IN THE UNITED STATES COURT OF FEDERAL CLAIMS

08-848
(Senior Judge Wiese)

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.

UNITED STATES,
Defendant.

DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

I. Nature Of The Case 2

II. Statement Of Facts 2

ARGUMENT 3

I. Standard Of Review 3

II. HUD's Allocation Formula Complies With The Statute Because It Is "Based On" The Number Of Units The Tribe Owned Or Operated Pursuant To A Contract With HUD 3

A. Statutory Background 3

B. The Regulations 5

C. The Intent Of Congress Is Clear 7

1. NAHSDA Contains Other Indica Of Congressional Intent 10

2. HUD's Rule Complied With The Congressional Mandate 12

D. Plaintiffs' Interpretation Of The Statute Is Unreasonable 13

E. The Reauthorization Act Demonstrates That HUD Correctly Interpreted The Statutue 16

F. Plaintiffs Mischaracterize *Fort Peck II* 20

III. HUD Acted Reasonably In Applying Section 1000.318 And Removing Units From Tribes' FCAS 21

A. HUD Acted Reasonably In Removing Units From Lummi's FCAS 24

B. HUD Acted Reasonably In Removing Units From Hopi's FCAS 25

1. The December 30, 2002, FCAS Reduction 25

2. The August 29, 2005, FCAS Reduction 25

3. The October 18, 2005, FCAS Reduction 27

4. The December 5, 2006, FCAS Reduction 27

5. The February 22, 2008, FCAS Reduction 28

6. The November 3, 2008, FCAS Reductions 31

7. The November 19, 2009, FCAS Reductions 32

C. HUD Acted Reasonably In Removing Fort Berthold Units 33

1. The December 12, 2003, FCAS Unit Reductions........................ 33

2. The ND-08 FCAS Reductions.. 33

3. The ND-10 FCAS Reductions 34

4. The ND-13 FCAS Reductions 36

IV. The Plaintiffs Cannot State An Illegal Exaction Claim And They Were Not Prejudiced By The Lack Of A Hearing.. 37

A. Lummi Did Not Dispute HUD's Overpayment.. 41

1. HUD's Recovery Of $845,667 41

2. The $14,029 And $3,540 Overpayment Recoveries 43

B. Hopi Did Not Dispute HUD's Recoveries 43

1. The $558,169 Recovery 43

2. The $26,735 Recovery 44

3. The $21,962 Recovery 45

4. The $251,692 Recovery 46

5. The $93,094 Recovery 47

6. The $13,047 Recovery 47

C. There Are No Facts To Resolve For The Fort Berthold Recoveries.. 48

1. The $35,491 Recovery 48

2. The $91,956 Recovery 49

3. The $67,043 Recovery 50

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 3

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 21

Caldbeck v. United States,
109 Fed. Cl. 519 (2013) 40

Casa de Cambio Comdiv. S.A. de C.V. v. United States,
291 F.3d 1356 (Fed. Cir. 2002) 30

Chattler v. United States,
632 F.3d 1324 (Fed. Cir. 2011) 21

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 7

Codd v. Velger,
429 U.S. 624 (1977) 39

Commissioner of Internal Revenue v. Callahan Realty Corp.,
143 F.2d 214 (2nd Cir. 1944) 19

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) 17

Cyprus Amax Coal Co. v. United States,
205 F.3d 1369 (Fed. Cir. 2000) 38

Dewakuku v. Martinez,
271 F.3d 1031 (Fed. Cir. 2001) 4

Eastport S.S. Corp. v. United States,
372 F.2d 1002 (Ct. Cl. 1967) 38

Ehlert v. United States,
402 U.S. 99 (1971) 22

Envtl. Def. Fund, Inc. v. EPA,
82 F.3d 451 (D.C. Cir. 1996) 14

Fort Peck Housing Authority v. HUD,
435 F. Supp. 2d 1125 (D. Colo. 2006)....................17, 18, 20

Fort Peck Housing Authority v. HUD,
2012 WL 3778299 (D. Colo. 2012)....................19

Fort Peck Housing Authority v. HUD,
367 Fed. App'x. 884 (10th Cir. 2010) .... passim

Gose v. U.S. Postal Serv.,
451 F.3d 831 (Fed. Cir. 2006)....................22

Gould, Inc. v. Mitsui Min. & Smelting Co.,
947 F.2d 218 (6th Cir. 1991) 9

Liquidating Trustee Ester DuVal of KI Liquidation, Inc. v. United States,
89 Fed. Cl. 29 (Fed. Cl. 2009) 3

Lummi Tribe of the Lummi Reservation v. United States,
99 Fed. Cl. 584 (2011) 39

Lummi Tribe of the Lummi Reservation v. United States,
106 Fed. Cl. 623 (2012) 38, 40

McBride Cotton and Cattle Corp. v. Veneman,
296 F. Supp. 2d 1125 (D. Ariz. 2003) 39

McDaniel v. Chevron Corp.,
203 F.3d 1099 (9th Cir. 2000) 9

Michael H. v. Gerald D.,
491 U.S. 110 (1989)....................39

Missouri v. Jenkins,
491 U.S. 274 (1989)....................9

Natural Resources Defense Council, Inc. v. Daley,
209 F.3d 747 (D.C. Cir. 2000)....................14

Newport News Shipbuilding & Dry Dock Co. v. Garrett,
6 F.3d 1547 (Fed. Cir. 1993).................... 19-20

Norman v. United States,
429 F.3d 1081 (Fed. Cir. 2005)....................38

Nuclear Energy Institute, Inc. v. Environmental Protection Agency,
373 F.3d 1251 (D.C. Cir. 2004) 14

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 12, 21

Pierce County, Washington v. Guillen,
537 U.S. 129 (2003) 19

Preminger v. Secretary of Veterans Affairs,
632 F.3d 1345 (Fed. Cir. 2011) 12

Rector v. City and County of Denver,
348 F.3d 935 (10th Cir. 2003) 39

Sebelius v. Auburn Regional Medical Center,
133 S. Ct. 817 (2013) 17

Sierra Club v. Environmental Protection Agency,
356 F.3d 296 (D.C. Cir. 2004) 9

Star-Glo Associates LP v. United States,
414 F.3d 1349 (Fed. Cir. 2005) 18

Teledyne, Inc. v. United States,
50 Fed. Cl. 155 (2001) 19

United Keetowah Band of Cherokee Indians v. HUD,
567 F.3d 1235 (10th Cir. 2009) 14

United States ex rel. Siller v. Becton Dickinson & Co.,
21 F.3d 1339 (4th Cir.) 8

Utah Envtl. Congress v. Bosworth,
443 F.3d 732 (10th Cir. 2006) 40

Young-Montenay, Inc. v. United States,
15 F.3d 1040 (Fed. Cir. 1994) 3

STATUTES AND REGULATIONS

25 U.S.C. § 4101 .... passim

25 U.S.C. § 4111(g) .... passim

25 U.S.C. § 4116 5

25 U.S.C. § 4152 .... passim

25 U.S.C. § 4161(a) 18, 19, 37

25 U.S.C. § 4182 4

42 U.S.C. § 1437 3

42 U.S.C. § 1437bb (1988) 3

42 U.S.C. § 1437c(a)(2) (1994) 4

24 C.F.R. § 1000.10(b) 4

24 C.F.R. §§ 1000.301- 340 5

24 C.F.R. § 1000.310 .... 6, 7

24 C.F.R. § 1000.312 6

24 C.F.R. § 1000.314 6

24 C.F.R. § 1000.316 .... 7, 13

24 C.F.R. § 1000.318 .... passim

24 C.F.R. § 1000.319(d) .... passim

24 C.F.R. §1000.532 .... 37, 38, 40, 42

24 C.F.R. § 905.422(b)(2) (1990) 4

LEGISLATIVE MATERIALS

Pub. L. No. 110-411 18

Pub. L. No. 105-276 18

Pub. L. No. 106-568 18

Pub. L. No. 106-569 18

Pub. L. No. 107-292 18

Pub. L. No. 108-293 18

Pub. L. No. 109-136 18

63 Fed. Reg. 12,334, 12,334-35 (Mar. 12, 1998) 4, 5

MISCELLANEOUS

Black's Law Dictionary 630 (8th ed. 2004) 10

Webster's Third New Int'l Dictionary 180 (1986) 8, 10

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Plaintiffs,	)	
v.	)	No. 08-848 (Senior Judge Wiese)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of the Court of Federal Claims (RCFC), defendant respectfully requests that the Court grant the Government summary judgment on plaintiffs' second amended complaint and deny plaintiffs' motion for partial summary judgment.

QUESTIONS PRESENTED

1. Whether the Native American Housing Assistance and Self-Determination Act, as originally enacted in 1996, required perpetual funding of Mutual Help housing units developed under the United States Housing Act of 1937, even when the grant recipient no longer owned and managed the units.

2. Whether the Department of Housing and Urban Development properly applied its regulation at 24 C.F.R. § 1000.318 when it removed from the grant allocation formula: (a) housing units that never existed; (b) conveyed units; (c) units for which the tribe made no attempt to convey within two years after they became conveyance eligible; and (d) units where the tribe never explained its failure to convey the units.

3. Whether the Department of Housing and Urban Development committed prejudicial error when it did not provide tribes with a formal hearing before recovering overpayments when: (a) there was no factual dispute to resolve at a hearing; (b) the tribes had unspent grant funds from which to recover the overpayments; and (c) the tribes did not request a hearing and in most cases did not appeal.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiffs entered into agreements with the Department of Housing and Urban Development (HUD) to receive annual grants through the grant allocation formula in the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. § 4101 *et. seq.*, in each fiscal year from 1998 to 2009. Second Amended Complaint (SAC) ¶ 5. Plaintiffs contend that, prior to its amendment in 2008, NAHASDA required HUD to perpetually count all housing units developed under the United States Housing Act of 1937 in the grant allocation formula. Plaintiffs contend that HUD "unlawfully recaptured and/or withheld" plaintiffs' annual block grants in fiscal years 1998 to 2009. *Id.* at ¶ 1. Plaintiffs dispute HUD's determinations that certain units are ineligible for inclusion in the formula used to calculate the grants and dispute HUD's determination that they have been overfunded. SAC at, e.g., ¶¶ 24-25.

II. Statement Of Facts

We respectfully refer the Court to our proposed findings of undisputed fact (GPFUF) that we are filing with this motion for summary judgment.

ARGUMENT

I. Standard Of Review

Pursuant to RCFC 56(a), the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. When reaching a summary judgment determination, the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The burden on the moving party may be discharged by "showing," that is, pointing out to the court, that there is an absence of evidence to support the nonmoving party's case. *Id.*

Although a plaintiff is not required to come forward with evidence to survive a defendant's motion for summary judgment, a plaintiff cannot prevail by merely controverting defendant's proffered facts with exiguous showings or conclusory statements of fact. *Liquidating Trustee Ester DuVal of KI Liquidation, Inc. v. United States*, 89 Fed. Cl. 29, 38 (2009) (citing *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1042 (Fed. Cir. 1994).

