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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 REPLY IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**"), files this Reply in further support of *Defendant's (I) Response to Plaintiff's Motion for Summary Judgment, (II) Objection to Extra-Record Documents, and (III) Cross-Motion for Summary Judgment* [Docket No. 58] (the "**Cross-Motion**")[1] and in reply to Mr. Begay's response and reply [Docket No. 60] (the "**Response**"). Through the Cross-Motion, ONHIR (i) objects to Plaintiff's *Motion for Summary Judgment* [Docket Nos. 42, 44] (the "**MSJ**"), and (ii) requests the Court grant ONHIR summary judgment.

Through the CAR and the Cross-Motion, ONHIR established the following points (among others):

[1] Unless otherwise defined herein, all capitalized terms used in this Reply will have the meanings given to them in the Cross-Motion.

- **Residency**: Mr. Begay failed to prove his HPL residency after 1982. The Hearing Officer found that Mr. Begay manifested an intent to reside in Tuba City in 1982. His periodic visits to his parents' HPL home did not change that intent. The Hearing Officer's findings were not arbitrary and capricious. *See* Cross-Motion, pp. 7-9.
- **Head of Household**: Even if Mr. Begay remained on the HPL longer, he still does not qualify for Relocation Benefits because he failed to prove that he was a head of household prior to July 7, 1986—the statutory deadline. Among other proof deficiencies, the Hearing Officer found that Mr. Begay's allegations of undocumented income could not carry his burden. Moreover, the Hearing Officer found that Mr. Begay did not prove that he actually supported himself, whatever his wages. These findings were not arbitrary and capricious. *See* Cross-Motion, pp. 9-15.
- **Third-Party Records**: The Hearing Officer did not depart from binding precedent. The Third-Party Records do not change this conclusion because, among other reasons: (i) the Third-Party Records are extra-record documents that the Court cannot consider; (ii) Mr. Begay waived his "departure from precedent" argument by not raising it with agency; (iii) the Third-Party Records are not binding precedent; and (iv) the Hearing Officer followed established precedent. *See* Cross-Motion, pp. 12-15.
- **Credibility Findings**: The Hearing Officer found that some witnesses lacked credibility. He provided specific and cogent reasons for his findings. Therefore, they are entitled to substantial deference. *See* Cross-Motion, pp. 15-16.
- **Remand**: If the Court finds that the Hearing Officer violated the APA, remand is the only available remedy. *See* Cross-Motion, p. 17.

In the Cross-Motion, ONHIR has set forth argument and authorities to establish each of these points. For the sake of brevity, ONHIR will not repeat all those arguments here. However, in light of the arguments Mr. Begay has raised in the Response, ONHIR respectfully requests that the Court consider the following points.[2]

[2] Mr. Begay alleges that ONHIR has accused him of conspiring with others to fabricate evidence. *See* Response, pp.1-2. ONHIR has never accused Mr. Begay of fabricating evidence. ONHIR merely asserts that Mr. Begay's evidence was not sufficient to carry his burden under

I. The Court Must Review The Hearing Officer's Residency Findings Under ONHIR's "Legal Residence" Standard

The Hearing Officer found that Mr. Begay failed to prove that he was an HPL resident beyond 1982. In the Response, Mr. Begay claims that he was an HPL resident until the late 1980s. He asserts that he only needed to maintain "substantial and recurring contacts" with the HPL to be a resident there. Mr. Begay is incorrect. When determining residency, ONHIR must examine whether an applicant qualifies as a "legal resident" of the HPL. Residency is not based on an applicant's "substantial and recurring contacts" with the HPL.

