

2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE DISTRICT OF ARIZONA
5

6 Dora Dean Mike, Deceased,
7 by Larry Mike,

8 Plaintiff,

9 v.

10 Office of Navajo and Hopi Indian
Relocation, an administrative agency of
the United States,

11 Defendant.
12

No. CV 06-0866-PCT-EHC

ORDER

13
14 **INTRODUCTION**

15 Before the Court are two Cross Motions for Summary Judgment. (Dkts. 15, 24).
16 Plaintiff seeks relief from a denial of relocation assistance benefits by the Office of Navajo
17 and Hopi Indian Relocation (“ONHIR”), an administrative agency of the United States. The
18 Commissioner of the ONHIR seeks affirmation of its final decision.

19 **STANDARD OF REVIEW**

20 A court should grant summary judgment when there is no genuine issue of material
21 fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).
22 Under the Administrative Procedure Act (APA), “a court reviews the challenged agency
23 action under a narrow and deferential standard to determine whether such action was
24 arbitrary and capricious.” Bark v. U.S. Forest Service, No. CV 04-356 MO, 2007 WL
25 756746 (D.Or. Mar. 3, 2007) (citing 5 U.S.C. § 706(2)(A)). A reviewing court may set aside
26 agency action that is unsupported by substantial evidence, is arbitrary, capricious or contrary
27 to law. 5 U.S.C. § 706(2)(A), 2(E). See Bedoni v. Navajo-Hopi Indian Relocation
28 Commission, 878 F.2d 1119, 1122 (9th Cir. 1989). Substantial evidence means “such

1 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
2 Information Providers’ Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866,
3 870 (9th Cir. 1991). When reviewing an agency’s decision under an arbitrary and capricious
4 standard, the Court must determine whether the agency’s decision was based on
5 consideration of relevant factors and whether there has been a clear error of judgment.
6 Northwest Motorcycle Association v. U.S. Department of Agriculture, 18 F.2d 1468, 1471
7 (9th Cir. 1994).

8 **PROCEDURAL HISTORY**

9 The ONHIR was created by Congress to carry out the relocation of members of the
10 Navajo and Hopi Tribes who live in the Federal Joint Use Area (“FJUA”), disputed land that
11 was eventually partitioned for each tribe. (Dkt. 1, Complaint for Judicial Review
12 (“Complaint”) ¶ 4; Dkt. 10, Answer ¶ 4). The ONHIR was also designated to provide
13 relocation assistance benefits for all households who moved off of land designated to the
14 other tribe pursuant to the Navajo-Hopi Settlement Act (“the Act”). (Complaint ¶ 4; Answer
15 ¶ 4). Plaintiff Dora Dean Mike (“Dora”) was an enrolled member of the Navajo Nation and
16 resided on the FJUA. (Complaint ¶ 3; Answer ¶ 3).

17 One of the Act’s regulations provided for relocation assistance benefits to those who
18 were residents of the FJUA “but moved from there between December 22, 1974, and August
19 30, 1978.” C.F.R. § 700.147(a)(2) (1983). The regulation was in effect from March 9, 1979,
20 to June 28, 1984, the period during which applicants could file for benefits. (Complaint, Ex.
21 1).

22 Dora applied for relocation assistance benefits on March 6, 1980. (Dkt. 26,
23 Defendant’s Statement of Facts (“DSOF”) ¶ 1; Dkt. 29, Plaintiff’s Reply to Defendant’s
24 Statement of Facts (“PRSOF”) ¶ 1). She was denied benefits on March 12, 1985, because
25 she did not respond to the ONHIR’s four requests for additional supporting documents.
26 (DSOF ¶¶ 2-3; PRSOF ¶¶ 2-3).

27 Dora died of cancer on July 22, 1987. (DSOF ¶ 4; PRSOF ¶ 4).
28

1 On June 5, 1990, the ONHIR determined that Dora was eligible to submit an appeal
2 of the denial, and on June 27, 1996, Plaintiff's counsel and the ONHIR stipulated that
3 Plaintiff's husband, Larry Mike ("Larry"), could pursue the appeal on Dora's behalf. (DSOF
4 ¶¶ 5, 7; PRSOF ¶¶ 5, 7). Plaintiff's appeal was heard on September 21, 1999. (DSOF ¶ 8;
5 PRSOF ¶ 8).

