No. 11-35444

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU, ET AL.,

Plaintiffs-Appellants,

v.

BLACKFEET HOUSING AUTHORITY, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs Martin Marceau *et al.* brought this action in district court on August 2, 2002, seeking review of an allegedly adverse construction design decision of the United States Department of Housing and Urban Development (HUD) made in 1976 and 1977 and requesting money damages for various claims related to that same alleged decision. Excerpts of Record (ER) 4. The district court initially dismissed all claims, and this Court affirmed dismissal of all claims except plaintiffs' claims

against defendant Blackfeet Housing Authority, and their claims against HUD for injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* ER 4. On remand, plaintiffs filed their Third Amended Complaint on October 6, 2009, seeking review of HUD's alleged 1976-77 decision and its failure to respond to various requests for assistance. ER 7-8. The district court had jurisdiction to review HUD's final agency decision pursuant to 28 U.S.C. § 1331.

The district court granted HUD's motion for summary judgment, and denied plaintiffs' cross-motion for summary judgment, on March 24, 2011. ER 1, 225-26. Plaintiffs filed a timely notice of appeal on May 20, 2011 (ER 228). *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1), as the district court denied plaintiffs' request for injunctive relief.[1]

STATEMENT OF THE ISSUES

1. Whether plaintiffs' claims under the APA, 5 U.S.C. § 706(2)(A), concerning HUD's alleged decision to require the use of wooden foundations in houses

[1] Contrary to plaintiffs' assertion (Pl. Br. 1), appellate jurisdiction does not lie under 28 U.S.C. § 1291, because there has been no "final decision[]" (*id.*) disposing of all claims against all parties; plaintiffs' claims against the Blackfeet Housing Authority have been stayed indefinitely, pending exhaustion of their remedies in tribal court. *See* ER 7; *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009). Because plaintiffs unsuccessfully sought injunctive relief under the APA against HUD, however, *see id.* at 928-29, this Court has jurisdiction over plaintiffs' appeal under 28 U.S.C. § 1292(a)(1), notwithstanding the interlocutory nature of plaintiffs' appeal.

constructed by the Blackfeet Indian Housing Authority are barred by the six-year statute of limitations.

2. Whether plaintiffs have identified any properly formed requests for assistance to which HUD failed to respond.

STATEMENT OF THE CASE

I. Nature Of The Case And Course Of Proceedings Below

Almost thirty-five years ago, HUD distributed funds to the Blackfeet Indian Housing Authority to provide for the construction of houses on the Blackfeet Reservation. Approximately 150 of these houses were built with wooden foundations, a construction choice that many homeowners and tribal representatives contested at the time and a decision that has remained contentious since construction of the houses was completed around 1980. The occupants and owners of some of these houses came to believe that the use of wooden foundations, rather than concrete, led to structural problems and detrimental health effects. The homeowners sought remedial funds from the Blackfeet Indian Housing Authority, which had constructed the houses; directly from HUD; and from their congressional delegation in Washington, D.C.

Unable to procure grant funding sufficient to repair the alleged problems with the houses, eight homeowners filed a purported class action suit on behalf of the

homeowners, against the Blackfeet Housing Authority and HUD. Their claims were initially dismissed *in toto* by the district court. On appeal and subsequent rehearing, this Court affirmed dismissal of all claims against HUD except plaintiffs' claims under the APA; the Court remanded those claims to the district court, along with plaintiffs' claims against the Blackfeet Housing Authority (which the Court stressed should be stayed pending exhaustion of plaintiffs' tribal court remedies).

On remand, on cross-motions for summary judgment concerning the remaining claims against HUD, the district court concluded that plaintiffs' APA claims in connection with HUD's alleged 1977 decision to require the use of wooden foundations were barred by the statute of limitations. The court also examined HUD's statutory and regulatory obligations and determined that HUD had not failed to comply with any properly formed requests for assistance from the housing authority. Accordingly, the court granted HUD's motion for summary judgment and denied plaintiffs' cross-motion.

II. Statutory And Regulatory Background

A. The Mutual Help and Homeownership Opportunity Program

Through the United States Housing Act of 1937, as amended, Pub. L. No. 93-383, 88 Stat. 633, 653 (codified at 42 U.S.C. §§ 1437-1440 (1976)), Congress sought to improve the living conditions of low-income Americans by authorizing payment

of subsidies to local public housing agencies that provide affordable housing to qualified families. The Act enabled local housing agencies to apply to HUD for loans to help finance the "development, acquisition, or operation of low-income housing projects by such agencies." 42 U.S.C. § 1437b(a) (1976); *see also id.* at § 1437(c) (authorizing HUD to contribute grants to housing agencies for the same purposes).

Pursuant to this statutory authority, HUD promulgated regulations creating the Mutual Help and Homeownership Opportunity Program (MHHOP), which was designed to meet the housing needs of low-income American Indian families. Under the MHHOP, HUD provided Indian housing authorities (IHAs) with funds that were then used to construct, buy, or rehabilitate housing for low-income Indian families. Those houses, in turn, were leased to the families.

After approving an IHA's application for a MHHOP project, HUD would issue a Program Reservation specifying the total number of approved homes. 24 C.F.R. § 805.206 (1976). HUD and the IHA then completed an Annual Contributions Contract (ACC) under which HUD would provide a specified amount of money to finance the MHHOP project. *Id.* § 805.405(b). All contracts for labor, materials, equipment, and professional services required HUD's prior approval, *id.* § 805.211(b), and the project had to be developed "at the lowest possible cost," *id.* § 805.214(a), in compliance with HUD's Minimum Property Standards, *id.* § 805.212.

To take account of local conditions and incorporate local customs, however, HUD could approve variations from these Standards. *Id.* Although HUD set the minimum standards, the IHA was responsible for the design and construction of the houses and for inspection of the project during construction. *Id.* § 805.221(a).

The IHA contracted directly with Indian families to negotiate the lease of the houses. To receive housing through an MHHOP program, a family first had to make several written commitments to the IHA. First, the family was required to contribute cash, labor, land, materials, or equipment to the project. *Id.* § 805.103(b) . The IHA determined the forms of contribution that would be required of all participating families. *Id.* § 805.408(a). Second, all MHHOP housing was contingent on monthly payments to the IHA based on a percentage of the family's income. *Id.* §§ 805.103(b), .416(a). The houses were leased on a "rent-to-own" basis, with the monthly payments contributing toward the predetermined purchase price of the home. *Id.* § 805.422. Third, and most significantly in this case, MHHOP homeowners had to commit to provide all maintenance of the house after it was built. *Id.* § 805.103(b). Neither the IHA nor HUD was obligated "to pay for or to provide any maintenance of the Home other than the correction of warranty items reported during the applicable warranty period." *Id.* § 805.418(a)(1) (1977). There was just one exception for urgent work: If the property condition created a life, health, or safety

hazard to its occupants, the IHA was required to perform the work and charge it to the homeowner. *Id.* § 805.418(a)(2) (1977).

The IHA was charged with enforcing the provisions of the homeowners' agreements under which the homeowners were responsible for maintenance of all MHHOP houses. *Id.* § 805.306(d). Upon completion of construction, the homeowners and the IHA each inspected the completed house, and the IHA provided the homeowner with a signed statement of the condition of the house. *Id.* § 805.417(a)(1). The homeowner could note any objections to the statement, and the IHA was responsible for reconciling the differences. *Id.* After the homeowners occupied the houses, the IHA was required to perform routine inspections of all houses to ensure compliance with the manufacturers' and suppliers' warranties, and the homeowners had to provide signed statements to IHA during each inspection as to any deficiencies so that the IHA could enforce its rights under any available warranties. *Id.* § 805.222. Homeowners were required to notify the IHA of any deficiencies and bore the cost of the correction of any deficiency that the homeowner did not timely report to the IHA. *Id.* § 805.417(b).

B. Indian Housing Act of 1988

Enactment of the Indian Housing Act of 1988, Pub. L. No. 100-358, 102 Stat. 676, provided HUD with an explicit statutory mandate to "carry out programs to

provide lower income housing on Indian reservations." 42 U.S.C. § 1437aa(a) (1988). The United States Housing Act of 1937 had not discussed or required the provision of housing services to American Indians, and the Indian Housing Act consolidated all Indian housing programs within a separate title of the 1937 Housing Act. Notably, the Indian Housing Act required HUD to "carry out a mutual help homeownership opportunity program for Indian families." *Id.* § 1437bb(a). HUD previously had implemented and operated the MHHOP on its own accord. Although the Indian Housing Act codified some provisions of the MHHOP, *see id.* § 1437bb, these provisions were nearly identical to the HUD's prior regulatory regime, and the Indian Housing Act had little practical effect on HUD's Indian housing services.

