No. 23-15747

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNIE FUSON,
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. CV-21-08237 (Hon. Diane J. Humetewa)

APPELLEE'S ANSWERING BRIEF

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GLOSSARY

APA	Administrative Procedure Act
HPL	Hopi Partitioned Lands
NPL	Navajo Partitioned Lands
IHO	Independent Hearing Officer
ONHIR	Office of Navajo and Hopi Indian Relocation

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 within Arizona. Congress understood that the partition would result in some members of each Tribe residing on lands partitioned to the other Tribe. The Settlement Act created a federal agency, now known as the Office of Navajo and Hopi Indian Relocation (ONHIR), to help relocate eligible Tribal members off the lands partitioned to the other Tribe through a grant of relocation benefits. An applicant for relocation benefits bears the burden of proving, among other things, that on December 22, 1974 (the date the Settlement Act became law) he or she was a legal resident of land that was subsequently partitioned to the other Tribe and that he or she was a "head of household" at the relevant time. 25 C.F.R. § 700.147(b).

Plaintiff Johnnie Fuson, a member of the Navajo Nation, applied for relocation benefits in 2010. Because Plaintiff was a member of the Navajo Nation, he was obligated to prove that he resided on Hopi Partitioned Lands (HPL) as of December 22, 1974. After a hearing, ONHIR determined that Plaintiff failed to make that showing. As the Independent Hearing Officer (IHO) recounted, in December of 1974 Plaintiff resided either with his then-wife and mother of his children at the Seba Dalkai school (which is not located on the HPL) or resided on

his grandmother's property on Navajo Partitioned Lands (NPL). Although Plaintiff sometimes might have visited the HPL to assist with livestock management prior to the livestock reduction program, he was not a legal resident on the HPL at that time. ONHIR entered a final agency action affirming the IHO's decision.

Plaintiff sued, and the district court granted summary judgment for ONHIR. The district court correctly held that the IHO's adverse credibility findings were supported by specific, cogent reasons and the agency's decision was supported by substantial evidence in the record and was not arbitrary or capricious. This Court should affirm.

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* 4-ER-625-35; *see also* 25 U.S.C. § 640d-14(g). The district court issued a final order granting summary judgment to ONHIR on March 16, 2023. 1-ER-002, 003-013. Plaintiff timely filed his notice of appeal on May 15, 2023. 4-ER-636-37; *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 conclusion that Plaintiff failed to prove that he resided on the HPL as of December 22, 1974, was rational and supported by substantial evidence.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. The Navajo-Hopi Settlement Act and ONHIR's regulations

In 1974, Congress enacted the Settlement Act, which authorized the judicial partitioning of the surface 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) (Op. Br. ADD 001-020)).[1] Pursuant to the Settlement Act, in 1977 the U.S. District Court for the District of Arizona partitioned the land, allocating approximately 900,000 acres (known as "Hopi Partitioned Lands" or "HPL") to the Hopi Tribe and approximately 900,000 acres

[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 have "special and not general application." https://go.usa.gov/xpGut. For the Court's convenience, we cite the former codification.

(known as "Navajo Partitioned Lands" or "NPL") to the Navajo Nation. This Court approved the partition in *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1084-86 (9th Cir. 1999) (discussing history of further agreements among the Tribes and the United States to settle related claims).

The Settlement Act, as amended, sought to induce tribal members residing in what had been the Joint Use Area to move from lands that were partitioned to the other Tribe. 25 U.S.C. §§ 640d-11, 640d-12, 640d-13, 640d-14. The Act created a federal agency—formerly, the Navajo and Hopi Indian Relocation Commission, now, ONHIR—to administer the Act. See *id*. §§ 640d-11, 640d-14(b); *Clinton*, 180 F.3d at 1084; *Bedoni v. Navajo-Hopi Indian Relocation Commission*, 878 F.2d 1119, 1121-22 (9th Cir. 1989).

The Settlement Act directed ONHIR, among other things, "to relocate . . . all households and members thereof and their personal property . . . from any lands partitioned to the [T]ribe of which they are not members," 25 U.S.C. § 640d-13(a), and to pay for the cost of a "replacement dwelling" for "the head of each household whose household is required to relocate," *id*. § 640d-14(b)(2). *See* 25 C.F.R. §§ 700.1(a) (purpose), 700.147 (eligibility); *see also Walker v. Navajo-Hopi Indian Relocation Commission*, 728 F.2d 1276, 1278 (9th Cir. 1984) (holding applicants were not entitled to relocation benefits unless "forced to move" because

of the partitioning). Effective March 14, 2022, the benefit was $170,000 for a household of three or fewer and $176,000 for a household of four or more. *See* 25 U.S.C. § 640d-14(b)(2); 25 C.F.R. § 700.183(b) (authorizing benefit adjustments).[2]

Under ONHIR's regulations implementing the Settlement Act, to receive relocation benefits, an applicant must establish, among other things, that: (1) he or she was a legal resident—on December 22, 1974 (the date of the statute's enactment)—of land partitioned to the Tribe of which the applicant was not a member; and (2) he or she was a "head of household" by the date that the applicant moved from the land partitioned to the other Tribe (but no later than July 7, 1986). 25 C.F.R. §§ 700.69(c), 700.147(a), (e). "The burden of proving residence and head of household status is on the applicant." 25 C.F.R. § 700.147(b).

This case concerns the first requirement: whether the applicant was a resident of land partitioned to the Tribe of which the applicant was not a member. To establish the first criterion, an applicant must prove that, as of December 22,

[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 application 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).

1974, he or she was a "legal resident[]" of land partitioned to the Tribe of which the applicant was not a member. 25 C.F.R. §§ 700.97, 700.147(a). The preamble to the regulations implementing the Settlement Act explains that "the term 'resident' . . . 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." 49 Fed. Reg. 22277, 22277 (May 29, 1984); *accord Charles v. ONHIR*, 774 Fed. App'x 389, 390 (9th Cir. 2019) (confirming that preamble contains "correct standard").

