UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

YVONNE GARREAUX, Plaintiff, vs. ALPHONSE JACKSON, Secretary of U.S. Department of Housing and Urban Development, his designees and assigns, and DIRK KEMKPTHORNE[1], Secretary of U.S. Department of Interior, his designees and assigns, Defendants.	CIV07-3021 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§2671-2680 and 1346(b), and the Administrative Procedure Act (APA), 5 U.S.C. §702-706. On September 21, 1977, the Bureau of Indian Affairs (BIA) approved a renewable twenty-five (25) year land lease agreement between the Cheyenne River Housing Authority (CRHA) and members of the Veo family, Indian heirs of property held in trust by the United States (the property). Cpl. Ex. A. The lease provided that the property would include a dwelling site for one Mable V. Blackbird and that the premises were to be used to construct and operate Public Housing Project SD 5-11. Plaintiff alleges that the dwelling Blackbird was constructed as part of the Mutual Help Homeownership Opportunity Program (MH Program) administered by HUD. Cpl. at 3, ¶8 and 12. After Blackbird and her successor failed to fulfill his or her Mutual Help Occupancy Agreement (MHOA) payment obligations, in 1992, CRHA allegedly entered into a MHOA with Plaintiff Yvonne Garreaux for the sale and purchase of the residence. Cpl. at 4, ¶14. Garreaux alleges that CRHA lost the MHOA and she cannot produce the document. *Id.* ¶15. When

[1] Correct spelling is Kempthorne.

Garreaux took possession of the home, it was allegedly in disrepair. Cpl. at 4-5, ¶18. CRHA allegedly promised to repair the home and told Plaintiff that if she complied with the terms of her MHOA, she would ultimately own the home. *Id.* ¶¶16, 18-22.

Garreaux alleges that she completed all but the final payment, Cpl. at 5, ¶23, and that she requested a meeting to arrange conveyance of title. Cpl. Ex. D. As CRHA began the process of conveying the house, however, the BIA contacted Garreaux and informed her that the majority interest holders in the leased land (the Veos and their heirs) were requesting that she move her house and leave the land. Cpl. at 6, ¶25, Ex. E (Letter dated December 10, 2004). After CRHA contacted the BIA to inform it that CRHA still had an interest in the home, the BIA indicated that the lease would remain in effect and Plaintiff could remain until CRHA ceased to maintain an interest. Cpl. ¶38, Ex. F (Letter dated March 14, 2005).

On January 31, 2006, Garreaux filed a FTCA administrative complaint against HUD and BIA alleging negligent administration of a MHOA, negligent administration of a lease agreement and negligence in trust responsibility to an American Indian person.[2] The United States is the proper defendant to this cause of action and will make efforts to obtain the certification as to the Defendants Plaintiff included in her complaint, and if certification is obtained, file a motion to substitute. 28 U.S.C. §2679(a), (b)(1); *Duncan v. Dept. of Labor*, 313 F.3d 445, 447 (8th Cir. 2002). Before HUD and BIA reached a decision on the administrative claim, however, Plaintiff filed a contract claim against the United States in the U.S. Court of Federal Claims (COFC) based on the same nucleus of operative facts, (COFC Case No. 06-502 C, filed July 5, 2006). On November 29, 2006, the BIA and HUD denied plaintiff's administrative claims due to the

[2] Plaintiff's above complaint does not allege HUD was negligent as to its trust responsibilities.

exercise of plaintiff's option under 28 U.S.C. §2675(a) to file a lawsuit concerning the matter. On July 27, 2007, the COFC dismissed the contract claims against the United States because there was no privity of contract. *Garreaux v. U.S.*, No. 06-502 C (Ct. Fed. Cl. July 27, 2007).

I. STATUTORY OR REGULATORY BACKGROUND AS TO HUD

Based upon Plaintiff's allegations, a procedural and regulatory background relating to HUD's role as to low income housing is beneficial. Title 42 U.S.C. §1437, *et seq.*, known as the United States Housing Act of 1937 (USHA) encompasses a number of programs to assist States and political subdivisions of States "to remedy the unsafe housing conditions and the shortage of decent and safe dwellings for low-income families; … to address the shortage of housing affordable to low-income families; and … to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability …." 42 U.S.C. §1437(a). Among the programs established through implementation of the USHA was the MH program, "which was designed to meet the homeownership needs of low-income Indian families on Indian reservations and other Indian areas." *Dewakuku v. Martinez*, 271 F.3d 1031, 1034 (Fed. Cir. 2001); *see* 42 U.S.C. §1437c(h) (authorizing sale of public housing to low-income tenants; repealed in 1998). Through the MHHO program, Indian housing authorities (IHAs) could apply to HUD for loan funds to develop housing for sale to eligible Indian families. 41 Fed. Reg. 10152 (March 19, 1976), *codified at,* 24 C.F.R. §805.401 *et seq.* (1976). In order to effectuate the program, the IHA would enter into an Annual Contributions Contract (ACC) with HUD, and the home buyer would enter into a Mutual Help Ownership Agreement (MHOA) with the IHA. 24 C.F.R. §§805.103(b), 805.403 (1976).