C. Native American Housing Assistance and Self-Determination Act of 1996

Congress reshaped and reorganized all federal Native American housing programs when it enacted the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), Pub. L. No. 104-330, 110 Stat. 4016. HUD's subsequent regulations implementing its new statutory mandate took effect on April 13, 1998. *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996, 63 Fed. Reg. 12,334 (Mar. 12, 1998) (to be codified at 24 C.F.R. pt. 1000). NAHASDA eliminated Indian housing programs

authorized by the United States Housing Act and the Indian Housing Act, including the MHHOP, and replaced those programs with a new scheme that provided for annual block grants to support all Indian housing programs. All of HUD's Indian public housing programs are now governed exclusively by NAHASDA and its implementing regulations. *See* 25 U.S.C. § 4101 *et seq*.

Since enactment of NAHASDA, HUD provides block grants to American Indian tribes to carry out affordable housing activities. 25 U.S.C. § 4111(a). An Indian Housing Block Grant (IHBG) may be used to provide modernization or operating assistance for MHHOP housing. 25 U.S.C. § 4132(1). Grants are available only if the tribe or its local housing authority has submitted an Indian Housing Plan (IHP) for that year. 25 U.S.C. § 4111(b)(1)(A), (c); 24 C.F.R. § 1000.212 (1999) ("An Indian tribe . . . must submit an IHP to HUD to receive funding under NAHASDA."); *but see* 24 C.F.R. § 1000.224 (1999) (stating that HUD may waive the IHP requirements, upon the request of an Indian tribe or its housing authority, "when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control"). "Grant funds cannot be provided until the [IHP] is submitted and determined to be in compliance with [the requirements described below] and funds are available." 24 C.F.R. § 1000.214 (1999). "Indian tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs

and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven." 24 C.F.R. § 1000.220 (1999).

An IHP is a formal request that must conform with stringent statutory requirements. It must include (1) a statement of goals and objectives to be accomplished in the year at issue; (2) a description of the housing needs of all Indian families in the jurisdiction; (3) a description of how the funds will be used, including a description of how the funds will leverage additional resources; (4) a description of affordable housing resources available including a "description of the manner in which the recipient will protect and maintain the viability of [MHHOP] housing" and a description of any "anticipated housing rehabilitation programs necessary to ensure the long term viability of the housing"; and (5) certification that the IHP complies with various requirements. *See*25 U.S.C. § 4112(b)(2), (c) (1999).

The amount of an annual block grant is determined by a statutory formula, *id.* § 4152, and consists of two components: (1) a formula based on the number of qualifying housing units, including MHHOP units, and a national per-unit subsidy amount, including subsidies for modernization, and (2) a need component that takes account of seven different criteria, including the number of Indian persons living in the formula area, the median household income, and the tribe's actual housing costs. 24 C.F.R. §§ 1000.301-.340 (1999).

STATEMENT OF THE FACTS

I. Pre-Litigation History

A. Design and Construction of the Houses

In the mid-1970s, the Blackfeet Tribe sought federal assistance and funding for the construction of low-income houses on the Blackfeet Reservation in northern Montana. The Blackfeet applied to HUD in 1976 for loan funding available through HUD's MHHOP. HUD approved the Blackfeet loan application in October 1976 and contracted with the Blackfeet Indian Housing Authority[2] to construct 101 houses at an estimated cost of $5,001,670.[3] Administrative Record (AR) 2568-76, reproduced in Supplemental Excerpts of Record (SER) 57-65.

Blackfeet Housing retained Archambault & Company, an engineering company in Montana, to design the homes, and Archambault sent the plans and specifications to HUD for review and approval on November 15, 1976. ER 2; AR 2313, SER 27. Two weeks later, HUD Director of Technical Services Peter Downs notified

[2] The Blackfeet Indian Housing Authority's name has since been changed to Blackfeet Housing Authority, and it is referred to simply as "Blackfeet Housing" throughout this brief.

[3] This initial construction project was known as Project MT 8–15, and its cost eventually rose to $5,747,832. AR 2965-66, SER 91-92. The number of units included in Project MT 8-15 was later decreased to ninety-three. ER 99. HUD subsequently agreed to fund the construction of another fifty-nine houses on the Blackfeet Reservation; that undertaking was known as Project MT 8–17. ER 2; AR 2375, SER 28.

Blackfeet Housing Chairman Edward Little Plume that HUD had completed its review of the plans and specifications. AR 2309, SER 23. Downs expressed concern that Blackfeet Housing would be unable to procure bids for the contract within the available budget:

> We do not believe that you will receive a bid anywhere close to being within the funds available if these plans are put out to bid as is. We recommend that a redesign be required of the architect by the Housing Authority. If the Housing Authority chooses to bid these plans and if, as we suspect, it is not possible to award the contract, HUD will require a redesign to fit the budget.

AR 2309, SER 23. This point was reiterated in the technical assessment of the proposed plans and specifications by HUD's Technical Review Branch, which was enclosed with the letter from Downs. AR 2311, SER 25.

The plans submitted by Archambault in 1976 obviously already contemplated the use of wood foundations. Item # 10 in the technical assessment requested that the architect "[r]echeck all stud sizes and spacing of all-weather wood foundations to be sure they are adequate and also meet the minimum requirements of NFPA"; and item # 16 further stated that "[f]oundation walls on below grade habitable spaces must be waterproofed per [Minimum Property Standards] – not just damp proofed ." AR 2310-11, SER 24-25.

Archambault sent the final drawings and specifications to HUD in February 1977, AR 2307, SER 21, and responded to HUD's questions, stating: "[a]ll sizing for wood foundation members have been checked with manual for proper sizing"; and with respect to item # 16, "[s]pecifications have been corrected to read waterproofed rather than damp proofed." AR 2307-08, SER 21-22. Downs notified Little Plume on March 2, 1977, that HUD had approved the plans and specifications. ER 98. Downs advised Little Plume that "it is still our opinion that you will have difficulty in receiving bids that are within the funds approved. If this is the case, then the project will have to be redesigned and re-bid to bring it within the available funds." *Id*.

As HUD officials had anticipated, the contractors' bids for the project exceeded the available funds "by a wide margin." ER 97. In another letter to Little Plume on March 18, 1977, Downs stated that the "wide discrepancy between bids and budget (about $450,000 using most of the contingency) and the large number of bid schedules make it impossible to negotiate with the contractor(s). The only course available is to re-design . . . ." *Id*.

Blackfeet Housing subsequently awarded various components of the construction project to three contractors — R.C. Hedreen Company (the prime contractor), Nicholas and Sons Construction Co., and Paul Construction and Strand,

Inc. — on April 11, 1977. ER 3; AR 2285, 2291, 2298, SER 1,7, 14. Each of the three contracts included as parties only Blackfeet Housing and the individual contractors; HUD was not a party to any of the contracts. ER 89-94. Each contract was subject to change orders, executed by the contractors, which allowed for the reduction of construction costs. ER 3.

Blackfeet Housing subsequently attached to each contract a "Schedule of Deductive Options," which included more than two dozen revisions to the plans and specifications in order to reduce the construction costs. *See* ER 95-96. Among many other revisions totaling $464,714 in reductions, R.C. Hedreen's contract stated that wooden foundations would be substituted for concrete foundations in certain houses for a savings of $24,100 or just over 5 % of the total reduction, ER 95, and in May 1977 Nicholas and Sons also requested that it be allowed to use wood rather than concrete for the foundations, ER 117. Construction of Project MT 8-15 began on November 15, 1977 and was completed in 1980. ER 3.

B. Origins of the Wooden Foundation Controversy

Although wooden foundations were, and continue to be, prevalent in houses across the country, their use in the MHHOP houses proved controversial from the outset.[4] Minutes from various 1977 meetings of the Blackfeet Housing Board of

[4] In its summary judgment pleadings, HUD refuted at length plaintiffs' claims that HUD required the use of wooden foundations, and that wooden foundations were

Directors establish that the choice to use wooden foundations was extensively debated.