The preamble further sets out a non-exclusive list of factors that ONHIR examines in assessing an applicant's "manifestations of intent to maintain legal residence in the partitioned lands," including, for example: employment records, school records, mailing address records, banking records, driver's license records, marital records, records of home ownership or rental off the disputed area, Bureau of Indian Affairs (BIA) census data, Social Security Administration records, marital records, court records, records from the Joint Use Area Roster and "any other relevant data." 49 Fed. Reg. at 22278. The final rule further states, "[o]nce legal residence is proven, current occupancy (which is a fluctuating condition) is not required for eligibility." 49 Fed. Reg. at 22278.

B. Factual background

1. Introduction

Plaintiff Johnnie Fuson, a member of the Navajo Nation, was born in 1944. 3-ER-383. He was raised by his grandmother, Fannie Greyhair, in the Teesto Chapter. 3-ER-384. Fannie Greyhair had multiple camps in the Teesto Chapter and was enumerated on the BIA's Enumeration in the HPL, where she was interviewed on January 15, 1975, and listed as the owner of a log dwelling. 3-ER-470. Fannie Greyhair was also enumerated at sites on the NPL with a complete corral and a complete frame dwelling. 3-ER-471. She was interviewed on January 27, 1975, at her NPL site, and thirteen family members, including Plaintiff, were enumerated by name at that site on the NPL. *Id*. No family members were specifically enumerated with Fannie Greyhair at her site on the HPL. 3-ER-470.

Plaintiff married Ruth Begay in 1971, and they were divorced on March 28, 1978. 3-ER-386; 3-ER-289. While married, the Plaintiff and Ruth Begay had four children, born in 1972, 1974, 1975, and in 1976. 3-ER-394. Ms. Begay was previously granted relocation benefits based on her family's HPL residence, but the parties stipulated that Plaintiff's only claim was based on his grandmother's residence, not his wife's. 3-ER-382.

2. ONHIR's denial of Johnnie Fuson's application for relocation benefits

Plaintiff applied for relocation benefits on August 26, 2010. 3-ER-309. In his application, Plaintiff stated that he was living on the HPL at a location "5 Miles NE of Teesto Chapter House, BIA QQL 124 SE 122, 120, 121, 119, 118" on December 22, 1974. 3-ER-307. On September 10, 2012, ONHIR sent Plaintiff a request for additional information, including a list of where he lived, worked, or went to school from 1970 to 1986. 3-ER-341.

In response, Plaintiff filled out two forms containing some information related to his residency and work history from 1970 to 1986. 3-ER-346. On one form, Plaintiff listed his residence from January 1970 to September 1976 as "Teesto HPL/NPL." 3-ER-346. On a second form, Plaintiff listed his residence from August 1972 to July 1975 as "Winslow." 3-ER-X347. In response, ONHIR sent Plaintiff another letter asking him to be "more specific" about where in Teesto he lived, and to clarify whether it was on the NPL or HPL. 3-ER-345. There is nothing in the record that indicates Plaintiff responded to this letter.

On June 6, 2013, ONHIR denied Plaintiff's application for Relocation Benefits. 3-ER-351-52. In its denial letter, ONHIR determined that Plaintiff was not a resident of the HPL on December 22, 1974. 3-ER-351. ONHIR noted that Plaintiff was listed in the Enumeration as a resident of the NPL, at site QQL 124 SW 109. *Id*. ONHIR also noted that Plaintiff's grandmother, Fannie Greyhair, was

enumerated on the NPL as well, and that Plaintiff was not identified as a resident of Fannie Greyhair's HPL site when she was interviewed on January 27, 1975. *Id*. ONHIR also referred to the certification of Plaintiff's former wife, Ruth Begay, and noted that she was certified based on her contacts with *her* family's HPL homesite, and not Fannie Greyhair's HPL site. 3-ER-352. ONHIR noted that Ruth Begay testified, during her hearing, that she and Plaintiff had separated in 1972 or 1973 (though they did not divorce until several years later), and that Plaintiff did not return with Ruth to her family's HPL homesite in 1974. *Id*. Plaintiff timely appealed ONHIR's denial.

3. Johnnie Fuson's administrative appeal hearing.

Plaintiff's hearing was consolidated with the hearing for his brother, Benny C. Fuson, and was held on August 21, 2015, before IHO Harold J. Merkow. 3-ER-378, 380. Plaintiff, his brother, and their cousin Margery Greyhair testified on Plaintiff's behalf. At the outset of the hearing, the parties stipulated that Plaintiff became a head of household prior to December 22, 1974. 3-ER-381. As a result, the only issue for the IHO's determination was whether Plaintiff was a resident of the HPL on December 22, 1974. *Id*.

The parties also stipulated that Fannie Greyhair had several improvements that were enumerated, and one of those was listed as being a "dwelling" on the HPL. *Id*. Finally, the parties stipulated that Plaintiff was not making a claim based

on Ruth Begay's HPL residence, but only based on Fannie Greyhair's HPL residence. 3-ER-382.

a. Johnnie Fuson's testimony

Plaintiff testified that the name of Fannie Greyhair's HPL location was "Lukai Dine." 3-ER-384. Plaintiff initially denied that Fannie Greyhair had a residence on the NPL and denied that she had camps at any other location other than the HPL site. 3-ER-385 ("Did [your grandmother] have any other locations?" "No."). He also denied living at any location other than the HPL site. 3-ER-386-86 ("Did you have any other locations that you lived?" "No."). After looking at a map, Plaintiff testified that the HPL site was a couple of miles "north, northeast" of Lukai Springs. 3-ER-387-88. Eventually, after cross-examination, Plaintiff admitted that Fannie Greyhair had a "shed" on the NPL but denied that she had any dwelling or corral on the NPL. 3-ER-407-08 ("In 1974, did your grandma have a corral on the Navajo side?" "No." "And are you sure your grandma didn't have a residence, a place to live on the Navajo side?" "No.").

