



1 **II. BACKGROUND**

2 The Settlement Act provided for the partition of the former Joint Use Area  
3 (hereinafter the “JUA”) between the Navajo and Hopi Tribes. The Act required JUA  
4 residents to relocate off land partitioned to the other tribe. *Id.* To compensate relocated  
5 tribal members, the federal government created ONHIR (initially the Navajo and Hopi  
6 Indian Relocation Commission) to carry out this relocation and provide relocation benefits  
7 to the relocated residents.. Pub. L. 93-531, §15, December 22, 2974, 88 Stat. 1719. FB is  
8 a member of the Navajo Nation who resided at Coalmine Mesa which was partitioned to  
9 the Hopi Tribe.  
10

11 **III. QUESTIONS PRESENTED**

12  
13 1) Whether Defendant’s decision that FB was not a “Head of Household” is  
14 arbitrary and capricious, not supported by substantial evidence, or contrary to law?

15 2) Whether Defendant’s decision that FB was not a “resident” of the HPL is  
16 arbitrary and capricious, not supported by substantial evidence, or contrary to law?  
17

18 **IV. STANDARD OF REVIEW**

19 The decision of the Hearing Officer (“HO”) i is subject to review under the  
20 Administrative Procedure Act (APA). Under the APA, a reviewing court may set aside  
21 agency action that is unsupported by substantial evidence, is arbitrary, capricious or  
22 contrary to law. 5 U.S.C. §706(2)(A), 2(E). See also *Bedoni v. Navajo-Hopi Indian*  
23 *Relocation Commission*, 878 F.2d 1119, 1122 (9<sup>th</sup> Cir. 1989).  
24

25 Substantial evidence means “such relevant evidence as a reasonable minds might  
accept as adequate to support a conclusion. *Information Providers’ Coalition for Defense*

1 *of the First Amendment v. FCC*, 928 F.2d 866, 870 (9<sup>th</sup> Cir. 1991). When reviewing an  
2 agency’s decision under an arbitrary and capricious standard, the Court must determine  
3 whether the agency’s decision was based on consideration of relevant factors and whether  
4 there has been a clear error of judgment. *Northwest Motorcycle Association v. U.S.*  
5 *Department of Agriculture*, 18 F.3d 1468, 1471 (9<sup>th</sup> Cir. 1994).  
6

7 An agency action is arbitrary and capricious “if the agency has relied on factors  
8 which Congress has not intended it to consider, entirely failed to consider an important  
9 aspect of the problem, offered an explanation for its decision that runs counter to the  
10 evidence before the agency, or is so implausible that it could not be ascribed to a  
11 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S.*  
12 *v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); see *Information Providers*  
13 *Coalition, supra*, 928 F.2d at 870..

14 Under the APA, the court reviews the challenged action under a deferential  
15 standard. *Bedoni, supra*, 878 F.2d at 1122. Nevertheless, “the agency must examine the  
16 relevant data and articulate a satisfactory explanation for its action including a ‘rational  
17 connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of*  
18 *U.S., supra*. A reviewing court “must not rubber-stamp ... administrative decisions that  
19 [the court deems] inconsistent with a statutory mandate or that frustrate the congressional  
20 policy underlying a statute.” *Ocean Advocates v. United States Arms Corps of Eng’rs*,  
21 402 F.3d 846, 859 (9<sup>th</sup> Cir. 2005).

22 The reviewing court must also recognize ‘the distinctive obligation of trust  
23 incumbent upon the Government in its dealings with [Native Americans].’ *Bedoni, supra*  
24 878 F.2d at 1124. This obligation is reflected in the ONHIR’s own Plan Update that it is  
25 “the intent of Congress to provide for a thorough and generous [relocation benefit]

1 program.” (AR #000259).The Agency’s statutory mandate is to implement the Settlement  
2 Act consistent with the goals and intent of Congress. Further, the purpose of the  
3 Settlement Act was to “take into account all the social, economic, cultural, and other  
4 adverse impacts on persons involved in the relocation and ... to avoid or minimize  
5 [them],”see S.Rep.No. 1177, 93 Cong., 2d Sess. 35 (1974), and “to take cognizance to the  
6 hardships that the relocates are subject to and develop procedures [accordingly],” see S.  
7 Rep. No. 1158, 95th Cong., 2d Sess. 4 (1978).

