IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SHAUN DONOVAN, Secretary of Housing and Urban Development, and DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing,

Defendants.

DEFENDANTS' RESPONSE BRIEF

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Table of Contents

Introduction 1

Factual Background 3
A. Background Of NAHASDA 3
B. The Inspector General's Audit 7
C. The Fort Peck Litigation 8
D. The 2008 Amendment Of NAHASDA 10

Argument 11
1. 24 C.F.R. § 1000.318 does not violate NAHASDA. 11
   a. The Tenth Circuit upheld 24 C.F.R. § 1000.318. 11
   b. 24 C.F.R. § 1000.318(a) implements congressional intent. 11
   c. The 2008 amendment to NAHASDA confirms the validity of 24 C.F.R. § 1000.318. 17
   d. The validity of 24 C.F.R. § 1000.318 includes its provisions relating to conveyance-eligible units. 26
2. HUD's procedure for recovering past overfunding based on erroneous FCAS counts did not violate Plaintiffs' rights. 32
   a. FCAS-count errors do not involve compliance. 32
   b. Even if hearings were required, the procedures used by HUD provided the equivalent of a hearing. 39
   e. 24 C.F.R. § 1000.532 does not mandate a hearing to correct FCAS-count errors. 40
   f. HUD did not rely on 24 C.F.R. § 1000.336, which merely implements the statutory and common law authority for HUD to correct overallocations. 41
   g. If a hearing were required, the proper remedy under the APA is remand to the agency for required hearing. 41
3. HUD properly used the federal government's inherent power to recover overpayments in order to implement Congress's mandate to distribute funds according to the formula. 42
4. NAHASDA does not bar HUD from recovering and redistributing erroneously allocated funds though spent on affordable housing activities. 46
5. Guidance 98-19 does not provide a basis for invalidating HUD's actions. 49
   a. Plaintiffs' challenges to Guidance 98-19 are procedural and, therefore, barred by the statute of limitations. 50
   b. Even if Plaintiffs' challenges to Guidance 98-19 were not barred by the statute of limitations, the Court should consider the question of its validity immaterial to these cases. 51
7. HUD did not violate any trust responsibilities. 52
   a. There is no trust at issue in this case. 52
   b. NAHASDA does not create general trust responsibilities. 54
8. The statute of limitations bars many of Plaintiffs' claims regarding specific overpayments. 58

9. HUD cannot be compelled to refund block grant funds that it recovered and redistributed. 61
a. The additional relief Plaintiffs seek is for money damages and thus is not available in this APA action. 61
b. Plaintiffs' request for the funds not already set-aside is moot because the funds have already been distributed to all the tribes. 63

Conclusion 64

Table of Authorities

Cases

American Bus. Ass'n v. Slater, 231 F.3d 1 (D.C. Cir. 2000) 45
Amtec Corp. v. United States, 69 Fed. Cl. 79 (2005), *aff'd,* 239 Fed. Appx. 585 (Fed. Cir. 2007) 49
Argent Financial Group Inc. v. Fidelity and Deposit Co. of Maryland, No. 3:04CV02323, 2006 WL 1793609 (W.D. La. June 28, 2006) 31
Ayers v. Espy, 873 F.Supp. 455 (D. Colo. 1994) 50
Bailey v. United States, 52 Fed. Cl. 105 (Fed. Cl. 2002) 22
Bell v. New Jersey, 461 U.S. 773 (1983) 19
Bennett v. Spear, 520 U.S. 154 (1997) 59, 60
Bowen v. Massachusetts, 487 U.S. 879 (1988) 62
Cedars-Sinai Med. Center v. Shalala, 177 F.3d 1126 (9th Cir. 1999) 50
Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485 (10th Cir. 1997) 59, 60
Cherry v. U.S. Dept. of Agr., No. 00-1139 2001 WL 811737 (10th Cir. July 18, 2001) .. 60
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12, 15, 25, 27
City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994) 64
Comm'r of Internal Revenue v. Callahan Realty Corp., 143 F.2d 214 (2d Cir. 1944) 25
Commodity Future Trading Com'n v. Schor, 478 U.S. 883 (1986) 18, 27, 45
Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 62
Dewakuku v. Martinez, 271 F.3d 1031 (Fed. Cir. 2001) 5
DSE, Inc. v. United States, 169 F.3d 21 (D.C. Cir. 1999) 40
Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268 (Ct. Cl. 1959) 49
FDIC v. Barham, 794 F.Supp. 187 (W.D. La. 1991) 31
Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 42
Fort Peck Housing Auth. v. HUD, 435 F. Supp. 2d 1125, 1127-28 (D. Colo. 2006) ("*Fort Peck I*") ..... passim
Fort Peck Housing Auth. v. HUD, No. 05-cv-00018-RPM, 2006 WL 2192043 (Aug. 1, 2006) ..... passim
Fort Peck Housing Auth. v. HUD, Nos. 06-1425, 06-1447, 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*") 4
Goss v. Lopez, 419 U.S. 565 (1975) 31
Gould, Inc. v. Mitsui Min. & Smelting Co., 947 F.2d 218 (6th Cir. 1991) 13
Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 62
Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272 (10th Cir. 1991) 62
Hodges v. Public Bldg. Comm'n, No. 93-C-4328, 1994 U.S. Dist. LEXIS 18419 (D. Ill. Dec. 23, 1994) 31
International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Prot. Dist., 877 F2d 814 (10th Cir. 1989) 22
Lyng v. Payne, 476 U.S. 926 (1986) 31
Marceau v. Blackfeet Housing Authority, 540 F.3d 916 (9th Cir. 2008), ... 56, 57
McDaniel v. Chevron Corp., 203 F.3d 1099 (9th Cir. 2000) 13
Mistretta v. United States, 488 U.S. 361 (1989) 42
Nagahi v. INS, 219 F.3d 1166 (10th Cir. 2000) 50

NLRB v. Food Store Employees Union Local 347, 417 U.S. 1 (1974) 42
PDK Laboratories, Inc. v. United States Drug Enforcement Admin., 438 F.3d 1184 (D.C. Cir. 2006) 30
Preminger v. Sec. of Veterans Affairs, 498 F.3d 1265 (Fed. Cir.) (2007) 58
Public Serv. Co. of Colo. v. U.S., 816 F.2d 530 (10th Cir. 1987) 20
Quick Bear v. Leupp, 210 U.S. 50 (1908) 53
Rice v. Rehner, 463 U.S 713 (1983) 16
Rosillo-Puga v. Holder, 580 F.3d 1147 (10th Cir. 2009) 28
Sai Kwan Wong v. Doar, 571 F.3d 247 (2d Cir. 2009) 50
Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005) 54
Samish Indian Nation v. United States, 82 Fed. Cl. 54 (2008) 53, 54
Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 2003) 40
Suiter v. Mitchell Motor Coach Sales, 151 F.3d 1275 (10th Cir. 1998) 26
Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 42
Trafalgar Capital Assocs., Inc. v. Cuomo, 159 F.3d 21 (1st Cir. 1998) 59
U.S. v. Manning, 526 F.3d 611 (10th Cir. 2008) 19
United Keetoowah Band of Cherokee Indians v. HUD, 567 F.3d 1235 (10th Cir. 2009) 26, 29, 30
United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) 13
United States v. Demurgas, 656 F.Supp. 1537 (E.D.N.Y. 1987) 21
United States v. Lahey Clinic Hosp., Inc, 399 F.3d 1 (1st Cir. 2005) 43, 44
United States v. Larionoff, 431 U.S. 864 (1977) 48
United States v. Luster, 889 F.2d 1523 (6th Cir. 1989) 20
United States v. Mitchell, 445 U.S. 535 (1980) ("*Mitchell I*") 53, 55
United States v. Mitchell, 463 U.S. 206 (1983) ("*Mitchell II*") 52, 55, 57
United States v. Navajo Nation, 537 U.S. 488 (2003) 56, 57, 58
United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 62
United States v. Texas, 507 U.S. 529 (1993) 43
United States v. United Mine Workers of America, 330 U.S. 258 (1947) 43
United States v. White Mountain Apache, 537 U.S. 465 (2003) 54
United States v. Wurts, 303 U.S. 414 (1938) 35, 41, 42, 46
Utah v. Babbitt, 53 F.3d 1145 (10th Cir. 1995) 17
Wind River Min. Corp. v. U.S., 946 F.2d 710 (9th Cir. 1991) 50

Statutes

5 U.S.C. § 702 62
5 U.S.C. § 706 ..... 40, 52
25 U.S.C. § 4101 58
25 U.S.C. § 4111(a) 54
25 U.S.C. § 4116(b) 17, 27
25 U.S.C. § 4151 ..... 32, 35, 45
25 U.S.C. § 4152(a) 12, 32
25 U.S.C. § 4152(b) ..... passim
25 U.S.C. § 4161(a) ..... passim
25 U.S.C. § 4161(d) 42

25 U.S.C. § 4165 ..... 34, 46, 48
25 U.S.C. § 4165(c) (1998) 47
25 U.S.C. § 4165(d) 37, 40, 44
25 U.S.C. §4163(b) 33
42 U.S.C. § 1437 et seq. 12

Treatises

2B Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 49:11 (7th ed. 2008) 21

Regulations

24 C.F.R § 1000.320 14
24 C.F.R § 1000.325 14
24 C.F.R. § 1000.302 ..... 6, 30
24 C.F.R. § 1000.314 13
24 C.F.R. § 1000.318 7
24 C.F.R. § 1000.318(a) 2, 6, 30
24 C.F.R. § 1000.319(b) 45, 63
24 C.F.R. § 1000.336 41
24 C.F.R. § 1000.532 ..... 40, 46, 48
24 C.F.R. Part 905, Subpart E 5
24 C.F.R. pt. 905, Subpart. G 5

Legislative History

Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self-Determination Act: Hearing Before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. 110–297 (July 19, 2007) 20, 23
Housing Issues in Indian Country: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65 (March 22,2007) 19
Reauthorization of the Native American Housing Assistance and Self-Determination Act: Hearing before the H. Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services, 110th Cong., No. 110–34 (June 6, 2007) 23
S. Rep. No. 110-238 (2007) ..... passim

Federal Register

63 Fed. Reg. 12343 (Mar. 12, 1998) 14, 27
72 Fed. Reg. 20025 (Apr. 20, 2007) 45
72 Fed. Reg. 20025-26 (Apr. 20, 2007) 41

Public Laws

Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 376 (2004) 54
Energy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) 27
Homeownership Opportunities for Native Americans Act of 2004, Pub. L. No. 108-393, 118 Stat. 2246 (2004) 27
Indian Veterans Housing Opportunity Act of 2010, Pub. L. No. 111–269, 124 Stat. (2010) 27
Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996) 3

Native American Housing Assistance and Self-Determination Reauthorization Act of 2002, Pub. L. No. 107-292, 116 Stat. 2053 (2002) 27
Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008) 10, 18, 27
Native American Housing Enhancement Act of 2005, Pub. L. No. 109-136, 119 Stat. 2643 (2005) 27
Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2927 (2000).... 27, 47

Introduction

These coordinated cases concern HUD's allocation of annual block grants under the Native American Housing Assistance and Self-Determination Act ("NAHASDA").[1] Congress enacted NAHASDA to distribute annually appropriated funds among all eligible Indian tribes through block grants known as Indian Housing Block Grants ("IHBGs"). Beginning in fiscal year 1998, HUD has distributed funds to approximately 575 tribes, either directly to tribes or to their Tribally Designated Housing Entities ("TDHEs") on behalf of the tribe.

The amount of each recipient's annual block grant allocation must be determined according to a formula established by a Negotiated Rulemaking Committee of representatives from HUD and a geographically diverse cross-section of small, medium, and large Indian tribes. The disputes over grant amounts at issue in these coordinated cases center on whether or not certain lease-to-own housing units should be counted for allocation purposes as Formula Current Assisted Stock ("FCAS") after they are or should have been conveyed. Each annual appropriation for the block grants is distributed by first multiplying the count of FCAS by fixed dollar amounts according to the type of unit and local area costs. Whatever funds remain are then divided based on percentages assigned to statistical evidence of each tribe's need for new housing. Distribution of the block grant funds is a zero-sum game: where one tribe receives more, the others receive less. And allocations based on FCAS reduce the funds

[1] HUD is submitting the identical brief in each of the coordinated cases raising issues under NAHASDA. Likewise, HUD is submitting identical excerpts of the administrative record (referred to as "Defendants' Record Appendix," or "DRA") and non-record appendix ("DNRA") in each of the coordinated cases. The coordinated cases are: *Fort Peck Housing Auth.*, 05-cv-18-RPM; *Northern Arapaho Tribe*, 06-cv-1680-RPM; *Blackfeet Housing*, 07-cv-1343-RPM; *Tlingit-Haida Regional Housing Auth.*, 08-cv-451-RPM; *Navajo Housing Auth.*, 08-cv-826-RPM; *Yakama Nation Housing Auth.*, 08-cv-257-RPM; *Modoc Lassen Indian Housing Auth.*, 08-cv-2573-RPM; *Choctaw Nation of Oklahoma*, 08-cv-2577-RPM; and *Sicangu Wicoti Awanyakapi Corp.*, 08-cv-2584-RPM.

available to address the general need for housing for all tribes. The 25 Plaintiff-tribes in the coordinated cases claim HUD should have allocated more of the block grants to them based on homeownership units they had conveyed or ought to have conveyed, and that HUD failed to use the proper procedures in determining and correcting overallocations.

Plaintiffs argue that HUD's determinations of their FCAS counts were wrong because they were based on 24 C.F.R. § 1000.318(a), which they claim conflicts with 25 U.S.C. § 4152(b)(1). The Tenth Circuit already rejected that argument and its reasoning stands up to scrutiny, especially because Congress, when reauthorizing NAHASDA in 2008, essentially incorporated § 1000.318(a) directly into the statute. Thus, now there is no question that § 1000.318 reflects—and reflected—Congressional intent.

