No. 12-70221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORT BELKNAP HOUSING DEPARTMENT, FORT BELKNAP INDIAN COMMUNITY COUNCIL, FORT BELKNAP INDIAN COMMUNITY,

Petitioners,

v.

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

Respondents.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR REVIEW OF AGENCY ACTION

JAMES L. VOGEL
ATTORNEY-AT-LAW
P.O. Box 525
Hardin, Montana 59034
(406)665-3900
Attorney for Petitioners

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STATEMENT OF RELATED CASES

The petitioners are not aware of any prior or related appeals in this case.

STATEMENT OF JURISDICTION

The Fort Belknap Housing Department, the Fort Belknap Indian Community Council and the Fort Belknap Indian Community, hereinafter "FBHD", seek to invoke this court's jurisdiction to review the actions of the Office of Public and Indian Housing, Department of Housing and Urban Development and the United States of America, hereinafter, "HUD" under the authority of 25 U.S.C. §4161(d). The statute is not ambiguous, but even if there were any lack of clarity, the proper interpretation is one that benefits Indians. "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The interpretation of the statutes and regulations at issue in this case is governed by that canon of construction, and not by the rule favoring deference to the agency's interpretation. See *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997)

STATEMENT OF THE CASE

The Fort Belknap Housing Department is operated as a tribal housing department at Harlem, Montana, for the Gros Ventre and Assiniboine Tribes

of the Fort Belknap Indian Reservation, eligible to receive funds under the Native American Housing Assistance Act of 1996, 25 U.S.C.§§ 4101-4212 (hereinafter NAHASDA).

HUD administers funds appropriated by Congress to implement the provisions of NAHASDA, and has wrongfully concluded in its letter of November 14, 2011, that beginning in FY 2012, the sum of $571,757 per year, for five consecutive years, (a total of $2,858,786) should be withheld from future grant awards to Petitioners.

This court has proper jurisdiction to review this final action of the Agency involved, pursuant to the authority established in 25 U.S.C. §4161, as this proposed action is being taken as a result of the Agency improperly determining that Petitioners have failed to abide by regulations of the Agency.

FBHD asserts hereby that the decision to reduce the funding to be delivered by HUD is arbitrary and capricious and/or improperly applies regulations found at 24 C.F.R. §§ 1000.318, 1000.319 & 1000.340. HUD's action seeks reimbursement for funds granted under the formula set forth in 24 C.F.R.§1000.318, going back to FY 2000, through FY 2010, a period of eleven years, even though 24 C.F.R.§ 1000.319(d) limits their recovery action to a three year period.

HUD first gave notice of its demand to recover $2,858,786 in this instance from the FBHD for fiscal years 2000 through 2010 by letter dated December 6, 2010. See Excerpt of Record 1-1 thru 1-6. After an appeal of this action was made by the FBHD, HUD affirmed its action by letter dated May 5, 2011. See Exc. Rec. 2-1 thru 2-4. After FBHD sought reconsideration of this decision, HUD again affirmed its action by letter dated October 4, 2011. See Exc. Rec. 3-1 thru 3-3. Finally, on or about November 14, 2011, HUD issued a letter stating its intention to reduce future grant awards to FBHD by the sum of $571,757 per year, for five consecutive years, to recover $2,858,786 it claimed was wrongfully received from FY 2000 thru FY 2010. See Exc. Rec. 4-1 thru 4-2. FBHD contends this process is contrary to applicable regulations, and this Petition has followed.

Further, HUD's action would reduce Petitioner's award for Formula Current Assisted Stock below 1996 levels, an action prohibited by 24 C.F.R. §1000.340.

SUMMARY OF ARGUMENT

HUD, in determining that the NAHASDA block grant for FBHD should be reduced by the sum of $2,858,786, ignored its own limitation on the time period for which it can take action to recapture funds. 24

C.F.R.§1000.319(d) provides a three year window wherein HUD can review and make a demand for repayment of funds, should there be an issue discovered. In this instance, HUD is trying to recapture funds paid in FY2000 through FY2008, when there demand letter of December 6, 2010, under their guidelines limits their action to 2009 and 2010.

STANDARD OF REVIEW

As a review of an agency decision, the court's review is governed by 25 U.S.C.§4161(d)(3):

> 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.
>
> Id.

ARGUMENT

1. HUD FAILED TO ADHERE TO THE LIMITATIONS FOUND IN 24 C.F.R.§1000.319(d) IN DECIDING TO REDUCE THE FBHD BLOCK GRANTS BY $2,858,786

Petitioner, FBHD, is an agency of the federally recognized Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation. FBHD is authorized as a Tribally Designated Housing Entity ("TDHE") to

receive annual block grant funds from the United States Department of Housing and Urban Development ("HUD") pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 et seq. ("NAHASDA"), and administer those funds to provide affordable housing for low income families. FBHD brought this action for review of agency action under NAHASDA, 25 U.S.C. §4561(d) because of HUD's effort to demand repayment of funds from the block grants awarded from FY 2000 through 2010, alleging that FBHD has received excess block grant funding.