8  
9 **V. ARGUMENT**

10 **A. Fred Begay meets ONHIR’s eligibility standards for Head of Household**

11  
12 25 CFR §700.147 describes the standards necessary for qualifying for relocation  
13 benefits including:

- 14 (a) To be eligible for services provided for under the Act, and these regulations,  
15 the head of household and/or immediate family must have been residents on  
16 12/22/74 of an area partitioned to the tribe of which they were not members.

17 Head of household standards are contained in 25 CFR §700.69:

- 18 (a) *Household*. A household is:  
19 (2) A single person who at the time of his/her residence on land  
20 partitioned to the Tribe of which he/she is not a member actually  
21 maintained and supported him/herself or was legally married and is  
22 now legally divorced.

23  
24 **1) Fred Begay Was a Head of Household**

25 In approximately 1985, ONHIR’s first Attorney, E. Susan Crystal developed a  
policy to define self-support. In a memorandum entitled “Criteria for Determination of  
Self-Supporting,” she wrote:

1 Artificial income levels are not sufficient to determine self-supporting status  
2 for Navajos.

3 (5) In some circumstances, individuals may be able to show that they  
4 were self-supporting without the benefit of tax returns and wage  
5 statements because of the lifestyle on the HPL. It is common for  
6 individuals to make a living from livestock or support themselves  
7 through odd jobs throughout the Reservation. The Commission has  
8 always considered these factors in its determination of head of  
9 household status...

10 *Id.* (hereinafter “Susan Crystal Memo”), Exhibit 3.

11 In 1987, ONHIR was ordered by Congress to re-examine those cases already certified  
12 to verify eligibility. *See* “Criteria for Certification Review.”, Exhibit 4, page 1. Attorney  
13 Crystal described how ONHIR developed its standard of \$1300 as the presumptive level  
14 for self-support. This amount was similar to the level of general assistance available to  
15 single individuals on the Reservation at that time (\$1,296 per year). Attorney Crystal  
16 noted:

17 ...the circumstances on the HPL are considerably different than mainstreamed  
18 communities. A non-cash economy exists for a large segment of the  
19 population. The Commission must therefore allow for the possibility of an  
20 individual demonstrating self-support at a lower figure than the \$1300 floor  
21 established herein.

22 *Criteria for Certification Review*, page 4, Exhibit 4.

23 Fred Begay became a head of household well before the July 7, 1986 deadline. Fred  
24 Begay earned over \$1,300 from 1982-1986.

25 **B. The Hearing Officer’s Credibility Findings are not Supported by  
Substantial Evidence**

The Hearing Officer (hereinafter, “HO”) made credibility findings for each witness  
(Decision at 4-6). The credibility findings are not supported by substantial evidence and  
cannot stand.

- 1 1. LESLIE HOSTEEN (Applicant's employer): Hosteen's testimony was  
2 contradictory and inconsistent with his December 2014 written declaration. Leslie  
3 Hosteen is not a credible witness.
- 4 2. JONATHAN SAKIESTEWA (Applicant's co-worker): Overall, Sakiestewa's  
5 testimony is inconsistent with other testimony provided at the hearing, as well as  
6 Leslie Hosteen's declaration, and he is not a credible witness.
- 7 3. ELVIRA CHISCHILLIE (Applicant's older sister): Except for her testimony about  
8 completing her brother's application, her testimony is not credible.
- 9 4. FRED BEGAY: Applicant could not remember critical details about his  
10 employment, could not testify about his earnings in any given year or about his  
11 taxable earnings in 1983/1984. Applicant's testimony about his Coalmine residence  
12 from 1982 on is inconsistent and not credible. Applicant is not a credible witness.
- 13 5. JOSEPH SHELTON (Agency Agent): Joseph Shelton is a credible witness.  
14 Negative credibility findings cannot stand unless supported by substantial evidence.

