No. 23-15747

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNIE FUSON
Plaintiff/Appellant,

-vs-

OFFICE OF 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

REPLY BRIEF OF PLAINTIFF-APPELLANT JOHNNIE FUSON

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I. INTRODUCTION

Mr. Fuson was a legal resident of Hopi Partitioned Land (HPL) on December 22, 1974. Mr. Fuson's family had a ranch that encompassed both the HPL and the NPL long before the land disputes arbitrary boundaries were imposed on the family. They traditionally grazed the entire area through 1974. Mr. Fuson was raised by his grandmother on this land and he did not abandon this domicile until after the Settlement Act was passed into law.

Mr. Fuson's application was denied by ONHIR because he was enumerated on the NPL. ONHIR recognized the enumeration is legally considered unreliable. ONHIR also took the inconsistent position that if he was not a legal resident of the NPL he was the legal resident of his wife's apartment 45 miles away. The hearing officer states that this is the "nuclear family's" alternative legal residence. However, the hearing officer and ONHIR never explained how this could be the nuclear family's legal residence when his estranged wife was determined by ONHIR to be a legal resident, at the same time, at her family's ranch. Thus, even though the sworn testimony demonstrates Mr. Fuson did not reside at her apartment at the passage of the Settlement Act, ONHIR decided, without reason or explanation, that it was his domicile.

Mr. Fuson was eligible on December 22, 1974. That is also the day he lost his ranch by operation of the Settlement Act. He was a lifelong legal resident of the ranch and is entitled to be certified eligible for benefits.

ONHIR's denial of Mr. Fuson's application was arbitrary and capricious and not in accordance with law.

II. ARGUMENT

A. ONHIR's Legal Residency Determination was Arbitrary and Capricious, not Based on Substantial Evidence, and in Violation of the Settlement Act

1. Mr. Fuson's Legal Residence Cannot be Determined to be on the NPL on December 22, 1974 Through the BIA Enumeration

In its answer brief, ONHIR admits that the enumeration cannot be solely relied upon to demonstrate legal residency of the HPL on December 22, 1974. However, it claims that the hearing officer did not just rely on that factor to determine that Mr. Fuson at the passage of the Act was a legal resident of the HPL. The hearing officer in fact did only rely on enumeration to find Mr. Fuson was a legal resident of the NPL. The hearing officer's conclusion of law states:

> 2. 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 (emphasis added)

The other additional facts that ONHIR claims the hearing officer relied upon are not in his decision. The hearing officer used the enumeration of the NPL for his finding of residency on the NPL. He fails to mention or analyze in his decision the fact that Ms. Greyhair and her family were also enumerated three times on the HPL (her family is noted as "Group A") 3-ER-470[1]. It is undisputed that the enumeration by itself cannot support a finding of legal residency. Answer Brief DktEntry:19, Page 34 of 49; *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"); *Ray v. ONHIR*, 2023 WL 4761789 *6-7. (The hearing officer based his decision on the enumeration, which is unreliable, and it is grounds for reversal.) The hearing officer's only evidence that Mr. Fuson was a legal resident of the NPL on December 22, 1974 was the NPL enumeration and he draws an irrational conclusion that the enumeration proves NPL legal residency. This render's his decision arbitrary and capricious.

[1] ONHIR citing to the NPL enumeration misstates three times that thirteen members of Ms. Greyhair's family were enumerated. Answer Brief, DktEntry 19. page 16, 31 and 36. This a fabrication. Ms. Greyhair, Johnnie and Ruth Fuson, and their two children Darneyle (Garneveie) and Hansen are noted and only Fannie Greyhair is interviewed. 3-ER-471

2. Failure of the Hearing Officer to Evaluate the Three Enumerations on the HPL is Arbitrary and Capricious

The failure of the hearing officer to address and explain the central issue that the Fuson family was enumerated once on the NPL and three times on the HPL is arbitrary and capricious. In *George v. ONHIR*, 825 Fed.Appx. 419 (2020) this court found the hearing officer failed to evaluate how relevant evidence "impacted the hearing officer's decision." Id*2. The *George* Court Relying on *Cal. Energy v. Dept of Energy*, 585 F.3d 1143, 1150-51 (9th Cir. 2009) reasoned that it is arbitrary and capricious to "fail to consider an important factor or aspect of the problem". Here central to Mr. Fuson claim is that his family ranch's traditional use area encompassed both the HPL and NPL. The enumeration states that Ms. Greyhair was interviewed three times at the HPL homesite and once at the NPL homesite. The contents of these interviews are forever lost and "destroyed in a flood". The "destroyed in a flood" admission is not "Mr. Fuson's assertion" as claimed by ONHIR. *Answer Brief*, Dkt.Entry 19; Page 35 of 49. This is what ONHIR admitted to the United States Government Accountability Office in a March 19, 2018 letter. Page 7. https://www.gao.gov/assets/gao-18-266.pdf. Despite the fatal loss of these foundational documents, ONHIR and its hearing officer still use the enumeration, to the applicant's detriment, and speculate as to what was reported in an interview over forty years ago. This Court has defined spoliation as "destruction or significant alteration of evidence, or the failure to preserve property for another's use as

