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.

REPLY BRIEF OF PETITIONERS

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I. THIS COURT HAS PROPER JURISDICTION UNDER 25 U.S.C. §4161 TO HEAR THIS MATTER.

Contrary to the arguments now offered, HUD, in this circumstance, is seeking to invoke a remedy against Fort Belknap as set forth in 25 U.S.C. §4161 (reducing payments to a recipient):

"Sec. 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…….
(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……."

Id. (Emphasis Added)

The November 14, 2011 letter of HUD, (Petitioner's ER, p. 4-1) clearly anticipates that the monies for which their demand has been made have been expended for units not otherwise eligible. Their schedule for reduced future awards demonstrates this. If the monies were still in hand, unexpended, HUD could have simply requested their return.

This subchapter of 25 U.S.C. was amended by Congress in P.L. 110-411, 122 Stat. 4330, on October 14, 2008, to add the language discussed in

Respondent's Brief:

"4161(a)(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."

Id.

At the same time, Congress recognized that there was a conflict between NAHASDA statutory language and HUD regulations regarding FCAS and Tribal Housing inventories. Congress amended NAHASDA to provide:

"4152(b)(1)(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."

25 U.S.C. § 4152, as amended, Pub. L. 110-411, title III, Sec. 301, Oct. 14, 2008, 122 Stat. 4329[1]

[1] 25 U.S.C.§ 4152 (b) (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

Under this amendment, if HUD had taken timely action against Fort Belknap, (under their own rules, within three years (24 C.F.R.§1000.319(d)), Fort Belknap could have taken advantage of this provision enacted by Congress in 2008, filed suit and argued that the merits of HUD's claim should not apply.

However, Fort Belknap had no argument against the methodology for applying the rules HUD now seeks to utilize, as HUD did not take action to quantify its latest claim for FY 2000 thru 2008, against Fort Belknap and its inventory, until December 6, 2010. This was well past the 45 day time limit Congress adopted in 2008. (Fort Belknap is not contesting the claimed amounts for FY 2009 & 2010, as the Formula Response Forms requested in August 2008 for FY-2009 and in August 2009 for FY-2010 were within the required three years of HUD's letter proposing to take action against Fort Belknap on December 6, 2010.)

HUD has, in their November 14, 2011 letter (see Petitioner's E.R., p. 4-1) stated its intention to reduce the IHBG awards to Fort Belknap by the amounts they assert were wrongfully received (and spent) by Fort Belknap. HUD's argument concerning the application of 25 U.S.C. § 4161(a)(2) and the requirement that there be something more than the FCAS formula issues found

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documentation necessary for conveyance; (iii) clouds on title due to probate or intestacy or other court proceedings; or (iv) any other legal impediment.

in §4152 doesn't apply. 25 U.S.C. 4161(a)(2) doesn't apply, as it wasn't adopted until after the FYs 2000 thru 2008 that are at issue in this case. Congress' modifications to §§4152 & 4161(a)(2) in 2008, as noted above, changed more than where appeals could be filed. These changes modified the law that was applicable in these disputes. See 25 U.S.C. §4152(b)(1)(E).

The only statutory authority HUD identifies in its reply brief for reducing payments to grant recipients is 25 U.S.C. §4161. But HUD rejects this provision as the authority for its grant fund reduction/repayment methodology found in 24 C.F.R.§ 1000.319. Rather, HUD argues the authority it was exercising is found in common law. See HUD Brief, p. 19, ftnt 5. This argument should fail, as 24 C.F.R.§ 1000.319 is part of the regulatory process adopted after being authorized by NAHASDA. 25 U.S.C. 4101 et. seq. (1996).

II. HUD DID NOTHING TO COMPLY WITH THE REQUIREMENTS OF 24 C.F.R. §1000.319(d) TO ENABLE ACTION AGAINST FORT BELKNAP IN DECEMBER, 2010 OF AMOUNTS CLAIMED FROM FISCAL YEARS 2000 THROUGH 2008.

The key language in 24 C.F.R. §1000.319(d) is that "HUD shall have three 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 to the

formula response form…" Throughout their arguments, HUD ignores the entire applicable phrase, "**take action against any recipient"**, and instead repeatedly changes the meaning of the regulation by limiting their analysis to "take action".

