No. 25-2213

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDDIE MALONEY
Plaintiff-Appellant,

v.

OFFICE OF NAVAJO & HOPI INDIAN RELOCATION,
Defendant-Appellee.

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

No. 3:23-cv-08632-SMB
Hon. Susan M. Brnovich

APPELLANT'S REPLY BRIEF

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A. Administrative Hearing Testimony of Eddie Maloney

Op.Br., 14-20; *Ans. Br.*, 23-26

The Hearing Officer's ("HO") *Decision* found Appellant Eddie Maloney ("Maloney") to be a "credible witness." ER-68. ONHIR states that while the HO made this finding, "in the formal credibility determination, that characterization was limited to Plaintiff's testimony 'about his employment … about his residence at Cow Springs, and … about visitation with his relatives who lived on Black Mesa.' " *Ans. Br.*, 23-24. However, the *Decision*'s Credibility Finding, while inaccurately summarizing Maloney's testimony, expresses no limitation on the determination he testified credibly.

The HO's summation of Maloney's testimony, citied by ONHIR, misrepresents its substance and emphasis. That Maloney testified about his "residence" at Cow Springs, and "visitation" with relatives on Black Mesa, is the wording of the HO. A review of the testimony [ER-33-47] shows Maloney didn't make such a distinction between his family's Cow Springs and Black Mesa homesites. He speaks of the homesites as being of equal significance, the only distinction being their primarily seasonal occupations. And contrary to the HO's characterization of the NPL homesite as his "residence," and the HPL homesite as

one he "visited," Maloney references his presence at Black Mesa more than Cow Springs.

In the *Decision's* Findings of Fact the HO recognizes that Maloney's family maintained a "traditional use area" that in the years at issue spanned the eventual Joint Use Area ("JUA") partition line. ER-65. One of the three prior decisions[1] of ONHIR's Hearing Officer, submitted as exhibits to Maloney's Motion for Summary Judgment filed in the District Court, gives a description of a "traditional" or "customary use area." ER-84-91.[2] "It is clear from the evidence that the family had a customary use area … which was divided by the partition line." ER-90. The *Decision* recognizes Maloney's family maintained this lifestyle, freely moving between two homesites and livestock grazing areas, but arbitrarily misrepresented "credible" testimony to exclude his residency pattern from that of his family.

ONHIR states, "the hearing officer identified two statements inconsistent with the record that called into question Plaintiff's credibility regarding residency on the HPL." *Ans. Br.*, 24. They are: "(1) Plaintiff's testimony that he mentioned

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[1] *Minnie Woodie,* CF#5124 (2011).

[2] ONHIR's objection to the consideration of the *Minnie Woodie* decision and the other two administrative decisions is addressed, *infra.*,14-15.

living at the HPL to the BIA enumerator;3and (2), his application answer that he was 'unfamiliar'4with relocation benefits." Id.

The first "inconsistent" statement relates to the finding of the BIA Enumeration, addressed, *infra.*, 8. Maloney didn't contradicted himself, or testify otherwise than stating he mentioned to the individual who interviewed him that he maintained another residence on Black Mesa. ONHIR relies on what is recorded in the Enumeration. This is relevant to the question of Maloney's residency in 1974, but doesn't support the HO's mischaracterization of credible testimony.

ONHIR asserts the HO, "was reasonably skeptical that Plaintiff mentioned living on the HPL to enumerators." *Ans. Br.,*24. And, "Plaintiff did not submit any evidence that his relatives on Black Mesa identified him as a resident …"[5]*Id.,* 24-25. The HO's conjecture about what Maloney or his relatives did or did not tell enumerators is not reasonable. He found Maloney to be a credible witness, then offered arbitrary speculation to undermine that testimony.

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[3]The HO asked Maloney if he told the enumerator he lived at the HPL homesite. Maloney: "Yes, I tell them we, I just kind of mentioned it, they didn't exactly ask me that question, but I just mentioned it." ER-47.

[4]The application question: "Why didn't you apply for Relocation Benefits?" Maloney: "I was not too familiar with the benefits." ER-25.

[5]Maloney's neighbor, Darrell Woody did identify him as a Black Mesa resident.

ONHIR counters Maloney's argument that conclusions about what transpired between he and the enumerator are speculative [*Op. Br.*, 24], responding that the HO's point was that the "general practice" of enumerators was to ask certain questions. *Ans. Br.*, 25, fn.7. But still, because no record exists as to what anyone said, "general practice" can't be relied upon to reject Maloney's credible testimony about what he recalled.

