No. 08-839C
(Senior Judge Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YAKAMA NATION HOUSING AUTHORITY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff, Yakama Nation Housing Authority ("YNHA"), hereby responds to The United States' Motion to Dismiss. Based on the facts of this case and applicable law, defendant's motion should be denied.

PLAINTIFF'S MEMORANDUM

QUESTIONS PRESENTED

Pursuant to RCFC 5.4(a)(3), YNHA does not contest the questions presented as set forth in defendant's motion to dismiss other than to note that with respect to question two, the relief sought by YNHA in the court of appeals is not the same relief sought in this Court.

STATEMENT OF THE CASE

Pursuant to RCFC 5.4(a)(3), YNHA generally accepts the statement of the case as set forth in the defendant's motion to dismiss. In connection with the defendant's discussion of the United States Court of Appeals for the Tenth Circuit's decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*") *rev'd* 2010WL 582653 (10th Cir.

2010) ("*Fort Peck II*"), however, it is important to note that decision was "an unpublished decision, not binding precedent." *Id.* at *1.

ARGUMENT

I. Standards of Review.

A. Standard of Review under RCFC 12(b)(1).

In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), the court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed. Cir. 1988). The relevant issue in a motion to dismiss under RCFC 12(b)(1) "'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (quoting *Scheuer*, 416 U.S. at 236). The plaintiff bears the burden of establishing subject matter jurisdiction, *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and must do so by a preponderance of the evidence. *See Reynolds*, 846 F.2d at 748 (citations omitted). The court may look at evidence outside of the pleadings in order to determine its jurisdiction over a case. *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001) (citing *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461-62 (Fed. Cir. 1998); *Rocovich v. United States,* 933 F.2d 991, 993 (Fed. Cir. 1991)), *aff'd in relevant part*, 281 F.3d 1376 (Fed. Cir. 2002). "Indeed, the court may, and often must, find facts on its own." *Id.* Where a plaintiff has "invoked a money-mandating statute and [has] made a non-frivolous assertion that [it is] entitled to relief under the statute, the Court of Federal Claims has subject

matter jurisdiction over the case." *Brodowy v. United States,* 482 F.3d 1370, 1375 (Fed. Cir. 2007).

B. Standard of Review under RCFC 12(b)(6).

When considering a motion to dismiss under RCFC 12(b)(6), "the allegations of the complaint should be construed favorably to the pleader." *Scheuer*, 416 U.S. at 236. The question is whether "it is beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Southfork Systems, Inc. v. United States*, 141 F.3d 1124, 1131 (Fed. Cir. 1998). It is only "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," that dismissal is warranted under RCFC 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Where a defendant moves to dismiss under RCFC 12(b)(6), the defendant bears the burden of proof. *See Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 23 (2007).

II. YNHA's Claims Were Timely Filed.

In its motion, the government relies on the general statute of limitations, 28 U.S.C. § 2501, to argue that some of YNHA's claims for damages are time barred. However, the general statute of limitation on which the government relies is not applicable. Rather, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 provides that this action and the claims for damages sought herein are timely. Thus, YNHA's claims are not time barred and that portion of defendant's motion to dismiss relying on the statute of limitations must be denied.

The Tucker Act affects a waiver of defendant's sovereign immunity. *See United States v. Mitchell*, 463 U.S. 206, 215 (1983)("*Mitchell II*") As such, a second waiver need not be found, nor do the provisions of law relied on by YNHA in its First Amended Complaint need be

construed in a manner consistent with waivers of immunity. *Id.* at 218-219. While the Native American Housing Assistance and Self-Determination Act of 1996 (hereinafter "NAHASDA"), Pub. L. 104-330, 25 U.S.C. § 4101 *et seq.* does not, nor is it required to, affect a waiver of immunity, it does expressly authorize claims and provides the limitations period for an action arising from the calculation of a NAHASDA recipient's formula current assisted stock ("FCAS"). *See* 25 U.S.C. § 4152(b)(1)(E).

The gravamen of YNHA's claims in this action is that HUD deprived YNHA of FCAS funding to which it was entitled in violation of the statutory payment mandates of NAHASDA and in breach of YNHA's annual funding agreements which incorporate the statutory requirements. NAHASDA expressly provides the limitations period for actions brought under its provisions, including those brought in the Court of Federal Claims. When Congress passed the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, it amended 25 U.S.C. § 4152(b)(1), the statute that lies at the heart of YNHA's claims. In so doing Congress codified, in part, 24 C.F.R. § 1000.318(a)--the regulation and HUD practices under it that were held to be unlawful by the district court in *Fort Peck I*--by amending 25 U.S.C. § 4152(b)(1). As part of the amendments, Congress provided that, "[the 2008 amendments] *shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008* if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph." *Id.,* 25 U.S.C. § 4152(b)(1)(E)(emphasis supplied). By making that provision, Congress expressly authorized Tribally Designated Housing Entities ("TDHE") such as YNHA to seek damages for past underfundings or unlawful adjustments based on the regulation as long as the 45 day filing deadline was met. *Cf. Otoe and Missouria Tribe of*

Indians v. U.S., 131 Ct. Cl. 593 (1955)(finding that the Indian Claims Commission Act, 25 U.S.C. § 70, was an exercise of Congress' political function in the "waiv[er of] the defenses of the statute of limitations and laches" in suits brought by Indian tribes against the United States). *Id.* at pp. 268-270.

