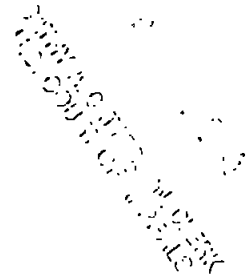
CASE NO. 04-35210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU; et al.,
Plaintiffs - Appellants,

vs.

BLACKFEET HOUSING AUTHORITY, and
its Board Members; et al.,
Defendants - Appellees.



On Appeal From the United States District Court
District of Montana, Great Falls Division
No. CV 02-00073-GF-SEH - Honorable Sam E. Haddon, Presiding

PLAINTIFFS/APPELLANTS' OPENING BRIEF

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ATTORNEYS FOR PLAINTIFFS/APPELLANTS

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CERTIFICATE OF INTEREST

Jeffrey A. Simkovic, and Thomas E. Towe, counsel for Appellants, certify the following:

1. The full name of every party or amicus represented by us are:

Martin Marceau, Candice Lamott, Julie Rattler, Joseph Rattler, Jr., John G. Edwards, Jr. Mary J. Grant, Gray Grant, and Deana Mountain Chief, on Behalf of Themselves and Others Similarly Situated.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

None.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party of amicus curiae represented by us are:

None.

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are:

Jeffrey A. Simkovic, Esq., and Thomas E. Towe, Esq.

Dated: September 16, 2004 By: _____

Jeffrey A. Simkovic For
Jeffrey A. Simkovic and Thomas E. Towe

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I. STATEMENT OF JURISDICTION

A. Subject Matter Jurisdiction of the District Court of Montana rests upon 28 U.S.C. §1331, for claims arising under United States Housing Act of 1937, 42 U.S.C. §§1437-1437x, and administrative regulations promulgated thereunder, 24 C.F.R. §§ 805, *et seq;* the Indian Housing Act of 1988 ("IHA"), 42 U.S.C §§1437aa-1437ff, and the regulations promulgated thereunder, 24 C.F.R. Part 905; the Native American Housing and Self Determination Act ,25 U.S.C. § 4101 *et seq.*, and administrative regulations promulgated 24 CFR § 2000.200 *et seq.*; and the Administrative Procedures Act, 5 U.S.C. §§ 701, *et seq.*

B. Appeal is taken pursuant to F.R.App.P. Rule 3, and is properly brought in the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. §§1291 and 1294.

C. This is an appeal from a Memorandum and Order, and final judgment entered in the United States District Court for the District of Montana on January 14, 2004. The Notice of Appeal was timely filed in this Court on March 3, 2004.

II. STATEMENT OF THE ISSUES

1. Did the District Court err in rejecting Plaintiffs-Appellants' claims for breach of Indian Trust responsibility?

2. Did the District Court err in rejecting the application of the Administrative Procedures Act?

3. Did the District Court err in refusing to find a waiver of sovereign immunity for Blackfeet Housing?

4. Did the District Court err in holding Plaintiff's exclusive remedy is with the U.S. Claims Court for damages?

III. STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

Plaintiff-Appellants ("Plaintiffs")and persons they seek to represent in this Class Action case are members of the Blackfeet Indian Tribe and are home buyers, or lessees, under the federal Mutual Help Homeownership Opportunity Program, of more than 152 homes built by the Blackfeet Housing Authority under contract with the Defendant-Appellee United States Department of Housing and Urban Development ("HUD").[1] Plaintiffs' homes were built over the period from approximately 1979-1980.

Plaintiffs' homes in general were constructed with poor construction techniques and choice of materials. Specifically, the homes were built with wood foundations, using chemically treated wood products. The wet, northern climate of the Blackfeet Indian reservation is not at all suited to wood foundation construction, and the chemicals used to treat the wood are toxic and hazardous to human health. Plaintiffs

[1]The definition of the class is broad enough to include homeowners and tenants of other houses on the Blackfeet Reservation under the same program which did not use wooden foundations but were defective in other ways.

vigorously protested the use of wood foundations in the homes, but to no avail. The siting of the homes, the construction materials, and standards used were all mandated by HUD.

The wood foundations did not perform adequately, giving way to seepage, moisture accumulation, and structural instability. As a result, water and sewage have regularly invaded the homes both below and within the living areas, resulting in mold and unsanitary conditions. These conditions have persisted for years, but have become more serious in recent times. Some of the houses are simply uninhabitable because of toxic mold and dried sewage residue. Doctors have advised the occupants of others to leave for health reasons.

Many Plaintiffs suffer an unusually high rate of serious health issues, including cancer, asthma, and kidney failure. Plaintiffs' requests for health studies to determine what they suspect is a connection between the conditions of the homes and their health problems have been refused. Plaintiffs' requests over the years for remediation of the problems caused by the chemically-impregnated, wood foundation construction of their homes have been met with the empty promises and lack of action, not untypical of other reactions afforded our Nation's Indian citizens. HUD and its implementing agency, Defendant-Appellee Blackfeet Housing, point to the usual lack of funding, and HUD denies responsibility and liability.

In particular, Defendant HUD characterizes itself as a simple conduit of mortgage funds for low income home buyers, contending that maintenance of the homes was the duty of the homeowners. ***Maintenance*** of the homes is not the issue. Normal homeowner maintenance would not have prevented, nor can it correct, the problems. Correction of the faulty construction and improvident use of wooden foundations mandated by HUD is the pressing issue. Due to high poverty on the reservation, Plaintiffs cannot afford to remedy these conditions themselves, nor can they afford to leave and move elsewhere. They are stuck in an admittedly unhealthy and unsafe situation.

B. STATUTORY AND REGULATORY BACKGROUND

During the time Plaintiffs' homes were built, the Mutual Help Homeownership Opportunity Program ("MHHOP") was governed by the general provisions of Title I of the United States Housing Act of 1937, ("USHA") 42 U.S.C . §§ 1437-1437x, and administrative regulations promulgated thereunder, 24 C.F.R. §§ 805, *et seq.* The USHA served all low income Americans, including Indian citizens. During the occupancy of the homes, the USHA was amended by the Indian Housing Act of 1988 ("IHA"), 42 USC §§1437aa-1437ff, and the regulations promulgated thereunder, 24 C.F.R. Part 905, to specifically address the United States' trust responsibilities to Indian peoples regarding their housing.

Again, during the occupancy of the homes, in 1996, the IHA was repealed, and the Native American Housing and Self Determination Act ("NAHSDA") was enacted to replace the federal government's implementation of its trust responsibilities to Indian peoples regarding housing. 25 U.S.C. § 4101 *et seq.*, 24 CFR § 2000.200 *et seq.*

C. THE CASE BELOW

Plaintiffs filed suit in the District Court after Defendants failed to fix the dangerous and unsanitary conditions in their homes. In Counts I and III of their Amended Class Action Complaint, Plaintiffs sought declaratory and injunctive relief, and damages, for breach of trust and fiduciary duties against Defendant HUD. Appendix 1, Amended Class Action Complaint, pp. 11-15, 16-17. In Count II, Plaintiffs sought judicial review of HUD agency actions under the Administrative Procedures Act, seeking declaratory and injunctive relief. *Id.*, pp. 15-16. In Counts IV, V and VI, Plaintiffs asserted claims for breach of the covenants of habitability, merchantability, and good faith and fair dealing. *Id.*, pp. 17-21.[2]

Plaintiffs sought certification as a class to proceed under F.R.Civ.P. Rule 23. *Id.*, pp. 8-11. Class certification was never addressed by the District Court. Defendants both separately moved to dismiss Plaintiffs' Amendment Complaint for

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[2]In Count VII, Plaintiffs sought recovery for emotional distress, but this claim was withdrawn prior to judgment.

lack of subject matter jurisdiction, and for failure to state a claim upon which relief could be granted.

D. THE DISTRICT COURT DECISION

In a Memorandum and Order filed on January 14, 2004, the District Court granted Defendants Blackfeet Housing and HUD's Motions to Dismiss on all Counts of the Amended Complaint, and denied Defendant Blackfeet Housing's Motion for Protection Order as moot. Appendix 2, District Court Memorandum and Order, p. 10.

While the District Court acknowledged the specific statutory waiver of sovereign immunity for HUD found in the USHA and IHA, it refused to carry that finding forward in analyzing the NAHSDA.[3] The district court did not acknowledge any form of implied waiver based on a fiduciary relationship under NAHSDA based on the reasoning of *Mitchell II*. Instead, the district incorrectly relied on the four-point test of *Cort v. Ash*, and refused to find that Plaintiffs had claims under any of the federal housing statutes asserted by Plaintiffs. *Id.*, pp. 3, 4-7.

The District Court characterized all of Plaintiffs' claims as essentially monetary damages claims, no matter how they were pleaded, and found they were barred for

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[3]The District Court did signal its discomfort with this finding, on the basis that claims available to Plaintiffs under the USHA and IHA should not be retroactively abrogated by the repeal of the IHA. Appendix 3, Transcript of Oral Argument, p. 11, lns. 4-10 .

failure to proceed before the Court of Claims. *Id.*, pp. 1,2,6,8.

At oral argument , the district court announced it was essentially converting the motions to dismiss to motions for summary judgment by ordering the parties to submit additional materials for its review. Appendix. 3, Transcript of Oral Argument, p. 18, lns. 14-17. The court failed however, to allow Plaintiffs to conduct any discovery to obtain the facts essential to defend against summary judgment.

IV. STANDARD OF REVIEW

The standard of review of the issues raised on appeal is *de novo*. Both the question of subject matter jurisdiction and the question of tribal sovereign immunity are reviewed de novo. *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

V. SUMMARY OF ARGUMENT

1. Did the District Court Err in Rejecting Plaintiff/Appellants' Claims for Breach of Indian Trust Responsibility?

The Supreme Court has found that a Federal agency which exerts both pervasive and comprehensive control over monies or property for the benefit of Indians has a trust or fiduciary relationship with those Indians. *United States v. Mitchell ("Mitchell I")*, 463 U.S. 206, 222, 103 S.Ct. 2961 (1983). In Counts I and III of their Amended Complaint, Plaintiffs sought declaratory and injunctive relief, and damages, against

HUD for a breach of this relationship.

Specifically, Plaintiffs claimed that the government, acting through HUD, had duties under federal statutes and regulations implemented under national housing policies to provide decent, safe, and sanitary housing , and to repair or remediate existing substandard housing. The courts have held that these statutory duties are not discretionary. Plaintiffs claim HUD has failed to fulfill its duties.

The District Court acknowledged the explicit waiver of HUD's sovereign immunity under the USHA and the IHA. However, the District Court erred when it refused to find a cause of action under these statutes, a waiver of immunity based on the existence of an Indian trust or fiduciary relationship, or a cause of action for breach of federal trust responsibility. The district court is incorrect as a matter of law and should be reversed on this issue.

2. **Did the District Court Err in Rejecting the Application of the Administrative Procedures Act?**

The district court acknowledged that 5 U.S.C. §702 of the Administrative Procedure Act (APA) waives sovereign immunity over claims for equitable relief based on agency action. App. 2, p. 7-8. However, the district court erred by mischaracterizing Plaintiffs' claims as claims for money damages which are not available under the APA. *Id.*, pp. 1,2,6,8.

The Supreme Court in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722 (1988), clearly stated that the remedy under the APA is an action for specific relief and not for "money damages" under 5 U.S.C. §702, **even though the Order could require the payment of money** by the Federal government. *Bowen*, 108 S.Ct. at 2740 (emphasis added). The district court ignored the *Bowen* case even though it is controlling. Its conclusion is clearly wrong, and should be reversed.

3. **Did the District Court Err in Refusing to Find a Waiver of Sovereign Immunity for the Blackfeet Housing Authority?**

The issue as to the waiver of sovereign immunity by Blackfeet Housing turns on the language of the "sue and be sued" clause in the ordinance creating it. The Montana federal district courts have uniformly concluded, until Judge Haddon's ruling now on appeal, that the "sue and be sued" clause in Tribal ordinances is sufficient itself to waive sovereign immunity of the Housing Authority. *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F.Supp. 599, 605-606 (D. Mont.,1981), *R.J. Williams Co. v. Fort Belknap Housing Authority*, 509 F.Supp. 933,938, fn. 1 (D.Mont.1981), aff.d 719 F.2d 979 (9th Cir. 1993).

This rule arises from the **corporate** nature of Indian housing authorities which were created under requirements of HUD. This Circuit, in affirming *R.J. Williams*, clearly upheld this rule of law of the Montana federal courts. *R.J. Williams Co. v.*

Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983).

4. Did the District Court Err in Holding Exclusive Remedy Is with the U.S. Claims Court for Damages?

The Tucker Act vests the Court of Federal Claims with jurisdiction for relief based on contract claims exceeding $10,000.00. 28 U.S.C. §1491(a)(1). However, the Claims Court does not have exclusive jurisdiction for claims exceeding $10,000.00 under the Tucker Act. *Jackson Square Assoc. v. United States Department of Housing & Development*, 797 F.Supp. 242, 244 (W.D.N.Y. 1992).

An action may be brought under federal question jurisdiction, 28 U.S.C. §1331, in the district court provided there is a waiver of sovereign immunity. As Plaintiffs have demonstrated in this appeal, sovereign immunity does not shield either HUD or Blackfeet Housing from suit.

A federal question is involved in this case: were the federal statutory and regulatory requirements followed in the construction of these homes? Also, the Indian Trust Responsibility question is a federal question. Therefore, since there is an independent bases for federal jurisdiction, and the issue does not generally sound in contract, the Tucker Act's exclusive jurisdiction over claims based on contract does not apply. *Tucson Airport Authority v. General Dynamics Corp. v. United State of America*, 922 F.Supp. 273, 281 (D.C. D. Ariz. 1996); *Conille v. Secretary of*

Housing & Urban Development, 840 F.2d 105, 117 (1st Cir. 1988).

VI. ARGUMENT

A. The District Court Erred In Rejecting Plaintiffs' Claims For Breach Of Indian Trust Responsibility.

The trust relationship existing between the United States and Indian Nations is set forth in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), as one which "resembles that of a ward to its guardian." The fiduciary trust relationship between the United States and Indians extends not only to Indian Tribes, but also to individual Indians. *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974).

The Supreme Court has found that a Federal agency which exerts both pervasive and comprehensive control over monies or property for the benefit of Indians has a trust or fiduciary relationship with those Indians. *United States v. Mitchell ("Mitchell I")*, 463 U.S. 206, 222, 103 S.Ct. 2961 (1983). "This Court [. . . has] consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the Trustee for damages resulting from a breach of the Trust." *Mitchell*, 463 U.S. at 226.