II. HUD'S Allocation Formula Complies With The Statute Because It Is "Based On" The Number Of Units The Tribe Owned Or Operated Pursuant To A Contract With HUD

A. Statutory Background

Before 1997, HUD provided Indian housing assistance under a variety of programs. Much of the assistance was for tenants and was provided under 42 U.S.C. § 1437, commonly referred to as low rent housing. HUD also provided assistance under programs designed to assist low-income Indian families in purchasing homes. One such program, the "Mutual Help" program, is relevant here.

The Mutual Help program was enacted into statute in 1988. *See* 42 U.S.C. § 1437bb (1988) (repealed by NAHASDA). Under the Mutual Help program, an Indian housing authority

entered into a contract with HUD that provided funds to build and operate homes designed to allow low-income Indian families to become homeowners by providing an up-front contribution of land, labor, or money, providing for their own utilities and home maintenance, and complying with a lease-purchase agreement or "Mutual Help Occupancy Agreement" (MHOA) of no more than 25 years. *See* 24 C.F.R. pt. 905, subpt. E (1990); *Dewakuku v. Martinez*, 271 F.3d 1031, 1035 (Fed. Cir. 2001); *see* 24 C.F.R. § 905.422(b)(2) (1990) (providing that the purchase price schedule shall reflect a "25-year period"). Regardless of the amount of a homebuyer's monthly payment, the purchase price reduced each month until it reached zero at the end of the MHOA term. *See* 24 CFR § 950.440 (1995).

Much of HUD's housing assistance to tribes before 1997 was provided through agreements between Indian housing authorities and HUD called Annual Contributions Contracts (ACCs). *See* 24 C.F.R. § 1000.10(b) (defining ACCs). HUD would award the Indian housing authority funds for a program by executing an ACC setting forth a specific dollar amount of funding authority. ACCs could call for payments over a period of up to 40 years. *See* 42 U.S.C. § 1437c(a)(2) (1994) (explaining the operation of ACCs).

In 1996, Congress enacted NAHASDA, Pub L. No. 104-330, 110 Stat. 4016 (1996), 25 U.S.C. §§ 4101 *et seq*. NAHASDA moved all Indian public housing assistance programs out of the prior statutes, and terminated the various types of assistance that tribes had received. *See* 25 U.S.C. §§ 4181(a), 4182 (terminating all financial and rental assistance provided under the Housing Act of 1937). It replaced those various types of assistance with a single program under which each tribe receives a single block grant for all of its affordable housing activities. *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996, 63 Fed. Reg. 12,334, 12,334-35 (Mar. 12, 1998) (summarizing NAHASDA).

NAHASDA delegated to HUD the authority to develop a formula to allocate to each tribe a portion of any congressional appropriation:

> (a) Establishment.
>
> The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.

25 U.S.C. § 4152 (2000). In referencing section 4116, Congress directed the Secretary of HUD to use negotiated rulemaking procedures. *See* 25 U.S.C. § 4116 (referencing 5 U.S.C. §§ 561 *et seq.* – the Negotiated Rulemaking Act). The statute provided for a minimum grant to each tribe that had received funding under the predecessor statute for units in fiscal year 1996. In subsequent years in which Congress appropriated more than it had in fiscal year 1996, each tribe was guaranteed to receive at least the amount it had received for operation and modernization pursuant to an ACC for units in 1996. 25 U.S.C. § 4152(d)(1). Because Congress sets the appropriation each fiscal year and the "formula . . . allocat[es] amounts available for a fiscal year . . . among Indian tribes," *id.* § 4152(a), the formula can neither add nor subtract from the total amount of money available to all tribes; to the extent the allocation is altered to give one tribe more funds, those funds must be taken away from the allocations of other tribes.

B. <u>The Regulations</u>

As required by NAHASDA, the Secretary engaged in the negotiated rulemaking process, convening a committee composed of 48 tribal representatives and 10 HUD representatives. 63 Fed. Reg. 12,334 (Mar. 12, 1998). The committee operated under a consensus model. *Id.* The resulting regulations, 24 C.F.R. §§ 1000.301-340, establish the "formula" referenced in 25 U.S.C. § 4152(a). That formula has two components: "(a) Formula Current Assisted Housing

Stock (FCAS); and (b) Need." 24 C.F.R. § 1000.310. At issue in this case is the way that FCAS is calculated. The regulations define FCAS by starting with the number of "housing units owned or operated pursuant to an ACC. This includes all low rent, Mutual Help, and Turnkey III housing units under management as of September 30, 1997." 24 C.F.R. § 1000.312. This starting number is then subject to two adjustments. An upward adjustment is made for any units that were "in the development pipeline" as of 1997, as well as units for which the tribe was receiving assistance under section 8 of the Housing Act. 24 C.F.R. § 1000.314. And a downward adjustment is made for rental units no longer operated by the tribe, units that had been conveyed by the tribe to a homeowner, and units that are eligible to be conveyed by the terms of the applicable rent-to-own agreement, to which plaintiffs object. 24 C.F.R. § 1000.318. This case involves the portion of the formula under which units that were conveyed or were eligible to be conveyed are subtracted out of the FCAS number:

> **1000.318 When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?**
>
> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, [Tribally Designated Housing Entity] or [Indian Housing Authority] 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 [Mutual Help Occupancy Agreement]; and
>
> (2) The Indian tribe, [Tribally Designated Housing Entity], or [Indian Housing Authority] actively enforce strict compliance by the homebuyer with the terms and conditions of the [Mutual Help Occupancy Agreement], including the requirements for full and timely payment.

24 C.F.R. § 1000.318(a). The resulting number of FCAS units of each type is then multiplied by a subsidy factor, which is the national average of operating and modernization subsidies received in 1996 for that type of unit, adjusted for inflation. 24 C.F.R. § 1000.316. The resulting amount of money is the tribe's FCAS payment for the fiscal year. After all FCAS amounts are subtracted from the appropriation, any remaining funds are allocated according to the "Need" component. 24 C.F.R. § 1000.310.

C. The Intent Of Congress Is Clear

The plaintiffs' challenge to the administrative actions of HUD is viewed under the rubric of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The relevant question is therefore whether "the intent of Congress is clear." *Id.* at 842. "[I]f the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In this case, the intent is clear from the language in NAHASDA that the number of units under contract in 1997 is a mere starting point for the formula established by HUD and the tribes. To be sure, Congress did not specify a precise formula to distribute the appropriated funds, but it provided enough guidance to establish that the Secretary, in promulgating the regulations at issue here, followed congressional intent. The relevant language is contained in 25 U.S.C. § 4152(b) (2000):

> (b) Factors for determination of need
>
> The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:
>
> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
>
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.

> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

First, Congress expressly delegated to the Secretary the authority to establish the allocation formula. 25 U.S.C. § 4152(a). As described above, the Secretary established the formula through the negotiated notice-and-comment rulemaking process specifically designated by Congress. Second, Congress told the Secretary that the formula should be "based on" two "factors" supplied by Congress: (1) the number of housing units under pre-NAHASDA contracts with HUD and (2) the extent of poverty among, and number of, Indians in the relevant area, plus any additional (3) "objectively measurable conditions" specified by the Secretary. 25 U.S.C. § 4152(b).

The primary question in this case is whether 24 C.F.R. § 1000.318(a) is contrary to these statutory directives because, while using the number of units specified in § 4152(b)(1) as a starting point, it includes both upward and downward adjustments to that starting point. As we demonstrate below, the regulation does not violate the statute because the statute merely required that the formula be "based on" the relevant number of units, as one of several "factors."

The phrase "based on," while unquestionably subject to several meanings, has been examined with some frequency by the Federal courts. However, as the Court of Appeals for the Tenth Circuit determined in upholding the validity of section 1000.318, the phrase "based on" is not synonymous with "equal to." *Fort Peck Housing Authority v. HUD*, 367 Fed. Appx. 884, 890 (10th Cir. 2010) (*Fort Peck II*). Consistent with the rulings of other circuits, the Tenth Circuit held that, applying the ordinary meaning, "based on" means that the factors form the basis, beginning, or starting point of the formula. *Id.* (citing *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (citing *Webster's Third New Int'l Dictionary* 180 (1986) (concluding that the ordinary meaning of "based upon" is "derived from"

or "use as a basis for"). *See Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991) ("based upon" means "arises from."); *McDaniel v. Chevron Corp.,* 203 F.3d 1099, 1111 (9th Cir. 2000) ("the plain meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'"). Accordingly, because the number of housing units described in section 4152(b)(1) is the "foundation" or "starting point" from which the formula flows, *id.*, the regulation complies with the statutory directive. To put it simply, the fact that a number is adjusted when used in a formula does not mean that the formula is not still "based on" the original, unadjusted number. *Sierra Club v. Envtl. Prot. Agency*, 356 F.3d 296, 306 (D.C. Cir. 2004) ("[R]esults obtained by adjusting the model can still reasonably be described as 'based on' that model.").

Indeed, it is common when a formula or decision is "based on" a particular figure or test or data for adjustments to be made to that figure or test or data. In *Sierra Club*, for example, the relevant statute required a particular state to demonstrate that it would meet certain air quality requirements, and that demonstration "must be based on photochemical grid modeling . . . ." *Id.* at 304 (quoting 42 U.S.C. § 7511a(c)(2)(A)). The court concluded that a demonstration could comply with this statutory directive even though several "adjustments" were made to the photochemical grid model because the model was still the "primary basis" for the demonstration and the adjustments helped further the statutory purpose. *Id.* at 306. In *McDaniel*, a pension plan was required to calculate benefits "based on" a particular mortality table. The Ninth Circuit held that it did so, despite adjusting the figures from that mortality table (by a "set forward") to reflect the gender ratio of the beneficiary population. 203 F.3d at 1104, 1110-1112. *Missouri v. Jenkins*, 491 U.S. 274, 277 (1989) applied this principle to attorneys' fees. There, a fee was calculated at an hourly rate of $200 because the current market rates of $125 - $175 were

adjusted upward due to "the preclusion of other employment, the undesirability of the case, and the delay in payment." Despite this adjustment, the resulting fee was "based on current hourly rates." *Id.* at 290 (O'Connor, J., concurring in part and dissenting in part).

The formula here was "based on" the number of housing units specified in section 4152(b)(1) in the same way. As the Tenth Circuit held, "HUD incorporated the units required by § 4152(b)(1) when it used all of the 1997 dwelling units as the starting point for the allocation formula." *Fort Peck II*, 367 Fed. Appx. at 891. That the number of units was subject to a number of adjustments hardly negates the fact that the formula is "based on" the original number. This conclusion is only bolstered by the fact that the statute refers to the number of units at issue here as one of several "factors" upon which the formula is to be based. The use of the word "factor" indicates that the relevant number of housing units was simply to contribute to the formula in some way. *See*, *e.g.*, *Black's Law Dictionary* 630 (8th ed. 2004) (defining "factor" as an "agent or cause that contributes to a particular result"); *Webster's Third New Int'l Dictionary* 813 (1993) (defining "factor" as "something (as an element, circumstance, or influence) that contributes to the production of a result"). Because the formula was "based on" the relevant number of homeownership units, as one of several "factors" to be considered, the formula complies with the statute.

