IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-CV-01516-RPM

NAMBE PUEBLO HOUSING ENTITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD), Shaun Donovan, Secretary of HUD, Sandra Henriquez, Assistant Secretary for Public and Indian Housing, and Glenda Green, Director, HUD's Office of Grants Management, National Office of Native American Programs,

Defendants.

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF RELIEF REQUESTED

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I. Jurisdiction to Review These APA Cases Resides in the District Court and Not in the Court of Appeals.

Despite the fact that the *Fort Peck* case has been pending before this Court for over eight years, and many of the other coordinated cases for more than five years, HUD opens its Response Brief arguing that, in fact, exclusive, original jurisdiction over these cases has all along resided with the Circuit Court of Appeals and not the District Court. Not only is this the first time the Defendants have argued that position before this Court--and the Defendants never raised it with the Tenth Circuit when *Fort Peck* was on appeal---but that position is diametrically opposed to the position these same Defendants took when Fort Peck Housing Authority ("Fort Peck") initially filed its case in the United States Court of Appeals for the Ninth Circuit. Moreover, it is contrary to law.

In 2004, prior to filing its action in this Court, Fort Peck filed a lawsuit challenging HUD's actions under NAHASDA in the United States Court of Appeals for the Ninth Circuit. On December 3, 2004, Fort Peck and the HUD respondents filed a Stipulation for Dismissal Without Prejudice to Reinstatement with the Ninth Circuit wherein HUD [the Respondent] stipulated that "Respondent will not dispute that 28 U.S.C. § 1331 confers jurisdiction over Petitioner's [Fort Peck] APA claims against Respondent and that under 28 U.S.C. § 1391(e) proper venue lies in the United States District Court for the District of Colorado." *Id.*, p. 2.[1] Apparently HUD forgot about that Stipulation and the position it took before the Ninth Circuit--that *this* District Court, rather than the circuit courts of appeals, has jurisdiction over these NAHASDA cases.

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[1] A copy of the Stipulation for Dismissal Without Prejudice to Reinstatement that was filed with the Ninth Circuit is attached hereto as Exhibit "1".

HUD's position that the circuit courts of appeals have exclusive jurisdiction over these cases is also contrary to the express wording of the statute on which HUD relies. NAHASDA § 401(d) begins with the recital that, "any recipient who receives notice *under subsection (a)* of the termination, reduction or limitation of payments under this Act … 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 …". *Id.* (emphasis supplied). NAHASDA § 401(a) provides that, "except as provided in subsection (b) *if the Secretary finds after reasonable notice and opportunity for hearing* that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act, the Secretary shall [take one of the listed four actions]." *Id.* (emphasis supplied). On its face, the jurisdiction of the courts of appeals is invoked only after the recipient tribes have been provided the "opportunity for [a] hearing ...". And, § 401(d)(4) provides that "upon the filing of the record [of such hearing] with the [Appellate] Court, the jurisdiction of the [Appellate] Court shall be exclusive …". Here, it is undisputed no plaintiff was provided the opportunity for or given a hearing and thus no record from a hearing exists that could be filed. As the Ninth Circuit observed in *Amvac Chemical Corp. v. U.S. EPA*, 653 F.2d 1260 (9th Cir. 1980):

> In this case, the agency action objected to was not to hold a public hearing on any crop except tomatoes. We hold that a decision not to hold a public hearing is not an order issued following a public hearing. For review, that decision must be presented first to a district court and not originally to a circuit court.

Id. at p. 1265. [2]

[2] In *Amvac Chemical, supra*, the Ninth Circuit was addressing its and the District Court's jurisdiction under 7 U.S.C. § 136.

In the companion case filed in the United States Court of Federal Claims by the Yakama Nation Housing Authority ("Yakama"), the Court of Federal Claims rejected this new jurisdictional argument now trotted out by HUD in this case. There, in rejecting HUD's argument that Yakama pled itself out of that court's jurisdiction because Yakama alleged HUD violated the notice and hearing requirements in NAHASDA §§ 401 and 405, the court ruled as follows:

> Furthermore, it is clear that § 4161 "does not present a 'specific and comprehensive scheme for administrative and judicial review' of all claims involving NAHASDA. Instead, section 4161 [NAHASDA § 401] merely authorizes the circuit court to hear challenges to determinations made under section 4161(a), following the requisite notice and hearing procedures set forth in that section. Only upon the filing of the record with the circuit court does jurisdiction become exclusive, and then only with respect to the claim at issue (*i.e.*, a challenge to the section 4161(a) determination)."

Yakama Nation Housing Authority v. The United States, 102 Fed. Cl. 478, 488 (2011).

