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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rosita George, Plaintiff, vs. Office of Navajo and Hopi Indian Relocation, an administrative Agency of the United States, Defendant.	17-CV-08200-PCT-DLR **MOTION TO DISMISS COUNT II OF THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

Through this Motion, Defendant, the Office of Navajo and Hopi Indian Relocation ("**ONHIR**"), respectfully requests the Court dismiss "Count II" of the Complaint [Docket No. 1] under Rule 12(b)(1). The Court lacks jurisdiction over Count II because, among other reasons, (i) the agency has not issued a final agency action on the claim, and (ii) Plaintiff, Rosita George, did not raise the claim at the agency level.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In 2013, ONHIR determined that Ms. George was not eligible for Relocation Benefits (defined below). In Count I, Ms. George challenges that denial. In Count II, Ms.

[1] Unless otherwise ordered by the Court, ONHIR will answer Count I of the Complaint within the time required under Fed. R. Civ. P. 12(a)(4)(A).

George asserts that ONHIR breached a trust obligation or fiduciary duty owed to Ms. George by delaying her benefits determination for "27 years."[2] She asserts that ONHIR's alleged delay caused her to fail to meet her burden for Relocation Benefits.

Ms. George has the burden to prove her eligibility for Relocation Benefits. *See* 25 C.F.R. § 700.147(b) (applicant has burden to prove eligibility). Through Count II, Ms. George attempts to avoid that burden. For decades, ONHIR applicants have tried unsuccessfully to avoid 25 C.F.R. § 700.147(b). *See, e.g., Bahe*, 2017 U.S. Dist. LEXIS 212562, at *7 ("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 burden-avoiding approaches has succeeded, and Count II shouldn't either.

In all events, the Court lacks jurisdiction over Count II. Ms. George has brought Count II under the APA. *See* Complaint, ¶¶ 39-41, 46. 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).

Therefore, to fulfill its appellate role, the Court must have a final agency decision to review based on facts contained in the administrative record. With respect to Count II, the Court has neither a decision of the agency nor all necessary facts.

[2] Ms. George first applied for Relocation Benefits in 2009. *See, infra*, Section III.

This Court recently rejected the same fiduciary duty claim brought by Ms. George's counsel in another ONHIR case because (i) the claim was not raised in the administrative proceedings, (ii) the claim was based on facts outside the record, and (iii) ONHIR's alleged inaction did not constitute a breach of fiduciary duty. *See Bahe v. Office of Navajo & Hopi Indian Relocation*, No. CV-17-08016-PCT-DLR, 2017 U.S. Dist. LEXIS 212562, at *17-18 (D. Ariz. Dec. 28, 2017). This Court should follow its reasoning in *Bahe* and dismiss Count II.[3]

II. ONHIR And The Settlement Act

In 1974, after decades of failed efforts at joint use of lands in northern Arizona by members of the Navajo Nation and the Hopi Tribe, Congress passed the Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, formerly codified as amended at 25 U.S.C. §§ 640d to 640d-31 (2015) (the "**Settlement Act**"). In the Settlement Act, Congress authorized the judicial partition of certain trust lands (known as the "**Joint Use Area**" or "**JUA**"). Subsequently, this Court partitioned the JUA by allocating approximately 900,000 acres (known as the Hopi Partitioned Lands or "**HPL**") to the Hopi Tribe and approximately 900,000 acres (known as the Navajo Partitioned Lands or "**NPL**") to the Navajo Nation. *See Laughter v. Office of Navajo & Hopi Indian Relocation*, Case No. 3:16-cv-08196-PCT-DLR, 2017 U.S. Dist. LEXIS 101116, at *2 (D. Ariz. June 29, 2017) (*citing Sekaquaptewa v. MacDonald*, 626 F.2d 113, 115 (9th Cir. 1980)). The Settlement Act required tribal "households" to move from lands partitioned to the other tribe and created a commission to pay for the major relocation costs (such costs are referred to herein as "**Relocation Benefits**") for eligible "heads of households." *See id.* (*citing Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121 (9th Cir. 1989)).