ONHIR doesn't comment on Maloney's reference to the deposition testimony of a BIA employee who worked on the Enumeration [*Op. Br.*, 28-29], cited in this Court's decision in *Fuson v. ONHIR*, 134 F.4th 1010, 1015 (9th Cir. 2025). The enumerator explained that interviews were conducted so as "to avoid overcounting the total number of people in the JUA" [*Op. Br.*, 28-29, citing *Fuson*], which can explain why some people were not recorded at homesites.

Maloney's application statement that he was "not too familiar with the benefits" is not relevant to his residency in 1974. ONHIR: "Common sense advises that if Plaintiff were truly living with his grandparents, he would have had some awareness of the relocation process that they were going through." *Ans. Br.*, 25. The issue is whether Maloney was a resident of the HPL on December 22, 1974. The JUA was partitioned in 1977,[6] and the "relocation process" followed.

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[6] *Bedoni v. Navajo-Hopi Indian Relocation Comm'n,* 878 F.2d 1119, 1121 (9th Cir. 1989).

Whatever was communicated within Maloney's family regarding Relocation Benefits would have been years after the time at issue here.

ONHIR responds to Maloney's point that the HO misrepresented his testimony in stating he "regularly returned" to Cow Springs while employed at the Shonto School, and "sometimes went to Black Mesa to visit family members." *Ans. Br.*, 26 fn. 8, citing *Op. Br.*,16. "But these findings of the hearing officer were reasonable given his well-supported credibility determinations…" *Id.* ONHIR here ignores his credibility finding: "Applicant is a credible witness." ER-68. ONHIR's response fails to provide support for the HO's misrepresentation of Maloney's testimony. *Op. Br.,*14-17. The testimony speaks for itself. ER-32-48.

B. Administrative Hearing Testimony of Darrell Woody
Op. Br., 20-22; *Ans. Br.*, 26-28.

ONHIR: "[T]he hearing officer reasonably found that Woody's testimony about 'seeing' Plaintiff on Black Mesa was not sufficient to support Plaintiff's assertion of HPL residency." *Ans.Br.*, 26. ONHIR endorses the HO's dismissal of Woody's testimony as "vague." *Id.*, 27. "Woody did not describer the nature, length, or frequency of *any* of his alleged sightings of Plaintiff on the HPL." *Id*.

The transcript [ER-48-56] shows this description of Woody's testimony to be inaccurate. He recalled more than simply "seeing" Maloney on Black Mesa. He was specific in recalling the substance and frequency of his encounters with Maloney on the HPL. Woody stated their families were neighbors and their

homesites close. ER-48-49. He recalled the names of several members of Maloney's family who lived near him on the HPL. ER-51. Woody had a clear recollection of Maloney regularly checking him out of the Shonto school dormitory, driving him to his Black Mesa home, and checking him back into the dorm. ER-53; 54-55.. This is not vague testimony

ONHIR concludes its defense of the HO's analysis of testimony: "Neither witness testified about Plaintiff's intent to reside on or return to live on the HPL, while substantial evidence … indicated Plaintiff's strong ties to Cow Springs." *Ans. Br.*, 28. ONHIR's eligibility requirements to receive benefits [*Op. Br.*, 5-6] require Maloney to prove residency on the HPL on December 22, 1974. He is not required to show residency beyond that date, nor intent to reside into the future.

Decisions of ONHIR's Hearing Officer have been held not based upon substantial evidence where he made credibility findings as he did here, finding a witness credible about everything except testimony going to the heart of the applicant's claim.

Ben v. ONHIR, cv-22-08032-SPL, 2023 WL 2140462 (D. Ariz. 2023), reversed the HO for failure to offer specific and cogent reasons in support of a partial adverse credibility finding:

> Nowhere in the decision does the IHO explain *why* he found Plaintiff's testimony regarding his return visits to Tolani Lake [HPL] to be exaggerated and not credible. The only other references to Plaintiff's trips to Tolani Lake are conclusory statements that those

> trips were for visitation purposes, insufficient to maintain legal residency. But merely stating a conclusion contrary to Plaintiff's testimony is not a specific or cogent reason for discrediting the testimony – as emphasized by the case law cited by Plaintiff.

Ben, *3. (emphasis in original).

Bitsuie v. ONHIR, cv-22-08146-JJT, 2024 WL 728701 (D. Ariz. 2024), reversed the HO and ordered the Agency to pay Relocation Benefits:

> In the "Credibility Findings," the IHO states, "Applicant is a credible witness about his education and employment, but applicant is not a credible witness about his contacts with Howell Mesa …" But the IHO provides no explanation for that conclusion. …The only reasons the IHO gave to find Plaintiff not credible were the supposed inconsistencies in his testimony, but none of those inconsistencies are supported by the record … Without a specific, cogent reason, the Court cannot defer to the IHO's finding that Plaintiff's testimony about his residency at Howell Mesa was not credible.