6 The decision of denial was issued on November 17, 1999. (DSOF ¶ 36; PRSOF ¶ 36).
7 The Hearing Officer found that Dora had moved from the FJUA before the Act was passed
8 on December 22, 1974; thus, she did not "move pursuant to the Act." The issue before the
9 Court is whether the Hearing Officer's decision was arbitrary, unsupported by substantial
10 evidence, or contrary to law, and as a result, a clear error of judgment.

11 BACKGROUND

12 Dora and Larry started dating in high school, a boarding school in Wingate, New
13 Mexico. (DSOF ¶¶ 10-11; PRSOF ¶¶ 10-11). Dora's family lived in Jeddito, Arizona, and
14 Larry's family lived in Rock Springs, New Mexico. (DSOF ¶ 12; PRSOF ¶ 12). When Larry
15 graduated in 1972, he went to a California school for automotive training and Dora remained
16 in New Mexico to finish high school. (DSOF ¶ 14, 16; PRSOF ¶ 14, 16).

17 Dora graduated from high school in 1973, began working at a hardware store in
18 Gallup, New Mexico, and obtained a New Mexico driver's license. (DSOF ¶¶ 16-17; PRSOF
19 ¶¶ 16-17). In July of 1973, Dora and Larry married in her Arizona hometown of Jeddito and
20 obtained a Marriage License and Certificate from the Navajo Nation. (DSOF ¶¶ 18, 21;
21 PRSOF ¶¶ 18, 21).

22 Larry had planned to build a home in Jeddito, Dora's parents' ancestral home, in
23 accordance with Navajo tradition. (PSOF ¶ 17). Dora's parents owned a two-room frame
24 house, sheep and horse corrals, a ramada and a hogan in Jeddito. (PSOF ¶ 21). Dora owned
25 two of the horses personally. (PSOF ¶ 13).

26 Larry and his mother, Nellie Mike ("Nellie"), testified that at the traditional,
27 matrimonial ceremony, the family elders advised the couple that, although it was tradition
28

1 to establish themselves in Jeddito, they would have to live elsewhere because the land dispute
2 with the Hopis prevented new construction. (DSOF ¶ 19; PRSOF ¶ 19).

3 Two weeks after the wedding, Dora and Larry moved in with Larry's mother in Rock
4 Springs; Dora left one of her horses in Jeddito and took the other to Rock Springs. The
5 couple and Nelli lived together in Nellie's home for approximately one year. (DSOF ¶¶ 20,
6 27; PRSOF ¶¶ 20, 27). After that, in 1974, Nellie moved to Gallup; Dora and Larry
7 continued to live in Nellie's home in Rock Springs..

8 Nellie passed ownership of her house to Larry, and a point of contention between the
9 parties is when that occurred. According to the ONHIR, Nellie told her son, *before* she
10 moved to Gallup, that he could remodel the Rock Springs home and remain there; this would
11 signify that Larry and Dora inherited the home before December 22, 1974. (DSOF ¶ 27).
12 Both Larry and Nellie testified that she expressed this to her son *after* she had moved to
13 Gallup, but before she returned to Rock Springs in 1978, signifying the likelihood that Larry
14 inherited the home after December 22, 1974. (PRSOF ¶ 27). Larry remodeled the Rock
15 Springs home for his family in 1978. (PSOF ¶ 24).

16 Larry further testified that he and Dora returned to Jeddito almost every weekend and
17 on vacations. (DSOF ¶ 26; PRSOF ¶ 26). They viewed their stay in Rock Springs as a
18 temporary employment arrangement; Dora always wanted to return to Jeddito permanently.
19 (PSOF ¶ 19). After five years of waiting for the land dispute to be resolved so they could
20 build their own home in Jeddito, Dora and Larry decided to make Rock Springs their
21 permanent home in June 1978. (PSOF ¶ 23). Consequently, Dora, a member of the Navajo
22 Nation Jeddito Chapter, changed her voter registration to the Rock Springs Chapter on July
23 10, 1978. (PSOF ¶ 23). Defendant argues that the couple made Rock Springs their
24 permanent residence after the wedding in 1973. (Dkt. 25, p.2).

25 Larry finished remodeling the Rock Springs home around 1978, and he and Dora lived
26 there from 1973 until 1986, when Dora became ill. (DSOF ¶¶ 28, 30; PRSOF ¶¶ 28, 30).
27 During that time, they filed taxes, did their banking, and worked in Gallup. (DSOF ¶¶ 25, 29,
28 31-32; PRSOF ¶¶ 25, 29, 31-32). Both of their children were born in Gallup, and the older

1 child, Vincent, testified that he grew up and attended school in Gallup. (DSOF ¶¶ 33-34;
2 PRSOF ¶¶ 33-34). Vincent did, however, return to Jeddito with his parents on weekends,
3 and also spent every summer there throughout elementary school. (PSOF ¶ 25).