The procedures HUD uses in resolving allocation disputes do not violate Plaintiffs' statutory, regulatory, or other rights. Much of Plaintiffs' arguments to the contrary rest on the assumption that HUD's determination of allocation data, such as FCAS counts, is or should be an enforcement action for the recipient's substantial noncompliance with NAHASDA and thus, triggers statutory and regulatory requirements for an administrative hearing before an Administrative Law Judge. Plaintiffs are incorrect. HUD's determination and correction of FCAS-count errors is not an enforcement action for recipient noncompliance and, moreover, the statute stipulates that FCAS-count errors do not alone constitute a substantial noncompliance by a recipient. Furthermore, if these coordinated cases did raise issues of substantial noncompliance, then the court of appeals would have exclusive jurisdiction.

When HUD determined that a tribe received a greater annual block grant than allowed by the allocation formula, HUD took steps to recover those overpayments and reallocate them in accordance with the formula. In so doing, HUD used the federal government's inherent power to recover funds that were erroneously paid out in order properly to implement the allocation formula. NAHASDA does not bar the exercise of that inherent power and, in fact, supports it by mandating allocations according to the established formula.

None of Plaintiffs' other arguments have merit. They challenge a 1998 guidance letter from HUD on procedural grounds, but even if the challenge had merit (which it does not), it is barred by the statute of limitations. Plaintiffs also argue that HUD violated trust responsibilities, but there is no trust corpus at issue in is this case and, thus, no trust. Furthermore, NAHASDA does not create a relationship enforceable under common law trust principles.

There are other flaws to Plaintiffs' claims. For example, many of the specific claims regarding overpayments are barred by the statute of limitations. Finally, HUD cannot be compelled to refund block grant funds it recaptured from Plaintiffs because those funds, with a few exceptions, have already been redistributed among all eligible tribes.

Factual Background

A. Background Of NAHASDA

Congress enacted NAHASDA in 1996. *See* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996). NAHASDA terminated Indian housing assistance under the 1937 Housing Act

after September 30, 1997 and provided for annual block grants to Indian tribes in amounts determined by an allocation formula to be established by regulations issued according to a negotiated rulemaking procedure. *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1127-28 (D. Colo. 2006) ("*Fort Peck I*") (citing 25 U.S.C. §§ 4151, 4152, 4116), *rev'd* 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck II*"). Congress directed HUD to establish an allocation formula for this new system to reflect the needs of the Indian tribes in the distribution of appropriated funds through block grants. *Fort Peck II*, 367 Fed. Appx. at 885 (citing 25 U.S.C. § 4152(a)). Congress specified that the formula be based upon factors reflecting need, including: "(1) The number of low-income housing dwelling units owned. . . (2) The extent of poverty and economic measurable conditions as the Secretary and the Indian tribes may specify." *Id.* at 886 (citing 25 U.S.C. § 4152(b) (2000)). A committee composed of 48 representatives of Indian tribes and 10 HUD representatives developed the regulations implementing NAHASDA. *Id.* (citing 63 Fed. Reg. 12334). The regulations are found in Part 1000, Subpart D, of Title 24 of the Code of Federal Regulations. 24 C.F.R. §§ 1000.301 to 1000.340.

The allocation formula that HUD and the tribes negotiated has two components: (1) Formula Current Assisted Stock ("FCAS") and (2) need. *Fort Peck II*, 367 Fed. Appx. at 886 (citing 24 C.F.R. § 1000.310). The FCAS component is based upon a tribe's inventory of rental units and lease-to-own units (referred to as "Mutual Help" and "Turnkey III" units), as of September 30, 1997. *Id.* at 886 n. 6 (citing 24 C.F.R. §§ 1000.314 and 1000.318). In the Mutual Help program, an eligible Indian family could contribute land, work, cash, materials or equipment to the construction of a home under

a Mutual Help and Occupancy Agreement ("MHOA") with an Indian Housing Authority that was, in essence, a lease purchase agreement for a term of up to 25 years. *See* 24 C.F.R. Part 905, Subpart E (1995); *Dewakuku v. Martinez*, 271 F.3d 1031, 1034-35 (Fed. Cir. 2001). The "Turnkey III" program was an older lease-to-own program, intended to encourage home ownership, in which participating families paid for operating expenses, debt service, and maintenance. *See* 24 C.F.R. pt. 905, Subpart. G (1995).

The need component of the allocation formula is based upon seven criteria, including information derived from census data, such as the number of households in a tribe's population with income below a median income level, and the number of households living without kitchens and plumbing. *Fort Peck II*, 367 Fed. Appx. at 886 n. 7 (citing 24 C.F.R. § 1000.324). Each year the funds appropriated for IHBGs are allocated by first calculating the FCAS component and then calculating the remaining funds under the need component; thus, a greater number of FCAS units reduces the amount available for the need component. *Id*. at 887.

The focus of all of these disputes has been on the FCAS component of the formula. *Fort Peck I*, 435 F. Supp. 2d at 1129. At the center of all of these disputes is a regulation that identifies when individual lease-to-own units should no longer be counted as part of FCAS. Section 1000.318 poses the question, "When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?" It then answers the question by providing in relevant part:

> Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise provided that:

> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy Agreement] and
> (2) The Indian tribe . . . actively enforce[s] strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.318(a).

Whether a lease-to-own unit will no longer be counted for purposes of the allocation formula is significant because, if the lease-to-own unit is removed from the FCAS count, the tribe will receive a smaller FCAS-based portion of its housing grant from HUD, and the overall housing grant it receives (which includes both the FCAS and "need" components) may also be smaller. However, over time, as lease-to-own units are conveyed to eligible Indian families as intended by the Mutual Help and Turnkey III programs and no longer counted in FCAS, the funding previously used for funding FCAS becomes available for distribution under the need component. Because HUD is dividing up one pot of NAHASDA money for all tribes through the allocation formula, an Indian tribe that inflates FCAS will receive a higher percentage of that pot than it should; a tribe that improperly includes units in FCAS increases its own grant at the expense of the grants of other tribes.

Furthermore, the reduction in funding to all tribes under the need component because of overreporting of FCAS will increase over time because FCAS is adjusted for inflation. 24 C.F.R. § 1000.302 ("National per unit subsidy is the fiscal year 1996 per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation"); 24 C.F.R. § 1000.316 (each element of FCAS multiplied by "national per unit subsidy" or adjustment factor for inflation). Because FCAS is adjusted for inflation each year and the need component of the formula is considered only after FCAS is fully

funded, over time, FCAS funding will consume more and more of the funds allocated to meet tribal housing needs and deprive the tribes without FCAS of this crucial funding.

B. The Inspector General's Audit

In 2001, HUD's Office of Inspector General ("OIG") performed a nationwide audit of the NAHASDA program implementation. *Fort Peck I*, 435 F. Supp. 2d at 1130. The OIG conducted site visits of seventeen TDHEs. The OIG audit report concluded that IHBG funds had not been properly allocated in previous years because they were based on "housing units that do not qualify as FCAS." *Id*. The OIG criticized HUD for a failure to enforce compliance with 24 C.F.R. § 1000.318, stating: "Since Mutual Help and Turnkey III programs generally do not exceed 25 years, one can reasonably expect that some of these units should be paid-off, and the Housing Entities[2] would no longer have the legal right to own, operate, or maintain these units." *Id.* The OIG also recognized that "there is little incentive for Housing Entities to report a reduction in the FCAS because it reduces the grant received by the Housing Entity." Plaintiffs' Record Appendix ("RA") 1 at CNOK000179. The OIG recommended that HUD's Office of Native American Programs "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 I,* 435 F. Supp. 2d at 1130. Prior to the OIG Audit, HUD had sought to recover overpayments; after the OIG Audit, HUD continued to do so. RA 1 at CNOK000241 (table submitted by HUD in

[2] Under NAHASDA, IHBGs may be provided to a tribe or a TDHE. The OIG report uses the term "Housing Entity" to refer to both tribes and THDEs.

response to draft OIG Audit showing that HUD had recovered over $1.6 million in overpayments to date).

C. The Fort Peck Litigation

On January 6, 2005, the Fort Peck Housing Authority filed suit in this Court pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., seeking, among other things, a declaration that HUD had acted unlawfully, and injunctive relief prohibiting HUD from recovering previous grant amounts. *See Fort Peck I*, 435 F. Supp. 2d at 1131. The parties thereafter filed motions for judgment on the administrative record. The issue considered by the district court was "whether HUD's reduction of the FCAS component of the plaintiff's block grant funding for the years 1999-2002 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. at 1131. On May 25, 2006, the district court ruled that § 1000.318 "conflicts with the plain language of 25 U.S.C. § 4152(b)(1), mandating the inclusion of '[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.'" *Id.* at 1132. The court held the regulation to be invalid. *Id*. at 1135. In addition, the court ordered that all applicable units owned by Fort Peck as of September 30, 1997 be included for determining its allocation of the annual Congressional appropriation for Indian housing block grants and that HUD take such administrative action necessary to implement this ruling. *Id.*

HUD appealed the district court's decision in *Fort Peck I* to the Tenth Circuit. The Tenth Circuit reversed in an unpublished opinion issued on February 19, 2010. The Tenth Circuit first reversed the district court's holding that NAHASDA had created a

perpetual floor for funding at the level of 1997 housing units. 367 Fed. Appx. at 890-891. The court then considered whether HUD's regulation comported with NAHASDA's requirement that the formula relate to the need of the Indian housing entities. *Id*. at 891-892. The court noted that it reviewed agency rulemaking with great deference when a challenged decision involves matters within the agency's area of expertise and that the disbursement of funds for low-income housing assistance for Indian tribes was "certainly" within HUD's expertise. *Id*. at 892. The court held that HUD's regulations at 24 C.F.R. §§ 1000.316-1000.318 complied with the mandate set forth in NAHASDA. *Id*. HUD "clearly included the entire [25 U.S.C. § 4152](b)(1) factor as the starting point." *Id*. The court of appeals then observed that, from this starting point, HUD's regulations provided for a reduction equal to the number of housing units no longer owned or operated by tribal housing entities. *Id*. The court held that this reduction "recognized the ongoing and evolving needs of Tribal Housing Entities." *Id*. The court held that NAHASDA required an interplay of all three factors in section 4152(b)(1)-(3) in the determination of an entity's housing needs, "including those HUD identified in its rulemaking process." *Id*. The court concluded that "[s]ection 1000.318's downward adjustment was an example of this interplay. It was not arbitrary and capricious." *Id*. Finally, the court denied Fort Peck's cross-appeal for return of its overfunding repayments because HUD's actions did not violate NAHASDA. *Id*. at 892, n.15.

Upon remand, this Court coordinated the Fort Peck case with all of the other NAHASDA cases pending in the District of Colorado and ordered the parties to file amended or supplemental complaints. Plaintiffs in the coordinated cases then filed amended/supplemental complaints on September 7, 2010.

D. The 2008 Amendment Of NAHASDA

On October 14, 2008 (after the district court decision in *Fort Peck I* but before the Tenth Circuit decision in *Fort Peck II*), Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008) (the "Reauthorization Act "). Section 301(2) of the Reauthorization Act amended NAHASDA at 25 U.S.C. § 4152(b), essentially by adopting the provisions in HUD's regulation at 24 C.F.R. § 1000.318 that provide for units to become ineligible for inclusion in FCAS when the tribes convey the units or the units become conveyance-eligible. The statute now provides:

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

25 U.S.C. § 4152(b).

The Reauthorization Act also provided that these amendments did "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." Reauthorization Act, § 301(2); 25 U.S.C. § 4152(b)(1)(E). Thus, this provision required any Indian tribe wishing to pursue a claim based upon the previous version of the statute and 24 C.F.R. § 1000.318 to file suit by November 28, 2008. Plaintiffs filed the coordinated cases before that deadline.

Argument

1. 24 C.F.R. § 1000.318 does not violate NAHASDA.

a. The Tenth Circuit upheld 24 C.F.R. § 1000.318.

The Tenth Circuit upheld § 1000.318 in *Fort Peck II*. 367 Fed. Appx. 884. The Tenth Circuit held that "NAHASDA was unambiguous and the final regulations were properly promulgated within NAHASDA's mandate." *Id*. at 892. The Tenth Circuit therefore found that "HUD's actions did not violate Congress's mandate." *Id*. at 892, n. 15. The Tenth Circuit's decision is law of the case as to Fort Peck and persuasive authority as to all other Plaintiffs. 10th Cir. R. 32.1(A). This Court should apply *Fort Peck II* to this case for the reasons given by the Tenth Circuit in that opinion as well as the reasons given below.

b. 24 C.F.R. § 1000.318(a) implements congressional intent.

i. NAHASDA unambiguously intended the FCAS-count reductions required by 24 C.F.R. § 1000.318(a).

To determine whether 24 C.F.R. § 1000.318(a) is contrary to the pre-2008 version of NAHASDA § 302(b)(1), 25 U.S.C. § 4152(b)(1), the Court applies the test

found in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* explains that a court must first determine whether Congress has spoken directly to the precise question at issue. *Id.* at 843-44. If so, the regulation must implement that intent. *Id.* at 843. However, if Congress has not directly spoken to the precise question at issue, then the Court considers whether the agency's regulation is a "permissible construction" of the statute. *Id.* at 844.

Here, the plain meaning of the statutory text supports the regulation. Congress did not specify a precise formula, but rather provided guidance and directed HUD to establish the allocation formula with Indian tribes in a collaborative rulemaking process. 25 U.S.C. § 4152(a). Congress stipulated that the formula be "based on" three non-exclusive "factors" supplied by Congress: (1) the number of housing units that were assisted under contracts with HUD pursuant to the United States Housing Act of 1937 (42 U.S.C. § 1437 et seq.) at the time NAHASDA became effective; (2) the extent of poverty among, and number of, Indians in the relevant area; and (3) other "objectively measurable conditions" specified by the Secretary and Indian tribes. 25 U.S.C. § 4152(b). Thus, § 4152(b)(3) prohibits any exclusion from the allocation formula of objectively measurable conditions reflecting need that are specified by the Negotiated Rulemaking Committee.

