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

ABSENTEE SHAWNEE HOUSING AUTHORITY;	)	
HOUSING AUTHORITY OF THE SEMINOLE NATION OF OKLAHOMA	)	
Plaintiff(s),	)	
	)	
v.	)	CIV-08-1298-HE
	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Defendant.	)	

DEFENDANT U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S (HUD'S) RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

This action was brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge federal agency action implementing the allocation formula for annual block grants under the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C.§ 4101 *et seq*. *See* First Amended Complaint ¶¶ 1, 8. The Court has jurisdiction over this action under 28 U.S.C. § 1331 to the extent that the APA waives sovereign immunity.

STATEMENT OF ISSUES FOR REVIEW

Under NAHASDA, Congress authorized HUD to distribute annual lump-sum appropriations for housing block grants among eligible Indian tribes, and mandated that the funds be distributed according to a formula established by a negotiated rulemaking committee comprised of representatives of HUD and geographically diverse small, medium, and large Indian tribes.

The questions presented are:

(1) whether before amendment in 2008, 25 U.S.C. § 4152(b)(1), required that, contrary to the established formula, lease-to-own housing units plaintiffs operated in 1997 must be counted as Formula Current Assisted Stock ("FCAS") for allocation purposes after they are lost, conveyed, or should have been conveyed;

(2) whether NAHASDA permits recovery and reallocation of amounts that plaintiffs were overfunded due to erroneous FCAS counts without necessitating actions to enforce a recipient's nonompliance with the statute; and

(3) whether NAHASDA imposes fiduciary duties on HUD enforceable under common law trust doctrine.

STATEMENT OF THE CASE

1. Statutory Background

Before fiscal year 1998, HUD provided funds to Indian housing authorities under a variety of programs. Much of the assistance was for low-income housing programs under the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq*. One such program, the Mutual Help Homeownership Opportunity ("Mutual Help") program, was designed to assist low-income Indian families in purchasing homes.

The Mutual Help program was enacted into statute in 1988. See 42 U.S.C. § 1437bb (1988) (repealed by NAHASDA).[1] Under the Mutual Help program, an Indian tribe applied to HUD for loan funds to allow it to develop public housing designed for sale to eligible families. *See* 24 C.F.R. pt. 950, subpt. E (1995). The homebuying family and the Indian housing authority would then enter "into what is, in essence, a lease-purchase agreement, for a period of up to twenty-five years." *Dewakuku v. Martinez*, 271 F.3d 1031, 1035 (Fed. Cir. 2001); *see* 24 C.F.R. § 950.440(b)(2) (1995) (providing that the purchase price schedule shall reflect a period "not less than 15 years or more than 25 years"). The lease-purchase agreement (or "MHOA")[2] incorporates a purchase price schedule reducing the purchase price to zero over the term of the agreement and providing for conveyance when the homebuyer's

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[1] The program had existed previously in non-statutory form. See 24 C.F.R. §§ 805.401 et seq. (1976).

[2] The Mutual Help and Occupancy Agreement ("MHOA") was described in 24 C.F.R.§ 950.416(b) (1998). See also, 24 C.F.R. § 1000.302 (NAHASDA regulation defining MHOA).

equity account equaled the then scheduled purchase price. 24 C.F.R. § 950.440(a), (e) (1995). The homebuyer made monthly payments "based on income." *Dewakuku*, 271 F.3d at 1035; *see*, 24 C.F.R. § 950.427. If the monthly payment exceeded the housing authority's administration charge, the excess was credited to the homebuyer's equity account. 24 C.F.R. § 950.440(a).

Assistance under the USHA for housing such as Mutual Help homeownership units was provided through an Annual Contributions Contract ("ACC") between HUD and the Indian housing authority. *See* 42 U.S.C. § 1437c(a)(2) (1994) (explaining the operation of Annual Contributions Contracts); 24 C.F.R. § 1000.10(b) (defining "Annual Contributions Contract").

In 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), Pub. L. 104-330, § 107, 110 Stat. 4016 (1996), 25 U.S.C. §§ 4101 *et seq*. Effective at the beginning of fiscal year 1998 (October 1, 1997), NAHASDA reorganized the system for providing HUD housing assistance to Native Americans by eliminating several separate programs, including those under the USHA, and replacing them with a single block grant. Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule, 63 Fed. Reg. 12334, 12334-35 (Mar. 12, 1998) (summarizing NAHASDA); *see also* 25 U.S.C. §§ 4181(a), 4182 (terminating Indian housing assistance under the USHA).

NAHASDA delegated to HUD the authority to establish a formula for allocating appropriated amounts among Indian tribes in collaboration with a representative cross-

section of Indian tribes:

> The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.

25 U.S.C. § 4152(a)(1). In referencing § 4116, Congress directed HUD to convene a "negotiated rulemaking committee" comprised "only of representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes" to develop the formula. 25 U.S.C. § 4116(b).

The formula can neither add nor subtract from the total amount of money available to all tribes. Congress sets the appropriation each fiscal year and the "formula . . . allocat[es] amounts available for a fiscal year . . . among Indian tribes," 25 U.S.C. § 4152(a). To the extent the allocation is altered to give one tribe more funds, those funds must be taken away from the allocations of other tribes.

Congress specified that the formula be based on factors that reflect need for affordable housing and that other factors be considered. 25 U.S.C. § 4152(b), (c). Congress further specified that the formula provide a minimum grant: each tribe must receive at least the amount it had received for operation and modernization of units under an ACC in 1996. 25 U.S.C. § 4152(d)(1).[3]

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[3] A proportionately reduced minimum grant was provided for years in which Congress appropriated less for NAHASDA than it had for operation and modernization of assisted Indian housing units in 1996, see 25 U.S.C. § 4152(d)(2), but that has not happened to date.

Here, plaintiffs focus on one of the need-based factors provided by Congress, § 4152(b)(1), as it existed before amendment in 2008. The full subsection then read:

> (b) Factors for determination of need
>
> The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:
>
> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
>
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
>
> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4152(b) (1996).

2. Establishment of the Formula

As required by NAHASDA, the Secretary engaged in the negotiated rulemaking process, convening a committee composed of 48 tribal representatives and 10 HUD representatives. 63 Fed. Reg. 12334, 12334 (Mar. 12, 1998).[4] The committee operated under a consensus model. *Id.* As relevant here, the resulting regulations, 24 C.F.R. part 1000, subpart D, (§§ 1000.301-.340), establish the "formula" referenced in 25 U.S.C. § 4152(a). This formula involves initial calculations under two components: "(a) Formula Current Assisted Housing Stock (FCAS); and (b) Need." 24 C.F.R. § 1000.310.

The FCAS component is calculated first and is the product of the number of FCAS units

[4] The large size of the committee "was justified due to the diversity of tribal interests, as well as the number and complexity of the issues involved." 63 Fed. Reg. 12334, 12334 (Mar. 12, 1998).

times a subsidy factor, which is the national average subsidy received in 1996 for the type of unit, adjusted for inflation and local costs. 24 C.F.R. § 1000.316. The Need component divides the remaining annual funds according to each tribe's share of seven criteria such as the number of below-median-income families or households living in overcrowded homes or without kitchens or plumbing. 24 C.F.R. § 1000.324. To the extent the allocation directs more funds under the FCAS calculation, those funds must be taken away from the Need calculation. Finally, the sum of a tribe's FCAS and Need calculations is guaranteed to meet the minimum required by § 4152(d) through a calculation proportionally reducing over-minimum allocations to provide the difference for those that were under-minimum. 24 C.F.R. § 1000.340(b).

The regulations define FCAS by starting with the number of "housing units owned or operated pursuant to an ACC. This includes all low rent, Mutual Help, and Turnkey III housing units under management as of September 30, 1997." 24 C.F.R. § 1000.312. This starting number is then subject to two adjustments. An upward adjustment is made for any units that were "in the development pipeline" as of 1997, as well as units for which the tribe was receiving assistance under section 8 of the United States Housing Act. 24 C.F.R. § 1000.314. And a downward adjustment is made for rental units no longer operated as low-income rentals, and homeownership units that have either been conveyed to a homeowner or should have been conveyed by the terms of the lease-purchase agreement. 24 C.F.R. § 1000.318.

Plaintiffs challenge the portion of the formula under which Mutual Help

homeownership units are subtracted from the FCAS count. Section 1000.318 poses the question, "When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?" It then answers the question by providing in relevant part:

> Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise provided that:
>
> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy Agreement] and
>
> (2) The Indian tribe . . . actively enforce[s] strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.318(a).

