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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' REPLY**

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 reply in support of their Cross-Motion for Summary Judgment.

Only one issue is properly before this court: whether HUD violated the Administrative Procedure Act ("APA") when it applied 24 C.F.R. § 1000.318(a) to exclude 40 homes from the calculation of Washoe Housing Authority's ("WHA") 2008 grant because the homes had been conveyed. HUD's application of that regulation complied with § 4152(b) of the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq.* ("NAHASDA")

because HUD based the allocation not only on the number of homeownership units in WHA's 1997 inventory, but also on other objective factors reflecting need — such as the elimination from WHA's inventory of the 40 units WHA no longer owned. WHA asks this Court to interpret § 4152(b) in a way that renders the statute's "based on" language meaningless. WHA also mistakes Congress's intent in amending § 4152(b)(1) — to mimick 24 C.F.R. § 1000.318(a) and "clarify" existing policy — as Congress's tacit repudiation of the allocation formula as it had existed since NAHASDA's inception. (Pl. Op. Brf. at 4-6 (Dkt. 33)).

WHA further argues that this action was timely filed because, when Congress amended NAHASDA in 2008, Congress stated that a portion of the amendment would not apply to certain claims raised in a civil action filed no later than 45 days after the amendment. (Pl. Op. Brf. at 8). WHA's argument is meritless. The "45 day" provision WHA cites — 25 U.S.C. § 4152(b)(1)(E) — merely dictates the version of § 4152(b)(1), pre-amendment or post-amendment, that applies in certain civil actions. Nothing in § 4152(b)(1)(E) changes other laws applicable to WHA's APA challenge — including the Federal Rules of Civil Procedure and applicable statute of limitations. Indeed, rather than reviving stale claims, subparagraph (E) shortened the time in which a plaintiff could file a claim based on the pre-amendment version of § 4152(b)(1). Accordingly, WHA's improperly raised and barely asserted claims — as well as WHA's facial claims based on speculation that HUD might apply a regulation improperly — should not be considered.

Because WHA's arguments are untenable, this Court should deny WHA's motion for summary judgment and grant summary judgment for HUD.

ARGUMENT

A. NAHASDA requires that the allocation formula be "based on" the relevant number of units — as one of several "factors."

NAHASDA § 4152 delegates to HUD the authority to establish the formula for distributing among eligible tribes the annual appropriation for Indian Housing Block Grants ("IHBGs"). Congress stipulated that the formula be created through a negotiated rulemaking with

representatives of the tribes and that it be based on need factors — some of which Congress identified and others that it left to the discretion of HUD and the negotiated rulemaking process. Until 2008, § 4152(b) described some of the need factors that should form a basis for the formula as follows:

> The formula shall be based on factors that reflect the need of the Indian tribes * * * for affordable housing activities, including the following factors:
>
> (1) The 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.
>
> (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. . .

25 U.S.C. § 4152(b) (1997). [1]

The allocation formula established by negotiated rulemaking is proper because it is based on the factors Congress identified. Specifically, 24 C.F.R. § 1000.312 reflects the first factor and § 1000.318 reflects the third factor. The statutory language "based on" means that no one factor dictates the final allocation. The count of 1997 units referenced in § 4152(b)(1) is thus a starting point for the allocation calculation, which is then affected by other objectively measurable conditions agreed to in negotiated rulemaking such as the loss of 1997 units from a tribe's inventory — a factor embodied in 24 C.F.R. § 1000.318. [2]

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[1] On October 14, 2008, 42 U.S.C. §4152 was amended by Section 301(2) of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (the "Reauthorization Act"). Since WHA's action relies on the statute before the Reauthorization Act amendment, all references herein to 42 U.S.C. §4152 — unless otherwise specified — are to §4152's language before that amendment.

[2] Section 1000.318(b) and (c) have the same effect on rental units and those with tenant-based subsidies that are no longer operated as low-income rentals.

WHA argues that the plain text of § 4152(b) should not be read to mean what it says, *i.e.*, that the formula "shall be based on factors * * * including the following." WHA believes the text should instead be read to mean that the formula must count — in perpetuity — the number of low-income housing dwelling units owned or operated in 1997. (Pl. Op. Brf. at 5-6). WHA's argument fails because it ignores the actual text of the statute. Indeed, the authority WHA cites dooms its own argument because that case law stands for the well-established proposition that the actual text of a statute controls its interpretation — including text such as NAHASDA's phrase "based on."

