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

---

PLAINTIFFS'/APPELLANTS' REPLY BRIEF

Appearance:
THOMAS E. TOWE, ESQ.
Towe, Ball, Enright, Mackey & Sommerfeld, PLLP
2525 6th Avenue North
P.O. Box 30457
Billings, MT 59107-0457
(406) 248-7337/Fax: (406) 248-2647
towe@tbems.com

JEFFREY A. SIMKOVIC
Simkovic Law Firm, PLLC
20 North 29th Street
Billings, MT 59101
(406) 248-7000/Fax: (406) 248-5191
Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I.

HUD'S RESPONSIVE BRIEF CONTAINS SO MANY STATEMENTS OF FACT THAT ARE INACCURATE OR TAKEN OUT OF CONTEXT THAT IT MARS THE BRIEF'S ACCURACY AND EFFECTIVENESS.

HUD spends considerable time in its responsive brief addressing facts based on the voluminous documents contained in the Administrative Record. However, there are a number of items that are simply inaccurate or taken out of context leaving an inaccurate impression of what actually happened in this case. These inaccuracies are sufficient to leave a distorted impression and need to be addressed.

First, In an apparent effort to undermine Plaintiffs' contention that the health issues caused by wooden foundations were not generally known until at least 1997 (Plaintiffs' opening brief at 24), HUD says the Plaintiffs' Third Amended Complaint specifically states that Blackfeet Housing Authority and many homeowners objected to wooden foundations as ineffective, substandard, unhealthy and dangerous in 1977. (Responsive Brief at 38, 45, & 17.) In point of fact, this is inaccurate. The time frame is wrong as it relates to "unhealthy and dangerous." While initially BHA and homeowners objected to wooden foundations as ineffective and substandard structurally, there was no health component in these objections because they had no knowledge at that time that the

drainage would lead to moisture accumulation and mold or that the creosote treatment of the lumber was toxic to their health. HUD misreads paragraph 31 of the Plaintiffs' Third Amended Class Action Complaint. When read in its entirety in context it is clear the allegation referred to objections made by homeowners in the beginning and all through the time period in question from 1977 through 2002 when this lawsuit was filed. *See ER 34-37.* Also see ¶39 which clarifies that Plaintiffs and other class members were unaware of the full extent of the defect and the accompanying health problems until just prior to the initial filing of this lawsuit. *(ER 36.)* Furthermore, the allegations contained in paragraph 31 of the Third Amended Complaint were each denied by HUD in its answer. *See page 7, paragraph 20 of Federal Defendants' Answer to Plaintiffs' Third Amended Complaint*.

Second, HUD states that HUD awarded a grant to correct the problems with the wooden foundations in the spring of 1980, suggesting that not only did HUD make money available to fix the problem as early as 1980, but they were doing something about this problem. (Responsive Brief at 17.) In fact, the document cited for that statement is an historical background prepared by a 1980 Housing Board member, Carl Kipp. HUD failed to mention, however, that Kipp himself specifically said, "The 'correction' work was actually cosmetic." (ER 130.) Apparently all that was done was to make the "bowed wall" appear plumb by

covering it with sheetrock. As Kipp states, "What it did was to make the wall appear plumb. After the new lumber materials were applied to the walls, sheetrock was installed to cover up the bowed walls. There was minimal structural strength added by this corrective work." (ER 130.) Obviously nothing was done about the drainage that would affect the moisture and mold or the creosote problem that later resulted in many of these houses becoming unlivable. HUD's incomplete reference to Kipp's history of the problem obviously leaves the wrong impression of what happened.

Third, at page 12, HUD suggests that plans submitted by Archambault, the Housing Authority's architect on the project, in 1976 already contemplated the use of wood foundations based on the language contained in item no. 10 of the technical assessment. (Responsive Brief at 12.) Item 10 is contained in a document prepared by HUD's architect Dale H. Young, and not Archambault, the Housing Authority's architect. Furthermore, the document is merely instructions to the Housing Authority and its architect and engineer to check the plans and specifications for accuracy and completeness. Reference to wood foundations does not, therefore, mean that there are or are not, in fact, any wood foundations but only if there are they should be checked accordingly. (SER 24-25).