In 1984, after proper notice and comment, ONHIR implemented 49 Fed. Reg. 22277 (May 29, 1984). That regulation abrogated any "substantial and recurring contacts" standard that may have existed and replaced it with a "legal residence" standard. *Id*. The legal residence standard focuses on a person's intent and manifestations of such intent. *See* Cross-Motion, pp. 7-9; 49 Fed. Reg. 22277 (the term "residence" "is meant to be given its legal meaning [,] . . . which requires an examination of a person's intent to reside combined with manifestations of that intent."); *see also* 48 Fed. Reg. 33005 (July 20, 1983). The legal residence standard is consistent with Congress's "house for a house" mandate under the Settlement Act, which allows applicants to receive Relocation Benefits only if the Settlement Act actually displaced them. *See* 25 U.S.C. § 640d-14(a).

Mr. Begay does not address ONHIR's 1984 regulation. Instead, Mr. Begay asserts that he only needs to prove "substantial and recurring contacts" with the HPL. As support, Mr. Begay relies on several cases. *See* Response, pp. 2-3. Those cases describe ONHIR's residency standard based on ONHIR's 1990 Plan Update to Congress or Section 1270 of an outdated management manual ("**MM § 1270**"). *See, e.g., Mike v. Office of Navajo & Hopi Indian Relocation*, Case No. CV-06–0866–EHC, 2008 WL 54920, at *10-11 (D. Ariz. Jan. 2, 2008) (relying on 1990 Plan Update); *O'Daniel* v. *Office of Navajo & Hopi Indian Relocation*, Case No. 07-354-PCT-MHM, 2008 WL 4277899, at *7 (D. Ariz. Sept. 18, 2008) (relying on MM § 1270); *Charles v. Office of Navajo & Hopi Indian Relocation*, Case No. CV-16-08188-PCT-

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25 C.F.R. § 700.147(b).

SPL, p. 4 (D. Ariz. Sept. 5, 2017) (relying on *O'Daniel* and *Mike*). Mr. Begay also cites directly to the 1990 Plan Update as support for his alleged residency standard. *See* Response, p. 2.

Reliance on the 1990 Plan Update and MM § 1270 is misplaced. Substantive rules bind an agency; interpretive statements do not. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."); *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (. . . "legislative rules have the 'force of law,' while interpretive rules do not . . ."); *cf. Powderly v. Schweiker*, 704 F.2d 1092, 1096 (9th Cir. 1983) ("While [interpretive rules] are not accorded the force and effect of law. . . , they are of persuasive value.") (internal citations omitted); *Sierra Club v. U.S. E.P.A.*, 671 F.3d 955, 962 (2012) (discussing *Chevron* deference given to agency interpretations). Thus, parties—including an agency—cannot rely on interpretive statements to avoid their burdens of proof. *See Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). The 1990 Plan Update is not a binding, substantive rule. It is not a statute, a regulation, a policy, or even an official interpretive statement. The 1990 Plan Update is an outdated communication to Congress about the progress of ONHIR's program. Similarly, MM § 1270 is not binding authority either.[3] Neither MM § 1270 or the 1990 Plan Update can create substantive rules, and they cannot override a binding federal regulation.[4] *See Chief Prob. Officers of Cal. v. Shalala*, 118 F.3d 1327, 1332-1338 (9th Cir. 1997) (interpretative rules that are inconsistent with binding regulations are invalid); *Burnside, et. al. v. Office of Navajo and Hopi Indian Relocation*, Case 3:15-CV-08233-PGR, 2017 U.S. Dist. LEXIS 158804, at *26-27 (D. Ariz. Sept. 27, 2017) (ONHIR policy not binding over regulation).

The Settlement Act and ONHIR's 1984 regulation are the only binding descriptions of ONHIR's residency standard. Those authorities describe a "legal residence" standard, which requires an applicant to prove his intent to reside on the HPL and offer affirmative evidence

[3] MM § 1270 is no longer in effect.

[4] For this reason, the 1990 Plan Update and MM § 1270 are also extra-record documents the Court cannot consider.

that demonstrates a manifestation of such intent. *See* 49 Fed. Reg. 22277; 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) (applicant must offer affirmative evidence, not bare testimony, to establish residency).

