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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Reed Tso, Plaintiff, v. Office of Navajo Hopi Indian Relocation, an administrative agency of the United States, Defendant.	**CV-17-08183-MHB** **REPLY IN SUPPORT OF MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT**

Comes now the Defendant, the Office of Navajo and Hopi Indian Relocation ("ONHIR"), and for its Reply in Support of its Motion to Dismiss Count II of Plaintiff's Complaint, provides the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

ONHIR's Motion is premised on the long-trodden, black-letter principle that "[a]s a general rule, if [a plaintiff] fails to raise an issue before an administrative tribunal, it cannot be raised on appeal from that tribunal." *Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985). This Court simply cannot review an agency decision that was never made because the agency has not issued a final agency action for review. *See* 5 U.S.C. § 704 (requiring a "final agency action"); *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (discussing finality). *See, also*, Mot at p. 4 et al (collecting cases). Plaintiff never states that he raised the allegations in

Count II before ONHIR at the administrative level; those issues are new and the APA requires that the agency pass on them before this Court may adjudicate the propriety of the Agency's decision. Count II of Plaintiff's complaint must therefore be dismissed, or in the alternative, this action may be remanded in its entirety for a complete adjudication of Plaintiff's claims. By no means may Plaintiff's claims proceed before this Court.

I. COUNT II WAS NEVER ADJUDICATED BEFORE THE AGENCY AND THEREFORE CANNOT BE REVIEWED BY THE DISTRICT COURT

Plaintiff has the burden to prove his eligibility for Relocation Benefits. 25 C.F.R. § 700.147(b). Through Count II, Plaintiff attempts to avoid that burden. For decades, ONHIR applicants have tried unsuccessfully to avoid 25 C.F.R. § 700.147(b) in this manner. *See, e.g., Bahe v. Office of Navajo & Hopi Indian Relocation, 2017 U.S. Dist. LEXIS 212562,* *7 (Dist. Ariz. December 28, 2017). ("Plaintiff's burden shifting framework is inconsistent with the language of § 700.147(b) and agency procedures."); *Jim v. Office of Navajo & Hopi Indian Relocation,* Case No. CIV-94-2254-PHX-PGR, p. 9 (D. Ariz. February 12, 1996) ("Since adoption of [applicants'] argument would render meaningless the Section 700.147(b) requirement that the applicant 'prove' eligibility, this argument must be rejected."). None of those approaches have succeeded, nor can Plaintiff counsel's current attempt to reiterate the same argument.

Plaintiff explicitly brings Count II under the APA. See Complaint, ¶¶ 40-47. Under the APA, this Court sits as an appellate tribunal. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Its role is limited. The Court cannot find facts; it must rely solely on the administrative record before the agency at the time the decision was made. *See Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Fence Creek Cattle Co. v. U.S. Forest Serv.,* 602 F.3d 1125, 1131 (9th Cir. 2010). Nor can the Court make its own determination about the appropriate outcome. *San Luis & Delta-Mendota Water Auth. v. Locke,* 776 F.3d 971, 994 (9th Cir. 2014). Rather, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. I.N.S.,* 753 F.2d 766, 769 (9th Cir. 1985). It is therefore axiomatic that this Court must have a final agency

decision to review based on facts contained in the administrative record to fulfill its appellate role. With respect to Count II, the Court has neither a final agency decision nor the facts necessary for its review. The claim is before this Court improperly.

Plaintiff attempts to characterize Count II as a challenge to delay in ONHIR's processing benefit applications under the APA. (Resp. at 3-4). While a plaintiff may challenge an agency's failure to take action under the APA, the remedy is to require the agency to take such action. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (noting that separation of powers prevents the court from entanglement in abstract policy disagreements; the court can only issue an order for the agency to take a "discrete" and "legally required" action). Here, Plaintiff has not requested that ONHIR take a discrete and allegedly legally required action in the future. Instead, he asks this Court to determine that ONHIR erred, as a matter of law, when it denied his relocation benefits. Plaintiff's claim is not a permissible "failure to act" claim under the APA. *See Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) ("This court has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'") (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991)). The Court should dismiss Count II. It does not have a final agency decision – or any decision for that matter -- to review on Count II and the issue is not ripe for appeal.

II. THE COURT CANNOT ADJUDICATE COUNT II WITHOUT ADDITIONAL FACTS NOT IN THE RECORD

As noted above, this Court sits as an appellate tribunal. Its review of ONHIR's actions is limited to the administrative record. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Ranchers Cattlemen Action Leg. Fund United Stockgrowers of Am. v. U.S. Dept. of Agr.*, 499 F.3d 1108, 1117 (9th Cir. 2007); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996). The Court cannot find its own facts. *Camp*, 411 U.S. at142 ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

Despite this restriction, Plaintiff's Count II is dependent on facts that are not in the administrative record. For example:

- "ONHIR knew or should have known that Mr. Tso was a member of the class of relocatees that ONHIR was obligated to assist pursuant to the Settlement Act . . . ." Complaint, ¶ 43.
- "ONHIR delayed action regarding Mr. Tso's entitlement for relocation assistance benefits for forty-three years." Complaint, ¶ 45.
- ". . . the passage of time has resulted in lost evidence and has placed an impossible burden on the applicant . . . ." Response, p. 14
- "Since February of 2010, when administrative hearings resumed following the Herbert decision, there have been some 226 administrative appeal hearings." Response, p. 14.
- "the IHO [ONHIR's independent hearing officer] has denied more than ninety percent (90%) of the appeals he has heard." Response, 14.
- ". . . ONHIR has shown an utter disregard for the negative effects of its indefinite timeframe for administrative action." Response, p. 11.

