IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs Lummi Tribe of the Lummi Reservation, Washington; Lummi Nation Housing Authority; Fort Berthold Housing Authority and Hopi Tribal Housing Authority ("Plaintiffs") reply to Defendant's Response to Plaintiffs Motion for Partial Summary Judgment (Def. Mot.). Plaintiffs assert that 24 C.F.R. § 1000.318(a) is invalid because it violates the pre-amendment version of NAHASDA's dwelling unit formula allocation provision, 25 U.S.C. § 4152(b) (1).

ARGUMENT

I. The Plaintiffs Interpretation of Section 4152 (b) (1) is Supported by its Plain Language.

Defendant first claims that Congressional intent in NAHASDA clearly allows the exclusion of FCAS units from the funding formula such as occurred here. Def. Mot. at 7. It props up its argument by claiming that the isolated phrase "based on" and the word "factors" unambiguously allow HUD's actions here. Def. Mot. 7-10.

Defendant contends that "based on" and "factors" are "generic phrases" (Id. at 15) that are "unquestionably subject to several meanings . . . ." *Id.* at 8. In this case however, § 4152 (b) (1), read literally, is unambiguous, and this court must presume that Congress said what it meant, and meant what it said. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (U.S. 2002). The fact that the courts in *Fort Peck Housing Authority, v. HUD*, 435 F.Supp.2d 1125 (D.Colo. 2006) (*Fort Peck I*) and *Fort Peck Housing Authority v. HUD*, 367 Fed. Appx. 884, 890 (10th Cir. 2010) (*Fort Peck II*) interpreted the statute differently does not make it ambiguous. *United States v. Hite*, 896 F. Supp. 2d 17, 24-25 (D.D.C. 2012); *See Broughton Lumber Co. v. BNSF Ry. Co.*, 2010 U.S. Dist. LEXIS 119721 (D. Or. Nov. 8, 2010) (a statute is not ambiguous merely because different interpretations are conceivable); *See also, United States v. Triumph Capital Group, Inc.*, 260 F. Supp. 2d 470, 475 (D. Conn. 2003) ("A statute is not ambiguous merely because the parties interpret it differently."). Although neither decision is binding on this court, the Plaintiffs

contend that the district court's literal reading of § 4152(b)(1) in *Fort Peck I*, 435 F. Supp. 2d at 1132, is the correct interpretation.

Like the Defendant, the court in *Fort Peck II* focused on the phrase "based on" reading it in isolation to support the conclusion that Congress did not really intend to include dwelling units that a TDHE no longer owns and operates in the dwelling unit formula. 367 Fed. Appx. at 890. However, the court failed to acknowledge that § 4152 (b)(1) mandated that the dwelling unit factor be based on all of the dwelling units owned at the time the statute became effective in 1997. The court also failed to recognize that while the phrase "based on", by itself, is ambiguous;[1] its meaning becomes clear when it is coupled with a definitive number, as is the case here. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004), citing *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 753-754 (D.C. Cir. 2000).

Even if the court were to accept the suggestion that § 4152 (b) (1) is ambiguous, if this Court finds the Plaintiffs' interpretation of NAHASDA reasonable, that interpretation should be upheld as "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes... The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar, supra*, 644 F.3d 1054, 1062 (10th Cir. 2011), *aff'd* 132 S. Ct. 2181, 2193 (2012) (finding that the tribe's favorable interpretation of an ambiguous statue controls) (*Salazar*).[2] *See also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C.

[1] See *Sierra Club v. Envtl. Prot. Agency*, 356 F.3d 296, 305-06 (D.C. Cir. 2004) ("There is no question that the phrase 'based on' is ambiguous.").

[2] Unlike *Fort Peck II*, which Defendant relies on for the argument that the Indian canon does not apply here (Def. Mot. 20), *Salazar* was not only published, but explicitly affirmed by the United States Supreme Court.

Cir. 1988). It is notable that the court in *Salazar* interpreted the Indian Self Determination Act, a zero sum game funding statute upon which NAHASDA was based. 25 U.S.C. § 4101 (7).

