IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE BLACKFEET TRIBE, Plaintiff, v. UNITED STATES OF AMERICA, by and through the Housing and Urban Development, Defendant.	Electronically filed: May 7, 2012 Case No. 1:12-cv-00004 Judge Christine O. C. Miller

PLAINTIFF'S RESPONSE TO

DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Books

Rules of the Federal Court of Claims

INTRODUCTION

The Native American Housing Self-Determination Act reaffirms the government trust responsibility to Indians and specifically mandates that the federal government work with Indian Tribes to improve the housing conditions on Indian Reservations. Blackfeet Indian Housing Authority was created in 1977, pursuant to federal regulations. Its predecessor Blackfeet Housing was created in 1999. In 1977, in order to receive funding, the HUD regulations mandated all Indian tribes create a corporate entity and directed what language must be included in this corporate entity's articles of incorporation or charter. This was step one that all Indian tribes had to do in order to receive assistance from the federal government under the 1937 Housing Act. HUD allocated money to BIHA for administration and then money to build the 225 units. HUD, as the trustee to BIHA, monitored and approved the steps BIHA took to build these homes, including the plans and specs and budget for the project.

Defendant HUD's Motion to Dismiss rests on three assertions. First, Defendant HUD claims that the Plaintiffs failed to file their complaint within the time frame of the statute of limitations because Plaintiffs had to know, at the time these homes were built, that the wooden foundation design was faulty and that the homes were unsafe and unhealthy. Second, Defendant HUD asserts there is no statutory or regulatory authority that

the government has violated. Third, the Defendant HUD asserts that the Blackfeet Housing is collaterally estopped from raising a breach of trust claim based on *Marceau v. Blackfeet Housing Auth.*, 540 F3d 916 (9th Cir. 2008) *(Marceau III)*. This argument addresses all three assertions.

STANDARD FOR A MOTION TO DISMISS

A motion to dismiss for failure to state a claim pursuant to RCFC 12(b)(6) challenges the adequacy of a complaint on its face. RCFC 12(b)(6). A complaint must be sufficient "to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted). In deciding a motion under Rule 12(b)(6), a court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059, 378 U.S. App. D.C. 355 (D.C. Cir. 2007). If, in considering a Rule 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment under Rule 56." RCFC 12(d). In this case, the Defendant has cited and referenced exhibits that include letters and documents that are not a part of the Complaint. As a result, Plaintiff objects to the use of these exhibits as

outside the scope of its motion to dismiss, because if this were a motion for summary judgment, the Plaintiff would like the opportunity to conduct discovery and do interrogatories, requests for production, and depositions.

FACTUAL BASIS

In the late 1990's and until late 2002, the homes in question were the subject of many letters and meetings between HUD representatives and Blackfeet Housing. In these meetings, HUD did not say they were not responsible for replacing the units but instead indicated they would try to replace these homes or fix the problem. Some of the correspondence falling within this period can be summarized as follows:

- April 18, 2002 – Daniel Marquez sent a letter to HUD to notify them that wooden foundation homes were treated with chromated copper arsenate (CCA) and that this compound is toxic and that it was determined by the EPA that this material should be removed from commercial sale. (Exhibit 1).
- May 9, 2002 – Randall Akers from HUD responded to Daniel Marquez's letter regarding CCA. HUD stated that they had done testing on the affected units and that it was now up to the Tribe and Blackfeet Housing to determine what should be done about CCA. HUD did state that they were consulting with the Tribe

regarding CCA and how to use grants and available funds to remediate any problems with CCA in wooden foundations. (Exhibit 2).

- June 12, 2002 – Patricia Boydston from HUD sent Susan Erickson a letter stating that an issue arising on the Blackfeet Reservation should be handled by the Denver Program Region office. The letter states that Ms. Erickson's correspondence had been forwarded to the Denver office. (Exhibit 3).
- June 26, 2002 – Randall Akers from HUD sent Susan Erickson a letter stating that HUD was aware of the wooden foundation problems, but that there were no funds beyond specific grants available to fix the homes. They did say that HUD was working with the Tribe and Blackfeet and expected the homes to be fixed. (Exhibit 4).

The meetings and discussions stop after the *Marceau* case was filed, but there is no record that reflects HUD ever told BH that it was not responsible and that they would not help remedy the situation.

ARGUMENT

1. Statute of Limitations.

The Indian Tucker Act has a six-year statute of limitations. This statute of limitations does not begin to run until *the claim first accrues*. The Defendant filed an action to dismiss, alleging that the statute of limitation had to accrue when the homes were built, between 1977 and 1980, or when Marceau was filed in 2002, but the Defendant does not address the issue of whether HUD, as the trustee to the Blackfeet Tribe, ever repudiated its position that it was no longer the trustee.

