No. 23-15902

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANLEY BARTON,
Plaintiff/Appellant,

v.

OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION,
Defendant/Appellee.

Appeal from the United States District Court for the District of Arizona
No. 3:22-cv-08022 (Hon. Steven P. Logan)

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations and Federal Register Notices

INTRODUCTION

The Navajo–Hopi Land Settlement Act of 1974 ("Settlement Act") authorized the judicial partition between the Navajo Nation and the Hopi Tribe of the Joint Use Area, a region of Arizona reserved for those two Indian Tribes. Congress contemplated that the partition would leave some members of each Tribe residing on lands partitioned to the other Tribe, so the Settlement Act created a federal agency, now known as the Office of Navajo and Hopi Indian Relocation ("ONHIR"), to provide relocation benefits to each eligible "head of a household" who, as a result of the partition, resided on lands allocated to the other Tribe. To obtain relocation benefits, a claimant bears the burden of proving, among other things, that he resided on the land partitioned to the other Tribe at the time he became "head of household."

Plaintiff Manley Barton, a member of the Navajo Nation, applied to ONHIR for relocation benefits. After hearing testimony and reviewing documents offered by the parties, a Hearing Officer determined that Plaintiff failed to meet his burden of proof. Specifically, the Hearing Officer found that Plaintiff was not a legal resident of the Hopi Partitioned Lands (HPL) at the time he became head of household in 1985 and was thus not eligible for relocation benefits. Plaintiff's grandparents had relocated from their homesite on the HPL in 1984, surrendering any claim of residence on that land in exchange for relocation benefits for a new

home on the Navajo Partitioned Lands (NPL). Thus, ONHIR reasonably concluded that Plaintiff—who was working as a gas-station attendant off the HPL and as a construction worker across northern Arizona when he became head of household in 1985—could not use his grandparents' former homesite to establish legal residence on the HPL. ONHIR's decision is supported by substantial evidence in the record and is not arbitrary and capricious. The district court's judgment upholding ONHIR's decision was correct and should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiff's claims arise under the Administrative Procedure Act and the Navajo–Hopi Land Settlement Act of 1974. *See* 25 U.S.C. § 640d-14(g). The district court issued a final order granting summary judgment to ONHIR on April 18, 2023, and entered a judgment that same day. 1-ER-2; 1-ER-3–12. Plaintiff timely filed his notice of appeal on June 16, 2023. 3-ER-313; *see* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether ONHIR's decision that Plaintiff did not establish that he was a resident of the HPL when he became head of household in 1985 was reasonable and supported by substantial evidence.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are in the Addenda to the opening brief and this brief.

STATEMENT OF THE CASE

A. The Navajo–Hopi Land Settlement Act of 1974 and ONHIR's regulations.

In 1974, Congress enacted the Navajo–Hopi Land Settlement Act, which authorized the judicial partition of 1.8 million acres of land held in trust by the United States for joint use by the Navajo Nation and the Hopi Tribe, known as the "Joint Use Area." Pub. L. No. 93-531, 88 Stat. 1712 (formerly codified, as amended, at 25 U.S.C. §§ 640d–640d-31 (2015))[1]; *see generally Clinton v. Babbitt*, 180 F.3d 1081, 1083–86 (9th Cir. 1999). In 1979, the District Court for the District of Arizona partitioned the Joint Use Area, splitting the area into about 900,000 acres for the Hopi Tribe (known as the Hopi Partitioned Lands, or HPL), and 900,000 acres for the Navajo Nation (known as the Navajo Partitioned Lands, or NPL). *See Clinton*, 180 F.3d at 1084; *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980) (affirming the partition).

[1] The Office of the Law Revision Counsel of the U.S. House of Representatives subsequently omitted these provisions from the U.S. Code because they are of "special and not general application." https://go.usa.gov/xpGut. For the Court's convenience, we cite the former codification.

The Settlement Act sought to induce members of each Tribe who resided on lands partitioned to the other Tribe to relocate to lands partitioned for their own Tribe, and it authorized payments to cover major relocation costs of displaced households. 25 U.S.C. §§ 640d-11, 640d-12, 640d-13, 640d-14. The Act created an independent federal agency—now known as the Office of Navajo and Hopi Indian Relocation (ONHIR)—to consider applications for relocation benefits sought by Navajo and Hopi members who, as a result of the court-ordered partition, were located on lands allocated to the other Tribe. *See id.* §§ 640d-11, 640d-14(b); *Clinton*, 180 F.3d at 1084; *Bedoni v. Navajo-Hopi Indian Relocation Commission*, 878 F.2d 1119, 1121 (9th Cir. 1989). The Act directed ONHIR to, among other things, "relocate . . . all households and members thereof and their personal property . . . from any lands partitioned to the Tribe of which they are not members," 25 U.S.C. § 640d-13(a), and to pay the cost of a "replacement dwelling" to "each head of a household whose household is required to relocate." *Id.* § 640d-14(b)(2); *see also* 25 C.F.R. § 700.1(a), 700.147. As of December 2019, the benefit was $134,000 for a household of three or fewer and $140,000 for a household of four or more. Office of the Inspector General, U.S. Department of the Interior, Report No. 2019-WR-039, at 4 (Dec. 2019), https://go.usa.gov/xzNVg; *see also* 25 U.S.C. § 640d-14(b)(2); 25 C.F.R. § 700.183(b) (authorizing benefit

adjustments). Effective March 14, 2022, ONHIR increased the benefit to $170,000 for a household of three or fewer and $176,000 for a household of four or more.[2]

To be eligible for relocation benefits, an applicant must satisfy two requirements: (1) the applicant must prove that, on December 22, 1974, he or she was a legal resident of land partitioned to the Tribe of which the applicant was not a member; and (2) the applicant must prove that he or she was "head of household" by the date that the applicant moved from land partitioned to the other Tribe (or by July 7, 1986, if that date is earlier). 25 C.F.R. §§ 700.69(c); 700.147(a), (e). So, under the second requirement, a member of the Navajo Nation like Plaintiff must show that he resided on the HPL when he became "head of household" to qualify for relocation benefits. *Id.* § 700.69(c). "The burden of proving residence and head of household status is on the applicant." *Id.* § 700.147(b).

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[2] The Settlement Act directed ONHIR to develop a relocation plan and to complete relocation within five years of the date on which the plan took effect. 25 U.S.C. §§ 640d-12, 640d-13(a). The Relocation Report and Plan were completed in 1981, and they made July 7, 1986 the date by which to complete all relocation. In 2008, ONHIR reopened the process for about two years after a district court ruled that the agency had breached a legal duty to timely and personally notify certain individuals that they might qualify for benefits. *Herbert v. ONHIR*, No. 06-cv-3014, 2008 WL 11338896, at *8 (D. Ariz. Feb. 27, 2008); *see also* Office of the Inspector General, U.S. Department of the Interior, Report No. WR-EV-MOA-0003-2014, at 4 n.2 (Dec. 2014), https://go.usa.gov/xz4w6 (noting reopening from October 2008 through August 2010). Plaintiff submitted his application on September 9, 2009. 2-ER-244–45.

