters*, and (3) the government's "pervasive control over the Colorado River." *Id.* Thus, the court's holding in *Navajo Nation* is limited by those three factors. Accordingly, it is of no help to the Nation here.

III. The Nation Lacks a Private Right of Action to Bring Its "Premature Closure" and "Interagency Assistance" Claims.

"A plaintiff may only bring a cause of action to enforce a federal law if the law provides a private right of action." *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929 (9th Cir. 2010). The Nation's Premature Closure and Interagency Assistance Claims (Claims 3 and 4) are based on alleged violations of § 640d-11(f) and § 640d-11(e). Mot. at 11, 14. Because neither provision creates a private right of action, and because the Nation disavows reliance on the APA, the Nation's claims must be dismissed. *See San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005); *Alpine 4 Holdings Inc. v. Finn Mgmt. GP LLC*, No. CV-21-01494-PHX-SPL, 2022 WL 1188073, at *3 (D. Ariz. Apr. 21, 2022) ("A claim must be dismissed for lack of subject matter jurisdiction if the statute on which it is based does not create a private right of action.").

A. The Settlement Act does not create a private right of action for the Nation's Premature Closure or Interagency Assistance Claims.

"[P]rivate rights of action to enforce federal law must be created by Congress."

[7] The Nation also points to ONHIR's management manual. Resp. at 8. But ONHIR's manual is not substantive federal law – a statute, treaty, or regulation; it was not published in the Federal Register, is for agency guidance only, and is without force of law. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) ("rules of agency organization, procedure or practice" do not have the force of law).

Alexander v. Sandoval, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* Where "Congress does not provide a private right of action explicitly" in a statute's text, "clear and unambiguous terms" are required to create an implied private right of action. *Lil' Man in the Boat, Inc. v. City & Cnty. of San Francisco*, 5 F.4th 952, 958 (9th Cir. 2021) (quotations omitted); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). Plaintiff bears the burden of proving that Congress intended to create a private right of action to enforce the statutory provisions relied upon. *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992).

The Nation does not contend that the Settlement Act creates an express private right of action to enforce § 640d-11. Resp. at 14-16. Rather, according to the Nation, Congress enacted the Settlement Act "to benefit the Nation and Navajos subject to relocation," somehow implying a right of action consistent with the Settlement Act's purpose. *Id.* at 14. The *Sandoval* Court rejected this kind of attempt to "revert … to the understanding of private causes of action that held sway 40 years ago" and allowed courts to imply a private right of action where consistent with a statute's purpose. *Sandoval*, 532 U.S. at 286-87.[8]

The Nation also argues for an implied private right of action based on *Benally v. Hodel*, 940 F.2d 1194, (9th Cir. 1990), where in holding that individual tribal members did not have standing to challenge the report and plan submitted to Congress by "Relocation Commission" pursuant to § 640d-12, the Ninth Circuit interpreted Section 640d-17(c)'s provision governing inter-tribal disputes as implying "a procedural right in tribal chairmen to challenge government compliance with the Settlement Agreement." 940 F.2d at 1999; Resp. at 15. As an initial matter, the *Benally* court did not directly consider whether the Settlement Act creates an implied right of action to enforce the provisions at issue here—Sections 640d-11(f) and 640d-11(e). *Rapid Transit Advocs., Inc. v. S. California Rapid Transit Dist.*, 752 F.2d 373, 378 (9th Cir. 1985) ("Existence of a private right under one section of [an] Act

[8] The Nation also states that "a private right of action is not required here." Resp. at 13. The Nation does not elaborate on this conclusory statement, but to the extent that it is suggesting that it can maintain its claims based on a breach of trust or some other theory, the Nation has not pleaded any such theory or advanced any such theory in its Response. Rather, the Complaint alleges that Claims 3 and 4 are based on § 640d-11, 25 U.S.C. § 640d-11 (Compl. ¶ 1), and its Response argues that it has a private right to enforce that provision.

does not mean such a right exists under other sections of the Act."). Furthermore, *Benally* was decided pre-*Sandoval* and *Gonzaga*, which fundamentally changed how courts must approach private rights of action and impose a heavy burden on the party seeking to create a private right of action where Congress did not provide one explicitly in the statute's text.

Under *Sandoval* and *Gonzaga*, the Nation has not met its burden of showing that Congress intended to create a private right of action to enforce Sections 640d-11(f) and 640d-11(e). The Nation points to no "rights-creating" language in Sections 640d-11(f) or 640d-11(e), which the *Sandoval* Court found critical to implying a private right of action. *See Sandoval*, 532 U.S. at 288; *UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018) ("To create a private right, a statute must use rights-creating language."). Sections 640d-11(f) and 640d-11(e) are "yet a further step removed" from having rights-creating language, as the provisions focus not on the individuals protected or the parties being regulated, "but on the agenc[y] that will do the regulating"—ONHIR, *Sandoval*, 532 U.S. at 289, which "dooms any suggestion that Congress intended to create a private right" to enforce the provisions. *UFCW*, 895 F.3d at 699. Even if the Nation could point to "rights-creating" language in § 640d-11, nothing in the Settlement Act "displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286.[9] Since § 640d-11(f) and § 640d -11(e) do not reflect a "clear and unambiguous" intent to create an implied private right of action, *Lil' Man*, 5 F.4th at 958, "a cause of action does not exist and courts may not create one," *Sandoval*, 532 U.S. at 286-87.