15  
16  
17 *Ceguerra v. Secretary of HHS*, 933 F.2d 735, 738 (9<sup>th</sup> Cir. 1991). Substantial evidence is  
18 "such relevant evidence as a reasonable mind might accept as adequate to support a  
19 conclusion." *Richardson v. Perales*, 402 US 389, 401 (1971).

20  
21 In making an adverse credibility determination an administrative law judge must do  
22 more than simply declare a witness's testimony not to be credible.

23  
24 This court reviews factual determinations, including credibility determinations,  
25 for substantial evidence. Under this standard, we reverse a factual determination only  
if "any reasonable adjudicator would be compelled to conclude to the contrary." An  
adverse credibility finding must be supported by "specific and cogent reasons." Those  
reasons "must be substantial and bear a legitimate nexus to the finding" of

1           incredibility. Inconsistencies that are "minor" or that "do not go to the heart of an  
2           applicant's claim[s]" are insufficient by themselves to support an adverse credibility  
3           finding.

4           *Morgan v. Mukasey*, 529 F.3d 1202, 1206-1207, (9<sup>th</sup> Cir. 2008) (Internal citations  
5           omitted) See also: *Zhou v. Gonzales*, 437 F.3d 860, 865 (9<sup>th</sup> Cir. 2006)

6           The HO's primary rationale for finding FB and his three witnesses not to be credible  
7           was based on inconsistencies he found in their testimony. "Minor discrepancies,  
8           inconsistencies or omissions that do not go to the heart of an applicant's claim do not  
9           constitute substantial evidence to support an adverse credibility finding." *Chen v. Ashcroft*,  
10           362 F.3d 611, 617 (9<sup>th</sup> Cir. 2004). An "adverse credibility determination may not rest on  
11           incidental misstatements that do not go to the "heart" of the petitioner's claim." *Shire v.*  
12           *Ashcroft*, 388 F.3d 1288, 1298 (9<sup>th</sup> Cir. 2004).

13           FB and his witnesses were testifying about events from more than thirty years  
14           previous. The HO found FB's claim to be "fraught with contradictions and  
15           inconsistencies." The HO found significance in the differing amounts FB and witnesses  
16           testified that he was paid, as well as differing testimony as to the year in which he began  
17           working for Ramsey. But such inconsistencies in pay rate and year of hire do not go to the  
18           heart of FB's claim since all testimony was consistent as to the type of work he was  
19           engaged in, and that he was employed at the latest by 1982. The omission of testimony  
20           about FB's specific annual earnings also does not provide a basis for finding the testimony  
21           to lack credibility. All testimony was consistent that FB and co-workers were paid in cash  
22           and that they did not pay taxes. There was no reason why FB or his witnesses would have  
23           a clear memory of yearly income.  
24  
25

1 The HO made mathematical computations to demonstrate that FB could not have  
2 made as much as \$1,300 a year while working for Ramsey. But, this was pure speculation  
3 on the HO's part as there is nothing in the record to indicate how many houses Ramsey  
4 constructed during the years FB was employed or how many homes he worked on each  
5 year. "Speculation and conjecture cannot form the basis of an adverse credibility finding,  
6 which must instead be based on substantial evidence." *Shire v. Ashcroft, supra*, at 1296.  
7 Also: *Zhou v. Gonzales*, 437 F.3d 860, 865 (9<sup>th</sup> Cir. 2006)

8  
9 **C. The Hearing Officer's Key Factual Findings are not Supported by**  
10 **Substantial Evidence.**