During the time Plaintiffs ' homes were built, the Mutual Help Homeownership Opportunity Program ("MHHOP") was governed by the general provisions of Title I

of the United States Housing Act of 1937, ("USHA") 42 USC §§ 1437-1437x, and administrative regulations promulgated thereunder, 24 CFR §§ 805, *et seq.* The USHA of 1937served all low income Americans, including Indian citizens. The purpose of the United States Housing Act of 1937 was to create safe, decent, and sanitary housing for American citizens. This was a mandatory mandate, not a precatory desire. *Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855 **(C.A.D.C. 1974).** During the occupancy of the homes, the USHA was amended by the Indian Housing Act of 1988 ("IHA"), 42 U.S.C §§1437aa-1437ff, and the regulations promulgated thereunder, 24 C.F.R Part 905, to specifically address the United States' trust responsibilities to Indian peoples regarding their housing.

Again, during the occupancy of the homes, in 1996, the IHA was repealed, and the Native American Housing and Self Determination Act ("NAHSDA") was enacted to replace the federal government's implementation of its trust responsibilities to Indian peoples regarding housing and living conditions on the reservations. 25 USC § 4101 *et seq.*, 24 C.F.R. § 2000.200 *et seq.*

Indian housing is presently controlled by the NAHSDA. The primary objective of the Act is "to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian Reservations and in other Indian areas for occupancy by low-income Indian families...."

25 USC §4131(a)(1). The Act also provides for "operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian Housing Authority." 25 USC §4132 (1)-(5) (emphasis added).

HUD had a duty to repair the houses once it knew of the need to do so. Under the IHA passed in 1988 and the subsequent regulations, 24 C.F.R. §905.270, HUD can provide additional money to the local housing authorities for repair and remediation of housing problems, and therefore, is "a necessary participant in the corrections process after home construction was completed." *Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1203-1204 (D. Ariz. 2002).

The District Court properly found that HUD was amenable to suit under the United States Housing Act of 1937, which contains an explicit waiver of the government's sovereign immunity. App. 2, p. 4; *see*, 42 USC § 1404a (Secretary of Housing and Urban Development may sue and be sued relative to its functions under the USHA). The District Court also properly found that the waiver of sovereign immunity of the USHA extended to actions under the IHA. App. 2, p. 5.

However, the district court erred when it refused to find a waiver of sovereign immunity in the current version of the federal government's implementation of national housing policy towards Indian peoples, the NAHSDA. The Plaintiffs' cause of action originated under the USHA and ripened further under the IHA. They did not lose their

right to sue the Secretary when NAHSDA replaced IHA. Congress has no authority to withdraw retroactively a previous grant of a waiver of sovereign immunity, even if it had said so, which it did not.

The District Court further erred when it failed to recognize a cause of action for Plaintiffs against HUD for breach of the agency's fiduciary trust responsibilities. The District Court held it could not find any explicit waiver of sovereign immunity provisions in the NAHSDA. *Id.*, p. 5-6. However, an explicit waiver of sovereign immunity in a statutory scheme is not the only method by which a cause of action for breach of trustee fiduciary duties may be recognized. In *United States v. Mitchell ("Mitchell II")*, 463 US 206 (1983), it was held that a waiver of sovereign immunity may also be found where the government creates such a comprehensive statutory and regulatory scheme that it gives rise to a cause of action for breach of the trust relationship. "[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." *Id*, 463 US at 225. As a fundamental incident of this fiduciary relationship is the right of the injured beneficiary (here Plaintiffs), to sue the trustee (here HUD), for a breach of the trust. *Id.*

The Court, in *Mitchell II*, begins its analysis noting the unique relationship between the United States government and Indian people. "This Court has previously

emphasized the distinctive obligation of trust incumbent upon the government in its dealing with these dependent and sometimes exploited people. This principle has long dominated the government dealings with Indians." (Citations omitted.) *Mitchell II*, 463 U.S. at 225-226.

In the NAHSDA of 1996, Congress reinforced its trust obligations in stating that the Congress, through treaties, statutes and historical relations, "...has a unique trust responsibility to protect and support Indian tribes and Indian people." That trust is discharged, in part, by "providing affordable homes in safe and healthy environments." 25 U.S.C. §4101.

In *Mitchell II*, the Court determined that if a trust relationship has evolved into fiduciaries duties common to a private trust relationship, a breach of those duties is compensable.

> This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian Tribe includes as a fundamental incident the right of the injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

Mitchell II, 463 U.S. at 226. (Citations omitted.)

The issue set out in the *Mitchell* doctrine, is not whether the regulations or statutes evince an express private right of action, or a Congressional intent to create a private right of action, but whether or not the statute and regulations, taken as a whole,

create a fiduciary relationship.

The finding of a fiduciary relationship, the breach of which is compensable, does not depend on Congress' intent to create a private right of action. **It depends on whether or not a fiduciary relationship exists as a result of the elaborate control of the government over the resources of the Indians.** The district court erred when it applied the traditional, and now outdated, four step test of *Cort v. Ash*, 422 U.S. 66, 95 (1975), for determining whether a private right of action exists. This mistake by the district court was obvious and reversible error in light of *Mitchell II*: *Cort v. Ash* was overruled by the U.S. Supreme Court in *Mitchell II*. 463 U.S. at 228, 229-30(citation omitted) (Powell, J., dissenting: "[Congress] . . . has effectively reversed the presumption that absent 'affirmative statutory authority,' . . . The United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries.").

The statutes and regulations providing for Indian housing under the United States Housing Act of 1937, the National Housing Act, the Indian Housing Act of 1988, and the Native American Housing and Self Determination Act, all provide for HUD's comprehensive control, management and supervision of Indian housing. It is clearly

elaborate enough to create a fiduciary duty sufficient to satisfy *Mitchell II.*

The scope of the regulations under 24 C.F.R. §805, et seq. which implement the USHA of 1937, goes way beyond the regulations actually contained therein. 24 C.F.R. §805.101(b). "In HUD's judgment it would be impractical to repeat all the other applicable regulations, which have been incorporated into this particular regulation by reference only." *Federal Register,* Vol. 44, 216, 64204, 1979, Subpart a(2).

HUD is more than a "pass-through" funding source for low income Indian housing, or the simple mortgage lender it portrayed in the District Court. HUD approves the projects initiated by the Indian Housing Authority, according to HUD standards. HUD approves the total development costs and the construction plans. 24 C.F.R. §805.103, §805.203, 24 C.F.R. §805.206. HUD must determine whether or not the local Indian housing authority is capable of administering HUD requirements. The IHA must meet HUD requirements for bookkeeping, submission of reports, maintenance of the property, occupancy, collection of rents and other payments, and eviction procedures. 24 C.F.R. §805.207. HUD must approve the loans and other contracts. 24 C.F.R. §805.209, §805.211. HUD approves the development program for a project prior to the annual contributions contract being executed. 24 C.F.R. §805.210.

All projects must meet HUD's minimum property standards. 24 C.F.R.

§805.212, 24 C.F.R. part 200, subparts. HUD must approve the site selection. 24 C.F.R. §805.216 and §805.217. HUD approves the maximum amount charged to the development cost per site. 24 C.F.R. §805.219. HUD must inspect the property during construction. 24 C.F.R. §805.221(b). Any increase in costs must receive the approval of HUD. 24 C.F.R. §805.223.

There is virtually no aspect of the creation of low income housing on Indian reservations over which the HUD does not establish and maintain elaborate control. That control exists from the inception of the Indian Housing Authority using the approved ordinance created by HUD, to the selection of the site, to the kinds of materials used in construction. There are few ways that a housing authority may act independently from HUD's regulations; if they do, it is with HUD's approval. Appendix 4, Interim Indian Housing Handbook, 1976. It is therefore not surprising that other courts have found HUD's control over housing projects overwhelms the local housing authority sufficient to invoke the Indian Trust Responsibility and give the injured Indian parties a right to sue. . *See Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1202-1204 (D. Az. 2002). The instant case is practically proof positive of such domination and control. The Plaintiffs did not want wooden foundations. They protested them. The Housing Authority did not want them. The Housing Authority protested them. But HUD made the rules. The Representative Plaintiffs had to accept

the wooden foundations or there would be no housing for them.

Just as the timber regulations at issue in *Mitchell II* were so pervasive that it gave those Indians a right to sue for breach of trust responsibility, the housing regulations in this case were so pervasive that Plaintiffs have a right to sue for a breach of trust responsibility. At the very least Plaintiffs should be allowed to conduct discovery to prove how pervasive the statutory and regulatory scheme really was. Plaintiffs believe they could establish, if Defendants don't actually admit, that HUD required wooden foundations notwithstanding the objections of the Housing Authority and occupants both. The wood foundations were not safe or healthy and HUD should have known it.

As trustee, HUD breached the fiduciary relationship when it constructed houses that were not only sub-standard but dangerous to the Indian occupants, and therefore, HUD plainly acted adversely to the beneficiaries' interest. HUD continues to act adversely to its beneficiaries' interests by failing to undertake repair or remediation of the dangerous and unsanitary conditions that persist in Plaintiffs' homes.

Other courts have found HUD's control over housing projects sufficient to invoke the ruling of Mitchell II. *Dewakuku v. Martinez*, 226 F.Supp.2d at 1202, 1209. Plaintiffs have stated a cause of action for breach of the federal governments' fiduciary duties. The district court clearly erred in rejecting Plaintiffs claims.

B. The District Court Erred in Rejecting the Application of the Administrative Procedures Act.

The District Court acknowledged that 5 U.S.C. §702 of the Administrative Procedure Act (APA) waives sovereign immunity over claims for equitable relief based on agency action. App. 2, p. 7-8. However, the district court erred by mischaracterizing Plaintiffs' claims under the APA as claims for money damages which are not available under the APA. *Id.*, p. 1,2,6,8.

The Supreme Court in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed 2d 749 (1988), clearly stated that the remedy under the APA is an action for specific relief and not for "money damages" under 5 U.S.C. §702, **even though the Order could require the payment of money** by the Federal government. *Bowen*, 108 S.Ct. at 2731, 2740. The District Court's conclusion is clearly wrong, and totally out of cinque with the decision of the United States Supreme Court.

The Court in *Bowen* explained that damages are a substitute for a loss suffered by a person, and a specific remedy is not a substitute. Specific remedies attempt to give the plaintiff "the very thing to which he was entitled." *Id.* at 2732 (quoting *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), and *D. Dobbs Handbook on The Law of Remedies*, 135 (1973). Representative Plaintiffs in the instant case are not asking

for any damages. They are not asking for a substitute. They are asking for the very thing to which they are entitled, namely, an order directing HUD to follow the law and grant them the safe, decent, and sanitary housing to which the law says they are entitled. Under *Bowen*, the fact that it might cost HUD some money to obey such an order is irrelevant. The United States Supreme Court has said that cost does not amount to "money damages" within the meaning of 5 U.S.C. §702.

> The fact that the mandate is one for the payment of money must not be confused with the question whether such payment, in these circumstances, is a payment of money as damages or as specific relief.

108 S.Ct. at 2735; See, also, *Zellous v. Broadhead Assoc.*, 906 F.2d 94 (3rd Cir.1990).

The fact that a court order forcing HUD to meet its statutory and regulatory duties may entail an expenditure of funds to remedy the condition of Plaintiffs homes is not the decisive point. Plaintiffs' are not asking for monetary damages at this point; what Plaintiffs seek is clearly something "other than money damages." They seek specific relief for HUD to meet its statutory and regulatory duties.

The district court clearly erred in dismissing Plaintiffs' claims under the APA.

C. The District Court Erred in Refusing to Find a Waiver of Sovereign Immunity for Blackfeet Housing.

The issue as to the waiver of sovereign immunity by Blackfeet Housing turns on

the "sue and be sued" clause in the ordinance creating it. This ordinance, and its language, was mandated by HUD under regulations designed to create housing on Indian reservations. 24 C.F.R. §§805 et seq., App. 1.

Tribal Ordinance No. 7, Article 5 - Powers, states in part:

> 2. The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

This is a typical "sue and be sued" provision. It is about as direct and explicit a waiver of sovereign immunity as one can imagine.

> Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings.

Federal Housing at Administration v. Burr, 309 U.S. 242, 245 (1940). This language was required by the United States Department of Housing and Urban Development ("HUD") in all Indian Housing Authority Charters for the specific purpose of allowing them to enter the business world, to contract and to act without the strictures and limitations of Tribal sovereign immunity.

> It is important to the development of the Indian tribes that they be given a greater control over their own destinies. If they are to be permitted to form corporations to conduct semi-governmental activities, they must of necessity be

> permitted to waive immunity from suit with respect to those activities.

Namekagon Development Company, Inc. v. Bois Forte Reservation Housing Authority, 395 F.Supp 23, 28-29 (D. Minn. 1974); aff.'d 517 F.2d 508 (8th Cir. 1975).

The issue is whether the "sue and be sued" clause is sufficient to waive sovereign immunity for all purposes, or whether the second clause in that paragraph limits the waiver. Defendant Blackfeet Housing claims it is not a general waiver but only authorization to the Housing Authority to waive sovereign immunity provided it does so by further contract.

The Montana federal district courts have uniformly concluded, until Judge Haddon's ruling at bar, that the "sue and be sued" clause in the ordinance is itself sufficient to waive sovereign immunity of the Housing Authority. *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F.Supp. 599, 605-606 (D. Mont.,1981), *R.J. Williams Co. v. Fort Belknap Housing Authority*, 509 F.Supp. 933,938, fn. 1 (D.Mont.1981); *See, also, Snowbird Construction Co., Inc. v. United States Department of Housing and Urban Development*, 666 F.Supp. 1437 (D. Idaho 1987)(Sue and be sued language of a tribal ordinance unequivocally expresses a waiver of sovereign immunity).

This Circuit, in affirming *R.J. Williams*, clearly upheld this rule of law of the

Montana federal courts. *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983). The question raised in *R.J. Williams* was whether the Fort Belknap Housing Authority was a Montana citizen for diversity jurisdiction purposes. This Court stated:

> The Housing Authority is an incorporated entity and as such is a Montana citizen for diversity purposes. *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F.Supp. 599, 602-02 (D.Mont.1981). The issue of citizenship for this purpose is often entangled with the issue of sovereign immunity. **Any sovereign immunity the Housing authority had, however, was waived by the operation of Fort Belknap Ord. No. 2-77, art. V, § 2 (1977), a "sue and be sued" clause in the ordinance establishing the Housing Authority.** *See also*, 24 C.F.R. §§ f805.108-109 & app. I, art. V. § 2.

719 F.2d at 982, fn. 2. (Bold emphasis added.)

The tribal ordinance of the Fort Belknap Tribe at issue in *R.J. Williams* is identical to the Blackfeet Tribal Ordinance at issue here, and is identical to the Crow ordinance quoted in *R.C. Hedreen Co.*, 521 F.Supp. 605-06. In fact, all the Indian housing authorities created in the 1970's were required by HUD to adopt identical language regarding the right to sue and be sued in their Charters. *Id.*

In *R.C. Hedreen* the Montana federal district court relied on the fact that the Crow housing authority's "sue and be sued" clause allowed the housing authority to effectively enter the commercial market in order to take advantage of the HUD programs. It also found that:

> it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.

