No. 12-70221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORT BELKNAP HOUSING DEPARTMENT, et al.,

Petitioners,

v.

OFFICE OF PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BRIEF FOR THE RESPONDENTS

STUART F. DELERY
Acting Assistant Attorney General

MICHAEL S. RAAB
(202) 514-4053
JONATHAN H. LEVY
(202) 353-0169
Attorneys, Appellate Staff
Civil Division, Room 7231
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 25 U.S.C. § 4161(d). As discussed in greater detail below, that provision does not apply to the agency action that petitioners seek to challenge, and the petition for review therefore should be dismissed for lack of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction over this petition for review under 25 U.S.C. § 4161(d).

2. Whether the Department of Housing and Urban Development correctly interpreted its own regulations to allow it to recover and redistribute an acknowledged overpayment of federal grant funds after it discovered that the recipient of those funds had provided the Department with inaccurate information.

STATUTORY AND REGULATORY PROVISIONS

The full text of the pertinent statutory provisions and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Starting in 2001, the Department of Housing and Urban Development (HUD) repeatedly questioned Fort Belknap regarding whether the count of housing units used as a basis for allocating Fort Belknap's share of the appropriations for Indian housing block grants improperly included ineligible units. After initially providing incorrect information regarding these units, Fort Belknap informed HUD in 2010 that many of the units had become ineligible years earlier, meaning that they should not have been used as a basis for the grants. HUD determined that, as a result, Fort Belknap had received overpayments for fiscal years 2000-2010 totaling $2,858,786, which Fort Belknap could repay over five years through deductions from subsequent grants. After Fort Belknap sought further review of this determination within HUD,

HUD's Assistant Secretary denied relief, determining that the agency was not barred from recovering the overpayments.

STATEMENT OF FACTS

A. Statutory Background

In 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), Pub L. No. 104-330, 110 Stat. 4016 (Oct. 26, 1996), 25 U.S.C. §§ 4101 et seq. Effective fiscal year 1998, NAHASDA terminated various housing assistance programs under the United States Housing Act of 1937, see 25 U.S.C. §§ 4181(a), 4182, and replaced them with a block grant program providing each eligible Indian tribe with an equitable share, derived by formula, of fixed annual congressional appropriations for affordable housing activities. See 63 Fed. Reg. 12,334, 12,334-35 (Mar. 12, 1998) (summarizing NAHASDA); 24 C.F.R. § 1000.6 (explaining formula block grant program).[1]

NAHASDA delegates to HUD the authority to develop a formula to allocate to each tribe a portion of any congressional appropriation. 25 U.S.C. § 4152. The formula is "based on factors that reflect the need of the Indian tribes," including,

[1] NAHASDA provides for payments to a tribe or to its tribally designated housing entity on behalf of the tribe. 25 U.S.C. §§ 4103(22), 4111(a)(2). Petitioners here include a tribe, its governing body, and its housing authority. For purposes of this case, we refer to such bodies collectively as a "tribe" and to petitioners collectively as "Fort Belknap."

among other things, the number of specified low-income housing units owned or operated by the tribe and the "extent of poverty and economic distress and the number of Indian families within the Indian areas of the tribe." Id. § 4152(b).

NAHASDA also provides for a minimum grant to certain tribes. See id. § 4152(d). Congress sets an appropriation each fiscal year to be allocated according to the statute. Id. § 4151. Accordingly, the total amount of money available to all tribes is fixed, and to the extent changes are made to the allocation for any one tribe, other tribes' allocations must necessarily be changed by an equal and offsetting amount.

B. Regulatory Background

The formula required by NAHASDA was established through a negotiated rulemaking and calculates block grant allocations as the sum of two components: "(a) Formula Current Assisted Housing Stock (FCAS); and (b) Need." 24 C.F.R. § 1000.310. This case involves only the FCAS component, which reflects the housing units referenced in 25 U.S.C. § 4152(b), cited above, and multiplies the number of units by a fixed subsidy amount. 24 C.F.R. § 1000.316. FCAS includes certain lease-to-own units, but those units are no longer included in the FCAS when they are conveyed (or eligible to be conveyed) to the lease-purchase homebuyer. Id. §§ 1000.312, 1000.314, 1000.318.

Before each year's formula allocation, HUD sends all eligible tribes a "Formula Response Form," which requires tribes to apply their superior knowledge of the status of the FCAS units to make corrections or changes to the formula data in HUD's records. See id. § 1000.302 (defining Formula Response Form). Tribes are responsible for reporting discrepancies between the FCAS data from HUD's records shown on the Formula Response Form and the tribe's up-to-date FCAS information. See Record Tabs 6, 9, 11, 20, 24, 26, 31, 33, 35, 39, 44 (estimated allocations with Formula Response Forms for fiscal years 2000 through 2010 for Fort Belknap).[2] HUD uses the information updated through the Formula Response Form to calculate each tribe's grant allocation. See 24 C.F.R. §§ 1000.301, 1000.310, 1000.316. HUD can review FCAS data through target monitoring or as a component of other reviews. Id. § 1000.319(d).

HUD has an obligation to "allocate equitably and fairly funds made available through NAHASDA among eligible Indian tribes," and to ensure that each tribe receives only the grant funds to which it is entitled. Id. § 1000.301; see also 25 U.S.C. § 4151. Because this allocation is made from an annual fixed appropriation,

[2] Regulations promulgated in 2007 make clear that each tribe "is responsible for verifying and reporting changes to [its FCAS] on the Formula Response Form to ensure that data used . . . are accurate." 24 C.F.R. § 1000.319(a); see id. § 315(a) (requiring each tribe to report corrections to its FCAS on the Formula Response Form).

as noted above, see 25 U.S.C. § 4151, any overpayment to one tribe takes away money that should go to other tribes. Accordingly, HUD regulations provide for overpaid funds to be repaid and redistributed. See 24 C.F.R. § 1000.319(b).

C. Administrative Proceedings

On August 1, 2001, HUD sent Fort Belknap a letter challenging the FCAS data Fort Belknap had reported or left unchanged on Formula Response Forms for fiscal years 1998 through 2001. HUD notified Fort Belknap that it believed that a number of units should not have been included in the FCAS because, based on the units' ages, it appeared that they should have already been conveyed or become eligible for conveyance. Respondents' Excerpts of Record (Resp. ER) 84-87. The letter provided HUD's understanding that a total of 171 units were improperly included in the FCAS for those fiscal years, explained that HUD would need to recover any overpayments ultimately found, and invited Fort Belknap to dispute HUD's information if it thought that information was incorrect. Resp. ER 84-85. Fort Belknap responded by providing reasons why some of the challenged units were included in the FCAS, primarily asserting that many units were occupied by "subsequent homebuyers" with new lease-purchase agreements, an assertion that, had it been true, would have allowed these units to be included in the FCAS for a longer period of time. See Resp. ER 79-81.

