No. 13-35284

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW TRIBAL HOUSING AUTHORITY,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLANT

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STATEMENT OF JURISDICTION

The plaintiff-appellee invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 & 1346.[1] This Court has jurisdiction under 28 U.S.C. § 1291. See Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 (9th Cir. 1990) (setting out criteria for agency appeals of remand orders). The district court's judgment was

[1] As explained below, the district court erroneously held that 25 U.S.C. § 4161 is applicable here. If the district court were correct that § 4161 applied, the district court would not have had jurisdiction, since review of agency action under § 4161 lies directly in this Court. See 25 U.S.C. § 4161(d)(1)(A).

entered on February 14, 2013. E.R. 1. Appellants filed a timely notice of appeal on April 8, 2013. E.R. 27-28.

STATEMENT OF THE ISSUE

The United States Department of Housing and Urban Development (HUD) distributes to Indian tribes federal block grant funds for low-income Native American housing. The issue presented is whether, when HUD makes an overpayment to a tribe based on inaccurate data, HUD may seek recovery of the overpayment without providing the tribe with a formal hearing.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

The Crow Tribal Housing Authority ("Crow" or "the tribe") has received block grant funds for its low-income housing activities since fiscal year 1998. In 2006, Crow filed this lawsuit, alleging that HUD had improperly calculated the amount of its block grants and improperly determined and recovered (in part) block grant overpayments.

The district court held that the block grant allocation formula used by HUD was valid under the governing statute, and Crow has not appealed from that ruling. The district court further held that HUD could not recover block grant

overpayments without engaging in a formal hearing process which HUD has not employed. The district court remanded the matter to HUD with instructions to provide such hearings. HUD then filed this appeal.

STATEMENT OF THE FACTS

A. Background

1. In 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), Pub L. No. 104-330, 110 Stat. 4016 (Oct. 26, 1996), 25 U.S.C. §§ 4101 et seq. Effective fiscal year 1998, NAHASDA terminated various housing assistance programs under the United States Housing Act of 1937, see 25 U.S.C. §§ 4181(a), 4182, and replaced them with a block grant program providing each eligible Indian tribe with an equitable share, derived by formula, of each annual congressional appropriation for affordable housing activities. See 63 Fed. Reg. 12,334, 12,334-35 (March 12, 1998) (summarizing NAHASDA); 24 C.F.R. § 1000.6 (explaining formula block grant program).[2]

NAHASDA delegates to HUD the authority to develop a formula to allocate to each tribe a portion of any congressional appropriation. 25 U.S.C. § 4152.

[2] NAHASDA provides for payments to a tribe or to its tribally designated housing entity on behalf of the tribe. 25 U.S.C. §§ 4103(22), 4111(a)(2). Plaintiff here is a tribal housing authority which we refer to as the tribe for these purposes.

The formula is "based on factors that reflect the need of the Indian tribes," including, among other things, the number of specified low-income housing units owned or operated by the tribe and the "extent of poverty and economic distress and the number of Indian families within the Indian areas of the tribe." Id. § 4152(b).[3] Congress sets an appropriation each fiscal year to be allocated according to this formula. Id. § 4151. Accordingly, the total amount of money available to all tribes is fixed, and to the extent changes are made to the allocation for any one tribe, other tribes' allocations must necessarily be changed by an equal and offsetting amount.

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

[3] In 2008, Congress amended NAHASDA, expressly adopting HUD's longstanding interpretation that the number of units relevant under the statute does not include units no longer owned by the tribe or units that the tribe retained even though they should have been conveyed. See 25 U.S.C. § 4152(b)(1) (as amended in 2008 by Pub. L. No. 110-411, § 301(2)).

the lease-purchase homebuyer. 25 U.S.C. § 4152(b)(1); 24 C.F.R. §§ 1000.312, 1000.314, 1000.318.

Before each year's formula allocation, HUD sends all eligible tribes a "Formula Response Form," which asks tribes to use their knowledge of the status of their FCAS units to make corrections or changes to the formula data in HUD's records. See 24 C.F.R. § 1000.302 (defining Formula Response Form). Tribes are responsible for reporting discrepancies between the FCAS data from HUD's records shown on the Formula Response Form and the tribe's up-to-date FCAS information. See id. §§ 1000.315(a), 1000.319(a).[4] HUD uses the information updated through the Formula Response Form to calculate each tribe's grant allocation. See id. §§ 1000.301, 1000.310, 1000.316. HUD can review FCAS data through target monitoring or as a component of other reviews. Id. § 1000.319(d).

