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 REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

DONALD E. KINNER
Assistant Director

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

February 25, 2011

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

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 REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

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

ARGUMENT

I. YNHA's Claims Are, In Part, Time Barred

In our motion to dismiss, we established that YNHA's claims through November 24, 2002 are barred by the statute of limitations. At page six of its brief, YNHA argues that the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("Reauthorization Act") essentially revived claims barred by the statutes of limitations by giving tribes or tribally designated housing authorities ("TDHEs") a 45-day period to file suit based upon the prior version of the Native American Housing and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et. seq.* YNHA is mistaken. Read in context, the 45-day provision of the Reauthorization Act actually shortened the six-year statute of limitations for any claim based upon prior law; it did not revive expired claims.

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

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

claim relating to fiscal year 2008 block grants, and based upon the provisions of section 4152(b)(1) of NAHASDA as they were prior to the Reauthorization Act, otherwise would have expired some time in fiscal year 2014, but under the Reauthorization Act it expired in November 2008. After that date, such a claim could only be resolved based on the provisions of section 4152(b)(1) of NAHASDA as amended by the Reauthorization Act.

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

YNHA argues, however, that because the Reauthorization Act uses the terms "any claim" and "any fiscal year" and because statutes are to be construed in favor of Indians, the statute should be read so as to revive expired claims. This argument is misplaced because the statute is clear in that it does not revive stale claims. Moreover, as we pointed out in our opening brief, Congress appropriates limited funds for the NAHASDA Indian Housing Block Grants ("IHBGs"). The concept of interpreting a statute to benefit Indians does not apply here. The issue in this case is how to divide a fixed congressional appropriation among a number of tribes. If YNHA obtains a larger block grant, another tribe or tribes receives a smaller grant or grants by exactly the same amount. This is a zero sum game, and all of the players are Indians. It thus does not help this Court to urge it to act in the best interest of Indians generally. As the United States Court of Appeals for the Tenth Circuit stated when it considered this argument by the Fort Peck Housing Authority, "we need not address this issue except to note the canon cited does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Fort Peck Housing Auth. v. HUD*, 367 Fed. Appx. 884, 892 (10th Cir. 2010) ("*Fort Peck II*").

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

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

YNHA also cites *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 fn. 13. (1978). That case involved a question as to which party should bear the notification costs in a class action with more than 100,000 members. The issue before the court was whether the discovery rules

authorized a district court to order the defendant to help identify the members of the class. It has little to do with the issues before this Court.

In its brief, YNHA identifies no discovery that would be helpful on its claims through November 24, 2002. Accordingly, there is no reason to provide YNHA discovery on these claims.

II. YNHA's Allegations Are Barred By Its Prior Filing In The Ninth Court

In our opening brief, we demonstrated that this case is barred by 28 U.S.C. § 1500 because it is based upon the same operative facts as YNHA's petition for review filed in the United States Court of Appeals for the Ninth Circuit and YNHA sought the same or similar relief in both courts. In its brief, YNHA does not dispute that its suits in the Ninth Circuit and this Court are based upon the same operative facts; it contests only that the actions seek the same relief.

At page seven of its brief, YNHA contends that the Federal Circuit has rejected the argument that the Government makes here concerning the similarity of the requested relief in *Tohono O'Odham Nation v. United States*, 559 F.3d 1284, 1287 (Fed. Cir. 2009) *cert. granted* 130 S. Ct. 2097 (2010). As YNHA points out, in *Tohono*, the Federal Circuit held that an action was not barred in this Court even though an earlier filed district court complaint also could result in the payment of money by the Government. *Tohono* does not, however, bar the Government's argument based upon the facts of this case.

The Federal Circuit's decision in *Tohono* turned on that court's holding that the plaintiff's complaints sought distinctly different relief. In the district court, the plaintiff sought an accounting that could result in disgorgement or equitable restitution of money that the

Government was supposed to be holding in trust for the plaintiff but which did not appear in the plaintiff's accounts. Both the plaintiff and the court of appeals referred to this as "old money." *Id.* at 1290. By contrast, in this Court, the plaintiff sought "new money", that is, consequential damages - profits that the plaintiff would have received but for the Government's mismanagement of the money. *Id.* Thus, the cases sought different pools of money. Because of this distinction, the court held that "there is no risk of double recovery." *Id.* at 1292. Accordingly, the court held that the complaints in the two courts did not seek the same type of relief. *Id.* at 1290-92.