Incredibly, HUD quoted that very passage to the Ninth Circuit Court of Appeals in a recent brief *contesting circuit court jurisdiction* in a case virtually identical to these coordinated cases. In *Fort Belknap v. HUD*, No. 12-70221, 2013 WL 4017285 (9th Cir. August 8, 2013), HUD recaptured NAHASDA grant funds from Fort Belknap alleging that in prior years, Fort Belknap had included housing units in its FCAS that should have previously been conveyed and thus received more NAHASDA grant funds than it was entitled to receive. When Fort Belknap sought judicial review of those recaptures before the Ninth Circuit under NAHASDA § 401(d), HUD, relying on *Yakama Nation Housing Authority, supra*, argued § 401 did not apply and that the Ninth Circuit did not have jurisdiction to hear the matter:

> Section 4161 [NAHASDA § 401] would confer jurisdiction here only if the Secretary had (1) determined that Fort Belknap failed to substantially comply with NAHASDA and (2) imposed one of the four remedies listed above. *See*

> *Yakama Nation Housing Auth. v. United States*, 102 Fed.Cl. 478, 488 (2011). (Section 4161 "does not present a specific and comprehensive scheme for administrative and judicial review of all claims involving NAHASDA. Instead, section 4161 merely authorizes the circuit court to hear challenges to determinations made under section 4161(a), following the requisite notice and hearing procedures set forth in that section.")

Brief for the Respondents, p. 18, filed in *Fort Belknap v. HUD*, Ninth Circuit case no. 12-70221, Dkt. # 21 (June 12, 2012). The Ninth Circuit agreed with HUD and dismissed the matter for lack of jurisdiction:

> In short, then, we have jurisdiction only where HUD (1) determines, after reasonable notice and an opportunity for hearing, that a recipient has failed to comply substantially with NAHASDA's provisions, and (2) imposes one of the four statutorily required sanctions for such failure. *See id.* As explained below, neither condition is met here. Accordingly, we lack jurisdiction over Fort Belknap's petition and dismiss it without reaching the merits.

Fort Belknap, supra, 2013 WL 4017285 at*5. Indeed, at the end of its opinion, the Court noted that, "At oral argument, HUD's counsel suggested that Fort Belknap could raise its claim in the appropriate district court." *Id.* at n. 11.[3]

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[3] Remarkably, HUD recently filed a Notice of Supplemental Authority which pointed this Court to the *Fort Belknap* decision but neglected to advise this Court that there, the Ninth Circuit held it did not have jurisdiction. Rather, HUD merely tells this Court the Ninth Circuit found that HUD "retained its common law authority to recover overpayments…independent of [NAHASDA]." *See, e.g.*, Defendants' Notice of Supplemental Authority, Dkt. # 62 (August 23, 2013).

In *Fort Belknap, supra*, in addition to holding it did not have jurisdiction over the dispute, the Ninth Circuit erroneously concluded that HUD had inherent authority to recapture money from Fort Belknap relying, in part, on the 2008 amendment to § 401 providing that misreporting the number of FCAS units does not, by itself, constitute substantial noncompliance with NAHASDA. *See* NAHASDA § 401(a)(2). Not only is that portion of the Ninth Circuit's decision mere dicta, but those 2008 amendments are not applicable to these coordinated cases, *see* 25 U.S.C. § 4152(b)(1)(E), and in any event the Ninth Circuit failed to consider the long line of cases holding it is fundamental that a federal agency has only those powers which have been conferred upon it by Congress. *See Am. Bus Ass. v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the

Now, just four months after that oral argument, HUD argues just the opposite before this Court citing to a number of cases that are inapplicable and readily distinguishable. For example, in *FTC v. Dean*, 384 U.S. 597 (1966), the court decided that the All Writs Act, 28 U.S.C. § 1651(a), gave the courts of appeals the power to issue injunctions to protect their jurisdiction under section 11(c) of The Clayton Act, 15 U.S.C. § 21(c). That case, involving a challenge to a

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Constitution.") (emphasis in original); *Louisiana Pub. Ser. Comm'n. v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act…unless and until Congress confers power upon it.").

Those distinctions and arguments were not presented to the Ninth Circuit by Fort Belknap (or HUD for that matter). *See* Motion to Dismiss For Lack of Jurisdiction, Ninth Circuit case no. 12-70221, Dkt. # 6 (February 29, 2012); Response To Motion To Dismiss, Dkt. # 10 (March 13, 2012); Brief for the Petitioners, Dkt. # 13 (April 9, 2012); Brief for the Respondents, Dkt. # 21 (June 12, 2012). In fact, HUD emphasized to the Ninth Circuit that "The alleged failure to comply with 24 C.F.R. § 1000.319(d) is the only basis invoked in Fort Belknap's brief for disturbing HUD's overpayment determination. *See* Pet. Br. 7-12." Brief for the Respondents, Dkt. # 21 (June 12, 2012), footnote 10, page 24. Beyond that, the Belknap "inherent authority" argument creates an anomaly that the Ninth Circuit did not consider - if a TDHE made a mistake, HUD can take the money from them without a hearing, but if a TDHE is guilty of substantial non-compliance, the TDHE gets a hearing before HUD can take the money from them. Those innocent of wrong doing get no protection under the Belknap theory. Congress could not have intended that result.