In 1988, through the Indian Housing Act (IH Act), Congress created the Office of Native American Programs within HUD and established separate housing programs for tribes. 102 Stat. 676; *see* 1988 U.S. Code and Admin. News V. 1 at 676 (statute) and V. 4 at 791 (legislative history). The IH Act moved all Indian public housing programs to a separate Title II of the USHA, including a statutory directive for the MHHO Program. IH Act §202.[3] HUD issued implementing regulations for the IH Act in June 1990. 55 Fed. Reg. 24741 (June 18, 1990) *codified at* 24 C.F.R. Part 905 (1991). The MHHO Program under the IH Act authorized HUD "to provide financial assistance to [IHAs] for the development, acquisition, operation and improvement" of homeownership projects. IH Act §202(b). The regulations implementing the IH Act were almost identical to those for the MHHO program under the USHA.

In 1996, the IH Act was superceded by the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). 25 U.S.C. § 4101, *et seq.* Plaintiff does not cite NAHASDA as a basis for her suit. NAHASDA replaced several housing programs for Native Americans, including the U.S. and Indian Housing Acts, with a single Indian Housing Block Grant (IHBG) program, effective October 1, 1997. HUD's regulations implementing NAHASDA appear at 24 C.F.R. Part 1000.

II. BIA'S LEASING AUTHORITY

Next, in light of Plaintiff's allegations as to the BIA, some background relating to BIA's leasing authority is informative. Most non-agricultural surface leasing is conducted under the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415. Section 415 authorizes leasing for up

[3] The IHA was codified at 42 U.S.C. §1437bb. Because it was repealed, we are citing to relevant sections of the original IH Act rather than to its codification.

to twenty-five (25) years with an option to renew for one additional twenty-five (25) year term. The regulations at 25 C.F.R. Part 162 govern the BIA's issuance of leases on "Indian land" which is defined as "any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status."

Generally speaking, virtually every person who wants to occupy Indian land that is held in trust for residential purposes must obtain a lease. *See* 25 C.F.R. § 162.601 (Secretary's authority to grant leases), § 162.602 (grants of leases by owners or representatives). Exceptions to this general rule are: (1) 100% Indian Landowners (meaning that the land is held in trust by the United States for the benefit of one tribe or one individual); and (2) a parent or guardian of a minor child who owns 100% of the trust interest in the land. 25 C.F.R. § 162.104(a), (c), respectively. Otherwise, an Indian landowner who owns a fractional interest (e.g., something less than 100%) in a tract of Indian land held in trust must obtain a lease. 25 C.F.R. § 162.101 (definitions), 162.104(b).

The leasing process allows the BIA to fulfill Congressional purposes regarding management of Indian land held in trust, to collect fair market value of the use of said land, and to distribute the proceeds to the beneficial Indian landowners. Non-agricultural leases may be negotiated by the tribe or individual Indian landowners. 25 C.F.R. §§162.602, 162.605. All leases are subject to the approval of the Secretary of the Interior who is required to ensure that adequate consideration is to environmental and land use factors prior to approving a lease. 25 U.S.C. § 415(a). In reviewing a negotiated lease for approval, the BIA will defer to the landowners' determinations that the lease is in their best interest, to the maximum extent possible. *See* 25 C.F.R. § 162.207(a). The BIA, however, remains responsible for ensuring that

tenants meet payment obligations and comply with the operating requirements of leases. 25 C.F.R. §162.108. The Secretary retains authority in case of violations of the lease terms, including the power to cancel leases. 25 C.F.R. § 162.219.

All subleases, assignments, amendments or encumbrances of leases on Indian land may only be made with the approval of the Secretary and the written consent of all parties to the lease. 25 C.F.R. § 162.610. However, the lease may contain a provision authorizing the lessee to sublease, encumber, or assign, the premises without further approval. *Id.* 162.610(b), (c), (d). But the lease must contain this provision, or approval is required. *Id.* 162.610(a).

III. STANDARD OF REVIEW

As to the claims which the United States seeks to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Plaintiff has the burden of establishing that subject matter jurisdiction exists. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

As to the claims which the United States seeks to dismiss for a failure to state a claim, the United States Supreme Court recently weighed in the dispute surrounding the much interpreted and disputed standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). *See Bell Atlantic Corp. v. Twombly*, __ U.S. ___, 127 S. Ct. 1955 (2007). The Eighth Circuit consistently held that dismissal under FRCP 12(b)(6) is proper if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Koehler v. Brody*, 483 F.3d 590, 596 (8th Cir. 2007); *Moses.com Securities, Inc. v. Comprehensive Software, Inc.*, 406 F.3d 1052, 1062 (2005). The "beyond doubt" standard has its genesis in the U.S. Supreme Court's case of *Conley*.

In *Bell Atlantic Corp.*, the Supreme Court examined the "beyond doubt" language of *Conley*. After noting that judges and commentators have balked at that pleading standard, the

Court abrogated *Conley*, holding it had been "questioned, criticized, and explained away long enough." *Bell Atlantic Corp.*, 127 S. Ct. at 1960. The Court noted that a literal reading of the *Conley* standard would permit a wholly conclusory statement of claim to survive a motion to dismiss "whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1959. The Court then quoted the Sixth Circuit Court of Appeals, which held as to a complaint making constitutional claims that:

> [W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional action . . . into a substantial one.

Id. (citing *McGregor v. Indistrial Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988)).

When the facts of Plaintiff's complaint amount to only a "wholly conclusory statement of a claim" and no specific facts are plead to support Plaintiff's conclusion of negligence or a violation of the APA, "this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic Corp.*, 127 S. Ct. At 1966 (quoting 5 *Wright & Miller* § 1216, at 233-234) (internal quotations omitted).

