CASE NO. 11-35444

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU; et al.,
Plaintiffs – Appellants

vs.

BLACKFEET HOUSING AUTHORITY, et al.,
Defendants – Appellees

On Appeal From the United States District Court
District of Montana, Great Falls Division
No. CV 4:02-00073-GF-SEH – Honorable Sam E. Haddon, Presiding

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PLAINTIFFS'/APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTEREST

Thomas E. Towe, counsel for Appellants, certifies the following:

1. The full name of every party or amicus represented by us are: Martin Marceau, Candice LaMott, Julie Rattler, Joseph Rattler, Jr., John G. Edwards, Jr., Mary J. Grant, Terry Gray and Deana Mountain Chief, on behalf of themselves and others similarly situated.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is: None.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party of amicus curiae represented by us are: None.

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are: Thomas E. Towe, Esq., Towe, Ball, Enright, Mackey & Sommerfeld, and Jeffrey A. Simkovic, Esq., Simkovic Law Firm, PLLC.

DATED this 12th day of September, 2011.

By:/s/ Thomas E. Towe
Thomas E. Towe

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I. STATEMENT OF JURISDICTION

A. The jurisdiction of the Court is invoked under the Administrative Procedures Act, 5 U.S.C. §701 et seq. It is also invoked under the authority of the National Housing Act, 12 U.S.C. §1702 , 42 U.S.C. §1437 and 42 U.S.C. §1401(a). Jurisdiction is also invoked under 28 U.S.C. §331, namely, a federal question and under 42 U.S.C. §1441 (the Secretary is obligated to provide a decent home and a suitable living environment for every American family) and 42 U.S.C. §1437 (the Secretary is obligated to provide decent, safe and sanitary dwellings for families of lower income) and 25 U.S.C. §4101 et. seq. (Native American Housing Assistance and Self Determination Act of 1996) (the Secretary is obligated to repair and maintain Indian housing). The jurisdiction of the District Court was further invoked under the authority of the Tucker Act, 28 U.S.C. §1346(a)(2) and 28 U.S.C. §1367(supplemental jurisdiction).

B. Appeal is taken pursuant to F.R.App.P. Rule 3, and is properly brought in the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. §§1291 and 1294.

C. The District Court entered is Memorandum and Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment on March 24, 2011 and Judgment in favor of the Defendant was entered the same day. A Notice of Appeal was timely filed in this Court on May 20, 2011.

II. STATEMENT OF THE ISSUES

1. Whether the discovery rule that operates to toll the statute of limitations applies to this case thereby making the lawsuit timely.

2. Whether the letter from the Chairman of the Blackfeet Tribe to Secretary of HUD requesting assistance to fix the wooden foundations is a properly formed request for assistance to which HUD must respond.

3. Whether the letter from the Blackfeet Housing Authority to HUD of March 22, 1999, requesting assistance to fix the houses that contained wooden foundations was a properly formed request for assistance to which HUD must respond.

4. Whether the appropriations request or other application for the 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.

5. Whether HUD had a legal duty to respond to fix the wooden foundation problems.

III.

STATEMENT OF THE CASE AND FACTS

A. Statement Of The Case

This Court has already issued three opinions in this case, *Marceau v. Blackfeet Housing*, 455 Fed.3d 974 (2006) (hereinafter "Marceau I"); *Marceau v. Blackfeet Housing Authority*, 519 Fed.3d 838 (2008) (hereinafter "Marceau II"); and *Marceau v. Blackfeet Housing Authority*, 540 Fed.3d 916 (2008) (hereinafter "Marceau III").

Appellants are members of the Blackfeet Tribe who purchased or leased substandard and possibly hazardous homes built under the auspices of the United States Department of Housing and Urban Development ("HUD"). The homes were built from funds provided by HUD under the careful supervision of HUD through very comprehensive and detailed regulations and requirements. Appellants filed a class action in the Montana District Court against HUD and the Blackfeet Tribal Housing Authority seeking declaratory and injunctive relief and damages for alleged violations of statutory, contractual, and fiduciary duties. The homeowners made claims against HUD based on violations of the trust responsibility, the Administrative Procedures Act ("APA"), and breach of contract.

The houses were built with wood foundations, using wood pressure-treated with toxic chemicals. The homeowners alleged that this caused their houses to deteriorate and caused health problems for those who lived in the houses. HUD moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6). The Tribal Housing

Authority moved to dismiss based on tribal immunity. The district court granted both parties' motions to dismiss and the homeowners appealed.

In *Marceau I* this Court affirmed the District Court's dismissal of claims against HUD but reversed the dismissal of Plaintiffs' claims against the Blackfeet Tribal Housing Authority and remanded for proceedings according to the opinion. Presiding Judge Harry Pregerson wrote the opinion of the Court and also wrote a specially concurring opinion explaining that the government has failed miserably in its duty to provide the tribes and Indian people with safe, decent, and sanitary housing and that Congress has not allocated sufficient discretionary funding to allow HUD to alleviate "this most grievous situation." Judge Pregerson then considered it was a moral responsibility and under the theories presented here "we cannot offer the Plaintiffs any relief against HUD." 455 Fed.3d at 988-89.

Both the Tribal Defendants and the Appellants moved to reconsider. In *Marceau II*, this Court affirmed that the threshold requirement for Plaintiffs to recover on a trust theory had not been shown but that the Plaintiffs' claim for injunctive relief under the APA was valid. The Court further affirmed its earlier decision that the Tribe waived the Housing Authority's Tribal immunity. This time the opinion was written by Judge Susan P. Graber and Judge Harry Pregerson issued a strong dissent claiming that the threshold requirements for Indian Trust responsibility had been met. 519 Fed.3d at 863. In *Marceau III*, this Court

affirmed its earlier ruling that HUD did not violate a trust responsibility and also affirmed its earlier ruling that the case must be remanded on the Administrative Procedures Act issue for further proceedings but while affirming its conclusion regarding the waiver of sovereign immunity in the claim against the Housing Authority it remanded the case to the district court for an exhaustion of Tribal Court remedies so that the Tribe would have the first opportunity to review the issue. It did authorize the district court to stay the proceedings rather than dismiss the action against the Housing Authority pending the Plaintiffs' exhaustion of their Tribal Court remedies. Again, Judge Pregerson issued a forceful dissent claiming the federal government control of the construction of the houses was so pervasive that the case was brought into the requirements for breach of the trust responsibility owed by the government to Indian peoples.

Upon remand, the Plaintiffs filed a Third Amended Complaint (ER 24) directed to the Administrative Procedures Act issue only without waiving its prior claims. In the Third Amended Complaint, the Plaintiffs asserted, in Count I, that HUD imposed on the Blackfeet Housing Authority and on Plaintiffs its decision to require wooden foundations on the construction of all houses at issue and that even though the Blackfeet Housing Authority and the homeowners objected, these objections were overruled. Plaintiffs further allege that the decision to require wooden foundations was contrary to HUD's own standards, to the industry

standards generally, and contrary to the statutory and non-precatory mandates of Congress to provide safe, decent, sanitary, healthy and habitable housing for low income citizens on American Indian reservations. (Third Amended Complaint at 11-12, ¶¶29-34.) (ER 24)

In Count II of the Third Amended Complaint, Plaintiffs alleged that numerous requests had been made by the Blackfeet Housing Authority, its successors, and individual homeowners to repair and maintain the houses in question because of the problems caused by the wooden foundations. Plaintiffs further allege that these requests to HUD were denied and HUD failed to take any action thus failing to provide safe, decent, sanitary and healthy housing to Plaintiffs (Third Amended Complaint at 14-15, ¶¶40-45.)