2. HUD has an obligation to "allocate equitably and fairly funds made available through NAHASDA among eligible Indian tribes," and to ensure that each tribe receives only the grant funds to which it is entitled. 24 C.F.R. § 1000.301; see also 25 U.S.C. § 4151. Because this allocation is made from an annual fixed appropriation, as noted above, see 25 U.S.C. § 4151, any overpayment to one tribe takes away money that should go to other tribes.

[4] These regulations were promulgated in 2007 – after the relevant FCAS reporting here – but clarify prior practice. See 72 Fed. Reg. 20,018, 20,020, 20,025 (April 20, 2007).

Accordingly, HUD regulations provide for overpaid funds to be repaid and redistributed. See 24 C.F.R. § 1000.319(b).

When HUD determines that it overpaid NAHASDA funds due to an inaccurate FCAS count or administrative error, it notifies the tribe of the discrepancy and informs the tribe that HUD will recover any overpayment for redistribution according to the formula. 24 C.F.R. § 1000.319(b); see, e.g., E.R. 40-41 (providing a five-year schedule for Crow to repay $660,818 in total overpayments). Before such recoupment, HUD provides the tribe with the opportunity to present additional information regarding the status of the units at issue or otherwise appeal the formula determination. 24 C.F.R. § 1000.336(a); see E.R. 50 (notice to Crow setting forth overpayment determination and notifying Crow of its right to an administrative appeal and the procedures governing such an appeal). The tribe may seek reconsideration if the appeal is denied. 24 C.F.R. § 1000.336(e)(2). Any funds recovered are redistributed to tribes according to the NAHASDA formula. 24 C.F.R. § 1000.319(b). In seeking to recover such overpayments, HUD has relied upon the general right of the government to use offsets to recover funds erroneously paid. See, e.g., United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); United States v. Wurts, 303 U.S. 414, 416 (1938); Grand Trunk W. Ry. Co. v. United States, 252 U.S. 112, 121 (1920).

3. The tribe in this case has also invoked two statutory provisions not

implicated by the recovery and redistribution procedure discussed above. The first provision is 25 U.S.C. § 4161(a)(1), which provides specific enforcement actions when HUD finds that a tribe failed to "comply substantially" with NAHASDA. Those actions are (1) termination of NAHASDA block grant payments to the tribe; (2) reduction of payments "by an amount equal to the amount of such payments that were not expended in accordance with" NAHASDA; (3) limiting the availability of payments to certain programs, projects, or activities; and (4) providing a replacement recipient of funding for the tribe. Ibid. Congress has specifically stated that misreporting an FCAS count is not substantial noncompliance under this provision. 25 U.S.C. § 4161(a)(2).

The second statutory provision invoked by Crow and the district court is 25 U.S.C. § 4165, which provides that tribal organizations are treated as non-Federal entities with respect to financial audit requirements applicable to recipients of federal grant funds generally, and may be audited or reviewed by the Secretary to determine whether they (1) have properly carried out NAHASDA "eligible activities;" (2) have a continuing capacity to carry out such "eligible activities;" (3) are in compliance with their statutory "housing plan" and "certifications;" and (4) have submitted accurate "performance report" data. Id. § 4165(b)(1).[5] The

[5] The quoted terms are terms of art with specific meanings within the context of NAHASDA. None relates to FCAS counts. Instead, "eligible

tribe may review and comment on any HUD report of such an audit or review, after which HUD will make the report and any comments or HUD revisions readily available to the public. Id. § 4165(c). Subject to the requirements of § 4161(a), the Secretary may adjust NAHASDA grant amounts in accordance with any findings with respect to the reports and audits submitted to the Secretary under § 4165. Id. § 4165(d). By regulation effective at all times relevant to this litigation, any tribe could request an administrative hearing before HUD reduced its grant amount pursuant to an audit or review conducted under § 4165. 24 C.F.R. 1000.532(b) (2012).[6] HUD did not invoke § 4165 in performing any of the reviews at issue here, and Crow did not request a hearing under § 1000.532 at any point in the administrative proceedings. As discussed in greater detail below, those reviews did not involve the topics addressed in § 4165, which center on a tribe's management and expenditure of grant funds in compliance with NAHASDA, but instead involved corrections to inaccurate data that HUD used to calculate the block grant amounts for each tribe.

