

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

1. **ABSENTEE SHAWNEE HOUSING**)
AUTHORITY, and)
))
2. **HOUSING AUTHORITY OF THE**)
SEMINOLE NATION OF OKLAHOMA)
))
Plaintiffs,)
v.)
))
1. **UNITED STATES DEPARTMENT OF**)
HOUSING AND URBAN DEV.)
))
Defendant.)

Case No.: 08-1298-HE

PLAINTIFFS' OPENING BRIEF

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March 12, 2012

Attorneys for Plaintiffs

I. INTRODUCTION

This dispute arises from the wrongful administration of Indian Housing Block Grant (herein "IHBG") funds under the Native American Housing and Self-Determination Act of 1996, 25 USC § 4101 *et seq.*, as amended (herein "NAHASDA"), by the United States Department of Housing and Urban Development (herein "HUD"). Specifically and as more fully described below, HUD unlawfully eliminated certain housing units from the calculation of Plaintiffs' Formula Current Assisted Stock ("FCAS") through the end of fiscal year 2008. As a result of HUD's erroneous interpretation of NAHASDA and its implementing regulations, as well as HUD's disregard of the procedural due process rights set forth therein, Plaintiffs have lost IHBG funds to which they were entitled from the inception of NAHASDA to and including fiscal year 2008. In addition, Plaintiffs are threatened with the recapture of additional IHBG funds already appropriated by Congress and expended by Plaintiffs on affordable housing activities. The Plaintiffs have incurred this loss and threat of loss without benefit of the due process protections provided by law.

This case presents the same legal issues that were adjudicated by the United States District Court for the District of Colorado in *Fort Peck Housing Authority v. U.S. Department of Housing and Urban Development*, 435 F.Supp.2d 1125 (D. Colo. 2006) (No. 05-CV-00018-RPM-CBS) (herein *Fort Peck I*), and remain pending before the Colorado District Court following remand by the United States Court of Appeals for the Tenth Circuit. *Fort Peck Housing Auth., et al. v. U.S. Dep't of Housing and Urban Dev.*,

et al., Nos. 06-1425, 06-1447, 2010 WL 582653 (10th Cir. Feb. 19, 2010) (herein *Fort Peck II*).

II. BACKGROUND

Enacted in 1996 with the express mandate of facilitating tribal sovereignty and self-determination, NAHASDA ushered in sweeping changes to the administration of Indian housing programs. Previously, in the State of Oklahoma, Indian tribes received grants to provide low-income housing activities from the State. Indian Tribes were required to organize as state agency housing authorities under Title 63 of the Oklahoma Statutes as a condition of receiving such funds. *See* 63 O.S. § 1057.¹ Both the Absentee Shawnee Housing Authority (“ASHA”) and the Housing Authority of the Seminole Nation of Oklahoma (“HASNOK”) are organized and continued to operate as state agency housing authorities.

Under NAHASDA, each federally-recognized Indian Tribe is eligible to receive block grant funding for affordable housing programs. Tribes are empowered under NAHASDA to expend IHBG on programs they identify in an Indian Housing Plan. Some low-income housing programs (such as homeownership and loan guarantees) are

¹Section 1057 of Title 63 was amended in 2010 to reflect the following policy change:

“At the time that state agency Indian housing authorities were authorized to operate for the benefit of the tribe, band or nation, the tribes, bands and nations were not eligible to receive federal funding for housing purposes. Federally recognized Indian tribes, bands and nations are now eligible to receive federal funding for housing purposes and many have received federal funds, and many have created tribal housing authorities for the purpose of providing housing for their tribal members. In the exercise of their sovereign powers, some tribes, bands and nations desire or may in the future desire to undertake the control and management of the state agency Indian housing authorities created for their benefit and to assume all the assets and liabilities, while other tribes, bands or nations may wish to consolidate the state agency Indian housing authority created or which may be created for their benefit into tribal housing programs. In the interest of the sovereign power of federally recognized Indian tribes, economy of efforts, and the maintenance of cooperative relationships between the state and federally recognized Indian tribes, and in light of the above findings, the state hereby authorizes any federally recognized Indian tribe, band or nation for whose benefit a state agency housing authority was or may be created, to assume management and control of the state agency Indian housing authority and all its assets, as provided in this section.” 63 O.S. § 1057(C).

enumerated by statute, and others may be approved as “model” activities. Tribes may elect to administer the IHBG directly or through a tribally-designated housing entity (“TDHE”). In the State of Oklahoma, many tribes (including the Absentee Shawnee Tribe of Oklahoma and the Seminole Nation of Oklahoma) permitted the existing state agency housing authority to serve as the TDHE.

