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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

FRED BEGAY, Plaintiff, vs. **OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION, an administrative agency of the United States,** Defendant.	Case No. CV-16-08268-DJH **PLAINTIFF'S RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant urges this Court to accept its theory that Mr. Begay, a 55 year old, blind, illiterate Navajo Man, who speaks limited English, conspired with his former employer, former co-worker and older sister to fabricate an elaborate chain of events which allegedly occurred between 1980-1995. Mr. Begay was 22 in 1982 when he began working for Ramsey Construction building ONHIR's relocation homes. He worked full time and was 26 and self-supporting on July 7, 1986. He lived on the HPL until his family relocated in 1988 or 1989 when he was 28 or 29.

Defendant offers no credible basis to believe the former employer, the foreman who worked for ONHIR building its relocation homes for over three decades, or the former co-worker, who worked side by side with Mr. Begay and their former employer from 1982-1995,

would perjure themselves to help Mr. Begay receive relocation benefits due him for over thirty years.

Defendant's role as a fiduciary requires they treat Mr. Begay fairly and assist him in providing the maximum relocation benefits due him as a relocate. Bedoni v. NHIRC, 878 F.2d 1119, 1125 (9th Cir., 1989). ONHIR's mission as the federal agency authorized to implement the Navajo-Hopi Settlement Act is to provide a "thorough and generous" relocation program, taking "into account all the social, economic, cultural, and other adverse impacts on persons involved in the relocation and…to avoid or minimize [them]." Bedoni, 878 at 1120. Defendant's decision to deny Mr. Begay his benefits and desire to shut down the federal relocation program as quickly as possible, at any cost, should not be condoned or affirmed.

PLAINTIFF ESTABLISHED THAT HE WAS A LEGAL RESIDENT OF THE HPL[1]

Defendant argues that Plaintiff moved off the HPL in 1982. In fact, the HO found Plaintiff resided in Coalmine, on the HPL, "until his family relocated" in the late 1980's. (AR #314). He later found Plaintiff left the HPL "some time before or in 1982." (AR #318). Alternatively he found if Plaintiff resided on the HPL after 1982 he was not a self-supporting head of household before July 7, 1986. (AR #319).

Defendant's definition of residency, as defined in its 1990 *Plan Update* is:

> **Legal residency,** where a person might be temporarily away, but maintained substantial, recurring contact with an identifiable homesite. This interpretation considered the fact that many persons would leave the partitioned lands temporarily to seek employment, job training, or other opportunities. Yet, they maintained strong ties to their homes and community and considered themselves residents.

ONHIR *Plan Update*, November 22, 1990, at 7. Legal residency depends on one's manifested intent to reside at his HPL property; it does not require a permanent physical presence, but only substantial, recurring contacts. Mike v. Office of Navajo and Hopi Indian Relocation, No. CV-06-0866-PCT-EHC, 2008 WL 54920 at 4. See also Elizabeth

[1] The May 11, 2012 letter from ONHIR denying Plaintiff relocation benefits states the denial is based on Plaintiff not being a "Head of Household." At no time did ONHIR issue a denial letter notifying Plaintiff he was not a resident of the HPL. (AR #50).

Begay v. ONHIR, CIV96-137-PCT-RGS, at 8-9 (D. Ariz., March 14, 1997) (The HO "failed to consider all the evidence presented, including evidence that plaintiff met the substantial and recurring contacts test. Consequently, the HO's decision is not supported by substantial evidence and is arbitrary.") (Exhibit 17); Daisey Martina v. ONHIR, CIV95-0480-PCT-RCB at p. 6, 8-9 (D. Ariz., March 27, 1996) ("A review of the record shows that all witnesses, save one, testified that plaintiff returned to Black Mesa as often as possible." The Court found: "The Hearing Officer is obligated to consider this evidence. However, for whatever reason, he elected instead to ignore or disregard it. This he cannot do…Rather, he simply concludes that plaintiff's contacts were not substantial or done for the purpose of maintaining her residency. Yet, as previously noted, the Hearing Officer cannot simply choose 'to ignore these relevant pieces of evidence.'"). (Exhibit 18). And most recently, the District Court found that HO Merkow again failed to apply the proper standard for legal residence in Rosita Charles v. ONHIR, CIV-16-08188-PCT-SPL at p. 5-6. (D. Ariz., Sept. 5, 2017) ("The IHO's failure to utilize Defendant's standard for legal residence in his decision to deny Plaintiff's application…represents clear error of judgment and is arbitrary.") (Exhibit 19). Here the HO has ignored settled law that a change of residency is not determined by one fact, but must be by the record as a whole. Manygoats v. ONHIR, 735 F.Supp. 949, 952 (D. Ariz. 1990) (The HO's decision based on one report is found to not be based on substantial evidence).

