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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fred Begay, Plaintiff, vs. Office of Navajo and Hopi Indian Relocation, an administrative agency of the United States, Defendant.	CV-16-08268-PCT-DJH **DEFENDANT'S (I) RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, (II) OBJECTION TO EXTRA-RECORD DOCUMENTS, AND (III) CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, LRCiv 56.1, and LRCiv 7.2(m), hereby (i) opposes Plaintiff, Fred Begay's *Motion for Summary Judgment* [Docket Nos. 42, 44, 46-54] (collectively, the "**Begay MSJ**"), (ii) objects to extra-record documents submitted by Mr. Begay, and (iii) moves for the entry of summary judgment in favor of ONHIR.

This Motion is supported by (i) the Memorandum of Points and Authorities attached hereto, (ii) *Defendant's (I) Objection to Evidence, (II) Controverting Statement of Facts, and (III) Supplemental Statement of Facts* (collectively, the "**CSOF**") filed concurrently herewith, (iii) the Certified Administrative Record ("**CAR**") on file with the Court, and (iv) the entire record before the Court in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Begay had the burden to establish his entitlement to Relocation Benefits (defined below). 25 C.F.R. § 700.147(b). Among other elements, Mr. Begay had to prove that he was a self-supporting "head of household" prior to the statutory deadline of July 7, 1986. To do this, Mr. Begay claimed that he earned "under the table" wages from a government subcontractor in the early 1980s. He did not produce documents to support his claim; instead, he relied on testimony about events that occurred over 30 years ago. The testimony, however, was contradictory, inconsistent, ambiguous, and generally unreliable. Mr. Begay did not produce any evidence to establish when he earned the alleged wages. Nor did he establish that he actually supported himself, whatever his wages. Accordingly, ONHIR's Independent Hearing Officer concluded that Mr. Begay failed to meet his burden and upheld ONHIR's decision to deny Mr. Begay Relocation Benefits. Under the Administrative Procedures Act ("**APA**"), the Hearing Officer's fact-based conclusions are entitled to deference.

Yet, Mr. Begay wants this Court to ignore such deference. Instead, he asks this Court to hold that he met his burden by merely asserting unverified wages. The Court should deny this request. If mere assertion is all that is required, then the head of household requirement is illusory. The head of household requirement, however, is a pivotal part of the statute, and an applicant must provide more than bare assertions to satisfy it. *See Benally v. Office of Navajo & Hopi Indian Relocation*, No. 13-cv-8096-PCT-PGR, 2014 U.S. Dist. LEXIS 16319, at *5-7 (D. Ariz. Feb. 10, 2014) (ONHIR does not violate APA by requiring contemporaneous documentation of wages). The Court should uphold the Hearing Officer's decision.

II. RELEVANT FACTUAL BACKGROUND

Mr. Begay is a member of the Navajo Nation. [CSOF, ¶ 88] His family lived in Coalmine Mesa, Arizona, which was later partitioned for use by the Hopi Tribe. [SOF, ¶ 2; CSOF, ¶ 89] After 8th grade, Mr. Begay dropped out of school. [SOF, ¶ 3; CSOF, ¶ 90] He turned 18 in 1978. [CSOF, ¶ 91] Around 1982, Mr. Begay left Coalmine and moved to Tuba City, Arizona

(which is not part of the partitioned lands) to live with his uncle. [CSOF, ¶ 92] His parents permanently moved from Coalmine sometime in the 1980s. [CSOF, ¶ 93] Mr. Begay did not establish when his parents left Coalmine. [CSOF, ¶ 94] Nevertheless, Mr. Begay was not part of his parents' household when they left. [CSOF, ¶ 95]

Sometime in the 1980's Mr. Begay worked for Leslie Hosteen. [CSOF, ¶ 96] Mr. Hosteen was building relocation houses for ONHIR under a subcontract with Ramsey Construction. [CSOF, ¶ 96] Mr. Begay did not establish the exact dates that he worked for Mr. Hosteen. [CSOF, ¶ 97] Mr. Begay was allegedly paid "under the table" from Mr. Hosteen. [SOF, ¶ 45; CSOF, ¶ 98] No records exist to establish what (if anything) and when (if ever) Mr. Begay was paid by Mr. Hosteen. [SOF, ¶¶ 18, 37, 50; CSOF, ¶ 99] Mr. Begay's Social Security earnings statement shows that he did not earn $1,300 in any single year prior to 1986. [CSOF, ¶ 100]