There is no dispute that the federal government has a general trust relationship with tribes, and courts have found that the common-law trust relationship can be the basis for a claim for specific relief. *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F. 2d 1094 (8th Cir. 1989).

Private trust law principles are most often invoked in controversies involving direct management of tribal resources and funds. *See, e.g., Shoshone Indian Tribe of the Wind River Reservation v. United States,* 364 F.3d 1339 (Fed. Cir. 2004) (mineral leasing and funds); *Cobell v. Norton,* 283 F. Supp. 2d 66, 287-295 (D.D.C. 2003) (injunction requiring historical accounting of trust funds); *Jicarilla Apache Tribe v. Supron Energy Corp.,* 782 F.2d 855 (10th Cir. 1986) (oil and gas leasing). In these situations, the government's role is most akin to that of a private fiduciary, and the common law of trusts provides a rich source of norms governing the basic duties of a trustee. Trust law treatises, *See, e.g.*, George G. Bogert, George T.

Bogert & William K. Stevens, *The Law of Trusts and Trustees* (West, rev. 2d ed. 1980); Austin W. Scott, *The Law of Trusts* (Little, Brown, 3d ed. 1967); the *Restatement of Trusts, See, Restatement (Second) of Trusts*; *Restatement (Third) of Trusts*, and state and federal trust law opinions are invoked as guides to determine the scope of enforceable fiduciary duties.

Given that HUD is a trustee to the Blackfeet Tribe, it is appropriate to invoke the private trust law principles to address the statute of limitations issue HUD raises. Some state courts have said a cause of action for breach of fiduciary duty "does not accrue until the trustee repudiates the trust and the beneficiary has actual knowledge of that repudiation." *Demoulas v. Demoulas Super Mkts, Inc.*, 424 Mass. 501, 518 (1997). The question is, when did the Plaintiff Blackfeet Housing have actual knowledge of HUD's repudiation of the trust, if ever, in order for the claim to accrue?

For example, in a state court case, the court found that repudiation must be clear. The court said, "Even if it could be said that Lattuca made formal "demand" in the contract sense, repudiation does not occur if the trustee, instead of flatly rejecting a demand or request… gives some apparently good or plausible reason for his non-compliance, or promises future compliance… [which] may well be regarded as being more nearly a recognition of the trust than a repudiation thereof." Anot., 54 A.L.R.2d 13, 25 (1957). See *Prendergast v. Sexton*, 282 Mass. 21, 24 (1933) (occasional

refusal to honor recognized legal obligation not absolute and unconditional repudiation).

In this case, HUD has a trust obligation to Blackfeet Housing. HUD has met with the Blackfeet Housing over and over and instead of flatly rejecting Blackfeet Housing's demand to replace the wooden foundations, has indicated that it will do what it can to get Blackfeet Housing the money to replace these units. HUD has told Blackfeet Housing it recognizes there is a problem with the units and has led Blackfeet Housing to believe it would resolve the problem. Because HUD did not repudiate the trust, it is not unreasonable for Blackfeet Housing to expect HUD to replace the wooden foundation homes that are in such poor physical condition that repair is likely going to exceed the cost of replacement. Finally, as of the date of the filing of this cause of action, there has been no repudiation from HUD of it trust responsibility, so the Blackfeet Housing's claim has not accrued. Further, HUD, as the trustee, had to flatly reject its responsibility to Blackfeet Housing and it has not done this.

2. HUD has Violated the Federal Regulations and the Native American Housing Self-Determination Act.

The Tucker Act vests the Court of Federal Claims with exclusive jurisdiction over claims seeking money damages that are "founded ... upon the Constitution, or any Act of Congress, or any regulation of an executive

department [or upon any express or implied contract with the United States]". *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*).

In a long line of cases, federal courts have upheld Tucker Act jurisdiction over claims seeking damages for breach of trust in the management of timber resources, *United States v. Mitchell,* 463 U.S. 206 (1983); trust funds, *See, e.g., United States v. Mitchell*, 463 U.S. 206 (1983) (trust funds derived from timber resource); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) (trust funds derived from mineral leasing); oil and gas leasing, *See, e.g., Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 646 (2003); *Pawnee v. United States,* 830 F.2d 187 (Fed. Cir. 1987) (upholding Tucker Act jurisdiction over claims alleging mismanagement of oil and gas leases, but dismissing Plaintiff's claim as not within scope of duties created by statutes and regulations at issue); sand and gravel leasing, *Shoshone Indian Tribe of the Wind River Reservation v. United States,* 364 F.3d 1339, 1350 (Fed. Cir. 2004); and long-term surface leasing, *Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996). In addition, tribes have successfully stated claims for breach of trust arising from mismanagement of a land consolidation program, *Oglala Sioux Tribe v. United States*, 21 Cl. Ct. 176 (Cl. Ct. 1990) (statutes, regulations, and memoranda of understanding imposed on BIA duties, *inter alia*, to keep accurate records and manage tribal lands