Plaintiff testified that he married Ruth Begay in 1971, and that she was working at Seba Dalkai School (outside the HPL) at the time. 3-ER-386. He testified that he spent time with her at Seba Dalkai "off and on." *Id*. He testified that he "split up" with Ruth Begay in 1975, but later testified that he and Ruth had a child in 1976. 3-ER-394. Plaintiff did not initially recall the specific birth years

of his children. 3-ER-393-94. A BIA Family Card was introduced into the record, which showed that Plaintiff and Ruth had children in 1972, 1974, 1975, and in 1976. 3-ER-394. Plaintiff testified that these children lived with his wife, Ruth Begay, at Seba Dalkai. 3-ER-403-04.

Plaintiff testified that his grandmother's family had livestock but sold some of it in 1974 due to the livestock reduction program. 3-ER-390. He further testified that he got a job in Winslow, Arizona in 1975. 3-ER-390.

b. Benny Fuson's testimony

Benny Fuson, Plaintiff's brother, testified that he grew up in Teesto. 3-ER-412. In contrast to Plaintiff's testimony, Benny Fuson eventually testified that Fannie Greyhair's NPL residence had a hogan,[3] a corral, and a shed, though he originally testified that there was no dwelling at the NPL camp. 3-ER-424-35. He testified that the NPL site was called "Lukai Point." 3-ER-419. Benny Fuson testified that the family's livestock were gone by 1974 or 1975. 3-ER-421. He had trouble recalling how he had completed the application for relocation benefits, or who had assisted him with the process. 3-ER-431.

[3] A Hogan is a type of residence or dwelling. 3-ER-424 ("You're sure there was no residence at all on the Navajo side, your grandma had?" "No, they had … a Hogan.").

c. Margery Greyhair's testimony

Plaintiff's cousin, Margery Greyhair, testified that she grew up in Teesto as well, and was raised by her mother and her grandmother, Fannie Greyhair. 3-ER-434. She testified that her grandmother had two camps—one on the HPL and one on the NPL. 3-ER-435. She further testified that both camps contained dwellings, and that the family "just sort of went back and forth between the two." *Id*. She recalled that the HPL site had "a couple of sheds, and then two Hogans." 3-ER-444.

When asked if she recalled the presence of Plaintiff at the HPL site in 1974 or 1975, Margery Greyhair testified that Plaintiff and her mother were doing "arts and crafts silver work" together. 3-ER-436. She also commented that Plaintiff's silversmithing was his regular means of employment—something that Plaintiff never mentioned during his testimony or work history. 3-ER-436-37. She further testified that her mother died when a generator exploded at the HPL camp in April of 1974 and indicated that the generator was necessary to provide power to the machines used for silversmithing by her mother and Plaintiff. 3-ER-437. She later noted that "the arts and crafts ended" after her mother's passing. 3-ER-444.

She testified that the family's residency pattern between the HPL and NPL sites changed as a result of the livestock reduction, and that the family gradually moved to the NPL camp after the livestock reduction concluded. 3-ER-440. She

clarified that there was an initial livestock reduction sometime prior to her mother's death in April 1974, and one after. *Id*.

4. The IHO's decision

After the parties submitted post-hearing briefs, the IHO issued his "Findings of Fact, Conclusions of Law and Decision" (the "Decision") on October 23, 2015. 3-ER-476. The IHO determined that Plaintiff's "testimony about residing at the Lukai Spring camp of Fannie Greyhair is not credible in light of his family's residence at Seba Dalkai School and his identification by the BIA as living on NPL." 3-ER-480. The IHO further noted that Plaintiff's "testimony contradicts and is inconsistent with other witnesses' testimony so, overall, Johnny Fuson is not a credible witness." *Id*. For Benny Fuson, the IHO determined that his testimony lacked credibility because it was "confusing, conflicting and inconsistent with other witnesses." 3-ER-480-81. For Margery Greyhair, the IHO determined that her testimony lacked credibility because it was "inconsistent with the testimony of applicant and Benny Fuson" and because "her 40-year-old recollections as an 11-year-old child are highly suspect." 3-ER-481.

The IHO determined that Plaintiff was not eligible for Relocation Benefits because he was not a resident of the HPL on December 22, 1974. 3-ER-485. The IHO concluded that Plaintiff was a resident at Seba Dalkai School "where he was living with his wife and family and where he had been for several years" or,

alternatively, that he was a resident of the NPL site where he had been enumerated with Fannie Greyhair. 3-ER-483. The IHO based this determination on several facts in the record: (1) Plaintiff's description of the structures at the HPL site were different than the other two witnesses; (2) Plaintiff failed to mention his jewelry making on the HPL, testified to by Margery Greyhair; (3) Plaintiff's residence at Seba Dalkai School must have been more than "off and on" due to Ruth's pregnancies in 1971, 1973, early 1975 and 1976; (4) the identification of Plaintiff by the BIA at the NPL homesite of Fannie Greyhair was "another indication that Fannie Greyhair's HPL residence was not [Plaintiff's] legal residence"; and (5); Benny Fuson and Margery Greyhair testified that by the time of passage of the Act, the Lukai Spring home on the HPL was vacated as Fannie Greyhair's livestock had been sold as a result of the livestock reduction program. 3-ER-483-84. The IHO further determined that "[t]he presence of all of the family members at [Plaintiff's] Seba Dalkai home is an overpowering determinant in deciding applicant's legal residence when weighed against Fannie Greyhair's HPL home." 3-ER-483. Finally, the IHO determined that if "there had been a traditional use area that encompassed both sides of the partition line, that traditional use area was abandoned by Fannie Greyhair when her livestock was sold, and it did not exist as of the date of passage of the Act." 3-ER-484.

As a result, the IHO determined that Plaintiff failed to meet his burden of proving that he was a resident of the HPL on December 22, 1974. 3-ER-485.