1. NAHASDA Contains Other Indicia Of Congressional Intent

There are additional indications in the statutory text that Congress intended to allow the Secretary to adjust the number of units owned or operated as of September 30, 1997. Congress not only described the factors upon which the formula was to be based but stated their purpose as well: to "reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities." 25 U.S.C. § 4152(b). Indeed the heading of this section is

"Factors for determination of need." *Id.* The number of housing units described in section 4152(b)(1) reflected the need of Indian tribes for assistance for affordable housing activities in 1997, but with each passing year, it does so less and less unless adjusted to reflect more recent events. It makes little sense for Congress to specify a factor as reflecting the need for affordable housing, and then to fix that factor as of a specified date and to forbid adjustments necessary to make that factor actually reflect that need. As the years went by, that unadjusted factor would no longer serve its designated purpose.[1] If, instead, adjustments are permitted, that factor can continue to meaningfully reflect the need for affordable housing.

Similarly, Congress granted the Secretary extremely broad authority with respect to this formula. No limits are placed on what weight the Secretary may give any factor, and, in consultation with the tribes, the Secretary can base the formula on any additional factor so long as it is "objectively measurable." 25 U.S.C. § 4152(b)(3). As a matter of logic and common sense, it would be odd for Congress to have granted the Secretary this extremely broad power but denied the Secretary the authority to make reasonable adjustments to one of the factors. Thus, as the Tenth Circuit held, "[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." *Fort Peck II*, 367 Fed. Appx. at 891.

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[1] For example, suppose a very small tribe has 10 impoverished families, each of which started living in a Mutual Help unit in 1980, intending to obtain ownership of the units over the next 25 years. In 1997, all of those families need to stay in their housing, and the tribe needs to continue to maintain that housing. Accordingly, the 10 units are properly counted in the formula. By 2005, however, each family has paid off the house and the tribe has conveyed each house to the family. The tribe no longer has any low-income members in need of housing, nor does the tribe need assistance with low-income housing that it owns or operates. But if the 10 units are still counted in the formula, the formula will not accurately reflect tribal need.

Finally, an equally valid way of looking at this case is to view the subtraction of conveyed units, not as an adjustment to the § 4152(b)(1) factor but instead as a separate factor under section 4152(b)(3). Under this view, the factor included under section 4152(b)(3) – the number of housing units that were conveyed (or otherwise disposed of) or that were eligible to be conveyed – is subtracted from the factor included under § 4152(b)(1) – the original number of housing units. This scheme clearly complies with the statutory requirements.

2. HUD's Rule Complied With The Congressional Mandate

As the Tenth Circuit held, courts review agency rulemaking with great deference when a challenged decision involves matters within the agency's area of expertise. *Fort Peck II*, 367 Fed. Appx. at 892 (citing *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006)); *see Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited."); *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011) (holding that when a proposed rulemaking "pertains to a matter of policy within the agency's expertise and discretion, the scope of review should 'perforce be a narrow one, limited to ensuring that the [agency] has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.'") (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981)).

In this case, as the Tenth Circuit held, the disbursement of funds for low-income housing assistance for Indian tribes was within HUD's expertise: its institutional experiences in implementing the Housing Act of 1937, including the low-income housing programs for Indian tribes which NAHASDA replaced, justify deference here. *Fort Peck II*, 367 Fed. Appx. at 892.

HUD's regulation complied with the mandate set forth in NAHASDA and clearly included the entire section 4152(b)(1) factor as the starting point. *Id.* (citing 24 C.F.R. §§ 1000.316(a)(1)(3) (including all of the 1997 units)). From this initial number, the formula offset the 1997 units by the number of units that the tribe conveyed, among other things. *Id.* (citing 24 C.F.R. §§ 1000.316-1000.318). This approach reflected the factors explicitly required by sub-sections 4152(b)(1)-(3). *Id.* A reduction equal to the number of dwelling units no longer owned or operated by a tribal housing entity recognized the ongoing and evolving needs of tribal housing entities. *Id.* NAHASDA clearly required interplay between all three factors in the determination of a tribe's need, including those HUD identified in the rulemaking process. *Id.* Section 1000.318's downward adjustment was an example of this interplay and was not arbitrary or capricious. *Id.*

D. Plaintiffs' Interpretation Of The Statute Is Unreasonable

Plaintiffs, as they must, spend considerable space attacking the Tenth Circuit's decision in *Fort Peck II*, but they never land more than a glancing blow. Notably, they never specifically state the meaning of "based on" or explain why it does not mean that the factors form the basis, beginning, or starting point of the formula. Plaintiffs never mention *Chevron*, and their argument in favor of perpetual funding of FCAS units is irreconcilable with the language and history of NAHASDA.

Plaintiffs cite no authority (dictionary, judicial opinion, etc.) for the proposition that when a formula is "based on" a number, that number may be adjusted upward but not downward. This simply does not track the statutory language. With respect to the meaning of "based on," plaintiffs contend that the Tenth Circuit failed to read the statute in context but it is difficult to glean from their brief what meaning they attach to this term. They seem to contend that

NAHASDA has a "precise quota figure" (the number of 1997 units) that the agency is required to include in the grant allocation formula. Plaintiffs' brief at 11.[2] However, this renders the phrase "based on" to mean "equal to," an interpretation that the Tenth Circuit justifiably rejected as contrary to the plain meaning of that term. *Fort Peck II*, 367 Fed. Appx. at 891.

Plaintiffs rely heavily upon *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235 (10th Cir. 2009). However, as the Tenth Circuit observed in *Fort Peck II*, *United Keetowah* actually supports HUD. *Fort Peck II*, 367 Fed. Appx. at 891. In that case, the Tenth Circuit considered whether a HUD regulation that imposed a jurisdictional-based factor for funding eligibility was contrary to its authority under the statute. The court of appeals stated that section 4152(b) "explicitly and unambiguously mandates that the factors in HUD's allocation formula reflect - in other words, have some connection or nexus with - the needs of Indian tribes and Indian areas of the tribes. The language does not permit any other reading." *Fort Peck II*, 367 Fed. Appx. at 891 (quoting *United Keetoowah*, 567 F.3d at 1241). The *Fort Peck II* court held that the same reasoning applies equally here. An interpretation of the formula requirement in NAHASDA that requires a perpetual funding "floor" does not reflect Congress's unambiguous intent that the formula be related to the need of all tribal housing entities. *Id.*

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[2] The cases that the plaintiffs cite do not support their position. *Nuclear Energy Institute, Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) involved the issue of whether the phrase "based upon and consistent with the findings and recommendations of the National Academy of Sciences" is clear and unambiguous; the court held that it was not. Notably, the court of appeals cited precedent instructive here in which it held that the similar phrase "consistent with," is "flexible statutory language" that requires not "exact correspondence ... but only congruity or compatibility." *Id.* (quoting *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 457 (D.C. Cir. 1996) (per curiam) (describing the phrase "consistent with" as requiring the court to defer to reasonable agency determinations), amended by 92 F.3d 1209 (D.C. Cir. 1996). Plaintiffs also cite *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 753-54 (D.C. Cir. 2000), which is even further afield from the facts here because it involved a question as to whether an agency's flounder fishing quota met statutory requirements that guard against depletion of the fishery where the agency conceded that the quota had only an 18 percent likelihood of success.

Plaintiffs also criticize the court of appeals because it allegedly "failed to consider the fact that low income Indian families who become home owners or whose units become eligible for conveyance are in many cases still low income and in need of affordable housing assistance." Plaintiffs' brief at 13. It may be true that such home owners still have needs, but to contend that such housing units should permanently remain in FCAS represents a fundamental misunderstanding of the history and purpose of NAHASDA.

First, it is clear as a matter of substance that Congress did not intend to use the number of housing units in 1997 as a "floor" to prevent a tribe's allocation from falling too low because Congress included a minimum allocation elsewhere in the statute itself. *See* 25 U.S.C. § 4152(d). This statutory minimum is detailed and comprehensive and, indeed, reflects both the amount of each annual NAHASDA appropriation and the number of units each tribe owned or operated in 1996 pursuant to a pre-NAHASDA contract. There is simply no reason to think that Congress, by using generic phrases like "based on" and "factors" intended section 4152(a) to set an additional implicit statutory floor, when it clearly and expressly created statutory minimum allocations in section 4152(d).

Second, § 4152(b) includes factors that measure a tribe's current (and to some extent future) need for affordable housing: "[t]he extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe." 25 U.S.C. § 4152(b)(2). The reason that this factor was not a complete measure of a tribe's "need" was that, under the predecessor statute, tribes had entered into long-term agreements with HUD to fund capital investments and improvements. NAHASDA terminated those agreements, leaving the tribes with a "need" for funds to replace the funding lost by those terminations. The "factor" described in section 4152(b)(1) accounts for this need. Over time, however, as the capital investments at issue are

fully funded, and/or the units that were the subject of the contracts are conveyed, the tribes' "need" based on those old contracts disappears. Accordingly, it is entirely appropriate for FCAS to decrease over time. As it decreases, the factor described in section 4152(b)(2), which reflects ongoing tribal needs independent of the predecessor statute, becomes predominant. That is entirely appropriate and completely in keeping with both the statutory language and congressional intent in shifting from the pre-NAHASDA scheme to the block grant concept embodied by NAHASDA.

E. The Reauthorization Act Demonstrates That HUD Correctly Interpreted The Statute

In 2008, Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319. In this act, Congress revised section 4152(b)(1) by adopting HUD's regulation at 24 C.F.R. § 1000.318. The revised section 4152(b)(1) provides, among other things, that housing units will not be included in the block grant formula if the recipient ceases to possess the legal right to own, operate, or maintain the unit; or if the unit is lost to the recipient by conveyance, demolition, or other means. 25 U.S.C. § 4152(b)(1)(A)(i)-(ii). In addition, Congress amended the statute so that it provides that "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)(1)(B).

In the Senate report accompanying this act, the Senate described this amendment as a "clarification" to the statute and stated: "This amendment clarifies that conveyed units or other units no longer owned or operated by a grant recipient as affordable housing, including those units the recipient no longer has the legal right to own, operate or maintain, may not be counted

in the funding formula." S. Rep. 110-238 at 9. In addition, the Senate made note of HUD's efforts to recover past overpayments. Not only did the Senate fail to give any indication that it viewed such recoveries as improper it instead cited the "the need for removal of these ineligible units from the funding formula calculations." *Id.* The Senate also observed that a "majority" of Indian tribes had repaid (or were repaying) the money, but again gave no indication that HUD should cease its recovery efforts or return funds already recovered. *Id.* at 9-10.

