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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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| REED TSO,<br><br>Plaintiff,<br><br>vs.<br><br>OFFICE OF NAVAJO AND HOPI INDIAN RELOCATION, AN ADMINISTRATIVE AGENCY OF THE UNITED STATES,<br><br>Defendant. | No. CV-17-08183 MHB<br><br>**PLAINTIFF'S RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT II OF THE COMPLAINT** |

Plaintiff Reed Tso ("Mr. Tso"), pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, responds in opposition to the Office of Navajo and Hopi Indian Relocation's ("ONHIR") motion to dismiss Count II of Mr. Tso's complaint for lack of subject matter jurisdiction [Doc.17]. This Court has subject matter jurisdiction over Count II because: (a) ONHIR makes only an insufficient "facial" jurisdictional attack under Rule 12(b)(1), and the Court must accept all allegations of the complaint as true and draw all reasonable inferences in Mr. Tso's

favor; (b) there is no statutory or regulatory exhaustion requirement; and (c) prudential exhaustion is inapplicable under the circumstances. Defendant's motion is without merit and should be denied.

## I. INTRODUCTION

Mr. Tso, an enrolled member of the Navajo Nation, was born in 1952 and raised in Blue Canyon and Tuba City, Arizona, where his parents lived. Complaint [Doc.1], ¶ 17. The Tso family's ancestral home in Blue Canyon ultimately was determined to be on Hopi Partition Land. *Id*., ¶ 18. Mr. Tso's mother, father, sister, and brother were all certified for relocation assistance benefits based on their legal residence at Blue Canyon. *Id*., ¶ 20. Following the *Herbert* decision in 2008, and pursuant to ONHIR Policy 14, Mr. Tso submitted his application for relocation benefits. *Id*., ¶ 22. ONHIR accepted for consideration Mr. Tso's application for relocation assistance on August 31, 2010, but ONHIR required another four years to rule on, and deny, that application. *Id*., ¶¶ 23, 24. Plaintiff appealed the denial on September 25, 2014, and on May 20, 2016, nearly six years after filing his application, ONHIR held its administrative hearing on Mr. Tso's appeal. *Id*., ¶ 26. The Independent Hearing Officer ruled against Mr. Tso, and the Complaint for Judicial Review followed. *Id*., ¶ 33.

## II. RULE 12(B)(1) STANDARDS

ONHIR has moved to dismiss Count II of Mr. Tso's complaint under Rule 12(b)(1) for lack of subject matter jurisdiction. A jurisdictional attack under Rule 12(b)(1) may be either "facial" or "factual." *See, e.g., White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the defendant asserts that the complaint's allegations on their face fail to support federal jurisdiction. In a factual attack, the defendant disputes the truth of those allegations by a proffer of extrinsic evidence outside the four corners of the complaint. *See Morrison v. Amway Corp*., 323 F.3d 920, 924 n. 5 (11th Cir. 2003) (stating that a jurisdictional challenge was factual where "*it*

*relied on extrinsic evidence* and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings") (emphasis added).

## III. ONHIR AND ITS DELAY OF THE APPLICATION PROCESS

In 1974, Congress enacted the Navajo-Hopi Land Settlement Act (the "Settlement Act" or the "Act"). The Act authorized the partition of the Joint Use Area, ordered tribal members living on the partitioned land of the other tribe to relocate, and created a generous benefit program to compensate the thousands of primarily Navajo people who would be compelled to abandon their homes and relocate. *See generally* Pub. L. No. 93-531, § 12, December 22, 1974, 88 Stat. 1716. Congress intended that the Act would "insure that persons displaced as a result of the Act are treated fairly, consistently, and equitably so that these persons will not suffer the disproportionate adverse, social, economic, cultural, and other impacts of relocation." 25 C.F.R. § 700.1(a). Mr. Tso seeks to vindicate his rights arising under the Act.