Here by contrast, as we established in our opening brief, there is a substantial overlap in the relief requested by YNHA. 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. . . ." Appendix ("A") 4. 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.

In an attempt to distinguish its complaints, YNHA points to its characterization of the relief it seeks. As it states, in the Ninth Circuit, YNHA sought declaratory relief that would compel the Government to pay for units "actually operated as affordable housing" by YNHA, while in this Court it seeks "damages". The crux of this argument is that the labels a plaintiff assigns to the relief it seeks are dispositive. As we have established, *Tohono* does not go that far. YNHA's argument turns on whether there is an actual difference between a declaration that the Government "must fund" $100 not paid in 1998 and an award of damages to compensate a plaintiff for that same $100 not paid in 1998. We see no meaningful distinction between such

relief. As the Federal Circuit has held, it is well settled that a court must look to the true nature of the action in determining the existence of jurisdiction. *Texas Peanut Farmers v. United States*, 409 F.3d 1370, 1373 (Fed. Cir. 2005). Where YNHA is seeking the same $100 not paid in 1998 in both courts, the true nature of the actions in both courts is the same, regardless of how YNHA characterizes them. Thus, the claims to be compared contrast sharply with *Tohono* where the true nature of the claims was for "old money" in one court and "new money" in the other. Accordingly, the Court should dismiss YNHA's complaint.

YNHA also attempts to distinguish the relief sought by contending that the relief it requested from the Ninth Circuit was "prospective" while in this Court it is seeking "damages already incurred in specific fiscal years." YNHA Brief at 9. This contention lacks merit for two reasons. First, there is nothing in YHNA's January 2005 petition for review that limits the relief requested to prospective relief only. In fact, the HUD decision for which YNHA sought review covered only fiscal years 1998 to 2005. In that decision, HUD concluded that there were units that YNHA should have conveyed during the 1998 to 2005 time period and which should have been excluded from FCAS. *See* A18 ("In some cases, the Tribe was able to demonstrate a delay in conveyance due to circumstances beyond the Tribe's control."). HUD sought $469,549 for overpayments during this period. A19. To accept YNHA's assertion that it sought only prospective relief from the Ninth Circuit, the Court would have to draw the illogical conclusion that YNHA requested no relief from the Ninth Circuit from HUD's demand that YNHA repay $469,549.

Second, even if the Court were to accept YNHA's assertion that it sought prospective relief only from the court of appeals, the prospective relief would have covered the remainder of

fiscal year 2005 as well as subsequent fiscal years. YNHA seeks relief for these same years in this Court. *See, e.g.*, Am. Cmpl. ¶ 7 ("Plaintiff maintains that all FCAS that had not actually been conveyed to a third party, and all FCAS which YNHA owned or operated during each fiscal year from 1998 through 2010 must be included in the FCAS calculations for that fiscal year for purposes of NAHASDA grant funding calculations."); Am. Cmpl. prayer for relief ¶ (f)(2) (requesting the Court to "calculate and base YNHA's FCAS entitlement by including in YNHA's FCAS funding all 1937 Housing Act units that were owned or operated by YNHA, as the case may be, in or for the fiscal year for which the pertinent FCAS grant allocation is or was being made. . ."). Thus, the relief that YNHA seeks overlaps from at least fiscal year 2005 forward.

YNHA also relies upon *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306 (Fed. Cir. 2009), a decision issued shortly after *Tohono*. *Eastern Shawnee* is even less helpful to YNHA than *Tohono*. As the Federal Circuit held, Eastern Shawnee's "Court of Federal Claims complaint here and its complaint in the district court differentiated the monetary relief sought in each court even more clearly than the two complaints in *Tohono*." *Eastern Shawnee*, 582 F. 3d at 1312.

Finally, YNHA also challenges the Government's reliance upon *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994) because it contends that *Katz* does not address the Court's jurisdiction under section 1500 and because the holding in *Katz* is "antithetical to the Government's position here." While *Katz* did not address section 1500, it provides strong support for the Government's position in this case. In *Katz,* the Federal Circuit held that the plaintiff, a developer in a dispute with HUD over the rents it was allowed to charge, was not seeking money damages, even though the relief it sought would result in additional payments by HUD. The Federal Circuit held that

the developer was seeking enforcement of the statutory mandate, not money damages and held that this Court lacked jurisdiction. *Id.* at 1208-09.