IV. DISCUSSION

Plaintiff brought her claims under two statutes: The FTCA and the APA. We treat each in turn as to each agency.

A. The Federal Tort Claims Act as to HUD

1. Plaintiff allegations against HUD contained in Count I[4].

[4] Should the Court conclude that Plaintiff alleged that HUD was negligent in entering into the underlying lease agreement, Cpl. at 13, ¶11, the lease is not signed by any HUD employee. Cpl. Ex. A. Accordingly, any allegation that a federal employee of HUD was negligent in entering into the lease fails because HUD was not a party to the lease. There is no waiver of sovereign immunity under the FTCA unless a claim is alleged against a federal employee. Therefore, this

Before addressing why Plaintiff's claims as to HUD should be dismissed, the United States will briefly summarize the allegations against HUD contained in the complaint. Plaintiff bases her complaint on two types of acts or omissions – the allegedly defective land lease and the substandard living conditions – she must make the required showing in each of these matters. The complaint summarizes the allegations in Count 1 against HUD as "Negligence and Failure of HUD in creation, supervision, approval and in administering the MHOA." Cpl. at 11.

The creation allegation in relation to the MHOA appears to arise from the alleged fact that HUD's oversight as to the local IHAs is a result of a regulatory scheme which is HUD's creation. Cpl. at 11, ¶11. No specific allegation is made that HUD created the MHOA or was negligent in the creation of the MHOA. Cpl. at 11-12, ¶¶ 11, 13-14 (allegations of negligence by HUD); Cpl. at 4, ¶¶14, 17 (stating that the MHOA agreement was between the CRHA and plaintiff). *See also Garreaux v. U.S.*, No. 06-502 C, Slip Op. at 5-6 (Ct. Fed. Cl. July 27, 2007) (finding that defendant United States was not a party to the MHOA but that CRHA is, and that Garreaux conceded that Plaintiff bargained with CRHA in entering into the MHOA).

As to the alleged negligence by HUD as to the supervision of the MHOA, there are only two allegations contained in Count I as to the supervision of the MHOA. Cpl. at 12, ¶13 (stating, "In addition to HUD's negligence in entering into the underlying lease agreement and their supervision of CRHA's supervision of the lease . . . .); Cpl. at 12, ¶14. The allegations as to the alleged negligent supervision by HUD of the MHOA is based upon HUD allowing CRHA to approve and enter into the MHOA and as well as HUD's failure to supervise CRHA as to the repairs of the home which Plaintiff alleged CRHA indicated it would make. Cpl. at 12, ¶¶13, 14.

Court would not have subject matter jurisdiction as to such a claim.

As to the allegation that HUD was negligent in administering the MHOA, Plaintiff alleges that HUD was negligent by failing to administer the MHOA given that they did not provide any oversight over the actions of the CRHA. Cpl. at 11, ¶11.

Finally, Plaintiff's allegation that HUD was negligent in approving the MHOA is inconsistent with Plaintiff's allegation that HUD was negligent in failing to administer the MHOA. Plaintiff's allegation relating to the negligent approval of the MHOA is simply an allegation in support of its negligent supervision claim. One only needs to look to the complaint to see the inconsistency. Plaintiff's complaint in Count 1, ¶11 and a portion of ¶13, alleges that CRHA approved the agreement, but another portion of Count 1 ¶13 states that HUD approved the agreement. *See* Cpl. at 11, ¶11 (CRHA "was allowed to approve the MHOA agreement") and Cpl. at 12, ¶13 ("By allowing CRHA to approve and enter into a MHOA . . . .); *compare* Cpl. at 12, ¶13 ("HUD was negligent in approving the MHOA agreement with the plaintiff in this case when [it] should have know[n] that the land lease upon which the Mutual Help home sat could be canceled once the participant in the MHOA program completed the payment process."). The last sentence of ¶13 contained in Count I makes it clear that as to Plaintiff's negligence of approval argument what Plaintiff is arguing is a continuation of Plaintiff's lack of oversight/ supervision argument. In ¶13, Plaintiff alleges that "[b]y allowing CRHA to approve and enter into a MHOA with the plaintiff HUD failed in its duty to provide a home to the plaintiff . . . ." Plaintiff is alleging that HUD's alleged lack of supervision of CRHA in the approval process is a breach of a duty which HUD has to provide Plaintiff with a home.

2. Under the FTCA, Plaintiff must establish a waiver of sovereign immunity for this Court to have subject matter jurisdiction. In the alternative, to state a claim, Plaintiff must establish the required elements of the specified tort.

Under the doctrine of sovereign immunity, the United States may not be sued without its consent. The FTCA was enacted to provide a limited waiver of sovereign immunity with respect to certain torts committed by a federal employee. 28 U.S.C. § 1346(b), 2674; *Primeaux v. U.S.*, 181 F.3d 876, 878 (8th Cir. 1999) (FTCA is a limited waiver of sovereign immunity). A contractor is not a federal employee. 28 U.S.C. § 2671. In addition, the United States is only liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1346(b), 2674.