The statute's use of the phase "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." The phrase "based on" has been examined frequently by federal courts, which have concluded that the ordinary meaning of "based upon" is "arising from." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th

Cir. 2000) ("In the context of statutory interpretation, courts have held that the plain meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'") (citations omitted); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991). Indeed, it is common when a formula or decision is "based on" a particular figure or test or data for adjustments to be made. The formula here was "based on" the number of homeownership units specified in § 4152(b)(1) in the same way. That number was a starting point for the FCAS portion of the formula and was subjected to a number of adjustments, including upward adjustments for units in the development pipeline when they come online. *See* 24 C.F.R. § 1000.314. None of those adjustments, including the challenged subtractions embodied in § 1000.318(a), negate the fact that the formula is "based on" the number required by § 4152(b)(1).

Because the number of homeownership units described in § 4152(b)(1) is the "foundation" or "starting point" from which the formula flows, the regulation complies with the statutory directive. *Fort Peck II*, 367 Fed. Appx. at 890 (HUD properly included the number of housing units receiving aid in 1997 ("1997 Units") "as the starting point for the allocation formula").

In addition, Congress directed that, in reflecting the need of Indian tribes, the formula include "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. § 4152(b)(3). Through the Negotiated Rulemaking Committee, whose members included representatives from HUD and geographically diverse small, medium, and large Indian tribes, HUD and the Indian

tribes specified various conditions of need for the formula that are not explicitly named in §§ 4152(b)(1) or (2). *See e.g.*, 24 C.F.R §§ 1000.320, 1000.325 (adjusting FCAS and need components based on local area costs), 1000.324(b) and (c) (households that are overcrowded or lack kitchen or plumbing, housing shortage). Similarly, the Committee specified a condition measuring the reduced need to operate homeownership units when they are conveyed or can and should be conveyed in accordance with a Mutual Help Occupancy Agreement ("MHOA"). *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule, 63 Fed. Reg. 12333, 12343 (Mar. 12, 1998) ("1998 Final Rule") (consensus agreement to current language of 1000.318(a)).

Having been specified by HUD and the Indian tribes in rulemaking, the statute requires that these other conditions be included as factors for the allocation formula. 25 U.S.C. § 4152(b)(3) ("The formula shall be based on factors . . . including" those specified by the Committee). In the legislative history to the 2008 amendment of NAHASDA, Congress reiterated the intent, implicit in § 4152(b)(3), that rulemaking by a committee of representative tribes is the best venue for establishing formula factors that accommodate the needs of the various Indian tribes. S. Rep. No. 110-238, at 4 (2007) (stating that the issue of how to accurately determine recipients' true housing need "is best left for resolution by the tribes and HUD through negotiated rulemaking.").

As the Tenth Circuit reasoned, § 1000.318(a) properly reflects the interplay of the three need factors identified by Congress in 25 U.S.C. § 4152(b)(1)-(3). *Fort Peck II*, 367 Fed. Appx. at 890-891. The formula satisfied Congress's first factor, § 4152(b)(1), when it used all 1997 Units as the starting point for the allocation formula. *Id.* at 891.

"However, this number was but one factor required to meet the statute's overarching mandate that the formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Id.* (quoting 25 U.S.C. § 4152(b)). And the statute prohibits Plaintiffs' construction because "[i]nterpreting § 4152(b)(1) to prohibit a reduction in the number of current units corresponding to a measurable reduction in responsibility by the Tribal Housing Entity for those units is inconsistent with the statute's plain language and is contrary to Congress's unambiguous intent that the funding formula relate to the needs of *all* tribal Housing Entities." *Ft. Peck II* at 891 (emphasis added). Accordingly, Congress did address the issue and mandated inclusion of the formula criteria specified in § 1000.318(a).

ii. Even if ambiguous, NAHASDA permits 24 C.F.R. § 1000.318(a).

Even if the statute were ambiguous, it nevertheless permits the construction given it by the Negotiated Rulemaking Committee because, for reasons discussed more fully in section 1(d)(i), below, the criteria specified by the Committee reflect need as required by § 4152(b). *Cf. Chevron*, 467 U.S. at 844. Great weight should be given to the Committee's determination because, not only is HUD expert in disbursing funds for low-income housing assistance for Indian tribes, *Fort Peck II*, 367 Fed. Appx. at 892, but it also represented a cross-section of Indian tribes, *see id.* at 886 (Negotiated Rulemaking Committee included 58 members, 48 of whom represented geographically small, medium and large Indian tribes) (citing 62 F.R. 35719); *see also* 63 F.R. 12333, 12334 (same). Moreover, NAHASDA implicitly placed great weight on the results of formula rulemaking by requiring a negotiated rulemaking committee representing Indian tribes, § 4116(b)(2)(B), and requiring the formula include factors identified by the

Committee in the rulemaking process, § 4152(b)(3); *see also* 367 Fed. Appx. at 892 (NAHASDA required interplay between factors including those identified in rulemaking).

For similar reasons, the Indian canon of construction does not support Plaintiffs' arguments. As an initial matter, the canon is unnecessary because § 1000.318(a) implements the unambiguous intent of Congress. As the Tenth Circuit stated in *Fort Peck II*: "Because NAHASDA was unambiguous and the final regulations were properly promulgated within NAHASDA's mandate, we need not address [the canon favoring Indians]." *Id. See also Rice v. Rehner*, 463 U.S 713, 732 (1983) (discussing the Indian canon, the Court explained that "we have consistently refused to apply such a canon of construction where application would be tantamount to a formalistic disregard of congressional intent.").

In addition, an interpretation of the statute that favors Plaintiffs will not favor "Indians"; it will just favor Plaintiffs. Plaintiffs argue, in passing, that the Indian canon should apply because if the *Fork Peck I* decision applied to all tribes, the impact of the increase of allocations to plaintiff "winners" would be spread among many "losers." P. Br. at 23-4 n. 26. The Court should ignore that argument because Plaintiffs' attempt to spin the numbers proves HUD's argument, that is, in this zero-sum game, Plaintiffs' gain must come from other tribes' losses and, therefore, the Indian canon of construction does not apply.

Plaintiffs are essentially disagreeing with the determination of a committee representing a cross-section of tribes as to the fairest way to address all Indian housing needs. The Indian canon does not apply in such cases because "the [competing] interests at stake both involve Native Americans." *Utah v. Babbitt*, 53 F.3d 1145, 1150

(10th Cir. 1995) (citation omitted). "[T]he canon cited does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Fort Peck II*, 367 Fed. Appx. at 892.

Finally, because Congress recognized that the circumstances of individual Indian tribes may create competing interests, the statute unambiguously required the funding formula to be developed by a rulemaking committee representing a cross-section of Indian tribes precisely to ensure that the circumstances of some tribes are not favored at the expense of other tribes. 25 U.S.C. § 4116(b)(2)(iii) (adapting negotiated rulemaking procedures "to ensure that the membership of the [rulemaking] committee include only representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes"). Here for example, a judgment favoring Plaintiffs because they have FCAS units would disfavor Indian tribes without FCAS—who are not represented in this litigation—whose allocation amount under the "need" prong of the formula would be proportionately reduced. The Indian canon of construction cannot supplant Congress's unambiguous intent that the formula be the result of a negotiated process including the interests of Indian tribes other than Plaintiffs.

c. The 2008 amendment to NAHASDA confirms the validity of 24 C.F.R. § 1000.318.

Plaintiffs raise three arguments for why the 2008 amendment to NAHASDA § 4152(b)(1) implies that its regulatory implementation violated the law prior to amendment: (1) the Tenth Circuit did not consider the 2008 amendment; (2) in hearing before Congress before the amendment, HUD witnesses stated the amendment would

change the way FCAS are counted; and (3) the amendment explicitly excluded its application from Plaintiffs.

i. The 2008 amendment does not alter the Tenth Circuit's analysis of the pre-amendment version of § 4152(b)(1).

Plaintiffs argue that the Tenth Circuit's conclusion in *Fort Peck II*—that 24 C.F.R. § 1000.318(a) did not violate NAHASDA as it existed through 2008—was wrong because it ignored the law in effect at the time of its judgment, specifically the 2008 amendment of § 4152(b)(1). P. Br. 28-31. However, while the Tenth Circuit's "Order and Judgment only consider[ed] the 2002 version of NAHASDA," the court was aware that NAHASDA had been amended. *Fort Peck II*, 367 Fed. Appx. at 885 n. 1. Plaintiffs' reasoning thus relies on the dubious proposition that the Tenth Circuit willfully ignored contrary legal authority; indeed, that it willfully ignored the law. The more reasonable conclusion is 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. As explained below, the new law emphatically supports the Tenth Circuit's construction of the old law.

ii. The legislative history of Congress's 2008 amendment supports HUD's implementation of 24 C.F.R. § 1000.318(a).

Congress's 2008 amendments to NAHASDA essentially moved the relevant part of § 1000.318 into the statute. Pub. L. No. 110-411, 122 Stat. 4319 (2008). By integrating § 1000.318(a) into the statute, Congress affirmed that the regulation implemented congressional intent.

The Supreme Court held in *Commodity Future Trading Com'n v. Schor*, 478 U.S. 883, 846 (1986), that when Congress ratifies a regulation by integrating it into a statute,

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

Plaintiffs' resort to legislative history is unnecessary because the Tenth Circuit found in *Fort Peck II* that Congress's intent was clear and that § 1000.318 implemented that intent. 367 Fed. Appx. at 892. That should end the analysis. *U.S. v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) ("If the statutory language is clear, our analysis ordinarily ends.") (citation omitted). However, even if the Court were to consider legislative history in this case, the legislative history regarding the 2008 amendments confirms that § 1000.318 reflected Congress's intent.

Before passing the 2008 amendments, Congress was aware of the controversy regarding the validity of § 1000.318 and, specifically, of *Fork Peck I*. *See, e.g.,* Housing Issues in Indian Country: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65 at 69-70 (March 22,2007) (letter from Committee to HUD and HUD's response regarding *Fort Peck I*);[3] *id*. at 140 (written testimony by Oglala Sioux President endorsing result in *Fort Peck I*); Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self–Determination Act:

[3] Available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg34266/content-detail.html.

Hearing Before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. 110–297 at 162-63 (July 19, 2007) (written testimony by Indian Housing Advocacy Coalition stating that the proposed amendment would "nullify the effect of [*Fort Peck I*]").[4] In the face of this controversy, Congress put the language of the regulation into the statute. As explained above, this alone is strong evidence that Congress intended the pre-amendment provision to encompass what HUD and the Indian tribes in Negotiated Rulemaking Committee had interpreted it to mean with 24 C.F.R. § 1000.318(a).

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

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

S. Rep. No. 110-238, at 9 (2007). Congress's clarifying statement here succinctly summarizes HUD's implementation of 24 C.F.R. § 1000.318(a). When a subsequent Congress states that it is "clarifying" a former statute, that statement is entitled to great weight. *Public Serv. Co. of Colo. v. U.S.*, 816 F.2d 530, 532-33 (10th Cir. 1987); *see also*, *e.g., United States v. Luster*, 889 F.2d 1523, 1529 (6th Cir. 1989) ("Insomuch as the amendment to the guideline is intended to clarify the existing guideline, it should be

[4] Available at http://www.indian.senate.gov/public/_files/July192007.pdf.

given substantial weight in determining the meaning of the existing guideline.") (citations omitted); *United States v. Demurgas*, 656 F.Supp. 1537, 1538 (E.D.N.Y. 1987) ("amendments designed to clarify earlier statutes are entitled to 'substantial weight' when interpreting meaning of an earlier statute.") (citation omitted). Thus, the legislative history provides more than ample evidence that the regulatory text—and HUD's implementation of it—comported with congressional intent. Plaintiffs' arguments do not overcome this weighty evidence.

Plaintiffs ignore Congress's own words and instead quote a treatise to the effect that a number of cases have found an amendment resolving doubtful meaning to be "'evidence that the previous statute meant the contrary.'" P. Br. at 35 (quoting 2B Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 49:11 (7th ed. 2008)). But again, Plaintiffs incorrectly apply legal authority addressing one set of circumstances to a different set of facts. The treatise itself relied principally on a case, *Barnes*, where this evidentiary inference could not prevail against post-enactment statements by two members of Congress that an amendment "clarified" pre-amendment intent. *See Barnes v. Cohen*, 749 F.2d 1009, 1015-16 (3d Cir. 1984) (noting the treatise's proposition as a "contrary position," but holding that the amendment restated the intent of the original provision because members of Congress stated it was clarification). Here as well, while it is true that the meaning of § 4152(b)(1) was put into doubt by *Fort Peck I*, and Congress was aware of that fact, Congress unequivocally chose the regulatory interpretation to clarify its original intent. Thus, the inference suggested by the treatise has no application here.

Plaintiffs also cite the treatise for the proposition that "[i]f a legislature adopts an amendment urged by a witness, it may be assumed that the intent voiced was adopted by the legislature." P. Br. at 34. In reliance on this principle, Plaintiffs argue that because HUD officials testified that the amendment included in the bill would "change" the way FCAS are counted, Congress's subsequent enactment of a similar amendment intended to change the intent of the original statutory provision. This series of inferences lacks merit at every point.

As an initial matter, to whatever extent the intent of a witness in a congressional hearing may imply the subsequent intent of Congress in enacting legislation, it cannot displace the intent manifest in the statutory text, nor can it displace congressional statements of intent in the legislative history. The amendment did not change the law as it was stated in the implementing regulation. On the contrary, the amendment restated that law. Moreover, Congress itself did not state it was changing the way FCAS are counted, rather it stated that it was clarifying the statute to reflect how FCAS were counted under the implementing regulation. In the hierarchy of legislative history, committee reports are entitled to greater weight than witness testimony, as the Tenth Circuit has found. *See, e.g., International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Prot. Dist.*, 877 F2d 814, 819 (10th Cir. 1989) ("our opinion will focus on committee reports, as they are more reliable indicators of congressional intent."). Even the treatise that Plaintiffs quote relies on cases where witness testimony is negligible. For example, in *Bailey v. United States*, 52 Fed. Cl. 105, 110-11 (Fed. Cl. 2002), the court observed, "[w]ithout a doubt, hearing testimony is not the most persuasive evidence of congressional intent."