In this case the Hearing Officer ("HO") found that Plaintiff's testimony failed to establish his residency because: (1) in his application for benefits he did not state when he moved off the HPL; (2) his testimony was "inconsistent and ambiguous" and; (3) trial testimony "indicated that Mr. Begay moved off the HPL in 1982". [Doc. No. 58, p. 8]

(1) Plaintiff's Application for Benefits

Plaintiff has been legally blind since 1996 so his sister filled out the application for him. There is no evidence Plaintiff was asked when he moved off the HPL. Plaintiff's application did state he was living on the HPL in Coalmine on December 22, 1974 and that he was a member of the Coalmine Chapter from 1960-1987 when he moved to the Tuba City Chapter. (AR #30-33). The HO only mentioned the unanswered question but ignored

the answers about Chapter membership which corroborate his, and the other witnesses, testimony that he resided in Coalmine from his birth in 1960 to 1987 when he and his family moved off the HPL and he moved to Tuba City.

(2) The Testimony About Residency Was Neither Inconsistent or Ambiguous

Plaintiff's Testimony

Plaintiff was born February 7, 1960 and grew up on the HPL in Coalmine Chapter approximately 1 1/2 miles south of the Coalmine Chapter House. (AR #190 - #191). Plaintiff was often away from Coalmine for work. (AR #193). Whenever Plaintiff was not working he would return to Coalmine. Plaintiff would stay in Tuba City overnight if he was working for his uncle or if he was working for Ramsey. (AR #200 - #201). Plaintiff's step-dad and his brother Freddie "moved off" the HPL in 1982 while awaiting relocation benefits due to the overcrowding at their homesite. (AR #202).[2] Later other family members "moved off" the HPL. (AR #202). Plaintiff's family quit claimed their Coalmine residence on September 27, 1988. (AR #23). In 1989 the family was "relocated" to Sanders on the New Lands. (Id.) (AR #202). In 1989 Plaintiff was still working for Ramsey and for his uncle Keith George in Tuba City. (AR #202 - #203). Eventually Plaintiff moved from Coalmine to his uncle's after the abandoned Coalmine homesite was torn down. (AR #202 - #203). Plaintiff lived his life at Coalmine from birth until his parents relocated in the late 1980's when he was 28 or 29. (AR #204 - #205).

Employer Leslie Hosteen's Testimony ("LH")

When Plaintiff came to work for him, Plaintiff was living in Coalmine. (AR #142). Plaintiff lived in Coalmine when he worked for Ramsey. (AR #142, #151). LH lived in Tuba City and he picked Plaintiff up for work in Coalmine. (AR #152). At times Plaintiff stayed in Tuba City overnight when he was coming from or going to work. (AR #152 - #153). Plaintiff "mostly he stayed in coal mine." (AR #153).

[2] On October 14, 1972 the federal court issued an order prohibiting any "new construction" by Navajos which created severe overcrowding on the HPL. Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976).