Congress directed the Secretary to, on or before October 26, 1996, promulgate regulations through negotiated rulemaking that would establish a formula for allocating block grant amounts as among eligible Tribes on an annual basis. 25 USC § 4152(a). Congress directed that these regulations be predicated on factors that reflect the need of the Tribes for low-income housing assistance. 25 USC § 4152(b). One factor to be encompassed in the formula was the number of dwelling units each Tribe or TDHE owned or operated pursuant to an Annual Contributions Contract (herein “ACC”) with the Secretary of HUD at the time the regulations were implemented. 25 USC § 4152(b)(1).

The allocation formula set forth in Section 4152 of NAHASDA provided as follows:

(a) Establishment

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.

(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(a)-(b), (e) (emphasis added).

Certain TDHEs (including Plaintiffs) interpreted Section 4152 and its implementing regulations to permit the inclusion of any and all units owned or managed by the TDHE in the FCAS for formula funding purposes. The statute, by its plain language, created the presumption that those units represented the minimum allocation for the FCAS portion of the formula. HUD, however, took the position that the Tribe or TDHE must cease to include units in its FCAS that had been conveyed to the participants. In addition, HUD deemed any unit that was more than 25 years old and intended for eventual homeownership (as opposed to rental) to be “conveyance-eligible” and excluded from FCAS. Accordingly, as homeownership units aged and were conveyed to the participants over time, the FCAS portion of the formula became – for all practical purposes – a ceiling for formula funding purposes. The *Fort Peck I* litigation ensued after HUD recaptured and/or threatened to recapture several million dollars in allegedly over-funded IHBG funds from the Fort Peck Housing Authority, the TDHE of the Assiniboine and Sioux Tribes.

The United States District Court for the District of Colorado initially entered judgment in favor of the Fort Peck Housing Authority, finding that HUD’s

implementation of Section 4152 was not in accord with the self-determination mandate and other strictures of NAHASDA. Notably, this decision occurred at a time when NAHASDA was undergoing the Congressional reauthorization process. The 2008 reauthorization amendments included a savings provision for lawsuits involving a disputed FCAS and filed within 45 days of its passage, prompting this and other lawsuits filed by Tribes and TDHEs under a “Fort Peck theory.” 25 USC § 4152(b)(1)(E). For example, there are 9 cases with 18 total plaintiffs pending in the United States District Court for the District of Colorado,² 2 cases with 3 total plaintiffs pending in this District,³ 4 cases with 5 total plaintiffs pending in districts in the Ninth Circuit,⁴ and 3 cases with 7 total plaintiffs pending in the Court of Federal Claims.⁵ Many of the cases pending in the United States District Court for the District of Colorado have been consolidated for briefing purposes and involve the same or similar legal issues and requests for relief.

² *Northern Arapaho Tribe v. HUD*, No. 06-cv-01680-RPM (D. Colo.); *Blackfeet Housing Authority v. HUD*, No. 07-cv-01343-WDM-KMT (D. Colo.); *Tlingit-Haida Regional Housing Authority v. HUD*, No. 08-cv-00451-ZLW-CBS; *Navajo Housing Authority v. HUD*, No. 08-cv-00826-RPM (D. Colo.); *Yakama Nation Housing Authority v. HUD*, No. 08-cv-02570-RPM (D. Colo.); *Modoc Lassen Indian Housing Authority v. HUD*, No. 08-cv-02573-RPM (D. Colo.); *Choctaw Nation of Oklahoma v. HUD*, No. 08-cv-02577-RPM (D. Colo.); *Muscogee Creek Nation Division of Housing v. HUD*, No. 08-cv-02583-RPM (D. Colo.); *Sicangu Wicoti Awanyakapi Corp. v. HUD*, No. 08-cv-02584-RPM.

³ *Absentee Shawnee Housing Authority v. HUD*, No. 08-cv-01298HE (W.D. Okla.); *Otoe-Missouria Tribe of Oklahoma v. HUD*, No. 08-cv-01297F (W.D. Okla.).