ONHIR is an independent federal agency responsible for carrying out relocations under the Settlement Act. *See O'Daniel v. Office of Navajo & Hopi Indian Relocation*, No.

[3] The Court disposed of Ms. Bahe's fiduciary duty claim through summary judgment, rather than dismissal, because Ms. Bahe raised the claim for the first time in her summary judgment motion.

07-354-PCT-MHM, 2008 WL 4277899, at *1 (D. Ariz. Sept. 18, 2008). ONHIR determines if an applicant is eligible for Relocation Benefits. *Id.* ONHIR's final decisions regarding such applications are subject to judicial review under the Administrative Procedure Act ("**APA**"). *Id.* ONHIR stopped taking new applications for Relocation Benefits after August 31, 2010.

III. Relevant Factual Background[4]

1. After being inundated with hundreds of appeals at one time, on September 1, 2009, ONHIR's Executive Director exercised his discretion, under 25 C.F.R. § 700.13, to waive the requirement that ONHIR hold appeal hearings within 30 days of an appeal for "all pending Administrative Appeals and any new Appeals."[5] [CAR: 176-178]

2. On January 13, 2009, Ms. George applied for Relocation Benefits. [Complaint ¶ 22; CAR: 6-10]

3. On October 21, 2009, ONHIR denied her application. [Complaint ¶ 23; CAR: 51-53].

4. On November 4, 2009, Ms. George appealed the denial to ONHIR's independent hearing officer. [Complaint ¶ 24; CAR: 58]

5. In October 2012, the hearing officer set a hearing on the appeal for May 17, 2013, which was rescheduled to August 23, 2013. [CAR: 56, 96].

6. Ms. George did not challenge the hearing date.[6]

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[4] ONHIR's references to the Certified Administrative Record, filed contemporaneously herewith, will be indicated by the abbreviation "CAR" followed by the relevant "Bates" number (excluding unnecessary characters), which appears in the bottom right corner of each page of the record (*e.g.*, Bates number "GEOR-ONHIR-000104" will be cited as "[CAR: 104]").

[5] At the time of Ms. George's appeal, ONHIR—a small agency with approximately 35 employees and only one hearing officer—had over 200 administrative appeals pending. This fact, among many others, is not in the record, which is another reason the Court cannot adequately review Count II of Ms. George's Complaint.

[6] The course of dealing between ONHIR and Ms. George's counsel, NHLSP, was not to set matters for hearing until NHLSP specifically stated it was ready (*i.e.,* when it had gathered all the evidence and witnesses it needed to support the claim). NHLSP was rarely, if ever, ready to proceed with an evidentiary hearing within 30 days. None of these facts is in the record, which is another reason the Court cannot adequately review Ms. George's Count II claim.

7. On August 23, 2013, the independent hearing officer held a hearing on Ms. George's appeal. [Complaint ¶ 25; CAR: 97-133]

8. On November 12, 2013, the independent hearing officer issued his decision upholding ONHIR's denial of benefits. [CAR: 159-169]

9. After Ms. George failed to file a motion to reconsider, ONHIR issued its final agency action letter on December 5, 2013. [Complaint ¶ 32; CAR: 171]

10. Ms. George did not raise any of the issues raised in Count II of her Complaint at the administrative level. [CAR: 1-178]

11. Almost four years later, Ms. George commenced this action.

IV. The Court Should Dismiss Count II Because It Lacks Jurisdiction Over It

A. Rule 12(b)(1) Dismissal Standard

Under Rule 12(b)(1), if the court lacks subject matter jurisdiction, it must dismiss the case. *See* Fed. R. Civ. P. 12(b)(1). A party bringing suit against the United States bears the burden of demonstrating subject matter jurisdiction; where it has failed to do so, "dismissal of the action is required." *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

When considering a motion to dismiss pursuant to Rule 12(b)(1), the Court is not restricted to the face of the pleadings; it may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *See, e.g., Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947) ("when a question of the District Court's jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as they exist"); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment). Further, under such circumstances, the Court need not

presume the truthfulness of the plaintiff's allegations. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