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activities" are defined in 25 U.S.C. § 4132. Tribes must submit an annual "housing plan" and "certifications" defined in 25 U.S.C. § 4112, which HUD reviews under 25 U.S.C. § 4113. Additional certifications of compliance with certain environmental requirements are required by 25 U.S.C. § 4115(c). Tribes must also submit an annual "performance report" under 25 U.S.C. § 4164.

[6] That regulation has subsequently been amended and no longer provides the opportunity for a formal hearing. See 24 C.F.R. § 1000.532.

B. Administrative Proceedings Regarding Crow Overpayments

On September 21, 2001, HUD first notified Crow that its FCAS counts may have been inaccurate and that, as a result, Crow may have received NAHASDA block grant overpayments in fiscal years 1998 through 2001. E.R. 34-35; see First Amended Complaint ¶ 77. HUD asked the tribe to respond within 30 days. E.R. 35. Over three months later, on January 2, 2002, Crow had failed to respond, and HUD wrote it another letter giving it another 30 days to do so. E.R. 38-39. More than five months after this second letter (and almost nine months after the first letter), on June 13, 2002, Crow had still failed to respond, and HUD informed the tribe that, as a result, HUD assumed that the tribe agreed with the assessments in its previous letters and therefore concluded that the tribe had been overpaid a total of $660,818 for fiscal years 1998 through 2001, which would be recovered through deductions in the tribe's future NAHASDA grants. E.R. 40-41. Crow's NAHASDA Formula Response Forms for fiscal years 2003 and 2004 (dated July 2002 and September 2003, respectively), each included an installment of this repayment to be deducted from the tribe's NAHASDA grant. E.R. 42-43.

Over one year later, on November 13, 2003, the tribe first wrote to HUD challenging the fiscal-year 1998 through 2001 overpayment determinations. The tribe's letter contained no substantive arguments regarding those overpayments, but requested copies of documents to assist the tribe in making its assertions. E.R.

47. On February 13, 2004, HUD responded and provided the requested materials. HUD also informed Crow that the overstated FCAS units were mistakenly included in Crow's FCAS counts in 2002 and 2003, resulting in additional overpayments totaling $848,347. E.R. 49-51.

At Crow's request, HUD conducted a site visit with the tribe on August 3-5, 2004, to assist the tribe in determining proper FCAS counts. The result of this site visit was the determination that Crow had received overpayments of $1,919,666 and underpayments of $90,967, for a total net overpayment of $1,828,699 for fiscal years 1998 through 2005, of which HUD had already recovered $528,656. This left the tribe with a remaining overpayment of $1,300,043 to be repaid. E.R. 57-64.[7] HUD notified Crow of these findings by letter dated October 20, 2005, and notified the tribe of its regulatory right to appeal. E.R. 64.

Crow responded by letter dated November 17, 2005. This letter requested reconsideration or appeal, sought more time to respond, and faulted HUD for not determining sooner that Crow had been overpaid. E.R. 70-78. HUD responded with a letter dated February 23, 2006, denying the request for reconsideration or

[7] In fiscal year 2006, HUD recovered the last installment of the original $660,818 overpayment, leaving a remaining overpayment balance of $1,167,881. HUD suspended any additional recoupment efforts during the pendency of this civil action. See E.R. 83-84. Additional information resulted in the reduction of this amount to $1,073,290. E.R. 85-86.

appeal. E.R. 79-82. HUD noted that its overpayment decision was based solely on Crow's own records, accessed during the site visit. E.R. 81.[8]

C. Prior Judicial Proceedings

Crow commenced this suit in March 2006. On the parties' joint motion, the district court stayed proceedings from October 2006 to June 2010. Crow then filed an amended complaint, alleging that: (1) the regulatory formula for distributing NAHASDA funds violated the statute; (2) HUD failed to provide a required hearing before recouping overpaid funds; and (3) HUD incorrectly determined the applicable number of FCAS units (and therefore inaccurately determined Crow's overpayment amount).