HUD then produced an Administrative Record admittedly, the Administrative Record is not complete. Because of the lapse of time since the issues in question, some of the records had been destroyed in the normal course of business and other records were simply not available. However, with the initial submission and 3 supplements, a total of 31,041 pages were submitted and constituted the Administrative Record. (Declaration of Randall R. Akers (Doc. No. 131-1)); Supplemental Declaration of Randall R. Akers (Doc. No. 165-2).) It is, however, all that is available. (See Order of the District Court dated July 20, 2010 (Doc. No. 176).) (ER 21). Plaintiffs argued that if the evidence contained in

this Administrative Record was lacking or insufficient to support HUD's decision, the Plaintiffs should prevail and the decision must be reversed and remanded to the Administrative Agency for further proceedings.

The Defendants filed a motion for summary judgment. Later, the Plaintiffs filed a cross motion for summary judgment. These motions were fully briefed and argued before the district court and the district court issued its decision on March 24, 2011. (See Memorandum and Order, Doc. No. 190.) (ER 1) The district court concluded the general 6-year statute of limitations would apply to Count I and that the final agency decision was made in 1979 or 1980 leaving the 6-year statute of limitations to bar any further proceedings. The court specifically ruled that the discovery rule did not apply and is not applicable in the context of an APA claim for judicial review. (Memorandum and Order at 12-13.) As to Count II, the district court held that neither the request of the chairman addressed to Secretary of HUD, Andrew Cuomo, nor the memo from Blackfeet Housing to Mike Boyd of HUD constituted a properly formed request for assistance under NAHASDA. (*Id. at 15*.) Totally ignoring the fact that Blackfeet Housing had made numerous appropriation requests in their Indian Housing Plan, the district court concluded HUD had no legal duty to respond to either document in question because it was not part of the Indian Housing Plan. (*Id. at 16*.)

Appellants appeal from that decision.

B. Statement Of The Facts.

Since this case has already produced 3 separate opinions from this Court, the facts are well known to the Court. As a result, however, of the production by HUD of the Administrative Record, there are a number of facts that were not available to this Court in *Marceau I*, *Marceau II*, and *Marceau III*.

1. The Problem: Houses Built without Compliance with the Regulations are Unhealthy and Unsafe.

Plaintiff-Appellants and persons they seek to represent in this class action case ("Plaintiffs") are members of the Blackfeet Indian Tribe and are home buyers or lessees, under the Federal Mutual Help Ownership Opportunity program, of 156 homes built by the Blackfeet Housing Authority under contract with HUD. Plaintiffs' homes were built over the period from approximately 1977-1980.

Plaintiffs' homes in general were constructed with poor construction techniques and poor choice of materials. Specifically, in order to save money, the homes were built with wooden foundations, using chemically-treated wood products instead of concrete. Although wood foundations were allowed by the regulations and industry standards in certain limited circumstances, there is no evidence that those circumstances existed with these houses. The investigation and determination of whether appropriate soil conditions existed for the use of wooden foundations as required by the regulations and industry standards was not performed. Furthermore, the requirements for drainage that are necessary for the

use of wooden foundations were not imposed. Thus, Plaintiff's contend that the regulations and the industry standards for use of wooden foundations were not met in the construction of these 156 homes. (Third Amended Complaint at 8-10, ¶¶ 16-24, at 12-13, ¶¶32-39.) (ER 24).

The wet northern climate of the Blackfeet Indian Reservation is not suited for wood foundation construction and the chemicals used to treat the wood were toxic and hazardous to human health. The wood foundations did not perform adequately, giving way to seepage, moisture accumulation, and structural instability. As a result, water and sewage have regularly invaded the homes both below and within the living areas, resulting in mold and unsanitary conditions. Eventually, some of the houses have become uninhabitable because of the toxic mold and dried sewage residue. Doctors have advised other occupants to move out for health reasons. (*Id.*)

Many Plaintiffs suffer an unusually high rate of serious health issues, including cancer, asthma, and kidney failure. Even though Doctors have advised some of the occupants to leave for health reasons, they have no place to go and no financing to assist in providing alternative living accommodations. Thus most Plaintiffs have no choice but to remain in the unhealthy, unsanitary, and unsafe homes. Plaintiffs' request for health studies to determine what they suspect is a connection between the conditions of the home and their problems have been

refused. Plaintiffs' requests over the years for remediation of the problems caused by the chemically-impregnated, wood foundation construction of their homes, have been met with empty promises and lack of action, not untypical of other reactions afforded our nation's Indian citizens. (*Id.* at 10-11, 14-17, ¶¶ 25-27, 40-50.) HUD and its implementing agency, Blackfeet Housing, point to the usual lack of funding, and HUD denies responsibility and liability.

2. **Administrative Regulations and Industry Standards were not Followed.**

The administrative regulations and the industry standards clearly provide that some soils are unsatisfactory for wooden foundations, and that wooden foundations should not be used without special precautions, including retaining a qualified engineer to advise on the design of the entire soil system. See 24 C.F.R. part 200, subp. S, §805212(a) (1976); HUD Minimum Property Standards, 1973 edition (Administrative Record ("AR") 000001 to 000434)(the title page and forward are included in the Excerpts of Record ("ER") at 81 & 82). Appendix E of the HUD Minimum Property Standards manual specifically refers to the National Forest Product Association standard entitled "All weather wood foundations-NFPA Technical Report No. 7." (ER 83; ER 84.) All weather wood foundations system basic requirements recommended by the National Forest Products Association specifically has some limitations that HUD failed to acknowledge or recognize. Paragraph 5.3, "Soil Characteristics," of that report provides:

> Group 4 soils are unsatisfactory for foundations unless special precautions are taken. Wood foundations shall not be built on soils in this group unless a qualified soils engineer advises on the design of the entire soil system.

(ER 109.)

The Administrative Record does not contain any evidence that HUD made any effort to determine whether these homes with wooden foundations were built in Group 4 soils. There is no evidence that HUD made any effort to determine whether these wooden foundations were appropriate for the area in which these homes were constructed. The Administrative Record contains no evidence that any inquiry was made into the appropriateness of wooden foundations in view of the soil and drainage conditions that did exist on the Blackfeet Reservation. There is, in the Administrative Record, no evidence of whether or not any special precautions were taken as required by this Industry Standard which was adopted as a part of the regulations governing the construction of these homes. There is no evidence in the Administrative Record that a qualified soil engineer was retained to review or advise regarding the entire soil system. The Administrative Record contains no evidence, therefore, that the wooden foundations on the Blackfeet Reservation met the requirements of the Code of Federal Regulations or the minimum standards of the housing industry at the time. By violating their own regulations, HUD failed to meet the congressional mandate to provide safe and sanitary housing on the Blackfeet Reservation.

