

1 S. Barry Paisner
2 Arizona Bar No. 009793
3 Hinkle Shanor LLP
4 218 Montezuma Avenue
5 Santa Fe, New Mexico 87501
6 (505) 982-4554
7 E-mail: bpaisner@hinklelawfirm.com

8 Susan I. Eastman
9 Arizona Bar No.021859
10 Navajo-Hopi Legal Services Program
11 Post Office Box 2990
12 Tuba City, Arizona 86045
13 (928) 283-3300
14 E-mail: seastman@nndoj.org

15 *Attorneys for Plaintiff*

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF ARIZONA

18 BERNICE NELSON,
19 Plaintiff,

20 vs.

21 OFFICE OF NAVAJO HOPI INDIAN
22 RELOCATION, AN ADMINISTRATIVE
23 AGENCY OF THE UNITED STATES,
24 Defendant.

25 **COMPLAINT FOR JUDICIAL
26 REVIEW**

27 Bernice Nelson, Plaintiff, brings this action because the Defendant has arbitrarily
28 denied her application for relocation assistance benefits in violation of the law.

INTRODUCTION

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3 1. In 1962, this Court determined that the Navajo Nation and Hopi Indian Tribe
4 held joint interests in a large area of northern Arizona long occupied by members of both
5 tribes, known as the Joint Use Area (“JUA”). *Healing v. Jones*, 210 F. Supp. 125, 192 (D.
6 Ariz. 1962).

7
8 2. Twelve years later, Congress enacted the Navajo-Hopi Land Settlement Act
9 (“Settlement Act”), Pub. L. No. 93-531, § 12, December 22, 1974, 88 Stat. 1716, which
10 authorized partition of the JUA between the tribes, ordered tribe members who lived on
11 the partitioned land of the other tribe to relocate to the land partitioned to their own tribe,
12 and created a generous benefit program to compensate the thousands of primarily Navajo
13 people who would be forced to abandon their homes on lands partitioned to the other tribe.
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17 3. The Settlement Act is to be implemented to “insure that persons displaced as
18 a result of the Act are treated fairly, consistently, and equitably so that these persons will
19 not suffer the disproportionate adverse, social, economic, cultural and other impacts of
20 relocation.” 25 C.F.R. § 700.1(a).
21

22 4. To manage this unprecedented forced relocation, the Act created an agency
23 now known as the Office of Navajo and Hopi Indian relocation (“ONHIR”), and gave it
24 five years from the date of the submission of the “relocation plan” to complete the
25 relocation of affected Navajo and Hopi tribal members. Pub. L. No. 93-531, 88 Stat. 1718
26 § 14 (a), 88 Stat. 1718.
27
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1 5. Seven years after the Settlement Act, in 1981, the agency finally issued its
2 relocation plan. According to the Settlement Act, Congress mandated that relocation “shall
3 be completed” by the end of 1986.
4

5 6. On July 7, 1986, ONHIR closed the application process for relocation
6 benefits.
7

8 7. Approximately 19 years later, in 2005, the agency began a new round of
9 benefit applications for certain individuals who had previously contacted ONHIR to apply
10 for benefits. Bernice Nelson is one of those individuals.
11

12 8. Today, more than forty years after the passage of the Act and thirty-one years
13 after Congress mandated relocation be completed, ONHIR has still not provided relocation
14 benefits to all of the Navajo relocatees, including Ms. Nelson.
15

16 9. To be eligible for relocation assistance and benefits, an individual Navajo
17 must be a head of household living on land partitioned to the Hopi Tribe no later than
18 December 22, 1973. Pub. L No. 93-531, §15 (g), Dec. 22 1974, 88 Stat 1719, *formerly*
19 *codified* at 25 U.S.C. 640d-14 (c).
20

21 10. Bernice Nelson meets all the eligibility qualifications. She is an enrolled
22 member of the Navajo Nation, was born and raised on the Hopi Partitioned Land (“HPL”),
23 and was forced to relocate from her home on the HPL after she attained her head-of-
24 household status.
25

26 11. ONHIR’s denial of relocation, benefits to Ms. Nelson was arbitrary and
27 capricious, not supported by substantial evidence, and unlawful.
28

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 701 *et seq.*, and the Settlement Act, Pub. L. No. 93-531, § 12, December 22, 1974, 88 Stat. 1716.