On page 11 of its brief, YNHA quotes the following language from *Katz*: "[t]hat a payment of money may flow from a decision that HUD has erroneously interpreted or applied its regulation does not change the nature of the case." *Katz*, 16 F. 3d at 1208. The quoted language actually emphasizes the absence of jurisdiction in this case because *Katz*, like the present matter, arose from HUD's interpretation of regulations that controlled the amount of payments to the plaintiffs. *Id.* at 1208-09. The Federal Circuit held that an action lies in the district court when a plaintiff is challenging HUD's actions as a regulator, even if the plaintiff is seeking to obtain money from HUD. *Id.* at 1209 (citing *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 608 (D.C. Cir.1992)). Accordingly, it held that "no relief is available in the Court of Federal Claims here because the case challenges the interpretation of law which controls payment to" the developer-plaintiff. *Id.*

In this case, YNHA seeks an adjudication of the lawfulness of HUD's actions as a regulator in the yearly allocation of housing grants to Indian tribes. This is demonstrated both by YNHA's allegations in the amended complaint and the manner in which YNHA has styled the three counts. For example, YNHA alleges in paragraph 23 of the amended complaint that 24 C.F.R. § 1000.318(a) is invalid and in paragraph 24 that "[b]ased on HUD's invalid regulation . . . YNHA received substantially less in FCAS funding. . . ." Moreover, YNHA styles the first and second counts of the amended complaint as violations of NAHASDA or the Fifth Amendment and the third count as a breach of trust. Thus, YNHA is challenging HUD's actions as a regulator and the *Katz* analysis governs this case.

III. NAHASDA Is Not A Money Mandating Statute

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

The statute at issue in *ARRA*, the American Recovery and Reinvestment Tax Act of 2009 ("Recovery Act"), involved a program for reimbursement grants to persons who invested in renewable energy property. *Id.* at *2. The plaintiff purchased twenty-five properties and then filed applications for reimbursement with the Government. After the Government denied the applications, the plaintiff filed suit. The Government responded with a motion to dismiss arguing that the statute was not money mandating. The Court denied the motion, holding that the statute compelled the Government to pay any person who placed the specified property in service. *Id.* at *8.

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

In its brief, YNHA all but ignores the Court's holding in *Samish V*, merely referencing language in which the Court held that one of the statutes at issue did not provide clear standards for paying money to recipients. YNHA brief at 15, fn. 6 (citing *Samish V*, 90 Fed. Cl. at 138). YNHA errs by focusing upon isolated sentences in *Samish V*. YNHA fails to address the Court's central holding that Federal grant-in-aid statutes are not money mandating. *Samish V*, 90 Fed. Cl. at 131-33. The specific page of the opinion that YNHA cites discusses the United States Housing Act of 1937. Even this portion of the opinion reinforces the central holding of the Court because the Court began its analysis by stating: "The court has previously held that the Housing Act is not a money-mandating source of jurisdiction to the extent that it authorizes federal grant-in-aid programs." *Id.* at 138. The language that YNHA relies upon was merely an alternate ground for the Court's holding that does not dilute the holding that grant-in-aid programs are not money mandating.

The Court's holding in *Samish V* was consistent with precedent. In *Malone v. United States*, 34 Fed. Cl. 257, 262 (1995), the Court held that it did not possess jurisdiction in a case where a landlord sought damages for retroactive housing assistance payments from HUD. The

Court held the statute in question was not money mandating because it directed HUD to pay "a calculable rental subsidy as part of a program designed to aid low-income families obtain housing," and did not mandate compensation for damages sustained by participating landlords. *Id.* at 263. As the Court explained, "the payment contemplated by the statute is not for the landlords' past injuries or labor, the essence of a Tucker Act claim for monetary relief." *Id.* Accordingly, the Court held that the plaintiff's claim was not for money damages and dismissed for, among other reasons, lack of jurisdiction. *Id.* at 264; *Katz*, 16 F.3d at 1207–09 (Fed. Cir.1994) (Court of Federal Claims lacked jurisdiction over suit by housing developer who sought payments under the Housing Act of 1937 because the developer was challenging HUD's interpretation of law which controlled payment to the developer).