Defendant next turns to indicia other than the plain language of § 4152 (b)(1) to extract "clear" congressional intent to allow the exclusion of the FCAS units at issue here. Def Mot 10-12. There is no need to search for indicia of what Congress intended when the words it has used are plain and unambiguous. *Barnhart,* 534 U.S. 461-462. Even so, the "indicia" Defendant points to is not related to the housing needs of Tribes, as shown in the Plaintiffs' opening brief, pages 25- 27. In this regard, the regulation here falls into the same category as the regulation invalidated in *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235 (10th Cir. 2009). Furthermore, Defendant's rationalization to support §1000.318 was never articulated during the rulemaking process. Instead, Plaintiffs have been faced with ever-shifting post-hoc rationalizations to justify a regulation which clearly runs afoul of the plain language of § 4152 (b)(1). *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 839 (Fed. Cir. 2006) ("We must ensure that the agency is not now masquerading a *post hoc* rationalization as a then-existing interpretation.").

Defendant claims that under 25 U.S.C. §4152(b), the formula "shall be based on factors that reflect the need of the Indian tribes" which could change. Def. Mot. 10-11. This, according to Defendant, indicates clear Congressional intent to allow HUD to categorically remove certain dwelling units described in 4152 (b)(1) and recapture millions of dollars from Plaintiffs at anytime.

Instead of giving Defendant "extremely broad authority" to withdraw funding relied upon by Plaintiffs (Def. Mot. at 11), Congress required Defendant to base funding on the Indians'

"need" for housing. 25 U.S.C. §4152 (b). In meeting this objective, Congress clearly required Defendant to respect the funding base or foundation as it existed on September 30, 1997 so that tribes may continue to operate their housing programs and allocate known resources to program participants. *See* Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/base (last visited June 24, 2013) (defining the transitive verb form of "base" as "to find a base . . . for."). *See also* Def. Mot. 9 (citing *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) for the proposition that "based on" means to provide a "foundation").[3] The first "need" factor upon which the formula must be based pursuant to 25 U.S.C. § 4152 was intended by Congress to provide a base amount of funding, founded upon a definitive number of dwelling units under an ACC contract on a date certain, upon which tribes could rely to implement their affordable housing activities. Congress never intended to allow HUD to make unilateral decisions to reduce this "dwelling unit" formula base by excluding units that the Plaintiffs no longer owned or operated, and Congress certainly did not intend to allow HUD to exclude units while they were still owned and operated because HUD did not believe the Plaintiffs were diligent enough in conveying the units. *See* 142 Cong. Rec. H11603-06 (statement of Rep. Lazio) (Sept. 28, 1996) ("the major principles . . . [of NAHASDA] are clear . . . [and include] ending decades of overly prescriptive policies and bureaucratic entanglements and providing more flexibility so the people who want to provide housing can be focused on the mission of providing housing, not on networking with rules and regulations and performance

[3] Plaintiffs do not argue that "based on" means that the number may be adjusted upward but not downward. Def. Mot. 13. Plaintiffs merely state that, under the statute, dwelling units that were under an ACC may not have been constructed but may have been in the development pipeline and therefore the statute mandated the inclusion of these units as factors in the funding formula.

standards irrelevant to the communities that they serve . . . .").[4] And yet that is precisely what HUD has done through § 1000.318 (a).

Defendant's hypothetical scenario in which a tribe has no need after all its families receive a deed to their homes is just that: a hypothetical, and a poor one at that. Def. Mot. 11, note 1. The hypothetical falsely assumes that Indian families magically become non low income when they get their deed. In fact, the great majority of homebuyers are still considered low income and in need of affordable housing assistance when their Mutual Help homes are conveyed or become eligible for conveyance. In many cases the homes are dilapidated after the 25 year term because they were not adequately constructed in the first place and because low income homebuyers could not afford to repair and maintain the homes. *See Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 989 (9th Cir. Mont. 2006) (Pregerson, J. concurring). For example, upon conveyance of mutual help units, at least 90% of Lummi homebuyers were still considered low income and eligible for housing assistance. Declaration of Charles N. Hurt, Jr. ("Hurt Decl.") at ¶2 (attached hereto as Exhibit A). Once those homes are conveyed, the Lummi Nation Housing Authority continues to provide assistance to those families pursuant to NAHASDA in the form of renovation or modernization assistance, utility assistance, etc. Hurt Decl. at ¶ 3. It is thus misleading for Defendant to assert that such units are no longer a factor simply because they have been conveyed; they are a factor in most cases because the families who occupy the homes are still in need of housing assistance.

