No. 08-839C
(Senior Judge Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YAKAMA NATION HOUSING AUTHORITY,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

DEFENDANT'S MOTION TO DISMISS

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DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims, defendant respectfully requests that the Court dismiss plaintiff Yakama Nation Housing Authority's ("YNHA") complaint for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted.

DEFENDANT'S MEMORANDUM

QUESTIONS PRESENTED

1. Whether YNHA's claims that accrued prior to November 24, 2002 are barred by the statute of limitations.

2. Whether the Court lacks jurisdiction because YNHA filed an action in the court of appeals prior to its filing in this Court where both actions are based upon the same operative facts and seek the same relief.

3. Whether there is a damages remedy against the Government when the Government fails to make a grant.

4. Whether the due process clause of the Fifth Amendment is money mandating.

5. Whether the case is now moot because NAHASDA money is obligated in the year appropriated by Congress and any remaining amounts are carried over and spent the following year.

6. Whether Congress has withdrawn Tucker Act jurisdiction in 25 U.S.C. §§ 4161 and 4165 by providing a specific procedure for judicial review of agency actions.

7. Whether the Native American Housing and Self-Determination Act creates fiduciary duties upon the part of the Government that are enforceable through a breach of trust law suit.

STATEMENT OF THE CASE

I. Nature Of The Case

YNHA received annual housing grants, referred to as Indian Housing Block Grants ("IHBGs"), from the Department of Housing and Urban Development ("HUD") in each fiscal year from 1998 to 2010 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. YNHA contends that HUD improperly reduced YNHA's annual grants in each of those years. YNHA disputes HUD's ineligibility determinations and HUD's determination that it has been overfunded. YNHA contends that it has been underfunded. Am. Cmpl. ¶¶ 5, 7.

II. Statement Of Facts

Indian tribes and tribally designated housing entities ("TDHEs") have filed more than a dozen cases in district courts and three cases in this Court challenging HUD's calculation and

recovery of grant funds paid by HUD to Indian tribes or TDHEs pursuant to NAHASDA.[1] Although there are some differences, the cases all arise from the same basic facts. The legal and factual backgrounds of the cases have been described at length in opinions by the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit. We rely on the decisions from those courts, YNHA's amended complaint in this court, its complaints in the district court, and a declaration concerning the status of NAHASDA funds prepared for this Court.

Background Of NAHASDA

Congress enacted NAHASDA in 1996. *See* Pub. L. 104-330, § 107, 110 Stat. 4016 (1996). NAHASDA terminated Indian housing assistance under the 1937 Housing Act after September 30, 1997 and provided for annual block grants to Indian tribes in amounts determined by an allocation formula to be established by regulations issued according to a negotiated rulemaking procedure. *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1127-28 (D. Colo. 2006) ("*Fort Peck I*") (citing 25 U.S.C. §§ 4151, 4152, 4116) *rev'd* 2010 WL 582653 (10th Cir. 2010) ("*Fort Peck II*"). Congress directed HUD to establish an allocation formula for this new system to reflect the needs of the Indian tribes in the distribution of appropriated funds through block grants. *Fort Peck II*, 2010 WL 582653 at *2 (citing 25 U.S.C. § 4152(a)). Congress specified that the formula be based upon factors reflecting need, including: "(1) The number of low-income housing dwelling units owned. . . (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe. (3) Other objectively

[1] The other cases in this Court are *Navajo Housing Authority v. United States*, No. 08-834 and *Lummi Tribe et al. v. United States*, No. 08-848. The Fort Peck Housing Authority, which has played a central role in the district court, is one of the plaintiffs in the *Lummi* case.

measurable conditions as the Secretary and the Indian tribes may specify." *Id.* (citing 25 U.S.C. § 4152(b) (2000)).

A committee composed of 48 representatives of Indian tribes and 10 HUD representatives developed the regulations implementing NAHASDA. *Fort Peck II*, 2010 WL 582653 at *2; *Fort Peck I*, 435 F. Supp. 2d at 1128 (citing "Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule," 63 Fed. Reg. 12,334 (March 12, 1998)). The regulations are found in Part 1000, Subpart D, of Title 24 of the Code of Federal Regulations. 24 C.F.R. §§ 1000.301 to 1000.340.

The allocation formula that HUD and the tribes negotiated has two components: (1) Formula Current Assisted Stock ("FCAS") and (2) need. *Fort Peck II*, 2010 WL 582653 at *2 (citing 24 C.F.R. § 1000.310). The FCAS component is based upon a tribe's inventory of rental units and lease-to-own units (referred to as "Mutual Help" and "Turnkey III" units), as of September 30, 1997. *Id.* at 2 fn. 6 (citing 24 C.F.R. §§ 1000.314 and 1000.318). According to the amended complaint, the Mutual Help program is the "germane" program for purposes of this dispute. Am. Cmpl. ¶ 12. In the Mutual Help program, an eligible Indian family could contribute land, work, cash, materials, or equipment to the construction of a home under a Mutual Help and Occupancy Agreement 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).

The need component of the allocation formula is based upon seven criteria, including information derived from census data, such as the number of households in a tribe's population with income below a median income level, and the number of households living without kitchens

and plumbing. *Fort Peck II*, 2010 WL 582653 at 2 fn. 7 (citing 24 C.F.R. § 1000.324). Each year the funds appropriated for IHBGs are allocated by first calculating the FCAS component and then dividing the remaining funds under the need component; thus, a greater number of FCAS units reduces the amount available for the need component. Id. at 2.

The focus of all of these disputes has been upon the FCAS component of the formula. Am. Cmpl. ¶ 16; *Fort Peck I*, 435 F. Supp. 2d at 1129; *see also* Navajo Am. Cmpl. ¶ 15; Lummi Am. Cmpl. ¶ 20. At the center of all of these disputes is a regulation that identifies when individual lease-to-own units should no longer be counted as part of FCAS. Section 1000.318 poses the question, "When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?" It then answers the question by providing that the units cease to be counted when the Indian tribe no longer owns the unit and provides further restrictions as follows:

> Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise provided that:
>
> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy Agreement] and
>
> (2) The Indian tribe . . . actively enforce[s] strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.318(a).