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

In this case, the Court would be adjudicating the rules of an ongoing grant program under NAHASDA. YNHA's complaints are predicated upon the contention that 24 C.F.R. § 1000.318 violates the Administrative Procedure Act in that (prior to the Reauthorization Act) it conflicts with NAHASDA. *E.g.*, Am. Cmpl. ¶ 18 ("24 C.F.R. § 1000.318(a) is invalid because it violates Section 302(b)(1) of NAHASDA. . ."). As we established in our opening brief, such relief can only be provided in the district court. In addition, unlike *ARRA*, there is no question here that the district courts possess jurisdiction and YNHA, in fact, is pursuing such a case. A6.

In *ARRA*, the Court also rejected the Government's argument that the Court "may never exercise jurisdiction over suits based on a statute that requires the payment of money as a grant or subsidy." *ARRA*, 2011 WL 140353 at *14. In support of this holding, the Court cited two cases, *Greenlee County, Ariz. v. United States*, 487 F.3d 871 (Fed. Cir. 2007) and *Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994). However, the statutes in both of these cases fall into the "past labor or injury" category like *ARRA*, rather than the enforcement of a statutory mandate or a subsidy for future expenditures like *Bowen*, *Katz, Samish V*, or *Malone*. *Greenlee County* involved a statute that compensated local governments for the losses associated with the tax immune status of Federal lands located within their jurisdictions. *Greenlee County*, 487 F.3d at 873. *Kanemoto* involved claims by American citizens detained during World War II because of their Japanese ancestry. Thus, each case involved a loss that the plaintiffs experienced because of the actions of the Federal Government, rather than a grant that, if received, would have subsidized some type of behavior that the Government did not require but wished to promote.[1]

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

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

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

IV. The Antideficiency Act Bars The Relief Sought By YNHA

In our opening brief, we demonstrated that the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), bars recovery by YNHA. YNHA responds by citing several cases involving Government contracts where this Court or the Federal Circuit held that the Antideficiency Act did not bar the Government from paying a contract claim because the Judgment Fund was available to pay the judgment. For example, YNHA cites *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563 (1997), in which the Court held that the Judgment Fund could be used to pay any judgment in an action for breach of a timber sales contract. In fact, the Contract Disputes Act ("CDA") provides that judgments in CDA cases shall be paid promptly pursuant to the Judgment Fund statute. 41 U.S.C. § 7108.[2]

The problem with YNHA's argument is that, unlike the plaintiff in *Wetsel-Oviatt*, YNHA is not a Government contractor. As a result, this case is similar to those in which courts have held that a plaintiff could not recover an underpaid grant or subsidy because the relevant appropriation had been exhausted. *E.g.*, *Highland Falls-Fort Montgomery Central School Dist.*

---

*5, 8.

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

v. United States, 48 F.3d 1166 (Fed. Cir. 1995) (upholding limited amount paid to plaintiff by agency because of the limited amount of Congressional appropriation). YNHA's attempt to distinguish *Samish V* by stating that the plaintiff in that case, unlike YNHA, never had a contract is also unavailing. In *City of Houston, Texas v. HUD*, 24 F.3d 1421, 1427 (D.C. Cir. 1994), the recipients of the HUD block grants had contracts but the court nevertheless held that the case was moot because no appropriation was available to pay the claim.

In *County of Suffolk, New York, v. Sebelius*, 605 F.3d 135 (2nd Cir. 2010), the Second Circuit recently considered issues similar to those in the present case. In that case, a local government filed suit contending that it had received less funding than that to which it was entitled under a statute providing for grants to localities that furnished essential services to individuals and families with AIDS. *Id.* at 138. The Government eventually conceded that the plaintiff had been classified at the wrong funding level and stated that it would be classified correctly for fiscal year 2009. However, with respect to fiscal years 2007 and 2008, the Government moved to dismiss the plaintiff's claims as moot because it had distributed the funds appropriated by Congress to other grant recipients. *Id.* at 139. The district court agreed and dismissed the case.

The Second Circuit affirmed. The court of appeals adopted the reasoning of the District of Columbia Circuit in *City of Houston,* in which that Circuit held that the Antideficiency Act barred payment of a claim where the appropriation at issue had become unavailable because it had lapsed, been paid to other recipients, or had been rescinded by Congress. *City of Houston*, 24 F.3d at 1427. The Second Circuit extended the *Houston* rule, holding that where the grant

funds had been available when the lawsuit was filed but later became unavailable, the case was still moot. *County of Suffolk*, 605 F.3d at 142.