WHA appears to argue that the word "shall" in the statute renders the phrase "be based on" meaningless. However, statutes should not be interpreted to render statutory language meaningless or superfluous. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995) ("A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."); *Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous.")

Moreover, WHA's interpretation was wholly rejected by the Tenth Circuit Court of Appeals in *Fort Peck Housing Auth. v. HUD*, 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*"). While no one contests the effect of the word "shall" in the statute, "'[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Fort Peck II at 890, quoting Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). As the Tenth Circuit recognized, the problem with WHA's interpretation of the statute is that it changes the meaning of "based on" in section 4152(b) to mean "equal to." *Id.* To the Contrary, the ordinary definition of "based on" means that the factors form the basis, beginning, or starting point of the formula. *Id., citing 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. denied*, 513 U.S. 928 (1994); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991) (same). Thus, the Tenth Circuit held that, even if Congress mandated that the formula be based on the number of units under contract in 1997, there was no language in NAHASDA that required funding "in perpetuity" of such units. *Fort Peck II at 890.*

The Tenth Circuit further held that the "overarching mandate" of NAHASDA was "that the formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Id.* at 891 (quoting 25 U.S.C. § 4152(b)). The court noted that HUD determined that funding of units that the tribes no longer owned or operated decreased the amount of funds that remained available to fund the current need of all tribal programs. *Id.* Thus, HUD provided for a reduction in the current units portion of the formula and "effectively increased the amount of funding available for the current need portion of the formula." *Id.* The Tenth Circuit concluded 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." *Id.* The court further concluded that HUD's regulation "complied with the mandate set forth in NAHASDA and clearly included the entire (b)(1) factor as the starting point." *Id.* at 892.

WHA neither mentions — nor refutes — the Tenth Circuit's holding in *Fort Peck II.* WHA also fails to address HUD's argument — which was adopted by the Tenth Circuit — that the subtraction of conveyed units results from the application of a separate "factor" to the formula. (D. Brf. at 11-13). The statute refers to the number of units at issue here as one of several "factors" upon which the formula "shall" be based. 25 U.S.C. § 4152(b). Because the formula was "based on" the relevant number of homeownership units — as one of several mandated "factors" to be considered — the formula complies with the statute. *Fort Peck II,* 367 Fed. Appx. at 891; 25

U.S.C. § 4152(b)(1). However, Congress also directed that, in reflecting the need of Indian tribes, the formula "shall" 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 — constituted an objectively measurable criterion reflecting the need of Indian tribes. *See* 62 Fed. Reg. 35742(Proposed Rule); 63 Fed. Reg. 12343 (Final Rule). Thus, the downward adjustment from the number of 1997 units required by 25 U.S.C. § 4152(b)(1) "was accomplished through 'other objectively measurable conditions' that reflected the need of Indian tribes in accordance with § 4152(b)(3)" and "Congress's explicit direction allowed for this result." *Fort Peck II*, 367 Fed. Appx. at 891. As the Tenth Circuit noted, 24 C.F.R. § 1000.318(a) properly reflects the interplay of the three need factors mandated by Congress in 25 U.S.C. § 4152(b). *Id.*

WHA argues that this represents a "cruel interpretation" of 4152(b) because WHA continues to provide significant maintenance for conveyed Mutual Help units through a "flooring project, a roofing project, and ramp and bathroom changes for the elderly and disabled Tribal members." (Pl. Op. Brf. at 6). While NAHASDA certainly permits and encourages such rehabilitation of housing as an eligible activity for the use of IHBG funds, the provision does not mandate such rehabilitation once WHA no longer owns or operates the home after conveyance. 25 U.S.C. §§4132(2), 4133(b).

The tribes' needs to improve existing housing are accounted for in the "Need" component of the allocation formula. *(See* D. Brf. at 5 describing criteria for "Need" calculation, including households with cost burdens, over-crowding or lack of plumbing and number of low-income households). Requiring the formula to fund improvement activities under the "FCAS" component would distort the formula's equitable distribution between tribes with the same need to improve housing units that are not eligible for FCAS allocations. Indeed, more of these kinds of projects for tribes and Indian families can be funded when more of the annual appropriation remains

available for distribution under the Need component. 24 C.F.R. §1000.318 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. This means that allocations under the FCAS component reduce funding for existing needs under the Need component, including a tribe's housing cost burdens, overcrowding, households without kitchens or plumbing, housing shortagse and number of low income individuals. *Id.* Consequently, reducing FCAS allocations for all 1997 units no longer in inventory of a smaller universe of tribes (*i.e.*, those with FCAS) directly increases funding for all tribes' existing needs and supports projects such as those rehabilitating homes of elderly and disabled tribal members that WHA describes.

