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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WASHOE HOUSING AUTHORITY, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SHAUN DONOVAN, Secretary of Housing and Urban Development; and DEBORAH HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, Defendants.	Case No. 3:08-CV-00617-RCJ-RAM **DEFENDANTS' OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendants the United States Department of Housing and Urban Development, the Secretary of the United States Department of Housing and Urban Development, and the General Deputy Assistant Secretary of the United States Department of Housing and Urban Development for Public and Indian Housing (collectively, "HUD"), submit this brief in opposition to Plaintiff Washoe Housing Authority's ("WHA's") Motion For Summary Judgment and in support of HUD's Cross-Motion for Summary Judgment.

STATEMENT OF THE CASE

The only question properly before this court is whether HUD violated the Administrative Procedure Act ("APA") when it applied 24 C.F.R. § 1000.318(a) to exclude forty lease-to-own

units that WHA had conveyed to their occupants in fiscal year 2007 from an allocation formula used to calculate WHA's block grant in fiscal year 2008. The regulation, promulgated in 1998 as directed by Congress, implements section 302(b) of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4152(b).

In § 4152, Congress directed HUD to establish a formula by negotiated rulemaking for the distribution of annual block grants. In § 4152(b), Congress mandated that the formula be based on factors - including those specified in negotiated rulemaking - reflecting the need for housing assistance of all Indian tribes and Indian areas of the tribes. The challenged regulation excludes from formula calculations certain lease-to-own dwelling units developed under a pre-NAHASDA statute (known as Mutual Help homeownership units) when such units are "lost by conveyance, demolition, or otherwise." 24 C.F.R. § 1000.318(a). Contrary to WHA's contention, the regulation properly implements Congress's mandate to take various factors into account when addressing the relative need of all tribes in 25 U.S.C. § 4152(b). In addressing the same question of law, the Court of Appeals for the Tenth Circuit held just that, and explained that a contrary interpretation prohibiting the formula from discounting lost units is "inconsistent with the statute's plain language and contrary to Congress's unambiguous intent that the funding formula relate to the needs of all tribal Housing Entities." *Fort Peck Housing Authority v. HUD et al.*, 367 Fed. Appx. 884, 891 (10th Cir. 2010) (unpublished) ("*Ft. Peck II*") (citing 25 U.S.C. § 4152).

WHA necessarily makes an "as applied" challenge under the APA because it filed this action more than ten years after the regulation's adoption. And yet WHA includes allegations about actions HUD might take in the future in applying the regulation to WHA. Such allegations should be discounted because an "as applied" challenge to the substance of a regulation requires final agency action. In addition, WHA improperly raises new claims in its summary judgment brief, Dkt. # 26 ("Pl. Brf."). Because it is well-established that claims made only in a brief on motion for summary judgment are not properly raised, this Court should not considered them. Moreover, even if WHA sought leave to amend its complaint to add the new claims made in its

brief, amendment would be futile. Thus, the only one issue properly before this Court is whether HUD's application of 24 C.F.R. § 1000.318(a) to WHA in 2007 violated the APA. It did not. Accordingly, the Court should deny WHA's motion for summary judgment and grant summary judgment for HUD.

STATUTORY AND REGULATORY BACKGROUND

I. Congress replaced separate Indian housing assistance programs with a block grant

Congress enacted NAHASDA in 1996 with an effective date of October 1, 1997, the first day of fiscal year 1998. Pub. L. 104-330, § 107, 110 Stat. 4016 (1996). NAHASDA reorganized the system of HUD housing assistance to Native Americans by eliminating several separate programs of assistance, including those under the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, which provided funds pursuant to a contract between an Indian Housing Authority and HUD, and replacing them with a single block grant program. *Fort Peck II* at 885. The Indian Housing Block Grant ("IHBG") program under NAHASDA distributes appropriated funds through annual block grants to individual Indian tribes or their designated housing entities for the purpose of carrying out affordable housing activities. *Id.; see also* 24 C.F.R. § 1000.6 (explaining nature of IHBG program).

II. Through a negotiated rulemaking committee, representatives of HUD and Indian tribes developed the Indian Housing Block Grant formula

Congress specified that "[t]he formula be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities." 25 U.S.C § 4152(b). Congress further specified some of the factors to be included: "(1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract . . . . (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe. (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify." *Id.* In addition to the three factors specified in § 4152(b)(1)-(3), Congress identified two further factors to be considered in the formula: (1) the relative administrative and

geographic challenges faced by recipients (addressed in 24 C.F.R. § 1000.538, which provides for technical assistance to recipients), and (2) the funding affect of NAHASDA's termination of previous funding programs (addressed in 24 C.F.R. § 1000.312, which includes units developed under terminated programs). *Fort Peck II* at 886 n. 5 (citing 25 U.S.C. § 4152(c)).

Regulations implementing NAHASDA were developed and adopted through a negotiated rulemaking process involving Indian tribes as required by 25 U.S.C. § 4116. Implementation of Native American Housing Assistance and Self-Determination Act of 1996; Final Rule, 63 Fed. Reg. 12334 (Mar. 12, 1998). For this purpose, HUD established a Negotiated Rulemaking Committee consisting of 58 members, 48 of whom represented geographically diverse small, medium, and large tribes. *Id.* The regulations establishing the block grant allocation formula are codified at 24 C.F.R. part 1000, subpart D (§§ 1000.301 to 1000.340). The formula involves an initial calculation of the amount each tribe receives for "Formula Current Assisted Stock" ("FCAS"), followed by the application of seven weighted criteria to the remaining available funds under a "Need" component. *Ft. Peck II* at 887.