[4] Defendant relies on *Sierra Club v. Envtl. Prot. Agency*, 356 F.3d 296, 306 (D.C. Cir. 2004) for the proposition that "based on" does not mean base, foundation or floor. Def. Mot. 9. *Sierra Club* is inapposite as that case dealt with a flexible model which may be adjusted, *Sierra Club*, 356 F.3d at 304 (figures must be based on "photochemical grid modeling . . . ."), not a definitive number of dwelling units such as exist here.

Moreover, in case of conveyance eligible units which HUD removed from FCAS under § 1000.318 (a)(1) – (2), those homes continue to be owned and operated by the Plaintiffs and Plaintiffs must continue to spend grant funds to operate and maintain these homes. In short, there is simply no way homes that are owned and operated by the Plaintiffs can be excluded from the funding formula without violating the statutory mandate of 4152 (b)(1). At a minimum, subsections 1000.318 (a)(1) – (2) are invalid.

Defendant is also incorrect in assuming that as units are conveyed, the FCAS goes down. *E.g.* Def. Mot. 11. In fact, TDHEs build new units to replace those that have been conveyed. For example, since 1998 the Lummi Nation has constructed 184 new units. Hurt Decl. at ¶4. But HUD does not allow tribes to receive FCAS funding based on these newly constructed units, even though the TDHE has to spend grant funds to maintain these units. *See* 24 C.F.R. § 1000.322. Thus, § 1000.318 has the anomalous effect of lowering a TDHE's dwelling unit funding as units are conveyed without considering the newly built dwelling units that replace them.

Because Plaintiffs continue to provide assistance under NAHASDA to low income families even after conveyance of mutual help units and continue to construct new housing units (without new funding), Plaintiffs must rely on the base funding contained in NAHASDA to maintain these units and meet the needs of the low income families who occupy them. In short, rather than ensuring the formula is "based on" the number of units owned as one of several "factors," Defendant categorically excludes all units that have been lost by conveyance, demolition or otherwise from the funding formula.[5] Despite the post hoc rationalizations and the

[5] Even if Defendant is correct and Plaintiffs' interpretation of NAHASDA is "unreasonable" (Def. Mot. at 13), that would only further support Plaintiffs' argument that Congress revisited and changed the statue to explicitly address HUD's concerns. As indicated, however, by the

contrived notions of indicia of congressional intent put forth by HUD, in the end it cannot escape the literal language of § 4152 (b) (1). It does not defy common sense to interpret the statute as it is written.

Throughout its argument, Defendant urges this Court to be bound by *Fort Peck II*. *E.g.*, Def. Mot. at 8,10-14, 20-21. For example, Defendant claims that *Fort Peck II* denied Fort Peck's claim that HUD could not exclude "conveyance eligible units because HUD's actions did not violate NAHASDA." Def. Mot. at 21. However, the Court did not distinguish between conveyed units and conveyance eligible units. It simply declined to address the issue and remanded the case to the District Court for further proceedings, including proceedings addressing whether HUD could lawfully exclude units that the FPHA continued to own and operate. *See Fort Peck II*, 367 Fed. Appx. at 892. This is how the District Court in *Fort Peck Housing Authority v. HUD*, 2012 WL 3778299 (D.Colo. 2012) (*Fort Peck III*) interpreted the *Fort Peck II* order, and the District Court's interpretation is correct.