To prove that any harm Plaintiff suffered was caused by HUD, she must establish either that one or more HUD employees acting within the scope of their employment committed a wrongful or negligent act or omission or that CRHA was in fact, if not in name, a Federal agency and that its employees committed a negligent or wrongful act or omission. 28 U.S.C. § 1346(b). Plaintiff must show that a private individual would be liable under South Dakota law for the claims which Plaintiff alleged against HUD. 28 U.S.C. § 2674. If Plaintiff cannot meet both these elements, this Court does not have subject matter jurisdiction because the United States has not waived its sovereign immunity under the FTCA unless these elements are met. *Brown v. U.S.*, 151 F.3d 800, 803 (8th Cir. 1998) (holding that sovereign immunity is a jurisdictional doctrine and the district court erred in converting motion to dismiss for lack of subject matter jurisdiction to a motion to dismiss for failure to state a claim).

If Plaintiff can establish a waiver of sovereign immunity under the FTCA, then to establish a claim of negligence, one element that Plaintiff must establish is that the defendant who is alleged to have committed the negligence owed a duty to the Plaintiff. *Muhlenkort v. Union Co. Land Trust*, 530 N.W. 2d 658, 662 (S.D. 1995). If Plaintiff's complaint fails to

establish that defendant owed Plaintiff a duty, Plaintiff failed to state a claim under the FTCA. *Carter v. U.S.*, 123 Fed. Appx. 253, 2005 WL 351119 (8th Cir. Feb. 15, 2005).

Plaintiff's allegations against HUD fail because Plaintiff has not waived sovereign immunity as to the claims alleged. In the alternative, Plaintiff failed to state a claim.

3. CRHA's actions may not be attributed to HUD and Plaintiff failed to establish subject matter jurisdiction as to all allegations contained in Count I relating to HUD. In the alternative, HUD's oversight of CRHA does not create a duty to Plaintiff.

All Plaintiff's allegations as to HUD described above are based upon the allegation that HUD is responsible for the actions of CRHA. Given that CRHA is not a federal agency, any such acts or omissions alleged on the part of CRHA may not be attributed to HUD.

In *United States v. Orleans*, 425 U.S. 807, 813, 814 (1976), the Supreme Court held that the FTCA was never intended to extend to "employees or agents of all federally funded programs that confer benefits upon people." "It is inconceivable," the Court continued, "that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of 'beneficiaries.'" *Orleans*, 425 U.S. at 816. Thus, the Act may extend to the conduct of the employees of Federal grantees and contractors only when the Federal Government has the power "to control the detailed physical performance of the contractor" or grantee. *Orleans*, 425 U.S. at 814. "The Federal Government in no sense controls 'the detailed physical performance' of all the programs and projects it finances by gifts, grants, contracts or loans." *Orleans*, 425 U.S. at 816 (internal cites omitted).

A number of courts have applied *Orleans* and concluded that public housing authorities receiving money from HUD are not Federal agencies for purposes of the FTCA. *See Staten v. Hous. Auth. of the City of Pittsburgh*, 638 F.2d 599, 603 (3rd Cir. 1980) (housing authority is not

extension of the United States where, although receiving federal funding, it was free from Federal involvement or control over its daily management and operations); *Perez v. U.S.*, 594 F.2d 280, 284 (1st Cir. 1979) (housing authority is not Federal agency under FTCA where, although it must comply with federal standards and regulations, its day-to-day operations are not supervised by the Federal government); *Allen v. Kansas City,* 660 F. Supp. 489, 494-495(D. Kan 1987) ("mere existence of federal funding by HUD and …[of the recipient's need to comply with] regulations under the low-rent housing act … without control over the daily management and operation of the authority does not make HUD or the United States liable for damages under the [FTCA]"). *See also Vincent v. United States*, 513 F.2d 1296, *cert. denied,* 426 U.S. 919, 96 S. Ct. 2623 (8th Cir. 1975) (federal control over Head Start nonprofit insufficient to consider nonprofit a federal agency under FTCA).

Perez is particularly instructive in that it involved HUD aid to a housing authority. In dismissing the claims against HUD, the court noted that "neither establishing guidelines nor supplying federal aid, advice and oversight in order to ensure the federal funds are not 'diverted to unauthorized purposes' gives the government the 'day-to-day control' over funded organizations that is a prerequisite to its liability under the [FTCA]." *Perez*, 594 F.2d at 285. As under the program in *Perez*, HUD's involvement in the MH program under the IH Act was that of financier. *See* IH Act §202(b). As financier, HUD had no affirmative duty to guarantee that the housing conditions. *See Perez*, 594 F.2d at 287, n. 11 and accompanying text.

HUD has no control over the day-to-day operations of CRHA. Plaintiff's allegations as to HUD are acts or omissions that CRHA is alleged to have committed, and Plaintiff is attempting to attribute to HUD. Since CRHA is not a federal agency as established by the case

authority cited above, Plaintiff failed to establish that a federal employee committed the alleged negligence. 28 U.S.C. §1346(b). The FTCA only authorizes torts against a federal employee; therefore, this Court does not have subject matter jurisdiction to proceed as to the alleged torts which Plaintiff is attempting to attribute to HUD. All allegations against HUD contained in Count I should be dismissed pursuant to Rule 12(b)(1). *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (both standing for the proposition that absent a waiver of sovereign immunity, the federal government and its agents are shielded from suit).

In the alternative, Plaintiff failed to state a claim. Based upon the case law above, HUD does not have a duty to Plaintiff despite the oversight which the regulations require of HUD. Accordingly, Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6).