The IHBG formula's FCAS component consists of the current stock of dwelling units that were developed pursuant to provisions of the United States Housing Act of 1937 ("USHA") terminated on October 1, 1997 by NAHASDA. For ease of reference, we will refer to these as "1997 units." It factors the count of rental units and lease-to-own homeownership units (referred to as "Mutual Help" and "Turnkey III" units) owned and operated pursuant to a contract between an Indian housing entity and HUD as of September 30, 1997, 24 C.F.R. § 1000.312, as adjusted upward for units in development at that date, *id.* § 1000.314, and adjusted downward for units removed from management or otherwise no longer operated as rental or lease-to-own units, *id.* § 1000.318. Mutual Help units were developed under the USHA as lease-to-own homes. The Mutual Help Homeownership program provided that an eligible family could contribute land, work, cash, materials, or equipment to construct a home under a Mutual Help and Occupancy Agreement ("MHOA") with an Indian Housing Authority that was, in essence, a lease purchase

agreement for a term of up to 25 years. See 24 C.F.R. Part 905, Subpart E (1995); *Dewakuku v. Martinez*, 271 F.3d 1031, 1034-35 (Fed. Cir. 2001)).

Over the years, Mutual Help units become eligible to be conveyed from a tribal housing entity's inventory or to be otherwise disposed of due to the terms of the lease-to-own agreement between the housing entity and the unit's occupant. *Ft. Peck II* at 887. The formula reflects this reduction in a housing entity's current stock by removing units a tribe "no longer has the legal right to own, operate, or maintain . . . whether such right is lost by conveyance, demolition, or otherwise." 24 C.F.R. § 1000.318(a). In determining the number of these ineligible units, HUD relies on information provided by the individual housing entity on annual "Formula Response Forms" on which tribes are required to report any changes or corrections to data used in the formula. *Ft. Peck II* at 887; 24 C.F.R. § 1000.315.

The Need component allocates remaining NAHASDA appropriations based on the following weighted criteria: (1) the number of Indian households with housing cost burdens greater than 50% of area income, weighted at 22%; (2) the number of Indian households that are over-crowded or without kitchen or plumbing, weighted at 25%; (3) housing shortage, which is the number of Indian households earning less than 80% of median income minus the number of FCAS and units developed under NAHASDA, weighted at 15%; (4) Indian households earning less than 30% of median income, weighted at 13%; (5) Indian households earning between 30% and 50% of median income, weighted at 7%; (6) Indian households earning between 50% and 80% of median income, weighted at 7%; and (7) Indian persons, weighted at 11%. 24 CFR § 1000.324.

III. Congress amended NAHASDA's formula provision in 2008, essentially adopting the regulation at issue here

On October 14, 2008, Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (the "Reauthorization Act "). Section 301(2) of the Reauthorization Act amended NAHASDA at 25

U.S.C. § 4152(b), by essentially adopting the provisions in 24 C.F.R. § 1000.318(a).[1] However, the Reauthorization Act also provided that this amendment does "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." 25 U.S.C. § 4152(b)(1)(E). Because WHA filed this complaint involving FCAS counts for fiscal years through FY 2008 on November 21, 2008, Compl. ¶ 8, the text of section 4152(b)(1) prior to the Reauthorization Act amendment applies in this case.

MATERIAL FACTS NOT GENUINELY IN ISSUE

When NAHASDA became effective on October 1, 1997, WHA owned and operated 150 Mutual Help homeownership units developed under the USHA. (AR 495, 501; *see also* AR 58 (explaining typographical error).) The count of these units was used in the allocation formula to generate WHA's annual allocation from the first NAHASDA block grant in FY 1998 through FY 2007. (AR 70, 507-508, 517-518, 527-528, 537-538, 549-550, 560-561, 571-572, 582-583, 594-595.)

On August 29, 2007, HUD's Office of Grants Management sent WHA a letter questioning the eligibility for inclusion in the allocation formula of the 40 Mutual Help homeownership units that comprised project number NV99B003006, which had a 1980 Date of Full Availability ("DOFA"). (AR 610-611.) Given that lease-to-own contracts for Mutual Help units developed under the 1937 Act were capped at 25 years, HUD stated its belief that based on the 1980 DOFA, the units in this project should have been conveyed by 2005 rendering them no longer eligible to be counted as formula units beginning in FY 2006. (AR 610.) The letter requested information

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[1] The statute now makes explicit that a unit developed under the USHA shall not be counted for formula purposes if "(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or (ii) the unit is lost to the recipient by conveyance, demolition, or other means," unless conveyance is delayed "for reasons beyond the control of the recipient." 25 U.S.C. § 4152(b)(1).

about each unit so that HUD could make a determination about each unit's eligibility. (AR 611.)

On September 29, 2007, WHA responded to HUD's letter by submitting a change to its formula information. (AR 612.) WHA requested that "all 40 units under project NV99B003006 be removed from our FCAS portion of the formula due to conveyance" and reported that all units in the project were conveyed on July 31, 2007. (AR 612-613; Compl. ¶ 22 (WHA conveyed certain units through its Mutual Help Homeownership program).)

On December 6, 2007, HUD sent Plaintiff a letter confirming receipt of WHA's information that the 40 questioned units had been conveyed in FY 2007 and thus would not be counted for formula allocation purposes beginning with the upcoming FY 2008 grant allocation. (AR 629.) Accordingly, WHA's FY 2008 final allocation no longer counted any units in project NV99B003006. (AR 00631-00632).

ARGUMENT

I. Standard of review

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). The movant need not, however, support its motion with evidence negating the opponent's claim. *Id.* The mere existence of a factual dispute, by itself, is insufficient to bar summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier of fact could find for the moving party. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987); *see also*

Liberty Lobby, 477 U.S. at 251-52.

