No. 08-848C
(Senior Judge Wiese)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON,
LUMMI NATION HOUSING AUTHORITY,
FORT PECK HOUSING AUTHORITY,
FORT BERTHOLD HOUSING AUTHORITY
and HOPI TRIBAL HOUSING AUTHORITY,
Plaintiffs,

v.

THE UNITED STATES,
Defendant,

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

DONALD E. KINNER
Assistant Director

MICHAEL N. O'CONNELL
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
1100 L Street, NW, 8th Floor
Washington, D.C. 20530
Telephone: (202) 353-1618
Facsimile: (202) 514-7969
Attorneys for Defendant

February 18, 2011

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, FORT PECK HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY and HOPI TRIBAL HOUSING AUTHORITY,	)	
Plaintiffs,	)	
v.	)	No. 08-848
	)	(Senior Judge Wiese)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims, defendant respectfully submits this reply to plaintiffs' response to defendant's motion to dismiss for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

ARGUMENT

I. Plaintiffs' Claims Are, In Part, Time Barred

In our motion to dismiss, we established that plaintiffs' claims through November 26, 2002 are barred by the statute of limitations. At pages three to four of its brief, plaintiffs argue that the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("Reauthorization Act") essentially revived claims barred by the statutes of limitations by giving tribes or tribally designated housing authorities ("TDHEs") a 45-day period to file suit based upon the prior version of the Native American Housing and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et. seq.* Plaintiffs are mistaken. Read in context, the 45-day

provision of the Reauthorization Act actually shortened the six year statute of limitations for any claim based on prior law; it did not revive expired claims.

As we stated in our opening brief, Congress enacted the Reauthorization Act on October 14, 2008. At that point in time, the decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125, 1132-35 (D. Colo. 2006) ("*Fort Peck I*") declaring 24 C.F.R. § 1000.318 invalid remained in effect. Congress overruled that decision in the Reauthorization Act by amending 25 U.S.C. § 4152(b) to provide, among other things, that units counted in Formula Current Assisted Stock ("FCAS") would not include those units where the tribe or TDHE "ceases to possess the legal right to own, operate, or maintain the unit" or when "the unit is lost to the recipient by conveyance, demolition, or other means." 25 U.S.C. § 4152(b)(1)(A)(i) & (ii). Thus, Congress effectively adopted the language of the 24 C.F.R. § 100.318(a), which provides that: "units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise. . . ."

But for subsection 4152(b)(1)(E) added by the Reauthorization Act, tribes or TDHEs would have had up to six years to file suit for claims relating to the prior version of that section. Congress' addition of subsection 4152(b)(1)(E) provided that the new sub-sections added by the Reauthorization Act adopting 24 C.F.R. § 1000.318 "shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." This amendment does not revive claims barred by the statutes of limitations. It specifies what law applies to a particular claim. The

effect of this amendment was to shorten the statute of limitations on claims arising under the law predating the enactment of the Reauthorization Act by up to nearly six years. For example, a claim relating to fiscal year 2008 block grants, and based upon the provisions of section 4152(b)(1) of NAHASDA as they were prior to the Reauthorization Act, otherwise would have expired some time in fiscal year 2014, but under the Reauthorization Act it expired in November 2008. After that date, such a claim could only be resolved based upon the provisions of section 4152(b)(1) of NAHASDA as amended by the Reauthorization Act.

There is also no countervailing indication either in the Reauthorization Act or its legislative history that indicates a congressional intent to revive stale claims. Accordingly, read in context, the Reauthorization Act did not revive claims that had long since expired.