HUD accepted Fort Belknap's factual assertions regarding subsequent homebuyers and made appropriate corrections to the FCAS, concluding that Fort Belknap had received overpayments totaling $330,524 for fiscal years 1998 through 2001. Resp. ER 75-78. Fort Belknap did not appeal from this determination, and, at its own request, this overpayment was deducted from its NAHASDA grants in fiscal years 2003 through 2007. See Resp. ER 71-74.

On March 2, 2005, HUD sent Fort Belknap a letter similar to the August 8, 2001 letter but relating to additional units for fiscal years 2004 through 2006. This letter specifically requested with respect to the housing units at issue that Fort Belknap provide the dates that each unit became eligible for conveyance and was actually conveyed. Resp. ER 67-68. Fort Belknap did not respond within the 30 days requested. On May 19, 2005, HUD sent a follow-up letter again requesting a response within 30 days. Resp. ER 65-66. The letter stated that if a response was not received within that time, HUD would assume that Fort Belknap was in agreement with the March 2, 2005 letter and would establish an appropriate repayment schedule. Id. Fort Belknap again failed to respond, and on July 19, 2005, HUD found an overpayment of $249,561 from fiscal years 2004 and 2005 to be recovered out of the fiscal year 2006 payment. Resp. ER 63-64. Fort Belknap did not appeal or otherwise dispute this determination, and the overpayment was recovered.

On September 4, 2007, HUD sent Fort Belknap a third similar letter regarding 45 additional units for fiscal years 2006 through 2008. Resp. ER 60-62. This letter also noted that Fort Belknap had never provided HUD with certain information about units that had been challenged by HUD back in 2001 but as to which HUD had accepted Fort Belknap's factual assertions regarding subsequent owners. Resp. ER 61-62. The letter requested a response within 30 days, but Fort Belknap did not respond.

On July 10, 2008, HUD wrote again to Fort Belknap, reiterating the requests contained in the September 4, 2007 letter. Resp. ER 58-59. Fort Belknap responded with an email on August 25, 2008, requesting a further 30-day extension, which was granted. Resp. ER 55-57. But Fort Belknap never submitted any substantive response. Two months later, HUD sent Fort Belknap another follow-up letter, noting the lack of substantive response to HUD's September 4, 2007 letter and concluding that the units mentioned in that letter had been improperly included in Fort Belknap's FCAS, resulting in an overpayment of $310,330 to be repaid over three fiscal years. Resp. ER 52-54. HUD also re-reiterated its request for further information regarding the units at issue in the 2001 proceedings, and requested such information within 30 days. Resp. ER 53-54. Fort Belknap did not respond for almost two years.

On September 30, 2010, Fort Belknap provided HUD with information with respect to units questioned in 2001, but for many such units Fort Belknap had only incomplete information. Resp. ER 46-51. On November 3, 2010, after additional discussions between Fort Belknap and HUD representatives, see Resp. ER 38-44, Fort Belknap provided more complete information about these units. Resp. ER 33-37. Much of this new information contradicted the statements Fort Belknap had made (and upon which HUD had relied) in 2001. For example, in November 2010, Fort Belknap conceded that there were at least 27 housing units in three different projects which had been included in the FCAS in 2001 (and later) despite the fact that those same units had actually been conveyed by Fort Belknap even before NAHASDA was enacted. Compare Resp. ER 34 (Fort Belknap's 2010 submission showing 27 units conveyed prior to October 26, 1996), with Resp. ER 80 (Fort Belknap's 2001 submission claiming these same units for inclusion in the FCAS for fiscal years up to and including 2001). Fort Belknap's 2010 submission also indicated that numerous other units had been improperly included its FCAS in years after those units had been conveyed or become eligible for conveyance. See, e.g., Resp. ER 35 (listing numerous units conveyed in 2003).

On December 6, 2010, HUD sent Fort Belknap a letter accepting the newly-provided information and finding an overpayment for fiscal years 2000-2010 of

$2,858,786. Petitioners' Excerpts of Record (Pet. ER) 1-1 to 1-6. This finding was based on the new information provided by Fort Belknap itself regarding the units in question and when they had been conveyed, were eligible to be conveyed, or had been converted. The letter stated that Fort Belknap had the option of appealing the determination it contained, Pet. ER 1-6, and Fort Belknap did so by letter dated February 4, 2011, Resp. ER 20-32.

In that administrative appeal, Fort Belknap asserted that the proposed overpayment had to be reduced to approximately $2 million in order to comply with 24 C.F.R. § 1000.340(b), which reflects statutory minimum NAHASDA allocations. Resp. ER 21-22. Fort Belknap also asserted that the three-year limitation period in 24 C.F.R. § 1000.319(d) precluded HUD from recovering overpayments before fiscal year 2008, and proposed that it repay only $336,610. Resp. ER 22-23. Fort Belknap did not suggest that HUD had erred in finding any of the units at issue ineligible for inclusion in the FCAS or that HUD had miscalculated the amount of the resulting overpayment.

That administrative appeal was denied by HUD's Deputy Assistant Secretary for Native American Programs by letter dated May 5, 2011. Pet. ER 2-1 to 2-4. The Deputy Assistant Secretary explained that HUD's overpayment findings did not violate 24 C.F.R.§ 1000.340(b) because the NAHASDA grants that Fort Belknap

received in fiscal years 2000 through 2010 remained above the floor set by § 1000.340(b) even when the overpayments were subtracted out; Fort Belknap's contrary conclusion was based on incorrect figures regarding its past grant amounts. Pet. ER 2-2 to 2-3. With respect to 24 C.F.R. § 1000.319(d), the Deputy Assistant Secretary noted that "taking action" with respect to an incorrect FCAS count includes taking action to determine whether particular units are properly within the FCAS count, and that HUD had repeatedly done so with respect to the Fort Belknap units at issue and had specifically notified Fort Belknap that it was doing so by the letters dated August 1, 2001, March 2, 2005, September 4, 2007, and December 6, 2010. Pet. ER 2-3. The Deputy Assistant Secretary therefore denied Fort Belknap's appeal. Pet. ER 2-4. The Deputy Assistant Secretary stated that Fort Belknap had the option of requesting reconsideration of his decision, Pet. ER 2-4, and Fort Belknap did so by letter dated July 1, 2011, Resp. ER 17-19.