521 F.Supp. at 606, citing *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575, 587 (S.D.N.Y. 1920). Thus, unless this Court overturns the authority R.C. Hedreen , or its own precedent in R.J. Williams Co., it must reverse the District Court on this issue.

Tribal Defendants argue that their Ordinance should be read to limit the waiver of sovereign immunity to situations in which the Housing Authority specifically waives sovereign immunity by further language in a contract. Tribal Defendants support their theory by reference to the second part of the sentence, namely, "and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have, ..."

Tribal Defendants' position is flawed for three reasons. First, such an interpretation is contrary to the plain meaning of the wording of the ordinance. The language, namely, "The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities under this ordinance ... ," is clear and

unambiguous. Without torturing the words, the Ordinance cannot be read any other way: the Council has waived the Housing Authority's immunity from suit. If the Tribal Council had intended to limit the Housing Authority's waiver to subsequent contracts, the ordinance should have said so.

Second, if Defendant's theory were correct that additional action and contract is necessary on the part of the Housing Authority to waive immunity, then the first clause of Section 2, *supra*, would have to be ignored where it states:

> The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities under this ordinance. ...

Standard rules of statutory rules of construction require that courts give meaning to all the words used in an enactment. Therefore, the only reasonable interpretation of Tribal Ordinance No. 7, Article 5, Section 2 which gives meaning to the entire sentence is that sovereign immunity is waived for the Housing Authority, ***and***, in addition, the Housing Authority is authorized to enter into contracts spelling the terms of waiver in more detail. The language used in the Ordinance evinces the Tribe's intent to make the Housing Authority amenability to suit unqualifiedly clear. It does not add an additional condition precedent to waiver.

Third, as held by the Montana federal district court, it is repugnant to give any organization the right to engage in commerce including the right to sue and enter into

contracts without also having the responsibility of being sued. They should not be able to receive the advantages of trade and commerce without having to worry about being sued. *R.C. Hedreen*, 521 F.Supp. at 606.

See, the opinion of the Assistant Secretary of the Department of Interior as to the eligibility of Indian tribes for loans and grants under the National Housing Act of 1937. He states that to be eligible for the benefits of the National Housing Act of 1937, a tribe which is organized under the Indian Reorganization Act needs to act in a corporate capacity to engage in business ventures including the making of contracts and having the right to sue and be sued. Appendix 5, 57 Interior DEC. 145, 1940 W.L. 4162 (DOI).

The Blackfeet Nation is organized under the Indian Reorganization Act. It, therefore, has both a Tribal and Corporate Charter. This Corporate Charter is analogous to the ordinance creating the Blackfeet Housing Authority in its ability to engage in the kinds of business described by the Department of Interior. The whole idea of creating the Blackfeet Housing Authority was to allow the Authority to engage in the business of constructing housing, a part of the **corporate activity** of the tribe. It was intended to engage in business ventures as the Assistant Secretary's opinion sets forth. It would be repugnant to allow the Housing Authority to engage in corporate and business activities, yet be immune from suit. *R.C. Hedreen*, 521 F.Supp. at 606

The Montana district court in *R.C. Hedreen* also relies on a case from the United States District Court of Minnesota, *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23 (1974), aff'd,, 517 F.2d 508 (8th Cir. 1975), (finding a waiver of the Housing Authority's sovereign immunity from levy and execution). In *Namekagon*, the Court analogizes the corporate status of the Housing Authority with federal corporations created by the United States Congress. The Court in *Namekagon* found that federally created corporations waived immunity by virtue of the circumstances surrounding the corporation's creation and operation, even without a "sue and be sued" clause.[4]

D. The District Court Erred in Holding Plaintiff's Exclusive Remedy Is with the U.S. Claims Court for Damages.

The Tucker Act vests the Federal Claims Court with jurisdiction for relief based on contract claims exceeding $10,000.00. 28 U.S.C. §1491(a)(1). However, the Claims Court does not have exclusive jurisdiction for claims exceeding $10,000.00 under the Tucker Act. *Jackson Square Assoc. v. United States Department of Housing & Development*, 797 F.Supp. 242, 244 (W.D.N.Y. 1992).

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[4]The Court in *Namekagon* clearly drew a distinction that the Indian housing authority was acting as a corporate entity. This important distinction has been discussed in the Ninth Circuit case of *Lineen v. Gile River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002), and cases cited therein. *See, also Indian TP. Passamaquoddy v. Governor*, 495 A.2d 1189, 1194 (Me. 1985)(Scolnik, J., dissenting on other grounds).

28 U.S.C. §1331 states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law or treaties of the United States.

An action may be brought under federal question jurisdiction, 28 U.S.C. §1331, in the district court provided there is a waiver of sovereign immunity. As Plaintiffs have demonstrated in this appeal, sovereign immunity does not shield either HUD or Blackfeet Housing from suit.

The jurisdiction of the Claims Court is not exclusive. It is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." *Western Security Co. v. Derwinski*, 937 F.2d 1276, 1279 (7th Cir. 1991).

> Suits to enforce contracts with Federal agencies are governed by federal common law . . . and as a result arise under the Federal law for purposes of §1331.

Derwinski, 937 F.2d at 1280.

Plaintiffs contend that the claims in the Amended Complaint, for declaratory and injunctive relief, habitability, merchantability, and the covenant of good faith and fair dealing, involve a federal question of federal law which might or might not result in a claim for damages. Plaintiffs' claims arise pursuant to HUD's obligation to construct and maintain properties in safe, decent, and sanitary conditions as provided for in the

Minimum Product Standards Requirements for the construction of housing under HUD's regulations.

> The substance of this implied unlimited warranty of habitability we define as follows: upon being notified that a particular party under a lease to a tenant is not in "decent, safe, and sanitary condition due to no fault of the tenant, the secretary must take reasonable, affirmative steps toward making the necessary repairs that will put the property in that condition."

Conille v. Secretary of Housing & Urban Development, 840 F.2d 105, 117 (1st Cir. 1988).

Here, the obligations provided by implied warranties are not addressed by statute. However, the warranties imply an obligation that, because the housing will meet the minimum federal standards by virtue of federal housing laws and HUD's own regulations, the houses must be fit, habitable, and merchantable. Upon being notified that properties are not in a safe, decent, and sanitary condition, HUD is obligated to take affirmative steps to repair the houses. Plaintiffs are asking for nothing more or less than the Department of Housing and Urban Development meet its statutory and regulatory obligations. These claims of Plaintiffs clearly involve a federal question. The federal housing statutes and regulations provide the federal question.

A district court has jurisdiction if there is a grant of subject matter jurisdiction and a waiver of sovereign immunity.

> Whether a particular action is one that "at its essence" is a contract claim, and thus subject to the Tucker Act's restrictions on relief and reform, "depends on the source of the rights upon which the plaintiff basis its claims, and upon the type of relief sought (or appropriate)."

Tucson Airport Authority v. General Dynamics Corp. v. United State of America, 922 F.Supp. 273, 281 (D.C. D.Ariz. 1996).

Here, the issue of habitability, warranty, and good faith and fair dealing is not based on the intent of the parties or on a contractual agreement between the parties. The issue does not generally sound in contract; it is, in fact, based on the federal statutory and regulatory provisions providing the plaintiff with safe, decent housing designed and constructed according to HUD's minimal property standards.

Therefore, since there is an independent bases for federal jurisdiction, the issue does not generally sound in contract, and the relief requested is not contract damages, the Tucker Act's exclusive jurisdiction over claims based on contract does not apply. *Tucson Airport Authority v. General Dynamics Corp. v. United State of America*, 922 F.Supp. at 281; *Conille v. Secretary of Housing & Urban Development*, 840 F.2d at 117. This is particularly true when, as here, equitable relief is requested. *Bowen*, supra, 487 U.S. at 905. The District Court's decision to the contrary is wrong and should be reversed.

VII. CONCLUSION

IT IS RESPECTFULLY SUBMITTED that Plaintiffs have established that the District Court committed reversible error on all four points raised in this Appeal. Plaintiffs have stated causes of action upon their pleadings that withstand Defendants' preliminary motions to dismiss. Plaintiffs pray this Court will reverse the Memorandum and Order of the District Court dismissing this action, and, further, will remand this case back to the trial court for further proceedings, including the discovery processes necessary for Plaintiffs to proceed to the merits of their claims.

Dated this 16 day of September, 2004.

THOMAS E. TOWE
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SIMKOVIC LAW FIRM

Counsel for Plaintiffs/Appellants

By: _____
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STATEMENT OF RELATED CASES

There is and has been no other appeal in or from the civil action that is the subject of the pending appeal, nor is there any case known to counsel to be pending in this or any other court that will directly affect or be affected by this Court's decision in the pending appeal. See, however, the appeal to this Court of the unrelated case of *Dewakuku v. Martinez*, 226 F.Supp.2d 1199 (D. Ariz. 2002) which could have some precedential impact on this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Cir. Rule. 32, I hereby certify that the foregoing Brief of Plaintiffs/Appellants is proportionally spaced, has a 14-point typeface, and as determined by the undersigned's word processing program, contains 7,471 words, not including The Table Of Contents, Table of Cases, Table of Authorities, Certificate of Service and Addendum.

DATED this 16 day of September, 2004.

By: _____

CERTIFICATE OF SERVICE

This is to certify that on the 16 day of September 2004, a true and accurate copy of the foregoing *Plaintiffs/Appellants' Opening Brief* was duly served by U.S. First Class Mail, postage prepaid, upon the following counsel of record:

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The original and 15 copies of the Plaintiffs/Appellants' Opening Brief were also sent on the above date to:

Clerk of Court
United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
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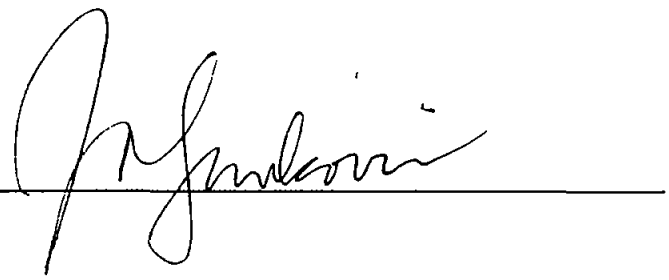
By: 

ADDENDUM

Appendix 1: Amended Class Action Complaint

Appendix 2: District Court Memorandum and Order

Appendix 3: Transcript of Oral Argument

Appendix 4: 57 Interior DEC. 145, 1940 W.L. 4162 (DOI)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MARTIN MARCEAU, CANDICE LAMOTT, JULIE RATTLER, JOSEPH RATTLER, JR., JOHN G. EDWARDS, JR, MARY J. GRANT, GARY GRANT and DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated, Plaintiffs, vs. BLACKFEET HOUSING and its board members SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR, & MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA, Defendants.	Cause No. – CV-02-73-GF-CS0 Judge Haddon **AMENDED** **CLASS ACTION COMPLAINT**

Plaintiffs complain of the Defendants and, for their claim for relief, allege as follows:

A.

INTRODUCTORY STATEMENT

tabbies APPENDIX 1

1. **Class Action.** This is a class-action complaint in which the named Plaintiffs seek to have a class or classes certified in which Martin Marceau, Candice LaMott, Julie Rattler, Joseph Rattler, Jr., John G. Edwards, Jr., Mary J. Grant, Gary Grant, and Deana Mountain Chief represent themselves and all persons similarly situated who are purchasing their homes on a lease purchase arrangement either directly or indirectly from the Defendant Blackfeet Housing, formerly known as Blackfeet Housing Authority.

2. **Defective Homes.** The Defendant BLACKFEET HOUSING either sold or leased homes to representative Plaintiffs and other Class members that were defective. Their construction involved the use of a wood foundation and other inadequate materials and faulty construction and design mandated by the Defendant MEL MARTINEZ, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA (hereinafter "HUD") which materials, construction and design are not appropriate for use in the area in which the homes were located. As a result of this defective materials, construction, and design, mold, sewage, and other toxic substances have developed and been deposited along with other defects which have made the homes uninhabitable, in need of unnecessary repairs, and have caused sickness and illnesses to the Plaintiffs and other occupants as hereinafter set forth. Representative Plaintiffs and other Class members have complained numerous times and requested the problems be fixed or repaired or some other solution be reached and the Defendants have either ignored these complaints or made promises which have not been kept.

IDENTIFICATION OF THE PARTIES

3. The Plaintiffs are homeowners within the territorial boundaries of the Blackfeet Reservation and within Glacier County, Montana, who either purchased homes constructed by the Defendant BLACKFEET HOUSING under the direction and supervision of and with funding from the Defendant HUD. They are all members of the Blackfeet Tribe of Indians.

4. The Defendant BLACKFEET HOUSING is a nonprofit organization organized by and under the auspices and direction of the Defendant HUD to assist members of the Blackfeet Tribe to obtain adequate housing. It is the successor organization to BLACKFEET INDIAN

HOUSING AUTHORITY that was originally organized in 1976 or 1977 for the purpose of building and holding title to the 153 houses and other homes hereinafter referred to. It, too was organized by and under the auspices and direction of the HUD. BLACKFEET HOUSING received all the assets and assumed all the liabilities of BLACKFEET INDIAN HOUSING AUTHORITY. SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR are the current members of the Board of Directors of the BLACKFEET HOUSING.

5. The Defendant MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA (hereinafter "HUD") is the Secretary of a department of government of the United States government charged with providing decent, suitable, safe and sanitary housing to every American through funding and other assistance and who has special responsibilities toward Indian people as set forth in special legislation designed to assist Indian people obtain decent, suitable, safe and sanitary housing.

JURISDICTION AND VENUE

6. The jurisdiction of this court is invoked under the authority of the National Housing Act, 12 USC § 1702 and 42 USC § 1401a. Jurisdiction is also invoked under 28 USC § 1331, namely, a Federal Question under 42 USC § 1441 (the Secretary is obliged to provide a "decent" home and a "suitable" living environment for every American family) and 42 USC § 1437 (the Secretary is obliged to provide decent, safe and sanitary dwellings for families of lower income) and 25 USC § 4101 et seq. (Native American Housing Assistance and Self Determination Act of 1996, the Secretary is obliged to repair and maintain Indian Housing).

7. The Jurisdiction of this court is further invoked under the authority of the Tucker Act, 28 USC § 1346 (a) (2).

8. The supplemental jurisdiction of this court is invoked under the authority of 28 USC § 1367.

9. The venue is proper in this court because the Defendant Blackfeet Housing resides within the judicial district of this court, a substantial part of the events or omissions giving rise to the claim occurred within the judicial district of this court, a substantial part of the property that is the subject of this action is situated within the judicial district of this court, and the representative Plaintiffs all reside within the judicial district of this court (see 28 USC § 1391.)