The Settlement Act established ONHIR for the sole 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. 25 C.F.R. § 700.133. Congress allowed ONHIR five years from the date of the submission of its "relocation plan" to complete the relocation of the affected Navajo and Hopi tribal members. ONHIR eventually required seven years from the passage of the Act to actually complete and issue its "plan" in 1981. That initial delay resulted in July 7, 1986 being established as the deadline for completing the relocation process.

ONHIR closed the application process for relocation benefits on July 7, 1986. Nearly twenty (20) years later, in 2005, ONHIR agreed to accept applications 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 the period 2006 – 2008. On February 27, 2008, Judge Wake issued his opinion in *Herbert v. ONHIR*, No. CV-06-03014-PCT, 2008 WL 11338896 (D. Ariz. Feb. 27, 2008), and ONHIR suspended hearings. In *Herbert*, Judge Wake ruled that ONHIR was "required to notify and inform 'each person' . . . potentially subject to relocation" and determined that ONHIR's systematic failure to notify such persons of their potential eligibility for benefits constituted a breach of ONHIR's trust obligations.

Following *Herbert*, ONHIR promulgated Policy 14 which reopened the application process to individuals who potentially were entitled to relocation benefits but who had been previously excluded from the application process, and administrative appeals then resumed in February of 2010. Thus today, more than forty years after the passage of the Act, and more than thirty-one years after Congress required that relocation be completed, ONHIR continues to deny relocation benefits to all eligible Navajo relocatees, including Ms. Tso, and the promise of the Act remains unfulfilled. Mr. Tso will demonstrate through the prosecution of Count II that ONHIR's incompetence in fulfilling its Congressional mandate, as well as ONHIR's persistent bureaucratic delays, have thwarted his ability to prove his case.

## IV. ONHIR'S FACIAL ATTACK UNDER RULE 12(B)(1) IS DEFICIENT.

ONHIR offers no extrinsic evidence in support of its motion, and instead merely relies on *ipse dixit* assertions regarding the inadequacy of the complaint. Accordingly, ONHIR's motion must be assessed as a facial jurisdictional attack. *See Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003) (stating that the movant converts the motion into a factual attack once an affidavit or other extrinsic evidence is brought before the court). As a facial attack, the allegations of Count II must be accepted as true and all reasonable inferences must be drawn

in favor of Mr. Tso. *Snyder & Assocs. Acquisition LLC v. United* States, 859 F.3d 1152, 1155 n. 1 (9th Cir. 2017). Count II plainly states a federal question cause of action.

However, even assuming that ONHIR somehow has properly posited a factual attack, "[j]urisdictional dismissals in cases premised on federal question jurisdiction are exceptional and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678 (1946)." *Sun Valley Gasoline, Inc. v. Ernst Enterprises*, 711 F.2d 138, 140 (9th Cir. 1983). In *Bell*, the Supreme Court held that jurisdictional dismissals are warranted "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." 327 U.S. at 682 – 83. It is well-established in the Ninth Circuit that a "[j]urisdictional finding of genuinely disputed facts is inappropriate when '*the jurisdictional issue and the substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits*' of an action." *Sun Valley*, 711 F.2d at 139 (emphasis added) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The jurisdictional question and the merits of an action are "intertwined" if "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Id*. Here the Settlement Act provides the basis for jurisdiction and for Mr. Tso's substantive claims.

It would be error to dismiss Count II of Mr. Tso's complaint under Rule 12(b)(1) "because the jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 – 40 (9th Cir. 2004). The Court should allow Count II of the complaint to proceed "because jurisdictional fact-finding by the court deprives litigants of the protections otherwise afforded by Rule 56, [and as a result the Ninth Circuit has] defined certain

limits upon this power of the court." *Sun Valley*, 711 F.2d at 139. Certainly Mr. Tso's allegations in Count II are well within the scope of the Settlement Act; they are inextricably intertwined with the merits of his relocation application; and they are consistent with the policy imperatives of the Act and the due process concerns expressed in *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1124 (9th Cir. 1989) (stating that ONHIR owes "a fiduciary obligation to all members of the Hopi and Navajo Tribes who were obligated to relocate from lands allocated to the other Tribe pursuant to the court-ordered partition"). If ONHIR owes Mr. Tso such a fiduciary obligation (which of course it does), and that obligation is more than empty words, then Mr. Tso should be able to pursue his claim in Count II that ONHIR has breached its trust obligation. His claim is embodied in the fabric of the Settlement Act.

