IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT TWO OF THE SECOND AMENDED COMPLAINT

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INTRODUCTION

The Plaintiffs respectfully request that the Defendant's Motion to Dismiss Count Two of the Second Amended Complaint ("MTD") be denied because Plaintiffs have stated a claim for the unlawful exaction of money and breach of contract under the pleading standards that govern RFCC 12 (b) (6) motions. The facts are as alleged in the Second Amended Complaint. The paragraphs relevant to this Motion are found at ¶¶s 28, 30, 32, 35, 37, 47-49.

In its Motion to Dismiss, the United States ("Defendant") hinges it argument on its "inherent authority" to recover illegal overpayments. Defendant does not, however, cite to *any* authority allowing it to recapture grant amounts already awarded via downward adjustments or reductions to Plaintiffs block grants without complying with the requirements of 25 U.S.C. §§4161 and 4165 and the regulations implemented thereunder, other than its own strained interpretation of these statutes. The Court should reject the Defendant's narrow interpretation of the Native American Housing Assistance and Self-Determination Act ("NAHASDA") for the reasons stated below.

Defendant's circular reasoning that it did not take enforcement action under 25 U.S.C. §§ 4161 or 4165 because it did not consider the violations to be substantial (MTD at 9), even though HUD exercised the same remedies contemplated by §§ 4161 and 4165, exhibits an endemic practice of HUD circumventing the law to avoid the protections Congress accorded Tribes facing a reduction in their grant funding. As shown below, NAHASDA does not allow the government to recapture grant amounts already awarded without a finding of substantial noncompliance, after according the Plaintiffs notice and a hearing that satisfies the requirements of 24 C.F.R. §§ 1000.532 and 540. Despite the comprehensive and exclusive remedial scheme set up in NAHASDA, the Defendant attempts to rest its case upon an inherent, common-law authority to

recover an illegal overpayment. Defendant does this by claiming that it can deny hearings and the required finding of substantial noncompliance before recapturing millions of dollars—amounts large enough to threaten the financial wellbeing of many Tribally Designated Housing Entities ("TDHEs")—merely by classifying its actions as not involving substantial non-compliance with a provision of NAHASDA. *See*, ***e.g.,*** MTD at 6. Thus, according to Defendant, the carefully crafted remedies set out in §§4161-4168 of NAHASDA (the exact remedies as HUD has accorded itself here) do not apply, leaving the Court with a common-law rule which Defendant claims allows the federal government to administratively recapture the alleged overpayments in this case.

Only outside of NAHASDA would Defendant not be subject to Section 4161(a) and so it is on the common-law hook that Defendant attempts to hang its case. As alleged in Plaintiffs' Second Amended Complaint, however, these were not undisputed, mistaken or illegal overpayments indisputably owed to the United States as a creditor. Instead, these were funds from units that were excluded from Plaintiffs' FCAS in violation of NAHASDA's funding formula mandate. Moreover, the common-law right to recapture funds erroneously paid is subject to statutory limits as the cases Defendant cites all acknowledge. As will be shown, Congress has placed limits on HUD's right to recapture the Plaintiffs' grant funds through the enactment of a comprehensive remedial scheme which governs HUD's actions in adjusting or reducing the Plaintiffs' grant funding. Congress has articulated the appropriate standards to be applied to the award, reduction or adjustment of grant funds under NAHASDA, particularly 25 U.S.C. §§4161(a) and 4165. Defendant's request that this Court rubber stamp HUD's decision that these are "overpayments" and are "illegal" without an adequate record or a finding of substantial noncompliance as required under the law should be rejected.

Finally, Defendant argues that Plaintiffs fail to state a claim for illegal exaction or breach of contract because "they have no right to notice and a formal hearing under 25 U.S.C. §§ 4161 and 4165 . . . . [and because] they do not identify any provision of the funding agreements that required HUD to provide notice and hearing." MTD at 15. Plaintiffs allege in count two of the Second Amended Complaint, however, that their funds have been unlawfully retained. E.g., SAC at ¶48. Additionally, because NAHASDA and its implementing regulations are incorporated by reference into the funding agreements, and because a finding of substantial noncompliance and notice and a hearing were required under NAHASDA before the recaptures that occurred in this case, Plaintiffs properly alleged breach of contract and Defendant's Motion to Dismiss should be denied.

ARGUMENT

I. Standard of Review

To survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[T]he plaintiff must allege facts that raise the right to relief above the speculative level under the assumption that all allegations are true." *Burch v. United States*, 99 Fed. Cl. 377, 381 (Fed. Cl. 2011) *citing Bell Atl.*, 550 U.S. at, 555. "The Complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Id.*, *quoting Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1366-67 (Fed. Cir. 2009). Further, in considering a motion under RCFC 12(b)(6), "[t]he court must determine whether the claimant is entitled to offer evidence to support

the claims, not whether the claimant will ultimately prevail." *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (internal quotation omitted). The question is whether "it is beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1131 (Fed. Cir. 1998). On a 12(b)(6) motion, the Court should primarily focus on the allegations in the Complaint and may also consider materials incorporated by reference in the complaint and materials over which the court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).[1]

Because Defendant's MTD involves the interpretation of NAHASDA and its implementing regulations, the canons of construction of statutes passed for the benefit of Indian Tribes play an important role in the court's determination. These canons, which arise out of the federal trust responsibility hold that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). *See also South Carolina v. Catawba Indian Tribe, Inc*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians"). The canons require the Court and Defendant to accept the Plaintiffs' interpretation of NAHASDA and its implementing regulations if it is reasonable**.** *Muscogee* (*Cree*k) N*ation v. Hodel***,** 851 F.2d 1439, 1445 (D.C. Cir. 1988); *Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455,

[1] Applying these standards, the court should ignore the numerous factual allegations made by the defendant concerning the actions it took to reduce the Plaintiffs' FCAS and the self-serving characterizations of the defendant's actions to adjust or recapture the Plaintiffs' block grant funds. (eg. MTD at 9). Moreover, the court should decline the defendant's invitation to revive that part of its previous order in *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584 (2011) that it subsequently vacated (MTD at n. 1 and accompanying text). "A vacated judgment has no effect." *Fort Knox Music, Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. N.Y. 2001). As the court itself recognized, it made premature factual determinations outside of the parameters of the Complaint in dismissing Plaintiffs' second claim for relief under RFCC 12 (b) (6), and that is why that portion of the order was vacated.