SOVEREIGN IMMUNITY

10. The sovereign immunity of the Secretary of the Department of Housing and Urban Development is expressly waived in 12 USC Section 1702 and 42 USC Section 1404a. It is also waived by the Tucker Act (28 USC § 1346 (a)(2).

11. The sovereign immunity of Blackfeet Housing is waived by its adoption of a resolution authorizing it to sue and be sued and because it is an arm and instrumentality of HUD thereby subjecting itself to the waiver of sovereign immunity in the previous paragraph.

FACTUAL BACKGROUND

12. The National Housing Act obliges HUD to provide a decent home and a suitable living environment for every American family. 42 USC §1441. HUD is also required to remedy the unsafe and unsanitary housing conditions and acute shortage of decent, safe and sanitary dwellings for families of lower income. 42 USC § 1437. HUD is required to exercise its powers, functions and duties consistently with this National Housing Policy in such a manner as will "facilitate sustained progress in attaining the National Housing Objective" and "in such manner as will encourage and assist (1) the production of housing of sound standards of design,

construction, livability, and size for adequate family life; (2) the reduction of the cost of housing without sacrifice of such sound standards; ..." 42 USC §1441.

13. This statute is not precatory; HUD is obliged to follow these policies. *The Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (DC Cir.) (1973). In fulfilling this mandate of Congress, HUD encouraged and directed the creation of the Blackfeet Housing Authority, predecessor of Defendant Blackfeet Housing for the purpose of assisting persons living within the territorial boundaries of the Blackfeet Indian Reservation to obtain decent and adequate housing.

14. Under the Native American Housing Assistance & Self Determination Act of 1996, Congress has stated that:

> the Federal Government has a responsibility to promote the general welfare of the Nation ... by using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances of factors beyond their control...

25 USC §4101(1). This same act explains that Congress has assumed a trust responsibility for members of Indian tribes to "improve their housing conditions." Id. at (4). Under 25 USC § 4132 of this Act, Congress has directed HUD to provide "housing services" to Indian people which includes "reconstruction, or moderate or substantial rehabilitation" of affordable housing.

15. That on or about 1976 and 1977, the Blackfeet Housing Authority, under the direction and close supervision of HUD, and upon funding made available by HUD, commenced construction of 153 houses on the Blackfeet Indian Reservation.

16. Blackfeet Housing Authority eventually completed the construction of these 153 houses and built additional houses. These houses were sold to Representative Plaintiffs and other Class

members, either directly or indirectly, or were leased to Representative Plaintiffs and other class Members.

17. The construction of these houses was under the close supervision, mandate, and direction of HUD. In this regard, the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish the goals and purposes of HUD.

18. In order to save money or for other reasons unknown to Representative Plaintiffs and Class Members, HUD directed that all 153 homes in the first phase of construction be constructed using chemically-treated wooden foundations even though such foundations were not standard in the industry at the time, were in violation of state and local building codes, are now in violation of their own regulations, and even though HUD knew, or should have known, that such construction materials could eventually produce contamination that could eventually lead to inhabitability of these 153 homes.

19. The Defendant Blackfeet Housing acknowledged the mandates and directions of HUD and submitted thereto and proceeded to construct the houses using chemically-treated wooden foundations and other defective products and designs, even though they also knew such foundations were substandard, in violation of state and local building codes, and would eventually produce contamination that could lead to uninhabitability.

20. Because of the use of wooden foundations and because of other design and construction defects, the houses were unable to provide continuous moisture control. This failure caused widespread mold development and septic contamination.

21. The latent defects of the chemically-treated wooden foundation and other defective designs have become known to Representative Plaintiffs and other Class members recently. In particular, pathogenic mold, septic/sewage contamination, and other toxic and dangerous

substances have developed. These molds, septic/sewage contamination, and other toxic substances have caused various health and medical conditions and have exacerbated other health and medical conditions in representative Plaintiffs and other class members including their spouses and children and other dependents living in their homes.

22. In addition, many of the houses contained extensive septic/sewage contamination resulting from repeated groundwater and septic flooding. Children who have been required to sleep in rooms with mold and septic/sewage contamination have developed health complications that have prevented them from playing sports and that has resulted in frequent nose bleeding, asthma, hoarseness, headaches and malaise, kidney failure, and cancer Elderly and other class members have developed similar health complications from exposure to these contaminations.

23. Because of the pathogenic mold, septic/sewage contamination, and other toxic substances, the houses have become unsafe for human habitation, and Representative Plaintiffs and other Class members have been damaged.

24. In January of 2002 the Environmental Protection Agency of the United States Government declared such chemically treated wooden foundations unfit for use in the construction of homes and banned their use in all such construction.

25. HUD has failed to fulfill its Congressional mandate to provide decent, suitable, safe, and sanitary housing for members of the Blackfeet Indian Reservation, a recognized lower- income group, and to provide housing of sound standards of design, construction and livability.

26. The Housing Authority has sold homes to Representative Plaintiffs and other Class members that are substandard, unsafe, unsuitable, unsanitary, unhealthy and uninhabitable.

27. Representative Plaintiffs and other Class members have repeatedly, since January of 2002, asked HUD and the Housing Authority to fix the problems and to provide safe, decent and suitable housing for Representative Plaintiffs and other Class members. Most of the residents have been living with these biological contaminants for between 5 and 15 years. The problem is ongoing.

28. Defendants have ignored these requests and have failed to fix or repair, reconstruct or rehabilitate the homes of Representative Plaintiffs and other Class members.

29. Representative Plaintiffs and other Class members have been damaged because of these actions and these failures.

30. Representative Plaintiffs and other Class members seek adequate remedies including an order or orders requiring Defendants to comply with the federal law, to make their homes safe, suitable, decent, and sanitary. Representative Plaintiffs and other Class members seek an order or orders requiring Defendants to either rehabilitate or reconstruct their existing homes or provide them with new homes or pay them adequate damages so they may make their own repairs or acquire their own safe, decent and sanitary housing. Representative Plaintiffs seek an order or orders awarding such other damages as may be appropriate and awarding attorney fees as authorized by law.

CLASS ALLEGATIONS

31. Pursuant to the rules for the certification of a class action that exists in federal jurisdictions (Fed.R.Civ.P. 23), the representative Plaintiffs bring this action as a class action consisting of:

> All homeowners and persons living in homes constructed by the Blackfeet Housing or its predecessor with financial assistance and under the direction of HUD, within the Blackfeet Indian Reservation, whose homes are contaminated, unsafe, or unsanitary and who have not received

adequate assistance from Defendants in fixing, repairing, reconstructing, rehabilitating or replacing said contaminated, unsafe, or unsanitary homes or have otherwise suffered damages because of defective design.

32. This action is properly brought as a class action because the class numbers are so numerous that joinder of all of them is impracticable. The identity of the class members and their names and addresses are uniquely within the knowledge of the Defendants.

33. This action is properly brought as a class action because certain questions of law and fact exist as to all class members, and predominant over any questions solely affecting any individual class members, inter alia:

1. Whether HUD mandated the use of chemically treated wood foundations?

2. Whether HUD improperly authorized and approved chemically treated wooden foundations?

3. Whether HUD required designs and construction that was so defective that continuous moisture control was impossible?

4. Whether HUD required designs and construction that resulted in septic/sewage contamination?

5. Whether HUD breached its nonprecatory mandate to provide a decent home and suitable living environment for every American family in authorizing unsafe and contaminated homes to be built and sold or leased to representative Plaintiffs and other class members?

6. Whether HUD breached its nonprecatory mandate to provide decent, safe, and sanitary dwellings for families of lower income?

7. Whether HUD breached its nonprecatory mandate to provide decent, safe, and sanitary dwellings for families of members of an Indian tribe.

8. Whether HUD breached its nonprecatory mandate to fix, repair, reconstruct, rehabilitate, or moderate the defective and

unsafe and unsanitary conditions of Representative Plaintiffs and Class members homes.

9. Whether HUD has a special obligation to these Representative Plaintiffs and other class members because of the Trust Responsibility of the Federal Government to Indians?

10. Whether HUD or the Housing Authority breached the federal common law protection for implied warranties of fitness?

11. Whether a federal common law protection against breach of implied warranty fitness exists in this case?

12. Whether the implied warranty of fitness has been breached in this case?

13. Whether the contaminants used by the Housing Authority at the direction of HUD caused the homes to be unsafe?

14. Whether the contaminants used by the Housing Authority at the direction of HUD caused injury to representative Plaintiffs and other class members?

15. Whether the representative Plaintiffs and other class members are entitled to injunctive relief or other appropriate remedies?

The only material question applicable to individual class members is the precise amount of damages caused to each Class member and the most appropriate remedy for each Class member. This information can be easily determined in a hearing regarding damages or other expeditious method of determining damages and individual remedies in class actions.

34. The Representative Plaintiffs' claims are typical of the Class members' claims since the Representative Plaintiffs and all Class members have been treated in the exact same manner by the Defendants.

35. The interest of the class members will be fairly and adequately protected by Representative Plaintiffs. The Representative Plaintiffs' interests are consistent with those of the Class members. The Representative Plaintiffs are committed to prosecuting this action and have

retained counsel experienced, knowledgeable, and competent in class action litigation and in defective housing issues. Neither the Representative Plaintiffs nor their counsel have any interest that might cause them not to vigorously pursue this action.

36. The Representative Plaintiffs are not antagonistic to, or in conflict with, the interest they seek to represent. The Representative Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

37. Class certification, therefore, is appropriate under the rules of class certification recognized in Fed.R.Civ.Proc. 23(b)(1) because the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members which would result in incompatible results and obligations of the Defendants. Class certification also is appropriate because the adjudication would, as a practical matter, be dispositive of the interests of the individual Class members.

38. Class certification is also appropriate because the above-described common questions of law and fact are predominant over any questions affecting individual Class members, thereby causing a class action to be superior to other available methods for the fair and efficient adjudication of this controversy.

39. The expense and burden of litigation would substantially impair the ability of the class members to pursue individual lawsuits in order to vindicate their rights and place an undue burden on the Court's system. In the absence of a class action, the Class members may not be able to pursue effectively their rights against the Defendants because the damages would be insufficient to justify such an action, and Defendants may not be required to make just compensation or take proper action to remedy the damages they have caused.

COUNT ONE

(Violation of the United States Trust Responsibility)

40. Representative Plaintiffs reassert all the previous allegations.

41. The trust relationship existing between the United States and Indian Nations as set forth in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), "resembles that of a ward to its guardian."

42. The Supreme Court has found that a Federal agency which exerts both pervasive and comprehensiv control over monies or property for the benefit of Indians has a trust or fiduciary relationship with thos Indians. *United States v. Mitchell*, 463 U.S. 206, 222, 103 S.Ct. 2961 (1983).

43. *Mitchell* further holds that the beneficiaries of the trust relationship are individual Indians as well as Indian tribes. "This Court [. . . has] consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the Trustee for damages resulting from a breach of the Trust." *Mitchell*, 463 U.S. at 226.

44. Cannons of constructions require that statutes passed benefiting Indians are to be liberally construed and ambiguous provisions interpreted to the Indians' benefit. Because of the unique legal status of Indians, legal doctrines must be approached from a different perspective. *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 553 (9th Cir. 1991).

45. When the United States Housing Act of 1937 undertook to provide decent homes and suitable living environment for every American Family including Indians, the United States acted within its trust relationship with the Indian Nations and individual Indians. 42 USC §1401 et seq. The National Housing Act undertook the same mandate. 12 USC §§1702-1705.

46. The 1990 Amendment to the National Housing Act provides that the United States will attempt to "remedy the unsafe and unsanitary housing conditions and acute shortage of decent, safe and sanitary dwellings for families of lower income." 42 U.S.C. § 1437 et seq.

47. The statutes and regulations adopted pursuant to these housing acts and amendments, were intended to benefit the Representative Plaintiffs by providing them with safe and sanitary housing. The terms under which the benefits are conferred create a binding obligation which is mandatory, not at the discretion of the Federal Agency, and one which because of its comprehensive and pervasive control of the monies, the property, the standards for constructing the homes, the standards for providing mortgages for the homes, the standards for who qualifies to live in the homes, triggers the fiduciary relationship between the United States and the Representative Plaintiffs.

48. The corpus of the trust agreement is found in the statutes - to provide decent, safe and sanitary housing to the Representative Plaintiffs. The fiduciary relationship is binding on agencies of the federal government including HUD. *Dewakuku v. Cuomo*, 107 F.Supp.2d 1117, 1126 (D. Ariz. 2000), overturned on other grounds; citing *HRI, Inc. v. Environmental Protections Agency*, 198 F.3d 1224, 1245 (10 Cir. 2000), (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 225 [1982]).

49. As trustee, HUD breached the fiduciary relationship when it constructed houses that were not only sub-standard but dangerous to the Indian occupants, and therefore, HUD plainly acted adversely to the beneficiaries' interest.

50. HUD had a duty to repair the houses once it knew of the need. Under the Indian Housing Act passed in 1988 and the subsequent regulations, 24 CFR §905.270, HUD could provide additional money to the local housing authorities for repair and remediation of housing

problems, and therefore, was "a necessary participant in the corrections process after home construction was completed." *Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1203-1204 (D. Ariz. 2002).

51. Indian housing is presently controlled by the Native American Housing and Self-Determination Act of 1996, Pub.L. No. 104-330 (HR 3219), codified at 25 USC §4101 et seq. The primary objective of the Act is "to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian Reservations and in other Indian areas for occupancy by low-income Indian families...." 25 USC §4131(a)(1). The Act also provides for "operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian Housing Authority." 25 USC §4132 (1)-(5). Each housing authority is also required to maintain the housing. 25 USC §4133.

52. Under the Native American Housing Assistance and Self-Determination Act, Congress found that "there exists a unique relationship between the government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people." 25 USC §4101(2). Congress also states that under the Act, the "United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people." 25 USC §4101(3). This language makes clear that the trust responsibility applies to HUD's actions or inactions under its current activities on the Blackfeet Reservation. It also makes clear that the trust responsibility applies to individual Indians as well as tribes.

53. The Representative Plaintiffs have an enforceable right to sue HUD as a trustee for damages resulting from the breach of the trust. As set forth above, by its actions and inactions regarding the homes of Representative Plaintiffs and other Class members HUD has

breached that trust. The Representative Plaintiffs and other class members are entitled to injunctive or declaratory relief, to damages to be determined at trial, and to attorney's fees.

COUNT TWO

(Administrative Procedures Act)

54. Plaintiffs re-assert all of the previous allegations.

55. The action of HUD set forth above is Agency action. Agency action caused harm to the Representative Plaintiffs and other class members, the action was not discretionary, it was otherwise not in accordance with law, and, therefore, is actionable under the Administrative Procedures Act. 5 U.S.C. §701, et seq.