to maximize income from lands acquired under land consolidation program); neglect of buildings comprising a fort on tribal land, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 480 (2003); and failure to survey and protect tribal land from third party intrusion, *Cherokee Nation v. United States*, 23 Cl. Ct. 117 (1991) (the tribe stated a claim for breach of trust, but claim stayed indefinitely until ownership could be determined), *stay vacated and remanded*, *Cherokee Nation v. United States*, 124 F.3d 1413 (Fed. Cir. 1997) (stay an abuse of discretion).

In this case, HUD's comprehensive regulatory scheme actually delineated the government's obligations with specificity; however, in trust cases not delineating the government's obligations but arising from actual control of a resource that did not involve an elaborate regulatory scheme and imprecise statutory language that did not determine the extent of the government's duties, courts still have found a general trust that in the end established an actionable claim for breach of trust. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) ("elementary trust law, after all, confirms the common sense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch"); *Seminole Nation v. United States,* 316 U.S. 286, 297 & 297 n.12 (1942) (payment of money to agents known to be dishonest violated private trust law standards); *Mason v. United States*, 461 F.2d 1364, 1372-1373 (Ct.

Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973) ; *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 19-20 (1944) (although jurisdictional statute required application of private trust law principles, application of principles "adds little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee"). *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, *1994 Utah L. Rev. 1471*.

In *Cobell v. Norton*, the D.C. Circuit stated that, "while the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms." The context and language of the applicable statutes provide the rationale:

> Where Congress uses terms that have accumulated settled meaning under either equity or the common law, [courts must infer] that Congress means to incorporate the established meaning of these terms [and] that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary. *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-330 (1981)).

Based upon the historic relationship between Defendant and Blackfeet Housing, and specifically, under the Native American Indian Housing Assistance Act, Congress passed laws providing that the federal government's trust relationship with the tribes creates a responsibility for

the federal government to remedy the deplorable housing conditions on Indian reservations. See Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101(2)-(5). The statute provides:

> The Congress finds that— (1) the Federal Government has a responsibility to promote the general welfare of the Nation—
> (2) there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;
> (3) the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;
> (4) the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition;
> (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 socioeconomic status

The actual language of the statute, coupled with the Defendant's assumption of the obligations and duties of a trustee by establishing and maintaining comprehensive, pervasive regulatory control of tribal trust lands and housing resources, and actual control of decisions of Blackfeet Housing, the United States government has created a trust obligation to protect and maintain the Tribe's trust property. As required in *Navajo Nation v. United States*, 556 U.S. 287, 290-91 (2009), NAHASDA itself is a duty imposing statute, thus, Blackfeet Housing, meets the requirements set forth in *Navajo.* If Congress had intended NAHSDA to only be an empty

trust as the defendant's state, then Congress would have expressly stated its intent.

3. The Collateral Estoppel Doctrine Does Not Apply in This Case.

This action is presently before the court on Defendant's Motion to Dismiss. Defendant contends that under the doctrine of collateral estoppel, also known as issue preclusion, Plaintiff should be bound in the action by the Ninth Circuit Court's prior determination that HUD has no trust responsibility to the *Marceau* plaintiffs.

Under the doctrine of issue preclusion, traditionally called "collateral estoppel," issues which are actually and necessarily determined by a court of competent jurisdiction are normally conclusive in a subsequent suit involving the parties to the prior litigation." *International Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1090 (Fed. Cir. 1984). The doctrine derives from the general principle that "the same person may obtain a judicial determination of an issue only once." James W. Moore et al., *Moore's Federal Practice* P 0.443[1] (2d ed. 1995). The Supreme Court described the derivation and purpose of collateral estoppel as follows:

> Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. Collateral estoppel . . . serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."

United States v. Mendoza, 464 U.S. 154, 158, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984) (citations omitted) (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980)); *see also Arkla, Inc. v. United States*, 37 F.3d 621, 623 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 1399 (1995) ("Affording a litigant more than one full and fair opportunity for judicial resolution of the same issue results in an untenable misallocation of resources.").

