No. 08-848C
(Senior Judge Wiese)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, FORT PECK HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY and HOPI TRIBAL HOUSING AUTHORITY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS COUNT TWO OF THE SECOND AMENDED COMPLAINT

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

DONALD E. KINNER
Assistant Director

MICHAEL N. O'CONNELL
Trial Counsel
Commercial Litigation Branch
Civil Division
U. S. Department of Justice
Classification Unit, 8th Floor
P. O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-1618
Facsimile: (202) 514-7969

December 16, 2011

Attorneys for Defendant

TABLE OF CONTENTS

PAGE

DEFENDANT'S MEMORANDUM. 1

QUESTION PRESENTED. 1

STATEMENT OF THE CASE. 1

I. Nature Of The Case. 1

II. Statement Of Facts 2

ARGUMENT.. 4

I. Standard Of Review 4

II. HUD Retains Its Inherent Authority To Recover Overpayments 4

A. Section 401 Of NAHASDA Did Not Diminish HUD's Inherent Authority To Recover Overpayments 6

B. Section 405 Of NAHASDA Did Not Diminish HUD's Inherent Authority To Recover Overpayments. 10

C. Congress Has Endorsed HUD's Interpretation Of Substantial Noncompliance 12

D. Plaintiffs Fail To State A Claim For An Illegal Exaction Or Breach Of Contract 15

CONCLUSION. 16

TABLE OF AUTHORITIES

CASES

Bank One, Michigan v. United States,
62 Fed. Cl. 474 (2003). 5

Barrett Refining Corp. v. United States,
242 F.3d 1055 (Fed. Cir. 2001). 5

Bell Atlantic Corporation v. Twombly,
550 U.S. 544 (2007).. 4

Casa de Cambio Comdiv v. United States,
291 F.3d 1356 (Fed. Cir. 2002). 15

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986).. 14

Daves v. Hawaiian Dredging Co.,
114 F. Supp. 643, 645 (D. Hawaii 1953). 4

DiSilvestro v. United States,
405 F.2d 150 (2nd Cir. 1968).. 5

Fort Peck Housing Authority v. HUD,
435 F. Supp. 2d 1125 (D. Colo. 2006).. 14

Grand Trunk Western Ry. Co. v. United States,
252 U.S. 112 (1920).. 5

Isbrandtsen Co. v. Johnson,
343 U.S. 779 (1952).. 5

Lummi Tribe of the Lummi Reservation v. United States,
99 Fed. Cl. 584 (2011). . . . . *passim*

Papasan v. Allain,
478 U.S. 265 (186).. 4

Star-Glo Associates LP v. United States,
414 F.3d 1349 (Fed. Cir. 2005). 15

United States v. Bank of the Metropolis,
40 U.S. 377 (1841). 4

United States v. Munsey Trust Co.,
332 U.S. 234 (1947). 5

United States v. Testan, ,
424 U.S. 392 (1976). 15

United States v. Texas,
507 U.S. 529 (1993). 5

United States v. Wurts,
303 U.S. 414 (1938). 4, 5

Wisc. Cent. R.R. Co. v. United States,
164 U.S. 190 (1896). 4, 5

STATUTES, RULES AND REGULATIONS

24 C.F.R. § 1000.318. . . . . 3, 13

24 C.F.R. §§ 1000.520-1000.532. 10

24 C.F.R. § 1000.532. . . . . 2, 11

24 C.F.R. § 1000.534. 7

24 C.F.R. § 1000.540. . . . . 2, 12

25 U.S.C. § 4101 *et. seq.*. *2*

25 U.S.C. § 4112. 10

25 U.S.C. § 4113. 11

25 U.S.C. § 4151. 5

25 U.S.C. § 4152. . . . . 5, 13

25 U.S.C. §§ 4161. . . . . *passim*

25 U.S.C. § 4165. . . . . 2, 6, 9, 10, 11, 12, 15

25 U.S.C. § 4166. 11

31 U.S.C. § 7502. 10

MISCELLANEOUS

5 Wright & Miller § 1216 at 233-34 4

Black's Law Dictionary 500 (5th Ed. 1979).. 5

Housing Issues in Indian Country: Hearing before the S. Comm. on
Indian Affairs, 110th Cong., S. Hrg. No. 110-65 at 69-70 14

Pub. L. 110-411, § 401.. 12

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, FORT PECK HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY and HOPI TRIBAL HOUSING AUTHORITY,	)	
Plaintiffs,	)	
v.	)	No. 08-848 (Senior Judge Wiese)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS COUNT TWO
OF THE SECOND AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims, defendant respectfully requests that the Court dismiss count two of plaintiffs' second amended complaint for failure to state a claim upon which relief may be granted.

