No. 23-15747

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNIE FUSON,
Plaintiff/Appellant,

-vs-

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

On Appeal from the United States District Court
for the District of Arizona

No. 3:21-CV-08237-DJH
The HONORABLE DIANE J. HUMETEWA
United States District Judge

BRIEF OF PLAINTIFF-APPELLANT JOHNNIE FUSON

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I. INTRODUCTION

Johnnie Fuson ("Appellant" or "Mr. Fuson") was a lifelong resident of his family ranch. The family had their hogan and a traditional grazing area on the land partitioned to the Hopi Tribe and as of the passage of the Settlement Act they were deprived of their customary usage and ownership of the property. Despite Mr. Fuson being a resident of the disputed land at the passage of the Settlement Act, the Office of Navajo Hopi Indian Relocation ("ONHIR") and its hearing officer denied Mr. Fuson's application for relocation assistance benefits in violation of the law and for arbitrary and capricious reasons. The denial was not based on a whole record review and the factual findings leading to the denial were not based on substantial evidence.

II. JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the cause of action arose under the laws of the United States. *See* Pub. L. No. 93-531, 88 Stat. 1712 (1974). This Court has appellate jurisdiction under the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, which govern judicial review of agency decisions under the Settlement Act. *See also Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 914 (9th Cir. 1995). This Court also has appellate jurisdiction because the appeal is from a final order of the district court. *See* 28 U.S.C. § 1291. The district court filed its Order and Judgment in a Civil Case

on March 16, 2023, and Mr. Fuson timely filed his appeal on May 15, 2023. *See* Fed. R. App. P. 4(a)(1)(B)(ii). 2-ER-253-4.

III. ISSUES PRESENTED FOR REVIEW

1. Whether ONHIR's denial of Mr. Fuson's application for relocation benefits was arbitrary and capricious because it misapplied the law of legal residence and used an incorrect standard.
2. Whether ONHIR's decision is supported by substantial evidence when its HO's findings are not based on evidence in the record, and the whole record review supports the reasonable conclusion that Mr. Fuson was a legal resident of property assigned to the Hopi Tribe on December 22, 1974.

IV. ADDENDUM

Mr. Fuson attaches an addendum at the end of this brief setting forth the text of the pertinent statutory, regulatory and agency case law.

V. STATEMENT OF THE CASE

A. The Settlement Act

The land dispute between the Navajo and Hopi people dates back to the Nineteenth Century and has been the source of numerous judicial and legislative attempts to resolve the dispute. *See generally Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119 (9th Cir. 1989); *Healing v. Jones*, 210 F.

Supp.125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (*per curium*) (determining that part of the lands jointly inhabited by the two tribes constituted a "Joint Use Area"). On December 22, 1974, Congress passed the Settlement Act[1], which, *inter alia*, authorized the appointment of a mediator to attempt a resolution of the conflicting land claims and authorized the *Healing* court to partition the Joint Use Area in the event mediation proved unsuccessful. *See Bedoni*, 878 F.2d at 1121; *Sekaquaptewa v. McDonald*, 626 F.2d 113, 115 (9th Cir. 1980). Mediation failed, the court partitioned the Joint Use Area and a fence was erected between Hopi Partitioned Lands ("HPL") and Navajo Partitioned Lands ("NPL"). *See Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 460 (9th Cir. 1996). In 1973, during the mediation period and continuing to today, a building "freeze" was put into effect which prohibited Navajo residents of the HPL from repairing existing homes or building new structures. In 1974, a livestock reduction program was put into place, threatening to seize the livestock of Navajo residents. *Hamilton v. MacDonald*, 503 F.2d 1138, 1150-1151 (9th Cir. 1974). These actions destroyed the traditional way

[1] 25 U.S.C. §§ 640d *et seq*. Effective September 1, 2016, § 640d of Title 25 has been omitted from the United States Code by the Office of Law Revision Counsel as being of "special and not general application." The omission is editorial only and has no effect on the validity of the law. The text of the Settlement Act can be found in the Session Laws as Pub. L. No. 93-531, 88 Stat. 1712 (1974). The Act was amended in 1980, 1988, and 1991, although the amendments are not pertinent to the issues presented here. *See* Pub. L. No. 96-305, 94 Stat. 929 (1980); Pub. L. No. 100-666, 102 Stat. 3929 (1988); and Pub. L. No. 102-180, 105 Stat. 1230 (1991

of life on the HPL and forced individuals and families to seek employment and/or educational opportunities off the HPL.

The Settlement Act also established the Navajo and Hopi Indian Relocation Commission (now renamed as ONHIR) for the purpose of identifying Navajo and Hopi tribal members who were potentially required to relocate from the Joint Use Area, processing the applications of those persons and, subject to qualification criteria, providing relocation housing and associated benefits. *See* 25 C.F.R. § 700.1. To qualify for relocation benefits, an applicant has the burden to show that on December 22, 1974, he or she was a legal resident of land partitioned to the tribe of which he or she was not a member and that he or she was a head of household at the time of relocation. 25 C.F.R. § 700.147 (a), (b), and (e). It is stipulated that Mr. Fuson, on December 22, 1974, was the head of household and this aspect of his case is not disputed. The single question presented was whether Mr. Fuson was a legal resident of the HPL on December 22, 1974 ("the determinative date").

Congress instructed ONHIR to first formulate a "relocation plan" and then to complete the relocation of the affected Navajo and Hopi tribal members within five years of the plan's issuance. Pub. L. No. 93-531, § 14(a). ONHIR took seven years from the passage of the Act to complete and issue its "Relocation Report and Plan" in 1981. ADD 146-160. That initial delay resulted in a July 7, 1986 deadline for

completing the relocation process. More than thirty-five years later, however, the process remains unfinished.[2]

Mr. Fuson, was raised by his grandparents Fannie and Hosteen Greyhair. His mother died when he was very young and his father was not part of his life. The Fuson family practiced a traditional agrarian life including grazing on land that was eventually assigned to the Hopi Tribe. The family had a "customary use area" located in Northern Arizona that was part on the NPL and part on the HPL. *In Re Estate of Wauneka,* 5 Navajo Rpt. 79, 81 (Navajo, 1986) ("…there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept."); *see also* 25 C.F.R. § 161.1. ("*Customary Use Area* refers to an area to which an

[2] "The dispute has also resulted in the largest forced relocations of any racial group in this country since the relocation and internment of 120,000 persons of Japanese ancestry during World War II." Whilston*, A Policy Review of The Federal Government's Relocation Of Navajo Indians Under P.L. 93-531 and P.L. 96-305,* 27 Ariz. Law Review 371, 372-3 (1985). By 1985, at least ten thousand Navajos had been identified as living on HPL and subject to compulsory expulsion. *See* I. Peterson, *Navajos Refuse to Bow to Relocation by U.S.*, N.Y. Times, May 9, 1985, at A1, https://www.nytimes.com/1985/05/09/us/navajos-refuse-to-bow-to-relocation-byus.html; *see also:* United States Government Accountability Office Report to Congressional Requesters ("GAO Report") at 20 (April 2018) reporting that as of November 2017, three thousand eight hundred and sixteen (3,816) Navajo families had been certified for relocation benefits since the inception of the program https://www.gao.gov/assets/700/691428.pdf.

individual traditionally confined his or her traditional grazing use and occupancy and/or an area traditionally inhabited by his or her ancestors."). Former Navajo Nation Supreme Court Justice explained the land tenure concept as follows:

> Because land and livestock are crucial to the survival of the Navajo people, the Navajo Nation government and its courts have recognized that just compensation must be paid for government taking of customary use rights through eminent domain. Thus, customary usage is a property right protected by the Navajo Nation Bill of Rights and the federal Indian Civil Rights Act.

RAYMOND AUSTIN, NAVAJO COURTS and NAVAJO COMMON LAW 196 (2009) University of Minnesota Press, pg. 196. The Fuson family grazed livestock on both the HPL and the NPL, and moved to their respective homes seasonally to graze. The HPL portion of the Fuson customary use area was called Lukai Springs. In the 1950s, the Fuson family had built a traditional cedar home called a hogan located on the HPL. This hogan was intact in 1974 and 1975. 3-ER-406, 470.

The family found their ancestral HPL home was on the "wrong side" of the partition. Despite the partition, the family continued to use their HPL home and grazed their livestock there until they sold their livestock beginning in 1974 and ending in 1975.