Fort Belknap sought reconsideration based solely on its disagreement with HUD regarding whether the 2001, 2005, and 2007 letters constituted "taking action" under 24 C.F.R. § 1000.319(d). Resp. ER 18-19. The request conceded that HUD had taken timely action in conformity with § 1000.319(d) with respect to fiscal years

2009 and 2010,[3] and offered to allow HUD to recover $664,558. Resp. ER 19. The request for reconsideration mentioned Fort Belknap's previous argument under 24 C.F.R. § 1000.340(b) only in the context of proposing to withdraw that argument as part of its proposed settlement. Resp. ER 19. In the request for reconsideration, as in its initial administrative appeal, Fort Belknap did not challenge HUD's conclusions regarding FCAS eligibility or the amount of the resulting overpayment.

Reconsideration was denied by HUD's Assistant Secretary by letter dated October 4, 2011. Pet. ER 3-1 to 3-3. The Assistant Secretary reiterated that HUD had taken relevant action through the letters dated August 1, 2001, March 2, 2005, and September 4, 2007, each of which questioned the relevant Fort Belknap FCAS counts. Pet. ER 3-1 to 3-2. The Assistant Secretary explained that "the 3-year limitation applies to the time period before the first action HUD takes and does not limit the time that HUD can collect a repayment after the issuance of the Form so long as HUD begins the process within 3 years." Pet. ER 3-2. The Assistant Secretary noted that Fort Belknap continued to owe the entire amount mentioned in the December 6, 2010 letter and asked Fort Belknap to contact HUD within 30 days to discuss repayment options. Pet. ER 3-2.

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[3] As noted on page 10 supra, Fort Belknap had previously conceded that HUD had acted timely with respect to fiscal year 2008 as well. See Resp. ER 22-23.

On November 4, 2011, Fort Belknap submitted emails requesting "an additional sixty (6o) days within which to complete a payback agreement with [HUD]." Resp. ER 16; accord Resp. ER 15. HUD responded on November 14, 2011, rejecting Fort Belknap's request for further time to gather information about the relevant housing units but granting Fort Belknap an additional 30 days to work with HUD to establish a repayment plan. Pet. ER 4-1. The letter noted that if a repayment plan were not established within this time, HUD would collect the overpayment in five $571,757 installments from Fort Belknap's NAHSDA grants for fiscal years 2012 through 2016. Pet. ER 4-1 to 4-2.

On December 22, 2011, Fort Belknap filed a waiver request, asking HUD to waive the requirement that it repay any of the overpayment, or, in the alternative, asking HUD to allow Fort Belknap to repay over 10 years, rather than 5 years. Resp. ER 10-14. On February 16, 2012, HUD denied the requested waiver. Resp. ER 3-5. It acknowledged that the repayments would have an adverse effect on Fort Belknap but noted that this was a necessary result of the fact that Fort Belknap had previously been paid money that should have been provided to other tribes. Resp. ER 4. HUD reiterated that it had acted timely under 24 C.F.R. § 1000.319(d) by sending Fort Belknap letters challenging the eligibility of certain housing units for inclusion in the FCAS. Resp. ER 4. And HUD declined to extend the 5-year repayment plan, noting

both that the repayment period was established in a negotiated rulemaking, see 24 C.F.R. § 1000.319(b), and that extending repayment would be unfair to the other tribes who were the rightful recipients of the overpaid funds. Resp. ER 4-5.

On January 18, 2012, HUD allocated Fort Belknap's fiscal year 2012 NAHASDA block grant in the amount of $2,236,037. From this amount, HUD collected the first installment of Fort Belknap's repayment in the amount $571,757, as explained in HUD's November 14, 2011 letter. See Resp. ER 8.[4] On January 26, 2012, Fort Belknap requested a stay of HUD's recovery of the overpayment, based on the filing of the instant petition for review. Resp. ER 6-7. HUD denied the requested stay on February 17, 2012. Resp. ER 1-2.

D. Judicial Proceedings

Fort Belknap filed this petition for review on January 20, 2012, challenging HUD's November 14, 2011 letter. See Petition (Dkt. No. 1) at 1. The petition invokes this Court's jurisdiction under 25 U.S.C. § 4161. See Petition 2. On February 29, 2012, the Government filed a motion to dismiss, noting that § 4161 does not apply to the facts of this case and that numerous other tribes with similar claims have presented those claims to district courts under the Administrative Procedure Act,

[4] HUD also collected two small additional repayments that are not at issue here, which is why the total "Repayments and Other Adjustments" for fiscal year 2012 is slightly higher than $571,757.

rather than to courts of appeals under § 4161 or any other jurisdictional provision. See Motion to Dismiss (Dkt. No. 6). On May 3, 2012, this Court denied that motion without prejudice to the Government renewing its jurisdictional argument in its brief, which we do below.

SUMMARY OF ARGUMENT

1. Judicial review of HUD final actions with respect to NAHASDA is generally conducted by district courts under the Administrative Procedure Act. Fort Belknap invokes a narrow statutory exception to that general rule. That exception allows for direct review in the courts of appeals when HUD (1) finds, after notice and the opportunity for a hearing, that a tribe engaged in substantial noncompliance with NAHASDA, and (2) imposes at least one of the statutorily-specified remedies. 25 U.S.C. § 4161. Here, HUD never invoked § 4161, never found substantial noncompliance, and never imposed any of the statutorily-specified remedies. Instead, HUD simply found and corrected an incorrect FCAS count, and even when a tribe fails to accurately report the number of FCAS units, such a failure is not substantial noncompliance. 25 U.S.C. § 4161(a)(2). Accordingly, § 4161 does not apply, and the petition for review should be dismissed for lack of jurisdiction.

2. If the Court concludes that it has jurisdiction, it should affirm the agency's decision on the merits. As explained below, HUD properly determined to recover the

overpayments made to (and acknowledged by) Fort Belknap in installments deducted from Fort Belknap's NAHASDA grants in fiscal years 2012-2016. There is no dispute regarding the amount of the overpayment, the fact that Fort Belknap was never entitled to the overpayment amount, or that other tribes were entitled to receive the overpaid funds. Fort Belknap's only assertion is that HUD acted too late to correct these overpayments, and that assertion is incorrect. The relevant regulation requires only that HUD "take action" within the specified time, which HUD did by challenging certain units' inclusion in the FCAS, providing Fort Belknap with the number of units affected and the reason for the challenge, inviting Fort Belknap to correct HUD's information (if incorrect), and notifying Fort Belknap that HUD would recover any overpayment found. Fort Belknap's assertion that the only relevant "action" that HUD could take was final agency action on the overpayment is contrary to the plain language of the regulation at issue and would have required HUD to act at a time when HUD had insufficient information, because Fort Belknap either failed to provide information or provided information that later turned out to be inaccurate.