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

The facts in this case are nearly identical to *County of Suffolk*. As we have established, HUD obligates NAHASDA funds to tribes in the year that they are appropriated by Congress; the limited amounts that are not obligated are carried over to the following year and obligated that year. A35, ¶ 14. This means that no money remains to pay YNHA's claims from fiscal year 1998 up to at least fiscal year 2006. As YNHA observes, HUD set aside limited amounts in fiscal years 2006 and 2007 to pay possible judgments in district court cases. A35, ¶ 15. A greater

amount is available for fiscal year 2008. *Id.* When or if any of the money set aside will become available if the Court enters judgment in favor of YNHA is unknown.

Finally, YNHA argues at page 19 of its brief that other funds may become available through Congressional appropriation or otherwise to pay its claims. It cites cases that provide that HUD would not be prohibited from using such funds to pay a judgment in this case. However, in the absence of a showing that Congress has appropriated such amounts, the argument is nothing more than speculation.

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

As we discussed in our opening brief, YNHA alleged in paragraphs 37-38 of its amended complaint that HUD acted improperly by attempting to recapture money from YNHA without providing it with notice and an opportunity for a hearing as provided in 25 U.S.C. §§ 4161 and 4165. Among other things, YNHA contended that "[t]his comprehensive and exclusive remedial scheme leaves no room for HUD to adopt or enforce the additional remedy of recapture of FCAS funds already awarded or distributed, based on alleged over-counting of FCAS." Am. Cmpl. ¶ 38; *see also* Am. Cmpl. ¶ 73 ("HUD may only reduce a NAHASDA recipient's grant amounts by complying with the notice and opportunity for hearing requirements of Sections 401 and 405 of NAHASDA (25 U.S.C. §§ 4161 and 4165)").

In its brief, YNHA does not contend that the Court possesses jurisdiction either to determine that HUD violated 25 U.S.C. § 4161 or 4165 or to award any relief if HUD has violated these sections. YNHA also does not explain what relief it seeks from the Court as a result of the alleged violations of sections 4161 and 4165. Nor does YNHA explain why these

allegations are in its complaint. Indeed, the allegations only serve to demonstrate that this action is in the wrong court because section 4161 places exclusive jurisdiction in the courts of appeals.

YNHA contends that the Court possesses Tucker Act jurisdiction, notwithstanding the "comprehensive and exclusive remedial scheme" in sections 4161 and 4165. It contends that the remedies in these sections are HUD remedies, not remedies for grant recipients, and that these sections do not withdraw Tucker Act jurisdiction. YNHA brief at 20-21. However, it is not clear what conclusion YNHA wishes the Court to draw from this argument because it has clearly alleged that HUD excluded units from FCAS and that these actions were improper without the notice and hearing provided in 25 U.S.C. § 4161. *E.g.*, Am. Cmpl. ¶ 37. The clear implication from the allegations in YNHA's complaint is that the section 4161 procedures are applicable to HUD's exclusion of units from FCAS and that HUD should have provided notice and a hearing to YNHA before doing so. Thus, as we stated in our opening brief, even if YNHA's contentions are correct, 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 that HUD must comply with the notice and hearing requirements, which this Court cannot provide. *E.g., National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998) (holding that "the basic rule" established by the Supreme Court in *United States v. King*, 395 U.S. 1, 3 (1969) prohibiting such relief remains in effect).

YNHA has not responded to our argument that, because YNHA did not allege in its complaint that HUD has recovered any money from YNHA, YNHA seeks only prospective relief from the Court barring such recoveries. The Court should, therefore, dismiss YNHA's allegations with respect to attempts to "recapture" grant money from YNHA.