4. Plaintiff's claims of acts or omissions on the part of CRHA that Plaintiff is attempting to attribute to HUD are based in contract not in tort.

Where a tort claim stems from a breach of contract, the claim is one arising in contract, and a lawsuit is therefore the exclusive jurisdiction of the Court of Federal Claims. Neither the "common law [n]or a local state law right to waive the breach and sue in tort brings the case within the Federal Tort Claims Act." *Awad v. United States,* 301 F.3d 1367, 1372 (Fed. Cir. 2002); *Wood v. Untied States,* 961 F.2d 195 (Fed. Cir. 1992); *see VS Ltd. Partnership v. HUD,* 235 F.3d 1109 (8th Cir. 2000) (exclusive jurisdiction is in the COFC for suit alleging HUD breached an oral modification of a mortgage agreement). The only exception to this jurisdictional limitation is under the *Little Tucker Act* for suits seeking no more than $10,000. 28 U.S.C. § 1346(a)(2). For claims exceeding that amount, the only way for a plaintiff to establish district court jurisdiction is for her to waive any claim to the amount exceeding that limit. *See Vander Mohen v. Stetsun*, 571 F.2d 617, 619 n. 2 (D.C. Cir. 1977). The South Dakota Supreme

Court recognizes "conduct that is merely a breach of contract is not a tort. The contract, however, may establish a relationship demanding the exercise of proper care and acts and omissions in performance may give rise to tort liability." *Weeg v. Iowa Mut. Ins. Co.*, 141 N.W. 2d 913, 916 (1966).

Plaintiff's claims against HUD are based on CRHA's alleged breach of its MHOA with Plaintiff, and on HUD's alleged breach of its ACC with CRHA. Accordingly, they sound in contract and are not properly cognizable under the FTCA. Since the FTCA does not waive sovereign immunity for claims based in contract, this Court does not have subject matter jurisdiction under the FTCA to proceed with a claim arising under a contract. *Audio Odyssey, Ltd. v. U.S.*, 255 F.3d 512, 516 (8th Cir. 2001) (FTCA is a limited waiver making the United States liable for certain torts); 28 U.S.C. §2674 (liability relates to tort claims). Therefore, given that Plaintiff's claims against HUD arise in contract, the claims should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

In addition, Plaintiff has not pled elements which establish that the contracts demanded the exercise of proper care on the part of HUD. The COFC dismissed Plaintiff's claim against the United States because there was no privity of contract. Without privity of contract against the United States, how could plaintiff demonstrate that the contract establishes a relationship requiring the United States to exercise proper care giving rise to tort liability. In the alternative, under South Dakota law, Plaintiff failed to state a claim in tort for conduct which is a breach of contract. Plaintiff's claims against HUD should be dismissed pursuant to Rule 12(b)(6).

5. In the alternative, as to Plaintiff's negligence claim alleged in Count 1 ¶14 of the complaint, any claim relating to the negligent condition of the home or the failure to repair the home is barred by the statute of limitations.

Next, should the Court find as to the negligence attributed to HUD in Count 1 ¶14 that Plaintiff properly alleged that a federal employee was negligence and that the claim is not one arising in contract, the alleged claim against HUD in Count I ¶14 would be dismissed regardless for lack of subject matter jurisdiction because the claim is outside of the statute of limitations. *T.L. ex rel. Ingram v. U.S.*, 443 F.3d 956 (8th Cir. 2006) (statute of limitations is jurisdictional). . The FTCA's two-year statute of limitations bars a claim based on HUD's breach of any responsibilities that it may have had under the Indian Housing Act. *See* 28 U.S.C. §2401(b).

The limitations period begins to run when the claim accrues under Federal law. *Reilly v. United States,* 513 F.2d 147 (8th Cir. 1975). In the case of injury or property damage based on the Government's negligent inspection of property, the claim accrues at the time the injury or damage is discernible. *United States v. Thurber,* 376 F. Supp. 670 (D. Vt. 1974). The IH Act was repealed effective October 1997 and HUD's responsibilities under that Act ceased. According to the complaint, Plaintiff was aware of the substandard condition of her unit from the time she moved in to the home in 1992. Cpl. at 4-5, ¶18. Thus the statute of limitations for the condition of her home would have run two years later, in 1994. Plaintiff did not file her tort claim until January 2006, and her administrative complaint is dated January 6, 2005. Given that the statute of limitations for claims for any alleged acts and omissions relating to the alleged substandard housing conditions expired prior to Plaintiff even filing an administrative claim, it is accordingly too late for Plaintiff to sue HUD based on any responsibilities it might have had under that Act. Based upon the foregoing, Count I ¶14 of Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

A second reason for dismissal in the alternative is Plaintiff failed to establish that HUD

had any duty to Plaintiff regarding the condition of her home. Even under the IH Act, HUD's responsibility to oversee CRHA's duty to ensure that homes it administered under the MH program were decent, safe and sanitary was insufficiently detailed to support HUD liability for CRHA's actions and omissions. The MH regulations emphasize that it was the home buyer's duty to maintain their homes and the IHA's duty to penalize the home buyer for failing to do this. "[N]either the IHA nor its implementing regulations imposed upon HUD a duty to ensure that homes built under the MHO 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 … Indian Housing Authority." *Marceau v. Blackfeet Housing*, CV-92-073-GF-SEH, slip op. at 5 (D. Mont. January 15, 2004), *affirmed in relevant part*, 455 F.3d 974 (9th Cir. 2006). In the alternative, as to Count I ¶14, Plaintiff failed to state a claim because HUD had no duty to Plaintiff for the allegations alleged; accordingly, Plaintiff's claim should be dismissed.