ONHIR found that Plaintiff was a resident of the HPL on December 22, 1974, so only the second requirement is at issue here; namely, whether Plaintiff was a resident of the HPL at the time he became "head of household." 1-ER-17. The preamble to ONHIR's regulations 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." *Commission Operations and Relocation Procedures; Eligibility*, 49 Fed. Reg. 22,277, 22,277 (May 29, 1984); *see also Charles v. ONHIR*, 774 F. App'x 389, 390 (9th Cir. 2019) (confirming that the preamble contains the "correct standard"). The preamble includes a nonexclusive list of factors that ONHIR examines in assessing residence, including ownership of livestock, ownership of improvements, grazing permits, homesite leases, school records, employment records, home ownership or rental off of the partitioned lands, and other relevant data. 49 Fed. Reg. at 22,278. The Act's residency requirement ensures that only those who relocate from their legal residence are provided with a replacement dwelling. *See* 25 U.S.C. § 640d-14(a), (b)(2) (requiring ONHIR to pay the reasonable cost of a replacement dwelling, plus the fair market value of existing habitation and improvements).

B. Factual background

1. Plaintiff's application for benefits and ONHIR's initial decision

Plaintiff Manley Barton was born in 1966 and is an enrolled member of the Navajo Nation. 2-ER-242. He filed an application for relocation benefits on September 9, 2009, stating that he lived in a residence on the HPL "at birth" but also that, at birth, he moved with his parents from that residence to Holbrook, AZ (off the HPL and entirely outside the former Joint Use Area), so that his parents could find work. 2-ER-244–45. Plaintiff indicated that on December 22, 1974, he was living "[i]n Holbrook with [his] parents" and that, as of that date, his parents were "employed in Holbrook." 2-ER-244.

After an attorney for ONHIR sent Plaintiff a letter requesting additional information about when Plaintiff moved off the HPL, Plaintiff submitted additional documentation stating that he was born on his grandparents' homesite on the HPL and that he lived there with his parents in a hogan. 2-ER-273. He also stated that his parents moved to Holbrook to find work and that he attended school in Holbrook from preschool until he graduated from high school in 1985. *Id.*

On June 1, 2012, ONHIR denied Plaintiff's application for relocation benefits, explaining that, after graduating high school in 1985, Plaintiff began working construction all over northern Arizona, returning to Holbrook when he had time off, and that his contacts with the HPL were "less frequent and social in

nature." 2-ER-279. Thus, ONHIR determined that Plaintiff had moved off of the HPL in 1985 but had not shown that he was "head of household" at that point, as required to obtain relocation benefits. *Id.* Plaintiff administratively appealed the denial of his application. 2-ER-283.

2. The administrative appeal hearing

On October 23, 2015, ONHIR held an administrative appeal hearing at which a Hearing Officer reviewed ONHIR's denial of benefits and Plaintiff had the opportunity to present testimony and call witnesses on his behalf. 2-ER-298. Plaintiff testified at this hearing, as did his uncle Richard Begay, aunt Mildrid Begay, aunt Ruth Ann Begay, and sister Marcella Barton.[3]

One focus of the administrative appeal hearing was Plaintiff's grandparents' homesite on the HPL, because Plaintiff's claim to HPL residency was based on that homesite. Richard Begay testified that in 1984 Plaintiff's grandparents accepted relocation benefits and relocated from their home on the HPL to a new home on the NPL, about a half-mile east of their original homesite. 2-ER-59. He testified that when Plaintiff's grandparents relocated, the grandparents moved into a house on the NPL but did not take their livestock with them, instead leaving them

[3] Plaintiff's sister was also named as a Plaintiff in the complaint, which alleged that ONHIR had improperly denied her application for relocation benefits as well. 3-ER-439. Plaintiff's sister died on October 18, 2021, while the case was pending before the district court. 1-ER-4 n.3. Her claim is not at issue in this appeal.

on the HPL homesite until 1985 or 1986. 2-ER-60. He also testified that, after Plaintiff's grandparents relocated, the family continued to perform ceremonies at the HPL homesite until the fall of 1987. 2-ER-61, 65.

Plaintiff's aunt Mildred Begay testified that, even though Plaintiff and his sister resided with his parents in Holbrook after his parents got jobs there, they would return to the HPL homesite several times a month. 2-ER-76. She testified that after Plaintiff's grandparents moved onto the NPL, the family continued to make use of the HPL homesite for ceremonial purposes several times a year. 2-ER-76–77. The family would also keep livestock at the HPL homesite. 2-ER-78. Mildred Begay testified that she remembered an experience when livestock grazing on the HPL were impounded by the Hopis. 2-ER-83.

Plaintiff's aunt Ruth Ann Begay also testified that Plaintiff's grandparents relocated to a new homesite on the NPL, but that the family continued to "go in and out" of the HPL homesite for ceremonies because the family retained a key to the property. 2-ER-86–87. She testified that the family kept sheep, horses, and cattle on the HPL site and that the cattle were removed at some point. 2-ER-91. When asked if anybody was actually living at the HPL homesite after Plaintiff's grandparents relocated in 1984, Ruth Ann Begay replied that she did not "recall anybody living there like 24/7." 2-ER-96.

Finally, Plaintiff himself testified at the hearing. He explained that he attended school in Holbrook and lived in an apartment in Holbrook with his family while he was in school. 2-ER-99. He explained that, while he was in school, he would go back to visit the HPL homesite when his mother was off from work, about every other weekend during the summertime and holidays. 2-ER-101. After graduation from high school, Plaintiff worked in construction and as a gas station attendant in Holbrook, earning over four thousand dollars in 1985. 2-ER-102, 112. When working in construction, Plaintiff worked throughout northern Arizona. 2-ER-109. Plaintiff also testified about his family's use of the HPL homesite after his grandparents relocated to the NPL, explaining that they used the property for ceremonies "and living in there." 2-ER-102. When asked what he did at the HPL homesite, he stated that he did chores such as hauling wood, hauling water, and feeding the animals on the property. *Id.* Plaintiff explained that his father became sick with bone cancer in 1984 and he spent time visiting his father in medical facilities between 1984 and when his father passed away in 1986. 2-ER-103,105.

3. The Hearing Officer's decision

In January 2016, the Hearing Officer issued a decision denying Plaintiff's appeal because Plaintiff failed to prove that he was a legal resident of the HPL when he became head of household in 1985. 1-ER-13–22. The Hearing Officer considered the testimony of the witnesses, the entire case file, and the parties'

arguments in reaching his decision. 1-ER-13. He considered the credibility of all five witnesses, finding all their testimony credible but noting that Ruth Ann Begay was uncertain about dates of events which limited her credibility. 1-ER-15–16

In his findings of fact, the Hearing Officer found that Plaintiff was born on his grandparents' homesite on the HPL and that his grandparents relocated to a site on the NPL in 1984. 2-ER-14. He found that Plaintiff's family lived in Holbrook, where Plaintiff attended school, his mother was a dormitory attendant, and his father worked in construction. *Id.* He also found that Plaintiff graduated from high school in 1985 and worked two jobs that year, earning $4,105. 1-ER-14–15.