⁴ *Walker River Paiute Tribe v. HUD*, No. 08-cv-00627-LRH-VPC (D. Nev.); *The Housing Authority of the Te-Moak Tribe of Western Shoshone Indians v. HUD*, No. 08-cv-00626-LRH-VPC (D. Nev.); *Washoe Housing Authority v. HUD*, No. 08-cv-00617-BES-RAM (D. Nev.); *Crow Tribal Housing Authority v. HUD*, No. 06-cv-00051-FRC (D. Mont.).

⁵ *Navajo Housing Authority v. United States*, No. 08-834 (Ct. Fed. Cl.); *Yakama Nation Housing Authority v. United States*, No. 08-839 (Ct. Fed. Cl.); *Lummi Tribe of the Lummi Reservation, Washington v. United States* (Case No. 08-848 (Ct. Fed. Cl.))

III. SUMMARY OF ARGUMENT

This case requires the Court to determine whether HUD has unlawfully deprived the Plaintiffs of IHBG funding through its interpretation and implementation of the IHBG formula. Plaintiffs contend that these actions are inconsistent with HUD's trust responsibility and the spirit and intent, if not the letter, of NAHASDA. Further, Plaintiffs take the position that they were not afforded the due process protections (specifically, notice and an opportunity to be heard) to which they were entitled prior to the IHBG reductions and/or recaptures effectuated by HUD. If permitted such hearing, Plaintiffs could have attempted to demonstrate that the allegedly over-funded units were not conveyance-eligible due to: (1) repairs/renovations being performed on the unit, (2) delays due to the Bureau of Indian Affairs ("BIA") approval process, (3) tenant delinquencies and other compelling reasons. Assuming, *arguendo*, that Plaintiffs were over-funded by HUD for any of the fiscal years in question, HUD lacks the remedial authority to set-off future IHBG in these amounts. The statute in effect at all times relevant to this lawsuit in fact prohibited the recapture of IHBG funds once such funds were expended on low-income housing activities. Finally, any remedial actions by HUD were subject to a three (3) year statute of limitations. 24 CFR §1000.319(d).

IV. ARGUMENT AND AUTHORITIES

A. HUD MUST ADMINISTER NAHASDA IN ACCORDANCE WITH ITS TRUST RESPONSIBILITY TO INDIAN TRIBES.

The captioned case must be viewed against the backdrop of tribal sovereignty and the federal trust responsibility to certain Indian Tribes and tribal organizations, which are

memorialized in the plain language of NAHASDA. *See* 25 USC § 4101(2) (“[T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people”).

NAHASDA also reflects that:

the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition . . .

25 USC § 4101(4) (emphasis added).

Congress, in enacting NAHASDA, specifically imposed a trust duty upon HUD in the course of administering federally-subsidized Indian housing programs. In so doing, Congress found that “providing affordable homes in safe and healthy environments is an *essential element in the special role of the United States* in helping tribes and their members to improve their housing conditions and socioeconomic status.” 25 USC § 4101(5) (emphasis added). In view of the foregoing mandates,

[t]he Federal Government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members . . .

25 USC § 4101(6). Finally, Congress directed that

Federal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes *or tribally*

designated entities under authorities similar to those accorded Indian tribes . . .

25 USC § 4101(7) (emphasis added) (internal citation omitted).

By its plain language, NAHASDA reflects that Indian housing programs are to be administered in accordance with the federal government's general trust responsibility to Indian Tribes. The trust duty operates as a restraint on the discretion of HUD. However, standard principles of statutory construction and agency deference do not have their usual force in cases involving Indian law. It is well-settled that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985); *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985). Any statutory ambiguities must be resolved in favor of tribal sovereignty. *See EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989).

Plaintiffs are the tribally-designated housing entities for two federally-recognized Indian Tribes, to which a trust duty is owed by HUD. Section 4101(7) of NAHASDA extends the trust responsibility not only to Tribes, but also to "*tribally designated entities under authorities similar to those accorded Indian tribes.*" 25 USC § 4101(7) (emphasis added). Further, the Tenth Circuit Court of Appeals previously has found that the Absentee Shawnee Housing Authority "qualifies as a tribe under our case law." *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1126 (10th Cir.

1999). HUD violated this duty by wrongfully recapturing and withholding IHBG funds to which Plaintiffs were entitled by law.

