IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-1516-RPM

NAMBE PUEBLO HOUSING ENTITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
SANDRA B. HENRIQUEZ, Assistant Secretary for Public and Indian Housing,
GLENDA GREEN, Director, Office of Grants Management, National Office of Native American Programs,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF RELIEF REQUESTED AND MOTION TO SUPPLEMENT THE RECORD

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INTRODUCTION

The Court ordered that "Plaintiffs in each case shall file a statement of the relief requested and the court's jurisdiction under the APA to grant such relief. Proposed supplements to the administrative record may be tendered." *See e.g., Fort Peck Housing Auth. v. HUD et al.*, No. 05-cv-00018, Dkt. 94 (Nov. 19, 2012). Defendants United States Department of Housing and Urban Development, *et al.* ("HUD"), accordingly file this response to Plaintiffs' Statements Of Relief Requested and Motions To Supplement The Record.[1]

Given the Court's ruling that HUD failed to comply with § 401(a)(1) of the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4161(a)(1), ("NAHASDA"), HUD's recoveries of overpaid grant amounts as well as the formula unit (FCAS") count decisions on which they were based are subject to Congress's choice of judicial remedies laid out in § 401(d). Exclusive jurisdiction over these cases is therefore lodged in the court of appeals. If § 401(d) did not control review here, the Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, ("APA") would not allow granting the prospective declaratory and injunctive relief requested because changes in the law make those requests moot. Only the relief authorized by the APA in 5 U.S.C. § 706 would be available to Plaintiffs, and would have prospective effect only to the extent HUD's application of proper FCAS counts through FY 2008 affects its future actions. Most of Plaintiffs' retrospective requests are not available because they are for money in place of hearings and, mostly, from substitute grant appropriations. This is not relief "other than money damages" under the APA, 5 U.S.C. § 702, and so is beyond the waiver of sovereign immunity therein. An accounting is

[1] HUD is filing this uniform response brief in all the coordinated cases. Plaintiffs' Statements of Relief Requested are largely uniform. To the extent necessary, discussion of issues raised uniquely by one Plaintiff will cite to that Plaintiff's brief. Otherwise, citation to propositions that are uniform across Plaintiffs' will be by reference to the Statement Of Relief Requested and Motion To Supplement The Record in *Navajo Hous. Auth. v. HUD*, No. 08-cv-00826 (D. Colo.), Dkt. 58 ("SOR").

unavailable for the same reasons; and, in any case, Plaintiffs fail to state a claim for a "paper" accounting of funds lost.

With respect to the administrative records in this case, HUD proposes supplementation only to bring them up-to-date with the amended and supplemented complaints Plaintiffs filed in 2010. HUD opposes Plaintiff's proposed additions to the record. In general, Plaintiffs' motions to supplement seek to add to the record evidence not considered by HUD when it made the challenged decisions. That would only be appropriate if the Court were performing a *de novo* review of the agency's decisions. It is not. The Supreme Court has repeatedly reminded courts not to displace the role Congress assigned to agencies to decide certain issues through administrative procedures. With that in mind, courts allow supplementation of the record with information that was not considered by the agency only in rare circumstances, none of which are present in this case.

ARGUMENT

I. Assuming NAHASDA § 401(a)(1) Applies To HUD Actions Here, The Judicial Remedy Lies Exclusively Within the Court of Appeals Jurisdiction[2]

A. Grant reductions to which § 401(a) apply are subject to the judicial review provision in § 401(d).

The Court held that until NAHASDA was amended in 2008, HUD failed to comply with § 401(a)(1) because HUD's authority to adjust the amount of a grant under § 405(d) is subject to 401(a). *Fort Peck Housing Authority v. HUD*, 2012 U.S. Dist. LEXIS 124049 at *17 (D. Colo. 2012). Thus, the Court held that "[t]hese provisions are applicable to the HUD actions now

[2] HUD argued this issue in its brief on the legal issues in these coordinated cases, *See e.g.*, *NHA v. HUD*, No. 07-cv-01343, Defendants Resp. Brf., Dkt. 39, p. 42. HUD reasserts the issue here because the Court has now ruled that § 401(a)(1) applies, and it has asked for statements regarding its APA jurisdiction to grant relief in this cases.

under review." *Id.* at *19 (citing and quoting 25 U.S.C. §§ 4161(a)(1), 4165, and 24 C.F.R. § 1000.532).

Section 401(a)(1) provides for four possible HUD actions after notice and a hearing: termination, reduction, or limitation of payments, and replacement of a housing entity. 25 U.S.C. § 4161(a)(1)(B)-(D). Plaintiffs do not allege any wrongful replacement, so HUD's noncompliance with § 401(a)(1) must be because HUD is deemed to have terminated, reduced, or limited payments. The Court's holding did not specify which, but Plaintiffs have argued the actions were reductions. *See e.g., Navajo Hous. Auth. v. HUD*, No. 08-cv-00826 (D. Colo.) ("*NHA*"), Opening Brf., Dkt. 34, p. 15. In subsection (d), Congress specified the judicial review available for such reductions, stating "[a]ny recipient who receives notice under subsection (a) of the termination, reduction, or limitation of payments under this Act may . . . file . . . a petition for review of the action of the Secretary." 25 U.S.C. § 4161(d). Plaintiffs cannot argue that subsection (d) does not govern due to lack of "notice under subsection (a)." There is no dispute here that, although HUD failed to provide pre-enforcement notice and a hearing, all Plaintiffs received notice of the reductions complained of. Nor can Plaintiffs otherwise avoid the import of subsection (d). They cannot treat the challenged actions as reductions under § 401(a)(1) and not as reductions under § 401(a)(1). *Cf. Stanley v. United States*, 140 F.3d 1023, 1030 (Fed. Cir. 1998) ("it will not do to treat the same transaction as payment and not as payment, whichever favors the [plaintiff]") (quoting *Rosenman v. United States*, 323 U.S. 658, 663 (1945)). Accordingly, because the Court found that the challenged HUD actions come under § 401(a)(1), their review is governed by § 401(d).

B. Pursuant to § 401(d), jurisdiction for review of grant reductions under § 401 is lodged exclusively in the court of appeals.

1. Section 401(d) mimics statutory review provisions long held to be exclusive.

Congress provided for review of reductions under § 401(a)(1) as follows:

(d) Review –

(1) In General – Any recipient who receives notice under subsection (a) of the termination, reduction, or limitation of payments under this Act –

> (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, United Stated Code. 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, United States Code.

25 U.S.C. § 4161(d). The terms of this provision are nearly identical to that of statutory review provisions that the Supreme Court and Tenth Circuit, among others, have long since held to lodge exclusive jurisdiction in the court of appeals. *See e.g.*, *FTC v. Dean Foods*, 384 U.S. 597, 604 (1966) (Clayton Act's judicial review provision, 15 U.S.C. § 21(c), is exclusive)); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-336 (1958) (Federal Power Act's review provision, 16 U.S.C. § 825l(b), is exclusive); *Williams Natural Gas v. Oklahoma City*, 890 F.2d 255 (10th Cir. 1989) (Natural Gas Act's review provision, 15 U.S.C. § 717r(a), is exclusive); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1971) (Federal Aviation Act's review provision, 49 U.S.C. § 1486(d) (1976), is exclusive); *but see Lummi Tribe v. United States*, 99 Fed. Cl. 584, 599-600 (Fed. Cl. 2011) (Tucker Act jurisdiction not divested by § 401(d)), *vacated in part by* Order, No. 08-848C (Fed. Cl. Sept. 29, 2011)).

In *Taxpayers of Tacoma*, for example, the Supreme Court quoted the language of § 313(b) of the Federal Power Act ("FPA"), providing in pertinent part:

> 'Any party aggrieved by [the Federal Power Commission's licensing order] . . . may obtain a review of such order in the United States court of appeals [in an appropriate Circuit] . . . by filing in such court, within 60 days . . . a written petition . . . . [The] Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court *shall have exclusive jurisdiction to affirm, modify or set aside such order in whole or in part.* No objection to the order of the Commission shall be considered by the court unless such objection [was] urged before the Commission . . . The finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive . . . *The judgment and decree of the court . . . shall be final, subject to review by the Supreme Court of the United States . . . .*'

357 U.S. at 335 (quoting 16 U.S.C. § 825l(b)) (emphasis in original). In NAHASDA as in the FPA, any recipient "may" file "a petition for review" in an appropriate "Court of Appeals" "not

later than 60 days after" the agency's action. In both statutes, the agency shall file with such court the record on which the complained of action was based. "Upon the filing of" the record, the court's jurisdiction "shall" be "exclusive" and its judgment "shall be final . . . subject to review by the Supreme Court." And in both statutes, "[n]o objection" to the agency action "shall be considered by the court unless such objection [was] urged before the" agency. Compare *id.* with 25 U.S.C. § 4161(d).

The Supreme Court found this language to be "written in simple words of plain meaning [leaving] no room to doubt the congressional purpose and intent [to] prescribe[] the specific, complete and exclusive mode for judicial review." *Id.* at 335-336. The Tenth Circuit, moreover, has engaged the same analysis and come to the same conclusion regarding section 19(b) of the Natural Gas Act. *Williams Natural Gas*, 890 F.2d at 260-261. That statute contains the same pertinent terms as NAHASDA: (1) any party aggrieved by the referenced agency action may file "within 60 days" for review "in the court of appeals of the United States" in the appropriate circuit; (2) "[u]pon the filing of the record" that court's jurisdiction "shall be exclusive"; (3) no objection shall be considered unless it was urged before the agency; and (4) the judgment of that court "shall be final, subject to review by the Supreme Court." *Id.* (quoting 15 U.S.C. § 717*r*(b)). According to the Tenth Circuit, this language is "nearly identical to the judicial review provisions of various other federal regulatory programs [that] have been interpreted to establish an exclusive scheme of review," and "plainly states" that the court of appeals' review is exclusive. *Id.* at 261 (citing cases).