Fourth, HUD states three times that two of the Lead Plaintiffs referred to the wood foundation problems as being toxic and health threatening from the very

beginning. Obviously this was done to suggest that the Plaintiffs themselves were aware of the health risks from the very beginning, i.e. 1976 and 1977, and not recently discovered as Plaintiffs contend. (Responsive Brief at 16, 39.) However, careful examination of the authority cited for these statements does not support Defendants statement. Admittedly the Plaintiffs and others were concerned from the beginning about "structural" problems but at no time did they have any knowledge that there would be health problems as well because of the moisture, mold, and toxicity of the creosote-treated wood. The statement attributed to Plaintiffs Gary and Mary Jane Grant is from a letter dated February 9, 2002, to the Office of Inspector General and it clearly states that, "These units have had structural problems from the beginning because of the wood foundations and construction flaws in the walls and roof." (SER 70.) The next sentence deals with health problems but at no time does it suggest that these started at the "beginning." The statements attributed to Plaintiff Martin Marceau are much more obviously taken out of context. The citation is to an article that appeared in an Indian newspaper on April 15, 2002, called the "Indian Country Today." He was talking about the entire gap of time and all the problems that had come to light by the date of that article. He very carefully, however, limited the beginning problems to "structural problems" and stated that, "right from the beginning we've had structural problems. They're not only toxic, but substandard." Obviously he

referred to the fact that structural problems existed from the beginning and the problems are not only the toxic problems that affect the health of the Indian people who acquired the homes and which just recently had come to light, but that structural problems, which were known from the beginning, caused them to be substandard as well. At no time did Martin Marceau suggest that the toxic issues were known from the beginning. There is no evidence that anyone knew of the toxic and mold health problems before 1997.

Fifth, in an apparent attempt to suggest the Plaintiffs themselves were guilty of not actively pursuing their rights, HUD states that a now-defunct Blackfeet Residential organization was encouraged to apply for a 10 million dollar grant from HUD to fund the rehabilitation of the placement of damaged homes but the application was never submitted to HUD. The authority cited for this statement is a guest editorial printed April 12, 2002 in "Western Breeze," a local newspaper. (SER 85.)[1] Not only is there some question about the accuracy of the date, but the statement is attributed to an unidentified person about an unidentified organization now defunct which the newspaper claims never submitted an application because the Housing Board wouldn't recognize its legitimacy. This was contained in a "guest editorial" of a newspaper. There is immediately a question of authenticity and relevancy. More importantly, there is no indication that the concern of this

1 HUD's citation to SER 84 is in error.

unidentified group in any way was based on the health concerns that later appeared or that any of these parties are in any way connected to the Plaintiffs. This is hardly concrete and solid proof to refute Plaintiffs' contention that the health issues caused by wooden foundations were not generally known until at least 1997. (Plaintiffs' opening brief at 24.)

Sixth, HUD states that its assistance secretary claimed in 1998 that 16.7 million dollars had been provided to Blackfeet Housing over the past 6 years and that funding to Blackfeet Housing from 1993 through 1999 was 41.5 million. (Responsive Brief at 22, 24.) While standing by itself these numbers seem to suggest that the housing authority had ample funds within which to fix or repair the wooden foundation problem. However, these numbers pale in significance when placed beside the Housing Authority's estimates of their total needs. In its letter to HUD dated March 22, 1999, the Housing Authority stated their total needs amounted to $193,450,000 of which $9,945,000 would be needed to replace or repair the wooden foundations. (ER 131, 132.)[2] Note in particular that the Housing Authority needed 900 new units at 99.5 million and 54.18 million to rehabilitate 1204 homes that already were in existence, not counting the 152 units that needed replacement of wooden foundations. These numbers all need to be kept in mind to place the problem in its proper perspective.

2 HUD's brief does indeed refer to this document at page 20.

Seventh, HUD's brief refers to Secretary Cuomo's visit to the Blackfeet Reservation in August of 1999 and to the fact that he announced at this visit a $500,000 Indian community development block grant to rehabilitate 9 houses and build a park. (Responsive Brief at 21.) What HUD does not state is the language Secretary Cuomo used to describe the problem during his visit. In the headlines of the Helena Independent Record from August 5, 1999, Cuomo was cited as stating that he found the housing conditions "deplorable," like third world nations (SER 78.) Nor does it say that Cuomo was dismayed to learn that the lack of funds plagues tribal housing. He stated that "HUD will never have enough money for all the housing needs of poor Native Americans." (SER 76, 77.)