This case arises under the APA. The standard used in reviewing an agency action under the APA is that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) & (C). WHA does not meet that high standard.

II. HUD's application of 24 C.F.R. § 1000.318(a) to WHA does not violate the APA

A. The regulation that reduces Mutual Help homeownership units from formula allocations properly implements 25 U.S.C. § 4152

In this matter, the Court is to determine whether 24 C.F.R. § 1000.318(a) is contrary to NAHASDA. In doing so, the Court must apply the test found in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* explains that a court must first determine whether Congress has spoken directly to the precise question at issue. *Id.* at 843-44. If so, the regulation must implement that intent. *Id.* at 843. However, if Congress has not directly spoken to the precise question at issue, then the Court considers whether the agency's regulation is a "permissible construction" of the statute. *Id.* at 844.

1. Congress directly addressed the formula at issue and HUD's regulatory implementation of that formula is consistent with congressional intent

Here, the plain meaning of the statutory text supports the regulation. Congress did not specify a precise formula, but rather provided guidance and directed HUD to establish the allocation formula in a collaborative rulemaking process. 25 U.S.C. § 4152(a). Congress stipulated that that the formula be "based on" three "factors" supplied by Congress - (1) the number of homeownership units that were under contracts with HUD pursuant to the USHA at the time NAHASDA became effective; (2) the extent of poverty among, and number of, Indians in the relevant area; and (3) other "objectively measurable conditions" specified by the Secretary and Indian tribes. 25 U.S.C. § 4152(b).

NAHASDA expressly directed HUD to establish through negotiated rulemaking a formula for allocating among Indian tribes funding amounts available for block grants. 25 U.S.C. § 4152(a)(1). It further states "[t]he formula shall be based on factors that reflect the need of Indian tribes and Indian areas of tribes for assistance for affordable housing activities, including — ." *Id.* § 4152(b). Congress's subsequent list, while not exclusive, mandates that certain factors shall be taken into account. The factors that must not be excluded are the number of 1997 units owned or operated by an Indian housing entity at NAHASDA's inception; the extent of poverty, economic distress and population of Indian families; and "(3) [o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." *Id.* § 4152(b)(1)-(3).[2] Thus, § 4152(b)(3) prohibits any exclusion from the allocation formula of objectively measurable conditions specified by negotiated rulemaking – at least so long as these conditions "reflect the need of Indian tribes…."

The statute's use of the phase "based on" indicates that the one factor identified in § 4152(b)(1), *i.e.*, the number of 1997 units, is only a starting point for the allocation formula, which may be affected by other "factors." The phrase "based on" has been examined frequently by federal courts, which have concluded that the ordinary meaning of "based upon" is "arising from." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) ("In the context of statutory interpretation, courts have held that the plain meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'") (citations omitted); *see also United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.) ("based upon" means "derived from," citing Webster's Third New Int'l Dictionary 180 (1986)), *cert.*

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[2] WHA brings this case pursuant to the Reauthorization Act provision that amended § 4152(b)(1) of NAHASDA, but stipulated that the amended provision shall not apply to claims based on FCAS counts for fiscal years through 2008. Compl. ¶ 8. Its claims are limited to FCAS counts through FY 2008. *Id.* Therefore, our discussion treats the pre-amendment § 4152(b)(1) as the relevant statutory provision for purposes of this action.

denied, 513 U.S. 928 (1994); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991) (same). Accordingly, because the number of homeownership units described in § 4152(b)(1) is the "foundation" or "starting point" from which the formula flows, the regulation complies with the statutory directive. *Ft. Peck II*, 367 Fed. Appx. at 890 (HUD properly included 1997 units "as the starting point for the allocation formula").

Indeed, it is common when a formula or decision is "based on" a particular figure or test or data for adjustments to be made. In *McDaniel*, for example, a pension plan was required to calculate benefits "based on" a particular mortality table. The Ninth Circuit held that it did so, despite adjusting the figures from that mortality table (by a "set forward") to reflect the gender ratio of the beneficiary population. 203 F.3d at 1104, 1110-1112. In *Sierra Club*, the relevant statute required a particular state to demonstrate that it would meet certain air quality requirements, and that demonstration "must be based on photochemical grid modeling . . . ." 356 F.3d at 304 (quoting 42 U.S.C. § 7511a(c)(2)(A)). The court concluded that a demonstration could comply with this statutory directive even though several "adjustments" were made to the photochemical grid model because the model was still the "primary basis" for the demonstration and the adjustments helped further the statutory purpose. *Id.* at 306. *Missouri v. Jenkins*, 491 U.S. 274, 277 (1989) applied this principle to attorney fees. There, a fee was calculated at an hourly rate of $200 because the current market rates of $125 - $175 were adjusted upward due to "the preclusion of other employment, the undesirability of the case, and the delay in payment." Despite this adjustment, the resulting fee was "based on current hourly rates." *Id.* at 290 (O'Connor, J., concurring in part and dissenting in part).

The formula here was "based on" the number of homeownership units specified in § 4152(b)(1) in the same way. That number was a starting point for the FCAS portion of the formula and was subjected to a number of adjustments. None of those adjustments, including the challenged subtractions embodied in § 1000.318(a), negate the fact that the formula is "based on" the number required by § 4152(b)(1).

