IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 1:05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD);
SHAUN DONOVAN, Secretary of HUD;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
DEBORAH LALANCETTE, Director, Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing,

Defendants.

PLAINTIFF'S REPLY BRIEF

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PLAINTIFF'S REPLY BRIEF

Introductory Statement

The Department of Housing and Urban Development ("HUD") continues both in the tone of its arguments and by its actions to be dismissive of the significant trust obligations which it owes to these Plaintiffs. Congress made clear with the passage of NAHASDA that it was seeking to fulfill the federal government's "unique trust responsibility to protect and support Indian tribes and Indian people," and "to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition." 25 U.S.C. § 4101(3), (4). Yet, there is nothing in HUD's Response which fairly reflects any recognition of these responsibilities imposed upon HUD by Congress.

Rather than recognizing its duty "to support Indian tribes and Indian people", HUD defends its failure to do so, presenting elaborate *post hoc* rationalizations for its actions. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *Gose v. U.S. Postal Serv.,* 451 F.3d 831, 839 (Fed. Cir. 2006) ("We must ensure that the agency is not now masquerading a *post hoc* rationalization as a then-existing interpretation.") HUD provides a panoply of explanations as to why it is free to recapture grant funds "already expended on affordable housing activities." *See* Section III, *infra*. When faced with the requirements of 25 U.S.C. § 4161(a) mandating both a finding of substantial non-compliance and a hearing, HUD adopts the illogical position that it can deny hearings before recapturing millions of dollars--amounts large enough to threaten the financial wellbeing of many Tribally Designated Housing Entities ("TDHEs")--merely by classifying its actions as not involving substantial non-compliance. *See* Defendants' Response Brief at p. 36 (hereinafter "HUD Br. at __").

HUD's failure to act with the fidelity of a trustee is garishly displayed when it seeks to recast the 2008 Reauthorization Act as merely "clarifying" NAHASDA's formula allocation provision (25 U.S.C. § 4152(b)), rather than changing it. HUD Br. at 18-23. Its "clarification" argument clearly flies in the face of: (A) HUD's own previous characterization of the 2008 Reauthorization Act as a "change" of law before Congressional committees; and (B) the explicit terms of the 2008 Reauthorization Act itself. Ultimately, any argument over whether Congress merely clarified § 4152(b) or amended it should end in the face of the 2008 Reauthorization Act's "civil action" provision. The "civil action" provision declared that the statutory changes to § 4152(b) would "not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." P.L. 110-411, § 301(b)(1)(E). HUD, in spite of its quixotic efforts, cannot explain how--if Congress merely clarified the law--the amended formula allocation provision "would not apply" to claims filed within 45 days of the Act's passage. For this "civil action" provision to have any meaning at all, NAHASDA's formula allocation provision as amended must be substantively different than the pre-amendment version. Despite HUD's "clarification" arguments, the plain language of, and context surrounding, the 2008 Reauthorization Act confirm that 24 C.F.R. § 1000.318(a) is invalid as it conflicts with the pre-amendment law.

HUD's lack of any sense of its obligations owed to Indian tribes and Indian people is revealed in bold when it argues that the Plaintiffs fail to understand what is truly happening here. According to HUD, the Plaintiffs need to understand: "The actions [they] challenge were not actions to enforce Plaintiff’s compliance with NAHASDA, but rather to ensure HUD's own compliance." HUD Br. at 36. In other words--HUD suggests that it should be obvious that when

HUD violates the law, Indian tribes should understand that they pay the price. Surely it cannot be suggested in this day and age that such treatment of the Plaintiffs is a reflection of the United States' "unique trust responsibility to protect and support Indian tribes and Indian people."

It is equally ironic that HUD continues to defend its treatment of the Plaintiffs on the basis that this is a "zero sum game" suggesting that this justifies the obviously unfair outcome of this process. HUD Br. at 1. Plaintiffs understand the "zero sum game" all too well. As a result of HUD's unilateral actions, Plaintiffs have seen their block grant funding illegally reduced by millions of dollars. In many cases, HUD has illegally seized and threatens to seize millions of dollars of funds previously spent on affordable housing by these Plaintiffs. Many of the Plaintiff TDHEs serve small tribes with limited financial resources. The funds awarded to these Plaintiffs are quickly spent on affordable housing. There is no reservoir of funds to satisfy HUD's unilateral demands; there is only a reservoir of great needs for affordable housing for America's indigenous population. Indeed, Plaintiffs well understand the reality of the "zero sum game" requiring them to pay the price for HUD's administration of this program. In filing these cases, Plaintiffs seek only to compel HUD's compliance with NAHASDA including the federal government's "unique trust responsibility to protect and support Indian tribes and Indian people." All of HUD's arguments ultimately fail.

Argument

I. HUD's Indecision on the Source of Its Supposed Power to Recapture Millions of Dollars from the Plaintiffs With Neither a Hearing nor a Finding of Substantial Noncompliance Demonstrates That, In Truth, HUD Has No Such Summary Authority.

A. HUD's List of Mutually Exclusive Rationales for Its Summary Actions Presents an Ever-Moving Target.

Over time, and in its Response, HUD has listed at least each of the following as the source of its alleged power to summarily, and without the required finding of "substantial

noncompliance," recapture millions from the Plaintiffs years after the relevant grants had been allocated and, in most instances, spent on affordable housing activities:

1. *The informal reconsideration process of Subpart D of the NAHASDA regulations, 24 C.F.R. § 1000.336.* On July 23, 2010, HUD attorney Jad Atallah told a NAHASDA Negotiated Rulemaking Committee:

> Under Subpart D, we have a totally separate process for when you challenge formula determinations. *And our position has always been that this is the process that governs FCAS overcounts.*

Minutes, Negotiated Rulemaking Session, July 22, 2010 (emphasis added); NRA "10." The statement is unambiguous: § 1000.336 "governs," and HUD was equally clear in taking that position in individual enforcement actions.[1] Now, apparently convinced by Plaintiffs that § 1000.336 applies only to the gathering of data for the upcoming fiscal year, and not to the recapture of funds granted years before (Plaintiff's Opening Brief at p. 19, *et seq.* ("Pl. Br. at __")), HUD's new position is that § 1000.336 never governed at all--a classic flip flop. HUD Br. at 41.

2. *Section 405 of NAHASDA.* According to HUD's brief, "[o]n the other hand, another statutory provision, 25 U.S.C. § 4165(d), allows for adjustment of grant amounts…even without the hearing required in the case of substantial

[1] *See, e.g.*, Fort Peck AR, p. 381; Blackfeet Housing AR, p. 485 (both located at RA "8."); YNHA AR Vol. II, Tab 30, YNHA000682-683; NHA AR Vol. 3, Tab 49, AR000766-768; NHA AR Vol. 3, Tab 66, AR000927-949; NHA AR Vol. 3, Tab 72, AR0001121-1123. Portions of the administrative records cited in this consolidated reply that were not previously included in the Administrative Record ("AR") filed with the consolidated Opening Brief are attached as the "Supplemental Record Appendix", hereinafter referred to as "SRA '__'". The last four documents listed above are attached as SRA "1"-"4", respectively. Documents referenced in this consolidated reply that were not previously included in the Non-Record Appendix ("NRA") filed with the consolidated Opening Brief are attached as the "Supplemental Non-Record Appendix," hereinafter referred to as "SNRA '__'".

noncompliance." HUD Br. at 37. HUD does not dwell on this alternative, given that recaptures under §405 are "subject to" the procedures of §401(a) of NAHASDA, which does require both a finding of substantial noncompliance and a hearing.[2]

3. *An implicit exemption from the hearing requirement of 24 C.F.R. § 1000.532*. HUD makes this argument at page 40 of its Response. Plaintiffs have demonstrated that § 1000.532 was intended to require HUD to grant a hearing in all cases involving grant reductions or withdrawals. Pl. Br. at 18, *et seq.* HUD had originally proposed to allow grant recaptures without a hearing under then Section 405(c). *See* 62 Fed. Reg. 35726 (July 2, 1997) (NRA "7", p. 9). But in response to overwhelming tribal opposition, HUD agreed, in the final rule, to require a hearing in all cases of grant recoupment--whether under §401 or §405. *See* 63 Fed. Reg. 12347 (March 12, 1998) (NRA "4", p. 14).[3] HUD's attempt to turn a regulation intended to make the hearing requirement universal into a limitation on tribes' hearing rights ignores both the history and purpose of the rule.

4. *HUD's allocation authority in Title III of NAHASDA.* The newest and most opaque theory advanced by HUD is that its largely successful effort to recapture millions of

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[2] In their Opening Brief, Plaintiffs demonstrated that Section 405(d) does require an opportunity for hearing, and a showing of substantial noncompliance, since its remedies are "subject to" Section 401(a). Pl. Br. at 17-18. HUD briefly argues, without any supporting authority, that the "subject to" language in Section 405(d) means the opposite: *i.e.*, that Section 401(a)'s requirements do not apply to Section 405 enforcement actions, thus rendering Congress' insertion of the "subject to" language in the 2000 amendments to NAHASDA (P.L. 106-568) a meaningless act. HUD Br. at 37-38. When a remedy (here Section 405) is made "subject to" the procedural requirements of another section (here Section 401), "subject to" is synonymous with "under," and means that actions under Section 405 "requires full agency adherence to all [of Section 401(a)'s]….procedural components." *St. Louis Fuel and Supply Co. v. F.E.R.C.*, 890 F.2d 446, 448-49 (D.C. Cir. 1989).

[3] Section 401 of NAHASDA is found at 25 U.S.C. § 4161. Section 405 of NAHASDA is found at 25 U.S.C. § 4165. References herein are to both versions.

dollars from Plaintiffs many years after the grants were issued was not an enforcement action at all, but rather an "allocation" action in which HUD was policing not Plaintiffs, but itself. HUD Br. at 32, *et seq.* Chasing after every cryptogenic "logical" theorem in this seven-page argument risks tripping down a rabbit hole and quarreling with the Cheshire Cat. Instead, the following subsection offers a handful of simple points intended to show that HUD's new *post hoc* rationalization for its summary action is meritless.

B. HUD's Actions Were Enforcement Actions Under Title IV of NAHASDA.

1. HUD's Actions Were Taken Years After the Grant Funds Were Allocated Under Title III of NAHASDA.

Under Section 301 of NAHASDA (25 U.S.C. § 4151), "allocat[ions]" are made on a fiscal year basis. The allocation of funds is made "each year," with that allocation occurring "as expeditiously as practicable." 24 C.F.R. § 1000.56. Once the grants have been disbursed pursuant to the annual allocation process, 24 C.F.R. § 1000.60 makes it clear that any later effort to "prevent improper expenditure of funds already disbursed to a recipient" must be done "*[i]n accordance with the standards and remedies contained in §1000.538 [to wit, Title IV] relating to substantial noncompliance…In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.*" *Id*. (emphasis added).

Thus, HUD's own regulation--a regulation conspicuously ignored in HUD's brief--draws a clear distinction between the initial "allocation" of grant funds, and any later action to recoup funds erroneously included in the recipient's initial allocation. It is the same distinction drawn in *City of Kansas City v. U.S.H.U.D.*, 861 F.2d 739 (D.C. Cir. 1988)("*Kansas City*")--the dispositive case in these appeals, yet one that receives not a single mention in HUD's brief.

In *Kansas City*, the court, dealing with nearly identical counterparts to NAHASDA §§401 and 405,[4] noted that there is a fundamental distinction between adjustments made at the initial stage of grant award, and withholdings or recaptures made after the grant is awarded. The former could occur without a hearing; the latter could not. *Id.* at 743, n. 6. The reasons are obvious: years after a grant is made, the recipient may have already spent it, or at least committed funds in reliance on it. *Id.* at 745-46; *see also City of Boston v. HUD*, 898 F.2d 828, 833 (1st Cir. 1990).

The grants recaptured in the present cases reach back to FY 1998, but many were not recaptured until 2002 or later. *See, e.g.*, THRHA A.R. 723-726 (RA "7"). At all times material, HUD regulations required that at least 90 percent of a grant to be obligated within two years of its initial award. *See* 24 C.F.R. § 1000.524(a). So, by the time of HUD's action, most of the 1998 grants would have long ago been expended. In a nutshell, grabbing back millions already spent or obligated is a fundamentally different action than computing the initial amount of a grant.

2. <u>HUD's Actions Were Exactly the Actions Described in §401(a)(1)(B) of NAHASDA.</u>

Section 401(a)(1)(B) of NAHASDA empowers HUD, upon a finding of "substantial noncompliance" and an opportunity for a 24 C.F.R. Part 26 hearing, to "reduce [future grants]….by an amount equal to the amount of such payments that were not expended in accordance with this Act." However, and without either a finding of substantial noncompliance or an opportunity for a hearing, that is precisely what HUD did to most recipients: to wit, reduced several future years' grants by an amount equal to the amount previously granted to the

[4] Pl. Br. at 16.

recipient for homes that, as construed by HUD, did not meet the criteria of 24 C.F.R. § 1000.318. *See, e.g.,* THRHA A.R. 746 (RA "7").

Moreover, HUD made it clear at the time that it was taking enforcement action because of the recipient's alleged noncompliance with § 1000.318. HUD claims that its compliance actions were not the result of any audit or review. HUD Br. at 34.[5] That is not true. All of the challenged actions in these coordinated cases came as a result of a nationwide audit of NAHASDA's program implementation by HUD's Office of Inspector General ("OIG"). After finding that HUD may have allowed FCAS units to be overcounted in light of § 1000.318, the OIG advised HUD to "*audit* all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years." *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125, 1130 (D. Colo. 2006) ("*Fort Peck I*") (emphasis added); *See* RA 1, p 11. The use of the word "audit" shows that even HUD's own OIG expected that the procedural safeguards in §§405(d) and 401(a) would apply to the recommended action. Further, HUD's own vernacular uses the term review in many cases where it has taken action to adjust and/or recapture funding. *See, e.g.*, Letter dated January 24, 2003 from Rodger J. Boyd to Zuni Housing Authority, Zuni Housing Authority AR pp. 750-761, attached as SRA "5". In some instances, while HUD was conducting normal monitoring and management audits of the Plaintiffs, HUD's reports resulted in reduction of FCAS units and recapture of funds. *See* January 23, 2001 Memorandum from R. Akers to D. Lalancette, TMHA

[5] Nor need they have been in order to fall squarely within the requirements of §401(a). The claim is made apparently in support of its claim that its actions were not compliance actions under §405--a claim that, as we have seen, contradicts its own invocation of §405 elsewhere in its brief.