Plaintiffs argue, however, that because the Reauthorization Act uses the terms "any claim" and "any fiscal year" and because statutes are to be construed in favor of Indians, the statute should be read so as to revive expired claims. This argument is misplaced, however, because the statute is clear in that it does not revive stale claims. Moreover, as we pointed out in our opening brief, Congress appropriates limited funds for the NAHASDA Indian Housing Block Grants ("IHBGs"). The concept of interpreting a statute to benefit Indians does not apply here. The issue in this case is how to divide a fixed congressional appropriation among a number of tribes. If plaintiffs obtain a larger block grant, another tribe or tribes receives a smaller grant or grants by exactly the same amount. This is a zero sum game, and all of the players are Indians. Thus, neither the analysis nor this Court is assisted by the urge to act in the best interest of Indians generally. As the United States Court of Appeals for the Tenth Circuit stated when it considered this argument by the Fort Peck Housing Authority, "we need not address this issue

except to note the canon cited does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Fort Peck Housing Auth. v. HUD*, 367 Fed. Appx. 884, 892 (10th Cir. 2010) ("*Fort Peck II*").

Finally, on page five of their brief, plaintiffs cite *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15 (2007) in support of an argument that the Court should not dismiss the case until plaintiffs have been allowed to take some discovery. *Rosebud Sioux Tribe* does not help plaintiffs because questions of when the plaintiff's claim accrued in that case were much more complicated than the present case. The Court dubbed the case "*Rosebud VI*." *Id.* at 22. *Rosebud I* through *Rosebud V* were a series of cases filed in two district courts and the United States Court of Appeals for the Eighth Circuit between 1998 and 2005 involving an on-again, off-again, project to construct a hog farm. The parties to the actions included an Indian tribe, public interest groups, the operator of the hog farm, and the Government. *Id.* at 17-20. In *Rosebud VI*, the Court considered an Indian trust claim alleging that the Government "breached fiduciary duties owed to the Tribe in the handling of the various lawsuits, vacillating between conceding the lease was void and valid, resulting in a determination by more than one United States District Court that the lease was valid and another that [sic] lease was invalid." *Id.* at 22. Due in part to this complicated history, and because some of the alleged damages occurred within the statute of limitations, the Court declined to dismiss. *Id.* at 23-24.

The facts of the current case are not nearly so complicated and uncertain as *Rosebud VI*. HUD's IHBG payments to plaintiffs in fiscal years 1998 to 2003 were discrete, identifiable acts that, if plaintiffs' view of the law is correct, resulted in damages to plaintiffs that occurred in those fiscal years. Unlike in *Rosebud VI*, there is no question as to when plaintiffs' claims

accrued. In their brief, plaintiffs identify no discovery that would be helpful on their claims for those years.[1] Accordingly, there is no reason to provide plaintiffs discovery on these claims.

II. NAHASDA Is Not A Money Mandating Statute

In our opening brief, we urged the Court to follow the Court's recent holding in *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 132 (2009) ("*Samish V*"), in which the Court, relying upon *Bowen v. Massachusetts*, 487 U.S. 879 (1988), held that Federal grant-in-aid statutes are not money mandating because they subsidize future expenditures rather than compensate the recipient for past injuries or labor. In response, plaintiffs contend that NAHASDA is money mandating, relying in part upon cases which provide that statutes are generally money mandating when they provide that the Government "shall" pay money. However, such cases are only of limited usefulness in cases such as the present matter, *Samish V*, or *Bowen*, which involve a statutory mandate or a grant-in-aid program that provides money for future expenses rather than statutes that provide payments for past labor or injuries. More to the point is Plaintiffs' reliance upon the Court's recent decision in *ARRA Energy Company I v. United States*, 2011 WL 140353 (2011), which involved a grant reimbursement program, albeit one that is readily distinguishable from the present case.

The statute at issue in *ARRA*, the American Recovery and Reinvestment Tax Act of 2009 ("Recovery Act"), involved a program for reimbursement grants to persons who invested in renewable energy property. *Id.* at *2. The plaintiff purchased twenty-five properties and then

[1] Plaintiffs also cite *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 fn. 13. (1978). That case involved a question as to which party should bear the notification costs in a class action with more than 100,000 members. The issue before the court was whether the discovery rules authorized a district court to help identify the members of the class. It has little to do with the issues before this Court.

filed applications for reimbursement with the Government. After the Government denied the applications, the plaintiff filed suit. The Government responded with a motion to dismiss arguing that the statute was not money mandating. The Court denied the motion, holding that the statute compelled the Government to pay any person who placed the specified property in service. *Id.* at *8.