11 **(1) Findings Concerning Head of Household**

12 The HO correctly found the following facts: FB is a 55 year old Navajo Indian,  
13 born February 7, 1960, who resided with his family in the Coalmine Mesa Chapter in a  
14 small house on the HPL. (SOF ¶1, 2, 5). FB attended boarding school through the 8<sup>th</sup>  
15 grade and then "returned to his parents' home in Coalmine until his family relocated."  
16 (SOF ¶3, 4) FB worked for his uncle, Keith George, in Tuba City where "he herded  
17 sheep and broke horses." (SOF ¶6) FB also worked spot jobs for the Coalmine Chapter  
18 and in Phoenix and Utah. (SOF ¶9) FB met Leslie Hosteen, Sr. ("LH") who "worked for  
19 Ramsey Construction, a contractor who was building relocation homes of behalf of  
20 ONHIR and the BIA. (SOF ¶10, 11, 12) LH hired FB to work on building homes. (SOF  
21 ¶12) FB worked doing site clean-up, he loaded shingles on roofs, and he did roofing on  
22 homes. (SOF ¶13) LH's crew would take 1 to 1 1/2 days to roof a home. (SOF ¶17) FB  
23 was paid hourly or piece-work if roofing. (SOF ¶14)  
24  
25



1 LH submitted a declaration on December 10, 2014 about FB's employment  
2 between 1982 and 1995. (SOF ¶19) FB was hired in 1982, constructing relocation homes  
3 between 1982-1995, FB worked 30-40 hours a week, was paid \$30 for loading shingles  
4 and \$85-\$90 to roof a house. (SOF ¶20, 21) LH later testified he hired FB in 1979 or  
5 1980, and paid FB \$150 to roof a house. (SOF ¶22) Jonathan Sakiestewa ("JS"), FB's co-  
6 worker, testified FB began working in 1983 or 1984, that the crew worked 40 hours a  
7 week, that he earned \$4,500 a month working for LH and that FB also worked for his  
8 uncle Keith George, for 5-6 years in Tuba City. (SOF ¶23)

10 Several key facts, as found by the HO, are not supported by substantial evidence.  
11 FB was not "living" with his uncle Keith George when he was hired by LH. FB did  
12 know when his various family members "left" the family's HPL homesite in 1982 and  
13 "relocated" from the HPL in 1989. FB worked for Ramsey all year but when  
14 construction slowed in the winter months, he supplemented his income working for his  
15 uncle.  
16

17 LH testified that he worked for Ramsey for over thirty years beginning in  
18 approximately 1976. Ramsey built approximately 95 relocation homes between 1980 and  
19 1986. (SOF ¶27-29) FB started in approximately 1979. (SOF ¶30). He began loading  
20 shingles and working on the cleanup crew. (SOF ¶32) LH was the foreman of a crew of six  
21 that included FB and JS. (*Id.*) FB and JS rode with LH to the various jobsites. (SOF ¶33).  
22 They camped out at the jobsites. (*Id.*) The crew worked 30-40 hours a week and  
23 sometimes weekends. (SOF ¶34). LH paid his workers in cash, either hourly or  
24  
25

1 piecework, based on the type of work. (SOF ¶35). FB made approximately \$150 per  
2 home. (SOF ¶35).

3 LH's wife was the business manager who maintained the records. (SOF ¶37). She  
4 died in 2003 and the records have been lost. (*Id.*) FB worked for Ramsey Construction  
5 until he was blinded in an accident in approximately 1995. (SOF ¶38, 39).

7 JS testified that he knew FB most of his life. (SOF ¶40). While JS was in high  
8 school, FB worked herding sheep for his uncle, Keith George. (*Id.*) JS began working for  
9 Ramsey in 1982. (*Id.*) FB began working for Ramsey in approximately 1983. (*Id.*) They  
10 worked 40 hours a week. (*Id.*)

12 JS testified that they were paid approximately \$130 per home for roofing. (SOF  
13 ¶43). In addition to roofing they also worked loading shingles, cleaning the job site and  
14 digging ditches. JS was paid in cash. (SOF ¶45). JS went to Texas in 1987 and (*Id.*, 30)  
15 FB was still working for Ramsey construction. (SOF ¶46).