1 **Co-Worker Jonathan Sakiespewa's Testimony ("JS")**
2 According to JS Plaintiff lived in Coalmine from 1983 until 1987 when JS went to
3 Texas. (AR #160). JS and LH would pick Plaintiff up for work in Coalmine and they would
4 ride together to the various job sites. (AR #161). While working they would camp in
5 sleeping bags and tents and sometimes come back to Tuba City for supplies and tools. (AR
6 #161 - #162). When Plaintiff was herding sheep and working with horses in Tuba City he
7 would stay with his uncle. (AR #161 - #162). Sometimes JS and LH would pick Plaintiff up
8 at his uncle's home if he was working in Tuba City. Otherwise they would pick him up or
9 drop him off at his mother's place in Coalmine. (AR #169, #170).
10 **Sister Elvira Chischillie's Testimony ("EC")**
11 EC was Plaintiff's older sister and they grew up together in Coalmine. (AR #176). As
12 the older siblings "moved off" the HPL, the younger kids, including EC and Plaintiff stayed
13 there with their mother. (AR #177). When EC graduated in 1978 Plaintiff was living in
14 Coalmine. (AR #178). Plaintiff would often be gone for days at a time when he was
15 working. (AR #178). EC moved to Phoenix in 1978 but came home every other week until
16 1989. (AR #178). Plaintiff resided at Coalmine until the family relocated in 1989. (AR
17 #180). Plaintiff never had any other residence other than in Coalmine. (AR #180 - #181).
18 EC left Coalmine in 1989 when she relocated to Sanders. (AR #180 - #181). EC and her
19 other siblings, except Plaintiff, were all certified for relocation benefits based on their
20 Coalmine residence. (AR #182). The family were members of the Coalmine Chapter. (AR
21 #182 - #183).
22 **PLAINTIFF ESTABLISHED HE WAS A HEAD OF HOUSEHOLD**
23 To be a head of household Plaintiff must establish he maintained and supported himself.
24 25 CFR §700.69(a)(2). An applicant can qualify as "self-supporting" if they (1) earned at
25 least $1,300 per year and (2) actually supported himself. Id.; Benally v. ONHIR, 2014 U.S.
Dist. LEXIS 16319 at *5-7. Although the records of Plaintiff's work for Ramsey
Construction are gone, the testimony clearly established that he "maintained and supported
himself" on and after July 7, 1986.

(1) Plaintiff's Testimony

Plaintiff went to boarding school in Tuba City until he completed the 8th grade. (AR #191). When Plaintiff quit school he initially supported himself by herding livestock. (AR #191, 192). Plaintiff was paid for his work with livestock with a combination of money, jewelry, blankets and other things. (AR #192). For example, Plaintiff once received $200 and jewelry for his work. (AR #192). Plaintiff also worked in Coalmine, Phoenix and Utah. (AR #193).

Plaintiff went to work for Ramsey Construction in the late 70s or early 80s. He worked for Ramsey for approximately 14 to 15 years building relocation homes until he was blinded in a work related accident in 1995 or 1996. (AR #195). Plaintiff performed several different types of work for Ramsey, including manual day labor, loading, roofing and cleaning up the job site in anticipation of occupancy. (AR #195, #196). Plaintiff was normally paid hourly but the roofing was paid per job. (AR #196, #197). Plaintiff was paid between six and eight dollars an hour over the years he worked. Plaintiff estimated he made an additional $100-$130 a home by roofing. (AR #197). Plaintiff built relocation homes all over the Navajo reservation for ONHIR including Tuba City, Red Lake, Cow Springs, Copper Mine, Kaibeto, Rocky Ridge, Navajo Mountain, Shiprock, Navajo, and Sanders. Plaintiff also built ONHIR homes in border communities like Flagstaff and Winslow. (AR #197). According to ONHIR's records, Ramsey built approximately 95 relocation homes between 1982 and 1986. (AR #289-295, #79).

Plaintiff knew that his father and a brother "moved off" or "left" the HPL homesite in 1982. (AR #202). Plaintiff also knew that his family relocated from the HPL in 1989. (AR #217). Much of the work Plaintiff did for Ramsey was done in the summer but Plaintiff worked for Ramsey all year around. (AR #143, #144, #149, #167). When construction slowed in the winter months, Plaintiff supplemented his income working for his uncle, at the Coalmine Chapter, and in Phoenix and Utah. (AR #191, #193, #202, #203). By the time Plaintiff began working construction in 1979 or 1980, he was able to load 50 pounds of shingles at a time. (AR #209). Because some of his work was paid hourly and the roofing

was paid by the job, Plaintiff would make a total of approximately $150 per homesite. (AR #209 - #210).[3]

(2) Employer Leslie Hosteen's Testimony ("LH")

LH initially submitted a declaration on December 10, 2014 about his recollection, without the benefit of the lost or destroyed employment records, of Plaintiff's employment with Ramsey between 1982 and 1995. (AR #315). LH believed he hired Plaintiff in 1982. Plaintiff worked on relocation homes in Tuba City, Flagstaff, Sanders, Shiprock, Monument Valley, and Cow Springs. Between 1982 and 1986. (AR #315). Plaintiff worked 30 to 40 hours a week and was paid $30 for loading shingles and $85-$90 to roof one house. (AR #315, 316). LH later testified at Plaintiff's hearing that he hired Plaintiff in 1979 or 1980 and between hourly and piece rate work he paid Plaintiff approximately $150 per house. (AR #316). LH testified that he himself worked for Ramsey for over 30 years beginning in approximately 1976. (AR #139, #140). During that time Ramsey built relocation homes all over the Navajo reservation as well as in some of the neighboring border towns. (AR #140, #149, #150, #152, #198, #199). Plaintiff began working for Ramsey as a day laborer loading shingles and working on the cleanup crew at the various construction sites. (AR #143). LH was the foreman of a work crew that included 4 to 6 people including Plaintiff and his co-worker JS. (AR #143). Plaintiff, JS and LH travelled together to the various job sites. (AR #145). They camped out at the job site and in the summertime had three months to build a home and in the winter four months. (AR #143-#144). The construction crew worked 30 to 40 hours a week and sometimes weekends depending on the weather. (AR #146). Plaintiff worked for LH until approximately 1995. (AR #146).