Finally, a third reason for dismissal of Count 1 ¶14 in the alternative is Plaintiff's negligence claim alleged in Count I ¶14 fails to establish a waiver of sovereign immunity because Plaintiff cannot establish a similar duty under state law. *Reynolds v. U.S.*, 927 F. Supp. 91, 96-97 (W.D.N.Y. 1996); 28 U.S.C. ¶2674. For negligence to be actionable under South Dakota law, the plaintiff must allege and prove duty, breach, proximate cause and injury. *See Mark, Inc. v. Maguire Insurance Agency, Inc.*, 518 N.W.2d 227, 229 (S.D. 1994). To characterize HUD's duty to oversee the maintenance of Plaintiff's home or to oversee CRHA's duty to ensure that Plaintiff's home was kept in an inhabitable condition as a private party tort is difficult. At best it might be characterized as akin to a duty of a mortgagee for a multifamily

property management company to ensure that the management company kept its dwellings in an inhabitable condition. *Compare Bull v. HUD,* 15 F.3d 1088 (table), 1994 WL 6653 (9th Cir 1994) (unpublished opinion)(comparing allegation that HUD violated the FTCA by allowing its architect to approve faulty window design to a private tort against a bank or other lender for negligent construction where bank did not construct the building but only inspected it and holding that no such private tort existed in Montana). We can find no such duty under the law of South Dakota. *See Garrett v. BankWest,* 459 N.W. 2d 833 (S.D. 1990)(bank owes no fiduciary duty to customer beyond that provided by contract itself); *see also Solecki v. United States,* 693 F. Supp. 770 (D. Iowa 1988)(denying claim under FTCA: as mortgagee, FmHA had no duty to repair stairs). Because there is no duty on the part of a financier or lender to oversee maintenance or property condition exists under state law, there is no basis for holding HUD liable for any failure on its part to oversee CRHA's oversight of Plaintiff's property maintenance. Accordingly, as to Count I ¶14, the sovereign immunity has not been waived without an allegation that a private person would be liable under state law. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1).

6. In the alternative, Plaintiff failed to state a claim as to the negligence alleged in Count I ¶13 .

If the Court should conclude that Plaintiff alleged claims against a federal employee of HUD in Count I ¶13 and that such claims arise in tort not contract, in the alternative, Plaintiff failed to state a claim as to the negligence alleged in Count I ¶13 of Plaintiff's complaint. The allegation in Paragraph 13 purports to set forth an omission by HUD – its failure to inform Plaintiff of the defective nature of the lease. In order for that omission to be wrongful, however, HUD must have had a duty to make the communication to Plaintiff. Plaintiff articulated no

source for such a duty. HUD had no relationship with Plaintiff to trigger such a duty. As stated above, HUD was not a party to the lease. *See* fn. 4, *infra*. In addition, HUD was not a party to the MHOA. *See* Cpl. at 4, ¶¶14, 17 (stating that CRHA entered into the MHOA with the Plaintiff). Furthermore, as explained above, HUD's mere power to provide oversight of CRHA's initiation and administration of an MHOA, does not create a duty under the FTCA.

Accordingly, given that HUD does not have a duty to Plaintiff, Plaintiff failed to state a claim for any cause of action alleging that HUD was negligent in its failure to inform Plaintiff of an allegedly defective lease, and even assuming the allegations as set forth by Plaintiff, Count I ¶13 should be dismissed for failure to state a claim pursuant to Rule 12(b)(6). In addition, Plaintiff's allegation in Count 1 ¶13 that HUD was negligent in "approving the MHOA" is in error both because there is no evidence that HUD either approved the MHOA or had the duty to do so. Plaintiff's complaint states that the MHOA was between Plaintiff and CRHA. Cpl. at 4, ¶14 and 12, ¶14. Plaintiff's complaint does not allege any specifics as to the allegation that HUD approved the MHOA. *See Bell Atlantic Corp.*, 127 S. Ct. 1955. For example, the complaint does not discuss who within HUD approved the MHOA, it only states in Count I ¶13 that "HUD was negligent in approving the MHOA agreement with the plaintiff in this case . . . ." Cpl. at 12, ¶13. The complaint does not discuss when HUD approved the MHOA. Even if Plaintiff alleges she cannot know these facts at this time, the complaint does not even allege what statutory provisions require HUD to approve the MHOA. Accordingly, under the standard of review stated in *Bell Atlantic Corp.*, Plaintiff failed to state a claim that HUD was negligent in approving the MHOA and Count I ¶13 should be dismissed pursuant to Rule 12(b)(6).

B. The Administrative Procedures Act as to HUD

The APA allows a "person suffering legal wrong because of [an] agency action" cognizable under the statute to file a claim in Federal court for relief for other than money damages from the agency. 5 U.S.C. §§ 702, 704. The reviewing court may set aside any such action which, as a matter of law, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). If, however, an agency makes a decision in an area that is committed to agency discretion by law, no judicial review is allowed. 5 U.S.C. §701(a)(2). Here, the APA suit should be dismissed for two reasons.