evidence, in pending or future litigation". *Kearney v. Foldy & Lardner, LLP*, 590 F.3d 638, 649 (9th Cir. 2009). Although the agency is well aware of the fact that foundational documents, like the notes and reports from interviews, are spoliated, it still speculates to the applicant's prejudice what the content of the interviews contain.

In the enumerator's deposition it is explained that the BIA would list family members only once even though they lived in two or more legal residences:

> BARDWELL: is it true that the enumerators would
> tell the homeowner to select one homesite as a primary
> homesite?
> NEZ: Yes.
> BARDWELL: And for what purpose was that?
> NEZ: Uhm, on the main house that
> they're living in, usually we list on everybody, uh, whole
> family is listed under one house, because, uhm, if you list everybody under
> one, two different houses on the roster, it
> would, you know, be more people, more people showing up on
> than what are out there. And it, the system was set μp
> where, uh, they only count one person twice if it's, uh, on
> code 01. 01 is on *main* head of household person or the
> person owning that house.
> BARDWELL: So for instance, if there was
> a sheep camp, a summer and winter sheep camp, the family
> would be asked to identify one of those homes as their *main*
> home?
> ELSIE T. NEZ: Uh, yes.
> BARDWELL: Even though they may have
> spent equal amounts of time at both homes.
> ELSIE T. NEZ: Right, right. Usually they
> have sorta *like* three homes, uh, if they have livestock,
> they usually have about, maybe three homesites, maybe one
> down *in* the valley where like during the school year. They
> live close to the bus pickups. And then usually one up in

the, up *in* the mountains. But usually they picked the house that they lived the longest, you know, like if it's being used seasonal, they pick the house that's probably like a frame house is usually the one that they want to be enumerated under.
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.
BARDWELL: Would the enumeration roster reflect that he was also interviewed at the secondary site?
ELSIE T. NEZ: Yes.
3 ER 203-205

ONHIR conveniently ignores that the family head would only list her family member's once, and on other enumerations they would be listed as "Group A" 3-ER-558. Instead of relying on actual evidence, ONHIR capitalizes on the BIA's negligent destruction of documents by speculating as to the contents of Ms. Greyhair's four interviews. ONHIR claims that Mr. Fuson is unnamed in the HPL enumeration. It further makes up that thirteen family members are enumerated on the NPL and only Ms. Greyhair on the HPL. The mischaracterization of the unreliable enumeration is used as an arbitrary foil to deny Mr. Fuson's application.

The enumeration's only probable utility in these cases is to reflect actual structures found on the ground with the correct coordinate on a given day.[2] The enumeration showed that on the HPL there was a log hogan, a frame house, and a corral. It showed that Ms. Greyhair was interviewed, and her family is notated as "Group "A". The hearing officer's erroneous conclusion is that Mr. Fuson was "enumerated" on the NPL in 1975 and this is conclusive proof of his NPL residency in 1974. He fails to explain the extant HPL homesite that the family used during the passage of the Act and as late as April 1975. The conclusion of law based on the enumeration is arbitrary and capricious. 3 ER 470. *George* and *Cal. Energy*.

3. The Hearing Officer did Not Base His Finding that Mr. Fuson was Exclusively a Legal Resident of The NPL on Substantial Evidence

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). Substantial evidence 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). ONHIR

[2] The enumeration also has been found to miss actual structures on the HPL in 1975.

admits that the enumeration is unreliable but inconsistently continues to base its finding that Mr. Fuson's legal residence on January 27, 1975, the date of the enumeration, was on NPL. *Ray.* There is no substantial evidence to support this conclusion and the hearing officer's decision is unreasonable and should be reversed.