LH paid his workers in cash and they were paid either hourly or by piece work. (AR #147, #149, #150, #154, #155, #163-#165, #175, #195, #197, #209, #214). The workers were paid seven or eight dollars an hour. (AR #147). When they were roofing they were paid by the job. Plaintiff made in total approximately $150 per home. (AR #147). LH's late

[3] ONHIR records confirm Ramsey built 95 relocation homes from 1982-1986. (AR #289). If Plaintiff worked on each home Ramsey built between 1982-1986 he would have earned approximately $14,250 (95 x $150) or $2,850 a year.

1 wife was the business manager for their business and maintained records of the work done
2 by his crew. (AR #148). LH's wife died in 2003 and the records from the early days of
3 construction on the reservation were lost or destroyed. (AR #148). Plaintiff worked year
4 round building relocation homes for ONHIR. (AR #149, #150, #167, #174-#175).

5 **(3) <u>Co-Worker Jonathan Sakiespewa's Testimony ("JS")</u>**

6 JS knew Plaintiff most of his life and Plaintiff began working by herding sheep for his
7 uncle in Tuba City. (AR #157). JS and Plaintiff began working for Ramsey Construction in
8 approximately 1982 or 1983. (AR #157, #160). JS and Plaintiff worked together on the
9 roofing crew and traveled together with LH to the various job sites. (AR #161-#162). The
10 construction crew worked 40 hours a week, JS earned approximately $4500 a month
11 working for LH and Plaintiff also did this same work for Ramsey. Plaintiff had a second job
12 working for his uncle for 5 to 6 years in Tuba City. (AR #316). Plaintiff lived in Coalmine
13 and JS and LH would pick Plaintiff up at his parents' home. (AR #161). JS, Plaintiff and
14 LH would camp at the job site in sleeping bags and tents. <u>Id</u>. Plaintiff and the rest of the
15 crew worked 40 hours a week, traveling from job site to job site. (AR #162). The crew
16 worked on multiple houses at the same time. (AR #162).

17 JS was paid approximately $130 per home for roofing. (AR #162-#163). There were four
18 roofers on each home and they split the shingles amongst themselves. (AR #163-#164). In
19 addition to roofing JS and Plaintiff also worked other hours loading shingles, cleaning the
20 job site and digging ditches. (AR #162, #163, #158-#160). They were paid 6 to 7 dollars
21 per hour for this work. (AR #163 - #164). JS was paid in cash the entire time he worked for
22 Ramsey. (AR #163 - #164). All of the workers were paid "under the table" by LH's wife
23 and no one ever paid taxes. (AR #165). JS went to Texas in 1987 and at that time Plaintiff
24 was still working for Ramsey. (AR #165).

25 JS worked full-time during the good weather months. (AR #167). During the winter
when work slowed, Plaintiff herded sheep for his uncle, from 1982 to 1987 in addition to the
work he did for Ramsey. (AR #168, #169, #173). Plaintiff stayed with his uncle when
working otherwise he would return to Coalmine. (AR #169, #170, #174). Between 1980 to
1987 Plaintiff resided in Coalmine. (AR #161, #165, #170, #171, #174). When JS came

back to work for Ramsey in 1992 he and Plaintiff worked together for several more years. (AR #174 - #175). In the 1990s, LH was still their foreman and continued to pay them in cash. (AR #174 - #175).

(4) Sister Elvira Chischillie's Testimony ("EC")

Plaintiff supported himself doing construction work and tending livestock. (AR #178). EC filled out her brother's application. (AR #183). EC did not list his employment with Ramsey or his other work because Plaintiff was always paid in cash and there were no records of his employment. (AR #183).

