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10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF ARIZONA**

12 Reed Tso,

13 Plaintiff,

14 v.

15 Office of Navajo Hopi Indian Relocation,  
16 an administrative agency of the United  
States,

17 Defendant.

**CV-17-08183-MHB**

**MOTION TO DISMISS COUNT II  
FOR LACK OF SUBJECT MATTER  
JURISDICTION**

18 Comes now the Defendant, the Office of Navajo and Hopi Indian Relocation  
19 (“ONHIR”), and pursuant to Rule 12(b)(1), Fed. R. Civ. P., respectfully requests this Court  
20 dismiss Count II of Plaintiff’s Complaint for lack of subject matter jurisdiction. In support  
21 of which, ONHIR relies on the following Memorandum of Points and Authorities and  
22 references to the Certified Administrative Record.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 This matter stems from a challenge under the Administrative Procedures Act (the  
25 “APA”) to an August 17, 2016, final agency decision by the executive director for the Office  
26 of Navajo and Hopi Indian Relocation. APA actions are record reviews, limited to issues  
27 and evidence brought before an administrative officer. Count II of Plaintiff’s Complaint  
28 raises a brand new claim, asserting that the ONHIR breached a fiduciary obligation to

1 Plaintiff by failing to affirmatively assist him in seeking relocation benefits and delaying its  
 2 decision on his application for benefits. (Comp ¶ 43 - 44). The allegation is before this Court  
 3 improperly. It was never raised before the administrative tribunal; ONHIR never had the  
 4 opportunity to address the issues raised in Count II, make factual findings regarding the  
 5 Count II claims, or develop any record on the Count II issues upon which this Court could  
 6 render a decision under the APA. Accordingly, under Ninth Circuit precedent, Count II of  
 7 Plaintiff's Complaint must be dismissed.

### 8 **I. LEGAL STANDARD.**

9 Under Rule 12(b)(1), if the court lacks subject matter jurisdiction, it must dismiss the  
 10 case. *See* Fed. R. Civ. P. 12(b)(1). A party bringing suit against the United States bears the  
 11 burden of demonstrating subject matter jurisdiction; where it has failed to do so, "dismissal  
 12 of the action is required." *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th  
 13 Cir. 2007); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).  
 14 When considering a motion to dismiss pursuant to Rule 12(b)(1), the Court is not restricted  
 15 to the face of the pleadings; it may review any evidence, such as affidavits and testimony,  
 16 to resolve factual disputes concerning the existence of jurisdiction. *See, e.g., Land v. Dollar*,  
 17 330 U.S. 731, 735 n. 4 (1947) ("when a question of the District Court's jurisdiction is raised  
 18 . . . the court may inquire by affidavits or otherwise, into the facts as they exist"); *Biotics*  
 19 *Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material  
 20 outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary  
 21 judgment). Further, under such circumstances, the Court need not presume the truthfulness  
 22 of the plaintiff's allegations. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

### 22 **II. THIS COURT LACKS JURISDICTION OVER COUNT II OF PLAINTIFF'S** 23 **COMPLAINT BECAUSE THE CLAIMS THEREIN WERE NEVER RAISED** 24 **AT THE AGENCY LEVEL.**

25 "[I]f a petitioner fails to raise an issue before an administrative tribunal, it cannot be  
 26 raised on appeal from that tribunal." *Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985);  
 27 *see also First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1088-89 (4th Cir. 1969)  
 28 ("ordinarily, a litigant is not entitled to remain mute and await the outcome of an agency's

1 decision [only to] attack it on the ground of asserted procedural defects not called to the  
2 agency's attention"). This rule ensures that the agency has the opportunity to bring its  
3 expertise to bear on an issue presented and has an opportunity to correct any errors it may  
4 have made at an earlier stage in proceedings. *See McGee v. United States*, 402 U.S. 479, 486  
5 (1971). It also ensures that the Court has an agency decision and factual record on the issues  
6 to review.

7 In an APA case, the Court sits as an appellate tribunal; the agency is the fact-finder  
8 not the reviewing court, and, therefore, the Court cannot conduct *de novo* review of an issue.  
9 *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) ("It  
10 is not the reviewing court's task to 'make its own judgment about' the appropriate outcome.  
11 . . . "Congress has delegated that responsibility to' the agency.") (citations omitted);  
12 *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985) (In an APA case, "the  
13 function of the district court is to determine whether or not as a matter of law the evidence  
14 in the administrative record permitted the agency to make the decision it did."); *Florida*  
15 *Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not  
16 generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to  
17 reach its own conclusions based on such an inquiry."). The Court can only review an actual  
18 decision of the agency on the relevant issues, based only on agency fact-finding. If the  
19 agency has not made a decision on the issues, the Court has nothing to review and lacks  
20 jurisdiction.

21 In addition, the Court's review is limited to the administrative record that was before  
22 the agency at the time of the decision. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401  
23 U.S. 402, 420 (1971) (holding that judicial review in an APA case is based upon the "full  
24 administrative record that was before [the agency] at the time [it] made [its] decision.");  
25 *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be  
26 the administrative record already in existence, not some new record made initially in the  
27 reviewing court."). Facts outside the administrative record cannot be considered, except in  
28 extraordinary circumstances. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d

1 1125, 1131 (9th Cir. 2010); *Burnside, et. al. v. Office of Navajo and Hopi Indian Relocation*,  
 2 Case 3:15-CV-08233-PGR, 2017 U.S. Dist. LEXIS 158804, at \*23 (D. Ariz. Sept. 27, 2017).