B. The Hearing Officer's Alternative Finding That Mr. Fuson's Legal Residence was at his Ex-Wife's Employment Housing Should be Reversed

The hearing officer rather than discharging his duty to determine whether Mr. Fuson was a legal resident of the HPL on December 22, 1974 makes a legally inconsistent finding that Mr. Fuson was either a legal resident in Teesto NPL or at his estranged wife's Seba Delkai employer-provided apartment. A person can only have one legal residence or domicile. "Since a person cannot have more than one legal residence/domicile the hearing officer had to choose one." *Gamble v. ONHIR*, No. 97-CV-1247 (D. Ariz., Sept. 24, 1998). ADD 98; The hearing officer has taken this position in numerous cases to determine legal residence. "one may have successive domiciles or "legal residences", however, one may not have more than one domicile at a time. *Weible v. United States,* 244 F.2d 158, 163 (9th Cir. 1957) (a tax case) *, In the Matter of the Application of Lorenzo Smith No.* 85-33 (ONHIR, 1985); ADD109-110. The *Smith* case, contrary to ONHIR's answer brief, was decided in 1985, after ONHIR changed its residency requirement from "recurring

and substantial contacts"[3] to domicile. *See* 47 FR 2089-02 (1982) ADD 36-79; 49 FR 22277-01 (1984) Effective date June 28, 1984. ADD 80-83. Thus, the "either or finding" by the hearing officer is arbitrary and capricious. An applicant can only have one legal residence and the hearing officer's decision holding that Mr. Fuson was a resident of Seba Delkai or the NPL is legally inconsistent and renders his decision arbitrary and capricious.

C. The Hearing Officer Failed to Apply the Law of Legal Residence in Determining that Mr. Fuson changed his Legal Residency to His Estranged Wife's Apartment

It cannot be seriously claimed that in determining whether a person is a legal resident of the HPL their intent to reside is not to be examined. *Weible* ("domicile means living in a locality with the intent to make it a fixed a permanent home"); Further, since the adaptation of the legal resident standard, the Agency has stated that it is a domicile standard. This Court has held that the burden to prove residency remains with the applicant and domicile's burden shifting presumptions will not be applied. 25 C.F.R. §700.147. ("Burden of proving residence and head of household

[3] ONHIR also incorrectly states that "substantial and recurring contacts test was long ago discarded by ONHIR". As ONHIR knows the test has been continuously used in an inconsistent and confusing manner and sometimes to exclusion of the "intent test" by the Agency since 1985. *Cf. Mike v ONHIR,* 2008 WL 54920 *4 (2008); *O'Daniel v. ONHIR*, 2008 WL 4277899. However, ONHIR stated in the *Charles* appeal: "applying the substantial recurring contact's standard to establish residency is wrong as a matter of law". Appellant's Opening Brief, *Charles v. ONHIR, Case* 17-17258, 04/30/2018.

status is on the applicant"). *Shaw v. ONHIR*, 860 Fed Appx. 493 (9th. Cir. 2021); *Daw v. ONHIR,* 20 WL 4838121(9th Cir 2021). The applicant does not advocate "burden shifting", ONHIR mischaracterizes the Appellant's position as "burden shifting", and then misrepresents to the court that *Shaw and Daw* are not even mentioned by the plaintiff in his opening brief. *Answer Brief* Dkt 19 Page 42 of 49.[4] The Agency in this case now takes the position that the only standard to be applied is that the applicant has the "burden to establish residence". *Answer Brief* Dkt Entry 19, Page 44 of 49. ONHIR's position on what standard should be imposed on the applicant changes based on what it perceives it needs to argue to prevail in litigation. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988), (deference will not be given to an agency's litigation position that is inconsistent with its prior decisions. *Id*.).

Legal residence is proven through showing "intent to reside". In the Federal Register, ONHIR in adopting Legal Residence and terminating "substantial and recurring contacts" standard, stated:

> The final rule reiterates the language of the proposed rule, limiting determination of residence to a specific point in time, December 22, 1974, the date of passage of Pub. L. 93-531.

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[4] Both cases are discussed in the Brief in Chief on page 21. "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"). Brief in Chief, Dkt Entry 10-1 Page 33.

> The term "residence" in the final rule is meant to be given its legal meaning combined which requires an examination of a person's intent to reside combined with manifestations of that intent. An individual who was, on December 22, 1974, away from the land partitioned to the Tribe of which he/she is not a member may still be able to prove legal residence. 49 FR 22277-01 1984. ADD 80.