56. The Representative Plaintiffs and other class members have repeatedly asked Blackfeet Housing Authority and HUD to remedy the dangerous housing conditions. These requests have largely been ignored and the Defendants have refused to take action to remedy the housing problem.

57. The Plaintiffs have sought assistance through administrative remedies over fifteen (15) years by complaining to Blackfeet Housing and the agents and employees of HUD about the housing conditions. Although many promises have been made to correct the problems, these complaints have largely been ignored.

58. Repairing or remedying the damages of the sub-standard housing created by HUD under the National Housing Act and its amendments is not discretionary. *Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1205 (D. Ariz. 2002).

59. HUD has violated its own standards by constructing sub-standard housing using materials and construction techniques which do not meet HUD's own standards or standards used in the industry generally.

60. HUD has violated the housing acts and amendments by failing to provide safe, sanitary and decent housing to Representative Plaintiffs and other Class members.

61. The Representative Plaintiffs and other Class members have been harmed by this construction of sub-standard housing and failure to remedy or repair the sub-standard conditions.

62. HUD has an affirmative duty to repair the houses and maintain them under the mandate of the Native American Housing Assistance and Self-Determination Act. 25 USC §4101 et seq.

63. The Representative Plaintiffs and other Class members are entitled to declaratory and injunctive relief and to damages, or other appropriate relief from Defendants, and to attorneys' fees.

Plaintiffs and other class members have been harmed by this construction of sub-standard housing and failure to remedy or repair the sub-standard conditions.

64. Hud has an affirmative duty to repair the houses and maintain them under the mandate of the Native American Housing Assistance and Self-Determination Act. 25 USC §4101 et seq.

65. The Representative Plaintiffs and other class members are entitled to declaratory and injunctive relief, or other appropriate relief from Defendants, and to attorneys= fees.

COUNT THREE

(Injunctive and Declaratory Relief for Violation of a Federal Statute)

66. Representative Plaintiffs reassert all of the previous allegations.

67. The 153 houses and other homes in question were constructed with the assistance of HUD, under the direction of HUD, and with the financing of HUD.

68. They are defective, unsuitable for a living environment, unsanitary, and unsafe for human habitation because of the use of chemically-treated wooden foundations and because of other design defects either because of the original construction or because of Defendants' failure to maintain them properly.

69. The nonprecatory mandate to HUD in 42 USC §§ 1441 and 1437 and in 25 USC § 4101 et seq. requires that HUD remedy the situation by repairing the damage, providing alternative housing, or by responding in damages so that representative Plaintiffs and other class members may obtain decent and suitable housing that is safe and sanitary.

70. Representative Plaintiffs and other class members are entitled to declaratory relief, injunctive relief, or other appropriate relief from Defendants who are capable of remedying the situation.

COUNT FOUR

(Breach of the Covenant of Habitability)

71. Representative Plaintiffs reassert all of the previous allegations.

72. The Housing Authority, by selling or leasing a defective home to Representative Plaintiffs and other Class members, has breached its implied warranty of habitability. Representative Plaintiffs and other Class members are entitled to equitable relief accordingly.

73. The contractual obligations between the parties in this matter arise out of federal law and represent a federal question actionable under 28 USC §1331. "Suits to enforce contracts with federal agencies are governed by federal common law...and as a result arise under federal law for purposes of section 1331." *Jackson Square Associates v. United States Dept. of Housing and Urban Development*, 797 F.Supp. 242, 245 (W.D.N.Y. 1992). (citations omitted). The contract

should be interpreted with closer attention to the obligations of the United States because those obligations arise out of the fiduciary relationship.

74. The implied warranty of habitability is founded under federal common law and under the laws of the State of Montana. Chase v. Theodore Mayer Brothers, 592 F.Supp. 90, 95 (S.D.Ohio 1983), Mathes v. Adams. 254 Mont. 347, 358, 838 P.2.d 390, 396 (1992).

75. Blackfeet Housing and its predecessor, Blackfeet Housing Authority, were created by and under the auspices and direction of HUD. They each became an instrumentality for the accomplishment of the goals of HUD. They remained and still remain under the total dominance and direction of HUD. As such, they each have become an agent, an arm, and an instrumentality of HUD and, as such, are fully liable, along with HUD, for all of the actions and omissions previously alleged. Both Blackfeet Housing and HUD are liable for a breach of the implied warranty of habitability.

76. Representative Plaintiffs and other Class members are entitled to damages for breach of the implied warranty of habitability.

COUNT FIVE

(Breach of the Implied Covenant of Merchantability)

77. Representative Plaintiffs reassert all of the previous allegations.

78. Blackfeet Housing and its predecessor, Blackfeet Housing Authority breached its implied warranty of merchantability by contracting to sell and lease homes to Representative Plaintiffs and other Class members that were defective and unfit for habitation. The houses were constructed in an unsafe and unsanitary and unhealthy manner in violation of the recognized industry standards and in violation of the law and regulations applicable to such housing.

79. Representative Plaintiffs and other Class members are entitled to a remedy. They are entitled to have their homes fixed, repaired, made decent, suitable and safe. In the alternative, they are entitled to alternative, adequate, and satisfactory homes. In the alternative, they are entitled to damages in an amount that will compensate them for the damages they have suffered because of the wrongful acts and omissions of the Defendants.

80. The Blackfeet Housing and its predecessor were created by and under the auspices and direction of HUD. They each became an instrumentality for the accomplishment of the goals of HUD. They remained and still remain under the total dominance and direction of HUD. As such, they each become an agent and instrumentality of HUD and both HUD and Blackfeet Housing are fully liable for all of the actions and omissions alleged in this Count for breach of the implied warranty of merchantability. Representative Plaintiffs and other Class members are entitled to equitable relief, or in the alternative, money damages for this breach.

COUNT SIX

(Breach of the Covenant of Good Faith and Fair Dealing)

81. Representative Plaintiffs reassert all of the previous allegations.

82. Representative Plaintiffs and other Class members are entitled to rely on the good faith and fair dealing of Blackfeet Housing and HUD in pursuing their contractual relationships. Representative Plaintiffs and other Class members who are homeowners purchased these homes under a contract. Representative Plaintiffs and other Class members who are tenants entered into a lease agreement with Blackfeet Housing, which, along with applicable landlord and tenant law, governs the relationship of the parties. Each of the Representative Plaintiffs and other Class members had a justified expectation that Blackfeet Housing and HUD would act in a reasonable manner in the performance of these agreements or conduct an efficient breach.

83. The parties are inherently unequal in their bargaining positions in that Blackfeet Housing and HUD, with access to large amounts of funds, clearly had a superior position to each of the Representative Plaintiffs and other Class members who are lower-income Americans and Indians. Housing for Representative Plaintiffs and other Class members was only available by complying with the wishes and desires of Blackfeet Housing and HUD. There was no other alternative for them to obtain housing.

84. The motivation for entering the contract was a nonprofit motivation.

85. Ordinary contract damages are not adequate because they would not require the parties in a superior position to account for their actions, and they do not make the inferior party whole.

86. Representative Plaintiffs and other Class members are especially vulnerable because of the type of harm that has been suffered. They, by necessity, placed trust in Blackfeet Housing and HUD to provide decent and suitable housing that would be safe and healthy and to repair their homes or replace them if necessary.

87. Blackfeet Housing was aware of this vulnerability. Nevertheless, Blackfeet Housing and HUD acted dishonestly and outside the reasonable commercial standards of fair dealing in the trade by failing to produce decent, suitable, safe, and healthy housing, by representing that such housing was decent, suitable, safe and healthy when it was not, by failing to maintain the properties as required, and by failing to remedy the situation when the defects were revealed to them.

88. The Representative Plaintiffs and other Class members have been damaged and are entitled to recover for a breach of the covenant of good faith and fair dealing sounding in tort and contract. HUD is liable because Blackfeet Housing was its agent or instrumentality in fulfilling the mandate of Congress.

89. Defendants have been guilty of malice, implied malice, and reckless indifference in failing to provide decent, safe, and sanitary housing to Representative Plaintiffs and Class members and Representative Plaintiffs and Class members are entitled to punitive damages accordingly.

COUNT SEVEN

(Emotional Stress)

90. Because of the violations of the laws and regulations designed to protect Representative Plaintiffs and other Class members, because of the breaches of the implied warranties of habitability and merchantability, because of the understanding that they were being furnished a decent, suitable, safe and healthy home when they were not, because of the representation that they were being furnished a decent, suitable, safe and healthy home which was not true, and because of the failure of the Defendants to remedy the situation when they learned that the homes were not decent, suitable, safe and healthy, representative Plaintiffs and other class members have suffered emotional stress.

91. Representative Plaintiffs and other class members are entitled to recover the damages resulting from said emotional stress.

WHEREFORE, Representative Plaintiffs pray for relief as follows:

1. That this case be accepted as a Class Action under Rule 23 of the Fed. R. Civ. Proc., that it be certified as a Class Action, and that Plaintiffs be designated the Representative Plaintiffs with authority to pursue the claims of all class members.
2. That Representative Plaintiffs and other Class members are entitled to relief against all Defendants for breach of the federal government's trust responsibility

towards Indians and Representative Plaintiffs and other Class members as set forth in the mandates of Congress in the various Housing Acts.

3. That Representative Plaintiffs and other class members are entitled to injunctive and/or declaratory relief against all Defendants, requiring Defendants to comply with the federal laws and regulations, to immediately take whatever action is necessary to provide decent, safe and sanitary homes, and, if needed, to conduct whatever study or fact finding is necessary to insure the health of the Representative Plaintiffs and other class members and their families is not further jeopardized.

4. That Representative Plaintiffs and other Class members are entitled to relief and damages for the breach of the implied warranty of habitability against all Defendants.

5. That Representative Plaintiffs and other class members are entitled to relief and damages for the breach of the implied warranty of merchantability against all Defendants.

6. That Representative Plaintiffs and other class members are entitled to relief and damages for the breach of the covenant of good faith and fair dealing against all Defendants and for punitive damages against all Defendants.

7. That Representative Plaintiffs and other class members are entitled to damages for emotional stress against all Defendants.

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RESPECTFULLY SUBMITTED this 3rd day of April, 2003.

ATTORNEYS IN CHARGE FOR THE REPRESENTATIVE PLAINTIFFS AND PUTATIVE CLASS:

TOWE, BALL, ENRIGHT, MACKEY & SOMMERFELD, P.L.L.P.

By _____
THOMAS E. TOWE

and

SIMKOVIC LAW FIRM, P.L.L.C.

By _____
JEFFREY A. SIMKOVIC

DEMAND FOR JURY TRIAL

Representative Plaintiffs demand a trial by jury on all issues for which they are entitled to a trial by jury.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

MARTIN MARCEAU, CANDICE LAMOTT, JULIE RATTLER, JOSEPH RATTLER, JR., JOHN G. EDWARDS, JR., MARY J. GRANT, GARY GRANT and DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

BLACKFEET HOUSING and its board members SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR, & MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA,

Defendants.

No. CV-02-73-GF-SEH

MEMORANDUM AND ORDER

BACKGROUND

Plaintiffs brought this action against Blackfeet Housing, four of its former board members,[1] and Mel Martinez, Secretary of the Department of Housing and Urban Development (HUD), for money damages and to obtain repairs to Plaintiffs' homes located on the Blackfeet Indian Reservation.[2] Blackfeet Housing's predecessor, Blackfeet Indian

1. Blackfeet Housing and the former board members are referred to in this Memorandum and Order as the "Tribal Defendants."

2. The suit against Martinez in his official capacity as Secretary of HUD is in effect a suit against HUD. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). For purposes of this Memorandum and Order, HUD will be designated as the Defendant.

tabbies APPENDIX 2

Housing Authority, between 1977 and 1980, built approximately 153 low-income homes on the Blackfeet Indian Reservation under HUD's Mutual Help Homeownership and Opportunity Program (MHHO Program), a program designed to help low-income Indian families become homeowners. Federal law required the homes to be "decent, safe, and sanitary." 42 U.S.C. § 1437a(b)(1)(1976). HUD provided financial assistance for the construction of the homes.

Plaintiffs are eight Indian persons who purchased homes built under the MHHO Program. The homes have chemically-treated wood foundations. The Amended Complaint asserts that problems inherent to wooden foundations have exposed Plaintiffs to mold and other toxic substances. Relief sought includes claims for damages and claims for repair or replacement of the homes.[3]

Defendants have moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.[4] The Tribal Defendants have also moved for a protective order precluding further discovery pending ruling on their motion to dismiss. Hearing on the motions was held on November 12, 2003. Supplemental briefs and supporting documents requested by the Court were submitted in December of 2003.[5]

HUD'S MOTION TO DISMISS

A. Counts 1 and 3 — Trust Responsibility Claim and Claim for Injunctive Relief

Counts 1 and 3 of the Amended Complaint assert claims against HUD for damages for breach of trust responsibility and for injunctive relief. The claims are based upon five statutes: the United States Housing Act of 1937 (USHA), 42 U.S.C. § 1437-1437x; the Indian Housing

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3. Counts 2 and 3 seek mandatory injunctive relief in the form of repair or replacement of the homes. Counts 1, 4, 5, 6 and 7 seek monetary damages.

4. HUD's Rule 12(b)(6) motion is, in substance, a Rule 56 motion. Both HUD and Plaintiffs rely on documents outside the pleadings. In re Rothery, 143 F.3d 546, 548-49 (9th Cir. 1998); San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470, 476-77 (9th Cir. 1998).

5. The documents requested by the Court and provided by the parties included HUD regulations in effect at the time Plaintiffs' homes were built.

Act of 1988 (IHA), 42 U.S.C. § 1437aa-ff; the Native American Housing and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 *et seq.*; the Housing Act of 1949, 42 U.S.C. § 1441 *et seq.*; and the National Housing Act (NHA), 12 U.S C. §§ 1702-1750.

Four criteria must be met to establish a cognizable claim against HUD grounded in any one of the five statutes relied upon by Plaintiffs:

(1) That HUD was subject to a statutory duty--- In this case, to ensure Plaintiffs' homes were constructed and maintained in a safe and sanitary condition;

(2) That HUD breached that duty;

(3) That a private right of action against HUD to enforce the breach was available; and

(4) That sovereign immunity with respect to the private right of action was waived.

United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003); United States v. Mitchell, 463 U.S. 206, 212-17 (1983); FDIC v. Meyer, 510 U.S. 471, 484 (1994). In the absence of any one of the criteria, no claim may be asserted.