STANDARD OF REVIEW

The jurisdictional issue is a legal question subject to de novo review. To the extent that this Court concludes that it has jurisdiction to review this matter, "findings of fact by the Secretary, if supported by substantial evidence on the record

considered as a whole, shall be conclusive." 25 U.S.C. § 4161(d)(3)(A). Here, Fort Belknap's judicial challenge is based on the application of a HUD regulation, and HUD's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation. E.g., PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575 (2011); Putnam Family Partnership v. City of Yucaipa, Cal., 673 F.3d 920, 928 n.4 (9th Cir. 2012).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE PETITION FOR REVIEW.

The only basis invoked by Fort Belknap in support of this Court's jurisdiction is 25 U.S.C. § 4161(d). As explained below, however, that provision does not apply here.

Section 4161(d) vests the courts of appeals with jurisdiction only to review "the termination, reduction, or limitation of payments" under 25 U.S.C. § 4161(a)(1), which states in relevant part:

> [I]f the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall –
>
> (A) terminate payments under this chapter to the recipient;

> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
>
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
>
> (D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

Section 4161 would confer jurisdiction here only if the Secretary had (1) determined that Fort Belknap failed to substantially comply with NAHASDA and (2) imposed one of the four remedies listed above. See Yakama Nation Housing Auth. v. United States, 102 Fed. Cl. 478, 488 (2011) (Section 4161 "does not present a specific and comprehensive scheme for administrative and judicial review of all claims involving NAHASDA. Instead, section 4161 merely authorizes the circuit court to hear challenges to determinations made under section 4161(a), following the requisite notice and hearing procedures set forth in that section.") (internal quotation marks omitted). But HUD never invoked § 4161 in the relevant administrative proceedings, never alleged – let alone determined – that Fort Belknap failed to substantially comply with NAHASDA, and never imposed any of the listed remedies. Instead, HUD simply determined that Fort Belknap received overpayments due to inaccurate

FCAS counts, which HUD is recovering over five years in accordance with 24 C.F.R. § 1000.319(b). That determination does not fall within § 4161.[5]

Indeed, Congress removed any doubt on this point by expressly stating that "[t]he failure of a recipient to comply with the requirements of section 4152(b)(1) . . . regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this subchapter [25 U.S.C. §§ 4161-4168]." 25 U.S.C. § 4161(a)(2). There is no dispute here that Fort Belknap was overpaid because it did not correctly report the number of low-income dwelling units as discussed in 25 U.S.C. § 4152(b), notably certain units which Fort Belknap "cease[d] to possess the legal right to own, operate, or maintain" or which were "lost to the [tribe] by conveyance, demolition, or other means." Id

[5] Independent of § 4161, HUD has inherent authority to determine the existence of an overpayment and recover that overpayment by use of an administrative offset. See United States v. Wurts, 303 U.S. 414, 415 (1938) ("The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid."); Grand Trunk Western Ry. Co. v. United States, 252 U.S. 112, 121 (1920) (administrative offset does not require the filing of a lawsuit); United States v. Mead, 426 F.2d 118, 124 (9th Cir. 1970) (when the Government makes a payment "under an erroneous belief which was material to the decision to pay, it is entitled to recover the payments"); see also United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); United States v. Systron-Donner Corp., 486 F.2d 249, 251 (9th Cir. 1973).

§ 4152(b)(1)(A)(I) & (ii).[6] Thus, Congress has determined that whatever mistakes Fort Belknap may have made in reporting the numbers of these units does not constitute "substantial noncompliance" under § 4161. And, absent substantial noncompliance, § 4161 does not confer jurisdiction.[7]

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[6] Congress enacted 25 U.S.C. § 4161(a)(2) in 2008, when it also amended § 4152(b)(1), to which § 4161(a)(2) refers. See Pub. L. 110-411 §§ 301(2), 401, 122 Stat. 4319, 4329, 4330 (Oct. 14, 2008). Congress expressly provided that the changes to § 4152(b)(1) "shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." 25 U.S.C. § 4152(b)(1)(E). These changes therefore apply in this case, which was filed more than 45 days after October 14, 2008. See Petition (Dkt. No. 1) (filed on January 20, 2012).

[7] In enacting 25 U.S.C. § 4161(a)(2), Congress made clear that this provision, specifying that misreporting the number of FCAS units does not constitute substantial noncompliance with NAHASDA, was merely a "[c]larification" of existing law. S. Rept. 110-238, at 10 (2007) (referring to the specific provision enacting § 4161(a)(2)); see also id. at 1 (noting that the entire bill of which § 4161(a)(2) was a part sought "to clarify existing law while removing unnecessary statutory and regulatory burdens"). But even if the enactment of § 4161(a)(2) constituted a change from pre-existing jurisdictional rules, the current version of the statute would still apply here; jurisdictional statutes generally apply to litigation that occurs after their enactment regardless of when the underlying conduct occurred. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 576-77 (2006) (jurisdiction-stripping statute applies "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed" because "unlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually takes away no substantive right but simply changes the tribunal that is to hear the case") (internal quotation marks omitted); Nunez-Reyes v. Holder, 646 F.3d 684, 691 (9th Cir. 2011) (en banc) ("[I]n cases in which the new rule of law strips the courts of jurisdiction, the courts must apply that new rule of law retroactively."); Santos v. Guam, 436 F.3d 1051, 1052-54 (continued...)

HUD's action here does not fall within § 4161 for the additional independent reason that HUD has never imposed any of the remedies listed in § 4161(a)(1). HUD has not terminated any payments, limited the availability of any payments, or provided a replacement tribally designated housing authority. See 25 U.S.C. § 4161(a)(1)(A), (C), or (D). Although HUD recovered the first installment of the overpayment from Fort Belknap's fiscal year 2012 NAHASDA allocation, HUD has not "reduce[d] payments" under § 4161(a)(1)(B), which mandates reduction "by an amount equal to the amount of such payments that were not expended in accordance with this chapter." Here, HUD has not determined that any amount was not expended in accordance with the statute; it has simply concluded that Fort Belknap was overpaid by amounts that should be recovered and redistributed.