1462 (10th Cir. 1997).[2] As shown below, the Plaintiffs' interpretation of NAHASDA is reasonable.

II. Defendant Does Not Have Inherent Authority to Recapture Funds in This Case

Defendant contends that it enjoys "inherent power" to recapture the NAHASDA funding at issue in this case, irrespective of any limitations on recapture that are contained within NAHASDA or its implementing regulations. *See* MTD at 4 ("an agency does not require statutory authorization to recover . . . overpayments because the right exists independent of statute."). Defendant's notion of its "inherent power" is overbroad, frightening, and lacking in merit.

Defendant relies on five cases in support of its "inherent power" argument: *United States v. Wurts*, 303 U.S. 414, 416 (1938); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1058 (Fed. Cir. 2001); *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112, 117 (1920); *United States v. Munsey Trust Co.*, 332 U.S. 234, 236 (1947); and *Bank One, Michigan v. United States*, 62 Fed.Cl. 474, 478 (2003). None of these cases support Defendant's characterization of

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[2] HUD has argued in the past that these canons should not apply in cases under NAHASDA because the annual block grant allocations to Tribes is a "zero-sum" game, whereby if one Tribe gets more funding, other Tribes get less. The Court should reject any such argument because the Plaintiffs' interpretation of NAHASDA will benefit all Tribes by protecting against *ad hoc* administrative funding adjustments or reductions that do not comply with the requirements of §§ 4161 and 4165. Moreover, the so called "zero-sum-game" argument was rejected in *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). In that case, a similar pool of money under the Indian Self Determination Assistance Act was at issue and the agency there, as here, was attempting to limit some Tribes' right to that money, which obviously benefited other Tribes by increasing their share. *See generally Id.* The Court nevertheless declined to defer to the Agency's discretion. *Id.* at 1346 n.10 and accompanying text. The "zero-sum-game" argument also erroneously assumes that the Tribes who get less are somehow wronged, and that is simply not the case. As the court in *Ramah Navajo School* held, Tribes are only entitled to their share of funding under a "legal allocation plan." *Id.* at 1346.

its "inherent power" to recapture funds in the context of this case. Rather, these cases stand for the unremarkable proposition that the federal government retains the inherent authority to bring a civil action in federal court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment:, absent statutory language to the contrary. *See Wurtz*, 303 U.S. at 415-16. The Plaintiffs here do not quarrel with HUD's inherent recourse to the judiciary, which the cases it cites inevitability support. Indeed, §4161(c) of NAHASDA expressly provides that right. Moreover, unlike the cases relied upon by Defendant, there is a comprehensive statutory scheme in NAHASDA that limits HUD's remedial authority under controlling case law.

Unlike *Wurtz*, Congress has foreclosed HUD's inherent authority "through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981). Therefore, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id; accord, Am. Elec. Power Co. v. Connecticut,* 131 D/ Vt. 2527, 2537 (2011) ("[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.").[3] As the Court in *Wurtz* acknowledged, the inherent authority to recover funds erroneously paid can be limited by Congress. 303 U.S at 415-16. In

[3] The field of Indian law is particularly of special federal interest. Congress' authority over Indian affairs has been described as plenary. *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for Indian tribes in all matters"). NAHASDA was enacted to carry out the unique trust responsibility owed by the United States to Indian Tribes, (25 U.S.C. § 4101(2)-(5)), and to provide federal assistance "in a manner that recognizes the right of Indian self-determination and tribal self-governance. . ." 25 U.S.C. § 4101 (7). Because of Congress' paramount authority and the policy to promote tribal self-government, federal courts must not infer the abrogation of Indian rights or protections, but must instead "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez, supra,* at 436 U. S. 60.

this case, any inherent authority HUD enjoyed to recapture funds has been limited by the comprehensive remedial scheme laid out in Subchapter IV of NAHASDA, 25 U.S.C. §§ 4161-68. At a minimum, Plaintiffs have alleged a plausible claim that NAHASDA and the HUD actions it authorizes, construed liberally in Plaintiffs' favor, provides the exclusive remedial mechanism under which HUD may recapture FCAS funding when it has been overstated in violation of 24 C.F.R. § 1000.318. *see Amer. Elec.*, 131 S. Ct. at 2537 (holding that the Clean Air Act, and the EPA actions it authorizes, displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants).

HUD also misconstrues and inflates the inherent authority recognized in *Wurtz* by suggesting that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the Tribes by administrative fiat. There is no such "inherent" authority—any authority to recover funds by purely administrative means must come from express delegation of that authority from Congress, in a statute. *Am. Bus Ass. v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (agency's authority to bring a civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary).

HUD's reliance on *United States v. Texas* is also unavailing. In *Texas*, the Court held that the Debt Collection Act of 1982 did not abrogate the government's common law right to collect pre-judgment interest. 507 U.S. at 530. Again, this case does not involve any "inherent right" to assess monetary liability administratively; the case simply reaffirms that the United States has a common law right to prejudgment interest if it files a civil claim that a court ultimately reduces to a judgment.

An agency's authority is shaped by what Congress has set forth in statute, in this case NAHASDA. *Am. Bus*, 231 F.3d at 4 (statute's enumerated remedies reveal Congress' unambiguous intent that such remedies be exclusive, and "consequent intent to deny agencies the power to authorize supplementary monetary relief."). The inherent authority rule of *Wurtz* and its progeny, to the extent it applies at all in a non-civil action context, is still limited by the rule that Congress may limit an Agency's remedial authority by a comprehensive remedial scheme that defines the Agencies authority to act:

> Where Congress has provided a comprehensive statutory scheme of remedies . . . the interpretive canon of *expressio unius est exclusio alterius* applies. See *Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S.Ct. 1511, 1521-22, 149 L. Ed. 2d 517 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L. Ed. 2d 146 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

Christ v. Ben. Corp., 547 F.3d 1292, 1298 (11th Cir. 2008).

Thus, a remedy cannot be implied under Titles I-III of NAHASDA outside comprehensive provisions and the express parameters of Title IV. Defendants reliance on 25 U.S.C. §§ 4151 - 4152[4] to support its notion of some independent authority to adjust or reduce Plaintiffs' grant without complying with the remedies laid out in Title IV (MTD at 5), must be rejected.