Because the *Fort Peck II* decision is unpublished, it is "*not* precedential . . . ." 10th Cir. R. 32.1(A) (emphasis added). *See Henderson v. Horace Mann Ins. Co.*, 560 F. Supp. 2d 1099, 1115 (N.D. Okla. 2008) (holding that an unpublished opinion "is not binding precedent," and declining to follow the unpublished decision on ground that it was not persuasive); *See also Garrett v. Lowe's Home Ctrs., Inc*., 337 F. Supp. 2d 1230, 1236 n. 1 (D. Kan. 2004). Furthermore, the *Fort Peck II* Court's choice *not* to publish was deliberate and fully informed. After the unpublished *Fort Peck II* decision was handed down on February 19, 2010, HUD filed a "Motion for Publication" on March 5, 2010. *See Fort Peck Housing Authority v. HUD,* Nos.

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plain language of the amendment, HUD's hearing testimony, the "civil action" provision in the new law, and Congressional intent, Plaintiff's interpretation of the statute as it existed prior to the 2008 amendment is eminently reasonable and should be upheld.

06-1425 and 06-1447, Doc. No. 01018378489 (10th Cir. March 5, 2010). As part of that Motion for Publication, HUD pertinently stated and argued as follows:

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

Id. at 2, 3 (emphasis added). The *Fort Peck II* Court denied the Motion for Publication on May 6, 2010. *See Fort Peck Housing Authority v. HUD*, Nos. 06-1425 and 06-1447, Doc. No. 01018416418 (10th Cir. May 6, 2010). Curiously, Defendant's Motion for Summary Judgment makes no mention of the Motion for Publication or the *Fort Peck II* Court's rejection of that Motion. In any event, it is clear that the *Fort Peck II* Court made a fully informed decision *not* to publish, even after being presented with HUD's arguments as to why *Fort Peck II* should be published.

Further, though 10th Cir. R. 32.1(A) provides that unpublished decisions may be cited for their persuasive value, the unpublished *Fort Peck II* decision has *no* persuasive value with respect to the effect of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("2008 Reauthorization Act"). Particularly, while recognizing the passage of the 2008 Reauthorization Act in *Fort Peck II*, the Circuit explicitly did not address or consider the effect that the amendments to NAHASDA's formula allocation provision have upon the appropriate interpretation of 25 U.S.C. § 4152 (b) (1) prior to its amendment. *See Fort Peck*

II, 367 Fed. Appx. at 885, n. 1. Thus, the unpublished *Fort Peck II* decision cannot be read as providing *any* guidance in determining issues related to the 2008 Reauthorization Act.

Fort Peck II's recognition of HUD's supposed "agency expertise", *Id.* at 892, is not persuasive because NAHASDA completely changed the way housing was funded and administered. In fact, HUD had no more expertise in implementing the new NAHASDA than the tribes did. Moreover, in cases where the language of the statute is plain and unambiguous, notions of deference to agency expertise becomes irrelevant. *Credit Union Nat'l Asso. v. Board of Governors of Federal Reserve System*, 700 F. Supp. 1152, 1161 (D.D.C. 1988).

Defendant argues that because a minimum allocation exists in 25 U.S.C. § 4152(d), Congress did not intend one to exist in 25 U.S.C. § 4152(b). Def. Mot. 15. Subsection (b)(1) was not aimed at a minimum funding floor. It simply says that a definitive number of dwelling units must be counted as a factor in the formula. HUD checked all 3 Plaintiffs annual FCAS funding against their funding minimum amount under subsection d. Defendant here mistakenly equates the minimum funding requirement of §4152(d) with the dwelling unit funding formula factor in §4152 (b)(1) when in fact the two are not the same.

Finally, almost as an afterthought, Defendant claims that "an equally valid way" to calculate the subtraction of units here is under the catch-all "other objectively measurable conditions" language of §4152(b)(3), not as an adjustment under §4152(b)(1). However, such an interpretation would impermissibly allow Defendant to use a more general catchall factor to overrule or limit the more specific congressionally mandated factor in §4152(b)(1). This would violate the canon that the specific section governs the general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012); *See* Plaintiffs' opening brief, page 12.