B. The Court Lacks Jurisdiction Because ONHIR Has Not Issued A Final Agency Action On Count II

In Count II, Ms. George asserts that ONHIR violated a "trust obligation" alleged owed to her. [Complaint, ¶ 46]. Ms. George never raised Count II with ONHIR, and ONHIR never issued a decision on the claim. In other words, the Court does not have a Count II decision to review, and therefore, it lacks jurisdiction under the doctrines of finality and ripeness. *See* 5 U.S.C. § 704 (requiring a "final agency action"); *Bennett v. Spear,* 520 U.S. 154, 178 (1997) (discussing finality); *Indus. Customers of Nw. Utilities v. Bonneville Power Admin.,* 408 F.3d 638, 646 (9th Cir. 2005) (same); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 810 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'") (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148–149 (1967)).

In her Complaint (¶¶ 41, 46), Ms. George attempts to characterize her Count II claim as challenge to agency "inaction" under the APA. While a plaintiff may challenge an agency's failure to take legally required, discrete actions under the APA, the remedy is to require the agency to take 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, Ms. George has not requested that ONHIR take a discrete and allegedly legally required action in the future (*i.e.*, provide Ms. George notice of her potential eligibility). Instead, she asks this Court to determine that ONHIR erred, as a matter of law, when it denied her Relocation Benefits. [Complaint, p. 10] Therefore, Ms. George'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 (or any) agency decision to review on Count II and the issue is not ripe for appeal.

C. The Court Lacks Jurisdiction Because Ms. George Failed To Raise Her Count II Claim At The Agency Level

The administrative record establishes that Ms. George failed to raise her Count II claim with ONHIR. Her failure precludes review by this Court under the doctrines of statutory exhaustion, issue exhaustion/waiver, and prudential exhaustion.

1. Ms. George Failed To Exhaust All Her Required Administrative Remedies

If a claimant fails to exhaust all "intra-agency" appeals mandated by agency rule, the Court lacks jurisdiction to review the claim. *See Darby v. Cisneros*, 509 U.S. 137, 146-147 (1993). 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, Ms. George failed to take any of these steps. Therefore, under *Darby*, she failed to exhaust her 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.").[7] The Court should dismiss Count II.

2. Ms. George Waived Her Count II Claim By Not Raising It Below

"[I]f a petitioner 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);

[7] This Court also rejected 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

Zara v. Ashcroft, 383 F.3d 927, 930 (9th Cir. 2004) ("'Failure to raise an issue in an appeal to the [agency] constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter.'") (quoting *Vargas v. U.S. Dep't of Immigration & Naturalization*, 831 F.2d 906, 907-908 (9th Cir. 1987)); *Bahe*, 2017 U.S. Dist. LEXIS 212562, at *6, 17 (ONHIR applicant waived issues not raised below); *see also 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); *accord First-Citizens Bank & Trust Co. v. Camp,* 409 F.2d 1086, 1088–89 (4th Cir. 1969) ("ordinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision [only to] attack it on the ground of asserted procedural defects not called to the agency's attention"). 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.").

The rule is also sound policy. In APA cases, the Court sits as an appellate tribunal; the agency is the fact-finder not the reviewing court, and, therefore, the Court cannot conduct *de novo* review of an issue. *See 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."); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."). Therefore, the Court can only review an actual decision of the agency on the relevant issues, based only on agency fact-finding. If the agency has not made a decision on the issues, the Court has nothing to review and lacks jurisdiction.

In this case, Ms. George did not raise her Count II claim at the administrative level. Ms. George could have raised Count II at any time during the administrative process. She did not do so. At the very least, Ms. George could have sought reconsideration of the hearing officer's decision, as permitted under ONHIR Policy No. 17, and presented her Count II allegations to ONHIR.[8] Again, she did not do so. Instead, she has raised her Count II claim for the first time on appeal; thereby bypassing agency review and requesting the Court to conduct a *de novo* inquiry into the new issues. The Court cannot do that under the APA. Accordingly, ONHIR respectfully requests the Court dismiss Count II of the Complaint.

