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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Annabelle Begay,

Plaintiff,

vs.

Office of Navajo and Hopi Indian Relocation, an administrative agency of the United States,

Defendant.

Case no. 3:20-cv-08057-DJH

DEFENDANT ONHIR'S (I) RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, and (II) CROSS-MOTION FOR SUMMARY JUDGMENT

Through this Response and Cross-Motion, Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**") (i) opposes Plaintiff Annabelle Begay's ("**Plaintiff**") *Motion for Summary Judgment* (Doc. 11) (the "**MSJ**"), and (ii) requests that 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 following 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 ("**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, 25 CFR Part 700 and official ONHIR policy, the ONHIR Management Manual and ONHIR Policy Memoranda. The primary Relocation Benefit is a replacement dwelling. 25 U.S.C. § 640d-14. To qualify for Relocation Benefits, Plaintiff had the burden of proving, among other elements, that she was a resident of the Hopi Partitioned Lands ("**HPL**") as of 1982 when it was stipulated she attained "Head of Household" status (described below). 25 C.F.R. §§ 700.69(c) and 700.147(e).

Plaintiff did not meet her burden of proof to establish her eligibility for Relocation Benefits. The evidence revealed that Plaintiff moved away from her home on the HPL prior to 1982. Accordingly, ONHIR's Independent Hearing Officer ("**IHO**") concluded that Plaintiff failed to meet her burden and upheld ONHIR's decision to deny Plaintiff Relocation Benefits. Under the Administrative Procedures Act ("**APA**"), the IHO's fact-based conclusions are entitled to deference.

Yet, Plaintiff wants this Court to ignore such deference. Instead, she asks this Court to reverse ONHIR's denial of Relocation Benefits based on the IHO's consideration of and reliance on materials Plaintiff characterizes as "extra-record evidence". (MSJ, at 2-3)

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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 November 1, 2019). 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 November 1, 2019). 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 November 1, 2019); *see also* OLRC's FAQ page, http://uscode.house.gov/faq.xhtml (last visited November 1, 2019).

Plaintiff's argument fails for several reasons. First, the so-called "extra-record evidence" was not "extra" at all – it was timely submitted by ONHIR and properly considered by the IHO, and therefore forms part of the CAR. Second, Plaintiff had access to these materials below through several avenues and had actually reviewed these materials and was thus not prejudiced by the IHO's reliance on these materials in his decision. Third, the IHO's decision was based on several facts in the CAR – not solely on the materials Plaintiff claims were outside the CAR. For these reasons, the Court should uphold ONHIR's denial of Relocation Benefits to Plaintiff.

II. RELEVANT FACTUAL BACKGROUND

Plaintiff – an enrolled member of the Navajo Nation – was born on December 8, 1960. (CSOF ¶ 1) Plaintiff's parents lived in the Howell Mesa area of the Coalmine Chapter, in an area that later became the HPL. (CSOF ¶ 2) Plaintiff's parents received Relocation Benefits, and received their relocation home in Tuba City, Arizona (which is not on the HPL), in 1990. (CSOF ¶ 3) While living in the Coalmine Chapter, Plaintiff's family had a "shack" located near their relatives Nelson and Sally Williams. (CSOF ¶ 4)

Plaintiff's father, Roger Begay, built a home in Tuba City when Plaintiff was approximately three (3) years old. (CSOF ¶ 5) Plaintiff attended school in Tuba City through high school, from which she graduated in 1980. (CSOF ¶ 6) After she graduated high school, Plaintiff babysat for various relatives in Tuba City. (CSOF ¶ 7) She testified that she lived at their houses during the week, but that she returned to Coalmine on the weekends, or sometimes in the evenings. (CSOF ¶ 8) Plaintiff produced no supporting documentation indicating how much money she earned from babysitting. (CSOF ¶ 9) In the spring of 1982, Plaintiff began working for the Navajo Nation Water Resources Office in Tuba City. (CSOF ¶ 10) She testified that she commuted to this job with her father from her home in Coalmine. (CSOF ¶ 11) Plaintiff worked for Water Resources until the fall of 1983, when she began attending Haskell College. (CSOF ¶ 12) Plaintiff reported earnings of $3,008.00 for her work at Water Resources during 1982. (CSOF ¶ 13)