Bitsuie, *6 (citations omitted).

The HO's credibility findings here are identical to those of *Ben* and *Bitsuie*. The decisions fault the HO for finding the applicant a credible witness overall, but not with respect to testimony on the frequency and substance of presence at their HPL home, the issue critical to determining eligibility for Relocation Benefits.

"[A]n ALJ cannot selectively examine evidence in determining credibility, but rather must present a reasoned analysis of the evidence as a whole and cite specific instances in the record that form the basis of the adverse credibility finding." *Tamang v. Holder*, 598 F.3d 1083, 1093-1094 (9th Cir. 2010).

A "reasoned analysis of the evidence as a whole" is absent from the analysis of testimony here.

II. The BIA Enumeration is not Determinative; the Entire Record Must be Examined to Determine if Plaintiff Maintained an HPL Homesite Through December 22, 1974

(*Op. Br.*, 23-30; *Ans.Br.*, 28-36)

ONHIR: "The hearing officer found that other than Plaintiff's and Woody's testimony, 'there is no evidence that applicant was a resident' of Black Mesa." *Ans. Br.*, 28. ONHIR lists the "evidence that Plaintiff did *not* reside on the HPL…" *Id.,* (emphasis in original). Three of the six items relate to the Enumeration: Maloney's "self-identification to enumerators as a Cow Springs resident and presence on NPL during his wintertime … interview;" his "relatives' enumeration on both the NPL and HPL," particularly John and Daisy Maize whom he said he lived with, and Maloney's enumeration only on the NPL; "the lack of evidence anyone found by enumerators on the HPL …identified Plaintiff as an HPL resident." *Ans. Br.*, 28-29.

Maloney's presence at the NPL homesite when encountered by the enumerator at the time of year his family occupied the HPL homesite is not evidence he was "living" there. His family's homesites were separated by 12 to 15 miles in 1974/75. ER-45-46. Maloney's family pursued a basic pastoral lifestyle encompassing a customary use area over which they grazed livestock, with seasonal variations in occupancy, but would not vacate a residence entirely without

visiting it for months at a time. Perhaps Maloney was there to check on the security of the dwelling or obtain a personal item.

The Arizona District Court responded to this point, presence at an NPL homesite during the time of year applicants claimed to reside on the HPL:

> The May 1975 interview … shows only that Plaintiffs' father was at the NPL homesite *on that day*. As Plaintiff … testified, he may have been there simply to check on Plaintiffs' grandparents, or to get tools and supplies for the family's work at the HPL cornfield.

Ray v. ONHIR, cv-08101-SPL, 2023 WL 4761789, *7 (D. Ariz. 2023). (emphasis in original)

Beyond Enumeration based arguments, ONHIR makes three additional points to argue Maloney was not a resident of the HPL on December 22, 1974:

(1) "Plaintiff's statement on his application [for Relocation Benefits] that his residence as of December 22, 1974, was Cow Springs." *Ans. Br.*, 29. (Addressed in the *Opening Brief*, 17-18). ONHIR's citation is to the HO's *Decision*, not the application question itself. ONHIR, as did the HO, ignores the complete compound question with four subparts, referencing only Maloney's answer to one subpart. (Question 2 on page 5 of the application is at ER-25.)

The **c**ompound question is ambiguous as to temporal identification. It does not mention the Joint Use Area, which existed on December 22, 1974, but not when Maloney was answering the question in 2009. It mentions the HPL, a region of the Hopi Reservation in 2009, but not yet delineated in 1974. Subpart 2b: "Was

the residence located on the HPL?" Maloney checked the box for "Yes." Subpart 2.c.: "If in the Navajo Nation, please explain where your residence was located." Maloney wrote, "Cow Springs AZ." In 2009 Cow Springs was an integral part of the Navajo Nation, but not in 1974.

For a traditional Navajo family, their entire customary use area in 1974 was Navajo land. When Maloney answered these questions the land had been legally divided between the Navajo and Hopi tribes. The question conflates the evolving legal designations of the land Maloney was born into (*Op. Br.*, 3-4): the pre-existing reservation occupied by Hopi and Navajo; the District Court's establishment of the exclusive Hopi Reservation and the Joint Use Area in 1962;[7] congress' passage of the Settlement Act in 1974; partition of the JUA in 1977. ONHIR oversimplifies Maloney's responses to these ambiguous questions by addressing only one subpart.