First, the relief requested from HUD is akin to money damages. "Plaintiffs cannot seek relief that is essentially the equivalent of money damages. [Thus, where] . . . the substance of their claim is that they are owed money damages from the federal government," their APA claim is barred. *Marceau v. Blackfeet Housing Authority,* 455 F.3d 974, 985 (9th Cir. 2006). In *Marceau,* the court affirmed the dismissal of the plaintiffs' APA claim seeking for HUD to repair or rebuild their homes, which had been damaged by mold due to defective, wooden foundations. The plaintiffs wanted a declaratory judgment "to seek monetary damages in other fora," and "in an amount necessary to repair or rebuild Plaintiffs' home." *Id.* Here, Plaintiff Garreaux seeks from HUD under the APA and order directing HUD to provide a home which is substantially similar and an order directing HUD "to repair the home in which the plaintiff currently resides." Cpl. Count II, Prayer for Relief ¶B & C. The relief sought against HUD here is thus essentially the same as that sought by the plaintiffs and rejected by the court in *Marceau.* Plaintiff seeks money to repair or to move and repair her current home or money to purchase another home. Accordingly, this Plaintiff seeks monetary damages under the APA. There is no waiver of sovereign immunity under the APA, and Plaintiff's APA claims against HUD should

be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See Raz v. Lee*, 343 F. 3d 936 (stating that 5 U.S.C. §702 waives sovereign immunity as to non-monetary relief).

Second, Plaintiff's APA claim as to HUD should still be dismissed because oversight of CRHA's responsibilities does not constitute agency action. As in the tort cases cited previously, *e.g.*, *Perez*, 594 F.2d 280, the courts have rejected claims that Federal agencies engaged in agency action in violation of the APA where the agencies' duties have been limited to general oversight of grantees and contractors. *See Shaw-Henderson v. Schneider*, 453 F.2d 748 (6th Cir. 1971); *Window Sys., Inc. v. Manchester Memorial Hosp.*, 424 F. Supp. 331, 336 (D. Conn. 1976). This refusal to categorize Federal oversight of grantee activities is consistent with the Supreme Court's pronouncement that "[g]rants of Federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed and virtually day-to-day supervision." *Forsham v. Harris*, 445 U.S. 169, 180 (citations omitted).

HUD regulations describing IHA maintenance oversight responsibilities for Mutual Help homes are quite vague. *See* 24 C.F.R. §905.345 (1991). The regulations explicitly state that maintenance of homes is the responsibility of the home buyer. 24 C.F.R. §905.345 (d). Through the regulations, HUD directed that the IHAs were responsible for ensuring that the housing was kept in a decent, safe and sanitary condition, but its only specific regulatory instruction on how IHAs were to accomplish this was that they "conduct a complete interior and exterior examination of each home at least once a year and … furnish a copy of the inspection report to the home buyer." 24 C.F.R. § 905.345(d). The IHA is responsible for taking action against the

home buyers for noncompliance with their MHOAs. *See* 24 C.F.R. §905.446(f) (1991). HUD's responsibility for overseeing IHA maintenance of MH units was limited to its annual overall monitoring reviews. *See* 24 U.S.C. §905.130(b); *see* 24. C.F.R. §905.350. Accordingly, Plaintiff's APA claim does not articulate an agency action reviewable under the APA and must be dismissed for lack of jurisdiction.

C. Federal Tort Claims Act as to DOI

Plaintiff alleges that the Bureau of Indian Affairs (BIA), negligently drafted, created, approved , and administered a lease agreement (Document No. 340 24548) on land owned by members of the Veo family, held in trust by the BIA and leased to the CRHA. Cpl. at 9-10, ¶1-8. No BIA employees are identified specifically in the complaint. South Dakota state law is determinative of liability under the FTCA as to the claims Plaintiff alleges against the BIA. *LaFramboise v. Leavitt*, 439 F.3d 792, 795 (8th Cir. 2006).

The question becomes whether the BIA owed the Plaintiff a duty in this instance. In leasing Indian lands, the BIA's fiduciary obligations are clearly to the Indian landowners. *See Wilkinson v. United States*, 440 F.3d 970, 975 (8th Cir. 2006). The fiduciary obligation does not disappear when the Secretary of the Interior approves a lease covering the allotted land. *Compare id*. However, the BIA does not become a trustee on behalf of lessees. *Burnell v. Acting Albuquerque Area Director, BIA*, 2000 I.D. Lexis 3, 35 IBIA 56 at *14 (2000) ("The Board has held on several occasions that BIA does not have a trust duty toward a lessee of Indian land, even where the lessee is Indian . . . "); *see also Johnson v. Acting Phoenix Area Director*, 1993 I.D. Lexis 17, 25 IBIA 18 (1993). Rather the BIA's duty remains for the Indian landowners. By stepping into the shoes of CRHA, Plaintiff would be a lessee under the lease.

The BIA owes its trust duty to the landowners not a lessee. Accordingly, given that the BIA does not have a duty to the lessee, Plaintiff's claims against the BIA fail to state a claim under the FTCA. Accordingly, Plaintiff's complaint should be dismissed for failure to state a claim as to the claims alleged in Count I against the BIA pursuant to Rule 12(b)(6).

In the alternative, should this Court find that the BIA has a fiduciary duty to Plaintiff, Plaintiff's complaint is an effort to allege that the BIA had breached a fiduciary trust duty which Plaintiff believes the BIA owed to her as an Indian who was the lessee, sublessee, or assignee of a lease agreement which the BIA approved. The proper forum for any claim alleging such a breach of a trust is the Court of Federal Claims.