On April 23, 2009, Plaintiff filed her Application for Relocation Benefits with ONHIR (the "**Application**"). (CSOF ¶ 14) In her Application, Plaintiff listed 1990 as the year when she moved off of the HPL to Tuba City. (CSOF ¶ 15) On March 27, 2012, ONHIR denied Plaintiff's Application. (CSOF ¶ 16) ONHIR noted that the reason for its denial was that "**ONHIR records indicate that you and your father Roger Begay, Sr. moved off of the HPL in 1979**." (CSOF ¶ 17) (emphasis added). On April 24, 2012, Plaintiff appealed ONHIR's denial of Relocation Benefits. (CSOF ¶ 18)

On June 18, 2012, attorney Susan I. Eastman (counsel for Plaintiff in this case), for the Navajo-Hopi Legal Services Program ("**NHLSP**"), entered her appearance on behalf of Plaintiff for her appeal of ONHIR's denial of Relocation Benefits. (CSOF ¶ 19) NHLSP had represented Plaintiff's father, Roger Begay, at his hearing related to his separate application for Relocation Benefits. (CSOF ¶ 20) On June 5, 2013 (prior to the hearing, but after NHLSP's appearance on behalf of Plaintiff), Ms. Eastman visited ONHIR's offices to "review[] the file of Roger Begay, Sr. pursuant to a FOIA request." (CSOF ¶ 21) In a follow up e-mail from Ms. Eastman to ONHIR, Ms. Eastman requested the hearing transcript and decision from Roger Begay's case file. (CSOF ¶ 22) ONHIR responded to Ms. Eastman's request by providing the requested documents on July 22, 2013 – prior to Plaintiff's hearing. (CSOF ¶ 23)

The IHO set Plaintiff's hearing for March 21, 2013, which was later rescheduled to November 8, 2013. (CSOF ¶ 24) At the hearing, Plaintiff and ONHIR stipulated that Plaintiff became a Head of Household (defined below) in 1982. (CSOF ¶ 25) Plaintiff testified at the hearing that she did not move off of the HPL until approximately 1990. (CSOF ¶ 26) Roger Begay testified at Plaintiff's hearing, stating: (1) that he had always been a member of the Coalmine Chapter; (2) that he lived in Coalmine (on the HPL) until he moved into his relocation home in 1990; and, (3) that he had livestock in Coalmine while Plaintiff was working. (CSOF ¶ 27) During the hearing, Ms. Eastman introduced portions of Roger Begay's case file into evidence (CSOF ¶ 28)

At the conclusion of the hearing, the IHO held the matter open for two weeks to permit either party to file a written Post Hearing Memoranda. (CSOF ¶ 29) The IHO later **extended the parties' submission deadline to December 13, 2013**, on which date the parties simultaneously submitted post-hearing briefs. (CSOF ¶ 30) (emphasis added) In ONHIR's Post Hearing Brief, it acknowledged that the sole issue for the IHO's determination was whether Plaintiff was a resident of the HPL in 1982 when she attained Head of Household status. (CSOF ¶ 31) ONHIR further acknowledged that Plaintiff's and Roger Begay's testimony at Plaintiff's hearing was, essentially, that Plaintiff had "substantial and recurring contacts with the HPL through 1982." (CSOF ¶ 32)

ONHIR then cited to materials from Roger Begay's file which directly contradicted Plaintiff's and Roger Begay's testimony at Plaintiff's hearing. (CSOF ¶ 33) After pointing out that NHLSP represented Roger Begay, ONHIR stated that "[o]ne of the first documents that NHLSP . . . submitted to ONHIR [during Roger Begay's hearing] was an Affidavit of Roger Begay sworn to on May 19, 1986" (the "**Roger Begay Affidavit**"). (CSOF ¶ 34) ONHIR went on to provide a direct quote from Roger Begay stating that he and has family "lived full time at this homesite [on the HPL] **until approximately 1979 when we moved to Tuba City**." (CSOF ¶ 35) (emphasis added)

Next, ONHIR cited the joint affidavit of Nelson Williams and Sally Williams, which NHLSP provided to ONHIR during Roger Begay's hearing (the "**Williams Affidavit**"). (CSOF ¶ 36) The Williams Affidavit was executed on May 19, 1986, and states that Roger Begay and his wife and children lived with the Williams "until he moved to Tuba City approximately five years ago." (CSOF ¶ 37)