Congress was aware of the lawsuits between the tribes and HUD when it enacted the 2008 amendments to NAHASDA. In fact, prior to enactment of the amendments, Congress solicited HUD's views on the proper response to the district court's subsequently overruled decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) (*Fort Peck I*). *See Housing Issues in Indian Country*: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65[3] at 69-70 (HUD's written responses to questions from the Senate Committee on Indian Affairs). Notably, HUD recommended to the committee that Congress amend NAHASDA, which, as discussed above, Congress did.

As the Supreme Court recently explained, when Congress amends a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the agency's interpretation is the one intended by Congress. *Sebelius v. Auburn Reg. Med. Ctr*, 133 S. Ct. 817, 827 (2013) (citing *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1986)). In *Auburn Medical Center*, the Supreme Court ruled that the regulation at issue was the interpretation intended by Congress because Congress had amended the pertinent statute six times but left the agency's regulation in place. *Id.*

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

Similarly, after HUD issued section 1000.318 on March 12, 1998, Congress amended NAHASDA seven times between 1998 and 2005 without disturbing this regulation. *See* Pub. L. Nos. 105-276, 106-568, 106-569, 107-292, 108-293, 109-136, and 109-58. Moreover, Congress did not merely leave HUD's interpretation of the prior statute untouched, it incorporated HUD's interpretation in the new section 4161(a)(2). Pub. L. No. 110-411. This is even stronger evidence that HUD's interpretation of NAHASDA has been the one intended by Congress all along. *See Star-Glo Assoc. LP v. United States*, 414 F.3d 1349, 1357 (Fed. Cir. 2005) (Congress approved the agency's prior efforts not by mere acquiescence but by enacting legislation incorporating agency's interpretation).

At pages 14-15 of their brief, the plaintiffs contend that a statement that Orlando Cabrera, Assistant Secretary for the Office of Public and Indian Housing, made to Congress on June 6, 2007, supports their contention that the amendments enacted a wholesale change to the prior version of NAHASDA. However, the plaintiffs take this statement out of context. Mr. Cabrera made this statement after the district court's decision in *Fort Peck I* but before the Tenth Circuit overruled that decision in 2010. In *Fort Peck I*, the district court ruled that HUD could not reduce the number of housing units eligible for inclusion in the allocation formula below the level that the tribe had under contract in 1997. *Fort Peck I*, 435 F. Supp. 2d at 1132-35. Although Mr. Cabrera spoke of the (then proposed) amendment as changing the law, taken in context, his statement meant that the law would be changed from the precedent established by *Fort Peck I*. That is why Mr. Cabrera said: "This change would comport with the process established by the original negotiated rulemaking committee that crafted the IHBG regulations." (Plaintiff's Appendix part 9 at 3). In other words, HUD was "changing" the process back to the process that had been in place from the enactment of NAHASDA until *Fort Peck I*.

Plaintiffs contend that the Reauthorization Act made a substantive change in the law that demonstrates that 24 C.F.R. § 1000.318 was invalid prior to the amendment. As its first support for this contention, plaintiffs cite statements by the district court after the Tenth Circuit reversed and remanded the case. Plaintiffs' brief at 16 (citing *Fort Peck Housing Authority v. HUD*, 2012 WL 3778299 (D.Colo. 2012) (*Fort Peck III*). However, because the Tenth Circuit had just held that this regulation is valid, the district court simply could not have made any statement that conflicts with the opinion of its reviewing court. While it is true that the district court stated that the Reauthorization Act made a substantive change in the law, the court was referring to the change to 25 U.S.C. § 4161(a)(2), which provides that reporting failures are not substantial noncompliance. *Fort Peck III* , 2012 WL 3778299 at *7. While we disagree with this statement, it does not speak to the issue of whether section 1000.318 was valid prior to 2008.

Plaintiffs also cite a variety of cases at pages 17 through 21 of their brief. However, none of these cases address a situation comparable to that here, namely, multiple congressional amendments to a statute that leave a regulation in place, followed by Congress' incorporation of that regulation in the statute. Plaintiffs cite, for example, *Pierce County, Washington v. Guillen*, 537 U.S. 129 (2003), but that case did not involve the validity of a regulation; rather it simply involved the meaning to be attached to the amendment of a statute. The Supreme Court rejected an interpretation that gave the statute no "real and substantial" effect. *Id.* at 145. The Government's interpretation of the Reauthorization Act gives it real and substantial effect consistent with the Supreme Court's decisions in *Auburn Medical Center* and *Schor* by recognizing the amendment as Congress' approval of section 1000.318.[4]

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[4] In this same vein, plaintiffs also cite *Commissioner of Internal Revenue v. Callahan Realty Corp.*, 143 F.2d 214 (2nd Cir. 1944), which addressed the effect of the amendment of a statute but not the validity of a regulation and *Teledyne, Inc. v. United States*, 50 Fed. Cl. 155, 177

Finally, plaintiffs (at p. 21 n.6 of their brief) contend that the Indian canon of construction requires that NAHASDA be construed in their favor. It seems obvious that the concept of interpreting a statute to benefit Indians cannot apply here. The issue in this case is simply how to divide a fixed congressional appropriation among a number of tribes. If the three plaintiff tribes obtain larger grants, another tribe or tribes get a smaller grant or grants by exactly the same amount. This is a zero sum game, and all of the players are Indians. It thus does not help this Court to urge it to act in the best interest of Indians generally. The Tenth Circuit properly rejected this contention: "Because NAHASDA was unambiguous and the final regulations were properly promulgated within NAHASDA's mandate, we need not address this issue except to note the 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.

F. Plaintiffs Mischaracterize *Fort Peck II*

Plaintiffs contend at page 22 of their brief that *Fort Peck II* did not address units that tribes continued to own or operate after the expiration of the Mutual Help Occupancy Agreement. That is not correct.

The Tenth Circuit analyzed the full scope of section 1000.318(a) and affirmed the regulation on that analysis. First, the *First Peck II* court explicitly referenced the regulatory subparagraph requiring that Mutual Help homes be timely conveyed when eligible for conveyance in order to be considered formula units. *See Fort Peck II,* 367 Fed. Appx. at 887 (citing §1000.318(a)(1)). The decision also discussed this aspect of the regulation in responding to the district court's discussion of conveyance-eligible units. *See Fort Peck I* 435 F. Supp. 2d at

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(2001), which merely involved the meaning of a change to a Cost Accounting Standard and which cited *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1564 (Fed. Cir. 1993), which upheld the regulation at issue. None of these cases aid plaintiffs' argument.

1131-32, 1134-35 (specifying that "[t]he downward adjustment required by § 1000.318 means that a tribe's FCAS inventory decreases as homeownership units reach the end of the 25-year amortization period."). The Tenth Circuit, in turn, considered the district court's analysis of the conveyance-eligible issue. *See Fort Peck II,* 367 Fed. Appx. at 889 ("Finally, the district court concluded Fort Peck's position furthered NAHASDA's goals [by] removing HUD's paternalistic oversight of whether units should be conveyed or participants evicted.").

Moreover, the Tenth Circuit persuasively reasoned that section 1000.318 in its entirety is valid because it reflects current need by reducing the count of formula units when the housing authority no longer needs to own and operate a Mutual Help unit. *Id.* at 891. Finally, the court denied Fort Peck's cross-appeal for return of its repayments for conveyance eligible units because HUD's actions did not violate NAHASDA. *Id*. at 892, n.15. Thus, the Tenth Circuit's validation of the regulation and HUD's overpayment recoveries addressed whether HUD could disallow units that were still owned and operated by a tribe after 25 years.[5]

III. HUD Acted Reasonably In Applying Section 1000.318 And Removing Units From Tribes' FCAS

The Court should rule that HUD acted properly in applying section 1000.318 to the plaintiffs. The Court must defer to the agency's interpretation of its own regulation unless it is "'plainly erroneous or inconsistent with the regulation.'" *Chattler v. United States*, 632 F.3d 1324, 1328 (Fed. Cir. 2011) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The agency "'interpretation need not be the best or most natural one by grammatical or other standards.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 702 (1991)).

[5] Plaintiffs also contend on pages 32-34 of their brief that section 1000.318 is invalid because it uses terms that plaintiffs contend are impermissibly vague such as "as soon as practicable." If this is correct, much of the Code of Federal Regulations is invalid because the Code uses the term "as soon as practicable" 1,461 times.

"The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation . . . . [The Court's] only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Seminole Rock*, 325 U.S. at 414. The Court must "defer even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation." *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006). Deference is particularly appropriate when the agency interpretation has been consistently applied. *Id.* (citing *Ehlert v. United States,* 402 U.S. 99, 105 (1971) ("[S]ince the meaning of the language [of the regulation] is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such." (citations omitted)).

In paragraph 25 of the plaintiffs' second amended complaint, and at pages 28-32 of plaintiffs' motion, plaintiffs raise seven purported defenses for tribes' failure to convey units at the time they became eligible at the expiration of the 25-year Mutual Help contract term: a tenant may be in arrears in his or her monthly payments 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; a proposed conveyance is located on Indian trust lands subject to Bureau of Indian Affairs

(BIA) approval which may have been withheld; or clouds on title due to probate or intestacy precluded or delayed conveyance.

Plaintiffs' enumeration of these defenses obscures one important point evident from a review of the record: HUD removed the vast majority of the units from plaintiffs' FCAS because the units never existed or the tribe reported to HUD that it had conveyed the units. Thus, for most units, the only issue that the Court should consider is whether HUD can recover undisputed overpayments. Moreover, all of these purported defenses do not actually apply to these plaintiffs. There are no units where a plaintiff reported to HUD that conveyance of a unit had been delayed as a result of NAHASDA funded repair or modernization work. There are no units where a tribe informed HUD that the unit would be demolished and replaced. In addition, the defenses involving subsequent tenants moving into units during the course of the initial Mutual Help Occupancy Agreement term, delays related to BIA approvals, and probate issues have limited application to this case because HUD did not remove these units from FCAS if the tribe provided the barest of explanations to HUD.

Similarly, in cases where a tribe contended that conveyance of a unit had been delayed because of unpaid rent (tenant accounts receivable or TAR units), HUD did not remove these units from FCAS if the tribe provided HUD with a short explanation as to how it was strictly enforcing the Mutual Help Occupancy Agreement. On the other hand, in cases where the tribe provided HUD no more information than the mere existence of a TAR issue (in some cases without identifying even the number of units to which the issue applied) HUD acted reasonably in removing such units from FCAS. Finally, there are seven units that the Hopi Tribe (Hopi) converted from Mutual Help units to Low Rent units, which HUD continued to fund as Mutual Help units. This is a strictly legal issue that involves an interpretation of the statutory language.

As we will demonstrate, HUD reasonably interpreted the language of NAHASDA to bar the creation of new Low Rent units.

In this section of our brief, we address the removal of units from tribes' FCAS. In section IV below, we address HUD's recovery of overpayments.