3. The Inspector General's Audit

In 2001, HUD's Office of Inspector General ("OIG") performed a nationwide audit of the NAHASDA program implementation. HUD Office of Inspector General, Audit Report 2001-SE-107-002 (Aug. 2, 2001); AR Vol. 1, Tab 32. The Inspector General found that HUD had been allocating block grants with inaccurate FCAS data because a number of homeownership units that had ceased to be eligible under 24 C.F.R. § 1000.318(a) were nevertheless still counted. As a result of the inaccuracies, HUD had overfunded some tribes and underfunded others. The Inspector General recommended that HUD recover the overfunding to tribes with inflated FCAS data and reallocate the recovery to tribes that were underfunded for current and prior years. AR Vol. 1, Tab 32, at 7-11.

4. Negotiated Rulemaking To Review The Formula

Pursuant to 24 C.F.R. § 1000.306, HUD convened a negotiated rulemaking committee to review the allocation formula regulations after five years. The resulting final rule changes were promulgated in 2007. 72 Fed. Reg. 20018, 20018 (Apr. 20, 2007). The committee did not alter 24 C.F.R. § 1000.318(a). It did, however, codify the practice explained in earlier guidance of recovering amounts overpaid due to formula data errors and reallocating the recovery in subsequent grant allocations. *See*, 72 Fed. Reg. 20025 (promulgating 24 C.F.R. § 1000.319); NAHASDA Guidance 98-19 (Dec. 18. 1998), available on-line.[5]

5. Fort Peck Litigation

In 2006, the District Court for the District of Colorado invalidated 24 C.F.R. § 1000.318, holding that 25 U.S.C. § 4152(b)(1) required the allocation formula to provide a funding floor using the number of ACC units in a recipient's inventory on September 30, 1997. *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*"), rev'd 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*"). The district court limited the scope of its judgment to Fort Peck Housing Authority. *Fort Peck I*, *supra* at 1135. The court also denied Fort Peck's motion to alter the judgment to grant a claim for return of overfunding repayments it had made. *Fort Peck Hous. Auth. v. HUD*, 2006 U.S. Dist. LEXIS 53203, *5 (D. Colo. Aug. 1, 2006). HUD appealed the invalidation, and Fort Peck cross-appealed the denial of its motion for return of its repayments. Many block grant recipients

[5] *See*, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_8298.pdf.

filed "Fort Peck" styled civil actions in reliance on the *Fort Peck I* holding. In 2010, the Tenth Circuit reversed the district court's invalidation of § 1000.318(a), denied Fort Peck's cross-appeal because HUD's actions complied with Congress's mandate, and remanded. *Fort Peck II*, 367 Fed. Appx. at 892. As an unpublished decision, *Fort Peck II* is not precedential, but persuasive authority. *See* 10th Cir. R. 32.1(A).

6. Congress's 2008 Amendment Of NAHASDA

In 2008, after the *Fort Peck I* decision but before its reversal by *Fort Peck II*, Congress reauthorized NAHASDA for five years with amendments. *See* Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). Congress amended 25 U.S.C. § 4152(b)(1), by essentially adopting the provisions in HUD's regulation at 24 C.F.R. § 1000.318(a) that provide for homeownership units to no longer count in the formula when tribes convey or should have conveyed the units. In relevant part, the statute now provides that the formula be based on factors including:

> (1)(A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if –
>
> (i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or
>
> (ii) the unit is lost to the recipient by conveyance, demolition, or other means.
>
> (B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed

to the homebuyer for reasons beyond the control of the recipient.

25 U.S.C. § 4152(b). The amendment further provided that demolished units rebuilt within one year remain eligible under the provision, § 4152(b)(1)(C), and that "reasons beyond the control of the recipinet" means legal impediments remaining after reasonable efforts are made to convey, § 4152(b)(1)(D). Finally, the amendment provided that subparagraphs (A) through (D) do not apply to claims based on the count of FCAS in allocations through fiscal year 2008 if a civil action is filed within 45 days of enactment (i.e., before November 28, 2008). 25 U.S.C. § 4152(b)(1)(E). Plaintiffs filed this action on November 26, 2008. Doc. No. 1.

7. Administrative Proceedings

a. Formula Block Grant Allocations to Plaintiffs

As relevant here, HUD allocated NAHASDA block grants to Absentee Shawnee Housing Authority ("ASHA") and Housing Authority of the Seminole Nation of Oklahoma ("HASNO") in fiscal years 2003 through 2008. AR Vol. 2, Tabs 35, 39, 48, 57, 64, 71; Vol. 3, Tabs 29, 37, 42, 54, 61, 69. Plaintiffs were amongst approximately 575 Indian tribes receiving allocations. *See* AR Vol. 1, Tab 32 (AR 549) (noting number of tribes in fiscal year 1999). Before allocations were made, HUD sent each plaintiff a Formula Response Form ("FRF") requesting corrections to HUD's formula data for the tribe, including changes to HUD records of housing units in the tribe's Formula Current Assisted Stock ("FCAS"). AR Vol. 2, Tabs 33, 37, 41, 50, 59, 66; Vol. 3, Tabs 27, 33, 39, 50, 57, 63; *see also, e.g.*, AR 840-841. ASHA reported changes to HUD's FCAS data for the tribe in fiscal years 2005

through 2008. AR Vol. 2, Tabs 42-44, 51-53, 60, 67. HASNO reported changes to HUD's FCAS data for the tribe in fiscal years 2007 and 2008. AR Vol. 3, Tabs 58, 65-67, 70.

On two occasions, HUD independently discovered errors in its FCAS data for HASNO. In July 2003, a monitoring division of HUD informed the division responsible for calculating block grant allocations that one FCAS unit in HUD's data for HASNO had not actually been built. AR Vol. 3, Tab 30. In December 2004, HUD discovered that it had made a technical error and used the wrong FCAS count when calculating HASNO's block grant allocations in fiscal year 1999 through 2004. AR Vol. 3, Tab 40.

HUD informed ASHA and HASNO how the updated data affected HUD's count of eligible FCAS to be used in the allocation formula in each fiscal year: HUD determined accurate FCAS counts by showing when units became ineligible as FCAS and explained the basis for those determinations. AR Vol. 2, Tabs 45, 54, 61, 68; Vol. 3, Tabs 31, 35, 59. When HUD found that units had become ineligible in prior fiscal years, HUD calculated the amount by which the tribe had been over-funded in those years due to the FCAS inaccuracy, requested that the housing authority contact HUD to discuss repayment options, and proposed that repayment could be made from prior or future grant amounts. AR Vol. 2, Tabs 45, 54, 68; Vol. 3, Tabs 31, 35. HUD also informed the housing authority that it had a right to appeal the decision in accordance with 24 C.F.R. § 1000.336. AR Vol. 2, Tabs 45, 54, 68; Vol. 3, Tabs 31, 35.

Neither ASHA nor HASNO appealed any of HUD's determinations regarding homeownership (MH) FCAS units. However, HASNO did appeal one HUD determination

of overfunding due to FCAS data error unrelated to the eligibility of homeownerships under the formula. In December 2004, HUD notified HASNO that as a result of internal data reviews, HUD discovered a technical error in transferring updated counts of HASNO's Section 8 FCAS units to the dataset used in formula calculations. AR Vol. 3, Tab 40. HUD explained that HASNO had been overfunded due to this error and requested repayment. AR Vol. 3, Tab 40. After a number of communications between HUD and HASNO about this matter, *see* AR Vol. 3, Tabs 43-48, HASNO appealed the decision in August 2005. AR Vol. 3, Tab 51. On appeal, the General Deputy Assistant Secretary for Public and Indian Housing considered HASNO's submissions and upheld the decision in November 2005. AR Vol. 3, Tab 52. This final decision explained that allocations must be in accordance with the formula, which requires that allocations be based in relevant part on the number of Section 8 units (a type of FCAS) as defined in §§ 1000.314 and 1000.316. The number of HASNO's Section 8 units was 150, but its allocations had been incorrectly calculated based on 174 such units. "Since funds incorrectly allocated to one tribe reduce all other tribes' allocations, the Department, to be fair and equitable to all tribes, will require repayment when [an error] is discovered." AR Vol. 3, Tab 52. The decision further explained that allocation corrections do not require proceedings to remedy recipient noncompliance; but are rather covered by the formula regulations, which provide recipients with due process through notice and an opportunity to resolve data discrepancies. AR Vol. 3, Tab 52. (citing § 1000.336 in the formula regulations at 24 C.F.R. part 1000, subpart D). Finally, the decision requested that HASNO contact HUD to discuss repayment of the overfunding. AR Vol. 3, Tab 52. When

HASNO did not respond, HUD proposed that HASNO repay the overpaid amounts over five years from grant amounts the tribe would receive in fiscal years 2007 through 2011. AR Vol. 3, Tab 55 (showing repayment schedule of $68,044 per year). HASNO did not object to this plan, and HUD deducted the repayments accordingly. *See* AR Vol. 3, Tabs 61, 69 (showing repayment of $68,044 from fiscal year 2007 and 2008 grants, respectively).

b. Determinations Specific To ASHA

Beginning in September 2004, ASHA submitted yearly FCAS data updates and corrections involving the conveyance of hundreds of Mutual Help ("MH") units to their homebuyers, the conversion of several MH units to low-income rental ("LR") units or non-dwelling uses, and confirmation that several FCAS units never existed in inventory. *See* AR Vol. 2, Tabs 42-44 (conveyances, and conversions to LR and office space), 51-53 (conveyances and confirmation of non-existent units), 60 (conveyances and conversions to LR), 67 (conveyances). When discrepancies arose between the information submitted and HUD's record of the number of units ASHA managed at NAHASDA's inception in fiscal year 1998, HUD sought clarification and ASHA resolved the discrepancies. *See e.g.*, AR Vol. 2, Tabs 45-46. FCAS information ASHA provided HUD in subsequent years did not affect any allocations through fiscal year 2008. AR Vol. 2, Tab 68 (HUD determination of FCAS counts through FY 2008).