Obviously, complying with these regulations and with the Industry Standard regarding wooden foundations is important because of the significance of moisture on treated wood foundations. Current site inspection seems to confirm that the soil situation is indeed a major part of the problem. The soil is absolutely critical to a satisfactory wood foundation system. See the National Forest Products Association basic requirements, Technical Report No. 7, the All Weather Wood Foundation System. That document states at the very beginning as follows:

> The most important of these measures is a porous gravel envelope surrounding the lower part of the basement. This porous layer conducts ground water to a positively drained sump, thus preventing hydrostatic pressure on the basement walls or floor. Similarly, moisture reaching the upper part of the basement foundation wall is deflected downward to the gravel drainage system by polyethylene sheeting, or by the treated plywood wall itself. The result is a dry basement space that is readily insulated for maximum comfort and conservation of energy.

(ER 108.)

In virtually every single home with a wooden foundation inspected by the United States Department of Agriculture Rural Development in 2002, the architect said "repairs would be recommended to include possible replacement of backfill with washed gravel . . ." (ER 106 and ER 107.) In general, the inspector noted:

> No faulty construction practices were observed in the wood basements, but would suspect structural wall movement was caused by improper soil backfill.

(ER 106.) Other inspections establish that the soil situation was and has been crucial to the wooden foundation problem on the Blackfeet Reservation. For example, in Robert Racine's home the site inspection states:

> Exterior site drainage is poor and allows water to accumulate next to residence.

(ER 152.) In Julia Little Dog's house the site inspection states:

> Exterior grade not sloped sufficiently to channel surface water away from residence.

(ER 153.) And:

> Clayey, gravely crawl space soils moist to very moist.

(ER 153.) In addition, the International Residential Code cited by HUD as evidence of the industry standard specifically provides as follows:

> R401.4.2 Compressible or Shifting Soil. Instead of complete geo-technical evaluation, when top or subsoils are compressible or shifting, they shall be removed to a depth and width sufficient to assure stable moisture content in each active zone and shall not be used as fill or stabilized within active zone by chemical, dewatering, or presaturation.

Exhibit 3 to HUD's Brief at 67. (ER 58.)

There is no evidence that any soil tests were made with regard to the 156 houses that have wooden foundations. There is no evidence that soils were removed and replaced by porous backfill of washed gravel as required. In April of 2002, Evelyn Meininger from the HUD main office in Denver stated that she

"cannot make a determination if wood foundations are inappropriate for the soil and climate conditions." (ER 224.)

There are also special requirements for pressure preservative treatment of lumber used in wooden foundations. The lumber must be pressure preservative treated and dried in accordance "AWPA-U1 (Commodities Specification A), use category 4B and Section 5.2, and shall bear the label of an accredited agency. Specific requirements are then set forth for field treatment, for plywood or lumber that is cut or drilled after treatment. (Exhibit 3 to HUD's Brief at 67.)(ER 58). There is no indication that this was done to the 156 houses in question. The construction of these 156 homes did not comply with HUD regulations and with generally accepted practices at the time of the construction.

3. **Inspectors Charged with Determining Compliance Rejected the Wooden Foundations.**

The Administrative Record does reflect that inspectors charged with finding deficiencies and defects, i.e., making sure the houses were built properly and that the proper materials were used, and that the construction was in compliance with the Regulations and the Industry Standards, actually rejected these Wooden Foundations. The notes on the May 16, 1977, BHA board meeting reflect the following:

> Wood Foundations 2 in ground were rejected. Frank Spearson is inspecting the materials in Spokane. All materials were rejected.

(ER 117.) Later on July 5, 1977, the same notes state:

> Archambault [one of the contractors] hired an expert to come in and inspect and grade the lumber used in the foundations previously rejected. The plywood is still rejected.

(ER 117.) The following sentence seems to imply that the rejection was ignored because HUD insisted on Wooden Foundations whether they were safe or not.

> HUD stated they the Wooden Foundations are acceptable.

(ER 117-118.)

4. **The Initial Bids were Over Budget and the Remedy was to Use Wooden Foundations.**

When the bids were opened on the initial plans that provided for concrete foundations, the project was over-budget. (ER 97.) HUD recommended that the project be redesigned. (ER 97.) It was and the concrete foundations were replaced by wooden foundations to save costs. The changes to wooden foundations were accomplished with "change orders." (ER 95.) It is clear that HUD would not approved the project with cement foundations because that would have cost too much. There would not have been sufficient funds to authorize the project to proceed with concrete foundations. The Blackfeet Housing Authority clearly had

no choice but to accept the wooden foundations or not receive any funds for Project 8-15 on the Blackfeet Reservation. (See ER 98 and ER 97.) See also the Change Order that deleted all concrete foundations on scattered sites and substituted wood foundations. (ER 95.) This saved the project $24,100.00 or approximately $669.44 per house. (ER 95 and ER 92.) There is evidence that an additional $50,000.00 was saved as a result of replacing the concrete foundations in the original specs to wooden foundations. (ER 87.) The Administrative Record establishes that HUD did not satisfy their statutory mandate to "provide decent, safe, and sanitary" dwellings for Indians and that they produced "housing of sound standards of design, construction and liveability, and size for adequate family life." 42 U.S.C. §1441; 25 U.S.C. §4101(1).

5. **Properly Formed Requests for Assistance were Submitted to HUD.**

As to Count II of the Third Amended Complaint, The Administrative Record contains two documents (ER 120 to 126 & ER 135) that contain a properly formed request for assistance by the Housing Authority1 and by the Chairman of the Blackfeet Tribe on behalf of all members of the Blackfeet nation. The first is the letter of the Chairman of the Blackfeet tribe, William Old Chief, to Andrew Cuomo, Secretary of HUD, dated April 9, 1999, which specifically asks:

1 Initially the Indian Housing Authority on the Blackfeet Reservation was called "Blackfeet Housing Authority." But it was reorganized in about 1996 and renamed "Blackfeet Housing." Hereinafter, the use of the term "Housing Authority" refers to either or both organizations depending on which name was being used at the time.

> The Tribe and Housing [BHA] are requesting assistance in remedying this problem [of Wooden Foundations].

(ER 120 to 126) The same request was made by the Housing Authority on or about March 22, 1999. (ER 131 to 136) The language is verbatim with the Chairman's request set forth above. *Id.* There is absolutely nothing in the Administrative Record to indicate that HUD ever responded to these two requests.

6. **Indian Housing Plan and Budget Request was Presented to HUD each year.**

Contrary to the implication in the District Court's Memorandum and Order,2 this request for assistance with the wooden foundation problem was included in the Indian Housing Plan and the budget requests to HUD every year.

Hal C. DeCell III, Assistant Secretary of HUD, stated in a letter to Senator Max Baucus on May 29, 1998, while the Housing Authority presented funding proposals prior to 1997, the Wooden Foundations were not listed as a priority. However,

> In 1997, BIHA submitted a new CGP plan and listed the wooden foundations/basement walls as a priority ... .

(ER 128) The same letter goes on to say that because there were insufficient funds the Wooden Foundations were not given a high enough priority and that since NAHASDA additional funds are no longer available for such projects

2 Memorandum and Order at 15-17.

without taking away from existing projects. *Id.* This is an admission that the Wooden Foundations were in the BHA's Comprehensive Grant Program Plan - the very Plan required under NAHASDA - at the time of the request to HUD on March 22, 1999.