A. HUD Acted Reasonably In Removing Units From Lummi's FCAS

The record indicates that HUD reduced Lummi's FCAS units on three occasions, but none of these reductions involved the seven defenses advanced by the plaintiffs. Rather, all of the reductions appear to be undisputed. By letter dated August 28, 2003, HUD notified Lummi that it had been overfunded in FY98-03 in project WA-11 because HUD had based its funding on 39 Low Rent and 15 Mutual Help units when that project contained only 39 Mutual Help units. GPFUF ¶ 38. This resulted in overfunding of $845,667 because not only did Lummi receive funding for 15 units that did not exist, it received funding at the higher Low Rent rate for 39 units. Lummi never disputed HUD's determination and a HUD letter to the Lummi Housing Authority dated December 22, 2003, states that the tribe had agreed to repay these funds. GPFUF ¶ 42. Because Lummi has never disputed the accuracy of HUD's determination and there is nothing in the statute or section 1000.318 that requires HUD to fund non-existent units, and because the plaintiffs have not challenged the lower subsidy provided for Mutual Help units, the Court should determine that HUD acted reasonably and in accordance with its regulation when it removed/reclassified these FCAS units.

The only other reductions in Lummi's FCAS units during the period covered by the second amended complaint (up to FY09), occurred because Lummi itself reported units that had been conveyed. By letter dated September 30, 2008, Lummi informed HUD that it had conveyed a total of seven units. GPFUF ¶ 52. HUD then removed these units from Lummi's FCAS.

GPFUF ¶¶ 53-54 . Similarly, on October 1, 2009, Lummi informed HUD that it had conveyed 17 additional units, which HUD then removed from Lummi's FCAS. *Id.* at ¶ 58. Because section 1000.318 provides that units are no longer to be included in FCAS "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 . . ." HUD acted in compliance with the regulation when it removed these units from Lummi's FCAS.

Accordingly, the Court should grant the Government summary judgment to the extent Lummi is contending that HUD failed to act in accordance with section 1000.318 when it removed units from Lummi's FCAS.

B. HUD Acted Reasonably In Removing Units From Hopi's FCAS

The record indicates that, as with Lummi, HUD removed most of the Hopi units from Hopi's FCAS because Hopi reported that it had conveyed these units.

1. The December 30, 2002, FCAS Reduction

On September 5 and 23, 2002, Hopi reported that it had conveyed 77 units in projects AZ-01, AZ-02, AZ-07, and AZ-11. GPFUF ¶¶ 66-71. HUD then removed these units from Hopi's FCAS by letter dated December 30, 2002. *Id.* at ¶ 72. Accordingly, there was no dispute as to HUD's removal of these 77 units from Hopi's FCAS and the Court should rule that HUD acted in accordance with section 1000.318 when it removed them from Hopi's FCAS.

2. The August 29, 2005, FCAS Reduction

On March 2, 2005, HUD wrote to Hopi to inform Hopi that the remaining three units in Project AZ-02 appeared to be ineligible for FCAS because this project had a date of full availability of November 30, 1977 (that is, the last day of the month in which substantially all the units in a housing development are available for occupancy by homebuyers) and more than 25

years had passed from that date, and the units, therefore, were eligible for conveyance. GPFUF ¶ 82. On May 2, 2005, Hopi informed HUD that two of the units had been conveyed in FY02. *Id.* at ¶ 83. On August 29, 2005, HUD informed Hopi that it would remove these units from Hopi's FCAS in the fiscal year following conveyance, that is, FY03. *Id.* at ¶¶ 85-87. Accordingly, there was no dispute as to HUD's removal of these two units from Hopi's FCAS and the Court should rule that HUD acted in accordance with section 1000.318 in removing them from Hopi's FCAS.

With respect to the third unit in AZ-02, unit 17, Hopi informed HUD on May 2, 2005, that this unit had been eligible for conveyance in September 2001 but had not been conveyed "due to concerns and questions with the Land, Titles and records Office Albq, NM and the Hopi Tribe Realty Office." GPFUF ¶ 83. On May 25, 2005, Hopi provided HUD with correspondence on dates from February to May 2005 that indicated that it was in the process of recording the original lease but was "unable to complete processing at this time due to the fact that the individual's mother is deceased." *Id.* at ¶ 84.

On August 29, 2005, HUD informed Hopi that it would remove this unit from Hopi's FCAS in FY02, the fiscal year following the year in which it became conveyance eligible. GPFUF ¶ 85. HUD observed that all of the correspondence purporting to explain the delay in conveyance for this unit had dates in 2005 even though the unit had been eligible for conveyance in September 2001. HUD stated that, for this unit to remain eligible for FCAS, Hopi had to document its efforts from 2001 to 2005 to resolve outstanding title and land issues. HUD stated that it had requested such documentation but Hopi had failed to provide it. Hopi never provided HUD with any further documentation.

Section 1000.318 requires tribes to convey units from FCAS "as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA . . . ." 24 C.F.R.

§ 1000.318(a)(1). The ordinary meaning of practicable is "capable of being put into practice or of being done or accomplished: feasible." Merriam-Webster Online Dictionary, www.merriam-webster.com. There is no evidence that Hopi took any action to convey unit 17 from the time that it became conveyance eligible in September 2001 until February 2005, a delay of well over three years. Thus, Hopi failed to demonstrate that it was not practicable to convey the unit in 2001 to 2004. As a result, HUD acted reasonably in removing this unit from Hopi's FCAS in FY02.

3. The October 18, 2005, FCAS Reduction

On September 14, 2005, Hopi informed HUD that four units (project AZ-07, units 14, 16, and 40, and project AZ-11, unit 67) had been conveyed in FY03. GPFUF ¶ 94. HUD then removed these units from Hopi's FCAS by letter dated October 18, 2005. *Id.* at ¶ 95. Accordingly, there was no dispute as to HUD's removal of these four units from Hopi's FCAS and the Court should rule that HUD acted in accordance with section 1000.318 in removing them.

4. The December 5, 2006, FCAS Reduction

On September 21, 2006, Hopi wrote to HUD, in part, to provide HUD information concerning "Conveyance of Formula Current Assisted Stock (FCAS) Units." GPFUF ¶ 100. The spreadsheet that Hopi attached listed 56 units in projects AZ-07 and AZ-11 with a payoff date. The spreadsheet also had columns for "Conveyance Date" and "Explanation for Conveyance delays greater than two years." There are hand-written notes on the spreadsheet that appear to indicate conveyance dates in the same year as the units were paid off by the owner. On December 5, 2006, HUD informed Hopi that it would remove these units from Hopi's FCAS. GPFUF ¶ 101. On January 16, 2007, Hopi indicated its agreement with HUD's action by

informing HUD that it had "no defensible basis for an appeal" and authorized HUD to deduct overpayments from the FY07 grant. GPFUF ¶ 103. Accordingly, there was no dispute as to HUD's removal of these 56 units from Hopi's FCAS and the Court should rule that HUD acted in accordance with section 1000.318.

5. The February 22, 2008, FCAS Reduction

In 2007 and 2008, Hopi and HUD engaged in correspondence concerning conveyed and conveyance eligible units in projects AZ-07 and AZ-11. GPFUF ¶¶ 108-13. This resulted in a HUD decision on February 22, 2008, in which HUD informed Hopi that it was removing a total of 31 units from Hopi's FCAS as of FY08.[6] GPFUF ¶ 114-22. However, on November 3, 2008, HUD reversed itself with respect to eight of these units after Hopi provided information concerning BIA-related delays. GPFUF ¶ 129.

Of the remaining 23 units, HUD removed two units because they never existed, one unit because Hopi had reported it would be demolished (AZ-07 unit 8018), one unit where a tenant had been delinquent on his rent (AZ-07, unit 1003), and the remainder of the units because Hopi had known about alleged delays related to the Hopi Tribe Realty Office and BIA since FY02, but had done nothing to attempt to convey the units until FY07. It does not appear that there is any dispute as to the removal of the non-existent units from Hopi's FCAS. With respect to the unit to be demolished, HUD acted in accordance with section 1000.318 because that regulation provides for the removal of units from FCAS when the tribe no longer owns, operates, or

[6] We ask the Court to note that when Hopi had reported that units had subsequent homebuyers that extended the payoff date for the unit, HUD credited Hopi with the later date, which contradicts the allegations in the complaint that HUD removed from FCAS units with subsequent homebuyers.

maintains the unit regardless of "whether such right is lost by conveyance, demolition or otherwise . . . ." Accordingly, HUD acted in compliance with its regulation.[7]

With respect to unit 1003, this unit was conveyance eligible on September 30, 2002, but Hopi still had not conveyed this unit by February 2008. Hopi did not provide HUD any information other than the statement "still paying on delinquency." Def. App. 2299. Section 1000.318 provides that units qualify as FCAS only if the tribe conveys the units "as soon as practicable after a unit becomes eligible for conveyance" and to "actively enforce 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)(1) & (2). In the absence of any explanation from Hopi for the more than five-year delay in conveying the unit, HUD reasonably concluded that the tribe did not convey the unit as soon as practicable or failed to enforce the requirement for full and timely payment by the home buyer.

With respect to the remaining 19 units that HUD removed (AZ-07 units 1011, 1068, 8003, 8008, 8020 and AZ-11 units 1052, 1113, 1127, 1026, 1011, 1019, 1068, 1097, 8009, 8016, 8017, 8019, 8023, 8088), Hopi's October 12, 2007, letter to HUD indicated that Hopi alleged that there were conveyance delays related to "the Hopi Tribe Realty Office and the BIA Office", which Hopi alleged were "holding back on conveyance[s]." Def. App. 2299. However, that letter indicates that these units became conveyance eligible as early as FY02, and Hopi's other correspondence before and after this letter indicated that Hopi did not represent that it had made any effort to convey these units before September 18, 2007. Def. App. 2290-92, 2301-07, 2346-50. Accordingly, because Hopi failed to explain why it waited nearly five years to attempt to convey several of these units, and failed to attempt to convey any of them in the fiscal year in

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[7] Contrary to the allegations in the complaint, if Hopi had informed HUD that it intended to rebuild the unit, HUD would have allowed the unit to remain in FCAS.

which they became eligible, Hopi cannot show that it conveyed the units as soon as practicable. As a result, HUD acted reasonably in removing these units from FCAS.

HUD's February 22, 2008 letter also indicated that Hopi would be allowed to retain seven units in FCAS that Hopi had converted to "Low Income Tax Credit rental units." GPFUF ¶ 121. The effect of this was that the units remained in FCAS but at the subsidy for Mutual Help units rather than Low Rent units.[8] HUD Guidance 98-19 provides:

> **How are converted units counted under FCAS?**
>
> If units were converted prior to October 1, 1997, as evidenced by an amended ACC, then those units will be counted as the type of unit to which they were converted for formula purposes. If units were converted on or after October 1, 1997, then those units will be counted as the type of unit specified on the original ACC for formula purposes.