Eighth, HUD states that none of the 6 million dollars in Indian Housing Block grant funding received since 1998 have been allocated to the repair of MHHOP houses. (Responsive brief at 23.) HUD cites ER 119 to support this statement. This is an incomplete letter written by HUD to Montana U.S. Senator Conrad Burns. While it refers to 6 million dollars given to the Blackfeet Tribe in IHBG funds in FY2000 nowhere does this citation refer to the fact that none of the funds had been allocated to repair MHHOP houses. Indeed, internal HUD memorandums suggest that 2.5 million dollars has been budgeted for rehabilitation and another $850,000 has been budgeted for maintenance operations from the Housing Authority's FY2002 IHP, part of which is outlined for identifying the

needs of homeownership units constructed with wooden foundations. (ER 114-115.)[3]

Ninth, finally, HUD states that Blackfeet Housing did not "mention" the need for remediation of wooden foundations in its CGP Physical Needs Assessment until 1997. (Responsive brief at 24.) ER 127 is listed as support for this statement. However, ER 127, a letter dated May 29, 1998, to Montana U.S. Senator Max Baucus, states that the wooden foundations/basement problems were not listed as a "priority" until 1997. (ER 127, 128.) There is quite a difference between not mentioning the problem and not stating the problem as a priority.

These 9 illustrations of inaccurate, out of context, or exaggerated statements are cited primarily to show that one can easily obtain the wrong impression from reading HUD's brief. Careful analysis suggests the impression is totally erroneous and this erroneous impression clearly mars the entire brief. While seemingly minor when taken individually, the accumulated impact does suggest the wrong impression. The wooden foundation problems were serious. They were listed as a priority starting in 1997. And the people affected did not know about the health problems caused by wooden foundations until 1997. It is also significant in that over half of HUD's brief is devoted to a summary of the facts.

---

3 Full readable copies of these Excerpts are shown as ER 273 and ER 274 (Vol.III). The first copies submitted with the Administrative Record were not completely legible.

II.

THE WIND RIVER CASE AND OTHERS REFER TO "DISCOVERY" AS THE KEY TO THE DATE OF ACCURAL FOR THE COMMENCEMENT OF THE STATUTE OF LIMITATION, WHICH DID NOT HAPPEN IN THIS CASE UNTIL 1997.

The actual errors and misrepresentations clearly affects HUD's principal arguments. HUD argues that all the parties were aware of the use of wooden foundations in 1977, which may be true; Plaintiffs don't deny the homeowners were aware that their houses had wooden foundations. However, HUD then attempts to argue that Plaintiffs acknowledged from the beginning these problems were not only structural but "unhealthy and dangerous" and "toxic" as well. (Responsive brief at 38, 39.) Obviously this is a direct reference to the statements of Gary and Mary Jane Grant and Martin Marceau referred to earlier (Fourth inaccuracy above) which were clearly taken out of context. Nowhere is there any evidence that Plaintiffs themselves ever were aware of the toxic nature of the wood foundation problem until 1997. (See SER 84, 86.) They certainly were aware of the structural problems from the beginning but not the toxic creosote, mold, and moisture problems that caused health issues until 1997. (See Plaintiffs' opening brief at 24-29.)