In view of broad language that includes "any claim", for "any fiscal year", and comporting with "the long-standing canon of statutory interpretation that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,'" *Wolfchild v. United States*, 2010 WL 5163376 at fn. 52 (Fed. Cl. Dec. 21, 2010) ("*Wolfchild*") (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)), it is clear Congress has allowed YNHA to go back as far as 1997 to recover damages for its claims.

Alternatively, even the defendant concedes that not all of YNHA's claims are time barred under the general statute of limitations, instead alleging that only those relating to Fiscal Years 1998 through 2002 are barred. However, even this assertion is not an accurate factual statement because it appears adverse funding actions for Fiscal Years 1998-2002 did not, in large part, occur until 2002 or thereafter, in which case those claims would be within the six year limitation period. Because it is not disputed some of the claims as alleged are not barred, defendant's motion to dismiss should be denied even if 28 U.S.C. § 2501 is applicable to YNHA's claims.

Finally, and even if 28 U.S.C. § 2501 is applicable to YNHA's claims, it is not appropriate at this stage to dismiss any of YNHA's claims until discovery is conducted and the facts are developed to enable a determination of whether any claims fall outside of the six year period. *See Rosebud Sioux Tribe v. United States*, *supra*, 75 Fed. Cl. at 23; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 fn. 13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.")

In its First Amended Complaint, YNHA alleges unlawful withholding of funds from, *inter alia,* 1998 to 2010. Therefore, at least some of YNHA's claims related to underfunding fall within the general six year statute of limitation. In short, "[i]t cannot be said at this early stage of the litigation that the Complaint does not, or could not, encompass claims that are not barred by the statute of limitations, and factual issues in this regard preclude summary dismissal." *Rosebud Sioux Tribe,* 75 Fed. Cl. at 25.

Because: (1) many, if not all of YNHA's claims arose within six years of the filing of the Complaint in this action; and (2) the general statute of limitations does not apply to YNHA's claims in any event, YNHA's claims are not time barred and defendant's motion to dismiss should be denied. Regardless, factual issues preclude summary dismissal at this stage of the litigation.

III. YNHA's Suit In This Court Is Not Barred By 28 U.S.C. § 1500.

The Court should deny the government's motion with respect to 28 U.S.C. § 1500, because YNHA's petition to the United States Court of Appeals for the Ninth Circuit sought only equitable relief, while YNHA's complaint in the present case seeks only monetary damages at law. The Federal Circuit in *Tohono O'odham Nation v. United States*, 559 F.3d 1284 (Fed. Cir. 2009), rejected essentially the same argument that the government advanced here in its opening brief, and held that equitable claims which may "in essence" result in receipt of money are not the "same relief" as specific claims for monetary damages at law.

A. In applying § 1500, Courts must focus on the particular relief that the plaintiff actually requests.

In its opening brief, the government's discussion of the standard governing § 1500 is incomplete, because it does not reflect the requirement that courts make their § 1500 analysis based on the particular relief that a plaintiff has actually requested in the complaints. In *Tohono*,

the Federal Circuit emphasized its *en banc* holding from *Loveladies Harbor, Inc. v. United States* that, "[f]or the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts*, and must seek *the same relief*." *Tohono*, 559 F.3d at 1287 (quoting *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (emphasis in original). The government's brief, however, leaves out the fact that in applying this standard, the *Tohono* court rejected the argument that § 1500 should be triggered whenever the two complaints both seek relief that is essentially in the form of money (whether as damages or in the form of an equitable remedy). *Id.* at 1288. The court unequivocally stated that "*injunctive relief is 'different'-or 'distinctly different'-from money damages,*" under the "same relief" prong of the § 1500 inquiry.[1] *Id.* (emphasis added). In short, in *Tohono*, the Federal Circuit held that § 1500 was avoided because the prayers for relief in the district court complaint all sought equitable relief, while the prayers for relief in the Court of Federal Claims complaint all sought specific money damages at law.

Furthermore, the *Tohono* panel rejected the government's approach of comparing what "in essence" would be the result of the plaintiff's requests in its prayers for relief, rather than comparing the actual requests themselves. Specifically, the Federal Circuit rejected the government's reasoning that certain equitable claims (such as for a restatement of accounts or for restitution) would essentially overlap with claims for money damages when such equitable claims may ultimately result in the receipt of money. *Tohono*, 559 F.3d at 1288, 1290 (rejecting the view that "the 'same relief' prong is always satisfied whenever two complaints both seek *any*

[1] This distinction between equitable remedies and monetary damages at law for jurisdictional purposes under § 1500, has also been recognized by several other courts. *See, e.g., Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1566-68 (Fed. Cir. 1988) (noting the difference between seeking equitable relief in a district court and monetary damages in the Court of Claims versus seeking monetary relief in both courts); *U.S. Home Corp. v. United States*, 92 Fed. Cl. 401, 410 (2010) (distinguishing a claim for declaratory judgment from various types of monetary damages claims); *Marks v. United States*, 34 Fed. Cl. 387, 400 (1995) (distinguishing a claim for declaratory and injunctive relief in a district court from a claim for monetary damages under the 5th Amendment in the Court of Federal Claims) *aff'd* 116 F.3d 1496 (Fed. Cir. 1996).

relief in the form of money-irrespective of ... the court's authority for awarding the requested money (i.e., as damages, as an equitable remedy, or under some other authority)."). Likewise, the Federal Circuit also rejected the argument that, because the Court of Federal Claims would have to undertake an accounting in order to determine monetary damages, the equitable request in the district court for an accounting essentially overlapped with the claim for monetary damages in the Court of Federal Claims complaint. *Id.* at 1291 (noting that the plaintiff's complaint in the Court of Federal Claims did not specifically request an accounting). In rejecting the government's arguments in these respects, the Federal Circuit stressed that "it is the relief that the plaintiff *requests* that is relevant under § 1500." *Id.* at 1291 (emphasis in original).