On July 29, 2010, Mr. Begay applied for Relocation Benefits. [CSOF, ¶ 101] His sister, Elvira Chischillie, helped him complete his application. [CSOF, ¶ 102] Mr. Begay directed his sister to state in the application that he did not earn $1,300 in any single year prior to 1986. [CSOF, ¶ 103] In the application, he did not state when he moved from the Hopi lands. [CSOF, ¶ 104] On May 11, 2012, ONHIR denied Mr. Begay's application because, among other reasons, he did not qualify as a head of household at any time prior to July 7, 1986. [CSOF, ¶ 105] On July 16, 2012, Mr. Begay appealed ONHIR's decision. [CSOF, ¶ 106] Hearing Officer Harold Merkow held a hearing on October 9, 2015. [CSOF, ¶ 107] At the hearing, the following witnesses testified: Mr. Begay; Mr. Hosteen; Ms. Chischillie; Mr. Begay's co-worker, Jonathan Sakiestewa; and Joseph Shelton, ONHIR's investigator. [CSOF, ¶ 108] Mr. Begay's testimony regarding his residency was inconsistent and ambiguous. [CSOF, ¶ 109] Testimony indicated that Mr. Begay moved from Coalmine in 1982 to live with his uncle in Tuba City. [CSOF, ¶ 110] Testimony regarding Mr. Begay's alleged wages was inconsistent, contradictory, and unreliable. [CSOF, ¶ 111]

On December 4, 2015, the Hearing Officer issued a decision (the "**Hearing Officer's**

Decision") upholding ONHIR's denial of Mr. Begay's application. [CSOF, ¶ 112] The Hearing Officer found the testimony of Mr. Begay, Mr. Hosteen, and Mr. Sakiestewa was contradictory, inconsistent, and not credible. [CSOF, ¶ 113] Except with respect to her testimony about Mr. Begay's application, the Hearing Officer found Ms. Chischillie's testimony was not credible because she lived in New Mexico during the relevant period. [CSOF, ¶ 114] The Hearing Officer found Mr. Shelton a credible witness. [CSOF, ¶ 115] The Hearing Officer ultimately held that Mr. Begay did not carry his burden to establish that he was a head of household when he left the lands partitioned to the Hopi Tribe. [CSOF, ¶ 116] The Hearing Officer found that Mr. Begay failed to establish when he left such lands. [CSOF, ¶ 117] The Hearing Officer determined that he likely left in 1982. [CSOF, ¶ 118] The Hearing Officer also concluded that, whether Mr. Begay left the Hopi lands in 1982 or sometime after, Mr. Begay did not establish that he was self-supporting at any time before July 7, 1986. [CSOF, ¶ 119] Mr. Begay did not produce evidence of enough income to meet the "self-supporting" standard. [CSOF, ¶ 120] Nor did he produce any evidence that he actually supported himself. [CSOF, ¶ 121] Therefore, the Hearing Officer held that Mr. Begay did not establish that he was eligible for Relocation Benefits. [CSOF, ¶ 122] On January 12, 2016, after Mr. Begay failed to request that ONHIR reconsider the Hearing Officer's Decision, ONHIR issued a Final Agency Action letter. [CSOF, ¶ 123]

III. MR. BEGAY HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE HEARING OFFICER'S DECISION WAS ARBITRARY AND CAPRICIOUS OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE

A. APA Summary Judgment Standard

Typically, a court should grant a motion for summary judgment when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). However, in reviewing an administrative decision under the APA, 5 U.S.C. §§ 500-706, "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. I.N.S.,* 753 F.2d 766, 769 (9th Cir. 1985). In APA cases, the agency is the fact-finder not the reviewing court; thus, "the function of the district court is to determine whether or not as a matter of law the evidence in the

administrative record permitted the agency to make the decision it did." *Id.; see also City & Cnty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997). Therefore, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental*, 753 F.2d at 770.

B. The Court Reviews Agency Action Under The Arbitrary And Capricious And Substantial Evidence Standards

Under the APA, a court may set aside agency action only if that action is "arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E); *see also Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010).

