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

Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**" or "**Defendant**"), hereby files this Reply in further support of Defendant's *Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment* [Docket No. 19] (the "**Cross-Motion**")[1] and in reply to Plaintiff's response and reply [Docket No. 21] ("**Plaintiff's Response**"). Through the Cross-Motion, Defendant (i) objects to Plaintiff's *Motion for Summary Judgment* [Docket No. 11] ("**Plaintiff's MSJ**"), and (ii) moves for the entry of summary judgment in favor of Defendant.

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

Plaintiff's Response is more noteworthy for what it concedes than for what it argues. First, Plaintiff concedes that she had access to the information in the Disputed Documents prior to Plaintiff's hearing and that her law firm represented Roger Begay. Second, Plaintiff goes to great lengths to avoid addressing an obvious and inconvenient fact: that the Disputed Documents – including Roger Begay's Declaration – unequivocally contradict Mr. Begay's testimony at Plaintiff's hearing regarding the date Plaintiff moved off of the HPL.

Faced with these undisputed facts, Plaintiff argues that the IHO's reliance on the Disputed Documents was arbitrary, capricious, and prejudicial for three primary reasons: (1) ONHIR submitted the Disputed Documents after the record was closed; (2) the IHO did not properly take "official notice" of the Disputed Documents; and (3) ONHIR was precluded by the doctrine of collateral estoppel from litigating the issue of when Plaintiff moved off of the HPL.

These arguments fail. The IHO did not formally close the record – he held the matter open for fourteen days, which he later extended, and received and considered post-hearing evidence in rendering his decision, which complies with 25 C.F.R. § 700.313. Nor did he improperly take official notice of the Disputed Documents. Plaintiff argues that the IHO took notice of a disputed matter – *i.e.*, when Plaintiff moved off the HPL. (Plaintiff's Response, at 12.) This is inaccurate. The IHO took official notice of the *existence* and *contents* of the Disputed Documents (not in dispute), then weighed their contents in rendering his decision. This approach complied with the requirements of 5 U.S.C. § 556(e).

Further, Plaintiff's attempt to employ collateral estoppel against ONHIR, and circumvent the unambiguous holding in *United States v. Mendoza*, 464 U.S. 154 (1984), is confusing and unpersuasive. *Mendoza* holds that nonmutual offensive collateral estoppel may not be used against the government. *Id.* Plaintiff concedes this point but relies on a case involving *private parties* and analyzing *privity* (not mutuality) to argue that Plaintiff did not need to prove residency under the Act because ONHIR certified her sister for

Relocation Benefits. In reality, the IHO was not bound by ONHIR's certification of Plaintiff's sister. Collateral estoppel does not apply.

For these reasons, the Court should enter summary judgment in favor of ONHIR.

I. Plaintiff Was Not Prejudiced By the IHO's Reliance On the Disputed Documents.

Plaintiff admits that her counsel "examined Roger Begay's file pursuant to a FOIA request" and that the same law firm "represented Roger Begay in his 1986 appeal before ONHIR." (Plaintiff's Response, at 10.) In fact, Plaintiff concedes that she was not "surprised" by the Disputed Documents. (*Id.*) Despite having a full knowledge of the Disputed Documents and their contents, however, Plaintiff argues that she was prejudiced because she could not "explain any discrepancies *at* her hearing when the witnesses were present and available for cross-examination by ONHIR." (*Id.*) (emphasis in original).

Plaintiff fails to explain how she was materially prejudiced by submitting her explanations in the form of a motion for reconsideration, rather than through live testimony at the hearing. In her Motion for Reconsideration, Plaintiff cited to "specific documents from Roger Begay's file demonstrating his continued [HPL] residency beyond 1982." (CAR 295.) These documents included some of the evidence Plaintiff cites on page three of Plaintiff's Response, including: (1) a 1983 Coalmine Chapter Resolution; (2) an affidavit from Bernard Phillips; and (3) a 1989 Quitclaim Deed. (CAR 295.) Presumably, these would have been the documents to which Plaintiff or Mr. Begay would have referred at the hearing to explain any inconsistencies. Indeed, how Plaintiff could have explained-away the impact of the Disputed Documents at all is a serious question. In the Roger Begay Affidavit, Mr. Begay states in no uncertain terms that he left the HPL for Tuba City in 1979. (CSOF ¶ 35.) To explain how this was not true, Mr. Begay either would have had to admit to being untruthful (thereby damaging his credibility) or to being mistaken (thereby also damaging his credibility).

