IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

SECOND AMENDED COMPLAINT

COMES NOW, THE ABOVE-NAMED PLAINTIFFS, and pursuant to this Court's order entered September 29, 2011 granting Plaintiffs leave to amend the Second Claim for Relief as stated in the First Amended Complaint, Plaintiffs file this Second Amended Complaint, which amends paragraphs 45-49 of the First Amended Complaint, and which changes the references to the "First Amended Complaint" below to the "Second Amended Complaint". Accordingly, for their Second Amended Complaint against the United States, Plaintiffs allege and state as follows:

INTRODUCTION

1. Plaintiffs bring this action to seek recovery of damages for those amounts that the United States Department of Housing and Urban Development (hereinafter, "HUD") unlawfully recaptured and/or withheld in grant funds. HUD's actions had the effect of improperly reducing the amount of federal funding that Plaintiffs were entitled to under the Native American Housing Assistance and Self-Determination Act of 1996 (hereinafter "NAHASDA"), Pub. L. 104-330, 25

U.S.C. § 4101 *et seq.* and the Plaintiffs' annual funding agreements. HUD is charged by Congress with the responsibility of administering NAHASDA.

2. This Second Amended Complaint is filed, in part, pursuant to H.R. 2786, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Title III, Section 301, which amended 25 U.S.C. § 4152 (b), the statute at issue in this case. Section 301 provides, *inter alia*, that, "[the 2008 amendments] shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph."

3. The subparagraph above was enacted on October 14, 2008. The Plaintiffs timely filed the original complaint within 45 days after the date of enactment and, pursuant to Rule 15 (c)(1)(B), Fed.R.Civ.P., this Second Amended Complaint relates back to the date the original complaint was filed.

4. Pursuant to NAHASDA, the Secretary of HUD is obligated to distribute affordable housing grants to Indian tribes. *See* 25 U.S.C. § 4111(a) ("For each fiscal year, the Secretary shall . . . make grants . . . on behalf of Indian tribes to carry out affordable housing activities.")

5. Under NAHASDA, Plaintiffs receive annual housing grants from HUD, the amount of which is based, in part, on the number of housing units that Plaintiffs owned or operated on September 30, 1997 pursuant to a contract with the Secretary of HUD under the United States Housing Act of 1937 (42 U.S.C. §1437, *et. seq.*) (hereinafter the "1937 Housing Act"), a predecessor housing statute to NAHASDA. These 1937 Housing Act homes are referred to under NAHASDA's implementing regulations as Formula Current Assisted Stock (hereinafter "FCAS"). Plaintiffs contend that HUD has unlawfully reduced mandatory congressional grants by eliminating certain eligible units of Plaintiffs' FCAS from HUD's grant calculations and otherwise acting unlawfully and in contravention of law and the Plaintiffs' annual block grant funding agreements as alleged herein.

6. Plaintiffs maintain that all FCAS units that were the subject of an Annual Contributions Contract (hereinafter "ACC") between HUD and Plaintiffs as of September 30, 1997 must be included in Plaintiffs' FCAS for purposes of NAHASDA grant funding calculations. Alternatively, Plaintiffs maintain that all FCAS that had not actually been conveyed, and all FCAS which the Plaintiffs owned or operated during each fiscal year from 1998 through 2009, must be included in the FCAS calculations for that the following fiscal year for purposes of NAHASDA grant funding calculations. In any event, however, HUD has acted unlawfully, in excess of its authority, and in violation of numerous laws and regulations in recapturing and/or withholding grant funds from Plaintiffs.

7. Plaintiffs seek a judgment finding that Defendant, through HUD, failed to calculate Plaintiffs' FCAS in accordance with NAHASDA, requiring Defendant to compensate Plaintiffs for grant funds which have been unlawfully reduced, withheld and/or recaptured for the periods including fiscal years 1998-2009, and for damages in an amount to be proven at trial.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491 (a)(1) and the Indian Tucker Act, 28 U.S.C. § 1505 because this action is founded upon NAHASDA, 25 U.S.C. 4101 *et. seq.*, and its implementing regulations, and because this action involves express or implied-in-fact contracts between the Plaintiffs and Defendant.