On its face, the Recovery Act is distinguishable from NAHASDA and the statutes involved in *Samish V*. In a case under the Recovery Act, the plaintiff spends money in reliance upon the statute, then seeks reimbursement for this past expenditure. By contrast, in *Samish V*, the Court held that grant-in-aid programs subsidize future, rather than past, expenditures and are not money mandating for that reason. *Samish V*, 90 Fed. Cl. at 132-33. Similarly, NAHASDA subsidizes future activities of a tribe and does not compensate the tribe for past expenses. *See, e.g.,* 25 U.S.C. § 4132.

In their brief, the plaintiffs almost ignore the Court's holding in *Samish V*, other than referencing language in which the Court held that one of the statutes at issue did not provide clear standards for paying money to recipients. Plaintiffs' brief at 8, fn. 3 (citing *Samish V*, 90 Fed. Cl. at 138). The plaintiffs err by focusing upon isolated sentences in *Samish V*. The plaintiffs fail to address the Court's central holding that Federal grant-in-aid statutes are not money mandating. *Samish V*, 90 Fed. Cl. at 131-33. The specific page of the opinion that plaintiffs cite discusses the United States Housing Act of 1937. Even this portion of the opinion reinforces the central holding of the Court because the Court began its analysis by stating: "The court has previously held that the Housing Act is not a money-mandating source of jurisdiction to the extent that it authorizes federal grant-in-aid programs." *Id.* at 138. The language that

plaintiffs rely upon was merely an alternate ground for the Court's holding that does not dilute the holding that grant-in-aid programs are not money mandating.

The Court's holding in *Samish V* was consistent with precedent. In *Malone v. United States*, 34 Fed. Cl. 257, 262 (1995), the Court held that it did not possess jurisdiction in a case where a landlord sought damages for retroactive housing assistance payments from HUD. The Court held that the statute in question was not money mandating because it directed HUD to pay "a calculable rental subsidy as part of a program designed to aid low-income families obtain housing," and did not mandate compensation for damages sustained by participating landlords. *Id.* at 263. As the Court explained, "the payment contemplated by the statute is not for the landlords' past injuries or labor, the essence of a Tucker Act claim for monetary relief." *Id.* Accordingly, the Court held that the plaintiff's claim was not for money damages and dismissed for, among other reasons, lack of jurisdiction. *Id.* at 264; *see Nat'l Ctr. for Mfg. Sci. v. United States*, 114 F.3d 196, 200 (Fed. Cir. 1997) (noting that courts have distinguished between two types of suits which seek money as a remedy: (1) those seeking payment to which plaintiff is entitled pursuant to statute, which do not provide Tucker Act jurisdiction; and (2) those seeking compensation for losses suffered, which do provide Tucker Act jurisdiction); *Katz v. Cisneros*, 16 F.3d 1204, 1207–09 (Fed. Cir.1994) (finding that, in suit in which housing developer sought payments under the Housing Act of 1937, APA review was proper because plaintiff was seeking "payments to which it alleges it is entitled pursuant to federal statute and regulations," not money as compensation for a loss suffered).

In *ARRA*, the Court recognized the distinction between statutes providing compensation for past injuries and those subsidizing future activities. The court held that, in the Recovery Act,

"the grants awarded under section 1603 are designed not to subsidize future behavior, but to reimburse costs that were already incurred." *ARRA*, 2011 WL 140353 at *13. The Court also stated that a judgment in this Court would provide the plaintiff with full and adequate relief because the plaintiff was merely seeking the grants relating to its expenditures for its investment in renewable energy properties. *Id.* The Court also noted that this was not the case in *Bowen*, where the Supreme Court held that Tucker Act jurisdiction was "doubtful" both because the case involved open accounts for payments and because the statutes that have been interpreted as money mandating typically attempt to compensate for past injuries or wrongs. *Id.* at *12. Moreover, the Court also held that a district court would not have possessed jurisdiction to consider the plaintiff's claim. *Id.* at 13.