This holding was reiterated in the Federal Circuit's subsequent opinion in *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306 (Fed. Cir. 2009).[2] In *Eastern Shawnee*, the Court once again rejected an argument by the government that an equitable claim, such as for an accounting, can be "in essence" the same as a claim for money damages, for purposes of § 1500. *Id.* at 1310-12. Citing *Tohono*, the Court held that the district court complaint, which sought only equitable relief, did not seek the "same relief," for purposes of § 1500, as the Court of Federal Claims complaint, which sought only monetary damages at law. *Id.* S*ee also, Griffin v. United States*, 590 F.3d 1291, 1294 (Fed. Cir. 2009) ("We do not look to what relief the plaintiff might or could receive, for 'it is the relief that the plaintiff *requests* that is relevant under § 1500.'") (emphasis in original).

B. YNHA's petition in the Ninth Circuit sought different relief.

Because YNHA's petition in the Ninth Circuit sought only equitable relief, like the District Court complaints at issue in *Tohono* and *Eastern Shawnee*, YNHA's Ninth Circuit

[2] In addition to leaving out important parts of the *Tohono* opinion, the government's brief also did not discuss the *Eastern Shawnee* case at all.

petition did not seek the "same relief" as YNHA's complaint in the present case for purposes of § 1500. YNHA's 2005 petition to the Ninth Circuit included two alternative requests for equitable relief: (1) a declaration "that HUD must fund units actually operated as affordable housing and may not rescind or recapture the grant funds," or (2) a declaration "that the Yakama Nation Housing Authority is entitled to a hearing under 24 C.F.R. Section 1000.540 before a final order to recapture funds." (9th Cir. Pet. at p. 4.) In contrast, YNHA's amended complaint in the present case includes two alternative requests for specific amounts of monetary damages for fiscal years 1998-2008 and a third request for a specific amount of monetary damages for fiscal years 2009 and 2010. (Doc. No. 18 at 12-13.) In other words, YNHA's petition to the Ninth Circuit on its face sought *only equitable relief*, while YNHA's complaint in the present case seeks *only monetary damages at law*.

In terms of substance, the two requests for relief are significantly different because the declaratory relief sought by YNHA's petition to the Ninth Circuit was prospective, and thus would have had a substantial impact on both the ongoing relationship between YNHA and HUD and YNHA's approach to future funding and affordable housing. In contrast, YNHA's claims in this Court seek only naked monetary judgments for damages already incurred in specific fiscal years. *C.f. Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) ("We are not willing to assume, categorically, that a naked money judgment against the United States [in the Court of Federal Claims] will always be an adequate substitute for prospective [declaratory] relief fashioned in the light of the rather complex ongoing relationship between the parties.") (quoting *Bowen v. Mass.*, 487 U.S. 879, 905, 108 S.Ct. 2722 (1988)). Specifically, if YNHA had been able to obtain declaratory relief that HUD does not have the authority to rescind or recapture (for any reason) grant funds that were for units actually operated as affordable housing, YNHA could

proceed with its housing assistance efforts and its relationship with HUD without fear that the funding YNHA has already received for affordable housing will later be taken away. This is not relief that YNHA is seeking or could seek from the Court of Federal Claims. Rather, in this Court, YNHA is seeking monetary relief due to damages already sustained as a result of HUD's improper disbursement of funds and exclusion of housing units in specific, prior fiscal years. This Court should therefore reach the conclusion that YNHA's Ninth Circuit petition and the complaint in the present case do not seek the "same relief," and should deny the Government's motion to dismiss under § 1500 for this reason.

1. The government's argument based on what may in essence be the "result" of YNHA's claims here and in its Ninth Circuit petition is incorrect.

The government next attempts to maintain a § 1500 argument by trying to draw a comparison between what it believes would, in essence, be the result of YNHA's requests for relief, i.e., the same approach that was rejected in *Tohono* and *Eastern Shawnee*. The government argues that "[e]ven 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." (Def.'s Mot. to Dismiss, p. 15) (emphasis added). In support of this incorrect approach, the government cites *Katz v. Cisneros*, *supra,* 16 F.3d at 1209, for the proposition that HUD will be presumed to "'act accordingly [with respect to any declaratory judgment regarding the propriety of its actions] and any monetary consequences will flow . . . .' from that declaratory relief." (Def.'s Mot. To Dismiss, p. 16.)

First, as discussed above, the proper comparison to be made in the § 1500 analysis is between the relief actually requested in the two complaints, not what may effectively or eventually be the result of the relief. *Tohono*, 559 F.3d at 1290-91; *Eastern Shawnee*, 582 F.3d

at 1310-12. In addition, *Katz* does not support the government's argument because (1) it was addressing a district court's jurisdiction under the APA, not this Court's jurisdiction under § 1500,[3] and (2) the holding in *Katz*, that "the relief sought by [the plaintiff] is not money damages, but a declaratory judgment and other equitable relief," is antithetical to the government's position here. *Katz*, 16 F.3d at 1208. In *Katz*, the Federal Circuit recognized that the relief being sought in the district court (an injunction compelling HUD to perform a calculation of contract rents in a certain manner) was not essentially the same as seeking monetary damages in the Court of Federal Claims. *Id.* ("That 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."). As the court explained, "[a]n adjudication of the lawfulness of HUD's regulatory interpretation will have future impact on the ongoing relationship between the parties. The Court of Federal Claims cannot provide this relief." *Id.* at 1209.