This conclusion is only bolstered by the fact that the statute refers to the number of units at issue here as one of several "factors" upon which the formula is to be based. The use of the word "factor" indicates that the relevant number of homeownership units was simply to contribute to the formula in some way. *See, e.g.*, Black's Law Dictionary 630 (8th ed. 2004) (defining "factor" as an "agent or cause that contributes to a particular result"); Webster's Third New Int'l Dictionary 813 (1993) (defining "factor" as "something (as an element, circumstance, or influence) that contributes to the production of a result"). Because the formula was "based on" the relevant number of homeownership units, as one of several "factors" to be considered, the formula complies with the statute.

Viewed another way, the subtraction of conveyed units results from the application of a separate "factor" to the formula. Congress directed that, in reflecting the need of Indian tribes, the formula include "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. § 4152(b)(3). Here, HUD and the Indian tribes determined that 1997 units lost to inventory, including Mutual Help homeownership units no longer owned and operated under a lease-to-own contract, was an objectively measurable criterion reflecting the need of Indian tribes. The Negotiated Rulemaking Committee, whose members included representatives from HUD and geographically diverse small, medium, and large Indian tribes, specified in the formula regulations that these units not be counted. *See e.g.*, Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Proposed Rule, 62 Fed. Reg. 35742 ("Proposed Rule") (the formula allocation will be reduced by the number of units removed from the inventory); Final Rule, 63 Fed. Reg. 12343 (agreeing to current language of 1000.318(a) for final rule after public comments).

The specified criterion reflects need because block grant funding is limited, and the Need component of the allocation formula is distributed from amounts remaining after the FCAS component is allocated. 24 C.F.R. § 1000.324. This means that allocations under the FCAS component reduce funding for existing needs under the Need component, which includes a tribes'

housing cost burdens, overcrowding, households without kitchens or plumbing, housing shortage, and number of low income individuals. *Id.* (listing need criteria). Consequently, reducing FCAS allocations for all 1997 units no longer in inventory directly increases funding for all tribes' existing needs.

And so reduction of FCAS counts for units lost to inventory applies an objectively measurable condition to reflect need. 25 U.S.C. § 4152(b)(3). The formula properly factors in the number of 1997 units by counting them in § 1000.312 in accordance with statutory § 4152(b)(1), and properly factors in the number that are "lost by conveyance, demolition, or otherwise," by discounting them in § 1000.318 in accordance with statutory § 4152(b)(3). As the Tenth Circuit cogently reasoned, the 1000.318(a) properly reflects the interplay of the three need factors identified by Congress in 25 U.S.C. § 4152(b)(1)-(3). *Ft. Peck II* at 890-891. The formula satisfied Congress's first factor, § 4152(b)(1), when it used all 1997 units as the starting point for the allocation formula. *Ft. Peck II* at 891. "However, this number was but one factor required to meet the statute's overarching mandate that the formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Id.* (quoting 25 U.S.C. § 4152(b)).

Moreover, Congress mandated that § 1000.318(a) be factored into the formula because it is an objectively measurable condition reflecting need that HUD and the tribes "specified" in negotiated rulemaking. Congress mandated that the formula "shall . . . include" such conditions. 25 U.S.C. § 4152(b)(3). The statutory language thus prohibits a construction that would preclude the specified criteria. The regulation at issue here, § 1000.318(a), is an objectively measured condition specified by HUD and the Negotiated Rulemaking Committee of representatives of Indian tribes that reflects the need of recipients for housing assistance, and so the statute may not be construed to prohibit it. The Tenth Circuit reached the same conclusion, explaining that "[i]nterpreting § 4152(b)(1) to prohibit a reduction in the number of current units corresponding to a measurable reduction in responsibility by the Tribal Housing Entity for those units is inconsistent

with the statute's plain language and is contrary to Congress's unambiguous intent that the funding formula relate to the needs of all tribal Housing Entities." *Ft. Peck II* at 891 (citing 25 U.S.C. § 4152). Accordingly, Congress did address the issue and mandated inclusion of the formula criteria specified in § 1000.318(a).

2. Even if the statute were ambiguous, the regulatory factor reducing homeownership units for formula purposes represents a permissible construction

Even if the reduction of 1997 units for formula purposes when "lost by conveyance, demolition, or otherwise" were not unambiguously compelled by the statutory language requiring the formula to "include . . . other objectively measurable conditions" reflecting need as specified in negotiated rulemaking, 42 U.S.C. § 4152(b)(b)(3), it would nevertheless be a permissible construction of the statute entitled to controlling weight. *Cf. Chevron*, 467 U.S. at 844. Congress unambiguously intended NAHASDA block grants to be distributed based on factors reflecting "the need of the Indian tribes and Indian areas of the tribes." 25 U.S.C. § 4152(b). The regulation is a permissible construction of § 4152 because it is based on need: it allocates less assistance to serve 1997 units when the need for assistance decreases through conveyance, and the funds not allocated to conveyed 1997 units are freed up for allocation to address "Needs" such as the amount of housing cost burden, housing shortage, households without plumbing and other like criteria.

B. WHA's interpretation that NAHASDA's formula provision creates a "floor" for 1997 units is fatally flawed

WHA asserts that the pre-amendment section 302(b)(1) of NAHASDA, 25 U.S.C. § 4152(b)(1), which states "[t]he number of low income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary [of HUD]," creates "a floor for funding." Pl. Brf., p. 5-6. This "floor" argument is essentially that § 4152(b)(1) mandated that the formula allocate funds in perpetuity for the number of 1997 units in existence in 1997. However, WHA ignores Congress's full text in § 4152, relies on circular logic to imply a congressional intent to create this floor, and reaches a false conclusion that the

regulation treats similarly situated tribes differently. Finally, WHA mistakes a sentence about terminated tenant-based Section 8 assistance in § 4181(a) – which Congress added to NAHASDA in 2000, two years after § 1000.318(a) was adopted – as indicating a congressional intent contrary to the treatment of homeownership units in § 1000.318(a). These arguments do not withstand scrutiny.

