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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8 Dora Dean Mike, Deceased, by Larry Mike,)	No. CV-06-866-PCT-EHC
9)	
10 Plaintiff,)	MEMORANDUM OF POINTS AND
11 vs.)	AUTHORITIES IN SUPPORT OF
12 Office of Navajo and Hopi Indian)	PLAINTIFF'S MOTION FOR
13 Relocation, an administrative agency of the)	SUMMARY JUDGMENT
14 United States,)	
Defendant.)	

15 I. PRELIMINARY STATEMENT

16 Dora Dean Mike was a member of the Navajo Nation whose ancestral lands at Jeddito,
17 Arizona were declared part of the Federal Joint Use Area (hereinafter "FJUA) of the 1882
18 Executive Order Hopi Reservation pursuant to the Navajo-Hopi Land Settlement Act
19 (hereinafter "Settlement Act"), 25 U.S.C. §640d. Larry Mike, Dora Mike's widower, has filed
20 this action to redress the denial by the Office of Navajo and Hopi Indian Relocation (hereinafter
21 "ONHIR") of compensation in the form of relocation assistance benefits under a repealed
22 version¹ of 25 CFR §700.147(a)(2). That regulation awarded relocation benefits to FJUA
23 residents who had "moved pursuant to the Act" from within the FJUA to outside the FJUA.
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27 ¹In existence between March 9, 1979 and June 28, 1984.
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II. QUESTION PRESENTED

Whether the decision of the Office of Navajo and Hopi Indian Relocation to deny Larry Mike's application for relocation assistance benefits is not based on substantial evidence, is arbitrary and capricious, and is contrary to law.

III. ARGUMENT

PLAINTIFF LARRY MIKE IS ENTITLED TO SUMMARY JUDGMENT, FINDING HIM ELIGIBLE FOR RELOCATION ASSISTANCE BENEFITS BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT, AND HE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Court should grant summary judgment in favor of the Plaintiff, if the record, read in the light most favorable to the Defendant, establishes there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985). No genuine issue of material fact exists in this case. Dora and Larry Mike were residents of Jeddito on the FJUA as of December 22, 1974; and moved "pursuant to the Act" to Rock Springs, New Mexico before August 30, 1978. Larry Mike, as Dora Mike's surviving spouse, is therefore eligible to receive relocation benefits in her stead.

A. Standard of Review Under the Administrative Procedure Act.

Under the Administrative Procedure Act, a reviewing court may set aside agency action that is unsupported by substantial evidence, is arbitrary, capricious or contrary to law. 5 U.S.C. §706(2)(A), 2(E). See Bedoni v. Navajo-Hopi Indian Relocation Commission, 878 F.2d 1119, 1122 (9th Cir. 1989). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 870 (9th Cir. 1991). When reviewing an agency's decision under an arbitrary and capricious standard, the Court must determine whether the agency's decision was based on consideration of relevant factors and whether there has been a

1 clear error of judgment. Northwest Motorcycle Association v. U.S. Department of Agriculture,
2 18 F.2d 1468, 1471 (9th Cir. 1994).

3 The Hearing Officer's decision to deny relocation assistance benefits to Larry Mike was
4 based on his finding that Dora Mike was not a legal resident of the FJUA at Jeddito on
5 December 22, 1974, but rather of Rock Springs, New Mexico, Larry's traditional area. Hearing
6 Officer's Findings of Fact, Conclusions of Law and Decision (hereinafter "Decision") at 2, 5,
7 AR 156, 159. Alternatively, if Dora Mike were a legal resident of Jeddito on December 22,
8 1974, her later move to Rock Springs was not "pursuant to the Act," because her circumstances
9 in 1976 [sic] remained too similar to those in 1974 to constitute a change of residence.² Decision
10 at 5, AR 159. Lastly, the Hearing Officer refuses to believe that Dora Mike moved because of
11 the land dispute since the Settlement Act didn't pass until December 22, 1974. Id.

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13 B. Defendant's Eligibility Requirements

14 To receive benefits, "Moved Pursuant to the Act" relocatees must meet three
15 requirements: (1) Their applications must be filed between March 9, 1979 and June 28, 1984, *see*
16 Exhibit 1 filed with Complaint. (2) They must be residents of the area partitioned to the tribe of
17 which they are not members; residents of the FJUA but moved from there between December 22,
18 1974 and August 30, 1978; or residents of an area partitioned to the tribe of which they were not
19 members but moved from there after August 30, 1978. 25 CFR §700.147(a)(1-3) (1983). (3)
20 They must be heads of household. 25 CFR §700.69(b)(3) provides that married couples whose
21 marriage was in effect as of June 19, 1980 meet this requirement.

22 It is uncontested that Dora and Larry Mike filed a timely application. Complaint,
23 paragraph (5); Answer, paragraph (2). In addition, they were married traditionally in June, 1973
24 and by license on July 12, 1973, so are heads of household. Tr. (hereinafter "Tr.") at 16, 32, 46,

25 ²The court refers to "1976" in its Conclusions of Law, Decision page 3, but the operative
26 year for determining whether applicants "moved pursuant to the Act" is 1978. Applicants must
27 have moved after December 22, 1974 and before August 30, 1978. 25 CFR §700.147(a)(2). We
believe the Court meant "1978" in this finding.

1 AR 112, 128, 142; AR 19(b).

2 The sole issue in this case is whether Plaintiffs meet the residency requirement found in
3 25 CFR §700.147(a)(2). Were they legal residents of the FJUA at Jeddito on December 22, 1974
4 and did they move from that location to Rock Springs, New Mexico, completely off the FJUA on
5 or before August 30, 1978?

6 C. The Hearing Officer's Decision, Findings and Conclusion that Plaintiff
7 Dora Dean Mike did not "move pursuant to the Act" is not supported by
8 substantial evidence.

- 9 1. *The Hearing Officer's finding that Dora Mike was not a*
10 *legal resident of Jeddito as of December 22, 1974 ignores*
11 *ONHIR's own Management Policy which permits "temporarily*
away" status for applicants whose employment is outside
their commuting area, but maintain substantial, recurring
contacts with their legal residence.