Under § 4151, "allocat[ions]" are made on a fiscal year basis. The allocation of funds is made "each year," with that allocation occurring "as expeditiously as practicable." 24 C.F.R. § 1000.56. Once the grants have been disbursed pursuant to the annual allocation process, 24 C.F.R. § 1000.60 makes it clear that any later effort to "prevent improper expenditure of funds

[4] Sections 4151 and 4152 are part of Title III of NAHASDA entitled "Allocation and Grant Amounts."

already disbursed to a recipient" must be done "*[i]n accordance with the standards and remedies contained in §1000.538 [to wit, Title IV] relating to substantial noncompliance…In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.*" *Id*. (emphasis added). HUD cannot seriously argue that funds over allocated and dispersed in violation of 24 C.F.R. §1000.318 are not improperly expended under § 1000.60. If a TDHE receives and spends more funds than it is entitled to under 25 U.S.C. § 4152 and 24 C.F.R. § 1000.318, then it obviously has not spent the funds in accordance with NAHASDA. Thus, HUD's own regulation—a regulation conspicuously ignored in Defendant's MTD—draws a clear distinction between the initial "allocation" of grant funds, and any later action to recoup funds erroneously included in the recipient's initial allocation. It is the same distinction drawn in *City of Kansas City v. U.S.H.U.D.*, 861 F.2d 739 (D.C. Cir. 1988)("*Kansas City*")—a dispositive case on this MTD.

In *Kansas City,* the court, dealing with nearly identical counterparts to 25 U.S.C. §§4161 and 4165, noted that there is a fundamental distinction between adjustments made at the initial stage of grant award, and withholdings or recaptures made after the grant is awarded. The former could occur without a hearing and finding of substantial noncompliance; the latter could not. *Id.* at 743. The reasons are obvious: years after a grant is made, the recipient may have already spent it, or at least committed funds in reliance on it. *Id.* at 745-46. *See also City of Boston v. HUD*, 898 F.2d 828, 833 (1st Cir. 1990). In a nutshell, grabbing back millions already spent or obligated is a fundamentally different action than computing the initial amount of a grant pursuant to NAHASDA Title III. Section 25 U.S.C. § 4151 does not support the notion advanced by Defendant that it has some inherent authority to recapture, adjust or reduce

Plaintiffs' grant funds once they have been dispersed, outside the parameters of Title IV of NAHASDA.

Defendant tortures the plain language of the statute in support of its thesis that, because NAHASDA does not prohibit HUD from taking any actions to recover overfunding in cases it says do not constitute substantial noncompliance, HUD is free to administratively recover funds outside the parameters of Sections 4161 and 4165. Such an argument does not survive serious scrutiny. As shown above, it is fundamental that a federal agency has only those powers which have been conferred upon it by Congress. *See American Bus*, 231 F.3d at 8 ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the Constitution.")(emphasis in original); *Louisiana Pub. Ser. Comm'n. v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act…unless and until Congress confers power upon it."). Defendant's "inherent power" argument turns this principle upside down.

Moreover, the Defendant's argument here is inconsistent with HUD's previous concession on this point during negotiated rulemaking. HUD had originally proposed to allow grant recaptures without a hearing under then 25 U.S.C. § 4165(c). *See* 62 Fed. Reg. 35718, 35726 (July 2, 1997). But in response to overwhelming Tribal opposition, HUD agreed, in the final rule, to require a hearing in all cases of grant recoupment--whether under §4161 or §4165. *See* 63 Fed. Reg. 12334, 12347 (March 12, 1998). HUD's attempt to turn a regulation intended to make the hearing requirement universal into a limitation on Tribes' hearing rights, and the accompanying right to be free of funding reductions or adjustments absent the required finding of substantial noncompliance, ignores both the history and purpose of the rule and Congress' intent in enacting Title IV.

Here, Plaintiffs are Tribal housing block grant recipients designated by Congress as benefactors of the statute HUD is entrusted to administer in order to fulfill the unique trust responsibility owed by the United States to Indian Tribes. 25 U.S.C. §§ 4101; *Yakama Nation Hous. Auth. v. United States*, 2011 U.S. Claims LEXIS 2317, 29-30 (Fed. Cl. Dec. 5, 2011). Plaintiffs are not private entities subject to an arms-length transaction with the Government or recipients of gratuities.[5] *Cf. DiSilvestro v. United States*, 405 F.2d 150, 153 (1968) (analyzing gratuities paid by the federal government and finding that *ex aequo et bono* does not apply to recover the same when it would "make the courts but rubber stamps for administrative action . . . ."). Defendant's actions here sought to recapture grant funds awarded or spent often years earlier, in a largely successful effort to force recipients to cover the recapture by diverting money needed for *current* housing needs. The court in *City of Boston v. HUD* put it this way:

> The cutting off of a contractually promised grant has serious impact. A grantee in this type of situation may already have made a heavy investment in reliance on HUD's promise. By providing that HUD must give notice and an opportunity for a hearing before sanctioning development grant recipients for noncompliance with statutory provisions, and by providing for judicial review, Congress gave to recipients the opportunity to try to convince the agency, and later a court, that they had complied.

898 F.2d 828, 833 (1st Cir. 1990). Plaintiffs here are not private parties entering into contracts with Defendant, they are governmental grant recipients carrying out their mandate to aid entire tribal populations. The cases relied on by Defendant for its inherent authority to recover sums-certain paid illegally simply do not apply here.

[5] "Gratuity" is defined as "done or performed without obligation to do so . . . ." BLACK'S LAW DICTIONARY 769 (9th ed. 2009). By contrast, "grant" means "an agreement that creates a right or interest in favor of a person or that effects a transfer of a right or interest from one person to another."*Id*. at 768.

III. Defendant Cannot Rely on Authority to Make Recaptures at Issue in This Case Outside the Parameters of Title IV of NAHASDA Because Title IV Provides a Comprehensive and Exclusive Remedial Scheme that Precludes the Common Law or Additional Administrative Remedy Defendant Asserts in This Case

Even if Defendant could establish a common-law authority to recapture from grant recipients such as Plaintiffs' disputed amounts that were not erroneously or illegally paid, the Court should not extend such authority to this case. Because Congress has "articulated the appropriate standards to be applied as a matter of federal law" in this case, Defendant's argument, based on federal common law, cannot stand. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981).