The Plaintiffs here agree the federal government retains the inherent authority to bring a civil common law action in an Article III court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment", absent statutory language to the contrary, s*ee U.S. v. Wurts*, 303 U.S. 414, 415, 416 (1938); *U.S. v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 16 (1st Cir. 2005), and do not quarrel in the slightest with HUD's inherent recourse to the judiciary. Indeed, §401(c) of NAHASDA expressly reserves that right. However, it is decidedly wrong to suggest that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the Tribes as a matter of administrative sanction. There is no such "inherent" authority--any authority to recover funds by purely administrative means must come from express delegation of that authority from Congress, in a statute. *See generally Am. Bus Ass. v. Slater, supra*, 231 F.3d at 5 (agency's authority to bring a civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary). That was the holding of this Court when it considered the issue after extensive briefing. *See Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev., No. 05-CV-00018-RPM, 2012 WL 3778299, at *11-12 (D. Colo. Aug. 31, 2012)* ("Fort Peck III").

merger as violative of the Clayton Act, has nothing to do with the statutes at issue here or the factual posture of these coordinated cases.

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) is no different. The statute at issue there was Section 313(b) of the Federal Power Act, which, *inter alia*, provided that the circuit courts of appeals "shall have exclusive jurisdiction to affirm, modify or set aside such order [made by the Commission] in whole or in part." *Id.* at 335. In *City of Tacoma*, a hearing "consuming 24 days, was conducted by a Commission examiner …". *Id.* at 326. In that case, there was no argument over whether the opportunity for a hearing was a prerequisite to circuit court jurisdiction as such a hearing occurred.

Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989) is similarly distinguishable. There, the jurisdictional statute at issue was 15 U.S.C. § 717r(b) which provided for circuit court of appeals jurisdiction over orders issued by the Federal Energy Regulatory Commission ("FERC"). Unlike the NAHASDA statute at issue here, the Natural Gas Act, 15 U.S.C. § 717-717w (1988), contains no express requirement for a hearing in order for the FERC to act or for the parties to invoke the circuit court of appeal's jurisdiction. In fact, in *Williams*, the FERC denied the request for a hearing. *Id.* at 258. *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979) is also inapplicable. There, the argument was over jurisdiction under Section 402(b) of the Communications Act and Section 1006 of the Aviation Act. The question there was whether a "no hazard" determination was the same as an "Order" thus vesting exclusive jurisdiction in the courts of appeals. *Id.* at 932-933. That case has nothing to do with the issues in this case.

HUD also cites *City of Boston v. HUD*, 898 F.2d 828 (1st Cir. 1990) to support its jurisdiction argument. HUD cited *Boston* in a companion case filed by the Lummi Tribe in the Court of Federal Claims, which was distinguished and rejected by that court. In *Lummi Tribe of the Lummi Reservation v. The United States*, 99 Fed. Cl. 584 (2011) the court observed that:

> Similarly, in *City of Boston*, 898 F.2d at 828, the Court of Appeals for the First Circuit interpreted a provision virtually identical to section 4161 as vesting jurisdiction in the circuit court over a claim challenging HUD's termination of the city's grant without a hearing. Significant for our purposes, however, the court explicitly declined to reach the issue of whether such jurisdiction was exclusive. *Id.* at 835 n. 7 ("We need not decide whether the district courts have concurrent jurisdiction under the Administrative Procedure Act over actions to compel HUD to provide a hearing unlawfully withheld under [42 U.S.C. § 5311(a)].")

Id. at 600. HUD's use of *City of Boston* cannot be squared with the court's holding in *City of Kansas City v. U.S.H.U.D.*, 861 F.2d 739 (D.C. Cir. 1988), the frequently cited loadstar case in these proceedings.

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) is even less helpful to HUD. The statute at issue in *Lorion, supra*, provided, *inter alia*, that "in any proceeding under this chapter … the Commission shall grant a hearing upon the request of any person whose interest may be affected the by proceeding." 42 U.S.C. § 2239(a)(1). Not surprisingly, the Court found that exclusive jurisdiction vested in the courts of appeals because, "it is clear that § 2239 contemplates the possibility of proceedings without hearings. Absent a request from a person whose interest may be affected by the proceedings no hearing is required." *Lorion, supra*, 470 U.S. at 741.

Finally, HUD argues that exclusive jurisdiction in the circuit courts of appeals can be implied from § 401(d), citing to *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d

70 (D.C. Cir. 1984). That same argument was rejected by the Court of Federal Claims in *Lummi, supra,* addressing its jurisdiction under the Tucker Act:

> Similarly devoid of merit is defendant's contention that 25 U.S.C. § 4161(d)(4) [NAHASDA § 401(d)(4)] divests this court of jurisdiction over plaintiffs' claims. In defendant's view, a statute that provides for review of a claim in another court withdraws jurisdiction from this court even in the absence of specific language that such jurisdiction is exclusive.
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> * * *
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> Defendant has offered no evidence that Congress intended the review procedure set forth in section 4161 to displace this court's traditional jurisdiction to afford relief for the violation of a money-mandating statute. *See, e.g., California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) (finding no evidence in the text or legislative history of the Flood Control Act of 1928 that Congress had "withdrawn the Tucker Act grant of jurisdiction," where "the Tucker Act . . . is not mentioned in the statute and does not appear in the legislative history to have been discussed at all," relying on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984)).

Id., 99 Fed. Cl. at 599.