Fort Belknap's opening brief asserts that § 4161 confers jurisdiction because HUD's action was based on its determination that Fort Belknap "failed to abide by the regulations of the Agency." Pet. Br. 5. This assertion is incorrect; HUD never asserted that Fort Belknap failed to abide by any regulations. Moreover, by its plain language, 25 U.S.C. § 4161(a) does not apply every time a tribe violates a NAHASDA regulation; the jurisdictional provision covers only instances in which

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[7](...continued)
(9th Cir. 2006).

a tribe fails to "comply substantially" (emphasis added) with specified provisions. Fort Belknap's assertion further ignores the statutory language in § 4161(a)(2), which, as noted above, specifically excludes specified tribal errors regarding FCAS counts from the definition of a failure to comply substantially. Despite being alerted to this issue by HUD's motion to dismiss, Fort Belknap continues to ignore the statutory language.

The most Fort Belknap says on this subject is that § 4161 might be ambiguous, see Pet. Br. 4, but Fort Belknap does not describe or explain the possible ambiguity. As noted above, the statute is not ambiguous in any relevant sense and does not confer jurisdiction here.

As HUD noted in its motion to dismiss, the fact that this Court does not have jurisdiction under 25 U.S.C. § 4161 to directly review HUD's decision does not necessarily leave Fort Belknap without judicial recourse. The district courts have entertained a number of actions by tribes challenging under the Administrative Procedure Act final HUD actions regarding NAHASDA allocations. See, e.g., Fort Peck Housing Auth. v. HUD, 435 F. Supp. 2d 1125 (D. Colo. 2006), rev'd, 367 Fed. Appx. 884 (10th Cir. 2010); Washoe Housing Auth. v. HUD, 2011 WL 4047702 (D. Nev. 2011); United Keetoowah Band v. HUD, 2008 WL 7358289 (E.D. Okla. 2008), rev'd, 567 F.3d 1235 (10th Cir. 2009). More than a dozen similar cases are pending

in the district courts, including, within this Circuit, Walker River Paiute Tribe v. HUD, Case No. 08-cv-00627-LRH-VPC (D. Nev.); The Housing Auth. of the Te-Moak Tribe of Western Shoshone Indians v. HUD, Case No. 08-cv-00626-LRH-VPC (D. Nev.); and Crow Tribal Housing Auth. v. HUD, Case No. 06-cv-00051-BLG-RFC (D. Mont.).[8]

II. HUD COMPLIED FULLY WITH THE REQUIREMENTS OF 24 C.F.R. § 1000.319(d).

If the Court concludes that it has jurisdiction over this petition for review, it should reject Fort Belknap's claim on the merits. Fort Belknap contends that when HUD issued its final agency action in 2010, it was forbidden by 24 C.F.R. § 1000.319(d) from recovering overpayments for fiscal years 2000-2008.[9] But

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[8] The fact that so many tribes have sought redress in the district court for similar alleged harms undermines Fort Belknap's suggestion that § 4161 must be construed to allow court of appeals jurisdiction here in order to follow the canon that statutes should be construed in favor of Native Americans. See Pet. Br. 4. As an initial matter, this canon does not apply where, as here, there is no statutory ambiguity. Moreover, the availability of district court review under the APA, with subsequent appellate review in the courts of appeals, makes it entirely unclear whether Fort Belknap's proposed interpretation of § 4161 would in fact benefit Native Americans in any meaningful way.

[9] Although the 2010 agency action challenged here involves overpayments for fiscal years 2000 through 2010, Fort Belknap has never contended that there is any impediment to HUD's recovery of the overpayments for fiscal years 2009 and 2010, see Pet. Br. 7, 10 n.1, which total $664,588, see, e.g., Pet. ER 1-5, 2-3; Resp. ER 21. Fort Belknap has been inconsistent with respect to fiscal year 2008. Although Fort (continued...)

§ 1000.319(d) states only that "HUD shall have 3 years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form," and HUD took such action by sending Fort Belknap the letters dated August 1, 2001, March 2, 2005, and September 4, 2007.[10]

HUD has consistently interpreted the phrase "take action" as used in § 1000.319(d) to encompass more than "final agency action" and to include the actions represented by the August 1, 2001, March 2, 2005, and September 4, 2007

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[9](...continued)
Belknap now appears to contend that HUD cannot recover the acknowledged overpayment for that year (which totals $277,413, see, e.g., Pet. ER 1-5, 2-3), it earlier conceded that HUD could recover this overpayment, see Resp. ER 23 (letter from Fort Belknap stating that "[t]he only fiscal years for which the December 6, 2010 letter appears timely are 2008, 2009 & 2010").

[10] The alleged failure to comply with 24 C.F.R. § 1000.319(d) is the only basis invoked in Fort Belknap's brief for disturbing HUD's overpayment determination. See Pet. Br. 7-12. Notably, Fort Belknap does not challenge the ultimate accuracy of HUD's determinations regarding which units were ineligible for inclusion in each year's FCAS. Although Fort Belknap's brief contains a single vague reference to 24 C.F.R. § 1000.318, which describes which units are excluded from FCAS, see Pet. Br. 5, that reference does not appear in the Argument (or Summary of Argument) section, and the brief does not state how HUD allegedly failed to comply with § 1000.318 or with respect to which units. Any argument regarding compliance with § 1000.318 has therefore been waived. See, e.g., Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 487 (9th Cir. 2010) (The Court "refuse[s] to address claims that were only argue[d] in passing, or that were bare assertions[s] . . . with no supporting argument.") (internal quotation marks and citations omitted).

letters.[11] That interpretation is reasonable because these letters took action (or informed Fort Belknap of action already taken) in at least three ways: (1) the letters informed Fort Belknap that HUD was looking into whether the tribe may have incorrectly received credit for specified units in specified fiscal years, (2) the letters opened a negotiation on this issue by asking Fort Belknap to provide relevant information and argument, and (3) the letters informed Fort Belknap that HUD would need to recover overpayments if it was conclusively determined that Fort Belknap received funding based on ineligible units (which is precisely what ultimately occurred). See Resp. ER 60-62, 67-68, 84-85.

The agency's interpretation is consistent with the ordinary understanding of the phrase "take action,"[12] as well as the manner in which the phrase is used in other legal contexts.[13] HUD's interpretation of its own regulation is entitled to controlling

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[11] HUD has also consistently applied this interpretation with respect to other tribes as well, although its statements to other tribes on this issue are necessarily not part of the Record here.