ONHIR closed the application process for relocation benefits on July 7, 1986, although applicants continued to try to submit relocation applications after that date. Nearly twenty years later, in 2005, ONHIR determined that it would accept applications from a limited number of specifically identified individuals who had

contacted ONHIR after the July 7, 1986 deadline. Administrative appeals were accepted from a limited number of specifically identified individuals who had contacted ONHIR after the July 7, 1986 deadline. Administrative appeal proceedings for some of those post-1986 applicants were held in 2006 - 2008. This limited appeal process was rejected by the District Court of Arizona on February 27, 2008, when United States District Judge Wake issued his opinion in *Herbert v. ONHIR*, No. CV-06-03014-PCT/NVW, 2008 WL 11338896 (D. Ariz. Feb. 27, 2008). Judge Wake ruled that ONHIR was "required to notify and inform 'each person' . . . *potentially subject to relocation*" of their rights under the Act and concluded that ONHIR's systematic failure to notify each such person of his or her potential eligibility for benefits constituted a breach of ONHIR's trust obligations. *Id.* at *6 (emphasis added); *see also Mike v. ONHIR*, No. CV-06-0866-PCT/EHC, 2008 WL 54920, at *7 (D. Ariz. Jan 2, 2008) (recognizing the agency's fiduciary responsibility to provide a thorough and generous relocation program). Following the *Herbert* decision's critique of ONHIR's deficient practices, ONHIR suspended its administrative appeal proceedings while it promulgated "Policy 14," which reopened the application process to individuals who potentially were entitled to relocation benefits, but who had been improperly excluded from the initial application process. Administrative appeals then resumed in February of 2010. Mr.

Fuson's application was processed pursuant to the *Herbert* Court order. 3-ER-305-309.

Mr. Fuson was thirty years old in 1974 when the Settlement Act was passed. Mr. Fuson 's legal residency was the same as his grandmother's in 1974. Mr. Fuson's legal residence had always been the customary use area including the HPL. His home and grazing areas were given to the Hopi Tribe by an Act of the Federal Government and he and his family were forced to abandon their HPL legal residence after December 22, 1974. They were eventually relocated to the Navajo side of the Teesto area. That is where Mr. Fuson lives today.

Although Mr. Fuson was entitled to be certified for benefits in 1974, final agency action on his case did not occur for over forty-one years. 3-ER-487. This appeal is a continuation of Mr. Fuson 's quest to have his eligibility recognized and his loss compensated through the award of relocation assistance benefits.

B. Procedural History

Appellant Johnnie Fuson brings this appeal to have his application for relocation assistance benefits granted and the ONHIR decision, which denied his application, overturned.

At the Administrative level, Mr. Fuson established that he was a legal resident of the Hopi Partitioned Land on December 22, 1974. ONHIR stipulated that Mr. Fuson was head of household on December 22, 1974. 3-ER-381. He met the burden

of proof as a legal resident on the HPL on December 22, 1974. 25 C.F.R. §§ 700.147, 700.69. His grandmother who raised him had a customary use area that was used for living and grazing. After the partition order, part was on the NPL and part was on the HPL. Mr. Fuson had a hogan on the HPL and a shack or frame house on the NPL.

ONHIR recognizes that when a family's customary use area is divided by the partition it is compensable. 3-ER-381. The determination on residency of the customary use area is not where the primary residence happens to be located. The determination is whether the applicant had a seasonal home on both the HPL and the NPL on December 22, 1974. ONHIR then compensates for the loss of the HPL property as a result of the Act. This legal residency standard has been applied for decades by ONHIR and its hearing officer. 25 C.F.R. § 700.97.

The hearing officer's decision in this matter ignored compelling evidence, ignored ONHIR policy, and ignored his own prior decisions. The Hearing Officer applied the wrong analysis of Mr. Fuson's legal residence and attempted to justify his decision with speculation, inferences, and erroneous credibility findings. Accordingly, pursuant to the APA, Appellant requests this Court vacate ONHIR's decision denying him benefits. *See* 5 U.S.C. § 706. ADD 024-025. Final Agency action was on November 23, 2015. 3-ER-487.

C. Statement of Facts

Ms. Fuson is an enrolled member of the Navajo Nation who has relocated from his home on Hopi Partition Land due to the Settlement Act. 3 ER 305-309. Mr. Fuson was born on February 3, 1944. 3-ER-305, 322-323, 383. Mr. Fuson has a sixth-grade education. 3-ER-397.

Mr. Fuson's mother died when he was a baby and his father was not part of his life from early childhood. 3-ER-383, 384. His maternal grandparents, Frannie and Hosteen Greyhair, raised him as their son. 3-ER-384, 385. Mr. Fuson was raised on his ancestral customary use area located within the former Joint Use Area which was partitioned into NPL and HPL. The HPL homesite was called Lukai Springs. 3-ER-397**.**

Mr. Fuson's grandfather built a cedar log hogan, a traditional dwelling, in the 1950's which was used through 1974-1975. 3-ER-406. Upon partition, this hogan was located on the HPL. Fannie Greyhair, his grandmother, had a grazing permit originally issued October 24, 1968 and reissued October 8, 1974. 3-ER-339**.** The permit allowed up to 237 sheep units. The family's livestock was reduced by the federal government's livestock reduction program beginning in 1974 and concluding in 1975. 3-ER-407-408, 440.

The family was enumerated on the HPL by a BIA census on January 15, 1975, April 24, 1975, and April 28, 1975. 3-ER-470. The BIA identified the hogan

Hosteen Greyhair built in the 1950's as a "completed log dwelling" at Quarter Quad Location 124 SE 122 which later became part of the HPL. 3-ER-470. The family was also enumerated on the NPL on January 27, 1975. *Id.* The enumeration at both locations is consistent with the family's customary use area and evidence that they used the HPL during winter and the NPL during summer. 3-ER-388.

Mr. Fuson was married to Ruth Ann Begay in 1971. 3 ER 284, 326. Ms. Begay lived in employer-provided rental housing from 1969 to 1976. 3 ER 288. Mr. Fuson and Ms. Begay had an on again off again marriage which she testified ended in 1973. 3-ER-290**.** Mr. Fuson recalls the relationship ended in 1975. 3 ER 394-395. Ms. Begay's 1992 testimony from her benefits hearing is part of the record. 3-ER-280-303. She describes that during the marriage they did not consistently cohabitate after 1971. Ms. Begay testified that Mr. Fuson was "always going home like when I went to work." 3-ER-289. She testified they separated in 1973. 3-ER-290. Ruth Ann Begay was enumerated as Ruth Fuson by the BIA at the NPL portion of Fannie Greyhair's customary use area on January 27, 1975, along with Appellant. 3-ER-470. Ms. Begay was certified eligible for relocation assistance benefits as a resident of her family's homesite and not at her employer-provided apartment or Mr. Fuson's NPL summer camp. 3-ER-280-302, 277.

In 1974-1975, Mr. Fuson legal residence was at his family's ranch where he cared for the family's livestock. 3-ER-389-390, 396. His first steady work was in 1975 when he moved to Winslow, Arizona. 3-ER-390.

VI. STANDARD OF REVIEW

A. The Court is to Review this Matter De Novo of the Agency Action

This Court reviews agency action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A) and (E). Section 706(2)(A) of the APA provides that agency action shall not be upheld upon judicial review if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or, pursuant to § 706(2)(E), if the agency action is "unsupported by substantial evidence." The Court "review[s] the district court's application of this standard *de novo*." *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 659 (9th Cir. 1988). Under *de novo* review, this Court views the case from the same position as the district court. *Lewis v. United States,* 641 F.3d 1174, 1176 (9th Cir. 2011*)*. This Court must consider the matter anew and as if no decision previously had been reached. *Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1004 (9th Cir. 2006). No deference is given to the district court. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011).