1. Arbitrary and Capricious Standard

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "It is not the reviewing court's task to 'make its own judgment about' the appropriate outcome." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (*quoting River Runners for Wilderness*, 593 F.3d 1064, 1070 (9th Cir. 2010)). '"Congress has delegated that responsibility to' the agency." *Id.*; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

The standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010) (internal quotation marks omitted). "A reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (internal quotation marks omitted); *see also, Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise."). An agency's action "need only be a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989). A court may not "infer an agency's reasoning from mere silence." *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009) (internal quotation marks omitted). Yet, "even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Id.*

2. Substantial Evidence Standard

Under the substantial evidence standard, a court must sustain an agency's fact-based conclusions unless no reasonable factfinder could have reached such conclusions based on the administrative record. *See Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995) ("Substantial evidence is more than a scintilla but less than a preponderance—it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion."). "[I]f evidence is susceptible of more than one rational interpretation, the decision of the [agency] must be upheld." *Id*.

C. Relocation Benefits

1. ONHIR and the Settlement Act

In 1974, Congress passed the Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, codified as amended at 25 U.S.C. §§ 640d to 640d-31 (the "**Settlement Act**").[1] In the Settlement Act, Congress authorized the judicial partition of certain trust lands jointly owned by the Hopi Tribe and the Navajo Nation by allocating approximately 900,000 acres (known as the Hopi Partitioned Lands ("**HPL**")) to the Hopi Tribe and approximately 900,000 acres

[1] Effective September 1, 2016, the Office of the Law Revision Counsel omitted Section 640d of Title 25 from the U.S. Code because it has "special and not general application." *See* OFFICE OF THE LAW REVISION COUNSEL, *http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title25-section640d&num=0&edition=prelim* (last visited July 28, 2017). The omission is editorial and "has no effect on the validity of a law and is not a statement on its value or importance." *See* OFFICE OF THE LAW REVISION COUNSEL *http://uscode.house.gov/editorialreclassification/t25/index.html* (last visited July 28, 2017). The full text of 25 U.S.C. § 640d can be found at the following web address: http://uscode.house.gov/view.xhtml?hl=false&edition=2015&req=granuleid%3AUSC-prelim-title25-section640d&num=0 (last visited July 28, 2017).

(known as the Navajo Partitioned Lands ("**NPL**")) to the Navajo Nation. *See Laughter v. Office of Navajo & Hopi Indian Relocation*, Case No. 3:16-cv-08196-PCT-DLR, 2017 U.S. Dist. LEXIS 101116, at *2 (D. Ariz. June 29, 2017) (*citing Sekaquaptewa v. MacDonald*, 626 F.2d 113, 115 (9th Cir. 1980)). The Settlement Act required tribal members to move from lands partitioned to the other tribe and created a commission to pay for the major relocation costs (hereinafter, "**Relocation Benefits**"). *Id.* (*citing Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121 (9th Cir. 1989)). ONHIR is an independent federal agency responsible for carrying out relocations under the Settlement Act. *See O'Daniel v. Office of Navajo & Hopi Indian Relocation*, No. 07-354-PCT-MHM, 2008 WL 4277899, at *1 (D. Ariz. Sept. 18, 2008). ONHIR's responsibilities include reviewing applications for Relocation Benefits. Pub. L. No. 100-666 (1988); *O'Daniel*, 2008 WL 4277899, at *1. ONHIR's final decisions regarding such applications are subject to judicial review under the APA. *Id.*

2. Eligibility For Relocation Benefits

ONHIR's regulations describe the essential eligibility requirements for Relocation Benefits. *See* 25 C.F.R. § 700.147. ONHIR's Policy Memorandum No. 14 (Revised) ("**Policy 14**") summarizes and supplements those regulations. A copy of Policy 14 is attached hereto as **Exhibit A**. Under Policy 14, an applicant must have become "a Head of Household on or before the earlier of the date the person left the HPL (if a Navajo) or the NPL (if a Hopi) or July 7, 1986." Policy 14 § D(c); *see also* 25 C.F.R. §§ 700.69(c) and 700.147(e).

D. Mr. Begay Did Not Establish That He Was An HPL Resident After 1982

The primary relocation benefit is ONHIR's acquisition of a "replacement dwelling" for an applicant. *See* 25 U.S.C. § 640d-14. The amount of the benefit is the "purchase price" for the "fair market value of" the "habitation and improvements" the applicant owned on land the applicant was required to vacate. § 640d-14(a). The monetary benefit is used to obtain a "replacement dwelling" on other land. § 640d-14(b)(2). Thus, an applicant must establish that he owned a residence on land partitioned to another tribe during the relevant time. *See* 25

C.F.R. § 700.147(a); Policy 14.