II. The 2008 Amendment to Section 4152 (b)(1) Supports Plaintiffs Interpretation.

As demonstrated here and in Plaintiffs' opening brief, the plain language of, and context surrounding, the 2008 Reauthorization Act confirms that 24 C.F.R. § 1000.318(a) could not survive under the old Act. Defendant contends that the Reauthorization Act merely clarified the statute and thus supports the validity of § 1000.318(a). Def. Mot. 16-20. Defendant's reliance on the Senate report and interpretation of the effect of the Reauthorization Act is misguided, however, as evidenced by the text and context of the 2008 Reauthorization Act. As shown in Plaintiffs' Motion for Partial Summary Judgment, and *infra*, the substantive change of law is evidenced by: (1) the plain language of the amendment; (2) HUD's own congressional hearing testimony concerning the amendment; and (3) the 2008 Reauthorization Act's "civil action" provision which allowed actions to proceed under the prior statute, if they were timely filed. The 2008 Reauthorization Act clearly and substantively changed the pre-amendment law by categorically excluding a significant class of housing units from Plaintiffs' FCAS. This change of law confirms that 24 C.F.R. § 1000.318(a) impermissibly violated the pre-amendment version of NAHASDA's dwelling unit factor, subsection (b)(1), which contained no such exclusion prior to the amendment.

In arguing that the 2008 Reauthorization Act amendment merely clarified the law, Defendant relies on a 2007 Senate committee report which characterizes the amendment as a "[c]larification." Def. Mot. at 16-17 (quoting S. Rep. No. 110-238, at 9 (2007)). However, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g., United States v. Vazquez-Rivera, 135 F.3d 172, 177 (1st Cir. 1998)*; *United States v. Wright,* 625 F.3d 583, 600 (9th Cir. 2010); *Boddie v. Am. Broad. Companies, Inc.*, 881 F.2d 267, 269

(6th Cir. 1989) ("*Boddie II*"); *Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan.,* 128 F.3d 1431, 1435-36 (10th Cir. 1997); *Commissioner of Internal Revenue v. Callahan Realty Corp.,* 143 F.2d 214, 216 (2nd Cir. 1944). As the First Circuit stated in *Vazquez-Rivera*:

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

Vazquez-Rivera, 135 F.3d at 177. Characterizing the 2008 Reauthorization Act amendment as a "clarification" is also the equivalent of painting black lines on the sides of a horse and calling it a zebra. The so-called "clarification" is much more than "merely cosmetic," it is a substantive and categorical change in the language of § 4152 (b)(1) and the way housing units are counted for the purposes of Plaintiffs' FCAS. Indeed, subsection (b)(1) was essentially re-written.

Defendant additionally argues that the 2008 Reauthorization Act is "persuasive evidence" that 24 C.F.R. § 1000.318(a) implements congressional intent as expressed in the pre-amendment law because Congress adopted a long-standing administrative interpretation without change, citing *Sebelius v. Auburn Reg. Med. Ctr,* 133 S.Ct. 817, 827 (2013). Def. Mot. at 17-18. Defendant is wrong.

Auburn Medical Center is distinguishable and inapposite. In that case, the relevant portions of the statutes at issue were indeed re-enacted without change. Here, as explained in below, the 2008 Reauthorization Act amendment fundamentally changed the pre-amendment formula allocation provision. Additionally, the language of the original and the re-enacted statutes in *Auburn Medical Center* was readily susceptible to the administrative interpretations of that statute. Here, by contrast, the relevant statutory language of the pre-amendment version of the formula allocation provision spoke directly to the FCAS issue and is flatly inconsistent with

§ 1000.318(a). Moreover, unlike the case at bar, *Auburn Medical Center* did not involve congressional committee hearing testimony from agency representatives that the amendment would "change" the existing law.