The United States Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Milwaukee*, 451 U.S. at 313 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). While federal common law may be a "necessary expedient" in certain instances, when, as here, the "'field has been made the subject of comprehensive legislation or authorized administrative standards'", the need for "such an unusual exercise of law making by federal courts disappears." *Id.* At 314 (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (CA 10 1971)). Of particular import to this case, the court in *Kansas City*, noted that "[i]n most cases, Congress has been silent on the question of a grantee's procedural rights when an agency decides to terminate some or all of its federal grant. When, as in this case, Congress has not been silent, a court has a special obligation to ensure that the agency does not end-run the clear procedural protections which Congress provided." 861 F.2d at 745 (quotations/alteration/citations omitted).

Contrary to Defendant's assertion (MTD at pg. 5), Congress need not evidence in a federal statute a clear purpose to preempt federal common law: in determining whether federal statutory or federal common law governs, courts "start with the assumption that it is for

Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee*, 451 U.S. at 317. (quotations omitted). Thus, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue." *Am. Elec. Power Co*. 131 S. Ct. at 2537 (alterations/quotations omitted); *Cf. Am. Bus Assoc.*, 231 F.3d at 4 ("carefully crafted remedies scheme reveals the legislature's intent that the statute's enumerated remedies were to be exclusive . . . .")

As discussed below, because Congress has articulated the appropriate standards to be applied to a recapture or adjustment of grant funding under NAHASDA, the Court should uphold those standards here and deny Defendant's Motion to Dismiss.

A. Title IV of NAHASDA Lays Out a Comprehensive Remedial Scheme Which Requires a Hearing and Finding of Substantial Noncompliance in This Case Before HUD May Recapture, Reduce or Adjust Grant Funds

Titles I-III of NAHASDA contain the Act's substantive provisions, but they contain no provisions providing for the enforcement of those substantive requirements.[6] That is the job of Title IV, which provides a comprehensive suite of remedies—administrative and judicial—for any violation of "any provision of this Act." 25 U.S.C. § 4161(a).

Defendant's proposal—to imply, within Titles I-III, the power to summarily enforce those titles and their implementing regulations (in this case, 24 C.F.R. § 1000.318) without regard to the procedural protections of Title IV, including the required finding of "substantial noncompliance"—would make Title IV a dead letter. Defendant would rarely invoke either

[6] Section 209 of NAHASDA (25 U.S.C. § 4139) does contain a lone enforcement provision dealing with using grant money for affordable housing activities; however, that section merely provides that a person violating a substantive standard will be dealt with under §4161(a).

Section 4161 or Section 4165, because both contain the bothersome sort of procedural requirements that the court in *Kansas City* noted HUD has been historically loathe to follow. *See Kansas City*, 861 F.2d at 741 ("[In] the 13 years since the [public housing equivalent of §405 of NAHASDA] has been in existence, the Secretary has *never* initiated [those hearing] procedures against any grant recipient." (*emphasis in original*)). Defendant would simply claim that it was following its own "duty" to comply with Titles I-III, thereby absolving itself of any requirement to provide any procedural protections to the recipient. Such a position leads to the anomalous result that violators would have greater protection under the statutes than those in compliance, and yet both suffer the same sanction of recapture, except the violators get greater protection than those who are in compliance. This result makes no sense.

Those procedural protections found in Title IV provide a comprehensive array of both sanctions and procedural safeguards, including, *inter alia*:

- administratively recapturing misspent revenues under section 4161, if the recipient is guilty of "substantial noncompliance,"[7] and the recipient is given the opportunity for a formal hearing;[8] and
- after audit or review, "adjust[ing]" the recipient's grant amount under section 4165 (d).

[7] "Substantial noncompliance" means, *inter alia*, noncompliance that involves a "material amount" of the recipient's grant funding, or the imposition of sanctions that have a "material effect on the recipient meeting" the goals of its Indian Housing Plan. 24 C.F.R. § 1000.534.

[8] The form of hearing required by 25 U.S.C. § 4161 is structured to provide meaningful due process protections. Pursuant to 24 C.F.R. §§ 1000.532(b) and 1000.540, hearings are governed by the formal hearing procedures of 24 C.F.R. Part 26, which include, *inter alia*, *de novo* review by an Administrative Law Judge or Board of Contracts Appeals Judge; broad discovery rights and the right to secure subpoenas; the right to cross-examination; and the right to a decision based only on the record.

Defendant's authority to "adjust the amount of a grant made to a recipient" pursuant to a report or audit under 25 U.S.C. § 4165 (d) is "subject to" the substantial noncompliance and hearing requirements of section 4161(a).[9] Defendant acknowledged in its first Motion to Dismiss the "exclusive remedial scheme" laid out by Congress in NAHASDA. Dkt #18 at 21-22. To now assert that this "exclusive remedial scheme" can be arbitrarily withheld from Plaintiffs in this case is indefensible. Dkt #18 at 21.

In violation of the law, and despite the amount of the recaptures involved here (both in absolute terms and in relation to the recipients' total grants), in no case did Defendant offer any of the Plaintiffs an opportunity for hearing that met the requirements of 24 C.F.R. § 1000.540, nor find that any Plaintiffs' alleged noncompliance was "substantial[]." 25 U.S.C. §4161 (a)(1). Nothing within the comprehensive panoply of remedies set out in Title IV, by Defendant's own submission, authorized HUD to so summarily deprive recipients of the procedural safeguards guaranteed by that Title. For HUD to now say that its remedies laid out in Title IV do not apply because it does not consider the FCAS funding violations to be substantial, but that it can nevertheless exercise the exact remedies it is accorded under Sections 4161 and 4165 without making the findings those statutes require, is nonsensical.

i. 25 U.S.C. § 4161(a) Applies Whenever HUD attempts to Recapture or Adjust Grant Funds That Have Been Awarded and Requires a Hearing and Finding of Substantial Noncompliance in this Case

Section 4161(a) provides, *inter alia*, that:

> (1)…[If] the Secretary finds *after notice and opportunity for hearing that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act*, the Secretary shall—

[9] There is a broad range of other remedies made available to HUD under Title IV, including replacing the recipient (Section 4162), remedial technical training (Section 4161(b)) and referral to the U.S. Attorney for a civil action. *See* Section 4161(c).