12 The Administrative Procedure Act requires a reviewing Court to set aside agency action,
13 findings, and conclusions found to be "unsupported by substantial evidence." 5 U.S.C.
14 §706(2)(E). Despite Larry Mike's testimony that the couple returned to Jeddito every weekend
15 and on holidays and participated in family chores such as washing dishes, cooking, herding the
16 40 head of sheep or 35 head of cattle, chopping wood, and hauling wood and water, the Hearing
17 Officer characterized the couple's contacts with Jeddito as "primary social." Decision at 4, AR
18 158; Tr. at 14, 15, 18, AR 110, 111, 114. His finding that "[p]eriodically, after moving to Rock
19 Springs in 1973, applicant returned to Jeddito, usually in the company of Larry Mike, where they
20 would stay for a weekend *when they both had time off of work*" minimizes both the time and the
21 emotional commitment Larry and Dora Mike made to maintain their Jeddito homesite. Decision
22 at 4, AR 158, (emphasis supplied).

23 ONHIR's Plan Update notes that "many persons ...leave the partitioned lands
24 temporarily to seek employment, job training, or other opportunities. Yet, they maintain[] strong
25 ties to their homes and community and consider[] themselves residents." Plan Update 7 (1990).
26 When asked whether Dora continued to return to Jeddito despite working in Gallup, Larry
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1 replied that she did. Tr. at 29, AR 125. When asked whether Dora continued to return to Jeddito
2 until the couple decided to make a permanent home in Rock Springs, Larry also replied in the
3 affirmative. Id. When asked whether they decided to move to Rock Springs at the close of their
4 traditional wedding ceremony as a result of advice from their elderly relatives regarding the
5 uncertainty of the land dispute, Larry replied they had not:

6 “L. MIKE: They said, you can’t build a house. I mean, first of all they said
7 when you get married like that you’re supposed to build a house
8 where you, the lady’s house, that’s where you’re suppose to build
9 TESSLER: a house but they said they can’t, you can’t because of what was
10 L. MIKE: going on at that time. You can’t build nothing.
11 TESSLER: Is that when you decided to move to Rock Springs?
12 L. MIKE: No.
13 TESSLER: Why did Dora go to live with you immediately if you didn’t
14 decide that?
15 L. MIKE: Because of the job.
16 TESSLER: Which job?
17 L. MIKE: The one she was working, the one I mentioned.
18 TESSLER: The one at the hardware store?
19 L. MIKE: Yes.”

20 Tr. at 32, AR 128.

21 Dora Mike obtained a job in Gallup at Trademark Square one or two weeks before the
22 couple were married in June, 1973. Tr. at 37, 41; AR 133, 137. When asked whether other jobs
23 existed in Jeddito for Dora, Larry replied: “No. Just probably the jewelry. So that was, so she
24 decided to stay and go back and forth, Rock Springs and Jeddito.” Tr. at 37, AR 133. Nor were
25 there body shops in Jeddito where Larry could work. Tr. at 43, AR 139. Employment in Gallup
26 allowed the couple to live in the same household, both during the week and on weekends in
27 Jeddito, as they had only one vehicle. Tr. at 18, AR 114.

28 When asked whether Dora came to live at Rock Springs as soon as she graduated from
high school in May or June, 1973, Larry replied: “Temporary. MERKOW: What do you mean
temporary? L. MIKE: We usually stay there with her and on weekends we go back to Jeddito.”
Tr. at 39, AR 135. Larry was unequivocal that the Rock Springs arrangement was temporary,
specifically for work. Tr. at 38, AR 134.

ONHIR’s Management Manual §1270.2(6), although written for “late” applicants [i.e.,

1 those who applied after July 7, 1986] recognizes five categories of “temporarily away” status:
2 education, incarceration, medical treatment, employment and military service. No prohibition
3 prevents application to “moved pursuant to the Act” cases; and in fact, such characterizations are
4 routinely applied in all relocation eligibility determinations.

5 The Mikes clearly qualify as FJUA residents “temporarily away” for employment. They
6 also meet the Management Manual standard for “legal residence” found in §1215(3) as they (1)
7 occupied and/or maintained a habitable dwelling on the FJUA; (2) intended to live there for a
8 period of time; and (3) maintained an ongoing physical presence. Id. Larry testified they
9 occupied their Jeddito homesite nearly every weekend and holiday and intended to reside in
10 Jeddito as soon as the land dispute was resolved. Tr. at 18, 26, AR 114, 122. They stayed in the
11 two-room frame house or hogan at Jeddito, while the homesite also contained two corrals and a
12 ramada. Tr. at 29, AR 125. Larry knew the number of livestock the family owned (8 horses, 35
13 cattle and 40 sheep) because Dora participated in herding them. Tr. at 14-15, AR 110-111. Dora
14 left one of her two horses there to care for on the weekends. Tr. at 15, 30, AR 111, 126.

15 The couple made no decision to move to Rock Springs permanently until June of 1978. A
16 month later Dora changed her voter registration from her home Chapter at Jeddito to Rock
17 Springs. Tr. at 22-26, 32, AR 118-122, 128.

18 ONHIR Management Manual §1215 identifies the JUA enumeration roster as a
19 determining factor in identifying occupied homesites and residents. Id. Dora Dean and Larry
20 Mike were enumerated by the BIA at QQL 102 SW 023, on the Jeddito NPL November 13, 1974,
21 one month before passage of the Settlement Act. AR 20. Rita S. John, Dora Dean Mike’s mother
22 was interviewed and included both her daughter, son-in-law, and their two children, Vincent
23 Mike and Nel Rita Mike as residents. Id. Had the couple already moved to Rock Springs, New
24 Mexico in May, 1973, as concluded by the Hearing Officer, they would never have been found on
25 the enumeration. Decision at 5, 7-10, AR 159, 161-164.

26 In summary, the Hearing Officer’s finding that Dora Dean Mike was not a legal resident
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1 of Jeddito on December 22, 1974 was erroneous. Dora and Larry Mike returned to Jeddito every
2 weekend after working in Gallup, New Mexico and performed chores including the herding of
3 livestock and hauling wood and water in maintenance of the homesite. They were enumerated on
4 the JUA roster, one month before the passage of the Settlement Act. Finally, their work in
5 Gallup, New Mexico and temporary residence in Rock Springs is entirely consistent with the
6 “temporarily away” status granted relocation applicants in ONHIR’s Plan Update and
7 Management Manual.

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9 2. *The Hearing Officer’s finding that Dora Mike’s circumstances*
10 *on August 30, 1978³ were identical to those on December 22,*
11 *1974 ignores the importance of the change in voter registration*
12 *from Dora’s home Chapter to Rock Springs, New Mexico in*
13 *July, 1978.*

14 Dora Mike was a member of the Jeddito Chapter when she married Larry in 1973. Tr. at
15 22, AR 118. She changed her voter registration to Rock Springs Chapter July 10, 1978. Id. The
16 Court agreed she became a member of the Rock Springs Chapter in 1978, though not specifying
17 the exact date.⁴ Decision at 4, AR 158. Larry testified he and Dora had discussed making Rock

18 ³See footnote 2, page 3.