For example, according to the minutes from a May 16, 1977 Board meeting, some wooden foundations were rejected for reasons that are not clear. ER 117. A May 31, 1977 Board meeting addressed the request of contractor Nicholas and Sons to use wooden foundations. *Id*. Minutes from a July 5, 1977 Board meeting further state that Archambault had hired an expert to inspect and grade the lumber used in the previously rejected foundations, and that the plywood was still rejected; those same minutes indicate that HUD deemed the use of wooden foundations "acceptable." ER 117-18. Minutes from a July 11, 1977 Board meeting state that contractor R.C. Hedreen's inspector examined the wooden foundations and found that most of the

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inconsistent with industry standards. *See* District Court Docket Entries144, 145, 175, 183, 184. In light of its resolution of the case, the district court did not reach these issues, and therefore they are not properly before the Court on plaintiffs' appeal. To the extent that plaintiffs have made such assertions in their opening brief (*see, e.g.*, Pl. Br. 10-14), however, HUD strenuously contests them, and in the event of a remand HUD will renew its arguments on the underlying merits dispute. The relevant federal regulations imposed the primary duty to inspect the construction activities to ensure compliance with the Minimum Property Standards on the Indian housing authority, not HUD. *See, e.g.*, 24 C.F.R. § 805.221 (1976) (making the housing authority "responsible for providing inspections during construction . . . to be performed by an architect, engineer or other qualified person," and requiring HUD only to make "site visits from time to time"); 24 C.F.R. § 805.216(g)(4) (1976) (placing responsibility for any soil testing on the Indian housing authority, and requiring that "[p]rofessional competence in soils and foundation engineering shall be required for both the performance of the subsurface soil investigation and evaluation of the results").

panels passed muster; minutes from that same board meeting indicate that the Board of Directors sent a letter to the Blackfeet Tribal Council regarding the use of wooden foundations, and that the Board specifically planned to meet with homeowners who would receive houses with wooden foundations. ER 118. An August 15, 1977 Board meeting also was taken up with the wooden foundations issue. *Id*. From a historical perspective, an April 2002 newspaper article sums up the controversy:

> Blackfeet officials say they were never keen about having wood, instead of more-expensive concrete, used for foundations. In fact, Blackfeet Housing Authority records show some of the homes were initially rejected by the tribal housing board as early as 1977.
> "We questioned it when HUD first talked about the wood foundations," says Blackfeet Chairman Earl Old Person, who formerly lived in one of the homes.

AR 2861, SER 84.

Dissatisfaction with the use of wooden foundations became more vociferous as certain homeowners immediately discovered problems with the houses due to alleged design and construction deficiencies. Indeed, in another 2002 newspaper article plaintiff Martin Marceau was quoted as saying "Right from the beginning we've had structural problems. They're not only toxic, but substandard. A lot of us quit paying our rent because nobody would listen to us." AR 2866, SER 86.

In their Third Amended Complaint (ER 24-42), plaintiffs confirm this very early dissent regarding the design and construction of their homes. They specifically

assert that the "Blackfeet Housing Authority and many homeowners objected contending that the climate on the Blackfeet Indian Reservation and other factors made wooden foundations ineffective, substandard, unhealthy, and dangerous." ER 35, ¶ 31. And they claim that HUD denied their objections to the use of wooden foundations. *Id.* ¶ 32.

C. Efforts to Procure Federal Assistance

Efforts to obtain federal assistance intensified in the late 1990s. Until then, individual homeowners had relied primarily on Blackfeet Housing to resolve the purported construction deficiencies. Despite the presence of inspectors employed by the architect and the engineering contractors, Blackfeet Housing elected in 1979 to retain their own inspectors. ER 129. Those inspectors purportedly noticed that several aspects of the Project MT 8-15 houses did not conform to the approved plans and specifications, including the water lines, drainage tiles, backfill, and concrete slab base. ER 130. Newly elected members of the Blackfeet Tribal Business Council voted in spring 1980 to terminate Blackfeet Housing's Board of Directors and assumed direct control over the housing authority, and around that time HUD awarded a grant to correct the problems with the wooden foundations. *Id*.

The construction problems also led to increased costs, and Blackfeet Housing requested and received additional funds for Project MT 8-15 by filing formal

amendments to the ACC, as required by the applicable statutes and regulations. AR 2381, 2385-93, 2413-30, SER 29, 30-38, 39-56. According to a newspaper report, the now-defunct Blackfeet Residential Organization was encouraged in 1993 to apply for a $10 million grant from HUD to fund the rehabilitation of replacement of the damaged houses, but Blackfeet Housing refused to recognize the legitimacy of the citizens' group, and the residential organization never submitted the application to HUD. AR 2862, SER 84.

Blackfeet Housing consistently had allocated its annual HUD block grants to other needs, however, and individual homeowners searched for other potential sources of federal funds to rehabilitate or rebuild their houses. Beginning in the late 1990s, they directed their pleas to officials in Washington, including HUD officials and representatives in Congress.

The housing authority had exhausted all HUD funds approved and distributed for Projects MT 8-15 and MT 8-17, and Blackfeet Housing could afford these repairs only by allocating a portion of HUD's annual block grants to these projects. Blackfeet Housing was reluctant to divert HUD funding from other needs, however, and consulted with HUD to determine the availability of special funds. ER 135. HUD had neither the requisite funds nor authorization to distribute any special funds to the Blackfeet for repairs or maintenance of the MHHOP houses, and HUD officials

repeatedly advised Blackfeet Housing of several options, including allocation of its annual block grants to the homeowners, conveyance without charge of the allegedly damaged houses to the homeowners, or creation of a nonprofit organization that would be able to solicit both federal and private funding to finance the necessary repairs. AR 2707-08, SER 66-67. Blackfeet Housing consistently declined these options.

In January 1998, for example, HUD officials met with representatives of Blackfeet Housing to discuss the deteriorating wooden basements, and Blackfeet Housing asked HUD to provide approximately $4 million to replace the wooden basements with concrete basements. ER 137. HUD administrator Vernon Harangara stated in a February 1998 letter to Blackfeet Housing that, since NAHASDA was enacted in 1997, HUD could no longer provide any additional funds to Blackfeet Housing through ACC amendments or emergency Comprehensive Grant Funds under the Comprehensive Grant Program (CGP). *Id*. Harangara advised that Blackfeet Housing's IHBG funds, when made available, could be used as long as it put the activity in its IHP. *Id*. He suggested that Blackfeet Housing allocate unused CGP grant funds to the basement repairs. *Id*.

Blackfeet Housing continued to refuse to allocate its block grants toward these repairs, electing instead to lobby senior HUD officials for a special allocation. In

March 1999, HUD officials and Blackfeet representatives began to plan a visit to the Blackfeet Reservation by HUD Secretary Andrew Cuomo. Blackfeet Housing representative S. Miller sent a fax on March 11, 1999 to Mike Boyd, the Director of Facilities Management for the Northern Plains Office of HUD's Office of Native American Programs, to discuss the logistics of the trip and to identify some of the issues to be addressed at the meeting. AR 2952-53, SER 89-90. The fax stated that members of the Blackfeet Tribal Council were scheduled to travel to Washington, D.C. later that month but would be willing to delay their trip to meet with Secretary Cuomo. AR 2953, SER 90. Miller sent a more comprehensive memorandum to Boyd on March 22, 1999, in which he outlined in greater detail the various housing issues confronting the Blackfeet. ER 131-36.

The details of Miller's memorandum reveal that the wooden foundations were just one of many issues to be discussed. Of the 2607 housing units on the Blackfeet Reservation, Miller estimated that fifty percent were in "substandard condition." ER 132. The Project MT 8-15 houses represented roughly ten percent of the total housing units being managed by Blackfeet Housing, and Miller's memorandum discussed numerous issues for which Blackfeet Housing sought assistance from HUD. *Id*. Miller identified Total Housing Needs of $193 million, of which only five percent would be spent to repair the wooden foundations. *Id*.

Three days later, on March 25, 1999, Blackfeet Chairman William Old Chief sent a letter to Secretary Cuomo expressing appreciation for Mr. Cuomo's interest in visiting the reservation and disappointment that "circumstances did not allow you to carry out the visit." AR 3034, SER 93. Chairman Old Chief informed Secretary Cuomo that Blackfeet representatives would be in Washington during the week of April 12, 1999 to meet with members of Congress, and the Chairman inquired whether he would be able to meet with Secretary Cuomo during the visit to discuss housing issues. *Id*. HUD officials met with Blackfeet representatives in April 1999, but it appears that Secretary Cuomo was unable to attend the meeting. *See* AR 2945, SER 88.

The Blackfeet tribal leadership continued asking HUD Secretary Cuomo to visit the Blackfeet Reservation to discuss its housing issues. In July 1999, Chairman Old Chief sent another letter to Secretary Cuomo in which he stated, "We are greatly honored by your upcoming visit to our reservation and look forward to your viewing our housing conditions and discussing with you the future housing needs of the tribe." AR 3035, SER 94. Secretary Cuomo ultimately visited the Blackfeet Reservation in August 1999, and during the visit he announced a $500,000 Indian Community Development Block Grant to rehabilitate nine houses and build a park. AR 2773, 2792-95, SER 76, 78-81.

During their discussions with HUD officials, the Blackfeet also tried to secure financial and political support from their elected representatives. The Blackfeet sent several letters to Senators Max Baucus and Conrad Burns, in particular, and found a sympathetic audience. In April 1998, Senators Baucus and Burns each sent letters to HUD regarding the deterioration of the wooden foundations in plaintiffs' houses. Senator Burns specifically discussed a March 1998 request from Blackfeet Housing for "a special appropriation of approximately $4 million to repair deteriorating wooden foundations of several housing units that were built with HUD funds during the 1970s." AR 2807, SER 82.

HUD Assistant Secretary Hal C. DeCell III replied separately to each letter in May 1998, stating that HUD had provided more than $16.7 million over the past six years to Blackfeet Housing under CGP and the Comprehensive Improvement Assistance Program. ER 127-28. As Vernon Harangara had advised Blackfeet Housing in February of 1998, Assistant Secretary DeCell stated that, since NAHASDA was enacted in 1997, HUD could no longer provide any additional funds such as ACC amendment funds or emergency CGP funds. *Id*.