[12] See Webster's Third New International Dictionary 21 (1993) (including, among many definitions of "action", "a thing done" and a "deed").

[13] E.g., 12 U.S.C. §§ 4208, 4228 (Attorney General's failure to provide a required notification constitutes a refusal to "take action"); 22 U.S.C. § 5304(b) (initiating negotiation constitutes taking action); 42 U.S.C. § 5403(a)(5)(C) (Secretary can "take action" by publishing a proposal and providing the opportunity for comment); 50 U.S.C. App. § 2402(5)(B) ("furnishing information" can constitute (continued...)

weight under longstanding principles of administrative law. See, e.g., Putnam Family Partnership v. City of Yucaipa, Cal., 673 F.3d 920, 928 n.4 (9th Cir. 2012) ("HUD's interpretation of HUD's own regulation" is "'controlling unless "plainly erroneous or inconsistent with the regulation"'") (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

Indeed, HUD's reading of § 1000.319(d) is also consistent with the other regulations of which § 1000.319(d) is a part. Most notably, the regulations provide that tribes must generally retain relevant records for three years after submitting the relevant report to HUD, 24 C.F.R. § 1000.552(b), but tribes must retain these records longer – namely until the resolution of all relevant issues – "[i]f any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period," id. § 1000.552(c). This record-retention requirement dovetails with HUD's interpretation of § 1000.319(d); both envision that HUD must initiate the overpayment recovery process within a reasonable period of time but

[13](...continued)
taking action); 22 C.F.R. § 1422.4(f)(4) (Regional Director can "take action" by issuing a notice of hearing); 26 C.F.R. § 56.4911-2(b)(2)(iii) & (iv) (individual "take[s] action" with respect to legislation by contacting a legislator with the purpose of influencing legislation); Ninth Cir. Jud. Miscon. R. 20(b)(1)(D)(iii) (characterizing "the initiation of removal proceedings" against a magistrate judge as "tak[ing] action").

envision no time limits on the completion of that process and the issuance of a final agency action regarding the overpayment.

There is a strong logical and practical basis for this type of scheme. It is reasonable for HUD to impose a time limit on itself to initiate an investigation into particular FCAS figures because HUD has full control over doing so. But because factors beyond HUD's control may prevent HUD from taking final action, it is also reasonable for HUD not to impose a time limit on itself to complete an investigation and issue a final agency action. That danger is highlighted by the facts of this case. Here HUD timely initiated three separate inquires into the inclusion by Fort Belknap of different housing units in the FCAS for various fiscal years. In 2001, Fort Belknap provided HUD with inaccurate information about numerous units – stating that it continued to control units under agreements with subsequent homebuyers, when, as Fort Belknap first disclosed in 2010, the units had been conveyed to others years earlier. Similarly, when HUD inquired of Fort Belknap regarding the status of certain units in 2007, Fort Belknap did not provide any substantive response for over three years. As properly interpreted by HUD, the regulations encourage prompt action by HUD without giving tribes a perverse incentive to delay or provide incorrect information in the hope that the passage of time will render HUD unable to recover overpayments.

Fort Belknap appears to acknowledge these legitimate concerns when it suggests that the three-year period established by § 1000.319(d) is akin to a statutory limitations period. See Pet. Br. 10. Although § 1000.319(d) is not a statute of limitations per se, HUD agrees that this provision has a similar purpose to a statute of limitations, which is to "'promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses disappeared.'" Catholic Social Servs., Inc. v. INS, 232 F.3d 1139, 1147 (9th Cir. 2000) (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974)). As discussed above, these purposes are not furthered by requiring a final decision within the limitations period; they are furthered by requiring that notice be given and that the process leading to a final decision be initiated within the limitations period.

Accordingly, in the judicial setting, a statute of limitations limits the time at which a lawsuit can be "commenced," not the time for a final judicial decision. See, e.g., 28 U.S.C. § 1658(a). Similarly an administrative limitations period is satisfied when administrative proceedings are instigated, rather than when those proceedings are completed and yield a final agency action. See, e.g., 28 U.S.C. § 2401(b) (Federal Tort Claims Act limitations period met if a prospective plaintiff's claim is "presented in writing to the appropriate Federal agency within two years after such claim

accrues"). Commencing the process and providing notice prevent surprise and allow for the preservation of evidence. HUD's letters here amply served those purposes. The letters put Fort Belknap on notice as to precisely the fiscal years and housing units that were being questioned and allowed Fort Belknap to preserve all relevant evidence. The letters made clear that HUD was considering recouping any overpayments and thus made clear that Fort Belknap could not reasonably assume that it would be able to permanently retain the possible overpayments. HUD's interpretation of § 1000.319(d) thus comports with Fort Belknap's stated understanding that the provision functions akin to a statute of limitations.

At the same time, HUD's interpretation furthers the purposes of the statute. As Fort Belknap notes, Congress intended through NAHASDA "to develop housing on reservations" and "foster self-determination." Pet. Br. 11. See 25 U.S.C. § 4101 (NAHASDA intended to "help[] tribes and their members to improve their housing conditions and socioeconomic status . . . in a manner that recognizes the right of Indian self-determination and tribal self-governance"). There is no question that the funds at issue in this case will go to one or more tribes to further the purpose of developing reservation housing; the only question is whether the recipient will be Fort Belknap or the other NAHASDA-eligible tribes to whom recovered funds would be distributed.

Moreover, HUD's interpretation furthers tribal self-determination by allowing the agency to take the time necessary to involve a tribe in its process, hear everything the tribe has to say, and consider all the evidence that the tribe wants to present before taking action. Fort Belknap's proposed alternative would require HUD to issue final agency action within the specified time regardless of the tribe's participation and even if the tribe requested more time.[14]

Fort Belknap provides little analysis for its contrary reading of § 1000.319(d). It appears to read the regulatory phrase "take action" as if it instead read "take final agency action." This is more of a re-writing of the regulation than an interpretation of it. Had HUD meant to refer to final agency action in § 1000.319, it would have used that phrase, and its failure to do so indicates that the regulation intentionally refers to something other than final agency action. See, e.g., 24 C.F.R. §§ 1000.118(b), 1000.234(d), 1000.336(e)(4)(ii) (NAHASDA regulations referring to "final agency action").