Manifestation of the intent to reside is the domicile standard. *Weible* ("domicile means living in a locality with the intent to make it a fixed permanent home"); *U.S. v. Arango*, 670 F,3d 988, 997 (9th Cir. 2012) (to prove a prisoner's domicile, intent must be examined and "there is an essential difference between domicile, which generally involves intent and residence, which generally involves an actual place of abode") *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). *Nobuo v. Phillips*, 50 F. Supp 167, 168 (S.D. Cal 1943) ("a person cannot acquire a domicile by any act done under legal or physical compulsion"). ONHIR, and its hearing officer has adopted a domicile standard. *In the Matter of the Application of Lorenzo Smith No.* 85-33 (ONHIR, 1985); ADD 104-111. *In Re Juan Keyonnie,* 85-28 (ONHIR, 1986) ADD 137-141. (Applicant retained his birth domicile because he "had not established a new domicile".) *In Re Marilyn Largo* 86-16 (ONHIR 1986) ADD 112-115. ("a factual determination is necessary to

support a new domicile or rebut the contention of an ancestral domicile". *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 the Agencies 1989 Management Manual § 1200 (Certification Review") interpreting "Eligibility" it is stated:

> The Commission has always used a definition of **residence which is synonymous with the term domicile** or legal residence. Domicile is defined as "that place where a man has his true, fixed, and permanent home and principal establishment and to which whenever he is absent, he has the intention of returning." Basically, legal residence is a residence at a particular place, accompanied with a positive proof of intention to continue there for an unlimited time. Reply ADD-162. (emphasis added)

The reason the applicant insists that his eligibility be determined through a domicile analysis is that he is entitled to have his application be analyzed consistently through established law. In this case, the hearing officer failed to examine Mr. Fuson's intent. The Agency in its answer brief encourages the court to analyze the case through simple residency. (the "unambiguous regulations" require the "applicant the burden to establish residence". *Answer Brief,* Dkt Entry page 41of 49. The regulations state "residence" is proved though "legal residence". 25 § C.F.R. 700.97. For over forty years ONHIR has interpreted "legal residency" as the

equivalent of domicile. It should give the Court pause to see ONHIR's repudiation of this establish Agency rule in order to deny one elderly applicant. It is arbitrary and capricious for the agency to change its position without a "reasoned explanation". *Organized Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 968 (9th Cir. 2015). The hearing officer's adjudicated policies must be adhered to in this case. He failed to follow his domicile analysis announced in prior cases and this has created an arbitrary and capricious decision. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973). A*ndrzejewski v. F.A.A.*, 563 F.3d 796, 798 (9th Cir. 2009).

Mr. Fuson was born and raised on a ranch that encompassed the HPL and the NPL. The family grazed this traditional use area before the passage of the Act and through 1975 when they were forced to sell their livestock. The hearing officer, without an intent analysis, decided that he was a legal resident of his estranged wife's apartment. Inconsistently, ONHIR determined his estranged wife was not even a legal resident of this apartment. Mr. Fuson had none of the earmarks of domicile in that apartment, but his wife did; she worked and lived at the school, she had her children housed there, she had a tenant relationship with her landlord. Even with these direct indicators, ONHIR determined, correctly, she was not a legal resident of the apartment because she intended her parent's ranch as her permanent domicile. CAR 141. It is inconsistent and illogical to find Mr. Fuson to be domiciled at the

apartment, but then find the legal tenant not to be domiciled at the apartment. If the hearing officer would have engaged in a domicile intent analysis, he would have had to determine that Mr. Fuson had no intent to abandon his ancestral ranch for a temporary apartment owned by his wife's employer.

D. The Finding that Mr. Fuson was a Resident of Ruth Begay's Apartment is Based on Conjecture and Speculation

ONHIR and its hearing officer base the alternative finding that Mr. Fuson changed his ancestral domicile to his estranged wife's apartment based on speculation and conjecture, not on substantial evidence. ONHIR mischaracterizes this argument as we are asking this Court to weigh the evidence. Because there is no substantial evidence to support the finding of domicile at her apartment, it is a legal question, not a weight of evidence question.

Speculation is not substantial evidence, and it cannot "survive judicial review". *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1247 (9th Cir 2001). "Speculation and assumptions are not evidence." *Ragsdale v. Paschal*, 118 F. Supp. 280 (1954). Although reasonable inference can be drawn, speculations and presumption are not substantial evidence. Factual findings based on speculation are not supported by substantial evidence. *Ruili Yao v. Sessions*, 743 Fed. Appx 99 (9th Cir. 2018). Further, the hearing officer must base his decision on the record as a whole and cannot cherry pick evidence. *Ghanim v. Colvin,* 763 F.3d 1154, 1164 (9th Cir. 2014).