Further, the court's holding in *Telecommunications Research, supra,* is not as broad as HUD argues and, in fact, demonstrates why HUD's position is wrong. In *Telecommunications Research,* the court wrote, "It 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*." *Id.* at 77 (emphasis supplied). Read together, NAHASDA §§ 401(a) and (d) clearly require "reasonable notice and opportunity for hearing" after which "the Secretary finds … that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act, …". HUD did not provide an opportunity for a hearing and no hearings were held. Thus, the procedures described in NAHASDA § 401(d) for the review of hearings never held have never

been invoked. Recognizing that principle and rejecting the same argument HUD is making here, the Court of Federal Claims in *Lummi Tribe of the Lummi Reservation, supra*, ruled as follows:

> Section 4161(d)(4) in fact indicates that jurisdiction in a circuit court is exclusive only "[u]pon the filing of the record with the court," a record presumably generated through the notice and hearing procedures referenced in section 4161(a). It would be an anomalous result indeed to conclude that section 4161 deprives this court of jurisdiction even where it terms -- the filing of a record with a circuit court -- have not been met.

99 Fed. Cl. 584 at 599.

HUD's newly minted argument that the circuit courts of appeals have all along had original, exclusive subject jurisdiction over these coordinated cases is wrong, remarkably disingenuous and should be rejected by this Court like so many others have done.

II. All NAHASDA Appropriated Funds Form Part of the Same "Res," and All are Therefore Accessible Under the APA to Satisfy the Tribes' Statutory Entitlement Under NAHASDA.

In its original memoranda, the Tribes demonstrated that**:**

- HUD routinely carries forward funds from a fiscal year, and distributes them in subsequent fiscal years. As much as $17.5 million/yr. has been transferred between fiscal years under this practice; [4]
- HUD's own regulations provide that any money recaptured from a fiscal year will be redistributed to other tribes in subsequent fiscal years and that is exactly what HUD did in these consolidated cases. 24. C.F.R. §1000.536. Appendix B at 5-6; Declaration of

[4] *Tlingit Haida Regional Housing Authority v. USHUD et al.*, Civ. Action No. 1:08-civ-999451, Plaintiff's Statement of Relief Requested and Motion to Supplement the Record, Appendix B at 5. Not all Tribes filed an Appendix B (Plaintiff in this action did not file an Appendix B). In cases where the Appendix was filed, they are virtually identical. All page references in this subsection to Appendix B are from the Tlingit Haida Regional Housing Authority appendix.

Jacqueline A. Kruszek, *Fort Peck Housing Authority v. HUD*, 05-cv-00018-RPM, Dkt. # 43, ¶¶ 4, 5 (June 29, 2006) ("Kruszek Declaration");

- HUD's regulations also provide that, if a Tribe successfully brings an underfunding claim for a fiscal year, HUD will use money from a *subsequent* fiscal year to pay that claim. 24 C.F.R. §1000.336(e)(4)(i); Appendix B at 5-6; and
- In FY 2008, HUD utilized over $26 million in FY 2008 funds to pay for underfunding that occurred *prior to FY 2003*. *Id.* at 7.

HUD disputes none of this, and by its silence concedes that NAHASDA funds are fungible, and may pass back and forth freely between fiscal years. Rather, HUD maintains that the fluid nature of NAHASDA funding does not "pre-empt the distinction between substitute and 'specie' money." HUD Response Brief at 22.

The Tribes have never made such a claim, and HUD is shooting at a straw man. The Tribes have never questioned the distinction between "enforce[ing] the statutory mandate itself, which happens to be one for the payment of money,"[5] on the one hand, and seeking "substitute or compensatory relief" [6] on the other.

To the contrary, the Tribes recognize that distinction, and claim that HUD's regulations and past conduct prove that NAHASDA funding really is a "permanent revolving appropriation."[7] Put in the *parlance* of the present controversy, NAHASDA funds appropriated

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[5] *Zellous v. Broadhead Associates*, 906 F.2d 94, 97 (3d Cir. 1990), *quoting Bowen v. Massachusetts*, 487 U.S. 879 (1988).

[6] *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999).

[7] *Yakama Housing Authority v. United States*, 102 Fed.Cl. 478, 487 (Ct. Cl. 2011).

in, say, FY 1998, are part of the same "res" as NAHASDA funds appropriated in later years, as HUD's own rules and conduct illustrate.

The courts have told us to look to Congress to determine whether, for purposes of applying *Bowen v. Massachusetts,* 487 U.S. 879 (1988), a "res" of funds is comprised of one or many years. "The *res* at issue is identified by reference to the congressional appropriation that authorized the agency's challenged expenditure." *County of Suffolk, N.Y. v. Sebelius,* 605 F.3d 135, 141 (2nd Cir. 2010).

Let us then look at the NAHASDA appropriations that bookend this controversy—1998 and 2008. The two are virtually identical, except for amount. Both appropriate funds "for the Native American Housing block grant program"—*not for projects in any particular year, but for the program generally.* Second, both "remain available until expended." Division K, Title II, P.L. 110-161 (FY 2008); Title II, P.L. 105-65 (FY 1998).

HUD can find no case holding that, where an appropriation is perpetual, and expenditures from it are not tied to any fiscal year, that an APA appellant is somehow seeking "substitute money" when it asks that later fiscal year money (or carried over earlier fiscal year) be utilized to satisfy a statutory entitlement under the very program for which the perpetual appropriation was made.