2. The government's argument based on the steps entailed in determining money damages is also unsupportable.

The government also improperly attempts to compare the relief requested in the Ninth Circuit with an intermediate step this Court may take in determining the amount of monetary damages in the present case: "in this Court, YNHA requests that the Court calculate and base YNHA's FCAS funding upon the units that YNHA owned and operated." (Def.'s Mot. to Dismiss, p. 15.) According to *Tohono* and *Eastern Shawnee*, the proper comparison to be made for purposes of § 1500 is between the relief *actually requested* by the plaintiff, not between any steps that may be taken in calculating monetary damages. *Tohono*, 559 F.3d at 1290-91; *Eastern*

[3] In determining a district court's jurisdiction in an APA context, one element a court considers is whether the plaintiff's claim for relief under the APA is one "for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Thus, the standard for a district court's jurisdiction under the APA (i.e., whether relief in another court would be an "adequate" substitute) is not the same standard for determining this Court's jurisdiction under § 1500 (i.e., whether a claim already brought in another court requests the "same relief").

Shawnee, 582 F.3d at 1310-12. At no point in the "Request For Relief" portion of YNHA's complaint in the present case does YNHA ask the Court to declare the legally proper way to calculate YNHA's FCAS funding or for an injunction requiring HUD to calculate the funding in a particular way. Instead, YNHA's complaint in the present case asks for specific amounts of monetary damages incurred as a result of HUD's wrongful actions in particular fiscal years. Moreover, just as the plaintiffs' requests for monetary damages in *Tohono* and *Eastern Shawnee* were not the "same relief" as their requests for an equitable accounting simply because an accounting might have been required in the course of calculating monetary damages, the fact that the Court in this case may wind up relying upon a particular method of calculation in the course of determining monetary damages in the present case does not mean that YNHA's claim here for monetary damages is the "same relief" as the request for declaratory judgment in YNHA's Ninth Circuit petition (concerning how HUD must calculate FCAS funding).

Accordingly, the government's argument fails because it does not focus on "the relief that [YNHA] *requests*." *Tohono*, 559 F.3d at 1291. When that inquiry is made here, it is clear that YNHA's petition to the Ninth Circuit does not seek the "same relief" as YNHA's complaint in this Court and, therefore, does not bar the present suit under § 1500.

IV. NAHASDA is a Money-Mandating Statute.

This Court has jurisdiction pursuant to the Indian Tucker Act, 28 U.S.C. § 1505[4], if a tribe identifies "a substantive source of law that establishes specific fiduciary or other duties, and allege that the government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 129 S. Ct. 1547, 1552 (2009) ("*Navajo III*") (quoting *United States v. Navajo Nation*,

[4] In adopting the Indian Tucker Act, the House sponsor of the Act stated Indian tribes were to be given "their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed." *Mitchell II*, 463 U.S. at 214 (quoting 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson)).

537 U.S. 488, 506 (2003)). If the tribe identifies such law and the breach, then the court must "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." *Id.* "A plaintiff must only demonstrate that the substantive source of law is '*reasonably amenable* to the reading that it mandates a right of recovery in damages.'" *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 130 (2009) ("*Samish V*") (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)) (emphasis added). The substantive law at issue need not expressly declare that a breach of duties under the law would be compensable, rather the law may grant the claimant a right to recover damages by implication. *See Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322, 329 (2005). Additionally, courts must be cognizant of the long-standing canon of statutory construction that "statutes are to be construed liberally in favor of Indian tribes." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1352 (Fed. Cir. 2004) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

In Section IV of defendant's motion to dismiss, defendant jumps to the conclusion that NAHASDA is not a money-mandating statute, relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988) ("*Bowen*") and *Samish V*[5], and thus concluding that this Court does not have jurisdiction. However, the matter at hand is distinguishable from *Samish V* and *Bowen* as those Courts analyzed different statutes and very different fact patterns.

Initially, NAHASDA leaves no room for HUD to exercise discretion in making grants. When a statute provides for no government discretion, Congress has provided a money-

[5] The *Samish V* court relied heavily on *Bowen*, stating that the "unambiguous statement in *Bowen* that '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* at 132. The Court's ruling solely focused on the question of whether "statutes creating federal grant programs are money-mandating, so as to permit the Court of Federal Claims' exercise of jurisdiction." *Id.* at 132.

mandating source for jurisdiction in this Court. *See Wolfchild*, 2010 WL 5163376, 30 (citing *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005) ("*Samish II*")). NAHASDA mandates that HUD "*shall* make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements. 25 U.S.C. § 4111 and 4151 (emphasis added). HUD's mandated allocation of funds must follow a specific formula, as further described in YNHA's First Amended Complaint and defendant's motion to dismiss. *See* 25 U.S.C. § 4151. Thus, a tribe which complies with NAHASDA's requirements is entitled to receive funds based upon that formula and defendant has not argued that YNHA was not entitled to receive grant funds. YNHA is seeking remedies for the damages incurred when HUD breached NAHASDA mandates. YNHA was entitled to certain funds pursuant to NAHASDA; YNHA is not simply seeking funds that it "wanted" as characterized by defendant in its motion to dismiss. Def.'s Mot. to Dismiss, p. 22.