In response to a subsequent June 2000 letter from Senator Burns, HUD Secretary Cuomo reiterated that HUD funds to assist with remediation or improvement of the MHHOP houses were available through only two programs: the

IHBG program and the Indian Community Development Block Grant program. ER 119. The Blackfeet had received approximately $6 million of IHBG funding each year since the program was implemented in 1998, but none of these funds had been allocated to the repair of the MHHOP houses. *Id*. Echoing a suggestion that previously had been made by members of his staff, Secretary Cuomo also suggested that the Blackfeet could create a Community Housing Development Organization, which would potentially allow the Blackfeet to obtain federal and private funding to assist with rehabilitation of the houses. AR 2744-45, SER 68-69.

For more than two years, the Blackfeet failed to act on HUD's suggestions. Ultimately, the tribal leadership chose to focus its attention on efforts to lobby Congress for a special appropriation for remedial funds. On April 24, 2002, HUD official Mike Boyd met with Blackfeet representatives and other government officials to discuss the presence of mold in the MHHOP houses. AR 3136, SER 97. During the meeting, the Blackfeet Tribe decided to ask Congress for $30 million to replace 203 housing units, SER 3136, and one month later Senator Baucus sought $15 million in special appropriations to fix the foundations. AR 2707-08, SER 66-67. HUD continued to suggest that the Blackfeet seek funding through HUD's Healthy Homes Grant Program, establish a Community Development Housing Organization, or use their NAHASDA funds, *id.*, and at the April 2002 meeting the Blackfeet leadership

requested assistance "in setting up a nonprofit on the Reservation," AR 3136, SER 97.

The exact amount of HUD funding received by the Blackfeet since 1977 is not clear from the record, but for the past twenty years Blackfeet Housing has received millions of dollars per year from HUD in the form of annual block grants. Between 1992 and Congress's enactment of NAHASDA in 1997, the largest source of HUD funding to the Blackfeet was the CGP, which distributed funds to Indian housing authorities according to a statutory formula and allowed local housing authorities to determine how to allocate those funds. During these six years, Blackfeet Housing received almost $17 million of funding through the CGP. ER 127. Total HUD funding to the Blackfeet from 1993 through 1999 was $41.5 million. AR 3042, 3054, SER 95, 96. Consistent with its commitment to provide NAHASDA funding commensurate with the amounts allocated to tribes under the 1937 Housing Act, HUD distributed $5.8 million to Blackfeet Housing in 1998 and $6.1 million in 1999. ER 133.

The decision not to allocate any portion of those funds to the homeowners rests squarely with the independent housing authority. Blackfeet Housing did not mention the need for remediation of the wooden foundations in its CGP physical needs assessments until 1997. ER 127. And although Blackfeet Housing did include

the foundation remediation in its 1997 CGP request, it elected not to include the foundations in its five-year action plan. ER 128.

II. History of this Litigation

Plaintiffs are eight American Indian persons who purchased MHHOP houses. ER 2. On August 2, 2002, plaintiffs brought this purported class action suit against Blackfeet Housing, four members of Blackfeet Housing's Board of Directors, and Mel Martinez, in his official capacity as Secretary of HUD, for claims related to the use of treated wood foundations in the houses.[5] The amended complaint included claims for breach of trust, violation of federal statutes, breach of implied warranties, breach of the covenant of good faith and fair dealing, emotional distress, and violation of the APA. The various defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. ER 4. The district court granted the motion and dismissed all claims. *Id*.

Plaintiffs appealed, and between 2006 and 2008, this Court issued three opinions in the case. On July 21, 2006, the Court affirmed dismissal of all claims against HUD but reversed dismissal of the claims against Blackfeet Housing. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974, 987 (9th Cir. 2006). The Court granted Blackfeet Housing's petition for rehearing, however, and reheard

[5] Plaintiffs' proposed class has not been certified.

the case, issuing a revised opinion on March 19, 2008. *Marceau v. Blackfeet Hous. Auth. (Marceau II)*, 519 F.3d 838, 842 (9th Cir. 2008).

In *Marceau II*, the Court affirmed dismissal of all claims against HUD except the APA claims, and found that HUD might be liable under the APA if (1) it required Blackfeet Housing to construct the houses using substandard materials and construction techniques in violation of HUD regulations, and (2) it had a legal obligation to respond to requests for assistance by Blackfeet Housing and the individual homeowners and it failed to do so. *Id.* at 851–52. The Court also invited the parties to file additional petitions for rehearing or rehearing en banc. *Id.* at 841.

The federal defendants subsequently filed a petition for panel rehearing, and Blackfeet Housing filed a petition for rehearing en banc. *Marceau v. Blackfeet Housing Authority (Marceau III)*, 540 F.3d 916, 918-19 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009). The petitions were denied, but the panel filed an amended opinion that "replace[d]" *Marceau II* "in its entirety" and "replaced in part and adopted in part" *Marceau I*. *Id.*

In *Marceau III*, the Court concluded that plaintiffs had two potentially cognizable APA claims based on the use of wooden foundations in the houses. *Id.* at 928. The Court first determined that the MHHOP houses had to comply with HUD's Minimum Property Standards in effect when the construction specifications

were approved in 1977. *Id.* at 925, 928. Because these standards "permitted, but did not require," the use of chemically-treated lumber for foundations in single-family homes, the Court determined that HUD may have violated its own regulations if it required Blackfeet Housing to use arsenic-treated lumber in the wooden foundations. *Id.* at 928. The Court next concluded that HUD may have violated 42 U.S.C. § 1441 if HUD mandated use of arsenic-treated lumber when such lumber was not within industry standards at the time that the houses were approved and constructed. 540 F.3d at 928. Because the record was silent with respect to whether arsenic-treated lumber was consistent with industry standards and whether HUD had failed to comply with its regulations by requiring use of such lumber, the Court remanded plaintiffs' APA claims to the district court. *Id.*

Significantly, this Court found that plaintiffs had not stated a viable claim related to HUD's alleged failure to respond to requests for assistance because "HUD had no legal obligation to respond to Plaintiffs' requests [for assistance], sufficient to give rise to a claim under the APA." *Id.* at 928 n.6. The Court noted that HUD did have an obligation to respond to a proper request for assistance by housing authorities, but concluded that "there is no evidence in the record of a properly formed request for assistance by the Blackfeet Housing Authority." *Id.*

On remand, the district court instructed plaintiffs to file amended pleadings limited to the APA claims, ER 7, and plaintiffs filed their Third Amended Complaint on October 6, 2009, ER 24-42. In Count One, plaintiffs assert that HUD required the use of wooden foundations in their houses, despite the objection of the Blackfeet Housing Authority and "many homeowners." ER 35, ¶ 31. Plaintiffs allege that HUD denied all appeals to change or reverse this decision, which contravened HUD's own regulations as well as HUD's statutory obligations. ER 35-36. Plaintiffs further allege that they "were unaware of the full extent of this defect and the accompanying health problems caused by the defect until just prior to the initial filing of this suit." ER 36, ¶ 39.

In Count Two, plaintiffs allege that the Blackfeet Housing Authority and individual homeowners asked HUD to repair and maintain the 153 houses at issue in this litigation or to provide adequate funds to the housing authority or the homeowners for those repairs. ER 37. Plaintiffs also allege "that each time a request was made to HUD to fix the problem caused by the wood foundations and other construction defects, the request was denied" and HUD stated that it would only disburse "regular annual grant monies appropriated by Congress." ER 37-38, ¶ 41. Plaintiffs allege that HUD's failure to provide these funds was contrary to the law. ER 38-39.

After the parties filed cross-motions for summary judgment, the district court held a hearing on both motions and issued its opinion and order. ER 1-18. The court first addressed the applicability of the statute of limitations and found that all APA claims asserted in Count One were time-barred, irrespective of whether the claims were treated as procedural or substantive challenges. ER 10. Noting that procedural challenges to HUD's alleged decision to require the use of arsenic-treated wood foundations had to be brought within six years of that alleged decision, the court held that the statute of limitations expired on all procedural challenges on November 15, 1983 — six years after construction began and nineteen years before plaintiffs brought this suit. ER 11 (citing 28 U.S.C. § 2401(a)). Substantive challenges to the decision fared no better. Relying on *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991), the district court stated that the six-year limitations period began to run on all substantive challenges to HUD's alleged 1977 decision when that decision was "applied" to each individual homeowner. ER 11. The court held that this application occurred "as the homes were being built." *Id*. Because construction of Project 8-15 began in 1977 and ended in1980, these claims accrued no later than 1980, and the limitations period for substantive challenges expired in 1986. ER 12.