C. Proceedings below

ONHIR entered final agency action denying Plaintiff's application for relocation benefits on November 23, 2015. 3-ER-485. Nearly six years later, on October 21, 2021, Plaintiff filed suit under the Administrative Procedure Act in district court challenging ONHIR's denial decision. 4-ER-625-35. On March 16, 2023, the court granted summary judgment in favor of ONHIR, holding that the agency reasonably determined that Plaintiff had not met his burden of proven that he resided on the HPL on December 22, 1974. 1-ER-003-013. The district court concluded: first, that the IHO did not "inconsistently or contradictorily" use BIA Enumeration evidence, 1-ER-007; second, that the IHO did not ignore ONHIR's "customary use policy" because it noted the absence of a traditional use area, 1-ER-009; and third, that the IHO had sufficient reason to deem all three witnesses incredible, 1-ER-010.

Plaintiff timely appealed to this Court on May 15, 2023. 4-ER-636.

SUMMARY OF ARGUMENT

The district court correctly affirmed ONHIR's denial of relocation benefits as reasonable and supported by record evidence. Substantial evidence supports the IHO's determination that Plaintiff failed to meet his burden to prove that he resided

on the HPL as of December 22, 1974. At the relevant time, Plaintiff was either living with his wife and children at Seba Dalkai School or was residing on his grandmother's NPL site.

The IHO rationally determined that the evidence manifesting Plaintiff's intent to reside off the HPL outweighed the central evidence Plaintiff relied on to support his claim—contradictory testimony about the number of livestock raised by his family, an alleged silversmithing business, and his ex-wife's testimony about their relationship. The IHO's reliance on enumeration records, in conjunction with other record evidence about Plaintiff's living situation, was reasonable.

Plaintiff wrongly relies on common-law principles of "domicile" to argue that, once he demonstrated an ancestral "domicile" on the HPL, ONHIR had the burden to show he abandoned that domicile. The "legal residence" test is defined not by the common law of domicile, but by the Settlement Act and its implementing regulations, which place the burden of establishing residence on the applicant. This Court has consistently rejected the burden-shifting framework asserted by Plaintiff whenever it has been raised by others in their similar suits challenging denials by ONHIR of relocation benefits on the ground of failure of the applicants to demonstrate legal residence.

Plaintiff also errs in asserting that the IHO acted arbitrarily in denying his application after ONHIR previously found his ex-wife eligible for relocation benefits. But the IHO was properly ruling on the evidence in this specific proceeding, which was not the same as the evidence presented in his ex-wife's proceeding. Nor was the IHO obligated to conform his decision to any prior determination involving Plaintiff's ex-wife, whose eligibility turned on her use of *her* family's HPL homesite, not on any claimed connection to Plaintiff's grandmother's homesite.

The district court's judgment sustaining the agency's decision should be affirmed. If this Court nonetheless identifies error in the agency decision, it should follow the ordinary rule and reverse ONHIR's decision and remand the matter to the agency for further review.

STANDARD OF REVIEW

The district court's summary judgment order is reviewed de novo. *Walker*, 728 F.2d at 1278. ONHIR's decision is reviewed under the APA for whether it is "arbitrary, capricious, an abuse of discretion," "not in accordance with law," "without observance of procedure required by law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (D), (E); *see also* 25 U.S.C. § 640d-14(g); *Bedoni*, 878 F.2d at 1122. 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) (quoting *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009)). Agency 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 the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturer Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

An agency's factual findings are to be affirmed if they are supported by substantial evidence. *Alaska Department of Health & Social Services v. Centers for Medicare & Medicaid Services*, 424 F.3d 931, 937 (9th Cir. 2005). 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). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal quotation marks and citation omitted); *accord San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). If the evidence is susceptible to more than one rational interpretation, the agency's decision must be upheld. *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995); *see also INS v. Elias-Zacharias*, 502 U.S. 478, 481 n.1

(1992) (to reject an agency's factual findings, a court "must find that the evidence not only *supports*" a contrary finding "but *compels* it." (emphasis in original)). An agency's credibility findings are also reviewed for substantial evidence. *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997).

ARGUMENT

I. ONHIR's determination that Plaintiff failed to meet his burden to establish HPL residency was reasonable and amply supported by record evidence.

Plaintiff contends that he is entitled to relocation benefits under the Settlement Act because he was a resident of his grandmother's HPL homesite as of December 22, 1974, at which she—but not he—was enumerated in 1975. Op. Br. 23. To prove HPL residence he had to establish his "intent to reside" on the HPL by demonstrating sufficient "manifestations of that intent" as of that date. 49 Fed. Reg. at 22277. The record evidence manifesting Plaintiff's intent, when viewed as a whole, fully supports the IHO's determination that Plaintiff did not meet that burden.

Contrary to Plaintiff's assertions of district court error, substantial evidence supports ONHIR's findings that, at the relevant time, Plaintiff either resided with his wife and children at Seba Dalkai School on the NPL or resided only on his grandmother's NPL homesite, as use of her HPL site had been significantly reduced due to the livestock reduction program.

A. The IHO's credibility findings should be sustained because they are supported by substantial evidence.

At the outset, the IHO "alone is in a position to observe" a witnesses' "tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence." *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985). The IHO need not credit testimony simply because it is unrefuted or corroborated by other evidence, *id*., and so long as the IHO provides a "specific, cogent reason" for an adverse credibility finding, such finding is entitled to "substantial deference," *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990) (internal quotation marks and citation omitted).

Here, the IHO identified conflicting statements among the accounts of Plaintiff, his brother, and his cousin as a "specific, cogent reason" for disbelieving testimony concerning their residence. 3-ER-480-81; *see Bahe v. ONHIR*, 770 F. App'x 871 (9th Cir. 2019) ("[Plaintiff] struggled to remember events at specific points in time, specifically the ages of her children during the pertinent time period[.]"). The IHO's adverse credibility findings here were supported not only by direct observation of the testifying witnesses and their demeanor, but also by extensive testimonial inconsistencies. And regardless of whether the discrepancies in testimony *compelled* the IHO to disbelieve testimony on the topic, the IHO acted well within his discretion to find such testimony not credible.