Furthermore, Plaintiffs mischaracterize the HUD witnesses' testimony. After stating that the amendment would "change" the way FCAS are counted, the witnesses explained that "[t]his change would comport with the process established by the original Negotiated Rulemaking Committee that crafted the IHBG regulations."[5] The witnesses testified before Congress at the time when the *Fort Peck I* decision had arguably changed the law by holding that the statute required an FCAS-count floor, but before *Fort Peck II* reversed that decision. Thus 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. In other words, because *Fort Peck I* had changed the FCAS counting method, the proposed amendment would change it back by clarifying that this was Congress's intention all along. Thus the HUD witnesses' use of the word "change" in this context does not undermine the more compelling evidence of Congress's intent that conveyed or conveyance-eligible homeownership units do not count as FCAS.

iii. Congress's reservation of the application of the 2008 amendment from Plaintiffs does not affect the validity of 24 C.F.R § 1000.318(a).

Plaintiffs argue that because Congress excluded certain claims in litigation from the retroactive application of its amendment to § 4152(b)(1), Congress intended the amendment to invalidate HUD's preceding implementation of the Act under 24 C.F.R. 1000.318(a). P. Br. at 36-38 (citing Pub. L. No. 110-411, § 302(E), codified at 25 U.S.C.

[5] Reauthorization of the Native American Housing Assistance and Self–Determination Act: Hearing before the H. Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services, 110th Cong., No. 110–34 at 8, 39 (June 6, 2007) (statement of Orlando Cabrera, Asst. Sec'y for Pub. & Indian Housing HUD), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37550/pdf/CHRG-110hhrg37550.pdf; Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self–Determination Act: Hearing Before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg.. 110–297 at 4, 8 (July 19, 2007) (statement of Rodger J. Boyd, Dep. Asst. Sec'y for Native American Programs HUD), available at http://www.indian.senate.gov/public/_files/July192007.pdf.

§ 4152(b)(1)(E)). This argument is flawed and finds no support in the case law Plaintiffs cite.

Plaintiffs' argument relies on a series of inferences about congressional intent that are controverted by the weighty evidence discussed above, as well as the Tenth Circuit's reading of the pre-amendment statute. Amended 4152(b)(1)(E) states that the subparagraphs (A) through (D) shall not apply to claims involving FCAS counts through 2008 if the claims are filed before 45 days after enactment. First, Plaintiffs infer from this provision that Congress recognized a difference between the pre-amendment and post-amendment law. In fact, Congress only recognized that they would apply differently in litigation. Second, because Congress recognized a difference, Plaintiffs infer that Congress meant to change the law not to clarify it. In fact, Congress meant to clarify that conveyed and conveyance-eligible units do not count as FCAS. Third, Plaintiffs infer that because Congress meant to change the law, it expressed its intent that the pre-amendment statute did not permit FCAS reductions as provided in 24 C.F.R. § 1000.318(a). In fact, Congress changed the law to mimic the regulation retroactively, except with respect to certain claims in litigation.

Plaintiffs' series of inferences is flawed because it ignores facts implying the contrary. Congress clearly stated its intent that the amendment clarified existing law in the face of doubt caused by *Fort Peck I*, and clarified it in favor of the Negotiated Rulemaking Committee's interpretation that conveyed and conveyance-eligible homeownership units do not count as FCAS. The Tenth Circuit held that, pre-amendment, NAHASDA unambiguously validated § 1000.318(a) as part of the congressionally-mandated interplay of need factors specified in rulemaking. And

§ 4152(b)(1)(E) made the amendment retroactive except for certain claims in litigation. Congress recognized only that a court's analysis of FCAS claims would be different if § 1000.318(a) were tested against the limited text of pre-amendment § 4152(b)(1) as opposed to the detailed text of post-amendment § 4152(b)(1)(A)-(D). As Congress is surely aware, court review of agency action differs depending on whether or not a statutory prescription directly addresses the issue in question. *See Chevron*, 467 U.S. at 843-44. To the extent post-amendment § 4152(b)(1)(A)-(D) is virtually identical, but not a verbatim reproduction of § 1000.318(a), *Chevron* would change a court's analysis of Plaintiffs' claims depending on whether the detailed or limited provision applied in the litigation. Thus, § 4152(b)(1)(E) merely ensured Chevron analysis of litigant claims would not change after amendment. Considering these facts, the more reasonable inference about congressional intent from § 4152(b)(1)(E) is: 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.

Plaintiffs' case law does not support its contrary conclusion. In *Comm'r of Internal Revenue v. Callahan Realty Corp.*, 143 F.2d 214, 216 (2d Cir. 1944), the Second Circuit found that because Congress explicitly limited the effect of an amendment to be prospective only, this "seem[ed] to show" that the amendment did not clarify existing law, but only changed it prospectively. Here, in contrast, Congress explicitly made the 2008 amendment retroactive except in the case of a limited class of claims in litigation. 25 U.S.C. § 4152(b)(1)(E). Thus, *Callahan* does not support Plaintiffs inferences.

Plaintiffs also cite *Suiter v. Mitchell Motor Coach Sales*, 151 F.3d 1275, 1281 n.7 (10th Cir. 1998). In *Suiter*, the Tenth Circuit held only that where a statute unambiguously denies the authority claimed in a regulation, subsequent amendment to include that authority does not support a finding that Congress clarified the existing law. There, several circuit courts had already held that the statute at issue unambiguously denied the authority claimed in regulations; the court therefore ignored the fact that Congress later incorporated the authority in the statute. *Id.* at 1281 (citing 7th, 9th, and 10th Circuit cases). Here, in contrast, the Tenth Circuit found that the pre-amendment statute unambiguously authorized its regulatory implementation. *Fort Peck II*, 367 Fed. Appx. at 892. At best, then, *Suiter* suggests that the Court should either ignore the 2008 amendment and follow the Tenth Circuit's analysis of the pre-amendment statute, or consider the weighty evidence that the amendment clarified the intent of pre-amendment § 4152(b)(1). Neither *Callahan* nor *Suiter* suggests that 24 C.F.R. §1000.318(a) invalidly interpreted pre-amendment § 4152(b)(1). And accordingly, Plaintiffs' arguments based on the 2008 amendment of NAHASDA are fruitless.

d. The validity of 24 C.F.R. § 1000.318 includes its provisions relating to conveyance-eligible units.

Plaintiffs argue that the conveyance-eligible provisions of 24 C.F.R. § 1000.318(a), specifically subparagraphs (1) and (2), are unlawfully vague and do not reflect need in accordance with § 4152(b), as construed by the Tenth Circuit in *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235, 1241 (10th Cir. 2009). This is a curious argument because the Tenth Circuit in *Fort Peck II* already held that § 1000.318(a), including its provisions related to conveyance-eligible units, is valid; and explicitly emphasized its holding in *Keetoowah* when it did so. *See Fort Peck II*, 367

Fed. Appx. at 891. In addition, as discussed above, the Negotiated Rulemaking Committee's specification of conveyance-eligibility as an objectively measurable condition reflecting need is entitled to great weight under both the *Chevron* standard and Congress's intent as expressed in §§ 4152(b)(3) and 4116(b). Moreover, Congress unambiguously expressed its view that conveyance-eligibility reflects need when it amended § 4152(b)(1) to include the same conveyance-eligibility provisions as factors reflecting need. Finally, the conveyance-eligible provisions use standard statutory and regulatory language that is not impermissibly vague. The subparagraphs are thus lawful reflections of the Congress's need standard.

i. The Negotiated Rulemaking Committee, Congress, and the Tenth Circuit have confirmed that 24 C.F.R. § 1000.318(a)(1) and (2) properly reflect need.

The Negotiated Rulemaking Committee determined that elimination of conveyance-eligible homeownership units from FCAS reflects need when it included 24 C.F.R. § 1000.318(a)(1) and (2) in the final rule in 1998. *See* 1998 Final Rule, 63 Fed. Reg. 12343 (all Committee members agreed on § 1000.318(a)). And although Congress has amended NAHASDA eight times since then,[6] it has never altered the formula so as to undermine the Committee's determination. This demonstrates Congress's implicit approval of the conveyance-eligibility provisions in the regulation. *See Schor*, 478 U.S. at 846 (failure to revise or repeal regulatory interpretation when

[6] See Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999. Pub L. No. 105-276, 112 Stat. 2461 (1998); Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000); Native American Housing Assistance and Self-Determination Reauthorization Act of 2002, Pub. L. No. 107-292, 116 Stat. 2053 (2002); Homeownership Opportunities for Native Americans Act of 2004, Pub. L. No. 108-393, 118 Stat. 2246 (2004); Native American Housing Enhancement Act of 2005, Pub. L. No. 109-136, 119 Stat. 2643 (2005); Energy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008); Indian Veterans Housing Opportunity Act of 2010, Pub. L. No. 111–269, 124 Stat. (2010).

Congress revisits a statute is persuasive evidence of approval); *see also Rosillo-Puga v. Holder*, 580 F.3d 1147, 1157 (10th Cir. 2009).

As the capstone, Congress amended NAHASDA in 2008 to "clarify" that conveyance-eligibility is related to need. It clarified that homeownership units not conveyed within 25 years (the putative MHOA termination date) cease to count as FCAS unless conveyance is impracticable, i.e., "beyond the control of the recipient." 25 U.S.C. § 4152(b)(1)(B), (D). The legislative history of Congress's 2008 amendments that incorporated conveyance-eligibility provisions from § 1000.318(a) leaves no room for doubt that the provisions implemented congressional intent. S. Rep. No. 110-238, at 9 ("This not only includes conveyed units but those units that are required to be conveyed based on the homebuyer agreement . . . . Conveyance of each homeownership unit should occur as soon as possible after a unit becomes eligible for conveyance based on the terms of the Agreement."). Congress has thus repeatedly confirmed that the funding formula, including § 1000.318's conveyance-eligible provisions, is based on need.

The Tenth Circuit, too, validated the entirety of § 1000.318(a), including its conveyance-eligible provisions. The Tenth Circuit reversed the district court's invalidation of § 1000.318. *Fort Peck II*, 367 Fed. Appx. at 892 ("[W]e **REVERSE** the district court's invalidation of 24 C.F.R. § 1000.318.") (emphasis in original). The district court had invalidated § 1000.318's conveyance-eligible provisions. *Fort Peck I*, 435 F. Supp. 2d at 1131-32, 1134-35. Therefore, the Tenth Circuit's reversal of the district court's order necessarily also reversed the district court's conclusion regarding counting conveyance-eligible in FCAS. Furthermore, the Tenth Circuit found that "[b]ecause

HUD's actions did not violate Congress's mandate, the issues raised in Fort Peck's cross-appeal are moot." *Fort Peck II*, 367 Fed. Appx. at 892, n. 15. The Tenth Circuit was aware of HUD's actions to eliminate conveyance-eligible units from FCAS because both Fort Peck and HUD addressed the issue extensively in their briefs. *See, e.g.,* Fort Peck's Response Brief and Principal Brief on Cross-Appeal in the appeal of *Fort Peck I* at 6-7, 32, 39 n. 12, 39, 40, 44-45 (included in Defendants' Non-Record Appendix ("DNRA") A); HUD's Brief for Appellants/Cross-Apellees in the appeal of *Fort Peck I* at 7, 18 n. 11, 24 (included in DNRA B). Therefore, the Tenth Circuit's conclusion that HUD's actions did not violate Congress's mandate included HUD's actions to eliminate conveyance-eligible units from FCAS.

Plaintiffs argue that, notwithstanding *Fort Peck II*, the regulation's conveyance-eligible provisions are not related to need and violate the Tenth Circuit's conclusion in *Keetoowah* that the allocation formula must be based on need to comply with Congress's mandate in § 302 of NAHASDA (25 U.S.C. § 4152(b)). P. Br. at 41-42. But, in *Fort Peck II*, the Tenth Circuit relied on *Keetoowah* to conclude that § 1000.318(a) is valid because it implements Congress's unambiguous intent that the formula reflect the need of all Indian tribes. 367 Fed. Appx. 891. As that court explained, Congress unambiguously intended that "the formula be related to the need of *all* tribal Housing Entities." *Id.* (emphasis added). Thus the rules for shifting formula funding from homeownership units that should have been conveyed towards distribution under factors measuring the need for new affordable housing, relate to need—the need of all Indian tribes. The Tenth Circuit in *Keetoowah* considered whether the regulation at issue there related to Congress's intent that funding be allocated based on need. 567

F.3d 1235 (10th Cir. 2009). Here, Congress has affirmed that the funding formula, including § 1000.318's conveyance-eligible provision, is based on need, stating: "This funding formula was developed by Indian tribes through negotiated rulemaking, and recently reaffirmed in 2007, *to ensure that the funding is allocated based on need.*" S. Rep. No. 110-238, at 10 (2007) (emphasis added). Accordingly, the conveyance-eligible provisions of § 1000.318(a) reflect need as required by the statute.

ii. § 1000.318(a)(1) and (2) are not impermissibly vague.

Plaintiffs argue § 1000.318 violates NAHASDA and the APA because the standards the regulation describes for HUD to determine when a housing unit is no longer included in FCAS "defy any consistent or fair standard" and "invite ad hoc decision-making on HUD's part." P. Br. at 49. This argument lacks merit because the regulatory provisions that define conveyance-eligibility, § 1000.318(a)(1) and (2), are not vague standards. They refer to the MHOA, a "lease with option to purchase agreement between an [Indian Housing Authority] and a homebuyer under the 1937 Act." 24 C.F.R. § 1000.302. As discussed previously, the MHOAs were of a limited term in order to encourage homeownership. The contents of the MHOAs give content to the regulations. The regulations are given further content by the requirements that a tribe convey a Mutual Help or Turnkey III unit to tribal units "as soon as practicable" and that a tribe "actively enforce strict compliance" with the MHOA. Some flexibility in the standard is required in order to allow for unusual circumstances. In this regard, HUD follows an accepted regulatory pattern. *See PDK Laboratories, Inc. v. United States Drug Enforcement Admin.*, 438 F.3d 1184, 1194 (D.C. Cir. 2006) ("an agency is not 'necessarily required to define [an open-ended] term in its initial general regulation—or

indeed . . . obliged to issue a comprehensive definition all at once.' Rather, in fleshing out the contours of vague statutory terms, agencies are 'entitled to proceed case by case.'") (citations omitted, alternations in original).