In this case, the Court cannot provide full and adequate relief. Plaintiffs' complaint is predicated upon the contention that 24 C.F.R. § 1000.318 violates the Administrative Procedure Act in that (prior to the Reauthorization Act) it conflicts with NAHASDA. *E.g.*, Am. Cmpl. ¶ 23 ("24 C.F.R. § 1000.318(a) is invalid because it violates section 302(b)(1) of NAHASDA. . ."). As we established in our opening brief, such relief can only be provided in the district court. In addition, unlike *ARRA*, there is no question here that the district courts possess jurisdiction to consider Plaintiffs's claims under the APA and, as we have established, Fort Peck and other TDHEs are actively pursuing such claims in the district court.

In *ARRA*, the Court also rejected the Government's argument that the Court "may never exercise jurisdiction over suits based on a statute that requires the payment of money as a grant or subsidy." *ARRA*, 2011 WL 140353 at *14. In support of this holding, the Court cited two cases, *Greenlee County, Ariz. v. United States*, 487 F.3d 871 (Fed. Cir. 2007) and *Kanemoto v.*

Reno, 41 F.3d 641 (Fed. Cir. 1994). However, the statutes in both of these cases fall into the "past labor or injury" category like *ARRA*, rather than a subsidy for future expenditures like *Bowen*, *Samish V*, or *Malone*. *Greenlee County* involved a statute that compensated local governments for the losses associated with the tax immune status of Federal lands located within their jurisdictions. *Greenlee County*, 487 F.3d at 873. *Kanemoto* involved claims by American citizens detained during World War II because of their Japanese ancestry. Thus, each case involved a loss that the plaintiffs experienced because of the actions of the Federal Government, rather than a grant that, if received, would have subsidized some type of behavior that the Government did not require but wished to promote.[2]

Accordingly, because NAHASDA does not compensate a grant recipient for past labors or expenses, the Court should follow the holdings in *Samish V* and *Malone* and hold that the statute is not money mandating.

Plaintiffs have not responded to our argument that the Fifth Amendment due process clause is not money mandating so we will not elaborate further on that argument.

III. The Antideficiency Act Bars The Relief Sought By Plaintiffs

In our opening brief, we demonstrated that the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), bars recovery by plaintiffs. Plaintiffs respond by citing several cases involving Government contracts where this Court or the Federal Circuit held that the Antideficiency Act did not bar the Government from paying a contract claim because the Judgment Fund was

---

[2] For similar reasons, Plaintiffs's reliance upon *Wolfchild v. United States*, 2010 WL 5163376 is also misplaced. The statutes at issue in that case appropriated money to Indians who remained loyal to the United States during an uprising and, as a result, ended up destitute. *Id.* at *5, 8.

available to pay the judgment. For example, plaintiffs cite *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563 (1997), in which the Court held that the Judgment Fund could be used to pay any judgment in an action for breach of a timber sales contract. In fact, the Contract Disputes Act ("CDA") provides that judgments in CDA cases shall be paid promptly pursuant to the Judgment Fund statute. 41 U.S.C. § 7108.[3]

The problem with plaintiffs' argument is that, unlike the plaintiff in *Wetsel-Oviatt*, plaintiffs are not Government contractors.[4] As a result, this case is similar to those in which courts have held that a plaintiff could not recover an underpaid grant or subsidy because the relevant appropriation had been exhausted. *E.g.*, *Highland Falls-Fort Montgomery Central School Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995) (upholding limited amount paid to plaintiff by agency because of the limited amount of Congressional appropriation).

In *County of Suffolk, New York, v. Sebelius*, 605 F.3d 135 (2nd Cir. 2010), the Second Circuit recently considered issues similar to those in the present case. In that case, a local government filed suit contending that it had received less funding than that to which it was entitled under a statute providing for grants to localities that furnished essential services to individuals and families with AIDS. *Id.* at 138. The Government eventually conceded that the plaintiff had been classified at the wrong funding level and stated that it would be classified correctly for fiscal year 2009. However, with respect to fiscal years 2007 and 2008, the

---

[3] The CDA has been recodified pursuant to Public Law 111-350 and now begins at 41 U.S.C. § 7101.