The Tenth Circuit noted that the provision's language stating jurisdiction is exclusive "upon filing" in the court of appeals does not mean that a district court has concurrent jurisdiction unless and until a petition is filed. This is not possible because this would allow a

plaintiff to circumvent Congress's intent and would defeat the "exclusive" review provision. *Id.* at 262 n.8. Thus, the Court of Federal Claims holding in *Lummi Tribe* cannot control in the Tenth Circuit. *Cf. Lummi Tribe*, 99 Fed. Cl. at 599 (jurisdiction in a circuit court is exclusive only upon the filing of the record with the court).

In *City of Rochester*, the D.C. Circuit further explained that the timeliness requirement in a similarly-worded Federal Aviation Act provision, evidences exclusivity because concurrent jurisdiction under some general jurisdictional mandate would completely undo the "deliberate congressional choice to impose statutory finality on agency orders, a choice we may not second-guess." *City of Rochester*, 603 F.2d at 935.

Accordingly, given this Court's holding that the actions challenged here are controlled by § 401(a), it follows that § 401(d)—including the exclusive jurisdiction in the court of appeals—governs review of those actions.

2. Congress's choice of court and judicial remedy for reductions under § 401(a) would preclude remedies here even if the statute did not say that court of appeals review was exclusive.

Even if the language of § 401(d) were not plain, "[i]t is well settled that even where Congress has not expressly stated that statutory jurisdiction is 'exclusive' . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citing cases); *Denberg.v. U.S. R.R. Retirement Board*, 696 F.2d 1193, 1196 (7th Cir. 1983); *see also Hinck v. United States*, 550 U.S. 501, 506 (2007) (a statute establishing review of certain IRS decisions in Tax Court cut off jurisdiction elsewhere "despite Congress's failure to explicitly define the Tax Court's jurisdiction as exclusive.").

The Supreme Court has often repeated this principle. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 286 (1994) (there is no general right to sue for any available remedies where statute specified "circumscribed remedies" because "we are not free to fashion remedies that Congress has specifically chosen not to extend"); *Hinck*, 550 U.S. at 506 ("[a] precisely drawn, detailed statute pre-empts more general remedies"); *United States v. Bormes*, — U.S. —, 133 S. Ct. 12, 18 (2012) (quoting *Hinck* and adding that "our precedents collectively stand for a more basic proposition: where a specific statutory scheme provides the accoutrements of a judicial action, the metes and bounds of the liability Congress intended to create can only be divined from the text of the statute itself"). And it applies to the APA: "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

Section 10(b) of the APA does not change this result. That section provides for "non-statutory" review only if the specific statutory review would be inadequate. 5 U.S.C. § 703. But the Tenth Circuit has held that exclusive court of appeals review under the "nearly identical" provision of the Natural Gas Act "is entirely consistent with § 10(b) of the [APA]." *Williams Natural Gas*, 890 F.2d at 262 (citing *City of Rochester*, 603 F.2d at 935). Furthermore, the lack of formal agency hearings in these cases could not render relief in the court of appeals inadequate. *Lorion*, 470 U.S. at 742 (no formal hearing necessary for adequate review); *see also City of Boston v. HUD*, 898 F.2d 828, 835 (1st Cir. 1990) (Community Development Block Grant provision, essentially identical to NAHASDA § 401, provided for adequate review in court of appeals whether or not the required agency hearing occurred); *TRAC*, 750 F.2d at 72 ("Where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the circuit court's future jurisdiction is subject to exclusive review of the Court of

Appeals"). In any case, § 401(d)(3)(A) specifically provides that the court of appeals can remand for additional fact finding by the agency. 25 U.S.C. § 4161(d)(3)(A).

Finally, court of appeals review may not be found inadequate on the basis that Plaintiffs filed their actions after the 60-day limitations period in § 401(d)(1)(A) had run on some of the HUD actions complained of. This would be an impermissible circumvention of the exclusive statutory scheme for judicial review. *Williams Natural Gas*, 890 F.2d at 262 n.8 (citing cases rejecting collateral challenges that were untimely).

3. In this context, the FCAS ineligibility determinations on which HUD's funding recoveries were based may not be reviewed independently.

The court of appeals' exclusive jurisdiction over HUD actions deemed to fall under § 401(a)(1) includes the FCAS disqualifications at issue here, whether those disqualifications are considered reductions in themselves or the findings on which HUD's recovery of funds were based. First, any other approach would occasion needless bifurcation of review, which should be avoided absent specific evidence of congressional intent to the contrary. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Second, insofar as FCAS eligibility may affect the lawfulness of HUD's directly appealable reductions under § 401(a)(1), it must be raised directly in the court of appeals. *Cf. City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) (rejecting concurrent jurisdiction in the district court merely because a violation of NEPA was alleged in action challenging Federal Communications Commission permit to construct a radio antenna).

Any challenge to the FCAS disqualifications that caused HUD to determine grants were overpaid and thus must be recovered, necessarily challenges the recoveries themselves and, thus, would be an impermissible collateral attack on the court of appeal's jurisdiction over grant reductions. *Cf. Williams Natural Gas*, 890 F.3d at 262 (prohibition on collateral attacks applies

whether collateral action is brought in state or federal court); *see also City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (collateral attack impermissible although in other contexts the determination is subject to independent review). Thus, Plaintiffs cannot rely on § 401(a) and yet seek relief in the district court on the theory that the challenged funding reduction may have also involved a violation of the NAHASDA §§ 302(b)(1) and 405. This would be an impermissible collateral attack on the directly appealable reductions under § 401(a)(1). In short, all of Plaintiffs' claims must be directed to the court of appeals.

Accordingly, because the Court has held that HUD failed to provide the hearing required for grant reductions under § 401(a)(1), jurisdiction for review of those reductions and the formula unit count determinations on which they were based is exclusive to the court of appeals under § 401(d). The appropriate course would be for the Court to dismiss for want of jurisdiction or transfer to the appropriate court of appeals where a Plaintiff had timely claims when filed in this Court, pursuant to 28 U.S.C. § 1631.

II. If § 401(a) and (d) Did Not Apply Here, The Court's Jurisdiction Under the APA Would Not Authorize Granting Most Of The Relief Requested

A. Plaintiffs' requests for prospective relief are moot because the law has changed.

Plaintiffs request the following prospective relief:

(1) Declarations and injunctions prohibiting HUD from recapturing funds without providing notice and a "full hearing" in accordance with 25 U.S.C. §§ 4161, 4165, and 24 C.F.R. §§ 1000.532,[3] and finding substantial noncompliance;

(2) Declarations and injunctions prohibiting HUD from recapturing funds until determining that the funds were not spent on affordable housing activities or in accordance with NAHASDA; and

(3) Declarations that 24 C.F.R. § 1000.318 is invalid or invalidly interpreted , and that all units owned and operated as of September 30, 1997 must be included as

[3] Several of Plaintiffs' claims also cite 24 C.F.R. § 1000.540, which describes the form of hearing provided for in § 1000.532. HUD does not reference it here because it is included by extension in the latter provision.

> Formula Current Assisted Stock ("FCAS") in the allocation formula for subsequent years.

Pls. Statement of Relief ("SOR"), § III and Appx. 1.[4] However, Congress amended NAHASDA in 2008.[5] Because Plaintiffs only claim infractions of the pre-2008 version of NAHASDA, their requests for prospective declaratory and injunctive relief are moot.

"It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997) (internal quotations omitted). As to injunctive relief: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S 83, 109 (1989) (internal quotations omitted). As to declaratory relief: a claim for declaratory relief is moot if the facts alleged, under all the circumstances do not show a substantial controversy of sufficient immediacy as to warrant a declaratory judgment. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10th Cir. 2010); *see also Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (declaratory judgment action dismissed for mootness because applicable statute had expired).

Plaintiffs plead that the challenged agency actions are currently unlawful under §§ 401, 405 and 24 C.F.R. § 1000.532. *See e.g.*, *NHA*, Supp. Compl., Dkt. 27 ¶ 19. But the Court has

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[4] In 2010, Plaintiffs filed amended and supplemental complaints. In 2011, the parties filed extensive briefs on the legal issues raised by those complaints. *E.g.*, *NHA*, Compl., Dkt. 1 (Apr. 22, 2008); Amd. Compl., Dkt.18 (Nov. 3, 2008); Amd/Suppl. Compl., Dkt. 27 (Sept. 7, 2010); Pl. Opening Brf., Dkt. 34 (July 26, 2011). Now, Plaintiffs request relief on two claims they never pleaded and only adverted to, without argument, in a legal brief: that HUD "forced" them to convey FCAS units; and did not fund converted units at an appropriate level. SOR Appx. 1, ¶¶ 5, 8. These should not be considered . *See e.g.*, *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) (claims may not be amended in briefing); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("[l]iberal pleading does not require that, at the summary judgment stage, defendants must infer all possible claims that could arise out of facts set forth in the complaint."); *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. Okla. 2004) (claims only adverted to in briefs are considered waived).

[5] Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008).

already decided that those provisions do not apply after NAHASDA's amendment in 2008.[6] So Plaintiffs' claim do not comprise any present or future violations of those provisions and their requests for declarations and injunctions to the same effect are moot.