In fact, Congress and agencies commonly use the phrase "as soon as practicable" to provide flexibility within a limit—a Westlaw search found the phrase used over 800 times in federal statutes and over 1,300 times in federal regulations. The Supreme Court has even used the phrase in defining constitutional rights. *Goss v. Lopez*, 419 U.S. 565, 582-583 (1975) (hearing for student removed from school should occur "as soon as practicable"). Thus, the regulation is not unlawful for vagueness.

The cases cited by Plaintiff do not suggest a different conclusion because they all address vagueness as an impediment of constitutional due process rights. Plaintiffs have neither argued nor demonstrated a liberty or property interest subject to due process analysis. And applicants for grant benefits may not have a right protected by due process. *Lyng v. Payne*, 476 U.S. 926, 942 (1986). The case Plaintiffs cite involving vagueness in a contract, *Hodges v. Public Bldg. Comm'n*, No. 93-C-4328, 1994 U.S. Dist. LEXIS 18419 (D. Ill. Dec. 23, 1994), is also inapt. Here, the regulation is not a contract between two parties seeking a meeting of the minds; rather, it is a prospective rule that must cover situations that arise over many years involving hundreds of tribes. Some flexibility is necessary. *PDK Laboratories*, 438 F.3d at 1194. In any case, even in contractual settings, that the term "as soon as practicable" is not too vague to define a contractual right. *See, e.g.*, *Argent Financial Group Inc. v. Fidelity and Deposit Co. of Maryland*, No. 3:04CV02323, 2006 WL 1793609, *3 (W.D. La. June 28, 2006); *FDIC v. Barham*, 794 F.Supp. 187, 194 (W.D. La. 1991).

Finally, Plaintiffs argue that, in certain instances, HUD applied the conveyance-eligibility provisions incorrectly. Because these arguments would require analyses of individual units and their histories, HUD believes this is an issue to be addressed in the subsequent "counting" phase of the consolidated briefing in these cases. Accordingly, HUD reserves its discussion of these individual determinations for that later brief.

2. HUD's procedure for recovering past overfunding based on erroneous FCAS counts did not violate Plaintiffs' rights.

Plaintiffs challenge HUD's implementation of Title III of NAHASDA, which requires that HUD allocate funds appropriated by Congress for IHBGs among all eligible tribes according a formula established by committee. 25 U.S.C. §§ 4151-4152. Plaintiffs claim that HUD's procedures for determining allocation amounts and correcting past overallocations under Title III violate Title IV and a regulation implementing § 405 of that title (25 U.S.C. § 4165). Plaintiffs misconstrue the law by ignoring the statutory scheme and employing false reasoning. Plaintiffs wrongly infer that any allocation reduction or recovery of past overallocations requires an enforcement proceeding. In addition, their reading of the statute is contrary to clear statements of congressional intent expressed in the statutory text and in the legislative history.

a. FCAS-count errors do not involve compliance.

Plaintiffs' claim of violation of NAHASDA §§ 401, 405, and the implementing regulation for § 405 (24 C.F.R. § 1000.532) lacks merit because it applies the rules for compliance actions under Title IV of NAHASDA to HUD's allocation actions under Title III. NAHASDA's statutory scheme imposes certain duties on HUD. These include primarily the proper allocation of appropriated funds among all eligible tribes according to a formula established by a negotiated rulemaking committee (Title III of NAHASDA

"Allocation of Grant Amounts"), and oversight of grant recipients' administration and use of those grants (Title IV "Compliance, Audits, and Reports"). The statutory scheme also imposes certain duties on grant recipients. These include using grant funds only on eligible activities in accordance with their annual Indian Housing Plans and administering the funds without waste (Titles I and II, "Block Grants and Grant Requirements" and "Affordable Housing Activities"). Recipients are also required under Title IV to conduct some level of self-oversight, 25 U.S.C. §4163(b),

Title IV, encompassing §§ 401–408, addresses the oversight and enforcement of grant recipient management and use of grant funds. 25 U.S.C. §§ 4161-4168. Title III, encompassing §§ 301 and 302, addresses the scope of HUD's duty properly to allocate block grant funds appropriated by Congress among all eligible tribes. 25 U.S.C. §§ 4151-4152. Nothing in Title IV inhibits HUD's actions to allocate funds according to formula or correct past overallocations and thereby fulfill its duty under Title III. Indeed, as discussed below, Congress added § 401(a)(2) to the title to clarify that Title IV enforcement is not necessary to correct FCAS count errors. 25 U.S.C. § 4161(a)(2). Simply put, the statutory rules cited by Plaintiffs from Title IV apply to policing recipient compliance, while HUD's actions to correct formula allocations are HUD's policing of its own compliance with Title III.

"'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Fort Peck II*, 367 Fed. Appx. at 890 (quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)). The same principles apply here. Title IV rules for treating recipient "bad apples" do not apply to HUD's actions treating its own

"bad oranges" so that HUD's actions to comply with Title III do not violate procedural rules for policing recipient compliance under Title IV. Specifically, § 401 (25 U.S.C. § 4161(a)) requires that HUD take enforcement action against a grant recipient if HUD finds substantial noncompliance "with any provisions of this Act." Section 405 (25 U.S.C. § 4165) requires that a grant recipient provide financial audits and undergo specific reviews of its performance by HUD. Neither the financial audit nor the performance reviews require a review of recipient's FCAS reporting. 25 U.S.C. § 4165.

As the many letters in the Administrative Records in these cases attest, in cases where HUD determined and recovered overpayments for ineligible FCAS, HUD did not "audit" or "review" Plaintiffs as those terms are defined under § 4165. HUD did not question the accuracy of information in a Plaintiff's annual performance report so as to be acting under § 4165(b)(1)(B). Nor did HUD question and issue a report adjudging Plaintiffs' activities for compliance with the standards in § 4165(b)(1)(A), such as compliance with the recipient Indian Housing Plan, so as to be acting under § 4165(b)(1)(A)(iii). Rather, HUD took non-enforcement action to determine Plaintiffs' correct FCAS counts by conferring with them on information that would assist HUD in determining the eligibility of particular homeownership units as FCAS under the allocation formula.[7] In doing this, HUD was merely complying with Title III and following a long established principle that the Government has a right to recover overpayments

[7] *See, e.g.,* DRA A-1, A-3, A-6, A-9. B-1, B-3, C-1, D-1, E-1, E-2, E-3, E-6, F-1, F-3, F-7, F-8, F-10, F-13, G-1, G-4, G-8, G-10, G-11, H-1, H-2, H-3, H-4, H-5, H-6, I-1, I-2, I-3, J-2, J-3, J-4, J-5, J-7, K-1, K-3, K-4, K-5, K-6, L-1, L-2, L-3, L-4, L-5, M-1, M-2, M-3, N-1, N-2, N-7, O-1, O-2, -3, O-4, P-1, P-5, Q-2, Q-3, Q-4, Q-5, Q-7, Q-8, Q-11, Q-12, R-1, R-4, R-8 R-13, S-1, S-2, T-1, T-4, T-8, T-9, T-10, T-11, T-13, T-14, T-16T-21, T-23, U-1, U-4, U-5, U-8, U-10, U-11, V-1, V-5, V-6, V-7, V-8, W-1, W-2, W-4, W-5, W-6, W-7, W-8, W-9, W-10, X-1, X-2, X-3, X-4, X-9, X-10, X-12, X-13, X-14, Y-1, Y-2, Y-5, Z-1, Z-4, Z-7, Z-8, Z-9.

even in the absence of a statute authorizing such recovery. *United States v. Wurts*, 303 U.S. 414, 415 (1938).

Even if Title IV rules for enforcement actions based on recipient noncompliance were to trump and impair HUD's authority to allocate block grant funds in accordance with Title III—which they do not—Plaintiffs' argument rests on fallacies and selective quotation of the statutory text. The actions Plaintiffs challenge were not actions to enforce Plaintiffs' compliance with NAHASDA, but rather to ensure HUD's own compliance. HUD must allocate funds in accordance with the formula. 25 U.S.C. § 4151. Plaintiffs erroneously reason that because the *result* of HUD's allocation corrections to comply with the formula was reduced grant amounts and Plaintiffs' liability for amounts overpaid to them, the *cause* must be an enforcement action under Title IV, which requires a hearing for substantial noncompliance. This is the classic fallacy of reliance on the consequent. And neither the statutory text, scheme, nor the legislative history supports this illogical conclusion.

First, Plaintiffs argue that because HUD's FCAS count corrections involved amounts per plaintiff of approximately $143,000 to $6,000,000, then there must have been "substantial noncompliance" by the recipient, triggering the need for a hearing under NAHASDA § 401(a) (25 U.S.C. § 4161(a)). This argument relies on the unsupported reasoning that a consequence resulting in a substantial change in funding must be caused by a substantial noncompliance, i.e., Plaintiffs substantially misreported FCAS counts to HUD. But even if Plaintiffs had substantially misreported FCAS counts, § 4161(a) does not require a hearing and finding of substantial noncompliance. 25 U.S.C. § 4161(a)(2) ("The failure of a recipient to comply with the requirements of

section 302(b)(1) regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for the purposes of this title.").

Second, Plaintiffs argue that because HUD's FCAS-count corrections reduced the amount Plaintiffs were eligible to receive under NAHASDA's allocation formula, there was a "reduction" as described in § 4161(a)(1)(B), and such a reduction cannot exist absent a finding of substantial noncompliance after notice and hearing. P. Br. at 15. This reasoning falls into the fallacy of reliance on the consequent of an "If-Then" rule. Section 4161(a)(1) is indeed an If-Then rule. But it states that "if" HUD finds substantial noncompliance after a hearing, "then" HUD must take one of four enforcement actions including "(B) reduce payments under this Act to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this Act." 25 U.S.C. § 4161(a)(1). This provision dictates only that the necessary consequence of a finding of substantial noncompliance after a hearing is an enforcement action (such as reduction of payments in the amount of funds misspent). However, the provision does not dictate the opposite, as Plaintiffs claim, that is, that the necessary consequence of reduced payments is a substantial noncompliance finding after a hearing. The statutory provision "If A, then B" simply does not equal Plaintiffs' construction "If B, then A."

Third, Plaintiffs' faulty reasoning is further impaired by the fact that its premises are false. Plaintiffs mistakenly claim that reductions in the amount a tribe is entitled to by the allocation formula are "reductions" as described in Title IV. However, the statute refers only to reductions to recapture misspent funds, specifying a reduction of "payments . . . to the recipient by an amount equal to the amount of such payments that

were not expended in accordance with this Act." 25 U.S.C. § 4161(a)(1)(B). Any "reduction" of grant amounts to recover overallocations was not a reduction to recapture funds that the recipient misspent. Thus even if Plaintiffs' reasoning were valid that B (reduction) implies A (substantial noncompliance hearing and finding), the Title IV "reduction" (B) that Plaintiffs claim to exist, does not; and therefore a substantial noncompliance hearing and finding would not, in any case, follow.

Neither the statutory scheme, text, nor legislative history supports Plaintiffs' illogical conclusion that recovery of an overallocation necessarily implies a finding of substantial noncompliance such that absent the finding (after a hearing) there can be no recovery. As discussed above, the statutory scheme requires HUD to comply with the allocation formula established in negotiated rulemaking (Title III) and separately to enforce recipient compliance with requirements for grant usage in Titles I and II (Title IV). Nothing in Title III requires an enforcement action to make proper allocations. More specifically, the text of Title IV, codified at 25 U.S.C. § 4161(a)(1), states only that *if* HUD finds substantial noncompliance, HUD *must* take enforcement action.

On the other hand, another statutory provision, 25 U.S.C. § 4165(d), allows for adjustment of grant amounts in certain circumstances even if there is no substantial noncompliance and even without the hearing required in the case of substantial noncompliance. Section 4165(d) allows HUD to adjust grant amounts based on "findings of the Secretary with respect to [the reports and audits related to a recipient described in subparagraphs (a) through (c)]." 25 U.S.C. § 4165(d). This authority to adjust is "subject to" § 4161(a), meaning that the scope of § 4161(a) is excluded from § 4165(d). Thus, except in cases where HUD finds substantial noncompliance, which

require notice and hearing as well as mandatory enforcement by HUD, § 4165(d) is a discretionary enforcement authority based on non-substantial noncompliance pursuant to specific reviews. If the clause "subject to," meant that substantial noncompliance hearings were necessary in every case under § 4165(d), Congress would have said so. Thus even within Title IV, the statutory text does not support the proposition that enforcement action necessarily implies a finding of substantial noncompliance (after a hearing). On the contrary, Congress clarified in 2008 that a recipient's failure to report FCAS correctly "shall not, in itself, be considered to be substantial noncompliance for purposes of this title." 25 U.S.C. § 4161(a)(2).[8] In other words, FCAS corrections—even when necessitated by recipient reporting failures—need not fall within the purview of Title IV. The legislative history could hardly make Congress's intent clearer that FCAS corrections do not necessitate a hearing for substantial noncompliance: "[I]f a grant recipient is required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301 [of Title III, 25 U.S.C. § 4151], the action does not constitute substantial non-compliance by the grantee and does not automatically trigger a formal administrative hearing process." S. Rep. No. 110-238, at 10 (2007).

Thus logically, and as confirmed by the statutory scheme, text, and legislative history, Plaintiffs' claim to a hearing for substantial noncompliance prior to relinquishing overpaid funds due to FCAS overcounts is without merit.

[8] That Congress intended the amendment to 25 U.S.C. § 4161(a) to be a clarification rather than a substantive change is clear the Senate Report's lead-in to the summary of the amendment: "Clarification on Availability of Administrative Hearing (Amends Section 401(a) of current law [25 U.S.C. § 4161(a)] …." Sen. Rpt. 110-238, at 10.

b. Even if hearings were required, the procedures used by HUD provided the equivalent of a hearing.