THE HEARING OFFICER'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In Universal Camera Corp. v. National Labor Relations Board, 71 S.Ct. 456 (1951), the Supreme Court explained the application of the "substantial evidence" standard in judicial review of agency decisions. In describing what "substantial evidence" is, the Court stated it means "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." Universal Camera requires review of "the whole record in order to ascertain substantiality". A reviewing court is not barred from setting aside a decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the HO's view. Id. at 488. The substantial evidence standard imposes "the requirement that evidence appear substantial when viewed, *on the record as a whole*, by courts invested with the authority and enjoying the prestige of the Courts of Appeals." Id. at 489; *see also* McAllister v. Sullivan, 888 F.2d 599 (9th Cir. 1989) ("In determining whether there is substantial evidence to support the ALJ's decision, we are required to review the administrative record as a whole, *weighing both the evidence that supports and detracts from the ALJ's conclusion*." Id. at 602; Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996) (In determining whether the findings are supported by substantial evidence, "we must consider the evidence as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion. *We must give the facts a full review and must independently determine whether the Commissioner's findings are supported by substantial*

1 *evidence."* [Emphasis added]); Orn v. Astrue, 495 F.3d 625 (9th Cir. 2007) (In applying the
2 substantial evidence standard of review to whether the ALJ's decision should be upheld, the
3 Court required "a reviewing court must consider the entire record as a whole and may not
4 affirm simply *by isolating a 'specific quantum of supporting evidence.'"*); Morgan v.
5 Commissioner of the Social Security Administration, 169 F.3d 595 (9th Cir. 1999). (With
6 regard to the claimant's testimony, if the ALJ finds the claimant's testimony to be
7 unreliable, "the ALJ must make a credibility determination citing the reasons why the
8 testimony is unpersuasive. The ALJ must specifically identify what testimony is credible
9 and what testimony undermines the claimant's complaints); Jones v. Heckler, 760 F.2d 993
10 (9th Cir. 1985) ("the court must consider both evidence that supports *and evidence that*
11 *detracts from the ALJ's conclusion; it may not affirm simply by isolating a specific quantum*
12 *of supporting evidence.*") Id. at 995. As to the credibility of the claimant's testimony, "the
13 ALJ could properly disregard Jones' self-serving statements to the extent they were
14 unsupported by objective findings. But an examination of the record reveals ample support
15 for Jones' subjective complaints, as detailed above. It was improper for the ALJ to
16 disregard Jones' testimony." Id. at 997); Hammock v. Bowen, 879 F.2d 498 (9th Cir. 1989)
17 ("reviewing court must review the record as a whole and consider adverse as well as
18 supporting evidence. We 'may not affirm simply by isolating a specific quantum of
19 supporting evidence.'" Id. at 501. Furthermore, *'the ALJ must articulate reasons for the*
20 *specific finding of lack of credibility and should indicate the amount of weight given the*
21 *various items of evidence.'"* Id. at 503 [Emphasis added]).

The Credibility Findings of the HO Are Not Supported by Substantial Evidence

The HO found Plaintiff, his employer, his co-worker and his sister were not credible witnesses. He supported these findings with nothing more than the barest of conclusory statements. Plaintiff "could not remember critical details about his employment, and he could not testify about his earnings in any given year or about his employer during 1983 or 1984. Appellant's testimony about his Coalmine residence from 1982 on is inconsistent and not credible." (Dec. p. 5). His employer's "testimony was contradictory and inconsistent with his December 2014 written declaration." (p.4). His co-worker's testimony is

1 inconsistent with other testimony provided at the hearing, as well as (Employer's)
2 declaration. (p. 5). As to his sister's testimony, "except for her testimony about completing
3 her brother's application, her testimony is not credible." (p. 5).