Moreover, this Court should decline Plaintiff's invitation to second-guess the IHO's finding because Plaintiff himself did "not put forward any evidence that reconciles the inconsistenc[ies]." *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989); *see also Sarvia-Quintanilla*, 767 F.2d at 1395 (noting that IHO is "uniquely qualified" and best situated to determine which "testimony has about it the ring of truth"). The testimonial inconsistencies go "to the heart" of Plaintiff's claim that he participated in specific activities during the relevant time period. *See Enying Li v. Holder*, 738 F.3d 1160, 1166 (9th Cir. 2013) (inconsistencies regarding duration of involvement in an activity were "central to determining" whether the witness suffered persecution for that activity, and credibility regarding that issue went "to the heart" of that claim).

Plaintiff suggests that the IHO's credibility determinations were deficient because they did not specifically set out separate rationales for why some testimony was found credible and some was not. Op. Br. 47. As examples, Plaintiff notes three IHO's findings of fact related to (1) the timing of the livestock reduction program, (2) Plaintiff's work history, and (3) the date of Plaintiff's separation from Ms. Begay. Op. Br. 46. But the first two of these findings were based on testimony that was either not inconsistent between Johnnie, Benny, and Margery Greyhair, or was otherwise supported by the record. *See supra* sections a, b, c. As to the last, while Ms. Begay testified that the couple separated in "early

‘72 and ’73,” this information conflicts with the birth of mutual children in 1975 and in 1976, while a later separation is consistent with those births. 3-ER-290. Ms. Begay also testified that Plaintiff was in “Gallup” in 1974, “taking adult training up there at a place called CIT.” 3-ER-292. Plaintiff did not note this training in his testimony.

Plaintiff also challenges the IHO’s credibility decision regarding Margery Greyhair’s testimony related to the exploding generator. Op. Br. 47; *see supra* section c. But this argument is inconsequential. ONHIR does not dispute that the Enumeration lists a complete dwelling on the HPL site. 3-ER-470. As noted above, however, Plaintiff was not enumerated at the HPL site—he was enumerated on the NPL site, along with thirteen other individuals. 3-ER-471. His grandmother, on the other hand, was enumerated on the HPL site. He offers no explanation for how those formal enumerations, which were conducted specifically to identify who was living at particular locations, could have been incorrect. And there were testimonial inconsistencies on other key points, as well, for example, the location and type of work purportedly performed by Plaintiff. *See supra* sections a, c.

Plaintiff may not agree with the IHO’s credibility determinations, but the IHO provided specific, cogent reasons for his conclusions. At bottom, Plaintiff has failed to provide a basis for disturbing the IHO’s well-founded credibility determinations in this case.

B. ONHIR's determination that Plaintiff did not reside on the HPL as of December 22, 1974, was reasonable.

The IHO's determination that Plaintiff no longer resided on the HPL at the relevant time was not arbitrary or capricious. The IHO reasonably concluded on the credible record evidence in the Enumeration and other data that, contrary to Plaintiff's contention, that he did not establish that his legal residence was on the HPL.

1. ONHIR followed its general practice regarding Customary Use.

ONHIR followed its general practice in considering whether Plaintiff made customary use of areas on the HPL. ONHIR did not dispute that Plaintiff's grandmother, Ms. Greyhair, maintained residences on both HPL and NPL sites, and that she historically moved between them. ONHIR's "customary use policy" (later refined in, and sometimes called in shorthand, the "Minnie Woodie Policy") holds that "the existence of a traditional use area and its continual, active and substantial use after partition" is acceptable proof of an applicant's legal residence. *Begay v. ONHIR*, 305 F. Supp. 3d 1040, 1048 (D. Ariz. 2018) (emphasis removed). But Plaintiff failed to satisfy the elements of the policy in claiming legal residence on the HPL during the relevant time period.

Plaintiff fails to undercut the IHO's appraisal of customary use on the record evidence, making no attempt to argue that he was a traditional Navajo elder, using

HPL and NPL lands as one unit. And Plaintiff also testified that he did *not* use the HPL and NPL sites on a continual basis. Rather, he testified that he split his time between the HPL site and the Seba Dalkai School, where his wife and children resided. 3-ER-386.

Plaintiff contends that he lived a traditional lifestyle of grazing livestock,[4] Op. Br. 12, citing to the *Decision for Harry Isaac*. Op. Br. 26-28. But that reliance is misplaced, because the circumstances in that case materially differ from those presented here. In *Harry Isaac*, the IHO determined that the applicant had a traditional customary use area which was partitioned as a result of the Settlement Act. And the IHO further held that the applicant's "pattern of residence in such traditional use area was continuous" and that the two homesites within the customary use area were "inseparable."

Here, in contrast, Plaintiff identified his home as being located on the HPL near the Lukai Spring location. 3-ER-385. During his testimony, Plaintiff initially denied that Fannie Greyhair had any residence at all on the NPL and denied that she had camps at any other location other than the HPL site. *Id*. He also denied living at any location other than the HPL site. *Id*. Only after cross-examination did

[4] Plaintiff previously asserted in the district court that he also lived a traditional lifestyle by making silver jewelry with his aunt, until her death in April 1974. 2-ER-099. Plaintiff never mentioned that alleged activity at any point in his testimony and appears to have now abandoned that assertion in this court.

Plaintiff admits that Fannie Greyhair had a "shed" on the NPL but then denied that she had any dwelling or corral on the NPL. *Id*. As such, he was not making use of a unitary land area that included both the HPL and NPL, nor was he engaging in any traditional activities on a continuous basis on both the HPL and NPL. While Margery Greyhair did testify that the family moved back and forth between the two camps, she also testified that the family's residency pattern changed in 1974 as a result of the livestock reduction. 3-ER-440.

And most importantly, Plaintiff's wife and children lived at the Seba Dalkai School, where children were near-annually born to Plaintiff as late as 1976. 3-ER-394. No analogous facts were present in the *Harry Isaac* decision, and the IHO's decision rejecting Plaintiff's claims are supported by substantial evidence on the record presented in this case.