Certainly none of HUD's cases stand for such a proposition. In *City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), HUD's statutory authority to expend the funds sought had expired years previous (*see* P.L. No. 99-160). To the court, the Appropriations Clause (U.S. Const., Art. I, § 9, cl. 7) thus barred the application of *Bowen v. Massachusetts, supra. City of Houston, supra*, 24 F.3d at 1428.

Here, by contrast, HUD invokes neither the Appropriations Clause nor the Anti-Deficiency Act (31 U.S.C. § 1341(a)) as a bar to APA recovery of the Tribes' statutory entitlements. This is one of the more telling aspects of HUD's memorandum, because it represents HUD's acknowledgement that appropriated money does exist, today, to fulfill the Tribes' statutory due. The omission, moreover, was plainly intentional. Claiming that newly-appropriated money cannot be used to honor past statutory liabilities would by necessity invalidate both HUD's regulation to the contrary, and HUD's use of over $26 million of FY 2008 to pay for pre-2003 NAHASDA unit undercounts. *See* pp. 9, 10, *ante*.

County of Suffolk, N.Y. v. Sebelius, 605 F.3d 135 (2nd Cir. 2010), was another case where Congress had put sideboards on the appropriated funds sought, hence defining the "res" narrowly. There, the appropriations in question were required to be expended by the end of the second succeeding fiscal year. *See* 42 U.S.C. § 300ff-20(a); 42 U.S.C. § 300ff-32(a); Sec. 261, P.L. 109-415.

If one accepts that the terms of the Congressional appropriation defines the "res," then the difference between these cases and the instant controversy becomes manifest. In *Houston* and *County of Suffolk*, Congress had drawn a fence around the availability of appropriated funds, the contours of that fence defining the "res." Here, there is no fence. Under the terms of HUD's appropriations, carry-over funds, and current NAHASDA appropriated funds, are available to fulfill the Tribes' statutory entitlements, regardless of the fiscal year in which that entitlement arose.[8]

[8] The remaining cases cited by HUD warrant only brief mention. *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), stands only for the unremarkable proposition that a lien on property is a "substitute" form of relief for actually receiving the money secured by the lien.

On the other side of this coin, the Tribes cited four APA cases where either subsequent fiscal year money was plainly utilized to satisfy prior year statutory entitlements, or the court believed that the year-of-appropriation to be irrelevant. In *Bowen*, *supra*, the controversy involved disallowed sums in the years 1978-80, but the suit challenging that disallowance was not brought until 1983. It concerned the Supreme Court not at all that the relief it sanctioned in that case would undoubtedly involve use of funds from fiscal years subsequent to FY 1978-80.

In *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672 (D. Kansas 1991), the court denied a motion to dismiss on subject matter jurisdiction grounds (a motion premised on the assertion that the appellant was seeking "money damages"). The appellant was seeking additional farm support payments for its 1987 crop. The motion to dismiss came before the District Court in May 1991. The court ruled that *Bowen* applied, and that the appellant was merely seeking that to which it was statutorily entitled, even though, by 1991, any award to appellant would plainly need come from post-1987 farm support appropriations.[9]

In *Zellous v. Broadhead Associates,* 906 F.2d 94 (3rd Cir. 1990), the plaintiffs sought refunds for allegedly excessive Section 8 rent obligations for the years 1985 and previous. The "money damages" issue was brought before the District Court in 1987, and before the Court of Appeals in 1990. Again, and obviously, granting the requested funds would require use of post-

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Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) did not involve the APA or the federal government at all. That case concerned the scope of a private cause of action under the Employee Retirement Income Security Act ("ERISA"). The court's mention of *Bowen* in that case was merely to chide appellant for using an APA case to define the scope of ERISA.

[9] HUD argues that *Olenhouse* should be ignored, because it was an interlocutory ruling, and its treatment of *Bowen* is dicta. The decision was interlocutory only in the sense that it was a denial of a motion to dismiss based on "money damages" grounds. And its treatment of *Bowen* was not dicta—it was the central issue underlying the motion to dismiss.

1985 Section 8 appropriations. That fact did not deter the Court of Appeals from holding that the plaintiffs were merely "seek[ing] to enforce…retrospectively the mandate contained within [the applicable statute]." 906 F.2d at 98.[10]

Finally, in *Holly Sugar Corp. v. Veneman*, 355 F.Supp.2d 181 (D.D.C. 2005), *rev'd. on other grounds* 437 F.3d 1210 (D.C. Cir. 2006), the plaintiffs sought a refund of excessive interest charged on commodity loans from 2002-2005. The *Bowen* issue reached the District Court in January 2005, yet the issue of whether there remained any FY 2002-2004 commodity loan program funding available to reimburse the plaintiffs was not even raised—the issue apparently being irrelevant to both the court and the U.S. Department of Agriculture.[11]

The Tribes are well-aware of this court's August 1, 2006 ruling regarding the *Bowen* issue in *Fort Peck Housing Authority v. U.S. Department of Housing and Urban Development*, Civ. Action 05-cv-00018. First, the ruling did not consider the use of future carry-over funds to provide the Tribes' their statutory entitlement—funds that have reached $17 million/yr. in the past. *See* p. 9, *ante*. Second, the court did not deal with the actual Congressional language for NAHASDA appropriations, nor the fact that HUD's own rules and practice treat NAHASDA appropriations from year-to-year as freely interchangeable.