Under 25 C.F.R. § 700.97, the term "residence" "is meant to be given its legal meaning combined which requires an examination of a person's intent to reside combined with manifestations of that intent." *Comm'n Operations and Relocation Procedures; Eligibility*, 49 Fed. Reg. 22277-01, 1984 WL 188188 at *22278 (May 29, 1984). "Substantial and recurring contacts are not enough in and of themselves—they must be coupled with the intent to maintain a home in that area and manifestations of that intent." *Gamble v. Office of Navajo & Hopi Indian Relocation*, Case No. CIV-97-1247-PCT-PGR, p. 16 (D. Ariz. September 24, 1998), attached hereto as **Exhibit B**; *see also Akee v. Office of Navajo & Hopi Indian Relocation*, 907 F. Supp. 315, 318 (D. Ariz. 1995), *aff'd*, 107 F.3d 14 (9th Cir. 1997). The comments to 49 Fed. Reg. 22277 list non-exclusive factors that may indicate a manifestation of intent to reside, including "[o]wnership of improvements", "[h]omesite leases", "[b]anking records", the "Joint Use Area Roster", and "any other relevant data."

The applicant has the burden to establish his residence. 25 C.F.R. § 700.147(b); *Jim v. Office of Navajo & Hopi Indian Relocation*, Case No. CIV-94-2254-PHX-PGR, p. 9 (D. Ariz. February 12, 1996), attached hereto as **Exhibit C**, (applicant must offer affirmative evidence, not bare testimony, to establish residency).

In this case, Mr. Begay offered only trial testimony to establish his residence on the HPL after 1982. The Hearing Officer found that the testimony was not enough because:

- In his sworn application for benefits, Mr. Begay did not state when he moved off the HPL; [CSOF, ¶ 104]
- Mr. Begay's testimony regarding his residency was inconsistent and ambiguous; and [CSOF, ¶ 109]
- Trial testimony indicated that Mr. Begay moved off the HPL in 1982. [CSOF, ¶ 110]

[CAR: 317-319]

Mr. Begay now claims that he established residency on the HPL by allegedly maintaining "substantial and recurring contacts" by visiting his parents' home. *See* Docket No. 44, pp. 15-

17. Social visits to family members, however, are not enough to establish residency. *See Gamble*, Case No. CIV-97-1247-PCT-PGR, p. 16 ("If substantial, recurring contacts were dispositive, many people would receive benefits for visiting their family on a regular basis."); *Dayzie v. Office of Navajo & Hopi Indian Relocation*, Case No. CIV-95-1885-PCT-PGR, pp. 10, 16 (D. Ariz. March 11, 1997), attached hereto as **Exhibit D**, (upholding Hearing Officer's decision that social visits are not enough). The applicant must provide affirmative evidence manifesting an intent to reside on the HPL. *See Jim*, Case No. CIV-94-2254-PHX-PGR, p. 9; *Gamble*, Case No. CIV-97-1247-PCT-PGR, p. 16.

The Hearing Officer found that Mr. Begay did not reside with his parents on the HPL after 1982. [CSOF, ¶ 118] Mr. Begay turned 18 in 1978. [CSOF, ¶ 91] He moved to Tuba City sometime in 1982. [CSOF, ¶ 92] Thereafter, Mr. Begay was not part of his parents' household. Nor was he included in his parents' household when they received Relocation Benefits. [CSOF, ¶ 95] Mr. Begay did not produce affirmative evidence, such as a driver's license or homesite lease, that manifested his intent to reside on the HPL after 1982. He cannot rely on his social visits to his parents' home, and he is not entitled to Relocation Benefits based on a household of which he was no longer a member. Such a result would conflict with the relocation program Congress established. *See* 25 U.S.C. § 640d-14(a) ("The Commissioner shall purchase from the head of each household . . . the habitation and other improvements owned by him on the area from which he is required to move.") (emphasis added); § 640d-14(b)(2). Therefore, the Hearing Officer did not act arbitrarily or capriciously when he held that Mr. Begay failed to meet his burden to establish a residence on the HPL after 1982.

E. Mr. Begay Did Not Establish That He Was A Head of Household At Any Time Before July 7, 1986

Mr. Begay had the burden to establish his head of household status. 25 C.F.R. § 700.147(b). To receive Relocation Benefits, Mr. Begay needed to establish that he was a head of household before 1982 or, at the latest, July 7, 1986. *See* Policy 14 § D(c). This, he did not do.