HUD asserts that such action was taken by sending Fort Belknap letters dated August 1, 2001, March 2, 2005, and September 4, 2007. See p. 24, Respondent's Brief. Close examination of these letters conclusively refutes this argument. The August 1, 2001 letter, referenced in HUD's briefing, raised a concern about whether or not projects MT10B01001, MT10B01002, MT10B01003, MT10B01004, MT10B01006, MT10B01007, MT10B01008, MT91B010028, and MT91B010029 had been conveyed or were eligible for conveyance prior to October 1, 1997, and therefore were possibly ineligible as FCAS in FY 1998, FY 1999, FY 2000, FY 2001, and FY 2002. See Respondent's ER, pp. 84-85. After correspondence was exchanged between the parties, HUD issued a letter identifying how it would go forward on these projects, identifying the adjustments that would be made project by project, and concluding that the amount overfunded for fiscal years 1998 through fiscal years 2001, was $330,524. See December 14, 2001 letter, Id. at pp. 75-78.

Other than making arrangements to reduce future grant awards to obtain repayment of the amounts previously "overfunded", it is clear from this

December 14, 2001 letter that HUD officials considered the matter resolved. Id. p. 78.[2]

While apparently the $330,524 was not immediately withheld from grant awards to the Fort Belknap Indian Community, Deborah Lalancette, the same official who signed the letter at issue in this case, (in December 2012), signed a letter on November 26, 2002, making it clear that the matter raised in the August 1, 2001 letter was resolved. See November 26, 2002 letter from Ms. Lalancette, Id. at pp. 71-72. In this letter, Ms. Lalancette set forth a schedule she proposed reducing downward the Fort Belknap Indian Community's Indian Housing Block Grant award by approximately $66,105 for each of the fiscal years 2003 through 2007, recouping the $330,524. She proposed no further action on the units identified in the projects first raised at issue in the August 1, 2001 letter. In fact, she ended her letter much as had Ted Key had ended his, clearly indicating the matter was resolved: *"Thank you very much for your efforts in resolving this matter."* Id. at p. 72.

The amounts identified were withheld from the Fort Belknap awards for the years set forth in Deborah Lalancette's November 26, 2002 letter. The action taken at that time by HUD would have met the requirements of 24 C.F.R.

[2] The author of the letter, Ted Key, Acting Deputy Assistant Secretary for Native American Programs in Washington D.C., ended his letter clearly indicating the matter was resolved: "Thank you again for your assistance in resolving this matter promptly." Id.

§1000.319(d).[3]

It was unreasonable for HUD in 2010 (and now) to mischaracterize the action it took in its letters of December 14, 2001 and again in November 26, 2002. Issues raised for the units and projects identified in its August 1, 2001 letter were complete. Each of the letters made it clear that action was taken against the Fort Belknap Indian Community, and that the matter was considered resolved. It is untenable for HUD to go backwards now and claim that their action somehow left a door open so that in 2010, HUD could return to those same units and same projects, that HUD so clearly communicated were resolved.

HUD did begin requesting information about those same units to update its files, on or about September 4, 2007. However, in the several letters which referenced those same projects first questioned in its August 1, 2001 letter, HUD noted in its December 14, 2001 letter, that the units in the projects listed, "…were determined to be eligible as FCAS based new MHOAs that were still within their 25 year term." See December 4, 2007 letter, Id. at p. 61, July 10, 2008 letter, Id. at p. 58, September 12, 2008 letter, Id. at p. 55, and November 13, 2008 letter, Id. at p. 53. Each of these letters only sought information to update their files, and none of them threatened to "take action against the

[3] 24 C.F.R.§ 1000.319(d) appears to have been adopted in 2007. See [72 FR 20025, Apr. 20, 2007, eff. May 21, 2007]

recipient" on the units resolved in the December 14, 2001 letter.

HUD did seek to "take action against" the Fort Belknap Housing Department for other units, from project MT10B010010, beginning in a letter dated March 2, 2005. This concern regarded 48 units from this project. See Respondent's ER, pp. 67-68. Significantly, the letter regarding this attempt by HUD to "take action against" the Fort Belknap Housing Department, included nothing about the previous projects which were at issue.

The absence of any mention in this process to address the FCAS inventory further affirms the conclusion that HUD considered the previous issue over different projects as "resolved." HUD pursued the issue regarding project MT010B010010 in additional letters dated May 19, 2005 (see Respondent's ER at pp. 65-66) and a letter dated July 19, 2005, Id. at pp. 63-64. Again, the matter was concluded regarding this project, by HUD adjusting the inventory and requiring a reduction of the Tribe's fiscal year 2006 allocation by the sum of $249,561. Id. When the repayment was completed, this matter was then resolved.

The letters described above, which began on September 4, 2007, perhaps provide the most significant illustration of the difference in letters simply requesting information vs. letters wherein HUD proposes to "take action against" the recipient. In September 4, 2007 (Id. at pp. 60-62), July 10, 2008

(Id. at 58-59) and November 13, 2008 (Id. at pp.52-54) HUD letters, HUD raised concerns about different projects which had not been previously at issue, specifically MT10B010011, MT10B010013, and MT10B010017. Concerns raised in this series of letters regarded the eligibility of certain of the units of these projects for inclusion in the FCAS.