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[10] HUD urges the court to disregard *Zellous* arguing the case "concerns an entirely different body of law." The materiality of that distinction is not apparent, given that the substantive issue—the applicability of *Bowen*—was exactly the same.

[11] HUD claims that *Holly Sugar* is unpersuasive because it was reversed on other grounds—a fact noted in the Tribes' original memorandum. The case was reversed on the merits. If the Court of Appeals felt any serious concerns over subject matter jurisdiction, one would have presumed that the Court would have addressed that issue first, before diving immediately into the merits of the case.

To the extent that the court views its prior ruling as compelling a mere "pyrrhic victory" to the Tribes,[12] the Tribes would respectfully suggest that court's ruling was based on a misperception that NAHASDA appropriations for a given fiscal year may be utilized only for obligations arising in that fiscal year—a misimpression that HUD has done little to correct. As we know now, Congress, and HUD (by rule and by practice), view NAHASDA appropriations between 1998 and 2013 as an indivisible whole—a single "res," available to meet any statutory obligation that may arise under the Act.[13]

III. Defendants' New Argument that the Four-Year Statute of Limitations Found in 28 U.S.C. § 1658 Applies to these Consolidated Cases is Without Merit.

In its Response Brief, HUD argues for the first time that the four-year statute of limitations found in 28 U.S.C. § 1658 is applicable to these coordinated cases. *See, e.g.,* Def. Resp., Dkt. # 57, at 28-30. Defendants have previously argued that "[t]he six-year statute of limitations at 28 U.S.C. § 2401(a) applies to APA challenges like the one at issue here." Dkt. # 38, at 82. The applicable language in § 2401(a) provides: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Further, as HUD previously recognized, these actions arise under 5 U.S.C. § 702 of the Administrative Procedure Act. *See* Def. Resp. at 65-68. Section 702 provides in relevant part: "The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . ."

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[12] *United States v. Michigan,* 781 F.Supp. 492, 497 (E.D. Mich. 1991).

[13] The court's August 1, 2006 ruling is not a final, appealable order, as the Tenth Circuit did not address Fort Peck's cross-appeal of that ruling. Nor would the ruling even constitute the law of the case with respect to the other Tribes involved in this litigation.

Defendants, disavowing their earlier position, now urge that rather than the six-year statute of limitations provided by § 2401(a) for actions against the United States, this Court should apply the four-year limitation provided by 28 U.S.C. § 1658. Defendants' argument misconstrues this statute. Section 1658 provides:

> (a) *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 may not be commenced later than 4 years after the cause of action accrues.

Id. (emphasis supplied). At the same time that Defendants embrace § 1658 they disavow the clear and unequivocal language of § 2401(a) which provides: "*every* civil action commenced against the United States" has a six-year statute of limitations (emphasis supplied). In presenting this argument, Defendants ignore the plain language of both 28 U.S.C. § 1658 and 28 U.S.C. § 2401(a). This argument must be rejected. Defendants provide no suggestion as to how the Court should negotiate around the all-inclusive phrase "every civil action" found in § 2401(a) when it urges that Plaintiffs' actions against an agency of the United States should be governed instead by the four-year statute of limitations in § 1658. Similarly, to accept HUD's new argument, the Court must also ignore the language of § 1658 which limits its application to exclude claims where there is an applicable statute providing limitations for the action. By the unambiguous phrase, "except as otherwise provided by law," § 1658 makes it explicit that it does not apply to actions such as these actions against the United States where Congress has *otherwise provided* a statute of limitations. Section 1658 thus did not repeal or amend § 2401 and clearly is not applicable to Plaintiffs' claims against the United States. *Horizon Lines, LLC. v. U.S.*, 414 F.Supp.2d 46, 52, n. 2 (D.D.C. 2006) ("[Section 1658] does not apply to suits against the

United States under the APA, which are subject to a six-year limitation period." Citing to 28 U.S.C. § 2401(a).).

Each of these statutes must be read according to the most basic rule of statutory construction, that is, Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). When a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). *Accord Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). In light of the fact that § 1658 begins with "except as otherwise provided," it simply cannot be read as vacating or modifying an existing statute. Similarly, § 1658 cannot be read to mean that § 2401(a), which covers "*every* civil action" brought against the United States, no longer means "every" but now covers only some undefined sub-class of claims brought against the United States.

HUD's new argument that § 1658 applies also fails to acknowledge the statute's further limitation that it only applies to "civil action[s] arising under an Act of Congress enacted after the date of [§ 1658's] enactment." 28 U.S.C. § 1658. *See also Harris v. Allstate Insurance Co.*, 300 F.3d 1183, 1190 (10th Cir. 2002). As previously presented, Plaintiffs' claims arise under § 702 of the APA, enacted in 1976, long before the operative date for § 1658. Accordingly, even if § 2401(a) did not provide for a six-year statute of limitations for *all* actions brought against federal agencies, § 1658 still would not govern these coordinated cases which are brought under a statute passed before December 1, 1990.