## V. THE SETTLEMENT ACT AND ITS ASSOCIATED REGULATIONS DO NOT REQUIRE THE EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Even if ONHIR's motion can be deemed more than a perfunctory facial jurisdictional attack, Mr. Tso is not required to exhaust his administrative remedies in relation to Count II of the complaint. Exhaustion of administrative remedies is only mandatory and jurisdictional if the pertinent enabling statute, or regulations promulgated under that statute, "expressly mandate exhaustion of administrative remedies prior to filing suit." *Darby v. Cisneros*, 509 U.S. 137, 143 (1993). The *Darby* Court held that it would be "inconsistent" with the Administrative Procedure Act, 5 U.S.C. § 701 (2012), to impose an exhaustion requirement when it is not required by "statute or agency rule." *Id.* at 148. In the present case, neither the Settlement Act, nor the regulations promulgated thereunder, contain any reference to an exhaustion requirement. Indeed, it is telling that ONHIR cannot direct the Court to a single provision in the Act, or in the Code of Federal Regulations, to support its argument. No statutory or regulatory support exists.

In the absence of such support, ONHIR is constrained to rely on a formalistic reading of the APA that ignores altogether the central holding of *Darby*. ONHIR's misapprehension as to when administrative exhaustion is required as a jurisdictional prerequisite undermines the central premise of its motion. *See also McCarthy v. Madigan*, 503 U.S. 140, 144, *superseded by statute on other grounds, as recognized in Booth v. Chumer*, 532 U.S. 731, 740 (2001) ("Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs."); *Patsy v. Bd. Of Regents of Florida*, 457 U.S. 496, 501 (1982) (stating that Congressional intent is of "paramount importance" to any exhaustion requirement). It is not enough for ONHIR to mechanically point to the APA in the hope that no further analysis will be required. This Court should apply *Darby*, look to the express terms of the Act and its regulations, and conclude that the Act imposes no exhaustion requirement.

ONHIR's exhaustion argument also ignores the well-established principle that federal courts should refrain from arbitrarily assigning the "jurisdictional" label in the absence of clear Congressional direction. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."); *Reed Elsevier v. Muchnick*, 559 U.S. 154 (2010) (cautioning courts against engaging in "drive-by jurisdictional rulings"); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006) (stating that a court's subject matter jurisdiction is restricted only "[i]f the Legislature clearly states that a threshold limitation on a statute's scope" exists). A litigant's "failure to exhaust an administrative or other pre-filing remedy deprives federal courts of subject matter jurisdiction *only* in those cases in which Congress makes plain the jurisdictional character of the exhaustion requirement." *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038,

1040 (9th Cir. 2011) (emphasis added). In implementing the Act, Congress provided no such clear direction, and as a result exhaustion is not a jurisdictional prerequisite here.

## VI. PRUDENTIAL EXHAUSTION IS NOT JURISDICTIONAL AND PROVIDES NO SUPPORT FOR ONHIR'S MOTION.

ONHIR's fallback position is that the Court should dismiss Count II of Mr. Tso's complaint on prudential grounds and invoke "prudential exhaustion" as a means to short-circuit Count II. This argument is equally unavailing. In *McCarthy*, the Supreme Court discussed prudential exhaustion and outlined the circumstances under which a court could impose an exhaustion requirement where one had not been mandated by statute or regulation. Before exercising its discretion to impose such a requirement, the trial court must first balance the goals of administrative authority and judicial efficiency against the interests of the individual litigant in obtaining prompt access to a judicial forum. *McCarthy*, 503 U.S. at 145 – 46. The litigant does not have to pursue administrative remedies if her "interest in immediate judicial review outweighs the government's interest." *Id*. at 146.

