IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLACKFEET HOUSING,	)	
	)	Electronically filed:
Plaintiff,	)	April 5, 2012
	)	
v.	)	Case No. 1:12-cv-00004
	)	Judge Christine O.C. Miller
THE UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	
_____	)	

THE UNITED STATES' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Plaintiff, Blackfeet Housing Authority ("Housing Authority"), has brought an action against the United States, acting by and through the Department of Housing and Urban Development ("HUD"), for a purported violation of the government's trust responsibility, seeking damages of upwards of $30 million. The Housing Authority's claim is without merit. First, the Housing Authority cannot evade the six year statute of limitations under 28 U.S.C § 2501. Second, even if the Housing Authority overcomes the jurisdictional bar of Section 2501, the Housing Authority has failed to satisfy the threshold requirement of alleging a violation of a "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009) ("*Navajo II*"). This failure arises for good reason: Neither the United States Housing Act ("USHA") of 1937, which applies to *all* public housing, nor the Native American Housing Assistance and Self-Determination Act ("NAHASDA") furnishes a valid basis for the Housing Authority's breach of trust claim. Third, the Housing Authority should be collaterally estopped from raising a breach of trust claim because this issue has already been addressed in *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) (*Marceau III*). For the reasons set forth below, this Court should grant the United States' motion to dismiss.

FACTUAL BACKGROUND

The Housing Authority is an entity wholly owned and operated by the Blackfeet Tribe. *See* Complaint ¶ 1, filed January 3, 2012 (ECF No. 1). Sometime between 1977 and 1980, the Housing Authority built approximately 225 low-income homes on the Blackfeet Indian

Reservation using HUD funds through the Mutual Help Homeownership Opportunity Program ("MHHOP").[1] Compl. ¶ 5. When the Housing Authority submitted its plans to HUD to construct the units, HUD expressed concerns that the Housing Authority would be unable to obtain bids for the construction project and also stay within budget.[2] Ex. 1-2. In order to proceed with construction with the funds available, HUD recommended that the Housing Authority redesign the project. Ex. 1-3. Although the project design contemplated the use of some wood foundations, *see* Ex. 1-4, the Housing Authority altered the project design to increase the use of wooden foundations, *see* Ex. 1-5 at 5 (change request specifying that contractor "[d]elete all concrete foundations on scattered sites, substitute wood foundations as specified and detailed."). By 1998, it became apparent to the Housing Authority that the wooden foundations, for at least some of the units, were allegedly posing health and safety issues. Ex. 1-6; Ex. 1-7.

Thirty-five years after the construction of the housing units, the Housing Authority files its Complaint containing only one Count, asserted against the United States of America, acting by and through HUD. In general, the Housing Authority asserts that HUD purportedly constructed, managed, and maintained Plaintiff Housing Authority's homes. Compl. ¶ 13. The Housing Authority claims that the construction methods were defective due to the use of wood

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[1] The Housing Authority is the "beneficial owner" of approximately 225 homes located on the Blackfeet Reservation. Compl. ¶ 5. Of those 225 homes, most have been conveyed to Indian homeowners, however, Plaintiff Blackfeet Housing retains ownership over "some homes." *Id.* Construction of these homes ended in 1980. *Marceau III*, 540 F.3d at 920 n.2.

[2] Defendant's Exhibits 1-7 are presented to address only the challenge to this Court subject matter jurisdiction under RCFC 12(b)(1), and thus does not convert the motion to dismiss to a motion for summary judgment. *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 409 (2010); *see also* RCFC 12(d). As a challenge based on statute of limitations grounds is jurisdictional in nature and non-waivable, this Court should look beyond the pleadings to determine if subject matter jurisdiction exists. *LaMear v. United States*, 9 Cl. Ct. 562, 568 n.6 (1986).

foundations, and, as a result, the homes have developed "on-going problems" that have produced conditions that pose health risks to the occupants of the homes. *Id.* at ¶ 5.

In Count One, the Housing Authority alleges that federal housing legislation has created a fiduciary trust relationship between the Plaintiff Housing Authority and the United States. The Housing Authority alleges that the United States "materially breached its trust responsibility" in the following manner: 1) By "failing to implement effective housing policies and regulations or provide a solution to the ongoing problem of the unsafe and unsanitary shelter conditions;" 2) "failing to ensure the 225 homes that were built to shelter members, [sic] were properly constructed in a safe and reasonable manner;" 3) breaching the fiduciary duty HUD owed the Housing Authority by "otherwise failing to act as a prudent fiduciary by failing to protect Blackfeet Housing and limit the damage to Blackfeet Housing's property that occurred as a result of faulty design and construction;" 4) "failing to provide safe and sanitary housing as mandated by Federal law;" and 5) "failing in its responsibility to maintain and conserve the trust property in the statutory common-law duty of a trustee to preserve and maintain trust assets." *Id.* at ¶ 16.

PROCEDURAL BACKGROUND

This case is related to the ongoing lawsuit in *Marceau, et al. v. Blackfeet Housing, et al*., Civ. No. 4:02-cv-73 (SEH) (D. Mont. Filed August 2, 2002). In *Marceau,* Blackfeet tribal members, individual homebuyers and renters of 156 homes, brought a lawsuit against the Housing Authority and HUD. Plaintiffs alleged, *inter alia*, that the Housing Authority and HUD were responsible for damages caused by the use of arsenic-treated wooden foundations in the construction of the homes.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, *Marceau* ECF No. 23, and the Housing Authority filed a motion to dismiss based

on tribal immunity, *Marceau* ECF No. 10. The District Court granted both parties' motions. *Marceau* ECF No. 71. On appeal, the Ninth Circuit affirmed the dismissal of HUD, concluding that neither the USHA of 1937 nor the Indian Housing Act ("IHA") and NAHASDA created a trust relationship that imposed a fiduciary duty on HUD to maintain and conserve the homes, *Marceau v. Blackfeet Housing Auth.*, 455 F.3d 974, 983-84 (9th Cir. 2006) ("*Marceau I*"), but reversed with respect to the Housing Authority's immunity claims, *id.* at 987.