Plaintiff makes no pretense that these facts are not in the record. In fact, Plaintiff acknowledges that he will need to further develop the record to address Count II. *See* Response, p. 4 ("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"). In addition, the fact that Plaintiff had to support his Response with a declaration from his own counsel shows that many of the facts that he will rely upon for Count II are outside the current administrative record.1 If this case were to proceed before this Court improperly, ONHIR would also be forced to produce additional facts in its defense, all outside of the APA record.

[1] ONHIR objects to the declaration of Plaintiff's counsel. *See* Response, Ex. 1. The declaration asserts facts based on hearsay or otherwise not within the personal knowledge of Plaintiff's counsel. *See, e.g.*, Declaration, ¶¶ 4-9. The Court should not consider counsel's declaration. ONHIR reserves all its rights regarding Plaintiff's counsel acting as a fact witness in this case. *See, e.g., Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624 P.2d 296 (1981).

This Court recently rejected the same fiduciary duty claim brought by Plaintiff's counsel in another case, in part, because the claim was based on facts outside the record. *See Bahe*, 2017 U.S. Dist. LEXIS 212562, at *17 ("Plaintiff's breach of fiduciary duty claim is based on facts outside the administrative record."). For the same reasons, this Court should dismiss Count II.

III. PLAINTIFF WAIVED HIS RIGHT TO RAISE COUNT II ON APPEAL TO THIS COURT

In its Motion, ONHIR established that Plaintiff did not raise Count II with the agency; therefore, the claim has been waived on appeal. *See Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 764 (2004) (judicial review precluded when petitioner failed to participate in the administrative process); *Tejeda-Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 726 (9th Cir. 1980) ("[I]t is an established principle that this court does not sit as an administrative agency for the purpose of fact-finding in the first instance, and if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum."); *Bahe*, 2017 U.S. Dist. LEXIS 212562, at *6, 17 (ONHIR applicant waived issues not raised below). This has been blackletter APA law from the beginning. *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). It is also consistent with general appellate procedure. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) ("As a general rule, an appellate court will not hear an issue raised for the first time on appeal.").

Plaintiff argues that Count II is properly before the Court because no statute or regulation required exhaustion of the Count II claim. (Resp. at 6-8). Plaintiff is incorrect. Plaintiff cites to *Darby v. Cisneros* in support of his position. *See Darby v. Cisneros*, 509 U.S. 137, 143 (1993). But *Darby* and its progeny stand for the proposition that once an agency makes a decision, the claimant does not need to take additional steps to exhaust remedies unless required by statute or regulation. *Id.* at 151. The existence of an agency decision, however, is a condition precedent to an APA review; without one, statutory exhaustion does not come into play. *See* 5 U.S.C. § 704. *Darby* does not permit a claimant

to raise a new APA claim never decided by the agency. *See id.* at 144 (discussing the difference between finality and statutory exhaustion). Such a ruling would eliminate the finality and ripeness requirements. The Court should not allow it.

Furthermore, *Darby* expressly requires a claimant to exhaust all "intra-agency" appeals mandated by agency rule. *See Darby,* 509 U.S. at 146-147. To exhaust, ONHIR's regulations require that an applicant do each of the following: (i) obtain an "Initial Commission Determination", (ii) appeal such determination to the "Presiding Officer," and, thereafter, (iii) obtain a final agency action from the "Commission." *See* 25 C.F.R. §§ 700.303(d), 700.319. With respect to Count II, Plaintiff failed to take any of these steps. Therefore, under Darby, he failed to exhaust his remedies. *See Bahe,* 2017 U.S. Dist. LEXIS 212562, at *17-18 ("Plaintiff's [fiduciary duty] argument is waived because she did not raise it during the [ONHIR's] administrative proceedings.").2

Finally, Plaintiff asserts that requiring the agency to rule on Count II is futile. (Resp. at 13-16). As a threshold matter, futility does not apply when the agency has not made a final decision on the claim. *See Naik v. Renaud,* 947 F. Supp. 2d 464, 471-72 (D.N.J. 2013); *Reliable Automatic Sprinkler Co.. v. Consumer Prod. Safety Comm'n,* 173 F. Supp. 2d 41, 51 (D.D.C. 2001) ("futility alone does not excuse the need for final agency action"), *aff'd,* 324 F.3d 726 (D.C. Cir. 2003). Nevertheless, Plaintiff's futility argument is based on anecdotal statements regarding OHNIR's staffing and pleadings the United States Attorney's Office has filed in other cases.