With respect to the use of the HPL homesite after Plaintiff's grandparents relocated in 1984, the Hearing Officer found that the family continued to use the hogans at the HPL site for religious ceremonies. 1-ER-15. The Hearing Officer found that Plaintiff returned to the area with his mother when he was not working or caring for his father and when his mother had time off from work. *Id.* Finally, the Hearing Officer found that when Plaintiff's grandparents relocated to the NPL they quit-claimed ownership of a hogan on the HPL site in favor of Plaintiff's mother. *Id.*

In his conclusions of law, the Hearing Officer found that, on December 22, 1974, Plaintiff was the legal resident of his grandparents homesite on the HPL by virtue of his repeated visits to the property, even though he lived in Holbrook with

his parents. 1-ER-17. But the Hearing Officer concluded that Plaintiff's claim to legal residence on the HPL homesite "ended in 1984 when [Plaintiff's] grandparents relocated to the NPL." *Id.* The Hearing Officer explained that "[r]egardless of the family's use of the structures at their former HPL homesite after relocation, the HPL homesite was no longer any family members' homesite or legal residence for relocation purposes." *Id.* Plaintiff had argued that his legal residence was the HPL homesite because his mother received a hogan on the property through quit-claim deed, but the Hearing Officer rejected this argument, explaining that "the quit claim simply entitled [Plaintiff's] mother to receive the hogan's value from the taking of the residence and did not allow occupancy or residence there after [Plaintiff's] grandparents' relocation to the NPL in 1984." 1-ER-17–18.[4]

In his decision, the Hearing Officer found that Plaintiff's claim for relocation benefits is predicated on ONHIR's alleged recognition of his grandparents' legal residence on the HPL after his grandparents had already relocated across the partition line to the NPL in 1984, but "[b]y operation of law, the HPL residence was extinguished as a homesite or a part of a legal residence

[4] If a Navajo applicant owned an improvement on the HPL but was denied benefits, the applicant could receive the value of their improvements on the HPL from ONHIR. *See* 25 C.F.R. § 700.127.

when [Plaintiff's] grandparents relocated to the NPL." 1-ER-18–19.[5] The Hearing Officer explained that once Plaintiff's grandparents relocated to the NPL, they "were legally dispossessed of the improvements at their former HPL homesite," and even if some family members continued to use the HPL homesite for ceremonies, that use could not support Plaintiff's claim of being a legal resident of the HPL homesite because "[n]o one in the family could acquire prescriptive rights to their former HPL homesite as the homesite has been acquired as part of the partition and that acquisition was recognized by Federal law and Court decisions." 1-ER-19. Essentially, the Hearing Officer explained, any claim Plaintiff had to residence on the HPL was extinguished when his family moved to the NPL, regardless of the fact that the family informally used the improvements on the HPL homesite for penning livestock and conducting ceremonies. 1-ER-20–21. The Hearing Officer noted that, "at best, the family's use of the HPL area for ceremonies and penning their livestock was ignored by the Hopis; at worst, the Hopis allowed such use by sufferance—neither provides a springboard from which to assert continued legal residence." 1-ER-21.

[5] ONHIR's Management Manual explains that, generally, applicants will "transfer all improvements not retained to the ONHIR by means of a Quit Claim Deed" when they execute a relocation contract. ONHIR Management Manual #1610 p.2, https://www.onhir.gov/assets/documents/mangement-manual/ONHIR-Management-Manual.pdf.

The Hearing Officer also noted that, although it was certain that Plaintiff was not an HPL resident at the time he became head of household in 1985, it was also "highly questionable whether the HPL homesite could be claimed by [Plaintiff] long before 1984 as [Plaintiff] lived with [his] parents in Holbrook, [he] attended school in Holbrook, [he] worked in Holbrook, and [his] return visits to [the HPL] were, at best, social and certainly infrequent from 1984 on." 1-ER-19. The Hearing Officer highlighted testimony from the hearing that Plaintiff worked two jobs after high-school graduation and traveled throughout northern Arizona for his work in construction. 1-ER-20. The Hearing Officer further explained that Plaintiff's aunt Ruth Ann Begay testified that the family "'went in and out of there (meaning the HPL hogan) for ceremonies' and that no one 'lived' at the HPL homesite after the grandparents relocated in 1984." *Id.* So the Hearing Officer noted that Plaintiff was busy in Holbrook and across northern Arizona with his work and that his return visits to the HPL were "limited to ceremonies and social interaction with family members"—in other words, the testimony was not evidence of legal residence. *Id.*

The Hearing Officer concluded that Plaintiff became head of household in 1985 when he earned more than four thousand dollars but failed to prove that he was a legal resident of the HPL at that time. Thus, the Hearing Officer denied his appeal. 1-ER-21–22. ONHIR's executive director approved the Hearing Officer's

decision on February 3, 2016, which is the final agency action at issue here. *See* 1-ER-4.

4. The district court's ruling

Six years later, on February 3, 2022, Plaintiff sought review of ONHIR's decision in federal district court. *See id.* The court granted summary judgment to ONHIR in April 2023. 1-ER-3–12. The court rejected Plaintiff's argument that ONHIR failed to apply the "temporarily away" policy, which allows an applicant to establish residency on the HPL in some cases where he did not actually reside on the HPL but left the HPL to pursue education, employment, or other opportunities and maintained substantial and recurring contacts with his home on the HPL. 1-ER-7. The court cited testimony from the hearing about Plaintiff's limited return visits to the HPL for ceremonies and social interaction, as well as Plaintiff's employment as a gas-station attendant and construction worker across northern Arizona. 1-ER-7–8. The court noted that "[e]ven if some testimony could support a contrary conclusion, the [Hearing Officer] reasonably concluded from the evidence in the record and logical inferences flowing therefrom that by 1985, Plaintiff's contacts with the HPL site were not substantial and recurring." 1-ER-8. The court held that ONHIR *did* apply the temporarily away policy when it found that Plaintiff was a resident of the HPL in December 1974 even though he lived with his parents in Holbrook, and that ONHIR's conclusion that Plaintiff's HPL

residence ended in 1984 "ultimately was not based on the frequency of Plaintiff's contacts but on the determination that his family's HPL site could no longer be claimed as a residence after his grandparents moved from the HPL to the NPL in 1984." *Id.*

The court also rejected Plaintiff's argument that ONHIR's decision was arbitrary and capricious because it failed to apply the "customary use area" policy, under which an applicant can be awarded relocation benefits if only part of their customary use area was partitioned to the other Tribe, so long as the applicant shows continuous use of the entire area and that they maintained residence on both sides of the partition line after partition. 1-ER-8–9 (citing *Begay v. ONHIR*, 305 F. Supp. 3d 1040, 1048 (D. Ariz. 2018), *aff'd*, 770 F. App'x 801, 802 (9th Cir. 2019) (upholding ONHIR's decision not to apply the policy where the applicant's family did not "occup[y] each property for a roughly proportional amount of time each year or spen[d] at least a full season on each property every year")). The court explained that the facts here "do not fit the mold of a customary use area" because there was no evidence that Plaintiff's family "dedicated a portion of the year to each homesite [on the NPL and the HPL] depending on the season, or that there was any continuous pattern of residence" through 1986. 1-ER-9. Instead, the court noted that, after Plaintiff's grandparents moved to the NPL in 1984, the family used the HPL for family gatherings, ceremonies, and grazing, so the record

evidence sufficiently supported ONHIR's finding that nobody continuously lived on the HPL after 1984. *Id.*