HUD's response is that BHA should use its regular appropriations under the Comprehensive Grant Program to fix the Wooden Foundations and that no additional funds are authorized outside these grants. (HUD's Reply Brief, Doc. 175 at 16-17.) In other words, "We can't help you. Only Congress can help." This places Plaintiffs in a catch 22 on this issue. HUD says it is Congress's fault and Congress says we can't act outside the CGP formula for each Tribe because of the political reality. To take money from the formula expectations of other Tribes will bring unanimous opposition from Congressional delegations from other States, making a special appropriation for these Blackfeet houses impossible to pass in Congress.

HUD is well aware that taking a part of the regular appropriations is not practical due to other needs. (ER 158.) Furthermore, the annual formula for the Housing Authority is wholly inadequate. The annual formula for the Blackfeet Tribe under NAHASDA is limited to $6,000,000 each year. Tribes can also compete for an additional $800,000 under the Indian community Development

Block Grant program. "Currently, these two programs are the only HUD resources available to tribes for such purposes." (ER 114. Accord ER 119.)

As to the wooden foundation problem, the cost to "fix it" ranges anywhere from $24 million (new houses would cost $154,000 times 156 houses = $24,024,000) to HUD's own estimate of $2,551,075 ($1,531,917 for rental units and $1,019,158 for homeownership units). (ER 112; 115.) The Tribe itself estimates costs of repair between $10,335,000 and $11,700,000. (ER 158.) The Housing Authority estimates at a minimum it will cost $3,500,000 to $4,000,000 to complete the project. (ER 137). On top of the regular $851,409 already budgeted for other repair work (ER 115), and the requirements for providing new housing as contemplated by the NAHASDA Comprehensive Grant Program, BHA is simply not going to take that kind of money out of their regular operating budget, even if the total cost was within the annual grant amount. Plaintiffs will never receive any relief under the current status quo.

7. **The Administrative Record.**

The Administrative Record is admittedly incomplete. (Declaration of Randall Akers, Document 131-1.) Because of the names and lack of identification, it is, at times, difficult to comprehend. Nevertheless, the District Court was very firm in its Order that no further discovery or supplementation to the record would be permitted. (Order, Document 160, ER 19; Order, Document 176, ER 21.)

Therefore, we must take this incomplete Administrative Record as it was presented. If there is no indication that HUD responded to a properly formulated request for assistance, we must accept the fact that HUD did not respond. That much has been established.

IV. STANDARD OF REVIEW

The standard of review of the issues raised on appeal is *de novo*. Both issues raise legal questions which control the issuance of summary judgment.

Judicial review of agency action is governed by 5 U.S.C. §706. Under 5 U.S.C. §706(1), the reviewing Court shall:

> "Compel agency action unlawfully withheld or reasonably delayed."

(*Id.*) Thus, if the agency fails to take a discrete agency action that it is required to take, a Court can compel the agency to act. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64-65 (2004); *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1268-69 (10th Cir. 1998). Further, if the record fails to show any action was taken or that any response was made regarding a properly formed request for assistance, the Government cannot rely on the existence of a response if none is shown in the Administrative Record. In such a case, the Government loses and the case must be remanded for further administrative proceedings. See *Norton v. Southern Utah*

Wilderness Alliance, 542 U.S. at 64; *Occidental Eng'g Co. v. INS*, 753 F.2d at 770.

Under 5 U.S.C. §706(2), the Court shall:

> Hold unlawful and set aside agency action, findings, and conclusions found to be
> (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;
> ...
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> ...
> (E) unsupported by substantial evidence . . . ;

5 U.S.C. §706. Review under the arbitrary and capricious standard is "narrow," but "searching and careful." *Marsh v. Or. Natural Res. Counsel*, 490 U.S. 360, 378 (1989). Agency action can be set aside "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto., Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must ask

> whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . [The court] also must determine whether the [agency] articulated a rational connection between the facts found and the

> choice made. [The] review must not rubber-stamp. . . . administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1035 (9th Cir. 2007). See *Greater Yellowstone Coalition, Inc. v. Servheen*, 672 F. Supp.2d 1112 (2009).

In this case, Plaintiffs claim relief under both Subsection 1 and Subsection 2 of 5 U.S.C. §706.

V. SUMMARY OF ARGUMENT

The District Court erred in rejecting this Court's rule regarding the statute of limitations as announced in *Wind River Mining Corporation*, 946 F.2d 710, 715 (9th Circuit 1991). Under the *Wind River* ruling, which has been adopted and followed for many years in this circuit, the statute of limitations commences running when the true state of affairs is discovered and the adverse impact of the administrative decision is applied to the challengers. In this case the true state of affairs regarding the mold and the health risk to the occupants of these 156 houses was not discovered and the adverse impact of HUD's illegal decision to approve wooden foundations was not felt by these Plaintiffs until 1997, at the earliest, well within the six-year statute of limitations. The case is not time-barred.

The District Court is wrong in stating that a request by the Blackfeet Tribal Chairman and its Tribal Council to the Secretary of HUD along with a similar

request from the Housing Authority to the proper officials in HUD to fix the wooden foundations problem is not a properly formed request for assistance. Consequently, HUD's failure to respond to these requests constitutes administrative action addressable by the courts. This case must be remanded with directions to order HUD to address this properly formed request for assistance. Furthermore, the Indian Housing Plan adopted by the Housing Authority and the budget requests to HUD also clearly raise the same request for assistance. The congressional mandate to HUD to provide safe, sanitary, and decent housing on Indian reservations for the Indian people (42 U.S.C. §1441; 25 U.S.C. §§4101, 4111(a), 4132(1)) has not been complied with.

VI. ARGUMENT

A.

Discovery (Full Knowledge of the Failure of the Wooden Foundations) Did Not Take Place Until Sometime After 1996 and this Lawsuit Is, Therefore, Not Time Barred.

HUD argued that the statute of limitations bars recovery under Count I. The District Court agreed with that argument and dismissed Count I of the the Plaintiff's Third Amended Complaint. Memorandum and Order at 9-13. Plaintiffs vigorously disagree.

1. Facts Regarding the Statute of Limitations.

This lawsuit was initially filed on August 2, 2002. The six-year statute of limitations would therefore reach back to August 2, 1996. 28 U.S.C. § 2401(a). The mold and other problems as a result of the wooden foundations for which redress is sought in the Third Amended Complaint, did not appear and were not known to the Plaintiffs at least until the inspections that took place in 1997, well within the statutory period. The "true facts" that would give rise to a cause of action were not known at least until 1997. Whether or not this is considered an application of the discovery rule, it is the law of this circuit and the action is not time barred.

The two main construction contracts for the construction of these 156 houses were signed on April 11, 1977. (ER 89 to 91; ER 92 to 96.) At least one of the contractors, Nicholas and Sons Construction Company, did not get the notice to proceed, however, until November 22, 1977. (ER 105.) The R.C.Hedreen Company contract, the largest contract, was to be completed in 580 days (ER 93), but because of financial problems, law suits, diversion of funds to other projects, and budgetary overruns, the project was not completed until after 1986 when the fifth revision of the contract was approved. (ER 99 to 104.)