Whether a lease-to-own unit will no longer be counted for purposes of the allocation formula is significant because, if the lease-to-own unit is removed from the FCAS count, the

tribe will receive a smaller FCAS-based portion of its housing grant from HUD and the overall housing grant it receives (which includes both the FCAS and "need" components) may also be smaller. Accordingly, over time, as lease-to-own units are conveyed to eligible Indian families as intended by the Mutual Help and Turnkey III programs and no longer counted in FCAS, the funding previously used for funding FCAS becomes available for distribution under the need component. Because HUD is dividing up one pot of NAHASDA money for all tribes through the allocation formula, an Indian tribe that inflates FCAS will receive a higher percentage of that pot than it should. Because NAHASDA only provides a mechanism for dividing the money appropriated by Congress each year, a tribe that improperly includes units in FCAS does not directly affect the Treasury. Rather, the effect is directly felt by other needy tribes who experience a reduction in their grants.

The Inspector General's Audit

In 2001, HUD's Office of Inspector General ("OIG") performed a nationwide audit of the NAHASDA program implementation. *Fort Peck I*, 435 F. Supp. 2d at 1130. The OIG conducted site visits of seventeen TDHEs. The OIG audit report concluded that IHBG funds had not been properly allocated in previous years because they were based on "housing units that do not qualify as FCAS." *Id.* The OIG criticized HUD for a failure to enforce compliance with 24 C.F.R. § 1000.318, stating: "Since Mutual Help and Turnkey III programs generally do not exceed 25-years, one can reasonably expect that some of these units should be paid-off, and the Housing Entities would no longer have the legal right to own, operate, or maintain these units." Id. The OIG recommended that HUD's Office of Native American Programs "audit all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that

had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years." *Id.*

HUD thereafter began seeking recovery of amounts it had paid for ineligible FCAS. *Id.* HUD has recovered at least some money from all of the plaintiffs in this Court with the exception of the YNHA.

The Fort Peck Litigation

On January 6, 2005, Fort Peck filed suit in the United States District Court for the District of Colorado pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., seeking, among other things, a declaration that HUD had acted unlawfully, and injunctive relief prohibiting HUD from recovering previous grant amounts. *See Fort Peck I*, 435 F. Supp. 2d at 1131. The parties thereafter filed motions for judgment on the administrative record. The issue considered by the district court was "whether HUD's reduction of the FCAS component of the plaintiff's block grant funding for the years 1999-2002 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 1131. On May 25, 2006, the district court ruled that section 1000.318 "conflicts with the plain language of 25 U.S.C. § 4152(b)(1), mandating the inclusion of '[t]he 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.'" *Id.* at 1132. The court held the regulation to be invalid. *Id.* at 1135. In addition, the court ordered that all applicable units owned by Fort Peck as of September 30, 1997 be included for determining its allocation of the annual Congressional appropriation for Indian housing block grants and that HUD take such administrative action necessary to implement this ruling. *Id.*

HUD appealed the district court's decision in *Fort Peck* to the Tenth Circuit. In an unpublished opinion issued on February 19, 2010, the Tenth Circuit reversed. The court of appeals first reversed the district court's holding that NAHASDA had created a perpetual floor for funding at the level of 1997 housing units. 2010 WL 582653 at *5-6. The court then considered whether HUD's regulation comported with NAHASDA's requirement that the formula relate to the need of the Indian housing entities. *Id.* at *7. The court first noted that it reviewed agency rulemaking with great deference when a challenged decision involves matters within the agency's area of expertise and that the disbursement of funds for low-income housing assistance for Indian tribes was "certainly" within HUD's expertise. *Id.* The court held that HUD's regulations at 24 C.F.R. §§ 1000.316-1000.318 complied with the mandate set forth in NAHASDA. Id. HUD "clearly included the entire [25 U.S.C. § 4152](b)(1) factor as the starting point." *Id.* The court of appeals then observed that, from this starting point, HUD's regulations provided for a reduction equal to the number of housing units no longer owned or operated by tribal housing entities. *Id.* The court held that this reduction "recognized the ongoing and evolving needs of Tribal Housing Entities." *Id.* The court held that NAHASDA required an interplay of all three factors in section 4152(b)(1)-(3) in the determination of an entity's housing needs, "including those HUD identified in its rulemaking process." *Id.* The court concluded that "[s]ection 1000.318's downward adjustment was an example of this interplay. It was not arbitrary and capricious." Id. Finally, the court denied Fort Peck's cross-appeal for return of its overfunding repayments because HUD's actions did not violate NAHASDA. *Id.* at *8, n.15.

Upon remand, the district court consolidated the Fort Peck case with all of the other NAHASDA cases pending in the District of Colorado and ordered the parties to file amended or supplemental complaints by September 6, 2010.

The Yakama Ninth Circuit Appeal

On January 4, 2005, YNHA filed a petition for review with the United States Court of Appeals for the Ninth Circuit. Appendix ("A") 1-5. YNHA sought to appeal a November 4, 2004, letter from HUD to YNHA. A18. The HUD letter informed YNHA that it had received net Indian Housing Block Grant over-funding of $469,549 in fiscal years 1998 to 2004. A18-20. HUD asked YNHA to contact HUD within 30 days to discuss repayment options that could include reducing previous or future year's funding. A20. YNHA's petition asserted jurisdiction under 25 U.S.C. § 4161(d), which provides jurisdiction over a petition filed within 60 days of the receipt of "notice under [25 U.S.C. § 4161(a)] of the termination, reduction, or limitation of payments under this chapter."

On December 7, 2010, the Ninth Circuit dismissed the petition for lack of jurisdiction. A30.