Here the hearing officer speculates that because Mr. Fuson had children with Ms. Begay it is the "overpowering determinant" that he was domiciled at her apartment. 3 ER 483. His opinion actually finds that he could not of had a casual relationship with Ms. Begay because they had three children born in 1971, 1973 and 1975. This is not substantial evidence demonstrating Mr. Fuson was living with Ruth Begay in 1974 and/or intended to make her apartment his permanent home; it is mere speculation. The positive evidence is independent testimony of Ruth Begay and Johnny Fuson, that they had an on again off again relationship. 3-ER-389. Ms. Begay testified that in 1974 she would bring the children to Ms. Greyhair's home so they could know their father:

> JERRY DERRICK: Okay. Okay, in 1974, uhm, did you ever, uh, go to Johnny's area and spend time there?
> RUTH BEGAY: Yes I did. Sometimes I spent like maybe, if I didn't have any babysitter, I would take my kids over there since, you know, I wanted them, at least I tried. Like I'm saying, I had marriage problems, to let them get to know their dad, but uhm, he wasn't there when I needed a babysitter so I left them with their grandmother. 3-ER 294

This is direct evidence that Mr. Fuson did not live with Ms. Begay in 1974. A mother does not have to travel 45 miles to introduce children to their father if they share a home.

ONHI's conjecture and speculation is that because a couple had children together it is conclusive or "determinative" that they cohabitated. This is rank

speculation not substantial evidence.[5] There is not substantial evidence that Mr. Fuson on December 22, 1974 was domiciled with his estranged wife at an apartment at Seba Delkai School.

E. The Hearing Officer's Credibility Findings have no Basis in Substantial Evidence

The hearing officer found Mr. Fuson and both his witnesses not credible. This is a pattern with this hearing officer. Rather that engage in analysis of evidence and testimony, he casts the negative castigation that the applicant and all the applicant's witnesses are not credible. *Tsosie v. ONHIR*, 771 Fed. Appx. 426 (9th Cir 2019) (hearing officer did not explain his credibility findings specifically in light of reliance on the witness testimony for other findings); *Beam v. ONHIR,* 2022 WL 371697. (Hearing officer failed to articulate reasons supporting his negative credibility findings). *Ray.* ("the Court finds that the IHO failed to explain how the Enumeration, on its own, amounted to a specific and cogent reason to entirely undermine the credibility of the Plaintiff and the other four individuals").

Like in *Tsosie,* the hearing officer finds witnesses not credible but will use their testimony to support findings to deny the applicant's appeal. This inconsistent finding is a basis to reverse the denial of the application. *Id.; Brown-Hunter v.*

[5] 1 in 4 or 18.4 million children in America live without their father at home. *The Father Absence Crisis in America*. National Fatherhood Initiative. https://www.fatherhood.org/father-absence-statistic

Colvin, 806 F.3d 487, 495 (9th Cir. 2015) (Legal error is found when the ALJ did not specify testimony she found not credible.) The use of the passage of time as a tool to find the witnesses not credible is not a basis for lack of credibility. Mr. Fuson was eligible for benefits in 1974. ONHIR did not accept his application until ordered by the *Herbert* Court. *Herbert v. ONHIR*, No. CV-06-03014-PCT/NVW, 2008 WL 11338896 (D. Ariz. Feb. 27, 2008). On August 21, 2015, Mr. Fuson testified at his due process hearing. 3 ER 380-446. Mr. Fuson received final agency action on November 23, 2015. 3 ER 487. Mr. Fuson and his witnesses were asked to recount what occurred forty-one years before the hearing. Any inconsistencies between the witnesses, the hearing officer claims makes all the testimony, except what the hearing officer could use to deny the application, incredible. Failure to provide evidence is not a legitimate basis for negative credibility findings. *Shah v. I.N.S. 2*20 F.3d 1062 (9th Cir. 2000). In *Shah*, this court stated that "we have repeatedly held that it is error to rest a decision …on speculation and conjecture." Speculation and conjecture "can never replace substantial evidence." *Id*. The Court stated that the agency must have "specific, cogent reasons for any stated disbelief." The Court also would not let stand adverse credibility determinations based on an applicant's lack of documents without an agency showing they "were easily available". The *Shah* case is an asylum case and the holdings are somewhat specific to asylum issues. However, the basis of a credibility finding which saddle's an applicant with the

impossible task of marshaling evidence, which occurred decades before, is similar to the hearing officer's finding in the *Shah* case. The hearing officer finds Mr. Fuson's testimony was inconsistent with other incredible witnesses' testimony, and it did not comport with the unreliable BIA census. *See Ray.* The evidentiary hearing took place 41 years after the events at issue. The delay in bring the matter to a due process hearing is the agency's fault and a dereliction of its duties. *cf. Herbert.* The hearing officer's credibility findings based on minor inconsistencies of the witnesses, like whether there was a corral or shed on the NPL forty-one years ago, is unreasonable. The credibility findings are not based on substantial evidence.