In the cases at bar, HUD's interpretation of the pre-amendment version of the formula allocation provision has been irregular and inconsistent. For instance, in addition to the referenced committee hearing testimony, prior to the 2001 OIG audit, HUD did not calculate FCAS consistent with § 1000.318(a). Thus, while Congress substantially adopted § 1000.318(a) with the 2008 Reauthorization Act, Congress did not adopt any consistent interpretation expressed by HUD. On the contrary, Congress substantively changed the law consistent with HUD's committee hearing testimony. Nor, as Defendant argues, did Congress acknowledge the validity of § 1000.318 by its silence when NAHASDA was amended prior to 2008. Congress was not aware of the conflict between the statute and regulation until HUD called its attention to the problem after *Fort Peck I* was decided and HUD threatened to withhold funding for all Tribes in response. *See Committee on Indian Affairs: Oversight Hearing to Review the Native American Indian Housing Programs*, 109th Cong. 7-11 (2006) (statement of Sen. Byron Dorgan, Vice Chairman, S. Comm. on Indian Affairs).This is a significantly different scenario than *Auburn Medical Center*, where Congress did not change the law to encompass a consistent, long-held and reasonable agency interpretation. Also, it is noteworthy that the statute at issue in *Auburn Medical Center* did not expressly authorize claimants to file suit against the agency under the pre-amendment version of the statutes.

Finally, Defendant claims that the Senate report (which HUD likely had a hand in drafting) acknowledges the "need for removal of . . . ineligible units . . . ." Def. Mot. at 17. This argument is a red herring. Removing units from the funding formula going forward is one thing,

but recapturing millions of dollars as result of past failure to remove the units is something completely different.[6] This harsh remedy is why Congress enacted the section 401 and 405 safeguards in the first place.[7]

A. The Plain Language of the Amendment.

One need only compare the text of the amendment with the text of the original formula allocation provision to see the substantive change. Again, the pre-amendment version of the provision included "*[t]he number* of low-income housing dwelling units owned or operated *at the time* [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary" as a mandatory FCAS factor. 25 U.S.C. § 4152(b)(1) (emphasis added). There is no controversy that the original formula allocation provision included and "explicitly list[ed]…the number of 1997 dwelling units" as one of the FCAS factors. *Fort Peck II*, 367 Fed. Appx. at 890. *Cf. Carcerari v. Salazar*, 555 U.S. 379 (2009) (holding that the phrase "now under federal jurisdiction" as used in the Indian Self Determination and Education Assistance Act means under federal jurisdiction in 1934, the year the statute was enacted). However, through the 2008 Reauthorization Act, Congress materially altered the formula allocation provision so that housing units are only counted for FCAS purposes if they "are owned or operated by a recipient on . . . October 1 of the calendar year immediately preceding the year for which funds are provided" and have not been "lost to the recipient by conveyance, demolition, or other means . . . ." P.L. 110-411, § 301, now codified at 25 U.S.C. § 4152 (b)(1) (A) (i)-(ii) (2009). This is

[6] The Plaintiffs submit that this failure is just as much the fault of HUD as it is the TDHEs.

[7] Neither is it pertinent that "Congress was aware of the lawsuits between the tribes and HUD . . . ." when it sought HUD's views prior to the 2008 Amendments. Def. Mot. at 17. Congress became aware of the problem with § 1000.318 almost immediately after the decision in *Fort Peck I*. But this does not mean that Congress somehow acquiesced in HUD's interpretation of the original statute.

far more than a cosmetic clarification. This is an elimination of housing units from the FCAS count. Housing units which were included under the original formula allocation provision must now be excluded. This amendment is a substantive change of law with an enormous financial impact on Plaintiffs.

The Sixth Circuit found a substantive change of law under similar circumstances in *Boddie II*. The *Boddie II* case involved 1986 amendments to § 2511(2)(d) of the Omnibus Crime Control and Safe Streets Act ("Title III"). As the *Boddie II* Court explained, under the amendment, nonconsensual interception of a communication for a merely "injurious" purpose was "no longer actionable" under Title III. 881 F.2d at 268. On appeal, the plaintiff, who originally filed the action under the pre-amendment version of § 2511(2)(d), argued that the district court improperly applied the amendment retroactively by denying her a jury trial on whether defendants acted with an "injurious" purpose. Defendants countered that the amendment to § 2511(2)(d) was a mere clarification of the pre-amendment law, and that thus, the district court simply and properly used the amendment as a guide in interpreting the prior law. The Sixth Circuit rejected defendants' "clarification" argument:

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

Id. at 269 (emphasis added).