Both the Ninth Circuit and this Court have ruled that the balancing process is within the sound discretion of the trial court. *See, e.g., Ortega-Morales v. Lynch*, 168 F.Supp.3d 1228 (D. Ariz. 2016) (denying the government's motion to dismiss and declining to apply prudential exhaustion). In *Ortega-Morales*, the government premised its motion to dismiss on the asserted failure of the plaintiff to exhaust her administrative remedies. *Id*. at 1234. Because no statute or regulation specifically required exhaustion, "sound judicial discretion" governed. *Id*. at 1240. The Court applied the *McCarthy* balancing test and found that the plaintiff's failure to pursue an appeal at the administrative level did not "violate any prudential exhaustion requirement." *Id*. at 1242. The same calculus should apply here.

When Congress fails to use "sweeping and direct language" to mandate exhaustion, a litigant's failure to exhaust is not a jurisdictional defect. *Id*. at 1240; *see also Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (stating that while statutory exhaustion is jurisdictional, prudential exhaustion is not). Thus, courts distinguish between statutorily imposed exhaustion which is a jurisdictional prerequisite and prudential exhaustion which is a judicially created and discretionary doctrine. *See, e.g., McCarthy*, 503 U.S. at 144 ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs."). The Ninth Circuit recently addressed and rejected an argument that non-statutory exhaustion was a jurisdictional requirement. *See Yagman v. Pompeo*, 868 F.3d 1075, 1083 (9th Cir. 2017). There the Court reviewed the terms of the Freedom of Information Act and concluded that it contained no express exhaustion requirement. As a result, the Court held that "exhaustion cannot be considered jurisdictional." *Id*.

## VII. APPLYING THE MCCARTHY BALANCING TEST, MR. TSO'S INTERESTS SUBSTANTIALLY OUTWEIGH ONHIR'S.

"Prudential exhaustion comes into play where "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Gonzales v. Dept. of Homeland Security*, 508 F.3d 1227, 1234 (9th Cir. 2007). In the present case, ONHIR makes no showing whatsoever regarding these institutional interests beyond simply reciting the three factors. ONHIR fails to acknowledge that the Settlement Act provides that the United States District Court for the District of Arizona is the only federal court empowered to hear relocation appeals. As stated in *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1120 (9th Cir. 1989), "Congress effectively directed the district court to develop expertise about the complex relocation process by *expressly granting the district court*

*jurisdiction over a wide range of disputes* arising therefrom." (Emphasis added.) *See also* 25 U.S.C. §§ 640d-3(a) and (b), 640d-5, 640d-7, and 640d-17. Accordingly, this Court has ample expertise in relocation questions, and the Court does not require any ostensible ONHIR expertise in reviewing agency delay and breach of trust claims.

The Court must balance the administrative concerns against the individual's compelling interest in obtaining prompt and meaningful access to federal court. *McCarthy* identified the following factors weighing in favor of the individual litigant (and against prudential exhaustion). First, "requiring resort to the administrative remedy may occasion undue prejudice to [the] subsequent assertion of a court action, especially where prejudice results from "an unreasonable or indefinite timeframe for administrative action." 503 U.S at 146 – 47; *see also Gibson v. Berryhill*, 411 U.S. 564, 575 n. 14 (1973) (stating that the administrative remedy is deemed inadequate "[m]ost often . . . because of delay by the agency"). Second, "an administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'" *McCarthy*, 503 U.S. at 147, quoting *Gibson*, 411 U.S. at 575 n. 14. Third, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy*, 503 U.S. at 148.