In February, 2013, the district court ruled on the parties' cross-motions for summary judgment. As an initial matter, not directly relevant to this appeal, the district court upheld the regulatory formula for allocating NAHASDA funds among tribes. Following a recent Tenth Circuit decision, the district court held that NAHASDA permits a formula in which the applicable number of units owned or operated by a tribe in 1997 can be adjusted "based on conveyance, demolition, or otherwise." E.R. 13 (citing Fort Peck Housing Auth. v. HUD, 367 Fed. Appx. 884 (10th Cir.), cert. denied, 131 S. Ct. 347 (2010)). Crow has not appealed from this

[8] The Administrative Record does not contain any request by Crow for a formal hearing under 25 U.S.C. § 4161, 25 U.S.C. § 4165, or 24 C.F.R. § 1000.532(b) (2012).

ruling.

The district court next addressed procedural requirements. The court began by appearing to reject Crow's contention that a hearing was required under the previous version of 24 C.F.R. § 1000.532, which applied to "adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under [25 U.S.C. § 4165]." 24 C.F.R. § 1000.532(a) (2012). As the district court noted, there were no such findings here. E.R. 18.

However, the district court went on to conclude that 25 U.S.C. §§ 4161 & 4165 and their implementing regulations lead "to the conclusion that a statutory vehicle exists through which HUD may recover any tribal housing grant overpayments." E.R. 21 (emphasis added). Given the availability of such a statutory mechanism, the district court concluded that common-law principles of overpayment recovery did not apply. Ibid. The court stated that, although HUD had never invoked § 4165, it was "undisputed," that HUD had acted under the review and audit authority specified in that section and adjusted Crow's NAHASDA grant amounts in accordance with its findings. E.R. 23. Although Congress had, in 2008, enacted legislation expressly providing that errors in FCAS counts were not substantial noncompliance (and therefore not subject to § 4161), the district court stated that this statutory provision was "a substantive change" that

"cannot be read as a clarification of pre-existing law." E.R. 22. In conclusion, the district court appeared to turn to equitable principles, stating that "[g]iven the amount of money involved and the effect such a deprivation would have on [Crow]'s housing projects, it is reasonable to allow [Crow] an opportunity for hearing . . . ." E.R. 23-24.

Having determined to remand to HUD for the provision of the allegedly required hearing, the district court concluded that it need not address any other issue presented by the parties. E.R. 24.

D. This Court's Fort Belknap Opinion

After the district court issued its decision and the government filed its notice of appeal, this Court issued its opinion in Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, No. 12-70221, 2013 WL 4017285, at *6 (9th Cir. Aug. 8, 2013) (for publication), which recognized that "HUD can recover the amount of over payment to [the tribe] pursuant to the doctrine of payment by mistake," as applied in United States v. Mead, 426 F.2d 118, 125 (9th Cir. 1970). The Court explained that this authority is "independent of [HUD's] power to find substantial noncompliance under § 4161." Fort Belknap, at *5. Indeed, under these circumstances, HUD "was not required to resort to § 4161 to recover those amounts, and it did not do so." Id. at *6.

The Court further held that 25 U.S.C. § 4161(a) applies "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." Fort Belknap, at *5. In the context of HUD recovery of overpayments based on inaccurate FCAS counts, this Court concluded that § 4161(a) did not apply for several reasons. First, HUD neither "alleged that [the tribe] had failed to comply substantially with NAHASDA" nor "found [the tribe] to be in substantial noncompliance with NAHASDA's provisions." Ibid. In so concluding, this Court noted that the tribe's misreporting of its FCAS counts "is specifically excluded from the statutory definition of 'substantial noncompliance.'" Ibid. (citing 25 U.S.C. § 4161(a)(2)).

In addition, the Court held that HUD had not imposed any of the remedies listed in 25 U.S.C. § 4161(a)(1). Fort Belknap, at *6-*7. With respect to § 4161(a)(1)(B), this Court found that HUD never alleged nor found that any funds were expended improperly but instead found that the tribe incorrectly received funding for ineligible units. Id. at *7.