1. Head Of Household Standard.

ONHIR regulations define a "household" for a single person (such as Mr. Begay), in part, as: "A single person who at the time his/her residence on land partitioned to the Tribe of which he/she is not a member actually maintained and supported him/herself or was legally married and is now legally divorced." 25 C.F.R. § 700.69(a)(2) (emphasis added). In some circumstances, an applicant can qualify as "self-supporting" if he earned at least $1,300 per year, but whether the applicant "actually maintained and supported him/herself" is determinative.[2] *See* 25 C.F.R. § 700.69(a)(2); *Benally*, 2014 U.S. Dist. LEXIS 16319, at *5-7.

In *Benally*, the Arizona District Court explained the "self-supporting" prong. *See Benally*, 2014 U.S. Dist. LEXIS 16319, at *5-8. In that case, the court held that ONHIR does not violate the APA by: (1) requiring contemporaneous documentation of wages; (2) requiring evidence that an applicant was actually self-supporting; or (iii) rejecting testimony not supported by or contradictory to documentary evidence. *See id*. In 2014, Mr. Benally appealed an ONHIR decision, asserting that the Hearing Officer erred when he required documents to establish earnings. *Id.* at *7. Mr. Benally did not produce any such documents. *Id*. Instead, Mr. Benally relied on testimony that he earned $100 per month selling crafts to friends and relatives. *Id.* at *7. The court held that the testimony, without more, was insufficient. *Id*. The court also held that, whatever his wages, Mr. Benally did not establish that he was supporting himself. *Id*. When Mr. Benally moved off the HPL, he was an 18-year-old living in a dormitory during the school year and with his parents on the weekends. *Id*. at *5. The school and his parents provided him with food and shelter. *Id*. at *6. He was not self-supporting. *Id*. Accordingly, the court upheld the Hearing Officer's decision. *Id*. at 7-8.

The *Benally* decision is consistent with sound policy. Mr. Begay implies that the Hearing Officer must accept all testimony regarding undocumented wages as true. If so, then the head of household element is illusory. Under such a rule, an applicant's bare assertion of wages (no

[2] The Court must defer to ONHIR's interpretation of its regulations and policies. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 1004 (9th Cir. 2010) (an agency's "interpretation of its own regulation is afforded even more deference than that which courts normally give agency interpretations of statutes").

matter how incredible) would be sufficient, and the head of household element would become meaningless surplusage. *See Jim*, Case No. CIV-94-2254-PHX-PGR, p. 9 ("Since adoption of [applicants'] argument would render meaningless the Section 700.147(b) requirement that the applicant 'prove' eligibility, this argument must be rejected."). Congress did not intend such a result. *See* 25 U.S.C. § 640d-14; *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (court has duty to give effect to every word in statute). *Benally* expressed the proper standard: ONHIR can require contemporaneous documents to prove income, particularly when testimony is inconsistent and contradicted by other evidence.[3] *See also O'Daniel*, 2008 WL 4277899, at *17 (applicant's failure to produce evidence of income supported Hearing Officer's decision).

2. Mr. Begay Did Not Establish That He Was A Head Of Household Before July 7, 1986

Mr. Begay failed to produce credible evidence that he (1) earned at least $1,300 per year at any time prior to July 7, 1986, and (2) actually supported himself. Therefore, Mr. Begay did not carry his burden, and the Court should uphold the Hearing Officer's Decision.

[3] To support his interpretation, Mr. Begay relies on an unpublished 1989 internal ONHIR legal memorandum written by ONHIR's former counsel, Susan Crystal (the "**Crystal Memo**"). *See* Docket No. 44, pp. 4-5 and Exhibit 3 thereto. Mr. Begay's reliance is misplaced. First, the Crystal Memo is not official policy that ONHIR must follow. *Compare* Exhibits A and E hereto, *with* the Crystal Memo. Second, Mr. Begay's reading of the Crystal Memo directly contradicts the precedent expressed in *Benally*, 2014 U.S. Dist. LEXIS 16319, at *5-7. Third, as discussed below, the Crystal Memo is outside the certified administrative record, and the Court should not consider it. Finally, the Crystal Memo is not applicable to Mr. Begay and the type of work in which he was allegedly engaged. The Crystal Memo supports consideration of undocumented income for "older" Navajos engaged in a "traditional lifestyle" on the Reservation, when such Navajos are making a living "from livestock" or "odd jobs throughout the Reservation." Crystal Memo, p. 4. The Crystal Memo does not (and cannot) require ONHIR to consider "under the table" income from a government contractor allegedly earned by a person not engaged in a traditional Navajo lifestyle (*i.e.*, moving seasonally from one camp to another, usually for grazing purposes).

