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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rosita George, Plaintiff, v. Office of Navajo and Hopi Indian Relocation, an administrative agency of the United States, Defendant.	No. 3:17-cv-08200-ESW **DEFENDANT'S (I) RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, (II) CROSS-MOTION FOR SUMMARY JUDGMENT, AND (III) OBJECTION TO EXTRA-RECORD DOCUMENTS**

Through this Response and Cross-Motion, Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**"), (i) opposes Plaintiff Rosita George's *Motion for Summary Judgment* [Docket No. 28] (the "**MSJ**"), and (ii) requests the Court grant ONHIR summary judgment. ONHIR files this Response and Cross-Motion under Fed. R. Civ. P 56 and LRCiv 56.1. The following items support this Response and Cross-Motion: (i) the attached Memorandum of Points and Authorities; (ii) *Defendant's (I) Controverting Statement of Facts, and (II) Supplemental Statement of Facts* (collectively, the "**CSOF**"), filed concurrently herewith; (iii) the Certified Administrative Record [Docket No. 16] ("**CAR**"); and (iv) the entire record before the Court in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

ONHIR exists to, among other things, provide relocation benefits (defined below) to those who qualify for them, in accordance with 25 U.S.C. §§ 640d to 640d-31,[1] the applicable federal regulations, and official ONHIR policy. To qualify for relocation benefits, an applicant must, among other things, be a "head of household" at the time he or she relocates from the partitioned land (explained further herein) or by July 7, 1986, whichever is earlier. Among other requirements, an applicant must prove that she "actually supported herself" prior to relocating from the partitioned land or by July 7, 1986.

Plaintiff attempts to meet the head of household standard in part by claiming undocumented wages during 1985 and 1986 from an alleged job selling Kachina dolls for her brother-in-law. Plaintiff did not produce a single document verifying any income received from the sale of Kachina dolls, or verifying that the business even existed.

Plaintiff further argues – without citing any authority – that the documented income she earned from January 1, 1986 through July 7, 1986, *if annualized throughout the entire year*, was enough to qualify her as a head of household. Plaintiff essentially asks the Court to ignore the established cutoff date of July 7, 1986 and consider Plaintiff's post-cutoff income.

Plaintiff failed to support herself and attain head of household status. Based on Plaintiff's failure to meet her burden, ONHIR denied her application for relocation benefits, and the Independent Hearing Officer ("**Hearing Officer**") upheld its denial. Yet,

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[1] Effective September 1, 2016, Section 640d of Title 25 has been omitted from the U.S. Code by the Office of the Law Revision Counsel "as being of 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 March 29, 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 March 29, 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 March 29, 2017); *see also* OLRC's FAQ page, http://uscode.house.gov/faq.xhtml (last visited October 11, 2018).

Plaintiff asks this Court to issue an order that would: (1) allow an applicant to merely assert income when necessary to qualify for relocation benefits, without actually providing documentation of such income; and (2) ignore the established cutoff date of July 7, 1986. The relief requested would render the head of household standard and the cutoff date illusory.

The Court should decline to grant the relief Plaintiff seeks. The Hearing Officer did not act in an arbitrary and capricious manner by refusing to simply take Plaintiff's self-serving assertions as truth, or consider post-cutoff income. The Hearing Officer appropriately required corroborating evidence, and only considered income earned (and documented) prior to July 7, 1986. The Hearing Officer's decision should be upheld. For these reasons, the Court should deny Plaintiff's MSJ and grant summary judgment in favor of ONHIR.

II. RELEVANT FACTUAL BACKGROUND

On January 13, 2009, Plaintiff applied for relocation benefits. [SOF, ¶ 12; CSOF, ¶ 1] On October 21, 2009, ONHIR denied Plaintiff's application because she did not obtain head of household status by July 7, 1986. [SOF, ¶ 12; CSOF, ¶ 2] On November 4, 2009, Plaintiff appealed ONHIR's decision. [SOF, ¶ 13; CSOF, ¶ 3] A hearing on Plaintiff's appeal was held on August 23, 2013. [SOF, ¶ 13; CSOF, ¶ 4] The Hearing Officer presided over the hearing. [CSOF, ¶ 5] At the hearing, the following witnesses testified: (1) Plaintiff Rosita George; (2) Cecilia Sims, Plaintiff's aunt; and (3) Emilia George, Plaintiff's mother. [CSOF, ¶ 6].