ONHIR went on to quote NHLSP's opening statement, made by counsel on behalf of Roger Begay at his hearing in 1986, stating: "I'd like to open by introducing my client, Roger Begay, who we believe has been a legal resident of Hopi Partition Lands from the date of his birth **until 1979** when Mr. Begay moved to the city for more or less a permanent basis." (CSOF ¶ 38) (emphasis added)

Finally, ONHIR quoted a portion of the transcript from Roger Begay's hearing, in which Roger Begay testified – under oath – that he got rid of his livestock and left the HPL in 1979 and moved to Tuba City. (CSOF ¶ 39)

The IHO issued his "Findings of Fact, Conclusions of Law and Decision" (the "**Decision**") on January 10, 2014, recommending that Plaintiff's request for Relocation Benefits be denied because Plaintiff was not a resident of the HPL in 1982. (CSOF ¶ 40) Ultimately, the IHO concluded that Plaintiff moved off of the HPL to Tuba City with her family in 1979. (CSOF ¶ 41) The IHO noted that he had read "the entire administrative file," and based his decision on the following evidence:

1. The presence of a residence in Tuba City that had been constructed for Plaintiff's family when Plaintiff was a small child, and Plaintiff's continuing use and occupation of that residence through high school;

2. Plaintiff's attendance in school at Tuba City until her graduation; and,

3. The Roger Begay Affidavit.

(CSOF ¶ 42)

The IHO also made Credibility Findings regarding the testimony of Plaintiff and Roger Begay. (CSOF ¶ 43) Noting the contradictions between the Roger Begay Affidavit and his 1986 testimony and Plaintiff's and Roger Begay's 2013 hearing testimony, the IHO found that Plaintiff and Roger Begay were not credible witnesses. (CSOF ¶ 44)

On January 30, 2014, Plaintiff filed a Motion for Reconsideration (the "**Motion for Reconsideration**"). (CSOF ¶ 45) Plaintiff's main argument in the Motion for Reconsideration was that ONHIR had not disclosed the Roger Begay Affidavit, the Williams Affidavit, the transcript from Roger Begay's hearing, or its intent to use these materials, prior to or during Plaintiff's hearing. (CSOF ¶ 46) Plaintiff also argued that the IHO failed to consider evidence Plaintiff submitted from the hearing for Annette Begay (Plaintiff's sister), who ONHIR certified for Relocation Benefits. (CSOF ¶ 47)

In response to the Motion for Reconsideration, ONHIR stated, in summary:

1. NHLSP represented both Plaintiff and Roger Begay;

2. Plaintiff's counsel reviewed Roger Begay's file prior to the hearing;

3. Plaintiff's counsel submitted portions of Roger Begay's file at Plaintiff's hearing; and,

4. ONHIR utilized the Roger Begay Affidavit and related hearing transcript for impeachment, which is exempt from disclosure.

(CSOF ¶ 48) On February 25, 2014, the IHO issued an "Order Re: Applicant's Request for Reconsideration of Hearing Officer's Decision" (the "**Order**"). (CSOF ¶ 49) The IHO denied the Motion for Reconsideration. (CSOF ¶ 50) The IHO reasoned that he could "take judicial notice of testimony given at a hearing before the undersigned involving applicant's father's application for relocation benefits." (CSOF ¶ 51) He further noted that Plaintiff's counsel had "obviously" examined Roger Begay's file because she used portions of his file at Plaintiff's hearing. (CSOF ¶ 52)

In addition, the IHO stated that "it would be incongruous to accept certain documents from Roger Begay's relocation file and reject others, especially since NHLSP represented both applicants, and portions of Roger Begay's file were presented to support his daughter's claim." (CSOF ¶ 53) (emphasis in original) The IHO went on to note that Roger Begay's own testimony (in the affidavit) "trumped" other evidence submitted by Plaintiff. (CSOF ¶ 54). Finally, the IHO stated that Plaintiff's presentation of testimony contrary to Roger Begay's sworn affidavit "borders on the perpetration of a fraud on this tribunal." (CSOF ¶ 55)

Based on the IHO's recommendation, ONHIR issued final agency action on March 21, 2014. (CSOF ¶ 56) Over five years later, Plaintiff filed this appeal.

III. PLAINTIFF HAS NOT MET HER BURDEN TO ESTABLISH THAT THE IHO'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 factfinder, 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." 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 be only a reasonable, not the best or most reasonable, decision."