Similarly, Plaintiffs' requests for prospective relief regarding the proper count of FCAS are moot because the alleged unlawfulness of HUD's FCAS count determinations ended with Congress's 2008 amendment to section 302(b)(1) of NAHASDA, 25 U.S.C. § 4152(b)(1). As discussed in prior briefing, that provision regards a unit-count factor on which the formula for calculating NAHASDA grant amounts must be based. It is implemented in part in HUD's formula regulation at 24 C.F.R. § 1000.318 (regarding housing units that cease to count as "FCAS" in the grant allocation formula). Congress's 2008 amendment of § 302(b)(1) essentially incorporated the regulation into the statute, but included a provision that allowed litigants like Plaintiffs[7] to have the pre-2008 provision applied through FY 2008. *See* 25 U.S.C. § 4152(b)(1)(E).

In this context, Plaintiffs have not disputed the validity of 24 C.F.R. § 1000.318 or HUD's interpretation of that regulation under the post-2008 version of § 302(b)(1). The regulation's validity is disputed only with respect to the pre-2008 version of NAHASDA. *See e.g.*, *NHA*, Supp. Compl., Dkt. 27 ¶ 7 (the regulation violates § 302(b)(1) prior to its amendment in 2008); *NHA*, Pls. Opening Brf., Dkt. 34, p.2 ("through fiscal year 2008, HUD unlawfully eliminated certain housing units from the calculation of Plaintiffs' [FCAS]"). Similarly, despite some of the present-tense language in their complaints, Plaintiffs have disputed HUD's interpretation of the regulation only by virtue of the pre-amendment version of § 302(b)(1).

[6] *See Nambe Pueblo Hous. Entity v. HUD*, 2012 U.S. Dist. LEXIS 125025, *16-*17 (D. Colo. 2012). In addition, a final rule effective January 3, 2013, removes from NAHASDA regulations any prohibition on recapturing funds already spent on affordable housing activities in conformance with Congress's removal of that provision from the § 405 of the statute in 2000. 77 *Fed. Reg.* 71513, 71529 (December 3, 2012) (amending 24 C.F.R. § 1000.532 among others).

[7] NPHE is excluded because it filed outside the timeframe provided in 25 U.S.C. § 4152(b)(1)(E).

Indeed, they have extensively argued that Congress's amendment in 2008 substantively changed § 302(b)(1) but without going on to argue what it changed into or what the current provision may now require. *See e.g., NHA*, Dkt. 34, p.9 ("Under the amendment, NAHASDA's formula allocation provision was changed to incorporate some of the language from 24 C.F.R. § 1000.318(a), the very regulation found to be invalid by this Court in *Fort Peck I*."). Claims inadequately argued in merits briefs are considered waived. *Exum v. United States Olympic Comm*., 389 F.3d 1130, 1133 (10th Cir. Colo. 2004) (issues waived because not mentioned in argument); *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. Okla. 2004) (citing Tenth Circuit precedent establishing that claims adverted to in a perfunctory manner are not considered). In this instance, Plaintiffs failed to assert, much less argue, in briefs arguing the legal merits of their case that the changed law does not now support HUD's interpretation of 24 C.F.R. § 1000.318. Their claim of current unlawfulness is therefore waived.[8]

The Court is to apply the law in effect at the time the relief is granted. "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not [barred as being] retroactive." *Landgraf*, 511 U.S. at 273-274. The Supreme Court has also held that "relief by injunction operates *in futuro*" and therefore, the law in effect at the time of the relief is granted should be applied. *American Steel v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921); *accord Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1158 (10th Cir. Colo. 2000) ("To ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief."). Here where

[8] Plaintiffs also pleaded that specific units were wrongfully disqualified even though they met all the terms for a qualified unit under 24 C.F.R § 1000.318. *See e.g., NHA*, Supp. Compl., Dkt. 27 ¶ 15. This is a claim that HUD simply erred in its findings about specific units and does not empower the Court to issue a general prohibition against making the same mistakes in the future.

Plaintiffs' still pertinent claims allege only past infractions of NAHASDA, prospective declarations and injunctions will not redress their injuries so there is no Article III controversy regarding those. *Cf. Steel Co.*, 523 U.S. at 109. Their requests for such relief are therefore moot.

B. Relief available under 5 U.S.C. § 706 is not moot.

The relief available to Plaintiffs is, as they contend, the "complete relief authorized by [5 U.S.C.] § 706" of the APA. *See* SOR § II and Appx. 2 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 900 (1988)). However, this does not include the remedies Plaintiffs seek in their Statements of Relief Requested. Rather, § 706 sets out the scope of the Court's review and includes deciding all relevant questions of law and granting two types of relief: (1) compelling a discrete and mandatory action unlawfully withheld, and (2) holding unlawful and setting aside unlawful agency action. 5 U.S.C. § 706. The Court may adjust its relief in accordance with the equitable principles governing judicial action, but must act within the bounds of the statute and without intruding on the administrative process. *Sierra Pacific Industries v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989) (citing *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

Setting aside FCAS disqualifications through FY 2008 that the Court finds were unlawful would have prospective effect to the extent HUD's regulatory authority permits correction of past underfunding, where HUD suspended recovery of amounts it determined a Plaintiff was overfunded, and where HUD set aside funds appropriated for grants in FY 2006, 2007, and 2008 per stipulation or injunction.[9]

[9] *Nambe Pueblo Housing Entity* ("NPHE") *v. HUD*, No. 11-cv-01516 (D. Colo.) presents a special case, however, due to the dates of the challenged agency actions (2009-2011) and the date NPHE filed its lawsuit (2011). The Court held that the agency actions at issue in that case occurred after the effective date of NAHASDA's amendment in 2008. *See* II.A. above (citing *NPHE v. HUD*, at *16-*17). NPHE's current requests for relief ask that the Court reconsider that ruling and declare that HUD unlawfully recovered overpayments from NPHE. NPHE SOR Appx.1, Dkt. 56-1 at 1-2. Relying on a mistaken quotation of *Bennett v. New Jersey*, 470 U.S. 632 (1985), NPHE argues that, in evaluating its claim that HUD unlawfully recovered overpaid money, the Court should have applied the law in effect at the time NPHE was overfunded rather than the law in effect at the time of HUD's action. *Bennett* does not support this. *Bennett* states that a grantholder's "expenditures" must be evaluated by the law in effect when the

1. The Court may set aside unlawful FCAS disqualifications through FY 2008 .

Under the APA, the Court may hold unlawful and set aside agency action found to have been arbitrary and capricious or not in accordance with law, and may remand for further consistent action by the agency. 5 U.S.C. § 706(2). Plaintiffs are entitled to a judgment that "declares" past actions unlawful in this way and obligates HUD to take consistent action within its regulatory authority and discretion.

Beginning in FY 2008, HUD elected not to recover grant funds that it found had been overpaid to Plaintiffs on account of FCAS units determined to be ineligible through FY 2008. HUD instead suspended recovery of the overpayments pending the outcome of a Plaintiff's litigation. Plaintiffs here received notice that, pending this litigation, HUD would not seek repayment of overfunding on account of inaccurate FCAS counts through FY 2008. *See e.g., Sicangu Wicoti Awanyakapi Corp. v. HUD*, No. 08-cv-02584 (D. Colo.), Admin. Rec. at SWAC000223 ("Given the pending litigation between the Sicangu Wicoti Awanyakapi Corporation and HUD, HUD will not seek payment at this time of the $31,556 over-funded to the Tribe due to ineligible FCAS."). As a result, by declaring unlawful and setting aside HUD determinations regarding the eligibility of FCAS units through FY 2008, the Court would obligate HUD to recalculate the amount overpaid and base recoveries, if any and if otherwise permitted, on the amount of those recalculations.

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grants were made. 470 U.S. at 640. Moreover, this Court only applied the law in effect at the time of HUD's action, not the law in effect at the time of Court's decision, thus raising no retroactivity issue. The Court should decline NPHE's request to reconsider, and decline the requested relief that relies on it. NPHE also requests a declaration that the pre-2008 version of § 302(b)(1) required HUD to fund "each TDHE," including NPHE, based on the number of units subject to an ACC on September 1997." Dkt. 56-1 at 2. By operation of 25 U.S.C. § 4152(b)(1)(E), however, the pre-2008 version does not apply to NPHE, so it lacks standing to seek such a declaration.

2. Because certain grant funds were set aside by stipulation or injunction, specific relief would be available in particular circumstances.

In FY 2006, 2007, and 2008, pursuant to stipulation or injunction approved or ordered by the Court, HUD set aside and stayed its allocation of certain amounts appropriated for NAHASDA block grants in those years.[10] There were set asides in four cases for a total of 15 Plaintiffs still in this case. In each instance the stipulation or injunction provides that a specific amount of NAHASDA block grant funds for a specific fiscal year's grant will be set aside for a particular Plaintiff so that the amount would be available upon resolution of the Plaintiffs' claims. The amounts set aside from a particular fiscal year's funds reflect estimates of the additional funds a Plaintiff would have received in that fiscal year if HUD had calculated block grant allocations using the count of FCAS required by *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*"). Pursuant to the stipulations and injunction, HUD set aside appropriations available in FY 2006, FY 2007, and FY 2008 in the amounts listed below:

[10] See *Northern Arapaho Tribe et al. v. HUD*, No. 06-cv-01680 (D. Colo.), Dkts. 3, 48, 50; *Blackfeet Housing et al. v. HUD*, No. 07-cv-01343 (D. Colo.), Dkt. 23; *Tlingit-Haida Regional Hous. Auth. v. HUD*, No. 08-cv-00451 (D. Colo.), Dkt. 3; Navajo Hous. Auth. v. HUD, No. 08-cv-0826 (D. Colo.), Dkt. 16.