B. THE 2008 NAHASDA REAUTHORIZATION ACT COMPELS A FINDING THAT 24 CFR § 1000.318 WAS INVALID UNDER THE LAW AS IT EXISTED THROUGH FISCAL YEAR 2008.

The adoption of the 2008 Reauthorization Act, which the Tenth Circuit in *Fort Peck II* explicitly excluded from its consideration, requires this Court to find that HUD has: 1) unlawfully deprived Plaintiffs of IHBG funding over a period of years; or 2) is now attempting to unlawfully recapture funding. HUD's actions in this regard are arbitrary, capricious and in excess of lawful authority.

For many years prior to the enactment of the 2008 Reauthorization Act, HUD reduced Plaintiffs' IHBG funding, and/or asserted that Plaintiffs had been overfunded, by categorically eliminating certain dwelling units from the calculation of their FCAS. In particular, HUD eliminated homeownership units under an ACC as of September 30, 1997 if: 1) those homes had been conveyed; or 2) the 25-year term had expired. HUD's reduction of block grant funding in this manner is based upon an unlawful and invalid regulation (24 C.F.R. § 1000.318(a)) which impermissibly conflicts with NAHASDA's formula allocation provision, 25 U.S.C. § 4152(b)(1).

In the wake of the *Fort Peck I* decision, NAHASDA was amended to exclude from FCAS those units "lost to the recipient by conveyance, demolition or other means" as provided by § 1000.318(a). *See* 25 U.S.C. § 4152(b)(1). Second, the Act provided that the relevant changes would not be applicable through fiscal year 2008 as to Tribes

that filed an action challenging recapture within 45 days of the passage of the Act. *Id.* at § 4152(b)(1)(E).

As an unpublished opinion, *Fort Peck II* is not precedential and is not binding on Plaintiffs in this case. Moreover, while the *Fort Peck II* Court expressly noted the existence of the 2008 Reauthorization Act, the Court made it explicit that it did not consider the impact of the 2008 Reauthorization Act, limiting its analysis to the 2002 version of NAHASDA. 367 Fed.Appx. at 885, n. 1. Thus, with respect to the 2008 Reauthorization Act, the Tenth Circuit's unpublished decision did not address: (a) the fact that Congress made substantive changes to NAHASDA's formula allocation provision which incorporate § 1000.318(a), the regulation found to be invalid in *Fort Peck I* or (b) the fact that Congress expressly declined to apply the amendment retroactively to TDHEs that filed a civil action within 45 days of the 2008 Reauthorization Act's effective date.

In view of the limited issues actually decided by the Tenth Circuit in *Fort Peck II*, this Court is free to decide issues not decided by the Circuit. Plaintiffs request that the Court determine that 24 C.F.R. § 1000.318(a) is invalid because it violates the pre-amendment version of NAHASDA's formula allocation provision, 25 U.S.C. § 4152(b), which requires that the FCAS portion of the NAHASDA funding formula, for each fiscal year through 2008, be based on the number of low-income housing dwelling units owned or operated pursuant to an ACC as of September 30, 1997.

C. HUD VIOLATED THE PRE-AMENDMENT VERSION OF NAHASDA, 24 CFR § 1000.318 AND THE APA BY EXCLUDING FROM FCAS AND REDUCING FUNDING FOR UNITS THAT WERE NOT ACTUALLY CONVEYED OR CONVEYANCE-ELIGIBLE.

HUD improperly excluded from FCAS and/or unlawfully recaptured funding for units that were conveyed or should have been conveyed to the participant as determined by HUD in violation of NAHASDA, 24 CFR. § 1000.318 and the APA. The *Fort Peck II* decision upheld 24 C.F.R. § 1000.318(a) to the extent it was applied to exclude units which a TDHE "no longer owned or operated". 367 Fed.Appx. at 891, 892. However, in many instances, HUD also deprived TDHEs of funding for units that a TDHE continued to own or operate for numerous lawful and good faith reasons, even after completion of the 15 or 25-year term of participation in the pertinent homeownership program. At the counting phase of these actions, Plaintiffs will demonstrate that HUD refused to consider situations where a TDHE could, legitimately and in the exercise of its self-determination, delay or even forgo conveyance. These reasons include, but are not limited to 1) repairs/renovations being performed on the unit, (2) delays due to the Bureau of Indian Affairs ("BIA") approval process, (3) tenant delinquencies and other compelling reasons.