The district court also rejected plaintiffs' attempt to invoke the discovery rule to toll the statute of limitations until 1997, when plaintiffs allegedly discovered various injuries that had been caused by the use of wooden foundations in their houses. *Id*. The court held the discovery rule inapposite to an APA claim for judicial review, and in light of plaintiffs' failure to cite any case supporting invocation of the discovery rule in this context, the court rejected such an application. *Id*.

Turning next to Count Two, the district court held that plaintiffs had offered no evidence that HUD failed to respond to a properly formed request for assistance. ER 15. Before reaching the merits of these claims, however, the court addressed plaintiffs' right to obtain their requested relief. ER 13. Plaintiffs' prayer for relief included only a request that the court order HUD to repair or rebuild the houses. ER 40. Plaintiffs had not sought any order compelling HUD to respond to the purported requests for assistance. Finding that liability for the claims in Count Two would not warrant an order compelling HUD to repair or rebuild the houses, the court instead treated Count Two as a request for an order compelling HUD to respond to the purported requests for assistance. ER 13.

The court then reached the merits of those claims. Reiterating this Court's prior conclusion "that HUD had no legal obligation to respond to any request for assistance by individual homeowners (i.e., the plaintiffs in this case)," ER 14 (citing

Marceau III, 540 F.3d at 928 n.6), the court "summarily dismissed" all APA claims "based upon requests for assistance made by individual homeowners." ER 14. The court finally addressed two pieces of correspondence that formed the basis of plaintiffs' claims: the March 1999 memorandum from Blackfeet Housing to a HUD employee and the April 1999 letter from the chairman of the Blackfeet Nation, Williams Old Chief, to the Secretary of HUD. ER 15. After discussing the statutory and regulatory scheme governing Indian housing programs in 1999, when the two documents allegedly were sent, the court concluded that HUD was obliged to respond only to an Indian Housing Plan that complied with the statutory requirements of 25 U.S.C. § 4112. ER 15-16. The court observed that both the letter from Chairman Old Chief and the memo from S. Miller "relate to a visit by HUD Secretary Cuom[o] to the Blackfeet Indian Reservation in 1999, and list a myriad of discussion issues for Cuom[o]'s visit." ER 16. Neither document was an Indian Housing Plan, and the court held that HUD had no legal obligation to respond. *Id*.

Finally, the district court emphasized that "HUD may only provide funds as appropriated and authorized by Congress." ER 16-17. As the court explained, HUD had provided annual block grants to the Blackfeet in accordance with its authority under NAHASDA, and the tribe was responsible for allocating those funds to its various housing needs. ER 17. "HUD's responsibility is one of oversight and audit,

to ensure that the federal funds are spent for the intended purpose. It has by the record met that responsibility." *Id.* (internal citations omitted). The court thus granted HUD's motion for summary judgment and denied plaintiffs' motion. *Id*.

SUMMARY OF ARGUMENT

Unable to seek money damages from the United States under this Court's previous holdings, plaintiffs resort to the APA for potential relief. Yet plaintiffs' APA claims are no more viable than the claims that this Court already has rejected. Accordingly, the district court correctly granted summary judgment to HUD, and its decision should be affirmed.

1. Plaintiffs rely upon entirely inapposite authority to support their untimely challenge, brought in 2002, to HUD's alleged decision to require use of wooden foundations in 1977. Although this Court opined as an abstract matter in *Marceau III* that HUD might be held liable under the APA if it unlawfully required the use of wooden foundations in plaintiffs' houses, that claim plainly is barred by the statute of limitations – an issue that was not before the Court when it decided *Marceau III*. Statutes of limitations protect parties, both private and public, from eternal judicial review of their past decisions. Plaintiffs failed to assert that claim against HUD when it arose some twenty-five years before they brought this action, and the homeowners may not now resurrect such long-defunct claims. Nor does the alleged discovery of

mold in plaintiffs' houses in 1997 mean that the challenged 1977 decision was somehow "applied" to plaintiffs in 1997, for purposes of APA review; the APA is not a tort statute, and it contains no tort-type discovery rule.

2. Squarely confronted with this insurmountable statutory obstacle and searching for claims that might evade the limitations bar, plaintiffs also renew their argument that HUD unlawfully failed to respond to past requests for assistance, and they ask the Court to require HUD to respond to these pleas. HUD was powerless to provide the assistance that plaintiffs sought, however, and the agency fully complied with its obligation to respond to all properly formed requests.

Limited by the scope of congressional appropriations, HUD provided to Blackfeet Housing all funds authorized for distribution. Blackfeet Housing chose not to allocate these annual grants to plaintiffs and instead allocated the funds to its other needs. Having received no satisfaction from the housing authority, plaintiffs sought to bypass Blackfeet Housing and obtain the necessary remedial funds directly from HUD. To this end, plaintiffs and other members of the Blackfeet community wrote letters to various HUD officials explaining their quandary. HUD was only authorized to dispense funds to the housing authority, however, and all authorized funds had been distributed. Evidently frustrated by HUD's response and by subsequent

legislative inaction, plaintiffs now ask this Court to compel HUD to respond to their letters by repairing their houses.

Plaintiffs erroneously contend that HUD's failure to respond to their requests was unlawful. Plaintiffs point to only two documents to which HUD allegedly failed to respond: a March 1999 memorandum and an April 1999 letter. These two documents do not support plaintiffs' claims. The April 1999 letter was not sent by Blackfeet Housing, and as this Court previously held in *Marceau III*, HUD was obliged to respond only to properly formed requests for assistance from the housing authority. Neither document, moreover, complied with the strict statutory and regulatory requirements governing proper requests for assistance. The district court thus properly granted summary judgment to HUD on these claims.

In sum, plaintiffs allege that HUD had a legal obligation to respond to two pieces of correspondence that discuss, within a long list of potential action items, the need to repair some houses with wooden foundations. Plaintiffs are unable to point to any statute or regulation from which HUD's duty to respond to these documents is derived, and it is abundantly clear that no such duty existed at the time that HUD received these documents.

Finally, plaintiffs invite the Court to comb through the extensive administrative record to determine whether HUD failed to respond to any other properly formed

requests for assistance. But this all-encompassing request is not a legally cognizable argument, and the Court is under no obligation to do plaintiffs' work for them. As the late Judge Goldberg of the Fifth Circuit memorably stated, "Judges are not ferrets!" *Nicholas Acoustics & Specialty Co. v. H & M. Const. Co.*, 695 F.2d 839, 847 (5th Cir. 1983). The district court's decision should be affirmed.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *See, e.g., Nolan v. Heald Coll.*, 551 F.3d 1148, 1153 (9th Cir. 2009).

ARGUMENT

I. THE STATUTE OF LIMITATIONS BARS PLAINTIFFS FROM SEEKING JUDICIAL REVIEW OF HUD'S ALLEGED DECISION IN 1977 TO REQUIRE THE USE OF WOODEN FOUNDATIONS.

Count One of plaintiffs' Third Amended Complaint challenges an alleged choice made by HUD more than twenty-five years before plaintiffs filed suit, and these claims plainly are barred by the statute of limitations. Civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues," 28 U.S.C. 2401(a), and this general limitations provision applies to claims under the APA. *Hells Canyon Pres. Council v. U.S. Forest Serv.*,

593 F.3d 923, 930 (9th Cir. 2010); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988).

The date on which a right of action against the United States first accrues depends on the nature of the suit. A challenge to "a mere procedural violation in the adoption of a regulation or other agency action" or a "policy-based facial challenge to the government's decision" must be filed within six years of the contested decision. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). A substantive challenge to an agency decision, on the other hand, "must be brought within six years of the agency's application of the disputed decision to the challenger." *Id.* at 716.

Plaintiffs presently seek review of HUD's alleged decision to "require" use of wooden foundations and HUD's alleged denial of the homeowners' requests to change or reverse that decision.[6] ER 35, ¶¶ 34, 35; *see Hells Canyon Pres. Council*,

[6] We note as a factual matter that plaintiffs have cited no evidence in the record that HUD ever "required" the use of wooden foundations, and we are aware of no such evidence. When the initial plans for the project were submitted to HUD, the agency merely commented that the project appeared to be "over-designed" from a cost perspective, and recommended a redesign by Blackfeet Housing's architect. ER 98; AR 2306, 2309, SER 20, 23. None of HUD's comments on the design, however, suggest the use of wooden foundations. Even after bids came in well over budget, HUD only recommended that the project be redesigned by the housing authority to bring it within available funding. ER 97. HUD did not in any way specify what aspects of the project should be redesigned, let alone mandate the use of wooden foundations. These decisions rested with Blackfeet Housing.

593 F.3d at 930 (noting that an APA claim under 5 U.S.C. § 706(2) requires plaintiffs to identify "a final agency action upon which the claim is based"). The limitations clock therefore began to tick on plaintiffs' substantive challenge the moment that HUD's alleged decision was applied to plaintiffs. Without question, that application occurred in 1977, when HUD allegedly required Blackfeet Housing to use wooden foundations and denied individual homeowners' appeals to reverse that decision.