SUMMARY OF THE ARGUMENT

The United States has common-law authority to determine the existence of an overpayment and to recover such an overpayment by means of an

administrative offset. As this Court recently held, that authority encompasses HUD's authority to assess, recover, and redistribute NAHASDA overpayments based on incorrect FCAS counts. Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, No. 12-70221, 2013 WL 4017285 (9th Cir. Aug. 8, 2013). Congress has not displaced that authority here.

The district court's suggestion that 25 U.S.C. § 4161 applies to this case is directly contrary to this Court's more recent decision in Fort Belknap, which made clear that § 4161 does not apply to the recovery of funds overpaid based on inaccurate FCAS counts, both because such inaccuracies do not generally result from "substantial noncompliance" with NAHASDA and because the recovery of funds in this situation does not constitute any of the remedies listed in § 4161(a)(1). As this Court noted, HUD recovers this type of overpayment without either alleging or proving such substantial noncompliance. Instead, HUD simply finds and corrects an incorrect FCAS count.

Contrary to the district court's conclusion, 25 U.S.C. § 4165 also does not apply here. Section 4165(d) states that "the Secretary may adjust the amount of a grant made to a recipient under this chapter in accordance with the findings of the Secretary with respect to . . . reports and audits" referenced in § 4165(a)-(c). But the overpaid funds at issue in this case were not recovered "in accordance with the findings of the Secretary with respect to" such reports and audits. Nothing in the

record indicates that HUD relied on any such report or audit in making the overpayment determination at issue here.

The district court also incorrectly held that § 4161 and § 4165 together encompass all circumstances in which HUD seeks to reduce the amount of funds provided to a tribe. E.R. 21. In fact, § 4161 only applies where a tribe fails to "comply substantially" with statutory requirements, and § 4165 only covers HUD's actions relating to specified financial audits and reviews examining the tribe's ability to use, and use of, grant money. These provisions were not intended to address overpayments resulting from inaccurate FCAS counts, nor do they suggest any intent to displace the agency's preexisting common-law right to recover overpaid funds.

Moreover, Crow's claimed entitlement to a formal hearing cannot be squared with subsequent congressional action with respect to the very issue before this Court. When Congress amended NAHASDA in 2008, it was aware that HUD had concluded that tribes had overstated their FCAS counts and that the agency had recovered many of those overpayments without conducting formal hearings. Congress enacted a clarifying amendment confirming that such hearings were not (and never had been) required.

As the administrative record reflects, HUD engaged in an extensive discussion with Crow about the units at issue here and provided ample opportunity

for Crow to provide evidence and arguments regarding the inclusion of those units in the FCAS count. The district court erred in concluding that any statute or regulation required a more formal hearing in this context.

STANDARD OF REVIEW

Because the district court decided this case on cross-motions for summary judgment, this Court reviews the decision below de novo. E.g., CRM Collateral II, Inc. v. Tricounty Metro. Transp. Dist., 669 F.3d 963, 968 (9th Cir. 2012) ("We review de novo a district court's ruling on cross-motions for summary judgment."); Redevelopment Agency of City of Stockton v. BNSF Ry. Co., 643 F.3d 668, 672 (9th Cir. 2011); Trunk v. City of San Diego, 629 F.3d 1099, 1105 (9th Cir. 2011).

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS AUTHORITY TO RECOVER OVERPAID FUNDS.

As this Court has recognized, where, as here, the government makes a payment "under an erroneous belief which was material to the decision to pay, it is entitled to recover the payments." United States v. Mead, 426 F.2d 118, 124 (9th Cir. 1970); see also United States v. Systron-Donner Corp., 486 F.2d 249, 251 (9th Cir. 1973). "As the one into whose hands the mistaken payments flowed," the tribe in this case "is liable to the government for each of the mistaken over-payments." Mead, 426 F.2d at 124. Because the tribe "was the active force in

obtaining the payments and directly received the benefits of the payments," the tribe "must return that portion of the total of the payments which was made by mistake." Ibid. This right of recovery has deep historical roots, see United States v. Wurts, 303 U.S. 414, 415 (1938) ("The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid."), and can be effectuated through an administrative offset without the filing of a lawsuit, see United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); Grand Trunk W. Ry. Co. v. United States, 252 U.S. 112, 121 (1920).