The wooden foundations did not come into the picture until the initial bids were opened and the contracts were way over budget. (ER 97.) HUD insisted that the houses be redesigned to save some money in order to bring the cost within their

budget amounts. (ER 97.) Although the 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's budget, they obviously were very skeptical of proceeding with wooden foundations notwithstanding assurances from HUD that they were "acceptable." (See board minutes at ER 116 to 118; ER 113.) They even voted to take the matter to the Tribal Council and to the "people that are getting these foundations." (ER 118.) There is nothing in these minutes, however, that suggest anyone was aware of the issues of mold or risks these wooden foundations would cause to the people's health. At this point, the "true facts" were simply unknown.

There is a document in the Administrative Record entitled Historical Background of HUD Project 8-15. (ER 129-130.) It refers to backfill problems as early as 1979 and basement walls starting to bow inward in 1980 because of backfill settling. This "upheaval" was generally blamed on the clay contends of the soil and was referred to as a "wood foundation-basement wall problem" in 1980. There is reference to improper drainage and use of clay that swelled causing the bowing. There is even reference to seeking a legal remedy against the contractors for faulty design and poor workmanship. There is reference to obtaining a grant from HUD to fix it but the work was cosmetic and did not really fix it. However, no mention is made in this report of "mold problems" or problems that involved a

health risk to the occupants. It only makes reference to structural issues that are not serious problem to the health and safety of the homeowners. (*Id.*)

Interestingly, HUD sent a representative to review the wood foundations on the project "to determine if there is [sic] any defects which should be addressed" in November of 1983. (ER 85.) This representative concluded "that there was no apparent damage to or defects in the wood foundations," although there were a couple of isolated cases where plywood was beginning to show signs of delamination at the knot hole and the edge. This was attributed to insufficient field testing. They also commented that the visqueen waterproofing material was deteriorating because of improper grading and backfilling. He recommended some precautionary steps to be taken as soon as possible to prevent further deterioration (ER 85) and they even priced the cost of doing this for 5 of the houses in this Montana 8-15 Project (ER 86 to 88). Nowhere, however, is there any mention of mold or risks to the health of the occupants. There is also no indication that HUD or anyone else paid any attention to his recommendations.

The first appearance of mold appears to be the inspection of certain homes by TD & H Engineering Consultants on July 14, 1997. (ER 138 to 147.) See also the inspection performed by the Department of Health and Human Services on the home of Julia Little Dog on July 10, 1997, a report of which was set forth in a letter to the Housing Authority on July 25, 1997. (ER 156.) This obviously

prompted Julia Little Dog's request to be put on the agenda of the next meeting of the Housing Authority. (ER 157.) Also, see the further inspection of another four homes by the same engineering firm TD & H, reported in their letter of September 23, 1997. (ER 150 to 155.) This was then followed by a letter from HUD to the Housing Authority on February 9, 1998 relating a meeting held on January 28, 1998 in Denver, Colorado, on which the subject was the condition of the wood basements. (ER 137.)

See also the letter to Senator Max Baucus from the Assistant Secretary dated May 29, 1998, in which references made to the listing by the Housing Authority of the wooden foundations as a priority for the first time in 1997. (ER 127 to 128.) In fact, that letter appears to make it quite clear that in all previous requests the Housing Authority did not list the wooden foundations as a priority; it did not appear in the requests for funding until 1997. See also, the discussion of wooden foundations in the Chairman's request to Secretary Cuomo on April 9, 1999. (ER 123.)

The real focus on the mold problem and an explanation of why it caused a health risk did not take place until 2002. The Environmental Assessment by DBS&A dated March 1, 2002, is the first report that focused on the seriousness of mold contamination and the current problem with the wooden foundations. (ER 159 to-221.) (See photographs at ER 171 to 173 and the explanation of the affect

of the mold on the resident's health from Dr. Don C. Fisher, M.D. at ER 207-208.) On April 24, 2002, Ken Falcon representing Senator Max Baucus's office met with the Chairman of the Tribe, certain rural development people, certain Housing Authority members, and their attorney, as well as the lead Plaintiff in this case, Martin Marceau, and others. The mold issues resulting from the wooden foundations were discussed at length at this meeting. (ER 148-149.)

This meeting with Senator Baucus's staff undoubtedly prompted the inspection of May 24, 2002, by Jim Raznoff of Rural Development of the United States Department of Agriculture who inspected five residences, apparently at the request of the Housing Authority. The results of these inspections are set forth in his letter to the Housing Authority dated May 28, 2002 (ER 106-107.) Significantly, replacing backfill with washed gravel was recommended in virtually each case.

At the same time, a study was commissioned by a lab that had greater expertise with regard to mold and its problems. *Stat! Disaster Restoration* did a thorough review of the mold contamination along with septic and radon contamination. *Stat* did their field inspection between May 24, and May 31, 2002, and the report that resulted is the first real in depth analysis of the magnitude of the mold problem caused by the wooden foundations. (ER 61 to 80) Until this report was prepared and made public, the representative Plaintiffs and the alleged class

members had no real opportunity to understand the magnitude of their problem. They did not realize that HUD had previously made decisions affecting their person and property that lead to these problems. See, "For Blackfeet Indians, Their Homes Turn Out to be Houses of Horrors," The Seattle Times, June 3, 2002 ("Jamie LaPier was already troubled by the black mold creeping up the walls of her home on the Blackfeet Indian Reservation, but the foot high mushrooms growing out of the basement carpet were the last straw.") (ER 110-111.)

This is confirmed by HUD's Northern Plains Office of Native American Programs document entitled "Mold Update." It shows the mold issue first appearing on the Blackfeet Reservation in 2002. (ER 222-223.) The awareness of the severity of the problem did not become apparent until 2002, months before the complaint was originally filed.

2. This Court's Ruling in Wind River Applies to the Facts of this Case.

This Court (Ninth Circuit) has specifically ruled that if a challenger contests the substance of an agency decision as exceeding the constitutional or statutory authority, he or she may do so later than six years following the decision.

> If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger.

Wind River Mining Corp. v. United States, 946 F2d 710, 715 (9th Cir. 1991). As stated by this Court:

> The government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.

(*Id*.) The *Wind River Mining Corporation* case does require that a more "interested" person than generally will be found in the public at large must bring such a challenge. In this case, Plaintiffs clearly are more "interested" than the public at large. It is their homes that are affected by the decision.

Furthermore, the challenge in question is to the statutory authority of HUD to approve wooden foundations for these Indian Houses. Plaintiffs' claims are that these wooden foundations were approved by HUD notwithstanding that they violated the regulations and standards governing the construction of homes under the circumstances that existed on the Blackfeet reservation at the time they were built. If HUD had followed their own regulations and the industry standards regarding wooden foundations, they would never have been approved. Consequently, Plaintiffs claim HUD violated the statutory mandate under 42 U.S.C. §1441 to provide decent, safe, and sanitary dwellings, and to eliminate substandard and other inadequate housing, and to provide "housing of sound standards of designs, construction, livability, and size for adequate family life." 42

U.S.C. §1441. As the D.C. Circuit has stated, these requirements are not precatory. *The Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (DC Cir. 1973). HUD's action in approving wooden foundations was beyond HUD's statutory authority.