In response to the updated FCAS information, HUD determined changes to the count of ASHA's FCAS each fiscal year. Specifically, HUD explained to ASHA that in accordance with § 1000.318, MH units ASHA had conveyed were no longer eligible in the fiscal year

after conveyance, *see e.g.*, AR Vol. 2, Tab 45; units become ineligible when converted to non-dwelling purposes such as office space, AR Vol. 2, Tab 45; MH units converted to Low Rent remain eligible as described in NAHASDA Guidance 98-12, AR Vol. 2, Tab 45; and HUD explained that due to the evidence of units counted that never existed, confirmed by ASHA, these would be removed from the FCAS count, AR Vol. 2, Tab 54.

According to the accurate count of FCAS established through this process, HUD determined the data to be used in the FCAS calculation of ASHA's formula allocations. When it found that ASHA had received block grant allocations calculated using ineligible FCAS units, HUD calculated the amount overfunded and sought repayment of the amount to which ASHA had not been entitled under the formula. *See*, AR Vol. 2, Tabs 45, 54, 61. After plaintiffs filed this complaint, HUD suspended any outstanding collection of overfunding pending resolution of its claims regarding allocations through fiscal year 2008. AR Vol. 2, Tab 80.

c. Determinations Specific To HASNO

HUD discovered information beginning in July 2003 regarding updates to HASNO's FCAS data. AR Vol. 3, Tab 30 (local HUD monitoring division found FCAS units not actually built and conversions). HUD responded to these data updates by subtracting units from HASNO's FCAS count that had not actually been built and explaining that homeownership units converted to low rent units remain eligible as FCAS. AR Vol. 3, Tab 31.

In October 2003, HASNO reported to HUD that two Mutual Help homeownership units had been paid-off in May 2002 and February 2003 but had not yet been conveyed. AR Vol. 3, Tab 34. The reason HASNO gave for its delay in conveying the units was "staff turnover." AR Vol. 3, Tab 34. HUD responded to these updates by reducing HASNO's FCAS count by the two units when they became eligible for conveyance because HASNO had not demonstrated reasons beyond its control for delay. AR Vol. 3, Tab 35 (explaining that "[a]ccording to 24 C.F.R. § 1000.318(a),units are no longer considered FCAS once those units are eligible to be conveyed unless the tribe can demonstrate reasons beyond your control that made conveyance impractical. We believe that internal staffing issues are not sufficient reasons for delaying conveyance.").

In September 2006, HASNO reported that a number of homeownership units had conveyed or became conveyance eligible, but provided no reason for delayed conveyance of those units. AR Vol. 3, Tab 58. From these data updates, HUD reduced the number of HASNO's FCAS by the number conveyed and conveyance-eligible in accordance with

§ 1000.318(a). AR Vol. 3, Tab 59.

Updates HASNO submitted in subsequent years did not affect any allocations through fiscal year 2008. Compare, AR Vol. 3, Tab 61 (Final allocation showing data of 93 Mutual Help units) with AR Vol. 3, Tab 69 (Final allocation showing same). As with ASHA, HUD suspended outstanding collection of over-funding pending resolution of its claims regarding allocations through fiscal year 2008. AR Vol. 3, Tab 75.

SUMMARY OF ARGUMENT

This case is one of a number of similar actions filed by NAHASDA block grant recipients after a district court invalidated the formula regulation, 24 C.F.R. § 1000.318, with respect to the Fort Peck Housing Authority, and before the Tenth Circuit reversed that decision. *See Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*"), rev'd 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*").[6] These cases challenge HUD's application of that regulation in calculating block grant amounts and HUD's determinations 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 concerning the number of eligible housing units and to recover overpayments. *See* 24 C.F.R. §§ 1000.310, 1000.314, 1000.318. The Inspector General's report criticized HUD for failing to enforce 24 C.F.R. § 1000.318, a regulation specifying that housing units no longer count

[6] Several of the similar cases have been dismissed, while others are still pending in Colorado, Oklahoma, Nevada, and Montana district court, the Court of Federal Claims, and the Ninth Circuit.

as FCAS "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 Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 588 (2011).

NAHASDA created a block grant program for providing federal assistance for affordable housing activities to eligible Indian tribes. 25 U.S.C. § 4111. Congress directed HUD to allocate funds appropriated for that purpose annually according to a formula. 25 U.S.C. § 4151. And Congress directed HUD to establish the formula through a negotiated rulemaking process in collaboration with a diverse cross-section of Indian tribes. 25 U.S.C. § 4152(a). The formula must be "based on" at least three "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities," and must provide a minimum level of assistance equal or proportional to the amount a tribe received before the block grant program began. 25 U.S.C. § 4152(b), (d). Two factors Congress stipulated as bases for the formula are the number of certain low-income housing dwelling units owned or operated by a recipient and other objectively measurable conditions specified by HUD and Indian tribes through rulemaking. 25 U.S.C. § 4152(b)(1), (3). As relevant here, the formula developed by HUD and Indian tribes through rulemaking starts with the number of units owned or operated by a recipient at the end of fiscal year 1997 (NAHASDA's inception), adds to that number as units that were in the pipeline become operative, and subtracts from it when units no longer need to be assisted.

HUD's actions should be upheld against plaintiffs' challenge because they applied the

negotiated formula mandated by Congress for the purpose of equitably distributing limited appropriations amongst all eligible Indian tribes. Because the allocation formula distributes one lump sum of federal appropriations amongst all eligible Indian tribes, HUD's determinations that plaintiffs were overfunded necessarily meant that all other tribes were simultaneously underfunded by that amount. These actions did not deprive plaintiffs of funding to which they were entitled; rather, they remedied the underfunding to other Indian tribes by seeking repayment of overfunding to plaintiffs for reallocation according to the formula. Because these were determinations of the amounts allocated or misallocated to plaintiffs, procedural requirements for remedying recipient noncompliance with NAHASDA do not apply; and in any case, plaintiffs received notice and an opportunity to object to all such determinations. Finally, because HUD's distribution of federal grants under NAHASDA does not make it a trustee of Indian property, these actions could not have breached a fiduciary duty.

ARGUMENT AND AUTHORITIES

I.

STANDARD OF REVIEW UNDER THE APA

When a challenge to an agency action is filed in the district court, it is processed as an appeal, not as a motion for summary judgment. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994).[7] Judicial review of agency action is governed by 5

[7] The *Olenhouse* court indicated that, as to matters of procedure, the district court "should govern itself by referring to the Federal Rules of Appellate Procedure." 42 F.3d at

U.S.C. § 706, under which a court "will set aside agency action only if . . . it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011) (internal quotations omitted). "Agency action is arbitrary and capricious if it 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

When reviewing an agency's interpretation of a statute, the court applies the two-step analysis set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837(1984). *Miami Tribe*, 656 F.3d at 1142. If Congress has spoken directly to the issue, that is the end of the matter and the court must give effect to Congress's unambiguously expressed intent. *Miami Tribe, supra* (citing *Chevron*, 467 U.S. at 842-43). "If the statute is silent or ambiguous, we proceed to. . .ask whether the agency's answer is based on a permissible construction of the statute. When answering that question, we afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care. Deference is especially due when an agency's interpretation of a statute rests upon its considered judgment, a product of its unique expertise." *Miami Tribe, supra*. (internal quotations omitted). At the same time, "federal statutes are to be construed liberally in favor

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1580.

of Native Americans, with ambiguous provisions interpreted to their benefit." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)). When considering agency action made pursuant to its own regulations, "[t]he agency's interpretation will control unless 'plainly erroneous or inconsistent with the regulation.'" *Miami Tribe*, 656 F.3d at 1142 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

Review under the APA is deferential and "the court cannot substitute its judgment for that of the agency." *Utahns for Better Transp., Inc. v. United States Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002). "An agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary and capricious." *Sorenson Communications v. FCC*, 567 F3d 1215, 1221 (10th Cir. 2009) (citing *Citizens Comm. To Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008)).

II.