Plaintiff's argument is an *ad hominem* attack on his adversary, not a legitimate challenge to the legal prerequisites under the APA. ONHIR has never ruled or even investigated Plaintiff's Count II claim. Therefore, the agency's decision on Count II is not certain. A mere assertion of futility is not sufficient to overcome the exhaustion requirement. Otherwise, a party could routinely avoid agency review by filing a lawsuit and simply stating that the agency would have ruled against him in the first instance. To be blunt: that's not how the APA works. Plaintiff has intentionally avoided agency review of his Count II claim.

[2] This Court also rejected the Ms. Bahe's fiduciary duty claim on the merits, finding that ONHIR's alleged "inaction does not constitute a breach of fiduciary duty." *Id.* at 17-18.

Congress mandated agency review and fact-finding in the first instance to preserve a separation of powers. The Court cannot permit Plaintiff to do thwart congressional intent. It should dismiss Count II.

IV. PLAINTIFF DOES NOT HAVE AN INDEPENDENT TRUST OBLIGATION CLAIM

Plaintiff asserts that he could not have raised Count II below because ONHIR does not have authority to adjudicate trust obligation or fiduciary duty claims. (Resp. at 11-13). But Plaintiff brought Count II under the APA.3 (Comp. ¶¶ 40-47). And, as discussed above, the APA requires that the agency make a final decision on the claim in the first instance.4

Plaintiff cites to several Ninth Circuit cases for the proposition that he can prosecute an independent trust obligation claim without exhausting his administrative remedies. Reliance on those citations is misplaced. For example, Plaintiff cites to *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991), *overruled on other grounds*, 764 F.3d 1030 (9th Cir. 2014). But *Horan* addressed a claim based on the alleged violation of an ERISA statute.5 *Id.* at 1417. ERISA provides for a private right of action for violation of its provisions; the Settlement Act does not. Therefore, Count II must be reviewed under the APA, where the agency has sole authority to determine claims (including Count II) in the first instance. *See Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)).

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[3] Notwithstanding statements in his Response to the contrary, Plaintiff has sought limited relief in his Complaint—a determination that ONHIR erred as a matter of law when it denied Plaintiff Relocation Benefits. *See* Complaint, p. 10. That relief can be fully addressed through Count I.

[4] In addition, Count II requires an interpretation of the Settlement Act and its regulations. The Court must permit ONHIR to provide that interpretation in the first instance. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (courts give '"controlling weight'" to the agency's interpretation of regulation, '"unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *Lawrence v. Chater*, 516 U.S. 163, 172-73 (1996) (*per curiam*) (deferring to agency interpretation).

[5] Interestingly, the *Horan* court rejected the plaintiff's fiduciary duty claim because, like Plaintiff here, the court could address the remedy under a straightforward benefits claim. *Horan*, 947 F.2d at 1418.

Even if the APA does not govern Count II – which it does -- the Court should still require an agency ruling. Count II is analogous to a due process claim. Claimants often attempt to bypass APA rules by challenging agency decisions under the Due Process Clause. Those attempts are routinely rejected. *See Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985) (a plaintiff "cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." . . . "'Due process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal."); *Vargas v. U.S. Dep't of Immigration & Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987) (expressly holding that constitutional challenges based on procedural errors not raised with the agency are not reviewable by the court). The same concept should apply to Plaintiff's Count II claim. The Court should not permit Plaintiff to bypass agency review by calling his Count II claim a trust obligation or fiduciary duty claim, particularly when he does not have a private right of action to bring such a claim under the Settlement Act. *See Oregon Nat. Desert Ass'n*, 465 F.3d at 982.

Furthermore, if Count II is an independent claim, Plaintiff has not established that the United States has expressly waived its sovereign immunity. *See Holloman v. Wall*, 708 F.2d 1399, 1401-02 (9th Cir. 1983) (waiver of sovereign immunity by the United States must be express and cannot be implied, and party suing the United States has burden to establish unequivocal waiver of immunity). Without an express sovereign immunity waiver, the Court must dismiss Count II.

Finally, if Count II is an independent claim, the statute of limitations expired on it long ago. *See* 28 U.S.C. § 2401(a). If ONHIR failed to provide Plaintiff notice in 1974 (Comp. at ¶ 43) (which is not a fact in the record), Plaintiff knew or should have known of this alleged failure in 1974, when "[ONHIR] certified his father, mother, brother and sister for benefits."6 (Comp. at ¶ 43). Plaintiff had many opportunities to raise Count II with agency prior to filing his Complaint. For strategic reasons, he chose not to. But that did not

[6] If his entire family was certified in 1974, Plaintiff should have known about the program and his potential eligibility at that time.

toll the statute of limitations or otherwise excuse his delay. The Court should dismiss Count II of Plaintiff's Complaint.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court DISMISS Count II of Plaintiff's Complaint.

Respectfully submitted this 14th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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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