The only circumstance in which the government may not "recover funds from a person who received them by mistake" is when "Congress has clearly manifested its intention to raise a statutory barrier." Mead, 426 F.2d at 124 (internal quotation marks and citations omitted, quoting Kingman Water Co. v. United States, 253 F.2d 588, 590 (9th Cir. 1958), in turn quoting Wurts, 303 U.S. at 415-416). Here, this Court has already made clear that no such statutory barrier exists. Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, No. 12-70221, 2013 WL 4017285 (9th Cir. Aug. 8, 2013). As the Court explained, "[l]ike the Government in Mead, HUD can recover the amount of over payment to [the tribe] pursuant to the doctrine of payment by mistake." Id. at *6. And as the Court emphasized, this common-law recovery authority is independent of 25 U.S.C. § 4161. Id. at *5; cf. Muscogee (Creek) Nation Div. of Housing v. HUD, 698 F.3d

1276, 1284 (10th Cir. 2012) (validating HUD use of remedy not explicit in NAHASDA but, instead, authorized by a decision of the Comptroller General explaining "long-standing principles of federal appropriations law"). The district court's contrary conclusion – that HUD cannot invoke Mead and the common-law right of recovery pursuant to the doctrine of payment by mistake addressed in Mead and numerous other cases, see E.R. 21 – is directly at odds with Fort Belknap.

Here, Congress conclusively negated any possible inference that it intended to take away the government's preexisting ability to recover overpayments without a formal administrative hearing. In 2008, Congress amended NAHASDA to expressly clarify that "[t]he failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance . . . ." 25 U.S.C. § 4161(a)(2) (as amended by Pub. L. No. 110-411, § 401). Congress took this action with the understanding that a number of tribes, including Crow, "had included ineligible units in their [FCAS] count," and that "the majority of those grant recipients . . . have paid or are in the process of paying back these funds." S. Rep. No. 110-238, at 9 (2007). In those cases, as here, HUD gave the tribe the opportunity to explain its position with regard to FCAS but determined the amount of any overpayment without recourse to a formal hearing. See Fort Peck Housing

Auth. v. HUD, 435 F. Supp. 2d 1125, 1129-1131 (D. Colo. 2006), rev'd, 367 Fed. Appx. 884 (10th Cir.), cert. denied, 131 S. Ct. 347 (2010). By specifying that an FCAS inaccuracy is not "substantial noncompliance," Congress made clear that recovery of overpayments based on such inaccuracy does not fall under 25 U.S.C. § 4161, which explicitly requires a hearing before final HUD action.

The agency's practice and Congress's ratification of it make eminent sense. Here, Crow has been afforded ample opportunity to explain its position regarding the disputed FCAS counts. See E.R. 34-39, 44-46, 49-82. By contrast, requiring a formal hearing in this situation would increase administrative costs and delay the redistribution of overpayment amounts that the agency recovers. Those amounts are not retained by the agency, but are disbursed to the other tribes who receive NAHASDA grants.[9] It was entirely reasonable for both Congress and HUD to refrain from providing formal hearings in these circumstances.

[9] These costs and delays would likely be significant because HUD receives numerous requests for correction and challenges to NAHASDA formula data. In the most recent period for which the record includes information, there were over 500 such requests and challenges in just 7 months (August 2009 through February 2010). E.R. 87-102.

II. NO STATUTE OVERRIDES THE AGENCY'S LONGSTANDING AUTHORITY TO RECOVER OVERPAYMENTS.

A. 25 U.S.C. § 4161 Does Not Apply To The Recovery Of Overpaid Funds At Issue Here.

The district court erroneously held that 25 U.S.C. § 4161(a) governs this case and therefore overrides the government's common-law right to recover overpayments. Section 4161(a) provides:

> [I]f the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall –
>
> (A) terminate payments under this chapter to the recipient;
>
> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
>
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
>
> (D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