Plaintiff was born on July 23, 1965. [SOF, ¶ 2; CSOF, ¶ 7] She is a member of the Navajo Nation. [SOF, ¶ 1; CSOF, ¶ 8] Her family resided in the Red Lake Chapter, on the Hopi Partitioned Land ("HPL", explained further herein). [SOF, ¶ 2; CSOF, ¶ 9] Plaintiff attended high school at Tuba City High School, and graduated in May of 1985. [CSOF, ¶ 10] After graduation, Plaintiff moved to Flagstaff and lived with her sister, along with her aunt Cecilia, her uncle, and her brother. [CSOF, ¶ 11]. While living in her sister's house,

from May 1985 to June 1986, Plaintiff did not pay rent or pay for her own food. [CSOF, ¶ 12]

Plaintiff testified that after she moved into her sister's house, she and her aunt worked for Plaintiff's brother-in-law. [CSOF, ¶ 13] According to Plaintiff, her brother-in-law made Kachina dolls and lamps, and Plaintiff and Cecilia would travel to sell the dolls and lamps at craft stores. [CSOF, ¶ 14] Plaintiff further testified that she was paid $200-$300 every two weeks in cash and that she and her aunt Cecilia continued selling the dolls and lamps until June of 1986. [CSOF, ¶ 15] Plaintiff did not introduce any records or supporting documentation showing that she earned money from her brother-in-law, or that her brother-in-law in fact ran a business manufacturing and selling Kachina dolls and lamps. [CSOF, ¶ 16]

In or around June of 1986, Plaintiff moved to an apartment in Flagstaff that she shared with a friend. [CSOF, ¶ 17] She was hired at Burger King in Flagstaff, but quit after one day, earning a total of $40.54. [CSOF, ¶ 18] In June 1986, Plaintiff then obtained a job at the Allstar Inn in Flagstaff, where she earned a total of $568.00. [CSOF, ¶ 19] While working at the Allstar Inn, she applied for a job with Coconino County and was hired in or around June of 1986. [CSOF, ¶ 20] Defendant estimated that Plaintiff's documented earnings in 1986 (prior to July 7, 1986) totaled approximately $1,074.85. [SOF, ¶ 18, CSOF, ¶ 21]

On November 7, 2013, the Hearing Officer issued his decision upholding ONHIR's denial of relocation benefits to Plaintiff. [CSOF, ¶ 22] In his decision, the Hearing Officer found Plaintiff's testimony related to her employment for her brother-in-law in Flagstaff was not credible because

> [T]here are no documents or records to show that applicant earned any money from her brother-in-law, there are no books of account or bookkeeping records in the record of this matter to support applicant's claim about earning money from her brother-in-law, and applicant's recollection of events more than 28 years ago, without any corroboration is unreliable. [CSOF, ¶ 23]

The Hearing Officer further reasoned that "in order for applicant and Cecilia Sands to earn $100 to $250 each week, the quantity of Kachina dolls and lamps they would have been required to sell each day was enormous . . . ." [CSOF, ¶ 24] Ultimately, the Hearing Officer based his decision on the fact that "there is no evidence **of any sort** to support applicant's claim . . . ." [CSOF, ¶ 25] (emphasis in original)

The Hearing Officer found the testimony of Cecilia Sims, Plaintiff's aunt, related to her employment selling Kachina dolls not credible for the same reasons. [CSOF, ¶ 26] The Hearing Officer noted that Emilia George, Plaintiff's mother, "offered no testimony about applicant's employment or income between 1985 and 1986." [CSOF, ¶ 27] Based on the evidence before him, the Hearing Officer held that Plaintiff did not obtain head of household status. [CSOF, ¶ 28] After Plaintiff failed to request reconsideration of the Hearing Officer's Decision, ONHIR issued a Final Agency Action letter on December 5, 2013. [CSOF, ¶ 29]

III. OBJECTION TO EXTRA-RECORD DOCUMENTS

Judicial review in an APA (defined herein) 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 v. Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996). Extra-record documents are almost always inappropriate because they "inevitably lead[] 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).

Parties that challenge the completeness of a record must file a motion and meet the Ninth Circuit standard for supplementation of the record. *See Fence Creek Cattle Co. v.*

U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010) (supplementation of an administrative record is only allowed upon motion with opportunity to object by showing that: "(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.").

As set forth more fully herein, Defendant objects to the extra-record documents attached to Plaintiff's MSJ as Exhibits A-C. The Court should not consider the extra-record documents because Plaintiff did not seek to supplement the record, as required by Ninth Circuit law. *Id.* Instead, Plaintiff attempts to circumvent Ninth Circuit law by simply attaching the improper documents. Plaintiff's attempt must be rejected, and the Court should not consider Exhibits A-C to Plaintiff's MSJ.