4 With regard to credibility, the Ninth Circuit in Cegerra v. Secretary of Health & Human
5 Services, 933 F.2d 735 (9th Cir. 1991) held, "[i]n appropriate cases, administrative law
6 judges may base their conclusion on a determination that witnesses did not testify credibly.
7 They *cannot, however, tacitly reject a witness' testimony as not credible. When the decision*
8 *of an ALJ rests on a negative credibility evaluation, the ALJ must make findings on the*
9 *record and must support those findings by pointing to substantial evidence on the record."*
10 Id. at 738 [Emphasis added]). Furthermore, the Court stated "if an ALJ has grounds for
11 disbelieving material testimony, it is both reasonable and desirable to require the ALJ to
12 articulate those grounds in the original decision." Id. at 740. The Court pointed that "no
13 contrary evidence" was in the record to contradict Cegerra's son's testimony that the food
14 and shelter he provided his mother while she waited for her SSI benefits to be restored was a
15 loan and not a gift. Id. at 741. *See also* Varney v. Secretary of HHS, 859 F.2d 1396 (9th
16 Cir. 1988). (In adopting the Eleventh Circuit's rule regarding the crediting of a claimant's
17 testimony, the 9th Circuit stated that "[r]equiring the ALJ's to specify any factors
18 discrediting a claimant at the first opportunity helps improve the performance of the ALJ's
19 *by discouraging them from 'reach[ing] a conclusion first, and then attempt[ing] to justify it*
20 *by ignoring competent evidence in the record that suggests an opposite result.'"* Id. at 398
21 [Emphasis added]); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (the Court held
22 that the ALJ "*cannot reach a conclusion first, and then attempt to justify it by ignoring*
23 *competent evidence in the record that suggests an opposite result."* Id. at 1456 [Emphasis
24 added]).

25 **Failure to Follow Precedent**

In general, an agency's decision is arbitrary and capricious if the agency fails to follow its own precedent or fails to give a sufficient explanation for failing to do so. Andrzejewski v. F.A.A., 563 F.3d 796, 799 (9th Cir. 2009). There is a presumption that the policies behind adjudicated cases are best carried out if the settled precedent is adhered to.

Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). An agency must therefore explain its departure from these prior norms. Andrzejewski v. F.A.A., 563 F.3d 796, 799 (9th Cir. 2009) (stating that "[a]n agency's decision is arbitrary and capricious if the agency fails to follow its own precedent or fails to give a sufficient explanation for failing to do so). In explaining departures from past norms, agencies may narrow the application of a rule or find that a rule is no longer applicable if the agency decides that congressional policy is best served by doing so. In such cases, the explanation must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate. California Trucking Ass'n v. I.C.C., 900 F.2d 208, 212 (9th Cir. 1990) (stating that "while an agency may announce new principles in an adjudicatory proceeding, it "may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case.").

When an agency attempts to simply distinguish earlier cases, the agency must point to factual differences. These factual differences are then only permitted to serve as distinctions "when some legislative policy makes the differences relevant to determining the proper scope of the prior rule." Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. at 808; *See also* California Trout v. F.E.R.C., 572 F.3d 1003, 1023 (9th Cir. 2009) (*citing* INS v. Yueh–Shaio Yang, 519 U.S. 26, 32, 117 S.Ct. 350, 136 L.Ed.2d 288 (1996)) (stating, "[t]hough the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the A.P.A.").

Susan Crystal Memos

Written in the 1980s, the Susan Crystal memos justified ONHIR's reliance on the $1,300 threshold for establishing self-support. Their author, ONHIR's first attorney, detailed how she arrived at the $1,300 figure, and why it was appropriate for Navajo relocatees. The Crystal memos are read in conjunction with 25 CFR § 700.69 (a)(2) and

provide that when an individual earned $1,300, they were presumed to be self-supporting. When they earned less, they could also demonstrate self-support:

> The Commission feels this favorable comparison of the average general assistance amount to its formula-derived per capital maintenance figure lends considerable credence to the establishment of this monetary floor *for the presumption of self-support*. It must be noted, however, that the circumstances of the HPL are considerably different than mainstreamed communities. A non-cash economy exists for a large segment of the population. The Commission must, therefore allow for the possibility of an individual demonstrating self-support at a lower figure than the $1,300 floor established herein.

Criteria for Certification Review, Plaintiff's MSJ Exhibit 3 at 6, emphasis supplied.

While the memos were not given an official ONHIR Policy Number, the $1,300 threshold amount established in the memos is still cited in every applicant's denial letter. (AR #50). In addition, "Criteria For Determining Self-Supporting" has been cited to by both Plaintiff and Defendant in a number of federal appeals to this Court.[4]

HO Merkow was hired by ONHIR in 1980 and has been the only Hearing Officer in the history of the program. As such, he has conducted hundreds of hearings, and written *every ONHIR hearing decision*, including those found at Plaintiff's MSJ Exhibits 6-15. These decisions, which are the decisions from all previous ONHIR appeals have never been published or otherwise made available to the public. The HO clearly relies on the memos' $1,300 criteria despite the fact the memos weren't included in the AR. Expansion of the AR can be made where the agency relies on documents not there. See Lands Council v. Powell, 395 F.3d 1019, 1029 (9th Cir. 2005). The whole administrative record "is not necessarily