The district court held that ONHIR's finding that Plaintiff's residency ended in 1984 was supported by substantial evidence. 1-ER-10. The court noted that Plaintiff cited to no testimony in the record to support his assertion that his family continued to occupy the HPL homesite until 1986, and instead pointed to contradictory testimony that the Hearing Officer "rationally balanced to conclude that Plaintiff did not reside at the HPL homesite after 1984." *Id.*

Finally, the court rejected Plaintiff's argument that ONHIR's denial of benefits violated its federal trust responsibility, finding that ONHIR is obligated "only to disburse benefits to those authorized to receive them under the Settlement Act," not to disburse benefits to every Navajo applicant irrespective of whether the applicant satisfies the eligibility requirements. *Id.* Thus, the Court granted summary judgment for ONHIR. 1-ER-12. Plaintiff appealed. 3-ER-313.

SUMMARY OF ARGUMENT

The district court correctly rejected Plaintiff's challenge and affirmed ONHIR's decision denying his application for relocation benefits. Substantial evidence supports the Hearing Officer's determination that Plaintiff is not entitled to relocation benefits because he failed to prove that he was a resident of the HPL at the time he became "head of household" in 1985.

First, the Hearing Officer correctly found that Plaintiff could not establish residency on the HPL when he became head of household in 1985 because his grandparents surrendered the family's HPL homesite and accepted relocation benefits to move to the NPL in 1984. Thus, even if Plaintiff's family was using the HPL homesite after 1984 for any purposes, they could not thereafter claim the site as a legal residence because the land was partitioned to the Hopi Tribe and Plaintiff's family had surrendered their interest in the land. Plaintiff has not provided any authority explaining how he could assert legal residence on the HPL homesite after 1984 when the homesite was partitioned to the Hopis and his grandparents surrendered their interest in the site. ONHIR's decision should be affirmed because it was not arbitrary and capricious for the agency to determine that Plaintiff could not use the HPL homesite to establish residency on the HPL after his family relocated.

Second, even if Plaintiff could theoretically establish residence on the HPL homesite in 1985, substantial evidence supported ONHIR's decision that Plaintiff did not prove that he was a resident of the HPL on the date he became head of household. The Hearing Officer pointed to testimony from the hearing that Plaintiff lived and worked in Holbrook and that his visits to the HPL homesite were infrequent and limited to ceremonies and social interactions with family members. Plaintiff's aunt Ruth Ann Begay testified that, after the family relocated

in 1984, she didn't recall anybody living at the HPL homesite. There were inconsistencies in the testimony—Plaintiff testified that he lived at the HPL homesite—but the Hearing Officer was entitled to weigh the testimony and resolve inconsistencies against the applicant, and if the evidence is susceptible of more than one interpretation the Court must uphold the agency's decision under the substantial evidence standard.

Plaintiff suggests that he is entitled to benefits under ONHIR's "customary use" policy, but that policy only applies to applicants who used two areas on both the HPL and the NPL before the partition. Here, Plaintiff points to no evidence showing that his family used the NPL site before they accepted relocation benefits and surrendered the HPL site. Plaintiff's grandparents' move to the NPL site was not a move between two sites owned by the family—it was a relocation from the HPL site to the NPL site in exchange for relocation benefits.

Finally, the Court should reject Plaintiff's breach-of-trust claim. Plaintiff has not alleged a specific judicially enforceable trust duty stated in a treaty, statute, or regulation, as is required by Supreme Court precedent, obligating ONHIR to find an applicant eligible for relocation benefits where, as here, the record supports the contrary determination.

ONHIR reasonably concluded that Plaintiff had not shown that he was entitled to relocation benefits, and the district court correctly affirmed that decision. This Court should affirm.

STANDARD OF REVIEW

The Court reviews ONHIR's decision under the Administrative Procedure Act to determine if it 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); 25 U.S.C. § 640d-14(g); *Bedoni v. Navajo–Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1122 (9th Cir. 1989). The Court reviews a grant of summary judgment de novo. *Bedoni*, 878 F.2d at 1122.

The scope of review under the Administrative Procedure Act is narrow, and the Court may not "substitute its judgment for that of the agency," so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 914 (9th Cir. 1995) (internal quotation marks omitted). An agency's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An agency's factual findings are reviewed for whether they are supported by substantial evidence. *Alaska Dep't of Health & Social Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 937 (9th Cir. 2005). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 587 U.S. ___, 139 S. Ct. 1148, 1154 (2019) (internal quotation marks omitted); *accord San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). To reject an agency's factual findings, a court "must find that the evidence not only *supports*" a contrary finding "but *compels* it." *INS v. Elias-Zacharias*, 502 U.S. 478, 481 n.1 (1992) (emphasis in original); accord *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011). The substantial evidence standard is even more deferential than the "clearly erroneous" standard for appellate review of a trial court's findings of fact. *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999).

ARGUMENT

I. ONHIR's decision was reasonable and was supported by substantial evidence.

Substantial evidence supported ONHIR's decision that Plaintiff was not a legal resident of the HPL when he became head of household in 1985.[6] Plaintiff's grandparents relinquished their improvements on their HPL homesite and relocated to the NPL in 1984. Plaintiff could not thereafter have used the HPL homesite as a basis to assert legal residency on the HPL because the claim to the homesite as a legal residence was extinguished when his grandparents accepted relocation benefits and moved to the NPL. But even if Plaintiff could have used the HPL homesite as a residence for purpose of obtaining relocation benefits, ONHIR reasonably concluded that Plaintiff did not prove that he was a legal resident of the HPL homesite in 1985 because he lived in Holbrook, worked in Holbrook and across northern Arizona, and his visits to the HPL were sporadic and for social occasions.

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[6] ONHIR does not dispute that Plaintiff became head of household in 1985 when he graduated high school and earned $4,105. *See* 1-ER-14–15. *Cf.* Pl's Br. 42–45 (arguing that Plaintiff became head of household in 1985).Thus, Plaintiff's argument that the Hearing Officer "did not follow" ONHIR's policy as to establishing head-of-household status is both incorrect and irrelevant. *Cf.* Pl's Br. 45.

A. Plaintiff could not have established legal residency at the HPL homesite when he became head of household in 1985 because his grandparents relocated from the HPL homesite to the NPL in 1984.

Plaintiff does not dispute that, in 1984, his grandparents accepted relocation benefits from ONHIR and relocated from the HPL homesite to a homesite on the NPL. Pl's Br. 33. Both ONHIR and the district court found that this fact was determinative, because once Plaintiff's grandparents accepted relocation benefits and surrendered their property on the HPL, that property could no longer be used as a basis for Plaintiff to establish legal residency on the HPL—it had been acquired for use by the Hopis as part of the partition. 1-ER-19–20 (Hearing Officer's decision) ("[N]one of the improvements at applicants' grandparents' HPL home can support any claim of being their legal residence following the 1984 relocation."); 1-ER-8–9 (District court opinion).