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 mere 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 Regulations Governing Eligibility for Relocation Benefits

1. The 1974 Settlement Act

In 1974, after decades of failed efforts at joint use by members of the Navajo Nation and Hopi Tribe of lands in northern Arizona held in trust by the United States and known as the "Joint Use Area," or "JUA," Congress authorized the judicial partition of lands through the Navajo and Hopi 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). *See generally Clinton v. Babbitt*, 180 F.3d 1081, 1084 (9th Cir. 1999). The District Court for the District of Arizona partitioned the lands in 1977, allocating approximately 900,000 acres (known as the "Hopi Partitioned Lands," or "HPL") to the Hopi Tribe and approximately 900,000 acres (known as the "Navajo Partitioned Lands," or "NPL") to the Navajo Nation. The Court of Appeals approved the partition in *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980).

The Settlement Act required tribal members residing in the JUA to relocate from lands partitioned to the other tribe. The 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 a 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 District Court for the District of Arizona. *Id.* § 640d-14(g).

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.* § 640d-13(a). The 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 head of household "the actual reasonable moving expenses of the household as if the household members were displaced persons" 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

ONHIR has promulgated regulations that establish the eligibility requirements for Relocation Benefits. Under those regulations, an applicant must satisfy two requirements in order to qualify for Relocation Benefits: (1) the applicant must have been a resident of land partitioned to a 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). The burden is on the applicant to prove both residency and head of household status. *Id.* § 700.147(b).

i. Residency

The regulations provide that "residence" is established "by proving that the head of household and/or immediate family were legal residents." *Id.* § 700.97; *see also id.* § 700.69 (defining "household" and "head of household"). In the preamble to the regulation, ONHIR explains that "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." The Ninth Circuit recently affirmed that "[t]he correct standard [for residency] is 'intent to reside combined with manifestations of that intent'". *Charles v. Office of Navajo & Hopi Indian Relocation*, No. 17-17258, at *2 (9th Cir. May. 28, 2019).

49 Fed. Reg. 22,227 (May 29, 1984). The preamble sets out a non-exclusive list of indicia that ONHIR will examine "in assessing an applicant['s] manifestations of intent to maintain legal residence in the partitioned lands," including: ownership of livestock, ownership of improvements, grazing permits, livestock sales receipts, homesite leases, public health records, school records, military records, employment records, mailing address records, banking records, driver's license records, tribal and county voting records, home ownership or rental off the disputed area, Social Security Administration records, Joint Use Area Roster, and other relevant data. 49 Fed. Reg. at 22, 278.

ii. The "Head of Household" Standard

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 becomes one of the following: (i) married, (ii) a parent , or (iii) one who "actually maintain[s] and support[s] himself/herself" I*d.* at (a)(1) and (a)(2)).

D. The IHO's Decision Was Not Arbitrary and Capricious or Unsupported by Substantial Evidence

In the MSJ, Plaintiff argues that the IHO's Decision was arbitrary and capricious for three reasons: (1) he relied on "extra-record evidence" and ignored "properly and timely-disclosed evidence"; (2) he based his Credibility Findings on the same "extra-record evidence"; and, (3) he was precluded from denying Plaintiff's application by virtue of ONHIR's earlier decision to certify Plaintiff's sister as eligible for Relocation Benefits. (MSJ, at 3-4) Plaintiff is mistaken. For the reasons set forth below, the Court should affirm the IHO's Decision and grant summary judgment in favor of ONHIR.

1. The Disputed Materials Were Not "Extra-Record" – They Are Properly Part of the CAR

Plaintiff's quarrel is with the IHO's reliance on the following documents: (1) the Roger Begay Affidavit; (2) portions of the transcript of Roger Begay's 1986 administrative hearing; and, (3) the Williams Affidavit (together, the "**Disputed Documents**"). (MSJ, at 8-9) At bottom, Plaintiff argues that ONHIR did not disclose the Disputed Documents or its intent to use them prior to or during Plaintiff's hearing, and that the IHO's reliance on them is, therefore, arbitrary and capricious. *Id.*

For support, Plaintiff cites 25 C.F.R. § 700.313, which governs procedure for administrative hearings conducted under the Settlement Act, and 5 U.S.C. § 556, which governs procedure for hearings under the APA. (MSJ, at 6-7) Neither statute helps Plaintiff. Rather, both statutes directly validate the IHO's consideration of and reliance on the Disputed Documents in rendering the Decision.