AR, TMHA000073, attached as SRA "6". Moreover, and in every case, HUD's demand letters set out the requirements of § 1000.318 and Guidance 98-19, and then claimed that the recipients (not HUD) had "incorrectly" claimed credit for ineligible homes. *See, e.g.,* THRHA AR p. 672 (RA "7"). In short, whether HUD's recapture actions are characterized as "reductions" under §401(a), or "adjustments" under §405(d), the result is always the same: HUD acts unlawfully when it recaptures awarded funds without following the requirements of §§401(a) and 405(d).

3. HUD's New Statutory Paradigm Would Render Title IV of NAHASDA Superfluous.

Titles I-III of NAHASDA contain the Act's substantive provisions, but they contain no provisions providing for the enforcement of those substantive requirements.[6] That is the job of Title IV, which provides a comprehensive suite of remedies--administrative and judicial--for any violation of "any provision of this Act." §401(a); 25 U.S.C. § 4161(a).[7]

HUD's proposal--to imply, within Titles I-III, the power to summarily enforce those titles and their implementing regulations (in this case, 24 C.F.R. § 1000.318) without regard to the procedural protections of Title IV, including the required finding of "substantial noncompliance"--would make Title IV a dead letter. HUD would never invoke either §401 or §405, because both contain the bothersome sort of procedural requirements that the court in *Kansas City* noted HUD has been historically loathe to follow. *See Kansas City*, 861 F.2d at 741 ("[In] the 13 years since the [public housing equivalent of §405 of NAHASDA] has been in existence, the Secretary has *never* initiated [those hearing] procedures against any grant

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[6] Section 209 of NAHASDA (25 U.S.C. § 4139) does contain a lone enforcement provision dealing with using grant money for affordable housing activities; however, that section merely provides that a person violating a substantive standard will be dealt with under §401(a).

[7] Titles I-IV of NAHASDA are found in 25 U.S.C. §§ 4111-4168, Chapter 43, Subchapters I-IV.

recipient." (*emphasis in original*)). HUD would simply claim that it was following its own "duty" to comply with Titles I-III, thereby absolving itself of any requirement to provide any procedural protections to the recipient.

HUD is right in one respect. It does have a duty to police compliance with Titles I-III. But that is true of every agency administering any statute. The point is this: as HUD's statutes and regulations make clear (24 C.F.R. § 1000.60), HUD discharges that duty by bringing enforcement actions under Title IV.

So, in the end, this is a simple matter, and seven pages of convoluted pseudo-logic changes none of that.

C. Under NAHASDA and Its Implementing Regulations, HUD Has a Duty to Afford Plaintiffs a Formal Adjudicatory Hearing and to Find "Substantial Noncompliance," and HUD's Claims of Substitute Performance and Harmless Error Do Not Excuse HUD's Failure to Discharge that Duty.

Under 24 C.F.R. § 1000.540, HUD has obligated itself to use the hearing procedures set out in 24 C.F.R. Part 26. Those procedures are to be used for any required hearing "under NAHASDA", *id.*, whether the hearing is held under Section 401 of NAHASDA (24 C.F.R. § 1000.534) or Section 405. *See* 24 C.F.R. § 1000.532 (b) (the recipient is entitled to "a hearing in accordance with § 1000.540)."

24 C.F.R. Part 26 sets out eight pages of procedural protections for recipients, including:

- appointment of a neutral administrative law judge or Board of Contract Appeals Judge. 24 C.F.R. § 26.2;[8]
- separation of advocacy and adjudicatory functions. 24 C.F.R. § 26.7;

[8] The regulatory citations are to the 2002 version of 24 C.F.R. Part 26--the version in effect when HUD notified most of the Plaintiffs of its intent to recapture funds. The regulations have not materially changed since.

- prohibition on *ex parte* contacts. 24 C.F.R. § 26.4;
- broad discovery rights, including document production and oral depositions. 24 C.F.R. §§ 26.17-26.20; and
- a public adjudicatory hearing and a decision on the record. 24 C.F.R. §§ 26.22-26.24.

While HUD offered no Plaintiff the opportunity for any such hearing or found the existence of "substantial noncompliance," HUD claims that it offered Plaintiffs the "equivalent"--to wit, an opportunity to submit a written response to HUD's demand, which the agency "considered." HUD Br. at 39.[9]

To begin with, allowing a written response is not the equivalent of an adjudicatory hearing on the record. More fundamentally:

> …it is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated…is required to those whom Congress has entrusted the regulatory missions of modern life.

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[9] HUD also claims that it invited "appeals and requests for reconsideration." But it did so inconsistently and never adequately. On some occasions, it invited recipients to use the written reconsideration process set out in 24 C.F.R. § 1000.118, which sets out the reconsideration process for HUD's denial of a request to house a non low-income Indian family or a model housing activity in a NAHASDA-assisted development. NHA AR Vol. 3, Tab 66, AR000927-949; NHA AR Vol. 3, Tab 72, AR0001121-1123, RA "7". For its part, Guidance 98-19 has its own *sui generis* "appeal" procedure. In other cases, the "reconsideration" was assigned to a subordinate of the official who made the initial decision. For example, in one case the initial recapture demand was made by Deputy Assistant Secretary for Native Programs Ted Key, with instructions to ask a subordinate staff-level employee, one Jackie Kruszek, to review the demand if the recipient felt it in error. THRHA A.R. 672-673, RA "7". No regulation-based appeal or reconsideration process whatsoever was offered. *Id.*

On another occasion, HUD attempted to outsource the decision making process to a private contractor which questioned the appropriateness of the referral: "I don't think we should be making a decision on what to include as FCAS for HUD." Email dated November 9, 1999 from Kate M. Brown to Jacqueline A. Kruszek, NAHA AR, NAHA0373, 74, attached as SRA "7".

Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986)(citation omitted).

HUD next argues that, even if it did violate its own regulations, "[p]laintiffs show no prejudice for lack of an administrative hearing…." HUD Br. at 40. There are three answers to that claim:

- HUD cites two cases for the proposition that the denial of a required adjudicatory hearing is "harmless." Neither case supports any such proposition. Neither *Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 2003) nor *DSE, Inc. v. United States*, 169 F.3d 21 (D.C. Cir. 1999) address an agency's denial of a hearing where, as here, the relevant statute and corresponding regulations require one. In *Sierra Club v. Slater*, the plaintiff sought to block a highway project, alleging myriad violations of the National Environmental Policy Act of 1969, § 2, *et seq.*, 42 U.S.C. § 4321, *et seq.* One claim alleged that the Army Corps of Engineers' notice of an application for a wetlands permit was fatal to the entire project because it failed to include a notice to the local water authority, which notice was required by the applicable regulations. *Sierra Club*, 120 F.3d at 637. There was no dispute that the local water authority was fully appraised of the project (it had been in the works for over a decade) and the related state agency knew that it would be obtaining the certification that was contemplated in the omitted notice. Moreover, the court found, the Corps' failure to reference the local water authority had no effect on the application or the public's right to notice and comment. It was a "technical failure" that "had no bearing on the ultimate decision." *Id.* The court called the plaintiff's claim "at best, nitpicking." *Id.*

  DSE, Inc. v. United States is even less helpful to HUD. In that case, the plaintiff did not even allege that the agency had failed to follow its own rules. In *DSE*, the Small

Business Administration miscounted the number of employees in a company that was the successful bidder on a government small business set-aside contract. The error was the result of the successful bidder's under-reporting of certain employees. 169 F.3d at 30. Even as corrected, the successful bidder's head count was well within the limit set for the contract, and the unsuccessful bidder failed to provide the court with "any reason to believe that it could ever show this revised count to be erroneous." 169 F.3d at 31. Under those circumstances, the court found the agency's error to be harmless. *Id*.

To our knowledge there is no case holding that denial of a hearing guaranteed by regulation or statute is "prejudicial" only if the complainant can show that it would have prevailed if such a hearing had been held. *Cf.* HUD Br. at 39 (no evidence that hearing "would have changed the result.") Indeed, to accept HUD's formulation, one would need to hold a hearing, and assess the outcome, to determine if its original denial was "prejudicial." The hearing rights established by NAHASDA and its regulations were, as the courts in *Kansas City* (861 F.2d at 744-45) and *City of Boston* (898 F.2d at 831-32) stressed, intended to provide Indian tribes with vital procedural protections against otherwise unfettered action by HUD that could cripple tribes' ability to meet their housing needs. *See Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (denial of core hearing rights guaranteed by regulation, and intended to protect private citizens, was "more than mere procedural irregularities.") In sum, HUD's arguments that it can, without the opportunity for a hearing required by the statutes, take millions of dollars from the Plaintiff Tribes without creating prejudice is flat wrong.

- Plaintiffs did show, in their Opening Brief, specific examples of prejudice from the absence of a hearing. Without a hearing, there was no opportunity to adjudicate the

individual circumstances behind each Plaintiff's case. One specific example: Alaska's Tlingit Haida Regional Housing Authority's ("THRHA") assertion that it was "impracticable," under 24 C.F.R. § 1000.318, to convey units during a time when THRHA was coping with the aftermath of class action litigation and resultant HUD-funded repairs on the homes at issue. Pl. Br. at 46, n. 42. To quote Plaintiffs' brief: "THRHA raised this 'impracticability' claim but, like the other tribes and TDHE's in this litigation, were never afforded an opportunity to adjudicate this claim." *Id.* Plaintiffs were likewise prejudiced in their inability to factually develop, through the fact finding processes of 24 C.F.R. Part 26 (or anything similar to it), individualized claims relating to cases in which:

- the MHOA precluded termination for arrearages (Pl. Br. at 43-45);
- repairs were still ongoing; (*id.* at 46-47);
- the homes had been demolished and replaced (*id*. at 48);
- there was a new tenant (*id.* at 48);
- trust land, lease or probate issues were delaying conveyance (*id*. at 49);
- the homes had been converted to the low rent program (*id.* at 48); and
- the sums recaptured had already been spent on NAHASDA-eligible activities (*id.* at 25).

Given the absence of a normal fact-finding record, Plaintiffs have been prejudiced by HUD's refusal to offer a hearing under 24 C.F.R. Part 26. Moreover, it should be obvious that HUD's invocation of the harsh remedy of recapture without the requisite notice and procedural safeguards in Part 26 and the congressionally mandated finding that that Plaintiffs' "failed to comply substantially with any provision" of NAHASDA,

25 U.S.C. §§ 4161(c), 4165d), is itself prejudicial. HUD's administrative recapture of funds in many cases amounted to millions of dollars and significant portions of Plaintiffs' annual funding.[10]

Finally, there was clear actual prejudice in the failure to provide the opportunity for a neutral decision-maker (either an ALJ or Board of Contract Appeals Judge under 24 C.F.R. Part 26), forcing recipients to plead their case, in mere letter correspondence, to HUD itself, and in some cases to subordinates of the HUD official making the original decision (*see* n. 9, *ante*); and

- Even HUD admits that these individualized issues "requires analyses of individual units and their histories," adding that it would be premature to reach any conclusions about these issues until the "counting phase." HUD Br. at 32. It would likewise be "premature" to conclude, in the abstract, that Plaintiffs have not been prejudiced by not having the tested tools of fact finding at their disposal in adjudicating individualized claims, the substance of which has been "reserved" for a later phase of this litigation.[11]

D. <u>The 2008 Amendment to Section 401(a)(2) of NAHASDA has no Bearing on the Recaptures at Issue in These Cases.</u>

In most cases, HUD issued its final recapture letters in 2002, and by 2008, most of the funds at issue had been fully recaptured. In 2008, Congress passed a number of amendments to NAHASDA, and HUD claims that one of those amendments--a change to §401(a)(2)--was

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[10] For example, HUD tried to recapture over 1.8 million dollars from Fort Peck Housing. *Fort Peck I*, 435 F. Supp 2d. at 1130 n. 5; 1.9 Million from N.W. Inupiat Housing, *see* Letter dated May 23, 2002 from Deborah Lalancette to N.W. Inupiat Housing Authority, attached hereto as SRA "8"; and 2.4 million from the Zuni Tribe, *see* SRA "5", *supra*. The Big Pine Paiute Tribe's annual finding was reduced by more than 40% as a result of HUD's recapture of funds. *See* Special Brief of Big Pine Tribe, Doc 64, p. 2.

[11] May 27, 2011 Scheduling Order at 3.

intended to have eight years' retroactivity, forgiving the denial of a hearing that occurred nearly a decade previous.[12]

Initially, there is a strong presumption against the retroactive application of a statutory amendment in this context. As recognized by the court in *Project B.A.S.I.C. v. O'Rourke*, 907 F.2d 1242 (1st Cir. 1990):

> The Supreme Court has said that, because it is difficult, and sometimes unfair, to make a grantholder abide by new (post-grant) statutory obligations, a grant-holder's obligations normally should be "evaluated by the law in effect *when the grants were made*," *Bennett v. New Jersey*, 470 U.S. 632, 640, 105 S.Ct. 1555, 1560, 84 L.Ed.2d 572 (1985) (emphasis added), not by the law "in effect at the time" the court "renders its decision," *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Elaborating, the Court stated,
>
> > "Absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants."
>
> *Bennett*, 470 U.S. at 641, 105 S.Ct. at 1561.