* * *

> (B) reduce payments under this Act to the recipient by an amount of such payments that were not expended in accordance with this Act; …

Id. (emphasis added). Thus, under Section 4161(a), HUD may recapture funds from future grants only "if" the Secretary: (i) provides an "opportunity for hearing"; and (ii) "finds…[that] the recipient has failed to comply substantially" with NAHASDA.[10] *Id.* Such was the holding in *Kansas City*, which involved an interpretation of Section 111 of the Housing and Community Development Act (42 U.S.C. § 5311 [1982]) ("CDBG Act"). *Kansas City*, 861 F.2d at 740. According to HUD, NAHASDA's enforcement provisions "like many others in NAHASDA, [are] patterned after" their CDBG counterparts,[11] and the language of Section 111 of the CDBG Act is essentially identical to Section 4161(a) of NAHASDA.

In *Kansas City*, the court held it was "absolutely clear" that the CDBC Act mandated a hearing before HUD could withhold funding from a recipient based on past noncompliance.[12] *Kansas City*, 861 F.2d at 742. The *Kansas City* court cited a HUD admission that it had avoided granting hearings under Section 111 for some 14 years because it found hearings to be time

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[10] 25 U.S.C. § 4161(a)(1)(B) also indicates that HUD's authority to recapture is limited to circumstances where NAHASDA funds were misspent by a Tribe, or "not expended in accordance with the Act." Section 4161 does not provide authority to recapture NAHASDA funds that are improvidently allocated by HUD, but spent by a TDHE in accordance with the Act. One important purpose of the notice and hearing requirements is to give a Tribe the opportunity to demonstrate that it has spent its NAHASDA funds in accordance with the Act, which would serve as a bar to recapture. In circumventing the notice and hearing requirement, HUD has also improperly endeavored to recapture funds without any inquiry into whether they were appropriately spent.

[11] 62 Fed. Reg. 35726 (July 2, 1997).

[12] The noncompliance at issue here, despite HUD's attempt to paint it otherwise, is the Plaintiffs' alleged failure to accurately report FCAS, which resulted in alleged over funding and led to the administrative action to reduce or adjust downward the Plaintiffs' future grants.

consuming. *Id.* at 744. In rejecting administrative burden as a rational for avoiding the plain language of the statute, the court held "[W]hen a statute dictates that parties receive notice and a hearing…the provision of those basic procedural rights is not left to be decided by administrative 'flexibility' or 'discretion'." *Id.* at 744 *quoting RKO General, Inc. v. FCC*, 670 F.2d 215, 233 (D.C. Cir. 1981)). The same holds true when the same statute that mandates notice and a hearing also requires a finding of substantial noncompliance, as did the statute at issue in *Kansas City,* and as does Section 4161 (a). Particularly relevant to this case, the *Kansas City* court found that any claim by HUD that the alleged noncompliance was "somehow insubstantial" (thereby not requiring notice and an opportunity for a hearing) would be "belie[d]" by "the fact that HUD selected a relatively drastic sanction (and one that is expressly authorized for violations under [the statute])…." *Kansas City*, 861 F.2d at 742, fn 3.

The Court of Appeals for the First Circuit reached the same conclusion in *City of Boston v. HUD*, 898 F.2d 828 (1st Cir. 1990). There, HUD claimed it had not "terminated" a grant under the CDBG Act because it had not yet made any payment under the grant. In dismissing that argument, the court held:

> That HUD's…reading is hyper-technical in this context is further shown by the obvious purpose of the notice and hearing provision. It was plainly intended to give a recipient a fair chance to respond to the serious charge of noncompliance, and so have the grant maintained if the Secretary's action was ill-conceived.

Id. at 832-33. Like in *Kansas City* and *City of Boston*, here Defendant is attempting to creatively argue its way out of its responsibilities under the law. Because Section 4161 speaks directly to reductions in grant amounts already awarded and provides that such reductions must be preceded by a hearing and finding of substantial noncompliance, Defendant's Motion to Dismiss should be denied.

ii. 25 U.S.C. §4165 Applies Whenever HUD Attempts to Recapture or Adjust Grant Funds That Have Been Awarded and Requires a Hearing and Finding of Substantial Noncompliance in This Case

Section 4165 of NAHASDA authorizes HUD to audit or review NAHASDA recipients. Section 4165(d) sets out the remedies HUD may pursue if it finds recipient is noncompliant as a result of an audit:

> *Subject to Section 4161(a)*, after reviewing the reports and audits relating to a recipient…, the Secretary may adjust the amount of a grant made to a recipient under this act in accordance with the findings of the Secretary with respect to those audits and reports.

25 U.S.C. § 4165 (d) (emphasis added). Absent the qualifier "subject to Section 4161(a)," this subsection could have created a conflict between Sections 4161(a)) and 4165(d), as Section 4165 itself does not reference either a hearing or "substantial noncompliance." Indeed, in *Kansas City*, the court was faced with a counterpart to Section 4165(d)—to wit, Section 104(d) of the CDBG Act— that contained no "subject to" qualifier.

As the court in *Kansas City* noted, construing Section 104(d) of the CDBG Act (the counterpart to Section 4165 of NAHASDA) as an overlapping enforcement mechanism without the procedural protections found elsewhere in the statute would render a "nullity" those more demanding hearing-based remedies. *Kansas City*, 861 F.2d at 744. *Kansas City* avoided that conflict in other ways. In this case, Congress did so by expressly providing that any action taken under Section 4165(d) was "subject to" the safeguards of Section 4161(a).

Defendant asserts that its compliance actions were not the result of any audit or review. MTD at 10-12. That is not true. The contention is belied by HUD's own Regulations. 24 C.F.R. Section 1000.319 (d) ("Review of FCAS will be accomplished By HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews"). Furthermore, all of the challenged actions in this case came as a result of a nationwide audit of NAHASDA's

program implementation by HUD's Office of Inspector General ("OIG"). After finding that HUD may have allowed FCAS units to be overcounted in light of § 1000.318, the OIG advised HUD to "*audit* all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years." *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125, 1130 (D. Colo. 2006) ("*Fort Peck I*") (emphasis added). The use of the word "audit" shows that even HUD's own OIG expected that the procedural safeguards in Sections 4165(d) and 4161(a) would apply to the recommended action. In short, whether HUD's recapture actions are characterized as "reductions" under Section 4161(a), or "adjustments" under Section 4165(d), the result is always the same: HUD unlawfully exacts funds when it recaptures awarded funds without following the requirements of Sections 4161(a) and 4165(d).