DEFENDANT'S MEMORANDUM

QUESTION PRESENTED

1. Whether the Department of Housing and Urban Development possesses authority to recover overpayments of Indian Housing Block Grants without providing notice and a formal hearing to the grant recipient.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiffs received annual housing grants, referred to as Indian Housing Block Grants ("block grants"), from the Department of Housing and Urban Development ("HUD") in each fiscal year from 1998 to 2009 through the grant allocation formula in the Native American

Housing and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et. seq.* Second Amended Complaint ("SAC") ¶ 5. Plaintiffs contend that HUD "unlawfully recaptured and/or withheld" plaintiffs' annual block grants in fiscal years 1998 to 2009. Id. at ¶ 1. Plaintiffs dispute HUD's determinations that certain units are ineligible for inclusion in the formula used to calculate the grants and dispute HUD's determination that they have been overfunded. Plaintiffs contend that they have been underfunded. SAC at, *e.g.*, ¶¶ 24-25.

Plaintiffs have filed a second amended complaint in which they contend that HUD may not recover block grants from them without: (1) finding that plaintiffs failed to comply substantially with some provision of NAHASDA pursuant to 25 U.S.C. §§ 4161(a), 4165(d); and (2) providing notice and the opportunity for a hearing pursuant to HUD's implementing regulations at 24 C.F.R. §§ 1000.532 and 1000.540. SAC ¶ 47. Plaintiffs contend that if HUD does not follow these steps, any recovery of block grants is an illegal exaction and a breach of their funding agreements. SAC ¶ 48.

II. Statement Of Facts

The background of this dispute has already been set forth at length in the Court's opinion granting-in-part and denying-in-part defendant's motion to dismiss plaintiffs' first amended complaint. *See Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584 (2011). We summarize the facts pertinent to count two of plaintiffs' second amended complaint here.

This case is one of a number of cases brought by Indian tribes challenging HUD's method of calculating block grants and its attempts to recover past overpayments. Since the 2001 issuance of a report by HUD's Office of Inspector General, HUD has made it a priority to correct misreported data used for calculating block grants and to recover overpayments based upon past inaccuracies. The Inspector General's report criticized HUD for failing to enforce

24 C.F.R. § 1000.318, a regulation specifying that housing units would no longer be considered in the formula for calculating block grants "when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit" so long as such units are conveyed "as soon as practicable after a unit becomes eligible for conveyance." *See Lummi*, 99 Fed. Cl. at 588. The Inspector General recommended that HUD's Office of Native American Programs audit all housing units included in the allocation formula, remove ineligible units, recover funding from tribes that had inflated their count of housing units, and reallocate the recovery to other tribes that had been under funded. *Id.*

HUD thereafter notified a number of Indian tribes (including all of the plaintiffs) that, due to formula housing count corrections, HUD intended to recover overpayments from them. HUD recovered at least some money from all of the plaintiffs. As the Court has found, HUD did so only after it provided the plaintiffs notices that identified the regulations upon which HUD based its claims, provided guidelines explaining these regulations, listed by project number the specific housing units that HUD considered to be ineligible for grant purposes, and invited plaintiffs to review HUD's data and supply any information regarding the disputed housing units that would establish their continuing eligibility to be counted as part of a tribe's qualifying housing stock.[1] *Lummi*, 99 Fed. Cl. at 599. Thus, although HUD notified the plaintiffs of its formula data and overpayment determinations, and provided them with the opportunity to dispute them, HUD did not provide the plaintiffs with a formal hearing. Plaintiffs now challenge that action in count two of the complaint.

---

[1] By order dated September 29, 2011, the Court vacated this portion of its opinion. However, because the Court's decision to vacate was based upon plaintiffs' request to recharacterize count two of the complaint as an illegal exaction claim (and not any error in these findings), the findings should stand.

ARGUMENT

I. Standard Of Review

Pursuant to RCFC 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court held in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), RCFC 8(a)(2) does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557. Thus, "when the factual allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558 (quoting *5 Wright & Miller § 1216* at 233-34 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Hawaii 1953))).