Plaintiff	FY 2006 Funds Set Aside	FY 2007 Funds Set Aside	FY 2008 Funds Set Aside
Northern Arapaho Tribal Housing	$445,000	$445,000	
Jicarilla Apache Housing Authority		$38,052	
Mescalero Apache Housing Authority		$188,364	
Blackfeet Housing			$462,000
Pueblo of Acoma Housing Authority			$157,320
Aleutian Housing Authority			$465,366
Ass'n of Village Council Presidents Regional Housing Auth.			$3,282,900
Big Pine Paiute Tribe			$173,072
Bristol Bay Housing Authority			$1,165,328
Chippewa Cree Housing Authority			$311,688
Isleta Pueblo Housing Authority			$248,052
Northwest Inupiat Housing Authority			$1,515,861
Zuni Tribe			$424,632
Tlingit-Haida Regional Housing Authority			$1,499,887
Navajo Housing Authority			$5,121,456

Here, with respect to a particular Plaintiff in the grant year for which it has a set aside, if the Court sets aside certain of HUD's FCAS disqualifications, HUD would be obligated to redetermine the appropriate grant amount for that Plaintiff and provide the difference, if any and to the extent of the set aside.

3. Remand would be appropriate.

Plaintiffs argue the Court should not remand here because it will further delay the provision of relief to Plaintiffs and is futile. SOR § V. But this request neglects to consider that if the Court sets aside an FCAS unit disqualification because it was not supported by the administrative record, the unit may nevertheless have been ineligible on other grounds not initially identified. This exemplifies one reason why courts are to remand vacated agency decisions "for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

Plaintiffs' futility argument against remand is moot because it presumes that NAHASDA § 401(a) currently applies to overfunding recoveries. Also, the precedents they cite to argue that

HUD's role should be pre-empted due to delay are inapt. In *Middle Rio Grande Conservancy District v. Norton* and *Stone v. Heckler*, the courts' concerns were not delay in and of itself. The court in *Middle Rio Grande* sought to prevent irreparable environmental harm because the complained of conduct had driven a species of fish to the edge of extinction. 294 F.3d 1220, 1226 (10th Cir. 2002). In *Stone*, the court declined to remand to the Department of Health and Human Services for further consideration of whether plaintiff's husband had qualified for disability benefits because time and the husband's intervening death made it "virtually impossible for the Secretary to adduce new medical evidence." 761 F.2d 530, 531 (9th Cir. 1985). In *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 489 (3d Cir. 1980), the court declined to remand because delay of disability benefits raised constitutional due process concerns. Here, delayed grant funds do not raise the same due process concerns as entitlement to disability benefits do, and Plaintiffs do not assert extremities here such as species extinction or that further consideration by HUD would be virtually impossible. Accordingly, where the action held unlawful and set aside concerns substantive counting decisions, remand to HUD would be appropriate.

C. The retrospective relief that Plaintiffs request is not available under the APA.

Plaintiffs primarily seek orders for the payment of grant money that HUD either recovered or underfunded on account of disqualified FCAS units. They argue that *Bowen v. Massachusetts* sanctioned this retrospective relief because it is the very thing they were entitled to, or because the relief authorized by 5 U.S.C.§ 706 includes equitable remedies such as "restoration" or accounting. SOR § II and Appx. 2 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). However, *Bowen* does not support these requests for money because they involve substitute relief that is barred by 5 U.S.C. § 702. Calling the monetary relief an equitable remedy does not help Plaintiffs. Nor do Plaintiffs state a claim for an accounting.

1. The Court lacks jurisdiction to grant substitute monetary relief.

The APA waives sovereign immunity for "relief other than money damages" 5 U.S.C. § 702, which waiver must be strictly construed. *United States v. Nordic Village*, 503 U.S. 30, 34 (1992). In *Bowen v. Massachusetts*, the Supreme Court held that not all monetary relief is categorically "money damages" for purposes of the APA. 487 U.S. at 900. Since *Bowen*, however, the Supreme Court has emphasized that pleading a money claim as an equitable remedy will not change its nature; and if the claim (couched in equitable terms or not) seeks substitute monetary relief, then it is a claim for money damages prohibited under the APA.

In *Department of the Army v. Blue Fox*, an Army subcontractor sought money that it was due from the bankrupt prime contractor by suing for an equitable lien on Army funds. 525 U.S. 255 (1999). Explaining that *Bowen*'s interpretation of money damages under § 702 "hinged on the distinction between specific relief and substitute relief," the Supreme Court in *Blue Fox* made clear that substitute monetary relief does not fall within waiver of sovereign immunity in § 702. *Id.* at 262-63. Despite the equitable form of the plaintiff's requested relief, the claim was essentially one for money damages barred under the APA because it sought substitute monetary relief and the equitable lien was simply "a means to the end of satisfying a claim for the recovery of money." *Id*. at 262-63. The Court's analysis and holding made clear that plaintiffs may not skirt the APA's limitations simply by framing the relief sought as "equitable." *See Id*. at 261.

Again in *Great-West Life & Annuity Insurance Co. v. Knudson*, the Supreme Court rejected a plaintiff's attempt to characterize its claim as equitable, instead finding that it was really a claim to enforce a contractual obligation to pay money in compensation for benefits received. 534 U.S. 204, 210 (2002). The Court reiterated that *Bowen* did not turn on distinctions between equitable relief and other forms of relief, but rather on what constituted "money damages." *Id*. at 212 (citing *Bowen* and *Blue Fox*, 525 U.S. at 261). "Almost invariably . . .

suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money . . . are suits for money damages . . . since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Id.* at 210 (internal quotation omitted).

The Tenth Circuit also has held that, when applying *Bowen*, courts must "scrutinize claims against the United States to be certain that the plaintiff has not endeavored to transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money." *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1278 (10th Cir. 1991). And when "the prime objective or essential purpose of the claim" is to recover money from the federal government, there is no jurisdiction for the relief under the APA. *Id.* at 1278.

Scrutinizing Plaintiffs' requested relief here shows that while stated as requests for equitable relief in the form of declarations, injunctive orders and an equitable accounting, their true nature is a claim for substitute money. All their prospective requests are moot, as explained above. Their retrospective requests, other than requesting an "accounting" statement of the amount of grant money due them (SOR Appx. 1 ¶ 12), all explicitly seek payment of money (*id.* ¶¶ 6, 8-11). And the money is to come from substitute grant appropriations. SOR § I.B.-I.D. (arguing for immediate release of amounts set aside for each plaintiff without regard to proper formula calculation or fiscal year of alleged formula underfunding); *id.* Appx. ¶ 11 (requesting restoration of funds not covered by set aside from "annual carry-over" or "other NAHASDA funds").

These are not requests for specific relief available under § 702. *Bowen*, 487 U.S. at 895, 899 (money may constitute a "specie remedy," so the waiver of sovereign immunity in § 702

allows a court to direct recovery of "specific property or monies"). Rather they seek substitute monetary relief.

As the Court recognized in *Fort Peck Housing Authority v. HUD*, monetary relief constitutes compensatory damages barred under § 702 when it must come from a source other than the specific congressional appropriation for NAHASDA grants in the year in which grant calculations are disputed. *See* 2006 WL 2192043, *3 (August 1, 2006) (Order denying Fed. R. Civ. P. Rule 59 motion to amend judgment). The D.C. Circuit elucidated this principle in *City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), an analogous case regarding HUD block grant funding. There, Houston claimed that HUD had unlawfully deprived it of Community Development Block Grant funds in 1986. The court ruled that since the 1986 funds had already been distributed to other recipients, Houston's claim was not for specific relief:

> Section 702 permits monetary awards only when, as in *Bowen*, such an award constitutes specific relief—that is, when a court orders a defendant to pay a sum owed out of a specific res. An award of monetary relief from any source of funds other than the 1986 CDBG appropriation would constitute money damages rather than specific relief, and so would not be authorized by APA section 702.

Id. at 1428. The court noted that it could have addressed the claim only if the plaintiff had sought a preliminary injunction preventing HUD from disbursing the funds at issue. *Id*. at 319.[11] Following *Houston*, the Second Circuit further explained that in cases challenging an agency's expenditure of funds, the specific *res* at issue—which is available as non-damages "specific relief"—is identified by reference to the congressional appropriation subject to challenge. *County of Suffolk v. Sebelius*, 605 F.3d 135 (2d Cir. 2010) (citations omitted).

Regarding annual block grants under NAHASDA in particular, this Court denied Fort Peck Housing Authority's earlier request for money it claimed entitlement to, reasoning:

[11] While some grant funds were set aside here, Plaintiffs' requests are not limited to the grants affected by these set asides. For discussion of the set asides here, see §II.B.2., above.

> "[T]he funds repaid have been re-distributed, and accordingly, the order requested would be 'substitute relief' within the distinction drawn by the Supreme Court in *Dep't of Army v. Blue Fox, Inc*., 525 U.S. 255, 262 (1999). Payment to FPHA of the amount requested must come from a source of funds other than the appropriations made for the fiscal years in issue."

Fort Peck Hous. Auth., 2006 WL 2192043 at *3.