2. ONHIR's use of enumeration data was reasonable.

Plaintiff challenges the reliability of the Enumeration in general and argues that the reliance on the enumeration by ONHIR is arbitrary and capricious. Op. Br. 28. Plaintiff cites several sources to assert one overarching argument that "the Enumeration is not, *on its own*, sufficient evidence to establish residency or non-residency." Op. Br. 30 (emphasis supplied). ONHIR does not dispute this statement—it simply does not apply to the IHO's Decision in this case. As discussed below, the IHO did not base the entirety (or even the majority) of his

Decision on Plaintiff's enumeration on the NPL. 3-ER-482. It was only one factor, among several, which led the IHO to conclude that Plaintiff failed to meet his burden of proving residency on the HPL on December 22, 1974. 3-ER-481-82.

Further, Plaintiff asserts that documents underlying the BIA enumeration were "lost in a flood." Op. Br. 31 n.4. Even if true, there is no plausible conclusion that BIA intentionally "destroy[ed]" any such documents. And Plaintiff further does not articulate any theory for why that alleged missing information would prove his HPL residency.

Plaintiff then argues that the IHO's decision is "arbitrary and capricious" because it "mischaracterizes the BIA enumeration in a legally and factually erroneous fashion to support the finding [Plaintiff] was a legal resident of the NPL and not the HPL." Op. Br. 35. Plaintiff argues that the IHO gave excessive weight to the portion of the Enumeration which listed Plaintiff (and his grandmother, and several other family members) at the NPL site, while ignoring the portion of the Enumeration which listed the family's dwelling on the HPL site. *Id.*

But Plaintiff's arguments cannot withstand scrutiny. The HPL enumeration did identify a "family" dwelling on the HPL only in the sense that the HPL enumeration identified his grandmother as located there. No conclusion can be reasonably drawn from that HPL enumeration that Plaintiff or any other family member besides his grandmother legally resided there. Nor did the IHO treat the

Enumeration as conclusive evidence "on its own." 3-ER-482. In fact, the IHO's decision placed *more* emphasis on evidence that Plaintiff's residence on December 22, 1974, was with his wife and children (including an infant) at the Seba Dalkai School. 3-ER-483. This is evident from the IHO's statement in the decision that "The presence of all the family members at their Seba Dalkai home is an *overpowering determinant* in deciding applicant's legal residence when weighed against Fannie Greyhair's HPL home." *Id*. (emphasis added). It was only after this finding that the IHO found "[a]lternatively" that Plaintiff's identification at the NPL homesite of Fannie Greyhair in 1975 "is *another* indication that Fannie Greyhair's HPL residence was not [Plaintiff's] legal residence." *Id*. (emphasis added). Thus, Plaintiff wrongly suggests that the IHO treated the Enumeration as "conclusive evidence."

Additionally, Plaintiff wrongly argues that the IHO ignored a portion of the Enumeration. Op. Br. 35. Plaintiff was *never* specifically enumerated by name at the HPL site, and Plaintiff does not identify any document or other evidence demonstrating otherwise. 3-ER-470. In contrast, thirteen family members, including Plaintiff, were explicitly enumerated by name at the NPL site. 3-ER-471 (specifically noting "Johnnie Fuson"). ONHIR's application of the residency requirement is intended to ensure that only persons who actually must relocate from their legal residence on lands later partitioned to the other Tribe are provided

with a "replacement dwelling." Plaintiff has the burden of proving that he was a resident of the HPL on December 22, 1974. The IHO reasonably considered the evidence before him in making his Decision, in addition to other facts set forth above. *See Bahe*, 770 F. App'x at 872 ("[T]he ONHIR drew reasonable inferences from the Joint Use Area Roster, which, along with other evidence, substantiated the residency determination.").

Plaintiff misses the point when he claims that "ONHIR has determined in past cases that the enumeration on the NPL when an applicant has both an NPL and HPL homesite is not evidence of residency on the NPL on December 22, 1974." Op. Br. 36. Even if accurate, that determination is inapplicable here because, as the IHO permissibly found on the record evidence in this case, Plaintiff did *not* have an HPL homesite as of the relevant date.

C. Substantial evidence supported ONHIR's determination that Plaintiff did not reside on the HPL as of December 22, 1974.

Of the more than twenty objective indicators of residence identified in the preamble to ONHIR's regulation, none supports Plaintiff's claim of HPL residence in December 1974. *See* 49 Fed. Reg. at 22278. Plaintiff did not, for example, acquire a driver's license at his grandmother's HPL address, he did not maintain a mailing address there, he did he own or rent any real property or improvements on

the HPL, nor did he provide any bank records supporting residence at that former location.

By contrast, the IHO's Decision found that Plaintiff was a resident of either Seba Dalkai School (which is not on the HPL) or the NPL as of December 22, 1974, and the IHO relied on the many regulatory factors found in this record in making this determination. 3-ER-478-80. The IHO further found that Plaintiff's residence at Seba Dalkai School must have been more than "off and on" due to Ruth Begay's pregnancies in 1971, 1973, early 1975 and 1976. 3-ER-483. Moreover, Plaintiff was enumerated by the BIA at the NPL homesite of Fannie Greyhair. 3-ER-471. And Benny Fuson and Margery Greyhair testified that, by the time of passage of the Act, the Lukai Spring home on the HPL was vacated as Fannie Greyhair's livestock had been sold as a result of the livestock reduction program. 3-ER-421; 3-ER-440.

This record evidence provides ample support for the IHO's determination that Plaintiff failed to meet his burden of proving that he resided on the HPL on December 22, 1974.

II. ONHIR's determination that Plaintiff was a resident of his wife's home was reasonable and based on substantial evidence.

A. The IHO's determination that Plaintiff resided with his wife was reasonable.

Plaintiff's arguments that ONHIR applied an incorrect legal standard disregard the IHO's actual analysis—which entailed an assessment of all record evidence manifesting Plaintiff's intent about where he resided—and would improperly engraft presumptions of common law domicile principles onto the different "legal residence" requirement in ONHIR's regulations.