The FTCA provides that the United States may be held liable for personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States acting within the scope of his or her employment under circumstances where the United States, if a private person, could be responsible to the claimant in accordance with state law. 28 U.S.C. §§ 1346(b), 2674. Plaintiff fails to cite any South Dakota law that would impose a fiduciary obligation on a private person in a garden-variety negligence action such as the instant one. The federal government's "fiduciary duty" to federally recognized Indians can serve as the basis for a breach of trust action against the United States. See, e.g., *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), *United States v. Navajo Nation*, 537 U.S. 488 (2003). Breach of trust claims arising under the Constitution, laws or treaties of the United States, must be brought under the Tucker Act, 28 U.S.C. § 1491 and its companion statute, the Indian Tucker Act at 28 U.S.C. § 1505. The Indian Tucker Act contains a

waiver of sovereign immunity for Indian tribal claims that would be cognizable in the Court of Federal Claims if the plaintiff is other than an Indian tribe. The Court of Federal Claims has exclusive jurisdiction for breach of trust type claims against the United States for money damages in excess of $10,000. 28 U.S.C. § 1505.

The Tucker Act and the Indian Tucker Act are jurisdictional statutes and do not create any substantive right against the United States for money damages. In order to recover money damages against the United States under these statutes, a plaintiff must identify a "substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained" for a breach of the duties they impose. Mitchell II at 218-19. In this case, Plaintiff seek money damages well in excess of $10,000 placing any breach of trust type claim within the exclusive jurisdiction of the Court of Federal Claims. Therefore, in the alternative, any cause of action predicated on a "fiduciary obligation" should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

D. APA Claims as to the DOI

As to the allegations against the BIA pursuant to the APA, the only fact mentioned as to the BIA is that it approved the underlying lease agreement. Plaintiff then makes a general statement that the aforementioned allegations amount "to a failure of the BIA and HUD to administer the program at question properly and constitutes an abuse of discretion." Complaint (Cpl.) at 17, ¶ 10. Plaintiff's complaint is insufficient on its face to establish a claim against the BIA that it acted arbitrarily and capriciously in signing the lease. Regardless of that fact, Plaintiff has not exhausted its administrative remedies under her APA/BIA claim .

Under the DOI's regulations, no decision that at the time of its issuance is subject to appeal to a superior authority in the Department, is final as to constitute Departmental action subject to judicial review under 5 U.S.C. §704; 25 C.F.R. § 2.6(a). Under 25 C.F.R. Part 2, decisions of the Assistant Secretary are final for the Department, while Regional Directors' decisions may be appealed to the Interior Board of Indian Appeals. In promulgating the initial regulations providing for review of administrative decisions of the BIA, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs." 40 FR 20819 (May 13, 1975). Thus, Interior Board of Indian Appeals decisions are final for the Department for purposes of review under 5 U.S.C. § 704; 43 C.F.R. § 4.314.

In this instance, the Superintendent of the Cheyenne River Agency sent a letter to the Plaintiff regarding the lack of a lease to the property. Cpl. Exh. E. Once the BIA was apprised the CRHA still had a financial interest in the property it ceased actions to evict the Plaintiff. Cpl. Exh. F. Plaintiff's complaint does not allege that his APA administrative remedies have been exhausted. Only final agency actions are reviewable. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (requirement for final agency action is jurisdictional). Thus, the Plaintiff failed to exhaust administrative remedies. Whether failure to exhaust administrative remedies is jurisdiction or is more in the nature of failure to state a claim, should the Court find that Plaintiff has stated an APA claim against the BIA, the APA claims should be dismissed pursuant to Rule 12(b)(1) or in the alternative, Rule 12(b)(6) for failure to exhaust.

Should the Court decline to dismiss the APA claim against the BIA for failure to exhaust administrative remedies, in the alternative, Plaintiff has failed to state a claim under the APA involving the BIA. The complaint alleges in a concluding sentence that the APA was violated when the BIA negligently administered the MHOA by approving the lease between HUD and the members of the Veo family. Cpl. at 17, ¶10.

> Generally, the obligation of contracts is limited to the parties making them, and ordinarily, only those who are parties to contracts are liable for their breach. Parties to a contract cannot thereby impose any liability on one who, under its terms, is a stranger to the contract . . . .

17A Am Jur 2d Contracts § 412. The BIA did not have a duty to administer the MHOA because it was not a party to the MHOA. Cpl. at 4, ¶14; *Garreaux*, Slip. Op. At 5-6 (court found that Defendant United States was not a party to the MHOA). Plaintiff cannot establish a claim under the APA that the BIA acted arbitrarily and capriciously when the BIA was not a party to the MHOA. Plaintiff's BIA/APA claim should be dismissed pursuant to Rule 12(b)(6).

Based upon the foregoing, all causes of action alleged against Defendants in the above-entitled matter should be dismissed.

Dated: August 28, 2007.

MARTY J. JACKLEY
United States Attorney

/s/ Stephanie C. Bengford
STEPHANIE C. BENGFORD
Assistant United States Attorney
P. O. Box 3303
Sioux Falls, SD 57101-3303
(605) 357-2341
(605) 330-4402 fax
stephanie.bengford@usdoj.gov