IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

1. ABSENTEE SHAWNEE HOUSING AUTHORITY, and	)	
2. HOUSING AUTHORITY OF THE SEMINOLE NATION OF OKLAHOMA	)	
Plaintiffs,	)	
v.	)	**Case No.: 08-1298-HE**
1. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEV.	)	
Defendant.	)	

PLAINTIFFS' REPLY BRIEF

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PLAINTIFFS' REPLY BRIEF

I. ARGUMENT AND AUTHORITIES

Plaintiffs Absentee Shawnee Housing Authority (herein "ASHA") and the Housing Authority of the Seminole Nation of Oklahoma (herein "HASNOK") hereby submit this reply to Defendant United States Department of Housing and Urban Development's Response Brief (Doc. No. 42).

A. THE FCAS PORTION OF THE FUNDING FORMULA IS THE SALIENT CONSIDERATION FOR PLAINTIFFS.

The overarching legal issue in this case is whether Defendant United States Department of Housing and Urban Development (herein "Defendant HUD") has unlawfully deprived the Plaintiffs of Indian Housing Block Grant (herein "IHBG") funding through its interpretation and implementation of the IHBG formula – specifically, through its determination of a recipient's formula current assisted stock ("FCAS") and its attempted recapture of funds due to alleged FCAS over-counts. Plaintiffs contend that these actions are inconsistent with HUD's trust responsibility and the spirit and intent, if not the letter, of the Native American Housing and Self-Determination Act of 1996, 25 USC § 4101 *et seq*., as amended (herein "NAHASDA").

Defendant HUD argues that FCAS is only one data element of the formula and is not indicative of the housing need of Plaintiffs ASHA and HASNOK. However, Defendant's arguments regarding the adequacy of the other "need-based factors" in the funding formula are misplaced. Doc. No. 42 at 16. During all times relevant to this lawsuit, the ASHA and the HASNOK were included within an over-lapping funding area

for formula funding purposes. Accordingly, the ASHA and the HASNOK received funding pursuant to Section 1000.326 of Title 24. Section 1000.326 provides for the allocation of IHBG funds based on Total Resident Service Area Indian Population ("TRSAIP"), unless all the tribes in the overlapping area agree upon an alternative method for sharing the data. The TRSAIP is a statistic related to the Indian labor force of a region and does not relate to the quality, availability or need for housing. Further, the TRSAIP includes all Americans Indians and Alaska Natives living in a particular geographic region, regardless of membership in the reporting tribe. Set in this frame, the FCAS data supplied the only formula funding element for Plaintiffs related to their particular housing needs.

B. PLAINTIFFS ARE ENTITLED TO DUE PROCESS REGARDING THE WRONGFUL RECAPTURE OF INDIAN HOUSING BLOCK GRANT FUNDS.

Plaintiffs were not afforded the due process protections (specifically, notice and an opportunity to be heard) to which they were entitled prior to the IHBG reductions and/or recaptures effectuated by Defendant HUD. The informal appeal and reconsideration procedure cited by HUD is not equivalent to the adjudicatory hearing on the record guaranteed by statute. *See* 24 C.F.R. § 26.

Further, HUD had no remedial authority to recapture funds previously spent on affordable housing activities under Section 405 of NAHASDA and 24 CFR § 1000.532, as such laws were in effect during the times relevant to this lawsuit. HUD never attempted to determine whether the Plaintiffs already had expended funds for the fiscal years in question. In *City of Kansas City v. U.S. HUD*, 861 F.2d 739 (D.C. Cir. 1988),

the Court considered the public housing analog of the regulations at issue in this case. In so doing, the Court found that "there is a fundamental distinction between adjustments made at the initial stage of grant award, and withholdings or recaptures made after the grant is awarded. The former could occur without a hearing; the latter could not." *Id.* at 743, n. 6. The Court further noted that, "[t]he reasons are obvious: years after a grant is made, the recipient may have already spent it, or at least committed funds in reliance on it." *Id.* at 745-46. *See also City of Boston v. HUD*, 898 F.2d 828, 833 (1st Cir. 1990).

In the case at bar, HUD regulations required IHBG recipients to have obligated at least 90 percent of a grant within two years of the initial award. *See* 24 C.F.R. § 1000.524(a). Accordingly, it is likely that Plaintiffs expended the IHBG funds at issue in this case prior to the commencement of the enforcement actions by HUD.