The Plaintiffs and proposed class members did not learn of this failure - this lack of statutory authority - until some of these houses were inspected in 1997. While some knowledge of violations of HUD's own regulations and industry standards could be imputed to Plaintiffs before 1997, they did not know that there was a health risk involved until 1997 at the earliest. Only then did the HUD errors rise to the level of an actionable *ultra vires* action. Only then did it become apparent that the HUD approval of wooden foundations contrary to their own regulations and industry standards constituted a failure to provide safe, decent and sanitary housing to Indians. 42 U.S.C. §1441. Only then did the challengers realize the wrongful decisions were applied to them and to their health. Only then did they realize that wooden foundations should never have been approved for these conditions under these circumstances and the result was a serious health risk. Indeed, it is submitted, any law suit brought prior to this time would not withstand a Rule 12(b)(6) motion to dismiss; the Plaintiffs had no evidence of any harm.

As stated in *Wind River Mining Corporation*, the government should not be permitted to avoid these Plaintiffs' challenges simply because the agency took the

action long before anyone discovered the true state of affairs. 946 F.2d at 715. For additional cases that utilize and apply this rule see, *Natural Resources Defense Counsel, Inc. v. Evans*, 279 F.Supp.2d 1129, 1148 (N.D. Cal. 2003); *Gifford Pinchot Task Force v. United States Fish and Wildlife Serve*, 378 F.3d 1059, 1075-76 (9th Cir. 2004); *Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Projection Agency*, 118 F.3d 1467, 1473 (11 Cir. 1997); *Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 152 (D.C. Cir. 1990); *Northwest Environmental Advocates v. United States Environmental Protection Agency*, 2005 W.L. 756614 (N.D. Cal. 2005) (Challenge to an agency regulation is an action that accrues when that regulation is applied by the agency to the challenger).

The 1997 discovery was well within the statutory six-year period. The original complaint was filed on August 2, 2002. This Count is not time barred.

The District Court refused to apply the "discovery rule." Incredibly, the District Court states the discovery rule "is not applicable in the context of APA claim for judicial review." Memorandum and Order at 12. To the contrary this Court has long held that discovery is critical in determining when the statute of limitation commences to run.

> The government should not be permitted to avoid all challenges to its actions, even if *ultra viries*, simply because the agency took the action long before anyone **discovered** the true state of affairs.

Wind River Mining Corporation, 946 F.2d 710, 715 (9th Circuit 1991). (Emphasis supplied.) In that case this Court rejected the contention that the six-year statute of limitations barred *Wind River* from contesting the Bureau of Land Management's decision to adopt a wilderness study area in 1979 on the grounds that *Wind River* did not discover the impact of this decision until *Wind River* relocated its claim in 1985 or the IBLA affirmed the BLM's denial of its challenges in 1987.

> [No] one was likely to have discovered that the BLM's 1979 designation of this particular WSA was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when *Wind River* staked its mining claims.

Id. *Wind River* challenged the legality of the wilderness study area designation on the grounds that such a designation was legal only if the area was roadless and, in fact, there was a road through it.

In a very comprehensive opinion, this Court in *Wind River* made it clear the commencement of the statute of the limitations depends upon the nature of the claim. If the grounds for challenge are usually apparent within the six-year period following the promulgation of the decision, the statute of limitation commences to run at the promulgation of the decision. Thus, a challenge to a mere procedural violation must be brought within six years of the decisions. Similarly, a policy-based facial challenge must also be brought within six years of the decision.

> If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger.

Id. It is not entirely clear whether this is the application of the "discovery rule" for the application of the statute of limitations; however, whether or not this is a discovery rule, it is the rule of this Circuit.

In the instant case the grounds for challenge were not apparent within the first 6 years of HUD's decision to approve wooden foundations. Until the health risks caused by mold and moisture conditions became apparent, there was no adverse application of the decision to these Plaintiffs. It cannot be denied that the discovery of the "true state of affairs" did not take place until mold was "discovered" in 1997, well within the six-year statute of limitations period. 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. It is also true that backfill problems became apparent as early as 1979 and the basement walls started to bow inward in 1980 because of the backfill settling. HUD itself realized their approval of wooden foundations should not have been approved under these conditions in November of 1983 (ER 96.) However, HUD then concluded "that there was no apparent damage to or defects in the wooden foundations" and any problems were merely structural. (ER 85.) There is no

mention of mold or risk to the health of the inhabitants. As set forth above, the first appearance of mold does not appear in the Administrative Record until July 14, 1997. (ER 138-147.) More significantly, although Julia Little Dog and the Housing Authority certainly knew as early as July of 1997, it was not widely known until the environmental assessments and reports that were done in 2002. (See above.)

Thus, we are not taking about a procedural challenge to the 1977 decision. In fact, we are not even talking about a policy-based facial challenge. We are talking about a failure to abide by a clear and unambiguous Congressional mandate to "provide decent, safe, and sanitary" dwellings for Indians by approving the construction of Indian housing that was unsafe and unsanitary and that was not of sound standards of design, construction and livability. (42 U.S.C. §1441; 25 U.S.C. §4101(1).) Under the *Wind River* authority and other cases of this circuit, it is clear the statute of limitations does not commence running until the decision is actually applied to these Plaintiffs, i.e. when the Plaintiffs discovered the "true state of affairs."

In addition to the *Wind River* decision, see also *Northwest Environmental Advocates v. U.S.E.P.A.*, 537 F.3d 1006, 1018-19 (9th Circuit 2008). In that case, plaintiffs were allowed to challenge clean water act regulations promulgated initially in 1973 and amended as late as 1979 by asking the EPA to repeal them in

1999 which petition was denied in 2003 well within the six-year statute of limitations. In so holding, this Court refers to the "adverse application" of the regulation to the plaintiff within the meaning of *Wind River* as the date of first accrual for purposes of the statute of limitations. In the instant case there clearly was no adverse application to these Plaintiffs until the mold was discovered. Indeed this seems consistent with the approved purpose of a statute of limitations as announced by the United States Supreme Court.

> These enactments [statutes of limitations] are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence whether by death, or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 US 111, 117 (1979). Until the mold appeared and until the risk to the inhabitant's health became apparent, Plaintiffs' could not have reasonably commenced their action. Until 1997, Plaintiffs had no time let alone a reasonable time to present their claims.

Indeed, the *Wind River* decision of this Court has generally been interpreted exactly this way. Thus, in *Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d 1174, 1182-83 (D.C.E.D. Calif. 2003) the district court applied the *Wind River* decision to a challenge to a court settlement that was reached more than six years before the action was commenced on the grounds that "substantive

challenges to agency action can be made up to six years from the date the action was applied to the challenger," citing the language in *Wind River* about discovering the "true state of affairs." In *Alaska Clean Water Alliance v. Clarke*, 1997 WL 446499 at 2n.2 (D.C.W.D. Wash. 1997) the challenged regulation had been in effect since 1983. Nevertheless, Plaintiffs were free to challenge the current application of the regulation as adverse to their interests in 1996, citing *Wind River*). *Id.* In *Alaskan Constitutional Legal Defense Conservation Fund, Inc. v. Norton*, 2005 WL 2340702 at 3 (D.C.D. Alaska 2005) the Court stated that in the 9th Circuit the action must be brought within six years of the agency's application of the disputed decision to the challenger, citing *Wind River*. In *Lord v. Babbitt*, 991 F.Supp. 1150, 1159 (D.C.D. Alaska 1998) the Court stated that the challenge must be brought within six years of the agency's application of the disputed decision to the challenger if the plaintiff wishes to challenge the substance of a decision as exceeding constitutional or statutory authority, citing *Wind River*. (See especially n7, *Id.*) In the instant case it cannot be denied that the application of the adverse impact of HUD's decision to Plaintiffs did not take place until at least 1997, well within the statute of limitations.