F. ONHIR's Inconsistent Treatment of Mr. Fuson's Case is Arbitrary and Capricious

Inconsistent Agency action is arbitrary and capricious Agency action. The Agency has a duty to explain its inconsistent actions, or the reviewing Court will reverse the illegal action. *Organized Village of Kake v. U.S. Department of Agriculture,* 795 F.3d 956, 966 (9th Cir. 2015). It is impermissibly inconsistent and arbitrary for an agency to not offer an explanation of its internally inconsistent actions. The Supreme Court held in *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 45 (1983) the requirement of consistent agency policy as follows:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, 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. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency action that the agency itself has not given". *Id.* 45

The Appellant is entitled to consistent treatment in the review of his application. 25 U.S.C. § 640d-10 (d). (ONHIR is to assure that people subject to relocation "are not deprived of benefits or services by reason of their status as an individual subject to relocation"). 25 C.F.R. § 700.1 (a). (ONHIR is to treat applicants "fairly, consistently, and equitably"). ONHIR and its hearing officer engaged in illegal and inconsistent treatment in the denial of Mr. Fuson's application which mandates reversal.

ONHIR applied a mere residency test when it and its hearing officer have interpreted the "legal residency" requirement as a intent to reside or domicile test. In his decision, the hearing officer mentions domicile, and misapplied the law indicating Mr. Fuson and Ruth Begay can have only one domicile as a separated family. 3-ER-483. Ruth Begay's domicile was determined by the Agency to be her parent's ranch and the hearing officer holds that the "nuclear family", which did not exist, including Mr. Fuson, were domiciled at Ruth Begay's rental apartment. This is a holding that is inconsistent, unreasonable, and not explained.

ONHIR uses the enumeration as determinative of legal residency despite the fact that it states in its Report and Plan "The inclusion of persons in this enumeration

is not to be taken as a **determination** of eligibility for relocation benefits." ADD 149. (emphasis added) In *Walker v. NHIRC,* 728 F.2d 1276 (9th Cir. 1984), the relocatee took the position that her name being included on the enumeration on the HPL was conclusive proof of eligibility. The Court found "The Commission [now ONHIR] has always taken the position that the enumeration list is not conclusive" *Id.* 1279. However, with Mr. Fuson, his name on the NPL enumeration was used as the only evidence of his domicile on the NPL on January 27, 1975. This is despite the finding that the family used the traditional grazing area to herd sheep encompassing both the HPL and NPL through the "end of 1974" and as late as April 24, 1975. 3-ER-470. 3-ER-479.

The Agency must apply the intent to reside or domicile law to determine whether an individual was a legal resident of the HPL on December 22, 1974. 49 FR 22277-01. ADD 80-81. However, the hearing officer engages in only a mere residence analysis. The regulation was amended to require legal residence that has been interpreted by the Agency as domicile law. The Agency in its Management Manual dated 1989 under "Certification Review" states that "The Commission has always used a definition of residence which is **synonymous with the term domicile** or legal residence." Reply ADD-162.

Mr. Fuson has also attached seven cases in which the hearing officer relied upon domicile law and a number of its presumptions. ADD 104-145. Despite the

Agency applying the law of domicile to its review of legal residence issues in applications since 1985, in its answer brief ONHIR states: "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**." Emphasis added *Answer Brief Dkt Entry 19, Page 39 of 49.* ONHIR wants each appeal to be decided in a "bubble", where it can arbitrarily deny an application without refence to the law or any legal standard which is applicable to the Agency. ONHIR acted in an inconsistent and arbitrary manner in its evaluation of Mr. Fuson's case, and its decision should be reversed.

IV. CONCLUSION

Mr. Fuson requests that this Court, based on a whole record review, find that ONHIR's denial of his application was arbitrary and capricious, not based on substantial evidence, and not in accordance with the law.

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 November 22, 2023.