Before the contractors broke ground in 1977, the homeowners were told that wooden foundations would be used in some of their houses. By their own account, plaintiffs immediately questioned the wisdom of that decision, and they contend that they suffered the effects of that decision "right from the beginning." *See* AR 2861, 2866, SER 84, 86. Plaintiffs forwent their right to seek judicial review of HUD's alleged decision in 1977, however, and the limitations period has long since expired.

Plaintiffs now seek to resurrect their long-barred claims by engrafting a tort-type discovery rule onto the APA. Plaintiffs are unable to support their argument with any applicable authority, and instead rely on a series of cases that are wholly inapposite. Although this Court has tolled or restarted the six-year limitations period where the plaintiffs were unaware of, and unaffected by, the agency's decision at the time it was made or where the agency affirmatively reapplied its prior decision to the plaintiffs, *see Wind River*, 946 F.2d at 715-16, neither of those exceptions is relevant

here. HUD took no affirmative action in 1997 to reapply its decision to plaintiffs, and having long deplored the use of wooden foundations in their houses, plaintiffs may not now argue that HUD's decision was first applied to them twenty years after HUD allegedly made that decision.

A. The record indisputably establishes that all parties involved in the construction of the houses, including the MHHOP homeowners themselves, were aware of the use wooden foundations in 1977. *See* ER 35, ¶ 31 (alleging that Blackfeet Housing and "many homeowners" objected to the use of wooden foundations in 1977 because the local climate and other factors "made wooden foundations ineffective, substandard, unhealthy, and dangerous"); ER 118 (noting that the Blackfeet Housing Board of Directors in July 1977 raised the issue with the Blackfeet Tribal Council and specifically planned to meet with homeowners who would receive houses with wooden foundations). Indeed, plaintiffs readily concede that they have known of HUD's alleged decision to use wooden foundations since 1977. *See* Pl. Br. 34 ("It is true that the Housing Authority, the Tribe, and the members of the Tribe opposed the use of wooden foundations at the time the decision was made in 1977."); *id.* at 25 ("[T]he Housing Authority was aware of the wooden foundations from the beginning when they were proposed as a way for bringing the costs down and into the HUD[] budget . . . . They even voted to take the matter to the

Tribal Council and to the 'people that are getting these foundations.'") (quoting ER 118); *see also* Third Amended Complaint, ¶ 31, ER 35.

It is equally apparent that the decision to use wooden foundations was applied to plaintiffs in 1977. Plaintiffs knew in 1977 that they would be affected by the use of wooden foundations; they applied for MHHOP housing at that time with the intention ultimately of purchasing the homes from Blackfeet Housing. *See* 24 C.F.R. § 805.422 (1976) (requiring persons receiving MHHOP housing to lease the houses on a "rent-to-own" basis). While waging their public campaign to obtain federal funds to replace the wooden foundations with concrete, moreover, plaintiffs consistently asserted that the use of wooden foundations had caused immediate and patent injury to them.

In a February 2002 letter, for example, plaintiffs Gary and Mary Jane Grant, writing on behalf of all affected homeowners, stated that the houses "had structural problems from the beginning because of the wood foundations and construction flaws in the walls and roof." AR 2754, SER 70. Two months later, Mr. Grant told a newspaper reporter that "tribal leaders and housing officials have been aware of some of the problems for decades." AR 2861, SER 84. Similarly, in another 2002 newspaper article plaintiff Martin Marceau was quoted as saying "Right from the beginning we've had structural problems. They're not only toxic, but substandard.

A lot of us quit paying our rent because nobody would listen to us." AR 2866, SER 86.

When Blackfeet Housing and HUD refused to accede to plaintiffs' demands and allegedly continued to insist on the use of wooden foundations, plaintiffs should have sought judicial review of the decision before the six-year limitations period expired in 1983. Instead, plaintiffs filed this direct attack on the 1977 decision to use wooden foundations on August 2, 2002 — approximately twenty-five years after Blackfeet Housing broke ground on Project MT 8–15 and more than twenty years after construction was completed. Plaintiffs may not now seek judicial review of the same agency decision to which they objected twenty-five years ago. *See Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978) (holding that 28 U.S.C. § 2401(a) barred a direct challenge to an agency decision almost thirty years after the agency decision was made); *see also Wind River*, 946 F.2d at 715 (adopting the D.C. Circuit's approach in *Oppenheim*). A party may not sleep on its rights for a quarter of a century and then assert them in an APA action.

B. Plaintiffs contend that "there was no adverse application of the decision to these Plaintiffs" until "the health risks caused by the mold and moisture conditions became apparent" in 1997. Pl. Br. 34. This is not a tort action, however, and the alleged recent spread of mold throughout plaintiffs' houses is irrelevant to their APA

claims. HUD took no action in 1997 that contributed to the spread of mold in plaintiffs' houses, and the alleged appearance of mold does not represent an adverse application by HUD of its purported decision twenty years earlier to use wooden foundations.

Plaintiffs' emphasis on their discovery of injuries allegedly caused by mold and arsenic conflates an APA claim with a tort claim. Plaintiffs contend that any suit brought before the discovery of mold in 1997 would have been dismissed because they lacked evidence of harm. *See* Pl. Br. 31. This is perhaps true of claims sounding in tort or contract, but it is not true of claims under the APA.

To succeed on their APA claims against the United States, plaintiffs need only prove that HUD acted arbitrarily, capriciously, or without statutory authority in requiring the use of wooden foundations in the houses. *See* 5 U.S.C. § 706; *Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States*, 384 F.3d 721, 727 (9th Cir. 2004). The APA does not require plaintiffs to establish that they have been physically harmed by the agency's unlawful, arbitrary, or capricious action. If HUD acted unlawfully when it required the use of wooden foundations, as plaintiffs contend, their claims accrued the moment that HUD made the decision, irrespective of whether plaintiffs had suffered any physical harm from that decision.

To support their contention that the discovery of mold constituted an adverse application of the 1977 decision, plaintiffs cite several cases in which the plaintiffs have been allowed collaterally to attack a prior agency decision after a renewed adverse application of that decision. *See* Pl. Br. at 35–37. These cases are inapposite. This Court previously has tolled the six-year statute of limitations only where (1) the agency affirmatively reapplied its original decision to the plaintiffs, or (2) the plaintiffs "could have had no idea" at the time of the original agency decision that they would be affected by the decision. Neither situation presents itself here; individual homeowners were fully aware in 1977 that HUD's alleged decision to use wooden foundations would affect them, and HUD has taken no action since 1977 to apply that decision to the homeowners. Indeed, the only "final agency actions" challenged by plaintiffs are the alleged decision in 1977 to require wooden foundations and HUD's denial of 1977 appeals to reverse that decision. *See* ER 35-36. The six-year limitations period therefore began to run in 1977.

Plaintiffs wrongly rely on cases in which the agencies took affirmative action several years after the challenged decision to apply that prior decision to the plaintiff. In *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008), for example, the EPA promulgated a rule in 1979. The plaintiffs filed a petition in 1999 asking the EPA to repeal the 1979 rule, and after the EPA denied their petition

for rulemaking in 2003, the plaintiffs filed suit challenging the EPA's allegedly *ultra vires* promulgation of the 1979 regulation. *Id.* at 1019. The Court held that the six-year statute of limitations did not bar the plaintiffs' substantive challenge to the 1979 regulation, because the EPA's formal denial of the plaintiffs' petition constituted an affirmative adverse application of the regulation. *See id.* Similarly, in *Wind River* the Court held that the statute of limitations did not begin to run on the plaintiff's claims until 1987, when the Bureau of Land Management affirmatively applied its 1979 classification to the plaintiff by denying the plaintiff's application to pursue exploration and development of its claims. 946 F.2d at 712.

Unlike the agencies in those cases, HUD took no action in or around 1997 that constituted an adverse application of its 1977 decision to plaintiffs, and plaintiffs' complaint does not challenge any decision made by HUD after 1977. HUD's decision to approve the use of wooden foundations was adversely applied to plaintiffs in 1977, when the decision was made. Plaintiffs cannot be said to suffer an adverse application of that decision whenever they are affected by some alleged consequence of that decision. To hold otherwise would subvert the very purpose of the statute of limitations by subjecting agencies' decisions to eternal judicial review under the APA.

HUD allegedly exceeded its legal authority when it failed to comply with the controlling statutes and regulations, and it is the 1977 application of that allegedly unlawful decision that plaintiffs challenge today. The APA does not provide a separate cause of action for each instance of harm resulting from an agency's decision. Plaintiffs may bring a substantive challenge to an earlier agency decision only in "the context of an adverse *application* of that decision," *Wind River*, 946 F.2d at 715 (emphasis added), and the discovery of mold and health problems resulting from a prior agency decision cannot reasonably be characterized as an adverse application by HUD of its 1977 decision.