The 2008 Amendment Of NAHASDA

On October 14, 2008 (after the district court decision in *Fort Peck* but before the Tenth Circuit decision), 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), essentially by adopting the provisions in HUD's regulation at 24 C.F.R. §

1000.318 that provide for units to become ineligible for inclusion in FCAS when the tribes no longer own, or should no longer own, the units. The statute now provides:

> (b) 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.), pursuant to a contract between an indian housing authority for the tribe and the Secretary, that are 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.
>
> (B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.

The Reauthorization Act also provided that these amendments did "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." Reauthorization Act, Section 301(2); 25 U.S.C. § 4152(b)(1)(E). Thus, this provision required any Indian tribe wishing to

pursue a claim based upon the previous version of the statute and 24 C.F.R. § 1000.318 to file suit by November 28, 2008. Plaintiffs filed this action before that deadline.

ARGUMENT

I. Standards Of Review

A. RCFC 12(b)(1)

In deciding a RCFC 12(b)(1) motion, "determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted). When this Court's subject matter jurisdiction is placed into issue, the non-moving party bears the burden of establishing jurisdiction. *International Industrial Park, Inc. v. United States*, 80 Fed. Cl. 522, 526 (2008). "Where a motion to dismiss challenges the truth of the jurisdictional facts alleged in the complaint, the court is not restricted to the face of the pleadings, but may consider all relevant evidence in order to resolve the factual dispute." *Id.* (citing *Ferreiro v. United States*, 350 F.3d 1318, 1324 (Fed. Cir. 2003)).

B. RCFC 12(b)(6)

The Tucker Act delineates this Court's jurisdiction. 28 U.S.C. § 1491 (2006). The statute "confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir.2005) (*en banc*). These include claims "'founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.'" *Id.*

(quoting 28 U.S.C. § 1491(a)(1)). The Tucker Act concurrently "waives the Government's sovereign immunity for those actions." *Id.* The statute does not, however, create a substantive cause of action or right to recover money damages in the Court of Federal Claims. *Id.* (citing *United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"), and *United States v. Testan*, 424 U.S. 392, 398 (1976)).

As the Supreme Court explained in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the factual allegations pled in the complaint must be enough to raise a right to relief above the speculative level. Thus, "when the factual allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558 (quoting *5 Wright & Miller § 1216* at 233-34 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Hawaii 1953))).

II. Plaintiffs' Claims Are Barred, In Part, By The Statute Of Limitations

This Court only possesses jurisdiction to consider a complaint if the plaintiff files its complaint within six years after the claim accrues. 28 U.S.C. § 2501. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008), the United States Supreme Court held that 28 U.S.C. § 2501 is jurisdictional and cannot be waived or tolled based upon equitable considerations. Pursuant to this statute, a claim accrues when "all events have occurred to fix the Government's alleged liability," and the plaintiff knew or should have known of the existence of his claim. *Martinez v. United States*, 333 F.3d 1295, 1303, 1319 (Fed. Cir. 2003) (*en banc*) (internal quotations omitted). "It is a plaintiff's knowledge of the facts of the claim that determines the accrual date." *Young v. United States*, 529 F.3d 1380, 1385 (Fed. Cir. 2008).

YNHA filed its complaint in this Court on November 24, 2008. YNHA's amended complaint seeks payment for additional FCAS units as far back in time as fiscal year 1998. Am. Cmpl. ¶ 26. YNHA's complaint contains no allegations that it did not know, and could not have known, the amount of HUD's payments to YNHA. As the housing authority, YNHA would have been aware of the terms of its lease-to-own contracts. There was no reason that it could not have pursued whatever avenues of judicial review were available as the units became ineligible for funding under 24 C.F.R. § 1000.318. YNHA's amended complaint indicates that its filing of a complaint in this Court more than 11 years after the start of fiscal year 1998 arises not from ignorance of the facts but from a new interpretation of NAHASDA by YNHA, namely, that HUD must perpetually pay plaintiffs for lease-to-own units under contract in 1997. However, even if plaintiffs' interpretation of NAHASDA were correct (which it is not) a prior misunderstanding of the law does not toll the statute of limitations. *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993).

Accordingly, YNHA's claims for fiscal years 1998 to 2002 and through November 24, 2002 are barred by the statute of limitations.

III. YNHA's Complaint Is Barred By The Prior Filing In The Ninth Circuit

YNHA filed a petition for review in the Ninth Circuit on January 4, 2005, more than three years prior to its filing in this Court. A1. That petition remained pending until the Ninth Circuit dismissed it on December 7, 2010. A30.

Section 1500 of Title 28 of the United States Code bars actions in this Court when the plaintiff previously filed suit in another Federal court:

> The United States Court of Federal Claims shall not have jurisdiction of any claim 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 or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The jurisdictional analysis is guided by "the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824)). The Supreme Court has held that section 1500 "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." *Keene*, 508 U.S. at 210. The Supreme Court has also recognized, however, that section 1500 does not define the term "claim" and that "[t]he exact nature of the things to be compared is not illuminated . . . by the awkward formulation of § 1500." Id.

In *Keene*, the Supreme Court held that "the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." Id. at 212. The Supreme Court did not decide "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." Id. at 213, n. 6. The Federal Circuit has interpreted *Keene*, in light of earlier opinions of the court of appeals, to mean that the section bars actions that "arise from the same operative facts" and "seek the same relief." *Tohono O'Odham Nation v. United States*, 559 F.3d 1284, 1287 (Fed. Cir. 2009) *cert. granted* 130 S. Ct. 2097 (2010) (quoting *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994 (*en banc*)). Thus, "if an action in the Court of Federal

Claims either arises from different operative facts or seeks completely different relief than the earlier-filed action, then § 1500 does not divest the Court of Federal Claims of jurisdiction." *Tohono O'Odham*, 559 F.3d at 1288.