THE COURT'S REVIEW HERE IS LIMITED

A. Plaintiff's Challenge to HUD's Application of 24 C.F.R. § 1000.318(a) Is Limited to Final Agency Actions after November 2002

APA review of agency decisions made more than six years before a complaint was filed is barred by the six-year statute of limitations at 28 U.S.C. § 2401(a). *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000). When a party contests the substance of an agency regulation, the challenger may do so later than six years following its adoption only on review of the adverse application of the regulation by final agency action. *Wind River*

Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991) (citing 28 U.S.C. § 2401(a)); see also *Crosby Lodge, Inc. v. National Indian Gaming Com'n*, 2008 WL 5111036, *6 (D.Nev. 2008) (citing 5 U.S.C. § 704). Plaintiffs filed this action seeking invalidation of 24 C.F.R. § 1000.318(a) more than ten years after the regulation's adoption. *Compare* Dkt. No. 1 (complaint filed Nov. 26, 2008) *with* 63 Fed. Reg. 12334, 12365 (Mar. 12, 1998) (final rule adopting § 1000.318). Consequently, plaintiffs' is an "as applied" challenge that must rest on final agency action taken within six years of November 26, 2008. The only agency decision plaintiffs cite in their brief, at page 13, occurred in December 2001 (AR Vol. 2, Tab 24), more than six years before plaintiffs filed this case in November 2008. However, review of that decision is barred by 28 U.S.C. § 2401(a).[8] *See Nagahi*, 219 F.3d at 1171.

Review here is limited to HUD actions after November 26, 2002 that applied § 1000.318(a) to determine plaintiffs' homeownership FCAS counts through fiscal year 2008 or sought repayment of over-allocated amounts without providing a hearing or determining if those funds had been spent. *See* Pl. Brf. 10-14.

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[8] In any case, plaintiffs mischaracterize the record of that 2001 decision. As plaintiffs concede, HUD notified ASHA of its determination to collect $217,015 in overfunding due to the past conveyance of 86 homeownership units and conversion of two rental units to non-dwelling uses, and HUD provided ASHA an opportunity to dispute this determination [Doc. No. 36, p. 13]; *see,* AR Vol. 2, Tab 24. However, plaintiffs misstate that ASHA attempted to challenge the determination. Rather, ASHA explicitly agreed with HUD's basis for that determination and questioned only whether HUD was including a number of other units in its FCAS count that ASHA had recently brought online. *See* AR Vol. 2, Tab 27. HUD later confirmed that the questioned units had in fact been added to ASHA's FCAS count since the date they came online. *See* AR Vol. 2, 31.

B. Plaintiffs Have Waived Arguments Not Adequately Briefed

"It is well-settled that arguments inadequately briefed in the opening brief are waived." *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) (internal quotations omitted). And "a bare assertion does not preserve a claim." *Craven v. Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218, 1226 (10th Cir. 2001). Because challenge to an agency action filed in district court is processed as an appeal, *Olenhouse*, 42 F.3d at 1580, the opening brief must identify "'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.'" *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (quoting Fed. R. App. P. 28(a)(9)(A)).

Plaintiffs' opening brief sets forth five contentions: (1) 24 C.F.R. § 1000.318(a) was invalidly applied to formula allocations through fiscal year 2008; (2) in the alternative, HUD's actions violated that regulation; (3) HUD was obligated to provide plaintiffs with notice and an opportunity for a hearing before seeking repayment of overallocated funds; (4) HUD may have violated 24 C.F.R. § 1000.532 by seeking repayment without a hearing to determine whether the overpayments had been expended; and (5) HUD breached a fiduciary duty. Doc. No. 36, pp. 7-14. It also makes the bare assertion, without further discussion, that HUD's actions were subject to 24 C.F.R. § 1000.319(d). Doc. No. 36, p. 7.

The brief fails to cite any facts in support of its contentions aside from a mischaracterization of the record of one agency decision that occurred outside the statute of limitations. The third contention cites constitutional, statutory and regulatory provisions without any argument as to their applicability. The fourth contention only speculates that

facts may exist to trigger a violation of § 1000.532, but is really a restatement of the third contention that a hearing was lacking to determine if such facts exist. In these circumstances, the issues raised in plaintiffs' second, third, and fourth contentions should be considered waived, as should any issue concerning 24 C.F.R. § 1000.319(a). *See e.g., Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1268 (10th Cir. 2008) (a court may refuse to consider inadequately briefed arguments). In the event they are not considered waived, we address all plaintiffs' contentions below.[9]

III.

HUD DETERMINED PLAINTIFFS' BLOCK GRANTS ACCORDING TO A FORMULA "BASED ON" THE FACTORS REQUIRED BY NAHASDA

HUD's allocation determinations through fiscal year 2008 did not violate the pre-amendment version of § 4152(b)(1), as plaintiffs claim. The determinations properly applied 24 C.F.R. § 1000.318(a), which comports with the plain language of § 4152 taken as a whole. The regulation benefits Native Americans in accordance with Congress's mandate that grants be allocated amongst all eligible Indian tribes to reflect relative needs as they change for each annual allocation. HUD's implementation of § 1000.318(a) was also upheld in similar circumstances in *Fort Peck II*; and has been reviewed and affirmed by actions of a negotiated

[9] In response to plaintiffs' assertion that HUD's actions were subject to the three year rule in 24 C.F.R. § 1000.319(d), we note that plaintiffs do not claim HUD violated this regulation. In fact, HUD appropriately applied the regulation in decisions made after its promulgation in 2007. *See* 72 Fed. Reg. 20018, 20020 (Apr. 20, 2007) (final rule adding § 1000.319 to formula regulations); *e.g.*, AR Vol. 2, Tab 77, p. 1095 (pursuant to 24 C.F.R. § 1000.319(d), limiting determination of overallocations to within 3 years of the discovered inaccuracy).

rulemaking committee composed of representatives from diverse Indian tribes in 2007 as well as Congress in 2008. Plaintiffs' inferential contentions to the contrary cannot overcome the weight of this authority.

A. NAHASDA Unambiguously Intended the FCAS-Count Reductions Required by 24 C.F.R. § 1000.318(a)

To determine whether 24 C.F.R. § 1000.318(a) is contrary to the pre-2008 version of NAHASDA § 302(b)(1), 25 U.S.C. § 4152(b)(1), the Court applies the test found in *Chevron*, 467 U.S. 837 (1984). *Chevron* explains that a court must first determine whether Congress has spoken directly to the precise question at issue. *Chevron*, 467 U.S. at 843-44. If so, the regulation must implement that intent. *Chevron*, 467 U.S. at 843. However, if Congress has not directly spoken to the precise question at issue, then the Court considers whether the agency's regulation is a "permissible construction" of the statute. *Chevron*, 467 U.S. at 844. In this context, the court also gives due consideration to the canon of construction favoring Native Americans. *Ramah Navajo Chapter*, 112 F.3d at 1461.

Here, the plain meaning of the statutory text supports the regulation. Congress did not specify a precise formula, but rather provided guidance and directed HUD to establish the allocation formula with Indian tribes in a collaborative rulemaking process. 25 U.S.C. §§ 4152(a), 4116(b). Congress stipulated that the formula be "based on" three non-exclusive "factors" supplied by Congress: (1) the number of housing units that were assisted under an ACC pursuant to the United States Housing Act of 1937 (42 U.S.C. § 1437 et seq.) at the time NAHASDA became effective; (2) the extent of poverty and economic distress among

Indians in the relevant area; and (3) other "objectively measurable conditions" specified by the Secretary and Indian tribes. 25 U.S.C. § 4152(b). Thus, § 4152(b)(3) prohibits any exclusion from the allocation formula of objectively measurable conditions that are specified by the Negotiated Rulemaking Committee.

The statute's use of the phase "based on" indicates that the factors identified in § 4152(b)(1), such as the number of units in 1997, is only a starting point for the allocation formula, which may be affected by other "factors." The phrase "based on" has been examined frequently by federal courts, which have concluded that the ordinary meaning of "based upon" is "arising from." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) ("In the context of statutory interpretation, courts have held that the plain meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'") (citations omitted); *see also, e.g., United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991). The formula here was "based on" the number of homeownership units specified in § 4152(b)(1) in the same way. That number was a starting point for the FCAS portion of the formula and was subjected to a number of adjustments, including upward adjustments for units in the development pipeline when they come online. *See* 24 C.F.R. § 1000.314. None of those adjustments, including the challenged subtractions embodied in § 1000.318(a), negate the fact that the formula is "based on" the number required by § 4152(b)(1). Because the number of homeownership units described in § 4152(b)(1) is a starting point from which the formula builds, the regulation complies with the

statutory directive. *Fort Peck II*, 367 Fed. Appx. at 890 (HUD properly included the number of housing units receiving aid at NAHASDA's inception "as the starting point for the allocation formula").