WHA's "floor" argument relies on the statutory text of § 4152(b)(1) to the exclusion of other decisive provisions in the same subsection. WHA asserts that § 4152 "expressly required that the formula include [units] owned or operated" in 1997. Pl. Brf., p. 5. However, this textual argument does not compel the conclusion that WHA asserts. As discussed at length above, the entirety of § 4152(b) precludes a construction of the statutory text that would prohibit the exclusion of other factors reflecting need, such as § 1000.318(a), that HUD and Indian tribes specify in negotiated rulemaking.

WHA then makes two arguments based on congressional intent to bolster its textual argument for a "floor." Pl. Brf. at 6. The first argument is meritless because it is based on circular reasoning. WHA asserts as fact, without evidentiary support, that tribes and their housing entities created long-term housing plans and strategies under USHA, some favoring homeownership and some rental housing. *Id.* WHA then asserts that Congress recognized these long-term strategies when it mandated that the formula allocate funds in perpetuity for the number of 1997 units in existence in 1997. *Id.* The implicit argument is that, when Congress mandated a floor, it evinced its intention to recognize tribes' "long-term housing plans and strategies" by creating such a floor. However, it is a logical fallacy to argue one's conclusion (Congress created a floor) as a predicate for demonstrating Congress intended that conclusion.

WHA then quotes a sentence in 25 U.S.C. § 4181(a), arguing that it implies Congress intended § 4152(b)(1) to create a floor for funding of 1997 units that is violated by § 1000.318. The quoted sentence from § 4181(a) is: "Any housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated

under this section shall, for the following fiscal year and each fiscal year thereafter, be considered a dwelling unit under section 4152(b)(1) of this title." 25 U.S.C. § 4181(a). WHA's inferences from this sentence are unwarranted for several reasons.

First, the provision addresses only "tenant-based assistance" terminated by NAHASDA, which refers to rental assistance provided to tenants under Section 8 of the USHA, *i.e.*, former Section 8 units. *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1133 (D. Colo. 2006) ("*Fort Peck I*") (citing the USHA, 42 U.S.C. § 1437f(o)) *rev'd* 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*"). The provision removed any question whether a "contract" for tenant-based assistance is the equivalent of a "dwelling unit" for purposes of 25 U.S.C. § 4152(b). *Id.* Thus, it provides no support for a conclusion about congressional intent regarding homeownership units developed under different provisions of USHA.

More importantly, however, the provision "did not require *the funding* of these dwelling units in perpetuity, nor did it require any other alteration of how HUD had interpreted the statute in its regulatory program." *Ft. Peck II* at 890 (emphasis added). It only required that housing formerly supported by tenant-based Section 8 assistance be considered a "dwelling unit" under § 4152(b)(1) and included in that "starting point" factor. Moreover, "[i]t did not remove or amend the other two factors of § 4152(b) which also formed the basis for the block grant formula, nor did it limit HUD's discretion to include other objectively measurable conditions in the formula according to § 4152(b)(3)." *Id.*

Finally, the sentence WHA relies on was added to NAHASDA in 2000, two years after § 1000.318(a) was adopted in 1998. *Compare* Pub. L. No. 106-568, 114 Stat. 2930 (2000) (amending § 4181(a)) *with* 63 Fed. Reg. 12365-12366 (Mar. 12, 1998) (Final Rule adopting § 1000.318). Congress revisited § 4152 when it added this provision to ensure that tenant-based Section 8 contracts be considered as "dwelling units" under § 4152(b). The fact that it chose not to alter the statutory and regulatory treatment of conveyed homeownership units when it added this provision indicates congressional approval of § 1000.318(a) as written. *See Commodities Futures*

Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). Accordingly, WHA's argument that § 1000.318(a) violates NAHASDA's mandated "floor" is meritless.

C. HUD's application of 24 C.F.R. § 1000.318(a) to WHA does not violate the APA

Because § 1000.318(a) is not contrary to NAHASDA as explained above, its straightforward application to exclude 40 conveyed Mutual Help units from WHA's FCAS count and subsequent grant allocation in FY 2008 does not violate the APA.

1. WHA's "as applied" challenge to § 1000.318(a) is constrained by the statute of limitations to final agency actions

When a party contests the substance of an agency regulation, the challenger may do so later than six years following its adoption only on review of the adverse application of the regulation to the particular challenger. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (citing statute of limitations at 28 U.S.C. § 2401(a)). Such an "as applied" challenge to a regulation "must rest on final agency action." *Crosby Lodge, Inc. v. National Indian Gaming Com'n*, 2008 WL 5111036, *6 (D.Nev. 2008) (citing 5 U.S.C. § 704). WHA filed this substantive challenge to § 1000.318(a) in 2008, more than six years after its adoption in 1998. *Compare* Dkt. # 1 (complaint filed Nov. 21, 2008) *with* 63 Fed. Reg. 12334, 12365 (final rule adopting § 1000.318(a)). Consequently, WHA's is an "as applied" challenge that must rest on final agency action or else be barred by 28 U.S.C. § 2401(a).

Agency action is final when it marks the "consummation" of the agency's decision making process and the action is one that determines "rights or obligations" or from which "legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). HUD applied § 1000.318(a) to WHA through final agency action in 2007, when HUD determined that 40 Mutual Help units

WHA had conveyed were not eligible for calculation in WHA's formula allocation. (AR 629-30.) WHA reported to HUD in September 2007 that it had conveyed all 40 Mutual Help units in that project effective July 31, 2007. (AR 612-613.) HUD then informed WHA that, in accordance with 24 C.F.R § 1000.318(a), HUD would cease counting these 40 units for purposes of WHA's formula allocation. (AR 629.) As a result, HUD did not include these units in the count of FCAS used for WHA's final grant allocation for FY 2008. (AR 631-632.)