The Settlement Act explains that, when an applicant applies for relocation benefits and agrees to relocate, ONHIR "purchase[s] from the head of each household . . . the habitation and other improvements owned by him on the area from which he is required to move." 25 U.S.C. § 640d-14(a). After this transaction, ONHIR is authorized to "dispose of dwellings and other improvements acquired or constructed pursuant to this subchapter in such manner [as best effects the purpose of the Act in partitioning the Joint Use Area], including resale of such dwellings and improvements to members of the tribe exercising jurisdiction over the area."

Id. § 640d-14(e). ONHIR's regulations further explain: "Before requiring an owner to *surrender possession* of his habitations and/or improvements, the Commission shall . . . [a]pply the agreed purchase price towards the acquisition price of the replacement dwelling . . . ." 25 C.F.R. § 700.113(g)(1) (emphasis added).

The statute and the regulations confirm that, after applicants agree to accept relocation benefits, they surrender any legal interest in their original homesites and ONHIR is authorized to dispose of those properties consistent with the Act's purpose of partitioning that land to the other Tribe. Here, when Plaintiff's grandparents agreed to accept relocation benefits and relocate to the NPL in 1984, they surrendered any property interest to their HPL homesite because that homesite was on land partitioned to the Hopis. Thus, as the Hearing Officer determined, Plaintiff could not use this land to establish legal residence on the HPL in 1985 because "[n]o one in the family could acquire prescriptive rights to their former HPL homesite as the homesite has been acquired as part of the partition." 1-ER-19. Even if Plaintiff's family was using the HPL homesite after 1984 for any purposes, they do not have a claim to that site as a legal residence. Indeed, the Settlement Act expressly prohibits "further settlement of Navajo individuals on the lands partitioned to the Hopi Tribe" after relocation. 25 U.S.C. § 640d-13(a). As the Hearing Officer explained: "at best, the family's use of the HPL area for ceremonies and penning their livestock was ignored by the Hopis; at worst, the

Hopis allowed such use by sufferance—neither provides a springboard from which to assert continued legal residence." 1-ER-21.

The fact that Plaintiff's grandparents quit-claimed ownership of one of the structures on the HPL homesite to Plaintiff's mother does not change this outcome. The Hearing Officer found that, when Plaintiff's grandparents "moved across the partition line to [the] NPL, they quit-claimed ownership of a hogan in favor of [Plaintiff's mother]." 1-ER-15. But that transfer did not allow Plaintiff to establish legal residency in the hogan on the HPL because when Plaintiff's grandparents moved to a relocation home provided to them by ONHIR on the NPL, they surrendered their legal interest in the HPL homesite. At most, the quit-claim deed entitled Plaintiff's mother to receive the hogan's value from ONHIR after the grandparents surrendered the property in exchange for relocation benefits. *See* 1-ER-17–18.

Plaintiff provides no legal argument on this point or authority explaining how he could assert legal residence on the HPL homesite after the homesite was partitioned to the Hopis and his grandparents moved to a relocation home on the NPL and surrendered the HPL site to ONHIR in 1984. This Court should affirm the district court's judgment and ONHIR's decision because it was not arbitrary and capricious for ONHIR to conclude that Plaintiff could not establish residency

on the HPL in 1985 based on the property that his grandparents surrendered to ONHIR in 1984 when they accepted relocation benefits.

B. Even if Plaintiff could have established legal residency on the HPL homesite, substantial evidence supported ONHIR's determination that Plaintiff did not prove that he was a resident of the HPL when he became head of household in 1985.

Plaintiff does not dispute that his grandparents relocated to the NPL in 1984, but still argues that he and his family were residents of the HPL homesite until 1986. Pl's Br. 33. As noted, he does not present any authority explaining how he could claim the HPL homesite as a legal residence after his grandparents surrendered that residence and accepted relocation benefits. But—regardless of the underlying legal status of the HPL homesite—substantial evidence supported ONHIR's finding that Plaintiff did not prove that he was a resident of the HPL homesite when he became head of household in 1985, and ONHIR's decision should, if necessary, be affirmed on those alternative grounds.

The Hearing Officer offered specific reasons, supported by evidence and testimony, as to why Plaintiff was no longer a resident of the HPL in 1985. Specifically, the Hearing Officer found that Plaintiff's use of the HPL homesite after 1984 was "social" and "infrequent" and did not support a finding of residence. 1-ER-19. The Hearing Officer explained that, before 1984, Plaintiff lived with his parents in Holbrook and attended school in Holbrook, and that in

1985 Plaintiff worked two jobs in Holbrook and across northern Arizona. 1-ER-19–20. The Hearing Officer found that the evidence belied Plaintiff's claim of substantial visitation of the HPL homesite—Plaintiff's work travels were an impediment to visiting the HPL, Plaintiff "spen[t] an inordinate amount of [his] time in Holbrook," and Plaintiff's return visits to the HPL were "limited to ceremonies and social interaction with family members." 1-ER-19–20.

Substantial evidence supported the Hearing Officer's conclusion. Plaintiff's aunt Mildred Begay testified that, after Plaintiff's grandparents relocated in 1984, the structures on the HPL homesite were "used for ceremonial purposes . . . [s]everal times a year" and that "livestock stayed in that area." 2-ER-77, 78. Plaintiff's aunt Ruth Ann Begay testified that the family had a key to the HPL homesite and "went in and out of" the homesite when family members "needed ceremonies" after the 1984 relocation 2-ER-86–87. She further testified that the family used the HPL homesite to store water and firewood and that the family kept livestock at the HPL homesite. 2-ER-91. And she testified that, after Plaintiff's grandparents relocated in 1984, she "d[idn't] recall anybody living [at the HPL homesite] like 24/7." 2-ER-96.

Plaintiff testified about his jobs as a construction worker and a gas-station attendant in 1985 that he worked to support his family after his father was diagnosed with bone cancer in 1984 or 1985. 2-ER-102–03. He further explained

that he worked these two jobs in 1985 at the same time, working construction "throughout Northern Arizona" and working at a gas station in Holbrook. 2-ER-109, 12.

The hearing testimony supported the Hearing Officer's decision that Plaintiff was not a resident of the HPL homesite. Plaintiff's family members testified that the family's use of the HPL homesite was limited to ceremonies and keeping livestock; in other words, nobody resided at the HPL homesite. And Plaintiff himself lived and worked in Holbrook and across northern Arizona. His visits back to the HPL homesite were social and infrequent. Plaintiff did not present any of the types of evidence—e.g., ownership of livestock, ownership of improvements, grazing permits, homesite leases, school records, employment records, home ownership or rental, or other relevant data—that would have supported a finding of legal residence on the HPL homesite. *See* 49 Fed. Reg. at 22,278.