The District Court seems to justify its decision by claiming the discovery rule is limited to applications of tort law and that proof that it has no application in APA claims for judicial review is found in *Gros Ventre Tribe v. United States*, 344

F.Supp.2d 1221, 1229 n.3 (D. Mont. 2004). That case, however, deals with a continuing violation question, an issue that is not present in the instant case. In that case, the Indian tribes sought to compel the federal government (BLM) to reclaim certain mine sites and insisted the statute of limitations did not apply since the reclamation had not yet been completed. The District Court held that the six-year federal statute of limitations begins to run when a plaintiff has all the necessary facts underlying his claims. The Court then concluded the final agency action was taken before the six-year statute of limitations that applied to the Tribe's Complaint. In note 3 the Court held that the continuing violations doctrine would not apply since it evolved in the context of a tort or nuisance law and is inapplicable to the APA claim for judicial review. There is no issue or claim of continuing violations in the instant case; that issue has not been raised by Plaintiffs. Nevertheless, this Court's decision in *Yakima v. U.S.*, 296 Fed.Appx. 566, 570 (9th Circuit 2008) sheds considerable doubt as to the validity of that District Court holding (concern over continued billing for irrigation services are unwarranted "given that the running of the statute will not begin until the completion of the pending administrative proceedings.")

The whole *Wind River* doctrine including the *Wind River* decision and all of the cases following its ruling, clearly indicate that a discovery of the true state of affairs by the plaintiff is a key fact in the context of an APA claim for judicial

review. The conclusion of the District Court in this case to the contrary simply makes no sense. Whether or not it is a discovery rule, this *Wind River* rule should be applied in this case.

B.

Failure to Act on the Housing Authority's Request for Remedial Action Is Cognizable Under the APA. The Administrative Record Confirms a Direct Request by the Housing Authority to "Fix It" but there was Absolutely No Response to that Request.

The Ninth Circuit clearly stated this Court prematurely dismissed Plaintiffs' claim for injunctive relief when Plaintiffs alleged that they repeatedly asked HUD to remedy the dangerous housing conditions and HUD failed to act. *Marceau II*, 519 F.3d at 852. In *Marceau III*, the Ninth Circuit Court of Appeals suggests in a footnote that this mandate maybe dropped because these regulations and statutes do not require HUD to respond to requests by homeowners such as Plaintiffs, and

> there is no evidence in the record of a properly formed request for assistance by the Blackfeet Housing Authority.

Marceau III, 540 F.3d at 928, n. 6. However, now that the Administrative Record has been submitted, it is clear that this footnote is factually incorrect. There now is evidence in the Administrative Record of a properly formed request for assistance by both the Blackfeet Tribe, as a governmental entity, and the Housing Authority. Consequently, this mandate was clearly resurrected.

The District Court recognized that this mandate was resurrected but then held that the two specific requests were not "properly formed requests for assistance." Memorandum and Order at 16. Further, the District Court stated that some funds were appropriated to the Housing Authority and if this was not enough, that was Congress's fault and not HUD's fault. *Id* at 16-17.

The two requests were clearly properly formed requests for assistance within the meaning of this Court's mandate on remand. *Marceau III*, 540 F.3d at 928, n. 6. First, on April 9, 1999, William Old Chief, Chairman of the Blackfeet Tribe of the Blackfeet Nation wrote a letter to Andrew Cuomo, Secretary of Housing and Urban Development, Washington, D.C. In this letter, he specifically discusses the wooden foundation problem and then he states:

> The Blackfeet Tribe, former housing authority and more recently Blackfeet Housing [the current housing authority] have asked HUD for help in remedying this situation. . . . The tribe and housing are requesting assistance in remedying this problem.

(ER 120-126 at ER 123.) This request is made by the Chairman of the Tribe and is directed to the Secretary of HUD. It specifically cites the wooden foundation problem and specifically requests assistance on behalf of the Blackfeet Nation and the Housing Authority. (ER 120 to 126.) How could a request for assistance be more specific, more properly authorized, and more properly formed?

Second, this exact same request using the exact same language appears under the letterhead of Blackfeet Housing, the Housing Authority on the Blackfeet Reservation, addressed to Mike Boyd who was apparently their contact person at HUD. (ER 131 to 136. See the verbatim request at ER 134-135.)

> The Blackfeet tribe, formerly housing authority and more recently Blackfeet Housing have asked HUD for help in remedying this situation. . . . The tribe and housing are requesting assistance in remedying this problem.

(*Id*.)

Not only does provide a properly formed request for assistance as required by this Court, but a mandate can also be found in the Regulations. And the language Regulations is far from precatory. At the time the houses were built in 1976, the Regulations regarding correction of deficiencies were very specific. They not only required a "correction of deficiencies" but said these deficiencies "shall" be charged to the party responsible. An exception, which applies in this case, was made for design deficiencies which should be charged to the development cost budget or to the Project operating receipts and, if necessary, the Development Program of the ACC (annual appropriations budget) should be amended to provide for enough funds to correct the deficiencies, including any damage these deficiencies caused. 24 C.F.R. §905.223(Feb. 7, 1976). This regulatory mandate is very specific.

By 1992, this provision was amended, but the amendment even more emphatically required HUD to act. The Housing Authority "must pursue correction of any deficiencies" against responsible parties or apply to HUD for amendment of the development budget if the protection of life or safety is involved. The cost of correcting deficiencies of design may not be charged to the homeowner. 24 C.F.R. §905.270 (March 25, 1994.)

Next, Congress made a specific finding in NAHASDA, which took effect on October 1, 1997, that the federal government "has a responsibility" to use Federal resources to assist needy families and individuals to obtain a safe and healthy home. 25 USC §4101. Further, Congress specifically found that:

> (5) 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 social economic status. . . .

(*Id*.); 24 C.F.R. §1000.2.

The Secretary is mandated to make grants on behalf of Indian tribes to carry out affordable housing activities. 25 U.S.C. §4111(a). And those affordable housing activities are specifically defined to include:

> (1) Indian housing assistance. The provision for modernization or operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian Housing Authority.

25 U.S.C. §4132(1).

Thus, the responsibility for correction of deficiencies is clearly spelled out in these regulations. Use of the word "shall" certainly indicates the Regulations expect action to be taken to correct the deficiencies and charge the appropriate parties. NAHASDA, passed by Congress in 1996 make it quite clear that HUD has a special "responsibility" to improve housing conditions for Indian tribes and their members. 25 U.S.C. §4101; 24 C.F.R. §1000.2. This specifically includes "operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian Housing Authority." 25 U.S.C. §4132(1). These provisions should be read as a mandate to the Secretary. "HUD had to consider their requests and then exercise discretion." *Marceau II*, 519 F.3d at 852. It failed to do so. Both the Tribe and the Housing Authority did their part; they made the requests both in the Indian Housing Plan (the budgetary document) and in a direct request to the Secretary and to the HUD officials. HUD did not even respond.