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

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

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

In our opening brief, we explained that YNHA's claim for breach of trust should be dismissed because YNHA has identified no statutory or regulatory prescription creating a fiduciary duty compensable in damages under the Tucker Act or Indian Tucker Act. We set out the Supreme Court precedents establishing that a trust claim enforceable in this Court requires: more than the general trust responsibility alleged by YNHA; and more than a statutory or regulatory duty untethered to any trust corpus (land, resources, money or other property considered to belong to Indians). Moreover, even where a trust corpus is created - such as through the General Allotment Act's specific prescription that land be held by the United States "in trust" - a trust duty enforceable in this Court requires full responsibility for management of the trust property to distinguish it from a "bare" or limited trust. *See e.g., United States v. Navajo Nation*, 129 S. Ct. 1547, 1552, 1558-1559 (2009) ("*Navajo II*") (describing the multi-step analysis required for trust liability under the Indian Tucker Act and rejecting the Federal Circuit's

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

On pages 23-24 of its brief, YNHA argues that several NAHASDA provisions establish that HUD has "substantial control" over grants, and that this control establishes the prerequisites for a compensable trust duty, including a trust corpus and a trust relationship between a trustee and beneficiary. Yet this argument erroneously relies upon "control alone." *See Navajo II*, 129 S. Ct. at 1558. The only statutory provisions YNHA cites are grant oversight and monitoring provisions (25 U.S.C. §§ 4161, 4163, 4165, and 4167) that are routinely included in grant program statutes to ensure that Federal funds are spent for the intended purpose. In *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 927 (9th Cir. 2008), the Ninth Circuit rejected this argument, holding that HUD's "oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory."

YNHA downplays the significance of *Marceau,* at page 24 of its brief, contending that this decision is limited to trust claims based upon the condition of housing. We do not read *Marceau* so narrowly. In rejecting a trust claim based upon NAHASDA, the language used by the Ninth Circuit was definitive. The court first noted various aspects of the statute that emphasized the limited functions HUD performed, noting among other things that "HUD's statutorily prescribed role - in addition, of course, to providing the block grants themselves - 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.'" *Marceau*, 540 F.3d at 927 (quoting)

25 U.S.C. § 4113(a)(1). The Ninth Circuit then concluded "no statute ever required tribes to form housing authorities. No statute obliged Indian housing authorities, once formed, to seek federal funds. No statute committed the United States itself to construct houses on Indian lands or to manage or repair them. . . . No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property." *Marceau*, 540 F.3d at 927. Accordingly, there is nothing in the Ninth Circuit's opinion that suggests that it is limited to trust claims based upon the condition of housing.

YNHA's passing reference at page 24 of its brief to the fact that HUD administers the allocation of NAHASDA funds does not evidence substantial control over grant funds. HUD must allocate funds according to a formula that was established in a negotiated rulemaking with representatives of Indian tribes. 25 U.S.C. §§ 4151, 4152(a)(1). HUD's allocation duties are thus ministerial applications of rules over which Indian tribes exert significant influence and HUD's "control" under this scheme is expressly limited. Thus, YNHA identifies no specific prescriptions imposing upon HUD full responsibility to manage Indian money so as to impose damages liability upon breach. As we established in our opening brief, the general trust language in 25 U.S.C. § 4101 does not contain such specific prescriptions. *See e.g., Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 67 (Fed. Cl. 2008).

Lacking any specific rights-creating or duty-imposing statutory or regulatory prescriptions imposing fiduciary duties on HUD, YNHA argues that: (1) congressional intent evidenced by

general trust language in 25 U.S.C. 4101; (2) evidence of the Federal Government's historical recognition of the problem of substandard housing in Indian country; and (3) Indian law canons of construction should fill the gaps in its trust claim. These arguments are unavailing. As noted above, general trust language does not provide the basis of a claim. Moreover, the history underlying a statute is only relevant for analyzing a trust claim under the Indian Tucker Act if it establishes that the statute was enacted pursuant to or as a substitute for a particular treaty debt. *See Wolfchild*, 2010 WL 5163376 at *32 (reasoning that under *Reuben Quick Bear v. Leupp,* 210 U.S. 50 (1908), a court should trace the historical origins of appropriated funds at issue to determine whether the money is appropriated pursuant to a treaty). Finally, Indian law canons of construction providing that statutes be construed liberally in favor of Indians do not advance YNHA's argument because the canons themselves derive from the general trust relationship between the United States and the Indians that YNHA hopes to augment to a comprehensive fiduciary duty. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). It is thus circular to argue that a general trust relationship should be construed as more than it is by virtue of the same general trust relationship. Accordingly, YNHA does not satisfy the legal standard for a breach of trust claim cognizable under the Tucker Act or Indian Tucker Act and its claim should be dismissed.

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,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

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

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

February 25, 2011

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 25th day of February, 2011, a copy of the foregoing "DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Michael N. O'Connell