In addition, the "substantial and recurring contacts" standard is too broad. Under such standard people whom Congress did not intend to receive benefits would qualify for them. *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). For example, under the substantial and recurring contacts standard, people who regularly visit friends and family on the HPL would qualify as residents there. *See Gamble v. Office of Navajo & Hopi Indian Relocation*, Case No. CIV-97-1247-PCT-PGR, p. 16 (D. Ariz. September 24, 1998) ("If substantial, recurring contacts were dispositive, many people would receive benefits for visiting their family on a regular basis."). The legal residence standard ensures that only applicants the Settlement Act actually displaced will receive Relocation Benefits. *See* 25 C.F.R. §§ 700.1(a).

Under the legal residence standard, the Hearing Officer correctly held that Mr. Begay failed to prove his intent to reside on the HPL and offer affirmative evidence demonstrating such intent. Even under the substantial and recurring contacts standard, Mr. Begay's visits to his parents' HPL home were not enough. *See Dayzie v. Office of Navajo & Hopi Indian Relocation*, Case No. CIV-95-1885-PCT-PGR, pp. 10, 16 (D. Ariz. March 11, 1997) (upholding Hearing Officer's decision that social visits are not enough). The Court should uphold the Hearing Officer's decision. *See Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995) ("[I]f evidence is susceptible of more than one rational interpretation, the decision of the [agency] must be upheld.").

II. As Affirmed By The *Benally* Court, The Hearing Officer May Require Contemporaneous Documentation Of Earnings

The Hearing Officer found that Mr. Begay did not prove that he was a head of household prior to the statutory deadline of July 7, 1986. Among other reasons Mr. Begay failed to meet

his burden, the Hearing Officer found that Mr. Begay did not produce contemporaneous documents to establish his earnings. Therefore, even if he were an HPL resident beyond 1982, he does not qualify for Relocation Benefits.

In the Response, Mr. Begay asserts that ONHIR's alleged precedent does not permit the Hearing Officer to require contemporaneous documentation of earnings. Mr. Begay's assertion is unfounded. As a threshold matter, the alleged precedent Mr. Begay cites is the Third-Party Records. As discussed below (and in the Cross-Motion), the Court cannot consider the Third Party Records, and, in any event, they do not support Mr. Begay's argument. Mr. Begay relies heavily on two of the Third-Party Records: the Crystal Memo and ONHIR's outdated 1989 management manual. As discussed in the Cross-Motion (n. 3), those documents do not support Mr. Begay's argument. Moreover, just like the 1990 Plan Update, the Crystal Memo and the 1989 management manual are not binding substantive rules. *See, supra*, Section I.

In any event, the Hearing Officer may require contemporaneous documentation of earnings. The *Benally* decision expressly affirmed this rule. *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). The Hearing Officer wrote his decision regarding Mr. Begay almost two years after the District Court issued its *Benally* decision. Mr. Begay fails to address the *Benally* decision or to explain how the Hearing Officer departed from precedent by following the rule confirmed by *Benally*.

Even if the Hearing Officer found that Mr. Begay had earned sufficient income, Mr. Begay failed to prove that he actually supported himself. *See* Cross-Motion, p. 15; 25 C.F.R. § 700.69(a)(2); *Benally*, No. 13-cv-8096-PCT-PGR, 2014 U.S. Dist. LEXIS 16319, at *5-8. Therefore, whatever his wages, Mr. Begay failed to carry his burden, and the Court should uphold the Hearing Officer's decision.

III. ***Fence Creek* Controls And Prevents The Court's Consideration of Third-Party Records**

As set forth in the Cross-Motion (pp. 12-15), the Hearing Officer did not depart from binding precedent. *See, e.g., Burnside*, Case 3:15-CV-08233-PGR, 2017 U.S. Dist. LEXIS

158804, at *25 (unpublished ONHIR decisions not biding). In the Response, Mr. Begay does not clearly address ONHIR's arguments on this point. He does, however, attempt to distinguish *Fence Creek Cattle Co. v. U.S. Forest Serv*., 602 F.3d 1125, 1131 (9th Cir. 2010). As set forth herein, *Fence Creek* is on point, and the Court should follow it.