907 F.2d at 1246. *See also Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (traditional rules provide that an amendment to a statute will not have retroactive effect if "it would impair a right a party had when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.").

HUD's only support for this construction of the newly-enacted amendment to §401(a)(2) is that the *title* of the Senate Report's discussion of this amendment uses the word "clarification." First, mere titles—even in statutes themselves—are unreliable indicators of legislative intent. 2A Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutes and*

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[12] HUD's brief at one point refers to this new statute without disclosing its recent origin. HUD Br. at 35-36. The Court should thus take special care in reading this portion of HUD's submission.

Statutory Construction § 18.07 at 90-91 (7th ed. 2009). Second, and as Section IV(B), *post*, discusses at length, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g., United States v. Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998).

And here, the actual substance of the Senate Report makes it clear that Congress was in fact substantively amending then-current law:

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

Sen. Rpt. 110-238 (110th Cong., 1st Sess.) at 10 (emphasis added). According to the Senate Report, "[t]his amendment has been included due to" an allegedly undesirable result that would otherwise occur under then-existing law (*i.e.*, a hearing). And, the change would occur "[u]nder this amendment." *Id*.

Finally, HUD overstates the significance of the 2008 amendment. It states that a recapture of FCAS funds does not "in itself" trigger a "substantial noncompliance" finding, and the Senate Report said that it does not do so "automatically." "In and of itself" is consistently used by the federal courts to mean "standing alone"—that is, without the presence of any other relevant factor. *U.S. v. Karo*, 468 U.S. 705, 722- 23 (1984) (O'Connor, J., concurring). *See also Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989).

Thus, the new law does not insulate HUD from requiring a hearing if the FCAS recapture would otherwise constitute substantial noncompliance—for example, if the recapture was financially significant to the recipient under the standards established in 24 C.F.R. §

1000.534, or if the over counting of FCAS was intentional or fraudulent. Read literally, the amendment does not support the notion that HUD can recapture FCAS funds absent a finding that the over count constituted substantial noncompliance. The 2008 amendment to §401(a)(2) states: "The failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this subchapter." §401(a)(2); 25 U.S.C. § 4161(a)(2). Thus, the failure to accurately report FCAS units, by itself, is no longer considered "substantial noncompliance." *Id*. However, §§401(a) and 405(d) still require a finding of substantial noncompliance before HUD can retroactively "adjust", *i.e.* recapture, a recipient's FCAS funding. Therefore, under the plain language of §401(a)(2), in order to retroactively adjust FCAS grant amounts (as opposed to correcting the overcount for the current FY going forward), HUD must make two findings after notice and hearing. First, that a recipient failed to accurately report FCAS units; and second, that the circumstances surrounding such failure constitute "substantial noncompliance" with a provision of NAHASDA. The fact that Congress removed the failure to accurately report FCAS from "substantial noncompliance" did not give HUD a new remedial method to recapture funding under NAHASDA. The plain, literal language of the amendment belies such an interpretation. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-462 (U.S. 2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). If HUD wanted Congress to give it the right to recapture FCAS funds outside of the parameters of Title IV, it should have been more forthright in asking Congress to do so. The 2008 amendment to §401 does not express Congressional intent to allow HUD to recapture

FCAS funds from grants already awarded without the additional finding of substantial noncompliance.

II. HUD Has No "Inherent Power" to Recapture Funds.

HUD contends that it enjoys "inherent power" to recapture the NAHASDA funding at issue in this case, irrespective of any limitations on recapture that are created within NAHASDA or its implementing regulations. *See* HUD Br. at 42 ("The federal government has the power, independent of statute, to recover funds that have been erroneously paid."). HUD's notion of its "inherent power" is overbroad, frightening, and lacking in merit.

HUD relies on the following cases in support of its "inherent power" argument: (1) *U.S. v. Wurtz*, 303 U.S. 414, 415 (1938); (2) *U.S. v. Texas*, 507 U.S. 529, 532 (1993); (3) *U.S. v. United Mine Workers of America*, 330 U.S. 258, 272 (1947); and (4) *U.S. v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15 (1st Cir. 2005). None of these cases support HUD's characterization of its "inherent power" to recapture funds. Rather, these cases demonstrate that the federal government retains the inherent authority to bring a civil common law action in an Article III court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment", absent statutory language to the contrary. *See Wurtz*, 303 U.S at 415-16; *Lahey Clinic*, 399 F.3d at 16. The Plaintiffs here do not quarrel in the slightest with HUD's inherent recourse to the judiciary. Indeed, §401(c) of NAHASDA expressly reserves that right.

But HUD misconstrues and inflates this authority by suggesting that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the Tribes as a matter of administrative sanction. There is no such "inherent" authority--any authority to recover funds by purely administrative means must come from express delegation of that authority from Congress, in a statute. *See generally Am. Bus Ass. v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (agency's authority to bring a

civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary).

HUD's reliance on *U.S. v. Texas* and *U.S. v. Mine Workers* is also unavailing. In *Texas*, the Court held that the Debt Collection Act of 1982 did not abrogate the government's common law right to collect pre-judgment interest. 507 U.S. at 530. Again, this case does not involve any "inherent right" to assess monetary liability administratively; the case simply reaffirms that the United States has a common law right to prejudgment interest if it files a civil claim that a court ultimately reduces to a judgment. *U.S. v. Mine Workers* falls even further afield. There, the United States filed a civil action seeking a declaration that the Mine Workers Union and its president, John L. Lewis, lacked authority to unilaterally terminate an agreement concerning terms and conditions of employment with respect to mines in possession of the Government. This required the Court to consider whether the Norris-LaGuardia Act divested the Court of jurisdiction to adjudicate the controversy. 330 U.S. at 272-73. This precedent sheds no light on the cases at bar and, in any event, does not support HUD's overbroad claim to "inherent power."

HUD is correct, however, in allowing that the agency's authority is shaped by what Congress has set forth in statute (in this case NAHASDA). HUD Br. at 43 (citing *Wurtz*, 303 U.S. at 416; *Mine Workers*, 330 U.S. at 272). *Accord Am. Bus*, 231 F.3d at 4 (statute's enumerated remedies reveal Congress' unambiguous intent that such remedies be exclusive, and "consequent intent to deny agencies the power to authorize supplementary monetary relief."). Nevertheless, HUD's application of the rule goes astray in the process of analyzing Congress' intent as revealed by the plain language of NAHASDA. HUD essentially tortures the plain language of the statute in support of its thesis that "*nowhere does Congress prohibit HUD* from taking any actions to recover overfunding." HUD Br. at 43 (emphasis added). It is fundamental

that a federal agency has only those powers which have been conferred upon it by Congress. *See American Bus*, 231 F.3d at 8 ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the Constitution.")(emphasis in original); *Louisiana Pub. Ser. Comm'n. v. FCC*, 476 U.S. 355, 374 (1986)("an agency literally has no power to act…unless and until Congress confers power upon it."). HUD's "inherent power" argument turns this principle upside down.

III. NAHASDA and Its Implementing Regulations Bar HUD From Recapturing Funds Spent on Affordable Housing Activities.

A. Pursuant to Section 405(c) as enacted in 1996 and Section 405(d) as amended in 2000, and 24 C.F.R. § 1000.532, HUD was prohibited at all times from recapturing funds that had been spent on affordable housing activities.

24 C.F.R. § 1000.532 provides as follows:

> § 1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?
>
> (a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. 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.*

Id. (emphasis added).

This regulation was implemented in 1998 at the conclusion of the first round of negotiated rule making, where the terms of the regulation were discussed at length between the tribes and HUD. *See* 63 Fed. Reg. 12334-01 (March 12, 1998), NRA "4". Section 1000.532 plainly bars the recapture of "grant amounts already expended on affordable housing activities." In pursuing the recaptures at issue in this case, HUD gave no regard to this provision. Now, in

response to the Plaintiff's allegation that HUD's conduct violates NAHASDA and § 1000.532, HUD presents a meritless litany of *post hoc* excuses for disregarding the regulation.

B. HUD's analysis of the bar on recapturing funds spent on affordable housing activities is profoundly flawed.

First, HUD argues that a distinction must be made between "the recovery of IHBG overpayments" and "grant adjustments made to cure recipient performance deficiencies." HUD Br. at 46. This is a distinction without a difference, which finds no support within NAHASDA or its implementing regulations. Here, by simply modifying the jargon of recapture, HUD suggests that it can neatly sidestep the restrictions on recapture set forth within Section 405 of NAHASDA and 24 C.F.R. § 1000.532. The Court should not be led astray by this semantic slight-of-hand.

HUD argues that the recapture bar set out in Section 405 of NAHASDA, and its implementing regulation at 24 C.F.R. § 1000.532, does not pertain to the recaptures at issue in these cases because HUD was acting under either its "inherent" power or some inexplicable and unsupported power delegated to it under Title III. As discussed above, the inherent power claimed to exist under *Wurtz* that HUD relies on is limited to a common law right to bring a civil action.

HUD argues that it has some unspecified sort of statutory authority to recapture funds under Title III of NAHASDA, although it cannot cite any provision of that title relating to recapture. Title III is absent any such delegation of authority. In addition to the right to file a civil action, Title IV delegates to HUD certain authority to recapture funds subject to due process and expenditure limitations as set out in §§ 401 and 405. As previously discussed, any remedy of recapture under the NAHASDA statute lies under Title IV, not Title III. A remedy

cannot be implied under Titles I-III outside comprehensive provisions and the express parameters of Title IV:

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

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

HUD also presents a discussion of the Omnibus Indian Advancement Act of 2000 (114 Stat. 2927), which amended (or redacted) language in the original version of NAHASDA. HUD Br. at 47 (quoting 25 U.S.C. § 4165 (c) (1998)). The original statute mirrored the language of § 1000.532 and provided that "grant amounts already expended on affordable housing activities may not be recaptured or deducted from future grant assistance . . .". *Id.* But, HUD's discussion misconstrues the effect of the 2000 amendment.

Prior to the 2000 amendment, HUD's approach to recapture was plainly violative of both § 1000.532 *and* 25 U.S.C. § 4165(c). This is noteworthy because many of the recaptures at issue in this case reach back to the pre-2000 era. HUD's suggestion that the pre-2000 version of 25 U.S.C. § 4165(c) was only applicable to "performance based recaptures" -- which are something different than the recaptures at issue here -- is basically incomprehensible.

HUD goes on to imply that, after the 2000 amendment, the applicability of § 1000.532 somehow morphed. HUD suggests that the 2000 amendment reveals congressional intent for HUD to pursue recapture by administrative fiat, which would render any contrary regulation invalid. HUD Br. at 48 (citing *U.S. v. Karionoff*, 431 U.S. 864, 873 (1977)). Here, HUD ignores the most salient provisions of the post-2000 version of NAHASDA and what they reveal about

Congress's intent. At §401(a)(1)(B), the post-2000 version of NAHASDA indicates that HUD's authority to recapture is limited to circumstances where NAHASDA funds were misspent by a Tribe or "not expended in accordance with the Act." *See* Pl. Br. at 15, n.11. This provision of the statute dovetails with the enduring restriction within § 1000.532 on recapturing "grant amounts already expended on affordable housing activities." HUD's interpretation also disregards the contemporaneous (2000) amendment to §405, which clearly indicates that HUD's authority to recapture under §405(d) is "subject to" the substantial noncompliance and hearing prerequisites of §401(a). *See* P.L. 106-568, Sec. 1003; Pl. Br. at 14.

HUD's discussion of the 2008 amendment to 25 U.S.C. § 4161(a) does little to add force to the argument that § 1000.532 does not mean what it says and bars recapture of "grant amounts already expended on affordable housing activities." *See* HUD Br. at 38. The amendment provides that a recipient's failure to report FCAS correctly "shall not, in itself, be considered to be substantial noncompliance. . .". 25 U.S.C. § 4161(a)(2) HUD interprets this language to demonstrate that "FCAS corrections" (read "recapture") "need not fall within the purview of Title IV." But the plain language of the amendment provides little support for HUD's interpretation. Furthermore, HUD would give its interpretation retroactive effect, which is a disfavored construction. *See* Section IV, *infra.* Moreover, the language of the Senate report on which HUD relies indicates that the amendment preserves the distinction between funds *not* expended and funds "already expended on affordable housing activities." *See* HUD Br. at 38, quoting S. Rep. No. 110–238. The report speaks to circumstances where a "grant recipient is required to *relinquish* overpaid funds." *Id*. (emphasis added). This language is best understood as relating to unexpended grant amounts.

That portion of the 2008 amendment to §401(a)(2) that deems FCAS reporting to be "not, in itself" "substantial non-compliance" is fraught with ambiguity. On its face, notwithstanding the confusing double-negative, the language indicates that FCAS reporting problems are, in and of themselves, generally *de minimis* in nature and not subject to recapture. HUD turns this language on its head in advancing its argument that the agency has unfettered discretion to deal with "non-substantial non-compliance" or other matters that are *de minimis*. But, HUD identifies no authority in NAHASDA that supports the notion that HUD's powers in policing compliance reach their zenith where "non-compliance" is "non-substantial." In fact, HUD completely ignores the statutory prohibition against recapture in cases of non-substantial non-compliance. *See* §§401(a) and 405(d).

Furthermore, HUD's argument that § 1000.532 does not apply cannot be squared with HUD's overarching reliance on the notion that the implementation of NAHASDA must be grounded in the approach that was established in negotiated ruling making. *See, e.g.,* HUD Br. at 13 (heralding the significance of negotiated rule making). Section 1000.532 is a product of that rule making, and the record developed in that process is not consistent with the *post hoc* theory that HUD presents to this Court. The need for a "standard that applies when HUD makes a determination to adjust a future grant" was debated at the negotiated rulemaking. 63 Fed. Reg. 12334-01, 12348 (March 12, 1998) NRA "4". Section 1000.532 emerged from this process. The regulation clearly bars recapture of "grant amounts already expended on affordable housing activities." Yet, HUD ignores this rule. By suggesting that the 2000 amendments to NAHASDA undermine this regulation, HUD attempts to snooker the Tribes and subvert both the regulation and the negotiated rule making process. The Court should not indulge HUD in this endeavor.