(2) "The fact that Plaintiff's child's death certificate listed only a Cow Springs address." *Ans. Br.*, 29. Only one "residence" would be listed and Cow Springs, 1.5 Mi. S. of Hwy 160 at M.P. 359 [SER-20], is a specific location. Black Mesa is a geographic area.

(3) "The lack of any other evidence that Plaintiff lived on the HPL." *Id.*

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[7] *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (*per curium*).

Maloney's and Woody's testimony is "evidence." Credible testimony has been repeatedly held sufficient to overcome the presumptions of the Enumeration, in prior decisions of ONHIR's HO, and by both the District Court and this Court.

ONHIR: "Plaintiff cites no precedent asserting that the hearing officer should disregard the BIA Enumeration in its entirety," and cites Mike v ONHIR[8] for, "finding that the independent hearing officer erred where he 'ignored[d]' the Enumeration and its presumption of residency." Ans. Br., 31-32. ONHIR, as did the HO, misreads Mike. As explained in the Opening Brief [26-27], Mike does not stand for the proposition that the absence of one being listed an HPL resident in the Enumeration carries a presumption of non-residency.

Maloney does not assert, as ONHIR suggests, that the HO should entirely disregard the Enumeration. Rather, in making the critical decision as to whether an applicant has demonstrated eligibility to receives compensation for involuntary relocation from his/her ancestral homeland, the Enumeration's recognized deficiencies must be taken into account. And, because applicants and witnesses, generally have only memory of events long ago with which to counter the Enumeration, testimony offered should be afforded proper probative weight, not arbitrarily dismissed or misrepresented.

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[8]CV-06-0866, 2008 WL 54920, *5-7 (D. Ariz. 2008),

ONHIR addresses two cases relied on by Maloney, Ray v. ONHIR (Op. Br., 25-26;29), supra., 9, and Fuson v. ONHIR (Op. Br., 22; 28-29), supra, 4, in an effort to weaken their authority in support of the argument that the HO gave conclusive weight to the Enumeration. ONHIR states that in quoting Ray, Maloney acknowledged, "that the hearing officer's task is to 'meaningfully consider whether Plaintiffs had met their burden in *disproving the Enumeration*.' " *Ans. Br.,*33, citing a portion of Maloney's quotation from *Ray* (and adding emphasis). The full sentence from *Ray* states the central holding of the opinion, that the HO "essentially treated the Enumeration as conclusive evidence of Plaintiffs' residency…" *Ray,**7.

Maloney acknowledges the Enumeration is relevant to the determination of residency in 1974-1975, but argues the HO over relied on it, treating it as determinative, while dismissing credible testimony challenging what it documents. The *Ray* court's analysis is on point with the instant case:

> The testimony was consistent and strongly supportive of Plaintiffs' claim to HPL residency. The Enumeration, on the other hand, constituted *prima facie* evidence of Plaintiffs' *non*-HPL residency. Faced with this competing evidence, the IHO simply chose to follow the Enumeration and to discount the testimony as not credible. The IHO offered no meaningful explanation for why the Enumeration was given so much weight in comparison to the testimony.

Ray, *8 (emphasis in original).

ONHIR attempts to distinguish *Fuson*, citing this Court's holding that, "the

hearing officer 'relied almost exclusively on the BIA enumeration roster' in his decision." *Ans. Br.,* 33, citing *Fuson*, 134 F.4th, at 1018. ONHIR argues the HO here, in contrast to *Fuson*, "appropriately considered the BIA Enumeration by weighing it with other credible evidence." *Ans. Br.*, 33. However, the HO's *Decision's* analysis mirrors that which this Court rejected in *Fuson,* as he relied on the Enumeration and failed to fairly evaluate testimony. The HO mischaracterized Maloney's testimony to allege he testified to a more substantial presence at Cow Springs than Black Mesa. The analysis and conclusion is the same as this Court found not based upon substantial evidence in *Fuson*. The HO:

> summarily treated the enumeration roster as dispositive evidence of [applicant's] residence at the NPL. By neglecting to engage with the critical testimony in his decision, the IHO failed "to reasonably consider[ ] the relevant issues and reasonably explain[ ]" his decision. ….The IHO's residency finding is therefore arbitrary and capricious.

Fuson, 134 F.4th, at 1019 (citations omitted).

ONHIR objects to the consideration of three prior decisions of ONHIR's Hearing Officer [Op. Br., 24],9attached as exhibits to Maloney's Motion for Summary Judgment, asserting the administrative record is limited to what was before the agency when it made its decision. "Considering evidence outside this record is inappropriate …." *Ans. Br.*, 33, (citation omitted).