Notwithstanding the Court's decision in *Fort Peck*, Plaintiffs request that specific grant year appropriations set aside by stipulation or injunction be immediately released to restore funds that HUD recovered or underfunded in any other grant. They argue this is specific rather than substitute relief because NAHASDA regulations authorize HUD to remedy misallocations by applying current grant appropriations to "retroactively" correct for past underfunding or by reallocating recovered funds in the next fiscal year. *See* SOR § I.C. (citing 24 C.F.R. §§ 1000.336(e)(4)(i), 1000.536 and referencing a provision of negotiated rulemaking in 2007, 72 Fed. Reg. 20018, 20020 (April 20, 2007)). But they cite no case supporting the proposition that these regulatory authorities pre-empt the distinction between substitute and "specie" money established under *Blue Fox*, *City of Houston*, *County of Suffolk*, *Fort Peck*, and other precedent. Instead they cite a Court of Federal Claims case stating that "NAHASDA is a permanent revolving appropriation." *Id.* (quoting *Yakama Hous. Auth. v. United States*, 102 Fed. Cl. 478, 487 (Fed. Cl. 2011)). However, there the § 702 prohibition against substitute monetary relief was not at issue. The Court of Federal Claims may award damages under the waiver of sovereign immunity supplied by the Tucker Act. So, whether or not the Yakama court was correct, its analysis cannot help here because it did not face the question before this Court.

Contrary to Plaintiffs' arguments, the "res" or "specie" of a set aside is money appropriated for block grants in a specific fiscal year, and was set aside as an estimate of what the Plaintiff allegedly should have been granted in that fiscal year. Release of set-aside funds to compensate Plaintiffs for monetary losses in fiscal years other than the set-aside year would

constitute substitute relief. *See e.g., County of Suffolk*, 605 F.3d at 141. Moreover, to the extent that Plaintiffs request release of set-asides to refund "recaptured" money, *i.e.*, to compensate for HUD's failure to provide hearings before recovering overpayments, they seek substitute relief in two senses. Not only would the set aside appropriations be funding a different year's grant, but it would be substituting money for "the very thing" Plaintiffs were allegedly entitled to, *i.e.*, a hearing. *Cf. Bowen*, 487 U.S. at 895 ("Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.").

There are no "other NAHASDA funds" available for an order of specific monetary relief. *See* SOR Appx. 1 § 11. Here, NAHASDA appropriations for grants in FYs 1998-2008 for which Plaintiffs seek payment have all been distributed. The funds would either have been distributed in the original year for which they were appropriated, 25 U.S.C. §§ 4111, 4151, 4152 or—if recaptured or otherwise carried over—in the subsequent fiscal year. *See* 24 C.F.R. §§ 1000.216, 1000.319(b), 1000.536 (carryover funds as well as grant funds adjusted are attributable to and distributed in the fiscal year subsequent to the year in which they are recaptured). So payment to Plaintiffs here would be substitute relief within the distinction drawn by the Supreme Court because it would "come from a source of funds other than the appropriations made for the fiscal years in issue." *Fort Peck Hous. Auth.*, 2006 WL 2192043 at *3 (citing *Blue Fox, Inc*., 525 U.S. at 262).

Plaintiffs' requests for an accounting fall within the class of relief pleaded as equitable but constituting money damages. An accounting is a form of equitable restitution contingent on establishing a constructive trust or equitable lien on a particular *res*. *See Great-West Life*, 534

U.S. at 214 n.2 . Just as the claim for an equitable lien in *Blue Fox* was denied as essentially a request for money damages, so should be Plaintiffs claims for equitable accounting.

This analysis also applies to what appears to be a request for a "paper" accounting, *i.e.*, a statement of amounts due to them as a result of HUD's actions, see SOR Appx. 1 ¶ 6(a). This form of relief would be "simply a means to the end of satisfying a claim for the recovery of money" as the equitable lien was in *Blue Fox*. See 525 U.S. at 262-63. Plaintiffs make this clear by asking that, if the Court cannot provide all the monetary relief they request, it allow them time to file a motion for transfer of their cases to the Court of Federal Claims. SOR § IV.[12] This suggests that the paper accounting is to be a means to bring a claim for the recovery of money in the Court of Federal Claims. In any case, Plaintiffs fail to establish any elements of an equitable action for accounting. They do not assert they lack an adequate remedy at law—a prerequisite for equitable accounting[13]—but rather assert that jurisdiction would be proper in the Court of Federal Claims for such a remedy. *See* SOR § IV. Nor do they assert grounds for an accounting such as fraud, unjust enrichment, or breach of a fiduciary duty. *See* Dobbs at 609-10 (monetary accounting generally refers to scenarios where fraud or unjust enrichment exist); *e.g.*, *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (an equitable accounting cannot be obtained unless a fiduciary duty exists).[14]

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[12] Plaintiffs' request that, if the Court cannot provide all the relief requested, they would seek time to file a motion to transfer to the Court of Federal Claims pursuant to 28 U.S.C. § 1631. SOR § IV. HUD believes that if transfer is appropriate, it must be to a circuit court of appeals for review under 25 U.S.C. § 4161(d). However, because Plaintiffs merely seek the option to file a motion for transfer in a contingency, HUD reserves its response for that eventuality.

[13] *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962).

[14] Plaintiffs do not assert that their request for an accounting is based on the breach of trust claim pleaded in their complaints, having apparently abandoned the claim since agreeing with the Court that NAHASDA grants do not establish a trust. *See* Coordinated Hearing Transcript of Proceedings, *Fort Peck Housing Authority v. HUD, et al.*, No. 05-cv-00018-RPM (May 30, 2012), Dkt. 88, p. 102 ("I don't think we can count these annual allocations as a trust fund in terms of ordinary trust law.") and p.109 (acknowledging that Plaintiffs are not arguing that "the allocation each year is a trust fund."); *accord Lummi Tribe v. United States*, 99 Fed. Cl. 584, 598 n.12 (2011) (no breach of trust claim under NAHASDA); *Marceau v. Blackfeet Housing Authority v. HUD*, 540 F.3d 916, 928 (9th Cir. 2008) (same). Now, Plaintiffs focus on § 706 as the source of their right to relief. SOR § II.

2. Equitable principles do not support Plaintiffs requested injunctive orders.

Plaintiffs do not establish grounds for the injunctive orders requested, having neither pleaded nor argued the predicates for equitable injunctions or relief under 5 U.S.C. § 706(1) "to compel agency action unlawfully withheld or unreasonably delayed."

Plaintiffs purport to seek "the full breadth of equitable relief available both under the APA and as a matter of common law," based on their assertion that the Court has "broad discretion to fashion declaratory and injunctive relief against federal defendants." SOR § III. But Plaintiffs do not meet the Tenth Circuit test for the equitable relief of an injunction because they do not show the requisite irreparable harm, balance of harms in their favor, or lack of adverse effect on the public interest. *See, e.g., Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009) (describing four-prong test). The Declaratory Judgment Act, upon which Plaintiffs rely because it provides for further relief, does not extend the Court's power beyond these and the other limitations above because it provides only for "further . . . proper relief." 28 U.S.C. § 2202.

Furthermore, while a court may "compel agency action unlawfully withheld or unreasonably delayed" pursuant to APA review, 5. U.S.C. § 706(1), "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis in original). This APA remedy carried forward the traditional practice for writs of mandamus. Thus, "§ 706(1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *Id.* (internal quotation omitted). This narrow remedial provision does not support Plaintiffs requested injunctions since they do not identify a discrete, non-discretionary act that HUD failed to take.

3. The case law Plaintiffs rely on does not support the relief sought here.

Like *Bowen*, Plaintiffs' other cases are inapposite. These include: reversed district court opinions, an interlocutory order speculating in *dicta* about potential relief, a dismissal on appeal speculating in *dicta* that some relief sought might be equitable, a challenge to rulemaking that did not address money damages, cases where the § 702 waiver of sovereign immunity was not at issue, cases where availability of funds for specific relief was unquestioned, and an obscure desegregation case. SOR § V and Appx. 2. To the extent Plaintiffs' cases are on point they are not persuasive; to the extent they could have persuasive power, they are not on point.

Plaintiffs' cite *Clark v. Library of Congress*, 750 F.2d 89, 104 n.33 (D.C. Cir. 1994), for the case distinguished in its footnote. In *Clark* itself, the court rejected all monetary relief claims as damages. 750 F.2d at 103-04. The case in its footnote, *Martinez v. Marshall*, 573 F.2d 555, 560-61 (9th Cir. 1977), is distinguishable here as well. The waiver of sovereign immunity was not at issue there, where the case was brought for relief from *ultra vires* action—outside the APA. Plaintiffs quote citations to *Bowen* from *Holly Sugar Corp. v. Veneman*, a case in which the court held it had jurisdiction to order restitution. 355 F.Supp.2d 181, 193 (D.D.C. 2005), *rev'd* 437 F.3d 1210 (D.C. Cir. 2006). But that analysis was stripped of value when it was reversed on the merits and the reversal "eliminate[d] any need to consider the district court's restitution order." 437 F.3d at 1215. In any case, the restitution there was for a claim of unjust enrichment, 355 F.Supp. 2d at 190, which could not be at issue here since the Government does not benefit from funds not granted to Plaintiffs; only other tribal grantees do. Finally, there was no indication that the funds Holly Sugar Corp. sought had already been distributed. *Zellous v. Broadhead Associates*, 906 F.2d 94, 98 (3d. Cir. 1990), too, concerns an entirely different body of law: HUD's obligations to tenants under the distinct scheme of the United States Housing Act

of 1937, 42 U.S.C. § 1437a(a). Grant funds were not at issue and there was no suggestion that the sought funds had been distributed.