The Housing Authority subsequently filed a petition for rehearing, which the Ninth Circuit granted. On rehearing, the Ninth Circuit: 1) reaffirmed that the United States did not undertake any trust responsibility toward plaintiffs to construct or maintain the houses. *Marceau v. Blackfeet Housing Auth.*, 519 F.3d 838, 844-50 (9th Cir. 2008) ("*Marceau II*"); 2) concluded that plaintiff homebuyers alleged sufficient facts to state claims against HUD under the Administrative Procedure Act ("APA"), *id.* at 850-52; and 3) held that the Housing Authority waived its immunity to suit through its enabling ordinance, *id.* at 842-44.

HUD and the Housing Authority filed separate petitions for rehearing en banc. On August 22, 2008, the Ninth Circuit denied both requests but issued a revised opinion that replaced, in part, and adopted, in part, the Ninth Circuit's opinion in *Marceau I*. *See Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 918-19 (9th Cir. 2008) ("*Marceau III*"). In the amended opinion, the panel concluded, for the third time, that the United States did not undertake any trust responsibility toward homebuyer plaintiffs. *Id.* at 921-28.

The panel found it compelling that: 1) HUD's regulatory control as implemented under the USHA of 1937 applied to all public housing, not just Indian housing; 2) "HUD regulations did not *require* the use of pressure-treated wooden foundations . . . HUD's Minimum Property Standards provided two alternative sets of minimum requirements . . . .;" and 3) the Housing

Authority was not "rigidly bound" by HUD's regulations, because the Housing Authority was free to deviate from any regulatory standards if, in the Housing Authority's estimation, local conditions justified such deviation. *Id.* at 926. As a result, the Ninth Circuit dismissed the breach of trust claims, concluding that:

> In summary, under the Housing Act, Indian housing authorities (such as the Blackfeet Housing Authority) applied to HUD for loans to enable *the housing authority* to develop low-income public housing designed to be sold to eligible members of the tribe. Under NAHASDA, block grants could be used *by the tribe* or its designated housing entity to repair or replace housing. As with any grant of federal funds, certain requirements had to be met to obtain and spend the funds. But the federal government held no property-land, houses, money, or anything else-in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing.

Id. at 928 (emphasis in original). The panel also reaffirmed that homebuyer plaintiffs alleged sufficient facts to state a claim under the APA. *Id.* at 928-30. However, the panel changed course with respect to the claims against the Housing Authority and concluded that it could not reach the merits of plaintiffs' claims against the Housing Authority because plaintiffs were required to exhaust their tribal court remedies. *Id.* at 920-21.

On remand, the district court concluded that plaintiffs' APA claims in connection with HUD's alleged decision to require the use of wooden foundations were barred by the six year statute of limitations pursuant to 28 U.S.C § 2401(a), because the decision to construct the homes with wood foundations occurred no later than November 15, 1977 and was applied to the plaintiffs from 1977 through 1980 (the period of construction). *See Marceau* ECF No. 190, at 11. The district court's decision is currently on appeal to the Ninth Circuit.

The Housing Authority brought this action on January 3, 2012.

STATUTORY AND REGULATORY BACKGROUND

I. THE UNITED STATES HOUSING ACT

The historical development of the statutes that govern housing, both on and off reservation, is important in reviewing the Housing Authority's claims in this case. In the Complaint, the Housing Authority refers only to NAHASDA, but this lone statutory scheme comprises only a portion of the body of law applicable to this action.

As set forth above, at the time the Blackfeet homes were built in the 1970s, there was no specific statutory enactment applicable to public housing on Indian lands. Instead, HUD's involvement with Indian public housing was exclusively controlled by the USHA, 42 U.S.C. §§ 1437-1437j (1976). The USHA, however, was not particular to Indian reservations, nor was it enacted specifically for the benefit of Native Americans. Indeed, the USHA was a generic, low-income housing legislative enactment that applied to both public housing located on an Indian reservation, as well as public housing located elsewhere. *See* 42 U.S.C. § 1437a(6)-(7) (1976) (defining "public housing agency" to include entities "authorized" by, among other governmental agencies, "Indian tribes" to "engage in or assist in the development or operation of low-income housing").

Like many federal grant statutes, the USHA functioned as a legal mechanism through which Congress both authorized itself to appropriate money up to a certain amount for certain purposes set forth in the statute, *see* 42 U.S.C. § 1437g(c) (1976), and authorized and directed the secretary of a federal agency to award, or lend, any appropriated funds to eligible grantees, *see* 42 U.S.C. §§ 1437b, 1437c, 1437f, 1437g(a), & 1439(d) (1976). In 1976, local housing authorities could apply for loans to finance the "development, acquisition, or operation of low-

income housing projects," *see* 42 U.S.C. § 1437b (1976), as well as for outright grants for the same purposes, *see* 42 U.S.C. §§ 1437c, 1437d(a), 1437g (1976).

Pursuant to the goals set out in the UHSA, HUD developed the MHHOP.[3] Under the MHHOP, an Indian housing authority, such as Blackfeet Housing, could apply to HUD for loan funds to enable the housing authority to develop public housing designed for sale to eligible tribal members. 24 C.F.R. Part 805, Subpart D (24 C.F.R. §§ 805.401- 430) (1976). The intent of Congress underlying the creation of tribal housing authorities was "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437 (1976).

Once a tribe established a housing authority, *see* 24 C.F.R. § 805.108-09, HUD would then enter into agreements called "Annual Contributions Contracts" with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authorities and preapproved by HUD, s*ee* 24 C.F.R. § 805.102 (1979); *id.* § 805.206. After securing funding from HUD, a housing authority, in turn, would contract with eligible American Indian families. *See id.* § 805.406. The families were required to contribute land, labor, or materials to the building of their house, *see id.* § 805.408, and after occupying the house, each family was required to make monthly payments in an amount calibrated to their income, *see id.* § 805.416(a). The homebuyers were also made responsible for

[3] From 1962 through 1988, MHHOP operated under a series of regulations and its own "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988), reprinted in 1988 U.S.C.C.A.N. 791, 793. In 1988, the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), repealed by Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996). The act of 1988 moved all Indian public housing programs to a separate "Title II" of the USHA. That enactment also provided express statutory authority for the MHHOP under 42 U.S.C. § 1437bb (1988), which was largely identical to HUD's prior regulatory program.

maintenance of the house. *See id.* § 805.418(a).