4 When Dora was diagnosed with cancer in 1986, she moved back to Jeddito where she
5 died a year later. (PSOF ¶ 26).

6 DISCUSSION

7 To qualify for relocation assistance benefits, the applicant must meet three
8 requirements: **1)** the application must have been filed between March 9, 1979 and June 28,
9 1984; **2)** the applicant must have been a resident of the area partitioned to the tribe of which
10 she was not a member, a resident of the FJUA but from where she had moved away between
11 December 22, 1974, and August 30, 1978, or a resident of an area partitioned to the tribe of
12 which she was not a member but from where she moved away after August 30, 1978; and **3)**
13 the applicant is a head of household. (Dkt. 13, p. 3).

14 There is no dispute that Dora met the first and third requirements. There is also no
15 disagreement that Dora was a resident of the FJUA. The sole issue is whether she moved
16 away from the FJUA between December 22, 1974, and August 30, 1978. The ONHIR argues
17 that Dora moved from the FJUA in 1973; Plaintiff asserts that Dora established legal
18 residency in July of 1978.

19 I. Hearing Officer's Findings of Fact

20 The Hearing Officer for the ONHIR affirmed the denial of benefits finding that:

- 21 A. Dora spent Thanksgiving and Christmas of 1972 in Rock Springs.
- 22 B. Larry intended to work in Gallup after finishing his training in California.
- 23 C. Dora moved to Rock Springs almost immediately after high school graduation,
24 and held several jobs in Gallup between 1973 and 1986.
- 25 D. After their Jeddito wedding, the couple spent only one night in Jeddito.
- 26 E. Nellie eventually gave her Rock Springs home to the couple, which Larry
remodeled.
- 27 F. Dora and Larry periodically returned to Jeddito on a weekend.
- 28 G. The couple both had New Mexico driver's licenses and bank accounts.

1 H. There was no evidence that Larry ever built a traditional marital home for Dora
2 in Rock Springs or anywhere else.

3 (DSOF ¶ 38). As a preliminary matter, the Court finds that reasons A and D are irrelevant
4 to the issue before the Court.

5 A voter registration card was introduced at the hearing as evidence that Dora officially
6 moved to Rock Springs when she registered to vote there on July 10, 1978. However,
7 although it was signed by a Registration Officer, Dora had not signed or dated the document.
8 Consequently, the Hearing Officer rejected the card and did not make it a part of the record.
9 (DSOF ¶ 35; PRSOF ¶ 35).

10 **II. Hearing Officer's Conclusions of Law**

11 The Hearing Officer concluded that:

12 A. As of December 22, 1974, Dora was not a legal resident of the Jeddito Chapter
13 because she had resided in Rock Springs, New Mexico, since she graduated
14 from high school; here children were born and raised in Rock Springs; she was
employed in Gallup, New Mexico; and she visited the Jeddito area primarily
for social reasons and assisting her family.

15 B. Alternatively, if Dora maintained her legal residency in Jeddito, her move from
16 there was not "pursuant to the Act" since her circumstances did not change
except to transfer her voter registration from Jeddito to Rock Springs in 1978.

17 C. Dora did not move "pursuant to the Act" before December 22, 1974, because
18 the Act had not yet passed, and such move was for purposes other than in
response to the Act.

19 D. Therefore, Plaintiff is not entitled to relocation benefits.

20 (Administrative Record ("AR"), pp. 158-59).

21 **III. Legal Residence**

22 The ONHIR published a Plan Update in 1990 which defines residency for the purpose
23 of relocation benefits. (Dkt. 13, pp. 4-6). It rejected "actual occupancy" as a requirement and
24 instead chose "legal residency" as the operative definition. (Dkt. 13, Ex. 3). Legal residency
25 is, according to the ONHIR,

26 where a person might be temporarily away, but maintained substantial,
27 recurring contact with an identifiable homesite. This interpretation considered
28 the fact that many persons would leave the partitioned lands temporarily to
seek employment, job training, or other opportunities. Yet, they maintained
strong ties to their homes and community and *considered themselves* residents.

1 Id. (emphasis added). The agency justified its choice of definition as follows:

2 [T]he definition of legal residency best met both legal requirements and
3 circumstances of life on the partitioned lands. By reflecting the cultural
4 traditions and economic realities of the people affected by relocation, this
interpretation fulfilled the intent of Congress to provide for a thorough and
generous program.