Along with the reduction of its FCAS by 40 units, WHA also alleges that it has some Mutual Help units that have not been conveyed but "may be subject" to enforcement of the regulation to recover past years' grant funds. Compl. ¶ 21. However, this speculation supports no separate claim because WHA alleges no final agency action, which is required in an as applied challenge, and is in any case contradicted by the evidence. WHA argues that HUD's query letter about the 40 units discussed above is evidence that HUD did or would recover past grant funds. Pl. Brf., p. 4 (citing AR 610-611). Yet, the record clearly shows that this was not the case. The 40 units were excluded from future formula calculations, but HUD determined no past overfunding and therefore did not seek repayment. (AR 629.) Therefore, WHA's "may be subject" claim is a facial challenge to the regulation, which is barred by the statute of limitations at 28 U.S.C. § 2401(a). *Cf. Wind River*, 946 F.2d at 715.

2. HUD's application of § 1000.318(a) to WHA did not treat similarly situated tribes differently without reason

WHA argues that the application of § 1000.318(a) to any tribe or housing entity of the tribe violates the APA because it treats similarly situated tribes differently. Pl. Brf., p. 6. This argument fails to stand up to scrutiny. As an initial matter, WHA distorts the rule of law applied in *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996). *Transactive* relied on the rule that "an agency is arbitrary when the agency offered insufficient reasons for treating similar situations differently." *Transactive*, 91 F.3d at 237 (citing cases). Thus the rule is not that treating similarly situated entities differently violates the APA, as WHA asserts. Rather, agencies

act arbitrarily if they treat similar situations differently without reason. The court in *Transactive* found that the Treasury Department had acted arbitrarily because it prevented private contractors from bidding on a contract to administer Treasury's Electronic Benefits Transfer (EBT) program, but evinced no reasonable explanation for why it found EBT to be materially different from its other Electronic Funds Transfer programs, such as direct deposit, which private contractors could bid to administer. *Id.* at 239.

Here, the situation of tribes that favored rental units in 1997 is not similar to that of tribes that favored homeownership units when it comes to the current allocation of funds for the management and operation of these units. Rental units can be operated as low income rental units indefinitely and correspondingly need management, operation, and maintenance by the housing entity indefinitely. Accordingly, tribes with rental units have an indefinitely continuing need to allocate funds to operate those units. Homeownership units, on the other hand, cease to be operated by the housing entity as lease-to-own contracts come to term and the unit is conveyed to its occupant. Accordingly, tribes with 1997 homeownership units will have reduced need over time to manage and operate the units as compared to tribes with 1997 rental units.

By the same token, tribes with 1997 units – whether rentals or homeownership units – can be considered similarly situated when it comes to ceasing the allocation of funds for units that are no longer operated according to the requirements of their unit type. *Compare* 24 C.F.R.§ 1000.318(a) (homeownership units no longer eligible when tribe loses the legal right to own or operate the unit according to its lease-to-own contract) *with* 24 C.F.R. § 1000.318(b)-(c) (requiring continued operation as low income rental units for continued formula eligibility). The formula is not arbitrary because similar situations are treated similarly and distinct situations are treated differently.

Finally, WHA's claim that the regulation "punishes" tribes that traditionally favored homeownership housing "with a steady loss of funding and no way to replenish" their 1997 units ignores the fact that the FCAS component of each tribe's block grant allocation is only a portion of

the full formula allocation. When tribes receive smaller allocations in the FCAS component of the formula due to lost 1997 units, the money freed up is distributed to all tribes, including those same tribes, according to criteria under the Need component. 24 C.F.R. § 1000.324 ("After determining the FCAS allocation, the remaining funds are allocated by need component."); 24 C.F.R. § 1000, App. B (showing formulas for allocation of funding). In this way the formula provides for a gradual transition away from 1997 units that are no longer owned or operated by a tribe towards current demographic measures that relate directly to the needs of the tribe.

The criteria by which money is allocated under the Need component explicitly account for the presence or loss of units by increasing the need allocation when the measurements of "housing shortage" increase. 24 C.F.R. § 1000.324(c) (need component consists of low-income Indian households reduced by the number of USHA plus newer assisted units). Thus, when the full grant allocation formula is considered (including the Need component), it cannot be said that a tribe with predominantly homeownership units from 1997 will necessarily experience a "steady loss of funding and no way to replenish" obsolete units. Similarly, it cannot be said that tribes with predominantly rental units from 1997 will necessarily receive a windfall because the Need component of the formula allocates less money when more Indian households have affordable units (such as assisted rental units), 24 C.F.R. § 1000.324(a), and when housing needs are met by low income rental units, 24 C.F.R. § 1000.324 (c).

For these reasons, WHA's disparate treatment argument fails. HUD's application of § 1000.318(a) to reduce homeownership units that WHA conveyed in FY 2007 from the FCAS component of WHA's formula allocation in FY 2008 was not arbitrary or otherwise in violation of the APA.

III. Claims improperly raised in WHA's summary judgment brief are not properly before the court and are in any case futile

The purpose of notice pleading required by Rule 8 of the Federal Rules of Civil Procedure is to provide defendant with fair notice of what plaintiff's claim is and the grounds on which it

rests. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). "[The] plaintiff must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery." *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir.1990).