B. Arbitrary and Capricious Standard

Under the arbitrary and capricious standard, the reviewing court must consider whether an agency decision was based on a consideration of the pertinent

legal factors and whether there has been a clear error of judgment. *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The agency's decision must be based on a "reasoned evaluation" of the appropriate factors. *Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505, 1511 (9th Cir. 1997). The inquiry by the reviewing court must be searching and careful. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

A reversal of an agency decision is warranted if the agency action "was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *George v. ONHIR,* 825 Fed. Appx. 419 (9th Cir. 2020) (the Hearing Officer failed to evaluate all the evidence which resulted in an arbitrary and capricious decision); *Shaw v. ONHIR,* 860 Fed. Appx. 493 (9th. Cir. 2021) (We review ONHIR's decision to determine if it was "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." Id.); *Tsosie v ONHIR*, 771 Fed.Appx. 426 (2019) (9th Cir. 2019) (The hearing officer's inconsistent application of ONHIR's policies is a basis for reversal)*; California Energy Com'n v. Department of Energy,* 585 F.3d 1143, 1150 (9th Cir. 2009). *(*"We will overturn a decision as 'arbitrary and capricious' when the agency failed to articulate a rational connection between the facts found and the conclusions made"). While the standard of review is deferential, there must be a rational connection between the facts found and the result reached. *Ranchers*

Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agriculture, 499 F.3d 1108, 1115 (9th Cir. 2007); *Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505, 1511 (9th Cir. 1997).

Under the arbitrary and capricious standard, the reviewing court must consider whether an agency decision was premised on a consideration of the pertinent legal factors and whether there has been a clear error of judgment. *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). Reversal is proper if the agency has relied on impermissible factors or has "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 it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An agency's decision is arbitrary and capricious if the agency does not follow its own precedent and does not provide a reasoned explanation for not following its precedent. *Andrzejewski v. F.A.A.*, 563 F.3d 796, 798 (9th Cir. 2009) *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (Ct. App. DC, 2010). (An Agency must acknowledge and explain its departure from established precedent and an agency who fails to do so acts arbitrarily and capriciously). Agency adjudications give an applicant a guide to actions the agency will be expected to take

in future cases. There is a presumption that adjudicated policies will be adhered to in the future. "From this presumption flows the agency's duty to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). An agency may reverse its position, but it is arbitrary and capricious to do so unless the agency provides "a reasoned explanation" why factual findings support its new position when those same facts previously supported a different position. *Organized Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 968 (9th Cir. 2015).

An agency's "silence in the face of inconvenient precedent is not acceptable." *Jicarilla* at 1120. When an agency fails to provide a reasoned explanation, or its explanation is contrary to the record the court must "undo its action." *County of Los Angeles v. Shalala,* 192 F.3d 1005, 1021 (DC Cir. 1999). The reason for ONHIR's departure from its prior policies must be "clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency mandate." *Id., Attchison, Secretary of Agriculture of U.S. v. U.S.*, 347 U.S. 645, 654 (1954). When individual rights are at issue, as in Mr. Fuson's appeal, "it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 1999 (1974) Or as stated

by Justice Frankfurter in *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959) "he who takes the procedural sword shall perish with that sword." (Frankfurter, concurring).

ONHIR must apply the "same basic standard of conduct to all parties before them." *Akee v. Office of Navajo and Hopi Indian Relocation*, 907 F. Supp. 315, 319 (D. Ariz. 1995), aff'd, 107 F.3d 14 (9th Cir. 1997). *Cf* 25 C.F.R. § 700.1 (a) (ONHIR's purpose is "To insure that persons displaced as a result of the Act are treated fairly, consistently, and equitably…"). An inconsistent analysis is arbitrary and capricious. *Nat'l Parks Conservation Ass'n v. E.P.A.*, 788 F.3d 1134, 1141 (9th Cir. 2015) and it also violates ONHIR's statutory mandate to " take cognizance to the hardships that the relocatees are subject to and develop procedures [accordingly]". S. Rep. No. 1158, 95th Cong., 2d Sess. 4 (1978).

If ONHIR's decision in this case is inconsistent with other customary use area cases, "the decision may be considered arbitrary if the agency fails to explain the discrepancy." *Id.* This policy has been in effect since relocatees' applications were being evaluated by the agency and require ONHIR to explain why it deviated from these prior policies and decisions when deciding Mr. Fuson's application. In the record, both parties argued and briefed these policies. At a minimum, the HO should have explained why Mr. Fuson's continued use and residence at his ancestral customary use area was discounted and his ex- wife's employer-provided apartment was given inappropriate weight.

C. Substantial Evidence Standard

Under the Administrative Procedure Act, this Court shall overturn a HO's decision when it is not supported by substantial evidence. *See:* 5 U.S.C. § 706(2)(E). *Shaw, Id. George Id.* Pursuant to the "substantial evidence" standard, this Court must ask whether the administrative record provides "such relevant evidence as a reasonable mind might accept as adequate to support [the hearing officer's conclusion]." *Universal Camera Corp. v. Nat'l Labor Relations Board*, 340 U.S. 474, 477 (1951). The Court must "review the administrative record as a whole, weighing the evidence that supports and detracts from the [hearing officer's] conclusion." *McAllister v. Sullivan*, 999 F.2d 599, 602 (9th Cir. 1989).

The substantial evidence standard of review applies to ONHIR's factual findings. *See Kappos v. Hyatt*, 566 U.S. 431, 435 (2012). The standard requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *De la Fuente v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003). The agency's factual determinations must be based on substantial evidence. *Bark v. United States Forest Service,* 958 F.3d 865, 869 (9th Cir. 2020). (Forest Service's determination is reversed and remanded for failure to identify and meaningfully analyze the regulatory requirements). The substantial evidence standard requires the Court to review the administrative record, weighing both the evidence that supports, and detracts from, the agency's determination. *Id.*; *Perez v. Wolf,* 943 F.3d 853, 866

(9th Cir. 2019) (Substantial evidence includes the review of agency fact finding). Agency assumption and speculation are not substantial evidence. *Joseph v. Holder*, 600 F.3d 1235, 1246 (9th Cir. 2010) (the agency engaged in improper speculation in making assumptions about the motivations and thought processes of the applicant). Substantial evidence is what "a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Int'l Brotherhood of Elec. Workers Local 48,* 345 F.3d 1049, 1054 (9th Cir. 2003).

VII. THE LEGAL FRAMEWORK FOR ELIGIBILITY PURSUANT TO THE SETTLEMENT ACT AND PROOF OF LEGAL RESIDENCY

A. The Law of Legal Residence as Applied by ONHIR

To receive relocation assistance benefits a Navajo applicant has the burden to show that he/she was a legal resident of land apportioned to the Hopi Tribe between December 22, 1973 and December 22, 1974, and that he/she was a head-of-household at the time of relocation. 25 C.F.R. § 700.147 (a), (b); Pub. L. No. 93-531, §15(g), 88 Stat. 1719, *formerly codified* at 25 U.S.C. § 640d-14(c). Only legal residence is an issue in this appeal as ONHIR stipulated Mr. Fuson was head of household by December 22, 1974. 3-ER-381.

The Agency, through its Hearing Officer, in 1985 decided in an agency hearing that "legal residence" is the equivalent of domicile. The Hearing Officer held:

> The question which must be resolved by this appeal is whether on December 22, 1974, applicant was a "legal resident" of lands which were partitioned for use by the Hopi Tribe. **"Legal residence" is often equated with domicile and for purposes of the Act, the concepts are interchangeable.** (Emphasis added)

In the Matter of the Application of Lorenzo Smith No. 85-33 (ONHIR, 1985); ADD 104-111. In *In Re Juan Keyonnie,* 85-28 (ONHIR, 1986) the applicant was in Phoenix for school. The hearing officer decided that he retained his ancestral domicile because he "had not established a new domicile." ADD 137-141. In *Re Priscilla O'Reilly,* 86-22 (ONHIR, 1986) The family had a customary use area that was partitioned part on the HPL and part on the NPL. ADD 142-145. The family was enumerated by the BIA on the NPL. The hearing officer held that Ms. O'Reilly's "domicile" was on the HPL *Id.* In *In Re Marilyn Largo* 86-16 (ONHIR 1986) ADD 112-115, the hearing officer explained the law of domicile under the Act:

> Domicile may be acquired by the applicant separately from that of his or her parents, in conjunction with his or her parents or in derogation of his or her parents but, always, a factual determination is necessary to support a new domicile or rebut the contention of an ancestral domicile.