HUD argues that the discovery rule is a tort rule that does not apply to this case (Responsive brief at 40-41) and that *Wind River Mining Corporation v. United States*, 946 F.2d 710 (9th Cir. 1991) only allows an extension of the statute of limitations when there is a postponement of the "application" of the decision of an administrative agency to the Plaintiffs. (Responsive brief at 43-46.) First, HUD is in error; the discovery principle is not merely applied to tort cases. See *Thorne v. Hale*, 2009 WL 890136 at 4 (E.D. Virginia VA. 2009) (The discovery rule is applied to an Americans for Disabilities Act case); *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038-40 (9th Cir. 2003) (The discovery rule is applied to injunctive relief under a franchise contract); *Deirmenjian v. Deutsche Bank*, 526 F.2d 1068, 1092 (C.D. Calif. 2007) (The discovery rule is applied to International Law such as a Class Action by Armenian Genocide Victims against a German Bank); *In Re Verisign, Inc. Derivative Litigation*, 531 F.Supp.2d 1173, 1215-16 (N.D. Calif. 2007) (The discovery rule is applied to a Shareholder Derivative Action); *Carrasco v. Fiore Enterprises*, 985 F.Supp. 931, 937-938 (D. Ariz. 1997) (The discovery rule is applied to a Federal Odometer Act case); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 2007) (The discovery rule is applied to a RICCO case); *In Re Seagate Technologies Security Litigation*, 1985 WL 5832 at 3 (N.D. Calif. 1985) (The discovery rule is applied to a case under the Securities Act of 1933). The discovery

rule has been applied to many more cases; application of the discovery rule in American jurisprudence is the rule not the exception.

Furthermore, HUD misreads the *Wind River* case. While it is true that this Court in *Wind River* refers to a substantive challenge to an agency decision must be brought within 6 years of the agency's "application" of that decision to the specific challenger (946 F.2d at 716), discovery and not application is the key. In that case the Plaintiff staked a mining claim within a region that had been declared by the BLM as a wilderness study area where mining activity could not apply. The Plaintiff challenged the decision to make it a Wilderness Study Area which banned mining because Wilderness Study Areas must be "roadless areas of 5000 acres or more" and there were roads in this particular tract. Therefore, Plaintiff urged that the decision to declare it a Wilderness Study Area was ineligible under 43 U.S.C. §1782a (1988) (FLPMA §603(a) and beyond the agency's authority to declare. This Court held that *Wind River's* right of action first accrued when *Wind River* first staked its mining claim and was informed by the BLM that its mining claim was barred on this land. It was only at this time that plaintiff "discovered the true state of affairs," namely, that the 1979 action of the BLM in establishing this Wilderness Study Area was *ultra vires* as exceeding the agency's statutory authority.

This Court first pointed to the difference between a procedural challenge and a substantive challenge indicating that *Shiny Rock Mining Corporation v. United States*, 906 F.2d 1362 (9th Cir. 1990) and *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) were both distinguishable as procedure challenges and not substantive challenges. Unlike a substantive challenge, there is no extension of the statute of limitations allowed for a procedural challenge. In *Wind River,* however, the challenge was substantive; Plaintiff challenged the BLM action as *ultra vires* because it exceeded the agency's authority. Similarly, in the instant case, Plaintiffs contend that the action in approving wooden foundations exceeded HUD's authority. It is, therefore, substantive or *ultra vires* as exceeding the agency's statutory authority.

This Court in *Wind River* then concluded that the plaintiffs' lawsuit filed in 1989 was not time-barred even though the BLM action was taken in 1979, 10 years earlier, because plaintiff did not discover "the true state of affairs," namely, that *Wind River* was barred from pursuing ore extraction activities on that land until much later. The language of this Court is very significant.

> The grounds for such challenges [substantive or *ultra vires* challenges] will usually be apparent to any interested citizen within a six year period following promulgation 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. . . 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.**

946 F.2d at 15. (emphasis supplied.) Clearly, the critical language and the critical reasoning for this Court's opinion is discovery.

HUD confuses the difference between when a claim actually arises and when the existence of such a claim becomes known to the Plaintiffs. (See Responsive brief at 41-42.) Under *Wind River*, the action accrues when the plaintiffs – or any reasonable person – should have **discovered** the critical facts. Here, the critical facts are wooden foundations cause health problems. The harm suffered by the Plaintiffs that led to this cause of action was the mold and the toxic nature of the creosote used to protect the wooden foundations neither of which were known or understood by anyone prior to 1997. This health hazard simply was not known to anyone prior to 1997. It is the essential part of Plaintiffs' claim for relief; it is the damage portion of Plaintiffs' cause of action.