[4] In Benally v. ONHIR, No. 13-CV-8096-PCT-PGR (D. Ariz., Feb. 10, 2014), the Court noted that both parties had cited to the Susan Crystal memo and included some of its language at fn 1, p. 6. In O'Daniel v. ONHIR, No. 07-354-PCT-MHM, 2008 WL 4277899 (D. Ariz., Sept. 18, 2008), the Court cited to the memo on pages 4 and 5, clearly noting that it had been attached as an exhibit. In Chee v. NHIRC et al, No. CIV-88-1258-PHX-RCB, 18 ILR 3078 (D. Ariz., Mar. 22, 1991), the Court cited to the Susan Crystal memo at fn 1, page 3079, noting it had been attached to Plaintiff's MSJ. In Laura Jensen v. ONHIR, No. CIV-95-0145-PCT-RCB (D. Ariz., Aug. 14, 1996), the Court cited to the memo in its Order, page 2, noting again its inclusion as part of Plaintiff's case-in-chief. *See* Plaintiff's MSJ in this action, Exhibit 10 at 3.

those documents that the agency has compiled and submitted as 'the' administrative record." Thompson v. US Dept. of Labor, 885 F. 2d 551, 555 (9th Cir. 1989). An incomplete records is a "fictional account of the actual decision-making process." Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993).

Defendant argues the memos are inapplicable to Plaintiff's circumstances: he worked on- and off-Rez; was in construction and was paid in cash. The Crystal memos require *substantiation of income and independence*, they do not preclude younger people from establishing this or categorically deny individuals who don't have documented wages. *See* Plaintiff's MSJ Exhibits 3 at 5; 4 at 5 and MSJ Exhibits 6-15. This is consistent with ONHIR's legal residency standard which recognizes many people had to "leave the partitioned lands temporarily to seek employment, job training or other opportunities. Yet, they maintained strong ties to their homes and community and considered themselves residents." ONHIR *Plan Update*, November 22, 1990 at 7.

The intent of the Crystal memos, in conjunction with ONHIR's Management Manual §1110 and 25 CFR §69 (a)(2), was to permit single applicants with undocumented wages to be certified. Defendant argues that 25 CFR §700.69(a)(2) should control, rather than the Crystal memos' presumptive level of support at $1,300. An Agency's interpretation of its own regulations cannot be given deference if inconsistent with its Congressional purpose. Morton v. Ruiz, 415 US 199, 236, 94 S.Ct. 1055, 1075 (1974). Providing a thorough and generous relocation program is inconsistent with Defendant's position in this case regarding the head of household and residency standard.

Exhibits 6-15 contain ten HO's decisions and three hearing transcripts. HO Merkow wrote all of the decisions which are ONHIR's caselaw. They have been included time and time again in federal appeals of relocation benefits cases[5] without objection by Defendant.

[5] See Akee v. ONHIR, 907 F. Supp. 315, 319 (D. Ariz. 1995) where the Court discusses the relevance of three decisions attached as exhibits in support of Plaintiff's claim; Manygoats v. ONHIR, 735 F. Supp. 949, 953 (D. Ariz. 1990) where the Court discusses a field investigation report that became the basis for two of the Plaintiff's relatives to be certified whereas Plaintiff was not. For that discussion to occur, the other two hearing decisions would have been attached as exhibits; Whitehair v. ONHIR, 107 F.3d 19 (9th Cir. 1997) where the court discusses the certification of others for benefits in

Significantly, the Court in Jensen v. ONHIR, No. CIV-95-0145-PCT-RCB (D. Ariz. 1996) draws a distinction between extra-record evidence (i.e., affidavits prepared after the IHO's denial) and the James Walker transcript[6] (an agency's certification decision made at the close of hearing), refusing to consider the affidavits while citing to the transcript and comparing it to the case at hand. Plaintiff's MSJ Exhibit 15 at 10. Plaintiff's Exhibits 6-17, despite their unpublished nature, are evidence that undocumented wages earned in both on- and off-Rez settings do qualify applicants for head of household. Defendant argues that past Hearing Officer decisions are not part of the AR, yet in another case before this Court, attached one if its own.[7] Defendant argues its Privacy Act may prevent the disclosure of past HO decisions and transcripts. Yet it's not the Defendant who has disclosed the documents.