PARTIES

9. Plaintiff Lummi Tribe of the Lummi Reservation, Washington, is a federally recognized Indian Tribe in Washington and was, during certain periods relevant to this case, authorized to receive and administer NAHASDA block grant funding.

10. Plaintiff Lummi Nation Housing Authority is a governmental agency of the federally recognized Lummi Tribe of the Lummi Reservation in Washington, and was, during

certain periods relevant to this case, authorized as a Tribally Designated Housing Entity (hereinafter "TDHE") to administer NAHASDA block grant funding.

11. Plaintiff Fort Peck Housing Authority is a governmental agency of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, a federally recognized Indian Tribe in Montana, and was, for the 1998-2009 fiscal years, authorized as a TDHE to receive and administer NAHASDA block grant funding.

12. Plaintiff Fort Berthold Housing Authority is a governmental agency of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, a federally recognized Indian Tribe in North Dakota, and was, for the 1998-2009 fiscal years, authorized as a TDHE to receive and administer NAHASDA block grant funding.

13. Plaintiff Hopi Tribal Housing Authority is a governmental agency of the Hopi Tribe, a federally recognized Indian Tribe geographically located within the exterior boundaries of Arizona, and was, for the 1998-2009 fiscal years, authorized as a TDHE to receive and administer NAHASDA block grant funding.

14. Defendant United States, during the time periods relevant to the claims presented, at all times relevant hereto, acted through HUD, a federal agency within the United States government designated to oversee and administer block grant funding for TDHEs. HUD distributes NAHASDA block grant funding to TDHEs to cover a range of eligible affordable housing activities for low income families, including rental and homeownership programs.

FACTS AND GENERAL ALLEGATIONS

15. Congress enacted NAHASDA in 1996 in order to fulfill the federal government's responsibility to Indian tribes and their members "to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic

condition." 25 U.S.C. § 4101(4). Congress found that "the need for affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities ... is acute." 25 U.S.C. § 4101(6). Through NAHASDA, Congress provides funding for housing assistance. Plaintiffs use NAHASDA funding to address their tribal members' acute need for affordable housing. Plaintiffs encourage independence and self-sufficiency among their tribal members by providing homeownership opportunities through their Turnkey and/or Mutual Help Homeownership Programs (hereinafter referred to collectively as "Mutual Help"). Plaintiffs also provide low rent housing assistance. Much of this assistance is provided through the continued maintenance, renovation and/or replacement of dwelling units that were under an ACC on September 30, 1997.

16. The Plaintiffs were allocated FCAS funding each year, and each Plaintiff signed annual funding agreements with HUD for each fiscal year from 1998-2009, which, among other things, incorporated the provisions of NAHASDA.

17. Prior to the enactment of NAHASDA, Indian housing assistance was administered through a variety of programs under the 1937 Housing Act. The 1937 Housing Act included a number of different housing programs, including a low rent program and the so-called "Mutual Help" program. Under the Mutual Help program, an eligible Indian family could contribute land, work, materials, or equipment to the construction of a home under a Mutual Help and Occupancy Agreement with an option to purchase the home at the end of a 25-year amortization term, or occasionally a 15-year amortization term.

18. NAHASDA was enacted in 1996, took effect on October 1, 1997 and purported to terminate future Indian housing assistance under the 1937 Housing Act after September 30,

1997, in favor of NAHASDA's block grant funding mechanism. *See* 25 U.S.C. §§ 4181(1) and 4182.

19. Even though NAHASDA purported to terminate assistance under the 1937 Housing Act, Congress recognized its continuing obligation to provide Indian housing authorities with operational maintenance and rehabilitation funds for housing constructed under the 1937 Housing Act. This obligation was without regard to whether any of these dwelling units would be rehabilitated or demolished and replaced, either before or after conveyance. *See* 25 U.S.C. §§ 4112(c)(4)(D) and 4133(b).