II. HUD Retains Its Inherent Authority To Recover Overpayments

Like all Government agencies, HUD has the inherent authority long recognized by the Supreme Court to recover funds that it has wrongfully, erroneously, or illegally paid. *United States v. Wurts*, 303 U.S. 414, 415 (1938) (citing *Wisc. Cent. R.R. Co. v. United States*, 164 U.S. 190, 212 (1896)). As the Supreme Court has explained, an agency does not require statutory authorization to recover such overpayments because the right exists independent of statute. *Id.* (citing *United States v. Bank of the Metropolis*, 40 U.S. 377, 401 (1841)). This authority is based upon "'the principle that parties receiving moneys illegally paid by a public officer are

liable *ex aequo et bono* to refund them.'"[2] *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1064 (Fed. Cir. 2001) (quoting *Wisc. Cent.*, 164 U.S. at 212). Government officials do not have to file suit to establish the illegality of the payment and may administratively offset the debt from amounts otherwise owed to the debtor. *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112, 121 (1920); *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *see Bank One, Michigan v. United States*, 62 Fed. Cl. 474, 478 (2003) (quoting *DiSilvestro v. United States*, 405 F.2d 150, 155 (2nd Cir. 1968) ("It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary.")). In this case, HUD's duty to recover overpayments arises from the requirement in 25 U.S.C. § 4151 that it pay Indian tribes in accordance with the formula established by negotiated rulemaking pursuant to 25 U.S.C. § 4152.

Congress can, of course, eliminate powers of the agencies that it has created. But the Supreme Court explained in *Wurts* that the Government has the right to recover funds paid by mistake unless Congress has clearly barred such a recovery by statute. *Wurts*, 303 U.S. at 416; *see United States v. Texas*, 507 U.S. 529, 534 (1993) ("'statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'") (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

---

[2] *Ex aequo et bono* - A phrase derived from the civil law, meaning in justice and fairness; according to what is just and good; according to equity and conscience. *Black's Law Dictionary* 500 (5th Ed. 1979).

As we will demonstrate, NAHASDA does not limit HUD's authority to recover the overpayments at issue in this case and the statutory provisions that the plaintiffs cite do not address the dispute between the parties. The overpayments at issue do not involve substantial noncompliance with NAHASDA by any of the plaintiffs; HUD did not take any of the enforcement actions that Congress mandated HUD to take in cases where a grantee is found to be in substantial noncompliance; and HUD did not conduct a review or audit, as those terms are defined in NAHASDA.

A. Section 401 Of NAHASDA Did Not Diminish HUD's Inherent Authority To Recover Overpayments

Although the plaintiffs do not specifically plead that Congress withdrew HUD's inherent authority to recover overpayments, they rely upon sections 401 and 405 of NAHASDA, 25 U.S.C. §§ 4161(a) and 4165(d), in support of their contention that HUD lacked the authority to recover overpayments without providing notice and a formal hearing. The plaintiffs read far too much into the limited restrictions in these sections.

Section 4161(a) of NAHASDA is directed toward one specific situation: where a tribe has engaged in substantial noncompliance with NAHASDA. It provides in relevant part:

> (a) Actions by Secretary affecting grant amounts
>
> (1) In general
>
> Except as provided in subsection (b) of this section, if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall--
>
> (A) terminate payments under this chapter to the recipient;

> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
>
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
>
> (D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

25 U.S.C. § 4161(a) (emphasis added). Congress did not define substantial noncompliance in the statute. However, in HUD's implementing regulations, HUD has provided that a noncompliance is substantial if:

> (a) The noncompliance has a material effect on the recipient meeting its major goals and objectives as described in its Indian Housing Plan;
>
> (b) The noncompliance represents a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or the regulations, even if a single instance of noncompliance would not be substantial;
>
> (c) The noncompliance involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity; or
>
> (d) The noncompliance places the housing program at substantial risk of fraud, waste or abuse.

24 C.F.R. § 1000.534. The plaintiffs have made no attempt in their complaint to demonstrate that their actions fall under any of these definitions of substantial noncompliance. Nor have they challenged this regulation.