To the extent there is any doubt as to the meaning of § 1658, it is helpful to understand the void in federal law that § 1658 is designed to fill. As the Court is aware, unlike actions

brought against the United States where § 2401(a) specifies a six-year statute of limitations, many federal statutes have been passed without any applicable statute setting out the limitations for such actions. The most notable examples of such laws may be the federal Civil Rights Act of 1866, particularly 42 U.S.C. § 1983. To compensate for the lack of an applicable federal statute of limitations, the practice has been to apply an analogous state statute of limitations found to be consistent with the purpose of the federal action. *Wilson v. Garcia,* 471 U.S. 261, 266-267 (1985). As a result, determining a limitations period for many federal actions has been a very complicated task lacking uniform results. For example, since § 1983 claims are generally brought against state and local government officials, the question was raised as to whether the shorter limitations provided by state government tort claim statutes should be applied to § 1983 actions rather than a state's general tort statute of limitations which is generally longer. *See Wilson v. Garcia,* 471 U.S. at 276-279. Alternatively, it was argued, since the intent required to prove a § 1983 action closely resembles the standard for intentional torts under the common law, the shorter limitations applied to intentional torts should apply. *See Owens v. Okure*, 488 U.S. 235, 251 (1989). The Supreme Court in both instances determined that each state's general tort statute of limitations would apply while expressing the "hope" that these determinations would "end the confusion over what statute of limitations to apply. . . ." *Owens v. Okure*, 488 U.S. at 251. *See also Wilson v. Garcia*, 471 U.S. at 266-267 (same). Given the task of identifying from the statute books of each of the fifty states plus the territories applicable statutes of limitation for numerous federal actions, uncertainty continued after *Garcia* and *Owens. See, e.g., Crocker v. Piedmont Aviation, Inc.,* 49 F.3d 735, 741-42 (D.C. Cir. 1995) (Airline Deregulation Act); *Cheeney v. Highland Cmty. Coll.,* 15 F.3d 79, 80 (7th Cir. 1994) (Rehabilitation Act of 1973);

and *Trustees of Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Const. Co., Inc. of Wyoming*, 850 F.2d 613, 618 (10th Cir. 1988), *holding modified by N.L.R.B. v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384 (10th Cir. 1992) (ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980).

Section 1658 was passed to assure that after its passage, with respect to new federal actions authorized by Congress, if Congress did not provide an applicable statute of limitations for that action, there would be a universal default statute of limitations. Unlike actions under § 1983 (as well as a number of other federal actions), since § 2401(a) provides a limitation period for claims against the United States, there is no void for § 1658 to fill when an action is filed under the APA.

Defendants' argument that § 1658 applies to actions such as those brought in the coordinated cases relies heavily upon *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), which considered whether 1991 amendments to 42 U.S.C. § 1981 constituted an act of Congress passed after the enactment of § 1658. Like other provisions of the Civil Rights Act of 1866, there is no statute setting out the limitations for claims brought under § 1981. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987). As originally drafted, § 1981 authorized actions to secure the equal right of racial minorities "to make and enforce contracts." Before the 1991 amendments, the statute was interpreted as being limited to only the actual making or enforcement of contracts and providing employee protections from a hostile work environment, wrongful discharge or discriminatory transfers after entering into an employment contract. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The 1991 amendments extended the scope of the statute to cover "all benefits, privileges, terms and conditions of the contractual

relationship." 42 U.S.C. § 1981. The Court in *Jones* found that the § 1981 claims of the plaintiffs for hostile work environment, wrongful termination and refusal to transfer could not have been brought under the pre-1991 version of the Act. Since the Act had been amended to cover these claims, the Court found those claims "arose under" the post-1990 amendment to § 1981. On that basis, *Jones* held that those § 1981 claims had a four-year statute of limitations.

Defendants use *Jones* to perform what amounts to a legal sleight of hand, arguing that these actions should be accorded a four-year statute of limitations because NAHASDA, which Plaintiffs seek to enforce, was not passed until 1997. This argument completely overlooks the fact that the United States was not a party in *Jones,* and therefore § 2401 was inapplicable. Conversely, these coordinated cases arise under the APA which authorizes actions against the United States for injunctive or declaratory relief. Defendants' argument is based on a very superficial reading of *Jones*. *Jones* says nothing about the applicable limitation period for APA actions, and Defendants' efforts to stretch it to cover such actions are a distortion of that decision.

Defendants' argument for the application of § 1658's four-year statute of limitations is without merit and must be rejected.

IV. The Administrative Record Should be Updated and Supplemented With the Documents Submitted by the Plaintiffs.

In its Response, HUD argues that all but a very few of the documents proposed by Plaintiffs should be excluded from supplementing the administrative record. HUD admits several times that, because it did not follow the required procedures for recapture of the tribes' funds, it did not consider certain documents as required by the NAHASDA statutes and regulations. *See, e.g.,* HUD Response Brief, p. 34 (HUD did not consider HUD's Line of Credit Control System), p. 36 (HUD did not consider unit by unit breakdowns of units removed), p. 38

(HUD did not consider Mutual Help and Occupancy Agreements). Consequently, HUD states, it developed a different administrative record than if it had followed the required procedures. As HUD admits, "In short, the record for review is what HUD actually considered, not what it would have or could have considered had HUD acted differently…. 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." HUD Response Brief, p. 35. In so doing, HUD seeks to use its own failure to block the Court from considering information that would have otherwise been in the administrative record if HUD had complied with the law. The Court has already ruled that HUD acted arbitrarily, capriciously and unlawfully in making the recaptures[14], and the Court has also requested that the parties propose supplementing the record in primary part to facilitate and clarify the claims for relief and other remedies requested by Plaintiffs (Ord. Regarding Briefing Schedule, November 19, 2012). The purpose of such supplementation is not to re-affirm HUD's guilt, but to provide the Court with enough