[4] Plaintiffs' attempt to distinguish *Samish V* by stating that the plaintiff never had a contract is also unavailing. In *City of Houston, Texas v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), the recipients of the HUD block grants in that case had contracts but the court nevertheless held that the case was moot because no appropriation was available to pay the claim. *Id.* at 1427.

Government moved to dismiss the plaintiff's claims as moot because it had distributed the funds appropriated by Congress to other grant recipients. *Id.* at 139. The district court agreed and dismissed the case.

The Second Circuit affirmed. The court of appeals adopted the reasoning of the District of Columbia Circuit in *City of Houston, Texas v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), in which that Circuit held that the Antideficiency Act barred payment of a claim where the appropriation at issue had become unavailable because it had lapsed, been paid to other recipients, or had been rescinded by Congress. The Second Circuit extended the *Houston* rule, holding that where the grant funds had been available when the lawsuit was filed but later became unavailable, the case was still moot. *County of Suffolk*, 605 F.3d at 142.

The Second Circuit also rejected the plaintiff's argument that the Judgment Fund could be used to pay because the district court had found that the appropriation had been paid to other grant recipients. The court of appeals pointed out that the Judgment Fund statute, among other things, required that the sought after payment must not be "otherwise provided for." *Id.* at 143. The court then noted that the GAO has stated that "'[t]here is only one proper source of funds in any given case.'" *Id*. (quoting *3 Principles of Federal Appropriations Law ("GAO Principles")* at 14-40). Further, the court held that "where, as here, 'payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available.'" *Id.* (quoting *3 GAO Principles* at 14-39). The court concluded that it was "persuaded by the GAO's construction of the operative statutory phrase, and therefore conclude that the appropriations relating to the funds plaintiffs seek are 'otherwise provided for,' 31 U.S.C. § 1304(a)(1)." *Id.* As

a result, the court held that sovereign immunity protected the Government from access to the Judgment Fund. *Id.*

The facts in this case are nearly identical to *County of Suffolk*. As we have established, HUD obligates NAHASDA funds to tribes in the year that they are appropriated by Congress; the limited amounts that are not obligated are carried over to the following year and obligated that year. Lalancette declaration, ¶ 14. This means that no money remains to pay plaintiffs' claims from fiscal year 1998 up to at least fiscal year 2006. As plaintiffs observe, HUD set aside limited amounts in fiscal years 2006 and 2007 to pay possible judgments in district court cases. *Id*. at ¶ 15. A greater amount is available for fiscal year 2008. *Id.* When or if any of the money set aside will become available if the Court enters judgment in favor of plaintiffs is unknown.

Finally, plaintiffs argue at page 11 of their brief that other funds may become available through Congressional appropriation or otherwise to pay their claims. They cite cases which provide that HUD would not be prohibited from using such funds to pay a judgment in this case. However, in the absence of a showing that Congress has appropriated such amounts, the argument is nothing more than speculation.

IV. Congress Has Precluded The Court's Jurisdiction Of This Action As Pled By Plaintiffs

As we discussed in our opening brief, in paragraphs 37 and 48 of their amended complaint, plaintiffs alleged that HUD acted improperly by recapturing money from plaintiffs without providing them with notice and an opportunity for a hearing as provided in 25 U.S.C. §§ 4161 and 4165. Among other things, plaintiffs contended that "[t]his comprehensive and exclusive remedial scheme leaves no room for HUD to adopt or enforce the additional remedy of recapture of FCAS funds already awarded or distributed, based on alleged over-counting of

FCAS." Am. Cmpl. ¶ 37.

In their brief, plaintiffs do not contend that the Court possesses jurisdiction either to determine that HUD violated 25 U.S.C. § 4161 or 4165 or to award any relief if HUD has violated these sections. Plaintiffs also do not explain what relief they seek from the Court as a result of the alleged violations of sections 4161 and 4165. Nor do plaintiffs explain why these allegations are in their complaint. Indeed, the allegations only serve to demonstrate that this action is in the wrong court because section 4161 places exclusive jurisdiction in the courts of appeals.