3 Accordingly, the Ninth Circuit has held “that ‘[f]ailure to raise an issue in an appeal  
 4 to the [agency] constitutes a failure to exhaust remedies with respect to that question and  
 5 deprives this court of jurisdiction to hear the matter.’” *Zara v. Ashcroft*, 383 F.3d 927, 930  
 6 (9th Cir. 2004) (quoting *Vargas v. U.S. Dep’t of Immigration & Naturalization*, 831 F.2d  
 7 906, 907-908 (9th Cir. 1987)). The Court cannot review an agency decision that was never  
 8 made because the agency has not issued a final agency action and the issue is not ripe for  
 9 appeal. *See* 5 U.S.C. § 704 (requiring a “final agency action”); *Bennett v. Spear*, 520 U.S.  
 10 154, 178 (1997) (discussing finality); *Indus. Customers of Nw. Utilities v. Bonneville Power*  
 11 *Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (same); *see also Nat’l Park Hospitality Ass’n v.*  
 12 *Dep’t of Interior*, 538 U.S. 803, 810 (2003) (“Ripeness is a justiciability doctrine designed  
 13 ‘to prevent the courts, through avoidance of premature adjudication, from entangling  
 14 themselves in abstract disagreements over administrative policies, and also to protect the  
 15 agencies from judicial interference until an administrative decision has been formalized and  
 16 its effects felt in a concrete way by the challenging parties.’”) (quoting *Abbott Laboratories*  
 17 *v. Gardner*, 387 U.S. 136, 148–149 (1967)). On this basis alone, the Court lacks jurisdiction  
 18 over Count II.

19 In this case, Plaintiff did not raise his Count II claims at the administrative level. In  
 20 Count II, Plaintiff alleges a broad range of new issues. For example, Plaintiff alleges that (i)  
 21 ONHIR owed him a trust obligation, (ii) ONHIR did not provide him with a timely hearing,  
 22 and (iii) ONHIR somehow has the burden of proof regarding lost evidence.<sup>1</sup> None of these  
 23 issues were raised below. Resolution of these issues would require significant factual  
 24 development and possible testimony from multiple parties. Such facts are not in the record.  
 25 ONHIR has not had an opportunity to address Plaintiff’s Count II issues or make findings  
 26 of fact regarding them—something only the agency can do under the APA. Regarding Count  
 27 II, the Court cannot “determine whether or not as a matter of law the evidence in the

28 <sup>1</sup> The record does not suggest that evidence was lost.

1 administrative record permitted the agency to make the decision it did” because ONHIR has  
2 not made a “decision” and there is no factual record of the issues. *Occidental*, 753 F.2d at  
3 769.

4 Plaintiff could have raised any of these issues at any time during the administrative  
5 process. He did not do so. At the very least, Plaintiff could have sought reconsideration of  
6 the hearing officer’s decision, as permitted under ONHIR Policy No. 17, and presented his  
7 new allegations to ONHIR.<sup>2</sup> Again, he did not do so. Instead, he has raised his Count II  
8 claims for the first time on appeal; thereby bypassing agency review and requesting the  
9 Court to conduct a *de novo* inquiry into the new issues. The Court cannot do that under the  
10 APA. Accordingly, ONHIR respectfully requests the Court dismiss Count II of the  
11 Complaint.

12 **III. IN ADDITION AND IN THE ALTERNATIVE, THIS COURT LACKS**  
13 **JURISDICTION UNDER THE PRUDENTIAL EXHAUSTION DOCTRINE.**

14 The Court should also find that it lacks jurisdiction under the doctrine of prudential  
15 exhaustion. “Prudential exhaustion comes into play where ‘(1) agency expertise makes  
16 agency consideration necessary to generate a proper record and reach a proper decision; (2)  
17 relaxation of the requirement would encourage the deliberate bypass of the administrative  
18 scheme; and (3) administrative review is likely to allow the agency to correct its own  
19 mistakes and to preclude the need for judicial review.’” *Gonzales v. Dep. of Homeland Sec.*,  
20 508 F.3d 1227, 1234 (9th Cir. 2007) (quoting *El Rescate Legal Servs., Inc. v. Exec. Office*  
21 *of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1992)).

22 Prudential exhaustion regarding Count II is appropriate in this case. Because Ms.  
23 Torpey did not raise her Count II claims with ONHIR, the record is not developed and  
24 ONHIR has not addressed him Count II claims in the first instance. As discussed above,  
25 ONHIR must use its expertise on these issues and create a proper record for review (if

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26 <sup>2</sup> Although a motion to reconsider under Policy 17 is optional, a party may not appeal an  
27 agency decision on grounds not raised below. In such circumstances, a party should file a  
28 motion for reconsideration or other similar request to allow the agency to address the issues  
in the first instance.

1 necessary). *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on*  
2 *other grounds, as recognized in* 532 U.S. 731 (2001) (noting that “exhaustion of the  
3 administrative procedure may produce a useful record for subsequent judicial  
4 consideration”) (internal citations omitted). Additionally, proceeding with Count II would  
5 undermine the APA review process. The Court should not allow Plaintiff to avoid the  
6 congressionally mandated review process. *See United States v. Cal. Care Corp.*, 709 F.2d  
7 1241, 1249 (9th Cir. 1983) (“The [prudential] exhaustion requirement may appear harsh to  
8 the [plaintiffs]; but they have brought this result on themselves.”). The Court should hold  
9 that it lacks jurisdiction under the prudential exhaustion doctrine.

#### 10 **IV. CONCLUSION.**

11 For the foregoing reasons, ONHIR respectfully requests that this Court GRANT its  
12 Motion to Dismiss and DISMISS Count II of Plaintiff’s Complaint

13 Respectfully submitted this 23rd day of January, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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