Defendant argues that Exhibits 6-17 have "questionable" presidential value. In Chee v. NHIRC, No. CIV-88-1258-PHX-RCB, 18 ILR 3078 (Mar. 22, 1991), four past HO decisions were considered by the Court and found to support the Plaintiff's claim for relocation benefits. 18 ILR 3080. In Herbert v. ONHIR, CV-06-3014-PCT-NVW (D. Ariz. Feb. 27, 2008), (Exhibit 20) the Court found the Plaintiff eligible for relocation benefits, but the Defendant used that decision to reopen applications for 3,014 individuals between December, 2008 and August 31, 2010. Clearly past decisions have precedential value.

Defendant argues that Plaintiff's MSJ Exhibits 6-17 cannot be material to the resolution of this appeal, citing Fence Creek v. United States Forest Serv., 602 F.2d 1125 (9th Cir. 2010). In Fence Creek, 25 grazing permit decisions were found to be outside the agency record and thus not considered by the Court. Unlike the Defendant, the U.S. Forest

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comparison to the Plaintiff's case; those decisions would have been attached as exhibits; Jensen v. ONHIR, No. CIV-95-0145-PCT-RCB (D., Ariz. 1996), Plaintiff's MSJ Exhibit 10, where the transcript of James Walker (included as Plaintiff's MSJ Exhibit 17) was included as Exhibit 7 in that action and discussed by the Court at p. 8; and Chee v. NHIRC, No. CIV-88-1258-PHX-RCB, 18 ILR 3080 (D. Ariz. Mar. 22, 1991) where the Court discusses four past IHO decisions attached to Plaintiff's MSJ and finds them persuasive. Id.

[6] In Re the Matter of James Walker, Hearing No. 94-57, Case No. 2160 (November 2, 1994). Plaintiff's MSJ Exhibit 21.

[7] *See* Charley Begay v. ONHIR, No. CV-16-08229-PCT-JAT, Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment at 14-15.

1 Service has no fiduciary duty to its grazing permit holders. ONHIR must "insure that
2 persons displaced as a result of the [Settlement] Act are treated fairly, consistently, and
3 equitably so that these persons will not suffer the disproportionate adverse, social,
4 economic, cultural and other impacts of relocation." 25 CFR §700.1(a). Failing to apply
5 the lessons learned from MSJ Exhibits 6-17 is not complying with Defendant's fiduciary
6 duty to treat each of its applicants consistently. Finally, Defendant suggests that Plaintiff,
7 after being denied by the HO, should have filed a Policy 17 Motion for Reconsideration.
8 Policy 17 is at best discretionary on the part of Plaintiffs, and mandates no additional briefs
9 or arguments before appealing to this Court.
10 Defendant also objects to inclusion of its own Management Manual §§1110 and
11 1210, approved July 19, 1989 because it is outdated, not binding and immaterial to
12 resolution of this appeal. While many parts of the Management Manual have not been
13 recently updated, neither have they been rescinded.

Plaintiff's Remedies Are Not Limited to Remand

14 Courts may remand with instructions when as here, the record is fully developed and
15 additional administrative proceedings would serve no useful purpose. Sierra Club v. United
16 States EPA, 346 F.3d 955, 963 (9th Cir. 2003). Plaintiff has waited since the late 1980's
17 when he was forced to leave the HPL. Enough is enough.

Conclusion

18 A certain rich man was enjoying a banquet. As he sat at the groaning table he could
19 see an old woman, half starved, weeping. His heart was touched with pity. He called a
20 servant to him and said: 'That old woman out there is breaking my heart. Go out and chase
21 her away. 'Felix Cohen, Indian Claims, The American Indian (1945), in the Legal
22 Conscience: Selected Papers of Felix S. Cohen 264 (1970). This Court should not allow
23 ONHIR or its servant to chase Mr. Fred Begay away.

24 RESPECTFULLY submitted this 14th day of September, 2017.

25 */s/ Lee Phillips*
Attorney for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 14, 2017, I electronically transmitted the
3 attached document, Plaintiff's Response to Defendant's Cross-Motion for Summary
4 Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment, to the
5 Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of
6 Electronic Filing to the following CM/ECF registrant:
7
8 Jason D. Curry
9 Assistant United States Attorney
10 Two Renaissance Square
11 40 North Central Avenue, Suite 1200
Phoenix, AZ 85004-4408
Jason.Curry@usdog.gov
12
13 */s/ Lee Phillips*
14 Lee Phillips
Attorney for Plaintiff
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