In the cited interlocutory order in *Olenhouse v. Commodity Credit Corp*., the plaintiffs there sought to restrain payment reductions. 136 F.R.D. 672, 675-76 (D. Kansas 1991). That order determined APA jurisdiction was available because the court could remand to the agency and not award money. *Id*. at 677. Issued before any final decision, *see Olenhouse*, 807 F. Supp. 688 (D. Kansas 1992), *rev'd* 42 F.3d 1560 (10th Cir. 1994), its hypothetical consideration of relief is unhelpful *dicta*.

The inquiries into availability of "equitable" relief in *Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), and *Sierra Pacific Industries v Lyng*, 866 F.2d 1099 (9th Cir. 1988), do not overcome the later Supreme Court holding that the relevant inquiry is not whether relief is "equitable." *See Blue Fox*, 525 U.S. at 262. In affirming dismissal in *Sea-Land*, the court merely acknowledged in *dicta* that some relief sought might be equitable. 659 F.2d at 246-47. And *Sierra Pacific* was a challenge to rulemaking with no contention of monetary relief nor reliance on the § 702 waiver. 866 F.2d 1099.

National Center for Manufacturing Sciences v. United States, 114 F.3d 196 (Fed. Cir. 1997), does not support Plaintiffs' characterization that they seek a "refund." SOR Appx. 2, p. 5. The relief there was not a refund as the disputed funds had not yet been allocated. 114 F. 3d at 201. The continued availability of disputed funds, as well as the fact that a pure money judgment was improper because the funds' use had statutory restrictions, distinguishes *National Center*. *Id*.

In *Jacksonville Port Authority v. Adams*, 556 F. 2d 52, 56 (D.C. Cir. 1977), the funds sought as specific relief had expired but—unlike here—had not been allocated to any other

recipient. The case did not consider relief from another appropriation and is limited to "when the disputed funds are found to be available." *Id*. (quoting *Commonwealth of Pennsylvania*, 367 F.Supp. 1378, 1387 (D.D.C. 1973).

Finally, Plaintiffs misplace reliance on cases governing preserved appropriations. SOR § I. HUD does not challenge the setting aside of funds, for which Plaintiffs cite *State of Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982), *United States v. State of Michigan*, 781 F.Supp. 492, 497 (E.D. Mich. 1991), and *Wilson v. Watt*, 703 F.2d 395, 403 (9th Cir. 1983). Those cases do not, however, support ordering release of all funds set aside to cure any recovery or underfunding. Nor does *Board of Education v. Department of Health, Education, and Welfare*, 655 F.Supp. 1504 (S.D. Ohio 1987) ("*Bd. of Ed.*"), establish that funds set aside for a fiscal year could be used to compensate for a different year's grant. There, disputed grant funds had been set aside during litigation and the court ordered release of the entire set-aside amount as the best available estimate of the amount due in the disputed fiscal year. 655 F.Supp. at 1548. Contrary to Plaintiffs' assertion, the decision in no way suggests that excessive funds were attorneys' fees. SOR at I.B. (citing 655 F.Supp. at 1548-1550). Moreover, *Bd. of Ed.* is not persuasive. Issued in a complex school desegregation case, it was not appealed and only one court has ever cited it—in a vacated decision—and only for a limited and unrelated procedural principle . *See Henry v. Department of Navy*, 755 F. Supp. 1442, 1451 (E.D. Ark. 1991), *rev'd without opinion and rev'd after remand*, 77 F.3d 271, 272 (8th Cir. Ark. 1996).

D. <u>The relief requested is limited by the applicable statute of limitations.</u>

Plaintiffs seek relief going back to 1998. SOR Appx. 1 ¶ 9. However, only agency actions that occurred within the applicable statute of limitations are subjects for relief. In these NAHASDA cases, HUD believes, this means that the final agency action must have occurred within four years before a Plaintiff filed its case. In prior briefing HUD asserted the general

statute of limitations typical for APA cases as governing here. *See e.g.*, *NHA*, Ds. Resp. Brf., Dkt. 39, p. 50. In its August 31, 2012 order, the Court reserved the factual question of when the statute of limitations began to run in these cases "for the next phase of this litigation." *E.g.*, *Fort Peck Hous. Auth. v. HUD*, 2012 U.S. Dist. LEXIS 124049, *20 (D. Colo. Aug. 31, 2012). As a result of research for our response to the Plaintiffs' Statements of Relief Requested and Motions to Supplement, HUD now believes that the applicable statute of limitations is 28 U.S.C. § 1658 rather than § 2501.

In 1990, Congress established a new catch-all statute of limitations: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. NAHASDA was enacted in 1996 and so appears on its face to fall within 28 U.S.C. § 1658.

The Supreme Court interpreted the reach of § 1658 in *Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369 (2004). In that case, a class of plaintiffs brought a hostile work environment claims under 42 U.S.C. § 1981 based on race. Prior to 1991, the statute was limited to claims related to making and enforcing contracts; in 1991, Congress added § 1981(b) to include hostile work environment claims in the statute. So the question for the Supreme Court was whether the cause of action "arose under" the pre-1991 version of § 1981 or the post-1991 amended version. It concluded that § 1658 did apply because the 1991 amendment created a new cause of action for hostile work environment under § 1981. The Supreme Court held that a cause of action "aris[es] under" § 1658 and is therefore governed by its four-year statute of limitations "if plaintiff's claim against the defendant was made possible by a post-1990 amendment." *Id*. at

382. It also stated that § 1658 applies "whenever a post-1990 enactment creates a new right to maintain an action." *Id.*

Here, the claim is that Plaintiffs were aggrieved by HUD's arbitrary, capricious or unlawful actions under NAHASDA. In other words, but for NAHASDA, Plaintiffs would not have an APA claim, or any claim. Because *Jones* held that § 1658 applies if a post-1990 act "made possible" a plaintiffs' claim, *Jones*, 541 U.S. at 382, and without NAHASDA the Plaintiffs would have no APA claim, it follows that the claims "arise under" NAHASDA within the meaning of 28 U.S.C. § 1658, and are therefore subject to a four-year statute of limiations.

III. The Administrative Record Should Be Updated Based On Plaintiffs' Amended/Supplemental Complaints, But Not Otherwise Supplemented

A. HUD proposes updating the administrative records based on Plaintiffs' amended and supplemental complaints.

Except in the case of *Nambe Pueblo Housing Entity v. HUD*, No. 1:11-cv-01516-RPM (D. Colo.) filed in 2011, HUD filed the administrative records in these coordinated cases at various times from 2006 through 2010. Earlier-filed cases were stayed pending the appeal of *Fort Peck I*. In September 2010, Plaintiffs in the earlier cases filed amended and supplemental complaints. Those complaints challenge generally any HUD actions to disqualify homeownership units from FCAS and recover funds that HUD determined were overpaid based on these disqualifications were unlawful. As a result of these timing circumstances, the administrative records that HUD filed before 2010 do not necessarily include the records of all agency actions implicated by the supplemental complaints. Accordingly, if the earlier cases are not dismissed or transferred to an appropriate court of appeals as argued for in Section I, above, then HUD would supplement the administrative records to bring them up-to-date with the supplemental complaints. Also, in the course of filing many different administrative records for

the number of different Plaintiffs in these cases, HUD has inadvertently neglected to include certain generally-applicable records in each Plaintiffs' administrative record. So HUD would include any inadvertently omitted documents in all the administrative records.

Other than these supplementations by HUD to bring the administrative records up-to-date with the supplemental complaints, and to ensure all generally applicable records are in all the inclusion in all administrative records of certain documents that HUD filed with many of the administrative records but inadvertently omitted from some, further additions to the administrative records would be improper.

B. The administrative records should not be supplemented with Plaintiffs' proposed documents.

Plaintiffs seek to supplement the administrative records with the following four categories of documents:[15]

Category 1: Documents that HUD never considered during the administrative process because it did not limit recovery of overfunding based on 24 C.F.R. § 1000.532. This category includes certain grant expenditure records such as lists of grantee withdrawals of grant funds as shown in HUD's Line of Credit Control System (LOCCS), HUD program notices and forms pertaining to LOCCS, and excerpts from Plaintiffs' independent financial audits.[16]

Category 2: Documents that were not before HUD when it made its decisions. This category includes "unit-by-unit breakdowns" of HUD's FCAS eligibility determinations and Plaintiffs' non-HUD form Mutual Help and Occupancy Agreements.

Category 3: Documents that plaintiffs claim should be part of the administrative record because they present "legislative facts." This category includes publicly-available HUD guidance documents, and a letter from a HUD field office to local program participants, which is also a Category 2 document.

Category 4: Document excerpts and versions of documents that differ from HUD records. This category includes excerpts and differing versions of letters between NHA and HUD. (HUD does not oppose adding the full documents as they exist in HUD's records.)

[15] *See* Appendix A, attached hereto, which specifically lists all Plaintiffs' requested record additions by category with citation to docket numbers.

[16] Some Plaintiffs have attached the documents they seek to supplement within this category; others request that the Court order HUD to produce them. *Compare e.g.*, *Tlingit-Haida Regional Housing Authority v. HUD*, No. 08-cv-00451-RPM (D. Colo.), Statement of Relief, ("THRHA SOR"), Dkt. 60-12 *with* NHA SOR, Dkt. 59-13.

1. Standards for the administrative record on APA review.

The Tenth Circuit prohibits "a district court's 'reliance on arguments, documents and other evidence outside the administrative record' as well as, relatedly, the treatment of an APA-based claim 'as a separate and independent action, initiated by a complaint and subjected to discovery and a pretrial motions practice.'" *Kane County Utah v. Salazar*, 562 F.3d 1077, 1086 n. 3 (10th Cir. 2009) (quoting *Olenhouse*, 42 F.3d at 1579).