20. Under NAHASDA, grant funding is provided to recipients for affordable housing programs based on an allocation formula to be established by regulations issued through a negotiated rulemaking procedure. *See* 25 U.S.C. §§ 4151 and 4152. The formula developed by the rulemaking process has two components: (1) FCAS; and (2) need. 24 C.F.R. § 1000.310. The focus of the present dispute is solely on the FCAS component of the formula. Under 25 U.S.C. § 4152(b)(1), the FCAS component is based on a recipient's inventory of 1937 Housing Act dwelling units, including Mutual Help units,in existence and under an ACC as of September 30, 1997.

21. HUD has adopted a regulation, 24 C.F.R. § 1000.318(a), which states in relevant part that: "Mutual Help … units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, …".

22. 24 C.F.R. § 1000.318(a) has the effect of unlawfully reducing Plaintiffs' FCAS allocation each year as Mutual Help homes continue to be either conveyed or considered by HUD to be conveyance eligible.

23. 24 C.F.R. § 1000.318(a) is invalid because it violates section 302(b)(1) of NAHASDA, 25 U.S.C. § 4152(b)(1), which, prior to its amendment in 2008, required that the FCAS part of the NAHASDA funding formula for each fiscal year be based on the number of low-income housing dwelling units owned or operated pursuant to a contract between an Indian housing authority for the tribe and the Secretary on September 30, 1997, with no exception for dwelling units which were subsequently lost by conveyance, demolition, or otherwise.

24. Based on HUD's invalid regulation, 24 C.F.R. § 1000.318, Plaintiffs received substantially less in FCAS funding, in an amount to be determined, beginning in fiscal year 1998 through fiscal year 2009, because HUD unlawfully refused to include all 1937 Housing Act units that were owned or operated by Plaintiffs on September 30, 1997 in calculating Plaintiffs' FCAS grants in those fiscal years.

25. In the alternative, 24 C.F.R. § 1000.318(a) is invalid in part, and has been wrongly interpreted and enforced because HUD improperly excluded FCAS and/or recaptured funding for FCAS that had not actually been lost by conveyance, demolition, or otherwise and/or FCAS which the Plaintiffs continued to own or operate for each fiscal year in question.. For numerous lawful and good faith reasons, recipients such as Plaintiffs may still own or operate a Mutual Help home even after completion of the 15 or 25 year contract term described in paragraph 17 of this Second Amended Complaint. For example: the tenant may be in arrears in his or her rent at the time the home becomes eligible for conveyance; the housing authority may be planning or conducting NAHASDA funded repair or modernization work on the house at the time it is otherwise eligible to be conveyed; the home may have been demolished and replaced; the home may have been converted to low-rent housing; a new tenant may occupy a Mutual Help unit during the pendency of the initial contract term; or a proposed conveyance is

located on Indian trust lands subject to Bureau of Indian Affairs (hereinafter "BIA") approval which may have been withheld. To the extent that Plaintiffs' FCAS funding is conditioned upon the requirements of §100.318 (a) (1)-(2), which require Plaintiffs to convey each such unit "as soon as practicable after the unit becomes eligible for conveyance", and "actively enforce strict compliance with the MHOA, including the requirements for full and timely payment", subsections (1)-(2) of the regulation are invalid because, among other reasons, they are not based on Plaintiffs' need for assistance for affordable housing within the meaning of the statute, 25 U.S.C.§ 4152 (b). The allegations of this paragraph assume the general validity of 24 C.F.R. § 1000.318(a) itself without reference to subsections (1)-(2), and are made as an alternative basis for relief that is without prejudice to Plaintiffs' claimed relief based on the number of FCAS units owned or operated pursuant to an ACC on September 30, 1997.

26. Each recapture of funding for and/or exclusion of eligible dwelling units from Plaintiff's FCAS as a basis for HUD's grant calculations is unlawful, to the extent that each recapture and/or exclusion is based on HUD's refusal to include in Plaintiffs' FCAS funding formula 1937 Housing Act units that had not been conveyed, and which the Plaintiffs continued to own or operate.

