IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YAKAMA NATION HOUSING AUTHORITY,	)	
Plaintiff,	)	
v.	)	No. 08-839C
	)	(Senior Judge Smith)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR RECONSIDERATION

Pursuant to Rule 59 of the Rules of the United States Court of Federal Claims ("RCFC"), defendant respectfully requests that the Court reconsider its December 5, 2011, opinion denying the Government's motion to dismiss for lack of jurisdiction pursuant to 28 U.S.C. § 1500 based upon plaintiff Yakama Nation Housing Authority's ("YNHA") prior filing in the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

I. Nature Of The Case

YNHA received annual housing grants, referred to as Indian Housing Block Grants ("block grants"), from the Department of Housing and Urban Development ("HUD") in each fiscal year starting in 1998 through the grant allocation formula in the Native American Housing and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et. seq.* First Amended Complaint ("Am. Cmpl.") ¶ 5. Plaintiffs contend that HUD "unlawfully withheld" plaintiffs' annual block grants in each of these years. *Id.* at ¶ 6. YNHA disputes HUD's determinations that certain units are ineligible for inclusion in the formula used to calculate the

grants and disputes HUD's determination that it has been overfunded. YNHA contends that it has been underfunded. Am. Cmpl. at, *e.g.*, ¶¶ 24-26.

II. Statement Of Facts

The background of this dispute has already been set forth at length in the Court's opinion granting-in-part and denying-in-part defendant's motion to dismiss plaintiffs' first amended complaint. ("YNHA Op."). We summarize the facts pertinent to our motion for reconsideration.

This case is one of a number of cases brought by Indian tribes challenging HUD's method of calculating block grants and its attempts to recover past overpayments. Since the 2001 issuance of a report by HUD's Office of Inspector General, HUD has made it a priority to correct misreported data used for calculating block grants and to recover overpayments.

HUD calculates the block grants due to tribes through an allocation formula. Prior to 2008, NAHASDA provided that the formula must be based upon factors reflecting need, including the number of certain types of housing units owned by the tribe in 1997:

> 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) The number of low-income housing dwelling units owned or operated at the time [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary.

25 U.S.C. § 4152(b). HUD's implementing regulation (formulated by negotiated rulemaking) provides that housing units would no longer be considered in the formula for calculating block grants "when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit" so long as such units are conveyed "as soon as practicable after a unit becomes eligible for conveyance." 24 C.F.R. § 1000.318. *See* YNHA Op. at 3.

In 2005, YNHA filed a petition for review with the Ninth Circuit, challenging a November 2, 2004 decision by HUD. Appendix ("A") 2. The 2004 HUD decision made adjustments, both up and down, to the number of units in eight YNHA housing projects during the time period of fiscal years 1998 to 2005. A19. HUD sought a return of net overfunding of $469,549 during this period. *Id.* The Ninth Circuit dismissed YNHA's petition for lack of jurisdiction in December 2010. YNHA Op. at 4.

In 2008, Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("Reauthorization Act"), which amended several sections of NAHASDA. *See* Pub. L. 110-411. In the Reauthorization Act, Congress revised 25 U.S.C. § 4152(b)(1) by essentially adopting HUD's regulation at 24 C.F.R. § 1000.318. The revised section 4152(b)(1) provides, among other things, that housing units will not be included in the block grant formula if the recipient ceases to possess the legal right to own, operate, or maintain the unit; or the unit is lost to the recipient by conveyance, demolition, or other means. 25 U.S.C. § 4152(b)(1)(A)(i)-(ii).

Congress placed a significant limitation upon the applicability of the revised section 4152(b)(1) in the Reauthorization Act. Congress provided that section 4152(b)(1)(A)-(D) would not apply to claims arising from HUD's calculations of block grants for fiscal year 2008 and earlier years, if a lawsuit were filed by not later than 45 days after the enactment of the Reauthorization Act on October 14, 2008, that is, by November 28, 2008. 25 U.S.C. § 4152(b)(1)(E). YNHA filed its complaint in this Court on November 24, 2008.