The law on this point, as set forth in both *Marceau II*, 519 F.3d at 852, and *Marceau III*, 540 F.3d at 928, is quite clear. Under 5 U.S.C. §706(1) ("agency action unlawfully withheld") a case may proceed where the Plaintiff asserts the agency failed to take action that it is required to take. Thus, when an agency is compelled by law to act and it fails to do so, the Court can compel the agency to

act. *Norton v. Southern Utah Wilderness Alliance*, 542 US 55, 64-65 (2004). See also, *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1286-69 (10th Cir. 1999)("through §706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed."). Further, the 10th Circuit stated:

> Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.

(*Id*.); *Health Sys. Agency of Oklahoma v. Norman*, 589 F.2d 486, 492 (10th Cir. 1978). See also, *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577 (9th Cir. 2000)("government inaction despite a statutory mandate may support a mandatory injunction issued by the Court"); *NLRB v. Olaa Sugar Company*, 242 F.2d 714, 721 (9th Cir. 1957); *Center for Biological Diversity v. Veneman*, 394 F.3d 1108, 1114 (9th Cir. 2003).

Under 5 USC §706(1), the United States Supreme Court and this Court have both indicated that a failure to act is subject to an injunctive action requiring the agency to do its job, to fulfill its statutory mandate. This appears to be exactly what this Court had in mind in this case when it stated that the Supreme Court in *Southern Utah Wilderness Alliance* held that a failure to act can be cognizable under the APA. *Marceau II*, 519 F.3d at 852; 542 U.S. at 64. Here the Administrative Record is crystal clear that the agency was requested to act, that the

regulations and the statutes read together clearly require such action, and the Administrative Record fails to show that any action resulted. Consequently, it is respectfully submitted that Plaintiffs request for injunctive relief on this matter should be granted. At a minimum, this Court should remand the case to the District Court instructing it to order HUD to act, i.e., to "fix it." The Order should direct HUD to take corrective action and do whatever is necessary to make these 156 houses safe and healthy pursuant to the Congressional mandate.

Knowing full well that such an order is likely to be ignored or evaded by government bureaucracy ("We can't do anything until Congress appropriates the necessary funds."), it is respectfully submitted the Courts need to require HUD to do exactly what the statutes and the regulations require HUD to do, namely, fix these 156 houses so they are safe and healthy for these Indians.

The District Court states that neither of these two requests constitutes a properly formed request for assistance under NAHASDA. Memorandum and Order at 15. No explanation is given other than a citation to NAHASDA which provides for the procedure for obtaining annual block grants and the requirement that the Indian Housing Plan document these requests. The District Court then concludes that HUD's statutory duty is limited to review of these requests and submitting the same to Congress and that the ultimate decision is the decision of Congress to appropriate and authorize the funds. It is respectfully submitted that

Congress has spoken. Congress mandated that HUD provide safe, sanitary and decent housing on Indian reservations. 42 U.S.C. §1441; 25 U.S.C. §§4101, 4111(a), 4132(1). HUD also has spoken on this matter; they have provided mandates in the regulations that require design defects be corrected with monies from the annual appropriations budget, if necessary. 24 C.F.R. §905.223 (February 7, 1976); 24 C.F.R. §905.270 (March 25, 1994); 24 C.F.R. §1000.2 (current). The District Court's excuse for inaction is simply inapplicable and contrary to the law. The courts can mandate to whom the congressional mandate is directed. There is no mistake, no lack of specificity, no excuse for not acting. Only the courts can resolve the catch 22 that HUD has thrust these Plaintiffs into, namely, the administration can't act because Congress doesn't appropriate the funds and Congress can't appropriate the funds because the current formula for distribution of Indian housing monies cannot be altered. Any effort to do so would be met by opposition from Congressmen and Senators from other States who will allow the formula to be altered if it favors these Indians over all the rest of the Indian Tribes.

Furthermore, the District Court is simply wrong in stating that a proper request for funds through the Indian Housing Plan and the regular appropriation process under NAHASDA has not been fulfilled. The specific request for assistance with the wooden foundation problem has been included in the Indian Housing Plan and the budget requests to HUD "as a priority" every year since

1997. (ER 128) This excuse of the District Court is no more valid than its other excuses. Plaintiffs are entitled to see the mandate of Congress performed. They have waited long enough for safe and decent houses. HUD should be ordered to "fix it."

VII. CONCLUSION

For the reasons stated herein, the District Court erred in rejecting the *Wind River* ruling of this Court regarding the commencement of the running of the statute of limitations. The statute of limitations commences running when the true state of affairs is first discovered. Here, the mold was first discovered in 1997, well within the statutory period. Thus, the adverse application to Plaintiffs did not take place until 1997, well within the statutory period.

The District Court erred in not considering the request by the Chairman of the Tribe to the Secretary of Housing and Urban Development along with a similar request from the Housing Authority directly to HUD as a properly formed request for assistance to which HUD must respond. Not only are these two items properly formed requests for assistance to which HUD must respond but the Indian Housing Plan adopted by the Housing Authority and the budgetary requests reflected in the Administrative Record also constitute properly formed requests for assistance. HUD has no further excuses. They must respond to these properly formed requests and the Courts have the authority to require that they do so.

STATEMENT OF RELATED CASES

There is and has been no other appeal in or from the civil action that is the subject of the pending appeal, nor is there any other case known to counsel to be pending in this or any other court that will directly affect or be affected by this Court's decision in the pending appeal with the exception of the Tribal Court case In the Blackfeet Tribal Court for the Blackfeet Indian Reservation, Browning, Montana, *Martin Marceau, Candice Lamott, Julie Rattler, Joseph Rattler, Jr., John G. Edwards, Jr., Mary J. Grant, and Deana Mountain Chief, Plaintiffs v. Blackfeet Housing and its board members, Ron Trombley, Howard Conway, Gail Rutherford, Joe Latray, Rodney Gervais, Ronald "Smiley" Kittson, and Leah Bad Marriage, Defendants*, Case No. 2009-CA-248. This Tribal Court case has been held in abeyance by stipulation of the parties until the conclusion of the instant case and all appeals therefrom.

DATED this 12th day of September, 2011.

TOWE, BALL, ENRIGHT, MACKEY
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Attorneys for Plaintiffs

By: /s/ Thomas E. Towe
Thomas E. Towe

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains no more than 14,000 (11,220) words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii.

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 (compatible) in Times New Roman 14 points.

DATED this 12th day of September, 2011.

TOWE, BALL, ENRIGHT, MACKEY
& SOMMERFELD, PLLP
Attorneys for Plaintiffs

By: /s/ Thomas E. Towe
Thomas E. Towe

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2011

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant.

Terryl T. Matt, Esq.
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DATED this 12th day of September, 2011.

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By: /s/ Thomas E. Towe
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ADDENDUM