Plaintiffs also erroneously rely on cases in which the agency's decision initially did not affect the plaintiffs and the court allowed the plaintiffs' suit to proceed to avoid the injustice that otherwise would be caused by effectively insulating the agency's decision from review. The rule articulated in those cases would toll the six-year limitations period only if plaintiffs and their predecessors-in-interest "could have had no idea" in 1977 that HUD's approval of the use of wooden foundations "would affect them." *N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) *cert. denied*, 130 S. Ct. 2095 (2010) (internal quotation marks omitted); *see also Strich v. United States*, No. 09-cv-01913, 2011 WL 1322053, at *3 n.8 (D. Colo.

Apr. 6, 2011) (stating that the plaintiff's APA claim was subject to predecessor-in-interest's six-year limitations period).

To the contrary, the undisputed facts establish that plaintiffs could have known, and in fact did know, that the 1977 decision to use wooden foundations "would affect them." Plaintiffs themselves contend that they pointedly objected to the alleged decision in 1977, because the local climate and other factors "made wooden foundations ineffective, substandard, unhealthy, and dangerous." ER 35, ¶ 31.

Plaintiffs' citation to *Wind River* in this context is equally unavailing. The Bureau of Land Management's classification of certain land as a Wilderness Study Area in *Wind River* did not affect the plaintiffs there until they attempted to stake mining claims on the land several years later. 946 F.2d at 711. Because a strict application of the six-year limitations period effectively would have insulated the agency's classification from judicial review, this Court held that the limitations period did not begin to run until the agency's classification was applied to the plaintiffs. *Id.* at 715; *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1182-83 (E.D. Cal. 2003) (extending statute of limitations where "plaintiffs could have had no idea" that prior agency decision would affect them ten years later). Conversely, HUD's purported decision to require the use of wooden foundation was

applied to plaintiffs immediately and never presented any risk of insulation from judicial review.

In short, the six-year statute of limitations bars plaintiffs from launching a direct attack upon an agency decision made twenty-five years before they filed suit. *Wind River* permits plaintiffs to seek judicial review of the use of wooden foundations in the Project MT 8-15 and MT 8-17 houses only in the event of a new, adverse application of that decision to plaintiffs by HUD. Plaintiffs do not challenge a new, adverse application of HUD's 1977 decision; they challenge the 1977 decision itself. Plaintiffs' request for relief from that 1977 decision therefore is untimely and is barred by the statute of limitations.

II. PLAINTIFFS HAVE NOT IDENTIFIED ANY PROPERLY FORMED REQUEST FOR ASSISTANCE TO WHICH HUD FAILED TO RESPOND.

Plaintiffs contend that HUD failed to respond to several requests for assistance to which HUD was obliged to respond, but each purported request for assistance suffered from critical infirmities that relieved HUD of any such obligation. This Court previously held that HUD was obliged to respond only to properly formed requests for assistance from Blackfeet Housing, *Marceau III*, 540 F.3d at 928 n.6, yet plaintiffs' allegations rest entirely on two pieces of correspondence whose content and form manifestly contradict plaintiffs' contention that these purported requests for

assistance were properly formed. Plaintiffs also ask this Court to determine whether HUD was obliged to respond to appropriations requests, Annual Contributions Contract applications, or other documents requesting assistance, *see* Pl. Br. 2, but plaintiffs do not cite any specific requests, applications, or documents in their briefs. Furthermore, plaintiffs have never alleged that HUD failed to respond to a formal appropriations request, including an Annual Contributions Contract application or an Indian Housing Plan. The district court therefore properly rejected these claims.

A. Neither The Old Chief Letter Nor The Memorandum From Mr. Miller Constituted A Properly Formed Request For Assistance.

Plaintiffs identify two separate pieces of correspondence to which HUD allegedly had an obligation to respond: (1) an April 1999 letter from William Old Chief, chairman of the Blackfeet Tribe, to the Secretary of HUD ("Old Chief Letter"); and (2) a March 1999 memorandum from Blackfeet Housing representative S. Miller to a HUD employee ("Miller Memo"). Pl. Br. 40-41. Neither the Old Chief Letter nor the Miller Memo complied with the statutory and regulatory requirements governing properly formed requests for assistance, however, and it is readily apparent that these documents were never intended to constitute formal requests for assistance. Under the plain terms of this Court's decision in *Marceau III*, moreover, HUD had

no legal obligation to respond to the Old Chief Letter because it was not sent by Blackfeet Housing. Plaintiffs' allegations thus are insufficient to justify relief.

1. In *Marceau III*, the Court clearly and definitively replaced its holding in *Marceau II* and made clear that HUD "had no obligation to respond to plaintiffs' requests" for assistance. 540 F.3d at 928 n.6. Instead, the Court stated that 24 C.F.R. § 905.270 (1992)[5] and 25 U.S.C. §§ 4111 and 4132(1) "impose[d] an obligation on HUD to respond to properly formed requests for assistance by *housing authorities*." *Marceau III*, 540 F.3d at 928 n.6. Whether a request for assistance was "properly formed" therefore must be examined in the context of the applicable statutory and regulatory requirements. HUD had no general obligation to respond to all requests for assistance, irrespective of the source, form, or contents of any such request. Because the Old Chief Letter and Miller Memo did not comply with the statutory and regulatory requirements governing proper requests for assistance, HUD had no legal obligation to respond.

The Old Chief Letter and Miller Memo each were sent in 1999, and HUD's obligation to respond therefore must be examined in relation to the statutes and regulations in effect at that time. Until 1996, Indian housing programs were governed by the United States Housing Act of 1937, as amended, Pub. L. No. 93-383, 88 Stat.

[5] *Marceau III* cited this regulation as 24 C.F.R. § 905.270 (1977). In fact, the regulation was not promulgated until 1992.

633, 653, and the Indian Housing Act of 1988, Pub. L. No. 100-358, 102 Stat. 676. HUD had promulgated 24 C.F.R. § 905.270 (1992) pursuant to its authority under these two acts. In 1996, however, Congress overhauled all federal Native American housing programs when it enacted NAHASDA, Pub. L. No. 104-330, 110 Stat. 4016. NAHASDA repealed 24 C.F.R. § 905.270 (1992), which had allocated responsibility among the various parties for correcting design and construction deficiencies in MHHOP houses.

Since enactment of NAHASDA, HUD provides Indian Housing Block Grants (IHBGs) to American Indian tribes to carry out affordable housing activities. 25 U.S.C. § 4111(a). The grants may be used for modernization, reconstruction, or rehabilitation of houses such as plaintiffs'. 25 U.S.C. § 4132(1)–(2). IHBGs are provided only upon submission of an annual Indian Housing Plan (IHP). *Id.* § 4111(b)(1)(A), (c); 24 C.F.R. § 1000.212 (1999) ("An Indian tribe . . . must submit an IHP to HUD to receive funding under NAHASDA."); *but see* 24 C.F.R. § 1000.224 (1999) (stating that HUD may waive the IHP requirements, upon the request of an Indian tribe or its housing authority, "when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control"). The amount of an annual block grant is determined by a statutory formula, 25 U.S.C. § 4152, and consists of two components: (1) a formula based on the number of

qualifying housing units, including MHHOP units, and a national per-unit subsidy amount, including subsidies for modernization, and (2) a need component that takes account of seven different criteria, including the number of Indian persons living in the formula area, the median household income, and the tribe's actual housing costs. 24 C.F.R. §§ 1000.301-.340 (1999).

Grant funds cannot be provided until funds are available for disbursement, the IHP has been submitted, and HUD has determined the IHP to be in compliance with certain stringent statutory requirements. *Id.* § 1000.214. An IHP must include (1) a statement of goals and objectives to be accomplished in the year at issue; (2) a description of the housing needs of all Indian families in the jurisdiction; (3) a description of how the funds will be used, including a description of how the funds will leverage additional resources; (4) a description of affordable housing resources available, including "a description of the manner in which the recipient will protect and maintain the viability of [MHHOP] housing" and a description of any "anticipated housing rehabilitation programs necessary to ensure the long term viability of the housing"; and (5) certification that the IHP complies with various requirements. 25 U.S.C. § 4112(b)(2), (c) (1999).

HUD therefore was not obligated to respond to the Miller Memo and the Old Chief Letter unless the documents complied with the statutory and regulatory

requirements in place following enactment of NAHASDA. Plaintiffs do not contend — nor could they fairly contend — that either document complied with these statutory and regulatory requirements. The two letters make no reference to the statutes or regulations and include only vague and non-actionable requests for assistance.

The Old Chief Letter provided HUD with an outline of the issues that Chairman Old Chief and a delegation of Blackfeet representatives intended to discuss with HUD Secretary Cuomo during a potential visit to the Blackfeet Reservation. ER 120. The Old Chief Letter lists numerous issues across a broad spectrum of subjects, and the discussion of wooden foundations is limited to just one paragraph in the six-page letter. ER 121–24 (outlining the tribe's community and housing needs, including the discussion of wooden foundations that plaintiffs treat as a formal and proper request for assistance). It would be eminently unreasonable to treat these sweeping issue summaries as formal requests for assistance under NAHASDA and its implementing regulations.