1. Plaintiff Errs in Attempting to Import Presumptions Applicable to the Law of Domicile into the Distinct Regulatory Concept of Legal Residence.

Plaintiff correctly recognizes, Op. Br. 39, that ONHIR's regulations in effect since 1984 require an applicant to demonstrate his "legal residence," which "requires an examination of a person's intent to reside combined with manifestations of that intent." 49 Fed. Reg. at 22277; *Charles*, 774 Fed. App'x at 390. As detailed herein, the IHO conducted that inquiry here, assessing all relevant manifestations of Plaintiff's intent before concluding that Plaintiff had not met his burden to establish HPL residence.

Plaintiff raises a meritless argument in contending that the IHO failed to conform the "legal residence" analysis to common law principles of "domicile"—distinct concepts which Plaintiff wrongly asserts are essentially synonymous. Op.

Br. 39-40. Under Plaintiff's view, the residence inquiry here should have incorporated a standard, purportedly drawn from "domicile" law used in determining a federal court's diversity jurisdiction, that his residence in 1974 was the same residence he had as a child, regardless of other circumstances such as his marriage and fatherhood. Plaintiff implies that the burden is on ONHIR to prove that Plaintiff "abandoned" his "ancestral home" to reside with his wife. Op. Br. 41. That argument is meritless. Plaintiff's burden-shifting framework is incorrect: it has no basis in the Settlement Act or its implementing regulations, and it has been repeatedly rejected by this Court.

Although domicile is a common law principle that may inform a court's inquiry into residence in other contexts, nowhere in the Settlement Act did Congress incorporate that doctrine into the relocation benefits context. Rather, Congress created ONHIR and directed the agency to design and implement a relocation plan. 25 U.S.C. § 640d-11(a) (creating agency); *id.* § 640d-12 (requiring report with relocation plan); *id.* § 640d-13(a) (providing that "relocation shall take place in accordance with the relocation plan"). Under that authority, ONHIR promulgated detailed regulations governing the process for applicants to obtain relocation benefits. Those regulations are crystal clear that the "burden of proving residence and head of household status is on the applicant." 25 C.F.R. § 700.147(b).

By expressly placing on the applicant the burden of proving "residence," the regulations required that Plaintiff affirmatively prove that he lived on the HPL on December 22, 1974. Plaintiff cannot merely point to where his grandmother lived and then claim that the burden shifts to ONHIR to prove that he did not live there during the relevant time period. *See* 49 Fed. Reg. at 22,278 (listing kinds of evidence by which an applicant can demonstrate legal residence). Plaintiff's argument would turn ONHIR's regulatory framework on its head, creating a presumption in favor of a supposedly established domicile and would impermissibly place a burden on ONHIR to establish that Plaintiff abandoned his prior residence rather than on Plaintiff to show both that he had a particular residence and that he maintained that residence for the requisite time frame. Br. at 26, 29. The regulations call for no such shifting of the burden on demonstration of legal residence, nor is there any suggestion that the common law of domicile provides the legal framework for determining an applicant's legal residence for purposes of assessing an applicant's claim to relocation benefits. The burden to establish residence properly remained on Plaintiff throughout the proceedings.

Indeed, this Court has consistently rejected the domicile argument Plaintiff presses. For example, the applicant in *Daw v. ONHIR* attempted to rely on the law of domicile to argue that "if he established that he previously lived on HPL, the burden shift[s] to the government to establish that his residence had changed."

2021 U.S. App. LEXIS 31849, slip op. at *2 (9th Cir. Oct. 20, 2021). Rejecting that position, this Court held that ONHIR's regulations place "the burden of proving residence . . . on the applicant," and that nothing in those regulations "suggests that burden ever shifts to the government." *Id.* (quotation marks omitted). Plaintiff here failed to meet his burden.

Nor is *Daw* the only such decision. this Court has uniformly and repeatedly denied attempts to import presumptions of "domicile" law into the "legal residence" inquiry. *See, e.g.*, *Shaw v. ONHIR*, 860 Fed. App'x 493, 494-95 (9th Cir. 2021) (rejecting argument that "general domicile law" applies and explaining that, irrespective of whether applicant "established past domicile on the HPL," the "burden of proving residence . . . lies with the applicant"); *Charles*, 774 Fed. App'x at 390 (relying on regulations, rather than law of domicile raised by applicant, in affirming ONHIR decision); *Bahe*, 770 Fed. App'x at 871-72 (upholding denial of benefits as rational against applicant's claim that ONHIR failed to apply domicile law).

Without even mentioning these decisions, Plaintiff incorrectly asserts that the IHO confused "'mere residence' with legal residence, which he also describes as "domicile." Op. Br. 39. But although *Gamble v. ONHIR*, No. CIV-97-1247-PCT-PGR (D. Ariz. Sep. 24, 1998) (*see* Op. Br. ADD 084-103), has language equating legal residence with domicile, that court was not considering, much less

adopting, the *burden-shifting* framework Plaintiff now raises. Op. Br. ADD 097 (comparing legal residence to domicile for purpose of explaining that a person cannot "have more than one legal residence").

Nor does a nearly four-decade-old ONHIR decision that Plaintiff cites for the first time in his opening brief on appeal, Op. Br. 25, advance his argument. *In re Lorenzo Smith*, ONHIR No. 85-33 (1986). The IHO in that proceeding appears to have been explaining and applying a "substantial and recurring contacts" test that was long ago discarded by ONHIR. *See* Op. Br. ADD 107 ("Applicant's contacts . . . were 'substantial and recurring' . . . pursuant to section 700.97(a)(2)"). For background, before ONHIR amended its regulations in 1984, an applicant who claimed to be "temporarily away" from a homesite on lands partitioned to the other Tribe could establish eligibility for relocation benefits by showing the "[m]aintenance of substantial recurring contacts" with that homesite. 47 Fed. Reg. 2,089, 2,096 (Jan. 14, 1982) (§ 700.97(a)(2)) (Op. Br. ADD 050). Spurred by a Government Accountability Office report faulting ONHIR's approach as potentially "too broad" in authorizing payments to individuals who did not "actually need to relocate," ONHIR discarded that standard. GAO, B-203827 L/M at 3 (Dec. 14, 1981), https://www.gao.gov/products/b-203827-lm; 49 Fed. Reg. at 22,278. In its place, ONHIR adopted the current "legal residence" test that entails examining an applicant's intent to reside, in combination with the applicant's

"manifestations of [] intent" to reside, on lands partitioned to the other Tribe. 49 Fed. Reg. at 22,278. Accordingly, that old agency decision should not be read as interpreting the current regulations defining "residence," which the district court and IHO in this case properly applied.