Under 25 C.F.R. § 700.313, the IHO is empowered to "[r]eceive relevant evidence." *Id.* He is also empowered to "[h]old the record open for submission of evidence no longer than fourteen days after completion of the hearings." *Id.* He may extend this deadline . . . for good cause shown. *Id.* Here, the IHO expressly left the record open for the submission

of post-hearing briefs. (CSOF ¶ 25) The IHO later **extended the parties' submission deadline to December 13, 2013**, on which date the parties simultaneously submitted post-hearing briefs. (CSOF ¶ 26) It was in its Post-Hearing Brief that ONHIR cited to the Disputed Documents. ONHIR's submission of the Disputed Documents by the extended deadline thus fell within the window the IHO set for the submission of additional evidence, under 25 C.F.R. § 700.313. As a result, the Disputed Documents are not "extra-record evidence" as Plaintiff suggests.

Plaintiff fares no better under 5 U.S.C. § 556(e), which defines the "exclusive record" as "[t]he transcript of testimony and exhibits, **together with all papers and requests filed in the proceeding** . . . ." *Id.* (emphasis added). In this case, ONHIR's Post-Hearing Brief is a document that was "filed in the proceeding", and therefore constitutes a proper part of the CAR on which the IHO could rely. This analysis also comports with Ninth Circuit precedent governing this Court's review of the administrative record. In reviewing agency actions, "this Circuit has concluded that the 'whole administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers . . . .'" *Arizona Rehabilitation Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 266 (D. Ariz. 1998) (citing *Thompson v. United States Department of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)) (emphasis in original).

Not only were the Disputed Documents properly before the IHO, but he also clearly considered them (directly or indirectly) in rendering his Decision. As such, this Court can and should include the Disputed Documents in its whole record review of whether the IHO's Decision was arbitrary and capricious, or not supported by substantial evidence.

2. Plaintiff Was Not Prejudiced By the Disputed Documents.

As set for the above, the Disputed Documents form a proper part of the CAR, were properly considered by the IHO as part of the grounds for his Decision and should be considered by this Court as a result. In addition, the post-hearing introduction of the Disputed Documents below did not materially prejudice Plaintiff.

Plaintiff's counsel worked at the same law firm that represented her father, Roger Begay. As such, Plaintiff's attorney had access to Roger Begay's file, and in fact filed a FOIA request and reviewed his file prior to Plaintiff's hearing. Tellingly, Plaintiff's attorney has never alleged that she was unaware of the Disputed Documents, and the CAR highlights why Plaintiff could not support such a claim – Plaintiff's attorney had its own copy of Roger Begay's file, reviewed ONHIR's copy of Roger Begay's file, and introduced portions of his file during Plaintiff's Hearing. To suggest that the Disputed Documents somehow caught Plaintiff by surprise[2] strains credulity. Plaintiff was given an opportunity to argue against their consideration and to submit contradictory evidence. The IHO weighed *all* of the material submitted from Roger Begay's file, and determined that Plaintiff's and Roger Begay's testimony at Plaintiff's hearing was not credible based on Roger Begay's previous, sworn testimony to the contrary. This Court need not determine whether the IHO could have made another decision – it only needs to determine whether the IHO's consideration of the Disputed Documents, and his Decision (which was based on the Disputed Documents *and other facts introduced at the hearing*) was reasonable. *Burford*, 871 F.2d at 855. The Decision was reasonable and should therefore be upheld.

3. The IHO Could Take Official Notice of the Disputed Documents.

Plaintiff argues that IHO improperly took "judicial notice" of the Disputed Documents. (MSJ, at 9-10) Plaintiff is, again, mistaken. An administrative law judge's ability to take official notice is governed by 5 U.S.C. § 556 (e), which states: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." *Id.* Here, any official notice taken by the IHO was proper. First, his Decision did not rest on a "material fact not appearing in the evidence in record" because ONHIR disclosed the substance of the Disputed Documents within the window set by the IHO for the submission

[2] In addition, ONHIR's Denial of Plaintiff's Application for Relocation Benefits states that the basis for its denial was that its own records revealed a move-off date of 1979 for Plaintiff's family. (CSOF ¶ 15) Plaintiff does not, and cannot, contest that the Denial is properly part of the CAR.

of post-hearing evidence. In any event, Plaintiff was given "an opportunity to show the contrary" through the Motion for Reconsideration (where, tellingly, she did not dispute the substance of the Disputed Documents). Plaintiff disagrees with the Order denying the Motion for Reconsideration, but that does not mean she was not given an opportunity to contest the IHO's reliance on the Disputed Documents.