IV. MS. GEORGE HAS NOT MET HER 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 can grant a motion for summary judgment only when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). However, when 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 can 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). The plaintiff bears the burden to demonstrate that an agency's actions violate the APA. *Forest Guardians v. U.S. Forest Serv.*, 370 F. Supp. 2d 978, 984 (D. Ariz. 2004) (citing cases).

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). 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 a reasonable factfinder could not have reached the same conclusion. *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."). However, "if evidence is susceptible of more than one rational interpretation, the decision of the [agency] must be upheld." *Id*.

C. Legal Framework: The Navajo-Hopi Settlement Act and ONHIR's Regulation Governing Eligibility for Relocation Benefits

1. The 1974 Settlement Act

For years, members of the Navajo Nation and Hopi Tribe tried and failed to cooperatively use certain lands in northern Arizona held in trust by the United States and known as the "Joint Use Area" or "JUA." To resolve this issue, in 1974, Congress authorized the judicial partition of lands through the Navajo and Hopi Indian Land Settlement Act ("**Settlement Act**"), Pub. L. No. 93-531, 88 Stat. 1712 (1974) (formerly codified as amended at 25 U.S.C. 640d to 640d-31 (2015)).[2] *See generally Clinton v Babbitt*, 180 F.3d 1081, 1084 (9th Cir. 1999).

Therefore, in 1977, the Arizona District Court partitioned the JUA, allocating approximately 900,000 acres to the Hopi Tribe – the HPL – and approximately 900,000 acres (known as the "Navajo Partitioned Lands" or "NPL") to the Navajo Nation. The

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[2] Effective September 1, 2016, the Office of Law Revision Counsel omitted these provisions from Title 25 from the U.S. Code because they have "special and not general application." *See* OFFICE OF LAW REVISION COUNSEL, http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title25 sections640d&num=0&edition=prelim.

Ninth Circuit approved the partition in *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980). The Settlement Act required tribal members residing on the JUA to relocate from lands partitioned to the other Tribe. The Settlement Act also created a federal agency – then known as the Navajo and Hopi Indian Relocation Commission and now known as ONHIR – to pay for the major relocation costs for households required to relocate. *See Clinton*, 180 F.3d at 1084; *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121 (9th Cir. 1989). Thus, ONHIR is an independent federal agency responsible for providing relocation benefits under the Settlement Act to each eligible "head of household whose household is required to relocate." 25 U.S.C. § 640d-14(b). ONHIR's final decisions on eligibility for relocation benefits are subject to judicial review under the APA in the Arizona District Court. *Id.* § 640d-14(g).

In enacting the Settlement Act, Congress was concerned only with relocation of households actually displaced by the partition and authorized the provision of benefits for "the head of each household whose household is required to relocate," not to each individual member of a household. *See, e.g.* § 640d-14(a), (b), (d). Congress did not intend that the Act's relocation benefit provisions "establish an Indian claims settlement program." *See* U.S. Gov't Accountability Off., GAO-B-203827 at 1 (Dec. 14, 1981) (1981 GAO Report).

The Settlement Act "authorized and directed" ONHIR "to relocate . . . all households and members thereof and their personal property, including livestock, from any lands partitioned to the Tribe of which they are not members." *Id.* § 640dl-13(a). The Settlement Act further directs ONHIR to "purchase from the head of each household whose household is required to relocate … the habitation and other improvements owned by him on the area from which he is required to move,", *id.* § 640d-14(a); to reimburse each household "the actual reasonable moving expenses of the household as if the household members were displaced person" under Section 202 of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, *id.* § 640d-14(b)(1); and to pay for the

cost of a "replacement dwelling" for each head of household whose household is required to relocate, *id.* § 640d-14(b)(2).

The "replacement dwelling" is the primary relocation benefit. The Settlement Act specifies that the amount paid for the replacement dwelling is the "fair market value of the habitation and improvements owned by the head of household purchased" by the agency, plus the additional amount necessary to equal the "reasonable cost of a decent, safe, and sanitary replacement dwelling adequate to accommodate" the household, capped at various dollar amounts by household size. *Id.* § 640d-14(b)(2).

2. ONHIR Regulations and the "Head of Household" Standard

ONHIR has promulgated regulations that establish the eligibility requirements for relocation benefits. To qualify for relocation benefits under those regulations, an applicant must satisfy two requirements: (1) the applicant must have been a resident – on December 22, 1974 – of land partitioned to the Tribe of which the applicant is not a member, 25 C.F.R. § 700.147(a); and (2) the applicant must have continued to be a resident of land partitioned to the other Tribe when the applicant became a "head of household," *id.* §§ 700.147(e), 700.69(a)(2), 700.69(c). 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." 25 C.F.R. §§ 700.69(c) and 700.147(e).The applicant has the burden of proving both residence and head of household status. *Id.* § 700.147(b).