16 JS worked for Ramsey Construction with FB from 1982 to 1987. (SOF ¶47). JS  
17 made approximately \$12,000 a year working for Ramsey. He worked full-time during  
18 good weather months. (*Id.*) During the winter work slowed. (*Id.*) JS testified that FB  
19 worked herding sheep for his uncle Keith George from 1982 to 1987 in addition to the  
20 construction work. (*Id.*) FB earned money herding sheep and taming horses when he  
21 dropped out of school and worked for his uncle while he worked for Ramsey. (*Id.*) JS  
22 came back to work for Ramsey in 1992 and he and FB worked together for several more  
23 years. (SOF ¶49). In the 1990s, LH was still their foreman and continued to pay in cash.  
24  
25 (*Id.*)

1 Elvira Chischillie (“EC”) testified her brother supported himself doing construction  
2 and herding sheep and training horses. (SOF ¶50). EC helped FB fill out his application  
3 due to his limited English and blindness. (*Id.*) EC did not list his employment because FB  
4 was paid in cash. (*Id.*)

5  
6 FB supported himself herding sheep and breaking horses. (SOF ¶51). FB was paid  
7 for his work with a combination of money, blankets and jewelry. (*Id.*) He testified  
8 Navajos paid him \$200, a blanket and bracelet for his work. (*Id.*) FB also did spot jobs  
9 before working for Ramsey Construction. (*Id.*)

10  
11 He was paid hourly or by piece-work and earned approximately \$120 - \$130 a  
12 home. (SOF ¶53).

13  
14 FB worked on relocation homes in Red Lake, Cow Springs, Copper Mine, Rocky  
15 Ridge, Navajo Mountain, Navajo, Sanders and Shiprock (N. Mex.). (SOF ¶54). FB  
16 supplemented his income by herding sheep and training, caring for or breaking horses.  
17 (SOF ¶55).

18  
19 Because some of his work was paid hourly and the roofing was paid by the job, FB  
20 estimated that he would make approximately \$150 per homesite. (SOF ¶56). FB completed  
21 on average three houses a month in good weather and worked slower in bad weather.  
22 (*Id.*).

23 **2. In Prior ONHIR Decisions the Hearing Officer Credited Undocumented**  
24 **Wages and Certified Applicants Without Written Proof of Income**

25 In his prior decisions the HO accepted undocumented wage testimony and found  
applicants heads of household despite a lack of documentation. U.S. Supreme Court and

1 Ninth Circuit case law clearly require that an agency's departure from its own precedents  
2 must be explained or it will be found arbitrary and capricious. *See Andrzejewski v. FAA*,  
3 563 F.3d 796, 799 (9<sup>th</sup> Cir. 2009); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of*  
4 *Trade*, 412 US 800, 808 (1973). In prior decisions, Susan Crystal's memos permitting  
5 certification without documented wage receipts were given wide application. This  
6 precedent contradicts the HO's denial in this case.

8 Christine Curley Riggs was certified by the HO. Exhibit 5<sup>1</sup>. Riggs was raised by  
9 her great grandparents after her father left and her mother died. Decision at 2. Transcript  
10 (hereinafter "Tr."), 19. Her great-grandmother received AFDC for Riggs until 1978. *Id.* at  
11 3. The HO found Riggs a head of household after 1978 through tending livestock,  
12 babysitting and weaving. *Id.* at 4. Riggs estimated her babysitting earnings at \$20-\$30 per  
13 month. Tr., 15. She made three to four rugs per month, selling them for \$40-\$75 apiece.  
14 Tr., 17. Her third source of income was shepherding. Tr., 12. No receipts existed for  
15 any of her livestock, weaving or babysitting income.