IV. Congress Has Not Endorsed HUD's Interpretation of Substantial Noncompliance

Defendant cherry picks from the law, using only those portions that serve it, by spending the majority of its MTD arguing that it may ignore Title IV of NAHASDA only then to rely on Congress' 2008 amendments to NAHASDA,[13] which Defendant contends "endorsed" HUD's interpretation of Sections 4161 and 4165. MTD at 12-15. As shown below, Congress did not endorse HUD's interpretation of NAHASDA. Even if it did, the amendment cannot be applied retroactively and so is irrelevant for purposes of this case. There is a strong presumption against the retroactive application of a statutory amendment in the context of federal grants:

> The Supreme Court has said that, because it is difficult, and sometimes unfair, to make a grantholder abide by new (post-grant) statutory obligations, a grant-holder's obligations normally should be "evaluated by the law in effect *when the*

[13] The 2008 amendments are contained in the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("Reauthorization Act")

> *grants were made*," *Bennett v. New Jersey,* 470 U.S. 632, 640, 105 S.Ct. 1555, 1560, 84 L.Ed.2d 572 (1985) (emphasis added), not by the law "in effect at the time" the court "renders its decision," *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Elaborating, the Court stated,
>
> > "Absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants."
>
> *Bennett*, 470 U.S. at 641, 105 S.Ct. at 1561.

Project B.A.S.I.C. v. O'Rourke, 907 F.2d 1242, 1246 (1st Cir. 1990); *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (traditional rules provide that an amendment to a statute will not have retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.").

Defendant supports its construction of the newly-enacted amendment to Section 4161(a)(2) by citing the Senate Report's use the word "clarification" in discussing the amendment. MTD at 13. However, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g., United States v. Vazquez-Rivera,* 135 F.3d 172, 177 (1st Cir. 1998); *United States v. Wright,* 625 F.3d 583, 600 (9th Cir. 2010); *Boddie v. Am. Broad. Companies, Inc.,* 881 F.2d 267, 269 (6th Cir. 1989); *Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan.,* 128 F.3d 1431, 1435-36 (10th Cir. 1997); *Commissioner of Internal Revenue v. Callahan Realty Corp.,* 143 F.2d 214, 216 (2nd Cir. 1944). As the First Circuit stated in *Vazquez-Rivera*:

> Painting black lines on the sides of a horse and calling it a zebra does not make it one. Similarly, labeling the…amendment [at issue] a "clarification" of Congress's intent in the original law is legally irrelevant . . . .*** [I]t is obvious that the "clarification" is more than merely cosmetic.

Vazquez-Rivera, 135 F.3d at 177. Characterizing the 2008 Reauthorization Act amendment as a "clarification" is the equivalent of painting black lines on the sides of a horse and calling it a zebra. The so-called "clarification" is much more than "merely cosmetic," it is a substantive addition to Section 4161 (a) that did not exist under the previous version of the statute. Moreover, the fact that Congress saw fit to amend the law to accommodate HUD's practice is itself evidence that HUD's prior interpretation could not stand without the amendment. *Callahan Realty*, 143 F.2d at 216.

The language of the Senate Report accompanying the Reauthorization Act makes it clear that Congress was in fact substantively amending the law:

> ***Under this amendment,*** if a grant recipient is required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301, the action does not constitute substantial non-compliance by the grantee and does not automatically trigger a formal administrative hearing process. ***This amendment has been included due to the significant amount of time and resources involved in a hearing,*** which may not be necessary when a grant recipient is otherwise in compliance with the requirements of the Act.

S. Rpt. No. 110-238, at 10 (2007) (emphasis added). According to the Senate Report, "[t]his amendment has been included due to" an allegedly undesirable result that would otherwise occur under then-existing law (*i.e.*, a hearing)—and the change would occur "[u]nder this amendment." *Id.*[14]

As Defendant notes at p. 13 of its MTD, the 2008 amendment to Section 4161(a) references Section 4152(b) (1), which was also amended by the Reauthorization Act. In their statements to Congress regarding amendments to the way FCAS housing units would be counted under the Reauthorization Act, both Orlando Cabrera, Assistant Secretary for Public and Indian

[14] The Senate Report is silent regarding HUD's authority to recapture funding from past grants absent a finding of substantial noncompliance.

Housing at HUD, and Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs at HUD,[15] stated as follows:

> ***An amendment to section 302, the IHBG Allocation Formula [25 U.S.C. §4152], would change the way that housing units in management are counted for formula purposes.*** It would stop counting units for FCAS purposes in the year after they are conveyed, demolished or disposed of. *This change* would comport with the process established by the original negotiated rulemaking committee that crafted the IHBG regulations.

Statements, at 3 (emphasis added).

As HUD itself agreed that the passage of the Reauthorization Act effected a "change" and an "amendment" to the relevant portions of the law, Defendant should not now be allowed to claim otherwise. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action . . . ."); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 839 (Fed. Cir. 2006) ("We must ensure that the agency is not now masquerading a post hoc rationalization as a then-existing 'interpretation.'")

Further, in its MTD, Defendant mischaracterizes the statutory language and scheme of revised 25 U.S.C. §§ 4152 and 4161. Defendant claims the amendments to these two statutes wholly endorsed HUD's regulations regarding the FCAS component of the funding formula (MTD 13). In fact, the amendment is significantly different from HUD's regulations. In particular, Congress did not adopt HUD's arbitrary and vague regulatory requirement that TDHEs "actively enforce strict compliance" with housing agreements, or convey FCAS units "as

[15] STATEMENT OF ORLANDO CABRERA, ASST. SEC'Y FOR PUB. & INDIAN HOUSING HUD, HEARING BEFORE THE HOUSE COMMITTEE ON FINANCIAL SERVICES SUBCOMMITTEE ON HOUSING & COMMUNITY OPP., June 6, 2007 at 3, available at http://archives.financialservices.house.gov/hearing110/htcabrera060607.pdf (last visited January 16, 2012). *See also* STATEMENT OF RODGER J. BOYD, DEP. ASST. SEC'Y FOR NATIVE AMERICAN PROGRAMS HUD, HEARING BEFORE SEN. COMMITTEE ON INDIAN AFFAIRS, July 19, 2007 at 3, available at http://www.indian.senate.gov/public/_files/Boyd071907.pdf (last visited January 2, 2012) (collectively referred to hereinafter as "Statements").

soon as practicable" after they become eligible for conveyance. 24 C.F.R. §1000.318(a) (1)-(2).[16] HUD used these vague standards to recapture grant amounts already awarded, and in many cases already spent for affordable housing, without complying with 25 U.S.C. §§4161(a) or 4165. Unlike HUD's arbitrary interpretation of FCAS eligibility, Congress took a more measured approach when it amended § 4152.