Plaintiffs claim that HUD failed to provide them a hearing. However, Plaintiffs do not argue, either in their opening brief or in the administrative record, that HUD failed to consider any relevant evidence, information, or argument that they wished to present to HUD. Nor do Plaintiffs argue how a hearing could have led to a different substantive result. In short, Plaintiffs argue a lack of procedure but show no prejudice.

The record here shows that, prior to determining it overpaid a recipient based on ineligible FCAS, HUD notified the recipient of the legal and factual bases of its decisions and invited a response.[9] When tribes submitted responses, HUD considered that information before making its final determinations.[10] Furthermore, HUD invited appeals and requests for reconsideration, in most cases, and, when such documents were submitted, considered and ruled on them.[11] Therefore, Plaintiffs received due notice and opportunity for a hearing, which is all that the text of 25 U.S.C. § 4161(a) requires. Plaintiffs neither argue nor show that an administrative hearing would have changed the result of HUD's allocation determinations based on FCAS miscounts, and thus no

[9] *See, e.g.*, DRA A-1, A-3, A-6, A-9, B-1, B-3, C-1, D-1, E-1, E-2, E-3, E-6, F-1, F-3, F-7, F-8, F-10, F-13, G-1, G-4, G-8, G-10, G-11, H-1, H-2, H-3, H-4, H-6, I-1, I-2, I-3, J-2, J-3, J-4, J-5, J-7, K-1, K-3, K-4, K-5, K-6, L-1, L-2, L-3, L-4, L-5, M-1, M-2, M-3, N-1, N-2, N-4, N-7, O-1, O-2, O-3, O-4, O-8, P-1, P-3, P-5, Q-2, Q-3, Q-4, Q-5, Q-7, Q-8, Q-11, Q-12, R-1, R-4, R-8, R-13, S-1, S-2, T-1, T-4, T-8, T-9, T-10, T-11, T-13, T-14, T-16, T-21, T-23, U-1, U-4, U-5, U-8, U-10, U-11, V-1, V-2, V-5, V-6, V-7, V-8, W-1, W-2, W-4, W-5, W-6, W-7, W-8, W-9, W-10, X-1, X-2, X-4, X-9, X-10, X-12, X-13, X-14, Y-1, Y-2, Y-5, Z-1, Z-4, Z-7, Z-8, Z-9.

[10] *See, e.g.,* DRA A-2, A-3, A-9, B-2, B-3, B-4, B-5, B-6, B-7, B-12, C-2, C-3, D-1, D-2, D-3, E-4, E-5, F-2, F-3, F-4, F-5, F-11, F-12, G-2, G-3, G-4, G-5, G-6, G-7, G-8, G-9, G-12, G-13, G-14, G-15, I-4, I-5, J-6, J-7, K-2, N-3, N-5, N-6, O-6, 0-7Q-2, Q-7, R-2, R-3, R-4, R-5, R-6, R-9, R-10, R-11, R-12, R-13, T-2, T-3, T-4, T-5, T-6, T-7, T-12, T-13, T-15, T-16, T-22, T-23, U-5, U-9, U-10, V-3, V-4, W-4, W-5, W-6, W-8, W-10, X-5, X-6, X-11, X-12, Y-3, Y-4, Z-2, Z-3, Z-8, Z-9.

[11] *See, e.g.,* A-9, A-11, B-4, B-5, B-6, B-7, B-12, C-1, C-2, C-3, D-1, D-2, D-3, E-5, E-6, F-4, F-5, F-7, F-10, F-11, F-12, G-4, G-8, G-11, H-3, H-5, H-6, I-3, J-3, J-4, J-7, K-3, K-5, K-6, L-2, L-3, L-5, M-1, N-3, N-5, N-6, N-7, O-2, O-3, O-4, O-6, O-7, P-2, P-3, P-4, P-5, Q-1, Q-2, Q-8, Q-9, Q-10, Q-11, Q-12, R-2, R-4, R-5, R-6, R-9, R-10, R-11, R-12, R-13, S-1, T-3, T-5, T-7, T-8, T-9, T-10, T-11, T-12, T-14, T-17, T-18, T-19, T-20, T-23, U-1, U-2, U-5, U-6, U-7, U-11, V-2, V-3, V-4, W-5, W-8, X-3, X-5, X-7, X-8, X-11, X-12, Z-8, Z-10, Z-11.

prejudice from lack of an administrative hearing. Lack of a hearing pursuant to HUD's implementation of § 4161 and § 4165 at 24 C.F.R. §§ 1000.532-1000.540 would therefore be harmless error because Plaintiffs all received notice and often extensive paper hearings before HUD made its final determinations about formula factors and the consequent change in Plaintiffs' allocated amounts. Under the APA, due consideration must be given to the rule of prejudicial error. 5 U.S.C. § 706 (requiring courts to take due account of "the rule of prejudicial error"); *DSE, Inc. v. United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) ("[I]t is . . . well settled that the principle of harmless error applies to judicial review of agency action."); *see also Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 2003) (under the harmless error rule, "a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination"). Plaintiffs show no prejudice for lack of an administrative hearing, and so their claim for violation of Title IV hearing requirements merits no relief under the APA.

e. 24 C.F.R. § 1000.532 does not mandate a hearing to correct FCAS-count errors.

24 C.F.R. § 1000.532 does not create any procedural requirement beyond that contained in 25 U.S.C. § 4165(d) because it applies only where § 4165 applies. 24 C.F.R. § 1000.532 allows HUD to make adjustments to grants "under section 405 of NAHASDA [25 U.S.C. § 4165]." As discussed above, § 405 (25 U.S.C. § 4165) does not create a right to a hearing here because a FCAS-count error is not an issue of substantial noncompliance.

f. HUD did not rely on 24 C.F.R. § 1000.336, which merely implements the statutory and common law authority for HUD to correct overallocations.

Plaintiffs argue that HUD cannot rely on 24 C.F.R. § 1000.336 to justify not applying Title IV (that is, §§ 401 and 405 of NAHASDA (24 U.S.C. §§ 4161 & 4165)) to recoveries of overpayments for FCAS-count errors. P. Br. at 19-24. But HUD does not so rely on § 1000.336. As explained above, Title IV does not apply to FCAS-count errors. Furthermore, HUD does not, contrary to Plaintiffs' assertions, rely on § 1000.336 for authority to recover overpayments for FCAS-count errors. Instead, as explained herein, HUD relies on the federal government's inherent authority to recover erroneous payments. *See, e.g., Wurts,* 303 U.S. at 415. HUD also relies on its obligation under 25 U.S.C. § 4151 to allocate annual appropriations "in accordance with the formula." HUD did apply the challenge and appeal procedure in § 1000.336 to describe the process by which a tribe could challenge and appeal a determination by HUD related to overpayments for FCAS-count errors.[12] Prior to 2007, HUD applied § 1000.336 because FCAS-count error challenges were very similar to the other sorts of data challenges described in § 1000.336. In 2007, § 1000.336 was explicitly amended to apply to challenges regarding FCAS. 72 Fed. Reg. 20025-26 (Apr. 20, 2007).

g. If a hearing were required, the proper remedy under the APA is remand to the agency for required hearing.

If Plaintiffs' claim for an administrative hearing merited relief, the only proper remedy under the APA would be remand to the agency for the hearing in the first instance rather than the injunctive relief that Plaintiffs request. *NLRB v. Food Store*

[12] *See, e.g.,* A-9, B-3, B-4, B-5, B-10, C-1, D-1, E-2, E-6, F-5, F-7, F-10, G-4, G-8, G-9, G-11, H-3, H-5, H-6, I-3, J-3, J-7, K-3, K-5, K-6, L-2, L-3, L-5, N-7, O-2, O-3, O-4, Q-8, Q-11, Q-12, R-2, R-4, R-10, R-13, S-1, T-8, T-9, T-10, T-14, T-20, T-23, U-1, U-2, U-5, V-2, W-5, W-8, W-10, X-3, X-4, X-6, X-12, Z-8, Z-9.

Employees Union Local 347, 417 U.S. 1, 10 (1974) (if agency omitted a remedy justified in the court's view, remand is the proper course); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (if agency did not consider relevant factors, the proper course, except in rare circumstances, is remand).

Particularly here, remand would be the only proper course because NAHASDA assigns the duty of holding a hearing to HUD. Additionally, NAHASDA reserves to the Court of Appeals review of the results of such hearings. 25 U.S.C. § 4161(d). In the case of a similarly written statute, the D.C. Circuit held that "[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). This is true even if Congress does not expressly state that the court of appeal's jurisdiction is exclusive. *Id*. Thus, if § 4161 applies in this case (and § 4165 by virtue of its "subject to" clause), jurisdiction is exclusive to the court of appeals.

In light of the Supreme Court's repeated admonition "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'" *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 680-681 (1988)), remand would be the only proper course.

3. HUD properly used the federal government's inherent power to recover overpayments in order to implement Congress's mandate to distribute funds according to the formula.

The federal government has the power, independent of statute, to recover funds that have been erroneously paid. *See, e.g., Wurts*, 303 U.S. at 415 ("The Government by appropriate action can recover funds which its agents have wrongfully, erroneously,

or illegally paid.") (citation omitted). "The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory bar." *Id*. at 416 (citation omitted). The rationale behind this rule is that statutes which limit common law rights "are to be read with a presumption favoring the retention of long-established and familiar principles." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."). "This presumption may be even stronger when a longstanding power of the United States is involved. In the context of recovery of overpayments, the government has broad power to recover monies wrongly paid from the Treasury, even absent any express statutory authorization to sue." *United States v. Lahey Clinic Hosp., Inc,* 399 F.3d 1, 15 (1st Cir. 2005). In *Lahey*, the First Circuit found that Congress's establishment in the Medicare Act of certain methods to recover money did not displace the United States' inherent right to recover money in other ways. *Id*. at 15-16.

Congress did not manifest any intent in NAHASDA to relinquish the federal government's inherent right to recover funds that HUD wrongfully paid. Nowhere does Congress prohibit HUD from taking any actions to recover overfunding. In § 401, Congress mandated that HUD take certain actions if, after notice and opportunity for hearing, it finds a recipient failed to comply substantially with NAHASDA. 25 U.S.C. § 4161(a)(1). The mandatory enforcement actions include reducing payments in an amount equal to the amount of payments not spent in accordance with NAHASDA. 25

U.S.C. § 4161(a)(1)(B). But they in no way preclude HUD recovery of overpayments in the absence of substantial noncompliance. In § 405, Congress gave HUD the power to adjust the amount of a grant after certain types of reviews and audits. 25 U.S.C. § 4165(d). But again, § 405 does not prohibit HUD from recovering overpayments. Congress's decision to establish certain methods to affect a recipient's grant does not mean that Congress prohibited any other methods, such as recovering overpayments. *See, e.g., Lahey*, 399 F.3d at 16 ("Although provisions of the Medicare Act expressly authorize the Secretary to reopen initial payment determinations and to recover overpayments administratively in certain circumstances . . . the statute does not displace the United States' long standing power to collect monies wrongfully paid through an action independent of the administrative scheme."). Because Congress did not manifest any intent in NAHASDA to relinquish the federal government's inherent right to recover, the federal government retains that power.

In fact, the legislative history regarding NAHASDA's amendment in 2008 demonstrates that Congress was well aware of HUD's efforts to recover overpayments and took no action to stop it. In addressing the amendments to § 302 (that is, the calculation of FCAS), the Senate Committee stated:

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

S. Rep. No. 110-238, at 9 (2007) (emphasis added). More specifically, when reporting on its clarifying amendment to § 401, the Senate Committee recognized grant recipients

are "required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301." *Id.* at 10.

Congress thus acknowledged, without disagreement, HUD's recovery of overpayments. Furthermore, at the time Congress reauthorized NAHASDA in 2008, a regulation, 24 C.F.R. § 1000.319(b), required HUD to recover overpayments based on FCAS-count errors. ("If a recipient receives an overpayment of funds because it failed to report such changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within 5 fiscal years."). That regulation became final on April 20, 2007. 72 Fed. Reg. 20025 (Apr. 20, 2007). If Congress disagreed with HUD's assertion of the federal government's inherent right to recover erroneous payments, as expressed in § 1000.319(b), Congress could have acted in 2008 to cut off that power. But Congress did not. *Schor*, 478 U.S. at 846.

Further, by recovering overpayments, HUD implements Congress's intent. In § 301, Congress mandated that HUD distribute IHBGs in accordance with the funding formula:

> For each fiscal year, the Secretary shall allocate any amounts made available for assistance under this Act for the fiscal year, *in accordance with the formula established pursuant to section 302*, among Indian tribes that comply with the requirements under this Act for a grant under this Act.

25 U.S.C. § 4151 (emphasis added). FCAS-count errors prevent the distribution of funds according to the formula. HUD corrects those errors by recovering overpayments and redistributing the overpayments through the formula. 24 C.F.R. § 1000.319(b). Therefore, HUD's recoveries of overpayments implements Congress's intent as manifested in § 301. Thus, this case is distinguishable from *American Bus. Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000) ("*ABA*"), cited by Plaintiffs. In that case, the court

found that the agency's imposition of a penalty exceeded its statutory authority. *Id*. at 4. Here, however, recovering overpayments is not a penalty and, further, Congress explicitly gave HUD the power to distribute IHBG funds according to a formula. *ABA* is also distinguishable because at issue at that case was whether Congress authorized penalties. In other words, the issue was whether Congress *created* that power. Here, in contrast, the issue is whether Congress *renounced* a power, that is, the inherent power of the federal government to recover improperly distributed funds. Such renunciation must be explicit. *Wurts*, 303 U.S. at 416. Congress did not renounce that power, as described above, and, therefore, HUD acted properly.

4. NAHASDA does not bar HUD from recovering and redistributing erroneously allocated funds though spent on affordable housing activities.