II. THE NATIVE AMERICAN HOUSING ASSISTANCE AND SELF-DETERMINATION ACT

In 1996, however, Congress terminated Indian housing assistance under the USHA of 1937 and enacted the NAHASDA of 1996, codified at 25 U.S.C. §§ 4101 *et seq*. HUD's involvement with Indian housing programs is now controlled exclusively by that enactment and its implementing regulations. As NAHASDA's statement of congressional findings recognized, federal Indian housing assistance was to be provided "in a manner that recognizes the right of Indian self-determination and tribal self-governance" and with the "goals of economic self-sufficiency and self-determination for tribes and their members." 25 U.S.C. § 4101(6)-(7).

Under this new funding scheme, HUD disburses funds through annual block grants to individual Indian tribes or their Tribally Designated Housing Entities ("TDHEs") for the purpose of carrying out affordable housing activities. [4] 25 U.S.C. § 4111. To apply for a grant, the tribe or the TDHE must develop an affordable housing plan that details, *inter alia*, "a description of the manner in which the recipient [TDHE or tribe] will protect and maintain the viability of housing owned and operated by the [TDHE or tribe] that was developed under a contract" between the Secretary and an Indian housing authority pursuant to the USHA of 1937. 25 U.S.C. § 4112(b)(2)(A)(v).

Moreover, the housing plan is to be "locally driven," 24 C.F.R. § 1000.220, and upon approval of the plan, the housing authority has the responsibility for running the housing

[4] A "recipient" may be a tribe, or a tribe may designate a recipient, known as a TDHE, which can be an Indian housing authority. 25 U.S.C. §§ 4103(19) and (22), 24 C.F.R. § 1000.202. A TDHE can be designated by resolution of the Indian tribe, or, when such authority has been delegated by the tribe's governing body, by resolution of a tribal committee. 24 C.F.R. § 1000.206.

program, which includes using grant funds to provide for the continued maintenance and efficient operation of housing. 25 U.S.C. § 4133. The recipient is also to ensure long-term compliance with NAHASDA, and is responsible for monitoring grant activities, ensuring compliance with applicable federal requirements, and monitoring performance goals under the housing plan. 25 U.S.C. §§ 4163, 4164; 24 C.F.R. § 1000.502(a).

Once a plan is submitted, HUD disburses the funds directly to the TDHE in an amount entirely determined by formula. The formula was developed through a negotiated rulemaking process that involved interested Indian tribes. 25 U.S.C. § 4152; *see also* §§ 4151, 4116.[5] The block-grant formula regulations are found in Part 1000, Subpart D, of Title 24 of the Code of Federal Regulations. 24 C.F.R. §§ 1000.301-1000.340.

STANDARD OF REVIEW

I. STANDARD FOR DECIDING A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

It is axiomatic that the "[p]laintiff bears the burden of showing jurisdiction by a preponderance of the evidence." *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002) (citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942)); *see also Hertz Corp. v. Friend*, —– U.S. ——–, 130 S.Ct. 1181, 1194–95 (2010). There exist two categories of jurisdictional challenges. If defendant presents a "facial" challenge – when the defendant seeks dismissal under Rule 12(b)(1) and argues that plaintiff's allegations are insufficient to establish jurisdiction – then the allegations contained in the pleadings must be taken as true and construed in the light most

[5] A committee composed of forty-eight representatives of Indian Tribes and ten HUD representatives participated in the development of the implementing regulations. Implementation of the Native American Housing and Self-Determination Act of 1966, 62 Fed. Reg. 35718-01 (July 2, 1997).

favorable to the plaintiff. *Cedars–Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). In contrast, a "factual" challenge arises when the defendant contests "the factual basis for the court's subject matter jurisdiction." *Id*. at 1583. In such a case, "the allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true for purposes of the motion." *Id*. (citations omitted). Disputed facts in the motion to dismiss are subject to fact-finding by the court, which "may weigh relevant evidence" to determine the factual basis for jurisdiction. *Ferreiro v. United States*, 350 F.3d 1318, 1324 (Fed. Cir. 2003). If the court determines that it lacks jurisdiction, it must dismiss the action. *See* Rules of the Court of Federal Claims ("RCFC") 12(h)(3).

II. STANDARD FOR DECIDING A MOTION TO DISMISS UNDER RULE 12(b)(6)

In considering a motion to dismiss a complaint for failure to state a claim under RCFC 12(b)(6), a court must accept as true all factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor. *See Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). Where it appears beyond doubt that a plaintiff cannot prove any set of facts that would entitled him to relief, a court may dismiss the cause of action. *See Conti v. United States*, 291 F.3d 1334, 1338 (Fed. Cir. 2002). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claim. *See Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,555 (2007) (internal citation and quotations omitted); *Esch v. United States*, 77 Fed. Cl. 582, 587 (2007) (quoting *Bell Atl.*

Corp., 550 U.S. at 555); *see also Steward v. United States*, 80 Fed. Cl. 540 543 (2008) (explaining that "[t]he court must inquire whether the complaint meets the 'plausibility standard'"); *May v. United States*, 80 Fed. Cl. 442, 448 (2008) (emphasizing that plaintiff must establish her right to relief above the speculative level).

ARGUMENT

I. PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

Claims against the United States in the Court of Federal Claims must be filed within six years of the accrual of the cause of action. 28 U.S.C. § 2501. "Claims by individual Indians or tribes for breach of trust are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act." *Oenga v. United States*, 83 Fed. Cl. 594, 609 (2008) (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578 (Fed. Cir. 1988)). Section 2501 is a jurisdictional limitation on actions in the Court of Federal Claims, which cannot be waived. *Navajo Nation v. United States*, 631 F.3d 1268, 1273 (Fed. Cir. 2011); *Hopland*, 855 F.2d at 1577. Because the statute of limitations is jurisdictional, plaintiff has the burden of showing by a preponderance of the evidence that its claims were timely filed. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Taylor*, 303 F.3d at 1359.