Thus, section 4161(a) requires notice and a formal hearing to the tribe only if HUD contends that the tribe acted in substantial noncompliance with NAHASDA. While Congress has provided this procedural protection to the tribes, it has also mandated that HUD take

specified enforcement actions if HUD concludes after the hearing that the tribe acted in substantial noncompliance. Affording tribes the procedural protections of notice and hearing in these limited circumstances is logical because the section 4161(a)(1) enforcement actions can be extremely serious for a tribe and may involve the termination of all NAHASDA payments or the replacement of the tribally designated housing entity. *See* 25 U.S.C. § 4161(a)(1)(A) & (D).

In contrast to situations involving substantial noncompliance, there is no language in NAHASDA that requires HUD to provide notice and a formal hearing of every funding correction it makes. Presumably, if Congress had intended to require notice and a formal hearing in every situation it would have done so, but it did not. Nevertheless, the second amended complaint states that "HUD may only adjust a NAHASDA recipient's grant amounts after complying with the notice and hearing requirements of Sections 401 and 405 of NAHASDA . . . ." SAC ¶ 48. If the plaintiffs are correct, HUD has no ability to recover an overpayment unless the tribe engaged in substantial noncompliance. Under this reading of the statute, if HUD inadvertently paid a tribe $10 million when the formula allocated only $1 million, HUD could not recover the overpayment because the tribe's mere receipt of an inflated payment would not be substantial noncompliance. Congress could not have intended such a nonsensical result.

As the Court has already found, this case arises out of a dispute between HUD and the tribes as to which housing units may be counted in the formula that determines the amount of the annual block grants. *See Lummi*, 99 Fed. Cl. at 587-90. As the Court's decision and the second amended complaint make clear, this dispute is primarily a dispute concerning the proper interpretation of NAHASDA's allocation provisions. The plaintiffs contend that, until the 2008 amendments to NAHASDA, HUD was required to fund plaintiffs at the level of their units in

1997. *See*, *e.g.*, SAC at ¶¶ 22-23. HUD disagrees with the plaintiffs' interpretation, but has never characterized the plaintiffs' misinterpretation of a complex statutory scheme as substantial noncompliance with that statute.

Plaintiffs' error in attempting to force fit this case into section 4161 is also demonstrated by the actions that HUD actually took here. As the Court has found, HUD worked with the tribes to recover the overpayments at issue by accepting voluntary returns of the overpayments by the tribes or by reducing the annual block grants. *Lummi*, 99 Fed. Cl. at 588-89. HUD did not take any of the prescribed section 4161(a)(1)(A)-(D) enforcement actions. Thus, HUD did not terminate payments to any of the plaintiffs. 25 U.S.C. § 4165(a)(1)(A). It did not reduce payments to any of the plaintiffs by the amount that such payments "were not expended in accordance with" NAHASDA. *Id.* at § 4165(a)(1)(B). It did not limit the availability of payments "to programs, projects, or activities not affected by such failure to comply." *Id.* at § 4165(a)(1)(C) (emphasis added). Nor did HUD provide a replacement tribally designated housing entity for the recipient. *Id.* at § 4165(a)(1)(D). Thus, HUD did not take any section 4161 enforcement actions.

Accordingly, count two of the second amended complaint is fatally defective because it fails to state a claim upon which the Court may grant relief under section 4161. As a matter of law, the plaintiffs have failed to identify language in NAHASDA that clearly evidences a congressional intent to limit HUD's authority to recover overpayments based upon the facts of this case. Section 4161, upon which the plaintiffs rely, does not contain a broad abrogation of HUD's authority, as the plaintiffs suggest; it merely provides that HUD must take one of four enforcement actions if a grantee engages in substantial noncompliance with NAHASDA.

From a factual standpoint, the plaintiffs have failed to plead the necessary facts to state a claim under section 4161. They have not pled that HUD has charged the tribes with substantial noncompliance with NAHASDA under 25 U.S.C. § 4161(a)(1). They have not pled that the facts of this case fit under any of the definitions of substantial noncompliance contained in 24 C.F.R. § 1000.540. They have not pled that HUD took any of the required enforcement actions in section 4161(a)(1)(A)-(D). Count two of the second amended complaint, therefore, does not state a claim upon which the Court may grant relief and should be dismissed by the Court.