A private right of action against HUD may be established in three ways. First, a private right of action may be expressed by statute. Mitchell, 463 U.S. at 216-17. Second, a private right of action may be implied from a statute's language and structure. Alexander v. Sandoval, 532 U.S. 275, 286-92 (2001); Cort v. Ash, 422 U.S. 66, 78 (1975); Dewakuku v. Martinez, 217 F.3d 1031, 1037-40 (Fed. Cir. 2001). Third, a private right of action may be said to exist under the judicially created "Mitchell Doctrine," if a statute and its implementing regulations impose upon HUD full responsibility to manage or control an Indian resource for the benefit of Indians. Navajo Nation, 537 U.S. 488, 504-07 (2003); White Mountain Apache Tribe, 537 U.S. at 472-74; Mitchell, 463 U.S. at 224-25. The statutes and regulations relied upon by Plaintiffs will be examined, in turn, to determine whether they support cognizable claims against HUD.

The United States Housing Act of 1937

Plaintiffs' homes were built under the authority of the USHA, 42 U.S.C. § 1437 *et seq.* (1976), its implementing regulations and the Interim Indian Housing Handbook, 7440.1 (March 1976). Although courts have recognized a waiver of sovereign immunity for claims authorized by the USHA (Dewakuku, 217 F.3d at 1036), that act cannot support a trust responsibility claim or a claim for injunctive relief against HUD. The legislation does not specify a private right of action. 42 U.S.C. § 1437 *et seq.* (1976). A private right of action likewise cannot be implied from the language and structure of USHA. Perry v. Housing Auth. of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981). Finally, a private right of action cannot be said to exist under the Mitchell Doctrine because neither USHA, nor its implementing regulations, nor the Interim Indian Housing Handbook, imposed upon HUD responsibility to control the construction and maintenance of public housing on the Blackfeet Indian Reservation.

The Blackfeet Indian Housing Authority was responsible for designing and constructing the homes built under the MHHO Program. Interim Indian Housing Handbook 7440.1, ch. 2, p. 2-1 (HUD 1976); 42 U.S.C. § 1437(a)(1976); 24 C.F.R. § 805.203 (1976). HUD only reviewed the Housing Authority's activities to ensure the homes complied with HUD's Minimum Property Standards. 24 C.F.R. §§ 805.210, 805.211(b), 805.212 (1976); 24 C.F.R. pt. 200, subpt. S (1976); Interim Indian Housing Handbook 7440.1, chs. 4, 5, 6, pp. 3-19 to 3-21, 5-1 to 6-48 (HUD 1976).[6] HUD was not responsible for maintaining the homes built by the Blackfeet Indian Housing Authority under the MHHO Program. Maintenance responsibilities rested exclusively with the home buyers and the Housing Authority. 24 C.F.R. § 805.418(a)(1), (a)(2)(ii)(1976).

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6. Plaintiffs contend that HUD should not have permitted the Blackfeet Indian Housing Authority to build homes on chemically-treated wood foundations because it was not permitted under HUD's Minimum Property Standards. The applicable Minimum Property Standards list the use of pressure-treated timber foundations as an accepted engineering practice. See 24 C.F.R. pt. 200, subpt. S, app. (1976); see also, *Minimum Prop. Stands. for One and Two Fam. Dwellings*, HUD Handbook 4900.1, pp E-1 to E-2, app. E (HUD 1973 ed.).

The Indian Housing Act of 1988

The IHA, which amended the USHA, was enacted approximately 8 years after Plaintiffs' homes were built. By that legislation, Indian housing programs were moved into a separate title within the USHA. 42 U.S.C. § 1437aa-ff (1988).

The IHA does not support a trust responsibility claim or a claim for injunctive relief against HUD because a private right of action does not exist under that act.[7] A private right of action is not expressed in the act. 42 U.S.C. § 1437aa-ff (1988). Nor can a private right of action be implied from the language and structure of the IHA. Dewakuku, 271 F.3d at 1037. Finally, neither the IHA nor its implementing regulations imposed upon HUD a duty to ensure that homes built under the MHHO Program were properly maintained. 42 U.S.C. § 1437aa-ff (1988); 24 C.F.R. § 905 *et seq.* (1991). Maintenance responsibilities rested exclusively with the home buyers and the Blackfeet Indian Housing Authority. 42 U.S.C. § 1437bb(e)(3) (1988); 24 C.F.R. § 905.428(a)(1), (a)(2)(ii) (1991). Consequently, there is no private right of action under the Mitchell Doctrine within the IHA.

The Native American Housing and Self-Determination Act of 1996

In 1996, the IHA was repealed and replaced by NAHASDA's Indian housing block grant program. 25 U.S.C. § 4101 *et seq.*; 24 C.F.R. pt. 1000 (1997). NAHASDA and its implementing regulations now provide the exclusive mechanism for controlling HUD's role in Indian public housing.

NAHASDA does not support a trust responsibility claim or a claim for injunctive relief. A private right of action is not expressly provided for in NAHASDA. 25 U.S.C. § 4101 *et seq.* Nor can a private right of action be implied from the language and structure of the act. Id. And, a private right of action cannot be said to exist under the Mitchell Doctrine because neither NAHASDA, nor its implementing regulations, impose on HUD a duty to manage or control the

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7. Since the IHA amended the USHA, the court recognized waiver of sovereign immunity in the USHA would apply to claims arising under the IHA. Dewakuku, 217 F.3d at 1036.

maintenance of public housing on Indian lands. 25 U.S.C. § 4101 *et seq.*; 24 C.F.R. § 1000.200 *et seq.* (2003). In short, a private right of action does not exist under NAHASDA.

Under NAHASDA, HUD makes block grants to Indian tribes to enable the tribes to develop their own public housing programs. 25 U.S.C. §§ 4103(18), (21), 4111(a), 4152 (2000); 24 C.F.R. §§ 1000.201, 1000.202, 1000.301-1000.340 (2003). Indian tribes are responsible for maintaining the public housing they build. 25 U.S.C. § 4133(b)(2000). HUD has only limited oversight responsibilities to ensure the tribes use the grant funds for eligible activities. 25 U.S.C. § 4165(b)(1)(2000); 24 C.F.R. § 1000.520 (2003).

The trust responsibility claim, based on NAHASDA, must also be dismissed because HUD has not waived its sovereign immunity for that claim. NAHASDA itself contains no waiver of immunity, and the waiver in the Little Tucker Act, 28 U.S.C. § 1346(a)(2), does not apply because Plaintiffs have failed to forego damages in excess of the $10,000 jurisdictional limitation in that act. Demontiney v. United States, 255 F.3d 801, 809 (9th Cir. 2001); Price v. Gen. Serv. Admin., 894 F.2d 323, 324 (9th Cir. 1990).

The Housing Act of 1949

The Housing Act of 1949 was enacted to help all families in America obtain decent homes and a suitable living environment. 42 U.S.C. § 1441a (2000); Cedar-Riverside Assoc., F.2d 254, 257 n.9 (8th Cir. 1979). The Housing Act of 1949 likewise cannot support a trust responsibility claim or a claim for injunctive relief against HUD. A private right of action is not expressly provided for in the act. 42 U.S.C. § 1441 *et seq.* A private right of action may not be implied from the language and structure of the act. Cedar-Riverside Assoc., 606 F.2d at 258. And, as with the other acts under consideration, a private right of action cannot be said to exist under the Mitchell Doctrine since neither the Housing Act of 1949 nor its implementing regulations impose upon HUD a duty to control the construction or maintenance of public housing on Indian lands. 42 U.S.C. § 1441 *et seq.* (2000) Moreover, the Housing Act of 1949 contains no waiver of sovereign immunity.

The National Housing Act

The NHA was enacted in 1937 to assist private industry in providing housing for low and moderate income families. 12 U.S.C. §§ 1715l(a), 1738(a)(2000). Congress sought to accomplish the legislative purpose by encouraging private investment in the construction of public housing. The NHA permits HUD to guarantee the repayment of mortgage loans made by private lenders. Pankow Construction Co. v. Advance Mortgage Corp., 618 F.2d 611, 614 (9th Cir. 1980); El Dorado Springs v. United States, 28 Fed. Cl. 132, 133 (1993). The NHA cannot support a trust responsibility claim or a claim for injunctive relief against HUD absent a determination that the NHA imposed upon HUD a duty to supervise the construction or maintenance of public housing on Indian lands. No such duty can be found in the language of the act. 12 U.S.C. §§ 1702-1750 (2000).

The trust responsibility claim, to the extent it is based on the NHA, must also be dismissed for lack of waiver of sovereign immunity. The NHA's waiver of sovereign immunity does not apply to the trust responsibility claim, since the waiver is limited to claims arising from HUD's activities as an insurer of mortgages. 12 U.S.C. § 1702 (2000). Likewise, the waiver of sovereign immunity in the Little Tucker Act does not apply since Plaintiffs' damage claims exceed the $10,000 jurisdictional limitation in that act. El Dorado Springs, 28 Fed. Cl. at 136; Demontiney, 255 F.3d at 809.

B. Count 2 --- the APA Claim

Count 2 asserts a claim for injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, based on HUD's failure to comply with a purported duty, under NAHASDA, to repair any unsafe and unsanitary conditions in Plaintiffs' homes. Plaintiffs seek an order directing HUD to comply with the claimed duty.

The APA is a procedural statute. 118 F.3d 1327, 1329 (9th Cir. 1997). It does not, itself, create substantive rights. El Rescate Legal Services, Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 752 (9th Cir. 1992).

It permits judicial review of federal agency actions to determine whether a federal agency violated a duty imposed by another statute. 5 U.S.C. § 702 (2000); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).

The APA claim must be dismissed. Neither NAHASDA nor its implementing regulations impose a duty upon HUD to maintain Plaintiffs' homes. Any duty to repair Plaintiffs' homes rests exclusively with Plaintiffs and Blackfeet Housing. 25 U.S.C. § 4133(b)(2000).

C. **Counts 4, 5 and 6 --- Breach of Contract Claims**

Counts 4, 5 and 6 assert breach of contract claims against HUD for breaches allegedly committed by the Blackfeet Indian Housing Authority when it sold Plaintiffs their homes. Plaintiffs allege HUD to be vicariously liable for the Housing Authority's breaches as an instrumentality or agent of HUD.

Dismissal of Counts 4, 5 and 6 is required on two separate grounds. First, HUD is not liable for contract breaches by the Blackfeet Indian Housing Authority. The Housing Authority is a tribal agency only. It is not an instrumentality or agent of HUD. Weeks Construction, Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986); Tohono O'odham Nation v. Schwartz, 837 F. Supp. 1024, 1031 (D. Ariz. 1993); Dubray v. Rosebud Hous. Auth., 565 F. Supp. 462, 465-66 (D.S.D. 1983); DeRoche v. United States, 2 Cl. Ct. 809, 812 (1983). Second, this Court lacks subject matter jurisdiction over the contract claims. Plaintiffs have not limited their damage claims to the $10,000 jurisdictional limit prescribed in the Little Tucker Act. 28 U.S.C. § 1346(a)(2)(2000); Rowe v. United States, 633 F.2d 799, 800-01 (9th Cir. 1980). Only the Court of Claims has jurisdiction over the contract claims. Id.

D. **Counts 6 and 7 --- Tort Claims**

The tort claims asserted in Counts 6 and 7 are subject to summary dismissal. Plaintiffs conceded at the November 12, 2003, hearing that HUD's motion to dismiss was well-taken.

TRIBAL DEFENDANTS' MOTION TO DISMISS

The Tribal Defendants have moved to dismiss all claims on grounds of tribal sovereign immunity. Plaintiffs argue tribal immunity has been waived.

Indian tribes, tribal agencies, and tribal officials acting within the scope of their official duties enjoy sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Linneen v. Gilva River Indian Comm., 276 F.3d 489, 492 (9th Cir. 2002); Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993). Blackfeet Housing, as a tribal agency, is entitled to sovereign immunity. Dillon v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583-84 (8th Cir. 1998); Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 84 (2nd Cir. 2001); Weeks Construction, Inc., 797 F.2d at 670. Sovereign immunity, however, may be waived. United States v. Testan, 424 U.S. 392, 399 (1976). The waiver must be unequivocal. Id.

Plaintiffs contend that a waiver provision in Tribal Ordinance No. 7 operates to waive the Tribal Defendants' immunity for the claims asserted in this case. It states:

> The Council hereby gives its irrevocable consent to allowing the [Blackfeet Indian Housing] Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for debts or obligations of the Authority.

Tribal Ordinance No. 7, art. V, ¶ 2 (Jan. 4, 1977).

Article V is not a waiver of the Tribal Defendants sovereign immunity for the claims asserted in this case. That provision simply gives the Tribal Defendants the authority to waive sovereign immunity, by contract, should they so choose. Ninigret Development Corp. v. Wetuomuck Hous. Auth., 207 F.3d 21, 30 (1st Cir. 2000); Dillon, 144 F.3d at 583-84; Garcia, 268 F.3d at 87. No contractual waiver exists in the record.

ORDER

1. HUD's motion to dismiss the original Complaint[8] is DENIED as moot.

2. HUD's motion to dismiss the Amended Complaint[9] is GRANTED.

3. Tribal Defendants' motion to dismiss the original Complaint[10] is DENIED as moot.

4. Tribal Defendants' motion to dismiss the Amended Complaint[11] is GRANTED.

5. In view of the Court's ruling on Tribal Defendants' motion to dismiss, Tribal Defendants' motion for a protective order[12] is DENIED as moot.

6. The Clerk of Court is directed to enter judgment consistent with this Memorandum and Order.

DATED this 14th day of January, 2004.

Sam E. Haddon

SAM E. HADDON
United States District Judge

8. Docket No. 22

9. Docket No. 48

10. Docket No. 9

11. Docket No. 45

12. Docket No. 15

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

MARTIN MARCEAU, CANDICE LAMOTT, JULIE RATTLER, JOSEPH RATTLER, JR., JOHN G. EDWARDS, JR., MARY J. GRANT, GARY GRANT and DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Plaintiffs,

-vs-

BLACKFEET HOUSING and its board Members SANDRA CALFBOSSPIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR, and MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING and URBAN DEVELOPMENT, UNITED STATES OF AMERICA,

Defendants.

Civil Docket
No. 02-73-GF-SEH

PARTIAL TRANSCRIPT OF MOTION HEARING PROCEEDINGS

Heard in Courtroom No. 209
Federal Courthouse - 215 First Avenue North
Great Falls, Montana
November 12, 2003 - 1 p.m.

BEFORE THE HONORABLE SAM E. HADDON

UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
215 First Avenue North - P.O. Box 2186
Great Falls, Montana 59403-2186

APPEARANCES:

PRESENT ON BEHALF OF THE PLAINTIFFS, MARTIN MARCEAU, CANDICE LAMOTT, JULIE RATTLER, JOSEPH RATTLER, JR., JOHN G. EDWARDS, JR., MARY J. GRANT, GARY GRANT and DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated:

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TOWE, BALL, ENRIGHT, MacKAY
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and

MR. JEFFREY A. SIMKOVIC
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Billings, Montana 59101

PRESENT ON BEHALF OF THE DEFENDANTS, BLACKFEET HOUSING and its board members SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR:

MR. STEPHEN A. DOHERTY

& BELCOURT, P.C.
410 Central Avenue, Suite 522
Great Falls, Montana 59401

PRESENT ON BEHALF OF THE DEFENDANTS MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING and URBAN DEVELOPMENT, UNITED STATES OF AMERICA:

MR. TIMOTHY J. CAVAN
OFFICE OF U.S. ATTORNEY
2929 North Third Avenue, Suite 400
P.O. Box 1478
Billings, Montana 59103-1478

The following proceedings were had:

* * * * * * * * * * * * *

tabbies APPENDIX 3

14:35:39 THE COURT: All right, counsel.