Plaintiffs argue that because 24 C.F.R. § 1000.532(a) prohibits the recapture of NAHASDA funds that have already been expended on affordable housing activities, HUD's recovery of block grant overpayments was unlawful because some of the overpayments had been spent when HUD sought their return. However, 24 C.F.R. § 1000.532 does not apply to the recovery of IHBG overpayments. It applies only to grant adjustments made to cure recipient performance deficiencies discovered in audits and reviews under 25 U.S.C. § 4165, and implemented in 24 C.F.R. §§ 1000.520-530 (describing HUD's annual review of recipient performance, performance measures, HUD's public reporting of performance review results, and informal remedial actions for performance problems). Furthermore, the Tenth Circuit has already ruled that HUD has the authority to recover funds under NAHASDA. *Fort Peck II*, 367 Fed. Appx. at 892, n.15.

The regulatory text makes clear that it only implements enforcement actions pursuant to performance reviews under § 405, 25 U.S.C. § 4165. It asks the question, "What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?" Subsection (a) goes on to provide that "HUD may . . . 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." *Id.* Plaintiffs' argument that the restriction of § 1000.532(a) on recapturing or deducting from future grants amounts already expended on affordable housing activities rests on the assumption that HUD's initial determinations that it had overpaid Plaintiffs were actions covered by section 405 of NAHASDA, 25 U.S.C. § 4165. That assumption is incorrect.

As explained above, § 405 does not pertain to overpayments for FCAS. The plain language of § 405, even as it existed before its amendment in 2000, addresses only the effect of performance reviews prescribed by the section. Before its amendment in 2000 in the Omnibus Indian Advancement Act, Pub. L. 106-568, 114 Stat. 2927 (2000), the statutory provision required HUD to make annual reviews of grant recipient performance and provided that these performance reviews could have a limited effect on grant amounts already expended on affordable housing activities. It stated, like § 1000.532(a), "The Secretary may make appropriate adjustments in the amount of the annual grants under this Act in accordance with the findings of the Secretary pursuant to reviews and audits under this section. . . . 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." 25 U.S.C. § 4165(c) (1998).

The plain language of 24 C.F.R. § 1000.532(a) similarly limits only those adjustments made to sanction uncured performance problems found in reviews and audits under § 405. Because HUD employed authority other than its compliance enforcement authorities under § 405 (25 U.S.C. § 4165) the implementing regulation, 24 C.F.R. § 1000.532(a), does not apply here, nor are its restrictions on enforcement actions that would recapture funds spent on eligible activities.

Plaintiffs argue that although Congress removed the restriction on performance-based recaptures from § 405 in 2000, the same prohibition lives on in § 401(a)(1)(B) (substantial noncompliance finding requires one of four enforcement actions including reduction of payments by the amount a recipient expended contrary to the Act). P. Br. at 25-8. The argument fails for at least two reasons. First, § 4161(a) does not restrict HUD from doing anything; instead, it requires HUD to take certain actions upon a finding of substantial noncompliance by stating ". . . if the Secretary finds . . ., the Secretary shall [do (A), (B), (C), or (D)]." Second, it strains reason to infer that Congress intended to continue a restriction on recaptures by removing the restriction that explicitly did so.

Furthermore, although HUD never construed § 1000.532(a) to restrict its ability to recover overallocations in compliance with its allocation duty under Title III, it would have been unreasonable to do so after 2000 because such an injunction on HUD's allocation duties under Title III would be without statutory support. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated). This means that even if § 1000.532(a) were not limited before 2000 to performance-based recaptures, it must be so limited after 2000 because otherwise it would conflict with HUD's statutory duty.

By statute, HUD must allocate block grant funds each year according to the allocation formula, which entails recovering overpayments to one tribe and redistributing them to all tribes according to the allocation formula. 25 U.S.C. § 4151; *Fansteel Metallurgical Corp. v. United States,* 172 F. Supp. 268, 270 (Ct. Cl. 1959) (If a payment of government money is erroneously or illegally made, such payment is in violation of the constitutional provision that Congress shall have power to dispose of and make all needful rules and regulations respecting property belonging to the United States; and the government has a duty to seek a refund of money erroneously paid); *Amtec Corp. v. United States,* 69 Fed. Cl. 79, 88 (2005), *aff'd,* 239 Fed. Appx. 585 (Fed. Cir. 2007). After 2000, HUD could not reasonably construe § 1000.532(a) to curtail overallocation recoveries for that would be contrary to § 4151 and HUD's constitutional duty.

5. Guidance 98-19 does not provide a basis for invalidating HUD's actions.

HUD issued Guidance 98-19 to "highlight the regulatory requirements that tribes, TDHEs, and HUD must consider when reviewing the FCAS section of a tribe's Formula Response Form." Plaintiff's RA 4 at THRA000101 (NAHASDA Guidance, No. 98-19, "Purpose" section).

Plaintiffs allege that Guidance 98-19 is a substantive rule and, therefore, should have been issued pursuant to negotiated rulemaking procedures under 5 U.S.C. § 533 and 25 U.S.C. § 4116(b). This is no more than a procedural challenge to HUD's issuance of Guidance 98-19, which is barred by the six-year statute of limitations applicable to APA actions. In any case, the validity of the Guidance would not alter the Court's judgment on HUD's funding actions in these cases because these funding

actions will stand or fall according to whether they violated the substantive law alleged in Plaintiffs' complaints.

a. Plaintiffs' challenges to Guidance 98-19 are procedural and, therefore, barred by the statute of limitations.

The six-year statute of limitations at 28 U.S.C. § 2401(a) applies to APA challenges like the one at issue here. *See, e.g., Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000) ("In the absence of a specific statutory limitations period, a civil action against the United States under the APA is subject to the six year limitations period found in 28 U.S.C. § 2401(a)."). And this time-bar applies specifically to procedural challenges to the adoption of agency rules: "If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision." *Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 715 (9th Cir. 1991); *see also Sai Kwan Wong v. Doar*, 571 F.3d 247, 262-3 (2d Cir. 2009) (applying same rule); *Ayers v. Espy*, 873 F.Supp. 455, 462-3 (D. Colo. 1994) (same).

"A cause of action challenging procedure errors in the promulgation of regulations accrues on the issuance of the rule." *Cedars-Sinai Med. Center v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999). In *Cedars-Sinai*, the regulation at issue was an amendment to the Medicare manual. *Id*. at 1128. Here, HUD issued Guidance 98-19 in 1998. Plaintiff's RA 4 at THRA000101. Therefore, the cause of action to challenge the procedures used in promulgating Guidance 98-19 accrued at that time and the statute of limitations expired six years later, in 2004. Plaintiffs alleged that Guidance 98-19 violated rulemaking procedures in an amended complaint by Tlingit-Haida Regional Housing Authority in June 2011, and by the rest of Plaintiffs in their

Supplemental/Amended Complaints filed in September 2010 (with the exception of Choctaw Nation of Oklahoma, which has not made any allegations regarding Guidance 98-10).[13] Even if this claim relates back to the initial complaints, the first Plaintiff to file a complaint in these coordinated cases was Fort Peck on January 5, 2005. Therefore, the statute of limitations bars all of Plaintiffs' claims regarding the procedures used to implement Guidance 98-18.

b. Even if Plaintiffs' challenges to Guidance 98-19 were not barred by the statute of limitations, the Court should consider the question of its validity immaterial to these cases.

Even if Plaintiffs' challenge to Guidance 98-19 were not barred by the statute of limitations, a holding on the validity of Guidance 98-19 would not affect the Court's judgment on Plaintiffs' claims. The policies stated in the Guidance are encompassed by the actions that Plaintiffs challenge as in violation of 25 U.S.C. §§ 4152(b)(1), 4161(a)(1), 4165(d), and 24 C.F.R §§ 1000.318(a), 1000.532(a). The policies fall into three categories: (1) units with Tenant Account Receivables ("TARs"); (2) converted units; and (3) recovery of overpayments for FCAS-count errors. The last category merely duplicates Plaintiffs' claims under NAHASDA's Title IV. The first two categories, TARs and converted units, merely duplicate Plaintiffs' claim that HUD unlawfully denied or recovered formula funding based on units that Plaintiffs still owned or operated. *See e.g.*, Dkt. No. 27 ¶¶ 13-17 (Navajo Housing Authority Amended/Supplemental Complaint).

[13] *See Fort Peck Housing Auth*, No. 05-cv-18, Dkt. No. 68 ¶ 19; *Northern Arapaho*, No. 06-cv-1680, Dkt. No. 72 ¶ 20 (Northern Arapaho), Dkt. No. 73 ¶ 2 (Jicarilla and Mescalero Apache Housing Auths., and Ute Indian Tribal Housing Auth.).; *Blackfeet Housing*, No. 07-cv-1343, Dkt. No. 55 ¶ 19; *Tlingit-Haida Regional Housing Auth.*, No. 08-cv-451, Dkt. No. 21 ¶ 41; *Navajo Housing Auth.*, Dkt. No. 27 ¶ 22; *Yakama Nation Housing Auth.*, No. 08-cv-2570, Dkt. No. 19 ¶ 19; *Modoc Lassen Indian Housing Authority*, No. 08-cv-2573, Dkt. No. 18 ¶ 18; *Sicangu Wicoti Awanyakapi Corp.,* No. 08-cv-2584, Dkt. No. 23 ¶ 41.

This means that if the Court invalidated Guidance 98-19, HUD's funding actions would nevertheless stand or fall based on the statutory and regulatory law that Plaintiffs already claim HUD violated. Because in APA actions, "due account shall be taken of the rule of prejudicial error," 5 U.S.C. § 706, finding Guidance 98-19 invalid would at best evidence harmless error that has no effect on Plaintiffs' claims. Accordingly, Guidance 98-19 does not provide an independent basis for invalidating HUD's funding actions because Plaintiffs' challenge to it is barred by the statute of limitations, 25 U.S.C. § 2401(a) and is, in any event, immaterial to Plaintiffs' claims.

7. HUD did not violate any trust responsibilities.

a. There is no trust at issue in this case.

HUD did not violate any trust responsibilities because there is no trust at issue with respect to IHBG funds. The Supreme Court has explained that, in the context of a breach of trust claim, for the Government to have a fiduciary duty arising from a trust relationship, there must be a trustee, a beneficiary, and a trust corpus. See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*") (explaining that a fiduciary trust relationship arose when the Government assumed "elaborate control over forests and property belonging to Indians" because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)"). The Supreme Court further held that a fiduciary relationship arises where the Government "'takes on or has control or supervision over tribal monies or properties. . . .'"). *Id.* (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). For the fiduciary duties to arise, the Government must be obligated to both hold the property for the beneficiary

and also manage it for the beneficiary. See *United States v. Mitchell*, 445 U.S. 535, 543-44 (1980) ("*Mitchell I*") (holding that where Congress intended the United States to hold certain land in trust for the tribes but not to control the use of the land, no fiduciary duty to manage the land arose). These elements are not present here, where the amount sought is simply that appropriated.

A congressional appropriation to be distributed by an agency to Indian tribes is generally not a trust corpus. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Supreme Court explained that "public moneys gratuitously appropriated" are distinct from "moneys belonging to the Indians themselves." *Id*. at 79. One class of appropriations relates to public moneys belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government. *Id*. at 78. In *Quick Bear*, the Supreme Court relied on this distinction and held that money designated by Congress to pay a treaty debt belonged to the Indians and had the same characteristics as a trust fund. *Id*. at 79-810. This distinction was recognized by the Court of Federal Claims in *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 68-69 (2008) ("*Samish 2008*"). ("[F]unding appropriated by Congress for the benefit of the Indian people via the [Tribal Priority Allocation] system and [Indian Health Service] funding process is not trust property."); and *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 148 (2009) (finding that the only "property" at issue, the funds that plaintiff might have received if it was treated as a Federally recognized Indian tribe between1969 and 1996, are not trust property).

Thus, the Government's general trust relationship with Indian tribes, even when there is a statute like NAHASDA that contains general language about that trust

relationship, does not convert all funds appropriated for tribes into a trust corpus or otherwise create a fiduciary relationship. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) (explaining that a "congressional statement of policy fails to create the necessary trust relation" because it did not "confer on the government pervasive or elaborate control over a trust corpus"); *Samish 2008*, 82 Fed. Cl. at 67 (holding that language similar to that in section two of NAHASDA, 25 U.S.C. § 4101, contained in the statutes that form the basis of the Tribal Priority Allocation system and Indian Health Service funding process is merely an expression of the general trust relationship between the United States and the Indian people). NAHASDA never states that the money appropriated is to be held "in trust" for an Indian tribe or tribes. *Cf. United States v. White Mountain Apache*, 537 U.S. 465, 475, 480 (2003). Instead, NAHASDA requires HUD to make grants directly to recipient Indian tribes or to their TDHE on behalf of the tribe, to carry out affordable housing activities under 25 U.S.C. § 4132. 25 U.S.C. § 4111(a)(1).[14] As a result, Plaintiffs' "breach of trust" claim relating to the funds appropriated for IHBGs relates neither to a trust corpus nor to any substantive law creating fiduciary duties.

b. NAHASDA does not create general trust responsibilities.

In *Mitchell I*, the Supreme Court considered whether the Indian General Allotment Act of 1887 ("GAA") authorized an award of money damages against the United States for alleged mismanagement of forests located on lands allotted to tribal members. The Court held that the GAA did not create private rights enforceable in a

[14] Likewise, annual NAHASDA appropriations are void of any trust language. *See, e.g.*, Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 376 (2004) ("For the Native American Housing Block Grants program, as authorized under title I of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4111 et seq.), $654,100,000, to remain available until expended. . . .").

suit for money damages under the Indian Tucker Act. After examining the GAA's language, history, and purpose, the Court concluded that it "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Mitchell I*, 445 U.S., at 542. In particular, the Court stressed that sections 1 and 2 of the GAA removed a standard element of a trust relationship by making "the Indian allottee, and not a representative of the United States, . . . responsible for using the land for agricultural or grazing purposes." *Id*. at 542-543.