In support of its argument that it is not barred from recapturing funds spent on affordable housing activities, HUD boldly asserts that the Tenth Circuit has already ruled that HUD has the authority to recover funds under NAHASDA. HUD Br. at 46, citing *Fort Peck Housing Authority v. U.S. Dept. of Housing and Urban Development*, 367 Fed. Appx. 884, 892, n. 15 (10th Cir. 2010)("*Fort Peck II")*. Putting aside the questions surrounding *Fort Peck II*, the Tenth Circuit did not address the issue of whether HUD could recapture funds already spent on affordable housing activities. Recapture of such funds was not an issue on appeal. Footnote 15 of the *Fort Peck II* decision addresses the dismissal of Fort Peck's cross-appeal. The cross-appeal was determined to be moot. HUD is prohibited from recapturing IHBG grant funds that have already been spent on affordable housing activities pursuant to the restrictions in §405 and 24 C.F.R. § 1000.532 and the Tenth Circuit has not ruled to the contrary. In seeking recapture of funds previously spent on affordable housing activities, HUD violates §401(a) and § 1000.532 of the implementing regulation, turns the remedial scheme in NAHASDA on its head and flies in the face of the principles of self-determination that are at the heart of the statute.

IV. 24 C.F.R. § 1000.318 Violates NAHASDA.

A. The Tenth Circuit's *Fort Peck II* Decision is Unpublished, Not Precedential and Does Not Consider the Impact of the 2008 Reauthorization Act.

In its Response, HUD repeatedly urges this Court to be bound by the Tenth Circuit's unpublished decision in *Fort Peck II*. Because the *Fort Peck II* decision is unpublished, it is "*not* precedential . . . ." 10th Cir. R. 32.1(A) (emphasis added). *See Henderson v. Horace Mann Ins. Co*., 560 F. Supp. 2d 1099, 1115 (N.D. Okla. 2008) (holding that an unpublished opinion "is not binding precedent," and declining to follow the unpublished decision on ground that it was not persuasive); *See also Garrett v. Lowe's Home Ctrs., Inc*., 337 F. Supp. 2d 1230, 1236 n. 1 (D. Kan. 2004). Furthermore, the *Fort Peck II* Court's choice *not* to publish was deliberate and fully

informed. After the unpublished *Fort Peck II* decision was handed down on February 19, 2010, HUD filed a "Motion for Publication" on March 5, 2010. *See Fort Peck Housing Authority v. HUD,* Nos. 06-1425 and 06-1447, Doc. No. 01018378489 (10th Cir. March 5, 2010). As part of that Motion for Publication, HUD pertinently stated and argued as follows:

> [T]his case was, in effect, the test case for a significant number of similar challenges to HUD's funding formula under the same (2002) version of NAHASDA. At least 18 such similar challenges are currently pending in the district courts within this circuit, . . . in the Court of Federal Claims . . . and in district courts within the Ninth Circuit . . . . And several of those similar challenges involve multiple plaintiffs . . . . Publication of this Court's decision here would assist the courts hearing these very similar cases. Moreover, *with respect to the numerous similar cases pending in the district courts within this Circuit, publication would avoid wasteful duplicative litigation by establishing this Court's decision as binding precedent.*

Id. at 2, 3 (emphasis added). The *Fort Peck II* Court denied the Motion for Publication on May 6, 2010. *See Fort Peck Housing Authority v. HUD,* Nos. 06-1425 and 06-1447, Doc. No. 01018416418 (10th Cir. May 6, 2010). Curiously, HUD's Response makes no mention of the Motion for Publication or the *Fort Peck II* Court's rejection of that Motion. In any event, it is clear that the *Fort Peck II* Court made a fully informed decision *not* to publish, even after being presented with HUD's arguments as to why *Fort Peck II* should be binding upon this Court in considering the cases at bar. So informed, the Circuit determined by implication that this Court is free to take a fresh look at the arguments of these Plaintiffs. [13]

Further, though 10th Cir. R. 32.1(A) provides that unpublished decisions may be cited for their persuasive value, the unpublished *Fort Peck II* decision has *no* persuasive value with respect to the Native American Housing Assistance and Self-Determination Reauthorization Act

[13] Because the court in *Fort Peck II* declined to address the effect of the 2008 Amendments, Plaintiff Fort Peck Housing Authority is not bound by the law of the case or the doctrine or *Res Judicata* with respect to this issue. *See* Plaintiffs' Reply, *post* at pp. 41 and 42, nn. 21 and 22 and accompanying text.

of 2008 ("2008 Reauthorization Act"). Particularly, while recognizing the passage of the 2008 Reauthorization Act in *Fort Peck II,* the Circuit explicitly did not address or consider the effect that the amendments to NAHASDA's formula allocation provision have upon the appropriate interpretation of the pre-amendment formula allocation provision, 25 U.S.C. § 4152(b). *See Fort Peck II,* 367 Fed. Appx. at 885, n. 1. Thus, the unpublished *Fort Peck II* decision cannot be read as providing *any* guidance in determining issues related to the 2008 Reauthorization Act. Also, despite HUD's contrary suggestion, Plaintiffs have not speculated as to *why* the *Fort Peck II* Court chose not to address the impact of the 2008 Reauthorization Act.[14] Whatever the reason or reasons, the fact remains that the *Fort Peck II* Court did not consider the effect of the 2008 amendments. *Id.* As demonstrated in Plaintiff's Opening Brief, the plain language of, and context surrounding, the 2008 Reauthorization Act confirms that 24 C.F.R. § 1000.318(a) could not survive under the old Act.

B. The 2008 Reauthorization Act Substantively Changed, Rather Than Merely "Clarified," NAHASDA's Formula Allocation Provision.

Substantially all of HUD's arguments regarding the 2008 Reauthorization Act center on whether the amendments to NAHASDA's formula allocation provision constitute a substantive change, or simply a "clarification," of the pre-amendment law. HUD argues that Congress merely clarified the meaning of the pre-amendment law by its substantial adoption of § 1000.318(a) in the 2008 Reauthorization Act. This argument is belied by the text and context of

[14] While Plaintiffs did not so speculate in their Opening Brief, HUD does speculate in its Response that "the Tenth Circuit deemed the amended law unnecessary to its judgment because the new law does not controvert its construction of the old law." HUD Br. at 18. If the *Fort Peck II* Court had determined that the 2008 Reauthorization Act "does not controvert its construction of the old law," it certainly could have said so. Ultimately, the Court chose to remain silent on the issue. Speculation on either side about why the *Fort Peck II* Court did not address the 2008 Reauthorization Act is unhelpful and unenlightening.

the 2008 Reauthorization Act. As shown in Plaintiff's Opening Brief, and *infra*, the substantive change of law is evidenced by: (1) the plain language of the amendment; (2) HUD's own congressional hearing testimony concerning the amendment; and (3) the 2008 Reauthorization Act's "civil action" provision which allowed actions to proceed under the prior statute, if they were timely filed. The 2008 Reauthorization Act clearly and substantively changed the pre-amendment law by categorically excluding a significant class of housing units from Plaintiff's FCAS. This change of law confirms that 24 C.F.R. § 1000.318(a) impermissibly violates the pre-amendment version of NAHASDA's formula allocation provision.

In arguing that the 2008 Reauthorization Act amendment merely clarified the law, HUD relies heavily on a 2007 Senate committee report which characterizes the amendment as a "[c]larification." HUD Br. at 20 (quoting S. Rep. No. 110-238, at 9 (2007)). However, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g., United States v. Vazquez-Rivera, supra,* 135 F.3d at 177; *United States v. Wright*, 625 F.3d 583, 600 (9th Cir. 2010); *Boddie v. Am. Broad. Companies, Inc.*, 881 F.2d 267, 269 (6th Cir. 1989) ("*Boddie II*"); *Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan.*, 128 F.3d 1431, 1435-36 (10th Cir. 1997); *Commissioner of Internal Revenue v. Callahan Realty Corp.*, 143 F.2d 214, 216 (2nd Cir. 1944). As the First Circuit stated in *Vazquez-Rivera*:

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

Vazquez-Rivera, 135 F.3d at 177. Characterizing the 2008 Reauthorization Act amendment as a "clarification" is also the equivalent of painting black lines on the sides of a horse and calling it a

zebra. The so-called "clarification" is much more than "merely cosmetic," it is a substantive and categorical change in the housing units counted for the purposes of Plaintiffs' FCAS.

1. The Plain Language of the Amendment.

One need only compare the text of the amendment with the text of the original formula allocation provision to see the substantive change. Again, the pre-amendment version of the provision included "*[t]he number* of low-income housing dwelling units owned or operated *at the time* [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary" as a mandatory FCAS factor. 25 U.S.C. § 4152(b)(1) (emphasis added). There is no controversy that the original formula allocation provision included and "explicitly list[ed]…the number of 1997 dwelling units" as one of the FCAS factors. *Fort Peck II*, 367 Fed. Appx. at 890. However, through the 2008 Reauthorization Act, Congress materially altered the formula allocation provision so that housing units are only counted for FCAS purposes if they "are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided" and have not been "lost to the recipient by conveyance, demolition, or other means . . . ." P.L. 110-411, § 301. This is far more than a cosmetic clarification. This is an unconditional elimination of housing units from the FCAS count. Housing units which were included under the original formula allocation provision *must* now be excluded. This amendment is a substantive change of law with an enormous financial impact on Plaintiffs.

The Sixth Circuit found a substantive change of law under similar circumstances in *Boddie II*. The *Boddie II* case involved 1986 amendments to § 2511(2)(d) of the Omnibus Crime Control and Safe Streets Act ("Title III"). As the *Boddie II* Court explained, under the amendment, nonconsensual interception of a communication for a merely "injurious" purpose

was "no longer actionable" under Title III. 881 F.2d at 268. On appeal, the plaintiff, who originally filed the action under the pre-amendment version of § 2511(2)(d), argued that the district court improperly applied the amendment retroactively by denying her a jury trial on whether defendants acted with an "injurious" purpose. Defendants countered that the amendment to § 2511(2)(d) was a mere clarification of the pre-amendment law, and that thus, the district court simply and properly used the amendment as a guide in interpreting the prior law. The Sixth Circuit soundly rejected defendants' "clarification" argument:

> There is some support in the legislative history for the District Court's conclusion that the 1986 amendment was a mere clarification. The Senate report stated that numerous cases--including *Boddie I*--had "misconstrued" the term "other injurious purposes." S.Rep. No. 541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3571. However, a closer look at the substance and history of the 1986 amendment reveals that Congress did not clarify section 2511(2); rather, *Congress acted to eliminate one basis for an action under that section . . . .. [A]ny inference that the amendment merely clarified the "injurious purpose" language is negated by the fact that rather than defining or rephrasing the term, the amendment removed it altogether.*
>
> ***
>
> We conclude that the District Court erred in treating the amendment as a clarification of prior law.

Id. at 269 (emphasis added). Similarly, in the case at bar, after the Court, in *Fort Peck I*, held that § 1000.318(a) impermissibly conflicts with the pre-amendment version of the formula allocation provision, HUD maneuvered to secure an amendment of NAHASDA categorically eliminating a class of 1997 units from the FCAS count. In passing the 2008 Reauthorization Act, Congress did just that. By significantly narrowing the scope of the formula allocation provision, the 2008 Reauthorization Act amendment "removed" an entire class of housing units "altogether" from Plaintiffs' FCAS. The text and context of the amendment establish that it constitutes a substantive and meaningful change in the law.

2. HUD's Congressional Committee Hearing Testimony.

Moreover, it is important to re-emphasize that HUD itself, in developing and proposing the amendment, testified before congressional committees that the amendment "*would change"* the law by no longer "counting units . . . in the year after they are conveyed, demolished or disposed of." *See* O. Cabrera Statement at 2 (NRA "4"); R. Boyd Statement at 3 (NRA "5") (emphasis added). As Plaintiffs argue in the Opening Brief, because Congress enacted the very amendment developed and advocated by HUD, "it may be assumed that the intent voiced [in the committee hearing testimony] was adopted by the legislature." 2A Norman J. Singer, *Sutherland Statutory Construction*, § 48:10 (7th ed.)(emphasis added). Understandably, HUD now wishes to distance itself from the hearing testimony of its designated witnesses.

In its zeal to distance itself from its prior testimony, HUD misrepresents the case law. Specifically, HUD asserts that "the treatise that Plaintiffs quote relies on cases where witness testimony is negligible." HUD Br. at 22. As its lone example of a case involving "negligible" witness testimony, HUD cites *Bailey v. United States*, 52 Fed. Cl. 105, 110-11 (Fed. Cl. 2002). HUD points to *Bailey*, noting that the "court observed" that "'[w]ithout a doubt, hearing testimony is not the most persuasive evidence of congressional intent.'" *Id.* at 22. HUD's selective quotation of *Bailey* omits highly relevant and important context. Immediately following HUD's selected quotation, the *Bailey* Court goes on:

> *However*, courts have considered hearing statements in the course of statutory construction . . . . *When it appears from the timing of the amendment and the content of the textual addition that Congress was responding to an interested party's proposal, it is permissible to conclude that Congress shared the interested party's intent. S.E.C. v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935) (relying on hearing testimony to interpret subsequent bill amendment that reflected changes suggested by the witness); 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 48:10 (6th ed. 2000) ("[I]f the legislature adopts an amendment urged by a witness, it may be assumed that the intent voiced was adopted by the legislature."). Although the Supreme Court has cautioned against

> attributing to Congress "an official purpose based on the motives of a particular group that lobbied for or against a certain proposal," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), it has also accorded weight to the views of interested parties with a particular expertise in the subject matter at issue. *Chicago & Northwestern Ry. Co. v. United Transp. Union*, 402 U.S. 570, 576, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971) (according statements of labor and management representatives "great weight in the construction of the [Railway Labor] Act" because of their role in its enactment). In light of the [National Treasury Employees Union]'s congressionally-recognized role in developing federal-sector labor legislation,[] the hearing statements proposing an amendment to make the negotiated procedures the exclusive administrative procedures are entitled to consideration.