See also: In Re Doris Smallcanyon 86-25 (ONHIR, 1986) ADD 116-119. (Absence from the HPL cannot be considered abandonment unless she has established a new domicile); *In Re Charlie Uentillie* 91-54, (ONHIR, 1991) ADD 120-124. (applicant's absence from the HPL "was not engendered by any motive of establishing an alternative domicile") *In Re Louise Peterson,* 86-73, (ONHIR, 1987)

ADD 125-129. ("One may not have two legal residences"). In this appeal, the Hearing Officer recognized but did not apply the domicile standard stating: "As the undersigned has ruled many times, a nuclear family can only have one legal residence (domicile)" 3-ER-483. ONHIR's hearing officer is correct that the Act creates a presumption of continued legal residency until a domicile is established. In enacting the legal residence regulations, ONHIR's predecessor stated the presumption of continued residence and eligibility as follows: "It is the Commission's view that the concept of legal residence reflects the intent of Congress that those who were, in 1974, residents of land partitioned to a tribe of which they were not members, be eligible for benefits." 49 Fed Reg 22277-01, 1984 WL 188188 (May 29, 1984) ADD 080-083.

In *Gamble v. ONHIR*, No. CIV-97-1247-PCT-PGR at 14 (D. Ariz. Sept. 24, 1998) the District Court interpreted the term "legal residence" as used in 25 C.F.R. § 700.97. ADD 030. The Court, relying on domicile law, stated that a person can only have one domicile and it determined the Plaintiff "did indeed abandon her home." The Court cites the Federal Register in which the Agency states that the term "residence" requires an examination of a person's intent to reside combined with manifestations of that intent. *Commission Operations and Relocation Procedures; Eligibility*, 49 FR 22277–01, 1984 WL 188188 (May 29, 1984) ADD 080-083.

This Court in *Charles v. Office of Navajo Hopi Indian Relocation,* 774 Fed. Appx. 389, 390 (9th Cir. 2019) held that the correct standard is "intent to reside combined with manifestation of that intent." The standard held by this Court, the Federal District Court of Arizona, and the Agency itself is the domicile standard. *Weible v. United States,* 244 F.2d 158 (9th Cir. 1957) (a tax case) ("domicile means living in a locality with the intent to make it a fixed a permanent home"); *Barber v. Varleta*, 199 F.2d 419, 423 (9th Cir. 1952) (an immigration case) (a person's old domicile is not lost until a new one is acquired); *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) (a diversity case) (The change of domicile requires more than physical presence it also requires the intent to remain there indefinitely). The Restatement (Second) of Conflicts follows Ninth Circuit domicile holdings that intent is the key and a domicile once established continues until it is superseded by a new one. Restatement of Conflicts §§ 18 and 19 (1971). This Court in *Shaw* has held that the burden demonstrating residency is the applicant's burden and there is nothing that authorizes burden shifting to ONHIR. *In accord, Daw v. ONHIR,* 20 WL 4838121(9th Cir 2021) (nothing in cited authority "suggests that [the] burden ever shifts to the government"). Appellant does not advocate burden shifting. However, Appellant is entitled to a uniform application of the law of legal residence as applied by ONHIR for the past four decades. *Akee v. ONHIR,* 907 F.Supp. 315, 319 (D. AZ. 1995).

B. The Law of Customary Use Areas as ONHIR has Applied it to Relocatees

When a family's customary use area is divided by the court ordered partitioned, ONHIR treats the partition[3] as "an adverse relocation outcome" as long as there was continuous use of the area as of December 22, 1974. *Begay v. ONHIR*, 305 F.Supp. 3d 1040, 1048 (D. Az., 2018) (division of the customary use area is a basis for residency arising out of the adverse impact of the partition).

Mr. Fuson and his family's legal residence was split by the partition of the Joint Use Area into the Navajo Partitioned Land and the Hopi Partitioned Land. The family was not aware exactly where the partition would be until after the determinative time to prove residency. On December 22, 1974, the Fuson customary use area was not fenced and was used as they always had as long as anyone could remember. ONHIR specifically recognizes relocatees residency in this exact situation. The Hearing Officer restated agency policy as:

> It has been a longstanding ruling by the undersigned that, if a customary use area existed as of December 22, 1974, the entire area would be treated as an adverse relocation outcome, even If only part of the customary use area was awarded to the Tribe of which he/she is not a member, so long as there is evidence of continuous use of the entire area as of the date of the Act. ADD 135

In the Matter of the Application of Minnie Woodie, Case # 5124 (ONHIR, 2011). ADD 130-136. In *In re Harry Isaac*, Case #86-31 (ONHIR, 1987) 3-ER-466-469.

[3] The Court ordered partition came before the erection of the JUA fencing.

the hearing officer held regarding Mr. Isaac's traditional use area the "the two homesites are inseparable as a traditional use area was proven. As the legal residence of the applicant cannot be separated between the homesites, applicant must be determined to have been a relocatee under the act." * 4. C F. *Pricilla O'Reilly*, *Id*.

The issue in this appeal is whether Mr. Fuson met his burden of proof that he was a legal resident and used the HPL portion of the property on December 22, 1974.

VIII. ARGUMENT

A. ONHIR's Determination that Mr. Fuson Was Not a Legal Resident of the HPL, was Arbitrary and Capricious, Not Based on Substantial Evidence and in Violation of the Settlement Act

1. The Finding that Mr. Fuson was a Legal Resident of the Navajo Partitioned Land was Arbitrary and Capricious

The Hearing Officer found that Mr. Fuson was a legal resident of the NPL based on his Grandmother Fannie Greyhair being enumerated by the Bureau of Indian Affairs (BIA) on January 27, 1975 at their NPL homesite. 3-ER-470. Ms. Greyhair was also enumerated at her HPL homesite on January 15, 1975, April 24, 1975, and April 28, 1975. 3- ER- 470. ONHIR reliance on the enumeration to prove legal residence is arbitrary and capricious.

a. Failure to Analyze the Customary Use Area is Arbitrary and Capricious

The property at issue, was a customary use area that spanned both the HPL and the NPL. The failure to deal with this important aspect of legal residency is arbitrary and capricious. *Motor Vehicle Manufacturers Ass'n of U.S., Inc.* The enumeration is used as dispositive fact of the legal residence of Mr. Fuson. However, it is undisputed that the family had two homesites, one on the HPL and one on the NPL. His grandmother was first interviewed and enumerated on the HPL on January 15, 1975. She is found to have a complete log hogan which comports with the testimony of the witnesses that on the HPL their grandfather, in the 1950s had built a cedar log hogan. 3-ER-470. The second interview was on the NPL enumeration which occurred in the winter when they traditionally lived on the HPL. 3-ER-388,470. This explains why Ms. Greyhair was enumerated and interviewed on the HPL three times and on the NPL only once. Ms. Greyhair is next enumerated on January 27, 1975 at the NPL homesite where she is interviewed and a frame house and corral are noted. In this enumeration, Mr. Fuson, and his then wife Ruth Begay, and two of their children are noted but not interviewed. 3-ER-470. In the HPL enumeration they are also noted as "family group A." *Id.* Mr. Fuson and Ruth Begay were not interviewed in any of the enumerations. There is no reliable way of knowing why Appellant and Ms. Begay were specifically named on the enumeration at the NPL and not on the HPL. As discussed infra, the BIA would only name individuals, not

the family head, once, and they would include them as family group A. ONHIR does not explain this discrepancy but uses it as dispositive proof that Mr. Fuson and his wife were living on the NPL on January 27, 1975. However, the testimony of all the witnesses explain that the customary use area was still being used and extant as of December 22, 1974.

ONHIR has promulgated procedures to evaluate the loss of customary use areas that affect individual entitlement to benefits. In *Begay v. ONHIR,* 305 F.Supp. 3d 1040 (D. Az. 2018), the District of Arizona discussed the obligation of ONHIR to follow its own customary use area policy. The Court held that ONHIR's decision will be held to be arbitrary and capricious if the agency fails to follow its own prior case law or explain its reasons for not following prior precedent. *Id*. at 1048. The Court stated:

> Previously, Defendant determined that the division of a traditional, customary use area was an "adverse relocation outcome, even if only part of the customary use area was awarded to the Tribe of which he/she is not a member, so long as there is evidence of continuous use of the *entire* area as of the date of the Act." (*In re Minnie Woodie*, CAR 55, Ex. B–1 at 6 (emphasis in original)). The fact that an individual seeking relocations benefits was enumerated on NPL alone does not preclude them from obtaining benefits if an IHO independently determines that the individual held a customary use property that spanned both sides of the partition line. *Id.* The concept of maintaining a "traditional use area" is not expressly codified in federal regulations regarding residency**, but Defendant concedes that it has historically recognized this as a basis for residency**.

Id. at 1048 (emphasis added).