Defendant fails to point out any language within NAHASDA that might be interpreted as conferring discretion upon HUD to make grants. In *Wolfchild*, the Court focused on the mandatory language in the subject statute, stating that the "consistent use of the word 'shall' throughout the statute favors a finding that the [statute] is money-mandating." *Wolfchild, supra,* at 32. Similarly, NAHASDA continuously uses the word "shall", mandating HUD's allocation of funds to Indian tribes. As such, NAHASDA is a money-mandating statute.

In the event that this Court finds that HUD can exercise discretion in deciding whether to award a grant, NAHASDA nonetheless would meet the discretionary test set forth in *Samish II*. This Court has jurisdiction when a statute: (1) provides "'clear standards for paying' money to recipients"; (2) provides "'precise amounts' that must be paid"; or (3) "compel[s] payment on satisfaction of certain conditions." *Id.*, 419 F.3d at 1364 (internal citation omitted). Here,

NAHASDA sets forth clear standards for making grants, pursuant to an established formula, to Indian tribes who comply with certain requirements, stating that HUD "shall allocate any amounts made available for assistance…in accordance with the formula established pursuant to section 302, among Indian tribes that comply with the requirements under this Act for a grant under this Act." 25 U.S.C. § 4151.

This case is very similar to a case recently decided in this Court. In *ARRA Energy Co. I v. United States*, 2011 U.S. Claims LEXIS 13, 32 (Fed. Cl. 2011), the Court determined that jurisdiction exists where plaintiffs sought damages incurred as a result of the government's denial of plaintiffs' applications for reimbursement grants under the American Recovery and Reinvestment Tax Act of 2009. As the defendant has in this case, the defendant in *ARRA Energy* relied on *Bowen*, arguing that this Court may not exercise jurisdiction over any claim for the payment of money under a statute that is designed to subsidize future expenditures by awarding grants to recipients. *Id*. at 32. *See* Def.'s Mot. To Dismiss, pp. 19-22. Not only were the statutes analyzed in *Samish V* and *Bowen* substantially different than NAHASDA by providing for federal discretion in making payments[6], but this Court in *ARRA Energy* recognized that "the principal issue addressed in *Bowen* was not the limits of this court's jurisdiction under the Tucker Act; rather, the dispute in that case was related to the jurisdiction of the district courts under the APA. Because this court's jurisdiction is not defined by the APA, this court's jurisdictional analysis is not fully addressed by the three-part analysis of APA jurisdiction set forth in *Bowen*." *ARRA Energy, supra,* at 38. Similar to *ARRA Energy*, the question here is whether NAHASDA

[6] In Samish V, the Court analyzed various programs, services and benefits, outlining the various discretionary aspects of the programs, such as there being no clear standards for paying money to recipients, no precise amounts and no mandate to pay upon satisfaction of certain conditions. Samish V, 90 Fed. Cl. at 138.

can be fairly interpreted as mandating the payment of compensation by the government. It can and, as such, NAHASDA is a money-mandating statute.[7]

V. The Anti-Deficiency Act Does Not Bar the Relief Sought by YNHA.

Defendant next argues that YNHA's claims should be dismissed due to an alleged lack of funds to pay for any court-imposed judgments pursuant to the U.S. Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A). Def.'s Mot. to Dismiss, pp. 22, 23. The Anti-Deficiency Act prohibits an officer of the United States from making or authorizing an expenditure or obligation exceeding the amount appropriated for the expenditure or obligation. 31 U.S.C. § 1341(a)(1)(A).

In this case, reliance upon the Anti-Deficiency Act is misplaced because YNHA has a contract with HUD that has been incorporated into NAHASDA as well as under NAHASDA annual block grant funding agreements. *See* First Am. Compl., ¶ 5. "[N]either the Appropriations Clause of the Constitution, nor the Anti-Deficiency Act shield the government from liability where the government has lawfully entered into a contract with another party." *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570 (1997). "The statutory appropriations restraints apply to the agency official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Id.* (internal citation omitted).

The government has set up a Judgment Fund for this very reason. 31 U.S.C. § 1304(a) provides "[n]ecessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—(1) payment is not otherwise provided for." In addition, "[T]he courts have long

[7] In addition, the history and Congressional intent of NAHASDA play a role in determining whether NAHASDA is money-mandating. Historical antecedents to an act also have an important bearing on whether the statute is money-mandating. *Wolfchild, supra,* at 32. The historical significance and Congressional intent of NAHASDA, discussed below in section VII, illustrate that NAHASDA mandates a right of recovery in damages for Indian tribes, further evidencing that NAHASDA is a money-mandating statute.

entertained breach of contract claims against the government filed after the relevant fiscal years have expired. In such a case, damages are awarded from the judgment fund created by 31 U.S.C. § 1304." *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1092 (Fed. Cir. 2003).

This case is easily distinguishable from *Samish V* upon which the government relies for its proposition that the Anti-Deficiency Act prevents a monetary remedy even when grant funds are not properly disbursed. Def.'s Mot. to Dismiss, p. 23. The Samish Indian Nation had undergone a period of years in which the federal government failed to recognize it as an Indian tribe and, after its status was corrected, brought suit for compensation it would have been entitled to receive had the government not accidentally omitted it from the list of federally recognized tribes. *Samish V*, 90 Fed. Cl. at 127. Because YNHA had a contract with HUD, and the government does not deny YNHA's entitlement to participate in the Indian Housing Block Grants during the years in question, the decision in *Samish V* is not applicable. In this case, HUD improperly withheld grant funds entitled to YNHA pursuant to contract and regulation. *See e.g.,* First. Am. Compl., ¶ 28.