In this case, the amended complaint in this Court and the petition for review arise from the same operative facts in that they both allege a pattern of underfunding YNHA's 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, the proper application of the FCAS 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 HUD cannot recover the overfunding because YNHA spent the money on affordable housing activities. *Compare* Am. Cmpl. ¶ 43 and A3.

YNHA is also seeking the same relief in this Court that it sought in the Ninth Circuit. In the Ninth Circuit, YNHA sought an order that HUD "must fund units actually operated as affordable housing and may not rescind or recapture grant funds. . . ." A4. Similarly, in this Court, YNHA requests that the Court calculate and base YNHA's FCAS funding upon the units that YNHA owned and operated. Am. Cmpl at p. 13, ¶ 2. Even if the Ninth Circuit petition may be construed as seeking declaratory relief only, that should not change the result because the actions in both that court and here would have achieved the same result - payment of money by HUD to YNHA. The Federal Circuit has held that where a plaintiff is challenging HUD's

actions as a regulator, the court will presume that, once the propriety of HUD's action has been adjudicated in the court with jurisdiction to grant declaratory relief, HUD "will act accordingly and any monetary consequences will flow. . . ." from that declaratory relief. *Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994). Thus, if YNHA had prevailed in the Ninth Circuit, that victory likely would have resulted in the payment of money by HUD to YNHA, the same relief it is seeking in this Court.

Accordingly, YNHA's actions are based upon the same operative facts and seek the same relief. The Court should dismiss the complaint for lack of jurisdiction.

IV. NAHASDA Is Not A Money Mandating Statute

A. Standards For Money Mandating Statutes

The United States is "immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity must be "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). The scope of a waiver of sovereign immunity must be "strictly construed . . . in favor of the sovereign," id., and "not enlarged . . . beyond what the language requires." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

Congress has provided a limited waiver of its sovereign immunity in 28 U.S.C. § 1491 (the "Tucker Act"), and in 28 U.S.C. § 1505 (the "Indian Tucker Act"). The Tucker Act and the Indian Tucker Act provide a limited waiver of sovereign immunity for claims to enforce substantive rights to money damages that appear in other sources of law, such as the Constitution, statutes, or regulations. *Mitchell II*, 463 U.S. at 216; *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) ("*Navajo III*").

To bring a claim in this Court under the Tucker Act or Indian Tucker Act, and fall within the scope of Congress's waiver of sovereign immunity, YNHA must satisfy two distinct requirements, as clarified in the Supreme Court's decision in *Navajo III*. The first of the two requirements is that a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo III*, 129 S.Ct. at 1552 (citation omitted); *see also Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. § 1491(a)). The obligations identified must arise out of specific statutory or regulatory prescriptions that govern the conduct at issue. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *Navajo III*, 129 S. Ct. at 1558 (citation omitted). A "threshold" requirement for non-constitutional claims is the identification of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish the "specific fiduciary or other duties" that the Government allegedly has failed to fulfill. *Navajo I*, 537 U.S. at 506.

If the tribe identifies a law that imposes specific obligations, a court may then proceed to the second inquiry, which requires the court to "determine whether the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo III*, 129 S. Ct. at 1552 (citation omitted). The law must be "reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

In this case, YNHA apparently contends that NAHASDA is a money mandating statute. Although YNHA references grant agreements between HUD and YNHA in the amended

complaint, it does not identify any specific provisions of the grant agreements that HUD has breached. Rather, the crux of YNHA's contentions in count one of the amended complaint is that HUD violated various provisions of NAHASDA by not providing permanent funding to YNHA at the level of lease-to-own units owned by YNHA in 1997. We address these contentions in this section of our brief. In count two, YNHA contends that HUD violated NAHASDA by failing to provide YNHA notice and a hearing before attempting to recover money from plaintiffs. We address this contention in section VI below. Count three of YNHA's amended complaint, which contends that there is a trust relationship between HUD and YNHA, also does not identify any contractual provisions breached by HUD. We address those contentions in section VII.

B. NAHASDA Does Not Provide For A Damages Remedy

NAHASDA provides for grants to tribes or tribally designated housing entities such as YNHA. It provides in subchapter I, Block Grants and Grant Requirements, Section 4111(a), Block grants, of title 25:

> (1) In general
>
> For each fiscal year, the Secretary shall (to the extent amounts are made available to carry out this chapter) make grants under this section on behalf of Indian tribes--
>
> (A) to carry out affordable housing activities under part A of subchapter II of this chapter; and
>
> (B) to carry out self-determined housing activities for tribal communities programs under part B of that subchapter.

See U.S. Gov't Accountability Office, GAO-10-326, *Native American Housing, Tribes Generally View Block Grant Program as Effective, but Tracking of Infrastructure Plans and Investments*

Needs Improvement at 3 (2010) ("GAO-10-326") (explaining that NAHASDA authorized two HUD administered programs, IHBGs and a loan guarantee program). Section 4111(f) provides that grants shall be in the amount provided for in the formula developed under section 4151. To receive their grant distribution, tribes must submit an Indian Housing Plan for each program year. 25 U.S.C. § 4112; *see* GAO-10-326 at 12. In that plan, the tribes identify their affordable housing needs and describe the housing activities they plan to pursue to address those needs. Id.

In *Samish Indian Nation v. United States*, 90 Fed. Cl. 122 (2009) ("*Samish V*"), the Court recently had the opportunity to consider whether statutes providing for grants are money mandating. The Court first provided a review of the nature of grants. It explained that "Broadly speaking, a federal grant is 'financial assistance authorized by federal law to support autonomous programs of states or local governments or groups, which the federal government does not dictate but does wish to encourage.'" *Samish V*, 90 Fed. Cl. at 131 (quoting Paul G. Dembling & Malcolm S. Mason, *Essentials of Grant Law Practice* § 2.02 (1991)). "'Grants are characterized by 'a maximum of autonomy in the program essentials, coupled with a necessary minimum of fiscal control to assure integrity.'" *Id.* Grants may be distinguished by their purpose. *Id.* "Categorical grants 'are those that are made for a narrowly defined purpose' and block grants 'are those that are made for broadly defined purposes. . . .'" *Id.* (quoting Dembling & Mason, at § 2.04(c)).