14:35:41 I had hoped, consistent with the practice that this court endeavors to follow, to be able to issue rulings on these matters at the conclusion of this hearing. I'm not going to be able to do that, because I find that the court is in need of additional materials which have not yet been provided to it. And I'll come to those.

14:36:09 And issues have been raised here today in argument that suggest that some additional briefing may be warranted on some part of the issues, and I'm going to give counsel an opportunity to file additional briefs if they choose to do so on some of these issues.

14:36:34 Although I am not in a position to make a final ruling on any of the matters that have been presented, and I emphasize that, I have some observations about some parts of the matters that have been raised that I want to bring to counsel's attention and to the attention of the parties who are here, because they are significant in the overall picture.

14:37:04 First of all, I think it appropriate for the court to point out that I am not in any way at this juncture able to

14:37:11 judge the merits of this case. What has been described in the pleadings is a situation involving a group of houses up on the Blackfeet Reservation that looks pretty dismal, as described in the pleadings. And numerous problems are recited in the pleadings as being present; and as the pleadings reflect, are said to be attributable to the original construction of this group of houses.

14:37:41 Whatever may be the factual situation on that level, I cannot make a decision about those matters today. We are not at that stage in this case. We are here today, and the court has under consideration initial motions that have been filed by defendants, addressing the fundamental-level question of whether this court has the capacity and authority and a legally-justified basis to proceed. And I'm going to limit my remarks today to some observations about the various pieces of legislation that form the basis for the claims asserted. And I want to start with the United States Housing Act of 1937, which has been at the center of the arguments made by the plaintiffs.

14:38:41 That act is referenced in Count One and in Count Three of the plaintiffs' complaint as a part of the basis for its claims in those two counts. It is a count that -- or it is a claim that is addressed solely against HUD. And at the heart of that -- of Count One is the argument that there is a duty imposed upon HUD in this case arising out of the so-called

Mitchell Doctnne.

Now, that doctrine, I think, is clear that it's -- it starts with the premise that there must be legislation, federal legislation, that is to be looked to. That specific federal legislation has to impose, as I read the Mitchell Doctrine in its entirety, a specific trust obligation upon the United States, in this case, HUD, to act in a particular way that amounts to management or control of a tribal resource or asset.

There must be a breach of the duty that is imposed by the legislation. That's a second component of the doctrine.

And there must be a waiver of sovereign immunity that covers the particular claim. And absent any one of those three components, there is no Mitchell duty Doctrine that can be said -- or Mitchell Doctnne duty that can be said to exist.

Now, turning to the question of whether there's a Mitchell Doctrine duty in this case under the United States Housing Act, we'll take up the easy question first; and that is: Is there a waiver of sovereign immunity? And the answer to that is clearly yes, there is a waiver of sovereign immunity under 42 U.S.C. Section 1404(a), which has been quoted here in this hearing today. And it's clear as to what it says: "The Secretary of Housing and Urban Development may sue and be sued only with respect to its functions under the

United States Housing Act of 1937 as amended."

This court takes that language to mean what it says: There is a waiver of immunity as to functions under that act. But this court does not read into that legislation or into that language a waiver of immunity under any other legislation. And it should not be interpreted as such.

The Martinez case, which has been referred to as the Dewakuku, I believe it is, case, clearly makes that declaration.

So we start with the proposition that under that act, there is, in the view of this court, a waiver of sovereign immunity.

Turn next to the question of whether the language of the act itself can be said to create the so-called Mitchell Doctnne obligation or responsibility. And this court's reading of the act does not find in the language of the act itself that Mitchell Doctrine responsibility.

But that is not the end of the inquiry, because the cases that have addressed this subject clearly look beyond the language of the statute itself. And that leads this court to one of the gaps in the information that it has before it. Any Mitchell Doctrine duty under the United States Housing Act, in my view, must be found, if it's said to be present, in the regulations and the application of those regulations that were in effect at the time that this

group of houses were constructed.

Now, that time frame, Mr. Towe, was when?

MR. TOWE: Nineteen seventy-eight to 1979, I think that most the houses were completed. May be some follow-up into 1980.

THE COURT: Well, at a minimum, the court needs access to the HUD regulations that the parties would either agree were applicable to its -- to HUD operations at that time frame, or if you cannot reach agreement about what regulations apply, I want both sides to supply the court with copies of what you contend to be the applicable regulations that were in effect at the time of this construction.

And without that information before the court, I am not in a position to make a determination as to whether there is a Mitchell Doctnne responsibility present.

I turn next to the question of whether under the U.S. Housing Act, there is a private right of action. And my preliminary determination is that the act, first of all, does not on its face create a right of action; and absent more than what I have before me at the moment, I do not find that there is a private right of action by implication applying the test of Cort versus Ash established by the United States Supreme Court.

Now, I want to alert counsel to one additional issue that I see to be present in this case.

Whatever the regulations are that are brought to the attention of the court that are said to have been applicable at the time of the construction of this block of houses, the court intends to take a careful look at whether or not those regulations are consistent with the language and responsibilities imposed upon the secretary by statute. And I want to bring to everyone's attention the basis for the court's concern, and that's the case of Alexander versus Sandoval. It's a recent United States Supreme Court case, 532 U.S. 275. And the court there in very explicit language says that "the language of a regulation cannot conjure up a private right of action that is not authonzed by Congress." It is the position of this court, and I want all to understand the position of this court, that it is the obligation of this court to apply the law that has been written by the Congress of the United States and to apply that law as written, subject to whatever interpretations that are controlling upon this court that may impact upon that interpretation and application.

If regulations comport with the language of the legislation, the regulations, of course, are to be accepted. If the regulations conjure up, to use the language of the Supreme Court, a private right of action not contemplated by the legislation, this court deems itself unable to apply a right of action not authorized by statute.

I want to turn next to the National Housing Act, which is set forth in 12 United States Code 1702 through 1750. It is asserted in Count One. As against HUD as a partial basis for the violation of the trust responsibility as set forth in Count One, I do not find any waiver of sovereign immunity in that statute that reaches this particular type of claim. There are waivers of sovereign immunity contained in 12 United States Code 1702, but those waivers of immunity are limited, and I do not read any of them as being applicable to the claims that are asserted in this case.

I similarly do not find any express cause of action or implied fiduciary duty to act contained in the language of that legislation. And I find no specific duty directed to the plaintiffs in this case contained within the ambit of that legislation. And unless something more than is present before the court today is brought to the court's attention, any claims grounded in that particular legislation are, in the view of the court, out of this case.

Next piece of legislation that's referenced in the pleadings is the Indian Housing Act of 1988. It was contained in 42 United States Code Sections 1437 double (a) through double (f). That legislation, as counsel have noted here today, was passed in 1988. It was repealed in 1996. It is a part of the basis for the trust responsibility breach that is claimed in Count One of the complaint, the amended

complaint.

Preliminarily, I have concluded that there is a waiver of sovereign immunity contained -- that applies to that legislation, since it was by its definition an amendment to the United States Housing Act of 1937, which as we've already discussed, contains a waiver of immunity in 42 U.S.C. 1404(a).

But I do not find within that legislation any express cause of action or right to sue. The Martinez case, which we have talked about extensively here today, similarly so holds. And the Martinez case confirms, and this court has concluded, that there's no private right of action recognized in that statute. And I similarly find that that statute on its face does not impose a Mitchell Doctrine duty.

And any application of that statute to this case would have to be found as it would under the United States Housing Act in the regulations that were in effect and applied during the operative period of time.

So if there is an intention on the part of the plaintiff to rely upon that act, then I need the regulations that are said to be applicable and in place during the appropriate time frame.

Unless those regulations would disclose and show in their operation a Mitchell Doctrine responsibility, it is my preliminary conclusion that any claim based on that statute

is out of this case. Additionally, that statute having been repealed in 1996, raises issues that are germane to a case filed in 2003.

Now, if there were claims that were viable under that act, my preliminary research does not suggest that those claims would be abrogated per se by the fact of repeal of the statute, if the claims are to be found in the substantive language of the act as distinct from claims which would be remedial and in which repeal might have an effect upon their continued vitality.

But all of that simply is a precursor to the question of timeliness of any claims based on this particular legislation, which as I pointed out, has been repealed for some ten years.

Congress has enacted legislation that specifically holds that the statute of limitations on any federal legislation enacted after -- or claims arising on -- under federal legislation after December 1 of 1990 are governed by a four-year statute of limitations. These claims do not appear to be within the ambit of legislation passed after that date or that arose after that date.

So prior to December 1 of 1990, it's the court's preliminary conclusion that all of those claims would be governed by the state law of limitations governing the analogous cause of action.

Montana law, which would be the source of law to which the court would presumably turn, imposes a two-year statute of limitations on any claims arising by liability created by statute.

So we have, separate and apart from the matters raised in the briefing to this point, an issue of claims that may be statutorily barred on a time line basis, at least as it relates to that particular legislation.

The Native American Housing and Self-Determination Act, NAHASDA, 25 United States Code Section 4101, is asserted as a basis against HUD only in Counts One on the violation of trust responsibility, and Count Two for declaratory judgment and injunctive relief, and in Count Three as a private cause of action.

My preliminary rulings are that I don't find any waiver of sovereign immunity in that statute. And I decline to impose a waiver of sovereign immunity contained in the United States Housing Act or other legislation as constituting a waiver of sovereign immunity applicable to that particular legislation.

I don't see any expressed claim of right asserted in the statute. And similarly, I do not find in the language of the statute itself, any duty that creates a claim in the plaintiffs' favor under either the Mitchell Doctrine or under the doctrine of a private right of action applying the Cort

versus Ash test.

Count Three of the amended complaint asserts as against HUD only, the end part, a claim grounded in the Housing Act of 1949, forty-two United States Code Sections 1441 and following. My rulings preliminarily on those matters related to that statute are as follows: First, I find no waiver of sovereign immunity in the statute; and I decline to borrow a sovereign immunity declaration in other legislation and apply it to this particular act.

There's no private right of action that this court can find that's recognized in that statute that is openly recognized; and I do not find that under application of the Cort versus Ash test that there is a duty imposed that creates a private right of action. And absent additional factors being brought to this court's attention, it is my determination that all claims based on that statute are out of this case.

I want to turn next to the Administrative Procedures Act which is asserted in Count Two as against HUD as a basis in part for the claims asserted there for declaratory judgment and injunctive relief.

As has been discussed here in this hearing today, it's my determination that the Administrative Procedures Act is, in substance, a procedural statute. And it does not of itself create any cause of action or create any particular

right of recovery.

It is by its language and its application limited to review of agency action. And its function is to determine if there has been a violation or breach of duty by an agency of the United States that arises under separate -- and apart from the Administrative Procedures Act -- statute or other basis in law.

And it is clear that the Administrative Procedures Act by definition cannot be utilized as a basis for seeking monetary damages.

And the waiver of sovereign immunity that is contained in the Administrative Procedures Act, 5 U.S.C. 702 specifically excludes claims for money damages.

Now, I'm going to invite additional briefing on this issue, but it is the preliminary conclusion of this court that what is sought in Count Two, regardless of how it is dressed up, is in substance a claim for damages. It is a claim that can only be satisfied by the expenditure of money. And in the view of this court, at this point, at least, that is a claim for damages and may not be pursued under the Administrative Procedures Act.

Similarly, I do not find in the NAHASDA legislation or its regulations a duty imposed upon HUD to maintain the houses that are in issue here.

It appears to the court from a reading of that statute

that the tribe is the recipient of the monies from HUD under that legislation. And that is a defined word in the statute. And that it is the recipient's obligation by statutory language to provide the appropriate maintenance.

My tentative conclusion is that these claims under the Administrative Procedures Act are not viable claims in this case. And in making that determination, the court is singularly aware of the decision of the District Court from Arizona in what has been referred to here as Dewakuku III. And it is fair to say that this court has a disagreement with the court in Arizona in its analysis of the use of the Administrative Procedures Act -- apart from the Little Tucker Act -- as a basis for ordering relief.

And so there is no misunderstanding about this court's position, I do not agree with the court's analysis in that case that it is possible to borrow language from the U.S. Housing Act and apply it to obligations arising under other legislation, if such obligations are said to exist.

It appears to the court that we no longer have the need to address any tort claims that are asserted in this amended complaint for emotional distress or any sort of claim grounded in breach of the covenant of good faith and fair dealing. I don't want to misstate your position on that, Mr. Towe, but it sounded to the court as if those claims were acknowledged to be governed by the Federal Tort Claims Act,

and there's no pleading to suggest that that act has been followed in presenting the claims here.

MR. TOWE: That is correct, Your Honor.

THE COURT: Very well.

Well then, I want to turn to the question, finally, of the claims that are pleaded in Counts Four and Five for breach of the covenant of habitability and the breach of the covenant of merchantability and the breach of the covenant of good faith and fair dealing as a contract claim set forth in Count Six.

And I'm going to invite counsel for all parties to present to the court, and I'll have a schedule for this to follow, any additional information or documentation that you wish this court to consider as evidence in addressing what I see as some core issues relating to these claims.

It appears to the court at this point that Blackfeet Housing is an agency of the Blackfeet Tribe, which is a recognized sovereign. On the basis of the information that is before the court at this point, I do not see that the Blackfeet Housing entity can be considered as an agent of HUD for which HUD is responsible. And any claims that are asserted against HUD for breach of the covenants of habitability or merchantability are substantively claims for damages. And there are no Little Tucker Act claims in this case, as Mr. Towe has candidly acknowledged, and

consequently, it is the view of the court, at least tentatively, that all of these claims for merchantability and habitability and good faith and fair dealing breach on a contract basis are claims that lie exclusively within the jurisdiction of the Court of Claims.

Those claims, like claims arising under the Indian Housing Act of 1988, likewise raise issues that have not yet been addressed as to timeliness on the statute of limitations basis.

Insofar as the Blackfeet Housing is concerned on those claims asserted in Counts Four, Five, and Six, which are against both defendants, and the individual defendants, it does appear, as I've said, that the Blackfeet Housing entity is a tribal agency. It is not subject to suit, absent a waiver of sovereign immunity.

I will invite additional briefs on the question of whether the individual members of that board are entitled to the same immunity that the entity itself, that is, the tribe, would be entitled to receive.