This accords with Supreme Court precedent. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court established that APA review is based on "the full administrative record that was before the Secretary at the time he made his decision." 401 U.S. 402, 420 (1971). It clarified this mandate in *Camp v. Pitts*, stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 U.S. at 142; s*ee also Florida Power & Light Co., v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."); *Bar MK Ranches, et al. v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (citing *Camp v. Pitts* and *Lorion*).

Accordingly, the rule in the Tenth Circuit is that the "[a]gency's action must be reviewed on the basis articulated by the agency." *American Mining Congress v. EPA*, 772 F.2d 617, 626 (10th Cir. 1985) (citation omitted). And "[t]the court assumes the agency properly designated the administrative record absent clear evidence to the contrary." *Bar MK*, 994 F.2d at 740; *see also Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2005) (plaintiff bears the burden of clearly establishing that record designated by the agency is incomplete or overinclusive).

Exceptions to these general rules are "extremely limited." *American Mining Congress*, 772 F.2d at 626; *Citizens for Alternatives*, 485 F.3d at 1096. The Tenth Circuit has categorized circumstances that could warrant record supplementation with extra-record material as follows: (1) where the agency ignored relevant factors it should have considered, (2) where there is a strong showing of bad faith or improper behavior such as when scientific or technical reports cast doubt on agency decision, (3) the agency action is not adequately explained, (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates that the actions were right or wrong. *American Mining Congress*, 772 F.2d at 626-27.

However, these broadly worded categories may not be read to overcome the Supreme Court's prohibition against *de novo* proceedings in the reviewing court. In a unanimous decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, for example, the Supreme Court reversed a court of appeals order for more fact finding and rulemaking procedures concerning the licensing of nuclear power plants, stating:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration.'"

435 U.S. 519, 549 (1978) (quoting *Camp v. Pitts*, 411 U.S. at 143). This is true even where an agency failed to consider relevant evidence:

> 'At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency.'

Id. at 544-545 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976)).

2. ***Category 1:*** *Grant expenditure records, such as LOCCS print-outs and excerpts from independent financial audits, were not considered by HUD and are not part of the administrative records in these cases.*

The first category of documents primarily pertain to their withdrawal of grant monies from Treasury through HUD's Line of Credit Control System ("LOCCS"). LOCCS is HUD's computer system for controlling the flow of grant monies to grantees. In addition, two of the Plaintiffs proffer documents entitled "Schedule of Expenditures of Federal Financial Awards," which are excerpts from financial audits that federal grantees must have an independent accountant conduct pursuant to the Single Audit Act, 31 U.S.C. § 7501 *et seq.*[17] Plaintiffs assert that HUD must have considered this material in making the decisions at issue in these cases. *See e.g.*, THRHA SOR, p. 14 ("Those facts were either directly or indirectly considered by the HUD decision makers in reaching their decision to recapture funds."). But HUD did not consider those facts.

"The proper touchstone remains the decision makers' actual consideration, and a party moving to complete the record must show with *clear evidence* the context in which materials were considered by decision makers in the relevant decision making process." *Center for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010) (emphasis added). Because Plaintiffs assert no "specific facts" clearly showing the circumstances of HUD's consideration of the material, they have not overcome the presumption that the proper administrative records exclude it. *See WildEarth Gardens v. Salazar*, 713 F. Supp. 2d 1243, 1254 (D. Colo. 2010) (citing *Bar MK Ranches*, 994 F.2d at 740); *Wilderness Workshop, et al. v. BLM*, 2012 U.S. Dist. LEXIS 70161, at *12 (D. Colo. 2012) (requiring specific facts—such as when the documents

[17] NAHASDA grantees are subject to the Single Audit Act pursuant to 25 U.S.C. § 4165 (a).

were presented to the agency, to whom, and under what context— in order to overcome presumption).[18] Indeed, Plaintiffs allege in their complaints that HUD violated 24 C.F.R. § 1000.532 by *failing to consider* information regarding their expenditure of grant funds. *See e.g.*, *NHA*, Supp. Compl., Dkt. 27 ¶ 25. In short, the record for review is what HUD actually considered, not what it could or would have considered had HUD acted differently.

By the same token, supplementing the administrative records with lists of LOCCS withdrawals and excerpts of financial audits is not warranted under the exception for extra-record evidence needed to "determin[e] whether the agency considered all relevant factors including evidence contrary to the agency's position," *Franklin Savings Association v. Office of Thrift Supervision*, 934 F. 2d 1127, 1137 (10th Cir. 1991). There is no dispute that HUD did not consider the "factor" that funds may have already been expended on affordable housing activities when it recovered overpayments from Plaintiffs.

Apparently Plaintiffs seek to add this material to the record in order to provide the Court with evidence about what HUD should have done had it considered the material. But that would turn this APA review into a *de novo* trial with the Court dictating to the agency the proper source of evidence for a determination the agency did not make and then deciding the issue without opportunity for further consideration by the agency on the basis of that new evidence. The Supreme Court has repeatedly admonished against courts overstepping the boundaries of APA review and bypassing the administrative process in this fashion. *See e.g.*, *Lorion*, 470 U.S. at 744 ("The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"*); INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("judicial judgment cannot be made to do service for

[18] Several plaintiffs filed affidavits averring that HUD considered the lists of withdrawals from LOCCS that they proffer. These averments similarly fail to meet Plaintiffs burden because they are merely conclusory speculations and do not assert specific facts clearly showing the circumstances of HUD's consideration of the material.

an administrative judgment"); *Vermont Yankee*, 435 U.S. at 549 (agency action must "stand or fall" on the agency's contemporaneous explanation of its decision and, if that finding is not "sustainable on the administrative record made, then [it] must be vacated and the matter remanded to [the agency] for further consideration.").

Here, when a Plaintiff raised the issue during the administrative process, HUD explicitly denied that its recovery of overpaid funds was limited to funds not already spent on affordable housing activities under 24 C.F.R. § 1000.532. *See e.g.*, Choctaw Nation of Oklahoma Admin. Rec., CNOK000721 (responding that "[t]he procedural requirement prescribed in §1000.532 do not apply to errors in calculating IHBG allocations."). The actions under review here must stand or fall on the existing administrative records, not a new record created initially in this Court. *Camp v. Pitts*, 411 U.S. at 142.[19]

3. ***Category 2:*** *newly created "unit-by-unit breakdowns" or "summaries" and evidence Plaintiffs did not to present to HUD during the administrative process should not be added to the administrative record.*

Plaintiffs seek to supplement the record with include "unit-by-unit breakdown[s] of units removed." SOR, p. 15. Plaintiffs argue these new records would clarify the subject matter before the Court by summarizing the administrative records. *Id*. They also assert, however, that the supplementation is appropriate because the administrative records lack the information that could be provided in a unit-by-unit breakdown. *Id*.

Ultimately, Plaintiffs concede that unit-by-unit "summaries" would add new evidence to the administrative record, but should be added to the record to "promote efficient judicial

[19] Even if the Court were to engage in a trial *de novo* of whether HUD recovered funds "already spent on affordable housing activities," the proffered documents would not be a sound evidentiary basis. Neither bare lists of fund withdrawals from LOCCS nor excerpts of financial audits could be a sound basis for a determination by HUD that specific amounts were spent on affordable housing activities or otherwise in accordance with NAHASDA. Withdrawn funds may have been misspent or spent on other than affordable housing activities as defined by NAHASDA; and nothing in the proffered financial schedules indicate they contain the independent auditors verified findings.

review." *Id*. This is exemplified by THRHA's submission of unit-by-unit breakdowns. *See* THRHA SOR, Dkts. 60-16 and 60-17. In that case, Plaintiff THRHA added hand-written annotations to a list of homeownership units from pages 705-721 of its administrative record accompanied by an affidavit by Norton Gregory, the Housing Services Manager of THRHA. In his affidavit, Mr. Gregory states he "noticed that, in several cases, no reason was given [by THRHA] in the original record document for the conveyance [of the unit] occurring later than 25 years after DOFA." He then explains how he prepared the hand-written unit-by-unit analysis. Among other things, he "consulted the regularly-kept individual housing unit records" that were in THRHA's possession and which "are available for HUD or its attorneys to inspect." THRHA SOR, Dkt. 60-15, p. 2. NHA submitted a similar affidavit accompanied by a table of unit data (dated February 12, 2013) that was newly created for purposes of this litigation and not based on the administrative record. *See* NHA SOR, Dkt. 59-22, p. 2 (affidavit of Ms. Lynch, referring to accompanying and averring that it "was prepared from the official records maintained by the NHA").

HUD provided THRHA and all Plaintiffs with opportunities to supply reasons why homeownership units should continue to be counted as FCAS, including reasons why conveyance occurred more than two years after the unit fully amortized under lease-purchase agreements that generally could not extend beyond 25 years from the project's Date of Full Availability or "DOFA." *See e.g.*, THRHA Admin Rec., THRHA000673 ("Please notify Jackie Kruszek… and provide information regarding the status of these units to show that they should be counted as FCAS."). Factual justifications provided by Plaintiffs now are not meaningful for the Court's review of HUD's disqualification decisions because the APA standard of review requires a court to decide whether, on the record before the agency at the time of its decision,

there was a rational relationship between the facts found and the decision made. *E.g.*, *Lorion*, 470 U.S. at 744; *Camp v. Pitts*, 411 U.S. at 142; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43(1983); *Asarco v. EPA*, 616 F.2d 1153, 1158 (9th Cir. 1980). In addition, newly submitted reasons for nonconveyance do not "clarify and summarize" the existing administrative record; they supplant it. This does not fall within any of the limited circumstances warranting record supplementation because even in the exceptional cases, extra-record materials "may not [serve] as a substitute for the administrative record." *Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993). Moreover, supplementing the administrative record with a summary of itself—whether drafted by plaintiffs or HUD—risks distorting facts in the record by omission or mischaracterization and confusing review by creating two records of HUD actions: the actual and the purportedly summary record.