The Court then stated the issue: "whether the statutes creating federal grant programs are money mandating so as to permit the Court of Federal Claims' exercise of jurisdiction." *Samish V*, 90 Fed. Cl. at 132. The Court held that the Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) governed the issue. In *Bowen*, the Supreme Court

considered whether a Federal district court possessed jurisdiction under the Administrative Procedure Act to review the final order of the Secretary of the United States Department of Health and Human Services ("Secretary of HHS") "refusing to reimburse a State for a category of expenditures under its Medicaid program," a Federal grant-in-aid program. *Samish V*, 90 Fed. Cl. at 132 (quoting *Bowen*, 487 U.S. at 882 & n. 1). The Government argued that the United States Claims Court (the previous name for this Court) possessed exclusive jurisdiction. *Id.* The Supreme Court rejected this argument.

In discussing this Court's jurisdiction under the Tucker Act, the Supreme Court noted that although there are "'many statutory actions over which the Claims Court has jurisdiction to enforce a statutory mandate for the payment of money,' such statutes all 'provide compensation for specific instances of past injuries or labors; suits brought under these statutes do not require the type of injunctive and declaratory powers that the district courts can bring to bear in suits under the Medicaid Act.'" *Samish V*, 90 Fed. Cl. at 132 (quoting *Bowen*, 487 U.S. at 900 n. 31); *see also Bowen*, 487 U.S. at 905 n. 42 (reiterating that statutes found to mandate the payment of money damages under the Tucker Act typically "attempt to compensate a particular class of persons for past injuries or labors"). In contrast, "the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures." *Samish V*, 90 Fed. Cl. at 132 (quoting *Bowen*, 487 U.S. at 905 n. 42). Thus, the Supreme Court concluded that the state's suit was "not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [was] a suit seeking to enforce the statutory mandate

itself, which happens to be one for the payment of money." *Samish V*, 90 Fed. Cl. at 132 (quoting *Bowen*, 487 U.S. at 900).

Relying on *Bowen*, this Court held that "statutes creating federal grant-in-aid programs are not designed to provide for a damages remedy." *Id.* The Court held that "plaintiff's attempt to use the underlying statutes and regulations to obtain money damages for the government's failure to provide the specified programs, services, and benefits must fail." *Id.* at 132-33. Accordingly, the Court held that jurisdiction for the tribe's claim must arise from a source of law distinct from grant-creating statutes and regulations. Id.

The same reasoning controls this case. NAHASDA, like the statutes involved in *Bowen* and *Samish V* does not purport to compensate Indian tribes for past labors or injuries. Indian tribes are not required to participate in NAHASDA. Rather, the program promotes activities that the Government wishes to encourage. As set forth in the statute, the goals of NAHASDA are focused upon increasing affordable housing and community development. Congress intended NAHASDA to accomplish objectives such as assisting and promoting affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments and ensuring better access to private mortgage markets for Indian tribes and their members. 25 U.S.C. § 4131(a); *see* GAO-10-326 at 5. NAHASDA provides block grants that may be spent on several categories of affordable housing activities such as: modernization or operating assistance for 1937 Housing Act units; housing development, (for example, acquisition, new construction, and rehabilitation of affordable housing); and housing services, including housing counseling and assistance to owners, tenants, and contractors involved in eligible housing activities. 25 U.S.C. § 4132; *see* GAO-10-326 at 6-7.

As can be seen from both the goals of NAHASDA and the activities funded, NAHASDA does not purport to compensate the tribes for "past injuries or labors." *See Bowen*, 487 U.S. at 905. Rather, NAHASDA, like the statutes involved in *Bowen* and *Samish V*, subsidizes future expenditures. *Samish V*, 90 Fed. Cl. at 132 (citing *Bowen*, 487 U.S. at 905, n. 42). In this case, YNHA is claiming that it did not receive all of the money that it wanted to subsidize its future activities. The money YNHA contends it should have received was not money intended to compensate YNHA for past labor or injuries. Thus, pursuant to *Samish V* and *Bowen*, such amounts are not damages that may be sought in this Court.

C. The Fifth Amendment Due Process Clause Is Not Money Mandating

In count two of its amended complaint, YNHA also raises the due process clause of the Fifth Amendment. To the extent that the amended complaint could be construed as contending that the due process clause is money mandating, such an argument is contrary to precedent. The Fifth Amendment due process clause does not mandate payment of money by the Government and cannot be a basis for jurisdiction in this Court. *Leblanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995).

Accordingly, none of the constitutional or statutory provisions that YNHA cites in the complaint is money mandating and the Court should dismiss the complaint for lack of jurisdiction.

V. The Antideficiency Act Bars The Relief Sought By YNHA

The Court also held in *Samish V* that, even if the Court possesses jurisdiction to provide a monetary remedy when grant funds are not properly disbursed, the Antideficiency Act limits the Court's ability to grant relief. The Anti-Deficiency Act provides that "[a]n officer or employee

of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). "Thus, '[f]unds appropriated for an agency's use can become unavailable in three circumstances: if the appropriation lapses; if the funds have already been awarded to other recipients; or if Congress rescinds the appropriation.'" *Samish V*, 90 Fed. Cl. at 133, n. 10 (quoting *City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). The Antideficiency Act bars the Court from granting relief when funds have become unavailable, unless the aggrieved party files suit seeking injunctive relief while the agency still has available funds. *Samish V*, 90 Fed. Cl. at 133, n. 10, 136; *City of Houston, Tex.*, 24 F.3d at 1426.