Furthermore, YNHA's claims of unlawful reduction by defendant of funds that should have been appropriated to YNHA under past years' contracts cannot, by its terms, be subject to the Anti-Deficiency Act. "The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for *future* payment of money in advance of, or in excess of, an existing appropriation." *RCS Enterprises v. United States*, 57 Fed. Cl. 590, 593 (Cl. Ct. 2003) (emphasis added). The government does not, and cannot, cite to any authority for the proposition that the Anti-Deficiency Act somehow protects HUD from liability for its actions in unlawfully excluding money from past years' funding agreement contracts. Such an argument must fail

because Congress cannot retroactively limit settlements to the amounts already due under a contract. *Thompson v. Cherokee Nation*, 334 F.3d at 1091.

Moreover, case law is clear that the Court can cure the damages done to YNHA through defendant's violation of NAHASDA from the Judgment Fund if no agency appropriations exist. "Title 31, section 1304 was intended to establish a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy judgment." *Wetsel-Oviatt*, 38 Fed. Cl. at 571 (citing *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (internal quotation marks omitted); *see also Lopez v. A.C. & S., Inc*., 858 F.2d 712, 716 (Fed. Cir. 1988) ("There is a standing appropriation to pay court judgments and appeal board awards, 31 U.S.C. § 1304, so courts and boards, in rendering judgment, are not required to investigate whether program funds are available.").

Should the Court nevertheless find that the Anti-Deficiency Act does apply, the Anti-Deficiency Act limits a court's ability to grant relief only if an obligation would exceed an amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A). Appropriated funds become unavailable in only three circumstances: "[1] if the appropriation lapses; [2] if the funds have already been awarded to other recipients; or [3] if Congress rescinds the appropriation." *City of Houston, Tx. v. Dept. of Housing & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). *See also, Samish V*, 90 Fed. Cl. at 133, n. 10. Unused Indian Housing Block Grant appropriations do not lapse and revert to the United States Treasury at the end of each fiscal year. Rather, they are retained by the government for future dispersals. *See* Decl. of Deborah M. Lalancette ¶ 4; P.L. 110-161 (FY 2008 NAHASDA appropriation stating: appropriated funds "remain available until expended.")

The government concedes that the NAHASDA funds have not all been awarded to other recipients. Def.'s Mot. to Dismiss, p. 23, n. 2. Monies remain from at least 2006 onwards due to set-asides from stipulations and court injunctions that may not actually be used to settle claims or pay off court judgments and would then be available for use in this matter because they have not been awarded to other recipients. Decl. of Deborah M. Lalancette ¶ 15. Additional unused funds likely remain from 2009 onwards as it takes HUD approximately two years to appropriate the funds. *Id.* at ¶ 14. In fact, "about $8 million dollars" are still appropriated from Fiscal Year 2008 for the NAHASDA program. Def.'s Mot. to Dismiss, p. 23, n. 2. Again, YNHA commenced this action on November 24, 2008. Since the appropriation did not lapse before this matter was filed, and approximately $8 million dollars that were appropriated in Fiscal Year 2008 have not been awarded to other recipients, a decision of this Court granting the relief sought by YNHA would not exceed the available appropriated dollars. Because the Judgment Fund provides a method by which the government can pay any reimbursement or damages awarded in this case, and remaining unexpended block grant appropriations also exist, the government's Anti-Deficiency Act defense fails.

Finally, the Court may issue a judgment in this case subject to payment that may be appropriated from a future Congressional statute. First, "[t]here is nothing in the Constitution, Supreme Court jurisprudence, or our jurisprudence that requires that only money appropriated to specific programs of a specific agency can be used in satisfaction of claims against that agency. *See Dewakuku v. Martinez*, 271 F.3d 1031, 1037 (Fed. Cir. 2001). Once money has been given to the agency by the Treasury, severed from Treasury funds and control, those funds are subject to being paid out in execution of a judgment against the Administration. *See OPM v. Richmond,* 496 U.S. 414, 424 (1990). Congress may appropriate funds, either for future block grants or to

pay a judgment in this case. Defendant's Anti-Deficiency Act defense is thus without merit. This is especially true because NAHASDA itself contains language allowing both future and retroactive allocations of Indian housing grant monies. *See* 25 U.S.C. § 4117 ("There are authorized to be appropriated for grants under this subchapter such sums as may be necessary for each of fiscal years 2009 through 2013. This section shall take effect on October 26, 1996.")

VI. YNHA's Plea, in the Alternative, that HUD Did not Comply with Notice and Hearing Requirements Does not Deprive this Court of Jurisdiction.

The defendant next argues that this Court is without jurisdiction because HUD, in addition to its unlawful exclusion of units, failed to provide notice and opportunity for hearing. However, YNHA does not argue or contend this Court has jurisdiction to review the notice and hearing requirement of 25 U.S.C. § 4161(a). Rather, YNHA argues that there are at least three, independent, ways in which HUD violated the law in excluding units in calculating YNHA's FCAS grants in the various fiscal years. The first two of these violations provides this Court with jurisdiction and the third does not divest this Court of Tucker Act jurisdiction.

First, HUD violated 25 U.S.C. § 4152(b), before the 2008 amendments to NAHASDA, by failing to include within YNHA's FCAS funding formula the number of 1937 Housing Act units owned or operated by YNHA on September 30, 1997. First. Am. Compl., ¶ 23. Second, and in the alternative, HUD violated 25 U.S.C. § 4152(b), before the 2008 amendments to NAHASDA, by previously excluding units that were owned and operated by YNHA from the FCAS calculation. First. Am. Compl., ¶¶ 27, 28. Third, and in addition to the above violations, YNHA points out that the exclusions noted above were unlawful because HUD may only reduce a NAHASDA recipient's grant amounts by complying with the notice and opportunity for hearing requirements of 25 U.S.C. §§ 4161 and 4165. First. Am. Compl., ¶ 37.