13. Bernice Nelson has exhausted her administrative remedies.

14. Venue is proper in this District pursuant to Pub. L. No. 93–531, §15(g), Dec. 22, 1974, 88 Stat. 1719, as amended by Pub. L. No. 100-666, §10, July 8, 1980, 102 Stat. 3929 November 16, 1988, *formerly codified as* 25 U.S.C. 640d-14(g), which requires appeals of ONHIR eligibility determinations to be brought in this Court.

PARTIES

15. Ms. Nelson is an enrolled member of the Navajo Nation who was relocated from her home on the HPL due to the Settlement Act, Pub. L. No. 93-531, §12, December 22, 1974, 88 Stat. 1716.

16. Defendant ONHIR is an independent federal agency created by Congress pursuant to the Settlement Act, Pub. L. No. 93-531, §12, December 22, 1974, 88 Stat. 1716, as amended by Pub. L. No. 100-666, § 4(a), November 16, 1988, 102 Stat. 3929, 3934, to carry out the relocation of members of the Navajo and Hopi Tribes who resided on land partitioned to the other tribe and to provide relocation assistance benefits for households required to relocate. ONHIR has a fiduciary obligation to administer its program in a fair manner to assure that Navajo relocatees receive the full benefits they are entitled to receive.

LEGAL RESIDENCY HISTORY

17. Ms. Nelson was born in 1962 and raised in Teesto, Finger Point, Arizona (HPL), where her parents and grandparents lived.

18. Ms. Nelson's ancestral home was eventually decreed to be on the HPL.

19. At no point prior to the passage of the Settlement Act did Ms. Nelson abandon her ancestral home.

REQUEST FOR RELOCATION BENEFITS AND ONHIR's DENIALS

20. According to the record before ONHIR, Ms. Nelson first contacted ONHIR about relocation assistance benefits on March 13, 1992.

21. On March 13, 1992, ONHIR did not accept an application for relocation benefits from Ms. Nelson.

22. In 2005, ONHIR opened a new round of applications for certain individuals who had previously contacted ONHIR to apply for benefits.

23. On July 25, 2005, ONHIR accepted Ms. Nelson's application for relocation assistance benefits.

24. On December 20, 2005, ONHIR denied Ms. Nelson's application for relocation benefits by finding that she did not reside on the HPL during the requisite period.

ADMINISTRATIVE APPEALS

25. On February 13, 2006, Ms. Nelson appealed the denial of her request for benefits. ONHIR accepted the appeal on February 15, 2006.

1 26. Despite accepting Ms. Nelson's appeal, ONHIR scheduled no hearings, and
2 the appeal remained pending for six years and ten months.

3 27. On February 27, 2008, this Court determined that ONHIR had breached its
4 fiduciary duty to all Navajo and Hopi individuals subject to relocation by failing to inform
5 them of their potential eligibility for relocation benefits prior to the July 7, 1986 application
6 deadline. *Noller Pete Herbert v. ONHIR*, CV-06-3014-PCT-NVW ONHIR (D. Ariz.
7 2008). In response, ONHIR issued its Policy 14, which reinstated the eligibility
8 requirements that were in place for individuals who submitted applications for relocation
9 benefits on or before July 7, 1986.
10
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12 28. Policy 14 applies to Ms. Nelson.
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15 29. Ms. Nelson is eligible for relocation benefits under the Act, ONHIR
16 regulations, and Policy 14 because she resided on the HPL before December 22, 1973;
17 continued to reside on the HPL when she became a head of household; did not abandon
18 her residence on the HPL prior to the passage of the Settlement Act; did not reject
19 relocation benefits; has not already received relocation benefits; did not relocate with a
20 different head of household; and did not sign an Accommodation Agreement with the Hopi
21 Tribe allowing her to remain temporarily on HPL pursuant to the Navajo-Hopi Land
22 Dispute Settlement Act of 1996, Pub. L. No. 104-301, § 2, October 11, 1996, 110 Stat.
23 3649.
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1 30. On December 7, 2012, six years and ten months after ONHIR accepted Ms.
2 Nelson's appeal, ONHIR finally held an administrative hearing on Ms. Nelson's appeal
3 before an Independent Hearing Officer ("IHO").
4

