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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8 Dora Dean Mike, Deceased
9 by Larry Mike

10 Plaintiff,

v.

11 Office of Navajo and Hopi Indian
12 Relocation, an Administrative Agency of
the United States,

13 Defendant.

CIV-06-0866-PCT-EHC

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT AND
RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

14
15 The Hearing Officer's Decision is Supported
16 by Substantial Evidence and Not
17 Arbitrary, Capricious or Contrary to Law.
18

19 Plaintiff's Memorandum of Points and Authorities in support of her Motion for Summary
20 Judgment correctly sets forth the Standard of Review under the Administrative Procedure Act,
21 and, therefore, defendant need not restate that Standard.

22 Plaintiff's argument that defendant must resolve factual doubts in favor of a relocation
23 benefits applicant due to defendant's general trust relationship with Native Americans is
24 incorrect. The argument was rejected by this Court in *Lavinia Yannie Whitehair v. Office of*
25 *Navajo and Hopi Indian Relocation*, CIV-94-1113-PHX-PGR (August 10, 1995) (copy
26 attached).

27 Plaintiff had the burden of proving that she was a resident of the former Joint Use Area and
28 that she moved from there between December 22, 1974, and August 30, 1978. It is clear from

1 the Administrative Record, Statement of Facts in Support of Defendant's Cross Motion for
2 Summary Judgment; and this Memorandum that Plaintiff clearly failed to meet her burden.

3 The record is clear that Plaintiff left her home in Jeddito after her marriage in 1973 and
4 thereafter resided in Rock Springs, New Mexico, where she worked and raised her family. Since
5 the Navajo-Hopi Settlement Act (25 U.S.C. §640(d)) was enacted on December 22, 1974, her
6 move to New Mexico in July 1973 cannot have been "made pursuant to the Act" which became
7 law over one year later.

8 Plaintiff cannot reasonably rely on the advice of elders at her June, 1973, wedding on 25
9 U.S.C. §640(d) enacted on December 22, 1974.

10 The decision of the Hearing Officer considered the testimony available, evidence presented,
11 and reasonably concluded that the move in this instance was not "made pursuant to the Act" and
12 that the move to Rock Springs, New Mexico, was permanent rather than temporary. This
13 decision was supported by substantial evidence, and was not arbitrary, capricious or contrary to
14 law.

15 Wherefore, Defendant, Office of Navajo and Hopi Indian Relocation (ONHIR), by and
16 through undersigned counsel, respectfully requests that the Court enter an Order granting
17 summary judgment for the defendant and denying the plaintiff's Motion for Summary Judgment.

18 Respectfully submitted this 27TH day of February, 2007.

19 DANIEL G. KNAUSS
20 United States Attorney
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21 */S/ Patrick J. Schneider*

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2007, 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 registrants:

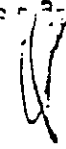
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U.S. Attorney's Office

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LAVINIA YANNIE WHITEHAIR,

Plaintiff,

v.

OFFICE OF NAVAJO AND HOPE
INDIAN RELOCATION,

Defendants.

CIV 94-1113 PHX-PGR

ORDER

I. BACKGROUND

Lavinia Whitehair, the Plaintiff, was born in 1965, and was raised by her aunt in the Hardrock Chapter of the Navajo Nation. Ms. Whitehair lived in her aunt's home, which was surrounded by the homes of other family members. Ms. Whitehair continued to live in Hardrock until 1979, when she began attending high school in Phoenix. After completing high school in May of 1985, Ms. Whitehair returned to live with her family for a few months before she moved back to Phoenix to reside there permanently.

The Office of Navajo and Hopi Indian Relocation ("ONHIR"), the Defendant, is a Federal agency which awards "relocation assistance benefits" to any member of the Navajo or Hopi Tribe who has relocated to a new area, and who meets certain requirements.

Ms. Whitehair first applied for relocation assistance benefits on July 10, 1984. ONHIR denied that application because Ms. Whitehair had not responded to letters

1 subsequently sent by ONHIR requesting documents and information required to
2 determine her eligibility for benefits. Ms. Whitehair appealed this decision, and
3 ONHIR again denied relocation assistance benefits, this time on the grounds that
4 Ms. Whitehair had failed to meet all of the requirements that are necessary in order
5 to receive relocation assistance benefits. Ms. Whitehair appealed that decision as
6 well, and on January 13, 1988, an administrative hearing was held to determine
7 again whether Ms. Whitehair was entitled to such benefits. Ms. Whitehair, her aunt,
8 and her father testified at the hearing. After the evidence was presented, ONHIR
9 again concluded that Ms. Whitehair had failed to meet all of the requirements that
10 are necessary in order to receive relocation assistance benefits.