We filed a motion to dismiss YNHA's amended complaint based, in part, upon 28 U.S.C. § 1500 and YNHA's prior filing in the Ninth Circuit. The Court agreed that YNHA's Ninth Circuit action was pending for purposes of section 1500 at the time YNHA filed its complaint in

this Court. YNHA Op. at 6. However, the Court noted that in this action YNHA contends that it is entitled to recoup funding for all housing units excluded from the funding formula that were under contract in 1997. *Id.* at 7. The Court also noted that Congress enacted the Reauthorization Act after the filing of YNHA's Ninth Circuit petition but prior to its filing of the complaint in this action. The Court held that, because YNHA's Ninth Circuit claim was not subject to the Reauthorization Act and YNHA contends in this Court that it is entitled to payment for all housing units excluded by HUD from the allocation formula, this action is not barred by section 1500. *Id.*

ARGUMENT

I. Standard Of Review

Pursuant to RCFC 59, the Court may reconsider any issue in a case "for any reason for which a new trial has heretofore been granted in an action at law in federal court" or "in a suit in equity in federal court. . . ." RCFC 59(a)(1)(A)-(B). "For a movant to prevail, he must point to a 'manifest error of law, or mistake of fact' and demonstrate that the motion 'is not intended to give an unhappy litigant an additional chance to sway the court.'" *Strickland v. United States*, 36 Fed. Cl. 651, 657 (1996) (citations omitted).

II. The Court Erred In Applying The Section 1500 Test And In Analyzing YNHA's Claim

A. The Court Should Not Have Focused Upon YNHA's Legal Theory

In its order denying the Government's motion to dismiss pursuant to 28 U.S.C. § 1500, the Court stated that YNHA's complaint in this Court "is subject to the 2008 NAHASDA amendment, the Reauthorization Act, which changed the analysis of housing unit eligibility in the grant formula in § 1000.318." YNHA Op. at 7. The Court held that any action pending prior to the enactment of the Reauthorization Act in 2008 "cannot be for or in respect to the same

claim and cannot be precluded under § 1500." *Id.* The Court held that the "two cases are separate and distinct causes of action and, thus, are not affected by 28 U.S.C. § 1500." *Id.*

The Court should not have focused upon any distinction in the version of NAHASDA upon which YNHA is basing its claim. As the Supreme Court held in *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993), the legal theory that the plaintiff is pursuing is not relevant to a section 1500 analysis. The only relevant criterion for a section 1500 analysis is the operative facts, not the plaintiff's legal theory. *See United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723 (2011). However, the question of the plaintiff's legal theory is academic in this case because, as we will now demonstrate, YNHA has based both claims on the pre-2008 version of NAHASDA.

B. The Pre-Reauthorization Act Version Of NAHASDA Applies To This Lawsuit

Even if the Court determines that the version of NAHASDA upon which YNHA is basing its claims is relevant to the section 1500 analysis, the amended complaint should be dismissed because YNHA is basing its claim upon the pre-2008 version of NAHASDA, just as it did in the Ninth Circuit.

YNHA filed its complaint in this Court on November 24, 2008. As stated above, the Reauthorization Act provided that the Act's incorporation of the requirements of 24 C.F.R. § 1000.318 into NAHASDA would not apply to civil actions filed before November 28, 2008. 25 U.S.C. § 4152(b)(1)(E). In its complaint, YNHA specifically identified and relied upon this provision of the Reauthorization Act. *See* Am. Cmpl. ¶ 2 (citing 25 U.S.C. § 4152(b)(1)(E) and noting that the 2008 amendments do not apply to complaints filed within 45 days after enactment) and ¶ 3 (stating original complaint filed within 45 days of October 14, 2008).