To be sure, there were inconsistencies in the hearing testimony about the scope of Plaintiff's post-1984 use of the HPL homesite. Plaintiff testified that, after 1984, he was at the HPL homesite "all the time," and used the homesite "for ceremonies and living in there." 2-ER-102. But that testimony was contradicted by the evidence that the family used the homesite only for ceremonies and livestock and that Plaintiff worked two jobs in Holbrook and across northern Arizona. Under the substantial evidence standard, if the evidence is susceptible to more than one

interpretation the Court must uphold the agency's decision—the decision need only be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Nat. Fam. Farm Coal. v. U.S. Envtl. Prot. Agency*, 960 F.3d 1120, 1132–33 (9th Cir. 2020). Here, the Hearing Officer weighed all the testimony and reasonably resolved those inconsistencies against Plaintiff and found that Plaintiff did not carry his burden to prove residency on the HPL. *See Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984) (finding that, under the substantial evidence standard, the hearing officer's decision must be upheld where "evidence is susceptible of more than one rational interpretation"); *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018) ("The [hearing officer] is responsible for determining credibility and resolving ambiguities when relevant."). That conclusion was supported by substantial evidence because the testimony at the hearing showed that Plaintiff lived and worked in Holbrook and across northern Arizona, and that his visits back to the HPL homesite were social and infrequent, which undermined Plaintiff's testimony that he was at the HPL homesite "all the time."[7]

[7] Plaintiff argues that these visits to the HPL homesite rise to the level of "substantial and recurring contacts," that prove legal residency, but this Court recently clarified that "substantial and recurring contacts" with the HPL are one aspect of the legal residency test for a person who is temporarily away from the HPL—they are not in and of themselves indicative of legal residency on the HPL.

In support of his argument that his legal residence was the HPL homesite in 1985, Plaintiff draws on the common law of "domicile" and improperly assumes that it applies to the idea of legal residence under ONHIR's regulations. *See* Pl's Br. 34–35; 41. Neither the Settlement Act nor ONHIR's regulations incorporate the doctrine of domicile; instead, the Act and the regulations establish clearly that the "burden of proving residence and head of household status is on the applicant." 25 C.F.R. § 700.147(b); *see also Begay v. ONHIR*, No. 22-16502, 2023 WL 8449196, at *1 (9th Cir., Dec. 6, 2023) ("To the extent that Begay contends that ONHIR was required to show that he had lost his earlier 'domicile' prior to becoming a head of household, that contention fails because the burden of proving residency and head of household status lies with the applicant."). Thus, by expressly placing on the applicant the burden of proving "residence," the regulations required that Plaintiff affirmatively prove that he lived on the HPL when he became a self-supporting head of his own household in 1985. Plaintiff cannot establish residency by merely pointing to where his parents lived or where he lived as a minor and then claiming that the burden shifts to ONHIR.

Plaintiff also claims that ONHIR was "inconsisten[t] in the application of its policies" regarding Plaintiff's entitlement to benefits. Pl's Br. 47. But ONHIR's

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Begay v. ONHIR, No. 22-16502, 2023 WL 8449196, at *1 (9th Cir., Dec. 6, 2023) ("Indeed, the hearing officer considered Begay's substantial and recurring contacts, but only as part of a broader analysis."). In any event, Plaintiff's contacts with the HPL in 1985 were not "substantial and recurring."

decision here was consistent with its policies and previous decisions. Plaintiff misplaces reliance on two prior cases in which the district court vacated and remanded a decision to ONHIR, Pl's Br. 35–38. The facts in both cases differ from those presented by Plaintiff, and neither case involved an applicant whose family had relocated from the HPL to the NPL before the applicant attained head-of-household status.

This case is different from the unpublished district court decision in *Mike v. ONHIR* cited by Plaintiff. *See* Pl's Br. at 36–37. There, the applicant "maintained substantial, recurring contact with her home [on the HPL], traveling there almost every weekend and whenever she . . . had time off from work," she testified that she "considered herself to be a resident" of the HPL, and she "chose to move back [to the HPL] for her last year of life." *Mike v. ONHIR*, No. CV 06-0866, 2008 WL 54920, at *5 (D. Ariz., Jan. 2, 2008). Furthermore, the applicant in that case was listed on an enumeration roster that identified residents of the Joint Use Area and had a voter-registration card associated with residence on the HPL. *Id.* at *6. On those facts, the district court found that the evidence compelled a conclusion that the applicant was a resident on the HPL. *Id.* at *7. In contrast here, Plaintiff offered no testimony about his desire to move back to the HPL and his contacts with the HPL after he became head of household in 1985 were less frequent than the contacts in *Mike*. And, as explained above, even if Plaintiff desired to move back

to the HPL he would not have been able to establish residence there after the land was partitioned to the Hopis and his grandparents surrendered their interest in the land.

Plaintiff's citation to the unpublished district court decision in *Powell v. ONHIR* fares no better. The district court remanded that case to ONHIR because the agency had incorrectly stated that the applicant lived with his mother in Holbrook when he had actually lived with his grandmother in Holbrook. *Powell v. ONHIR*, No. CV-21-08148, 2022 WL 3286587, at *3–4 (D. Ariz., Aug. 11, 2022). Plaintiff reads *Powell* too broadly; the district court did not determine that the applicant "had not moved off the HPL when he went to Holbrook temporarily for school." Pl's Br. 38. Rather, the district court remanded based on the Hearing Officer's factual error and stated that the record was "not clear as to Plaintiff's legal residence." *Powell*, 2022 WL 3286587, at *4. *Powell* is inapposite because the Hearing Officer here made specific findings of fact, which are undisputed, that Plaintiff grew up in Holbrook, went to school in Holbrook, and lived with his family in Holbrook. 1-ER-14.

In sum, substantial evidence supported ONHIR's decision that Plaintiff did not show that he was a resident of the HPL in 1985 and was thus not entitled to relocation benefits. Even if this Court finds that Plaintiff could have established

legal residency on the HPL homesite after his grandparents relocated, ONHIR's decision should be upheld on this alternative ground.

C. The "customary use" policy does not apply here.

Plaintiff argues that he was entitled to relocation benefits because his family had a "customary use area on both the HPL and the NPL" and that, once his grandparents relocated to the NPL in 1984, "the rest of the family continued to use the HPL homesite for lodging, family gathering, ceremonies and for grazing." Pl's Br. 40. This argument fails for two reasons.

First, as explained above, substantial evidence supported the Hearing Officer's conclusion that Plaintiff did not carry his burden to prove that he was a resident of the HPL when he became head of household in 1985, if this were even legally possible after 1984 when his grandparents surrendered the HPL homesite in exchange for a relocation home on the NPL. Rather, the evidence showed that his visits to the HPL homesite in 1985 were social, infrequent, and only for ceremonies. *See supra* at 26–29.