11 In May of 1994, ONHIR granted relocation assistance benefits to some of Ms.
12 Whitehair's family members who had lived on the same land-site as Ms. Whitehair.
13 Moreover, one of the beneficiaries was Ms. Whitehair's cousin, who had graduated
14 from high school at the same time as Ms. Whitehair.

15 Ms. Whitehair appeals the ONHIR decision--that she is not entitled to
16 relocation assistance benefits--to this Court under 25 U.S.C. § 640d-14(g) and 28
17 U.S.C. § 1361. She asserts that the ONHIR ruling is arbitrary, capricious, not based
18 on substantial evidence, and contrary to law. Ms. Whitehair filed a Motion for
19 Summary Judgment, and ONHIR filed a Cross-Motion for Summary Judgment.

20 II. DISCUSSION

21 A. Summary Judgment is Appropriate

22 Under Rule 56(c) of the Federal Rules of Civil Procedure, the parties are
23 entitled to judgment as a matter of law if there is no genuine issue of material fact.
24 In this case, neither party disputes the factual record presented at the administrative
25 hearing. Rather, the parties dispute whether this Court can set aside the ONHIR
26 decision under 5 U.S.C. § 106(2)(A) and (E). Thus, judgment as a matter of law is
27 appropriate.

1 B. Plaintiff's Eligibility for Relocation Benefits

2 In order to receive relocation benefits, an applicant must meet three
3 conditions. First, the applicant must show that, on December 22, 1974, he or she
4 was a legal resident of an area partitioned to a Tribe under the Navajo-Hopi
5 Settlement Act, 25 U.S.C. § 640d. 25 C.F.R. §700.147(a). Second, the applicant
6 must not be a member of the Tribe which received the partitioned land. Id. Third,
7 the applicant must have been a "head of household" at the time when he or she
8 moved from the partitioned land. Id. A head of household is defined as "that
9 individual who speaks on behalf of the members of the household and who is
10 designated by the household members to act as such." 25 C.F.R. §700.69(c).

11 At the administrative hearing, ONHIR determined that 1 on December 22,
12 1974, Ms. Whitehair was a legal resident of an area that was partitioned under the
13 Settlement Act, and 2 Ms. Whitehair, as a member of the Navajo Nation, had moved
14 from land partitioned to the Hopi Tribe. (Decision at 3, Admin. Rec. 29). Thus, Ms.
15 Whitehair meets the first two conditions of eligibility. She would therefore be entitled
16 to relocation assistance benefits if she had been a head of household at the time
17 when she moved from the land that was partitioned to the Hopi Tribe. However, on
18 the basis of Ms. Whitehair's own testimony, ONHIR determined that Ms. Whitehair
19 failed to meet this third requirement. (Decision at 3-4, Admin. Rec. 29).

20 Ms. Whitehair testified that, from the age of one until she began high school,
21 she had lived with her aunt on land that had been partitioned to the Hopi Tribe. (Tr.
22 at 2-4, Admin. Rec. 29). While attending Southwestern Indian School in Phoenix
23 from 1979 to 1985, she returned to her aunt's home on weekends to help build a
24 house for her aunt on land that had been partitioned to the Navajo Tribe. (Tr. at 4-
25 5, Admin. Rec. 29). However, neither party disputes that during this period, Ms.
26 Whitehair was a dependant minor, and was not a head of household. Therefore, if
27 Ms. Whitehair ever did attain head of household status, it would have to have
28 occurred at some point after she graduated from high school. But Ms. Whitehair

1 stated twice during the hearing that, after graduating from high school, she returned
2 to live in the house that was on land partitioned to the Navajo Tribe, not in the
3 house that was on land partitioned to the Hopi Tribe, because at some point while
4 she was still in high school, the house on the land that was partitioned to the Hopi
5 Tribe had been destroyed. (Tr. at 6 & 9, Admin. Rec. 29). On the basis of those
6 statements, ONHIR determined that Ms. Whitehair could not have attained head of
7 household status while living on the Hopi partitioned land-site, and that she
8 therefore failed to meet the third requirement that is necessary in order to recover
9 relocation assistance benefits.

10 C. Standard of Review

11 This Court will set aside an administrative agency's decision only if that
12 decision was arbitrary, capricious, not based on substantial evidence, or contrary to
13 law. 5 U.S.C. § 706(2)(A) & (E); Bedoni v. Navajo-Hopi Relocation Comm'n, 878
14 F.2d 1119, 1122 (9th Cir. 1989).