27. Under the above alternative argument, Plaintiffs contend that, at a minimum, Defendant should be held liable for the elimination of FCAS units from the FCAS funding formula when these units had not actually been conveyed, and when these units continued to be owned and operated by the Plaintiffs during each funding period.

28. HUD had no lawful authority to recapture grant amounts by adjusting future grant allocations where those amounts had already been awarded in prior fiscal years, and/or which were already spent on affordable housing activities. HUD failed or refused to give prior notice

and an administrative hearing in accordance with 25 U.S.C. §§ 4161 and 4165 prior to recapturing, adjusting or reducing Plaintiffs' block grant allocation. HUD also failed or refused to provide an administrative hearing which complied with applicable provisions of the Administrative Procedure Act ("APA").

29. All of the Plaintiffs have suffered substantial losses of block grant funding during the period covered by fiscal years 1998-2009, as a result of being unlawfully required to exclude dwelling units from FCAS funding even though NAHASDA, prior to its amendment in 2008, required that all of the Plaintiffs dwelling units under an ACC on September 30, 1997, be counted in the block grant formula.

30. HUD was required, but failed to comply with the requirements of NAHASDA, 25 U.S.C. §§ 4161 and 4165, and applicable provisions of the APA governing administrative hearings, in conducting its review and adjustment of the Plaintiffs' block grant funding during the periods covered by fiscal years 1998-2009.

31. HUD's actions in unilaterally reducing the Plaintiffs' grant funding and in asserting the right to recapture previously awarded grant funds, as well as recapturing or withholding block grant monies, are contrary to NAHASDA, including specifically but without limitation, 25 U.S.C. §§ 4152, 4161 and 4165, and applicable provisions of the APA. As a result, Plaintiffs were unlawfully deprived of congressionally mandated funding and suffered damages.

32. HUD could not recapture any purportedly past overfunded grant amounts because no legal authority exists for such recovery and because HUD had a trust responsibility to ensure that Plaintiffs' FCAS was properly counted prior to awarding the grants. Further, NAHASDA did not allow HUD to recapture, reduce, or limit Plaintiffs' block grants unless HUD complied

with Sections 401 and 405 of NAHASDA, 25 U.S.C. §§ 4161 and 4165 and applicable provisions of the APA.

33. On September 11, 1998, HUD issued a so-called "guidance" entitled Guidance 98-19, "Regulatory Requirements Regarding FCAS as listed on a tribe's Formula Response Form" ("Guidance 98-19"). Guidance 98-19 purported in mandatory terms, to unlawfully limit the FCAS units that could be counted in receiving FCAS funding, and further unlawfully denied recipients a right to a hearing with respect to such denial of assistance, all as heretofore alleged in this Second Amended Complaint. HUD purported to give Guidance 98-19 the force of law, and took the unlawful actions as heretofore alleged in material part based upon the requirements and limitations of Guidance 98-19. Guidance 98-19 constituted a rule, the adoption of which violated: (i) 5 U.S.C. §553 because the rule was not adopted in accordance with the procedures set out in such statute; and (ii) Section 106(b)(2) of NAHASDA, 25 U.S.C. § 4116(b), because such rule was not adopted in accordance with the negotiated rulemaking procedures required thereunder. Plaintiffs have suffered damages as a result of the unlawful enforcement of Guidance 98-19.

34. Because the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 did not become law until October 14, 2008, a date after Plaintiffs' FCAS funding had been determined for FY 2009, it does not apply to FCAS calculations or counts involving an Indian housing block grant allocation for any fiscal year through fiscal year 2009.

35. Under any interpretation of the HUD regulation, the recapture is also unlawful because some or all of the recaptured funds have already been expended on affordable housing activities. 24 C.F.R. §1000.532 prohibits the recapture of NAHASDA funds that have already

been expended on affordable housing activities. HUD knows, or has access to information by which it could know, that some or all of the recaptured funds or funds sought to be recaptured have already been expended on affordable housing activities but HUD has nevertheless sought to recapture or has recaptured those funds. Prior to recapturing these funds, HUD is obligated to determine whether the funds have already been expended on affordable housing activities and is obligated to provide Plaintiffs with notice and an opportunity for a hearing in making or to contest any such determination. HUD's failure to do so is a violation of Sections 401 and 405 of NAHASDA (25 U.S.C. §§ 4161, 4165), 24 C.F.R. §1000.532, and the due process clause of the United States Constitution, Amendment 5, and is arbitrary, capricious and not in accordance with applicable law.