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[14] In *Fort Peck III*, the Court wrote:

> There is no reason to give any deference to HUD with respect to Guidance 98-19. It is not a rule established under the rulemaking procedure required by NAHASDA and the APA.
>
> It is not necessary to invalidate 24 C.F.R. § 1000.318 itself as unauthorized by § 4152(b) before the enactment of the 2008 amendments to find that HUD's application of it to the plaintiff tribes now under judicial review was arbitrary and capricious.
>
> HUD failed to comply with the statutory requirement for a hearing provided by the pre-amendment version of 25 U.S.C. § 4161(a)(1)….

Id., at p. 11.

information to fashion appropriate relief for the Plaintiffs, to the extent that the court concludes that any additional fact finding is necessary in this case. [15]

In other cases involving recapture of NAHASDA funds, HUD has agreed that certain documents should be part of the administrative record, even though it now seeks to block the inclusion of those same documents in the present case. *See, e.g.*, Notice of Conventional Filing of Supplement to the Administrative Record, *Crow Tribal Housing Authority v. HUD, et.al*, CV 06-51-BLG-RFC, Dkt. # 42 (9th Cir., January 18, 2012) (evidencing that HUD consented to allow LOCCS information into the record in that case), attached hereto as Exhibit "2". Further, HUD has submitted statements detailing actions of its employees who participated in the decisions to recapture grant amounts from the Plaintiffs. Those statements show that HUD used the LOCCS account system extensively during the recapture process as well as other HUD guidance that are not yet part of the AR in the present case. *See* Kruszek Declaration, *Fort Peck Housing Authority v. HUD*, 05-cv-00018-RPM, Dkt. # 43.

It is well established that there is no barrier to supplementation when the administrative record is inadequate. HUD has had to supplement the administrative records in this and other parallel cases throughout the whole course of litigation – in a sense, admitting the administrative records are deficient. Therefore, the Court faces no legal barrier in allowing further supplementation of the records in these coordinated cases, should it determine that additional information is useful or necessary.

[15] It is Plaintiffs' contention that, to a substantial extent, the existing record is sufficient to award Plaintiffs that to which the court has already ruled them entitled. *See* Section V, *post.*

V. Plaintiffs' Requested Relief.

At this stage of the proceedings, the Plaintiffs in these consolidated actions believe they have established the Court can grant the following immediate relief based on the prior legal findings made by the Court and the authority to which the Court has been directed in the Plaintiff's Statement of Relief Requested and this Reply.

First, the Court should declare that the recaptures of NAHASDA grant funds from the Plaintiffs was illegal, contrary to law, and in excess of the authority granted to HUD and order the recaptured funds be returned to the Plaintiffs from the funds escrowed for that Plaintiff's benefit by prior stipulation or Court Order in these actions; and if the funds escrowed are not sufficient to fully reimburse a Plaintiff or if no funds were escrowed for a Plaintiff, that the amount necessary to make such Plaintiff whole be funded out of either carried forward funds or funds appropriated in future grant years. The Plaintiffs have shown the Court that HUD, pursuant to its rules and regulations, can do that and, in fact, HUD has itself funded obligations arising in prior years from subsequent grant years.

Second, the Court should declare that any threatened recapture of NAHASDA funds is illegal, void, contrary to law, and in excess of the authority granted to HUD and therefore enjoin HUD from recapturing any further NAHASDA grant funds from any Plaintiff unless and until HUD complies with the requirements of NAHASDA including, but not limited to, providing notice and an opportunity for a hearing at which HUD establishes substantial noncompliance with NAHASDA by the Plaintiff subject to the recapture notice and that the funds sought to be recaptured have not previously been spent on affordable housing activities or in accordance with NAHASDA.

Finally, this Court should enter its order: (a) declaring that 24 C.F.R. §1000.318 is unlawful or that HUD's enforcement and application of said regulation is unlawful; (b) declaring that all units Plaintiff owned and operated but which were excluded from FCAS because of HUD's illegal and unlawful actions are entitled to FCAS funding and should have been included as FCAS in the allocation formula for subsequent years until such time as the units were ready for conveyance as determined by Plaintiff; (c) declaring that all units that HUD forced Plaintiff to convey pursuant to its illegal application of 24 C.F.R. §1000.318 instead should have been included as FCAS in the allocation formula for subsequent years until such time as the units were ready for conveyance as determined by Plaintiff; (d) order HUD to provide an accounting of the units and the grant funds attributable to the units that were excluded because of HUD's illegal and unlawful actions; and (e) order HUD to take such action as is within its authority under existing regulations and law to restore the funds via either carry forward funds or upward grant funding adjustment(s) to future fiscal years' appropriations to the affected Plaintiff.

Respectfully submitted this 3rd day of September, 2013.

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

I hereby certify that on September 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:

timothy.jafek@usdoj.gov

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/ John Fredericks III
John Fredericks III