5 Id.

6 **1. Employment and the economic realities of life on the reservation**

7 The purposes of education and employment are valid reasons for being “temporarily
8 away” from a legal residence. (Dkt. 13, Ex. 4). The Hearing Officer cites Dora’s
9 employment in New Mexico as support for denying the relocation benefits, even though it
10 is a recognized reason for being “temporarily away.” Moreover, the Hearing Officer ignores
11 that her high school attendance for four years at a boarding school in New Mexico was
12 presumably a temporary stay given Dora’s status as a minor. It is consistent with her
13 continued temporary stay for employment after graduation, because Jeddito offers little in
14 terms of employment and education. (See Dkt. 13, pp. 11-13).

15 The ONHIR itself acknowledges the “economic realities” of those residents who
16 relocate temporarily for school or work. The government does not dispute that facilities such
17 as banks, vehicle registration facilities, schools, and jobs are rarely accessible in Jeddito, a
18 phenomenon still problematic today but more so in 1973. (See Dkt. 13, pp. 12-13).

19 Larry testified that he intended to work in New Mexico after finishing school in
20 California because there was no work for him in Jeddito.

21 **2. Substantial contact and strong ties to the home and community**

22 Dora also maintained substantial, recurring contact with her home in Jeddito, traveling
23 there almost every weekend and whenever she and Larry had time off from work. Larry,
24 Nellie, and Vincent all testified to that fact. Without explanation, the Hearing Officer instead
25 characterized the contact as periodic social visits to Jeddito. (DSOF ¶ 38).

26 Furthermore, according to the testimony, Dora considered herself to be a resident of
27 Jeddito until 1978, which parallels her strong ties and recurring contact with her parents and
28

1 their ancestral home. This is further evidenced by Dora's decision to move back to Jeddito
2 for her last year of life, before dying of cancer.

3 **3. Property ownership**

4 The parties do not dispute that when Nellie told her son he could have the home, she
5 told him he could remodel the home as well. He did not do so until approximately 1978,
6 reflecting the likelihood that Nellie conveyed the property to Larry after she moved to
7 Gallup, a point of contention between the parties. Even if the property were conveyed before
8 1974, many married couples own property outside their location of residence. While the
9 timing of transfer of Nellie's home to Larry is a factor in determining when Dora established
10 her legal residence in New Mexico, it is not definitive.

11 **4. Cultural Tradition**

12 The ONHIR does not dispute the Navajo tradition that a newly married husband is
13 obligated to build a house at the ancestral homeland of his wife's parents. The defendant
14 asserts, however, that the couple could not have "reasonably relied" on the advice of elders
15 at their wedding to live elsewhere "pursuant to the Act," because the relocation enactment
16 occurred on December 22, 1974, well after the couple's wedding. (Dkt. 25, p. 2).

17 It is unlikely, however, that the tension between the Navajos and Hopis was not
18 known to the Jeddito residents living in the partitioned lands. In fact, testimony by nearby
19 residents in another case demonstrates that the land dispute was public knowledge well
20 before the enactment and that some hogans in an area near Jeddito had been burned down by
21 the Hopis. (See Dkt. 30, Ex. 2). It is fair to assume that the couple's reliance on their elders'
22 advice was reasonable.

23 The couple intended to adhere to tradition and build a home in Jeddito. They waited
24 five years, but the land dispute persisted and they were unable to do so. Although the
25 Hearing Officer found that Larry did not build a home for Dora elsewhere, it would not have
26 met Larry's traditional obligation that the home be built in Jeddito. Nonetheless, Larry
27 substantially remodeled the Rock Springs home in 1978, after it was given to him by his
28 mother.

1 Larry's failure to build a new home elsewhere is immaterial; this finding of fact in
2 support of the Hearing Officer's adverse decision was inappropriate.

3 **5. Residential Intent**

4 The ONHIR does not challenge the fact that Dora, Larry, and their two children were
5 listed on the JUA enumeration roster which identifies occupied homesites and residents. The
6 Mike family members were listed as residents of Jeddito on the roster, which was dated
7 November 13, 1974, one month prior to the passage of the Settlement Act. (Dkt. 13, p. 6).

8 The ONHIR's Management Manual indicates that "[t]he JUA roster is the master
9 record used by the Commission to determine the existence of occupied homesites . . . and to
10 identify residents of these homesites. (Dkt. 13, Ex. 5). "If the applicant is listed on the JUA
11 roster, he/she is assumed to have been a legal resident unless there is evidence to the
12 contrary." Id. Despite this presumption, the Hearing Officer does not acknowledge the
13 enumeration roster at all in his decision.