The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. Thus, the relevant question is when did events first transpire entitling the claimant to bring suit alleging the breach. *See Navajo Nation*, 631 F.3d at 1277 ("[F]or purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful.'" (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980))). It is when the

operative facts exist and are not inherently unknowable that dictates when the claim first accrues. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1984)[6]. Thus, in deciding the issue of dismissal on a statute of limitations ground, the Court must focus on when the plaintiff "was or should have been aware" of the material facts that would establish the government's liability. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011). It is incumbent upon a plaintiff to "make inquiry or seek advice" with regard to facts of potential injury from the government's action, as "blameless ignorance" of the law or of the material facts central to plaintiff's claim is not a basis for tolling the statute of limitations. *Menominee*, 726 F.2d at 721.

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[6] In *Menominee Tribe, supra*, the Federal Circuit addressed arguments that elements of the claims were "inherently unknowable." The factual basis for Menominee Tribe's principal claim, despite involving technical forestry principals, i.e., that the annual harvest limitation was too low, did not make the factual basis for the claim "inherently unknowable." *Id.* at 721, n.8. As the Circuit stressed:

> Nor were the facts of potential injury from Interior's conduct "inherently unknowable" at the ordinary accrual date in 1952. Plaintiffs charge Interior's officials with that very knowledge which was also available to the Indians if they sought advice. The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. . . .Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable."

Id. (citing *Affiliated Ute Citizens v. United States*, 199 Ct. Cl. 1004 (1972)).

A. Plaintiff's claim accrued between 1977 and 1980.

Plaintiff was or should have been aware of the material facts that would establish HUD's liability as early as 1977 when construction of the project began and no later than 1980 when construction completed. Plaintiff's breach of trust claim is premised on the theory that HUD required the Housing Authority to use wood foundations for the housing units, and it was the use of wooden foundations that allegedly made the homes unsafe and created health risks for occupants. *See* Compl. ¶ 5. The Housing Authority knew in 1977 that wooden foundations were being used because the Housing Authority submitted the proposal to construct the units using wood foundations. *See* Ex. 1-4. The Housing Authority cannot claim ignorance of the material facts when it was an active participant in the formulation of the housing plans, which specified wood foundations. While the extent of the alleged damage caused by the use of wood foundations may not have been known in 1977, this is immaterial for the purposes of claim accrual so long as the relevant facts were not inherently "unknowable." *Menominee*, 726 F.2d at 721; *see also San Carlos Apache Tribe*, 639 F.3d at 1354 (rejecting Tribe's argument that its claim did not accrue until 2006 because "all of the facts relevant to the Tribe's claim were known as of 1935," even though the extent of the damage remained unknown until 2006).

HUD expressed concerns that the Housing Authority would be unable to obtain bids for the construction project under the original proposal because of the availability of funds. Ex. 1-2. As HUD predicted, the bids received for the construction of the units exceeded the funds available "by a wide margin." Ex. 1-3. As such, HUD recommended that the project be redesigned by the Housing Authority to bring it within available funding but did not mandate the use of wooden foundations. *See id.* The Housing Authority kept the project within budget by altering, among other things, the project design to replace concrete foundations with wooden

foundations. For example, the Housing Authority contracted with three different companies, and the contracts were subject to change orders that included replacement of concrete foundations for wooden foundations. *See, e.g.*, Ex. 1-5 at 5. Although HUD advised that wood foundations would be acceptable, the Housing Authority was the primary agent that reconfigured the project to specify the use of wood foundations. Thus, it "was or should have been aware" of the material facts that would establish HUD's liability. Moreover, the Tribe could have inquired or sought advice about the potential for damages that could result from the use of the wood foundations, and thus cannot claim ignorance of the material facts. *See supra* at 13, n.6.

Shoshone Indian Tribe of Wind River Reservation v. United States, No. 2010-5150, 2012 WL 34382 (Fed. Cir. Jan. 9, 2012), is especially instructive on this point. In *Shoshone*, Indian Tribes raised a breach of trust claim based on a failure to collect royalty amounts due under leases that the Tribes alleged were illegally converted by the Department of the Interior. *Id.* at *3. The United States argued that the Tribes' claim was time-barred by 28 U.S.C. § 2501 because the claim accrued at the time of the lease conversion. *Id.* In response, the Tribes argued, in part, that the claim did not accrue until after the Tribes filed their complaint because they did not have actual or inquiry notice of the conversions. *Id.* at *4. The court found the Tribes' argument unconvincing given the fact that the Tribe was an active participant in the lease conversions and stressed:

> [T]he Tribes were not prevented from knowing all of the material facts that established the Government's liability for Claim II. The Tribes actually approved the conversion of the leases. They had actual knowledge of all the relevant facts related to the conversions. The Tribes' injury was having the leases approved without following the notice, advertisement, and competitive bidding requirements of the 1938 Act. Because of their involvement in the approval of the leases, the Tribes should have known that the leases were not competitively bid. And, thus, that the repudiation of the trust upon which their claim is premised had occurred.

Id. at *10. Just as in *Shoshone*, the Housing Authority was or should have been aware of the material facts that would establish the government's liability – the use of wood foundations – because the Housing Authority opted to use wood foundations in order to stay within budget limitations. Accordingly, Plaintiff's claim accrued between 1977 and 1980, which is well outside the statute of limitations.

B. In the alternative, Plaintiff's claim accrued no later than 1998 when it had actual notice of problems associated with the wood foundations.

If this Court finds that Plaintiff's claim did not accrue between 1977 and 1980, this Court should find that Plaintiff's claim accrued at the time the Housing Authority had actual notice of the problems associated with the wood foundations. Even though Plaintiff does not have to possess actual knowledge of the relevant facts in order for a cause of action to accrue, *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."), claim accrual would most certainly occur if Plaintiff was fully aware of the material facts, *see Doyle v. United States*, 20 Cl. Ct. 495, 501 (1990) (finding that plaintiffs were "clearly on actual notice" of potential claims when defendant sent letter that set forth material facts). Here, Plaintiff received a letter from HUD dated February 9, 1998, which recounted a meeting between HUD and the Housing Authority on January 28, 1998, where HUD and the Housing Authority discussed the "serious conditions" associated with the wood foundations. Ex. 1-6. The letter shows that Plaintiff and HUD discussed that "[a]pproximately 220 wood basements are in varying degrees of decay." *Id.* By at least 1999, the Housing Authority was well aware that these housing units were in need of repair as it listed as one of its housing needs for discussion

during an upcoming visit by the Secretary of HUD, $9,945,000 for "HUD Units, Wood Foundations" to "rehab/replace 152 units @ $65K ea" Ex.1-7.