19 ⁴The Court did not admit Plaintiff’s Hearing Exhibit 2, the voter registration form
20 because it did not include Dora Mike’s signature, the date of signature or the Chapter
21 designation. It did, however, include Precinct Number “072.” This numerical designation refers
22 to the Rock Springs Chapter (*see* Plaintiff’s Exhibit 1, List of Registered Voters as of October
23 26, 1999, Navajo Election Administration). The form was dated “7-10-78.” A better copy of
24 AR 19c is included as Plaintiff’s Exhibit 2.

25 Undersigned counsel contacted Gloria Dennison, Records Clerk at the Navajo Nation
26 Elections Office in Window Rock, Arizona August 30, 2006. Ms. Dennison confirmed that the
27 record provided to Larry Mike as evidence of his wife’s change in voter registration was in fact a
28 temporary record created to transfer the office’s manual voter registration affidavits into a form
used by the Nation’s Computer Services Department to prepare a list of eligible voters. The
record itself was created from a signed affidavit from Dora Dean Mike dated July 10, 1978.
None of these temporary records bore the signature of the voter; they were simply an interim
step from the signed affidavit to a computerized list of eligible voters. Because Dora Dean Mike
had died eleven years prior to Larry Mike’s request for her voting record, *see* Tr. at 23-25, the
temporary record he received may have been the only record left, as records of deceased voters

1 Springs their permanent home about a month before the registration. Tr. at 25, AR 121. When
2 asked why it took the couple so long to make a permanent move, Larry replied:

3 Why, the time we got married, we was going to build a house in Jeddito,
4 in a year. You can't build nothing at that time, can't even build a corral,
5 or another house or addition or anything. They won't let you do it, so
we just waiting for what was going to happen, what was going to
change.

6 Tr. at 26, AR122.

7 The significance of a change in voter registration on the Navajo Nation cannot be
8 overemphasized. Many Navajos retain their original Chapter membership, although they move to
9 other locations during their lifetimes. Becoming a Chapter member can be effected as easily as
10 registering to vote there; and becoming a Chapter member in a new location can be effected by
11 cancelling one's old registration and registering in the new locale. Changes in registration require
12 that voters relinquish any rights to financial assistance from their former Chapters. Such
13 assistance can include student enrichment funds for children in high school or grade school,
14 college scholarships, employment and housing assistance. The new Chapter must also agree to
15 accept them.⁵

16 Dora Dean Mike's registration with the Rock Springs Chapter on July 10, 1978 was
17 synonymous with becoming a member of that Chapter. Doing so on July 10, 1978 meant that
18 Dora Dean Mike relinquished any housing assistance from the Jeddito Chapter were she to be
19 denied relocation benefits.

20 D. The Hearing Officer's finding that any moves made prior to the Settlement
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22 are routinely purged.

23 ⁵Martin Bahe, Jeddito Chapter Coordinator verified on August 31, 2006 that registration
24 with a new Chapter is synonymous with becoming a member there. A Chapter's funds for
25 student enrichment, college tuition, employment and housing assistance vary with their
26 population. Assistance is withheld from non-voters, even if they reside within the Chapter
27 boundaries. Chapters must be willing to accept new members, but the burden is on the new
resident to gain approval from the Chapter's grazing committee and their new neighbors in
securing a homesite lease.

1 Act could not have been made “pursuant to the Act” is arbitrary and
2 capricious. It ignores the sage advice provided by elders at the couple’s
3 traditional wedding ceremony in June, 1973; the 1973 Construction Freeze,
4 and the 1973 cancellation of FJUA grazing permits.

5 Hearing Officer Merkow concluded in his Decision that any advice provided by the elders
6 on both sides of the Mike family during their traditional wedding ceremony in June, 1973, could
7 not have impacted Larry and Dora’s decision to move to Rock Springs. Decision at 5, 7-8, 10,
8 AR 159, 161-162, 164: “One must wonder how one could move “pursuant” to an Act that did not
9 exist!” Decision at 8, AR 162.

10 When Larry Mike was asked what advice both his and Dora’s elders had provided at the
11 wedding ceremony in 1973, he replied:

12 Well, the conversation was about how we’re going to live and
13 there’s a lot of people, there’s some elderlies that talked to us.
14 He said, in older days when a guy get married and the guy should
15 stay at the lad[y]’s house and build a house and then at time some
16 of them saying that there’s no use building a house now, all the
17 Hopis, that you can’t build any houses anymore. That’s what they
18 told us so it’s best to get a house or live somewhere else so you
19 can have a better life so that’s what we’ve been told.

20 Tr. at 5, AR 101. Nellie Mike, Larry’s mother, sat next to him at the ceremony and
21 offered her recollection:

22 At the time that they were having the traditional ceremony, our
23 relatives, our elderly relatives would go in and then Dora Mike’s
24 relatives were also, elderly relatives would also go into the
25 ceremony and when they gather they have different people doing
26 lectures on how their lives are to progress. At that time, Dora’s
27 paternal grandmother, she doesn’t recall, she doesn’t know her
28 name, but she introduced herself as Dora’s paternal grandmother,
29 and she’s the one that addressed Larry Mike saying that, son,
30 now that you’re part of the family, tradition is that you should,
31 because you marry into our family, you should build a home here
32 at Jeddito. But because of the land dispute, it’s not good that
33 there is much dispute about any building, that was the lecture
34 and other people said the same thing.

35 Tr. At 47, AR 143. The couple’s elders were clear in their concern that Navajo tradition
36 could not, at least in June 1973, be followed. In contrast to the foregoing testimony, the Hearing
37 Officer found that “neither passage of the Act nor the underlying land dispute played a role in
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1 applicant's decision to move to Rock Springs in 1973; and the later partition of the former Joint
2 Use Area likewise played no role in applicant's decision to remain at Rock Springs after
3 December 22, 1974." Decision at 10, AR 164.

4 The Hearing Officer focuses on the fact that Larry Mike did not build a new home for his
5 wife during the period 1973-1986, but chose instead to remodel his mother's Rock Springs home
6 once he inherited it. *Id.* Larry testified his remodel of the Rock Springs home was extensive and
7 included replacing the roof; installing new windows, sheet rock and floor tile; repainting and
8 plastering. Decision at 4, AR 158; Tr. at 38, AR 134. He didn't remodel the home until 1978 or
9 1979, after the couple had been waiting several years for the land dispute to resolve.⁶ Tr. at 26,
10 32-34, 37-39, 43; AR 122, 128-130, 133-135, 139. Whether Larry remodeled an existing
11 structure or built a new one in Rock Springs, the fact remains he left the FJUA after several years
12 of waiting for an opportunity to build there.