In the amended version of 25 U.S.C. §4152, Congress does not rely on an elusive "active enforcement" or "practicability" standard to prop up an arbitrary 25 year mandatory conveyance rule. Rather, the amendment provides that, if "the unit is a homeownership unit not conveyed within 25 years," a recipient of funding shall not be considered to have lost the legal right to own that unit (i.e. funding may still be received for that unit) if it "has not been conveyed to the homebuyer for reasons beyond the control of the recipient." *Id*. at §4152(b)(1)(B). Further, the phrase "reasons beyond the control of the recipient" is a defined term under Section 4152(b)(1)(D), and the definition looks nothing like § 1000.318 (a) (1) or (2).

That the Reauthorization Act affirmed HUD's ability to reduce FCAS counts for certain units going forward is undisputed. In amending NAHASDA, Congress did not give to HUD, much less "endorse", its claimed right to recapture grant funding already awarded and utilized by tribes for affordable housing purposes without any procedural protections or the required finding of substantial noncompliance. What Congress did say was, in order to reduce such payments, HUD must first provide "reasonable notice and opportunity for hearing" and make a finding of substantial noncompliance pursuant to 25 U.S.C. §§4161 and 4165. At best, the 2008 amendment

[16] These vague standards would not even be enforceable in a private contract action. *See Hodges v. Pub. Bldg. Comm'n of Chicago*, 93-C-4328, 1994 WL 716300, *15 (N.D. Ill. Dec. 23, 1994) (discussing the vagueness of the phrase "as soon as practicable" in a contract that rendered the provision at issue too indefinite and uncertain to form grounds for liability to support an action for breach of contract).

to Section 4161(a) authorizes HUD to correct a FCAS count in the present year going forward, or relinquish grant funds that have not already been obligated by the TDHE, without the required finding of substantial noncompliance. Any doubt on this issue must be resolved in the Plaintiffs' favor, as the beneficiary of the trust created under NAHASDA and the historic general trust relationship between the United States and Plaintiffs. *Osage Tribe of Indians v. United States*, 96 Fed. Cl. 390, 407 (Fed. Cl. 2010); *Northern Paiute Nation v. United States*, 10 Cl. Ct. 401, 413 (Cl. Ct. 1986). The United States' trust responsibility is particularly relevant to the Court's analysis of HUD's claims:

> The Supreme Court has continually recognized "the distinctive obligation of trust incumbent upon the Government," . . . in its dealings with the Indian tribes. . . . Because of this trust relationship the Government, in both its executive and legislative branches, is held to a high standard of conduct, one consonant with its "moral obligations of the highest obligation and trust." For the same reason, whenever doubt or ambiguity exists in federal statutes or regulations, such doubt is resolved in favor of the tribes.

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part/dissenting in part) (footnote and citations omitted). On rehearing *en banc*, the majority adopted the dissenting opinion of Judge Seymour with exceptions and additions not relevant here. 782 F.2d 855 *(en banc*), *en banc* opinion supplemented by 793 F.2d 1171 (10th Cir. 1986)).

Defendant not only overstates the scope of the 2008 amendment to 25 U.S.C. §4161, it overstates its significance. The amendment states that a recapture of FCAS funds does not "in itself" trigger a "substantial noncompliance" finding (*Id.* at §4161(a)(2)), and the Senate Report said that it does not do so "automatically." S. Rpt. No. 110-238, at 10 (2007). The phrase "in and of itself" is consistently used by the federal courts to mean "standing alone"—that is, without

the presence of any other relevant factor. *U.S. v. Karo*, 468 U.S. 705, 722- 23 (1984) (O'Connor, J., concurring). *See also Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989).

Thus, the 2008 amendment does not insulate Defendant from requiring a hearing if the FCAS recapture would otherwise constitute substantial noncompliance—for example, if the recapture was financially significant to the recipient under the standards established in 24 C.F.R. § 1000.534, or if the over counting of FCAS was intentional or fraudulent. Read literally, the amendment does not support the notion that HUD can recapture FCAS funds absent a finding that the over count constituted substantial noncompliance. The 2008 amendment to §4161(a)(2) states: "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." *Id.* Thus, the failure to accurately report FCAS units, by itself, is no longer considered "substantial noncompliance." *Id*. However, §§4161(a) and 4165(d) still require a finding of substantial noncompliance before Defendant can retroactively "adjust", *i.e.* recapture, a recipient's FCAS funding. 25 U.S.C. §4165(d).

Therefore, under the plain language of amended Section 4161(a)(2), in order to retroactively adjust FCAS grant amounts via recapture through a reduction of future grants (as opposed to correcting the FCAS data for grant allocation purposes in the present grant year going forward), Defendant must make two findings. First, that a recipient failed to accurately report FCAS units as required by NAHASDA and its implementing regulations; and second, that the circumstances surrounding such failure constitute "substantial noncompliance" with a provision of NAHASDA. The fact that Congress removed the failure to accurately report FCAS from "substantial noncompliance" did not give Defendant a new remedial method to recapture funding under NAHASDA. The plain, literal language of the amendment belies such an interpretation.

See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-462 (U.S. 2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). Even if the Court were to consider this language ambiguous, the canons of construction dictate that the ambiguity be construed in favor of the Plaintiffs. If HUD wanted Congress to give it the right to recapture FCAS funds previously awarded outside of the parameters of Title IV, it should have been more forthright in asking Congress to do so. The 2008 amendment to Section 4161 does not express Congressional intent to allow HUD to recapture FCAS funds from grants already awarded without the additional finding of substantial noncompliance. The Court should reject Defendant's irrelevant and unsubstantiated claim that the 2008 amendment merely endorsed HUD's interpretation and clarified the law.