Judicial review in an APA case is based only upon the administrative record that was before the agency at the time it made its decision; thereby preventing the reviewing court from finding its own facts or substituting its judgment for that of the agency. *See* Cross-Motion, p. 13; *Fence Creek*, 602 F.3d at 1131.

In *Fence Creek*, an applicant sought grazing permits from the U.S. Forest Service. *Fence Creek*, 602 F.3d at 1130. The Forest Service denied the permits. *Id.* On appeal to the District Court, the applicant sought to expand the administrative record by adding Forest Service files from 25 unrelated grazing cases. *Id.* at 1131. The applicant believed the 25 extra-record documents established precedent. *Id*. The District Court refused to expand the record. *Id*.

On appeal to the Ninth Circuit, the panel acknowledged that expansion of the record may be appropriate in four narrowly construed instances: "(1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Id.* The narrow exceptions '"operate to identify and plug holes in the administrative record'" not to bring in unrelated documents. *Id*. (*quoting Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). The party seeking to expand the record carries the "heavy burden to show that the additional materials sought are necessary to adequately review" the case. *Id.*

The Ninth Circuit construed the applicant's request as an attempt to establish bad faith by the Forest Service through disparate treatment. *Id*. Nevertheless, the Ninth Circuit did not expand the record because the applicant could "not show[] that review of agency files of twenty-five unrelated grazing permits and actions taken concerning those permits would demonstrate that the Forest Service acted in bad faith." *Id*.

Similar to the applicant in *Fence Creek*, Mr. Begay attempts to introduce unrelated, third-

party documents to establish that ONHIR treated Mr. Begay differently from other applicants. *Fence Creek* rejected this tactic, and so should this Court.

Mr. Begay attempts to distinguish *Fence Creek* by alleging that the Forest Service does not have a "fiduciary duty" to treat all permit applicants consistently, whereas, ONHIR does. *See* Response, pp. 15-16. Mr. Begay is incorrect. As noted in the Cross-Motion, all federal agencies have a duty to treat parties before them consistently. The Ninth Circuit was surely aware of this duty when it issued the *Fence Creek* decision.

Mr. Begay, however, appears to refer to a duty allegedly owed by ONHIR to Mr. Begay under the Settlement Act. This duty is based on another Ninth Circuit case, *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121 (9th Cir. 1989). As a threshold matter, Mr. Begay did not raise this issue in his MSJ; therefore, he waived the argument. *See Graves v. Arpaio*, No. 08–17601, 2010 WL 3987721, at *3 (9th Cir. October 13, 2010) ("arguments raised for the first time in a reply brief are waived"); *U.S. v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) ("arguments not raised by a party in its opening brief are deemed waived").

Nevertheless, Mr. Begay misstates ONHIR's trust responsibility. The United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). The Settlement Act is the only statute that imposes a trust responsibility on ONHIR. The trust responsibility applies only to those who qualify for Relocation Benefits. *See* 25 C.F.R. § 700.1 (purpose is to assist residents who are displaced by partition); *Bedoni*, 878 F. 2d at 1124-1126 (noting that ONHIR had a trust responsibility to maximize benefits for a party who had already qualified for relocation). Here, because Mr. Begay was not "displaced" by the partition (*i.e.*, eligible for Relocation Benefits), ONHIR did not owe him a trust responsibility. However, even if ONHIR owed Mr. Begay a trust responsibility, the responsibility does not alter the eligibility standards or abrogate APA law by allowing extra-record documents. *See Benally*, No. 13-CV-8096-PCT-PGR, 2014 U.S. Dist. LEXIS 16319, at *8-9 ("While *Bedoni* recognized an obligation for the Commission to assist the family in securing the maximum allowable funds, the case does not alter the standard by which ONHIR determines whether an

applicant is entitled to relocation benefits.").