HUD also cites *North Country Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009), Cert. Denied 130 S.CT. 2095 (2010). This case also supports Plaintiffs' position more than it supports HUD's position. In that case, the Nooksack Indian Tribe submitted a proposed gaming ordinance to the National Indian Gaming Commission ("NIGC") in 1993. Pursuant to that action, the

Nooksacks licensed and began constructing a casino in 2006 and the neighboring residents and other property owners near the casino site formed an organization (the Plaintiff) and filed a suit in July of 2007. This Court specifically held that the six-year statute of limitations did not bar the plaintiff's claim against NIGC whose action took place in 1993, 14 years earlier, because no one was likely to have "discovered" that the agency's action was *ultra vires*, i.e., beyond its authority until well within the statutory period.

> "[N]o one was likely to have discovered" that NIGC's approval was "beyond the agency's authority until someone actually took an interest in" it. *Wind River*, 946 F.2d at 715. The Alliance [Plaintiff] "took an interest" in 2006 when construction of the casino began near some of its members' properties. The Alliance "could have no idea" in 1993 that the NIGC's approval of the Nooksack's ordinance "would affect them" in 2006 by leading to construction of a casino thirty-three miles from the Nooksack Reservation.

573 F.3d at 742-43. Note that this Court does not use the words "applied to the Plaintiffs" but uses the word "discovered." Clearly the focus is on discovery. That is what is important to this Court in its previous decisions.

Similarly, in *Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d 1174, 1182-83 (E.D. Calif. 2003), a case cited by HUD (Responsive brief at 45) and cited significantly by this Court in *North Country Community Alliance, Inc.*, 573 F.3d at 743, the Court also focuses on the discovery of the true set of facts. In that case, a competitive gambling concern sued the Department of

Interior claiming the secretary had violated the APA by listing the tribe as a federally-recognized Tribe in 1992. The district court held the six-year statute of limitations did not bar the claim even though the Department's action was taken 9 years earlier. Citing extensively the *Wind River* case of this Court, the District Court stated:

> The rationale of the *Wind River* decision is equally applicable to this action: "the government should not be permitted to avoid . . . challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.

278 F.Supp.2d at 1182-83. Continuing:

> Thus, there was no one with standing to challenge the recognition decision at the time it was made. For these reasons, the statute of limitations did not start running on plaintiffs' tribal status claim until IGRA gaming in San Pablo by the Lyttons became probable. It follows that plaintiffs' claim is not barred by the six-statute of limitations.

Id. Thus, it is clear that this case also supports Plaintiffs' position. The key is not when it was applied to the Plaintiffs but when the true state of affairs was **discovered** or when someone "with standing to challenge" the action became aware of the right to sue. In the instant case, a law suit based on health issues could not be brought by someone without standing. Standing would require someone affected and injured by the health problems of the wooden foundations; at

a very minimum, a person would have to know about the health problems to have standing. That did not happen until 1997.

Furthermore, there is no continuing application here as HUD contends. The action of HUD that is challenged by Plaintiffs in this Count is the approval of wood foundations for the use in homes which were then constructed for Plaintiffs when such approval violated HUD's own standards. The decision was *ultra vires* in that it exceeded HUD's authority under the regulations and statutes. Once the action was taken, namely, the approval was granted, the houses were built. There is no continuing violation until we get to Count II in which the Plaintiffs challenged the inaction or failure of HUD to "fix it." The action challenged in Count I was a one-time decision, in the nature of a tort that did not affect the Plaintiffs until the health issues became apparent; that is certainly subject to the discovery rule. To the extent it was substantively wrong and *ultra vires*, it was arbitrary for HUD and the Defendant the Housing Authority, to rely on it. See *Oppenheim v. Coleman*, 571 F.2d 660, 663 (D.C. Circuit 1978, cited extensively in *Wind River*, 946 F.2d at 715).

If the word "application" is used, it should only be used as it applies to the application to a particular challenger, such as the Plaintiffs. The health issues did not apply to any of these Plaintiffs until 1997 – when it was first realized the mold

and toxic creosote may be causing them health problems. See additionally the many cases cited in Plaintiffs' Opening Brief at 32-37.

Thus, it is respectfully submitted that the case is not time barred. The action does not accrue and Plaintiffs did not have standing on the health issues until they learned of the fact that wooden foundations cause mold and toxic health problems in 1997. That is well within the 6 year statute of limitations.

III.