Second, the "customary use" policy does not apply here in any event.[8] The "customary use" policy recognizes that partition of a family's customary use area can be an adverse relocation outcome, but only where "there is evidence of

[8] The "customary use" policy is also referred to interchangeably as the "traditional use" policy.

continuous use of the *entire* area as of the date of the [Settlement] Act [December 1974].” *Begay*, 305 F. Supp. 3d at 1048 (D. Ariz. 2018) (emphasis in original) (quoting ONHIR’s decision in *In re Minnie Woodie*), *aff’d*, 770 F. App’x 801, 802 (9th Cir. 2019) (upholding ONHIR’s decision not to apply the policy where the applicant’s family did not “occup[y] each property for a roughly proportional amount of time each year or spen[d] at least a full season on each property every year”)).

Here, the customary use policy is inapplicable because Plaintiff’s grandparents’ relocation to the NPL site was not a move to a site that their family previously owned and occupied as of December 1974—it was a relocation, where Plaintiff’s grandparents surrendered their ownership interest in the HPL homesite and accepted relocation benefits on the new NPL homesite. As the district court put it, “the facts simply do not fit the mold of a customary use area” because “there is no evidence that [Plaintiff’s family] dedicated a portion of the year to each homesite depending on the season, or that there was any continuous pattern of residence over the traditional use area through 1986.” 1-ER-9.

Plaintiff incorrectly claims that ONHIR’s decision not to apply the customary use policy was inconsistent with its past precedent. *Cf.* Pl’s Br. 39–40. The facts differ in those cases as well. Plaintiff points to ONHIR’s decision in *In re Minnie Woodie*, in which an applicant’s grazing area was divided by the partition

fence and the applicant was awarded relocation benefits even though she did not have any permanent structures on the HPL. 3-ER-397–98. But there, the record evidence showed that the applicant lived a traditional Navajo lifestyle and extensively used the HPL for grazing, collecting water, and harvesting herbs prior to December 1974. 3-ER-401. Here, there is no evidence in the record that shows that Plaintiff or his family used the entire area (both the NPL and HPL homesites) prior to the critical date, December 22, 1974. Rather, Plaintiff's grandparents accepted relocation benefits to relocate from the HPL homesite to the NPL homesite. Similarly, *Shaw v. ONHIR* provides no support because the applicant in that case "had both a summer and winter camp," with structures and improvements on both the NPL and the HPL. *Shaw v. ONHIR*, 860 F. App'x 493, 494 (9th Cir. 2021). And in *Begay*, the district court upheld ONHIR's decision to *deny* relocation benefits because an applicant's seasonal planting on one site was insufficient to establish a traditional use area. *Begay*, 305 F. Supp. 3d at 1048. *Begay* actually undermines Plaintiff's argument that his family had a traditional use area on both the NPL and the HPL because there is no evidence in the record that the family used the NPL site as a traditional use area as of December 22, 1974.

Plaintiff did not show that his family used both the NPL and HPL sites for traditional use as of December 22, 1974, and has thus not established a customary use area.

II. Plaintiff has not identified any trust duty that ONHIR breached.

Plaintiff argues that ONHIR violated a federal trust responsibility when it denied his application for relocation benefits. Pl's Br. 49–52. Plaintiff does not clearly identify what trust responsibility ONHIR supposedly breached but suggests that ONHIR has arbitrarily changed its standards to increase the number of denials of benefits to applicants "whose circumstances were essentially identical to others who had been previously certified, such as members from the same homesite." *Id.* at 49–50. Plaintiff also identifies a report issued by the Department of the Interior that supposedly supports his trust claim. *Id.*

Plaintiff's trust claim fails on multiple grounds. The district court correctly concluded that Plaintiff's trust claim failed because "the longstanding general trust obligation that has dominated Government interaction with Native Americans" does not "bear[] upon Plaintiffs' individual eligibility under the Settlement Act or [the district court's] review under the APA." 1-ER-11 (quoting *Bedoni*, 878 F.2d at 1124). There is no duty obligating ONHIR to find an applicant eligible for relocation benefits where, as here, the record supports the contrary determination. *See, e.g.*, *Begay v. ONHIR*, 771 F. App'x 384, 385 (9th Cir. 2019) ("Even if we were to accept . . . that ONHIR has a trust relationship with applicants, the requirements of any trust relationship would not alter or override Begay's burden to establish his eligibility for benefits under 25 C.F.R. § 700.147(b).").

Moreover, ONHIR has no specific duty to any particular applicant other than compliance with the Settlement Act's procedures for determining eligibility for relocation benefits. *See, e.g.*, *Begay*, 771 F. App'x at 385; *Akee v. ONHIR*, No. 96-15040, 1997 WL 51760, at *1 (9th Cir. 1997). The United States has a "general trust relationship" with Indian tribes. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *see, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). As the Supreme Court has long held, however, that general trust relationship alone is not enough to establish judicially enforceable duties. See *Jicarilla*, 564 U.S. at 173 ("The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship.") (citation omitted). Rather, for a duty to be judicially enforceable, a tribe first "must identify a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). That "substantive source of law" must be a "statutory or regulatory prescription[]," not merely a common-law principle. *Id*. And the source must contain "specific, applicable, trust-creating" language. *Jicarilla*, 564 U.S. at 177 (brackets and citation omitted).

Plaintiff cannot prevail on his federal trust claim because he has not alleged a specific trust obligation that ONHIR breached or identified any treaty, statute, or regulation that imposes a duty on ONHIR that is implicated here. The Supreme Court reaffirmed last term that, to maintain a breach-of-trust claim against the

United States, "the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States." *Arizona v. Navajo Nation*, 559 U.S. 595, 563 (2023). Even if an individual member of a Tribe could assert a breach of trust claim against the United States, Plaintiff has identified no statute, treaty, or regulation that requires the United States (via ONHIR) to provide him with relocation benefits. Plaintiff cites *Bedoni*, Pl's Br. 50, but that case explains that any duty to manage and distribute Settlement Act funds applies only to applicants who (unlike Plaintiff) have already been determined eligible under the statute to receive relocation benefits. *See Bedoni*, 878 F.2d at 1125 (duty to assist displaced families eligible for relocation benefits to receive "the maximum benefits allowed them under the Settlement Act"); *Stago v. ONHIR*, 562 F. Supp. 3d 95, 105–106 (D. Ariz. 2021).

Plaintiff erroneously states that this Court has "repeatedly found the decisions of the [Hearing Officer] and ONHIR to be inconsistent with the federal trust duty," Pl's Br. 50. All three of the cases he cites (two of which are district court decisions) merely note that there is a general trust relationship between the government and Tribes. The cases do not address, much less establish, a specific judicially enforceable trust duty for ONHIR to disburse benefits to any applicant. *See Jensen v. ONHIR*, CV-95-0145 (D. Ariz., Aug 12, 1996) (excerpts of record at 3-ER-422–23) (finding that ONHIR's decision that Plaintiff had not reached head

of household status was not supported by substantial evidence and noting only the general "trust relationship that exists between the United States and all Native Americans which imposes a fiduciary obligation upon the federal government in its dealings with those peoples"); *Mike v. ONHIR*, No. CV 06-0866, 2008 WL 54920, at *5 (D. Ariz., Jan. 2, 2008) (noting the general "obligation of trust incumbent upon the Government" in its dealings with Native Americans); *Bedoni*, 878 F.2d at 1124 (noting that it is "hardly a novel proposition that [ONHIR's predecessor agency], as [an] entit[y] and representative[] of the executive branch of the federal government, ha[s] a general trust relationship with Native American Tribes" and thus holding the government to a "high standard of conduct").