This second category also includes copies of Mutual Help and Occupancy Agreements ("MHOAs") that THRHA and NHA allege they used during the time relevant to the litigation and, in THRHA's case, numerous documents relating to its claim that the conveyance of units were delayed due to repairs under the Comprehensive Grant Program ("CGP") terminated by NAHASDA. According to THRHA and NHA, HUD "actually considered" these documents. THRHA SOR, Appx D, p.2; NHA SOR, Appx. 3, p.1. However, if HUD had considered these documents, either because THRHA or NHA submitted them to HUD to justify FCAS unit eligibility or HUD specifically referenced them in the correspondence explaining an FCAS eligibility determination, they would already be in the administrative records. As explained above, to justify completion of the record with documents a plaintiff claims an agency considered, the plaintiff must present clear and specific evidence such as when the documents

were presented to the agency, to whom, and under what context. THRHA and NHA present no evidence, and these documents were not before HUD when it made its eligibility determinations.

The MHOA THRHA proposes for supplementation appears, in all respects except some added design work, to be the March 1976 version HUD-53056 that HUD has already provided in a number of the other administrative records. *See* THRHA SOR, Dkt. 60-6. NHA proffers six MHOAs. NHA SOR, Dkt. 59-1 through 59-7. The first three closely resemble HUD-form MHOAs from 1976, 1991, and 1993. The remaining three are not HUD forms. NHA asserts these were the form of MHOA that NHA used beginning in 1998, 2009, and at an unstated time for subsequent homebuyers. To the extent these MHOAs are functionally equivalent to the MHOAs already in the administrative records, supplementation is unnecessary because Plaintiffs can point to the record to support any arguments based on the MHOA. To the extent they are not equivalent, just like the second category of documents proffered by Plaintiffs, they are submitted as evidence for a *de novo* trial of FCAS eligibility that is prohibited on APA review.

THRHA also seeks to add to the reasons given HUD in 2001 and 2002 for its delayed conveyance of homeownership units benefitting from funds for rehabilitation work under the pre-NAHASDA Comprehensive Grant Program ("CGP"). This issue is already addressed repeatedly in the existing administrative record. *See* THRHA Admin. Rec., THRHA000672-693, 699-725, 735-738, 746-747. Among other things, THRHA wants to add a letter dated March 16, 1995, over two years before NAHASDA took effect, from the Administrator of the Alaska Office of Native American Programs to "all Indian Housing Authorities" stating that homeownership units undergoing CGP-funded rehabilitation should not be conveyed until the work is done. THRHA argues "HUD surely considered this program-wide letter when it reversed the decision contained therein, and held (in Guidance 98-19) that conveyance should

precede repair work." THRHA SOR, Dkt. 60-5, p. 2. The argument misreads the document and the effect of Congress's enactment of NAHASDA on pre-NAHASDA grant programs such as CGP. The Administrator of the Alaska Office of Native American Programs does not have the authority to issue "program-wide directives." By directing the letter "to all Indian Housing Authorities," he addressed only Indian Housing Authorities in his jurisdiction, *i.e.*, in Alaska. Other than the choice of words the Administrator used to address the letter, THRHA provides no evidence that this letter was a program-wide directive. Moreover, THRHA could have presented the document and urged its current arguments to HUD during the repeated administrative appeals related to CGP. If it had, HUD would have been able to explain that there was no "reversal" involved and reiterated that Congress enacted NAHASDA changing the way certain funding programs worked. And, as set out in the Transition Notice explaining many of the changes wrought by NAHASDA's replacement of housing assistance programs such as CGP, monies remaining from pre-NAHASDA CGP grants were freed from the restrictions of the prior program. *See* Indian Housing Block Grant Program - Revised Notice of Transition Requirements, 63 Fed. Reg. 4076, 4083 (January 27, 1998) ("Any unobligated/unexpended funds which were approved for new development, modernization, operations or HOPE can now be used for any eligible NAHASDA activity.").

THRHA further argues for supplementation because some of the CGP-related documents "clarify facts already in the record." THRHA SOR, Appx. D, p. 4. They do not clarify, but rather add to facts in the record. THRHA had an opportunity to provide these documents during the administrative process and did not. It should not be allowed to supplement the record with them now.

4. ***Category 3****: documents should not be added on the basis that they may contain a "legislative fact."*

Plaintiffs argue that a number of the documents they submit should be added to the administrative record because they present legislative facts. Legislative facts are "generalized statements about the world that help the court decide questions of law and policy," which "includes any generalized fact about the world—not specific to the parties—that a judge uses to decide a case or to make his opinion more persuasive." Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, Va. L. Rev. 1255, 1265-66 (2012) (*citing* Kenneth Culp Davis, *Administrative Law Text* § 7.03 (3d ed. 1972)). A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties. *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976).

Based on the definition of "legislative fact," it does not appear that HUD policy issuances, correspondence, or guidance are documents that the Court should consider to be legislative facts. In addition, assuming that the Court concluded that certain of the documents presented generally accepted facts about the world, the Court could take judicial notice of those facts but should not add the documentation to the administrative records.

5. ***Category 4****: otherwise proper record documents submitted in excerpted or different form should not be added in the form submitted.*

NHA has submitted certain papers for addition to its administrative record that are excerpts or different versions of documents that HUD would otherwise supplement when bringing NHA's administrative record up-to-date with the amended and supplemental complaint. *See* NHA SOR, Dkts. 59-9 through 59-12, 59-18 (Exhibits 9-12, 18). HUD does not oppose supplementing the NHA administrative record with the full documents as they exist in HUD's records. Any other version would not accurately reflect material considered by the agency.

6. Record supplementation is not warranted under the limited exception for extra-record material to clarify a complex or technical issue.

Plaintiffs cite to *Metrex Research Corp. v. United States*, 151 F.R.D. 122 (D. Colo. 1993) for the proposition that the Court may allow supplementation of the record to "clarify a complex or technical issue" and "promote efficient judicial review." SOR at pp. 14-15. However, "any exception to [the] general rule against the use of extra-record materials must be extremely limited." *American Mining Congress*, 772 F.2d at 626. These coordinated cases are distinguishable from *Metrex* and do not fall within this limited exception.

In *Metrex*, a chemical germicide producer challenged EPA's publication of test results required to verify its claims about the product before marketing. Plaintiff claimed that the test, the Association of Analytical Chemists (AOAC) Sporicidal Test, and its scientific protocols were flawed. Noting controversy in the scientific community about the test and that EPA had commissioned the design of a better test protocol, the court allowed limited discovery in order to clarify the protocol used in the complex scientific test and because it was likely that the science had changed since the agency action. *Metrex Research Corp*., 151 F.R.D, at 124.

Here there are no complex scientific protocols and no changing science, so *Metrex* does not help Plaintiffs' arguments for extra-record material based on complexity. HUD did not "test" whether the recovered funds had been spent on affordable housing activities, so there is no complexity to clarify on that issue. And, HUD's "test" of the eligibility of homeownership units for FCAS does not involve scientific or technical complexity. Instead, in determining when a homeownership unit ceased to be counted as FCAS, HUD considered: (1) when was the unit demolished; (2) when was the unit conveyed to its homebuyer; or (3) when could it have been conveyed based on amortization of the purchase price at the end of a lease-purchase term.

7. Record supplementation is not needed to facilitate review of HUD's actions; rather, review can be aided by briefing unit disqualifications by category in reliance on the actual administrative records.

The administrative records should not be supplemented with "summaries" or otherwise in order to help the Court review HUD's FCAS disqualifications in these cases. This does not, however, mean that information from the administrative record cannot be organized to facilitate the Court's review. For example, briefing on the disqualification decisions, if necessary, can be organized by categories of circumstances in which HUD disqualified the units. Plaintiffs' supplemental complaints, for example, summarized categories of HUD disqualification decisions that were allegedly unlawful. *See e.g.*, *NHA*, Suppl. Compl., Dkt. 27 ¶ 13 (listing units for which tenants were in arrears in their monthly payments at the time the unit becomes eligible for conveyance, units that were being repaired or modernized at the time the unit became eligible for conveyance, units that had been demolished and replaced, units converted to low-income rentals, units that were transferred to new homebuyers, units not conveyed because of delays by the Bureau of Indian Affairs, units not conveyed because transfer of title was subject to resolution of rights in a probate proceeding). HUD did not disqualify units in most of those categories, but they nonetheless describe a method for facilitating briefing on the disputed unit disqualifications.

Briefing on actual unit disqualifications could follow this model and summarize HUD decisions, but with citations to the administrative records that can be verified or corrected against the actual record. Such a procedure perfectly comports with the APA, which explicitly contemplates that courts decide the validity of agency action based on "those parts of it cited by a party." 5 U.S.C. § 706.

CONCLUSION

For the reasons stated above, the case should be dismissed or transferred to the appropriate court of appeals for review under 25 U.S.C. § 4161(d). Should the Court retain jurisdiction, the available remedies are limited to deciding all relevant questions of law; setting aside HUD action held unlawful; remanding to HUD; and obligating or ordering HUD to use set aside funds as appropriate after remand.

Dated July 3, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on July 3, 2013, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

None

s/ Timothy B. Jafek
Timothy B. Jafek