4. The Hearing Officer's Credibility Determinations are Entitled to Deference.

"'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)). Deference is appropriate because the trial judge is actually present during the testimony:

> [The ALJ] 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 an [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 an [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 IHO explained the reasons for his adverse credibility findings against Plaintiff and Roger Begay. Namely, the IHO relied on the Disputed Documents, which directly contradicted Plaintiff's and Roger Begay's sworn testimony at Plaintiff's hearing. The IHO's reliance on the Disputed Documents was reasonable, as Roger Begay's recollection of relevant events in 1979-1982 was much fresher in 1986 (the date of the affidavit) than it was in 2013 when he testified at Plaintiff's hearing. Contrary to Plaintiff's assertions, the Disputed Documents are properly part of the CAR, and the IHO's reliance on them in rendering his Credibility Determinations was proper.

5. The Doctrines of Claim Preclusion and Issue Preclusion Did Not Bar the IHO From Denying Relocation Benefits to Plaintiff

In the MSJ, Plaintiff argues that ONHIR was "precluded from relitigating the issue of the continued occupancy of the Coalmine homesite by the Begay family" because, according to Plaintiff, that issue was conclusively determined (in Plaintiff's favor) when ONHIR certified Plaintiff's sister, Annette Begay, for Relocation Benefits in 1994. (MSJ, at 14-15)

First, Plaintiff cannot employ collateral estoppel (issue preclusion) offensively against ONHIR. *United States v. Mendoza*, 464 U.S. 154 (1984) ("[T]he doctrine of nonmutual offensive collateral estoppel, under which a nonparty to a prior lawsuit may make 'offensive' use of collateral estoppel against a party to the prior suit, is limited to private litigants and does not apply against the Government").

Even if Plaintiff could employ issue preclusion against ONHIR, it does not apply in this case. "Issue preclusion bars the re-litigation of issues actually adjudicated in previous litigation *between the same parties*." *Littlejohn v. U.S.*, 321 F.3d 915, 923 (9th Cir. 2003) (emphasis added). A litigant invoking issue preclusion must show: (1) the issue at stake is identical to an issue raised in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id.* The Supreme Court has expanded on the "actually litigated" requirement by recognizing that "issue preclusion is inappropriate where the parties have not had a full and fair opportunity to litigate the merits of an issue." *Id.* (citing *Allen v. McCurry*, 449 U.S. 90, 94-95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)).

Here, Plaintiff has introduced no facts or law supporting the proposition that the IHO was required to give preclusive effect to a prior determination regarding her sister's eligibility for Relocation Benefits. First, the two hearings at issue here (those of Annette Begay and Plaintiff) did not involve the "same parties." *Id.* Second, the issues in both hearings were *not* identical. In Annette Begay's hearing, the focus naturally was on *her*

residency on the HPL. Here, the focus was on *Plaintiff's* residency. As such, Plaintiff's insistence that the IHO had to treat Plaintiff's case, evidence, and issues, the exact same way that he treated those in Annette Begay's case, does not comport with the doctrine of issue preclusion.

Nor does the doctrine of claim preclusions help Plaintiff. "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). The doctrine is applicable whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *Id.* Plaintiff does not (and cannot) seriously contend that Plaintiff's application for Relocation Benefits is "barred" by her sister's prior hearing. Nor could she argue that there is "identity" or "privity" between the sisters' separate applications for Relocation Benefits. The doctrines of issue preclusion and claim preclusion pose no bar to the IHO's Decision or ONHIR's final agency action denying Plaintiff Relocation Benefits.

IV. PLAINTIFF'S REMEDIES ARE LIMITED TO REMAND

Plaintiff improperly requests relief beyond remand. (MSJ at 18) Remand 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). "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 IHO erred, the Court should remand.

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V. CONCLUSION

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

Respectfully submitted this 5th day of November, 2020.

MICHAEL BAILEY
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District of Arizona

s/Peter Lantka
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Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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