15 1. The agency's decision is not arbitrary or
16 capricious

17 Generally, an administrative agency must apply the "same basic standard of
18 conduct to all parties before them." Teamsters Local Union 769 v. N.L.R.B., 532
19 F.2d 1385, 1392 (D.C. Cir. 1976). If an agency's decision is inconsistent with other
20 findings, the decision may be considered arbitrary if the agency fails to explain the
21 discrepancy. Id.

22 Ms. Whitehair asserts that the ONHIR determination in 1988 that she
23 ineligible for relocation benefits is inconsistent with the ONHIR determination in 1994
24 that her cousin was eligible for such benefits, on grounds that the cases are
25 factually similar; that is, both Ms. Whitehair and her cousin lived in houses on the
26 same Hopi partitioned land-site, and both graduated from high school at the same
27 time. However, ONHIR found that Ms. Whitehair had not attained head of
28 household status when she moved from the home on Hopi partitioned land, while

1 ONHIR found that Ms. Whitehair's cousin had attained such head of household
2 status. Ms. Whitehair therefore asserts that, because ONHIR failed to explain why it
3 ruled differently in these similar cases, its decision must be considered arbitrary and
4 capricious.

5 However, the facts that have been established in both of these cases are
6 entirely compatible. It is clear from the testimony at the administrative hearing that
7 there were many houses at Ms. Whitehair's homesite on Hopi partitioned land. (Tr.
8 at 8, Admin. Rec. 29). At her hearing, Ms. Whitehair testified that the house on
9 Hopi partitioned land in which she had previously been living had been destroyed
10 before she graduated from high school. At her cousin's hearing, however, there
11 was no testimony that the house in which he had been living had been destroyed
12 before he graduated from high school.¹ Therefore, ONHIR could easily conclude
13 that Ms. Whitehair's cousin remained living at the house after he graduated from
14 high school, and during that time attained head of household status, while Ms.
15 Whitehair could not have done the same, because the house in which she had been
16 living in on Hopi partitioned land had already been destroyed. Thus, because the
17 ONHIR findings in these cases are not mutually inconsistent, there was no reason
18 why ONHIR should explain why it had denied relocation assistance benefits to Ms.
19 Whitehair while granting such benefits to Ms. Whitehair's cousin.

20 2. The agency's decision is supported by substantial
21 evidence

22 Substantial evidence is "such relevant evidence as a reasonable mind might
23 accept as adequate to support a conclusion." Information Providers' Coalition for
24 Defense of the First Amendment v. F.C.C., 928 F.2d 866, 870 (9th Cir. 1991)

25 ¹ If in determining whether Ms. Whitehair's cousin was eligible for relocation benefits,
26 ONHIR found that all the houses on Hopi partitioned land-site had been destroyed at the
27 same time, Ms. Whitehair has failed to present this to the Court. While Ms. Whitehair
28 states that she and her cousin lived in the same house on Hopi partitioned land, the only
support for this contention in the record is that they lived at the same homesite.

1 (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938)). In this case,
2 the ONHIR determination that Ms. Whitehair was not a head of household when she
3 moved was primarily based on Ms. Whitehair's own testimony at the hearing. Those
4 statements indicate that, after graduating high school, Ms. Whitehair returned to live
5 in the house on Navajo partitioned land because at some point earlier the house on
6 Hopi partitioned land had been destroyed. (Tr. at 6 & 9, Admin. Rec. 29).

7 Ms. Whitehair asserts that this decision by ONHIR should be set aside
8 because it was not based on substantial evidence, for three reasons. First, Ms.
9 Whitehair argues that there "may have been a mix-up on dates." However, even if
10 Ms. Whitehair was confused about certain dates, her testimony--that after
11 completing high school she lived only on Navajo partitioned land--does not refer to
12 or require any calendar dates. (See Tr. at 9, Admin. Rec. 29). This argument is
13 therefore unpersuasive.

14 Second, Ms. Whitehair argues that the ONHIR decision should be set aside
15 because the destruction of one home on Hopi partitioned land before she completed
16 high school does not preclude the possibility that she could have lived in another
17 home on the same land-site. However, this argument contradicts Ms. Whitehair's
18 own testimony that, after graduating from high school, she lived only on Navajo
19 partitioned land. Id. Therefore, this argument must also be rejected.

20 Third, Ms. Whitehair argues that the ONHIR decision should be reversed
21 because there was testimony at the administrative hearing that the family continued
22 to use the home on the Hopi partitioned land until approximately two years prior to
23 that hearing. Specifically, Ms. Whitehair testified that the Hopi partitioned land-site
24 was used "until about two years ago," (Tr. at 5, Admin. Rec. 27); her aunt testified
25 that the home on Hopi partitioned land had been destroyed "a couple of years ago"
26 (Tr. at 17, Admin. Rec. 27); and her father testified that the home had been
27 destroyed "about 2 years" previously (Tr. at 13, Admin. Rec. 27). Since the hearing
28 was held on June 13, 1988, Ms. Whitehair concludes that it was impossible for the

1 house on Hopi partitioned land to have been destroyed before she graduated from
2 high school, which was in May of 1985. However, these inexact statements cannot
3 be held as conclusive evidence that the house on Hopi partitioned land was not
4 destroyed before Ms. Whitehair graduated from high school, especially in light of
5 Ms. Whitehair's own testimony to the contrary.