WHA did not plead, but raised first only in its summary judgment brief, the claims that: (1) HUD failed to provide WHA notice and a hearing; (2) HUD might not comply with 24 C.F.R. § 1000.319(d); and (3) HUD has or might recover grant funding that WHA already spent on affordable housing activities in violation of 24 C.F.R. § 1000.532. Pl. Brf., p. 7-8. The Court should not consider these claims because they were not pleaded. *See Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1316 (11th Cir. 2004) (at the summary judgment stage, proper procedure to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a)). In any event, the claims have no legal analysis and are barely argued, and so should be considered waived. *See Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). At the least, HUD should be given the opportunity to oppose inclusion of these claims according to Rule 15(a), particularly because amendment would be futile. *See Nordyke v. King*, --- F.3d ----, 2011 WL 1632063, *8 n.12 (9th Cir. 2011). Should the court determine that these claims are properly before it, HUD requests leave to further supplement its brief in opposition to plaintiff's motion for summary judgment.

A. The claims WHA asserts only in its summary judgment brief should not be considered

In keeping with the requirement of fair notice, claims may not be raised for the first time in a summary judgment brief. *Manufactured Housing Communities of Washington v. St. Paul Mercury Ins. Co.*, 660 F. Supp. 2d 1208, 1216 (W.D. Wash. 2009) (citing *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1313 (11th Cir. 2004)); *accord Shanahan v. City of Chi.*, 82 F.3d 776, 781 (7th Cir. 1996), *Frederico v. Home Depot*, 507 F.3d 188, 201-202 (3d Cir. 2007), *Bell v. City of Phila.*, 275 Fed. Appx. 157, 160 (3d Cir. 2008). Thus, "summary judgment is not a

procedural second chance to flesh out inadequate pleadings." *Wasco Products, Inc. v. Southwall Tech., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006).

Here, WHA's complaint claimed that a portion of HUD's allocation formula requiring that FCAS be reduced as Mutual Help units are "lost by conveyance, demolition, or otherwise," 24 C.F.R.§ 1000.318 is contrary to NAHASDA and cannot be used to recover block grant funds previously allocated to WHA. Compl. ¶¶ 15, 26-27, 30-31. The complaint is devoid of any mention of the legal grounds for entitlement to relief that WHA now asserts in claims raised in its summary judgment brief: 25 U.S.C. §§ 4161, 4165, 24 C.F.R. § 1000.532, the Due Process Clause of the United States Constitution, 24 C.F.R. § 1000.319(d), and 24 C.F.R. § 1000.532. Nor did the complaint make factual allegations to demonstrate any basis for these claims.

Although WHA alleged that HUD classifies certain disputes over formula allocations as disputes over data that do not provide for a hearing, Compl. ¶ 23, it nowhere asserted that this impacted WHA in any way, was in any way improper, or if so, on what grounds. This does not supply the necessary "fair idea of the basis of the complaint and the legal grounds claimed for recovery." *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) (internal quotations omitted). The complaint contains not even the barest hint of an allegation that might support the other two surprise claims.

Accordingly, the Court should not consider the claims WHA failed to plead and raised only in its summary judgment brief. *Wasco Products*, 435 F.3d at 992.

B. If the court finds WHA's new claims to be properly asserted, they should be considered waived because they are inadequately argued

It is well-established in the Ninth Circuit that a court reviews "only issues which are argued specifically and distinctly in a party's opening brief," that the court will not "manufacture arguments," and that "a bare assertion of an issue does not preserve a claim." *Independent Towers*, 350 F.3d at 929 (citing *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.1994) and *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir.2001)). A claim is

waived absent a cogent argument with authorities, *Greenwood*, 28 F.3d 971, as is one where the opening brief contains "only cursory mention, with virtually no discussion of [the] claim," *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997). Because the three new claims WHA raises in its summary judgment brief are, at best, merely assertions of claims rather than arguments, they are waived.

WHA's first improperly raised claim (hearing rights) lists provisions of law that may or may not "requir[e] a hearing" in any particular circumstances, and without more, concludes that "attempt[ed]" action by HUD unlawfully denied a hearing. WHA's second improperly raised claim (§ 1000.319(d) 3-year limit) quotes the regulation and asks the court to order HUD's compliance with it; there is no argument at all. WHA's third improperly raised claim (§ 1000.532 protects expended funds from recovery) makes bare assertions without evidence or legal authority beyond citation to the regulatory section. WHA's claim based on § 1000.318(a) was actually made in its complaint. These belated claims, however, were improperly interposed only in summary judgment briefing – as though an afterthought – and received only "cursory mention, with virtually no discussion." They are therefore waived. *Cf. Entertainment Research Group*, 122 F.3d at 1217.

C. HUD would oppose a motion to amend WHA's complaint to assert its new claims because the amendment would be futile

The proper procedure to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). *Gilmour*, 382 F.3d at 1316. Rule 15(a) requires a party to seek leave of court to amend its complaint where more than 21 days has elapsed since service of the answer and the opposing party does not consent to the amendment. Fed. R. Civ. P. 15(a)(1)-(2). Leave to amend a complaint under Rule 15(a) is futile and may properly be denied if the amendments would be immediately subject to dismissal. *Nordyke* at *8, n. 12. Here, HUD answered the current complaint on November 1, 2010, Dkt. # 21, and would oppose amendment. WHA must therefore seek leave to amend its complaint if it wants to assert the new claims improperly raised in its summary judgment brief. While HUD reserves the right to fully brief its opposition should WHA

seek to amend its complaint, HUD would oppose because amendment to raise these new claims would be futile.