52 Fed. Cl. at 111 (emphasis added) (footnote omitted). *See also United States v. Am. Trucking Ass'ns.*, 310 U.S. 534, 548 (1940) ("[T]he Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."). Clearly, the *Bailey* Court found the hearing statements at issue there to be more than "negligible." In *Bailey*, representatives of the National Treasury Employees Union ("NTEU") testified before a House subcommittee urging that Congress amend the Whistleblowers Protection Act to clarify the remedies available under that Act. The *Bailey* Court considered the hearing testimony in rendering its decision due to NTEU's "congressionally-recognized role in developing federal-sector labor legislation . . . ."

Here, at least two HUD employees that testified--Orlando Cabrera, Assistant Secretary for Public and Indian Housing, and Roger Boyd, Deputy Assistant Secretary for Native American Programs--actually participated in the recapturing decision making and signed recapture determination letters. *See, e.g.*, Letter dated May 15, 2006 from Orlando Cabrera to The Honorable Richard Brannan, Chairman, Northern Arapaho Business Counsel, NAHA AR, NAHA0752, 53, attached as SRA "9"; Letter dated March 23, 2007 from Rodger J. Boyd to attorneys for Blackfeet Housing Authority, Blackfeet Housing Authority AR 657-58, attached hereto as SRA "10". HUD is more than just an "interested party." HUD is the agency charged

with the administration and implementation of NAHASDA. HUD obviously has significant experience in administering NAHASDA block grant funds. In addition, HUD's role in developing the amendment was paramount. HUD developed, drafted, proposed and advocated the exact amendment language which was ultimately enacted by Congress as part of the 2008 Reauthorization Act. In considering the "timing of the amendment and the content of the textual addition," there is no doubt that Congress was responding to HUD's proposal. HUD cannot run from its admission that the amendment "would change the way that housing units in management are counted for formula purposes" by not "counting units . . . in the year after they are conveyed, demolished or disposed of."[15]

HUD's argument that the "HUD witnesses (perhaps inartfully) spoke of a 'change' from the counting method imposed by *Fort Peck I* to one that reverted to the original rulemaking committee's regulations," only supports Plaintiffs' position. HUD Br. at 22.[16] HUD recognized that a substantive change in the statutory counting method was needed in order to comport with 24 C.F.R. § 1000.318(a). This is an admission that § 1000.318(a) violates the pre-amendment version of the formula allocation provision.

3. The 2008 Reauthorization Act's "Civil Action" Provision.

Lastly, the 2008 Reauthorization Act provides that the statutory changes to the formula allocation provision would "not apply to any claim arising from a formula current assisted stock

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[15] *See* Pl. Br. at 29, 34 and 35, n. 34.

[16] In its Response, HUD repeatedly emphasizes that 24 C.F.R. § 1000.318(a) resulted from negotiated rulemaking involving representatives of several Native American Tribes. However, the fact that the regulatory scheme was developed through negotiated rulemaking is irrelevant as a matter of law. *See, e.g.*, 5 U.S.C. § 570 (a rule developed through negotiated rulemaking shall not be "accorded any greater deference by a court than a rule which is the product of other rulemaking procedures."); *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dept. of Hous. & Urban Dev.*, 567 F.3d 1235, 1245-46 (10th Cir. 2009)("*Keetoowah*").

calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." P.L. 110-411, § 301(b)(1)(E). With this "civil action" provision, Congress expressly declined to apply the amendment retroactively to TDHEs that filed a timely civil action. If the amendment was nothing but a clarification of existing law, there would be no need for the provision permitting tribes to file suit under the pre-amendment formula allocation provision. If the amendment was just a distinction without a difference, there would be no use in drawing lines between the effect of the original statute and the amended statute. Courts do not presume that Congress would perform such "'a useless act.'" *United States v. Phommachanh,* 91 F.3d 1383, 1387 (10th Cir. 1996) (quoting 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.11 at 83 (5th ed. 1992)). The "civil action" provision is a congressional acknowledgment that the formula allocation provision has been materially changed by the amendment and does not apply retroactively.

HUD argues that the "more reasonable inference" about congressional intent to be drawn from the "civil action" provision is that: "Congress recognized it changed the text of the statute in order to clarify that the pre-existing law encompassed the Negotiated Rulemaking Committee's determination that conveyed and conveyance-eligible homeownership units do not count as FCAS." HUD Br. at 25. Other than rank speculation regarding Congress' purported concern about how courts would conduct the balancing set out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)("*Chevron*") after the amendment, HUD offers absolutely no support for its proposed "inference." HUD never explains why it was necessary for Congress to expressly draw such a stark distinction between the pre-amendment and post-amendment formula allocation provisions. HUD never explains why Congress bothered to

explicitly exempt a class of TDHEs from retroactive application of an amendment which it claims to have merely clarified the earlier statute. The only logical explanation is that Congress recognized, as HUD previously testified, that the amendment in fact materially changed the way housing units in management are counted for formula purposes.

In sum, the 2008 Reauthorization Act substantively changed the formula allocation provision. And this statutory change confirms that § 1000.318(a) violates the pre-amendment version of the formula allocation provision.[17]

C. HUD's Argument That The Pre-Amendment Version of the Formula

[17] HUD additionally argues that the 2008 Reauthorization Act is "virtually conclusive" evidence that 24 C.F.R. § 1000.318(a) implements congressional intent as expressed in the pre-amendment law, citing *Commodity Future Trading Com'n. v. Schor*, 478 U.S. 883 (1986), and *Bell v. New Jersey*, 461 U.S. 773 (1983). HUD Br. at 19-20. However, the *Schor* and *Bell* decisions are distinguishable and inapposite. In *Schor,* the relevant portions of the statutes at issue were re-enacted essentially without change. Here, as explained *supra*, the 2008 Reauthorization Act amendment fundamentally changed the pre-amendment formula allocation provision. In *Bell*, the Court found that the plain language and legislative history of the *original* statute at issue there recognized the right made explicit by the amendment. *Bell*, 461 U.S. at 783. By contrast, there is no plain language or legislative history connected with the pre-amendment formula allocation provision which supports the categorical elimination of 1997 housing units from Plaintiffs' FCAS. Additionally, the language of the original and the re-enacted statutes in both *Schor* and *Bell* was readily susceptible to the administrative interpretations of those statutes. Here, by contrast, the relevant statutory language of the pre-amendment version of the formula allocation provision spoke directly to the FCAS issue and is flatly inconsistent with § 1000.318(a). Moreover, unlike the cases at bar, neither *Schor* nor *Bell* involved congressional committee hearing testimony from agency representatives that the amendment would "change" the existing law.

In the cases at bar, HUD's interpretation of the pre-amendment version of the formula allocation provision has been irregular and inconsistent. For instance, in addition to the referenced committee hearing testimony, prior to the 2001 OIG audit, HUD did not calculate FCAS consistent with § 1000.318(a). *See, e.g.*, RA 1 at CNOK000179. Either implicitly, or explicitly, HUD has at various times acknowledged the conflict between the pre-amendment law and the regulation. Thus, while Congress substantially adopted § 1000.318(a) with the 2008 Reauthorization Act, Congress did not adopt any consistent interpretation expressed by HUD. On the contrary, Congress substantively changed the law consistent with HUD's committee hearing testimony. This is a significantly different scenario than *Schor* or *Bell*, where Congress clarified the law by truly ratifying consistent, long-held and reasonable agency interpretations. Also, it is noteworthy that the statutes at issue in *Schor* and *Bell* did not expressly authorize claimants to file suit against the agency under the pre-amendment version of the statutes.

Allocation Provision Unambiguously Required the FCAS Reductions Under 24 C.F.R. § 1000.318(a) Is Wrong.

In its Response, HUD spends four pages arguing that, irrespective of any analysis of the 2008 Reauthorization Act, the pre-amendment version of the formula allocation provision unambiguously "supports" the categorical elimination of housing units required by § 1000.318(a). HUD Br. at 11-15. In support of this argument, HUD asserts that the pre-amendment "statute's use of the phrase 'based on' indicates that the one factor identified in § 4152(b)(1), *i.e.*, the number of 1997 units, is only a starting point for the allocation formula, which may be affected by other 'factors.'" HUD Br. at 12. Several courts have held that while the words "based on" do not compel an agency to rest its decision "solely on" a specified factor, such language constrains the agency from "abandon[ing]" or "supplant[ing]" the specified factor. *Catawba County, N.C. v. E.P.A.*, 571 F.3d 20, 37 (D.C. Cir. 2009) (citing *Sierra Club v. EPA*, 356 F.3d 296, 306 (D.D.C. 2004)); *see also Environmental Defense v. E.P.A.*, 369 F.3d 193, 203-04 (2d Cir. 2004); *Nuclear Energy Inst., Inc. v. E.P.A.*, 373 F.3d 1251, 1270 (D.C. Cir. 2004). The regulation renders irrelevant the number of units owned or operated as of September 30, 1997 for the purposes of the formula. More precisely, the regulation categorically eliminates from FCAS units that the TDHE "no longer has the legal right to own, operate, or maintain . . ., whether such right is lost by conveyance, demolition, or otherwise . . . ." 24 C.F.R. § 1000.318. Under the regulation, the Secretary is denied any discretion to include units that were to be included under the statutory formula. Hence, the regulation replaces, *i.e.*, supplants, a statutory factor with something materially different. The words "based on"--as used in the formula allocation provision--do not grant HUD the authority to supplant a statutory factor in this manner. And this construction of law is only confirmed and strengthened by the text and context of the 2008 Reauthorization Act. If the pre-amendment formula allocation provision properly

granted HUD the authority to promulgate the regulation, the subsequent change of law would have been unnecessary.

Furthermore, courts have held that the phrase "based on" is ambiguous. *See, e.g., Sierra Club,* 356 F.3d at 306; *Environmental Defense,* 369 F.3d at 204; *Catawba County*, 571 F.3d at 37. To the extent such ambiguity exists, it should be resolved in Plaintiffs' favor under the Indian Canon of Construction. Under the Indian Canon of Construction, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians.").[18] The Canon further provides "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*¸ 276 F.3d 1186, 1194 (10th Cir. 2002) (citing *Bryan v. Itasca County, Minnesota,* 426 U.S. 373 (1976)). Additionally, the familiar "*Chevron* deference" is trumped by

[18] HUD argues that the Canon does not apply because "'the [competing] interests at stake both involve Native Americans.'" HUD Br. at 16 (quoting *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995)). Two circuits, including this one, have rejected that proposition in the context of this case. *Ramah Navaho Chapter v. Salazar*, 644 F.3d 1054, 1062, 1065, 1066 (10th Cir. 2011)(holding that Indian canons apply to Indian Self-Determination and Education Assistance Act such that, "if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way"); *accord Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Nevertheless, on balance, Plaintiffs' construction of the formula allocation provision benefits the tribes. As pointed out in Plaintiffs' Opening Brief, HUD estimated that, for FY 2006, had this court's ruling in *Fort Peck I* been applied nationally: (i) 60% of the benefitting tribes would have realized grant increases of over $100,000 in that year alone; while (ii) over two-thirds of the remaining tribes would have realized an annual loss of less than $50,000. *See* NRA "17." Any negative impact is now further attenuated by the fact that Plaintiffs are a subset of TDHEs who timely filed suit under the 2008 Reauthorization Act's "civil action" provision and because going forward, the 2008 Amendments change the way FCAS is counted. Therefore, the relief Plaintiffs request in these actions will not hurt absent tribes.

the Canon in this case. *See Ramah Navajo Chapter v. Lujan, supra*, 112 F.3d at 1462. While there may be questions as to what exactly "based on" means, it is clear what "based on" does *not* mean. It does not mean that HUD was authorized to supplant the first factor of the formula allocation provision by regulatory fiat. Indeed, whether the Canon is applied or not, this is an eminently reasonable and amply supported interpretation. And while HUD should not benefit from *Chevron* deference, even if *Chevron* balancing were applied in this case, HUD's interpretation would not prevail as the regulation is "arbitrary, capricious" and "manifestly contrary to the statute." *Chevron*.

Lastly, Plaintiffs' interpretation of the pre-amendment formula allocation provision and 24 C.F.R. § 1000.318 is consistent with NAHASDA's overall goals and purposes. Congress passed NAHASDA with the recognition 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 U.S.C. § 4101(4). Congress determined that "the need for affordable homes and healthy environments on Indian reservations [and] Indian communities is acute." *Id.* § 4101(6). Plaintiffs' interpretation is consistent with these goals and benefits the tribes by setting a fixed baseline for each tribe's housing inventory to be counted for formula purposes. Plaintiffs' interpretation treats all tribes equally, regardless of how the tribes' housing units are distributed between rental and homeownership and regardless of whether they were demolished and replaced or converted from Mutual Help to low rent. Additionally, contrary to HUD's interpretation, Plaintiffs' interpretation does not discourage tribes from developing new homeownership units to replace older ones that have been demolished or conveyed. Simply put, 24 C.F.R. § 1000.318 violates the pre-amendment version of NAHASDA's formula allocation provision.

V. HUD Violated The Pre 2008 Version of NAHASDA, 24 C.F.R. § 1000.318 and the APA By Excluding and Reducing Funding for Units That Were Not Actually Lost By Conveyance to a Third Party, Demolition or Otherwise.