6 Therefore, none of the arguments presented by Ms. Whitehair show that the
7 ONHIR decision was not based on substantial evidence.

8 3. ONHIR's Decision is not contrary to Federal law

9 The Federal Government has a trust relationship with Native Americans.
10 Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The Government and
11 its Agencies must act in good faith and fairness towards Native Americans, United
12 States v. Payne, 264 U.S. 446, 448 (1924), and ambiguities in Federal law must be
13 construed in favor of Native American rights. White Mountain Apache Tribe v.
14 Bracker, 448 U.S. 136, 143-144 (1980).

5 The administrative agency's decision in this case was made in good faith
6 because, as indicated above, the decision was based on substantial evidence, was
7 not arbitrary, and was not inconsistent with other ONHIR decisions. Further, the
8 applicable law in this case is clear: only individuals who were heads of households
9 at the time of relocation are entitled to relocation assistance benefits. See 25
10 C.F.R. § 700.147(a). Thus, the ONHIR decision does not appear to violate the
11 Federal Government's trust obligation to Native Americans.

12 Ms. Whitehair argues that ONHIR's decision violates the Federal
13 Government's trust obligation, not because there is any ambiguity in the applicable
14 law in this case, but because the agency "failed to resolve any [factual] doubts in
15 favor of the applicant." Ms. Whitehair asserts that there was "confusing evidence"
16 as to when Ms. Whitehair moved from the Hopi-land homesite, that the issue should
17 have been resolved in favor of her for that reason, and that not to do so is contrary
18 to the Federal Government's trust obligation to Native Americans.

1 However, if this Court were to adopt Ms. Whitehair's argument--that all factual
2 doubts must be resolved in favor of the tribal member--the requirement that an
3 applicant prove eligibility for relocation assistance benefits would no longer exist.
4 See 25 C.F.R. § 700.147(b). Instead, any applicant who could show that he or she
5 is merely a possible candidate for relocation benefits would be entitled to those
6 benefits, whether or not the applicant could actually prove eligibility. Since adoption
7 of Ms. Whitehair's argument would render meaningless the Section 700.147(b)
8 requirement that the applicant "prove" eligibility, this argument must be rejected.

9 III. CONCLUSION

10 This Court will set aside an administrative agency's decision only if it is
11 arbitrary, capricious, not based on substantial evidence, or contrary to law. First,
12 the ONHIR decision to deny relocation assistance benefits to Ms. Whitehair was not
13 inconsistent with its decision to grant such benefits to Ms. Whitehair's cousin,
14 because the facts that have been presented in each the two cases were different;
15 thus, ONHIR was not acting arbitrarily and capriciously by not explaining why it ruled
16 differently in each case. Second, the ONHIR decision was based on substantial
17 evidence; this is evident from the fact that Ms. Whitehair's own testimony supports
18 the ONHIR finding. Third, the ONHIR decision is not contrary to law; while the
19 federal government has a trust obligation to Native Americans, that does not mean
20 that all factual doubts must be resolved in favor of Native Americans.

21 Therefore, in accordance with the foregoing,

22 IT IS ORDERED denying Plaintiff's Motion for Summary Judgment [Doc.

23 #13].

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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AUG 18 1995	
CLERK U.S. DISTRICT COURT	
DISTRICT OF ARIZONA	
BY <u>[Signature]</u>	

LAVINIA YANNIE WHITEHAIR,

Plaintiff,

v.

OFFICE OF NAVAJO AND HOPE
INDIAN RELOCATION,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CIV 94-1113 PHX PGR

 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 X Decision by Court. This action came for consideration before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court having granted the Cross-Motion for Summary Judgment by Defendant, Plaintiff take nothing and the Complaint and this action are hereby dismissed with prejudice.

August 18, 1995
Date

RICHARD H. WEARE
Clerk

[Signature]
(By) Deputy Clerk

1 IT IS FURTHER ORDERED granting Defendant's Cross-Motion for Summary
2 Judgment [Doc. #16]. Plaintiff's complaint and action are dismissed with prejudice.
3 The Clerk of the Court is directed to enter judgment accordingly.
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5 DATED this TH 17 day of August, 1995.

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7 HON. PAUL G. ROSENBLATT
8 United States District Judge
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