D. HUD VIOLATED SECTIONS 401 AND 405 OF NAHASDA, 24 CFR § 1000.532 AND THE APA BY DENYING PLAINTIFFS NOTICE AND AN OPPORTUNITY FOR HEARING.

Prior to recapturing any funds from a recipient, HUD is obligated to provide Plaintiffs with notice and an opportunity for a hearing to contest any such determination. HUD's failure to do so is a violation of Sections 401 and 405 of NAHASDA (25 USC § 4161), 24 CFR §1000.532, the APA and the due process clause of the United States Constitution, Amendment 5.

The administrative record in this case reflects that, on December 10, 2001, HUD notified the ASHA of its intent to recapture \$217,015.00 in IHBG funds due to an alleged FCAS over-count. [Ex. A, letter to Glenn W. Edwards, December 10, 2001]. The correspondence invites the ASHA to “discuss . . . repayment options” with HUD, but does not notify the ASHA of its right to appeal the determination in any way. The record also reflects that the Executive Director of the ASHA attempted to challenge the determination in writing within thirty (30) days of the correspondence from HUD, but does not reflect that HUD provided any additional due process to the ASHA with respect to the determination. [Ex. B., letter to Deb Lalancette, January 10, 2002].

E. HUD VIOLATED SECTION 405 OF NAHASDA, 24 CFR § 1000.532 AND THE APA BY RECAPTURING FCAS FUNDS ALREADY SPENT ON AFFORDABLE HOUSING ACTIVITIES.

At all times relevant to this lawsuit, HUD did not possess the remedial authority to recapture monies allegedly over-paid to a Tribe by setting off those amounts from the Tribe’s future IHBG allocation. Under NAHASDA, if HUD finds, after reasonable notice and opportunity for a hearing, that a recipient has failed to comply substantially with any provision of NAHASDA (including its implementing regulations), HUD may terminate or reduce grant payments to the recipient. *See* 25 U.S.C. § 4161(a).

Pursuant to Section 405 of NAHASDA and 24 CFR § 1000.532, NAHASDA funds that already have been expended on affordable housing activities were not subject to recapture by HUD during the time period relevant to this lawsuit.⁶ 24 C.F.R. § 1000.532(a) authorized HUD to adjust grant amounts for future fiscal years, subject to

⁶ Section 405 was amended significantly in the 2008 Reauthorization legislation.

compliance with the due process procedures set forth in §1000.532(b). The relevant language of subsection (a) provided that:

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

24 C.F.R. § 1000.532(a) (emphasis added). HUD never attempted to determine whether the Plaintiffs already had expended funds for the fiscal years in question. If indeed some or all of these funds have been spent on affordable housing activities, then the above-referenced regulation would prohibit HUD from recapturing these amounts, even if HUD correctly determined that Plaintiffs had over-counted their respective FCAS. HUD should have carried out this inquiry prior to requiring Plaintiffs to repay any funds, especially in view of HUD's trust responsibility to Plaintiffs. Additionally, HUD was required to give notice and opportunity to allow Plaintiffs to make this showing in a hearing that met the requirements of Sections 401 and 405 of NAHASDA. Therefore, HUD's actions violated Section 405 of NAHASDA, 24 CFR § 1000.532 and Section 706 of the APA.

V. PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court issue a declaration which provides as follows:

1. HUD lacks authority to recapture funds without providing a full hearing in accordance with Sections 401 and 405 of NAHASDA and 24 CFR § 1000.532;

2. HUD lacks authority to recapture funds unless a finding of “substantial non-compliance” is made during a formal hearing;

3. HUD cannot recapture funds that previously were spent on affordable housing activities;

4. HUD cannot recapture funds beyond the three (3) year limitations period set forth in NAHASDA; and

5. HUD’s conduct in departing from NAHASDA and its implementing regulations as described herein violates the trust obligation owed by HUD to the Plaintiffs.