The *Begay* decision, unlike Fuson, was focused on activities on the customary use area after the partition fence was erected (1975) when the Begay's only family home was on the NPL. The Fuson issue is that the family had a summer camp with a residence on the NPL and a winter camp with a residence on the HPL. The *Begay* Court found that the hearing officer did apply the applicable standards set out in agency adjudications of customary use areas. In Fuson, the evidence supports that the family had a hogan on the HPL and grazed livestock on this portion of the customary use area during the winter months before the partition fence was erected. Unlike *Begay* and *Woodie* the inquiry in Fuson is not limited to traditional use. The family actually migrated to an HPL hogan in the winter and the NPL "frame house" or "shack" in the summer. Thus, in Fuson, the family continued to live on, and graze livestock on, the HPL on December 22, 1974. This is analogous to *In Re Isaac*, #86-31 (ONHIR, 1987) 3-ER-204-207. In *Isaac*, the hearing officer found that his "family maintained residences in both areas and only one residence was partitioned to the Hopi Tribe". 3-ER-468. The hearing officer held:

> Your undersigned believes that applicant has sustained his burden of proving legal residence in an area partitioned to the Hopi Tribe by proving that he and his family used, possessed and maintained a traditional use area that spanned both sides of the partition line. 3-ER-468.

Appellant's family, like the Isaac family, maintained its customary use area (traditional use area) in 1974 through at least April 28, 1975, the last time the BIA interviewed the matriarch on the HPL. 3-ER-470. Like the Isaac family, Mr. Fuson's

family maintained residences on both the HPL and the NPL.

The evidence is that Mr. Fuson's grandmother, Fannie Greyhair, held the grazing permit for the family. 3-ER-339. It was first issued on October 24, 1968 and reissued October 8, 1974. It was for 237 sheep units. *Id.* The hearing officer, without evidence, states by 1974 "her flock was significantly reduced or eliminated by the end of 1974" 3-ER-479. and "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 the passage of the Act". 3-ER-484. The hearing officer makes these conclusions without a rational connection to the facts. Ms. Greyhair and family did not abandon the HPL homesite on December 22, 1974. She and her family, which included Appellant, were enumerated at the HPL homesite on January 15, 1975, April 24 1975, April 28 1975. The enumerations demonstrate that twenty-four days after December 22, 1974 Ms. Greyhair and Appellant were enumerated and Fannie Greyhair was interviewed at their HPL log hogan. One hundred and twenty-seven days after December 22, 1974, the family remained at the HPL homesite with a "complete log hogan". The BIA did not notate the family's hogan was abandoned. The BIA enumerators would freely notate that a hogan was abandoned on the census report. 3-ER-554-555. It defies logic to conclude the family "abandoned" the HPL homesite by December 22, 1974, when they were enumerated at that homesite during

the applicable time period. The enumeration placing the family at the time is corroborated by the testimony. Mr. Fuson testified that in 1974 the family grazed "a bunch of cattle, horse, sheep". 3-ER-390. His brother testified that in 1974 he was in Mississippi and Appellant took care of his livestock at the family ranch. 3-ER 420-421. The hearing officer's conclusions based on the enumeration on the NPL are arbitrary and capricious.

b. The Enumeration of Navajo Residents of the Former Joint Use Area to Prove Legal Residence or Domicile is Unreliable

The "Enumeration Roster" was prepared by the Bureau of Indian Affairs ("BIA"). The BIA was the federal agency charged with *range restoration* efforts in the former Joint Use Area. To assist in that effort, the BIA undertook an "enumeration" of the people and improvements located within the JUA. This enumeration effort began in late 1974 and was completed in 1975. The results of that project are known as the Joint Use Area Roster or the Enumeration Roster. *See* Navajo and Hopi Indian Relocation Commission Report and Plan (pp. 71-72) (April 1981). ADD 146-160. In its Report and Plan submitted to Congress, the Commission went to some lengths to acknowledge the Enumeration's limited utility. There were several factors which limited the usefulness of the Joint Use Area Roster for the Commission's enumeration. The enumeration was primarily conducted on weekdays when many residents were away from their homes. Also, some residents were hostile towards the range restoration program and refused to talk to BIA enumerators.

Finally, lack of housing, employment, and education facilities caused many residents to maintain temporary homes outside the partitioned area and thus were not available for the BIA field enumeration.

Following the BIA Enumeration, and recognizing its deficiencies, the Commission undertook its own enumeration as part of the submittal of its final plan to Congress. The Commission recited that its enumeration "is probably the most accurate census ever taken in the former Joint Use Area." Yet even with regard to its own enumeration, the Commission cautioned that "[t]he inclusion of persons in this enumeration is not to be taken as a determination of eligibility for relocation benefits." ADD 150

The Commission's caution was well justified given that both enumerations have been found to be inaccurate and unreliable. As of December 1980, for example, ONHIR stated that it had "enumerated" 2,801 Navajo households on HPL. In the 2018 Government Accountability Office (GAO) Report to Congress, however, ONHIR confirmed that it had certified more than 3,800 Navajo families for relocation. Thus, ONHIR's own enumeration, touted as "the most accurate census ever taken" in the JUA, understated at least a thousand Navajo families (38%). Neither enumeration should be used as a tool to provide "proof" of where an applicant was living on December 22, 1974. In *Ray v. ONHIR*, Case 3:22-cv-08101-SPL (District of Arizona 7/26/23) the district court reversed ONHIR's finding based

in part on it and its Hearing Officer's reliance on the BIA enumeration. The Court found that ONHIR "based its denial" on the parents listed in the "1974-75 Enumeration of residents of the JUA as residing only on the [NPL]" page 2-3. The Court rejected ONHIR's position that the testimony of ten witnesses establishing HPL residency was outweighed by the enumeration finding one family member in May of 1975 residing on the NPL. The Court reasoned the "Enumeration was, in many ways unreliable…Courts have generally recognized this unreliability by finding that the Enumeration is not, on its own, sufficient evidence to establish residency or non-residency". Id. *See also Walker v. Navajo-Hopi Indian Relocation Comm'n*, 728 F.2d 1276 (9th Cir. 1984) ("The Commission has always taken the position that the enumeration list is not conclusive as to eligibility."); *Tso v. ONHIR,* No. CV-17-8183-PCT-JJT, 2019 WL 1877360 (D. Ariz. Apr. 26, 2019) (The reliability of the enumeration "appears questionable"); In the GAO Report 18-266, Appendix VI: "Comments from the Office of Navajo and Hopi Indian Relocation" at 143. In discussing the "complexities" of communicating with and locating Navajo residents living in the former Joint Use Area, ONHIR stated:

> As a result of these issues, ONHIR used the 1974 – 1975 BIA Enumeration which consisted of aerial photos of the JUA followed by a house-to-house survey conducted by BIA teams. **Unfortunately, while ONHIR has the survey results, the original data entry documents were destroyed by a flood while still in the possession of the BIA.** *Id*. at 144 (emphasis added).

Thus, ONHIR concedes that the JUA Roster's "original data entry documents" have now been destroyed and only the survey as a list remains.[4] The enumeration as it existed at the hearing is a list with names, improvements and whether an individual was interviewed. The underlying foundational documents that would be required to make the list even facially reliable have been lost "in a flood". *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Management, Inc.* 618 F.3d 1025, 1036 (9th Cir. 2010) (admissibility versus weight is determined by examination of the methodology used in the survey). The enumeration can only be used to demonstrate on any given day a person was at a certain location if they were present and interviewed. It also can demonstrate, to some extent, some of the improvements which are listed. In Appellant's case, it was used as conclusive proof he was living on the NPL on January 27, 1975. Although he was not physically present and was

[4] Although the BIA is not a party, Mr. Fuson is hamstrung by the destruction of evidence that was in its possession. The survey states his grandmother was interviewed but of course what she said is a matter of speculation because the notes from the interview were "lost in a flood". It is arbitrary and capricious to rely on a survey when the underlying documents are destroyed. Evidentiary law creates an adverse inference when evidence has been destroyed and (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007). Ordinary negligence can meet the culpability test. *Northrop Grumman Sys. Corp. v. United States*, 126 Fed. Cl. 602, 605 (2016) *cf. Cobell v. Norton,* 240 F. 3d 108, 166 (US. App. D.C.) (It is a breach of trust to destroy records of Indian trust lands)

not interviewed. The contents of his grandmother's interview were "lost in a flood" and subject only to rank speculation. Thus, the ultimate finding that Appellant was a legal resident of only the NPL is based on a wholly unreliable document which does not demonstrate Mr. Fuson was not a legal resident of the HPL on December 22, 1974.