14 Although not admitted as part of the record by the Hearing Officer, Dora's voter
15 registration card was recognized by a Records Clerk at the Navajo Nation Elections Office
16 in Window Rock, Arizona, as a "temporary record." (See Dkt. 13, pp. 7-8). A Registration
17 Officer had signed and dated the card on July 10, 1978, but Dora had not. Nevertheless, the
18 Records Clerk indicated that these temporary records never bore the voter's signature but
19 were simply an interim step between an applicant's affidavit and the eventual list of eligible
20 voters. (Dkt. 13, p. 7, note 4).¹ According to Plaintiff, and not contended otherwise by
21 Defendant, a Jeddito Chapter Coordinator confirmed that "registration with a new Chapter
22 is synonymous with becoming a member there." (Dkt. 13, p. 8, note 5).

23 Larry unequivocally testified that he and Dora intended to return to Jeddito, and were
24 in Rock Springs temporarily for work. (Dkt. 13, p. 12). Dora considered herself a resident
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26
27 ¹Although Dora's affidavit could not be located, it is not unusual that such records are
28 routinely purged, not only because Dora had died, but because Larry's request for the
document was eleven years after her death. (See Dkt. 13, p. 7, note 4).

1 of Jeddito up until the time she transferred her voter registration from Jeddito to Rock
2 Springs in 1978.

3 Dora's voter registration card, her JUA roster listing as a legal resident of Jeddito on
4 November 13, 1974, and testimony of the witnesses, together are strong evidence that she
5 officially moved to Rock Springs when she registered to vote there on July 10, 1978.

6 In summary, Dora met the presumption of legal residency through her listing on the
7 JUA roster in late 1974, a fact the Hearing Officer did not mention in his Decision. She was
8 "temporarily away" from her homesite before her marriage for school. Moreover, Larry
9 testified she was "temporarily away" after their marriage for work, *and* because the couple
10 could not build a new home in Jeddito due to a construction freeze.

11 While the couple waited for a resolution to the land dispute, Dora maintained
12 substantial ties and recurring contact with an identifiable homesite, her parents' home in
13 Jeddito. The Hearing Officer did not explain why he characterized it as periodic interaction,
14 instead. When the couple decided to reside permanently in Rock Springs, Dora transferred
15 her voter registration accordingly.

16 **IV. Credibility of Witnesses**

17 The Hearing Officer found that the three witnesses, Larry, Nellie, and Vincent, were
18 credible witnesses. (AR, pp. 159-60). Yet, he chose to disregard the relevant testimony with
19 regard to Dora's intent to live in Rock Springs temporarily until she and Larry could build
20 their own home in Jeddito. Furthermore, the Officer failed to explain why he found the
21 witnesses credible in some respects but not in others. In considering all of the witness'
22 testimony as credible, there is no alternative but to conclude that Dora met the criteria for
23 legal residency on the FJUA.

24 **V. Fiduciary Relationship between the U.S. government and Native Americans**

25 "The United States Supreme Court has repeatedly recognized 'the distinctive
26 obligation of trust incumbent upon the Government in its dealings with [Native Americans]."
27 Bedoni v. Navajo-Hopi Indian Relocation Comm'n, 878 F.2d 1119, 1124 (9th Cir. 1989)
28 (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)) (alteration in original)

(citations omitted). This obligation is reflected in the ONHIR's own Plan Update that it is "the intent of Congress to provide for a thorough and generous [relocation benefit] program." (Dkt. 13, Ex. 3).

VI. Conclusion

The Hearing Officer does not justify findings which contradict testimony that he characterizes as credible. Nor does he explain why he ignores credible evidence, in particular, the JUA roster which names Dora as a resident of Jeddito in November of 1974. His decision is arbitrary, capricious, and unsupported by substantial evidence. It is a clear error of judgment.

There are no genuine issues of material fact. The sole contested fact, the timing of Nellie's transfer of her home to Larry, is not material. Regardless of when the conveyance occurred, a finding, that Plaintiff is entitled to relocation benefits, is clearly demonstrated.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment (Dkts. 13, 15) is **granted**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Dkt. 24) is **denied**.

IT IS FURTHER ORDERED remanding the matter for payment of benefits to Plaintiff.

DATED this 2nd day of January, 2008.



Earl H. Carroll
United States District Judge