As it had done previously in 2001 and 2005, HUD identified units that it considered should be excluded from the Fort Belknap inventory, and sought repayment of amounts, in this instance, $310,330. Id. at 52-54. HUD took action to reduce the IHBG allocation to Fort Belknap to recoup this amount through fiscal years 2009, 2010, and 2011. Id. This resolved their concern about the units in these projects.

HUD suggests in its briefing that it agrees with Fort Belknap that this is like a statute of limitations argument where a complaint is filed but is not resolved. See Respondent's brief, pp. 28-29. Unfortunately, HUD mischaracterized their letters and the language therein. Each of HUD's letters regarding the projects at issue in 2001, 2002, 2005, and 2007, were similar to a complaint, just as might be filed in a court of law, and sought a resolution. Yet unlike a lawsuit languishing for years awaiting a resolution, yet immune from statute of limitations, each of those letters resulted in a resolution of the claims that HUD was making regarding the projects identified. None of those letters

were ambiguous in that the resolution being proposed by HUD would be implemented and complete.

Contrary to HUD's suggestion that Fort Belknap would be put on notice that these matters would remain alive somehow, the letters of 2001, 2005, and 2007 and the resolutions brought about thereby, clearly communicated the claims were resolved. In 2001 and 2002, HUD even thanked the representatives of Fort Belknap for working so quickly to "resolve" the matters.

Nothing about this language and the action HUD took to collect the amounts they were claiming (by reducing grant amounts) inferred that the matters would someday be reopened and related back to the dates that HUD concluded their original concerns by withholding funds from Fort Belknap. No suggestion that such action could take place in the future was even made until December 6, 2010, when HUD made its demand that funds dating all the way back to fiscal year 2000 would have to be repaid.

HUD has asserted in their briefing, that they did make clear in their original letters of 2001, 2005, and 2007, that they intended to recoup overpayments in each of the projects. However, it is clearly misleading to stop there and ignore the resolution letters which demanded repayment and effected repayment in each of those instances. The only way HUD could now claim that those letters met the requirements of 24 C.F.R. §1000.319(d) requirements of

notice within three years of a formula response form being sent out, to "take action against a recipient" would be that if the action actually taken was absent.

Just as a complaint filed before a judicial forum is resolved when judgment is entered and money is paid on a claim, these claims of 2001, 2005, and 2007 were clearly fully resolved and satisfied. Their claims being done, nothing survived the resolutions that they sought and obtained.

While theoretically, additional claims could have been brought raising concerns about Council's inventory, those claims, reasonably, would be subject to the three year limitation set forth in 24 C.F.R. §1000.319(d). Simply stated, HUD has mischaracterized its action. The action it took against Fort Belknap in 2001, 2005, and 2007 was "final action." Nothing in the language of the action HUD took characterized it as an incomplete "investigation." See Respondent's brief, p. 27.

HUD seems to suggest that the entire responsibility to review FCAS inventory falls on tribal recipients. That suggestion is a false one. In the latter part of the very regulation at issue, §1000.319(d) it is provided that, *"Review of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews."* Id. HUD had an affirmative duty, under its own regulations, to investigate questions it might have if it believed that information was not correct. Through the review of

information provided in each instance, confirmed by site visits by HUD representatives and other monitoring, HUD raised no further concerns for which it sought adjustments of payments. HUD, under its own guidelines had affirmative responsibility to timely monitor the FCAS and "take action against any recipient that fails to correct or make appropriate changes on that formula response form", within three years of the date the formula response was sent out. See 24 C.F.R. §1000.319(d).

The management deficiencies at Fort Belknap, perhaps demonstrated by the three separate sanctions imposed in a single decade, reveal performance problems which were separately sanctioned in addition to the repayment requirements, by high risk designation. The uncontested acceptance of the separate sanctions demonstrates Fort Belknap was not trying to "play the system," purposely delaying the provision of information. Responses were made in each circumstance. HUD had sufficient information to sanction the program and complete the action that it originally proposed in each instance. It is unreasonable for HUD to levy those sanctions, be complete in each of those sanctions, and then pass by the time limit as established in its own regulations, only to try to revisit those same projects and units. Their claim that their complete action was somehow made incomplete, simply because they say so, is ineffective, as their letters in each instance demonstrate otherwise.

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 26th day of June, 2012.

/s/_____

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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 2762 words, according to the word counter of Microsoft Word.

Dated this 26th day of June, 2012.

/s/_____
James L. Vogel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply 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 June 26, 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.

/s/_____
JAMES L. VOGEL
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