While it is true that HUD's actions were unlawful because of a failure to comply with 25

U.S.C. §§ 4161 and 4165, such further violation of the law does not invalidate the Court's jurisdiction over YNHA's claims. Congress has not withdrawn this Court's Tucker Act jurisdiction by enacting NAHASDA §§ 4161 and 4165. The comprehensive remedial scheme laid out in NAHASDA *specifies remedies accorded to HUD*, and does not preclude Tucker Act jurisdiction over claims for damages against the United States based on HUD's failure to comply with sections 4161 and 4165 and the funding agreements as alleged in YNHA's First Amended Complaint. The "withdrawal of Tucker Act jurisdiction by implication is disfavored, which means that a court must find that the statute at issue . . . reflects an unambiguous congressional intent to displace the Tucker Act's waiver of sovereign immunity." *Acceptance Ins. Cos. v. United State*s, 503 F.3d 1328, 1336 (Fed. Cir. 2007); *See U.S. Home Corp. v. United States*, 92 Fed. Cl. 401, 409 (Fed. Cl. 2010) (and cases cited therein). This standard is not met here.

The comprehensive remedies described in §§ 4161-4165 *speak to remedies available to HUD, not a grant recipient*. Section 4161 describes one of the remedies available to HUD in the event it determines that a recipient fails to substantially comply with its obligations under NAHASDA, and a recipient's appeal rights in the event HUD makes a finding, after notice and a hearing, that a recipient has failed to comply. YNHA's First Amended Complaint alleges that HUD failed to comply with the mandatory requirements imposed by §§ 4161 and 4165 before adjusting YNHA's block grant funding, that HUD breached YNHA's annual NAHASDA funding agreements and that YNHA suffered damages as a result. *See e.g.,* First. Am. Compl., ¶¶ 6, 37. The exclusive jurisdiction of the court of appeals described in § 4161(d)(4) is, by its terms, limited to a review of a final Agency action, and is triggered only when HUD complies with the provisions of § 4161(a) and only after a record of the administrative proceedings is filed with the

court of appeals[8]. Thus, the exclusive jurisdiction described in § 4161(d)(4) is limited to actions which seek review of an adverse final agency decision, an action which is properly characterized as one against the agency itself and not the United States. This is insufficient to withdraw Tucker Act jurisdiction. *Acceptance Ins*., 503 F.3d at 1338 (holding that a takings claim against the United States was proper under the Tucker Act despite a statute that conferred exclusive jurisdiction on the federal district court for actions against the federal agency that allegedly committed the taking, and that a suit against the agency is distinct from a claim against the United States). Indeed, YNHA has been deprived of the remedy accorded by § 4161(d) because HUD reduced its grant funds without according YNHA its rights under the statute and YNHA's funding agreements which incorporate the requirements of the statute. YNHA's claim against the United States for damages under the Tucker Act for violating these rights is distinct from the Petition for Review contemplated by § 4161(d).

For the same reason, the government's argument that YNHA's Second Claim for Relief seeks only prospective, equitable relief is wrong. Here, YNHA *is* seeking damages against the government because, among other reasons, HUD acted illegally and breached YNHA's annual NAHASDA funding agreements by adjusting YNHA's block grant funding without first complying with the mandatory notice and hearing requirements imposed by 25 U.S.C. §§ 4161 and 4165. *See e.g.*, First Am. Compl., ¶¶ 6, 36 and 40. The remedy sought by YNHA in this Court is not an injunction ordering HUD to provide notice and a hearing. The remedy sought is the damages suffered by YNHA, measured by the amount HUD illegally reduced YNHA's block grant funding. If, sometime in the future, HUD wants to attempt to recapture some or all of those funds after complying with, *inter alia*, 25 U.S.C. §§ 4161 and 4165, that is HUD's choice.

[8] Indeed, with respect to the Ninth Circuit Petition filed by YNHA, the Ninth Circuit granted HUD's unopposed Motion to Dismiss because there was no final agency action pursuant to 25 U.S.C. § 4161(a) and thus the Ninth Circuit did not have jurisdiction under 25 U.S.C. § 4161(d). *See* Appendix to Def.'s Mot. to Dismiss, p. 30.

That future possibility does not, however, somehow make YNHA's current lawsuit before this Court one "seeking declaratory or injunctive relief." Def.'s Mot. to Dismiss, p. 27.

Because the Court has jurisdiction to hear YNHA's claims and the authority to grant the requested relief, and because the First Amended Complaint, including the Second Claim for Relief, seeks money damages and not prospective, equitable relief, the Court should deny the government's motion to dismiss.

VII. An Enforceable Trust Relationship Does Exist.

A trust responsibility exists under NAHASDA[9] thus providing for jurisdiction in this Court. In determining whether a trust relationship exists, courts have had to determine whether the applicable statutes, regulations and management by the federal government create fiduciary responsibilities. *See, e.g., Mitchell II*, 463 U.S. at 225, 226. While interpreting statutes, the Indian law canons of construction provide that statutes are to be construed liberally in favor of Indian tribes; ambiguities are to be resolved in favor of Indian tribes. *See Shoshone Indian Tribe*, 364 F.2d at 1352; *see also* Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law § 5.04[4][a] (2006 ed.). Indeed, the Supreme Court in *Mitchell II* acknowledged that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *Mitchell II*, 463 U.S. at 226.