**A. Mr. Tso has been prejudiced by ONHIR's unreasonable, indefinite, and arbitrary timeframe for administrative action.**

The crux of Count II of the Complaint is that ONHIR has used an unreasonable, indefinite, and arbitrary timeframe for its administrative handling of Mr. Tso's case. Because of ONHIR's decades-long delays, the Court should not require Mr. Tso to return to the administrative forum to exhaust his breach of trust claim. *See Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1987) ("Because the Bank Board's regulations do not place a reasonable time limit on

FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures."); *Walker v. Southern Railway Co.*, 385 U.S. 196, 198 (1966) (finding possible delay of ten years in administrative proceedings makes exhaustion unnecessary). If a remand to an agency will simply return an applicant to an endless process, it would be prejudicial to the applicant to impose more delay in the administrative forum. Mr. Tso has repeatedly attempted to comply with ONHIR's Kafkaesque processes, only to be met with further delay

For example, ONHIR's policies and regulations conveniently fail to impose mandatory deadlines on the agency's completion of administrative review, and ONHIR has shown an utter disregard for the negative effects of its indefinite timeframe for administrative action. As a result, the Court should not require Mr. Tso to return to the agency forum to exhaust his breach of trust claim. Mr. Tso has rejected ONHIR's offer to return to the agency forum for the simple reason that he is reluctant to venture down the rabbit hole again without any assurance of a fair and timely administrative review. The uncertainty of when, if ever, Mr. Tso would complete the administrative process for his breach of trust claim and be able to return to federal court for judicial review weighs heavily in favor of this Court addressing Count II on the merits.[1]

**B. ONHIR is not empowered to rule on, or grant effective relief for, the breach of its trust obligations.**

ONHIR is not empowered to effectively rule on Mr. Tso's breach of trust claim. The terms of the Settlement Act create a trust relationship between ONHIR and those who were compelled to relocate as a result of the Act. *See Bedoni*, 878 F.2d at 1124 – 25 ("The undisputed general trust obligation, buttressed by the many grants of express trustee authority in the Settlement Act, justify

[1] In some cases, ONHIR's decades-long delay has resulted in applicants dying of old age before completing the administrative process. *See, e.g., Hedy Bahe v. ONHIR*, No. 3:17-CV-08016-PCT/DLR (D. Ariz.) (where plaintiff brought suit on behalf of her deceased husband who died of old age in the time between the denial of his application and his administrative appeal).

the imposition of an affirmative duty to manage and distribute the funds appropriated pursuant to the Settlement Act such that the displaced families receive the full benefits authorized for them."); *Mike v. ONHIR*, No. CV-06-0866-PCT, 2008 WL 54920, at *7 (D. Ariz. 2008) (stating that ONHIR is to provide a "thorough and generous" relocation benefits program and this evidences a trust relationship); *Herbert v. ONHIR*, 2008 WL 11338896, at *7 (stating that the refusal to accept the plaintiff's application "violates both ONHIR's general trust responsibility to relocatees and its specific fiduciary obligation to maximize relocatee benefits.").

Under Ninth Circuit precedent, an agency is not empowered to rule on a breach of trust claim when the agency's trust obligation to the applicant arises out of statute. *See, e.g., Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 n. 1 (9th Cir. 1991) ("The exhaustion requirement applies to the plaintiff's benefits claim, but does not apply to the plaintiff's fiduciary breach claim because this claim alleges a violation of the statute."); *Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987) (finding that exhaustion "is not required where the issue is whether a violation of the terms or provisions of the statute has occurred"); *Traylor v. Avnet, Inc.*, No. CV-08-0918-PHX/FJM, 2009 WL 383594, at *4 (D. Ariz. Feb. 13, 2009) (holding that statutory interpretation is a matter for judicial review only and that administrative exhaustion is therefore not required). Moreover, [t]he APA in conjunction with 28 U.S.C. § 1331, gives the court jurisdiction to compel action from a government agency unlawfully withheld or unreasonably delayed." *Sidhu v. Chertoff*, No. 1:07-CV-1188-AWI/SMS, 2008 WL 540685, *4 (E.D. Cal. Feb. 25, 2008).