And I want to invite the parties to brief, if they wish, this particular provision that has been referenced in the briefs already, and that's the consent that is contained in Tribal Ordinance Number 7, and whether that is a waiver of immunity or simply, as is suggested by the Housing Authority, the ability to, by contract, waive immunity.

My initial conclusion is that it is the latter. And that it cannot be read on its face as a blanket waiver of immunity.

Now, none of these observations that I've made here today are final. But I have stated them because I want counsel to have a full opportunity to know what the court's thinking is on these issues. I want to give both sides a full opportunity to present any additional briefs on this matter or any of these matters that you wish the court to consider. And I will permit documentation that is not disputed as to its authenticity and identity to be presented to the court as supplements to the briefs that have been filed for purposes of evaluating these motions.

Now, when I do that, of course, I have, to an extent, converted these motions to dismiss into something more substantive, in the nature of, perhaps, summary judgment motions.

But rather than string this process out unnecessarily, I would hope that counsel could agree upon documents that do not appear to be infirm on either of those bases, and could agree that, to the extent they are relevant, that the court may consider them in evaluating the issues that are before it.

I'll give counsel 30 days from today's date in which to file simultaneous additional documentation, at which time,

these motions will be fully and finally submitted for the court's decision.

That means no reply briefs to the briefs that are due 30 days from now.

I want to apprise all that I have appreciated the work that both sides have done on this case. There has been, obviously, a tremendous amount of work by counsel on both sides. The case -- The matter has been well-briefed. It just turns out that the court finds itself short on information on some of the points that I think are significant to the decision process. And in addition, I want to give counsel a full opportunity to address these matters of preliminary conclusion that the court has reached and to, if I am in error, in your view, to point it out.

Mr. Towe.

MR. TOWE: Your Honor, may I ask, you've indicated in Counts Four and Five, habitability and merchantability, bad faith, that you are asking for additional evidence. In particular, to show that the claims, as we are contending, that HUD is in fact asserting total control. I ask if there's some way we can do that without --

THE COURT: Well, I think before we get to that, Mr. Towe, we've got to address the question of whether I've got any jurisdiction. Because these look like damage claims to me. And if they're damage claims, and you're not

asserting any jurisdiction under the Little Tucker Act, then they go to the Court of Claims.

If you're claiming a breach of contract --

Now, you can brief this further, and I invite you to do so --

MR. TOWE: We shall.

THE COURT: But the court's conclusion at this point preliminarily is that these claims are contract damage claims pure and simple, and that they're not under the Little Tucker Act, which you say you're not, then I'm not at all sure I've got any jurisdiction at all to consider them.

MR. TOWE: And I don't want to rehash the argument I made just a moment ago. My question deals with how are we to get additional evidence when we have not been able to obtain an answer to our discovery requests?

THE COURT: Well, I think this is a jurisdictional question that looks at the type -- looks at the claim you have filed, Mr. Towe. And I think where I asked for additional evidence was for evidence that would suggest that this Blackfeet Housing is other than a tribal agency. I think that's what I'm primarily interested in on that issue.

MR. TOWE: My concern is that in order to get a full and complete indication of our case, we need discovery on what happened when these houses were built from the Housing Authority. We can certainly look up the regulations,

and we can compare those. But as to exactly what happened, we need discovery for that.

THE COURT: Well, I'm not going to set this case off on a discovery path at this juncture, counsel; because I'm not at all sure that it gets to that point. And I don't want to put anyone on unnecessary work. This court subscribes to the proposition that process should never overcome the objective, which is a resolution of the case on its merits. And if you feel that there is factual information that's missing to the point that this court can't rule on these issues, then you may outline it, and I'll take a look at it.

MR. TOWE: Thank you.

THE COURT: I think that's as far as I can go. Anything else, counsel?

MR. CAVAN: Nothing further, Your Honor.

MR. DOHERTY: Nothing further, Your Honor.

THE COURT: Well, again, I appreciate the efforts of all the lawyers. You've done good work. The court's pleased to have you here and to hear the arguments. They are very helpful and beneficial to the court. This is a matter that is well-presented.

We are in recess.

(The proceedings in this matter were adjourned at 3:13 p.m.)

CERTIFICATE

STATE OF MONTANA)
: SS
County of Cascade)

I, TINA C. BRILZ, RPR, FCRR, Official Court Reporter and Notary Public of the State of Montana residing at Great Falls, Montana, do hereby certify as follows:

That the foregoing motion hearing was reported by me on November 12, 2003, at 1 p.m. in Courtroom No. 209 in the United States Courthouse in Great Falls, Montana.

That the foregoing twenty-one (21) pages of typewritten material constitute a true and accurate partial transcription of my stenographic notes which were reduced to writing by means of computer-aided transcription.

I further certify that I am not an attorney nor counsel of any of the parties nor a relative or employee of any attorney or counsel connected with this action or otherwise interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal on this 14th day of Nov., 2003.

Tina C. Brilz

TINA C. BRILZ
REGISTERED PROFESSIONAL REPORTER
NOTARY PUBLIC for the State of Montana residing at Great Falls, Montana. My commission expires November 26, 2007

57 Interior Dec. 145, 1940 WL 4162 (D.O.I.)
Department of the Interior (D.O.I.)

**1 ELIGIBILITY OF INDIAN TRIBES FOR LOANS AND GRANTS UNDER NATIONAL HOUSING ACT OF 1937

Opinion, August 6, 1940

*145 INDIAN TRIBES AS GOVERNMENTAL ENTITIES--AUTHORITY OF ORGANIZED INDIAN TRIBES TO ENGAGE IN HOUSING PROJECTS--INDIAN TRIBES AS PUBLIC HOUSING AGENCIES--NATIONAL HOUSING ACT OF 1937.

An Indian tribe is a governmental entity or public body capable of undertaking tribal housing projects, and where a tribe is incorporated under the Indian Reorganization Act it is clearly authorized to engage in the low-rent housing and slum clearance projects contemplated by the National Housing Act, and, therefore, such a tribe comes within the terms of that act as a public housing agency eligible to obtain the assistance and benefits of that act.

The Indian Office, in consultation with the United States Housing Authority, is giving consideration to the possibility that Indian *146 tribes may take advantage of the benefits afforded by the National Housing Act (act of September 1, 1937, 50 Stat. 888, 42 U. S. C. A. ch. 8). This act establishes a housing authority with power to make loans and grants on certain conditions to public housing agencies for the erection of low-rent housing and for slum clearance. The legal question whether Indian tribes come within the terms of the act has been referred to me for opinion.

The crucial question, in my opinion, is whether an Indian tribe is covered by the definition of a "public housing agency" in section 2 (11) of the act. If an Indian tribe does come within this definition, there remains only the administrative question whether a particular tribe can meet the conditions required for assistance in housing enterprises. The fact that the act does not mention Indians or Indian tribes is not material in the consideration of a law such as this which provides benefits to all who come within the definitions and standards established by the act. It has previously been recognized by this office and by the administrative agencies concerned that Federal general welfare and relief acts are available to the Indians, although not mentioned therein, since these laws apply to all eligible persons without regard to race or status, whether of wardship or otherwise. (See Memorandum of the Solicitor of the Interior Department, April 22, 1936, concerning the eligibility of Indians for benefits under the Social Security Act.) [FN1]

The United States Housing Authority has suggested in certain correspondence that the act is not applicable to Indian tribes as they do not come within the definition of a "State" in section 2 (12) of the act. This provision defines the term "State" as including "the States of the Union, the District of Columbia, and the Territories, dependencies and possessions of the United States." This definition is, in my opinion, a description of the geographical area within which the National Housing Act applies and is not a description of the body or agency to which loans and grants may be made. Geographically, Indian reservations are, of course, within the States. However, it may be said parenthetically that if it were necessary to bring an Indian tribe within this definition of a State it would be possible to support the assertion that Indian tribes may be characterized as dependencies of the United States. A dependency has been described as a dependent nation, State or country, controlled in all its foreign relations by the superior government upon which it is dependent, usually as a result of treaties between the two, and incorporated into the dominion of the superior government, while nevertheless retaining local self-government. (See United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706; 18 C. J. 493.) This description of a dependency fits with peculiar perfection the *147 historic position of an Indian tribe held since the early decisions of Cherokee Nation v. Georgia, 5 Pet. 1, and Worcester v. Georgia, 6 Pet. 515, and reaffirmed in numerous Supreme Court cases, including Kagama v. United States, 118 U. S. 375; Choctaw Nation v. United States, 119 U. S. 1, and United States v. Sandoval, 231 U. S. 45. These cases recognize an Indian tribe as a "domestic dependent nation" dependent upon the United States for protection, controlled by the United States in its relations with outsiders and brought within the dominion of the United States by treaties, but nevertheless retaining the right of local self-government.

**2 I place my opinion that Indian tribes come within the provisions of the National Housing Act on the broad definition of the term "public housing agency." Section 2 (11), setting forth this definition

APPENDIX 4

is as follows:
The term "public housing agency" means any State, county, municipality, or other governmental entity or public body (excluding the Authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance.
In the first place it should be noted that a public housing agency does not need to be an agency or entity of a State government. This is apparent on the face of the definition and, if for no other reason, from the specific reference to the Authority, which is an agency of the Federal Government. The definition embraces any governmental entity within the geographical area covered by the National Housing Act.
An Indian tribe is both a governmental entity and a public body. This is a fundamental statement in Indian law. After the passage of the Indian Reorganization Act (act of June 18, 1934, 48 Stat. 984), this office made an exhaustive analysis of the status of an Indian tribe as a governmental entity and of its powers of local self-government over Indians on Indian reservations. (Solicitor's opinion, October 25, 1934, 55 I. D. 14.) The following quotations from the statements and citations within that opinion illustrate the findings:
The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: An Indian tribe possesses, in the first instance, all the powers of any sovereign State. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e. g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i. e., its powers of local self-government. These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. [55 I. D. at 22.]

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The doctrine of tribal sovereignty is well summarized in the following passage in the case of [illegible]:
**148* "From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection, and for the protection of the whites adjacent to them. [illegible] Jackson v. Goodell, 20 Johns. 193. (At p. 329.)" [55 I. D. at 26.]

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**3 The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of whole-hearted sympathy and respect. The painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee Intermarriage Cases (203 U. S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state. [55 I. D. at 26.]

* * * * * * *

Neither the allotting of land in severalty nor the granting of citizenship has destroyed the tribal relationship upon which local autonomy rests. Only through the laws or treaties of the United States, or administrative acts authorized thereunder, can tribal existence be terminated. As was said in the case of [illegible] with reference to certain New York Indians over whom State courts had attempted to exercise jurisdiction:

* * * * * * *

"The right of self-government has never been taken from them. * * *
"At all times the rights which belong to self-government have been recognized as vested in these Indians. (At p. 173.)" [55 I. D. 29.]
And in the case of Raymond v. Raymond, supra (83 Fed. 719), the court declared:
"The Cherokee Nation * * * is a distinct political society, capable of managing its own affairs and governing itself. It may enact its own laws, though they may not be in conflict with the constitution of the United States. It may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts. (At page 722.)"
See, also, Nofire v. United States (164 U. S. 657); Heckman v. Lee (56 Fed. 532). [55 I. D. 56.]
The governmental powers of Indian tribes have been incorporated in the 100 or so constitutions adopted by Indian tribes under section 16 of the Indian Reorganization Act. Since the Blackfeet Tribe has been considered by the Indian Office and the United States Housing Authority as the most likely applicant for the benefits of the act, the powers of that tribe under its tribal constitution are used as illustration. That constitution, which was adopted "for the government, protection, and common welfare of the said tribe and members ***149*** thereof," places in the council of the tribe the tribal powers, among others, of managing the tribal land, safeguarding the peace and safety of residents of the reservation, establishing a judicial system, regulating property, requisitioning community labor for public purposes, and levying assessments for public purposes.
While an Indian tribe is a governmental entity so long as it retains its character as a tribe, even though it may not be organized in the manner provided by the Indian Reorganization Act, its character as a governmental entity is conclusively established and takes practical form when the tribe is organized under a constitution under section 16 of that act and incorporated as a Federal corporation under section 17.
**4 Since an Indian tribe is a governmental entity, it may likewise be described as a "public body." That term may refer to a public agency with less governmental power than that of a governmental entity. It undoubtedly contemplates such public corporations as are established for the purpose of carrying on particular public enterprises and which are endowed with limited governmental powers. An Indian tribe fulfills the concept of a public body as a local government similar to a municipality or, when the tribe is incorporated, as a public corporation carrying on public enterprises. The charter of every tribe incorporates such tribe as a "body politic and corporate of the United States of America." The remaining question is whether an Indian tribe is a governmental entity or public body "authorized to engage in the development or administration of low- rent housing or slum clearance." The management of tribal property and the carrying on of tribal business enterprises are governmental powers which have been recognized by Congress and by this Department as within the authority of an Indian tribe. This recognition has already included the undertaking by the tribes of housing enterprises under the supervision of this Department. Since 1935 Indian tribes have been recognized agencies for the carrying out of rehabilitation projects upon the Indian reservations, and, under grants from rehabilitation funds appropriated to the Indian Office, they have undertaken housing projects for the benefits of their members.
However, only those tribes which are incorporated under the Indian Reorganization Act may be said with assurance to have express authority, both from their membership and from Congress, to engage in the low-rent and slum clearance projects contemplated by the National Housing Act. Incorporated tribes have specific authority in their charters to engage in any business that will further the economic well-being of the members of the tribe, to make and perform contracts with ***150*** any person, association, or corporation, to sue and be sued, to borrow funds from any governmental agency, and to pledge tribal assets (excluding tribal lands) for the purpose of obtaining such a loan, certain of such powers being subject, according to the extent of their exercise, to the approval of the Secretary of the Interior. A tribe which has not been incorporated cannot be said to have authority, without Congressional sanction, to enter into the undertakings probably required for engaging in low-rent and slum clearance projects, particularly the authority to sue and be sued and to make contracts involving interests in tribal lands and the proceeds therefrom. It would, therefore, be a serious question whether the United States Housing Authority would find, as an administrative matter, that such a tribe was an agency to which it could properly loan housing

funds.
In summary, therefore, it is my opinion that an Indian tribe is a governmental entity or public body capable of undertaking tribal housing projects, and that where a tribe is incorporated under the Indian Reorganization Act it is clearly authorized to engage in the low-rent housing and slum clearance projects contemplated by the National Housing Act, and, therefore, such a tribe comes within the terms of that act as a public housing agency eligible to obtain the assistance and benefits of that act.
**5 Approved:
OSCAR L. CHAPMAN, Assistant Secretary.

KIRGIS
Acting Solicitor

FN1. In files of Solicitor's Office. [ED.]
57 Interior Dec. 145, 1940 WL 4162 (D.O.I.)
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