HUD'S CONTENTION THAT THE OLD CHIEF LETTER AND THE MILLER LETTER DO NOT CONSTITUTE A PROPER FORMED REQUEST FOR ASSISTANCE DEFIES NOT ONLY THE FACTS BUT LOGIC AS WELL. THE LANGUAGE OF BOTH LETTERS IS CLEAR AS IS THE OFFICIAL NATURE OF THE REQUEST.

Incredibly HUD insists that the Old Chief letter from the Tribal Chairman to the Secretary of HUD dated April 9, 1999 (ER 120-126), and the Miller letter from Blackfeet Housing to Mike Boyd of HUD dated March 22, 1999 (ER 131-136), do not constitute a properly formed request for assistance. This statement and this argument defies the facts. Both letters (they are virtually identical in language) present a summary of the housing needs on the Blackfeet Reservation and, after reviewing the wooden foundation problem, specifically provide in paragraph 7 of the Old Chief letter and paragraph 5 of the Miller letter,

> The Tribe and Housing are requesting assistance in remedying this problem.

(ER 123, 135.) It would be hard to imagine more specific language or the formulation of words that would make a request for assistance clearer or more obvious. HUD can't complain about the language or the wording of the request. The words, "properly formed request for assistance," are the words of this Court in *Marceau III*. *Marceau III*; 540 F.3d 916, 928 at note 6 (9th Cir. 2008).

Indeed, HUD says these letters don't mean what they say; i.e., they were never intended to constitute formal requests for assistance. (Responsive brief at 47.) The letter from the Tribal Chairman is the directed to the Secretary of Housing and Urban Development and contains very specific language. HUD cannot legitimately say these letters do not intend what they say; HUD's position is inexplicable. To reach this conclusion HUD must ignore the plain meaning of the words. These are not just any requests. The Old Chief letter is from the highest elected official of the Blackfeet Tribe, Chairman William Old Chief, and it is directed to Andrew Cuomo, Secretary of Housing and Urban Development, the head person of that organization. The Miller letter is from the Executive Director of the Housing Authority on the Blackfoot Reservation and is directed to Mike Boyd who is the chief contact the Housing Authority has with HUD. It is "a properly formed request for assistance by the Blackfeet Housing Authority" as required by this Court in *Marceau III*. 540 F.3d at 928, n. 6. To say the language

is not properly formed or the language wasn't intended to mean what it says, is not reasonable.

HUD seems to suggest that the only documents that would be a properly formed request for assistance would be the annual Indian Housing Plan (IHP) (See Responsive brief at 49) or the Annual Contributions Contract (ACC) (See Responsive brief at 54). Unfortunately, as Plaintiffs indicated in their opening brief, the Administrative Record is admittedly incomplete (Declaration of Randall Akers, Document 131-1.) Consequently, none of the Annual Indian Housing Plans (IHPs) or the Annual Contribution Contracts (ACCs) are included in the Administrative Record.

There are, however, significant references to both documents in the Administrative Record. The letter from Randall R. Akers to Ted L. Key with a copy to Michael E. Boyd and other HUD officials copies in full a status report on Blackfeet wooden foundations/mold issues prepared by Lori L. Roget on March 22, 2002. That document states in part:

> Pursuant to BH's [Blackfoot Housing's] FY2002 IHP [Indian Housing Plan], the following goals and objectives are planned to assist occupants of rental and homeownership units in need of repairs:
> . . .
> - Identify needs of homeownership units constructed with wooden foundations;

(ER 114-115)4 This certainly indicates that an Indian Housing Plan for the Blackfeet Reservation was prepared and submitted for FY2002. And it included a request for funding to fix the wooden foundations. There is nothing to indicate that an appropriate plan was not also submitted for every other year in question. Thus, even if HUD were correct that a properly formed request for assistance by the Blackfeet Housing Authority had to be made in an Indian Housing Plan, this was done. And there is no evidence that the HUD ever responded to this request.

Similarly, in a letter from Hal C. DeCell, III, Assistant Secretary of HUD to the Hon. Max Baucus, United States Senator for Montana, dated May 29, 1998, the Assistant Secretary of HUD specifically states

> In 1997, BIHA [Blackfeet Indian Housing Authority] submitted a new CGP [Comprehensive Grant Program] plan and listed the wooden foundations/basement walls as a priority. . .