5 31. At the hearing Ms. Nelson established that she was entitled to relocation
6 benefits. She was born and raised in Teesto, Arizona, an area which was eventually
7 designated as the HPL. Her natural mother and father separated when Ms. Nelson was a
8 young child and both parents remained legal residents of Teesto Chapter, Finger Point,
9 Arizona (HPL); Ms. Nelson left school at the age of sixteen and worked at a motel in Show
10 Low, Arizona. Ms. Nelson's mother moved off the HPL when she remarried in 1978 and
11 after Ms. Nelson's mother moved off the HPL, Ms. Nelson continued to live with her father
12 and maternal grandparents, all of whom resided on the HPL. Ms. Nelson attained the legal
13 status of head of household in 1979, when she earned the requisite amount of income
14 working at the motel in Show Low, Arizona, and Ms. Nelson was a legal resident of Teesto,
15 Finger Point, Arizona (HPL) when she attained the legal status of head of household.
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19 32. Following the hearing, the IHO found that the testimony of Ms. Nelson's
20 father, Jimmy George, was not credible because his recollection about events was "faulty
21 and inconsistent."
22

23 33. The IHO further found: that Ms. Nelson was a legal resident of the HPL on
24 December 22, 1974 because she was a minor and she took her mother's residency, which
25 was Teesto Chapter, Finger Point, Arizona (HPL); that Ms. Nelson's legal residence
26 transferred with her mother in 1978 when her mother remarried and moved to an unknown
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1 location; and that Ms. Nelson attained the legal status of head of household in 1979, when
2 she earned the requisite amount of income while working at the motel.

3
4 34. The IHO concluded that Ms. Nelson was not a legal resident of the HPL when
5 she attained head of household status in 1979 erroneously finding that her legal residence
6 transferred with her mother when her mother remarried and moved to an unknown location
7 in 1978.
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10 35. The IHO's decision is erroneous in finding Ms. Nelson's legal residency
11 followed her mother's residency despite the fact that Ms. Nelson continued to reside with
12 her father and maternal grandparents, all of whom resided on the HPL.
13

14 36. ONHIR issued a Final Agency Action on April 29, 2013, upholding its denial
15 of Ms. Nelson's eligibility for relocation assistance benefits.
16

17 **COUNT I**

18 37. The forgoing allegations are incorporated by reference as if fully set forth
19 herein.
20

21 38. ONHIR's final decisions regarding eligibility determinations are subject to
22 judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.
23

24 39. This Court may set aside an agency decision that is "unsupported by
25 substantial evidence" or "arbitrary, capricious, an abuse of discretion, or otherwise not in
26 accordance with law[.]" 5 U.S.C. § 706(2)(A), (E).
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1 40. ONHIR's denial of Ms. Nelson's eligibility for relocation benefits adversely
2 affects her and is arbitrary and capricious, not supported by substantial evidence, and
3 contrary to law.
4

5
6 **COUNT II**

7 41. The forgoing allegations are incorporated by reference as if fully set forth
8 herein.
9

10 42. ONHIR owes a fiduciary obligation to all members of the Navajo Nation
11 who were obligated to relocate from the HPL pursuant to the court-ordered partition and
12 the Settlement Act.
13

14 43. The APA permits judicial review on behalf of a person to whom ONHIR
15 owes a fiduciary obligation.
16

17 44. The APA permits judicial review on behalf of any person who seeks
18 nonmonetary relief and has suffered a legal wrong because of action or inaction by a federal
19 agency, or an officer or employee of an agency.
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21 45. This Court is granted authority by the APA to find an agency's inaction and
22 delay to be unlawful. The APA further directs courts to overturn agency action that violates
23 the Constitution, exceeds statutory authority or jurisdiction, fails to observe a procedure
24 that is required by law, is unsupported by substantial evidence, or is unwarranted by the
25 facts.
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1 A. Enter judgment reversing ONHIR's denials of Ms. Nelson's eligibility for
2 relocation benefits and ordering ONHIR to find Ms. Nelson eligible for
3 relocation benefits;

4 B. Award Plaintiff's costs and reasonable attorney's fees pursuant to 28 U.S.C. §
5 2412; and
6

7 C. Award Plaintiff such other relief as the Court deems just and proper.
8

9 Respectfully submitted this 18th day of August, 2017.
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11

12 /s/ S. Barry Paisner

13 Hinkle Shanor LLP
14 218 Montezuma Avenue
15 Santa Fe, New Mexico 87501
16 *Attorney for Plaintiff*
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