Prudential exhaustion and administrative remand is especially inappropriate in situations involving a breach of the trust relationship with Navajo applicants like Mr. Tso. In *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), plaintiffs claimed that the Secretary of the Interior

breached her fiduciary duties in managing Indian trust accounts. The Court refused to remand the case to the agency because further delays would inevitably result and would be "potentially severe," and delays would cause more documents to be lost, thereby making it more difficult for the plaintiffs to prove their case. *Id.* at 1097.

ONHIR also erroneously argues that this Court should dismiss Count II on jurisdictional grounds because Mr. Tso should have brought the issue in an "optional" motion for reconsideration pursuant to ONHIR Policy 17. *See* Motion to Dismiss [Doc. 17] at 5. But in *Darby*, the Supreme Court flatly rejected that very argument. Optional Policy 17 mentioned in ONHIR's motion is not mandatory. *See Young v. Reno*, 114 F.3d 879, 882 (9th Cir. 1997) (stating that an optional intra-agency review is not an exhaustion prerequisite to judicial review). *Darby* held that federal courts do not have the authority to require a plaintiff to exhaust administrative remedies that are merely optional under the relevant statute and/or agency regulations. Accordingly, the Court may not dismiss Count II on the grounds that Mr. Tso elected not to pursue an optional administrative remedy. The question presented by Count II is whether ONHIR breached its fiduciary duties arising under the Settlement Act – a specific statutory requirement intended to protect applicants like the plaintiff. Hence the second factor of the balancing test weighs strongly in favor of Mr. Tso.

### C. ONHIR has shown itself to be biased and has otherwise predetermined the issues raised in Count II.

There is no requirement of prudential exhaustion if an agency's official position makes further recourse to the agency futile. *El Rescate Legal Services*, 959 F.2d at 747 ("[T]here is no requirement of exhaustion where resort to the agency would be futile."); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990) (when an agency's position is "set," recourse to the agency would be futile and is not required). When an agency has clearly articulated its hostility

to a position, it is futile and a misallocation of resources to require an applicant to go through the motions of presenting that position again in the administrative context. *See, e.g., Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (stating that it "would be to demand a futile act" to require the plaintiff to go before the Attorney General where the issue has been predetermined); *Horan*, 947 F.2d at 1416 (holding that it is unnecessary to require plaintiffs to exhaust administrative remedies on a claim when the administrator stated in its appellate brief that the claim was meritless).

Over the course of ONHIR's history, the agency has relied on a single administrative law judge, Harold Merkow, to preside over every administrative hearing and rule on every appeal. Since February of 2010, when administrative hearings resumed following the *Herbert* decision, there have been some 226 administrative appeal hearings. *See* Exhibit 1, Affidavit of Susan I. Eastman. Of those 226 hearings, the hearing officer has ruled against the applicant 204 times. *Id*. Thus, the IHO has denied more than ninety percent (90%) of the appeals he has heard. *Id*.

More specifically, ONHIR, its Hearing Officer, and its legal counsel have had numerous opportunities to acknowledge and explain ONHIR's delays when addressing applications for relocation benefits, and instead they have assiduously avoided accepting any responsibility for ONHIR's own conduct. For example, ONHIR's in-house counsel and Certifying Officer, Larry Ruzow, grudgingly acknowledged recently that the passage of time has resulted in lost evidence and has placed an impossible burden on the applicant:

> In Appeals such as this . . . [producing evidence of the applicant's "move-off" date] some forty years after the critical events is an extraordinarily difficult task. Since the Applicant has the burden of proof to show eligibility, much of this burden is borne by Applicants. It is sad that [the applicant] did not choose to file his Application at a time when witnesses now deceased were alive and when memories were not clouded by time.

*In re Application of Bobbie Benally*, ONHIR Post Hearing Brief, Attachment A to Ms. Eastman's Affidavit (Ex. 1). The not-so-subtle irony here is that Mr. Ruzow blames the applicant for a delay in the proceedings *that was caused by ONHIR*.[2] He neglects to mention or explain ONHIR's history of stopping the application process for nineteen (19) years, reopening the process for a discrete subset of applicants in 2005 but denying access to the process for others, and then being compelled by *Herbert* in 2008 to reopen the process more broadly.