B. Section 405 Of NAHASDA Did Not Diminish HUD's Inherent Authority To Recover Overpayments

Section 405 of NAHASDA, 25 U.S.C. § 4165, entitled "Review and audit by Secretary," provides that tribes are subject to the audit requirements in chapter 75 of title 31 of the United States Code. 25 U.S.C. § 4165(a). Chapter 75 audits examine matters such as whether the financial statements of the audited entity have been prepared in accordance with generally accepted accounting principles and whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole. *See* 31 U.S.C. § 7502(e)(1)-(2). The plaintiffs have not contended that a title 31, chapter 75, audit was involved in this case.

Section 4165 further provides that tribes are subject to reviews and audits by HUD to determine, among other things, whether the tribe has carried out eligible activities, has a continuing capacity to carry out eligible activities in a timely manner, and is in compliance with the Indian housing plan submitted pursuant to 25 U.S.C. § 4112. *See* 25 U.S.C. § 4165(b); 24 C.F.R. §§ 1000.520-1000.532. By contrast, section 4165 does not cover other reviews or

audits that the Government might take, such as HUD's review of an Indian housing plan submitted to be eligible for a grant under 25 U.S.C. § 4113, or an audit by the Comptroller General under 25 U.S.C. § 4166. Section 4165 reviews and audits involve situations where HUD is determining whether a tribe is spending its block grant in an appropriate manner, that is, by carrying out eligible activities and complying with its Indian housing plan. HUD has not alleged that the reason it is seeking to recover overpayments from the plaintiffs is based upon a tribe's failure to carry out eligible activities or failure to comply with their Indian housing plans. Thus, section 4165 has no application to this case.

Finally, section 4165(d) also provides:

> (d) Effect of reviews
>
> Subject to section 4161(a) of this title, after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient. . . .

This subsection simply means that if the review or audit uncovers substantial noncompliance pursuant to section 4161(a), HUD must provide notice and a hearing under that section. However, because, as we demonstrated above, this case does not involve substantial noncompliance, section 4165(d) does not apply to this dispute.

For similar reasons, the plaintiffs reliance upon 24 C.F.R. § 1000.532 is also misplaced. Section 1000.532 is simply the implementing regulation for section 4165. As the first sentence of the regulation states: "HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA." 24 C.F.R. § 1000.532(a) (emphasis added). Thus, this regulation has no applicability to this

dispute because the plaintiffs cannot show that HUD's action arose from a review or audit to determine if the tribes were engaging in eligible activities or complying with their Indian housing plans.[3]

Accordingly, count two of the second amended complaint is fatally defective because it fails to plead the facts necessary to state a claim under section 4165. Section 4165 does not contain a broad abrogation of HUD's authority to recover overpayments, as the plaintiffs suggest. The plaintiffs have not pled that HUD has charged the tribes with substantial noncompliance with NAHASDA under 25 U.S.C. § 4161(a)(1). They have not pled that HUD's recovery of the overpayments arose from an audit under chapter 75 of title 31. *See* 25 U.S.C. § 4165(a). They have not pled that HUD's recovery of the overpayments arose from reviews or audits by HUD to determine whether the plaintiffs were engaging in eligible activities or were in compliance with their Indian housing plans. *See* 25 U.S.C. § 4165(b). Count two of the second amended complaint, therefore, does not state a claim upon which the Court may grant relief and should be dismissed by the Court.

C. <u>Congress Has Endorsed HUD's Interpretation Of Substantial Noncompliance</u>

In 2008, Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, which amended several sections of NAHASDA while reauthorizing appropriations for another five years. *See* Pub. L. 110-411, § 401. Among the amendments, Congress added a new section 4161(a)(2), which provides:

> (2) Substantial noncompliance

---

[3] The plaintiffs also cite 24 C.F.R. § 1000.540. SAC ¶¶ 47-48. But this provision does not provide any right to a hearing. Rather, it merely specifies the procedures to be followed if a hearing is required.

> The failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this subchapter.