Furthermore, to aid in the enforcement of the declarations requested above, the Plaintiffs ask that this Court enter an injunction that:

1. Prohibits HUD from recapturing any funds from Plaintiffs that are inconsistent with this Order;

2. Prohibits HUD from collecting under any “repayment agreements” that were improperly obtained by HUD in violation of the rights of the Plaintiffs as declared herein;

3. Orders HUD to take all appropriate measures to appropriately compensate each affected Plaintiff in accordance with the ruling herein;

4. Orders HUD to return to the Plaintiffs funds spent on affordable housing that wrongfully were recaptured;

5. Orders HUD to pay Plaintiff their costs and attorney’s fees incurred herein;
and

6. Provides Plaintiffs with such other and further relief that is just and appropriate under the circumstances.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Sanford C. Coats, Esq.
Robert A. Bradford, Esq.
United States Attorneys
210 Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102

/s/ Amanda S. Proctor
AMANDA S. PROCTOR

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

**1. ABSENTEE SHAWNEE HOUSING)
AUTHORITY, and)**

**2. HOUSING AUTHORITY OF THE)
SEMINOLE NATION OF OKLAHOMA)**

Plaintiffs,)

v.)

Case No.: 08-1298-HE

**1. UNITED STATES DEPARTMENT OF)
HOUSING AND URBAN DEV.)**

Defendant.)

PLAINTIFFS' OPENING BRIEF

EXHIBIT A



U.S. Department of Housing and Urban Development

1999 Broadway, Suite 3390, Box 90
Denver, Colorado 80202

OFFICE OF THE ASSISTANT SECRETARY
FOR PUBLIC AND INDIAN HOUSING

NATIONAL OFFICE OF NATIVE
AMERICAN PROGRAMS

DEC 10 2001

Mr. Glenn W. Edwards
Executive Director
Absentee Shawnee Housing Authority
P.O. Box 425
107 North Kimberly
Shawnee, OK 74802

FILE COPY

Dear Mr. Edwards:

This is in response to information received from our Southern Plains Office of Native American Programs (SPONAP) dated October 12, 2001, regarding the Formula Current Assisted Stock (FCAS) as listed on the Absentee Shawnee Tribe's Fiscal Year (FY) Indian Housing Block Grant (IHBG) Formula Response Form.

Conveyance and Non-Dwelling Use Conversions

The SPONAP reported that the Absentee Shawnee Tribe conveyed 9 Mutual Help (MH) units in FY 1998, 12 MH units in FY 1999, 29 MH units in FY 2000 and 36 MH units in FY 2001. In accordance with 24 CFR 1000.318(a), units are no longer considered FCAS once they have been conveyed.

The SPONAP also reported that the Tribe converted 2 Low Rent (LR) units to non-dwelling units prior to October 1, 1997. In accordance with 1000.318(b), LR units are no longer eligible FCAS once they cease being operated as low income rental units. Once these units are converted to other uses, they are no longer eligible as FCAS.

The table below shows the correct number of units eligible as FCAS in FY 1998, FY 1999, FY 2000, FY 2001 and FY 2002.

Eligible Units					
Project Number	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
OK95B091006	74	74	74	74	74
OK95B091007	22	22	20	18	18
OK95B091008	73	72	70	70	70
OK95B091009	42	42	36	34	34
OK95B091010	24	24	24	24	24
OK95B091011	23	23	22	22	22
OK95B091013	46	46	43	43	43
OK95B091017	25	25	25	24	24
OK95B091019	23	21	21	21	21
OK95B091020	9	9	9	9	9
OK95B091021	15	15	14	14	14
OK95B091027	10	10	10	9	9
OK95B091028	10	10	9	9	9
OK95B091031	20	20	19	19	19
OK95B091034	20	20	20	19	19

Units conveyed or converted to non-dwelling uses in any particular FY are not eligible as FCAS beginning in the next FY. Our records indicate that the Tribe incorrectly received funding for these units in prior years. We estimate this over-funding to be approximately \$217,015 (\$24,980 in FY 1998; \$32,588 in FY 1999; \$70,009 in FY 2000; and, \$89,438 in FY 2001). Therefore, we will need to adjust your FY 2002 allocation to reflect the over-funding received for these units.

Should you believe this information is incorrect or if you would like to discuss this or other repayment options, please contact Jackie Kruszek of my staff at (303) 675-1690, x3306 within 30 days of the date of this letter.