Plaintiffs' response is limited to contending that the Court possesses Tucker Act jurisdiction, notwithstanding the "comprehensive and exclusive remedial scheme" in sections 4161 and 4165. It contends that the remedies in these sections are HUD remedies, not remedies for grant recipients, and that these sections do not withdraw Tucker Act jurisdiction. Plaintiffs' brief at 13-14. However, it is not clear what conclusion plaintiffs wish the Court to draw from this argument because it has clearly alleged that HUD recaptured money from plaintiffs and that these actions were improper without the notice and hearing provided in 25 U.S.C. § 4161. Thus, as we stated in our opening brief, even if plaintiffs' contentions are correct, the only relief to which plaintiffs would be entitled is a ruling that HUD must provide a hearing, followed by judicial review at a circuit court. At most then, plaintiffs are seeking declaratory or injunctive relief that HUD must comply with the notice and hearing requirements, which this Court cannot provide. *E.g., National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998) (holding that "the basic rule" established by the Supreme Court in *United States v. King*, 395 U.S. 1, 3 (1969) prohibiting such relief remains in effect).

Finally, while we do not disagree with plaintiffs' citation to precedent which provides that repeal of Tucker Act jurisdiction by implication is disfavored, plaintiffs fail to respond to cases that we cited in which the Federal Circuit held that the specific assignment of jurisdiction to another court was sufficient to repeal Tucker Act jurisdiction. *E.g., Biltmore Forest Broadcasting FM, Inc. v. United States*, 555 F.3d 1375, 1382-84 (Fed. Cir. 2009). As we established in our opening brief, 25 U.S.C. § 4161 is a classic example of such a statute because it specifically provides for jurisdiction in the courts of appeals, just like the statute in *Biltmore*.

Accordingly, the Court does not possess jurisdiction to consider plaintiffs' allegations with respect to any alleged violation of the notice and hearing requirements in section 4161.

V. NAHASDA Does Not Create A Trust Relationship Enforceable In This Court

In our opening brief, we explained that plaintiffs' claims for breach of trust should be dismissed because plaintiffs have identified no statutory or regulatory prescription creating a fiduciary duty compensable in damages under the Tucker Act or Indian Tucker Act. We set out the Supreme Court precedents establishing that a trust claim enforceable in this Court requires: more than the general trust responsibility alleged by plaintiffs; more than a statutory or regulatory duty untethered to any trust corpus (land, resources, money or other property considered to belong to Indians); and, even where a trust corpus is created - such as through the General Allotment Act's specific prescription that land be held by the United States "in trust" - a trust duty enforceable in this Court requires full responsibility for management of the trust property to distinguish it from a "bare" or limited trust that does not fall within Tucker jurisdiction. *See e.g., United States v. Navajo Nation*, 129 S. Ct. 1547, 1552, 1558-1559 (2009) ("*Navajo II*") (describing the multi-step analysis required for trust liability under the Indian Tucker Act and

rejecting the Federal Circuit's finding of Federal trust liability premised on "comprehensive control" alone). The touchstone for a court's analysis must be "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 1555.

On pages 16 and 17 of their brief, plaintiffs argue that several NAHASDA provisions describing HUD oversight and monitoring of grantees establish that HUD has "substantial control" over grants, and this control establishes the prerequisites for a compensable trust duty, which would include a trust corpus and a trust relationship between a trustee and beneficiary. Yet this argument erroneously relies upon "control alone." *See Navajo II*, 129 S. Ct. at 1558. The only statutory provisions plaintiffs cite are grant oversight and monitoring provisions (25 U.S.C. §§ 4161, 4163, 4165, and 4167) that are routinely included in grant program statutes to ensure that Federal funds are spent for the intended purpose. In *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 927 (9th Cir. 2008), the Ninth Circuit rejected this argument, holding that HUD's "oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory."