B. The Nation's claims are not cognizable under the APA.

[9] In *Apache Tribe*, the Ninth Circuit expressed reluctance to create a private right of action against the government, where, as here, alternative means of ensuring governmental compliance with federal statutes is presumed available under the APA. *Apache Tribe*, 417 F.3d at 1095-98. The court emphasized the rationale expressed by then-Judge Breyer:

> It is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the federal government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for" conformity with statutory obligations without any such 'private right of action.'

Id. at 195-96 (quoting *NAACP v. Sec'y of HUD*, 817 F.2d 149, 152 (1st Cir. 1987)).

Because the Settlement Act does not create a private right of action to enforce § 640d-11(f) and § 640d-11(e) – the substantive provisions on which the Nation's Premature Closure and Interagency Assistance Claims are based – the Nation's claims must rely on the APA's right of action. *Lujan*, 497 U.S. at 882; Mot. at 12, 15.

The Nation's Premature Closure Claim is not cognizable under the APA because, as explained in Defendants' Motion, it does not challenge "agency action" that is "final" within the meaning of the APA. *See* Mot. at 12-13. And the Nation's Interagency Assistance Claim fails because it does not challenge discrete, nondiscretionary, "agency action" that is subject to review under Section 706(1) of the APA. *See* Mot. at 15-17. The Nation does not respond to Defendants' arguments. Instead, the Nation insists that its claims are not brought pursuant to the APA and thus not subject to its procedural requirements. Resp. at 13, 16. In turn, the Nation's claims should be dismissed because the Settlement Act does not create a private right of action and the Nation disavows reliance on the APA. *See Apache Tribe*, 417 F.3d at 1099; *Alpine 4 Holdings*, 2022 WL 1188073, at *3.

IV. The Nation's Premature Closure and Interagency Assistance Claims Fail as a Matter of Law and Should be Dismissed.

Even if the Settlement Act did provide the Nation with a private right of action to enforce the provisions of Section 640d-11, which it does not, the Nation's Premature Closure and Interagency Assistance Claims fail as a matter of law and should be dismissed.

A. The Court should dismiss the Nation's Premature Closure Claim.

The Court should dismiss the Nation's Premature Closure Claim (Claim 3) because, in addition to there being no jurisdictional basis for the claim, ONHIR is not the proper defendant to the Nation's claim and no "actual controversy" exists between the parties.

The Nation's Premature Closure Claim seeks a declaratory judgment that ONHIR "may not cease to exist unless and until there is a Presidential Determination that ONHIR's functions have been fully discharged" and injunctive relief to prevent ONHIR from closing. Compl. ¶ 142. The Nation does not dispute the Settlement Act vests authority in the President alone to terminate ONHIR's operations, 25 U.S.C. § 640d-11(f), and ONHIR has no statutory

or other authority to terminate its own operation. Resp. at 13. The Court should dismiss the Nation's Premature Closure Claim because ONHIR has no authority, as a matter of law, to cease its own operations. *Alhawarin v. McCament*, No. CV 17-3444-GW(AFMX), 2018 WL 6265081, at *11 (C.D. Cal. Mar. 29, 2018). Additionally, the Court should dismiss the Nation's claim because there is no "actual controversy" between the parties regarding ONHIR's closure authority. *Takeda Pharm. Co. v. Mylan Inc.*, 62 F. Supp. 3d 1115, 1121–22 (N.D. Cal. 2014).

B. The Court should dismiss the Nation's Interagency Assistance Claim.

The Nation's Interagency Assistance Claim (Claim 4) fails as a matter of law and should be dismissed. Under § 640d-11(e)(1), ONHIR is "authorized" to call upon any department or agency of the United States to assist [it] in implementing the relocation plan." 25 U.S.C. § 640d-11(e)(1). In other words, it does not *require* ONHIR to seek assistance from a particular agency or seek assistance at all. Indeed, numerous courts have recognized that statutes simply "authorizing" an agency to act do not impose a mandatory duty that can be compelled through a writ of mandamus or mandatory injunction. *See, e.g.*, *U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) ("The law must not only authorize the demanded action, but require it …."); *Hopi Tribe v. United States*, 55 Fed. Cl. 81, 89 (2002) (noting "authorized" as used in the Settlement Act provides discretion); Mot. at 16.

The Nation does not dispute that Section 640d-11(e)(1) gives ONHIR discretion. Instead, it argues that even if the provision is discretionary, the claim is reviewable nonetheless because the Court can discern a "meaningful standard" by which to review the "exercise of discretion." Resp. at 17 (*quoting Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 752 (9th Cir. 2021)). This argument is misplaced. It is based on *Heckler v. Chaney, 470 U.S. 821* (1985) and § 701(a)(2)'s exception to the APA's presumption in favor of judicial review for agency action committed to agency discretion by law, which is irrelevant to the Defendants' arguments under § 706(1) and on the merits. Because § 640d-11(e) plainly gives ONHIR discretion to decide whether to seek agency assistance, from which agencies to seek assistance, and when to seek assistance – facts that the Response does not appear to dispute – the Nation's claim seeking to "compel ONHIR to obtain and DOI to provide reasonable assistance to implement" the

Settlement Act must fail as to both Defendants. *See* Mot. at 17 n.7.

The Nation's claim also fails as to DOI because Section 640d-11(e) does not even refer to DOI and the Settlement Act does not otherwise impose any duties on DOI in connection with relocation. Absent a request for assistance from ONHIR, which the Nation concedes in its Response has not happened here (Resp. at 17), DOI has no duty to assist in completing relocation. This concession by the Nation and the plain text of Section 640d-11(e) foreclose the Nation's Interagency Assistance Claim. DOI should be dismissed.

CONCLUSION

Defendants therefore request that the Nation's Complaint be dismissed.

RESPECTFULLY SUBMITTED this 16th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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