36. Effective May 2007, HUD implemented for the first time a regulation, 24 C.F.R. § 1000.319, that purports to allow HUD to recapture FCAS funding. Section 1000.319 is unlawful to the extent it allows HUD to recapture or adjust Plaintiffs' block grant funds without complying with the provisions of NAHASDA sections 401 and 405, 25 U.S.C. §§ 4161 and 4165, 24 C.F.R. §1000.532, and/or the due process clause of the United States Constitution, Amendment 5. Alternatively, assuming § 1000.319 is valid, HUD had no lawful authority to recapture block grant funds prior to the effective date of the regulation's adoption. Further, to the extent 24 C.F.R. §1000.319 is deemed to be retroactive, and assuming it does not conflict with Sections 401 and 405 of NAHASDA, the recapture is unlawful because, pursuant to 24 C.F.R. §1000.319(d), HUD is given only 3 years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form. With respect to some or all of the Plaintiffs, however, HUD has

sought to and recaptured funds disbursed to Plaintiffs more than 3 years from the date Formula Response Forms were sent out.

37. Sections 401-405 of NAHASDA, 25 U.S.C. §§ 4161-4165, establish a comprehensive and exclusive remedial scheme which does not include the recapture of block grant funds which have already been awarded or distributed. This comprehensive and exclusive remedial scheme leaves no room for HUD to adopt or enforce the additional remedy of recapture of FCAS funds already awarded or distributed, based on alleged over-counting of FCAS.

FIRST CLAIM FOR RELIEF

38. Plaintiffs hereby re-allege and incorporate herein by reference paragraphs 1 through 37 of this Second Amended Complaint.

39. Plaintiffs have suffered a legal wrong and damages and are adversely affected and aggrieved as a result of HUD's aforementioned actions in unlawfully withholding, recapturing, adjusting, and/or reducing Plaintiffs' past block grant funding.

40. Under Section 302(b)(1) of NAHASDA (25 U.S.C. § 4152(b)(1)), prior to its amendment in 2008, any conveyances of housing units under the Mutual Help program should have no effect on HUD's calculation of Plaintiffs' annual FCAS funding, since all of these conveyed homes had been owned or operated pursuant to an ACC by Plaintiffs on September 30, 1997.

41. In the alternative, and only in the event that Plaintiffs do not prevail in using 1997 as a base year for FCAS funding, Plaintiffs' FCAS entitlement should include all 1937 Housing Act units that were owned or operated by Plaintiffs in or for each fiscal year for which the pertinent FCAS grant allocation is or was being made. HUD has unlawfully withheld FCAS

funding in prior fiscal years from 1998 to 2009, in an amount to be determined, by, among other things, unlawfully recapturing FCAS funds which had already been awarded, excluding FCAS units that HUD contends were conveyed or should have been conveyed and by otherwise unlawfully excluding dwelling units that the Plaintiffs continued to own and operate during the fiscal years in question.

42. HUD's actions alleged above, including the adoption, enforcement and application of 24 C.F.R. §1000.318(a), and the agency actions referred to in this Second Amended Complaint, are unlawful, arbitrary, capricious and in excess of the agency's statutory authority.

43. HUD's actions as alleged herein violate NAHASDA, and constitute material breaches of Plaintiffs' funding agreements.

44. As a result of Defendant's unlawful conduct, Plaintiffs are entitled to damages to compensate them for their losses.

SECOND CLAIM FOR RELIEF

45. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 44 of this Second Amended Complaint.

46. Plaintiffs have been unlawfully deprived of their IHBG funding because HUD has wrongly reduced, adjusted, withheld and/or recaptured grant funds from Plaintiffs, all as alleged in this Second Amended Complaint.