Guidance 98-19 is consistent with the pre-Reauthorization Act language of NAHASDA, which provided that the allocation formula should be based on: "The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary." 25 U.S.C. § 4152(b)(1) (emphasis added). HUD interprets "at the time" to mean the time that NAHASDA terminated assistance under the Housing Act of 1937, that is, October 1, 1997. Other than units in the development pipeline, NAHASDA and HUD's regulations do not allow the creation of new FCAS units after that date. Thus, HUD has interpreted NAHASDA to mean that Low Rent units cannot be created after that date, even if they are being converted from Mutual Help units.

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[8] At page 31 of their brief, the plaintiffs' raise a new claim not contained in their second amended complaint: that HUD acted improperly in not increasing the subsidy for units converted from Mutual Help to Low Rent units. The Court should hold that the plaintiffs waived this claim. *Casa de Cambio Comdiv. S.A. de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed. Cir. 2002).

As we demonstrated above, Congress designed the grant allocation formula to take into account units that had been built under the prior statutes. By allowing for the continuation of funding for Mutual Help units for the entire term of the Mutual Help Occupancy Agreement, Congress met the need based on the old contracts. There is no indication in NAHASDA that, after: (1) providing a grant to construct the unit; and (2) paying the tribe a subsidy for the full 25-year term of the Mutual Help occupancy agreement, Congress intended that HUD continue to pay subsidies indefinitely as Low Rent units. *See* 42 U.S.C. § 1437c(a)(2) (1994). Thus, the Court should defer to HUD's interpretation of the statute as barring the creation of new Low Rent units.

6. The November 3, 2008, FCAS Reductions

On September 22, 2008, Hopi wrote to HUD to inform HUD of conveyance eligible units. GPFUF ¶ 126. Hopi identified four units as having been conveyance eligible in FY07 but alleged that the units had TAR issues (AZ-11, unit 1058, AZ-15, units 1002 and 5043, and AZ-17, unit 8017) and one unit that would be demolished and not replaced (AZ-15, unit 5033). Hopi also stated that other units that had become conveyance eligible in FY07 had conveyance delays related to the Hopi Tribe Realty Office and BIA "holding back" on conveyances; Hopi stated that it had taken action during that fiscal year to convey those units. Def. App. 2350. By letter dated November 3, 2008, HUD stated that it would not remove the Hopi Tribe Realty Office/BIA units from FCAS because Hopi had explained the reasons for the delay and demonstrated that it had attempted to resolve the issues. GPFUF ¶ 129. HUD also stated that it would remove unit 5033 from FCAS because it would be demolished and not replaced. As we demonstrated above, the removal of a demolished unit that will not be replaced is proper under section 1000.318.

With respect to the four units where Hopi stated that there was a TAR issue but had not provided any details, including what it had done to enforce the Mutual Help Occupancy Agreement or convey the units, HUD removed these units from FCAS. In the absence of any explanation from Hopi that explained the delay in conveying these units, HUD reasonably concluded that the tribe did not convey the unit as soon as practicable or failed to enforce the requirement for full and timely payment by the home buyer.

7. The November 19, 2009, FCAS Reductions

On October 27, 2009, Hopi wrote to HUD to explain the reason for delay in conveyance of a number of units in projects AZ-07 and AZ-11. GPFUF ¶ 131. Hopi stated that there were four units that had become conveyance eligible in FY08 but had not been conveyed due to TAR issues and that there were 23 other units where conveyance was delayed because of the issues related to the Hopi Tribe Realty Office and BIA. On November 19, 2009, HUD responded. GPFUF ¶ 134. HUD stated that it would not remove from FCAS the 23 units for which Hopi had claimed a Hopi Tribe Realty Office/BIA delay because Hopi had represented that it had been trying to resolve those issues since FY07. However, for four units (AZ-11, units 1006, 1063, 1121, and 8025) where Hopi had stated nothing more than that there was "an outstanding balance due," HUD removed these units from FCAS. In the absence of any explanation from Hopi that explained the delay in conveying units that had become conveyance eligible in FY07, HUD reasonably concluded that the tribe did not convey the unit as soon as practicable or failed to enforce the requirement for full and timely payment by the home buyer.

C. HUD Acted Reasonably In Removing Fort Berthold Units

1. The December 12, 2003, FCAS Unit Reductions

On October 9, 2002, HUD wrote to Fort Berthold Affiliated Tribes (Fort Berthold) to inform it that projects ND-05 and ND-07 had dates of full availability of August 31, 1976, meaning that all of the units in these projects became conveyance eligible on August 31, 2001, and that the four units in each of these projects were no longer FCAS eligible. GPFUF ¶ 137. Fort Berthold never responded (except for a telephone call requesting more time, to which HUD agreed). *Id.* at ¶ 139. On December 12, 2003, HUD removed these units from Fort Berthold's FCAS. *Id.* Accordingly, because Fort Berthold never raised any objection to the removal of these units that had reached the end of the 25-year term, HUD acted in accordance with section 1000.318 when it removed the units from FCAS.

2. The ND-08 FCAS Reductions

Because of the detailed nature of the correspondence between HUD and Fort Berthold and its attorney, we will discuss the remainder of the FCAS reductions on a project basis.

On August 29, 2007, HUD wrote to Fort Berthold and stated that project ND-08 had a date of full availability of December 31, 1979. This meant that the 41 units in this project should have been conveyed or were conveyance eligible by December 31, 2004. GPFUF ¶ 145. On July 7, 2008, Fort Berthold responded by stating that "we are actively pursuing serious delinquencies that each home owner may have particular to said unit." GPFUF ¶ 147. However, Fort Berthold did not provide any documentation for this contention, nor did it identify the number of units that were delinquent, how long they had been delinquent, and what, specifically, Fort Berthold was doing to address the situation. On September 30, 2010, Fort Berthold's attorney wrote to HUD and conceded that 20 of the units had been conveyed on dates ranging

from October 30, 2000, to November 23, 2009. *Id.* at ¶ 154. Accordingly, there is no dispute that these units were no longer FCAS eligible and HUD acted properly in removing these units from Fort Berthold's FCAS.

With respect to the remaining 21 units in ND-08, Fort Berthold never provided HUD any evidence that it had attempted to convey these units. Accordingly, in the absence of any evidence from Fort Berthold concerning conveyance delays, HUD acted properly when it removed these units from Fort Berthold's FCAS in its February 16, 2011, letter. GPFUF ¶ 160.

3. <u>The ND-10 FCAS Reductions</u>

On December 28, 2009, HUD wrote to Fort Berthold and stated that project ND-10 had a date of full availability of December 31, 1983, and that the 10 units in this project should have been conveyed, or were conveyance eligible, by December 31, 2008. GPFUF ¶ 150. Fort Berthold's attorney wrote to HUD on September 30, 2010, and conceded that five of these units had been conveyed on various dates from 2001 to 2009. GPFUF ¶ 154. Accordingly, because there is no dispute that these five units had been conveyed, HUD acted properly in removing these units from Fort Berthold's FCAS.

With respect to the five remaining units in ND-10, Fort Berthold's attorney stated only that the homebuyer had not met his obligations under the Mutual Help Occupancy Agreement "and/or there was a subsequent homebuyer or successor." GPFUF ¶ 154. After Fort Berthold's attorney provided more information on two of these units (469 and 475), HUD agreed not to remove these units from FCAS. With respect to unit 469, HUD accepted Fort Berthold's representation that a subsequent homebuyer had entered into a Mutual Help Occupancy Agreement for this unit on May 11, 1994, which meant that the agreement continued through May 11, 2019. With respect to unit 475, HUD accepted Fort Berthold's representation that the

home buyer had vacated the unit on May 5, 2008, and that Fort Berthold was processing the unit for reassignment. GPFUF ¶ 169.

This leaves three disputed units in ND-10, units 467, 473, and 474. According to Fort Berthold, all of these units had Mutual Help Occupancy Agreements dated June 13, 1983, which made them conveyance eligible by June 13, 2008. Def. App. 4363. With respect to unit 467, the record indicates that this unit had a TAR issue but that Fort Berthold failed to take any action to resolve the issue within two years of the unit becoming conveyance eligible. An April 7, 2011, letter from Fort Berthold's attorney stated that Fort Berthold was "researching accounting issues with unit balance and conveyance eligibility." Def. App. 4343. In an August 24, 2011, letter from Fort Berthold's attorney, Fort Berthold stated that it had started an eviction action against the tenant. However, by that point, more than three years had passed since the unit became conveyance eligible. Based on the minimal explanation provided by Fort Berthold, and the passage of such a long time before it began eviction proceedings, HUD reasonably concluded that Fort Berthold did not convey the unit as soon as practicable after it became eligible for conveyance and did not enforce strict compliance by the homebuyer with the terms and conditions of the Mutual Help Occupancy Agreement, including the requirements for full and timely payment. Accordingly, HUD acted reasonably in removing this unit from Fort Berthold's FCAS.

With respect to unit 473, Fort Berthold conveyed this unit on August 16, 2011, more than 38 months after it became conveyance eligible. Def. App. 4363. Fort Berthold provided little explanation as to the reason for the delay. It stated that it had served a termination notice on April 16, 2008, that the owner had health difficulties, that his son had provided Fort Berthold with a power of attorney to act on his behalf on September 2, 2008, and that Fort Berthold had

worked with him "to resolve accounts on the unit." *Id.* However, other than stating that it received a $65 payment in 2009, Fort Berthold provided no explanation as to what it did to resolve this unit in 2009 and 2010. Accordingly, because Fort Berthold did not explain why it was not practicable to convey this unit until more than three years had passed from the date on which it became conveyance eligible, HUD acted reasonably in removing this unit from FCAS in the year after it became conveyance eligible.

With respect to unit 474, Fort Berthold stated both that it conveyed this unit on June 21 and August 16, 2011. Def. App. 4363. Fort Berthold never explained the reason for the delay in conveyance of this unit for more than two years after the project's date of full availability on December 31, 2008, and never provided HUD the date on which the owner had finished paying for the unit. Accordingly, Fort Berthold failed to demonstrate that it conveyed this unit as soon as practicable and HUD acted reasonably in removing this unit from FCAS.

4. The ND-13 FCAS Reductions

The correspondence between HUD and Fort Berthold is extensive with respect to these units. However, it appears that only two of the 30 units in this project are in dispute. The positions of the parties evolved as they traded information. For example, HUD accepted Fort Berthold's representation that the correct date of full availability for this project was October 31, 1986, and that the conveyance eligibility date was not until October 31, 2011. GPFUF ¶ 165. According to Fort Berthold's final representations in a letter from its attorney on August 24, 2011, Fort Berthold agreed that 17 of the 30 units had been conveyed, and that one unit (494) would be conveyed in October 2011. Def. App. 4364-66. Thus, there is no dispute with respect to these units and the Court should rule that HUD acted reasonably in removing these units from Fort Berthold's FCAS.

In HUD's final correspondence dated December 7, 2011, HUD accepted Fort Berthold's representation that there were units with successor homebuyers that should remain in FCAS or which had later dates of conveyance eligibility. Def. App. 4392. As a result, HUD allowed units to 479, 487, 490, 498, 499, 504, and 506/508 to remain in FCAS.