13 The Hearing Officer also concludes that Dora's claim would have been stronger had she
14 built a home in Jeddito in 1978, as she could have shown an intent to retain Jeddito as her primary
15 residence. Decision at 10, AR 164. This reasoning makes no sense at all because the couple's
16 claim, as a "moved pursuant to the Act" case requires one to leave the FJUA permanently
17 between December 22, 1974 and August 30, 1978. 25 CFR §700.147(a)(2)(1983).

18 A number of legal actions preceded the Settlement Act and severely impacted residents of
19 the FJUA. The Hopi Tribe, pursuant to the ruling in Healing v. Jones, 210 F. Supp. 125 (D. Ariz.
20 1962) that both tribes had an undivided and equal interest in all of the 1882 Executive Order
21 Reservation lying outside Land Management District 6, petitioned the District Court for an order
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23 ⁶Although the Settlement Act passed December 22, 1974, the Land Dispute was not
24 "settled." The Navajo Nation filed a number of lawsuits challenging the Act, *see* Hamilton v.
25 Nakai, 453 F.2d 152 (9th Cir. 1971), *cert denied*, 406 U.S. 945 (1972); U.S. v. Kabinto, 456 F.2d
26 1087 (9th Cir. 1972), *cert denied*, 409 U.S. 842 (1972); Hamilton v. MacDonald, 503 F.2d 1138
27 (9th Cir. 1974); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976), *cert denied*, 430 U.S.
August 30, 1978.

1 of compliance to enforce its rights as co-tenant on March 13, 1970. *See Hamilton v. Nakai*, 453
2 F.2d 152, 154 (9th Cir. 1971). The Ninth Circuit reversed the District Court's denial of the Hopi
3 petition and granted its request for relief which included joint use and possession of all surface
4 area on the FJUA outside District 6 and the removal of Navajo livestock to prevent further
5 overgrazing damage. *Id.* at 154. In response, the Federal Government developed implementation
6 plans which mandated (1) permits for new Navajo construction issued jointly by both tribes; (2)
7 livestock reduction; (3) range reconnaissance including the establishment of new grazing districts;
8 (4) cancellation of all present grazing permits; and (5) issuance of future permits divided equally
9 between the tribes. *See Hamilton v. MacDonald*, 503 F.2d 1138, 1149 (9th Cir. 1974). Although
10 the Navajo Tribe challenged the legality of the construction freeze and livestock reduction plans,
11 they were not successful. *Id.* at 1149.

12 The federal implementation plans were first approved by the District Court on April 23,
13 1973, *Id.* at 1149, two months before the Mikes were married. The advice provided by the
14 Mikes' elders at their wedding ceremony was therefore entirely appropriate and timely, yet the
15 Hearing Officer dismissed it as inconsequential. Decision at 7, 8, 10, AR 161-162, 164.

16 E. The Hearing Officer's emphasis on the couple's New Mexico driver's
17 licenses, banking locations, and schools for their two children as
18 evidence of New Mexico residency ignores the federal concept of
domicile and its application to relocatees.

19 Under federal common law, the elements of legal domicile include (1) physical presence
20 and (2) intent to remain. *See Mississippi Choctaw v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597
21 (1989). A person may be absent for a prolonged period of time from his domicile without
22 changing it. *See Sanpos v. Skouras Theatres Corporation*, 364 F.2d 161, 164 (2d Cir. 1966), *cert*
23 *denied*, 385 U.S. 987 (1966); *Lewis v. Splashdam By-Products Corporation*, 233 F.Supp. 47
24 (D.C.Va. 1964) This definition and ONHIR's Management Manual §1215(3), *see* Paragraph (C)
25 of this memorandum, are similar in that they both require physical presence and intent.

26 In contrast to Larry Mike's expressed intent that the parties wanted to build in Jeddito but
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1 were prevented by the land dispute's construction freeze, yet kept returning in hopes the land
2 dispute would resolve, Tr. at 26, 32-34, 37-39, 43, AR 122, 128-130, 133-135, the Hearing
3 Officer found their New Mexico driver's licenses, banking and working arrangements and
4 children's schools evidence of New Mexico domicile. Decision at 9, AR 163.

5 TESSLER: OK. Because Dora was already working in Rock
6 Springs, hadn't you already decided to live in Rock Springs by
7 the time you were married?

8 L.MIKE: No, she wanted to, we wanted to live in Jeddito.
9 Tr. At 34, AR 130.

10 TESSLER: Did you and Dora plan to move to Gallup or Rock
11 Springs as [soon] as you were married?

12 L.MIKE: We talked about it but we like, she wanted to live
13 in Jeddito but we didn't have no, well, and I
14 thought we didn't have no choice so we move
15 back to Gallup.

16 Tr. at 43, AR 139.

17 The Hearing Officer's finding of New Mexico domicile based on the existence of
18 employment, commercial facilities and state offices totally disregards the absence of these
19 amenities on the Navajo Nation in 1973. There were no car registration facilities, banks or
20 schools in Jeddito at that time.⁷ There remain no vehicle registration facilities or banks to this

21 ⁷Christina Kanuho, Customer Services Supervisor of the Window Rock and Chinle State
22 of Arizona vehicle registration offices verified on August 30-31, 2006 that prior to 1980 in
23 Chinle and 1978-79 in Window Rock, Arizona counties regulated this activity. During the
24 period 1973-1978, Jeddito residents would have travelled to Holbrook, Arizona, a distance of 64
25 miles (*see* aaa.com) to register vehicles. This is still the practice, as no vehicle registration
26 facilities exist on the Navajo Reservation in Navajo County.

27 Valerie Qooyaquaptewa, Superintendent's Secretary at Cedar Public School in Jeddito,
28 Arizona verified on September 8, 2006 that the first Jeddito elementary school began in 1982-83.

29 Carolyn Mitchell, Community Development Manager at Wells Fargo Bank in Phoenix,
30 Arizona verified on September 1, 2006 that banking in Chinle began for the first time in 1994 as
31 Norwest. Distance to Chinle from Jeddito is 67 miles (*see* aaa.com).

1 day.