3. 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) (holding that judicial review in an APA case is based upon the "full administrative record that was before [the agency] at the time [it] made [its] decision."); *Camp* , 411 U.S. at 142. Facts outside the administrative record cannot be considered, except in extraordinary circumstances. *See Fence Creek*, 602 F.3d at 1131; *Burnside, et. al. v. Office of Navajo and Hopi Indian Relocation*, Case 3:15-CV-08233-PGR, 2017 U.S. Dist. LEXIS 158804, at *23 (D. Ariz. Sept. 27, 2017). And, the Court cannot find its own facts. *See Camp*, 411 U.S. at 142.

Yet, Ms. George's Count II claim is dependent on facts that are not in the administrative record. Here are a few examples:

- "ONHIR knew or should have known that Ms. George was a member of the class of relocatees that ONHIR was obligated to assist . . . ." Complaint, ¶ 42.

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[8] Although a motion to reconsider under Policy 17 is optional, a party may not appeal an agency decision on grounds not raised below. In such circumstances, a party should file a motion for reconsideration or other similar request to allow the agency to address the issues in the first instance.

- "In 2009, ONHIR ***finally***[9] accepted Ms. Georges' application . . . ." Complaint, ¶ 43 (emphasis added).
- "ONHIR delayed action regarding Ms. George's entitlement for relocation assistance benefits for approximately 27 years." Complaint, ¶ 44.

None of these allegations are supported by the record. Moreover, ONHIR will have additional facts it will need to develop to adjudicate Count II. With so many facts undeveloped, the Court cannot adjudicate Count II, and the Court should dismiss the claim. *See, e.g., Bahe*, 2017 U.S. Dist. LEXIS 212562, at *17 (rejecting a similar claim because "Plaintiff's breach of fiduciary duty claim is based on facts outside the administrative record.").

4. The Court Lacks Jurisdiction Under The Prudential Exhaustion Doctrine

The Court should also find that it lacks jurisdiction under the doctrine of prudential exhaustion. "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. Dep. of Homeland Sec.,* 508 F.3d 1227, 1234 (9th Cir. 2007) (quoting *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review,* 959 F.2d 742, 747 (9th Cir. 1992)).

Prudential exhaustion regarding Count II is appropriate in this case. Because Ms. George did not raise her Count II claims with ONHIR, the record is not developed and ONHIR has not addressed her Count II claims in the first instance. As discussed above, ONHIR must use its expertise on these issues and create a proper record for review (if necessary). *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds, as recognized in* 532 U.S. 731 (2001) (noting that "exhaustion of the administrative procedure may produce a useful record for subsequent judicial

[9] Nothing in the record indicates that Ms. George applied for benefits prior to 2009 or that ONHIR rejected such application.

consideration") (internal citations omitted). Additionally, proceeding with Count II would undermine the APA review process. Ms. George appears to have deliberately bypassed agency review. The Court should not allow this. *See United States v. Cal. Care Corp.*, 709 F.2d 1241, 1249 (9th Cir. 1983) ("The [prudential] exhaustion requirement may appear harsh to the [plaintiffs]; but they have brought this result on themselves."). The Court should hold that it lacks jurisdiction under the prudential exhaustion doctrine.

V. Conclusion

The Court should dismiss Ms. George's Count II claim for many reasons. ONHIR has never made a decision on the claim. The claim is not ripe for appeal. Count II improperly attempts to expand issues and claims on appeal, and it depends on facts not in the record, among other shortcomings. The Court has sufficient legal authority to prevent Ms. George from intentionally bypassing agency review. ONHIR respectfully requests the Court do so.

CERTIFICATION OF CONFERRAL

Undersigned counsel for ONHIR certifies that he notified counsel of the issues raised in this motion, and he has conferred with Plaintiff's counsel to determine whether a dismissal motion could be avoided. The parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by Plaintiff.

Respectfully submitted this 7th day of February, 2018.

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s/Jason D. Curry
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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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