[14] This point is not merely theoretical; a significant portion of the time that it took to resolve the issues in this case is attributable to HUD's repeated efforts to engage Fort Belknap and to give it additional time and opportunity to participate in the processes regarding its NAHASDA grants. This included sending multiple letters when Fort Belknap failed to initially respond, see Resp. ER 58, 61, 65, and giving Fort Belknap additional time to respond at its request, see Resp. ER 55; Pet. ER 4-1.

Fort Belknap seeks to undermine the deference due to HUD by arguing that § 1000.319 should be construed liberally for the benefit of Indian tribes. Pet. Br. 12 (quoting 25 C.F.R. § 900.3(b)(11)). But the regulation upon which Fort Belknap relies is completely inapposite; it was promulgated by different agencies (the Departments of Interior and Health and Human Services) within a different title of the Code of Federal Regulations (title 25) to implement a different statute (the Indian Self-Determination Act), and therefore has no bearing here. See 61 Fed. Reg. 32,482 (June 24, 1996) (promulgating 25 C.F.R. § 900.3(b)(11)).

Even if the regulations at issue here were subject to a rule of construction in favor of Indian tribes, such a rule would be of no avail to Fort Belknap in this case. Fort Belknap is acting in this case in its interests and the interests of its members. Fort Belknap is not acting in the interests of other tribes and their members. To the contrary, if Fort Belknap prevails here, the other tribes will receive less NAHASDA funding. Because of this zero-sum situation involving only tribal interests, a rule of construction favoring interpretations that benefit Native Americans generally cannot support Fort Belknap here.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction, or, in the alternative, denied.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

MICHAEL S. RAAB
(202) 514-4053
JONATHAN H. LEVY
(202) 353-0169
Attorneys, Appellate Staff
Civil Division, Room 7231
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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STATEMENT OF RELATED CASES

Counsel for Respondents are not aware of any related cases, as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND WITH NINTH CIRCUIT RULE 32-1

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 7,367 words.

/s/ Jonathan H. Levy

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief for the Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on June 12, 2012, by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jonathan H. Levy

ADDENDUM OF PERTINENT STATUTORY AND REGULATORY PROVISIONS

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

§ 4101. Congressional findings

The Congress finds that--

(1) the Federal Government has a responsibility to promote the general welfare of the Nation--

(A) by using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances or factors beyond their control;

(B) by working to ensure a thriving national economy and a strong private housing market; and

(C) by developing effective partnerships among the Federal Government, State, tribal, and local governments, and private entities that allow government to accept responsibility for fostering the development of a healthy marketplace and allow families to prosper without government involvement in their day-to-day activities;

(2) there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;

(3) the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;

(4) the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition;

(5) providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status;

(6) the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members; and

(7) Federal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

Subchapter III. Compliance, Audits, and, Report

§ 4152. Allocation formula

(a) Establishment

(1) In general

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.

(2) Study of need data

(A) In general

The Secretary shall enter into a contract with an organization with expertise in housing and other demographic data collection methodologies under which the organization, in consultation with Indian tribes and Indian organizations, shall--

(I) assess existing data sources, including alternatives to the decennial census, for use in evaluating the factors for determination of need described in subsection (b); and

(ii) develop and recommend methodologies for collecting data on any of those factors, including formula area, in any case in which existing data is determined to be insufficient or inadequate, or fails to satisfy the requirements of this chapter.

(B) Authorization of appropriations

There are authorized to be appropriated such sums as are necessary to carry out this section, to remain available until expended.

(b) Factors for determination of need

The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

(1)(A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if–

(I) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or

(ii) the unit is lost to the recipient by conveyance, demolition, or other means.

(B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.

(C) If the unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be considered a low-income housing dwelling unit for the purpose of this paragraph.

(D) In this paragraph, the term "reasons beyond the control of the recipient" means, after making reasonable efforts, there remain--

(I) delays in obtaining or the absence of title status reports;

(ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;

(iii) clouds on title due to probate or intestacy or other court proceedings; or

(iv) any other legal impediment.

(E) Subparagraphs (A) through (D) shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008.

(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.

(c) Other factors for consideration

In establishing the formula, the Secretary shall consider--

(1) the relative administrative capacities and other challenges faced by the recipient, including, but not limited to geographic distribution within the Indian area and technical capacity; and

(2) the extent to which terminations of assistance under subchapter V of this chapter will affect funding available to State recognized tribes.

(d) Funding for public housing operation and modernization

(1) Full funding

(A) In general

Except with respect to an Indian tribe described in subparagraph (B), the formula shall provide that, if, in any fiscal year, the total amount made available for assistance under this chapter is equal to or greater than the total amount made available for fiscal year 1996 for assistance for the operation and modernization of public housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.], the amount provided for such fiscal year for each Indian tribe for which such operating or modernization assistance was provided for fiscal year 1996 shall not be less than the total amount of such operating and modernization assistance provided for fiscal year 1996 for such tribe.

(B) Certain Indian tribes

With respect to fiscal year 2001 and each fiscal year thereafter, for any Indian tribe with an Indian housing authority that owns or operates fewer than 250 public housing units, the formula shall provide that if the amount provided for a fiscal year in which the total amount made available for assistance under this chapter is equal to or greater than

the amount made available for fiscal year 1996 for assistance for the operation and modernization of the public housing referred to in subparagraph (A), then the amount provided to that Indian tribe as modernization assistance shall be equal to the average annual amount of funds provided to the Indian tribe (other than funds provided as emergency assistance) under the assistance program under section 14 of the United States Housing Act of 1937 (42 U.S.C. 1437*l*) for the period beginning with fiscal year 1992 and ending with fiscal year 1997.

(2) Partial funding

The formula shall provide that, if, in any fiscal year, the total amount made available for assistance under this chapter is less than the total amount made available for fiscal year 1996 for assistance for the operation and modernization of public housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.], the amount provided for such fiscal year for each Indian tribe for which such operating or modernization assistance was provided for fiscal year 1996 shall not be less than the amount that bears the same ratio to the total amount available for assistance under this chapter for such fiscal year that the amount of operating and modernization assistance provided for the tribe for fiscal year 1996 bears to the total amount made available for fiscal year 1996 for assistance for the operation and modernization of such public housing.

(e) Effective date

This section shall take effect on October 26, 1996.

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

Subchapter IV. Compliance, Audits, and Reports

§ 4161. Remedies for noncompliance

(a) Actions by Secretary affecting grant amounts

(1) In general

Except as provided in subsection (b) of this section, if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall--

(A) terminate payments under this chapter to the recipient;

(B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;

(C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or

(D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

(2) Substantial noncompliance

The failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this subchapter.