Plaintiff also ignores the fact that in ONHIR's denial of Plaintiff's original application, ONHIR noted that the reason for its denial was that its records indicated that

Plaintiff and her "father Roger Begay, Sr. moved off of the HPL in 1979." (CSOF ¶ 17.) In other words, there was evidence in the record at the hearing indicating that Mr. Begay had left the HPL in 1979. The IHO's consideration of the Disputed Documents, which confirm ONHIR's basis as stated in its denial, was therefore not prejudicial to Plaintiff.

In reality, Plaintiff disagrees with the IHO's decision to give more weight to the Disputed Documents, but that does not mean she was deprived of a meaningful opportunity to explain the inconsistencies between Disputed Documents and Mr. Begay's testimony at Plaintiff's hearing.

II. ONHIR'S Post-Hearing Submission of Documents Complied with Applicable Statutes and Regulations Regarding Evidence and Procedure

In Plaintiff's Response, Plaintiff does not dispute that the IHO could have held the record open for fourteen days (or more) to allow for the submission of additional evidence, under 25 C.F.R. § 700.313. (Plaintiff's Response, at 5.) Rather, Plaintiff argues that the IHO closed the record at the end of the hearing. (*Id.*) A more expansive and fair reading of the CAR, however, suggests that the IHO did, in fact, hold the record open. First, at the conclusion of the hearing, the IHO stated that he would "hold this Matter open for a period of two weeks . . . ." (*Id.*) Second, the IHO did not explicitly close the record, or limit the parties post-hearing submissions to briefs, and not evidence. Third, his consideration of the Disputed Documents suggests that, by holding the "matter" open for additional time, he held the *record* open for additional time. Had he closed the record, he presumably would have said so, and not considered the Disputed Documents.

Moreover, Plaintiff's argument that "there is nothing in the Administrative Record to support ONHIR's claim that the IHO granted the parties an extension to submit post-hearing briefs" is incorrect. (Plaintiff's Response, at 5.) ONHIR noted in its Post-Hearing Brief that "[t]he time for both counsels to submit Post-Hearing Briefs was extended by Hearing Officer Merkow to December 13, 2013." (CAR 242.) While a formal order granting the extension is not in the CAR, the date Plaintiff submitted her Post-Hearing

Brief (signed December 12, 2013) suggests that the parties did, in fact, obtain an extension. (CAR 256.)

Plaintiff also argues that the IHO improperly applied the concept of "judicial notice" or "official notice" because he took official notice of "a disputed fact" – namely, the date Mr. Begay and his family moved off of the HPL. (Plaintiff's Response, at 12.) Plaintiff mischaracterizes the fact of which the IHO took official notice. The IHO did *not* take official notice of Plaintiff's move-off date. He took official notice of "testimony given at a hearing before the undersigned [IHO] involving applicant's father's application for relocation benefits." (CAR 360.) In other words, the IHO took official notice of the *fact* and *contents* of Mr. Begay's testimony at his own hearing, over which the IHO presided. Then, he weighed Mr. Begay's prior testimony (the contents of which are not disputed) against his testimony at Plaintiff's hearing, and the other evidence and arguments submitted by Plaintiff. He was entitled to do this and committed no error by doing so.

ONHIR's submission of, and the IHO's consideration of the Disputed Documents was not arbitrary and capricious.

III. Collateral Estoppel Does Not Apply in This Case

Plaintiff acknowledges that, under *Mendoza*, "nonmutual offensive collateral estoppel" does not apply against the government. (Plaintiff's Response, at 13.) However, she then argues that "if the party asserting offensive collateral estoppel is in privity with the party to the prior suit in which issue preclusion is sough then it is not 'non-mutual'". (*Id.*) Citing *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984), she argues that the Supreme Court has held that "mutual" collateral estoppel still applies when used against the government. (*Id.*) Finally, Plaintiff argues that she and her sister, Annette Begay, are "in privity" with each other, citing *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1997).