In addition, HUD accepted Fort Berthold's representations that it was taking enforcement action with respect to three units (481, 484, 491) that had TAR issues. HUD stated that, because Fort Berthold was taking legal action to address the TAR issues, these units could remain in FCAS. Def. App. 4392.

The only units that remain are units 493 and 500. Fort Berthold stated that these units had been abandoned and that it was contemplating demolition of the units. Def. App. 4392. Because these units had been funded through the full 25 years of the Mutual Help Occupancy Agreement, there were no tenants in the units, and no specific plan to have more tenants in the units in the future, HUD reasonably informed Fort Berthold that it had not provided HUD with sufficient information to support continued funding of these units.

IV. The Plaintiffs Cannot State An Illegal Exaction Claim And They Were Not Prejudiced By The Lack Of A Hearing

In count two of the plaintiffs' second amended complaint, the plaintiffs' contend that HUD has committed an illegal exaction because it recovered overfunding from plaintiffs "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." SAC ¶ 47. Count two does not state an illegal exaction claim, nor can plaintiffs show prejudice from the lack of a formal administrative hearing. Accordingly, the Government is entitled to summary judgment on count two.

An illegal exaction involves money that was '"improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."' *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). The classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the Government. *Id.* To invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by "necessary implication," that "the remedy for its violation entails a return of money unlawfully exacted." *Id.* (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

Section 405 of NAHASDA has never contained a requirement for HUD to provide tribes with a hearing before recovering grant funds. *See Lummi Tribe of the Lummi Reservation v. United States*, 106 Fed. Cl. 623, 633 (2012) (*Lummi II*) (holding that section 405, 25 U.S.C. § 4165, applies to this case). The prior version of HUD's implementing regulation, 24 C.F.R. § 1000.532(b), required HUD to provide a hearing if requested by the tribe, which, in this case, would only apply to the latter two Fort Berthold recoveries. However, there is nothing in the regulation that expressly provides that the remedy for failure to provide a formal hearing is for HUD to return the recovered funds to the tribes. Nor is there anything in the regulation that implies that HUD must return the recovered funds to the tribe if it failed to provide the tribe with a formal hearing, regardless of whether HUD was right on the merits and the tribe had unspent funds from which to recover the overpayments. Accordingly, NAHASDA cannot be read, either expressly or by necessary implication, as requiring HUD to return monies recovered if HUD did not provide the tribe with a hearing.

In addition, the plaintiffs cannot show prejudice from the lack of an administrative hearing. Federal courts have rejected contentions by litigants that the court should overturn agency actions where the agency failed to provide a hearing, if it was apparent that the Government would have prevailed at the hearing. In *Codd v. Velger*, the Supreme Court considered an appeal by a discharged employee who contended that a municipality had violated his due process rights when it discharged him and placed allegedly defamatory material in his file but failed to provide him with a hearing. 429 U.S. 624, 625 (1977). The Supreme Court rejected the claim because the plaintiff did not challenge the substantial truth of the material placed in his file. The Court held that, because the purpose of the hearing is to give the employee a chance to clear his name, "there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Id.* at 627; *see Rector v. City and County of Denver*, 348 F.3d 935, 945 (10th Cir. 2003) (dismissing purported class action relating to parking tickets that allegedly provided misleading information concerning appeal rights because the named plaintiff "asserted no legal basis for challenging the ticket. Any deficiencies in notice thus caused her no injury, because there was nothing for a hearing to decide.") and *id.* at 944 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 5 (1989) (plurality opinion) ("We cannot grasp the concept of a 'right to a hearing' on the part of a person who claims no substantive entitlement that the hearing will assertedly vindicate."); *McBride Cotton and Cattle Corp. v. Veneman*, 296 F. Supp. 2d 1125, 1137-38 (D.Ariz. 2003) (rejecting claim that corporation from which agency offset debt owed by shareholder was entitled to a hearing because there was no factual dispute to challenge at a hearing); s*ee also Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 599 (2011) (*Lummi I*) (holding that "Plaintiffs have failed to show any prejudice as a result of the

procedures that HUD followed and thus have failed to state a claim upon which relief can be granted."); *Caldbeck v. United States*, 109 Fed. Cl. 519, 529 (2013) (in military pay case, requiring plaintiff to show violation of law and serious prejudice); RCFC 61 ("Harmless Error . . . . At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.")).

The plaintiffs' count two claim is based on the contention that, before recovering overpayments from tribes, HUD must provide tribes with a formal hearing and find that they acted in substantial noncompliance with NAHASDA. While the Court has agreed with the plaintiffs that section 405 of NAHASDA, as implemented in 24 C.F.R. § 1000.532 (1998), applies to HUD's recovery of overfunding in this case, the Court also rejected the plaintiffs' contention that HUD must find substantial noncompliance before it can recover overpayments under section 405. *Lummi II,* 106 Fed. Cl. at 633. As a result, the only issues that could be resolved in a section 405 hearing are whether HUD's revision of the tribe's FCAS contravened 24 C.F.R. § 1000.318 and whether there were grant funds not already spent on affordable housing activities from which HUD could recover the overpayments pursuant to 24 C.F.R. § 1000.532.

As described in our proposed findings of fact, HUD repeatedly asked the plaintiffs for evidence disputing HUD's FCAS determinations, but plaintiffs generally failed to provide such evidence. The record also demonstrates that the tribes had unspent grant funds available for recovery, or had spent grant funds on activities not protected by section 1000.532, that is, planning and administration rather than affordable housing activities. The vast majority of units for which HUD recovered overpayments were units for which the plaintiffs: (1) did not dispute that they should be removed from FCAS; (2) declined to appeal; and (3) in several cases

authorized HUD to recover the overpayments. By far the most common situation involved units where the tribe reported to HUD that it had conveyed the unit but, for some reason, failed to notify HUD in a timely manner of the conveyance and continued to accept a subsidy for the unit. There were also a number of instances where tribes accepted funding for units that did not exist. In the cases of units for which the tribes waited years after the owner had completed paying for the unit, or units that involved TAR issues, the record demonstrates that HUD properly applied section 1000.318(a)(1) and (2), because nothing prevented the plaintiffs from conveying those units and the plaintiffs failed to demonstrate that they strictly enforced the provisions of the Mutual Help Occupancy Agreement for full and timely payment. Accordingly, the plaintiffs are seeking to recover money that they had no right to keep. The lack of a formal hearing before its recovery was, therefore, not prejudicial. We now discuss the specific recoveries at issue.

A. Lummi Did Not Dispute HUD's Overpayments

As we demonstrated in our proposed findings of fact, Lummi did not challenge HUD's determinations that it had overpaid Lummi or HUD's right to recover the overpayments. We briefly discuss each of HUD's three overpayment recoveries from Lummi.

1. HUD's Recovery Of $845,667

This overpayment, by far the largest at issue in this case, occurred because a representative of Lummi informed HUD that Lummi project WA-11 had 39 Low Rent and 15 Mutual Help units (*see* Def. App. 66) when this project had only 39 Mutual Help units. *See* GPFUF ¶¶ 37-42. This resulted in significant overpayments because not only did HUD base funding on 15 units more than existed, but it also paid Lummi at the higher Low Rent subsidy. *See* GPFUF ¶ 19. HUD calculated Lummi's grants for FY98 to FY03 based on these incorrect unit numbers. In each of these years, Lummi failed to correct Formula Response Forms that

showed 39 Low Rent and 15 Mutual Help units and accepted the subsidy without informing HUD of the error.

The record indicates that, after HUD informed Lummi of the overpayment and sought recovery of the overpayment, Lummi never responded in writing, never requested a hearing or sought to appeal, and never raised any objection or defense to HUD's recovery of the overpayments. In addition, by letter dated December 22, 2003, HUD recounted a telephone call from a representative of Lummi in which Lummi agreed to HUD's recovery of the overpayments. GPFUF ¶ 42. Lummi never disputed the contents of that letter.

The record also clearly indicates that, far from being short on grant funds, Lummi had more than $8 million of unexpended grant funds on August 28, 2003, when HUD put Lummi on notice of the overpayments. GPFUF ¶ 44. In addition, the $102,312 that Lummi was underfunded in FY99-02 was available for HUD to offset. GPFUF ¶ 38. Even with respect to the specific overfunded grants (FY98-FY03), Lummi had ample funds remaining in its grants for FY00-03 to reimburse HUD, and possibly in FY99 as well. Of the net total of $743,355 sought by HUD, Lummi clearly had remaining funds available to repay the FY00 ($113,226), FY01 ($116,328), FY02 ($119,890) and FY03 ($148,843) net overpayments from the grants for these years. GPFUF ¶¶ 44-48 (identifying grant funds Lummi retained for each fiscal year). (These amounts total $498,287.) In addition, Lummi had at least $2,023 in remaining funds for FY99 on August 28, 2003.

In addition, the prior version of 24 C.F.R. § 1000.532(a) only barred HUD from recovering funds already spent on affordable housing activities. NAHASDA treats amounts spent on administration and planning as distinct from amounts spent on affordable housing activities. *See* 25 U.S.C. § 4111(g) (requiring grant recipients to spend money only on

affordable housing activities except for amounts spent on, among other things, administrative and planning expenses under section 4111(h)). Thus, even if Lummi had not retained sufficient grant funds to reimburse HUD, Lummi had used funds for administration and planning that HUD could recover. GPFUF ¶ 49.

Accordingly, the record demonstrates that there were no factual disputes to resolve at a hearing and Lummi cannot identify any prejudice from the lack of a hearing.

2. The $14,029 And $3,540 Overpayment Recoveries

These overpayments occurred because Lummi reported to HUD that it had conveyed units and identified the fiscal years in which it had conveyed those units. However, Lummi's notifications were one year late so that Lummi received funding for four units in FY08 and one unit in FY09 that had been conveyed in the previous fiscal year. GPFUF ¶¶ 53, 59. The record also indicates that, for FY08 and FY09, Lummi had more than $2 million in unspent grant funds remaining more than six months after HUD informed Lummi of the overpayments and requested repayment. GPFUF ¶ 55, 60. Accordingly, there was no dispute that Lummi had conveyed these units and was no longer entitled to funding, and no dispute that it had remaining funds to repay HUD. Thus, Lummi did not suffer prejudice because HUD did not provide Lummi with a hearing that Lummi did not request.

B. Hopi Did Not Dispute HUD's Recoveries

1. The $558,169 Recovery

This recovery arose when Hopi informed HUD on September 5, 2002, that it had conveyed more than 70 units in three projects. GPFUF ¶ 66. Hopi had waited more than three years after payoff to convey many of the units. *Id.* at ¶ 67. According to Hopi, the delay for almost all of these units occurred because of intra-tribe squabbling between the Hopi Realty

Office and the Hopi Tribal Housing Authority. *Id.* at ¶¶ 67-69. As a result, conveyance did not occur as soon as practicable after payoff.