In *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983), the Court of Appeals for the Federal Circuit articulated the following four requirements for issue preclusion:

> (1) the issues to be concluded are identical to those involved in the prior action; (2) in that action the issues were raised and "actually litigated"; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded . . . was fully represented in the prior action [and had a full and fair chance to litigate].

While *Marceau* involved the question of whether HUD breached its trust responsibility to the homeowners, the issues were not identical in that *Marceau* involved a claim by tribal members. Turning initially to the first requirement of *Mother's Restaurant*, Blackfeet Housing does not dispute that both the instant case and the Ninth Circuit litigation involve the question of whether HUD's involvement with the wooden foundations constituted a breach of HUD's trust responsibilities, but that is where the similarity ends, as the court was addressing concerns or claims of tribal members, not the tribe. Thus, given the factual allegations in the instant

complaint and the Ninth Circuit decision, in pertinent part, they are not the same. Thus, even though *Marceau* raised a breach of trust issue, this court should not view the two cases as raising the identical issue for the purpose of issue preclusion, as Blackfeet Housing was a defendant and prohibited from bringing a claim for money damages in the district court or Ninth Circuit, as the Tucker Act vests the Court of Federal Claims with exclusive jurisdiction over claims seeking money damages that are "founded…upon the Constitution, or any Act of Congress, or any regulation of an executive department [or upon any express or implied contract with the United States]" 28 U.S.C. § 1491 (a)(1) and 28 U.S.C. § 1505. The end result was Blackfeet Housing did not have a full and fair opportunity for judicial resolution. Because the identical breach of trust issue does not exist between the Ninth Circuit litigation and this action, Defendant has failed to satisfy the first requirement for issue preclusion.

The second requirement of *Mother's Restaurant* is whether the issue was raised and actually litigated in a prior proceeding. In this cause of action, the breach of trust was raised and litigated in the Ninth Circuit litigation as it pertains to plaintiff potential homebuyers, but not as to the breach of trust to the tribe. The record shows in *Marceau III* the Ninth Circuit specifically addressed the breach of trust issue as to the tribal members only. In their written opinion, the court stated:

> Plaintiffs allege that HUD violated its trust responsibility to them, *as tribal members*. "
>
> *Marceau III*, 540 F.3d at 921.

In NAHSDA, the Congress made a distinction between its trust responsibility to tribal governments and tribal members. While the appellate court ruled against the tribal members, it did not once address the issue of the trust responsibility HUD owed Blackfeet Housing. Thus, the second requirement for issue preclusion has not been satisfied.

Defendant contends that the third requirement of *Mother's Restaurant* has been satisfied because the Ninth Circuit Court's determination was not "necessary and essential" to the court's judgment. The question of the breach of trust determination, as it relates to Blackfeet Housing, was not "necessary and essential" to the judgment because the Ninth Circuit Court did not have jurisdiction to decide the issue of trust responsibility as a claim for money damages vests exclusively with the Federal Court of Claims. Further, the Ninth Circuit could have reached a different conclusion given the tribal government was bringing the action, not defending. Here, as described above, the Ninth Circuit Court's judgment depended upon the determination that the defendant had breached its fiduciary obligations to tribal members. Thus, the breach of trust determination was not decided as to Blackfeet Housing or the Blackfeet Tribe.

The final requirement of *Mother's Restaurant* is that the party against which preclusion is sought was fully represented in the prior litigation and had a full and fair opportunity to litigate. The complaint in the Ninth Circuit litigation specifically named the United States and Blackfeet Housing as defendants. The issue as to the defendant HUD on the question of breach of trust was resolved as to the tribal members but not to the tribal housing authority. As HUD and Blackfeet Housing were co-defendants, and this action was not identical, the parties had different roles, and Blackfeet Housing was prohibited from bringing a claim for money damages. So, to dismiss this case now would result in this court not providing Blackfeet Housing with a full and fair opportunity to litigate the breach of trust issue.

CONCLUSION

The trust responsibility of the federal government is clear in the Native American Housing and Self-Determination Act. Blackfeet Housing's complaint is well within the statute of limitations because the federal government has not repudiated its trust responsibility. Second, HUD is likely prevented from repudiating its trust responsibility given the language in NAHSDA. Third, Blackfeet Housing in Marceau was unable to file a claim as the Tucker Act vests the Federal Court of Claims with exclusive jurisdiction over claims seeking money damages, under the

Constitution or federal statutes or laws. Further, the Ninth Circuit was not asked to address the question of the Federal Government's trust responsibility as to the Blackfeet Tribe or its governmental entitles, and NAHSDA recognizes a difference between Tribal governments and the tribal members. For these reasons the Plaintiff respectfully requests that this court deny the Defendant's motion to dismiss.

DATED this 7h day of May 2012.

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