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

s/ S. Barry Paisner
S. Barry Paisner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-15747

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ADDENDUM TO PLAINTIFF-APPELLANT'S REPLY BRIEF

Johnnie Fuson v. Office of Navajo and Hopi Indian Relocation

Case No. 23-15747

ADDENDUM TABLE OF CONTENTS
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Other Authorities

SECTION 1200 ELIGIBILITY

SUBJECT 1230 Certification Review

AUTHORITY P.L. 99-590

POLICY.

Pursuant to P.L. 99-590, the Commission will review files of certified applicants to verify their eligibility. The review will encompass the files of all clients who have been certified, or who are pending initial determination, or who are pending reversal of initial denial, who have not yet signed a Relocation Contract. The review will be conducted in accordance with the regulations in effect at the time the person was certified.

All notices issued pursuant to these procedures will be sent certified mail, return receipt.

ATTACHMENT # 1

CRITERIA FOR CERTIFICATION REVIEW

There are two basic criteria for the determination of eligibility for relocation benefits: Head-of-Household status and Residence.

Residence

The Commission has always used a definition of residence which is synonymous with the term domicile or legal residence. Domicile is defined as "that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." Basically legal residence is a residence at a particular place, accompanied with a positive proof of intention to continue there for an unlimited time. Black's Law Dictionary. The pattern of life on the Hopi Partitioned Lands is such that often times members of a household are away for employment or educational purposes, but retain an interest in an identifiable homesite on the Hopi Partitioned Lands. The Commission has always utilized a number of factors to determine residence.

1. Inclusion on the Joint Use Area roster prepared by the BIA immediately following the passage of the Act, is generally presumptive of residence absent any information to the contrary.

2. Continuous and current occupancy is obviously sufficient for the purpose of determining residency. This is generally shown by information contained on the time duration sheet prepared by the applicant, grazing permits and addresses.

3. Residency may be shown by the maintenance of substantial, recurring contacts with an identifiable homesite. This may be so even though the individual is temporarily away for employment, education, medical reasons, or continuous duty in the military service. The criteria on substantial and recurring contact goes to the intent to consider a place as one's permanent residence or domicile.

4. The following factors are considered in the determination of residence as of 1974:

   (1) Ownership of Livestock.
   (2) Ownership of Improvements.
   (3) Grazing Permits.
   (4) Livestock Sales Receipts.
   (5) Homesite Leases.
   (6) Public Health Records.
   (7) Medical and Hospital Records, including those of

Medicinemen.
(8) Trading Post Records.
(9) School Records.
(10) Military Records.
(11) Employment Records.
(12) Mailing Address Records.
(13) Banking Records.
(14) Drivers License Records.
(15) Voting Records-Tribal and County.
(16) Home Ownership or Rental off the Disputed Area.
(17) B.I.A. Census Data.
(18) Certification from Chapter Officials-Not Required.
(19) Certification of Residency.
(20) Certification by Relocatee.
(21) Information Obtained by Certification Field Investigation.
(22) Social Security Administration.
(23) Marital Records.
(24) Court Records.
(25) Records of Birth.
(26) Joint Use Area Roster.
(27) Any Other Relevant Data.

There is not a fixed number of factors which are required for a determination of residence, rather, we consider the total circumstances of an individual's living situation as of 1974 to determine residence.

5. It is important to note that the living patterns on the Hopi Partitioned Lands are unlike typical Anglo communities and must be viewed in that context. Because of the building freeze and livestock reduction a number of families may be residing in one dwelling and a number of families may claim one residence as their domicile. These factors have been taken into account in regulations and in practice.

Although the regulations have been amended twice since the first publication, the basic criteria for eligibility required residence as of 1974. The regulations that were used from 1979 through 1983 allow for a determination of residency based on substantial and recurring contact, therefore, these certifications required an examination of an individuals activities following the passage of the Act in 1974. Those were substantiated by field investigation contacts by Commission staff as well as certification of residency obtained from chapter officials and other local residents. In those regulations, there was also a provision stating that anyone who moved from the Joint Use Area between 1974 and 1978 was presumed to have moved pursuant to the Act and there was therefore a presumption of eligibility. People who were certified between 1979 and 1983 could therefore establish eligibility based on that presumption.

The certification review is being conducted in accord with the regulations which were in effect at the time of certification, therefore each set of applicable regulations will be the basis for any determinations.