The cases further relied on by Plaintiff to draw out this alleged distinction are not relevant to the ONHIR inquiry. The one cited case from this Court, *Lew v. Moss*, only discussed domicile in the context of subject matter jurisdiction under 28 U.S.C. § 1332. 797 F.2d 747, 748 (9th Cir. 1986). The other two cited cases are both out of circuit district court opinions also dealing with jurisdiction. *See Slate v. Shell*, 444 F. Supp 2d. 1210, 1216-1217 (S.D. Alabama, 2006); *Bridgerton v. Bridgeman,* 63 S.W. 3d 686 (E.D. Missouri, 2002). But nowhere in the Settlement Act did Congress incorporate the doctrine of domicile into the relocation benefits context, nor has ONHIR in its regulatory framework governing relocation benefits applications.

This Court accordingly should adhere to ONHIR's consistent position in the many recent applications squarely presenting the issue—a position that, as this Court has repeatedly held, correctly interprets ONHIR's unambiguous regulations in placing on the applicant the burden to establish residence. Under that standard, the district court properly upheld ONHIR's denial of benefits, and this Court should affirm.

2. ONHIR's Benefit Determinations for Plaintiff's Family Members Do Not Render Its Decision Here Arbitrary.

Plaintiff is incorrect that ONHIR acted arbitrarily in denying his application after awarding relocation benefits to his ex-wife, because his ex-wife's relocation benefits application presented materially different circumstances. Op. Br. 42. Specifically, Plaintiff's application turns on a completely different HPL site for evaluating "residence" than his ex-wife's application. His application claims residence based on his grandmother's location on the HPL. Her application relied on her *parents'* household located on the HPL. 3-ER-290. This fundamental difference shows that Plaintiff is plainly wrong in asserting that there is no "discernible rational basis" that could justify the different outcomes between their applications. *Davis v. EPA*, 348 F.3d 772, 781 (9th Cir. 2003).

To be sure, in addition to this failure of record evidence to support his misplaced theory, ONHIR's resolution of prior applications also are "non-precedential, individualized" determinations that do not bind the agency. *Begay v. ONHIR*, 770 Fed. App'x 801, 802 (9th Cir. 2019); *see also Alphonsus v. Holder*, 705 F.3d 1031, 1046 (9th Cir. 2013) ("unpublished, non-precedential [agency] opinion" is not binding); *Burnside v. ONHIR*, 2017 U.S. Dist. LEXIS 158804, slip op. at *25 (D. Ariz. Sep. 27, 2017) (ONHIR's "informal, nonpublished decisions" are not "binding precedent").

Nor can Plaintiff point to any position the agency has articulated that might compel it to award benefits in this (or any) case. Indeed, one rational basis for a different outcome here from that of his ex-wife is the body of evidence—including testimony by Plaintiff and his family—not before the agency in considering his ex-wife's application. *See*, *e.g.*, *Daw*, 2021 U.S. App. LEXIS 31849, slip op. at *5 (9th Cir. Oct. 20, 2021) ("prior decisions did not bind [] ONHIR" when decision "was based on evidence it had not previously heard").

More generally, and as the district court observed, ONHIR's "obligation is only that the agency applies the law consistently to cases with similar material facts," meaning the agency need not "find the same facts for different parties, in different proceedings, and based on different evidence." 1-ER-7 (quotation marks omitted); *see Begay v. ONHIR*, 2022 U.S. App. LEXIS 31925, slip op. at *5 (9th Cir. Nov. 18, 2022) (ONHIR may reach different outcomes for different applicants if "there is a meaningful distinction between the two cases").

Because Plaintiff's application hinged on substantially different facts than the application of his ex-wife, Plaintiff's claim of irrationally disparate treatment lacks merit.

B. ONHIR's finding that Plaintiff resided with his wife and children was based on substantial evidence.

The IHO reasonably found Plaintiff to be a legal resident of either (1) "the Teesto chapter area of the Navajo Reservation . . . as he was enumerated there as a

resident," or (2) the "Seba Dalkai School where he was living with his wife and family and where he had been living for several years." 3-ER-482. In this regard, the IHO reasonably concluded that Plaintiff's residence at Seba Dalkai School would have been more than "off and on" due to Ruth Begay's pregnancies in 1971, 1973, early 1975 and 1976. 3-ER-483. Plaintiff's suggestion that Ruth Begay, in a hearing regarding *her own* eligibility for Relocation Benefits based on her residency at a different HPL site, established that *Plaintiff* continued using his family HPL site after December 22, 1974, is certainly not compelled by the evidence before the IHO.

III. If the Court concludes that the record does not support ONHIR's decision, remand, rather than reversal, is appropriate.

Plaintiff requests that the IHO's decision be reversed and that ONHIR be instructed to award Plaintiff relocation benefits. Op. Br. 50. That relief should not be available even if the Court finds that the decision is not adequately supported by the record. Rather, 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*, 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).

Here, this Court should affirm the district court's judgment. But if the Court disagrees, it should follow the general rule and remand for further agency proceedings evaluating Plaintiff's assertion of HPL residency. *See, e.g.*, *George v. ONHIR*, 825 Fed. Appx. 419, 421 (9th Cir. Aug. 25, 2020) (remanding for ONHIR to consider specific evidence but "express[ing] no view as to the proper outcome").

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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