On December 30, 2002, HUD determined that Hopi had received overfunding of $558,169 ($33,827 in FY98, $114,969 in FY99, $133,467 in FY00, $137,071 in FY01, and $138,835 in FY02). *Id.* at ¶ 74. Hopi never responded to HUD's determination, never requested a hearing or sought to appeal, and never raised any objection or defense to HUD's recovery of the overpayments. The record demonstrates that Hopi had unspent grant funds on hand until sometime in at least 2004 that were available to reimburse HUD. Thus, Hopi had $470,607 from its FY99 grant available until January 22, 2004; it had $136,812.83 from its FY00 grant available until October 7, 2004; it had $170,631.18 from its FY01 grant available until August 23, 2004; and it made a $114,352.07 draw from its FY02 grant on October 6, 2009, a $111,447.83 draw on January 20, 2010, and another $64,310 draw on June 15, 2010. *Id.* at ¶ 76-80. Hopi also used funds on planning and administration that were available for recovery by reducing a future grant. *Id.* at ¶ 76.

Accordingly, there was no dispute that Hopi had conveyed these units or had remaining funds to repay HUD (or had spent funds on planning and administration) and Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing that Hopi did not request.

2. <u>The $26,735 Recovery</u>

This recovery occurred because Hopi admitted that it had conveyed two units in FY02 but had continued to receive funding for them through FY05, and because it had one unit that was conveyance eligible in FY01 but it had done nothing to convey the unit until calendar year 2005. GPFUF ¶¶ 83-86. As a result, there was no dispute that these first two units had been

conveyed, or that the third unit had not been conveyed as soon as practicable. Hopi did not appeal or request a hearing.

There also is no dispute that, on August 29, 2005, when HUD informed Hopi that it would recover the overpayments, Hopi had unspent funds available for each of the years at issue (FY02-05). Hopi had $64,310 remaining in its FY02 grant until June 2010; it had $110,821.77 in its FY03 grant until April 2006; it had $477,256.41 in its FY04 grant until October 2009; and it had $299,057.95 available in its FY05 grant until February 2008. GPFUF ¶¶ 89-93.

Accordingly, there was no dispute that Hopi had conveyed these units (or that one unit was conveyance eligible), or that it had remaining funds to repay HUD. As a result, Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing.

3. <u>The $21,962 Recovery</u>

This recovery arose after Hopi informed HUD on September 14, 2005 that it had conveyed four units in FY03 but had continued to receive funding through FY05. GPFUF ¶ 94. HUD informed Hopi on October 18, 2005, that it had been overfunded by $10,796 in FY04 and $11,166 in FY05. *Id.* at ¶ 95. As stated in sub-section two above, the record indicates that Hopi had available funds from the FY04 grant as late as October 2009 and from the FY05 grant as late as February 2008. Hopi did not request a hearing or indicate any disagreement with HUD's determination.

Accordingly, there was no dispute that Hopi had conveyed these units and that it had available funds to repay HUD. As a result, Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing.

4. The $251,692 Recovery

This recovery arose after Hopi informed HUD on September 21, 2006, that 56 units in two projects had reached their payoff date at various times between FY03 and FY06. GPFUF ¶ 100. Hopi did not provide any explanation for conveyance delays and the units may all have been conveyed as there are handwritten dates under the "Conveyance Date" column. On December 5, 2006, HUD informed Hopi that this had resulted in overfunding of $251,692 ($13,495 in FY04, $83,744 in FY05, and $154,453 in FY06) and stated that HUD would recover the overpayments. *Id.* at ¶ 101.

Hopi responded to HUD's letter on January 16, 2007. *Id.* at ¶ 103. Hopi stated that it had "researched the units outlined" in HUD's letter and had "determined that the HTHA has no defensible basis for an appeal." Hopi also authorized HUD to deduct the overpayments from its FY07 allocation.

The record demonstrates that HUD had remaining funds from its FY04-06 grants available to repay HUD on December 5, 2006. As described in sub-section two above, Hopi had sufficient funds remaining in its FY04 grant as late as October 2009 and in its FY05 grant as late as February 2008 to repay HUD. It also had $240,904 in its FY06 grant as late as April 2009. *Id.* at ¶ 106.

Accordingly, there was no dispute that Hopi had conveyed these units (or that they were conveyance eligible), and that it had remaining funds to repay HUD. As a result, Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing, particularly where Hopi has already conceded that it has no defensible basis for an appeal.

5. The $93,094 Recovery

This recovery was the result of exchanges of correspondence between HUD and Hopi that culminated with HUD's determination on February 22, 2008, that Hopi had been overfunded by $93,094 in FY06 and FY07.[9] GPFUF ¶ 117. This recovery was based on the inclusion in Hopi's FCAS of two units that never existed and other units that were conveyance eligible but for which Hopi could not document any timely efforts to convey the units. *Id.* Hopi did not dispute HUD's determinations and on March 31, 2008, it wrote to HUD, acknowledging the "over funding" and authorizing HUD to recover the funding from its FY08 grant. *Id.* at ¶ 122.

As of February 22, 2008, Hopi had grant funds available to repay HUD. As stated above, Hopi had $240,904 in its FY06 grant as late as April 2009. *Id.* at ¶ 123. Hopi had $350,567.89 available in its FY07 grant as late as October 2009. *Id.* at ¶ 124.

Accordingly, there was no dispute that these units did not exist or were conveyance eligible and that Hopi failed to take timely action to convey the units, and that it had remaining funds to repay HUD. As a result, Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing.

6. The $13,047 Recovery

On October 27, 2009, Hopi informed HUD that four units that were conveyance eligible in FY08 had not been conveyed due to TAR issues. GPFUF ¶ 131. Because Hopi had not provided HUD any information that explained what, if anything, Hopi had done to address this issue, HUD informed Hopi on November 19, 2009, that these units had been ineligible for funding in FY09 and that it had been overfunded by $13,047 in FY09. *Id.* at ¶ 133. Hopi did not

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[9] HUD also identified overfunding as early as FY98 but because of its three year rule for recovering overpayments (24 C.F.R. § 1000.319(d)), it did not seek repayment for FY98-05 overpayments. Def. App. 2311. Thus, Hopi was allowed to retain overfunding of approximately $100,000.

in any way challenge HUD's determination. At that time, Hopi had sufficient funds remaining to repay HUD. In fact, the record demonstrates that Hopi had $130,283 from its FY09 grant available as late as May 3, 2011. *Id.* at ¶ 134.

Accordingly, there was no dispute that these units were conveyance eligible and that Hopi failed to take timely action to convey the units, and that it had funds to repay HUD. As a result, Hopi did not suffer prejudice because HUD did not provide Hopi with a hearing.

C. <u>There Are No Facts To Resolve For The Fort Berthold Recoveries</u>

1. <u>The $35,491 Recovery</u>

This overpayment recovery occurred after HUD wrote to Fort Berthold three times between October 2002 and December 2003 concerning eight units that were conveyance eligible by August 31, 2001, and that should have been conveyed. This resulted in overfunding in FY02 and FY03 totaling $35,491. GPFUF ¶¶ 137-140. Fort Berthold never responded to any of these letters (except for a telephone call requesting more time, to which HUD agreed), nor did it appeal or request a hearing.

As of December 12, 2003, when HUD informed Fort Berthold that it would recover the overpayments, Fort Berthold had unspent grant funds from FY02 and FY03. With respect to the FY02 grant, Fort Berthold was able to withdraw $69,111 from its line of credit account on December 27, 2005. With respect to the FY03 grant, Fort Berthold was able to withdraw $358,180.69 from its line of credit account on November 8, 2004. *Id.* at ¶¶ 142-43.

Accordingly, there was no dispute that these units were conveyance eligible and that Fort Berthold failed to take timely action to convey the units, and that it had funds to repay HUD. As a result, Fort Berthold did not suffer prejudice because HUD did not provide Fort Berthold with a hearing.

2. The $91,956 Recovery

The correspondence relating to this overpayment recovery is somewhat lengthy but what it boils down to is this: on September 30, 2010, Fort Berthold's attorney reported to HUD that Fort Berthold had conveyed 20 units in project ND-08 on dates ranging from FY01 to FY10; HUD accepted Fort Berthold's representations and removed these units from Fort Berthold's FCAS in the fiscal year following conveyance. GPFUF ¶¶ 154-61. HUD determined that overpayments totaled $91,956 ($17,699 in FY06, $21,306 in FY07, and $52,956 in FY08). *Id.* at ¶ 61. HUD sought to recover overpayments only in the three years prior to HUD's determination, which meant that Fort Berthold received a windfall from FY01 to FY05 because it had failed to report its conveyances and continued accepting the subsidies.

The record indicates that Fort Berthold had unspent grant funds available on August 29, 2007, when HUD put Fort Berthold on notice of these overpayments. With respect to the FY07 grant, Fort Berthold's letter of credit account indicates that it made its last draw in the amount of $230,447 on December 20, 2007. Fort Berthold's letter of credit account also indicates that Fort Berthold made its last draw on its FY08 grant in the amount of $80,000 on February 4, 2009. *Id.* at ¶ 163-64.

Because these units were removed from FCAS based on Fort Berthold's representations concerning conveyance dates, and Fort Berthold had grant funds available for recovery, there were no factual issues to resolve at a hearing. As a result, Fort Berthold did not suffer prejudice because HUD did not provide it a hearing. To the contrary, the record indicates that HUD carefully considered Fort Berthold's contentions. *See* GPFUF ¶¶ 160-61.

3. The $67,043 Recovery

The correspondence leading up to this recovery is also complex but the important facts are these. On April 7, 2011, Fort Berthold's attorney informed HUD that it had conveyed five units in project ND-10 on dates ranging from FY01 to FY09. In addition, it informed HUD that it had conveyed 11 units in project ND-13 on dates ranging from FY01 to FY10. GPFUF ¶¶ 167-69. Based on these representations, HUD calculated that Fort Berthold had received funding for 12 ineligible units in FY08 ($33,443) and 13 ineligible units in FY09 ($33,600). GPFUF ¶¶ 176.

As of December 28, 2009, when HUD put Fort Berthold on notice of overpayments in ND-10 and ND-13, Fort Berthold had unspent grant funds available to repay HUD. Fort Berthold's Cash Transaction Reports show that Fort Berthold had $874,201 from its FY09 grant on hand as late as March 31, 2010, and $22,410 as late as June 30, 2010. *Id.* at ¶ 177.

Accordingly, there does not appear to be any dispute that HUD recovered overfunding based on units that Fort Berthold conveyed but failed to report to HUD. (Fort Berthold again received a windfall because HUD did not attempt to recover overpayments from FY01 to FY07). The record also demonstrates that Fort Berthold had unspent grant funds available from FY09 and that it had spent funds from its FY08 grant that were subject to offset in grants for future years. As a result, because there are no factual disputes and the record demonstrates that HUD carefully considered all of Fort Berthold's contentions, there were no factual disputes to resolve at a hearing and Fort Berthold did not suffer any prejudice from the lack of a hearing.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court grant defendant's cross motion for summary judgment and deny plaintiffs' motion.

Respectfully submitted,

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