The IHO has adopted ONHIR's refusal to accept responsibility for the decades-long delay of administrative action. For example, the IHO recently made specific reference to the passage of time and the absence of documentation in making negative witness credibility findings:

> Applicant is not a credible witness . . . as there are no documents or records to show that applicant earned any money from her brother-in-law, *there are no books of account or bookkeeping records in the record of this matter to support applicant's claim . . .*

*In re Application of Rosita George*, IHO's Findings of Fact, Conclusions of Law, and Decision, Attachment B to Ms. Eastman's Affidavit (Ex. 1) (emphasis added). ONHIR and the IHO place an applicant in an untenable and fundamentally unfair Catch-22 position: the applicant is required to "prove" factual propositions with "books of account" and records that no longer exist, and, because they no longer exist, the propositions can never be proven. This needlessly formalistic approach is arbitrary and capricious, especially in relation to Native peoples engaged in subsistence agricultural and ranching activities and a barter and cash-based economy. Navajo

[2] It is unconscionable to blame applicants for not applying for relocation benefits sooner. After July 7, 1986 and until 2005, ONHIR denied individuals the opportunity to apply by arbitrarily refusing applications from most of those who applied. ONHIR then belatedly solicited applications beginning in 2005 from a select group of persons it identified as having previously contacted the agency to apply and who had been summarily turned away. Thus, prior to *Herbert*, even ONHIR was forced to recognize its inconsistent and capricious approach to the application process. ONHIR's stop-and-start approach, and the delays occasioned by that approach, is hardly the fault of applicants.

applicants should not be chastised for failing to preserve "books of account" from thirty or forty years in the past.

ONHIR has specifically denied that its delays and negative credibility findings constituted a breach of trust. For example, in *Laughter v. ONHIR*, the agency dismissively claimed its delay was "immaterial." *See* ONHIR's Reply in *Laughter* at 4 n. 7, Attachment C to Ms. Eastman's Affidavit (Ex. 1). Similarly, in *Bahe v. ONHIR*, the agency denied that it owed a trust responsibility to the plaintiff and argued that such a responsibility was *only* owed to applicants who were certified eligible for benefits. *See* ONHIR's Response in *Bahe* at 14 – 15, Attachment D to Ms. Eastman's Affidavit (Ex. 1). Again, the applicant is placed in a Catch-22 situation where: (a) a trust responsibility is owed *if* the applicant is eligible for benefits; but (b) the trust responsibility will never be triggered because of the IHO's barriers to eligibility.

ONHIR has made it clear at each level of the administrative process that it has predetermined the breach of trust issue. Consequently, this Court should not require that Mr. Tso engage in the futile process of returning to the administrative forum only to allow ONHIR to deny the claim at some indefinite point in the future. In sum, the *McCarthy* balancing test as applied to Mr. Tso's case is strongly in his favor, and the Court should not invoke prudential exhaustion.

## VIII. CONCLUSION

For the reasons set forth above, plaintiff requests that ONHIR's motion be denied. ONHIR's facial attack on jurisdiction is insufficient. Accepting the allegations of Count II as true and resolving all reasonable inference in Mr. Tso's favor, Count II plainly states a federal question cause of action under the Settlement Act. Alternatively, there is no express exhaustion requirement set forth in the Act, or in any of the regulations promulgated under the Act. Finally, the Court should not invoke prudential exhaustion. Even if the Court were to apply the *McCarthy* balancing

test, Mr. Tso's interests prevail. ONHIR has not provided the Court with a credible rationale for remanding the matter back to the agency for an exercise in futility, further delay, and a predetermined outcome. Mr. Tso is entitled to resolve Count II in this forum.

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I hereby certify that on 21st day of February, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and served a copy of the attached document through the CM/ECF System to all counsel of record.

*/s/ S. Barry Paisner*
Attorney for Plaintiff