Moreover, WHA's factual argument for a regulation based on one housing entity's particular circumstances is refuted by the statute. As explained above, 24 C.F.R. § 1000.318 properly implements the text of NAHASDA § 4152(b)(3) because it embodies an *objectively* measurable condition identified through negotiated rulemaking that reflects need. That is, the factor identified by Congress in § 4152(b)(3) must be tested against an objective standard. As the negotiated rulemaking committee recognized — and the Tenth Circuit confirmed — 1997 dwelling units that are no longer owned or operated by the tribe *objectively* decrease need. Consequently, WHA's factual argument about its particular needs does not address the question whether 24 C.F.R. § 1000.318 comports with NAHASDA and thus could not support a judgment that HUD violated the APA in applying the regulation — even if WHA supplied some evidence of the needs that it asserts as required by Fed. R. Civ. P. 56(c)(1) (for summary judgment, a party asserting a fact must support the assertion).

To reach a different conclusion than the Tenth Circuit, this Court would have to conclude that NAHASDA clearly required HUD to count in perpetuity the number of units a tribe owned and operated in 1997 — even if the tribe no longer owns the units. Such a reading of the statute would be illogical for the reasons identified by HUD and the Tenth Circuit. Here, HUD applied 24 C.F.R. 1000.318(a) to WHA by eliminating 40 homeownership units from the calculation of

WHA's formula allocation after WHA notified HUD that "all 40 units under project NV99B003006 [should] be removed from our FCAS portion of the formula due to conveyance." (AR 612-613). Because this reasonably comports with NAHASDA § 4152(b)(1)-(3), HUD did not violate the APA and the Court should grant summary judgment in HUD's favor.

B. The legislative history of the 2008 amendment supports HUD's interpretation of 25 U.S.C. § 4152(b)(1).

WHA argues that when Congress amended 25 U.S.C. § 4152(b)(1) to mirror 24 C.F.R. § 1000.318(a) in the 2008 Reauthorization Act, it implicitly disapproved the regulation. (Pl. Op. Brf. at 7). WHA's argument does not stand up to scrutiny because it is based on an illogical and counter-factual inference of congressional intent as well as on a false premise. First, congressional adoption of a regulation into the statutory text implies affirmation of the policy — not disapproval, as WHA contends. Second, legislative history demonstrates that Congress meant to confirm the existing allocation policy. Third, WHA fails to support its argument by stating — wrongly — that Congress declined to apply the amendment to § 4152(b)(1) retroactively. *Id.* Finally, 25 U.S.C. § 4181(a) — which WHA cites — has no application to the question at hand.

Congress's amendment of § 4152(b)(1) incorporated 24 C.F.R. § 1000.318(a) almost verbatim. As amended, NAHASDA now provides that units counted in the formula will not include those units where the tribe "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." *Compare* 25 U.S.C. § 4152(b)(1)(A)(i) & (ii) *with* 24 C.F.R. § 1000.318(a). By incorporating these relevant provisions rather than rejecting them, Congress clearly approved HUD's regulation at 24 C.F.R. § 1000.318 in the Reauthorization Act amendment. *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).

Indeed, the legislative history of the Reauthorization Act confirms Congress's approval of 24 C.F.R. § 1000.318. As stated in the Senate report, "[t]his amendment *clarifies* that conveyed units" as well as "units that are required to be conveyed based on the homebuyer agreement" "may not be counted in the funding formula." S. Rep. 110-238, at 9 (2007)S. Rep. 110-238, at 9 (2007) (*emphasis added*). Thus, contrary to WHA's claims, the amendment was meant to endorse HUD's formula. *See id.* at 10 ("[HUD's original] funding formula was developed by Indian tribes through negotiated rulemaking, and recently reaffirmed in 2007, to ensure that the funding is allocated based on need.").

Moreover, contrary to WHA's claim, Congress did apply the amendment retroactively. As amended, 4152(b) now provides:

> FACTORS FOR DETERMINATION OF NEED — The formula shall 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, including the following factors:
>
> (1) (A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) * * * owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section 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.
> >
> > . . .
>
> (E) *Subparagraphs (A) through (D) 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 the date of enactment of this subparagraph.