Pursuant to NAHASDA, HUD has control and authority over the grants made to Indian tribes, thereby creating a trust corpus. In Section VII of defendant's motion to dismiss, the government seeks to downplay HUD's management role and argues that NAHASDA fails to state that the money appropriated is to be held "in trust". Def.'s Mot. to Dismiss, p. 30. Whether the underlying statute states that the funds are to be held "in trust", however, is not dispositive.

[9] The trust responsibility can also be defined by the full network of rules and regulations relating to Indian housing.

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute about a trust fund or a trust or fiduciary connection. *See Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

Here HUD has substantial control over NAHASDA funds. Not only does HUD administer the allocation of such funds, but HUD has authority to terminate payments to a recipient, reduce payments, limit their permitted uses, limit the availability of payments or provide a replacement tribally-designated housing entity in the event of non-compliance. 25 U.S.C. § 4161. HUD monitors compliance, establishing performance measures and conducting onsite inspections. 25 U.S.C. § 4163. HUD also reviews reports from the recipients which include a description of the use of the funds and then submits to Congress a progress report, a summary of funds used and description of the outstanding loan guarantees. 25 U.S.C. § 4167. HUD also has authority, when it determines such action to be appropriate, to conduct an audit or review for various purposes. 25 U.S.C. § 4165.

Defendant relies on *Marceau v. Blackfeet Housing Authority*, 540 F.2d 916 (9th Cir. 2008) in concluding that no trust relationship exists under NAHASDA. However, defendant fails to make an important distinction between *Marceau* and the matter at hand. In *Marceau*, the Ninth Circuit did analyze NAHASDA, but the plaintiff's claim focused on the condition of the actual housing, so the analysis revolved around whether a trust responsibility existed in maintaining the condition of housing. Here, YNHA's claim does not deal with actual housing structures. Rather, YNHA's claim relates to the grants controlled by HUD. Whether or not HUD

has substantial control over houses is irrelevant to this case. The key is that HUD does have substantial control and management authority over grant funds, thus creating a trust relationship.

Further, defendant erroneously states that imposing fiduciary duties under NAHASDA would be contrary to NAHASDA's principal purposes of self-determination and self-governance. Def.'s Mot. to Dismiss, pp. 33-34. At first glance, the principles of self-determination and self-government and a trust responsibility may seem contradictory, but these principles can, and do, co-exist. NAHASDA was adopted during the Self-Determination Era of Indian policy. During this era (which continues today), various statutes were adopted with the intent of providing Indian tribes with the tools to strengthen their self-governance. However, these statutes do not completely extinguish the trust relationship; instead, there is a balancing act wherein various trust duties still continue. NAHASDA still charges HUD with authority to control and manage grant funds, but once funds are received, Indian tribes do operate their housing programs. Indeed, Indian policy is continuously evolving in order to address Indian tribes' concerns. NAHASDA's text and the history of Indian housing illustrates that the trust relationship still exists in light of NAHASDA's goals of tribal self-determination and self-governance.

The historical importance of an act is significant when determining whether a trust responsibility exists. *See Wolfchild*, 2010 WL 5163376 at 34 (court found that the historical importance of the Appropriations Act and Congress' intent for the statute was to serve as substitutes for the obligations that the federal government took upon itself). NAHASDA's language, Congress's intent and the history of Indian housing clearly provide that HUD has a trust responsibility. The federal government recognized the problem of substandard, unsanitary housing conditions in Indian Country over one hundred and fifty years ago. *See* Virginia Davis, A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation, 18

Harv. BlackLetter L.J. 211, 232 (Spring, 2002) (citing Arnold C. Sternberg & Catherine M. Bishop, Indian Housing: 1961-1971, A Decade of Continuing Crisis, 48 N.D. L. REV. 593, 593 (1972)).

Congress has specifically set out its purpose for NAHASDA. In 25 U.S.C. § 4101, setting out the Congressional Findings, the legislature recognized that "the Federal Government has a responsibility to promote the general welfare of [Indian tribes]"; that there "exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people"; that "the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people"; that "the Congress ... has assumed *a trust responsibility* for the protection and preservation of Indian tribes and for *working with tribes and their members to improve housing conditions and socioeconomic status";* that "*providing affordable homes in safe and healthy environments is an essential element in the special role* of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status"; and that "*Federal assistance to meet these responsibilities shall be provided* in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to Indian tribes or tribally designated entities...". 25 U.S.C. § 4101(1), (2), (3), (4), (5), (6) and (7) (emphasis added). Congress recognizes its existing trust responsibility and has tasked HUD with upholding the trust relationship by controlling and managing housing funds for Indian tribes.

Because HUD has significant control and authority over grant funds and because NAHASDA language specifically outlines defendant's trust responsibility, which is supported by historical analysis of Indian housing, an enforceable trust relationship exists giving this Court jurisdiction. The defendant, acting through HUD, has breached its trust duties by unlawfully

withholding grant funds that YNHA was entitled to and mandated by NAHASDA. YNHA has stated a claim for relief alleging HUD owes YNHA a trust responsibility under NAHASDA.

CONCLUSION

For the foregoing reasons, YNHA respectfully requests that the court deny the defendant's motion to dismiss.

Respectfully submitted this 14th day of February, 2011.

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UNITED STATES COURT OF FEDERAL CLAIMS
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 14th day of February, 2011, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail addresses:

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