(3) Continuance of actions

If the Secretary takes an action under subparagraph (A), (B), or (C) of paragraph (1) the Secretary shall continue such action until the Secretary determines that the failure to comply has ceased.

(4) Exception for certain actions

(A) In general

Notwithstanding any other provision of this subsection, if the Secretary makes a determination that the failure of a recipient of assistance under this chapter to comply substantially with any material provision (as that term is defined by the Secretary) of this chapter is resulting, and would continue to result, in a continuing expenditure of Federal funds in a manner that is not authorized by law, the Secretary may take an action described in paragraph (1)(C) before conducting a hearing.

(B) Procedural requirement

If the Secretary takes an action described in subparagraph (A), the Secretary shall--

(I) provide notice to the recipient at the time that the Secretary takes that action; and

(ii) conduct a hearing not later than 60 days after the date on which the Secretary provides notice under clause (I).

(C) Determination

Upon completion of a hearing under this paragraph, the Secretary shall make a determination regarding whether to continue taking the action that is the subject of the hearing, or take another action under this subsection.

(b) Noncompliance because of technical incapacity

(1) In general

If the Secretary makes a finding under subsection (a) of this section, but determines that the failure to comply substantially with the provisions of this chapter--

(A) is not a pattern or practice of activities constituting willful noncompliance, and

(B) is a result of the limited capability or capacity of the recipient,

the Secretary may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability and capacity of the recipient to administer assistance provided under this chapter in compliance with the requirements under this chapter, if the recipient enters into a performance agreement with the Secretary that specifies the compliance objectives that the recipient will be required to achieve by the termination date of the performance agreement.

(2) Performance agreement

The period of a performance agreement described in paragraph (1) shall be for 1 year.

(3) Review

Upon the termination of a performance agreement entered into under paragraph (1), the Secretary shall review the performance of the recipient that is a party to the agreement.

(4) Effect of review

If, on the basis of a review under paragraph (3), the Secretary determines that the recipient--

(A) has made a good faith effort to meet the compliance objectives specified in the agreement, the Secretary may enter into an additional performance agreement for the period specified in paragraph (2); and

(B) has failed to make a good faith effort to meet applicable compliance objectives, the Secretary shall determine the recipient to have failed to comply substantially with this chapter, and the recipient shall be subject to an action under subsection (a) of this section.

(c) Referral for civil action

(1) Authority

In lieu of, or in addition to, any action authorized by subsection (a) of this section, if the Secretary has reason to believe that a recipient has failed to comply substantially with any provision of this chapter, the Secretary may refer

the matter to the Attorney General of the United States with a recommendation that an appropriate civil action be instituted.

(2) Civil action

Upon such a referral, the Attorney General may bring a civil action in any United States district court having venue thereof for such relief as may be appropriate, including an action to recover the amount of the assistance furnished under this chapter that was not expended in accordance with it, or for mandatory or injunctive relief.

(d) Review

(1) In general

Any recipient who receives notice under subsection (a) of this section of the termination, reduction, or limitation of payments under this chapter--

(A) may, not later than 60 days after receiving such notice, file with the United States Court of Appeals for the circuit in which such State is located, or in the United States Court of Appeals for the District of Columbia, a petition for review of the action of the Secretary; and

(B) upon the filing of any petition under subparagraph (A), shall forthwith transmit copies of the petition to the Secretary and the Attorney General of the United States, who shall represent the Secretary in the litigation.

(2) Procedure

The Secretary shall file in the court a record of the proceeding on which the Secretary based the action, as provided in section 2112 of Title 28. No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.

(3) Disposition

(A) Court proceedings

The court shall have jurisdiction to affirm or modify the action of the Secretary or to set it aside in whole or in part. The findings of fact by the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may order additional evidence to be taken by the Secretary, and to be made part of the record.

(B) Secretary

The Secretary--

(I) may modify the findings of fact of the Secretary, or make new findings, by reason of the new evidence so taken and filed with the court; and

(ii) shall file--

(I) such modified or new findings, which findings with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole; and

(II) the recommendation of the Secretary, if any, for the modification or setting aside of the original action of the Secretary.

(4) Finality

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Title 24. Housing and Urban Development
Subtitle B. Regulations Relating to Housing and Urban Development
Chapter IX. Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Refs & Annos)
Part 1000. Native American Housing Activities (Refs & Annos)
Subpart D. Allocation Formula

§ 1000.319 What would happen if a recipient misreports or fails to correct Formula Current Assisted Stock (FCAS) information on the Formula Response Form?

(a) A recipient is responsible for verifying and reporting changes to their Formula Current Assisted Stock (FCAS) on the Formula Response Form to ensure that data used for the IHBG Formula are accurate (see § 1000.315). Reporting shall be completed in accordance with requirements in this Subpart D and the Formula Response Form.

(b) If a recipient receives an overpayment of funds because it failed to report such changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within 5 fiscal years. HUD shall subsequently distribute the funds to all Indian tribes in accordance with the next IHBG Formula allocation.

(c) A recipient will not be provided back funding for any units that the recipient failed to report on the Formula Response Form in a timely manner.

(d) HUD shall have 3 years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form. Review of FCAS will be accomplished by HUD as a component of A–133 audits, routine monitoring, FCAS target monitoring, or other reviews.

[72 FR 20025, April 20, 2007]

SOURCE: 63 FR 12349, March 12, 1998, unless otherwise noted.

AUTHORITY: 25 U.S.C. 4101 et seq.; 42 U.S.C. 3535(d).

Title 24. Housing and Urban Development
Subtitle B. Regulations Relating to Housing and Urban Development
Chapter IX. Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Refs & Annos)
Part 1000. Native American Housing Activities (Refs & Annos)
Subpart F. Recipient Monitoring, Oversight and Accountability

§ 1000.552 How long must the recipient maintain program records?

(a) This section applies to all financial and programmatic records, supporting documents, and statistical records of the recipient which are required to be maintained by the statute, regulation, or grant agreement.

(b) Except as otherwise provided herein, records must be retained for three years from the date the recipient submits to HUD the annual performance report that covers the last expenditure of grant funds under a particular grant.

(c) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3–year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3–year period, whichever is later.

SOURCE: 63 FR 12349, March 12, 1998, unless otherwise noted.

AUTHORITY: 25 U.S.C. 4101 et seq.; 42 U.S.C. 3535(d).