Head-of-Household

The Commission has always considered the variety of circumstances in which people live on the Hopi Partitioned Lands. A number of individuals survive in a traditional manner with their primary income from livestock and, therefore, have no objective evidence of income. Artificial income levels are not sufficient to determine self-supporting status for Navajo individuals. Those who are custodial parents or are married clearly fit the definition of head of household and family cards, marriage license, and birth certificates are utilized to prove such status. Those individuals who do not fall into these two groups but who are single must show proof of self-support. The various definitions of head of household status have been as follows:

1976 Regulations- The first regulation adopted by the Commission defined eligibility to require that a person must live in the area partitioned to the other tribe. A head-of-household was defined as "a person who qualifies as a head-of-household under the Internal Revenue Code of 1954, or a married couple, widow, or widower, or any single person who maintains a separate home and did so for a period of one year prior to the above date of the regulation." The only requirement for achieving head-of-household status related to single individuals who would to have been maintaining separate homes since 1975.

1979 Regulations- The Commission amended its regulations in 1979, defining residence as either current occupancy or maintenance of substantial and recurring contacts. At that time, a household was defined as:

(1) One or more persons residing together in a single abode where one household member has maintained continuous residency since December 22, 1974, or

(2) A married couple who was married as of 1980, or

(3) A single person who is a custodial parent, or

(4) A single person who has maintained and supported himself since November 12, 1975.

A dependent was defined as someone who receives more than 1/2 of their support from another.

1984 Regulations- The regulations were again amended in 1984. The regulations were amended to provide that in order to qualify as a head-of-household, the individual must have been a head-of-household as of the time they moved from the partitioned land. A single person would qualify as long as they actually maintained and supported themselves while residing on the partitioned land. This change was made to clarify the differing eligibility standards between custodial parents, married persons, and single individuals.

The Commission has always considered the variety of circumstances in which individuals live on the HPL. Artificial income levels are not sufficient to determine self-supporting status for Navajos. The following criteria are to be used in considering self-supporting status:

(1) While it is difficult to establish a fixed amount of income sufficient to demonstrate self-support, some guidelines can and will be determined. According to the 1980 Census, the median annual household income on the reservation was $8,000. Starting with that figure as a base the Commission would propose the following:

(a) A certain percentage of any household maintenance income can be considered non-variable in relation to family size. The Commission has established a 25% rule, in off-reservation moves, which is in keeping with this concept. Therefore, the Commission would reduce the above mentioned median income by 25% to account for such non-variable expenses.

(b) Application of this percentage reduction leaves a balance of $6,000 to be considered as discretionary, disposable maintenance income. The average size of families subject to relocation is 4.5 members. Dividing the discretionary maintenance income by the average family size results in a per capita maintenance figure of approximately $1,300.

(c) The $1,300, contingent upon adequate documented evidence, will be utilized as the base figure for presumption of self-support.

It should be noted that this figure is extremely close to the general assistance figure discussed in (2) below. The Commission feels that this favorable comparison of the average general assistance amount to its formula-derived per capita maintenance figure lends considerable credence to the establishment of this monetary floor for the presumption of self-support. It must be noted, however, that the circumstances on the HPL are considerably different than mainstreamed communities. A non cash economy exists for a large segment of the population. The Commission must, therefore allow for the possibility of an individual demonstrating self-support at a lower figure than the $1,300 floor established herein. It would, however, require a much more rigorous investigation and extensive documentation for any individual to demonstrate self-support at a level lower than this figure.

(2) The level of general assistance available to single individuals on the Reservation. This amount is approximately $1,296 per year. In most cases, this is supplemented by food stamps and the receipt of Federal commodities. Individuals who can demonstrate receipt of general assistance would be determined

self-supporting.

(3) Single individuals who have received scholarship grants from the Tribe or educational institutions, as long as the grant includes funds for living expenses. In cases where the grants are predicated on the receipt of a certain amount of income from the individual or family which is more than half of the total estimated expenses, this person would not be considered self-supporting.

(4) Individuals who can produce wage statements, W-2 forms, or tax returns showing a consistent level of income in excess of the general assistance level would be considered self-supporting.

(5) Individuals who were still high school students at the time of certification will be scrutinized more closely and will require substantiation of income and independence to rebut the normal presumption of dependence.

(6) In some circumstances, individuals may be able to show that they are self-supporting without the benefit of tax returns and wage statements because of the lifestyle on the HPL. It is common for individuals to make a living from livestock or support themselves through odd jobs throughout the Reservation. The Commission has always considered these factors in its determination of head-of-household status. In most cases, individuals falling into this category are older and engaged in a traditional lifestyle. Those who fall into this category will be considered on the basis of the facts of the case.

SC:sll

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