V. Plaintiffs State a Claim For an Illegal Exaction and Breach of Contract

For all of the foregoing reasons, and applying the standards of RFCC 12(b) (6), Plaintiffs have stated a claim for relief for the unlawful exaction or retention of their funds and for breach of contract. The gravamen of Plaintiffs' Second Claim for relief is that HUD violated 25 U.S.C. §§ 4161 and 4165 and the regulations promulgated thereunder, both of which apply under the facts as pled, in recapturing Plaintiffs' FCAS funding. HUD's failure to comply with the statues and regulations (particularly the requirement of finding substantial noncompliance) prior to taking the Plaintiffs funds constitutes an illegal exaction. As this Court has previously explained:

> an illegal exaction claim may be maintained when "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" that "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 605, 372 F.2d 1002, 1007 (1967). The Tucker Act provides jurisdiction to recover an illegal exaction by government officials

> when the exaction is based on an asserted statutory power. 178 Ct.Cl. at 605, 372 F.2d at 1007-08. *See South Puerto Rico Sugar Co. Trading Corp. v. United States,* 167 Ct.Cl. 236, 244, 334 F.2d 622, 626 (1964), *cert. denied*, 379 U.S. 964, 85 S.Ct. 654, 13 L.Ed.2d 558 (1965) (recovery of "exactions said to have been illegally imposed by federal officials (except where Congress has expressly placed jurisdiction elsewhere)").

Aerolineas Argentinas v. United States, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996). *See also Pan American World Airways v. United States,* 129 Ct. Cl. 53, 55, 122 F. Supp. 682, 683-84 (1954) ("the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction and not a tort).

Thus, an illegal exaction claim is cognizable where the government's action is the result of the "misinterpretation or misapplication of statutes, regulations, or forms." *Aerolineas*, 77 F.3d at 1578; *See Crocker v. United States*, 37 Fed. Cl. 191, 197 (1997)(explaining that one type of noncontract-based money claim envisioned by the Tucker Act is where "the Government, under color of statute, demands and receives money from the claimant," and the parties disagree whether the statute requires such payment).

In a circumstance just like this case, where a statute set forth specific procedures the IRS had to follow to recover a refund erroneously paid, and the Plaintiff alleged in the complaint that the Internal Revenue Service ("IRS") failed to follow those statutorily mandated procedures, the court held that Plaintiff properly pled an illegal exaction claim and dismissal was unwarranted:

> [P]laintiff has sufficiently pled an illegal exaction claim in this case. Here, plaintiff has made a prima facie case that the exaction at issue was the direct result of a "misapplication of" the law and that the remedy for such violation is a return of the money unlawfully exacted. As discussed above, plaintiff's claim is based on the IRS' alleged misapplication of the statutory erroneous refund collection procedures. The Federal Circuit, in *Stanley*, held that where the taxpayer has paid the assessed tax, the IRS must either file suit under 26 U.S.C. § 7405(b) to recoup the refund or reassess the liability for the relevant tax year under 26 U.S.C. §§ 2604 and 6501(a), taking into account the erroneous refund, after which it may recover the reassessed liability under 26 U.S.C. § 6502(a)(1). *Stanley*, 140 F.3d at 1027. Here, taking plaintiff's allegations as true,

> the IRS did not reassess plaintiff's tax liability to account for the erroneous refund, as laid out in 26 U.S.C. §§ 2604, 6501(a), and 6502(a)(1), nor did the IRS file suit under 26 U.S.C. § 7405(b), as it was arguably required to do. **Because the IRS did not follow the erroneous refund procedures, but instead took the refund through levy and wage garnishment, the IRS appears to have "illegally exacted" the refund**.

Pennoni v. United States, 79 Fed. Cl. 552, 561-562 (Fed. Cl. 2007) (citing *Stanley v. United States*, 140 F.3d 1023, 1027 (Fed. Cir. 1998) (emphasis added).

Just as in *Pennoni*, here Plaintiffs have pled that HUD's actions in exacting money by recapturing, reducing or adjusting (i.e. exacting or retaining) Plaintiffs' grant funds to recover alleged overpayments, without complying with the statutorily required provisions of 25 U.S.C. §§4161 and 4165 (which include a finding of substantial noncompliance) and the regulations implemented thereunder, was a misapplication of the relevant law. Further, as in *Pennoni*, return of the recaptured funds is the "necessarily implicit" remedy when the government violates the applicable statutes and regulations. *Pennoni*, 79 Fed. Cl. at 562. This proposition is further buttressed by the conclusion that NAHASDA is a money mandating statute, such that refund of the funds illegally taken is a proper remedy. Based on the foregoing, Plaintiffs have met the burden of pleading an illegal exaction or retention claim resulting from HUD's failure to comply with 25 U.S.C. §§4161 and 4165 and the implementing regulations at 24 C.F.R. §1000.532 and §1000.540. In short, there is no meaningful distinction between this case and *Pennoni*.

The court in *Pennoni* also rejected a claim similar to Defendant's claim that a tribe would receive a windfall if the government could not recover an overpayment in a hypothetical case where it inadvertently paid a tribe ten million dollars when the tribe was only entitled to one million. MTD at 8. Putting aside the fact that this case is not about an "inadvertent payment" but instead concerns a dispute over compliance with and the validity of block grant formula regulations, the hypothetical posed by Defendant is irrelevant when the law requires it to comply

with certain procedures prior to exacting or retaining Plaintiffs' funds. In such cases "courts have ordered that the money be returned . . . , even where the courts have recognized that this results in a windfall" to the Plaintiff. *Pennoni*, 79 Fed. Cl. at 562, (*citing Stanley,* 140 F.3d at 1024-25, and *O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995)). "Underlying these cases is the understanding that return of the refund is the 'necessarily implicit' remedy when the government violates the erroneous refund statute." *Id*., (*citing Norman v. United States*, 429 F.3d 1081, 1095, 1096 (Fed. Cir. 2005)).

Additionally, because the requirements of 25 U.S.C. §§4161 and 4165 are incorporated by reference in the Plaintiffs' funding agreements, and because Plaintiffs allege breach those provisions of the statute, Plaintiffs properly allege breach of contract in Count 2. *See Cramp Shipbuilding Co. v. United States*, 122 Ct. Cl. 72, 96-97, (1952).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court deny Defendant's Motion to Dismiss Count Two of the Second Amended Complaint.

Dated: January 24, 2012

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CERTIFICATE OF FILING

I hereby certify that on the 24th day of January, 2012, a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT TWO OF THE SECOND AMENDED COMPLAINT** was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ *John Fredericks III*
John Fredericks III