HUD misconstrues Plaintiffs' argument regarding unlawfully excluding FCAS or recapturing funding for FCAS that have not actually been lost by conveyance, demolition or otherwise and argues that 24 C.F.R. § 1000.318(a)(1) and (2) properly reflect need and are not impermissibly vague. HUD is wrong.

Initially, HUD sets up a house of mirrors in an attempt to argue that §§ 1000.318(a)(1) and (2) reflect need and to detract from the *Keetoowah* decision which is squarely on point on this issue. HUD relies heavily on *Fort Peck II*, which addressed only the exclusion of units no longer owned or operated by a TDHE. Pl. Br. at 12. As previously pointed out, beyond any possible application to Ft. Peck Housing Authority, not only is *Ft. Peck II* dubious authority on any of these matters, but there is absolutely no basis for reading *Fort Peck II* as encompassing units that were still owned and operated by a TDHE at the time they were disqualified for funding--a *crucial* distinction in the context of these coordinated actions.

HUD's expansive interpretation of *Fort Peck II* to authorize the exclusion of units that a TDHE still owns and operates simply cannot be reconciled with the decision in *Keetoowah* which struck down a similar regulation that was not based on need. Nor should the court give *Fort Peck II* such an expansive reading because to do so would render Fort Peck II in direct conflict with *Keetoowah*. *Fort Peck II* did not address, either expressly or implicitly, whether these dwelling units, though still owned and operated by a TDHE, could lawfully be excluded from FCAS by HUD, or whether HUD could recapture funding for these units under § 1000.318. Instead, the court's decision upheld the regulation as one which validly excluded units which a

TDHE "no longer owned or operated". *Fort Peck II*, 367 Fed. Appx. at 885, 887, 891, and 892. Specifically, the court in *Fort Peck II* held that:

> A reduction equal to the number of dwelling units *no longer owned or operated* by a Tribal Housing Entity recognized the ongoing and evolving needs of Tribal Housing Entities. NAHASDA clearly required interplay between all three factors in the determination of a Tribal Housing Entity's need, including those HUD identified in the rulemaking process. *Section 1000.318*'s downward adjustment was an example of this interplay. It was not arbitrary or capricious.

367 Fed. Appx. at 892 (emphasis added).[19]

In this regard, it is significant that the plaintiff in *Fort Peck II* asked the Tenth Circuit panel to clarify its decision in its Petition for Rehearing as to whether the units that it still owned and operated were covered by or outside the scope of § 1000.318 (a). The *Fort Peck II* plaintiff sought this clarification in light of the fact that § 1000.318 does not explicitly address HUD's authority to remove such units from FCAS, and in light of the Tenth Circuit's published decision in *Keetoowah.* The clarification was sought because the Order and Judgment limited its characterization of § 1000.318 as excluding dwelling units no longer owned or operated by the *Fort Peck II* plaintiff.[20] The Petition for Rehearing was denied without opinion. Consequently, the Plaintiffs' claim that HUD may not lawfully exclude FCAS units they still own and operate

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[19] Such a characterization of § 1000.318(a) is consistent with the regulation's plain language. However, it is notable that § 1000.318 does not expressly authorize HUD to remove units from FCAS or recapture funds for units which a TDHE continues to own and operate, including mutual help units which have not been conveyed. Indeed, no regulation authorized recapture of FCAS funds until the promulgation of 24 CFR § 1000.319 in April, 2007. Even then, this regulation may only authorize recapture after compliance with the requirements of NAHASDA sections 4161(a) and 4165 and the Regulations promulgated thereunder.

[20] *See Fort Peck Housing Authority v. HUD*, Civil Action No. 05-cv-00018-RPM, Doc. Nos. 62, 64.

could not be foreclosed by the mandate in *Fort Peck II*.[21] The district court can and should determine whether or not HUD may, consistent with § 1000.318 and the Tenth Circuit's decision in *Keetoowah*, exclude units that the Plaintiffs continue to own and operate. *See Doran v. Petroleum Management Corp*., 576 F.2d 91, 93 (5th Cir. 1978) (holding that a circuit court's remand permitted any resolution not inconsistent with circuit court's opinion, and denial of rehearing without opinion was not a determination of an issue raised in rehearing petition; it merely relegated the initial decision of that issue to the trial court).[22]

Next, HUD argues that excluding units under § 1000.318(a) properly reflects need. HUD props up its position with the incredible assertion that: 1) since need must account for all Indian tribes and 2) because unlawfully excluding FCAS or recapturing funding for FCAS from one or more tribes leaves more funds for others then 3) the needs test is met. *See* HUD Br. at 29. As argued in Plaintiffs' Opening Brief, however, this *post hoc* rationalization was rejected in *Keetoowah*. As in *Keetoowah*, here HUD withdrew funds not because of a drop in needy

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[21] "The mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). The circuit court panel in *Fort Peck II* remanded the case to this court "for action consistent with this Order and Judgment." 367 Fed. Appx. at 892. This is considered to be a general remand. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 711 (10th Cir. 2004); *Republican Party of Minn. v. White*, 361 F.3d 1035, 1042-1043 (8th Cir. 2004), citing *Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998). "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993); *accord Copart, Inc. v. Admin. Review Bd.*, 495 F.3d 1197, 1201 (10th Cir. 2007); *Pittsburg County*, *supra*, 358 F.3d. at 711.

[22] For the same reason, the *Fort Peck* plaintiff submits that its claim, pled in the alternative in paragraph 2 of its Complaint, is not foreclosed by the law of the case, and that the District Court can and should determine whether or not HUD may, consistent with § 1000.318 and the Tenth Circuit's decision in *Keetoowah*, exclude units that the FPHA continued to own and operate. *See Copart*, 495 F.3d at 1201-1202 (holding that the law of the case doctrine did not preclude lower tribunal from awarding attorney fees where circuit court simply denied motion for attorney fees without explicitly addressing the merits of the claim). The other Plaintiffs in these consolidated cases are, of course, not in any way limited by the law of the case doctrine.

households but because of an arbitrary and vague "practicable" or "actively enforce[ing] strict compliance" standard. 567 F. 3d. at 1240. Extending HUD's argument (and further evidencing the fact that § 1000.318 lacks discernable standards) excluding units or recapturing funds from tribes with the letter "g" in their name would relate to "need" as all other tribes without the "g" would benefit from such an exclusion. Making funding contingent on whether tribes have court jurisdiction over an area (*Keetoowah,* 567 F.3d at 1237), whether tribes have a "g" in their name, or whether tribes "actively enforce strict compliance" with terms of the MHOA or convey those units "as soon as practicable" does not relate to a tribes' need for housing. Plaintiffs are not aware, and HUD has not cited, any case standing for the proposition that an administrative agency may ignore Congress' mandate. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) ("[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law . . . ."); *Levine v. Apker*, 455 F.3d 71, 85 (2d Cir. 2006) ("Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions. And, an agency may not promulgate categorical rules that do not take account of the categories that are made significant by Congress."). Here, that delegation is clear: 25 U.S.C. § 1452(b) unambiguously states that the amount of IHBG funding must be based on housing need. *Keetoowah,* 567 F.3d at 1240, 1241. HUD's ends cannot justify its means--exclusion under §§ 1000.318(a)(1) and (2) of units still owned or operated by tribes is unrelated to need and is unlawful under NAHASDA. *Id*.

HUD contends that the Negotiated Rulemaking Committee determined that the elimination of conveyance eligible FCAS units reflected need when § 1000.318(a) was promulgated. HUD Br. at 27. Nothing in the administrative record supports such an assertion.

The Negotiated Rulemaking Committee made no finding that the requirements laid out in subsections (1) and (2) were reflective of housing need. In fact, the Record shows that these subsections were added at the last minute, in response to a comment that was not reflective of need. *See* 63 Fed. Reg. 12343 (March 12, 1998), attached as SNRA "1". Moreover, the Negotiated Rulemaking Committee also approved the regulation struck down in *Keetoowah*, and yet this did not deter the court from finding that the regulation did not reflect housing need. Nor should it; the law is clear that a regulation promulgated pursuant to negotiated rulemaking has no special force. 5 U.S.C. § 570.

Nor should the court give any weight to the fact that Congress did not address § 4152(b)(1) in its previous eight amendments of NAHASDA, with the exception of the one time that Congress actually amended § 4152(b)(1), in 2008. The fact that Congress did not address the flaws in § 1000.318 in amendments previous to the 2008 Reauthorization Act is irrelevant because Congress was not aware of the issue until HUD called it to their attention after this Court's decision in *Fort Peck I*. HUD's reliance on *Schor*, 478 U.S. at 846 is misplaced. Congress' failure to revise a statute in response to an Agency interpretation, unaccompanied by any evidence of congressional awareness of the interpretation, is not persuasive evidence. *Catron County Bd. of Comm'rs. v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996). Something more than passivity is required. *Id*., citing *Schor*, 478 U.S. at 846. Moreover, the congressional acquiescence theory applies only where Congress has revisited the language subject to the administrative interpretation. *Catron County*, 75 F.3d at 1438 (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994)). The only amendment to the statute that is relevant to this issue is the 2008 amendment, whereby subsection (b)(1) was rewritten to accommodate most of § 1000.318. As shown previously, the

fact that Congress saw the need to rewrite the statute to accommodate the flawed regulation is strong evidence that the regulation could not stand without the amendment. *Callahan Realty*, 143 F.2d at 216.

VI. Section 1000.318 is Impermissibly Vague.

HUD argues that §§ 1000.318(a)(1) and (2) are not impermissibly vague, citing *PDK Laboratories, Inc. v. United States Drug Enforcement Admin.*, 438 F.3d 1184 (D.C. Cir. 2006) for the proposition that an agency is not required to define general terms in a regulation. HUD Br. at 30. *PDK Laboratories, Inc.*, however, is inapplicable. That case involved the Drug Enforcement Agency's application of "an all-things-considered standard to implement a statute that confers broad discretionary authority" in order to suspend the importation of chemicals used to make methamphetamine. 438 F.3d at 1195. Here, instead of harnessing quasi-criminal powers of law enforcement in an attempt to eradicate a "powerful and highly addictive synthetic stimulant", HUD is attempting to enforce conditions on the grant of federal monies under a contractual relationship with the Plaintiffs who in turn utilize those funds to provide housing for families in need. *Id.* at 1186. To carry out their mandate, Plaintiffs must "voluntarily and knowingly" accept the terms of the relationship, something they simply cannot do when those terms are vague and ambiguous. *See Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (analogizing the conditional receipt of federal funds to a contract and finding that just "as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power to legislate under the spending power… rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.' … Accordingly, if Congress intends to impose a condition of the grant of federal moneys, it must do so unambiguously.") (alterations/quotations omitted). Federal Agencies are bound by the same rule. *See Citizens Alert v. Leavitt*, 355 F. Supp. 2d 366, 370 (D.D.C. 2005).

Rather than merely claiming that §§ 1000.318(a)(1) and (2) are "unlawful for vagueness," HUD Br. at 31, Plaintiffs assert that HUD in this case is held to a higher standard. Here the federal government, acting through HUD, is not merely providing discretionary benefits to a class of people. Rather, it is acting pursuant to its long-recognized trust responsibility, described as a guardian-ward relationship, with Indian tribes. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974)(striking down the Secretary of Interior's *ad hoc* denial of benefits to Indians as "inconsistent with the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.") (quotations omitted). *See also Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982) ("the government has assumed almost a guardian-ward relationship with the Indians by its treaties with the various tribes and its assumption of control over their property. This suggests that the withdrawal of benefits from Indians merits special consideration."). These same trust principles are codified in NAHASDA, 25 U.S.C. §§ 4101(2)-(4). In promulgating §§ 1000.318(a)(1) and (2), HUD must do more than merely provide guidance so that a reasonable person would know what the law prohibits or allows. HUD Br. at 31 (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975)). Pursuant to basic rules of contract law, within its unique trust relationship with Indian tribes, HUD must provide Plaintiffs with sufficient clear standards so that they are fully aware of the consequences of failing to comply with HUD's notion of what constitutes "conveyance as soon as practicable" or "strict compliance with" the MHOA. Furthermore, the regulations HUD promulgates under NAHASDA must be consistent with its obligation to respect tribal sovereignty and self-determination. Subsections 1000.318(a) (1)-(2) fail miserably in this regard. *See N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) ("Courts are consistently guided by the purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of

statutory interpretation allow. We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty . . . .)(quotations/citation omitted).[23]

In short, because the conditions attached to the receipt and use of federal funds under §§ 1000.318(a)(1) and (2) are not plainly stated, do not reflect Plaintiffs' housing need, and unreasonably intrude upon the sovereign right of the Plaintiffs to determine how to enforce their housing agreements without the ever present threat of a loss of funding, sub-sections (1) and (2) should be held unlawful.[24]

VII. Guidance 98-19 is an Invalid Substantive Rule That Was Not Promulgated Pursuant to Informal and Negotiated Rulemaking Procedures.

HUD characterizes Plaintiffs' arguments regarding Guidance 98-19 as procedural, and hence barred by the six-year statute of limitations, in an attempt to avoid the clear rule of law that, "[w]hen, as here, a party challenges application of a regulation, the statute of limitations begins to run at the completion of the administrative proceedings, not when the rule is promulgated." *Ayers v. Espy*, 873 F. Supp. 455, 463 (D. Colo. 1994). As the D.C. Circuit stated:

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[23] Similarly, the federal government is held to a higher standard when placing conditions on federal appropriations made to states. *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept those conditions "voluntarily and knowingly.") (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Comparable inter-sovereign concerns mandate the same result here.

[24] *PDK Laboratories, Inc.* is also inapt because it relied on *Chevron* in analyzing the statute at issue in that case. *PDK Laboratories Inc.*, 438 F.3d at 1189-90. Here, if the Court finds the Plaintiffs' interpretation of NAHASDA and §§ 1000.318(a)(1) and (2) reasonable, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes... The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar*, *supra*, 644 F.3d at 1062 (*quoting Ramah Navajo Chapter v. Lujan*, *supra*, 112 F.3d at 1462).

