

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 18 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANNABELLE BEGAY,

No. 21-16349

Plaintiff-Appellant,

D.C. No. 3:20-cv-08057-DJH

v.

MEMORANDUM*

OFFICE OF NAVAJO AND HOPI INDIAN
RELOCATION, an Administrative Agency
of the United States,

Defendant-Appellee.

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

Diane J. Humetewa, District Judge, Presiding

Submitted November 15, 2022**
Phoenix, Arizona

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

This case arises from Annabelle Begay’s claim to receive relocation benefits under the Navajo-Hopi Land Settlement Act of 1974 (“Settlement Act”), Pub. L. No. 93-531, 88 Stat. 1712. The Office of Navajo and Hopi Indian Relocation (“ONHIR”) denied Ms. Begay’s claim. When Ms. Begay sought judicial review of ONHIR’s decision, the United States District Court for the District of Arizona granted summary judgment to ONHIR in an order which Ms. Begay now appeals. This court has jurisdiction under 28 U.S.C. § 1291. Having reviewed the district court’s order de novo, *see Walker v. Navajo-Hopi Indian Relocation Comm’n*, 728 F.2d 1276, 1278 (9th Cir. 1984), we affirm.

1. Ms. Begay argues that ONHIR’s decision was arbitrary and capricious under the Administrative Procedure Act (“APA”) because ONHIR violated its own procedures and relied on post-hearing evidence to reach it. The hearing officer (“HO”) assigned to Ms. Begay’s case relied on affidavits and testimony from a prior proceeding, in which Ms. Begay’s father, Roger Begay, claimed relocation benefits under the Settlement Act. These materials, however, were not introduced into the administrative record for Ms. Begay’s case. Instead, ONHIR put them before the HO by quoting them in a post-hearing brief. Ms. Begay contends that ONHIR’s procedures prohibit an HO from considering materials introduced in this way. ONHIR responds that the HO was permitted to take administrative notice of the materials in question.

ONHIR is correct. As a general matter, an ONHIR HO is permitted to take administrative notice of evidence that is not in the record. In other contexts, this court has adopted a “rule of convenience” that permits an administrative law judge to “take notice of adjudicative facts whenever the [administrative law judge] at the hearing knows of information that will be useful in making the decision,” *Banks v. Schweiker*, 654 F.2d 637, 640-41 (9th Cir. 1981) (alterations and internal quotations omitted), so long as the applicant is provided with “notice and an opportunity to respond to extra-record facts.” *Getachew v. I.N.S.*, 25 F.3d 841, 845 (9th Cir. 1994). The reasons for adopting this rule of convenience—that administrative law judges must handle “a huge volume of cases,” and that they have an “affirmative duty . . . for developing the facts fairly”—apply to hearings before an ONHIR HO. *See Banks*, 654 F.2d at 640-41 (providing these reasons); 25 C.F.R. § 700.313 (allowing HOs to develop facts fairly).

In this particular case, the HO was permitted to take administrative notice of the materials quoted in ONHIR’s brief but not placed into the record. Those materials were useful to the HO’s decision because they bore on a key issue in dispute, namely, whether Ms. Begay resided on Hopi Partitioned Land at the time that was required for her to be eligible for relocation benefits under the Settlement Act. The HO notified Ms. Begay that his decision relied on them. And Ms. Begay had an opportunity to respond—an opportunity that she exercised—by filing a

motion for reconsideration that objected to the use of the materials from Mr. Begay's proceeding. In this particular context, a motion for reconsideration is an adequate opportunity to respond. Since the HO was permitted to take administrative notice of the materials quoted in ONHIR's brief, the HO's reliance on them was not arbitrary or capricious.

2. Ms. Begay also argues that ONHIR erred by misapplying the concept of residence under the Settlement Act. First, Ms. Begay argues that the HO applied the wrong definition of residence by failing to consider where she *intended* to reside. Second, Ms. Begay argues that the HO's residence determination was not supported by substantial evidence.

Ms. Begay's argument fails in both respects. To the extent that Ms. Begay argues that the HO applied the wrong legal standard, she has forfeited that argument by not raising it before the agency or the district court. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 922 (9th Cir. 2010). And substantial evidence supports the HO's determination that Ms. Begay did not reside on Hopi Partitioned Land as of 1982. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "a highly deferential standard of review." *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). In this case, sworn affidavits

and testimony from Mr. Begay's proceedings, which occurred over twenty-five years closer to the events in question than Ms. Begay's hearing, indicated that she resided and intended to reside outside of Hopi Partitioned Land starting in 1979. While other evidence—chiefly, testimony at Ms. Begay's hearing—pointed to a contrary conclusion, the HO chose to discredit that testimony because it was contradicted by sworn statements from Mr. Begay's proceedings. That decision was supported by substantial evidence.

3. Ms. Begay's other arguments are without merit. Ms. Begay argues that ONHIR's decision was arbitrary and capricious because ONHIR granted relocation benefits to her sister, Annette Begay, whose case was similar to Ms. Begay's. But there is a meaningful distinction between the two cases: the HO in Annette Begay's case did not receive the pertinent materials from Mr. Begay's proceeding, while the HO in Annabelle Begay's case did. Ms. Begay also argues that ONHIR violated the APA by submitting materials from Mr. Begay's proceeding to the HO *ex parte*—that is, without copying Ms. Begay or her counsel. But the record does not show that ONHIR made such a submission; it shows only that ONHIR quoted those materials in a brief, which itself was not submitted *ex parte*.

For the foregoing reasons, the order of the district court is **AFFIRMED**.