Mr. Begay also relies on an outdated 1989 ONHIR Management Manual. *See* Exhibit 4 to the Begay MSJ. ONHIR objects to this exhibit. As discussed below, the document is outside the administrative record and immaterial. It also does not apply to Mr. Begay. *See, e.g.*, Exhibit 4, p. 5 (ONHIR may consider undocumented wages for individuals engaged in grazing and farming). ONHIR's current Management Manual does not contain the language relied upon by Mr. Begay. *See* https://www.onhir.gov/readingroom/index.html (last visited on May 30, 2017).

a. Mr. Begay Did Not Establish That He Earned $1,300 In Any Year Prior To July 7, 1986

Mr. Begay offered only testimony to establish his earnings. The Hearing Officer found the testimony insufficient because:

- Mr. Begay stated, in his sworn application for benefits, that he never earned $1,300 in any year prior to 1986; [CSOF, ¶ 103]
- Mr. Begay did not produce documents proving his alleged wages [CSOF, ¶¶ 97, 98, 99, 120]; *Benally*, 2014 U.S. Dist. LEXIS 16319, at *7;
- Mr. Begay did not report his alleged wages to the Social Security Administration [CSOF, ¶ 100];
- Testimony regarding such wages was inconsistent, contradictory, and unreliable [CSOF, ¶ 111];[4] and
- Mr. Begay did not establish that his alleged wages were earned prior to 1986.[5] [SOF, ¶ 18; Docket No. 44, p. 8 (. . . "there is nothing in the record to indicate how many houses Ramsey constructed during the years [Mr. Begay] was employed or how many homes he worked on each year."); CAR: 320-323].

These facts, found by the Hearing Officer, rationally support the Hearing Officer's holding that Mr. Begay did not carry his burden. *See Arrington*, 516 F.3d at 1112. These facts also constitute "more than a scintilla" of evidence. *See Orteza*, 50 F.3d at 749. Therefore, the Court should uphold the Hearing Officer's Decision.

i. The Third Party Records Are A Red-Herring

Faced with the Hearing Officer's well-reasoned decision, Mr. Begay asserts, for the first time on appeal, that the Hearing Officer departed from precedent regarding undocumented wages. To support this assertion, Mr. Begay filed incomplete records from 11 unrelated non-parties, along with other non-binding ONHIR documents (collectively, the "**Third Party Records**"). *See* Docket No. 44, pp. 12-14 and Exhibits 1-15 to the Begay MSJ. The Third Party Records do not support the Begay MSJ and the Court should disregard them for the

[4] CAR: 229-233 provides a detailed discussion of the problems with the testimony.

[5] In light of ONHIR's construction schedule, Mr. Begay likely did not work on enough houses to meet the head of household standard prior to 1986. [CAR: 233-235; 320-323]

following reasons:

- *Extra-Record Documents*. Judicial review in an APA case is based upon the "full administrative record that was before [the agency] at the time [it] made [its] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Thus, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996). The reviewing court's consideration of extra record documents is almost always inappropriate because it "inevitably leads the reviewing court to substitute its judgment for that of the agency." *Ranchers Cattlemen Action Leg. Fund United Stockgrowers of Am. v. U.S. Dept. of Agr.*, 499 F.3d 1108, 1117 (9th Cir. 2007) (*citing Asarco, Inc. v. U.S. Envtl. Protec. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)) (internal quotations omitted). To expand the record, a party must file a motion and meet the Ninth Circuit standard. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). Here, the Court should not consider the Third Party Records because they are not part of the certified administrative record. *See id.* (refusing to consider records from 25 unrelated non-parties because they were outside the administrative record). Moreover, Mr. Begay did not seek to supplement the record, as required by Ninth Circuit law. *Id.* Instead, Mr. Begay attempts to avoid Ninth Circuit law by simply attaching the improper documents. The Court should reject Mr. Begay's attempt and disregard the Third Party Documents.