Even though the Housing Authority knew or should have known the full extent of the problems associated with the wooden foundations by 1998, it consciously sat on its rights and brought this lawsuit against the United States almost fifteen years later. Accordingly, this Court should dismiss Plaintiff's Complaint because Plaintiff failed to file suit within the statute of limitations period.

C. The Housing Authority clearly had notice of all issues related to the wood foundations at the filing of the *Marceau* action.

If this Court still finds that Plaintiff's claim did not accrue between 1977 to 1980 or 1998, Plaintiff most certainly had notice of all the material facts when the homeowner plaintiffs filed suit on August 2, 2002 in *Marceau, et al. v. Blackfeet Housing, et al*., Civ. No. 4:02-cv-73. On August 2, 2002, homeowner plaintiffs filed a class action complaint against the Housing Authority and HUD. In *Marceau*, the crux of plaintiffs' complaint against the United States was that HUD required the use of wooden foundations thereby causing health and safety concerns for the occupants of the units. *See Marceau* ECF 1 ¶ 2 ("[Housing] construction involved the use of a wood foundation and other inadequate materials and faulty construction and design mandated by the Defendant U.S. Department of Housing and Urban Development which materials, construction and design are not appropriate for use in the area in which the homes are located."). In the present action, the Housing Authority raises nearly identical allegations.

Because the Housing Authority was a co-defendant in *Marceau*, it had every opportunity to file a cross-claim against HUD to address any grievances it had in 2002. Instead, Plaintiff chose to wait a decade later to file this current suit.

In sum, Plaintiff had three distinct opportunities to bring this suit against the United States, but inexplicably, Plaintiff sat on its rights until now. As such, Plaintiff's claim should be barred as untimely under 28 U.S.C § 2501.

II. THE HOUSING AUTHORITY HAS NOT IDENTIFIED ANY SPECIFIC STATUTORY OR REGULATORY DUTY THAT THE GOVERNMENT HAS VIOLATED

A. In the absence of a clear statutory prescription, the Housing Authority's reliance on the general trust duty and notions of governmental control are misplaced.

Unlike private trustees for whom common law defines their trust duties, the United States need only comply with specific statutory obligations. *United States v. Jicarillia Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,'. . . . that trust is defined and governed by statutes rather than the common law."). Indeed, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id*. at 2325. Because the United States is a statutory trustee, not a common law trustee, any alleged breaches of trust by the United States must be rooted in a specific substantive law, not mere general allegations. *Id*. In *Jicarilla*, the Supreme Court reiterated that, though the relationship between the government and Indian Tribes has been described as a trust, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." 131 S. Ct. at 2323 (citing *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("Mitchell I")).

Moreover, in *Navajo II*, the Supreme Court reaffirmed the two-step test for determining whether a specific duty is money-mandating, and therefore gives rise to a claim for damages under the Indian Tucker Act. 556 U.S. at 290. The Court reiterated that the first of "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" is that a tribe must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.* (quoting *Navajo I*, 537 U.S. at 506).

If plaintiff can clear the initial threshold, the reviewing court can then proceed to the second step: Whether the tribe or individual has demonstrated that the substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo I*, 537 U.S. at 506 (quoting *Mitchell II*, 463 U.S. at 216-217, 219). Reference to a general trust relationship alone, however, is "insufficient to support jurisdiction under the Indian Tucker Act;" rather, the court must look to the relevant statutes or regulations. *Navajo I*, 537 U.S. at 490. But absent a clear statutory duty, "neither the Government's 'control' . . . nor common-law trust principles matter." *Navajo II*, 556 U.S. at 301 (emphasis added).

B. Neither the USHA nor NAHASDA furnishes a valid basis for Plaintiff Housing Authority's Indian Tucker Act claim.

The Housing Authority contends that with the passage of NAHASDA, Congress created a fiduciary trust relationship between the Housing Authority and the United States. To advance a claim for a purported breach of fiduciary duties and corresponding damages, the Housing Authority avers that the United States "materially breached its trust responsibility" in the following manner: 1) By "failing to implement effective housing policies and regulations or

provide a solution to the ongoing problem of the unsafe and unsanitary shelter conditions;" 2) "failing to ensure the 225 homes that were built to shelter members, [sic] were properly constructed in a safe and reasonable manner;" 3) breaching the fiduciary duty HUD owed the Housing Authority by "otherwise failing to act as a prudent fiduciary by failing to protect Blackfeet Housing and limit the damage to Blackfeet Housing's property that occurred as a result of faulty design and construction;" 4) "failing to provide safe and sanitary housing as mandated by Federal law;" and 5) "failing in its responsibility to maintain and conserve the trust property in the statutory common-law duty of trustee to preserve and maintain trust assets." Compl. ¶ 16. Plaintiff appears to raise the breach of trust claim only under the provisions of the NAHASDA. *Id.* at ¶ 1.

Under this claim, the Housing Authority attempts to fashion a cause of action against the United States under the Supreme Court's decisions in *Mitchell I* and *Mitchell II*, and their progeny. However, nowhere in the Housing Authority's complaint does it "identify a substantive source of law that establishes specific fiduciary or other duties." *Navajo II*, 556 U.S. at 290 (citation omitted). Indeed, it was not HUD that "negligently constructed, managed, and maintained these homes," Compl. ¶ 13, but Plaintiff Housing Authority. All specific duties as to development, construction, and ongoing maintenance that Plaintiff attempts to foist upon HUD reside in all actuality with Plaintiff Housing Authority.

i. The USHA does not create an actionable trust obligation.