In the December 6, 2010 letter, HUD cites §1000.319(d) for authority to collect the amounts set forth above. Exc. Rec. 1-5. In its entirety, this section reads as follows:

> **Sec. 1000.319 <u>What would happen if a recipient misreports or fails to correct Formula Current Assisted Stock (FCAS) information on the Formula Response Form?</u>.....(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, Apr. 20, 2007, eff. May 21, 2007]**
>
> 24 C.F.R.§1000.319(d)

In the plain language of this provision, there is a definitive limit on the time to take action (such as the action proposed in the December 6, 2010 letter) to within "……***three (3)years from the date a Formula Response Form is sent out……"*** Id.

As is noted in this letter, the Formula Response Forms referenced in this provision are sent out annually. Id. Clearly, this regulatory language places a burden on HUD staff to "take action", within three (3) years of the annual Formula Response Form issuance, if a "….recipient fails to correct or make appropriate changes on that Formula Response Form….." §100.319(d).

In its letters, HUD asserts that the FBHD failed to correct or make appropriate changes on the Formula Response Form in Fiscal Years 2000, 20001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 & 2010. The December 6, 2010 letter, proposing "…to take action.." against the FBHD, is issued on a date well beyond the annual Formula Response Form time limit for action (three (3) years) for Fiscal Years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007 & 2008. (Forms are sent prior to the end of each preceding Fiscal Year. E.g.: To compute a Block Grant Award for a Tribal Housing Entity for Fiscal year 2000, a Formula Response Form was sent out

by HUD just before the end of the previous fiscal year in 1999.) [1] See also definition of Formula Response Form, 24 C.F.R.§1000.302.

Whether or not other letters of inquiry were issued for some housing projects at Fort Belknap in 2001, 2005, and/or 2007, asking questions, makes no difference. That correspondence on the part of HUD was separate and distinct, and cannot, reasonably, be argued to extend the period of limitations embodied in 24 C.F.R. §1000.319(d) for the current proposed action for fiscal years 2000 to 2008.

By its own regulations, HUD was charged with monitoring the Formula Current Assisted Stock: *"Review of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews."* 24 C.F.R. 1000.319(d). FBHD had the right to rely on the limitations imposed on HUD by the clear language of this provision. If there was a problem, HUD clearly had a responsibility to monitor and require correction within three years.

While the language of this regulation is clear on its face, it is helpful to consider Congress's purpose, as set forth in statute when adopting

[1] This process was described for the Fiscal Year 2011 Grant process in the December 6, 2010 letter, p. 4. HUD was in receipt of the FBHD Formula Response Form dated September 30, 2010, and used that information to establish the 2011 FCAS (and grant). Working backwards in time, all but the 2009 and 2010 Formula Response Form transmittals from HUD would have been more than three years before HUD's December 6, 2010 demand letter.

NAHASDA:

> (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. 4101

These purposes make it clear that Congress wanted to develop housing on reservations with an affirmation of Congressional goals to foster self-determination. Elsewhere, regulations governing the implementation of

the very self-determination laws cited in NAHASDA affirm that regulations are to be "liberally construed for the benefit of Indian tribes and tribal organizations":

> The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, ***that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act***.
>
> 25 C.F.R. § 900.3(b)(11)(emphasis added)

The clear language of 24 C.F.R.§1000.319(d) forecloses HUD's action to attempt recapture of grant funds from FY2000 through FY2008. Further, if there were any ambiguity found in part 319(d), HUD is charged with construing the language of their regulation in a manner favorable to FBHD.

CONCLUSION

For the reasons stated herein, this court should modify the action of HUD in this instance to limit, consistent with their controlling regulations attempts to collect for purported problems with FCAS inventory to FY 2009

and FY 2010.

Respectfully submitted this 9th day of April, 2012.

/s/_____
James L. Vogel, Attorney for
Petitioners
(406)665-3900
P.O. Box 525
Hardin, Montana 59034
jimvmt@email.com

CERTIFICATION OF COMPLIANCE

In accordance with the Court's Rules, I certify the following:

1. No privacy redactions are required for, or have been made in, this document.

2. That the foregoing Brief for the Appellants is monospaced in 14-point Times font, and contains 2532 words, according to the word counter of Microsoft Word.

Dated this 9th day of April, 2012.

/s/_____
James L. Vogel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief in

support of Petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 9, 2012. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further verify that I did submit four paper copies of Petitioner's Excerpts of Record to the Clerk of Court, and by Electronic Filing, and did provide a paper Copy of the same to counsel for Respondent, together with an digital copy of the same.

/s/_____
JAMES L. VOGEL
Attorney for Petitioners