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[9] *Edison Bahe,* .Hearing No. 89-36, 1989 [ER-94]; *Harry Isaac*, Hearing No. 85-31, 1987 [ER-79]; *Minnie Woodie*, Casefile No. 5124, 2011 [ER-84].

Maloney is not seeking to supplement the record with additional evidence. The HO's prior decisions are offered for their precedential value; to show that in past decisions he did not treat the Enumeration as determinative of residency as he did here. Other courts have admitted and considered prior decisions of ONHIR's Hearing Officer. In *Ray* plaintiffs sought to introduce the *Edison Bahe* decision [ER-92] and ONHIR objected. The court reasoned: "Because an agency must follow its own precedent or else explain any deviation, this Court may consider prior ONHIR decisions to determine whether a decision is arbitrary and capricious." *Ray,* *3. The court found *Bahe* to have precedential value.

> The Court finds that the … *Bahe* Decision involves facts that are indistinguishable from the instant case. Both cases involved applicants who … were not listed as HPL residents in the Enumeration. The Court finds the *Bahe* Decision to be necessary to determine whether the IHO adequately explained its credibility and residency decisions….

Id.

Bahe similarly involves facts indistinguishable from the instant case. Other courts have permitted plaintiffs to introduce prior decisions of ONHIR's HO:

> "Generally, administrative agencies 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) (quoting *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C.Cir.1976)). "If an agency's decision is inconsistent with other findings, the decision may be considered arbitrary if the agency fails to explain the discrepancy." *Id.*

Torpey v. ONHIR, cv-17-08184-SMB, at 6 (D. Ariz. 2019).

> The court disagrees with ONHIR's position that the hearing office's

> prior decisions are extra-record evidence that cannot be considered on review or that the hearing officer's decisions can be inconsistent with one another without consequence. …

Tsosie v. ONHIR, cv-08245-JWS, 10-11 (D. Ariz. 2017).

ONHIR argues that regardless, "…these decisions do not aid Plaintiff," because "in each one … credible evidence rebutted the presumption established by the Enumeration." *Ans. Br.*, 34. The "credible evidence" in the decisions was testimony, which ONHIR and the HO here have sought to discredit.

ONHIR responds to Maloney's point [*Op. Br.*, 23] that an applicant has little to offer to counter the Enumeration or prove residency besides testimony. ONHIR states, "[t]his is not true," and cites indicia of residency in ONHIR's regulations, at 49 Fed. Reg. at 22,278. *Ans. Br.*, 35. The examples of documentary evidence are not realistic to prove residency in 1974 on what became the HPL, as has been noted by the Arizona District Court.

> [T]he regulation's adoption of a legal residency test may not directly further the language of the Settlement Act and Congress' intent, as the Congressional Record indicates that Congress recognized that the Navajo people traditionally were and are 'nomadic,' typically having more than one 'Hogan' or homesite location used seasonally."

Reed Tso v. ONHIR, cv-17-08183-JJT, 2019 WL 18177360, *3, fn. 2 (D. Ariz. 2019), citing 49 Fed. Reg. 22, 277-278 (Congressional citations omitted).

The documents would not have an address reflecting residency in that remote area. Even today residents of the former JUA typically receive mail at Post Offices.

Mike, *supra*.,11, notes the remoteness in a region of the former JUA:

> The ONHIR itself acknowledges the "economic realities" of those residents who relocate temporarily for school or work. The government does not dispute that facilities such as banks, vehicle registration facilities, schools, and jobs are rarely accessible in Jeddito, a phenomenon still problematic today but more so in 1973.

Mike, *5.

Finally, ONHIR argues that "if the Court concludes that ONHIR erred, it should follow the general rule and remand for further agency proceedings." *Ans. Br.*, 37. However, this Court has discretion to find Maloney eligible for benefits as did the district court in *Bitsuie, supra*., 7.

> The Court also finds that further proceedings are unnecessary because no unresolved material questions remain in the record … *See Begay v. Off. Of Navajo & Hopi Indian Relocation*, No. CV-16-08221-PCT-DGC, 2017 WL 4297348, at *4 (D. Ariz. Sep. 8, 2017) (stating remand for payment of benefits is appropriate where "the reviewing court finds the record clearly demonstrates an applicant's eligibility for relocation benefits"). After properly crediting the testimony in the record, the evidence is sufficient to demonstrate that Plaintiff is eligible for relocation benefits under the Settlement Act.

Bitsuie, *6.

III. Conclusion

For the foregoing reasons, Eddie Maloney respectfully requests that this Court reverse the decision of the Arizona District Court.

Respectfully submitted, this the 20th day of January, 2026.

s/Robert S. Malone
Attorney for Plaintiff/Appellant Eddie Maloney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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