25 U.S.C. § 4152(b) (*emphasis added*).

The plain language of subparagraph (E) manifests Congress's intent for the statutory change in (A) through (D) to be retroactive in general or it would not have excluded retroactive application *only* in the case of certain claims raised in certain timely-filed civil actions. In other words, Congress would not expressly exclude retroactive effect in limited circumstances unless the provisions were intended to be retroactive generally. Thus WHA errs in asserting that Congress declined amending § 4152(b)(1) with retroactive effect and even more so errs in reasoning on that false premise that Congress meant to repudiate the law in existence up to that point — including formula regulation § 1000.318.

Finally, WHA points to a December 27, 2000 amendment to 25 U.S.C. § 4181(a) and claims it shows a congressional intent to allocate grants based on a 1997 "floor," or perpetually fixed number of units that existed in 1997. (Pl. Op. Brf. at 7). WHA ignores the pertinent part of § 4181(a), which shows that the provision does not address homeownership units at all. 25 U.S.C. § 4181(a) specifies that:

> 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 to be a dwelling unit under section [4152](b)(1).

25 U.S.C. § 4181(a), Pub. L. No. 106-568, 114 Stat. 2930 (*emphasis added*). The "tenant-based assistance" in this amendment refers to Section 8 rental assistance provided to tenants under the United States Housing Act of 1937. *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1133 (D. Colo. 2006) ("*Fort Peck I*"), *citing* 42 U.S.C. § 1437f(o)), *rev'd on other grounds by Fort Peck II*, 367 Fed. Appx. 884. The purpose of the amendment was to remove any question about whether a "contract" for tenant-based assistance is the equivalent of a "dwelling unit" for purposes of 25 U.S.C. § 4152(b). *Id.* The amendment did not, however, act to support the position that the count of any 1997 units — much less homeownership units — will be the floor for IHBG funding. Indeed, the Tenth Circuit noted the following with respect to the § 4181(a):

> The amendment 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. It only required the terminated housing be considered a dwelling unit under § 4152(b)(1) and included as part of the block grant formula's basis — no more. It 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). Because HUD included all terminated housing in § 4152(b)(1), it satisfied the requirement of § 4181(a).

Fort Peck II at 890-891. The 2000 amendment to NAHASDA also sheds some light on Congress's own interpretation of the statute. 24 C.F.R. § 1000.318(a) existed at the time of this statutory amendment and Congress was obviously looking very closely at § 4152(b)(1) when it was enacted. Again, the fact that Congress chose not to alter the statutory treatment of conveyed 1997 units when it enacted this provision relating to Section 8 units further indicates congressional approval of the regulation as written. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. at 846.

C. WHA's challenge to 24 C.F.R. § 1000.318 is limited to an "as applied" challenge.

WHA misinterprets HUD's argument that, because of 28 U.S.C. § 2401(a) and the timing of the lawsuit, WHA's challenge to 24 C.F.R. § 1000.318 can only be an "as applied" challenge. (D. Brf. at16-17). Since any facial challenge to 24 C.F.R. § 1000.318 is precluded by the six-year statute of limitations in 28 U.S.C. § 2401(a), WHA is limited to 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).

Along with the reduction of its FCAS by 40 units that comprised project number NV99B003006, WHA 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. (*See* Compl. ¶ 21). However, the allegation that WHA "may be subject" to some improper agency action is mere speculation and supports no separate claim because it alleges no final agency action — as is required in an "as applied" challenge. In any case, WHA's allegation is contradicted by the

evidence.[3] Therefore, WHA's "may be subject" claim could only potentially stand as a facial challenge to the regulation, which would nevertheless be barred by the statute of limitations at 28 U.S.C. § 2401(a). Thus, the only issue before this Court is whether HUD violated the APA when it applied 24 C.F.R. § 1000.318(a) to exclude the 40 units from the allocation formula used to calculate WHA's block grant in fiscal year 2008. HUD committed no such violation.

WHA incorrectly asserts that subparagraph (E) of the 2008 amendment to 25 U.S.C. § 4152(b)(1) "expressly overrode and reestablished a statute of limitations" for any facial challenge to 24 C.F.R. § 1000.318. Read in context, the 45-day provision of the Reauthorization Act — 25 U.S.C. § 4152(b)(1)(E) — actually shortened the six year statute of limitations for any claim to be brought based on the pre-amendment version of § 4152(b)(1); the provision did not revive expired claims.