- *Arguments Waived*. Mr. Begay waived any argument that the Hearing Officer departed from precedent by failing to raise it at the agency level. *See Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985) ("[I]f a petitioner fails to raise an issue before an administrative tribunal, it cannot be raised on appeal from that tribunal."); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004) (failure to raise an issue is a failure to exhaust remedies). Mr. Begay could have raised this argument either by citing to the Third Party Records in his administrative brief or by filing a motion to reconsider the Hearing Officer's Decision. *See* Policy Memorandum

No. 17, attached to hereto as **Exhibit E** (allowing applicants to seek reconsideration of a Hearing Officer's decision). Mr. Begay failed to do either. [CSOF, ¶ 123]. The Court should not consider such arguments for the first time on appeal.

- *Not Binding Precedent*. The Third-Party Records are not binding precedent. *See Laughter*, 2017 U.S. Dist. LEXIS 101116, at *10 (ONHIR decisions "do not constitute binding precedent"). The Third Party Records are not published such that the public can rely upon them when applying for Relocation Benefits.[6] *See Alphonsus v. Holder,* 705 F.3d 1031, 1046 (9th Cir. 2013) ("an unpublished, non-precedential opinion" does not bind agency). Nor did the Third Party Records announce a new ONHIR policy. *Cf. Israel v. I.N.S.*, 785 F.2d 738, 740 (9th Cir. 1986) (a published opinion was binding because it expressly "announced the following [new] policy"). Like many agency decisions, the Hearing Officer decides cases based on the unique facts in the record of each applicant; therefore, similar cases often turn out differently. *See Maunz*, 77 F. Supp. 3d at 236 ("But the Board decides each case 'on the evidence of the record,'. . . . It is therefore unsurprising that different cases with different evidentiary records will sometimes come out differently."). Such differences are the product of fact-specific decision-making, not arbitrary and capricious action.

- *No Opportunity To Address Issue*. The Hearing Officer only errs if he departs from binding precedent, without explanation. *Akee*, 907 F. Supp. at 319 (emphasis added). As discussed herein, the Third Party Records are not binding precedent and he did not depart from precedent. But, even if the Hearing Officer did depart from precedent, he did not do so without explanation because Mr. Begay did not cite the Third Party Records to him. *See Maunz v. James*, 77 F. Supp. 3d 230, 236, n.5 (D. D.C. 2015) (no basis for finding agency error for failure to address precedent not cited by applicant); *LeMoyne–Owen College v. NLRB*, 357

[6] Hearing Officer decisions contain information likely protected by the Privacy Act and are generally only available to the relevant applicant(s). ONHIR does not maintain a database of past Hearing Officer decisions. Presumably, Mr. Begay's counsel, who is under contract with the Navajo-Hopi Legal Services Program ("**NHLSP**"), gave him the Third Party Records. NHLSP obtained the Third Party Documents through its representation of the applicants discussed therein.

F.3d 55, 61 (D.C. Cir. 2004) (remanding for agency explanation only when "a party makes a significant showing that analogous cases have been decided differently"). The Hearing Officer simply did not have an opportunity to address the issue.

- *Hearing Officer Followed Precedent*. Mr. Begay interprets the Third Party Records to effectively eliminate the head of household standard from the Settlement Act. Mr. Begay's interpretation is incorrect. *See Cassell v. F.C.C.*, 154 F.3d 478, 483 (D.C. Cir. 1998) (an "agency's interpretation of its own precedent is entitled to deference."). The Third Party Records do not allow applicants to prove head of household status by merely asserting unverifiable income when such testimony is inconsistent with other evidence in the record, as it was here. ONHIR's precedent holds that an applicant must provide documents to prove income, except in certain unique circumstances not applicable to Mr. Begay and in the discretion of ONHIR. *See Benally*, 2014 U.S. Dist. LEXIS 16319, at *5-8. The Hearing Officer followed this precedent. The Court should uphold the Hearing Officer's Decision.

b. Whatever His Wages, Mr. Begay Did Not Establish That He Was Actually Self-Supporting

To qualify as a self-supporting head of household, an applicant must establish that he "actually maintained and supported him/herself." 25 C.F.R. § 700.69(a)(2); *Benally*, 2014 U.S. Dist. LEXIS 16319, at *7-8. Mr. Begay failed to do this. Mr. Begay turned 18 in 1978. [CSOF, ¶ 91] He moved in with his uncle sometime in 1982. [CSOF, ¶ 92] Mr. Begay did not submit any receipts, tax records, utility bills, or other documents (or even testimony) demonstrating that he actually maintained and supported himself. Accordingly, whatever his wages were in the early 1980s (which Mr. Begay did not establish), Mr. Begay did not meet the head of household standard. Therefore, the Court should uphold the Hearing Officer's Decision.