As established in the declaration of Deborah M. Lalancette, Director of the Office of Grants Management, Office of Native American Programs, Department of Housing and Urban Development, HUD allocates all NAHASDA funding in the year it is appropriated by Congress; those amounts that are allocated to a tribe but not granted due to the lack of an Indian Housing Plan are carried over and obligated in the following fiscal year. A35, ¶ 14. Accordingly, because we are now in fiscal year 2011, there are no NAHASDA appropriations from 2009 and prior fiscal years other than the amounts specifically set aside by HUD in the district court (*see id.*, ¶ 15), and current carryover to the 2011 allocation.[2] *Id.* This is money that would otherwise go to the other needy tribes that receive Indian Housing Block Grants. This money should not be

[2] The current carryover includes about $8 million dollars from fiscal year 2008 because certain plaintiffs in the district court for which HUD had set aside this amount voluntarily dismissed their cases. This amount is now in the fiscal year 2011 allocation process for distribution to all of the tribes and will be obligated to participating tribes once Congress finalizes HUD's 2011 NAHASDA appropriation.

taken from other needy tribes to satisfy YNHA's claims, especially in light of the fact that it has received overfunding at the expense of those tribes since fiscal year 1998. Thus, YNHA's claims should be dismissed.

VI. Congress Has Precluded The Court's Jurisdiction Of This Action As Pled By YNHA

YNHA alleges that HUD has acted unlawfully by "reducing . . . . attempting to recapture and/or withholding grant funds from YNHA." Am. Compl. ¶¶ 1, 7. In count two of the amended complaint, YNHA alleges that because HUD did not provide YNHA a hearing, HUD's actions violated the "exclusive remedial scheme" set forth in NAHASDA at 25 U.S.C. §§ 4161-4164. *Id.* at ¶ 38. Count two does not seek damages. Jurisdiction is, therefore, lacking in this Court. Moreover, even if the Court were to construe count two as seeking monetary relief, the Court still would not possess jurisdiction because the asserted exclusive remedial scheme vests jurisdiction in the courts of appeals

A. Count Two Seeks Only Prospective Relief Beyond This Court's Jurisdiction

As an initial matter, while it is not clear what YNHA means by "attempting to recapture" (Am. Cmpl. ¶¶ 7, 37), YNHA never alleges that HUD actually "recaptured" any money from YNHA. Unlike all of the other plaintiffs in the NAHASDA cases before this Court, HUD has not recovered or "recaptured" any money from YNHA. Because YNHA cannot seek damages for something that has not occurred, count two of YNHA's complaint seeks prospective relief only, that is, a declaration that a recapture by HUD would be unlawful, or an injunction prohibiting HUD from recapturing money from YNHA. The Court does not possess jurisdiction to award such relief. *National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998) (holding that "the basic rule" established by the Supreme Court in *United States*

v. King, 395 U.S. 1, 3 (1969) prohibiting declaratory relief remains in effect); *Kanemoto v. Reno*, 41 F.3d 641, 644-45 (Fed. Cir. 1994) (Court is prohibited from entering injunctions other than in bid protests).

B. YNHA Pleads Jurisdiction in the Court of Appeals

Even if the Court were to construe count two as seeking monetary relief, the Court still would not possess jurisdiction. YNHA contends that 25 U.S.C. §§ 4161-4164 set forth an "exclusive remedial scheme" that precludes HUD's alleged "recapture" of NAHASDA funding. *Id.* at 38. With that assertion, YNHA effectively pleads itself out of this Court because the asserted exclusive remedial scheme vests jurisdiction in the courts of appeals. Examination of the statute relied upon by YNHA confirms this point.

Pursuant to 25 U.S.C. § 4161(a)(1), the Secretary of HUD must terminate, reduce, or limit payments to a tribe or TDHE if the Secretary finds after reasonable notice and opportunity for a hearing that the recipient failed to comply substantially with any provision of NAHASDA. The statute further provides that any recipient who receives notice under sub-section 4161(a) of the termination, reduction, or limitation of grant payments, may, not later than 60 days after receiving notice of such action, file a petition for review of the Secretary's action with the United States Court of Appeals for the circuit in which the state of the recipient is located, or in the United States Court of Appeals for the District of Columbia Circuit. *Id.* at § 4161(d)(1). The statute requires the Secretary to file with the court a record of the proceeding upon which HUD based its action, as provided in 28 U.S.C. § 2112. *Id.* at § 4161(d)(2). Upon the filing of the record with the court, the jurisdiction of the court "shall be exclusive and its judgment shall be final" except that the judgment may be reviewed by the Supreme Court. *Id.* at § 4161(d)(4).

Review by the court of appeals is limited to objections made by the recipient to the Secretary. *Id.* at § 4161(d)(2). The court has jurisdiction to affirm or modify the action of the Secretary or to set it aside in whole or in part. *Id.* at § 4161(d)(3)(A). The court must affirm the Secretary's findings of fact if they are supported by substantial evidence. *Id.* The court may order the Secretary to take additional evidence, which is to be made part of the record. *Id.*

NAHASDA also provides the Secretary discretion to adjust grants after reviews or audits conducted by HUD. 25 U.S.C. § 4165(d). If the Secretary determines that the recipient's actions constitute substantial non-compliance with NAHASDA under section 4161(a), the notice and hearing and judicial review provisions in section 4161(a) would apply. Thus, there is no basis in the statute upon which YNHA can support jurisdiction in the Court to consider the Secretary's actions. This is clear from case law as well.

Congress assigns jurisdiction to all Federal courts except the Supreme Court. *In re United States*, 877 F.2d 1568, 1571 (Fed. Cir. 1989). Congress can withdraw jurisdiction from the Court of Federal Claims and assign it elsewhere. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984). *See also Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005) ("Tucker Act review of takings claims is precluded where Congress has provided 'a specific and comprehensive scheme for administrative and judicial review.'"); *Tex. Peanut Farmers v. United States*, 409 F.3d 1370 (Fed. Cir. 2005) (applying statutory grant of exclusive jurisdiction to district courts of claims against the Federal Crop Insurance Corporation); *Wilson v. United States*, 405 F.3d 1002 (Fed. Cir. 2005) (affirming conclusion that direction of 42 U.S.C. § 405(g) that claims arising under the Medicare Act "shall be brought in the district court of the United States" was a congressional withdrawal of Tucker Act jurisdiction).