Plaintiffs downplay the significance of *Marceau,* at page 17 of their brief, contending that this decision is limited to trust claims based upon the condition of housing. We do not read *Marceau* so narrowly. In rejecting a trust claim based upon NAHASDA, the language used by the Ninth Circuit was definitive: "no statute ever required tribes to form housing authorities. No statute obliged Indian housing authorities, once formed, to seek federal funds. No statute committed the United States itself to construct houses on Indian lands or to manage or repair them. . . . No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain*

Apache Tribe, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property." *Marceau*, 540 F.3d at 927. Accordingly, there is nothing in the Ninth Circuit's opinion that suggests that it is limited to trust claims based upon the condition of housing.

Plaintiffs' passing reference at page 17 of its brief to the fact that HUD administers the allocation of NAHASDA funds does not evidence substantial control over grant funds. HUD must allocate funds according to a formula that was established in a negotiated rulemaking with representatives of Indian tribes. 25 U.S.C. §§ 4151, 4152(a)(1). HUD's allocation duties are thus ministerial applications of rules over which Indian tribes exert significant influence and HUD's "control" under this scheme is expressly limited. Thus, plaintiffs identify no specific prescriptions imposing upon HUD full responsibility to manage Indian money so as to impose damages liability upon breach. As we established in our opening brief, the general trust language in 25 U.S.C. § 4101 does not contain such specific prescriptions. *See e.g., Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 67 (Fed. Cl. 2008).

Lacking any specific rights-creating or duty-imposing statutory or regulatory prescriptions imposing fiduciary duties on HUD, plaintiffs brief argues that: (1) congressional intent evidenced by general trust language in 25 U.S.C. 4101; (2) evidence of the Federal Government's historical recognition of the problem of substandard housing in Indian country; and (3) Indian law canons of construction should fill the gaps in its trust claim. These arguments are unavailing. As noted above, general trust language does not provide the basis of a claim. Moreover, the history underlying a statute is only relevant for analyzing a trust claim under the Indian Tucker Act if it

establishes that the statute was enacted pursuant to or as a substitute for a particular treaty debt. *See Wolfchild*, 2010 WL 5163376 at *32 (reasoning that under *Reuben Quick Bear v. Leupp,* 210 U.S. 50 (1908), a court should trace the historical origins of appropriated funds at issue to determine whether the money is appropriated pursuant to a treaty). Finally, Indian law canons of construction providing that statutes be construed liberally in favor of Indians do not advance plaintiffs' argument because the canons themselves derive from the general trust relationship between the United States and the Indians that plaintiffs hopes to augment to a comprehensive fiduciary duty. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). It is thus circular to argue that a general trust relationship should be construed as more than it is by virtue of the same general trust relationship. Accordingly, plaintiffs do not satisfy the legal standard for a breach of trust claim cognizable under the Tucker Act or Indian Tucker Act and its claim should be dismissed.

VI. Fort Peck's Claim Is Barred By Res Judicata

In our opening brief, we established that Fort Peck's claim is barred by res judicata as a result of the Tenth Circuit's decision in *Fort Peck II*.

In response, Fort Peck first contends that its claim for money recovered by HUD from Fort Peck was not addressed by the Tenth Circuit. To the contrary, the Tenth Circuit opinion is clear that the court of appeals decided this issue in favor of the Government. As that court stated, both parties appealed decisions of the district court. *Fort Peck II,* 367 Fed. Appx. at 885. The Government appealed the invalidation of 24 C.F.R. § 1000.318; Fort Peck appealed the district court's denial of its request for an order directing the Government to return Fort Peck's repayments. *Id.* The Court agreed with the Government, reversing the district court's

invalidation of the regulation. It further held that "[b]ecause HUD's actions did not violate HUD's mandate, the issues raised in Fort Peck's cross-appeal are moot." *Id.* at 892, fn. 15. While the Tenth Circuit did not elaborate upon its holding, the only conclusion that can be drawn is that the court reasoned that, if the regulation was valid, HUD had a clear right to recover overpayments collected through enforcement of that regulation. Indeed, such a holding is consistent with the long established principle that the Government has a right to recover overpayments even in the absence of a statute authorizing such recovery. *United States v. Wurts*, 303 U.S. 414, 416 (1938). Accordingly, the Tenth Circuit decision forecloses relitigation of Fort Peck's claim for return of its repayments.