c. The Enumeration was used Conclusively to Find Mr. Fuson was a Legal Resident of the NPL

The Agency in its denial letter of Mr. Fuson's application states: "First, you are listed in the Bureau of Indian Affairs' 1974-1975 Enumeration as a resident of the Navajo Partitioned Lands (NPL) at QQL 124 SW 109." 3-ER-351. The Hearing Officer, in his decision, parrots the denial and states: "On December 22, 1974, applicant was a legal resident in the Teesto Chapter area of the Navajo Reservation, in an area of the former Joint Use Area that was partitioned for the use of the Navajo Indians as he was enumerated there as a resident." 3-ER-482. The enumeration of Fannie Greyhair also occurred on the HPL on January 15, 1975, April 24, 1975 and April 28, 1975. 3-ER-470. The Hearing Officer in his decision and the ONHIR in its denial do not mention the three other enumerations which find Frannie Greyhair living on the HPL with the completed log hogan. 3-ER-470.[5] Undisputed testimony

[5] ONHIR, in its post hearing brief, does recognize that: "Enumeration shows Fannie Greyhair was enumerated on both the HPL 124 SE 122 where she was interviewed on January 15, 1975 as an owner of a log dwelling…" 3-ER-451.

proved that this home was built on the HPL by Mr. Fuson's grandfather, Hosteen Greyhair, in the 1950s. 3-ER-389, 406.

The omission that the family was enumerated by the BIA three times on the HPL is a relevant factor that indicates that there was a "clear error of judgment" by ONHIR and its Hearing Officer. *Northwest Motorcycle Association v. U.S. Dept of Agriculture*, 18 F.3d 1468 (9th Cir. 1994) (The agency must articulate and explain the rational connection between the facts and the decision.). The Hearing Officer's inquiry was whether Appellant was a resident of the HPL on December 22, 1974. The Hearing Officer bases the legal residence determination on the NPL solely on Mr. Fuson's grandmother being interviewed on the NPL and presumably giving Mr. Fuson and his wife's name to the enumerator.

The arbitrary and capricious nature of this decision is evident. First, Ruth Begay was determined by ONHIR to be a legal resident of her parents HPL homesite on December 22, 1974. 3-ER 403. As held by the Hearing Officer in this matter: "A nuclear family can only have one legal residence. (domicile)". 3-ER-483. *In accord. Gamble, Id.* Ruth Begay has been determined, with their children, to be a legal resident of her parent's homestead and not her husband's (Appellant's) grandmother's homesite. Second, the enumeration process just identified additional family members at one homesite and then simply listed them as inclusive of the listed "family group". Elsie Nez was employed as a BIA enumerator. Ms. Nez was

deposed on April 23, 1991. 3-ER-232-561; 4 ER-563-615. The deposition testimony explains the BIA Enumeration practices by someone with personal knowledge of BIA Enumeration procedures. 3-ER-510-536. ONHIR and the Hearing Office ignore the deposition testimony in which Ms. Nez confirmed the enumerators' practice of listing all household members at the one site, but at the other site they only list the family head or "homeowner". 3-ER-557. Ms. Nez testified that the enumerators would list only the homeowner at the second site even when the other household members also used the other homesite. 3-ER-558. Her testimony on the issue is as follows:

> BARDWELL: And so is it true that all household members would be listed at the primary site, but at the secondary site only the homeowner would be listed?
> ELSIE T. NEZ: Right
> BARDWELL: And that's true even though other household members may have used that other homesite?
> ELSIE T. NEZ: Right. Because if it's, and like the homeowner is coded 01, this was for the data system reason, you know. If it's 01, it automatically, if there's three John Doe with an 01, it count, you know, the machine count that as just one, even though it's, three different.
> BARDWELL: And is it also true that the enumeration roster would reflect that the homeowner was interviewed at the home he claimed as his primary home?
> ELSIE T. NEZ: Yes.
> 3-ER-558.

The basis of the hearing officer's finding that Mr. Fuson was a resident of the NPL is that his grandmother gave his name when she was interviewed by the

enumerator on the NPL. However, by the BIA's own standards, that fact his name was given as a family member he should have also been included in the HPL homesite enumeration.

The Hearing Officer in his analysis mischaracterizes the BIA enumeration in a legally and factually erroneous fashion to support the finding Appellant was a legal resident of the NPL and not the HPL. The Hearing Officer failed to even acknowledge the HPL enumeration and its inclusion of Mr. Fuson. This myopic analysis fails to address the unique factual basis of this flawed census. The BIA did not name every family member at every homesite when the primary family head was interviewed. The Hearing Officer's misapplication of the enumeration has created an arbitrary and capricious decision which should be reversed by this Court.

d. Prior Cases Recognize Enumeration of Customary Use Area

ONHIR has recognized in prior agency adjudications that the enumeration of an applicant on the NPL when the applicant's family's customary use area encompasses both the HPL and the NPL is not determinative of legal residency. The Hearing officer held in *In Re Harry Isaac*:

> ….where a portion of such traditional use area was Partitioned to the Tribe of which the applicant is not a member, **your undersigned will recognize the legal residence of the applicant even though the BIA enumeration census found the applicant at the homesite which was partitioned to the tribe of which the applicant is a member.**
>
> 3-ER-469; See also *Priscilla O'Reilly, Id.*

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. The hearing officer was obligated to explain the departure from the prior precedent of the agency and his failure to do so is "an inexcusable departure from the essential requirement of reasoned decision making" *Jicarilla Id.; Andzejewski Id*. The Hearing Officer did not explain and distinguish his finding that Mr. Fuson's name on the NPL roster after the determinative date is evidence that he abandoned his ancestral homeland in light of the fact the family had a customary use area encompassing the NPL and the HPL. The failure to explain the departure from agency precedent in this case is arbitrary and capricious and this Court should order that Appellant be certified eligible for benefits.

2. The Finding that Mr. Fuson was a Legal Resident of the Navajo Partitioned Land was not Based on Substantial Evidence

The hearing officer's finding that Mr. Fuson on December 22, 1974 was a legal resident of the NPL was unreasonable, based on speculation and not on the whole record. His findings are not based on substantial evidence. Presumptions, speculation and suppositions should not be substituted for evidence. *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1247 (9th Cir 2001) ("speculation is not a sufficient rational connection to survive judicial review). Substantial evidence requires the hearing officer to

consider the evidence holistically and not "cherry-pick" evidence to support his conclusions. *Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014)

Appellant was born and raised on the family's customary use area which encompassed the HPL and the NPL. All the witnesses testified that in 1974-1975 Mr. Fuson lived and worked the family ranch. Mr. Fuson testified that he lived on the family ranch in 1971 when he got married and his wife lived at her place of employment. 3-ER-386. He was involved in the stock reduction program in 1974. In 1975, he obtained his first job, other than traditional ranching, and moved to the border town of Winslow, Arizona. (Approximately 45 miles from the family ranch). 3-ER-390. On April 5, 1974, Appellant's aunt, Maggie Greyhair, died in a dramatic family event, outside the HPL hogan. 3-ER436-437. Maggie Greyhair was refueling a generator, it exploded, she dragged it outside, and she died. *Id.* The generator was used for silversmithing by Appellant and his maternal aunt, Maggie Greyhair. In 1992, in Appellant's ex-wife's testimony for her eligibility hearing, she independently recollected that in 1974, she brought her children to Appellant's ranch to attend Maggie Greyhair's funeral. 3-ER-302. Appellant and Maggie Greyhair worked at their ranch together in 1974 making jewelry. 3-ER-436. The witnesses also testified that the livestock reduction was in 1974 and 1975 and that Appellant remained living at the family ranch until he got employment in Winslow. 3-ER-408, 421-422, 435, 440. The hearing officer finds that the family engaged in the livestock

reduction program several times and the flock and herd "were significantly reduced or eliminated by the end of 1974." 3-ER-479. Mr. Fuson's burden is to prove he was a legal resident of the customary use area on December 22, 1974. *Begay, Id.* The hearing officer speculated Appellant and his family abandoned the HPL portion of the ranch "as of the date of the passage of the act". (December 22,1974). 3-ER-484. This legal conclusion is based on speculation and ignores evidence that is contrary to his holding. The unrebutted evidence is that Appellant's legal residence was the family ranch encompassing the customary use area on December 22, 1974. The holdings are contradictory. Surely December 22, 1974 is at the "end of 1974". This would mean that the homesite was used and extant on December 22, 1974. Further, there is no testimony that the HPL homesite was abandoned in December of 1974. All testimony states the HPL portion of the ranch was used and lived in into 1975 and Appellant did not cease living there until 1975 when he became employed in Winslow. Also, the BIA enumeration shows that the hogan was not abandoned and Ms. Greyhair was present at the hogan as late as April 28, 1975. The enumeration lists the HPL residence as "Dwelling Complete log". Id. Further, the testimony as to the completion of the stock reduction was not fixed in time by any witness other than saying it was approximately "1974 or 1975". Whether it was 1974 or 1975 cannot be a determinative fact because the issue is whether Appellant maintained his winter home in the winter of 1975 and all the evidence demonstrates

he did. The hearing officer's speculation that the home was abandoned at the passage of the act is not based in substantial evidence. His findings based on the BIA enumeration ignores the procedures of the enumeration with regard to families and the fact the family, including Appellant, was shown as residing on the HPL after the determinative date.