Accordingly, Mr. Begay's attempt to distinguish *Fence Creek* fails and further underscores *Fence Creek*'s applicability here. The Court should follow *Fence Creek* and refuse to consider the Third-Party Records. *See also Burnside*, Case 3:15-CV-08233-PGR, 2017 U.S. Dist. LEXIS 158804, at *23-25 ("The Court concludes both that the plaintiffs have not met their 'heavy burden' to show that the additional submitted documents are necessary for the Court to adequately review ONHIR's waiver denials, *Fence Creek Cattle Co.*, 602 F.3d at 1131, and that the administrative record before it is sufficient to conduct its APA review.").

IV. Mr. Begay's Remedies Are Limited To Remand

In the Response, Mr. Begay again encourages this Court to exceed its power by ordering relief beyond remand. In administrative review cases, the district court "does not perform its normal role but instead sits as an appellate tribunal." *Palisades Gen'l Hosp. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (internal quotation marks and citation omitted). "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."); *Ranchers Cattlemen Action Leg. Fund United Stockgrowers of Am. v. U.S. Dept. of Agr.*, 499 F.3d 1108, 1117 (9th Cir. 2007) ("Under the APA, courts must refrain from *de novo* review of the action itself and focus instead on the agency's decisionmaking process.").

Accordingly, 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, and finding that district court erred by going beyond remand to decide the underlying question); *Defenders of Wildlife v. U.S. Envt'l Protection Agency*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("Typically, when an agency violates the Administrative Procedure Act and the Endangered Species Act, we vacate the agency's action and remand to the agency to act in compliance with its statutory obligations."); *Alvarado Cmty. Hosp. v. Shalala*, No. 96-55967, 1998 U.S. App. LEXIS 33973, at *25-26 (9th Cir. Sep. 11, 1998) (requiring remand in an APA case).[5] The APA itself supports simple remand. *See* 5 U.S.C. § 706(2) (authorizing the Court to "set aside" agency decisions); *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, No. C 02-02006 SBA, 2005 U.S. Dist. LEXIS 36035, at *30-33 (N.D. Cal. Mar. 7, 2005). "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) (*citing Cty. of Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999).

This case does not present a "rare circumstance" that would warrant relief beyond remand. If the Court finds that ONHIR erred, remand is appropriate because (i) Mr. Begay raised issues for the first time in this appeal, (ii) the administrative record does not include all the documents Mr. Begay wants ONHIR to consider, and (iii) Mr. Begay alleges that the Hearing Officer applied incorrect legal standards. If so, the Court should remand to the agency for proper review.

In his Response, Mr. Begay does not address established law on this point. He simply

[5] *See also Camp v. Pitts*, 411 U.S. 138, 143 (1973) (when an agency's "finding is not sustainable on the administrative record made, then the [] decision must be vacated and the matter remanded [to the agency] for further consideration."); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."); *Lorion*, 470 U.S. at 744 ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration"); *Omar v. Kerry*, No. 15-cv-01760-JSC, 2016 U.S. Dist. LEXIS 18590, at *37 (N.D. Cal. Feb. 16, 2016).

urges the Court to ignore binding precedent because it is more expedient to him. Expedience is not the standard. If a remedy is warranted, simple remand is the only one available. Remand is not a procedural roadblock set up to thwart Mr. Begay's efforts; it is the system Congress established for agency review. ONHIR respectfully requests that it be followed.

V. CONCLUSION

Mr. Begay did not establish that he was a resident of the HPL after 1982, and he failed to establish that he was a head of household before the statutory deadline of July 7, 1986. Accordingly, the Hearing Officer appropriately upheld ONHIR's decision to deny Mr. Begay Relocation Benefits. The Court should not set aside his decision.

Respectfully submitted this 28th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 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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