Second, Fort Peck contends that the Tenth Circuit decision did not address disputed units - those units excluded by HUD from FCAS that were still owned by Fort Peck. However, a close reading of the district court decision indicates that such units were part of the dispute considered by the district court and were at least part of the money recovered by HUD. In fact, the disputed units are the only units specifically mentioned by the district court. As the district court related, during discussions with Fort Peck, HUD contended that:

> any Mutual Help unit not conveyed at the end of the initial amortization period could not be counted unless FPHA provided a satisfactory reason for the lack of conveyance. HUD refused to allow FPHA to retain units in its FCAS inventory by extending the repayment period for homebuyers who took over the payment schedules of previous homebuyers and excluded any unit with a "tenant account receivable" at the end of the period, unless a written repayment agreement was in place or eviction proceedings had been commenced.

Fort Peck I, 435 F. Supp. 2d at 1131. The Tenth Circuit also referenced this part of the dispute in its decision. *Fort Peck II*, 367 Fed. Appx. at 889 ("Finally, the district court concluded Fort

Peck's position furthered NAHASDA's goals of self-governance and self-determination by eliminating many bureaucratic burdens and removing HUD's paternalistic oversight of whether units should be conveyed or participants evicted." (citing *Fort Peck I*, 435 F. Supp. 2d at 1134-35)). As a result, when the Tenth Circuit held Fort Peck's cross-appeal for return of the overpayments to be moot, without carving out an exception for disputed units, it also effectively decided Fort Peck's claim with respect to disputed units.

Third, Fort Peck also contends that the Tenth Circuit did not consider the effect that the 2008 amendments to NAHASDA, or HUD's issuance of 24 C.F.R. § 1000.319, had on its claim. With respect to the 2008 amendments to NAHASDA, it is not clear why Fort Peck contends that the amendments would shield it from the operation of res judicata. As we established in section I above, the Reauthorization Act contained two provisions that work in favor of HUD's litigation position: Congress adopted HUD's regulation at 24 C.F.R. § 1000.318 and it shortened the statute of limitations for claims based upon the pre-2008 version of NAHASDA. Neither of these changes work in favor of Fort Peck.

With respect to 24 C.F.R. § 1000.319, HUD issued this regulation on April 20, 2007. According to the motion to vacate that Fort Peck filed in the district court, Fort Peck contends that the issuance of this regulation demonstrates that HUD previously lacked authority to recover overpayments. Fort Peck Appendix, p. 8. However, this contention is contrary to long established law cited above, which provides that the Government has a right to recover overpayments, unless Congress has specifically banned the Government from doing so. *Wurts*, 303 U.S. at 416.

Finally, Fort Peck also contends that defendant's interpretation of *Fort Peck II* would render that decision in conflict with an earlier Tenth Circuit decision, *United Keetowah Band of Cherokee Indians of Oklahoma v. HUD*, 567 F.3d 1235 (10th Cir. 2009) but it is not clear why Fort Peck makes this contention. In fact, in *Fort Peck II*, the Tenth Circuit considered its decision in *United Keetowah* and found the two opinions to be in harmony. *Fort Peck II*, 367 Fed. Appx. at 891.

Accordingly, the Court should dismiss Fort Peck's claim based upon the doctrine of res judicata.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court dismiss Plaintiffs's complaint for lack of jurisdiction or failure to state a claim.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Donald E. Kinner
DONALD E. KINNER
Assistant Director

s/ Michael N. O'Connell
MICHAEL N. O'CONNELL
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
1100 L St., N.W., 8th floor
Washington, D.C. 20530
Tel: (202) 353-1618
Fax: (202) 514-7969

February 18, 2011

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 18th day of February, 2011, a copy of the foregoing "DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Michael N. O'Connell