Very sincerely yours,



Deborah Lalancette
 Director, Office of
 Grants Management

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1. UNITED STATES DEPARTMENT OF)
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Case No.: 08-1298-HE

PLAINTIFFS' OPENING BRIEF

EXHIBIT B

JAN-11-02 11:23AM

FROM-Absentee SHAWNEE Housing Authority

+405 275 0678

T-270 P.002/006

F-021

ABSENTEE SHAWNEE HOUSING AUTHORITY

P. O. Box 425 • 107 North Kimberly • Shawnee, Oklahoma 74802-0425

January 10, 2002

U.S. Department of Housing & Urban Development
Attn: Deb Lalancette, Director, Office of Grants Management
1999 Broadway, Suite 3390, Box 90
Denver, CO 80202

Re: Letter Dated 12/10/01-FCAS

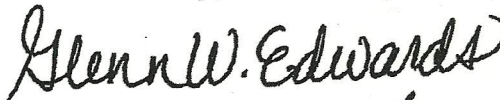
Dear Deb,

Please let this letter serve as formal notification of our disagreement with the letter dated December 10th, 2001 from your office regarding the FCAS for ASHA. ASHA does agree however that there have been units conveyed, and those numbers are accurate. What has not been taken into consideration or the information forwarded to your office from SPONAP are those units in Projects 91-35, 36, 37, 38, 39 & 40 which were constructed/acquired with TIHD funds, and have been completed and under management since NAHASDA's inception. There are a total of 125 units in the above referenced Projects which much be considered when ONAP makes adjustments to its FCAS for ASHA.

We request your office re-review ASHA's FCAS records with SPONAP as the numbers which are reflective in your letter are not entirely accurate. Please see the attached documentation from the Management Review performed by SPONAP, that makes reference to this matter.


Should you need any documentation to thoroughly address this matter in correcting the FCAS for ASHA, please do not hesitate to contact Jennifer Ricker, Operations Manager or myself at anytime. We will assist you anyway we can. Thank you so much in advance for your prompt attention to this vitally important issue.

Sincerely,



Glenn W. Edwards
Executive Director



35 - 25MH
36 - 25
37 - 25
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40 - 25

Xc: Governor James "Lee" Edwards, AST
Ann Alexander, ASHA BOC Chairman

Telephone (405) 273-1050
Fax (405) 275-0678

JAN-11-02

11:24AM

FROM-Absentee

ee Housing Authority

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T-270

P.003/006

F-021



**SOUTHERN PLAINS OFFICE OF
NATIVE AMERICAN PROGRAMS**
U.S. Department of Housing and Urban Development
500 West Main, Suite 400
Oklahoma City, Oklahoma 73102-3202



AUG 03 2001

Mr. Lee Edwards
Governor, Absentee Shawnee
Tribe of Oklahoma
2025 S. Gordon Cooper Drive
Shawnee, OK 74801

Dear Mr. Edwards:

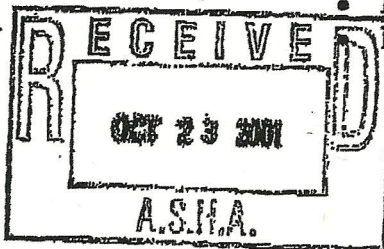
SUBJECT: Final Monitoring Report for Indian Housing Block Grant Programs

The final report resulting from the monitoring review of the Absentee Shawnee Housing Authority (ASHA), the Tribally Designated Housing Entity (TDHE) is enclosed. The review was performed by the Southern Plains Office of Native American Programs (SPONAP) in accordance with 24 CFR Part 1000.526 and was completed January 11, 2001.

A draft monitoring report was issued February 7, 2001, in accordance with 24 CFR Part 1000.528 and a copy of the TDHE's response, received July 6, 2001, is enclosed. SPONAP has considered the TDHE's response and has added applicable comments to the final report.

The following programs administrated by the TDHE were monitored during the review.

- FY 1998 IHBG project number 98IH4000040
- FY 1999 IHBG project number 99IH4000040
- FY 2000 IHBG project number 00IH4000040
- Traditional Indian Housing Development project numbers OK95B091020, 29, 31, 32, 35, 37, 38, 39, and 40
- Comprehensive Grant Program project numbers OK95B091704-95, 05-96, and 06-97.
- Drug Elimination Grant number OK95DEP091096
- Home Indian Program Grant number M95-IG950003



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FROM-Absentee

see Housing Authority

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The review identified 6 findings and 2 concerns, which are fully explained in the report. A finding is a deficiency in program performance that represents a violation of a statutory or regulatory requirement; consequently, corrective action is required. A concern is a deficiency in program performance that does not constitute a violation of a statutory or regulatory requirement and does not require corrective action.