A "household" is defined by ONHIR regulation, 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). Section 700.69 of the regulation defines "head of household" as "that individual who speaks on behalf of the members of the household and who is designated by the household members to act as such." 25 C.F.R. § 700.69(b). An unmarried applicant qualifies as a "head of household" when he or she: (i) gets married (25 C.F.R. § 700.69(a)(1)), (ii) becomes a parent (*id.*), or

(iii) "***actually maintain[s] and support[s] herself/herself***," (*id.* § 700.69(a)(2)) (emphasis added).

ONHIR's binding regulations or policies do not identify a specific dollar amount an applicant must have earned to qualify as "self-supporting." Instead, the binding regulation requires that the applicant prove that he or she "actually maintained and supported him/herself," whatever his/her wages. *See* 25 C.F.R. § 700.69(a)(2). ONHIR, however, has held that an applicant who earned at least $1,300 per year can make a *prima facie* showing of self-supporting status. *See Benally v. Office of Hopi Indian Relocation*, NO. 13-cv-8096-PCT-PGR, 2014 U.S. Dist. LEXIS 16319, at *3 (D. Ariz. Feb. 10, 2014).

D. Ms. George Did Not Carry Her Burden to Establish that She Attained Head of Household Status at Any Time Before July 7, 1986

1. Ms. George Failed to Establish that She Actually Supported Herself

Ms. George failed to produce credible evidence that she actually supported herself while she was an alleged resident of the HPL. 25 C.F.R. §§ 700.69(a)(2), (c); 700.181(a). In fact, while she was living in her sister's house in Flagstaff from May 1985 to June 1986, she did not pay rent or buy her own food. From this, the Hearing Officer could reasonably conclude that Ms. George did not "actually maintain and support herself." 25 C.F.R. § 700.69(a)(2).

Whether the applicant "actually maintained and supported him/herself" is determinative.[3] *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

[3] 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").

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.

Here, Ms. George left home and moved in with her sister until June 1986 (just one month before the cutoff date), where she paid no rent and did not buy her own food. Under *Benally*, she did not actually support herself and therefore did not attain head of household status.

2. Ms. George Did Not Establish That She Earned $1,300.00 In Any Year Prior to July 7, 1986

Even if Ms. George was only required to prove that she earned $1,300.00 prior to leaving the HPL, she did not meet this burden. The Hearing Officer correctly determined that Ms. George's testimony of undocumented income from the alleged sale of her brother-in-law's Kachina dolls between May 1985 and June 1986 was not credible because it was uncorroborated by *any* documentation – either supporting sales or the existence of the business at all. ONHIR has always been permitted to require documentation of wages in circumstances like Ms. George's. *See, e.g.*, *Benally*, 2014 U.S. Dist. LEXIS 16139, at *7 (holding that the applicant did not meet his burden when his claimed earnings were "totally unsupported by contemporaneous documentation."); *Fred Begay v. Office of Navajo & Hopi Indian Relocation*, No. 16-cv-08268-PCT-DJH, ECF No. 66 at 7 (D. Ariz. March 30, 2018) (upholding ONHIR's denial of benefits, in part, "[b]ecause there are no records of

[applicant's] purported income."). Otherwise, the applicant's burden becomes perfunctory and 25 C.F.R. § 700.147(b) becomes meaningless.

Ms. George implies that the Hearing Officer should accept all testimony regarding undocumented wages. To support his interpretation, Ms. George relies on an unpublished 1989 internal ONHIR legal memorandum written by ONHIR's former counsel, Susan Crystal (the "**Crystal Memo**"). *See* George MSJ, at p. 4, and Exhibit A thereto. Ms. George's reliance is misplaced. First, the Crystal Memo is not official policy that ONHIR must follow. Second, Ms. George's interpretation 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 Ms. George and the type of work in which she was allegedly engaged. The Crystal Memo supports consideration of undocumented income for "older" Navajos engaged in a "traditional lifestyle" on the Reservation (*i.e.*, moving seasonally from one camp to another, usually for grazing purposes), 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 brother-in-law who makes Kachina dolls, allegedly earned by a person not engaged in a traditional Navajo lifestyle and living in an apartment in Flagstaff.

Ms. George also relies on an outdated 1989 ONHIR Management Manual. *See* Exhibit B to the George MSJ. ONHIR objects to this exhibit. This document is outside the administrative record and is immaterial.