B. The Finding that Mr. Fuson was a Legal Resident of His Ex-Wife's Employer-Provided Housing is Arbitrary and Capricious and not Based on Substantial Evidence

The Hearing Officer made the following alternative finding: "Alternatively, applicant's legal residence was at Seba Dalkai School where he was living with his wife and family and where he had been living for several years." 3-ER-482.

1. The Hearing Officer's Alternative Choice of Mr. Fuson's Ex-Wife's Temporary Apartment was Arbitrary and Capricious

a. The Hearing Officer Failed to Apply the Law of Legal Residence in Finding Mr. Fuson Abandoned the HPL Domicile

The evidence is uncontroverted that Appellant did not intend to create a new legal residence or domicile at his wife's apartment in Seba Delkai School at the determinative date. (Winslow, Arizona). The hearing officer has confused "mere residence" with legal residence. In *Weible*, Id. 163 the 9th Circuit Court of Appeals explained the distinction between mere residence and domicile holding:

> Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode, though, to be sure, domicile often hangs on the slender thread of intent

> alone, as for instance where one is a wanderer over the earth. **Residence is not an immutable condition of domicile.** Id. 163 (emphasis added) See also Restatement of Conflicts §§ 18 and 19 (1971).

In *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986), the court held that acquiring a new domicile consists of physical presence in a new location with an intention to remain there. *Id. at 750. See: Charles. Id.* The evidence demonstrates that: Ruth Begay and Mr. Fuson were married in 1971. 3-ER-284. Ms. Begay began working at the Seba Dalkai Boarding School in 1969. 3-ER-288. Ms. Begay resided in employer-provided housing and the employer took rent payments directly out of her paycheck. 3-ER-288. Appellant had no ownership interest or tenancy interest in his wife's work-provided apartment. In *Slate v. Shell,* 444 F. Supp 2d. 1210, 1216-1217 (S.D. Alabama, 2006) the Court, in determining domicile, found that an employee spending four nights a week in Louisiana and staying in temporary lodging provided by his employer did not change his domicile when the indicia of residence remained in Alabama. In *Bridgerton v. Bridgerton,* 63 S.W. 3d 686 (ED Missouri, 2002) the Court found that the husband and wife living in a different state in employer-provided housing did not change the family's domicile to the new state. In Appellant's case, the housing that the hearing officer determined was his new domicile was not based on his employment but was his wife's employment predating the marriage. 3-ER-288. After the couple split up in 1973 or 1975, the apartment remained Ms. Begay's. 3-ER-290, 393. Appellant was born and raised on the HPL.

ONHIR specifically held that "that those who were, in 1974, residents of land partitioned to a tribe of which they were not members, be eligible for benefits." *Commission Operations and Relocation Procedures; Eligibility*, 49 FR 22277–01, 1984 WL 188188, *22278. (May 29, 1984) ADD 080-083. Nothing in the record supports the hearing officer's conclusion that Appellant abandoned his ancestral home for an apartment which was provided to his wife prior to their marriage. All the indicia of the legal residence of Appellant demonstrates legal residence on the family ranch. Appellant was always a member of the Teesto Chapter. 3-ER-399. He did not change his chapter affiliation. In 1974, he worked for Teesto Chapter for its ten-day projects. 3-ER-390. In 1974, his family had a grazing permit including the HPL portion of the ranch. 3-ER-339. Appellant was charged with grazing and management of the livestock because his brother, Bennie, was in Pascagoula, Mississippi, for work. 3-ER-420-421. His first full time employment was in 1975 and only after the livestock was reduced. 3-ER-390. Appellant was a lifelong legal resident of the HPL. The evidence demonstrates that after the determinative date, after his grandmother was enumerated on the ranch, and after the livestock was reduced in 1975, he left the family ranch for employment with the BIA. 3-ER-391. The indicia of legal residence as held by ONHIR in adopting its regulations in 1984 were met. *Commission Operations and Relocation Procedures; Eligibility*, 49 FR 22277–01, 1984 WL 188188 (May 29, 1984). The indicia of legal residence as

interpreted by ONHIR was also met. *See: In Re Juan Keyonnie, Id.* ADD 137-141*; In Re Priscilla O'Reilly, Id.* ADD 142-145; and, *In Re Marilyn Largo, Id*. ADD 112-115. The finding that Appellant abandoned his ancestral ranch for his wife's apartment is arbitrary and capricious because it fails to determine Appellant's intent to reside there permanently. *Charles Id.*

There is no credible evidence that Appellant intended to abandon his ranch for an apartment at a boarding school leased by his then wife.

b. ONHIR Inconsistent Treatment of Ruth Begay and Johnnie Fuson is Arbitrary and Capricious

ONHIR has an obligation to treat all applicants consistently. *Akee, Id.* ONHIR denied Mr. Fuson's application because he was listed on the enumeration on the NPL on January 27, 1975. 3-ER-351. The Hearing officer parrots the same reason for denial. 3-ER-482. However, Ruth Begay is listed on the same enumeration. 3-ER-470. This did not affect her being certified as a legal resident of her parents homesite in Teesto, HPL and her receiving benefits. Ms. Begay, who was the tenant and had a leasehold estate in the property, was certified eligible for benefits and not found to be a resident of Appellant's NPL portion of the ranch or her employer-provided housing. 3-ER- 277,280-303. ONHIR's counsel admitted at the hearing: Ruth Begay "was certified from her parents place on the HPL in Teesto". 3-ER-403. ONHIR had a duty to explain its inconsistent treatment of these individuals. Its failure to do so is

arbitrary and capricious. *Organized Village of Kake, Id., Atchison, Topeka & Santa Fe Ry. Co. Id.*. This issue was presented to ONHIR and it simply ignored its inconsistent treatment of two applicants and, therefore, this Court should reverse ONHIR's denial of Appellant's application for benefits.

2. ONHIR's Finding that Mr. Fuson was a Legal Resident of his Ex-Wife's Apartment is not Based on Substantial Evidence

The hearing officer found that because the couple had children in 1971, 1973, 1975 and 1976 it was "overpowering determinant in deciding applicant's legal residence when weighed against Fannie Greyhair's HPL home." 3-ER-483. This holding defies the record, biology and reasonableness; and, is a compelling basis to overturn the decision as not based on substantial evidence.

Ms. Begay's testimony for her eligibility hearing, where she was certified for benefits, is made on the record. 3-ER-280-303. The testimony was given in 1992. That is twenty-three years before Appellant testified and eighteen years after the determinative date. Appellant testified forty-one years after the determinative date. Besides being closer in time to 1974, Ms. Begay had no motive to support Appellant's case as it did not affect her application and certification. Ms. Begay testified as regarding Appellant as follows: They were married in 1971. 3-ER-284. They split up in 1973. 3-ER-290. When asked if Johnnie Fuson lived full time with her she testified:

> RUTH BEGAY: Yes, the first time, our first year of marriage, uhm, we lived together at Seba Dalkai Boarding School, but he was, uh, always going home like when I went to work, I didn't see him until late that evening after I got off work. And it just continued that way. And then we were separated after my, my little girl was born, when she was about, uh, two years old. 3-ER-289.