When Congress enacted the Reauthorization Act (October 14, 2008), a District Court decision invalidating 24 C.F.R. § 1000.318(a) had yet to be overruled on appeal. *See Fort Peck II* at 884 (reversing invalidation of regulation by decision dated Feb. 19, 2010). As demonstrated above, Congress essentially overruled that decision in its 2008 amendment by effectively adopting the language of the 24 C.F.R. § 1000.318(a). *Compare* 25 U.S.C. § 4152(b)(1)(A)(i) & (ii) *with* 24 C.F.R. § 1000.318(a).

Without the inclusion of subparagraph 4152(b)(1)(E) in Congress's amendment, Indian tribes would arguably have had up to six years to file suit for claims grounded in the pre-amendment version of § 4152(b)(1). Instead, subparagraph 4152(b)(1)(E) provided that the amended § 4152(b)(1) "shall not apply to any claim * * * if a civil action relating to the claim is

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[3] WHA argues that HUD's query letter about the 40 units project number NV99B003006 evidenced that HUD did or would recover past grant funds. (*See* WHA's Brief in Support of Motion for Summary Judgment (Dkt. # 26, 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 that there was no past overfunding and therefore did not seek repayment. (AR 629).

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 version of § 4152(b)(1) applies in a particular civil action. The effect of this amendment, however, was really to shorten the time for asserting claims based on pre-2008 law.

There is also no countervailing indication either in the Reauthorization Act of 2008 — or its legislative history — that Congress intended to revive stale claims, including facial challenges to a ten-year-old regulation. Accordingly, subparagraph 4152(b)(1)(E) did not revive claims that had long since expired.

D. Claims raised for the first time in WHA's summary judgment brief are not properly before this Court and they should in any case be considered waived.

Plaintiff argues 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 recovered — or might recover — grant funding that WHA already spent on affordable housing activities in violation of 24 C.F.R. § 1000.532. (D. Brf. at19-25 (citing Dkt # 26 ("Pl. Brf.") at 7-8)). This Court should not consider those claims, however, because they were not pleaded in the complaint. *Manufactured Housing Communities of Washington v. St. Paul Mercury Ins. Co.*, 660 F.Supp.2d 1208, 1216 (W.D. Wash. 2009) (at the summary judgment stage, the proper procedure to assert a new claim is to amend the complaint). Moreover, these claims — pleaded for the first time in WHA's summary judgment brief — are not supported by legal analysis. In fact, Plaintiff offers barely any argument related to those claims and thus this Court should consider them waived. *See Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("we 'review only issues which are argued specifically and distinctly in a party's opening brief'").

Nonetheless, WHA asserts that: (1) HUD should have known about these claims since other plaintiffs in other suits have alleged them; (2) Fed. R. Civ. P 8(a)(2) merely requires WHA to provide "a short and plain statement of the claim showing that the pleader is entitled to relief;" and (3) any failure on the part of WHA to support or argue its claims is HUD's fault. Because none of

these responses excuses WHA's failure to plead or argue these new claims, this Court should not consider the new claims. Alternatively, this Court should consider them waived.

WHA provides no authority for the proposition that a pleading in one case may be deemed to incorporate claims made by different plaintiffs in separate (albeit similar) cases. Moreover, HUD is aware of no such authority. The Federal Rules of Civil Procedure require a "short and plain statement of the claim" in the pleading of each civil action. Fed. R. Civ. P. 8(a)(2). WHA counters that Fed. R. Civ. P. 8(a)(2) requires only a "short and plain statement." WHA fails to indicate, however, what statement in its pleading could constitute a statement of the new claims that it raises only in a summary judgment brief.

WHA's reliance on Fed. R. Civ. P. 8(e) — which requires that pleadings be construed to do justice — is misplaced. Rule 8(e) cuts against WHA's argument for maintaining claims that it did not plead. This is because procedural rules such as Rule 8(a)(2) — requiring claims to be stated in the complaint — must be observed precisely for the reason that they promote the even-handed administration of justice. *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[I]n the long run, experience teaches that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law") (internal quotations and citation omitted).