Further, Congress directed that, in reflecting the need of Indian tribes, the formula include "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. § 4152(b)(3). Through the Negotiated Rulemaking Committee, whose members included representatives from HUD and geographically diverse small, medium, and large Indian tribes, HUD and the Indian tribes specified various conditions of need for the formula that are not explicitly named in §§ 4152(b)(1) or (2). *See e.g.*, 24 C.F.R § 1000.320 (adjusting formula components based on local area costs), § 1000.324(b) and (c) (households that are overcrowded or lack kitchen or plumbing, housing shortage). Similarly, the Committee specified a condition measuring the reduced need to operate homeownership units when they are lost by conveyance or otherwise, or are ready to be conveyed by the terms of the lease-purchase agreement and there is no reason beyond the tribe's control to delay conveyance. 24 C.F.R. § 1000.318(a). The rulemaking committee considered the perverse incentive built into the homeownership program whereby a tribal housing entity may be rewarded with a larger grant allocation if it delays conveyance to eligible homebuyers. The regulation was therefore revised to counter-act this. *See* 63 Fed. Reg. 12,334, 12,343 (Mar. 12, 1998).

The statute compels these other objective conditions be included as factors for the allocation formula because they are specified by the rulemaking committee of HUD and

Indian tribes. 25 U.S.C. § 4152(b)(3). In the legislative history to the 2008 amendment of NAHASDA, Congress reiterated the intent, implicit in § 4152(b)(3), that rulemaking by a committee of representative tribes is the best venue for establishing formula elements that accommodate the needs of the various Indian tribes. S. Rep. No. 110-238, at 4 (2007) (stating that the issue of how to accurately determine recipients' true housing need "is best left for resolution by the tribes and HUD through negotiated rulemaking.").

As the Tenth Circuit reasoned, § 1000.318(a) properly reflects the interplay of the three need factors identified by Congress in 25 U.S.C. § 4152(b)(1)-(3). *Fort Peck II*, 367 Fed. Appx. at 890-891. The formula satisfies Congress's first factor, § 4152(b)(1), by using all 1997 Units as the starting point for the allocation formula. *Fort Peck II*, 367 Fed. Appx. at 891. "However, this number was but one factor required to meet the statute's overarching mandate that the formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Fort Peck II*, 367 Fed. Appx. at 891. (quoting 25 U.S.C. § 4152(b)). And the statute prohibits plaintiffs' construction because "[i]nterpreting § 4152(b)(1) to prohibit a reduction in the number of current units corresponding to a measurable reduction in responsibility by the Tribal Housing Entity for those units is inconsistent with the statute's plain language and is contrary to Congress's unambiguous intent that the funding formula relate to the needs of *all* tribal Housing Entities." *Ft. Peck II* at 891 (emphasis added). Accordingly, Congress did address the issue and mandated inclusion of the formula criteria specified in § 1000.318(a). Even if the statute were ambiguous, it nevertheless permits the construction given it by the Negotiated

Rulemaking Committee. In the context of § 4152 as a whole, § 4152(b)(1) should not be read to establish a funding floor based on ACC units in existence in 1997 because Congress explicitly provided for such a funding floor in § 4152(d). Section 4152(d) provides a funding floor based on the amount of funding a tribe received for ACC units in 1996 (assuming sufficient appropriations). *See* 25 U.S.C. § 4152(d). Reading § 4152(b)(1) to do the same would make § 4152(d) superfluous. Statutes should not be so construed. *See Marx v. General Revenue Corp.*, 668 F.3d 1174, 1183 (10th Cir. 2011) (discussing application of superfluity canon in cases of ambiguity).

Further, exclusion of homeownership units that are or should be conveyed and therefore no longer need management assistance furthers the congressional purpose that the formula be need-based and benefits Native Americans *Cf. Chevron*, 467 U.S. at 844; *Ramah Navajo Chapter*, 112 F.3d at 1461. Indian families in need of housing assistance are benefitted through a more equitable allocation between tribes and those who have achieved the right to homeownership are benefitted by the reduced incentive for housing entitites to delay conveyance of their homes. Great weight should be given to the rulemaking committee's determination because HUD is an expert in disbursing funds for low-income housing assistance, *Fort Peck II,* 367 Fed. Appx. at 892, and the committee's representation of a cross-section of Indian tribes ensured a fair appraisal of relative needs. NAHASDA implicitly placed great weight on the results of the rulemaking committee by requiring the formula include factors specified in the rulemaking process. 25 U.S.C. § 4152(b)(3); *see also* 367 Fed. Appx. at 892 (NAHASDA required interplay between factors including those

identified in rulemaking).

For similar reasons, the Indian canon of construction does not support plaintiffs' arguments. As an initial matter, the canon is unnecessary because § 1000.318(a) implements the unambiguous intent of Congress. As the Tenth Circuit stated in *Fort Peck II*: "Because NAHASDA was unambiguous and the final regulations were properly promulgated within NAHASDA's mandate, we need not address [the canon favoring Indians]." *Fort Peck II*, 367 Fed. Appx. at 892; *see also, Rice v. Rehner,* 463 U.S 713, 732 (1983) (discussing the Indian canon, the Court explained that "we have consistently refused to apply such a canon of construction where application would be tantamount to a formalistic disregard of congressional intent."). In addition, plaintiffs interpretation of the statute will not favor Native Americans; it will just favor plaintiffs. As the Tenth Circuit expressed it, "the canon cited does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Fort Peck II*, 367 Fed. Appx. at 892. The Indian canon does not apply in such cases because "the [competing] interests at stake both involve Native Americans." *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (citation omitted).

Finally, because Congress recognized that the circumstances of individual Indian tribes may create competing interests, the statute unambiguously required the funding formula to be developed by a rulemaking committee representing a cross-section of Indian tribes precisely to ensure that the circumstances of some tribes are not favored at the expense of other tribes. 25 U.S.C. § 4116(b) (2)(iii) (adapting negotiated rulemaking procedures "to ensure that the membership of the [rulemaking] committee include only representatives of

the Federal Government and of geographically diverse small, medium, and large Indian tribes"). Here for example, a judgment favoring plaintiffs because they have FCAS units would disfavor Indian tribes without FCAS – who are not represented in this litigation – whose allocation amount under the "need" prong of the formula have been proportionately reduced by the amount overfunded to plaintiffs. The Indian canon of construction cannot supplant Congress's unambiguous intent that the formula be the result of a negotiated process including the interests of Indian tribes other than plaintiffs.

B. The 2008 Amendment to NAHASDA Confirms the Validity of 24 C.F.R. § 1000.318

Plaintiffs erroneously focus on one of the three factors that Congress prescribed as a basis for the allocation formula, § 4152(b)(1), and claim that (before its amendment in 2008) it established a funding floor based on the number of housing units owned or operated pursuant to an ACC in 1997, which § 1000.318(a) violates. They assert this is so because, when amending the provision essentially to incorporate the negotiated formula regulation at § 1000.318(a), Congress made the amendment retroactive except as to Fort Peck-type claims, like plaintiffs, filed within 45 days of the amendment. Doc. No. 36, p. 10-11 (citing 25 U.S.C. § 4152(b)(1)(E)). This inferential argument fails because while Congress's intent in adding an exception to retroactive application of the amended provision for certain litigation matters is unclear, the language and scheme of Congress's allocation mandate before and after amendment is not.

Congress's 2008 amendments to NAHASDA essentially moved the relevant part of §

1000.318 into the statute. By integrating § 1000.318(a) into the statute, Congress affirmed that the regulation implemented congressional intent.

The Supreme Court held in *Commodity Future Trading Com'n v. Schor*, 478 U.S. 883, 846 (1986), that when Congress ratifies a regulation by integrating it into a statute, such ratification is "virtually conclusive" evidence that the regulation implements congressional intent: "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem the construction virtually conclusive." *Id.* (citation omitted). *See also Bell v. New Jersey*, 461 U.S. 773, 785 n. 12 (1983) ("Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean.") (quotation omitted, ellipsis in original).

Before passing the 2008 amendments, Congress was aware of the controversy regarding the validity of § 1000.318 and, specifically, of *Fork Peck I*. *See, e.g.*, Housing Issues in Indian Country: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65 at 69-70 (March 22,2007) (letter from Committee to HUD and HUD's response regarding *Fort Peck I*);[10] S. Hrg. No. 110-65 at at 140 (written testimony by Oglala Sioux President endorsing result in *Fort Peck I*); Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self–Determination Act: Hearing

[10] *See*, http://www.gpo.gov/fdsys/pkg/CHRG-110shrg34266/content-detail.html.

Before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. 110-297 at 162-63 (July 19, 2007) (written testimony by Indian Housing Advocacy Coalition stating that the proposed amendment would "nullify the effect of [*Fort Peck I*]").[11] In the face of this controversy, Congress put the language of the regulation into the statute. As explained above, this alone is strong evidence that Congress intended the pre-amendment provision to encompass what HUD and the Indian tribes in Negotiated Rulemaking Committee had interpreted it to mean with 24 C.F.R. § 1000.318(a).