1. WHA's improperly raised procedural claim is futile

First, WHA claims that HUD attempted to reduce WHA's FCAS and recapture past grant amounts. While HUD did reduce WHA's FCAS, it did not recover past overfunding. (AR 629-630.) Based on this unsupportable allegation, WHA claims it was due notice and a hearing under 25 U.S.C. §§ 4161, 4165, 24 C.F.R. § 1000.532, and constitutional due process. WHA's procedural due process claim would be subject to dismissal because WHA's improperly raised claim fails to allege the deprivation of a protected property interest, and in any event, WHA received the process due. "[T]o have a property interest in a benefit, a recipient must have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). WHA is not entitled to a stream of benefit but must apply each year for funding, § 4111(b)(1) (requiring submission of approved plan for annual grant). *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) (applicants for benefits never held to have legitimate due process claim). And an incremental change in the calculation of benefits is not necessarily a deprivation of a protected property interest. *Cf. Painter v. Shalala*, 97 F.3d 1351, 1357-58 (10th Cir. 1996 (holding that a physician "failed to demonstrate a legitimate property interest in having his reimbursement payments calculated in a specific manner"). Moreover, HUD provided all the process due by querying WHA about the status of certain Mutual Help units and incorporating WHA's response into the FCAS component of WHA formula calculation. AR 610-13, 629-30.

WHA's claim under 25 U.S.C. §§ 4161 and 4165, Pl. Brf. at 7, would also be subject to dismissal because jurisdiction over such a claim lies exclusively in the Court of Appeals. "[W]here a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review." *Public Utility Com'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (following TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984); *see also Sierra Club v. Johnson*, 2008 WL 3820385,

*1, n.1 (N.D. Cal. 2008) (noting Ninth Circuit adoption of TRAC); *Daniels v. Union Pac. Railroad Co.*, 530 F.3d 936, 942-944 (D.C. Cir. 2008) (applying TRAC).

WHA neither asserts nor argues how a reduction in the number of Mutual Help units used in the allocation formula is connected to the program compliance provisions of sections 4161 and 4165. *See* 25 U.S.C. §§ 4161 (titled "Remedies for noncompliance"); § 4165(b)(1) (authorizing review of recipient performance of "eligible activities" in a timely manner and in compliance with Indian housing plan). It is not. Section 4161 requires action in response to "substantial noncompliance" with NAHASDA, which is nowhere here alleged; § 4165 authorizes enforcement (1) in response to financial audits, monitoring reviews or performance reports. Neither applies to tribal entities' updates to the data used in the allocation formula.

Nevertheless, if these provisions were implicated, exclusive jurisdiction would be in the court of appeals because § 4161(d)(1)(A) commits review to the court of appeals, stating that "[a]ny recipient [receiving notice of substantial noncompliance may] file with the United States Court of Appeals . . . ." *Cf. Bonneville*, 767 F.2d at 626. WHA's claim under 24 C.F.R. § 1000.532 is similarly futile because the regulation implements compliance actions under § 4165.

2. WHA's improperly raised claim for a 3-year limit to HUD action is futile

WHA's claim based on 24 C.F.R. § 1000.319(d), Pl. Brf. at 7, is futile because it is a bare request for an advisory opinion, for which Article III courts lack jurisdiction under the United States Constitution. *See e.g., Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1074 (9th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). WHA asks the Court to order HUD to comply with §1000.319(d), if and when appropriate, simply because WHA "is skeptical" that HUD will follow the regulation. At the least, the Court would lack jurisdiction because this claim is not ripe. *Dietary Supplemental Coalition v. Sullivan*, 978 F.2d 560, 562 (1992) (ripeness requires final agency action and showing that withholding judicial review would result in direct and immediate hardship more than possible financial loss). Because the Court

would have no jurisdiction to take up WHA's request, this claim would be immediately dismissed if asserted in an amended complaint and is thus futile.

3. WHA's improperly raised claim for protection of expended funds is futile

Finally, WHA's claim based on 24 C.F.R. § 1000.532(a) concerning recovery of grant amounts already expended on affordable housing activities, Pl. Brf., pp. 7-8, is futile because it fails to allege that any amounts already expended have been or may be recovered. WHA asserts only that it "spent some or all" of the relevant funds, *id.* at 7, and alleges no recovery of funds. Indeed, the record shows that past grants have never been recovered from WHA. *Cf.* AR 629-630 (applying reduced FCAS count to future formula allocations). Amendment to assert this claim in WHA's complaint would therefore be futile.

CONCLUSION

The only question properly before the court is whether HUD violated the APA by applying to WHA a regulation that was duly promulgated in 1998 pursuant to negotiated rulemaking procedures as directed by NAHASDA and that contains an objective criterion reflecting need that was specified by the rulemaking committee of representatives from HUD and a cross-section of Indian tribes. The answer, as explained above, is no. Accordingly, the Court should deny WHA's Motion for Summary Judgment and grant HUD's Cross-Motion for Summary Judgment.

Respectfully submitted,

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/s/ Holly A. Vance
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Assistant United States Attorney

CERTIFICATE OF SERVICE

WASHOE HOUSING AUTHORITY, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SHAUN DONOVAN, Secretary of Housing and Urban Development; and DEBORAH HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, Defendants.	Case No. 3:08-CV-00617-RCJ-RAM

The undersigned hereby certifies that service of the foregoing **DEFENDANT'S OPPOSITION AND CROSS MOTION FOR SUMMARY JUDGMENT** has been made by electronic notification through the Court's electronic filing system or, as appropriate, by sending a copy by first-class mail to the following addressee(s) on May 9, 2011:

ROBERT W. STORY
245 East Liberty Street, Suite 530
Reno, NV 89501

/s/ Holly A. Vance
Holly A. Vance