2 TESSLER: Did Dora get a New Mexico driver's license?

3 L.MIKE: Yes.

4 TESSLER: When did she get that?

5 L.MIKE: About '73.

6 TESSLER: When she started working at the hardware store?

7 L.MIKE: Yes.

8 Tr. At 36, AR 132.

9 Larry and Dora Mike returned to Jeddito every weekend. Tr. at 18, AR 114. Their only
10 opportunity to obtain driver's licenses, bank or place their children in day school was in Gallup
11 where they worked during the week. Placing their children in Gallup schools meant they could
12 remain together as a family, rather than sending their children to boarding school; and, as a
13 family, they could return to Jeddito on the weekends to maintain the homesite in the event they
14 could move to Jeddito permanently when the land dispute was resolved.

15 F. The Hearing Officer's conclusion that Dora Dean Mike could not have
16 moved "pursuant to the Act" because she began living in New Mexico
17 prior to December 22, 1974 establishes an impossible burden of proof
18 for applicants who were "temporarily away" from the FJUA when the
19 Settlement Act was passed.

20 The federal trust responsibility imposes a fiduciary relationship upon the United States in
21 its dealings with Indian tribes. United States v. Mitchell, 463 U.S. 206, 225-226 (1983); Morton
22 v. Ruiz, 415 U.S. 199, 236 (1974). In order to fulfill the purposes of the Settlement Act, such a
23 relationship exists between ONHIR and a defined class of Navajos and Hopis. Bedoni, 878 F.2d
24 at 1124-1125. The standard of conduct imposed by the trust relationship is high. Id. at 1124.
25 United States' agencies must always act in good faith, demonstrating absolute fairness toward the
26 Indians. United States v. Payne, 264 U.S. 446, 448 (1924). In addition to imposing exacting
27 standards on federal officials' conduct, the trust responsibility is the basis for important principles
28 of statutory construction. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144
(1980). Statutes are broadly construed for the benefit of Native Americans, with ambiguities
resolved in their favor. E.g., Id., Rockridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971); White

1 Mountain, 448 U.S. at 143-144 (1980).

2 Morton v. Ruiz, 415 U.S. 199 (1974) illustrates the Supreme Court's view that a federal
3 agency should not rigidly apply residency requirements to Indians, but should consider the
4 individual's economic and social circumstances in determining eligibility for government
5 benefits. *See id.* at 238. The issue in Ruiz was whether two Papago (now Tohono O'Odham)
6 Indians who lived off-reservation were eligible for BIA general assistance benefits. *Id.* at 211.
7 The Supreme Court unanimously held that despite the wording of the agency regulation, which on
8 its face appeared to limit eligibility to those who physically resided within the reservation
9 boundaries, plaintiffs *were* eligible because they had maintained close economic and social ties
10 with their reservation. *Id.* At 203, n.3, 238 (emphasis supplied).

11 Like many families who worked off-reservation in 1973, the Mikes maintained their FJUA
12 homesite on the weekends when they were off work. They did their banking, registered their
13 vehicle, and placed their children in day school rather than boarding school in a location where
14 these services were available. They elected to remain together as a family both during the week,
15 and on the weekends.

16 The Hearing Officer maintains that no FJUA relocatee, who prior to December 22, 1974
17 spends time in a border town during the week, but returns to the FJUA weekends could qualify
18 for "moved pursuant to the Act" status. Larry Mike testified that body shop work was unavailable
19 in Jeddito and Dora could have performed jewelry making there, but no other employment. Tr. at
20 37, 43, AR 133, 139. A temporary move to Rock Springs enabled both husband and wife to
21 work, place their children in nearby schools and receive the financial benefits of living in a border
22 town. To apply such a strict burden of proof that relocation applicants must remain full-time at
23 their FJUA homesites prior to December 22, 1974 in order to qualify for "moved pursuant to the
24 Act" status ignores ONHIR's own "temporarily away" policy for off-reservation employment,
25 and its promise of a "thorough and generous" relocation program. ONHIR Plan Update, 7.

26
27 IV. CONCLUSION

1 Dora Dean and Larry Mike were residents of the NPL at Jeddito on December 22, 1974 as
2 evidenced by their weekend returns and maintenance of the homesite; their intent on building in
3 Jeddito permanently once the land dispute were resolved; and their enumeration at that location
4 November 13, 1974. Their work in Gallup, New Mexico and temporary residence during the
5 week in Rock Springs, New Mexico are completely consistent with ONHIR's Management
6 Manual exceptions for employment off-reservation and its standard of "legal residence."

7 Dora Dean and Larry Mike became permanent residents of Rock Springs in June, 1978
8 after five years had passed and the land dispute had not resolved. Larry extensively remodeled
9 the home his mother had given them in 1978 or 1979, and Dora Mike changed her voter
10 registration and therefore her membership to Rock Springs Chapter July 10, 1978.

11 The Hearing Officer's finding that the Mikes are Rock Springs residents as early as 1973
12 ignores Larry's extensive testimony that the couple could not make a permanent decision on
13 where to live at the time they were married, due to the reality of life on the FJUA: the
14 construction freeze and the livestock reduction. While their wish was to build in Jeddito if the
15 land dispute resolved within a reasonable time, they decided on Rock Springs as a permanent
16 home after five years of waiting. Such a decision is consistent with ONHIR's "moved pursuant to
17 the Act" requirements: residency on December 22, 1974 on the FJUA and a move prior to August
18 30, 1978 off the FJUA.

19 For these reasons, there is no genuine issue of material fact. It is clear that ONHIR's
20 decision to deny Larry Mike relocation benefits is not based on substantial evidence, is arbitrary
21 and capricious, and is contrary to law. This Court should set aside ONHIR's determination and
22 grant Plaintiff's Motion for Summary Judgment.

23
24
25
26 RESPECTFULLY SUBMITTED this 27th day of September, 2006.
27
28

1 NAVAJO-HOPI LEGAL SERVICES PROGRAM

2
3 s/Betsy Lynn Snow
4 Attorney for Plaintiff

5 CERTIFICATE OF SERVICE

6 I hereby certify that on September 27, 2006, I electronically transmitted the Motion for
7 Summary Judgment and Memorandum of Points and Authorities to the Clerk's Office using the
8 ECF system. A Notice of Electronic Filing was also transmitted to the following ECF registrant,
and a courtesy copy provided by mail:

9 Michael A. Johns
Assistant United States Attorney
10 Two Renaissance Square
40 North Central Avenue, Suite 1200
11 Phoenix, Arizona 85004-4408

12 By: s/Betsy Lynn Snow
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1 Betsy Lynn Snow
State Bar Number 015310
2 Navajo-Hopi Legal Services Program
Post Office Box 2990
3 Tuba City, Arizona 86045
(928) 283-3300

4 Attorney for Plaintiff
5

6 UNITED STATES DISTRICT COURT

7 DISTRICT OF ARIZONA

8 Dora Dean Mike, Deceased by Larry Mike,)

No. CV-06-866-PCT-EHC

9 Plaintiff,)

INDEX TO EXHIBITS

10 vs.)