And yet Congress provided further evidence of its intent in the committee report accompanying enactment. Congress stated that it amended § 4152(b)(1) in order to "clarify" that the regulatory interpretation was the correct one. The Senate committee report stated:

> Clarification of Units Eligible Under Funding Formula (Amends Section 302 of current law [25 U.S.C. § 4152]): This amendment clarifies that [certain units] may not be counted in the funding formula. This not only includes conveyed units but those units that are required to be conveyed based on the homebuyer agreement; units demolished and not rebuilt within a specific time frame; or units no longer being operated as low-income units. Conveyance of each homeownership unit should occur as soon as possible after a unit becomes eligible for conveyance based on the terms of the Agreement. The recipient has not lost the legal right to own, operate or maintain the unit if it has not been conveyed for reasons beyond the control of the recipient, as enumerated in the provision.

S. Rep. No. 110-238, at 9 (2007). Congress's clarifying statement here succinctly summarizes HUD's implementation of 24 C.F.R. § 1000.318(a). When a subsequent Congress states that it is "clarifying" a former statute, that statement is entitled to great weight. *Public Serv. Co. of Colo. v. U.S.*, 816 F.2d 530, 532-33 (10th Cir. 1987); *see also*,

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[11] *See*, http://www.indian.senate.gov/public/_files/July192007.pdf.

e.g., United States v. Luster, 889 F.2d 1523, 1529 (6th Cir. 1989) ("Insomuch as the amendment to the guideline is intended to clarify the existing guideline, it should be given substantial weight in determining the meaning of the existing guideline.") (citations omitted); *United States v. Demurgas*, 656 F.Supp. 1537, 1538 (E.D.N.Y. 1987) ("amendments designed to clarify earlier statutes are entitled to 'substantial weight' when interpreting meaning of an earlier statute.") (citation omitted). Thus, the legislative history provides more than ample evidence that the regulatory text – and HUD's implementation of it – comported with congressional intent. Plaintiffs' arguments do not overcome this weighty evidence.

C. HUD's Determinations of Plaintiffs' FCAS Counts Applied 24 C.F.R. § 1000.318(a) in Accordance with the Statutory Mandate

Plaintiffs contend in the alternative that 24 C.F.R. § 1000.318(a) does not lawfully reach homeownership units that plaintiffs still own or operate. They argue that the Tenth Circuit so limited it in *Fort Peck II* by refering to the regulation's exclusion of units "no longer owned or operated." Doc. No. 36, p. 12.

This is a curious argument because *Fort Peck II* held that § 1000.318(a), including its provisions related to conveyance-eligible units, is valid. *See Fort Peck II*, 367 Fed. Appx. at 891. The Tenth Circuit found that "HUD's actions did not violate Congress's mandate." *Id.* at 892. It was aware of HUD's actions to exclude conveyance-eligible units from FCAS because both Fort Peck and HUD addressed the issue extensively in their briefs. *See, e.g.*, Fort Peck's Response Brief and Principal Brief on Cross-Appeal in the appeal of *Fort Peck I* at 6-7, 32, 39 n. 12, 39, 40, 44-45; HUD's Brief for Appellants/Cross-Apellees in the appeal

of *Fort Peck I* at 7, 18 n. 11, 24 (Addendum [xx]). Thus, the Tenth Circuit's conclusions refute plaintiffs' inference that it limited the validity of § 1000.318(a).

In addition, as discussed above, the Negotiated Rulemaking Committee's specification of conveyance-eligibility as an objectively measurable condition reflecting need is entitled to great weight under both the *Chevron* standard and Congress's intent as expressed in § 4152(b).

Moreover, Congress unambiguously expressed its view that conveyance-eligibility reflects need when it amended § 4152(b)(1) to include the same conveyance-eligibility provisions as factors reflecting need. Congress amended NAHASDA in 2008 to clarify that conveyance-eligibility is a need-based factor by stating that homeownership units not conveyed within 25 years (the maximum MHOA termination date) count as FCAS only if, after reasonable efforts, conveyance proves impracticable, i.e., "beyond the control of the recipient." 25 U.S.C. § 4152(b) (1)(B), (D). The legislative history leaves no room for doubt that the provisions implemented congressional intent. S. Rep. No. 110-238, at 9 ("This not only includes conveyed units but those units that are required to be conveyed based on the homebuyer agreement. . .Conveyance of each homeownership unit should occur as soon as possible after a unit becomes eligible for conveyance based on the terms of the Agreement."). Congress has thus repeatedly confirmed that the allocation formula, including § 1000.318's conveyance-eligible provisions, is based on need.

Plaintiffs assert, without citation to the record, that HUD improperly excluded homeownership units that plaintiffs failed to timely convey because of repairs being made

on the homes, Bureau of Indian Affairs ("BIA") approval delays, tenant delinquencies or "for other compelling reasons." Doc. No. 36, at 12. This is simply a misstatement of fact that is flatly refuted by the administrative record. All but one of HUD's determinations reducing counts of plaintiffs' homeownership units for allocations through fiscal year 2008 resulted from plaintiffs informing HUD that the units had conveyed, burned down, or never existed in their inventory. *Compare* AR Vol. 2, Tabs 45, 54, 61, 68; Vol. 3 Tabs 31, 39, *with* AR Vol. 3, Tab 35. In only one instance, HASNO provided a reason for its failure to convey two homeownership units that had been paid-off and were thus eligible for conveyance. The reason was "staff turnover." AR Vol. 3, Tab 34. HUD's determination in response to this information reduced HASNO's FCAS count by the two units because inadvertance is not a reason beyond the tribes control making timely conveyance impracticable. As HUD explained, "[a]ccording to 24 C.F.R. § 1000.318(a), units are no longer considered FCAS once those units are eligible to be conveyed unless the tribe can demonstrate reasons beyond your control that made conveyance impracticable. We believe that internal staffing issues are not sufficient reasons for delaying conveyance." AR Vol. 3, Tab 35. HASNO did not appeal the decision. HUD's explanation is consistent with the language of the regulation which requires that: "[c]onveyance of each Mutual Help or Turnkey II unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA." 24 C.F.R. § 1000.318(a)(1). Thus, HUD's determinations were not arbitrary and capricious because HUD explained its reasoning based on § 1000.318(a) and made a rational connection between the facts found and the decisions made.

Accordingly, HUD did not improperly implement 24 C.F.R. § 1000.318(a) to subtract homeownership units from plaintiffs' FCAS counts. According to information plaintiffs provided, these units were conveyed or were paid-off and plaintiffs could demonstrate no reason beyond their control preventing timely conveyance.

IV.

HUD'S PROCEDURES FOR RECOVERING PAST OVERFUNDING BASED ON ERRONEOUS FCAS COUNTS DID NOT VIOLATE PLAINTIFFS' RIGHTS

Plaintiffs contend, without argument, that before recovering overpayments made to plaintiffs, what plaintiffs term a "recapture" of funds, HUD must provide a hearing pursuant to the NAHASDA (25 U.S.C. §§ 4161, 4165), 24 C.F.R. § 1000.532, which implements § 4165, and constitutional due process. Doc. No. 36, pp. 12-13. Because HUD's recovery of over-allocated funds is not governed by the cited sections of NAHASDA but is rather authorized by the Government's inherent right to return of overpayments, and because HUD did provide adequate process in making these determinations, plaintiffs' contention is meritless.

A. NAHASDA's Compliance Enforcement Provisions Do Not Govern Recovery of Funds Erroneously Allocated

"'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Fort Peck II*, 367 Fed. Appx. at 890 (quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)). Here, HUD's allocation actions – to determine and correct the grant amounts to which plaintiffs were entitled – do not arise from, or fit within,

NAHASDA's provisions governing compliance actions. Accordingly, they cannot be challenged for failure to comply with those provisions. NAHASDA's statutory scheme imposes certain duties on HUD. Primarily, HUD must distribute appropriated funds among all eligible tribes according to a formula established by committee, 25 U.S.C. §§ 4151, 4165, and ensure that recipients use grant funds in accordance with the Act, 25 U.S.C. §§ 4161-4165.[12] Plaintiffs seem to reason that when HUD corrected a misallocation of grants by seeking repayment of amounts overpaid to plaintiffs for reallocation under the formula (HUD's first duty), this constituted an enforcement action for their noncompliance with NAHASDA under 25 U.S.C. §§ 4161 and 4165 (HUD's second duty). This simply misapprehends the statutory scheme as well as the nature of HUD's actions.

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

> (a)(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.

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[12] HUD must also submit reports to Congress, 25 U.S.C. § 4167, and administer loan guarantee programs not at issue here, 25 U.S.C. §§ 4191-4195.