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

Defendant claims that *Fort Peck III* found that the Reauthorization Act substantively changed only 25 U.S.C. §4161(a)(2). Def. Mot. at 19. The court in *Fort Peck III* spoke in much broader terms, stating that the "Reauthorization Act of 2008 was a substantive change in the statutory framework. The text and context of the amendment establish that it constitutes a substantive and meaningful change in the law. It cannot be read as a clarification of pre-existing law and it cannot be given retroactive effect to these disputes." 2012 U.S. Dist. LEXIS 124049 at *20.

B. HUD's Congressional Committee Hearing Testimony.

It is important to re-emphasize that HUD itself, in developing and proposing the amendment, testified before congressional committees that the amendment "*would change"* the law by no longer "counting units . . . in the year after they are conveyed, demolished or disposed of." *See* O. Cabrera Statement at 2 (Dkt. 77 at #9); R. Boyd Statement at 3 (Dkt. 77 at #10) (emphasis added). As Plaintiffs argue in their Motion for Partial Summary Judgment at 14-15, because Congress enacted the very amendment developed and advocated by HUD, "it may be assumed that the intent voiced [in the committee hearing testimony] was adopted by the

legislature." 2A Norman J. Singer, *Sutherland Statutory Construction*, § 48:10 (7th ed.)(emphasis added). Understandably, Defendant now wishes to distance itself from the hearing testimony of its designated witnesses.

Defendant attempts to distance itself here from the testimony of its witnesses by claiming that the "change" in the law described by HUD merely brought the statute back to its original interpretation. Def. Mot. at 18. This argument only supports Plaintiffs' position. In its Congressional testimony, HUD recognized that a substantive change in the statutory counting method was needed in order for the statute to comport with 24 C.F.R. § 1000.318(a). This is an admission that § 1000.318(a) violates the pre-amendment version of the formula allocation provision. The fact that *Fort Peck I* had already been decided is irrelevant as that decision was limited to the Fort Peck Housing Authority and was not applied nation wide. *Fort Peck I*, 435 F.Supp.2d at 1136 (ordering that the ruling is "limited to Fort Peck Housing Authority.").

HUD here is more than just an "interested party" whose testimony may aid in the Court's interpretation of the statute. HUD is the agency charged with a trust responsibility in the administration and implementation of NAHASDA. HUD's role in developing the amendment was paramount. HUD developed, drafted, proposed and advocated the amendment language significant portions of which were ultimately enacted by Congress as part of the 2008 Reauthorization Act. In considering the "timing of the amendment and the content of the textual addition," there is no doubt that Congress was responding to HUD's proposal. *Bailey v. United States*, 52 Fed. Cl. 105, 111 (Fed. Cl. 2002). Defendant can therefore not run from HUD's admission that the amendment "would change the way that housing units in management are counted for formula purposes" by not "counting units . . . in the year after they are conveyed, demolished or disposed of."

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

Lastly, the 2008 Reauthorization Act provides that the statutory changes to the formula allocation provision would "not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." 25 U.S.C. § 301(b)(1)(E) (2009). With this "civil action" provision, Congress expressly declined to treat the amendment as a mere clarification of existing law. If the amendment was nothing but a clarification of existing law, there would be no need for the provision permitting tribes to file suit under the pre-amendment formula allocation provision. If the amendment was just a distinction without a difference, there would be no use in drawing lines between the effect of the original statute and the amended statute. Courts do not presume that Congress would perform such "'a useless act.'" *S. Corp. v. United States*, 690 F.2d 1368, 1374 (Fed. Cir. 1982). The "civil action" provision is a congressional acknowledgment that the formula allocation provision has been materially changed by the amendment and does not apply retroactively.

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

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Partial Summary Judgment.

Dated: July 1, 2013 Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that on the 1st day of July, 2013, a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ *John Fredericks III*
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