17 Alton Begay was certified by the HO. Exhibit 6<sup>2</sup>. His Social Security statement  
18 showed no wages until 1987. Exhibit 6 at 2. Begay sold his paintings beginning in the 8<sup>th</sup>  
19 grade and also made tomahawks, lances, leggings, bow and arrow sets and shields and sold  
20 them for prices starting at \$20.00. Exhibit 6 at 4-6; Tr. 5-6. Begay's parents did not  
21 contribute to his support. Exhibit 6, Tr. at 16. His art teacher wrote an affidavit in support  
22

23  
24 <sup>1</sup> The Hearing Officer's Decision dated March 16, 1994 and pages 1-24 of the  
transcript are included. Because the hearing was consolidated with  
Christine's two sister, Priscilla C. Yazzie and Fannie Curley, Christine's  
testimony is contained in pages 1-24 only.

25 <sup>2</sup> Exhibit 6 contains Alton Begay's Notice of Certification, transcript and all  
exhibits submitted at the time of hearing.

1 of Begay's work but did not appear as a witness. Exhibit 6 at 4-5. The HO accepted his  
 2 testimony and demonstrative exhibits as evidence of his work. No receipts were requested,  
 3 nor were they available.

4 Jimmy Yellowhair was certified by this HO. Exhibit 7<sup>3</sup>. After leaving high school,  
 5 Jimmy worked for the railroad for one year, then later for a sheep ranch. Exhibit 7,  
 6 Decision at 2, 4; Tr. 10-11, 23, 26. Jimmy testified he was paid \$250/month plus meals.  
 7 Exhibit 7, Tr. 11. No receipts existed either for his railroad work or his shepherding, nor  
 8 were they requested. Exhibit 7, Decision at 3-4<sup>4</sup>; Tr. 1-47.

9  
 10 In addition, in the following five decisions, the HO found the applicants to be head  
 11 of household on the basis of testimony alone, without documentation:  
 12

13 Calvin Manning, Exhibit 8<sup>5</sup>; Clarence Blackrock, Jr. Exhibit 9<sup>6</sup>; Amos Daily,  
 14 Exhibit 10<sup>7</sup>; Manual Yellowhair, Exhibit 11<sup>8</sup>; Norman Lee Edison, Exhibit 12<sup>9</sup>; Melvin  
 15 Cleveland, Exhibit 13<sup>10</sup>; Roland Thompson, Exhibit 14<sup>11</sup>.

16  
 17  
 18 <sup>3</sup> Exhibit 7 contains the Hearing Officer's Decision and entire transcript. Mr. Yellowhair's head of household testimony spans only pages 10-12; 23-27; and 35-37.

19 <sup>4</sup> "The *testimony* presented herein, however, supports applicant's claim for relocation as his circumstances are materially different than his mother's circumstances during 1973 and 1974." Emphasis added. Exhibit \_\_, Decision at 3-4.

20 <sup>5</sup> The Hearing Officer's March, 1988 decision and pages 1, 22-31 of the transcript are included. Because Calvin participated in a consolidated hearing with his mother, Maggie and other relatives, Beverly and Verna, only those portions of the transcript that contain Calvin's testimony are included.

21 <sup>6</sup> Exhibit 9 contains Clarence Blackrock, Jr.'s Notice of Certification, transcript and Exhibits 1 and 2 submitted at the time of hearing. Although other exhibits were submitted at hearing, none pertained to the question of head of household.

22 <sup>7</sup> Exhibit 10 contains Amos Daily decision and transcript.

23 <sup>8</sup> Exhibit 11 does not contain Manual Yellowhair's transcript, because the Hearing Officer acknowledged the lack of receipts for Mr. Yellowhair's wages in his Decision at 3.