25 U.S.C. § 4161(a) (emphasis added).[13] Thus, § 4161 requires notice and a formal hearing to the tribe only if HUD contends that the tribe acted in substantial noncompliance with NAHASDA.

Plaintiffs do not claim that HUD's recoverying of overpayments resulted from a charge of their substantial noncompliance with NAHASDA, nor that HUD took any of the enforcement actions required by § 4161(a)(1)(A)-(D). They contend only that any "recapture" requires a hearing, but this is not what the statute says. 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. Instead, Congress requires that "[f]or each fical year, [HUD] shall allocate any amounts made available . . . in accordance with the formula established pursuant to section [4152]. . ." 25 U.S.C. § 4151.

The actions plaintiffs challenge were not actions to enforce plaintiffs' compliance with NAHASDA, but rather to ensure HUD's own compliance with the allocation mandate of § 4151. In fact, the legislative history regarding NAHASDA's amendment in 2008 demonstrates that Congress was well aware of HUD's efforts to recovery funds over-allocated due to FCAS overcounts. In addressing its amendment to the allocation formula

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[13] Subsections 4152(b)-(d) provide alternative remedies for substantial noncompliance, such as technical assistance in approriate cases, referral for a civil action brought by the Attorney General, and provide for direct appeal of a substantial noncompliance determination to a court of appeals.

provision, § 4152, the Senate Committee stated:

> A 2001 HUD Office of Inspector General audit report identified the need for removal of these ineligible units from the funding formula calculations. In response, the majority of those grant recipients who had included ineligible units in their count have paid or are in the process of paying back these funds. This funding formula was developed by Indian tribes through negotiated rulemaking, and recently reaffirmed in 2007, to ensure that the funding is allocated based on need.

S. Rep. No. 110-238, at 9 (2007) (emphasis added). Rather than taking any effort to stop this recovery of overpayments, Congress added a provision, § 4161(a)(2), to clarify that a hearing for substantial noncompliance is not required in cases of FCAS corrections. Addressing this addition, the Senate Committee recognized that when grant recipients are "required to relinquish overpaid funds to the inclusion of housing units deemed ineligible under Section 301 [25 U.S.C. § 4152], the action does not constitute substantial noncompliance by the grantee and does not automatically trigger a formal administrative hearing process." S. Rep. No. 110-238, at 10.

Section 4165, which plaintiffs also cite, is similarly inapplicable because it is addressed to remedying specific noncompliance findings not at issue in this case. Section 4165, entitled "Review and Audit by Secretary," provides that tribes are subject to the financial audit requirements in chater 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 by HUD to determine whether the tribe has carried out eligible activities, has a continuing capacity to carry out eligible activities in a timely manner, submitted an accurate performance report under § 4164, 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, § 4165 does not cover other reviews or audits that the Government might make, such as HUD's review of an Indian housing plan under 25 U.S.C. § 4113, or an audit by the Comptroller General under 25 U.S.C. § 4166. Section 4165 audits and reviews thus 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. Nothing in the record here shows that the reason HUD sought to recovery overpayments from plaintiffs is based upon their failure to carry out eligible activities, to comply with their Indian housing plan, or because of financial mismanagement shown in a title 31, chapter 75, audit. Thus, § 4165 has no application to this case.

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 § 4165. The regulatory text makes clear that it only implements enforcement actions pursuant to performance reviews under § 405 of NAHASDA (25 U.S.C. § 4165). It asks the question, "What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?" Subsection (a) goes on to provide that:

> 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 finding of HUD pursuant to reviews and audits under 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews or audits, except that grant amounts already expended on affordable hosuing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

24 C.F.R. § 1000.532(a). 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 expending funds on eligible activities, complying with their Indian housing plans, or appropriately accounting for expended funds.

Plaintiffs selectively quote that regulation to support the proposition that any "recapture" of funds requires a hearing to determine whether any funds may have already been spent on affordable housing activities. Doc. No. 36, p 14.[14] However, 24 C.F.R. § 1000.532 does not limit repayments of overfunding because, as shown above, the regulation addresses only "recaptures" arising from reviews and audits of performance under § 4165. Because it does not address making proper allocations, HUD has not interpreted it to limit recovery of overpayments in order to correct misallocations under § 4151. This interpretation is controlling because it is consistent with the explicit language limiting the provision to adjustments pursuant to audits and reviews under § 4165. *See Miami Tribe*, 656 F.3d at 1142 ("The agency's interpretation [of its regulation] will control unless 'plainly

[14] Plaintiffs erroneously state that 25 U.S.C. § 4165 was amended in 2008 and before then limited recaptures under the section. Doc. No. 36, p 13, n.6. In fact, Congress amended the section in 2000 and removed the limit on recaptures. *See* Pub. L. 106-568, 114 Stat. 2927 (Dec. 27, 2000).

erroneous or inconsistent with the regulation.'") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

Indeed, the regulatory limit on grant adjustments due to performance reviews and audits cannot trump the statutory mandate for HUD to distribute funds for each fiscal year according to the established formula. 25 U.S.C. § 4151; *see also Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (a payment of government money, if erroneously or illegally made, violates Congress's power to dispose of and make all needful rules and regulations respecting property belonging to the United States; and the government has a duty to seek a refund of money erroneously paid); *Amtec Corp. v. United States*, 69 Fed. Cl. 79, 88 (2005), aff'd, 239 Fed. Appx. 585 (Fed. Cir. 2007).

In sum, plaintiffs cannot rely on §§ 4161, 4165, or 24 C.F.R. § 1000.531, to support the claim that HUD's actions under §§ 4151, 4152, and their formula implementing regulations were procedurally improper. As discussed below, neither did HUD's actions violate constitutional due process or the APA.

B. HUD Is Authorized to Recover Overpayments and Did So after Providing Notice and an Opportunity for Hearing

Like all federal agencies, HUD had the inehrent authority long recognized by the Supreme Court to recover funds that it has wrongfully, erroneously, or illegally paid. *United States v. Wurtz*, 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 explained, an agency does not require statutory authority to recover such overpayments because the right exists independent of

statute. *Id.* This authority is based on "the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them."[15] *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1064 (Fed. Cir. 2001). Agencies 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 (2d 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.

HUD's use of this authority to recover overpayments resulting from inaccurate FCAS was codified in the formula regulations in 2007. *See* 24 C.F.R. § 1000.319(b) ("If a recipient receives an overpayment of funds because it failed to report such changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within

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[15] *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).

5 fiscal years."); 72 Fed. Reg. 20025 (Apr. 20, 2007) (final rule adding 24 C.F.R. § 1000.319). As shown above, when Congress amended NAHASDA in 2008, it acknowedged HUD's recovery of overpayments. If Congress disagreed with HUD's assertion of the federal government's inherent right to recover erroneous payments, as expressed in § 1000.319(b), Congress could have acted in 2008 to cut off that power. But Congress did not. Thus, deference to HUD's implementation of NAHASDA in this regard is "especially warranted." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986) (deferring to administrative interpretation where subsequent statutory amendments did not overrule regulatory interpretation).

Further, HUD implements Congress's intent by recovering overpayments and reallocating according to the formula. This long-standing practice is similarly codified in 24 C.F.R. § 1000.319(b), which states that when a recipient is required to return overpaid funds, "HUD shall subsequently distribute the funds to all Indian tribes in accordance with the next IHBG [block grant] Formula allocation." FCAS-count errors prevent the distribution of funds according to the formula because when one tribe is overfunded, less funds remain to be allocated to all other tribes who are thus underfunded. *See e.g*, AR Vol. 1, Tab 32 (HUD OIG Audit Report at 7). HUD corrects those errors by recovering overpayments and redistributing the overpayments through the formula. 24 C.F.R. § 1000.319(b). Therefore, HUD's recoveries of overpayments implements Congress's directive in § 4151 that HUD distribute block grants amongst Indian tribes in accordance with the allocation formula.

Plaintiffs claim, without argument, that HUD's collection of repayments violated

constitutional due process. This contention should be considered waived, and is in any case meritless. Plaintiffs do not attempt to demonstrate a protected property interes in grant amounts that HUD erroneously paid to them. And it is unlikely they could, since recipients of erroneously-granted funds generally possess no property interest in theose funds. *See Evelyn v. Schweiker,* 685 F.2d 351, 353 (9th Cir. 1982). In addition, even if plaintiffs showed a property interest in NAHASDA block grants, it does not follow that plaintiffs have a proeprty interest in an amount of funding greater than Congress has provided for. *See Painter v. Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996) (physicians have no property interest in a greater amount of Medicare payments than was outlined in regulations).