The Miller Memo is substantially similar in substance and form to the Old Chief Letter. Sent by S. Miller at Blackfeet Housing to HUD employee Mike Boyd less than three weeks before the Old Chief Letter was sent to Secretary Cuomo, the Miller Memo provides a brief introduction to the Blackfeet Tribe and a synopsis of

the same issues addressed in the Old Chief Letter. ER 131–36. Less than two weeks before sending the Miller Memo, Miller sent a fax to Boyd discussing the logistics of Secretary Cuomo's potential trip and introducing the issues on which he would expound in the subsequent memorandum. AR 2952-53, SER 89-90. The timing and contents of the fax, the Miller Memo, and the Old Chief Letter indisputably establish that each document was prepared in anticipation of Secretary Cuomo's potential visit. Indeed, the subject line of the Miller Memo reads, "Discussion Issues – Cuomo." ER 131. Like the Old Chief Letter, the Miller Memo ignores the statutory and regulatory requirements of a formal request for assistance and certainly was not intended to constitute a formal petition from Blackfeet Housing for remedial funding.

Plaintiffs suggest that *Marceau III* imposed an additional obligation to respond that is distinct from HUD's statutory and regulatory obligations to respond, *see* Pl. Br. 40–41, but this argument is untenable. As the Court made clear in *Marceau III*, HUD's obligation to respond to properly formed requests for assistance derived solely from the applicable statutes and regulations. *See Marceau III*, 540 F.3d at 928 n.6. The Old Chief Letter and Miller Memo cannot constitute properly formed requests for assistance within the meaning of *Marceau III* unless they comply with the requirements of those statutes and regulations, and both documents plainly fall far short of that standard.

Plaintiffs' argument relies heavily on this Court decision in *Marceau II*, *see* Pl. Br. 43-44, but that decision is no longer valid – indeed, it no longer exists. The Court withdrew that opinion and "replaced [it] in its entirety" with its subsequent opinion in *Marceau III*. 540 F.3d at 918. Plaintiffs' reliance on *Marceau II* in this context is further misplaced because plaintiffs have reverted to challenging HUD's alleged 1977 decision to use wooden foundations. Although ostensibly addressing the allegation in Count Two that HUD failed to respond to requests for assistance, plaintiffs' argument here in fact reiterates their earlier argument that HUD acted unlawfully when it allegedly required the use of wooden foundations. Plaintiffs also mistakenly cite various regulations that allegedly required HUD to fund the correction of design deficiencies. These regulations do not create a separate cause of action for plaintiffs and manifestly do not relate to HUD's alleged obligation to respond to requests for assistance in 1999. Plaintiffs' arguments thus are without merit.

2. Furthermore, the Court need not determine whether Chairman Old Chief's purported request for assistance was "properly formed," because HUD had no obligation to respond to any requests for assistance from homeowners or third parties such as Chairman Old Chief. Relying on the provisions of 24 C.F.R. § 905.270 and 25 U.S.C. §§ 4111 and 4132(1), the Court stated in its superseded *Marceau II* opinion

that plaintiffs had a cognizable claim for injunctive relief premised on HUD's failure to respond to their alleged requests for remedial funds. 519 F.3d at 852. In its revised opinion that replaced *Marceau II*, however, the Court concluded that the applicable regulations and statutes imposed an obligation on HUD to respond only to "properly formed requests for assistance by *housing authorities*. They do not require HUD to respond to requests by *homeowners* such as Plaintiffs . . . ." *Marceau III*, 540 F.3d at 928 n.6. This language is dispositive with respect to the Old Chief Letter.

A cursory inspection of the Old Chief Letter reveals that it was not sent by or on behalf of Blackfeet Housing. As noted above, the Old Chief Letter simply provided a general outline of the issues that Chairman Old Chief hoped to discuss with Secretary Cuomo. The letterhead, signature, context, and contents of the letter all make clear that it came from Chairman Old Chief and not from Blackfeet Housing. HUD thus had no obligation to respond.

B. Plaintiffs Have Not Alleged That HUD Failed To Respond To Any Other Properly Formed Request For Assistance.

Plaintiffs' fourth issue presented is "[w]hether the appropriations request or other application for Annual Contributions Contract or any other document requesting assistance to fix the houses that contained wooden foundations constituted

properly formed requests for assistance to which HUD must respond." *See* Pl. Br. 2. This Court should disregard plaintiffs' open-ended argument for several reasons.

First, plaintiffs have not identified any specific appropriations requests, Annual Contributions Contract applications, or other purported requests for assistance to which HUD allegedly failed to respond. Plaintiffs do not make any such allegation in their Third Amended Complaint, and although they pose this very broad question in their opening brief, plaintiffs do not even discuss the question in the body of their argument. Plaintiffs therefore have waived this argument, and the Court need not address the question. *See In re Lowenschuss*, 67 F.3d 1394, 1402 (9th Cir. 1995) (stating that an issue presented in the Statement of Issues but not discussed in the brief is deemed to be waived), *cert. denied*, 517 U.S. 1243 (1996).

Second, this Court held in *Marceau III* that HUD was obliged to respond only to "properly formed requests" from Blackfeet Housing, 540 F.3d at 928 n.6, and the record is clear that HUD in fact responded to all such requests. Only requests for assistance dated August 2, 1996 or later are relevant to these proceedings, because claims premised on any earlier failure to respond would be barred by the statute of limitations. *See* 28 U.S.C. § 2401(a) (imposing six-year statute of limitations on APA claims).

From August 1996 through September 30, 1997, when NAHASDA terminated assistance under the United States Housing Act of 1937, *see* 25 U.S.C. § 4181, Blackfeet Housing could apply to HUD "for amendment of the development budget" (also known as the annual contributions contract, or ACC), to request funding "to correct deficiencies (and any damage resulting therefrom) in design, construction, and equipment." 24 C.F.R. § 950.280(a), (b) (1996). Remedial funds were available through this amendment process only if (1) the costs of correcting the deficiencies could not be recovered from the responsible party (such as the contractor) or (2) immediate correction of the deficiency was necessary "to protect life or safety or to avoid further damage" to the houses. *Id.* § 950.280(a). HUD was under no obligation to provide the requested funds. *Id.* § 950.280(b).

Alternatively, funding was available to Blackfeet Housing through HUD's CGP, which provided grants for modernization and emergency repair work. *See id.* § 950.600. Funding was allocated to Indian housing authorities through the CGP according to a specified formula that took account of the availability of appropriated funds and the housing authority's needs, and the housing authority could then appeal the formulaic grant. *Id.* §§ 950.600, .650.

Following implementation of NAHASDA, Blackfeet Housing has received HUD funding by submitting an IHP that complied with the requirements of 25 U.S.C.

§ 4112. Blackfeet Housing has submitted annual funding requests to HUD since 1997, and HUD responded to each of these requests. ER 123, 127-28. Indeed, Blackfeet Housing made annual requests for funding through the CGP and received approximately $16,767,000 from 1992 through 1997, ER 127, and has received approximately $6,000,000 in annual funding since enactment of NAHASDA. HUD therefore has complied with all of its statutory and regulatory obligations to respond to properly formed requests for funding to repair the wooden foundations.

Finally, plaintiffs invite the Court to comb through the extensive administrative record to determine whether HUD failed to respond to any other properly formed requests for assistance. But this all-encompassing request does not present a legally cognizable argument; the Court simply has no duty to undertake such an onerous research assignment on plaintiffs' behalf. As the late Judge Goldberg of the Fifth Circuit memorably stated, "Judges are not ferrets!" *Nicholas Acoustics & Specialty Co. v. H & M. Const. Co.*, 695 F.2d 839, 847 (5th Cir. 1983); *see also Potter v. Dist. of Columbia*, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, J., concurring) ("[J]udges 'are not like pigs, hunting for truffles buried in briefs' or the record."), quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Plaintiffs have

had ample opportunity to pore over the record, and the Court should not entertain this open-ended, amorphous request to do their work for them.[6]

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted,[7]

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[6] We note in closing that, as the district court held (ER 13), even if plaintiffs had submitted a proper request for assistance, at most they would be entitled to an injunction ordering HUD to respond to their request – not, as plaintiffs contend, an order to "'fix it'" (Pl. Br. 47; *see also* ER 37, 39, 40), *i.e.*, to repair their homes.

[7] The Department of Justice gratefully acknowledges the assistance of Zachary K. Warren, a student at Georgetown University Law School, in the preparation of this brief.

STATEMENT OF RELATED CASES

Government counsel are aware of no related case pending in this Court.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing brief was prepared using WordPerfect X5 software; is proportionally spaced, in Times New Roman font; has a typeface of 14 points; and contains 13,248 words (which does not exceed the applicable 14,000 word limit).

s/John S. Koppel
John S. Koppel

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2011, I electronically filed the foregoing "Brief for the Federal Appellees" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/John S. Koppel
John S. Koppel