Plaintiff mixes and misapplies several concepts important to any analysis of collateral estoppel. "Offensive use of nonmutual collateral estoppel [which may not be used against the government under *Mendoza*] occurs when a plaintiff seeks to prevent a defendant from relitigating an issue that the defendant previously litigated unsuccessfully

against a different party." *Clymore v. Fed. R.R. Admin.*, No. 1:14-CV-101 AWI SMS, at *2 (E.D. Cal. Sep. 29, 2015). In *Stauffer*, the Supreme Court held that "the doctrine of *mutual defensive collateral estoppel* is applicable against the government to preclude re-litigation of the same issue already litigated against the same party in another case involving virtually identical facts." *Stauffer Chemical Co.*, 104 S. Ct. at 580 (emphasis added). As such, *Stauffer* not only addressed the use of *mutual* collateral estoppel, it also focused on *defensive* collateral estoppel – i.e., the instance where a defendant defends against a plaintiff's claim by invoking collateral estoppel. This version of estoppel (mutual defensive collateral estoppel) is entirely different than nonmutual offensive collateral estoppel – at issue here and in *Mendoza*. Plaintiff's reliance on *Stauffer* is therefore misplaced.

In addition, Plaintiff offers no support for her argument that "nonmutual" collateral estoppel becomes "mutual" when the party employing it is in privity with the party in the prior litigation. (Plaintiff's Response, at 13.) "The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *W.J. O'Neil Co. v. Shepley, Bullfinch, Richardson & Abbot, Inc.*, No. 11-12020, at *10 (E.D. Mich. Aug. 5, 2016). Put differently, "mutuality" exists where both parties are "bound by the same judgment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) Plaintiff does not, and cannot seriously contend that Plaintiff or ONHIR are "bound" by the results in Annette Begay's case.

Yet, Plaintiff argues that the version of collateral estoppel she seeks to employ is "mutual" because she and her sister are in "privity." (Plaintiff's Response, at 13.) Plaintiff relies on *Trevino* for support. However, *Trevino* is inapposite. In *Trevino*, it was the government that successfully argued that Trevino was collaterally estopped from re-litigating the issue of punitive damages. *Trevino*, 99 F.3d at 916. Furthermore, the court examined the "privity" issue not to determine mutuality, but to examine the second element of the collateral estoppel doctrine: "[T]hat the issue must have been actually litigated by the party against whom estoppel is asserted." *Id.* at 923. The court in *Trevino* examined

whether the plaintiff and a family member – the party "against whom estoppel was asserted" – were in privity. *Id.* Here, the party against whom estoppel is asserted is ONHIR – not Plaintiff or her sister. Plaintiff's attempt to link mutuality and privity by citing *Trevino* falls flat.

The policy set forth in *Mendoza*[2] prohibiting nonmutual offensive collateral estoppel against the government is sound and would be undermined by a holding that issues decided in one applicant's case preclude ONHIR from re-litigating similar issues for a different applicant. Each applicant's case is different, stemming for different facts and involving individual applicants' actions. The Court should reject Plaintiff's collateral estoppel argument.

IV. Plaintiff's Relief Is Limited To Remand

Plaintiff does not respond, with any substance, to ONHIR's argument that Plaintiff's relief (if any) is limited to remand. Rather, she simply requests that this Court "set aside Defendant's decision and grant summary judgment to Plaintiff." (Plaintiff's Response, at 15.) The Court should reject this request. Plaintiff ignores multiple cases holding that remand is the primary relief except in "rare circumstances"[3], which this case is not.

Therefore, to the extent the Court finds that the IHO erred, this case does not warrant any relief beyond remand. Moreover, remand would be consistent with the separation of powers intended by Congress in enacting the APA. This is not a procedural roadblock set

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[2] The Supreme Court set forth this policy as follows: "A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Mendoza*, 464 U.S. at 160.

[3] *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). 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).

up to thwart Plaintiff's efforts to collect money for her decades-old relocation; it is the system Congress established for agency review. Defendant respectfully requests that it be followed.

V. Conclusion

Based on the foregoing, ONHIR respectfully requests that the Court uphold the IHO's Decision and ONHIR's Final Agency Action, deny Plaintiff's MSJ and grant summary judgment in favor of ONHIR.

Respectfully submitted this 22nd day of December, 2020.

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s/Peter Lantka
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 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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