When the case returned to the Supreme Court three years later, the Court permitted a claim based upon different statutes to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes that Congress had enacted after the GAA. *Id*. at 219-23. Those statutes directed the Government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the Indian landowners. *Id*. The Court held that those statutes imposed strict and detailed duties on the Government to manage forest lands. *Id*. at 224-25. In view of the pervasive and complete control exercised by the Government over the lands, the statutes confirmed the existence of a fiduciary relationship. *Id*. Thus, the statutes satisfied the requirements for a claim of breach of fiduciary duty because they mandated the payment to Indians of money resulting from the management of Indian timber resources. *Id*. at 224-27. As the Supreme Court later explained, the difference between the statutes in *Mitchell I* and *Mitchell II* is that the former provided only a "'bare trust'" for a limited purpose, while the latter provided for "'full responsibility'" for

management of Indian resources. *United States v. Navajo Nation*, 537 U.S. 488, 505 (2003) (quoting *Mitchell II*, 463 U.S. at 224).

Applying *Mitchell I* and *Mitchell II*, the Ninth Circuit held that NAHASDA does not create general trust responsibilities. In *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), members of an Indian tribe who had purchased homes from an Indian housing authority alleged to be defective brought suit against HUD, contending among other things that HUD's actions constituted a breach of its trust responsibilities under NAHASDA. The United States Court of Appeals for the Ninth Circuit rejected the claim that NAHASDA contains anything more than a limited trust relationship and affirmed district court dismissal of that part of the law suit. The Ninth Circuit first observed that NAHASDA's statement of congressional findings recognized, "federal Indian housing assistance was to be provided 'in a manner that recognizes the right of Indian self-determination and tribal self-governance' and with the 'goals of economic self-sufficiency and self-determination for tribes and their members.'" *Marceau*, 540 F.3d at 927 (quoting 25 U.S.C. § 4101(6)- (7)). The court of appeals noted that HUD's statutorily prescribed role—in addition to providing the block grants—"is generally confined to 'a limited review of each Indian housing plan,' and even then 'only to the extent that [HUD] considers review is necessary.'" *Id*. (quoting 25 U.S.C. § 4113(a)(1)). The grant, once made, is subject to tribal control; the recipient, rather than HUD, is responsible for operating the housing program, including the continued maintenance of housing. *Id*. (citing 25 U.S.C. § 4133). HUD's responsibility consists primarily of oversight and audit, to ensure that Federal funds are spent for the intended purpose. *Id*. (citing 24 C.F.R. § 1000.520).

The Ninth Circuit also noted that NAHASDA did not require tribes to form housing authorities or, if they chose to do so, did not require them to seek federal grant funds. *Id*. Further, the court held that, under NAHASDA, "the federal government held no property—land, houses, money, or anything else—in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing." *Id*. at 928. Accordingly, the Ninth Circuit rejected the Indians' breach of trust claims. *Id*. This Court should as well.

Plaintiffs' complaints do not identify any responsibilities that HUD owed to the tribes that are comparable to the duties that created an enforceable trust relationship in *Mitchell II* where the Government managed Indian forest resources, obtained revenue thereby, and paid proceeds to the Indian landowners. *Mitchell II*, 463 U.S. at 224-25. HUD's duties under NAHASDA, as the Ninth Circuit noted, are limited to making grants. HUD can review the Indian Housing Plans to the extent it deems necessary but, if it does so, Congress limited HUD's authority to do so to "a limited review . . . to ensure that the plan complies with the requirements of section 4112 of this title" (listing the requirements for the housing plan). 25 U.S.C. § 4113(a)(1). Thus, although NAHASDA states in sub-sections 4101(3) and (4) that there is a trust relationship between the Government and the tribes, it is nothing more than a "bare trust" that the Supreme Court rejected in *Mitchell I* and *Navajo*. *Navajo,*, 537 U.S. at 505.

Furthermore, Imposing fiduciary duties upon the Government under NAHASDA would be contrary to NAHASDA's principal purposes, just as in *Mitchell I* and *Navajo I*. In *Mitchell I*, the GAA was designed so that "the allottee, and not the United States, ...

[would] manage the land." *Navajo*, 537 U.S. at 508 (quoting *Mitchell I*, 445 U.S. at 543). Imposing upon the Government a fiduciary duty to oversee the management of allotted lands would not have served that purpose. *Id*. Similarly, in *Navajo*, the statute at issue aimed to enhance tribal self-determination by giving tribes, not the Government, the lead role in negotiating mining leases with third parties. *Id*. As the Court of Federal Claims recognized, "'[t]he ideal of Indian self-determination is directly at odds with Secretarial control over leasing.'" *Id*. (quoting 46 Fed. Cl. 217, 230 (2000)).

So too here. NAHASDA seeks to "allow families to prosper without government involvement in their day-to-day lives." 25 U.S.C. § 4101(1)(C). It seeks "to achieve the goals of economic self-sufficiency and self-determination for tribes and their members" and provides for Federal assistance to tribes "in a manner that recognizes the right of self-determination and tribal self-governance. . . ." *Id*. at § 4101(6) & (7). Imposing fiduciary duties on the Government would be contrary to these goals. Accordingly, the Plaintiffs' trust claim fails.

8. The statute of limitations bars many of Plaintiffs' claims regarding specific overpayments.

The statute of limitations bars many of Plaintiffs' claims regarding specific overpayments because more than six years passed between the date HUD informed Plaintiffs of its final decision to recover the overpayments and the date Plaintiffs challenged those decisions in court.

To determine when a cause of action under the APA accrues, the Court must determine when the agency action at issue became final. *See, e.g., Preminger v. Sec. of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir.) (2007) (cause of action under APA accrues when agency action final); *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d

21, 35 (1st Cir. 1998) (same). The Supreme Court has articulated the test for final agency action as having two conditions. "First, the action must mark the 'consummation' of the agency's decisionmaking process. . . . And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'". *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Although the decision to take an action is a final agency action, the actual implementation of that decision is not a final agency action. For example, in *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494-95 (10th Cir. 1997) ("*CWWG*"), the Army issued a final environmental impact statement in 1989 approving of plans to destroy chemical weapons by incineration at an Army facility in Tooele, Utah. *Id*. at 1487. Plaintiffs filed a complaint in 1996 seeking to prevent the Army from carrying out the plan. *Id*. at 1488. Sometime after 1989, but within six years of the filing of the complaint at issue, the Army decided to commence trial burns at the Utah facility. *Id*. at 1494. However, the Tenth Circuit found that the plaintiffs "provide[d] no indication that the Army [had] ever revisited the question of how precisely it planned to destroy the chemical weapons at Tooele since its 1989 Final Environmental Impact Statement." *Id*. at 1494. Therefore, the Tenth Circuit found that the plaintiffs' APA claim was barred by the statute of limitations because more than six years had passed from the time the Army approved of the destruction-by-incineration plans. *Id*. at 1494-95. The cause of action accrued when the decision was made, not when the decision was carried out. *See also Cherry v. U.S. Dept. of Agr.*, No. 00-1139 2001 WL 811737, *3

(10th Cir. July 18, 2001) (implementation of a decision made long ago is not a final agency action under the APA).

In this case, HUD's final decisions that overpayments had been made are the final agency decisions at issue. Those decisions fulfill both of the tests for a final agency decision—they were the culmination of the agency's decisionmaking process and the actual recovery of overpayments flowed from those decisions. *Bennett*, 520 U.S. at 177-78. Although the actual recoveries may not have occurred until later (or, indeed, at all, because HUD has suspended recoveries from Plaintiffs pending the outcome of this litigation), the final agency decision was the decision to recover, not the later recovery. *See CWWG*, 111 F.3d at 1494-95.

A ruling now that the statute of limitations bars claims regarding decisions to recover made more than six years before a complaint was filed will streamline the litigation for the "counting" phase. In most cases, a determination that a challenge to an overpayment decision is barred by the statute of limitations should be straightforward. For example, HUD informed the Association of Village Council Presidents Regional Housing Authority ("AVCP") on October 20, 2000, that it was overfunded in FY 1998, 1999, and 2000 by $1,340,126 and for FY 2001 by $2,193,826, and that HUD sought recovery of those overpayments. DRA J-1. However, AVCP did not file a complaint until over six years later, on June 27, 2007. *Blackfeet Housing*, No. 07-cv-1343, Dkt. No. 1. Likewise, HUD informed the Lower Brule Housing Authority ("LBHA") on June 20, 2002, that it was overfunded in FYs 1998 to 2002 by $372,442, and requested that the LBHA contact HUD to discuss repayment. DRA Y-2. LBHA and HUD exchanged letters and HUD stated on July 29, 2002, that it would deduct the overpayments from

grants to LBHA in FYs 2003 to 2007. DRA Y-4. LBHA did not file their complaint until more than six years later, on November 26, 2008. *Sicangu Wicoti Awanyakapi Corp.*, No. 08-cv-2584, Dkt. No. 1. Accordingly, the Court should hold that any challenge to a determination is barred by the statute of limitations if made later than six years after the determination.

9. HUD cannot be compelled to refund block grant funds that it recovered and redistributed.

The Court cannot require HUD to repay Plaintiffs the recovered block grant funds because, as discussed above, the allocation regulation at issue is valid and Plaintiffs received more money than they were due. But even if the regulation were not valid, Plaintiffs cannot force a refund through this lawsuit. First, the monetary relief Plaintiffs seek is not available under APA. Second, it could not in any case be granted now to the extent the funds at issue have been redistributed to tribes through the allocation formula.

In the Fort Peck litigation, the plaintiff requested that the court order HUD to repay it the amount of block grant funds HUD had recovered. Despite its ruling invalidating § 1000.318, the Court held that, "[t]he relief requested is not an available remedy under the APA because it constituted money damages contrary to the restriction in 5 U.S.C. § 702." *Fort Peck Housing Auth. v. HUD*, No. 05-cv-00018-RPM, 2006 WL 2192043, *2 (Aug. 1, 2006). The same applies here.

a. The additional relief Plaintiffs seek is for money damages and thus is not available in this APA action.

The waiver of sovereign immunity in this action is the APA, 5 U.S.C. § 701 et seq. That waiver of sovereign immunity "must be construed strictly in favor of the

sovereign and may not be "enlarge[d] ... beyond what the language requires." *See United States v. Nordic Village, Inc*., 503 U.S. 30, 34 (1992) (internal quotation marks omitted). In an action under the APA, a plaintiff may seek only "relief other than money damages." 5 U.S.C. § 702. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court clarified that not all monetary relief is "money damages" for purposes of the APA. Since *Bowen*, the Supreme Court confirmed that "Bowen's interpretation of § 702 . . . hinged on the distinction between specific relief and substitute relief . . . ." *Department of the Army v. Blue Fox, Inc*., 525 U.S. 255, 262 (1999). In *Blue Fox*, the Court held that where a party sought an equitable lien, it should be viewed as seeking "money damages" because the lien, though equitable, was "a means to the end of satisfying a claim for the recovery of money." *Id*. at 262. More recently, the Court indicated that under these standards, virtually all claims seeking payment of money should be viewed as claims for money damages: "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (internal quotation making omitted). Accordingly, a court must scrutinize carefully the relief sought to determine whether what is sought is specific money or property, or merely recovery for loss resulting from a defendant's breach of legal duty. See *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1278 (10th Cir. 1991) (holding that courts must "scrutinize claims against the United States to be certain that

the plaintiff has not endeavored to transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money.").

Applying these standards here, the money Plaintiffs seek is a claim for money damages. Except for amounts set aside by stipulation, HUD did not retain recovered funds but rather redistributed those funds through the IHBG formula to eligible tribes in the fiscal year the funds were recovered or in the next fiscal year. 24 C.F.R. § 1000.319(b) (recovered overpayments distributed to all tribes in accordance with IHBG formula allocation). Here, the only money HUD could provide to Plaintiffs (other than set-asides) is substitute money, from another appropriation. Such money would clearly be to compensate Plaintiffs for the loss of the other funds, not to return identifiable funds.

b. Plaintiffs' request for the funds not already set-aside is moot because the funds have already been distributed to all the tribes.

Plaintiffs' request for relief also should be denied as moot to the extent that Plaintiffs seek to recover funds that were redistributed by HUD to eligible tribes as part of its regular funding process.[15]

Where funds held by an agency have been redistributed, the party claiming that it was entitled to those funds cannot get the money back, even if its claim of entitlement is valid, because the court cannot recover the distributed funds. "[O]nce the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of*

[15] Mootness does not apply to funds governed by stipulations and a preliminary injunction regarding HUD's set-aside of funding from specific fiscal years from which judgments regarding funding from those specific fiscal years may be satisfied. HUD has set aside FY 2006 funds related to Northern Arapaho's claim. No. 06-cv-1680, Dkt. No. 3. HUD has set aside FY 2007 funds related to the claims of Northern Arapaho, Jicarilla Apache Housing Authority, and Mescalero Apache Housing Authority. *Id*. at Dkt. Nos. 46, 48, 50. HUD has set aside FY 2008 funds related to the claims of the plaintiffs in the *Blackfeet* case , Tlingit-Haida Housing Authority, and Navajo Housing Authority. No. 07-cv-1343 at Dkt. No. 23, No. 08-cv-451 at Dkt. No. 3, and No. 08-cv-826 at Dkt. No. 16. HUD has also agreed not to recover overpayments at issue in the coordinated cases while this litigation is pending.

Houston v. HUD, 24 F.3d 1421, 1426 (D.C. Cir. 1994). In *City of Houston*, the plaintiff claimed that HUD had not properly awarded it $2.6 million in community development block grants. *Id*. at 318-17. The court ruled that because HUD had already awarded the funds to recipients, the court could not grant monetary relief, which rendered moot the plaintiff's request for such relief. *Id*. at 318-19. This Court has held similarly. *Fort Peck*, 2006 WL 219043, *2. Accordingly, even if Plaintiffs were entitled in this action to recover the funds, the Court cannot grant Plaintiffs all the relief they seek.

Conclusion

For the reasons given above, judgment should be entered for Defendants against Plaintiffs.

Dated October 11, 2011

Respectfully submitted,

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

I hereby certify that on October 11, 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:

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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/ Timothy B. Jafek
Timothy B. Jafek