1 In addition, Laura Jensen was certified after federal appeal. CIV-95-0145-PCT-  
 2 RCB (August 14, 1996). Exhibit 15<sup>12</sup>. Jensen worked for the Teesto Chapter in 1979 and  
 3 1980, earning \$829.40 and approximately \$850.00, respectively. Order 4, 6-7. Pay slips  
 4 reflected earnings of \$396.80 through July 18, 1980, but Jensen's testimony indicated she  
 5 worked the entire summer; and the HO credited her with earnings of \$850.00. Order, 4;  
 6 AR 4(g); Tr. at 4. In addition, she made arts and crafts, earning \$30/month and worked as  
 7 a motel maid, earning \$60/month for four months in the fall of 1980. Order, 4, 6; Tr., 3.  
 8 Combining the sources of income, the Court found her earnings exceeded \$1300 for 1980.  
 9 Order at 7. No receipts existed for the crafts or maid work. Exhibit 6.

10  
 11  
 12 Like these certified applicants, FB began working at an early age doing  
 13 various jobs in a rural reservation where work was scarce. All of FB's witnesses confirmed  
 14 that he was self-supporting by the 1986 deadline. ONHIR offered no evidence to the  
 15 contrary.

16  
 17 **3) Fred Begay was a Resident of the HPL from December 22, 1974 until  
 1986**

18 Defendant's regulations define residence as:

19 Residence is established by proving that the head of household and/or his/her  
 20 immediate family were legal residents as of 12/22/1974 of the lands partitioned to  
 21 the Tribe of which they are not members.

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22  
 23 <sup>9</sup> Exhibit 12 contains the Hearing Officer's Decision. No transcript is  
 included because the ALJ acknowledged in his Decision, p. 3 that no written  
 evidence existed for wages in 1979, the head of household year in question.

24 <sup>10</sup> Exhibit 13 contains the Hearing Officer's Decision and transcript.

<sup>11</sup> Exhibit 14 contains Roland Thompson's Decision and transcript.

25 <sup>12</sup> Laura Jensen's District Court Order dated August 14, 1996, her transcript  
 and two AR documents (pay slips from 1980 [totaling \$396.80] and from 1979  
 [totaling \$829.40] are included.

1 In addition, in *Chee v. Navajo-Hopi Indian Relocation* the court determined:

2 “The Commission’s definition of “residence” includes “[a] person who is not  
3 actually living on the partitioned lands but maintains substantial, recurring contacts  
4 with an identifiable homesite.” Navajo & Hopi Indian Relocation Comm’n, Report  
5 and Plan 119 (1981) (exhibit 1 to plaintiff’s motion for summary judgement). Such  
6 a resident is classified as “temporarily away.” *Id.* The lack of employment  
7 opportunities in the Joint Use Area requires many of the area’s residents to seek  
8 employment elsewhere. *Id. at 119.* Many of those who find such employment  
9 regularly return to their family homes in the Joint Use Area and “claim a strong  
emotional attachment to their land even though they may be absent for long  
periods.” *Id.* Determining “residence” in this context requires examination of a  
person’s intent to reside combined with manifestations of that intent.” 49 Fed. Reg.  
22277 (May 29, 1984)

10 *Chee v. Navajo-Hopi Indian Relocation Comm’n.*, 18 Ind. L. Rep. 3078, 3079 (D. Ariz.  
11 1991) (Copy attached as Exhibit 16).

12 **4) The Hearing Officer’s Decision that FB was not a Legal Resident of the**  
13 **HPL is not supported by Substantial Evidence.**

14 Substantial evidence is a quantum of relevant evidence needed so that a “reasonable  
15 mind might accept as adequate to support a conclusion.” *Walker v. Mathews*, 546 F.2d  
16 814, 818 (9<sup>th</sup> Cir. 1976) (citation omitted). Furthermore, this Court should consider the  
17 record as a whole, both the evidence that supports and the evidence that detracts from the  
18 agency’s findings. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9<sup>th</sup> Cir. 1975) *Walker*, 546  
19 F.2d at 818. Moreover, an agency’s decisions that are made by isolating a specific  
20 quantum of evidence are not supported by substantial evidence. *See Weinberger*, 552 F.2d  
21 at 1156. Thus, if the HO’s findings are not supported by substantial evidence based on the  
22 entire record, the HO’s findings should be set aside by this court. *Id.* In this case, the HO  
23 did not consider the entire record when he determined that FB was not a resident of the  
24 HPL in 1986.  
25