47. Defendant's actions violate NAHASDA's mandate that HUD allocate block grant money in accordance with the statute, 25 U.S.C. § 4152(b)(1), and that HUD comply with the requirements of 25 U.S.C. §§ 4161 and 4165 and 24 C.F.R. § 1000.532 before adjusting or recapturing funds from the Plaintiffs' annual block grant. Specifically, HUD may not adjust or

recapture the Plaintiffs Block Grant without: (1), finding that Plaintiffs "failed to comply substantially" with any provision of NAHASDA. 25 U.S.C. § 4161 (a), 4165(d); and (2) providing notice and the opportunity for a hearing pursuant to the Regulations implemented under §§ 4161(a) and 4165, found at 24 C.F.R. §1000.532 and 1000.540. The failure of the Defendants to comply with the applicable statutes and regulations constitutes the unlawful exaction or retention of money.

48. Each such recapture, adjustment and/or exclusion is unlawful because HUD may only adjust a NAHASDA recipient's grant amounts after complying with the notice and hearing requirements of Sections 401 and 405 of NAHASDA, 25 U.S.C. §§ 4161 and 4165, the due process clause of the United States Constitution, Amendment 5, and only after finding that the Plaintiffs "failed to comply substantially" with any provision of NAHASDA. 25 U.S.C. §§ 4161(a), 4165(d). HUD failed or refused to comply with these provisions in effecting the recaptures, adjustments and/or exclusions, nor did HUD at any time advise Plaintiffs of any of the above-referenced notice and hearing rights under 24 C.F.R. §§ 1000.532 and 1000.540. To the extent HUD asserts the right, based on 24 C.F.R. §1000.318 or otherwise, to recapture or adjust funds and/or exclude dwelling units without compliance with Sections 4161(a), 4165(d) of NAHASDA and the Regulations implemented thereunder, specifically, without a finding of substantial noncompliance after according the required hearing rights, such action constitutes the unlawful exaction or retention of money and is unlawful. Such action is also a material breach of the Plaintiffs' annual NAHASDA funding agreement(s).

49. As a result of Defendant's unlawful conduct, Plaintiffs are entitled to a judgment awarding damages as compensation for their losses, equal to the amounts unlawfully exacted or retained.

THIRD CLAIM FOR RELIEF

50. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1- 49 of this Complaint.

51. Defendant owes a trust responsibility to Plaintiffs arising from NAHASDA and the general trust responsibility of the United States to Indian Tribes.

52. Defendant has a statutory trust and/or fiduciary duty to Plaintiffs to correctly calculate and allocate block grant funds owed to Plaintiffs in accordance with NAHASDA's block grant formula for fiscal years 1998-2009.

53. Defendant owes a statutory trust and/or fiduciary duty to account for and compensate the Plaintiffs for the loss of block grant funding suffered by Plaintiffs as a result of HUD's unlawful enforcement of 24 C.F.R. § 1000.318, or any other regulation or action which unlawfully limited FCAS funding or the number of dwelling units in Plaintiffs' FCAS for fiscal years 1998-2009.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue and enter a judgment finding that the Defendant has unlawfully, in violation of NAHASDA, in breach of its trust responsibility, and/or in breach of its funding agreements with the Plaintiffs, withheld, adjusted, reduced and/or recaptured congressionally mandated block grant funding by eliminating eligible dwelling units from funding in the block grant formula, and a judgment against the United States for damages, in an amount to be proven at trial, equal to the NAHASDA grant funds that HUD improperly recaptured, reduced calculated and/or withheld in fiscal years 1998 to 2009 based on its unlawful actions as alleged above, plus pre and post judgment interest as allowed by law.

2. Award Plaintiffs their reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;

3. For such other and further relief as the Court deems proper.

Respectfully submitted, this 28th day of October, 2011.

s/ *John Fredericks III*
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UNITED STATES COURT OF FEDERAL CLAIMS
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 28th day of October, 2011, a copy of the foregoing "SECOND AMENDED COMPLAINT" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system as listed below. Parties may access this filing through the Court's system.

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s/ *Debra A. Foulk*

Debra A. Foulk
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