11 Office of Navajo and Hopi Indian
Relocation, an administrative agency of the)
12 United States,)

13 Defendant.)
14

15	Exhibit 1:	Navajo Election Administration Chapter Designations as of October 26, 1999	2
16	Exhibit 2:	Navajo Nation Voter Registration for Dora Dean Mike July 10, 1978	4
17	Exhibit 3:	ONHIR Plan Update (7)	6
18	Exhibit 4:	ONHIR Management Manual §1270.2(6)	9
19	Exhibit 5:	ONHIR Management Manual §1215(3)	13

20
21 Respectfully submitted this 27th day of September, 2006.

22 NAVAJO-HOPI LEGAL SERVICES PROGRAM

23
24 s/Betsy Lynn Snow
Attorney for Plaintiff
25
26
27
28

EXHIBIT 1

NAVAJO ELECTION ADMINISTRATION
REGISTERED VOTERS: 87,044
AS OF OCTOBER 26, 1999

NBOES Members: Jackie Burbank/Leonard Begay

<u>CHINLE AGENCY TOTAL</u>	12,268
012 HARD ROCK	638
013 FOREST LAKE	437
014 PINON	1,172
015 TACHEE/BLUE GAP	638
032 CHINLE	2,386
033 MANY FARM	1,054
034 NAZLINI	650
035 TSELANI/COTTONWOOD	1,060
036 LUKACHUKAI	904
037 ROUND ROCK	672
038 TSAILE/WHEATFIELDS	999
100 ROUGH ROCK	529
106 BLACK MESA	396
107 WHIPPOORWILL	733

NBOES Members: Harry D. Brown/Eunice J. Begay

<u>WESTERN NAVAJO AGENCY TOTAL</u>	15,744
001 COPPERMINE	553
002 KAIBETO	880
003 LECHEE	545
004 TONALEA/RED LAKE	1,054
005 INSCRIPTION HOUSE	635
006 NAVAJO MOUNTAIN	510
007 SHONTO	964
008 BODAWAY/GAP	738
009 CAMERON	679
010 COALMINE CANYON	519
011 TUBA CITY	2,723
016 BIRDSPRINGS	577
017 LEUPP	790
018 TOLANI LAKE	516
024 CHILCHINBETO	599
025 DENNEHOTSO	744
026 KAYENTA	1,737
027 OLJATO	980

NBOES Member: Paul H. Redhouse/Roy H. Tso

<u>SHIPROCK AGENCY TOTAL</u>	16,375
028 MEXICAN WATER	649
029 ROCK POINT	801
030 SWEETWATER	739
031 TEECNOSPOS	912
039 ANETH	1,011
040 TWO GREY HILLS	756
041 RED VALLEY	931
042 SANOSTEE	1,151
043 SHEEP SPRINGS	539
044 SHIPROCK	3,120
045 BURNHAM	419
046 NENAHNEZAD	760
047 FRUITLAND	962
099 RED MESA	652
101 BECLABITO	441
103 HOGBACK	803
104 CUDEII	454
108 COVE	386
109 NEWCOMB	508
110 SAN JUAN	382

NBOES Members: Bessie Yellowhair/Lenora Fulton

<u>FORT DEFIANCE AGENCY TOTAL</u>	22,482
019 DILCON	773
020 INDIAN WELLS	565
021 JEDDITO	667
022 TEESTO	745
023 WHITECONE	658
048 COYOTE CANYON	850
049 MEXICAN SPRINGS	702
050 NASCHITTI	1,048
051 TOHATCHI	900
052 TWIN LAKES	953
076 CORNFIELDS	683
077 GANADO	959
078 GREASEWOOD SPRINGS	811
079 KINLICHEE	1,061
080 KLAGETOH	719
081 STEAMBOAT	892
082 WIDE RUINS	685
083 CRYSTAL	720
084 FORT DEFIANCE	2,327
085 HOUCK	920
086 OAK SPRINGS	505
087 RED LAKE	403
088 ST. MICHAELS	1,529
089 SAWMILL	736
090 LUPTON	532
098 LOW MOUNTAIN	593
105 NAHATADZIL	545

NBOES Members: Jay R. DeGroat

<u>CROWNPOINT AGENCY TOTAL</u>	20,175
053 BECENTI	420
054 LAKE VALLEY	344
055 LITTLEWATER	560
056 NAHODISHGISH	298
057 PUEBLO PINTADO	465
058 STANDING ROCK	485
059 TORREON	935
060 WHITEHORSE LAKE	468
061 WHITEROCK	260
062 BACA/PREWITT	1,033
063 BREADSPRINGS	503
064 CASAMERO LAKE	402
065 CHICHILTAH	924
066 CHURCHROCK	1,124
067 IYANBITO	522
068 MANUELITO	542
069 MARIANO LAKE	544
070 PINEDALE	652
071 RED ROCK	931
072 ROCK SPRINGS	705
073 SMITH LAKE	533
074 THOREAU	618
075 TSAYATOH	563
091 HUERFANO	1,140
092 NAGEEZI	894
093 OJO ENCINO	522
094 RAMAH	948
095 CANONCITO	665
096 ALAMO	710
097 CROWNPOINT	907
102 COUNSELOR	559

I HEREBY CERTIFY THAT THE ABOVE TOTAL REGISTERED VOTERS ARE CORRECT TO THE BEST OF MY KNOWLEDGE.