(ER 127-128.) The Comprehensive Grant Program is the funding formula that both HUD and the Housing Authority operate under. It is taken directly from the Annual Contributions Contract. Again, there is nothing to indicate that a similar contract for all other years since 1997 did not include a request for assistance for the wooden foundation problem. Again, therefore, even if HUD is correct that the only properly formed request for assistance is in the Annual Contributions Contract, the Administrative Record shows that there was such a contract and it

4 Complete copies of these documents are located in Vol. III, ER 273 and ER 274.

included a request for funding for the wooden foundation problem. There is no evidence that HUD properly responded.

The mere fact that Old Chief letter and the Miller letter were prepared before a visit from Secretary Cuomo is irrelevant. As indicated, the letter primarily reflects exactly what is in the Indian Housing Plan (IHP) says and requests; in this regard the letter simply reinforces the official documents. HUD's suggestion that HUD has no obligation to respond to a letter from the Chairman (Responsive brief at 54) makes no sense. The Chairman is not a homeowner but is the officially-elected representative of the entire Tribe. Furthermore, the Miller letter is from the Housing Authority and directed to the officials in HUD. This is from the very authority that this Court has indicated the request must originate. (*Marceau III*, 540 F.3d 916 at 928 n. 6.)

Plaintiffs' point in this Count is not that the funds were not provided but that HUD has never properly responded – or at least there is no evidence that they have responded in the Administrative Record. This case should be remanded to the District Court with an Order to Remand the issue of responding to the properly formed requests for assistance on the wooden foundation problems to HUD for further action. HUD should be ordered to fix it.

CONCLUSION

HUD's initial decision to approve wooden foundations for the MT-8 Project was beyond its authority because it was done without complying with the industry standards required of the regulations and because the wooden foundations were approved without any evidence that a proper drainage as required by the industry standards and the regulations was followed in view of the soils that existed in this project. Since the approval went beyond HUD's authority under the statutes and its own regulations, it is *ultra vires.* Thus, this decision was arbitrary and capricious and contrary to law and the relief sought in Count I of the Plaintiff's Third Amended Complaint should be granted. Plaintiffs' Complaint is not time-barred because the health issues resulting from the approval of wooden foundations did not come to the Plaintiffs' attention at least until 1997. Only then did Plaintiffs acquire standing and a right to sue for the health issues cause by the approval of wooden foundations. Under the *Wind River* case of this Court and other cases following the *Wind River* decision, the case accrues upon discovery of the true facts which not only gives rise to a cause of action but gives standing to the Plaintiffs to bring it. This happened sometime after 1997, well within the statute of limitations period.

Further, the Old Chief letter from the Tribal Chairman dated April 9, 1999 (ER 120), and the Miller letter from the Executive Director of the Blackfeet Housing Authority dated March 22, 1999 (ER 131), clearly request assistance to

deal with the wooden foundation problem. They both constitute a properly-formed request for assistance. The Miller letter is from the official person with authority to request such assistance on behalf of the Blackfeet Housing Authority. It is addressed to the proper person in HUD. Even if somehow these letters could be disregarded as not binding or not official, the official documents, the Indian Housing Plan and the Annual Contribution Contracts, both include requests for assistance on the wooden foundation problem. Therefore, there is clearly a properly-formed request for assistance from the Blackfeet Housing Authority as required by the regulations and there is no evidence that HUD properly responded. Thus, the relief requested in Count II of the Plaintiffs' Third Amended Complaint should be granted.

Consequently, Plaintiffs urge this Court to reverse the decision of the District Court, remand the case to the District Court with instructions to remand the case to HUD for further action on these 2 issues and to issue an injunction enjoining HUD accordingly. In effect, HUD should be ordered to "fix it."

DATED this 22nd day of November, 2011.

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

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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App. P. 32(a)(7)(B)(ii) because this brief contains no more than 7,000 (5501) 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 of 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 22nd day of November, 2011.

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

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 November 22, 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.
310 East Main
Cut Bank, MT 59427

DATED this 22nd day of November, 2011.

TOWE, BALL, ENRIGHT, MACKEY
& SOMMERFELD, PLLP
Attorneys for Plaintiffs/Appellants
By: /s/ Thomas E. Towe
Thomas E. Towe