As these cases indicate, the Federal Circuit has interpreted statutes providing for review in other courts as conferring exclusive jurisdiction upon those courts, even in the absence of specific language stating that the jurisdiction is exclusive. For example, in *Biltmore Forest Broadcasting FM, Inc. v. United States*, 555 F.3d 1375, 1382-84 (Fed. Cir. 2009) the Federal Circuit held that a statute providing that "Appeals may be taken from decisions and orders of the [Federal Communications] Commission to the United States Court of Appeals for the District of Columbia" conferred exclusive jurisdiction on the District of Columbia Circuit. *See also City of Boston v. HUD*, 898 F.2d 828, 834-35 (1st Cir. 1990) (interpreting provision nearly identical to section 4161(a) in another HUD grant statute to vest jurisdiction in the circuit court where a grant had been terminated within the meaning of the statute and holding that proper relief was remand for an administrative hearing). Jurisdiction to consider YNHA's claims that it received less grant funding than required may, therefore, reside in a Federal court, but not this one.

In any event, even if YNHA were correct that HUD violated section 4161(a) by reducing, withholding or attempting to recapture funds without a hearing, the only relief to which YNHA would be entitled is a ruling that HUD must provide a hearing, followed by judicial review at a circuit court. At most then, YNHA is seeking declaratory or injunctive relief. As we established above, this Court generally lacks authority to enter declaratory judgments or issue injunctions. *National Air Traffic Controllers Ass'n*, 160 F.3d at 716; *Kanemoto*, 41 F.3d at 644-45.

Accordingly, the Court should dismiss all of YNHA's claims related to alleged violations of 25 U.S.C. §§ 4161 and 4165.

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

In its third claim for relief, YNHA contends that "HUD owes a trust responsibility under NAHASDA to tribal beneficiaries of the funds for which YNHA is a recipient under NAHASDA, and owes a general trust responsibility to Indian tribes, including YNHA." Am. Cmpl. ¶ 46. YNHA alleges no trust corpus or substantive source of law establishing specific fiduciary or other duties upon which it could base a breach of trust claim.

A. YNHA's Breach Of Trust Claim Relating To The Funds Appropriated For IHBGs Does Not Relate To A Trust Corpus And Does Not Involve Fiduciary Duties

The Supreme Court has explained that, in the context of a breach of trust claim, for the Government to have a fiduciary duty arising from a trust relationship, there must be a trustee, a beneficiary, and a trust corpus. *See Mitchell II*, 463 U.S. at 225 (explaining that a fiduciary trust relationship arose when the Government assumed "elaborate control over forests and property belonging to Indians" because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)"). The Supreme Court further held that the fiduciary relationship arises where the Government "'takes on or has control or supervision over tribal monies or properties. . . .'"). *Id.* (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). For the fiduciary duties to arise, the Government must be obligated to both hold the property for the beneficiary and also manage it for the beneficiary. *See United States v. Mitchell*, 445 U.S. 535, 543-44 (1980) ("*Mitchell I*") (holding that where Congress intended the United States to hold certain land in trust for the tribes but not to control the use of the land, no fiduciary duty to manage the land arose). These elements are clearly not present here, where the amount sought is simply that appropriated.

A congressional appropriation to be distributed by an agency to Indian tribes is generally not a trust corpus. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Supreme Court explained that "public moneys gratuitously appropriated" are distinct from "moneys belonging to the Indians themselves." *Id.* at 79. One class of appropriations relates to public moneys belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government. *Id.* at 78. In *Quick Bear*, the Supreme Court relied on this distinction and held that money designated by Congress to pay a treaty debt belonged to the Indians and had the same characteristics as a trust fund. *Id.* at 79-81. This distinction was recognized by this Court in *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 68-69 (2008) ("*Samish IV*"). ("[F]unding appropriated by Congress for the benefit of the Indian people via the [Tribal Priority Allocation] system and [Indian Health Service] funding process is not trust property."); and *Samish V*, 90 Fed. Cl. at 148 (2009) (finding that the only "property" at issue, the funds that plaintiff might have received if it was treated as a Federally recognized Indian tribe between 1969 and 1996, are not trust property).

Thus, the Government's general trust relationship with Indian tribes, even when there is a statute like NAHASDA that contains general language about that trust relationship, does not convert all funds appropriated for tribes into a trust corpus or otherwise create a fiduciary relationship. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) (explaining that a "congressional statement of policy fails to create the necessary trust relation" because it did not "confer on the government pervasive or elaborate control over a trust corpus"); *Samish IV*, 82 Fed. Cl. at 67 (holding that language similar to that in section two of NAHASDA, 25 U.S.C. § 4101, contained in the statutes that form the basis of the Tribal Priority Allocation

system and Indian Health Service funding process is merely an expression of the general trust relationship between the United States and the Indian people). NAHASDA never states that the money appropriated is to be held "in trust" for an Indian tribe or tribes. 537 U.S. at 475, 480. Instead, NAHASDA requires HUD to make grants on behalf of Indian tribes for recipients, Indian tribes and TDHEs, to carry out affordable housing activities under 25 U.S.C. § 4132. 25 U.S.C. § 4111(a)(1).[3] As a result, YNHA's "breach of trust" claim relating to the funds appropriated for IHBGs relates neither to a trust corpus nor to any substantive law creating fiduciary duties.