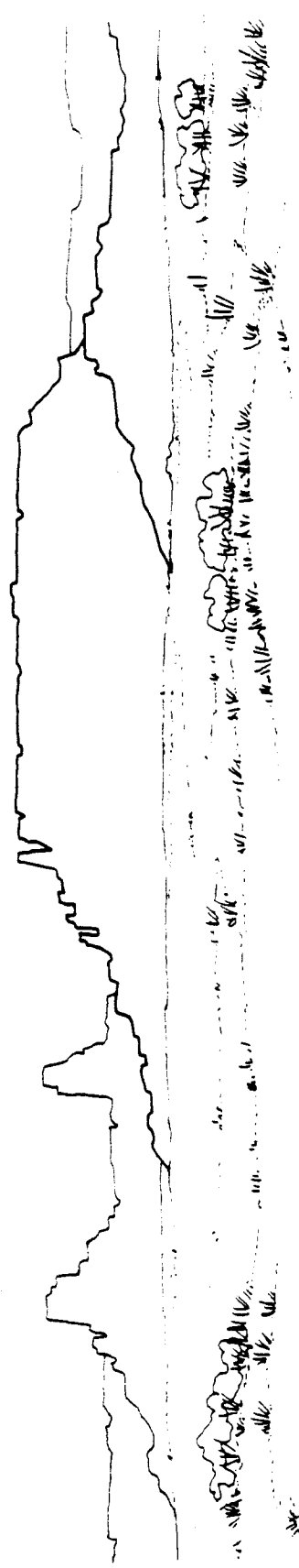
Gloria Dennison, Records Clerk II
Navajo Election Administration

Richie Nez, Executive Director
Navajo Election Administration

EXHIBIT 2

NAVAJO TRIBE VOTER REGISTRATION				c# 098,493
NAME DORA DEAN MIKE				
STATE	PRECINCT	CHAPTER		
NM	072			
SOC. SEC. NO.	NAVAJO CENSUS NUMBER			
527-90-7108	098,493			
DATE OF BIRTH				
04-13-54				
ADDRESS				
Bx 8	Gallup, NM 87301			
DATE OF REGISTRATION	REGISTRATION OFFICER			
07-10-78	Johnnie Howe			
<p>I DO SOLEMNLY SWEAR (OR AFFIRM) THAT THESE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND THAT I WILL BE AT LEAST 18 YEARS OF AGE AT THE TIME OF THE NEXT SUCCEEDING ELECTION. IF FURTHER SWEAR THAT I AM A CITIZEN OF THE UNITED STATES AND MEMBER OF THE NAVAJO TRIBE.</p>				
SIGNATURE OR MARK OF REGISTRANT		DATE		

EXHIBIT 3



Office of Navajo and Hopi Indian Relocation

Carl J. Kunasek, Commissioner

Mailing Address:

P. O. Box KK
Flagstaff, Arizona 86002

Phone (602) 779-2721

Toll Free (AZ) 1-800-321-8431
(UT,NV,NM,CO,CA) 1-800-321-3114

FAX (602) 774-1977

Street Address:

201 East Birch
Flagstaff, Arizona 86001

CHAMHILL, Consultants

November 22, 1990



Plan Update

2-1: ELIGIBILITY FOR RELOCATION BENEFITS

In enacting the 1974 Settlement Act, Congress stated that a guiding principal was to provide for a "thorough and generous relocation program" for tribal members residing on the partitioned lands. Although the Act identified the relocation benefits to be made available, it did not specifically define who was eligible for the program. In the absence of explicit Congressional direction or precedent, the NHIRC was responsible for establishing eligibility criteria and procedures.

ESTABLISHMENT OF ELIGIBILITY CRITERIA

The eligibility criteria developed by the NHIRC include conditions for residency, head of household, and time of residence that applicants must meet in order to receive relocation benefits.

Residency

The definition of "residency" was a major issue in developing the criteria. The NHIRC considered two possible interpretations:

1. **Actual occupancy**, where a person continually occupied a dwelling on the partitioned lands.
2. **Legal residency**, where a person might be temporarily away, but maintained substantial, recurring contact with an identifiable homesite. This interpretation considered 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.

The NHIRC decided that the definition of legal residency best met both legal requirements and circumstances of life on the partitioned lands. By reflecting the cultural 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.

The NHIRC's decision involved considerable deliberation and consultation with legal counsel. The NHIRC also consulted with the General Accounting Office, the Department of Interior's Office of the Solicitor, and other Department of Interior staff. Following adoption of the eligibility criteria, Congress requested the General Accounting Office again to review the residency requirement. The GAO affirmed that the NHIRC's interpretation was legal and appropriate.

EXHIBIT 4

interview local residents about the homesite occupants' history of grazing, farming, gardening, etc. Field investigations and interviews may be conducted to verify other activities which a resident claims as means of self-support, such as: medicine man services; rug and basket weaving, pottery, jewelry, or other craft production.

6. Exceptions to the Requirement for Continuous Full-Time Residence:

(1). Temporarily Away for Education. Persons who were legal residents of the HPL on 12/22/74 and maintained continuous legal residence on the HPL and at no other location until 7/7/86; and were residing physically full-time on the HPL on 7/7/86, and were thereafter away because of enrollment in college or vocational training and returned permanently to the HPL homesite immediately following completion of the training/education and resided there physically full-time continuously thereafter until the eligibility determination is issued will be considered to have been continuous residents of the HPL.

The resident must provide transcripts from the college or vocational training institute which demonstrate enrollment and the period of time attended. Information provided about by the applicant about full-time residence on the HPL must demonstrate that the applicant returned to the partitioned lands as a full-time resident immediately after completing the college or training program.

(2). Temporarily Away Because of Incarceration. Persons who were legal residents of the HPL on 12/22/74 and maintained continuous legal residence on the HPL and at no other location until 7/7/86; and were residing physically full-time on the HPL on 7/7/86, and were thereafter away because they were sentenced to a jail term and returned permanently to the HPL homesite immediately following completion of the jail term and resided there physically full-time continuously thereafter until the eligibility determination is issued will be considered to have been continuous residents of the HPL.

The resident must provide certified or authenticated documentation from the facility where he/she was incarcerated (municipal, county, state, or federal) which established the date the applicant was taken into custody and the date the individual was released from custody. Information provided about by the applicant about full-time residence on the HPL must demonstrate that the applicant returned to the partitioned lands as a full-time resident immediately after release from prison.

(3). Temporarily Away for Medical Treatment. Persons who were legal residents of the HPL on 12/22/74 and maintained continuous legal residence on the HPL and at no other location until 7/7/86; and were residing physically full-time on the HPL on 7/7/86, and were thereafter away for prolonged medical treatment and returned permanently to the HPL homesite immediately following completion of medical treatment and resided there physically full-time continuously thereafter until the eligibility determination is issued will be considered to have been continuous residents of the HPL.

The resident must provide documentation from the medical facility or attending physician stating the nature of treatment, name/location of hospital, nursing home, or other medical facility; and duration of treatment. Information provided by the applicant about full-time residence on the HPL must demonstrate that the applicant returned to the partitioned lands as a full-time resident immediately following completion of medical treatment.