1 LH testified that when FB came to work for him, FB was living with his family in  
2 Coalmine. (SOF ¶57). According to LH, FB lived in Coalmine the entire time he worked  
3 for Ramsey Construction. (SOF ¶58). LH would pick FB up in Coalmine which was about  
4 a 50 minute drive from Tuba City. (SOF ¶59). At times FB would stay with his uncle in  
5 Tuba City when he was on his way to or returning from work. (SOF ¶60).

7 JS testified that FB lived in Coalmine with his family. (SOF ¶62). FB lived in  
8 Coalmine from 1983 to 1987 when JS went to Texas. (SOF ¶63). JS and LH would go to  
9 Coalmine to pick FB up for work and the three of them travel to the job site. (SOF ¶64).  
10 When JS left for Texas in 1987 FB was living in Coalmine. (SOF ¶66). Sometimes they  
11 would pick FB up at his uncle's home if he was working in Tuba City. Otherwise they  
12 would pick him up or drop him off at his mother's place in Coalmine. (SOF ¶67).

14 EC testified she was FB's older sister and they grew up together at their parents'  
15 homesite in Coalmine. (SOF ¶68). As the older siblings grew up and "moved off" the  
16 HPL the younger kids stayed in Coalmine. (SOF ¶69). In 1978 EC and FB was living in  
17 Coalmine. (SOF ¶70). FB would often be gone for days at a time when he was working  
18 herding sheep, training horses or on the road with the construction crew. (SOF ¶71).

20 EC moved to Phoenix for employment in 1978 but she came home every other  
21 week until the family relocated in 1989. (SOF ¶72). FB resided at the Coalmine homesite  
22 until the family relocated in 1989. (SOF ¶73). FB never had any other home or residence  
23 other than his family's residence at Coalmine. (SOF ¶74). FB was always back at his  
24 family's home when he was not working. (SOF ¶80). FB's family left Coalmine in 1989  
25



1 and relocated to Sanders. (SOF ¶75). The siblings, except FB, were certified for relocation  
2 based on residence at Coalmine. (SOF ¶76).

3 FB testified he grew up with his family in Coalmine. (SOF ¶78). Whenever Fred  
4 was not working he would return to Coalmine. FB stayed in Tuba City overnight if he was  
5 working there or if he was working for Ramsey. (SOF ¶80).

7 FB’s stepdad and his brother Fred “moved off” the HPL in 1982 while pending  
8 relocation due to the overcrowding. (SOF ¶81). Other family members also “moved off”  
9 the HPL. (SOF ¶82). When his parents relocated in 1989 FB was still working for Ramsey  
10 and for his uncle in Tuba City. (SOF ¶85). Eventually FB moved from Coalmine to his  
11 uncle’s after the Coalmine homesite was torn down. (SOF ¶86). Fred testified he lived his  
12 life at Coalmine from birth until his parents relocated in 1989. (SOF ¶87).

14 **VI. CONCLUSION**

15 Plaintiff Fred Begay was a legal resident of Coalmine on the HPL until his family  
16 all relocated in 1989. He had become a Head of Household by virtue of consistently  
17 earning sufficient income beginning in at least 1983. The decision of the Hearing Officer  
18 upholding ONHIR’s denial of his application for relocation benefits is unsupported by  
19 substantial evidence and is arbitrary, capricious and contrary to law.  
20

21 RESPECTFULLY submitted this 17<sup>th</sup> day of July, 2017.

22 /s/ Lee Phillips  
23 Lee Phillips  
24 Attorney for Plaintiff  
25

**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2017, I electronically transmitted the attached document, Plaintiff’s Memorandum of Points and Authorities, to the Clerk’s Office using the CM/ECF System for filing, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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