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

Functional Music, Inc. v. F.C.C., 274 F.2d 543, 546 (D.C. Cir. 1958). *See also Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("We hold that a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger.").

Moreover, HUD overlooks the fact that Plaintiffs brought this action pursuant to the authority granted in 25 U.S.C. § 4152(b)(1)(E), which clearly authorizes "any claim", for "any fiscal year through fiscal year 2008", as long as the claim is filed before expiration of the 45 day limitation period described in the statute. The Plaintiffs met that 45 day limitation period in this case. Accordingly, the six-year statute of limitations is not applicable to this action and Plaintiffs are entitled to challenge the validity of Guidance 98-19 to the extent that it has been used to reduce their FCAS funding in "any fiscal year", including the year in which it was adopted. This is so regardless of whether the Plaintiffs' claims are characterized as procedural or substantive in nature.

In any event, the Plaintiffs' challenge to the Guidance cannot be characterized as merely procedural. Plaintiffs assert that Guidance 98-19 is a substantive rule with no statutory or regulatory basis that has "consistently been applied by HUD" to directly "deprive the Plaintiffs of FCAS funding for units it continued to own and operate and for units converted from Mutual Help to Low Rent after October 1, 1997." Pl. Br. at 51-58. Plaintiffs do more than raise a procedural challenge to the *adoption* of the Guidance but directly attack the *application* of an

unlawful substantive rule that HUD continues to rely upon to deprive Plaintiffs of funding. As such, Plaintiffs respectfully request that Guidance 98-19, as well as any action taken under it, be declared unlawful.[25]

Next, HUD claims that the question of whether Guidance 98-19 is unlawful is irrelevant as it "would not affect the Court's judgment on Plaintiffs' claims." HUD Br. at 51. This is simply not true. The rule to recover overpayment originally contained in the 1998 Guidance was not promulgated pursuant to required informal rulemaking and negotiated rulemaking procedures until 2007. *See* § 1000.319. The fact that prior to 2007 HUD recovered overpayments solely pursuant to Guidance 98-19 evidences unlawful rule making. The substantive rules enunciated in the Guidance and challenged herein which have not seen the light of day through notice and comment rulemaking are, like the predecessor to § 1000.319, unlawful rulemaking. HUD cannot evade required APA informal rule making and negotiated rule making procedures by slipping substantive rules into a Guidance bulletin. Accordingly, the Guidance, and any action thereunder, should be invalidated. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *NRDC v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011). Mindful of HUD's trust responsibility as stated in *Morton v. Ruiz*, *supra*, and what is at stake in this case, the Tenth Circuits analysis in *Vigil v. Andrus*, *supra*, is particularly pertinent here:

[25] HUD admits that it will not be prejudiced by the relation back to the original complaint of Plaintiffs' challenge to Guidance 98-19 pursuant to Fed.R.Civ.P. 15(c) by characterizing that challenge as "merely duplicat[ive]" of Plaintiffs' other arguments. HUD Br. at 51. In fact, Plaintiffs' challenge to Guidance 98-19 does not merely duplicate arguments made elsewhere but rather is an alternative, stand-alone argument.

> *Ruiz* specifically focused on the BIA's duty to be fair in informing the Indians of changes in eligibility requirements for general assistance benefits, but the case may be read more broadly to require the BIA to follow rulemaking procedures whenever it cuts back congressionally created and funded programs for Indians. Ruiz states: "This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the government legislation, … but also to employ procedures that conform to the law…. No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
>
> "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.". [Ruiz] later states: "It is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished *ad hoc* determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'"

667 F.2d. at 936-37, quoting *Ruiz*, 415 U.S. at 232, 236

VIII. HUD Shirks Its Trust Responsibility.

A trust responsibility exists under NAHASDA which requires HUD to administer NAHASDA grant funds in a manner that is consistent with the federal government's responsibility as trustee of the Tribes. *See* 25 U.S.C. §§ 4101(1), (2), (3), (4), (5), (6) and (7); Pl. Br. at 60, *et seq*. Where this trust obligation is implicated, the United States and its agencies have fiduciary responsibilities. *See, e.g., U.S. v. Mitchell*, 463 U.S. 206, 225 (1983)("*Mitchell II*"). Here, the Government's conduct must "be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The trust responsibility constrains any discretion that HUD may otherwise enjoy in administering NAHASDA, and creates for HUD a fiduciary duty to each Plaintiff Tribe. Plaintiffs aver that HUD breached these trust duties by unlawfully recapturing and withholding grant funds the Plaintiff Tribes were

entitled to under NAHASDA. HUD denies that NAHASDA incorporates this trust obligation, or that HUD should be held to the exacting standard that attaches to the trust obligation. HUD Br. at 52, *et seq*. HUD's theory that NAHASDA funds are "gratuitously" provided and that NAHASDA funds are therefore not a "trust corpus" is yet another example of HUD's overbroad notion of its authority.

The U.S. Court of Federal Claims recently considered an analogous argument from HUD in *Lummi Tribe v. United States*, 2011 U.S. Claims LEXIS 1664 (Fed. Cl. Aug. 4, 2011) ("*Lummi*"). In *Lummi*, HUD asked the court to dismiss the Tribes' claims for money damages arising under NAHASDA arguing NAHASDA is not a "money-mandating" statute. The court rejected HUD's argument expressly holding that NAHASDA is a "money-mandating" statute:

> In plaintiffs' view, NAHASDA is money mandating because it leaves no room for HUD to exercise discretion in making grants. This court agrees. "In general, a statute will be deemed to be a money-mandating source of law if it compels the government to make a payment to an identified party or group." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (citing *Eastport*, 372 F.2d at 1009 ("Under *Section 1491* what one must always ask is whether the constitutional clause or the legislation which the claimant cites can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.")); see also *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (observing that "where the statutory text leaves the government no discretion over payment of claimed funds[,]" Congress has provided a money-mandating source for jurisdiction in this court); *Gray v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989) (characterizing a statute as money mandating for the purposes of Tucker Act jurisdiction where the Secretary had no discretion to prevent a qualified applicant from participating in the statutory program).
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> As indicated above, NAHASDA provides that the Secretary "*shall* . . . make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. *Eastport*, 372 F.2d at 1009.

2011 U.S. Claims LEXIS 1664 at 27-28. The *Lummi* court's decision on this point is directly contrary to HUD's argument that NAHASDA funds are gratuitously provided.

HUD cites *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) as authority for the proposition that HUD has no trust responsibilities arising under NAHASDA. This argument mischaracterizes the ruling in *Marceau*, where the claims presented against HUD were dissimilar from the case at bar. In *Marceau*, the claimants sought to hold HUD liable for construction methods that resulted in black mold problems. The Court concluded that HUD has no trust responsibility in these circumstances because the "federal government did not build, manage, or maintain the housing." *Id*. at 928. Unlike *Marceau*, the claims at issue in this case arise from HUD's conduct in recapturing or withholding grant money, not an allegation that HUD allowed grant money to be used improvidently. HUD acknowledges this crucial distinction in its Response: "the grant, once made, is subject to tribal control." HUD Br. at 56. Here, HUD tacitly admits that the opposite is also true: that the grant, prior to being made, is subject to HUD's control, and therefore within the trust responsibility. More broadly, HUD's contention that it lacks a sufficient quantum of control for the trust responsibility to attach is fraught with contradiction. This argument cannot be squared with HUD's other argument: that HUD has "inherent power" to recapture NAHASDA funds by any means it deems necessary.

The fact that NAHASDA is a money-mandating statute which gives rise to the trust obligation also serves to clarify that the familiar Indian law canons of construction are applicable to Plaintiffs' claims. While interpreting statutes, these canons provide that statutes are to be construed liberally in favor of Indian tribes, and that ambiguities are to be resolved in favor of the Indians. *See Minnesota v. Mille Lacs Band*, 526 U.S. 172, 200 (1999). Therefore, to the

extent that the Court finds portions of NAHASDA or associated regulations ambiguous, those ambiguities should be construed in favor of the Tribes.

HUD makes much of the fact that the NAHASDA funding formula presents "a zero-sum game" where, if one Tribe receives more, the others receive less. *See*, *e.g.*, HUD Br. at 1. HUD contends that because of this "zero sum" circumstance, the Court should suspend the application of the canons of construction and deny the Plaintiffs relief. HUD's argument suffers from the fallacy of circular reasoning. HUD begins from the premise that HUD's administration of the formula comports perfectly with what Congress intended, then cautions that any change in the way the formula is administered would damage those Tribes who have benefitted from HUD's approach. This logic is flawed. The 2008 amendments to NAHASDA alleviated concern about effects on future funding. The claims at bar arise under the previous statute and therefore cannot prospectively affect the funding of non-party tribes under the current statute.

Furthermore, HUD misconstrues the economic reality of this "zero sum" circumstance. If the Plaintiffs in this case are correct that HUD's implementation of the formula has unlawfully deprived the Plaintiffs of funding that is mandated by NAHASDA, it necessarily follows that certain non-party Tribes enjoyed a windfall of excess NAHASDA funding (prior to 2008). If this is the case, will HUD attempt to recapture this windfall? Evidently not. *See* HUD Br. at 63 (where funds held by an agency have been distributed, "the party claiming that it was entitled to those funds cannot get the money back, even if the claim of entitlement is valid, because the Court cannot recover the distributed funds") ("request for relief" is "moot" where funds were distributed "by HUD to eligible tribes as part of its regular funding process"). Here, the truly arbitrary nature of HUD's approach to recapture is revealed: HUD contends that recapture (from the Plaintiffs) "implements the intent of Congress as manifested by Section 301" (HUD Br. at

45); but elsewhere claims that if the Plaintiffs are correct, there is no remedy because HUD "cannot get the money back" from the Tribes that got too much. HUD Br. at 63.

While it may be true that the canons of construction do not require HUD to "rob Peter to pay Paul," this homily misperceives the nature of the claims at bar, and miscasts the Plaintiff Tribes as Paul. The Plaintiff Tribes bore the brunt of HUD's attempts at recapture and are therefore akin to Peter. Ultimately, as the Tribes' trustee, HUD should remain accountable to any Tribe that was damaged by unlawful conduct by HUD in administering funding under NAHASDA, a money-mandating statute. *See Mitchell II*, 463 U.S. at 227.

IX. The Six Year Statute of Limitations is Inapplicable to Plaintiffs' Claims, or, in the Alternative, Statute of Limitations Issues Should Be Determined at the "Counting" Phase on a Case-by-Case Basis.

HUD argues that "many of Plaintiffs' claims regarding specific overpayments" are barred by the six-year statute of limitations applicable to APA actions. HUD Br. at 58. This argument is presented in the face of the language of the "civil action" provision of the 2008 Reauthorization Act which provides that "[the 2008 amendments] shall not apply to *any claim* arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for *any fiscal year* through fiscal year 2008 *if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008.*" 25 U.S.C. § 4152 (b)(1)(E) (emphasis added). By its express terms, Congress has authorized these actions as long as the 45 day limitation period is met. *Cf. Otoe and Missouria Tribe of Indians v. U. S.,* 131 Ct.Cl. 593 (1955) (finding that the Indian Claims Commission Act, 25 U.S.C. § 70, was an exercise of Congress' political function in the "waive[er of] the defenses of the statute of limitations and laches" in suits brought by Indian tribes against the United States).

Accounting for the broad scope of the language enacted by Congress encompassing "any claim", for "any fiscal year" (25 U.S.C. § 4152 (b)(1)(E)), and comporting with the longstanding

canon of statutory interpretation that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), it is clear that Congress has allowed the Plaintiffs to file claims arising from FCAS calculations or counts as far back as fiscal year 1998. This constitutes a limited abrogation of the usual six-year limitations period for those Plaintiffs who filed within the applicable 45-day time limit.[26]

In the alternative, even if the Court finds that the six-year limitations period applies, the Court should refrain from deciding whether any claims are barred until the "counting" phase of the cases-at-bar. The determination of when the statute of limitations begins to run is a fact-specific inquiry. *See, e.g., Horn v. A.O. Smith Corp.,* 50 F.3d 1365, 1370 (7th Cir.1995); *United States v. Premises Known as 318 South Third Street*, 988 F.2d 822, 826 (8th Cir.1993).

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[26] This view is well accepted. In an analogous setting, the court in *Felter v. Salazar*, 679 F. Supp. 2d 1 (D.D.C. 2010) wrote:

> Of great importance here is that P.L. 108-108 applies "to any claim in litigation pending on the date of the enactment of this Act." Plaintiffs filed their claim in 2002. When Congress enacted P.L. 108-108 in 2003, the plaintiffs' claim was pending in litigation. Therefore, the statute of limitations "shall not commence to run" on the claim until the plaintiffs have been furnished with an accounting. Even though the language does not contain an explicit directive to revive stale claims, it is identical to the language that the Supreme Court hypothesized would indicate an express command for retroactive application in *Martin* [*Martin v. Hadix,* 527 U.S. 343, 354, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999)] and *Landgraf* [*Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)]. Whether the statutory language applies to stale claims for which no suit was pending when P.L. 108-108 was enacted is an issue that need not be reached here, but Congress has left no ambiguity that the provision applies retroactively with respect to claims pending in litigation when P.L. 108-108 was enacted. *See United States v. Zacks*, 375 U.S. 59, 65-67, 84 S.Ct. 178, 11 L.Ed.2d 128 (1963) (holding that Congress retroactively reopens claims otherwise barred by the statute of limitations when it creates a "grace period" during which the claims can be brought).