Even if WHA's complaint could be liberally construed as containing the claims raised in its summary judgment brief, WHA's bare assertion of the claims does not constitute argument. Thus such claims should be deemed waived. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments * * * and a bare assertion does not preserve a claim * * * "). WHA devotes little more than a page of its brief to discussing three new claims. WHA makes no effort to cite record evidence or legal authority other than by citing the section numbers of several NAHASDA statutory and regulatory provisions. Nor does WHA explain with any specificity why it is entitled to judgment as a matter of law based on these mere allegations. WHA's first improperly raised claim (related to hearing rights) lists provisions of law that may or may not

"requir[e] a hearing" in any particular circumstances and concludes that "attempt[ed]" action by HUD unlawfully denied a hearing. (Pl. Brf. at 7, lines 4-12). WHA's second improperly raised claim (related to § 1000.319(d)'s 3-year limit) quotes the regulation and asks the court to order HUD's compliance with it; there is no argument at all. *(Id.* lines 14-23). WHA's third improperly raised claim (related to § 1000.532's protecting expended funds from recovery) makes bare assertions without evidence or legal authority beyond citation to the regulatory section. (*Id.* at 7, lines 44-28 through 8, lines 1-4).

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 should be deemed waived.

WHA does not respond to this legal argument and provides no contrary legal authority. WHA merely asserts that it cannot argue its new claims because HUD prevented an adequate record from being made by denying WHA an administrative hearing. (Pl. Op. Brf. at 8-9). However, to defeat HUD's cross-motion for summary judgment, WHA must do more than speculate about evidence for claims it never pleaded; HUD is not required to support its cross-motion with evidence negating WHA's bald assertions. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, WHA's response misrepresents the administrative process and has no logical nexus with the new claims WHA attempted to raise in its summary judgment brief.

HUD's administrative procedure for determining allocations provides that each tribe supply HUD updates to the data used to calculate its allocation according to the formula. 24 C.F.R. §§ 1000.315, 1000.319. HUD's administrative procedure further provides that each tribe may challenge allocation determinations and appeal if a challenge is denied. 24 C.F.R. § 1000.336. This "paper hearing" procedure ensures that any issue or objection presented to HUD by a tribe

would be part of the administrative record on APA review. Furthermore, WHA's three new claims (lack of an administrative hearing and the speculation that HUD may violate two 24 C.F.R. §§ 1000.319(d) and 1000.532) have no logical connection to the lack of adequate documentation in the administrative record. The first new claim asserts lack of a record and therefore need rely only on legal argument, which WHA neglects to make. The second and third new claims assert only that HUD may do something in the future that violates a regulation. Necessarily, records concerning speculative action would be lacking in any administrative record.

Section 706 of the APA provides that judicial review of agency action shall be based on "the whole record." 5 U.S.C. § 706. "The whole record" includes everything that was before the agency pertaining to the merits of its decision. *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir.1989). Here, WHA acknowledges that this action is "challenging HUD block grant allocations to [WHA] for fiscal years 1997 through 2008." (Pl. Op. Brf. at 8.) Therefore, the only question properly before this court is whether HUD violated the APA when it applied 24 C.F.R. § 1000.318(a) to exclude the forty lease-to-own units from the allocation formula used to calculate WHA's block grant in fiscal year 2008. The record shows this was done pursuant to WHA's September 29, 2007 letter submitting a change to its formula information and requesting that "all 40 units under project NV99B003006 be removed from our FCAS portion of the formula due to conveyance" in July of 2007. (AR 612-613). As a result, WHA's FY 2008 final allocation no longer counted any units in project NV99B003006. (AR 631-632.) Thus the record shows that HUD never recovered funds from WHA and, therefore, the alleged three-year limit on the recovery of overpayments in 24 C.F.R. § 1000.319(d) — and the alleged prohibition of the recovery of already-spent funds in 24 C.F.R. § 1000.532 — are not even at issue in this case.

WHA's belated claims were improperly interposed only in summary judgment briefing — as though an afterthought — and received only "cursory mention, with virtually no discussion." They should not be considered, and if considered, should be deemed waived. *Cf. Entertainment Research Group, Inc. v. Genesis Creative Group*, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997).

Should the court, however, determine that these claims are properly before it, HUD requests leave to further supplement its brief in opposition to address the merits of these claims.

CONCLUSION

For the reasons argued above, this 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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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 **DEFENDANTS' REPLY** 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 July 8th, 2011:

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/s/ Holly A. Vance
Holly A. Vance