A required corrective action, including a target completion date, has been established for each finding. Please provide SPONAP a status report on corrective actions taken on or before the established target date. SPONAP has also provided recommendations to address concerns so that the TDHE may avoid either a reoccurrence of the problems or ensure that these problems do not develop into something more serious. The TDHE has the option of accepting or rejecting the recommendations based upon an evaluation of the issue.

The Final Monitoring Report is considered public information and will be provided to interested parties upon request.

We wish you continued success in implementing affordable housing programs for your tribal members and look forward to working with you and providing any technical assistance that is needed to correct or address deficiencies. If we may be of assistance or if you have questions or concerns regarding this letter, please contact Teresa Cook, Grants Evaluation Specialist, at (405) 553-7536.

Sincerely,



Calvin Moser
Director
Grants Evaluation Division
Southern Plains Office of
Native American Programs

Enclosure

cc:

Mr. Glenn Edwards, Executive Director
Ms. Ann Alexander, Chairperson, IHA

For more information regarding HUD's Native American Programs, see our internet home page at
<http://www.codetalk.fed.us/sponap.html>.

JAN-11-02

11:24AM

FROM-Absentee

Housing Authority

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Financial and Fiscal Management and Cost Allowability

Finding No. 1: Formula Response Forms/Changes in Current Assisted Stock

It appears that the recipient was allocated IHBG funding for current assisted stock (CAS) units that are no longer under management. In accordance with 24 CFR 1000.332, HUD provides Formula Response Forms, by August 1st of each year, informing tribes/TDHE's of data to be used in calculating upcoming IHBG formula allocations and to provide an estimate of upcoming funding. Tribes/TDHEs are responsible for reviewing the Formula Response Forms and reporting any discrepancies to HUD.

The TDHE submitted a letter, dated September 11, 2000, informing HUD that 125 units from six development projects had reached the Date of Full Availability (DOFA) and should be added to the CAS units used in the IHBG formula calculation. Although the letter provided the number of units to be added, it did not provide the number of units that had either paid off or were no longer used for low-income housing.

For more information regarding HUD's Native American Programs, see our internet home page at <http://www.code.mil.fed.us/spoanp.html>.

to who

A comparison of data in the HUD Formula Response Forms with the TDHE's housing inventory indicates that the TDHE was incorrectly awarded IHBG CAS funding for 94 units during the first four years of NAHASDA, excluding the units to be added as a result of DOFAs. See Exhibit Numbers 1 and 2. The number of over-funded units is based on the number of years each ineligible unit was funded. A summary of the number of units that should have been excluded, by funding year, is as follows:

<u>IHBG Funding Year</u>	<u>Paid Off MH Units</u>	<u>Low Rent Units Converted to Other Uses</u>
1998	9	2
1999	12	2
2000	29	2
2001	<u>36</u>	<u>2</u>
TOTAL	<u>86</u>	<u>8</u>

Corrective Action:

Reconcile the Formula Response Form with the TDHE's 1937 Act inventory for Fiscal Years 1998, 1999, 2000, and 2001, and inform SPONAP of variances from our reconciliation. Once SPONAP and the TDHE are in agreement regarding the correct number of units, SPONAP will notify the IHBG Formula Customer Service Center of any necessary corrections. In the future, changes in the CAS unit count should be reported on an annual basis in accordance with ONAP NAHASDA Guidance 2000-11.

TDHE RESPONSE: ASHA does not disagree with the summary of the numbers of paid off MH units and converted low rent units and it was an oversight by ASHA that prevented the earlier adjustment to these numbers. However, the 125 units that reached DOFA in 2000 are a result of an undercount by HUD and should be added to the CAS in 2000. ASHA requests that SPONAP take whatever steps necessary to accomplish these adjustments after due notice of such action.

SPONAP COMMENTS: SPONAP will notify the Formula Customer Service Center of dates that IHBG allocations should have been reduced for units no longer under management and increased for projects that reached DOFA. The Formula Customer Service Center will contact the TDHE regarding necessary adjustments. The TDHE has completed the requested corrective action and the finding is closed. No further response is requested.