Plaintiff's trust claim appears to be largely premised on a passage allegedly contained in a September 2020 Interior Department report entitled "Status of the Office of Navajo and Hopi Indian Relocation's Appeals on Denied Eligibility Determination Cases." Pl's Br. 49–50. The report is not in the administrative record and post-dates ONHIR's final decision in this case. *See* 3-ER-405. But in any event, the report could not establish an enforceable trust duty under Supreme Court precedent.[9] Furthermore, Plaintiff materially mischaracterizes the report. Plaintiff asserts that "*[t]he Report states* significant increases in the number of

[9] The Report is not a "treaty, statute, or regulation" that imposes certain duties on the United States, which is required to bring a trust claim. *Arizona v. Navajo Nation*, 559 U.S. at 563.

denials is due to arbitrary changes in eligibility standards applied by this [Hearing Officer].” Opening Brief 49 (emphasis added). But the report states no such thing; Plaintiff is paraphrasing a passage from a comment in the Navajo Nation’s response to a draft of the report, which is included as an attachment to the report. See 3-ER-415–16 (pages from Navajo Nation memorandum dated July 31, 2020).

The report itself notes the Tribe’s comment on the draft report (3-ER-410), as well as ONHIR’s position: that “during the last application period, the Navajo Nation encouraged as many Navajo as possible to apply, including applicants who did not meet eligibility criteria.” *Id.* But the report does not purport to resolve the question one way or the other. *Id.* (“Regardless of the reasons for the increased number of applicants and rate of denial, all of these applicants may continue to exercise their appellate rights for many years to come.”).

Thus, Plaintiff’s trust claim fails for a multitude of reasons.

III. If the Court concludes that the record does not support ONHIR’s decision, remand, not reversal, is the appropriate remedy.

Plaintiff requests that this Court vacate ONHIR’s decision, “order ONHIR to fulfill its obligations under the Settlement Act,” and award Plaintiff relocation benefits “to which he is lawfully entitled.” Pl’s Br. 52. The Court should not grant this relief even if it concludes that the record does not support ONHIR’s decision.

If “the record before the agency does not support the agency action” or “the agency has not considered all relevant factors,” the proper course, “except in rare

circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); accord *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019); *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 603 (lacking substantial evidence for agency's decision, a court should "not compensate for the agency's dereliction by undertaking its own inquiry into the merits," but should remand for further agency proceedings) (internal quotation marks and citations omitted).

This Court should affirm the district court's judgment. But if the Court disagrees with ONHIR's arguments on the merits, it should follow the general rule and remand for further agency proceedings. *Cf. George v. ONHIR*, 825 F. App'x 419, 421 (9th Cir. 2020) (remanding for ONHIR to consider specific evidence but "express[ing] no view as to the proper outcome").

CONCLUSION

For these reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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December 28, 2023
90-2-4-17197

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Date December 28, 2023

ADDENDUM

25 U.S.C. § 640d-13(a) (2015)

Relocation of households and members

(a) Authorization; time of completion; prohibition of further settlement of nonmembers without written approval; limit on gazing of livestock

Consistent with section 640d-7 of this title and the order of the District Court issued pursuant to section 640d-2 or 640d-3 of this title, the Commissioner is authorized and directed to relocate pursuant to section 640d-7 of this title and such order all households and members thereof and their personal property, including livestock, from any lands partitioned to the tribe of which they are not members. The relocation shall take place in accordance with the relocation plan and shall be completed by the end of five years from the date on which the relocation plan takes effect. No further settlement of Navajo individuals on the lands partitioned to the Hopi Tribe pursuant to this subchapter or on the Hopi Reservation shall be permitted unless advance written approval of the Hopi Tribe is obtained. No further settlement of Hopi individuals on the lands partitioned to the Navajo Tribe pursuant to this subchapter or on the Navajo Reservation shall be permitted unless advance written approval of the Navajo Tribe is obtained. No individual shall hereafter be allowed to increase the number of livestock he grazes on any area partitioned pursuant to this subchapter to the tribe of which he is not a member, nor shall he retain any grazing rights in any such area subsequent to his relocation therefrom.

. . .

25 U.S.C. § 640d-14(a), (b), (e) (2015)

Relocation housing

(a) Purchase of habitation and improvements from head of household; fair market value

The Commissioner shall purchase from the head of each household whose household is required to relocate under the terms of this subchapter the habitation and other improvements owned by him on the area from which he is required to move. The purchase price shall be the fair market value of such habitation and improvements as determined under section 640d-12(b)(2) of this title.

(b) Reimbursement for moving expenses; payment for replacement dwelling; limitations

> In addition to the payments made pursuant to subsection (a) of this section, the Commissioner shall:
>
> **(1)** reimburse each head of a household whose household is required to relocate pursuant to this subchapter for the actual reasonable moving expenses of the household . . . .
>
> **(2)** pay to each head of a household whose household is required to relocate pursuant to this subchapter an amount which, when added to the fair market value of the habitation and improvements purchased under subsection (a) of this section, equals the reasonable cost of a decent, safe, and sanitary replacement dwelling adequate to accommodate such household . . . .

. . .

(e) Disposal of acquired dwellings and improvements

The Commissioner is authorized to dispose of dwellings and other improvements acquired or constructed pursuant to this subchapter in such manner, including resale of such dwellings and improvements to members of the tribe exercising jurisdiction over the area at prices no higher than the acquisition or construction costs . . . .

25 C.F.R. § 700.69

Head of household

(a) Household. A household is:

(1) A group of two or more persons living together at a specific location who form a unit of permanent and domestic character.

(2) 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.

(b) Head of household. The head of household is that individual who speaks on behalf of the members of the household and who is designated by the household members to act as such.

(c) In order to qualify as a head of household, the individual must have been a head of household as of the time he/she moved from the land partitioned to a tribe of which they were not a member.

25 C.F.R. § 700.113(g)

Basic acquisition policies

. . .

(g) Payment before taking possession. Before requiring an owner to surrender possession of his habitations and/or improvements, the Commission shall—

> (1) Apply the agreed purchase price towards the acquisition price of the replacement dwelling or;
>
> (2) Deposit with the court in an appropriate proceeding, such as divorce or probate, for the benefit of the owner, an amount not less than the Commission's determination of fair market value for the property or the court award of compensation for the property up to the maximum benefit allowed under the then existing replacement housing benefit.

25 C.F.R. § 700.147

Eligibility

(a) To be eligible for services provided for under the Act, and these regulations, the head of household and/or immediate family must have been residents on December 22, 1974, of an area partitioned to the Tribe of which they were not members.

(b) The burden of proving residence and head of household status is on the applicant.

(c) Eligibility for benefits is further restricted by 25 U.S.C. 640d–13(c) and 14(c).

(d) Individuals are not entitled to receive separate benefits if it is determined that they are members of a household which has received benefits.

(e) Relocation benefits are restricted to those who qualify as heads-of-household as of July 7, 1986.