F. The Hearing Officer Set Forth Specific And Cogent Reasons For His Credibility Findings

As noted, Mr. Begay must establish that he is entitled to Relocation Benefits. 25 C.F.R. § 700.147(b). To establish his entitlement, Mr. Begay offered testimony regarding undocumented wages allegedly earned over 30 years ago. After carefully listening to such

testimony, the Hearing Officer found that it lacked credibility. Mr. Begay asserts that the Hearing Officer's credibility findings were arbitrary and capricious. Mr. Begay is incorrect.

'"An [agency's] credibility findings are granted substantial deference by reviewing courts,' although 'an [administrative law judge] who rejects testimony for lack of credibility must offer a 'specific, cogent reason' for the rejection."' *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990) (*quoting Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988)). However, an administrative law judge is not

> . . . required to believe the [witness] when his testimony is merely "unrefuted" and is "corroborated" by documentary evidence . . . . [The] judge alone is in a position to observe [a witness]'s tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether [a witness]'s testimony has about it the ring of truth. The courts of appeals should be far less confident of their ability to make such important, but often subtle, determinations.

Sarvia-Quintanilla v. United States Immigration & Naturalization Serv., 767 F.2d 1387, 1395 (9th Cir. 1985).

Here, the Hearing Officer explained the reasons for his credibility findings. These reasons are discussed throughout the decision and include the: (1) absence of contemporaneous supporting documents; (2) presence of contradicting documentary evidence (*e.g.*, Mr. Begay's relocation application and Social Security earnings statement); and (3) presence of inconsistencies in the testimony, as discussed above. The Hearing Officer's reasons are specific and cogent; therefore, the Court should substantially defer to his credibility findings. *See De Valle*, 901 F.2d at 792; *Benally*, 2014 U.S. Dist. LEXIS 16319, at *7-8 (Hearing Officer may require contemporaneous documents showing earnings); *Laughter*, 2017 U.S. Dist. LEXIS 101116, at *9 (Hearing Officer reasonably relied on contradictory documentary evidence to find witnesses lacked credibility); *O'Daniel*, 2008 WL 4277899, at *16-17 (contradictory testimony supported lack of credibility finding). The Court should uphold the Hearing Officer's Decision.

IV. MR. BEGAY'S REMEDIES ARE LIMITED TO REMAND

Finally, Mr. Begay improperly requests relief beyond remand. *See* Complaint p. 14. Remand, however, expresses the proper separation of powers Congress codified in the APA. In administrative review cases, the district court sits as an appellate tribunal. The Court is required to examine an agency's process; it may not substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Thus, except in "rare circumstances," "the proper course of action where 'the record before the agency does not support the relevant agency action' is to remand to the agency for additional investigation and explanation." *UOP v. United States*, 99 F.3d 344, 351 (9th Cir. 1996) (*quoting Lorion*, 470 U.S. at 744); *see also* 5 U.S.C. § 706(2) (authorizing the Court to "set aside" agency decisions). "Indeed, to order the agency to take specific actions is reversible error." *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 57 (D. D.C. 2014). Therefore, to the extent the Court finds that the Hearing Officer erred, the Court should remand.

V. CONCLUSION

Mr. Begay had the burden to establish that he is entitled to Relocation Benefits. He did not meet his burden. Mr. Begay did not establish that he was a resident of the HPL after 1982, and the evidence indicates that he was not. Therefore, he was required to demonstrate that he was a head of household before 1982. Yet, even if he resided on the HPL after 1982, he still had to establish that he was a head of household before the statutory deadline of July 7, 1986. This, he did not do. Mr. Begay did not provide any documents to support his income claims, and the testimony of his witnesses was inconsistent and unreliable. Mr. Begay's application and social security earnings statement both show that he did not earn enough money to support himself prior to 1986. And Mr. Begay failed to offer any evidence that he actually supported himself prior to 1986, whatever his wages. Under such circumstances, the Hearing Officer appropriately upheld ONHIR's decision to deny Mr. Begay Relocation Benefits. This Court should too.

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Respectfully submitted this 15th day of August, 2017.

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s/Jason D. Curry
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and served a copy of the attached document and Notice of Electronic Filing to the following CM/ECF registrant:

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