679 F. Supp. 2d at 7.

Invariably, once the cases-at-bar move to the individualized "counting" phase, each Plaintiff's specific case will involve unique facts that could impact the Court's limitations determination. As HUD acknowledges in its Response, "[t]o determine when a cause of action under the APA accrues, the Court must determine when the agency action at issue became final." HUD Br. at 58 (citing *Preminger v. Sec. of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir. 2007) and *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 35 (1st Cir. 1998)).

The determination of when particular final agency actions occurred with respect to each Plaintiffs' FCAS is inherently case-specific. For instance, on October 17, 2008, Plaintiff Housing Authority of the Choctaw Nation of Oklahoma ("HACN") submitted a letter requesting that HUD: (a) "reconsider" an earlier denial of HACN's challenge to HUD's FCAS determination; and (b) "take immediate administrative action to re-determine the correct allocation for the Indian Block Grant for the *years 1997 through 2008* and the amount of the deficiency be included in [the] Choctaw Nation and HACN fiscal year 2009 Indian Housing Block Grant." *See* Choctaw Nation AR, Vol. III, Tab 94 (emphasis added) (attached hereto as SRA "11"). Under 24 C.F.R. § 1000.366(e)(3), HUD was required to either affirm or reverse its earlier decision in writing within twenty (20) calendar days from receipt of the request for reconsideration. HUD's failure to timely act on the reconsideration request constitutes a *de facto* final agency action. Nevertheless, on December 3, 2008, over twenty (20) days after receipt of the request for reconsideration, HUD issued a formal written denial of HACN's reconsideration request, noting that its decision was "the Agency's *final action* on this issue…." *Id.* at Tab 95 (emphasis added)(attached hereto as SRA "12"). Therefore, it would seem that HUD issued a final agency action with respect to many, if not all, of HACN's claims well within the limitations period. Similarly, for each Plaintiff and each of their claims a detailed analysis will be required.

In an effort to avoid--and perhaps prejudice--such an inquiry, HUD seeks a blanket ruling that the statute of limitations "bars claims regarding decisions to recover made more than six years before a complaint was filed…." HUD Br. at 60. Such a blanket ruling at this stage would be inappropriate and unhelpful. It will amount to little more than an advisory opinion devoid of the essential factual context on which any decision barring claims on the basis of a statute of limitation must rest. The question of when final agency action occurred, and thus, when the statute of limitations began to run, as to each Plaintiff's individual claims, must be made on a case-by-case, claim-by-claim basis informed by specific applicable facts. Such a decision is appropriately made at the individualized "counting" phase, rather than as a broad legal ruling of general application.

X. The Court Has Authority to Provide a Panoply of Remedies.

HUD's discussion of the remedies that this Court may provide is correct in certain respects, but largely incomplete.

A. HUD concedes that Plaintiffs' claims can be funded with monies set aside by stipulation or preliminary injunction.

At page 63, n. 15 of HUD's Response, HUD concedes that funds set aside by stipulation or preliminary injunction are available to fund Plaintiffs' claims. Plaintiffs agree with HUD on this point.

B. The Court has authority to declare HUD's conduct in seeking recapture to be unlawful, and enjoin such unlawful conduct prospectively.

Contrary to HUD's assertion, the APA's waiver of sovereign immunity is implicated in this lawsuit. The APA provides that, in most circumstances, "[a]n action in a court of the United States seeking relief other than money damages ... shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. The determination of whether an action seeks relief "other than money damages," thereby implicating waiver under the

APA, encompasses two distinct inquiries: "1) Is the claim for *monetary* relief?; 2) Is the claim for *damages*?" *Normandy Apartments, Ltd. v. U.S. Dept. of Hous. & Urban Dev.*, 554 F.3d 1290, 1296 (10th Cir. 2009) (emphasis in original) ("*Normandy Apartments, Ltd.*")

Normandy Apartments, Ltd. addressed allegations that "HUD had violated its regulations and breached its contractual obligations by the manner in which it terminated its payments" to plaintiff Normandy under the Section 8 housing program. *Id.* at 1293. The court examined the complaint (which "sought a preliminary and permanent injunction preventing HUD from following through on its decision to terminate assistance payments") and held that the waiver was implicated and suit in the District Court was appropriate. *Id.* at 1294.

To determine whether the claim was for "monetary relief," the court noted that the Tucker Act provides exclusive jurisdiction in the Court of Claims for monetary claims against the United States in excess of $10,000. *Id.* at 1296. Whether a claim seeks monetary relief vesting exclusive jurisdiction in the Court of Claims, however, requires determining the "prime objective" or "essential purpose" of a suit. *Id.* To determine whether the prime objective of a suit is to obtain monetary relief, the Tenth Circuit has "typically found dispositive that the action lacks any significant prospective effect or considerable value apart from facilitating a monetary claim to compensate for *past* wrongdoing." *Id.* at 1297 (quotations omitted) (emphasis in original). Additionally, when a claim is "primarily designed not to enable a claim for past pecuniary harm, but to preserve an ongoing relationship. . . . we have found a claim's 'prime objective' to be to obtain equitable relief, not monetary relief." *Id.* Here, like the claim in *Normandy Apartments, Ltd.*, Plaintiffs' objective in this Court is not to seek money damages but

rather to obtain declaratory and injunctive relief. Pl. Br. at 63-65.[27] As was found "significant" by the Tenth Circuit Court of Appeals, Plaintiffs here seek "an Order declaring [the] regulations void and a mandatory injunction compelling Defendants to continue to provide funds" for Plaintiffs under NAHASDA. *Id.* at 1297 (quotations omitted) (alteration in original).[28]

Additionally, Plaintiffs do not seek "damages" and thus waiver of immunity under the APA is implicated and this Court has jurisdiction over Plaintiffs' claims. As stated in *Normandy Apartments, Ltd.*:

> In [*Bowen v. Massachusetts*, 487 U.S. 879], the Supreme Court explained that not all species of monetary relief constitute 'money damages' as defined by [5 U.S.C. § 702]. Specifically, it distinguished between 'money damages'-or compensatory relief to *substitute* for a suffered loss-and those specific remedies that have the effect of compelling monetary relief; the Court determined that only the former are exempted from the waiver of sovereign immunity contained in § 702 of the APA.

554 F.3d at 1298.

Here, Plaintiffs are not seeking "compensatory relief to substitute for a suffered loss" but rather are seeking "specific remedies that have the effect of compelling monetary relief . . . ." *Id.* Therefore, they are not seeking "damages" within the meaning of 5 U.S.C. § 702 and their claims are not exempted from the waiver of immunity contained in that section.

It is well-established that suits for prospective relief are allowed against federal officers acting in excess of their statutory authority. *See, e.g., Larson v. Domestic & Foreign Commerce*

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[27] The injunctive relief includes money escrowed by the Court and an injunction preventing HUD from following through on its threat to recapture funding in many cases. *See* Pl. Br. at 63-64 and n. 45.

[28] The fact that equitable relief in this Court may at some time in the future provide Plaintiffs with a claim for money damages against HUD does not alter this analysis. "[D]istrict court jurisdiction over a suit for nonmonetary relief is not foreclosed by the fact that it may later be the basis for an award of damages against the United States." *Id.* at 1298 (alteration in original) (quoting *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985)).

Corp., 337 U.S. 682 (1949). This rule is codified at 5 U.S.C. § 702 (claims "seeking relief other than money damages" permitted against U.S. or federal officer). Accordingly, declaratory and injunctive relief are available if the Court embraces many of the arguments presented in Plaintiffs' Opening Brief, including the arguments that: (a) HUD's conduct violated §§401 and 405 of NAHASDA; (b) HUD's conduct violated 24 C.F.R. § 1000.532; (c) HUD's application of 24 C.F.R. § 1000.318 was unlawful, arbitrary and capricious; (d) HUD's conduct violates §706 of the APA.[29] The specific contours of appropriate declaratory and injunctive relief are further outlined at page 62 of Plaintiffs' Opening Brief. Declaratory and injunctive relief on these points would serve to clarify the boundaries of HUD's authority to recapture, to stop recaptures that have been threatened but not completed, and to establish HUD's liability for withholding or recapturing funds in an unlawful manner. With this relief in place, Plaintiffs' right to funds set aside by stipulation or preliminary injunction can be established. Furthermore, as discussed below, such relief will expedite proceedings in the Court of Claims in instances where monetary relief may be available in that forum.

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[29] The remedy of an accounting is available as part the Court's authority to provide declaratory and injunctive relief. *See Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001)(("noting that (a) section 702 of the Administrative Procedure Act waives federal officials' sovereign immunity for actions 'seeking relief other than money damages' involving a federal official's action or failure to act[;] (b) [i]nsofar as the plaintiffs seek specific injunctive and declaratory relief-and, in particular, seek the accounting to which they are entitled-the government has waived its sovereign immunity under this provision [;] (c) plaintiffs['] rel[iance] upon common law trust principles in pursuit of their claim is immaterial, as here they seek specific relief other than money damages[;] and [d] federal courts have jurisdiction to hear such claims under the APA") (cited with approval in *Fletcher v. U.S.*, 160 Fed. Appx. 792, 796 (10th Cir. 2005)(unpublished); *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, 700 F.2d 1143, 1150 (7th Cir.1983) (typical examples of equitable relief include an accounting or an injunction.)

C. The Court has authority to transfer Plaintiffs' claims to the Court of Claims.

Finally, by HUD's own admission, this is not simply a contract action. HUD Br. at 31. Rather, Plaintiffs are asserting rights based on federal regulations. Therefore, the Indian Tucker Act (28 U.S.C. § 1505) does not divest this Court of jurisdiction. *See Normandy Apartments, Ltd.*, 554 F.3d at 1298-99 (examining in the context of Tucker Act mandatory jurisdiction whether a claim is founded on contract or on the federal Constitution, statutes, or regulations). If the Court nevertheless determines that jurisdiction over any portion of Plaintiffs' refund claims vests exclusively in the Court of Claims, Plaintiffs respectfully request that those claims be transferred to the Court of Claims pursuant to 28 U.S.C. § 1631 so that Plaintiffs can seek appropriate damages from the judgment fund. *See Ruiz v. Mukasey*, 552 F.3d 269, 273-74 (2d Cir. 2009) (addressing transfer of an APA action pursuant to 28 U.S.C. § 1631 and finding "a strong presumption in favor of judicial review . . . ."). *See also Lummi,* 2011 U.S. Claims LEXIS 1664, 27-29 (holding that the Court of Claims has Tucker Act jurisdiction under NAHASDA which is a money-mandating statute.)[30]

D. A remand for further agency action is unnecessary.

Generally, if the sole basis of the court's decision is that a hearing was improperly withheld, the doctrine of primary jurisdiction may counsel for a remand. If, however, the court finds substantive error in HUD's actions--*i.e.*, withholding FCAS funds for homes that were, in fact, still owned and operated by the recipient in the relevant fiscal year—then HUD has no

[30] Although the court in *Lummi* initially dismissed count 2 of the plaintiffs' complaint, alleging the violation of 25 U.S.C. §§ 4161 and 4165, *Lummi,* 2011 U.S. Claims LEXIS 1664, 44-46, it subsequently vacated the dismissal and granted plaintiffs' motion for leave to amend their Complaint to state a claim for the unlawful exaction or retention of funds. *See Lummi,* Case No. 1:08-cv-00848-JPW, Doc 41 (Sept. 29, 2011), Doc. 44 (Oct. 28, 2011); *see also Pennoni v. United States*, 79 Fed. Cl. 553, 561 (Fed. Cl. 2007).

discretion to deny funding to those homes, and reversal, rather than remand, would be the appropriate remedy. Pierce, *Administrative Law Treatise* (5th Ed.) at §18.1. This is especially so given that the parties have agreed, and this court had ordered, that the application of any ruling on the substance of Plaintiffs' claims would be adjudicated by the court not on remand, but in the "counting phase" of this litigation—a phase handled by the court, not the agency. HUD Br. at 32 (any "analyses of individual units and their histories" are issues "to be addressed in the subsequent 'counting phase' of the consolidated briefing in these cases."); May 27, 2011 Scheduling Order at 3.

Further, by virtue of 24 C.F.R. § 1000.540, the requirements of 24 C.F.R. Part 26 would be mandatory at any remand hearing. If the Court orders a remand, Plaintiffs request that the Court be as explicit as possible in detailing the procedural protections that attach to Plaintiffs' right to a hearing, and the limitations that exist on HUD's authority to recapture.

E. HUD's admonition about judicial overreaching is misplaced.

At page 42 of HUD's Response, HUD avers that the Judicial Branch cannot provide a remedy (other than remand) for the claims at issue because that task is "more properly accomplished by [the executive branch][HUD]." This argument misperceives the Court's authority and the limitations that exist on HUD's "inherent power." Section 702 of the APA provides that "Federal Court suits for injunctive and declaratory relief are permitted, either against federal officers or directly against the United States Government." Federal Jurisdiction, Erwin Chemerinsky (4th ed.) § 9.2, p. 616. The statute "allows the judiciary, assuming all other jurisdictional requirements are met, to halt illegal government conduct." *Id*. *Accord Chevron, supra*, 467 U.S. at 843 n. 9 ("Judiciary is final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Conclusion

In light of the foregoing and the arguments set forth in Plaintiff's Opening Brief, the Plaintiff Tribes ask the Court to issue the declaratory and injunctive relief requested in their Opening Brief and move these consolidated cases to the Counting Phase.

DATED: November 10, 2011

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSIONS

In accordance with the Court's General Order Regarding Electronic Submission of Documents, I certify the following:

1. No privacy redactions are required for, or have been made in, this document.
2. The digital submission of this document has been scanned for viruses with the most recent version of Malwarebytes' Anti-Malware, version 1.46, May 10, 2011, and, according to that program, this document is free of viruses.

By: /s/ *John Fredericks III*
John Fredericks III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on November 10, 2011, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail addresses:

timothy.jafek@usdoj.gov

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

None

s/ John Fredericks III
John Fredericks III