(Emphasis added). In the revised section 4152(b)(1) that section 4161(a)(2) references, Congress adopted HUD's regulation at 24 C.F.R. § 1000.318. The revised section 4152(b)(1) provides, among other things, that housing units will not be included in the block grant formula if the recipient ceases to possess the legal right to own, operate, or maintain the unit; or the unit is lost to the recipient by conveyance, demolition, or other means. 25 U.S.C. § 4152(b)(1)(A)(i)-(ii). Thus, the revised 4161(a)(2) provides that, even if a tribe is paid for units that should not have been included in the block grant formula due to the tribe's failure to accurately report the number of units that qualified for inclusion in the formula, that is not substantial noncompliance. In the Senate report accompanying this act, the Senate described this amendment as a "clarification" to the statute. Sen. Rpt. 110-238 at 10. The report noted the "significant amount of time and resources involved in a hearing" and stated that a hearing "may not be necessary when a grant recipient is otherwise in compliance with the requirements of the Act." *Id.*

The revised 4161(a)(2) speaks directly to the current dispute. As evidenced by paragraphs 21-25 of the second amended complaint, the plaintiffs acknowledge that they were paid for units that did not qualify for inclusion in the block grant formula under 24 C.F.R. § 1000.318 and the 2008 amendments to NAHASDA. Pursuant to the revised 4161(a)(2), even if the overpayments were caused by the plaintiffs failure to accurately report the number of housing units that qualified for inclusion in the formula, that alone is not substantial noncompliance. This, in turn, means that the notice and hearing requirements of section

4161(a)(1) do not apply to such a dispute because, as we demonstrated above, NAHASDA only requires notice and a hearing when the tribe has engaged in substantial noncompliance. Thus, there is no question that from 2008 forward, HUD is not obligated to provide notice and a formal hearing to a tribe when there is merely a dispute over the number of units to be included in the allocation formula. However, Congress's adoption of HUD's interpretation signifies much more - that HUD has been correct all along in its interpretation that these disputes do not involve substantial noncompliance.

Congress was aware of the lawsuits between the tribes and HUD when it enacted the 2008 amendments to NAHASDA. In fact, prior to enactment of the amendments, Congress solicited HUD's views on the proper response to the district court's subsequently overruled decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006). *See Housing Issues in Indian Country*: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65[4] at 69-70 (HUD's written responses to questions from the Senate Committee on Indian Affairs). Notably, HUD recommended to the committee that Congress amend NAHASDA, which, as discussed above, Congress did.

As the Supreme Court has explained, when Congress amends a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the agency's interpretation is the one intended by Congress. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1986). Of course, in this case Congress did not merely leave HUD's interpretation of the prior statute untouched, it incorporated HUD's interpretation in the new

---

[4] Available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg34266/content-detail.html

section 4161(a)(2). This is even stronger evidence that HUD's interpretation of NAHASDA has been the one intended by Congress all along. *See Star-Glo Associates LP v. United States*, 414 F.3d 1349, 1357 (Fed. Cir. 2005) (Congress approved the agency's prior efforts not by mere acquiescence but by enacting legislation incorporating agency's interpretation).

Accordingly, Congress's addition of the new section 4161(a)(2) to NAHASDA in 2008 is persuasive evidence that, prior to 2008, HUD correctly interpreted NAHASDA to mean that disputes over the number of housing units to be included in the allocation formula do not involve substantial noncompliance.

D. Plaintiffs Fail To State A Claim For An Illegal Exaction Or Breach Of Contract

In paragraphs 47-48 of the second amended complaint, the plaintiffs allege that HUD's failure to comply with 25 U.S.C. §§ 4161 and 4165 means that the recovery of plaintiffs' overpayments is an illegal exaction. An illegal exaction under the due process clause exists only if money has been "improperly exacted or retained" by the Government. *Casa de Cambio Comdiv v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002) (quoting *United States v. Testan*, 424 U.S. 392, 401 (1976)). Because the plaintiffs had no right to notice and a formal hearing under 25 U.S.C. §§ 4161 and 4165, their claim for an illegal exaction based upon the failure to provide such a notice and hearing must fail.

Similarly, the plaintiffs contend that HUD's recovery of the overpayments is a breach of their funding agreements. SAC ¶ 48. However, they do not identify any provision of the funding agreements that required HUD to provide notice and a hearing. Instead, they rely solely upon sections 4161 and 4165. Because these statutory provisions do not require notice and a hearing, as we have demonstrated, HUD did not breach the funding agreements.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court dismiss count two of the second amended complaint for failure to state a claim.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Donald E. Kinner
DONALD E. KINNER
Assistant Director

s/ Michael N. O'Connell
MICHAEL N. O'CONNELL
Trial Attorney
Commercial Litigation Branch
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 353-1618
Fax: (202) 514-7969

Dated: December 16, 2011