(4). Temporarily Away for Employment or Military Service. Persons who were legal residents of the HPL on 12/22/74 and maintained continuous legal residence on the HPL and at no other location until 7/7/86; and were residing physically full-time on the HPL on 7/7/86, and were thereafter away for reasons of employment or military service and returned therefrom regularly (weekends, leave or off-season) and whose immediate legal family (legal spouse, minor children) were continuous legal residents of the HPL from 12/22/74 until 7/7/86 and resided there physically full-time on 7/7/86 and continuously thereafter until the eligibility determination is issued will be considered to have been continuous residents of the HPL.

Military Service. An applicant who is temporarily away for military service must provide copies of the service records. If the applicant has been discharged, a copy of the discharge documents will be required. The applicant must provide information that he/she returned to the HPL when he/she was on leave. The applicant's immediate family (legal spouse, minor children) must have resided on the partitioned lands during the applicant's tour of duty. The E/A Specialist may conduct interviews of camp and other local residents to verify the applicant's contacts with the HPL while serving in the military. The applicant must demonstrate that he/she returned to the partitioned lands as a full-time resident immediately after discharge from the service.

Employment. An applicant who is temporarily away for employment must provide information about the job location(s) and living arrangements. The applicant must provide information that he/she returned to the HPL over weekends, holidays, and off-season. The applicant's immediate family (legal spouse, minor children) must

have resided on the partitioned lands while the applicant was working elsewhere. The E/A Specialist may conduct interviews of camp and other local residents to verify the applicant's contacts with the HPL while working off the HPL. The applicant must demonstrate that he/she returned immediately to the partitioned lands as a full-time resident when the job ended.

7. Time Frame for Submitting Documents: The HPL resident shall have 120 days to provide information which will support eligibility. After 120 days have elapsed, or the HPL resident has provided all information requested, whichever is sooner, the E/A staff will complete form MM#1270.1 and submit it to Legal Counsel for eligibility determination.

8. Review of Existing Records. The E/A staff will review information contained in records known to exist on HPL homesites. Such records may include but are not limited to:

- (1) JUA roster.
- (2) ONHIR appraisal records.
- (3) ONHIR files of persons who failed to file an application for relocation assistance by 7/7/86.
- (4) casefiles of resident's parents, siblings, or other family members.
- (5) mediator's list A of persons eligible for an Accommodation Agreement.
- (6) BIA and Hopi Tribe/OHL records.

Documented Contact with HPL Residents. While no specific or minimum number of contacts between HPL residents and ONHIR, BIA and/or OHL staff is required in order to demonstrate continuous residence, records must show sufficient contact to support a finding of continuous residence. Contacts must have occurred at the resident's homesite or adjacent camps; contacts at other locations will not be sufficient to support a claim to continuous residence at the homesite.

Type/nature of historic contact with HPL residents will also be considered. Statements made by camp residents and recorded by staff at group meetings will be reviewed. Such statements may document a resident's prior residence history and intention to remain on (or conversely, to leave) the HPL. These statements may also provide information on the residence of the improvement owner's children or other extended family members.

Negative contacts will also be considered. Recorded statements of staff, including BIA, OHL, and ONHIR field staff, or of other residents of the vicinity to the effect that the person had left the area; or whose camp was uninhabited at the time of a field visit;

EXHIBIT 5

- c. Clerical error. If the case file contains an office conference record and an application form has been prepared for the applicant but no signature was obtained while the applicant was in the office, the date of the office conference shall be entered as the date of application.
- d. The date of original application for a household will be entered in cases where there has been a legal separation or divorce and the spouse submits a separate application.

Application dates may not be entered from the obsolete Certification of Residency and Certification by Relocatee forms.

If the certification worker determines that a date of application earlier than the one on the official application form should be entered as the correct date of application for reasons other than the ones listed above, the certification worker shall submit the case file to the DCC Manager for determination of the correct date of application.

3. Eligibility Summary Section II: Legal Residence in 1974.

Residence requirements are met if the applicant can prove that he/she and/or the immediate family were legal residents as of 12/22/74 of a homesite located on land which was later partitioned to the Hopi Tribe. "Legal residence" means that:

- a. A person, or the person's immediate family, occupied and/or maintained a habitable dwelling on the HPL;
- b. The person intended to live on the HPL for a period of time; and
- c. The person manifested this intent by establishing an on-going physical presence on the HPL.

The JUA roster is the master record used by the Commission to determine the existence of occupied homesites on the HPL in 1974 and to identify residents of these homesites. Besides the JUA roster, there are other documents which the applicant may produce can demonstrate his/ her legal residence.

a. Information from NHIRC Records.

The certification worker will study the information which the applicant has provided on the application form and on any supporting documents. The certification worker will also study any information collected during the office conferences and/or field investi-

this section. If additional space is required, the certification worker will write on the back of Page 1, or attach additional sheets.

The certification worker shall observe the following guidelines.

(1) Applicants Listed on the JUA Roster. If the applicant is listed on the JUA roster, he/she is assumed to have been a legal resident unless there is evidence to the contrary.

The certification worker will review the manual JUA roster, the applicant's residence history record, and all other information in the case file, to determine if there is evidence that the applicant established legal residence off the HPL prior to 1974. Evidence can include: mailing address (from JUA roster), condition of dwelling (from JUA roster and appraisal file), statements about the place of domicile (from residence history).

If there is evidence that the applicant was not an HPL resident in 1974, the certification worker may schedule an office conference to interview the applicant about the discrepancies in the record.

After the conference is held, the certification worker will review the information obtained during the conference. The worker will summarize both the information which supports and does not support the applicant's claim in Section 1 of the Eligibility Summary. Because of the discrepancy in the information, the case will be referred to the DCC Manager for determination after the certification worker has examined eligibility under the remaining criteria.

(2) Applicants Not Listed on the Roster. If the applicant is not listed on the JUA roster, the applicant must provide documented proof of residence at the homesite in 1974. The certification worker will review the information on the application, the residence history record, and all other information in the case file to determine if there is information that the applicant was a legal resident in 1974. Such information may include ownership of improvements on the HPL, recorded in the Client Master File and the Report and Plan; statements recorded on the Residency History Record; documents showing membership (dependency) in the household which occupied the homesite site. The information and documentation in the case file must relate to residence in 1974 in order to substantiate the applicant's claim. Documents dating from other years can be considered only if they establish a residence pattern for 1972-73 and 1975-76 which can be used to draw conclusions about residence in 1974.

If there is evidence that the applicant was a resident of the identified homesite in 1974 despite the fact that he/she is not