The Hearing Officer's decision to require some kind of "paper proof" does not arise out of his "personal bias", as Plaintiff wrongly suggests. *See* George MSJ, at p. 11. It is both reasonable and consistent with sound policy and District Court decisions, and should therefore be upheld.

3. The Hearing Officer Did Act Arbitrarily by Failing to "Annualize" Plaintiff's Documented Income Throughout 1986

In a novel (though unsupported) attempt to qualify as a head of household, Ms. George argues that her documented wages of approximately $1,074.85 from January 1, 1986 through July 7, 1986, exceeds the $1,300.00 threshold if annualized throughout the entire year. *See* George MSJ, at p. 8 ("[I]f there is a presumption of self-sufficiency through $1,300.00 of income in a 365-day period, the applicant should not have to show $1,300.00 of income in 187 days. In the first 187 days of 1986, the applicant's burden was to show income of $665.72.")

As a threshold matter, Plaintiff failed to raise this argument below and has therefore waived it. *Zara v. Ashcroft,* 383 F.3d 927, 930 (9th Cir. 2004) ("We have held that '[f]ailure to raise an issue in an appeal to the [agency] constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter.'"). Regardless, this argument ignores the fact that July 7, 1986 is a cutoff date by which Plaintiff must have attained head-of-household status. As such, post-cutoff income (potential or realized) cannot be considered to qualify an applicant for head-of-household status. Nor may the $1,300 threshold be pro-rated to account for a shortened year. Such a rule would functionally shift the cutoff date from July 7, 1986 to December 31, 1986[4]. The Court should reject this argument outright.

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[4] Applicants must establish head of household status by the time they move off of the HPL or July 7, 1986 – whichever is earlier. 25 C.F.R. §§ 700.69(c) and 700.147(e). Under Ms. George's "annualized income" argument, an applicant who left the HPL on January 31, 1986 would have to establish a little over *$108.00* income for the month of January to prove that, if annualized, his 1986 income would exceed $1,300.00. This approach is inconsistent with the underlying purpose of the July 7, 1986 cutoff date – to provide a hard and fast deadline by which applicants must establish head-of-household status. It would also require hearing officers and courts to engage in significant speculation regarding an applicant's potential, post-cutoff income.

E. The Hearing Officer's Credibility Findings Were Supported by Specific, Cogent Reasons

Plaintiff complains that the Hearing Officer erred when he found Plaintiff's testimony lacked credibility. Plaintiff 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)). Nevertheless, 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 set forth specific and cogent reasons for his findings. Those findings are entitled to substantial deference. The fact that Plaintiff disagrees with the Hearing Officer's findings is insufficient to overcome the deference granted to the Hearing Officer. The Hearing Officer's decision should be upheld.

F. The Court Should Not Consider Exhibit C to Plaintiff's MSJ.

Plaintiff also attempts to support her argument by attaching incomplete records from an unrelated non-party. *See* Exhibit C to Plaintiff's MSJ. The Court should not consider Exhibit C because, among other reasons: (i) it is not contained within the CAR; (ii) it is incomplete[5];(iii) it was not before the Hearing Officer at the time of his decision regarding

[5] Agency decisions cannot be evaluated without the benefit of the full corresponding administrative record. Here, Plaintiff does not (and should not) attach the full administrative record related to the applicant in Exhibit C. The value of this documents is severely limited.

Plaintiff; (iv) its precedential value is questionable[6]; and (v) it is immaterial to Plaintiff's case. *See, supra*, Section III; *see also Fence Creek*, 602 F.3d at 1131 (refusing to consider records from 25 unrelated nonparties because they were outside the administrative record).

V. MS. GEORGE'S REMEDIES ARE LIMITED TO REMAND

Finally, Ms. George improperly requests relief beyond remand. *See* Complaint p. 10. 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, if the Court finds that the Hearing Officer erred, the Court should remand.

VI. CONCLUSION

Based on the foregoing, the Court should uphold the Hearing Officer's Decision, deny Plaintiff's MSJ, and grant summary judgment in favor of ONHIR.

DATED: November 13, 2018.

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s/Peter M. Lantka
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[6] *See, e.g.*, *Alphonsus v. Holder*, 705 F.3d 1031, 1046 (9th Cir. 2013) (rejecting the binding nature of "an unpublished, non-precedential opinion" of an agency); *Seattle Area Plumbers v. Washington State Apprenticeship & Training Council*, 129 P.3d 838, 847 n.10. (Wash. App. 2006), *as amended* (May 16, 2006) (refusing to bind agency to prior decisions because they did not establish precedent).

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, 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 registrants:

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