C. HUD DOES HAVE A TRUST RESPONSIBILITY TO IHBG RECIPIENTS.

In enacting NAHASDA, Congress specifically and repeatedly affirmed its trust responsibility with respect to federally-recognized Indian tribes. *See* 25 U.S.C. §§ 4101(1), (2), (3), (4), (5), (6) and (7). Congress did not merely recognize its trust responsibility to tribes in the general sense of the term. Rather, Congress *specifically* expressed its intent to provide adequate, safe and affordable housing for tribal members and vested HUD with the authority to carry out these responsibilities through the Indian Housing Block Grant program.

The existence and enforceability of the federal trust responsibility with respect to Indian tribes and their members is well-settled. *See, e.g., U.S. v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). The United States government by and through HUD acts in a

fiduciary capacity when administering block grant funds for the benefit of Indian tribes and tribally-designated housing entities under NAHASDA, a "money-mandating" statute. The Court of Claims recently characterized the trust responsibility in the context of Indian housing, as follows:

> NAHASDA provides that the Secretary "*shall* . . . make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government.

Lummi Tribe v. United States, 2011 U.S. Claims LEXIS 1664 at 27-28 (Fed. Cl. Aug. 4, 2011) (internal citations omitted). The absence of discretion on the part of the funding agency to exclude a participant from receiving funds under a particular statutory scheme supports the characterization of a statute as money-mandating. *See Gray v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989). Under NAHASDA, all tribes are guaranteed a minimum amount of funding as established annually by law. *See* 24 CFR § 1000.328. Additionally, the familiar "*Chevron* deference" that courts normally grant to a federal agency's interpretation of statutes it administers is applied with "muted effect" in cases involving Indians. *See Cobell v. Salazar,* 573 F.3d 808, 812 (D.C.Cir. 2009) ("*Cobell XXII*").

The case cited by HUD, *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), is inapposite and does not eviscerate HUD's fiduciary responsibilities in the context of Indian housing. In *Marceau*, the claims related to allegedly negligent

housing construction and maintenance that resulted in black mold contamination. The claims were brought by individual housing participants and the tribally-designated housing entity was a named party *defendant*. The Court found that a trust responsibility did not exist under a circumstance where the "federal government did not build, manage, or maintain the housing." *Id*. at 928. The case at bar clearly is distinguishable. This dispute arises from HUD's unlawful recapture and withholding of IHBG funds from tribes and TDHEs. NAHASDA is premised on the mandate of the *self-determination* of tribal governments rather than individual tribal members. The *Marceau* case was brought by individual tribal members against not only HUD but also the respective tribal housing entity. The public policies of NAHASDA were not served under the facts at issue in *Marceau*, and the Court's holding is not reflective of the trust responsibility of HUD vis-à-vis tribal governments.

D. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

NAHASDA, by its plain language, provided that the statutory changes to §4152(b) would

> not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008.

25 U.S.C. § 4152(b)(1)(E). HUD acknowledges that Plaintiffs' cause of action timely was filed with respect to the 45-day limitations period set forth in the Act. Doc. No. 42 at 18.

Section 4152(b) operates not only as a "savings" statute with respect to the Plaintiffs' claims, but also as a permissible waiver by Congress of any limitations period to the contrary. Courts have recognized the authority of Congress to enlarge the limitations period otherwise provided under the Administrative Procedure Act (herein the "APA"), especially in the context of Indian rights and claims. *See Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (finding that the appropriations acts waived the United States' sovereign immunity and deferred accrual of potential claims until an Indian beneficiary receives a meaningful accounting). *See also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed.Cir. 2003)).

Generally, lack of final agency action divests the court of power to review agency action under the APA. However, there is an exception when "plaintiffs claim that a governmental action was unlawfully withheld or unreasonably delayed." *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("*Cobell VI*"). "[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review." *Id*. at 1095 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)) (internal quotation omitted); *see also* 5 U.S.C. § 551(13) (including "failure to act" under the definition of "agency action"). As stated above, Plaintiffs take the position that HUD wrongfully deprived them of an opportunity for a hearing regarding the alleged over-counting of formula current assisted stock and resultant recaptures of grant funds. HUD's failure to provide the required due process protections to Plaintiffs effectively has tolled the limitations period applicable to this case.

To the extent that the Court finds Section 4152(b)(1)(E) of NAHASDA to be ambiguous, those ambiguities should be construed in favor of the Plaintiffs pursuant to the Indian canons of construction which are acknowledged by HUD in its brief. Doc. No. 42 at 14.

II. CONCLUSION

In light of the foregoing and the arguments set forth in Plaintiff's Opening Brief, the Plaintiffs ask the Court to issue the declaratory and injunctive relief requested in their Opening Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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