B. YNHA's Claim Of General Trust Responsibility To Indian Tribes Fails To State A Claim

In *Mitchell I*, the Supreme Court considered whether the Indian General Allotment Act of 1887 authorized an award of money damages against the United States for alleged mismanagement of forests located on lands allotted to tribal members. The Court held that the GAA did not create private rights enforceable in a suit for money damages under the Indian Tucker Act. After examining the GAA's language, history, and purpose, the Court concluded that it "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Mitchell I*, 445 U.S., at 542. In particular, the Court stressed that sections 1 and 2 of the GAA removed a standard element of a trust relationship by making "the Indian allottee, and not a representative of

[3] Likewise, annual NAHASDA appropriations are void of any trust language. *See, e.g.*, Consolidated Appropriations Act, 2004, Pub. Law 108-199, 118 Stat. 376 ("For the Native American Housing Block Grants program, as authorized under title I of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4111 et seq.), $654,100,000, to remain available until expended. . . .).

the United States, . . . responsible for using the land for agricultural or grazing purposes." *Id.* at 542-543.

When the case returned to the Supreme Court three years later, the Court permitted a claim based upon different statutes to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes that Congress had enacted after the GAA. *Id.* at 219-23. Those statutes directed the Government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the Indian landowners. *Id.* The Court held that those statutes imposed strict and detailed duties on the Government to manage forest lands. *Id.* at 224-25. In view of the pervasive and complete control exercised by the Government over the lands, the statutes confirmed the existence of a fiduciary relationship. *Id.* Thus, the statutes satisfied the requirements for a claim of breach of fiduciary duty because they mandated the payment to Indians of money resulting from the management of Indian timber resources. *Id.* at 224-27. As the Supreme Court later explained, the difference between the statutes in *Mitchell I* and *Mitchell II* is that the former provided only a "'bare trust'" for a limited purpose, while the latter provided for "'full responsibility'" for management of Indian resources. *Navajo I*, 537 U.S. at 505 (quoting *Mitchell II*, 463 U.S. at 224).

In *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), members of an Indian tribe who had purchased homes from an Indian housing authority alleged to be defective brought suit against HUD, contending among other things that HUD's actions constituted a breach of its trust responsibilities under NAHASDA. The United States Court of Appeals for the Ninth Circuit rejected the claim that NAHASDA contains anything more than a limited trust relationship and affirmed district court dismissal of that part of the law suit.

The Ninth Circuit first observed that NAHASDA's statement of congressional findings recognized, "federal Indian housing assistance was to be provided 'in a manner that recognizes the right of Indian self-determination and tribal self-governance' and with the 'goals of economic self-sufficiency and self-determination for tribes and their members.'" *Marceau*, 540 F.3d at 927 (quoting 25 U.S.C. § 4101(6)- (7)). The court of appeals noted that HUD's statutorily prescribed role - in addition to providing the block grants - "is generally confined to 'a limited review of each Indian housing plan,' and even then 'only to the extent that [HUD] considers review is necessary.'" Id. (quoting 25 U.S.C. § 4113(a)(1)). The grant, once made, is subject to tribal control; the recipient, rather than HUD, is responsible for operating the housing program, including the continued maintenance of housing. *Id.* (citing 25 U.S.C. § 4133). HUD's responsibility consists primarily of oversight and audit, to ensure that Federal funds are spent for the intended purpose. *Id.* (citing 24 C.F.R. § 1000.520).

The Ninth Circuit also noted that NAHASDA did not require tribes to form housing authorities or, if they chose to do so, did not require them to seek Federal grant funds. *Id.* Further, the court held that, under NAHASDA, "the federal government held no property - land, houses, money, or anything else - in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing." *Id.* at 928. Accordingly, the Ninth Circuit rejected the Indians' breach of trust claims. *Id.* This Court should as well.

In YNHA's amended complaint, YNHA does not identify any responsibilities that HUD owed to the tribes that are comparable to the duties that created an enforceable trust relationship in *Mitchell II* where the Government managed Indian forest resources, obtained revenue thereby,

and paid proceeds to the Indian landowners. *Mitchell II*, 463 U.S. at 224-25. HUD's duties under NAHASDA, as the Ninth Circuit noted, are limited to making grants. HUD can review the Indian Housing Plans to the extent it deems necessary but, if it does so, Congress limited HUD's authority to do so to "a limited review . . . to ensure that the plan complies with the requirements of section 4112 of this title" (listing the requirements for the housing plan). 25 U.S.C. § 4113(a)(1). Thus, although NAHASDA states in sub-sections 4101(3) and (4) that there is a trust relationship between the Government and the tribes, it is nothing more than a "bare trust" that the Supreme Court rejected in *Mitchell I* and *Navajo I*. *Navajo I*, 537 U.S. at 505.

Imposing fiduciary duties upon the Government under NAHASDA would be contrary to NAHASDA's principal purposes, just as in *Mitchell I* and *Navajo I*. In *Mitchell I*, the GAA was designed so that "the allottee, and not the United States, ... [would] manage the land." *Navajo I*, 537 U.S. at 508 (quoting *Mitchell I*, 445 U.S. at 543). Imposing upon the Government a fiduciary duty to oversee the management of allotted lands would not have served that purpose. Id. Similarly, in *Navajo I*, the statute at issue aimed to enhance tribal self-determination by giving tribes, not the Government, the lead role in negotiating mining leases with third parties. *Id.* As this Court recognized, "'[t]he ideal of Indian self-determination is directly at odds with Secretarial control over leasing.'" *Id.* (quoting 46 Fed. Cl. 217, 230 (2000)).

So too here. NAHASDA seeks to "allow families to prosper without government involvement in their day-to-day lives." 25 U.S.C. § 4101(1)(C). It seeks "to achieve the goals of economic self-sufficiency and self-determination for tribes and their members" and provides for Federal assistance to tribes "in a manner that recognizes the right of self-determination and tribal self-governance. . . ." Id. at § 4101(6) & (7). Imposing fiduciary duties on the Government

would be contrary to these goals. Accordingly, the Court should dismiss count two of the amended complaint.

CONCLUSION

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

Respectfully submitted,

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January 13, 2011

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 13th day of January, 2011, a copy of the foregoing "Motion to Dismiss" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Michael N. O'Connell