While Plaintiff alleges that the United States failed to ensure that the 225 homes were "properly constructed in a safe and reasonable manner," Plaintiff brings suit solely under NAHASDA. NAHASDA, however, was enacted in 1996. The Blackfeet homes, on the other hand, were built in the 1970s, under the authority of the USHA of 1937, which applied to *all*

public housing. But Plaintiff neither mentions nor cites to the USHA of 1937 in its own complaint. And that is for good reason. The USHA vested each housing authority with the maximum amount of responsibility, *see* 42 U.S.C. § 1437 (1976), such that Plaintiff Housing Authority was responsible for constructing and maintaining safe and sanitary Indian Housing. Indeed, the Housing Authority, per its enabling ordinance, "was charged with '[a]lleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income' and '[r]emedying unsafe and [u]nsanitary housing conditions that are injurious to the public health, safety and morals."' *Marceau I*, 455 F.3d at 977, quoting Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977).

Under the USHA, Congress never intended the federal government to assume the obligations that Plaintiff now attempts to impose upon HUD. To the contrary, the express intent of Congress was "to vest in local public housing agencies," such as Plaintiff, "the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437 (1976). And HUD's guidance to the Indian housing authorities reflected this congressional sentiment. *See* Ex. 2 at 18 ("The [Indian Housing Authority] is responsible for the planning and development of Indian housing projects. The U.S. Housing Act of 1937 provides that local public housing agencies are to be vested with maximum responsibility for project administration and the Indian Self-Determination and Education Assistance Act emphasizes the importance of maximum Indian self-determination.").

Neither the USHA nor its implementing regulations obligated the federal government itself to undertake any course of action as to construction, management, and/or maintenance of Plaintiff's public housing, as Plaintiff's Complaint appears to suggest. Those duties were and remain to this day the sole province of the Housing Authority. The USHA only provided a

statutory framework through which Congress authorized and directed the secretary of a federal agency to award, or lend, appropriated funds to eligible grantees. *See* 42 U.S.C. §§ 1437b, 1437c, 1437f, 1437g(a), and 1439(d) (1976).

Under the USHA, local housing authorities, not just Indian housing authorities, could apply to HUD for loans to finance the "development, acquisition, or operation of low-income housing projects," 42 U.S.C. § 1437b (1976), as well as for outright grants for the same purposes, s*ee* 42 U.S.C. §§ 1437c, 1437d(a), 1437g (1976). Pursuant to HUD's MHHOP, implemented pursuant to Section 5(h) of the USHA, the Housing Authority would apply for funds to construct and develop Mutual Help housing for members of a tribe. 24 C.F.R. Part 805, Subpart D (24 C.F.R. §§ 805.401-.430) (1976). Once the Tribe had established an Indian housing authority, *see* 24 C.F.R. §§ 805.108-.109 (1976) (lndian housing authorities), it could submit an application to HUD to develop a project, *see, e.g.*, *id*. §§ 805.206-.207. To obtain approval for a project, however, a housing authority was required to demonstrate, among other things, that it was capable of administering the project, which included the capacity to complete the housing development and the ability to maintain the property. *See* 24 C.F.R. § 805.207(a).[7]

Moreover, both during construction and following occupancy, the Housing Authority was obligated to inspect and correct any potential deficiencies. During construction and during the contractor's warranty period, the Housing Authority was responsible for conducting inspections to assure completion of quality housing. 24 C.F.R. §§ 805.221(a), 805.222(b). If any deficiencies were identified, the onus was on the Housing Authority to remedy the problem. *Id*.

[7] The Housing Authority's responsibilities were not limited to construction, either; they were also made responsible for assuring the homebuyer's maintenance of the house. *See* § 805.418(a).

Following occupancy, the Indian housing authority ("IHA") retained the right to inspect a homebuyer's premises during the lease period, to ensure the home was being maintained in a manner that protected the Housing Authority's interest in the home, should the homeowner default on his maintenance obligations under the purchase agreement. *See* 24 C.F.R. §§ 805.417(e), 805.418(a)(2)). Moreover, in the event a condition hazardous to life, health, or safety arose, the Housing Authority, not HUD, was required to abate the condition. 24 C.F.R. § 805.418(a)(2)(ii) (1976);[8] *see also* 24 C.F.R. § 905.270(a) (1991) ("The IHA must pursue correction of any deficiencies against the responsible party (e.g. architect, contractor, or the MH homebuyer) as soon as possible after discovering the deficiencies."). In no event was HUD ever responsible.

Fatally to the Housing Authority's claim that HUD failed to limit the damage resulting from allegedly faulty design and construction, the applicable regulations expressly made the Housing Authority responsible for asserting warranty claims. Indeed, the relevant regulations expressly imposed inspection duties on Indian housing authorities, independently of HUD, including any enforcement of warranties. *Marceau III*, 540 F. 3d at 927 (citing 24 C.F.R. §§ 805.221(a), 805.417(a) (1977)). Following the homebuyer's occupancy, the Housing Authority would inspect each home, no less often than every three months, so that the Housing Authority could exercise its contractual rights should any construction or design defects be identified. 24 C.F.R. § 805.222(b). The Housing Authority was also responsible for enforcing warranties and addressing any deficiencies that the homebuyers detected. 24 C.F.R. §§ 805.417(a)(2), 805.417(b) (1976). And the Housing Authority was responsible for correcting any deficiencies

[8] Which states in pertinent part, "[i]f the condition of the property creates a hazard to the life, health or safety of the occupants, the IHA shall have the work done . . . ."

which could have been detected and corrected during the warranty period if the Housing Authority had inspected at the appropriate time. 24 C.F.R. § 905.270(a) (1991). In this manner, HUD regulations expressly set forth and made clear the means through which the Housing Authority could assert claims against any contractor, manufacturer, or supplier of materials.

Thus, in light of the wide range of responsibilities that resided with Plaintiff Housing Authority, it is not surprising that the Ninth Circuit rejected the notion that the USHA imposed any unique obligation with respect to HUD's actions under a statutory scheme that applies to *all* housing authorities. As the Ninth Circuit observed:

> Ultimately, no statute ever required tribes to form housing authorities. No statute obliged Indian housing authorities, once formed, to seek federal funds. No statute committed the United States itself to construct houses on Indian lands or to manage or repair them. Indeed, the relevant regulations expressly imposed inspection duties on Indian housing authorities, independently of HUD, including any enforcement of warranties.