Even if plaintiffs could show a protected property interest, HUD provided constitutionally adquate procedures. The formula regulations provide notice of recipients' right to appeal formula data determinations. 24 C.F.R. § 1000.336; *see Lyng v. Payne*, 476 U.S. 926, 942 (1986) (publication in federal register provides adequate notice). In addition, with every determination that HUD would seek repayment of overpaid funds, HUD explicitly notified plaintiffs of HUD's decision and provided plaintiffs an opportunity to dispute the finding – in all cases reminding plaintiffs of administrative appeal rights provided under 24 C.F.R. § 1000.336. AR Vol. 2, Tabs 45, 54, 68; Vol. 3, Tabs 31, 35. HUD's notices identified the regulations and facts upon which HUD based its decisions, provided guidelines explaining the regulations, and listed by project number the specific housing units that HUD considered to be ineligible for formula purposes. AR Vol. 2, Tabs 45, 54, 68; Vol. 3, Tabs 31, 35. HUD also reminded plaintiffs of their right to appeal the determinations pursuant to

24 C.F.R. § 1000.336, which provides a right to request reconsideration after appeal. Thus, HUD notified plaintiffs of its formula and overpayment decisions and provided them with the opportunity to dispute them. This is constitutionally adequate notice and opportunity for hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

Accordingly, HUD's recovery of overpayments from plaintiffs was authorized and procedurally sound.

C. Alternatively, if NAHASDA Requires Alternative Procedures, Plaintiffs Were Not Prejudiced; If Relief Is Nevertheless Warranted, it Should Be Remand for a Hearing

Prior to determining it overpaid a plaintiff based on ineligible FCAS, HUD notified the plaintiff of the legal and factual bases of its decisions and invited a response. When tribes submitted responses, HUD considered that information before making its final determinations. Furthermore, HUD invited appeals and requests for reconsideration, and when such documents were submitted, considered and ruled on them. *See e.g.*, AR Vol. 3, Tabs 40, 43-48, 51-52, 55 (dispute regarding data error calculating HASNO's Section 8 FCAS units). Therefore, plaintiffs received notice and often extensive paper hearings before HUD made its final determinations about formula factors and the consequent change in plaintiffs' allocated amounts.

Under the APA, due consideration must be given to the rule of prejudicial error. 5 U.S.C. § 706 (requiring courts to take due account of "the rule of prejudicial error"); *DSE*,

Inc. v. United States, 169 F.3d 21, 31 (D.C. Cir. 1999) ("[I]t is . . . well settled that the principle of harmless error applies to judicial review of agency action."); *see also Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 2003) (under the harmless error rule, "a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination"). Plaintiffs show no prejudice for lack of an administrative hearing, and so their claim for violation of hearing requirements merits no relief under the APA.

If plaintiffs' claim for an administrative hearing provided by regulation under the noncompliance enforcement provisions of NAHASDA merited relief, the only proper remedy under the APA would be remand to the agency for the hearing in the first instance rather than the injunctive relief that plaintiffs request. *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1, 10 (1974) (if agency omitted a remedy justified in the court's view, remand is the proper course); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (if agency did not consider relevant factors, the proper course, except in rare circumstances, is remand). In light of the Supreme Court's repeated admonition "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 680-681 (1988)), remand would be the only proper course.

V.

GENERAL TRUST LANGUAGE IN NAHASDA'S STATUTORY FINDINGS DOES NOT IMPOSE FIDUCIARY DUTIES

NAHASDA's reference in congressional findings to the trust relationship between the United States and Indian tribes does not create fiduciary duties enforceable under common law trust principles. Moreover, there is no trust corpus over which HUD could be considered a trustee, as NAHASDA grant funds are not appropriated pursuant to a treaty that could render them, in effect, money belonging to the Indians. As the grant administering agency, HUD distributes the grants according to a formula and has limited oversight over their use to ensure that appropriated funds are spent for the purposes appropriated. Such a statutory scheme does not create fiduciary duties enforceable under common law trust doctrine.

Supreme Court precedents establish that an enforceable trust claim requires: more than the general trust responsibility alleged by plaintiffs; more than a statutory or regulatory duty untethered to any trust corpus (land, resources, money or other property considered to belong to Indians); and, even where a trust corpus is created - such as through the General Allotment Act's specific prescription that land be held "in trust" – an enforceable trust duty requires full responsibility for management of Indian property to distinguish it from a "bare" or limited trust. *See e.g.*, *United States v. Navajo Nation*, 556 U.S. 287, 290-91, 301-02 (2009) (describing the multi-step analysis required for trust liability and rejecting trust liability premised on "comprehensive control" alone).

First, there is no trust corpus at issue with respect to NAHASDA block grant funds.

The Supreme Court has explained that, for the Government to have a fiduciary duty arising from a trust relationship, there must be a trustee, a beneficiary, and a trust corpus. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*") (explaining that a fiduciary trust relationship arose when the Government assumed "elaborate control over forests and property belonging to Indians" because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)"). Even where there is a trust corpus, for the fiduciary duties to arise, the Government must be obligated to both hold property belonging to Indians and also manage it for the beneficiary. *See United States v. Mitchell*, 445 U.S. 535, 543-44 (1980) ("*Mitchell I*") (holding that where Congress intended the United States to hold certain land in trust for the tribes but not to control the use of the land, no fiduciary duty to manage the land arose). These elements are not present here.

A congressional appropriation to be distributed by an agency to Indian tribes is generally not a trust corpus. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Supreme Court explained that "public moneys gratuitously appropriated" are distinct from "moneys belonging to the Indians themselves." *Id*. at 79. One class of appropriations relates to public moneys belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government. *Id*. at 78. In *Quick Bear*, the Supreme Court relied on this distinction and held that money designated by Congress to pay a treaty debt belonged to the Indians and had the same characteristics as a trust fund. *Id*. at 79-81. Plaintiffs do not claim, as they cannot, that NAHASDA funds are appropriated to pay a treaty

debt. Thus, as with other federal grant programs to benefit Indians, NAHASDA grants are not trust property. *See e.g.*, *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 68-69 (2008) ("[F]unding appropriated by Congress for the benefit of the Indian people via the [Tribal Priority Allocation] system and [Indian Health Service] funding process is not trust property."); *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 148 (2009) (finding that the only "property" at issue, the funds that plaintiff might have received if it was treated as a Federally recognized Indian tribe between1969 and 1996, are not trust property).

In addition, the language plaintiffs cite in NAHASDA's findings, which describe the Government's general trust relationship with Indian tribes, does not impose a fiduciary duty. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) (explaining that a "congressional statement of policy fails to create the necessary trust relation" because it did not "confer on the government pervasive or elaborate control over a trust corpus"). NAHASDA does not require HUD to hold any money "in trust" for an Indian tribe or tribes. *Compare United States v. White Mountain Apache*, 537 U.S. 465, 475, 480 (2003). Instead, NAHASDA requires HUD to make grants directly to recipient Indian tribes or to their TDHE on behalf of the tribe, to carry out affordable housing activities under 25 U.S.C. § 4132. 25 U.S.C. § 4111(a)(1).

Second, even if there were a trust corpus, NAHASDA does not impose fiduciary duties. Applying the principles set out in *Mitchell I* and *Mitchell II*, the Ninth Circuit held that NAHASDA does not create general trust responsibilities. In *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), members of an Indian tribe who had purchased

allegedly defective homes built with federal assistance brought suit against HUD. They contended among other things that HUD's actions constituted a breach of its trust responsibilities under NAHASDA. The Ninth Circuit rejected the claim that NAHASDA contains anything more than a limited trust relationship and affirmed district court dismissal of that part of the law suit. The Ninth Circuit held that, under NAHASDA, "the federal government held no property – land, houses, money, or anything else – in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing." *Id*. at 928. Accordingly, the Ninth Circuit rejected the Indians' breach of trust claims. *Id*.

The Ninth Circuit's conclusion is supported by the Court of Federal Claims opinion in *Lummi Tribe v. United States*, 99 Fed. Cl. 584 (2011), a case arising from similar claims under NAHASDA as those of plaintiffs. There the court explained that it did not, at the jurisdictional stage, need to address plaintiffs trust claims. The court went on to note, however, "that the government 'assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute' – a requirement that plaintiffs have not shown has been satisfied here." *Id*. at 598 n. 12. (quoting *United States v. Jicarilla Apache Nation*, --- U.S. ---, 131 S. Ct. 2313, 2325 (2011)). The court was "unconvinced that grant funds to which a tribe claims entitlement are properly construed as 'Indian assets' for the purposes of trust law or that the Secretary's limited responsibilities in allocating those funds under NAHASDA create the common-law trust duties envisioned by the Supreme Court in

United States v. Mitchell, 463 U.S. at 226." *Id.* Nor should this court be.

Accordingly, plaintiffs' "breach of trust" claim relates neither to a trust corpus nor to any substantive law creating fiduciary duties.

CONCLUSION

For the foregoing reasons, plaintiffs' claims should be denied and HUD's actions upheld.

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 25, 2012, he electronically transmitted the attached document to the Clerk of court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: Amanda S. Proctor

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