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14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE DISTRICT OF ARIZONA

16 Rosita George,
 17
 18 Plaintiff,
 19
 20 vs.
 21 Office of Navajo and Hopi Indian
 22 Relocation, an administrative Agency of
 23 the United States,
 24
 25 Defendant.

17-CV-08200-PCT-DLR

**DEFENDANT’S REPLY IN
 FURTHER SUPPORT OF MOTION
 TO DISMISS COUNT II OF THE
 COMPLAINT FOR
 LACK OF SUBJECT MATTER
 JURISDICTION**

26 Defendant, the Office of Navajo and Hopi Indian Relocation (“ONHIR”), files this
 27 Reply in further support of its Motion to Dismiss Count II [Docket No. 15] (the “**Dismissal
 28 Motion**”)¹ and in reply to Plaintiff, Rosita George’s Response in Opposition to the
 Dismissal Motion [Docket No. 18] (the “**Response**”).

Through the Dismissal Motion, ONHIR established that the Court should dismiss
 Count II of Plaintiff’s Complaint for lack of subject matter jurisdiction because, among
 other reasons, (i) the agency has not issued a final agency action on Count II, (ii) Ms.
 George failed to exhaust her administrative remedies regarding Count II, (iii) Ms. George
 waived her Count II claim by not raising it at the administrative level, and (iv) the Court
 cannot adjudicate Count II without additional facts not in the record.

¹ Unless otherwise defined herein, capitalized terms used in this Reply will have the
 same meaning given to them in the Dismissal Motion.

1 In the Response, Ms. George did not assert that ONHIR has issued a final agency
2 action on Count II. In fact, Ms. George did not address finality at all. Therefore, Ms. George
3 does not dispute that the Court lacks jurisdiction based on the doctrine of finality, and the
4 Court can grant the Dismissal Motion on this basis alone.

5 Ms. George also asserts that the Settlement Act and ONHIR regulations do not
6 require exhaustion, and then she asserts that ONHIR failed to direct the Court to “a single
7 provision in the Act, or in the Code of Federal Regulations” to support its exhaustion
8 argument. Response p. 7. Ms. George is incorrect. In the Dismissal Motion, ONHIR
9 specifically cited to 25 C.F.R. §§ 700.30(d) and 700.319 for the proposition that, to
10 exhaust, ONHIR’s regulations require that an applicant do each of the following: (i) obtain
11 an “Initial Commission Determination”, (ii) appeal such determination to the “Presiding
12 Officer”, and, thereafter, (iii) obtain a final agency action from the “Commission.” *See*
13 Dismissal Motion, p. 7. Ms. George did not address this argument at all. Nor did she assert
14 that she took all steps required for exhaustion. Therefore, Ms. George has not disputed that
15 she was required to take the steps outlined in 25 C.F.R. §§ 700.30(d) and 700.319, and the
16 Court can dismiss Count II on this basis as well.

17 Ms. George also failed to address ONHIR’s waiver arguments or ONHIR’s
18 assertion that additional facts are necessary to adjudicate Count II. Again, because Ms.
19 George does not address these issues in her Response, they are undisputed, and the Court
20 can dismiss Count II.

21 Finally, Ms. George claims that ONHIR did not cite to external documents in
22 support of its Dismissal Motion; therefore, the Dismissal Motion is a “facial” attack. But
23 ONHIR specifically cited to the Certified Administrative Record for the proposition that
24 Count II was never raised at the administrative level and ONHIR never issues a final
25 agency action on Count II. In any event, if the Dismissal Motion is a “facial” attack, the
26 Court must still dismiss. Ms. George has not alleged that she exhausted her Count II claims
27 under 25 C.F.R. §§ 700.30(d) and 700.319 and obtained a final agency action. Therefore,
28 on the face of the Complaint, the Court lacks jurisdiction and Count II should be

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dismissed.²

For the reasons set forth in the Dismissal Motion and herein, ONHIR respectfully requests the Court dismiss “Count II” of the Complaint under Rule 12(b)(1).

Respectfully submitted this 22nd day of March, 2018.

ELIZABETH A. STRANGE
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District of Arizona

s/ Jason D. Curry

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Assistant United States Attorney

² Ms. George also asserts that the jurisdictional issues surrounding Count II are “intertwined” with the substantive issues. This is not true. The jurisdictional issue is whether the claim was raised below, not whether the claim is valid.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 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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