Marceau III, 540 F.3d at 927 (citing 24 C.F.R. §§ 805.221(a), 805.417(a) (1977)). The federal government held no property – land, houses, or money – in trust. Nor did the federal government build, manage, or maintain any of the housing – the Housing Authority did. Finally, the USHA did not provide for the assumption of government control of any tribal property or resources, and it did not establish specific fiduciary duties that the government must perform on behalf of Native Americans. Rather, all relevant responsibilities created under the USHA and the MHHOP resided with Indian housing authorities.

ii. NAHASDA does not create an actionable trust obligation.

The Housing Authority's reliance on NAHASDA as a basis for damages that arose after 1996, *i.e.* after the passage of NAHASDA, is similarly unavailing for a number of reasons. First, there is no textual basis for concluding that HUD's financial oversight under NAHASDA

extends to include a duty, enforceable in an action for money damages, to construct, manage, and maintain the Plaintiff Housing Authority's own property, as Plaintiff suggests. Second, NAHASDA cannot be construed to provide a source of substantive law that imposes any of the duties that the Housing Authority alleges, particularly where the legislative scheme aims to enhance tribal autonomy and self determination by giving the Housing Authority the lead role.

Against the backdrop of the USHA, NAHASDA marked a fundamental alteration of HUD's delivery of housing services to Native Americans, with an *increased* emphasis on tribal autonomy and self-determination. Until 1998, most HUD programs were developed under the authority of the USHA of 1937, an act that provided for government regulation of all public housing. With the passage of NAHASDA, however, Congress reorganized the system of federal housing assistance for Native Americans by replacing a myriad of separate housing programs with a single Indian Housing Block Grant program. But the streamlined process was aimed at providing federal funds "in a manner that recognizes the right of Indian self-determination and tribal self-governance" and with the "goals of economic self-sufficiency and self-determination for tribes and their members." 25 U.S.C. § 4101(6)-(7). Thus, if anything, NAHASDA marked Congress' intent to reduce HUD's management responsibilities. Far from endowing the government with more control and authority, NAHASDA instead delegates expansive authority to the Housing Authority to develop and control their own tribal housing programs. *See Marceau III*, 540 F.3d at 916; *see also Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 598 n.12 (Fed. Cl. 2011) (concluding, in dicta, that HUD, through NAHASDA, did not assume any trust responsibilities).[9]

[9] *Yakama Nation Housing Authority v. United States*, 102 Fed. Cl. 478, 486-87 (2011) is not to the contrary. There the court's jurisdictional holding was based on a claim for breach of

Importantly, Plaintiff nowhere identifies a specific, applicable, trust-creating provision of NAHASDA. *See Navajo II*, 556 U.S. at 302 ("Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating."). Instead, Plaintiff's lone citation is to 25 U.S.C. § 4101(2)-(5), congressional findings. But this congressional statement of policy fails to create any trust relation triggering the damages remedy Plaintiff claims here. In *Samish Indian Nation v. United States*, the Federal Circuit rejected a similar argument that the congressional findings in the Indian Self-Determination Education Assistance Act were sufficient to create a trust relationship. 419 F.3d 1355, 1368 (Fed. Cir. 2005). The Federal Circuit found it compelling that the policy statement "nowhere uses the express language of atrust," and, "[i]nstead of arrogating control and authority to the government . . . the ISDA delegates to tribal organizations authority over federal programs." 419 F.3d at 1368.

The reasoning of *Samish* applies with equal force here, given that the language and structure of Indian Self-Determination Assistance Act served as a model for the Native American Housing Assistance and Self-Determination Act. *See* S. Rep. No. 107-246 (2002) ("Building on the highly successful Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 . . . which authorized tribes to assume responsibility for the administration of many federal programs and services, NAHASDA reflects the unique government to government relationship between Indian Tribes and the Federal Government."). At most, Section 4101 represents Congress' general recognition of the unique general trust relationship between the United States

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contract, not breach of trust. In any event, the court's dicta agreeing with plaintiffs' trust arguments suggest only that HUD's control over allocating and reducing grant funds gave rise to fiduciary duties associated with HUD's exercise of those controls. *See id*. at 486-87.

and Indian tribes, but "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *Jicarilla*, 131 S.Ct. at 2323 (citing *Mitchell I*, 445 U.S. at 542 and *Mitchell II*, 463 U.S. 224).

The notable absence of any specific statutory or regulatory citation in Plaintiff's Complaint, aside from general congressional findings, is for good reason: Neither NAHASDA nor its implementing regulations impose a specific statutory or regulatory mandate. It bears emphasizing that the practical effect of NAHASDA's financing scheme is to limit HUD's responsibility to that of oversight connected with the grants, largely conducted by financial audits. 24 C.F.R. § 1000.520; *see also Marceau III*, 540 F.3d at 927 ("HUD's responsibility consists primarily of oversight and audit, to ensure that federal funds are spent for the intended purpose.").

Under NAHASDA, HUD makes annual block grants, in amounts determined by formula, to Plaintiff Housing Authority, to carry out affordable housing activities. 25 U.S.C. §§ 4111(a), 4152, 24 C.F.R. §§ 1000.201, 202, 206, 1000.301-1000.340. HUD may only provide funds as appropriated and authorized by Congress. To be eligible for a HUD block grant, a tribe must submit to HUD an Indian housing plan that meets certain requirements and that is subject to HUD's approval. 25 U.S.C. § 4111(b), and 24 C.F.R. § 1000.201. However, the housing plan is to be "locally driven." 24 C.F.R. § 1000.220. "And HUD's statutorily prescribed role-in addition, of course, to providing the block grants themselves-is generally confined to a 'limited review of each Indian housing plan', and even then 'only to the extent that [HUD] considers review is necessary." *Marceau II*, 519 F.3d at 849 and 25 U.S.C. § 4113(a)(1). "The grant, once made, is subject to tribal control; the recipient, rather than HUD, is responsible for operating the housing

program, including the continued maintenance of housing." *Id*., 25 U.S.C. § 4133, and 24 C.F.R. § 1000.56.