She further testified that in 1974 she would take their children to Appellant's ranch for Fannie Greyhair to babysit and for the children, "to let them get to know their dad". 3-ER 294. She testified, "I would take my kids over there since, you know, I wanted them, least I tried. Like I am saying, I had marriage problems" Id. Ms. Begay's testimony demonstrates that by 1972 Appellant did not stay at the apartment at Seba Delkai. Even during the first year of marriage he would go to the ranch and he would come back only late at night. Mr. Fuson testified that after marrying Ruth Begay he remained living at the family ranch. He characterized his time at Ms. Begay's apartment as "off and on." 3-ER-389. It is unreasonable of the hearing officer to interpret this testimony and the troubled marriage between Ms. Begay and Appellant as a intact family where the father, mother, and children live together in an apartment. The hearing officer's comment that the relationship could not be casual because they had four children ignores the reality of this family's dynamic. By doing so, the hearing officer bases his conclusion not on evidence but on unreasonable inference and speculation. *Joseph*, Id. Further, the hearing officer's conclusion that the family in 1974 lived an intact and harmonious life at Ms. Begay's apartment is unsupported by the evidence and a reasonable mind would not support

this conclusion. *NLRB v. Int'l Brotherhood of Elec. Workers Local 48. Id.* As stated by the United States Supreme Court "The path of the analysis was misguided and the inferences it produced are questionable." *Motor Vehicle Manufacturers Ass'n of U.S., Inc. id at 44*. Here, the hearing officer's decision that Appellant was a legal resident of his wife's apartment is based on his speculation and unreasonable inferences and is not based on the Fuson family or based on substantial evidence.

C. The Hearing Officer's Credibility Findings are not Based on Substantial Evidence

Credibility findings must be based on substantial evidence in the record. *Ceguerra v. Secretary of HHS*, 933 F.2d 735, 738 (9th Cir. 1991) (citation omitted). When the Hearing Officer finds a witness to be credible overall, but "fails to explain why he found the witness credible in some respects but not in others", the "decision is arbitrary, capricious, and unsupported by substantial evidence." *See Dora Dean Mike (deceased) by Larry Mike v. ONHIR*, No. CV-06-00866-EHC (January 2, 2008) at 10-11. *Beam v. ONHIR*, 624 F.Supp 3d. 1069 (2022). In *Beam* the hearing officer's credibility findings were the basis of reversal because he found the witnesses testimony "'exaggerated and not credible' while simultaneously finding the rest of Plaintiff's and her mother's testimony to be credible." *Id.* at 1077. *See also, Tsosie v. ONHIR,* 771 F. App'x 426, 427 (9th Cir. 2019) (The hearing officer's conclusory negative credibility findings on some issues but finding the witness credible on other issues is not supported by substantial evidence.)

Here, the Hearing Officer determined Appellant and his two witnesses were not credible. For Mr. Fuson, the hearing officer did not find him credible because he was identified by the "BIA as living on the NPL". The Hearing Officer further found that Appellant's testimony was inconsistent with the other witness who the Hearing Officer also found not credible. Appellant's brother, Benny Fuson, was the second witness. The Hearing Officer concluded "Benny Fuson is not a credible witness." Appellant's cousin, who was also raised by Fannie Greyhair, was also determined not to be not credible because she was eleven years old in 1974. The Hearing Officer, based solely on her age in 1974, found her testimony "highly suspect" and not credible just the same as Appellant and Bennie Fuson.

However, many of the hearing officer's factual findings are based on testimony of witnesses whom he found not to be credible:

Finding of fact number 2, regarding the livestock reduction program which ended "by the end of 1974," was based on Margery Greyhair, Benny Fuson and Appellant's testimony. 3-ER-479.

Finding of Fact number 4, regarding Appellant's work history, is based solely on Appellant's testimony. 3-ER-480.

Finding of Fact number 5, that Appellant and Ruth Begay split up in 1975 was based on Appellant's testimony. However, Ms. Begay, whose testimony was not ruled as not credible, testified they split up in 1973. 3-ER-480.

The Hearing Officer, in his legal decision, recounts Margery Greyhair's recollection of her mother's dramatic death in 1974 as true, but then states her recollection of Appellant being there at the time as not credible. 3-ER-484.

Astonishingly, the hearing officer finds all three witnesses' testimony not credible but segregates specific testimony that provides a basis for denial of the application and gives it the moniker of credibility. Appellant is found to not be credible, but his date of 1975 for the split up is used rather than 1974 as testified by Ms. Begay in 1992. *Id.* The Hearing Officer states that his basis of finding Appellant not credible is that Appellant's "testimony contradicts and is inconsistent with other witness testimony." First, this is a circular argument/finding. All three witnesses were found not credible by the hearing officer and Appellant's testimony is not credible because it conflicts with other testimony found not to be credible. *cf Beam,* Id. Second, the hearing officer finds "applicant identifies the structures at Fannie Greyhair's Lukai Spring [HPL] resident differently than the other two witnesses." The structures present at the HPL are consistently testified to by Mr. Fuson. Mr. Fuson testified that on the HPL there was a cedar hogan. 3-ER-389, 406. This is consistent with the BIA enumeration. He testified they had a shed on the NPL. He stated on the NPL "we just make a small fence corral" but denied in 1974 they had a substantial corral. 3-ER-407. Benny Fuson also testified there was a shed on the NPL. 3-ER-424. Benny seems to recall a hogan and corral on the NPL. Margery

Greyhair testified that there was a hogan on the HPL. 3-ER 436, 444-445. Ms. Greyhair did not testify regarding the improvements on the NPL. Benny's testimony is inconsistent. At first he said there was just a shed on the NPL, and then he said there was in "74 and 75" a hogan. Mr. Fuson is found not credible for not agreeing with his brother's confused testimony on cross examination. This is not based on substantial evidence and is not rational.

The Enumeration finds a hogan on the HPL and a frame house on the NPL which is most probably the "shack or shed" consistently testified to by Appellant and Benny Fuson. 3-ER-470. Elsie Nez testified as to how the enumerators input a "frame house" in the enumeration. She stated, "if its square. And if it also got a roof. Then I put that [Frame house]". 4-ER-580. Thus, Appellant, contrary to the hearing officer's finding that he "could not accurately identify the improvements" is not borne out by the record. Appellant testified there was a hogan on the HPL and a shack or what the BIA termed as a "frame house" on the NPL.[6] The hearing officer finds the witness testimony contradictory. However, when the testimony is reviewed, it is credible and consistent. Further, Ms. Greyhair's testimony cannot be discredited only because she was eleven years old at the determinative date. There is no showing that her testimony was factually wrong and the hearing officer

[6] It is evident from the record that the HPL home was more substantial than the NPL home which is reflected to as "summer camp." 3-ER-388.

throughout his decision relies on her testimony. 3-ER-483-484. The testimony of adults recollecting their childhood has consistently been relied upon by courts and juries to find defendants civilly and criminally liable.

In *American Wrecking Corp v. Secretary of Labor*, 351 F.3d 1254 (U.S. App D.C., 2003) the Court criticized the ALJ's decision to credit some portions of the witnesses testimony "but not others". The Court stated that "This simply will not do, especially not with respect to what the Commission deemed to be "key issues". The court reasoned that each finding should identify the oral testimony and the basis must be stated "for crediting a witness who was not impeached or contradicted" Id. 1263. The hearing officer found all Appellant's witnesses to be not credible because they are inconsistent with each other. This analysis is confused and does not provide a basis to deny Appellant's application. No witness was impeached by showing their testimony was incorrect and the witnesses did not contradict each other on key issues. The hearing officer's findings are based on speculation and conjecture and not the record before him. *Ge v. Ashcroft,* 367 F.3d 1121,1124 (9th Cir. 2004). ("[s]peculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence.")

The evidentiary record including the testimony of the three witnesses supports a finding that Appellant was legal resident of the HPL on December 22,

1974. The hearing officer misapplied the credibility standards and accordingly his findings should be reversed and Appellant should be certified for benefits.

IV. CONCLUSION

Based on a whole record review and the reasons set forth in this brief, Appellant requests this Court reverse the agency decision which denied him relocation assistance and benefits and certify him eligible for benefits. ONHIR's denial of his application is arbitrary and capricious and not based on substantial evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 25, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will accomplished by the appellate CM/ECF system.

s/ S. Barry Paisner
S. Barry Paisner