This distinction is crucial to YNHA's claim. If YNHA cannot rely upon the pre-2008 version of NAHASDA, most of its claim disappears. YNHA is contending that 24 C.F.R. § 1000.318 was in conflict with the pre-2008 version of NAHASDA. Thus, YNHA alleges in paragraph 23 of the amended complaint that this regulation was invalid because of the requirement in the pre-2008 version of NAHASDA that the allocation formula be based upon the number of units owned by the tribe in 1997. In this same paragraph, YNHA effectively concedes that only the pre-Reauthorization Act version of NAHASDA required that the block grant allocation formula take into account all units that the tribe owned or operated as of September 30, 1997. *See* Am. Cmpl. ¶ 23 ("prior to its amendment in 2008, [25 U.S.C. § 4152(b)(1)] required that the FCAS [Formula Current Assisted Stock] part of the NAHASDA funding formula for each fiscal year be based on the number of low-income housing units owned . . . on September 30, 1997."). If the Court were to apply the Reauthorization Act to YNHA's claim, YNHA could not claim 24 C.F.R. § 1000.318 is invalid because, as we established above, the Reauthorization Act incorporated the provisions of this regulation into NAHASDA.

As the Court observed in its opinion, Congress enacted the Reauthorization Act after YNHA filed its petition for review in the Ninth Circuit but prior to its filing in this Court. However, the timing of these actions does not necessarily determine the version of NAHASDA that must be applied to a complaint. It is the language of the statute that determines the applicability of the Act. The Reauthorization Act applies to only two types of claims: (1) claims arising out of fiscal years 1998-2008 where the plaintiff did not file suit within 45 days of October 14, 2008; and (2) claims arising out of fiscal years 2009 and after. 25 U.S.C. § 4152(b)(1)(E). Because YNHA's complaint was filed within 45 days of October 14, 2008, and seeks damages for fiscal years 1998 to 2008, the pre-2008 version of 25 U.S.C. § 4152(b)(1)

applies to this action, the same version of the statute that was in effect for the fiscal year 1998 to 2005 time period covered in YNHA's petition to the Ninth Circuit. Thus, the Court's analysis should focus solely upon whether YNHA's action is based upon the same operative facts as its case in the Ninth Circuit.

III. Section 1500 Bars YNHA's Claim

Section 1500 of title 28, United States Code, bars actions in this Court "for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . ." As the Supreme Court has explained, section 1500 bars actions in this Court if the plaintiff has the identical action pending in another court - an action "for" the same claim. *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723, 1728 (2011). Moreover, the Supreme Court held in *Tohono* that section 1500 also bars actions in this court when the plaintiff's other action "is related although not identical - a suit 'in respect to' the same claim." *Id.* Thus, a case must be dismissed if there is a "substantial overlap in operative facts" with the case in the other court. *Id.* at 1731. Accordingly, the only question that remains is whether YNHA's Ninth Circuit petition for review "is related although not identical" to its action in this Court.

There are differences between YNHA's Ninth Circuit action and its action in this Court. In this Court, YNHA seeks payment for a greater number of housing units by adding additional fiscal years to its claim (1998-2005 vs. 1998-2008). However, a comparison of YNHA's amended complaint and Ninth Circuit petition readily demonstrate that the cases are closely related. Both actions concern the funding of YNHA's Indian Housing block grants starting in fiscal year 1998. *Compare, e.g.*, Am. Cmpl. ¶¶ 5-7 and A2-4 and A18-20. Both the petition for review and the amended complaint concern a dispute over the number of YNHA mutual help

units that should be included in determining the amount of YNHA's block grants. Am. Cmpl. ¶¶ 5-7, 23 and A19. Both cases concern the proper application of the allocation formula and HUD's determination that YNHA received more funding than that to which it was entitled. *Compare* Am. Cmpl. ¶¶ 2, 12-16, 27 and A18-19. In both cases, YNHA is disputing an alleged failure by HUD to issue such a decision without providing YNHA notice and a hearing. *Compare* Am. Cmpl. ¶ 37 and A2. In both cases, YNHA also contends that it spent the block grants on affordable housing activities and that this provides it a defense to repayment. *Compare* Am. Cmpl. ¶ 43 and A3. Thus, although there are some differences between the cases, there clearly is a substantial overlap of operative facts between the two cases. *See Tohono*, 131 S.Ct. at 1731 (barring complaint because of "substantial overlap in operative facts").

Accordingly, YNHA's Ninth Circuit petition was a related but not identical action to its action in this Court and is barred by 28 U.S.C. § 1500.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our earlier briefs, defendant requests that the Court dismiss YNHA's amended complaint.

Respectfully submitted,

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