Ultimately no statute assigns HUD any obligation to maintain the Tribe's own properties. *Marceau II*, 519 F.3d at 849. Those duties reside with the Housing Authority. *See Marceau III*, 540 F.3d at 927. And no statute requires, let alone allows, the United States to occupy, use, or improve upon any of the *Housing Authority's* properties. *Id.* ("here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property."); *compare with United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468 (2003). Those powers reside solely with the Plaintiff Housing Authority. The Housing Authority's plenary authority is subject only to HUD's limited oversight to ensure funds are expended in accordance with the goals and purposes of the NAHASDA. But oversight alone "cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory." *Marceau III*, 540 F.3d at 927 (citing *Mitchell I*; *Navajo I*).

III. PLAINTIFF IS COLLATERALLY ESTOPPED FROM RAISING A BREACH OF TRUST CLAIM BECAUSE THIS ISSUE HAS ALREADY BEEN DECIDED IN *MARCEAU III*

Under the doctrine of collateral estoppel, or issue preclusion, "a judgment on the merits in a first suit precludes relitigation in a second suit of issues actually litigated and determined in the first suit." *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003) (quoting *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994)). As the Supreme Court and other courts have recognized, collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). Collateral estoppel applies even where the second action involves a new claim or cause of action,

so long as the determinative issue has already been decided. *See Larson v. United States*, 89 Fed. Cl. 363, 390 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)).

The Federal Circuit has applied a four-part test, in which the party invoking collateral estoppel must show that: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action. *Innovad Inc. v. Microsoft Corp.*, 260 F.3d 1326, 1334 (Fed. Cir. 2001) (citation omitted). Here, all the prerequisites for applying collateral estoppel are satisfied.

The elements of the four-part test are clearly satisfied as is evident in the Ninth Circuit's decision in *Marceau III*. In Plaintiff's claim for relief in the present case, the Housing Authority contends that the "trust obligation requires that the Federal Government provide shelter that is decent, safe, and sanitary." Compl. ¶ 16. Plaintiff's allegations rest on the legal theory that NAHASDA establishes a trust relationship between HUD and Plaintiff because HUD maintains comprehensive and pervasive regulatory control over housing resources. *Id.* at ¶ 1 ("The actual language of [NAHASDA], coupled with the Defendant's assumption of the obligations and duties of a trustee by establishing and maintaining comprehensive, pervasive regulatory control of tribal trust lands and housing resources, and actual control of decisions of Blackfeet Housing, the United States Government has created a trust obligation . . . ."); *id.* at ¶ 7 ("Defendant has assumed duties of a trustee by establishing and maintaining comprehensive regulatory control over Blackfeet housing resources."). The Ninth Circuit has already resolved this issue in favor of the United States.

As discussed previously, *see supra* at 5-6, the Ninth Circuit in *Marceau III* unequivocally concluded that HUD did not owe a trust responsibility to the homeowners because HUD did not exercise direct control over building, managing or maintaining the housing. *Marceau III*, 540 F.3d at 928. [10] At most, the court found that HUD functioned as an oversight authority in providing funding to the housing program but concluded that "oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement to recover on a trust theory." *Id.* at 927. The court found instead that the Housing Authority, not HUD, held considerable control over the design, management, and upkeep of the housing. *Id.* at 928 ("[U]nder the Housing Act, Indian housing authorities (such as the Blackfeet Housing Authority) applied to HUD for loans to enable *the housing authority* to develop low-income public housing designed to be sold to eligible members of the tribe. Under NAHASDA, block grants could be used *by the tribe* or its designated housing entity to repair or replace housing." (emphasis in original)).

The issue before the Ninth Circuit was whether or not HUD possessed "comprehensive regulatory control" over Blackfeet housing resources, thereby establishing a trust duty. The court concluded that HUD did not. Plaintiff attempts to raise the very same issue again in the present case. The issue has already been litigated, the issue has been resolved, and a final judgment rendered. Accordingly, the first three prongs of the four-part test have been satisfied.

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[10] The fact that the trust doctrine was advanced by individuals in *Marceau* and is advanced by the Housing Authority here has no bearing on the collateral estoppel effect of *Marceau III*. The Indian trust doctrine involves a trust relationship "between the United States and Indian Nations." *Marceau III*, 540 F.3d at 921 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). In reaching its decision in *Marceau III*, the Ninth Circuit determined the relevant statutes and regulations do not impose any affirmative fiduciary duty on HUD to manage or maintain property. *See supra* at 5-6.

With regard to the fourth prong, collateral estoppel would only be appropriate if the Housing Authority had a "full and fair opportunity" to litigate the first action. *Innovad Inc.*, 260 F.3d at 1334. It is of no consequence that in *Marceau III* the Housing Authority and HUD were co-parties. Collateral estoppel applies between co-parties to the first action even where the co-parties were not arrayed as adversaries in the prior litigation. *Union Pac. R. R. Co. v. United States*, 292 F.2d 521, 522-23 (Ct. Cl. 1961); *see also Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 845 (3d Cir. 1974). The Housing Authority had a full and fair opportunity to raise the same issue raised in its current Complaint against the United States, and, in fact, it did. On remand to the District of Montana, the Housing Authority filed an opposition to HUD's motion for summary judgment, arguing that HUD had comprehensive regulatory control over Blackfeet housing decisions via the NAHASDA. *Marceau*, ECF at 173 at 6-16.

In sum, Plaintiff urges this Court to reach a different result than the one made by the District Court of Montana and the Ninth Circuit simply because it is unhappy with the outcome – this is precisely what the doctrine of collateral estoppel is meant to prevent. As such, this Court should dismiss Plaintiff's Complaint.

CONCLUSION

The Housing Authority asserts a single claim over which this Court does not have jurisdiction. To the extent that the Court may find that it does have jurisdiction over this action, the allegations contained in Plaintiff's Complaint nonetheless fail to state a claim for which relief may be granted. Moreover, Plaintiff should not have multiple opportunities to litigate an issue that has already been resolved in favor of the United States. For these reasons, the Court should grant the United States' motion and dismiss the Plaintiff's Complaint.

Respectfully submitted on this 5th day of April 2012.

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