This Court's decision in Fort Belknap undermines this aspect of the district court's ruling as well. As the Court explained in Fort Belknap, at *5, section 4161 applies "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." Here, as in Fort Belknap, HUD neither "alleged that [the tribe] had failed to comply substantially with NAHASDA" nor "found [the tribe] to be in substantial noncompliance with NAHASDA's provisions." Ibid. And Fort Belknap's conclusion that a tribe's misreporting of its FCAS counts "is specifically excluded from the statutory definition of 'substantial noncompliance,'" applies here as well. Ibid. (citing 25 U.S.C. § 4161(a)(2)).[10] Finally, this Court's holding that the recovery and redistribution of overpaid NAHASDA block-grant funds is not one of the remedies listed in 25 U.S.C. § 4161(a)(1) applies here as well. See id. at *6-*7. In short, there is no valid basis to distinguish this case from

[10] The district court appears to have concluded that 25 U.S.C. § 4161(a)(2) does not apply here because it was enacted after the miscounting and resulting overpayments at issue in this case. See E.R. 22. That conclusion is inconsistent with this Court's Fort Belknap decision. One of Fort Belknap's claims was that HUD acted untimely in recovering overpayments made in fiscal years 2000 through 2007 – before the enactment of § 4161(a)(2) in 2008 as § 401 of Public Law No. 110-411. See Fort Belknap, at *4. Invoking § 4161(a)(2), this Court held that it lacked jurisdiction over all of Fort Belknap's claims, including its claims relating to overpayments in fiscal years 2000 through 2007. Id. at *5. Fort Belknap thus makes clear that inaccurate FCAS, by itself, does not constitute failure to substantially comply with NAHASDA regardless of whether the inaccuracy relates to a fiscal year before or after the enactment of § 4161(a)(2). Indeed, Congress stated that § 4161(a)(2) was merely a "[c]larification" of existing law, S. Rep. 110-238, at 10 (2007), and "[w]hen an amendment is labeled a clarification, it is generally applied retroactively," United States v. Sanders, 67 F.3d 855, 857 (9th Cir. 1995).

Fort Belknap in terms of the latter's holding that § 4161 does not apply to HUD's recovery and redistribution of NAHASDA overpayments.

Crow argued in the district court that HUD's interpretation of § 4161 was not entitled to deference because the statute must be interpreted to favor Native American tribes. See Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). But this Court in Fort Belknap has already upheld HUD's interpretation, and that decision is fully consistent with the canon of interpreting statutes in favor of Native Americans. What Crow seeks here – requiring a formal hearing for each of the hundreds of formula data corrections and challenges that HUD processes each year, see E.R. 87-102 – would unduly delay the recovery and redistribution of funds to the rightful recipient tribes.

B. 25 U.S.C. § 4165 Does Not Apply To The Recovery Of Overpaid Funds At Issue Here Or Give Crow A Right To A Formal Hearing.

The district court also improperly invoked 25 U.S.C. § 4165(d), which provides that "after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this chapter in accordance with the findings of the Secretary with respect to those reports and audits." Notably, § 4165 does not require a formal hearing of any kind, and is limited to HUD action based on types

of audits and reports not at issue in this case. Accordingly, § 4165 has no application here.

The suggestion that § 4165 applies to the recovery of funds overpaid due to inaccurate FCAS counts is without basis. As the statutory text makes plain, not every audit or every report can be the subject of an adjustment under § 4165(d); only "reports and audits relating to a recipient that are submitted to the Secretary under this section" are addressed. 25 U.S.C. § 4165(d) (emphasis added). Accordingly, this provision would only apply here if HUD acted in recovering the overpaid funds in accordance with a finding of the Secretary with respect to reports and audits submitted to the Secretary under § 4165. But neither Crow nor the district court identified such a report or audit.[11] Indeed, the district court agreed that this case involves no "findings of HUD pursuant to reviews and audits under [§ 4165]." E.R. 18. The court provided no explanation for its conflicting suggestion that § 4165 review authority was a "but for" cause of HUD discovering the overpayments here. When HUD first informed Crow of its discovery of the FCAS overcount, HUD did not rely on any audit or report; the agency simply stated that "[i]t has come to our attention that the Crow Tribe may have incorrectly

[11] The burden of proof lies with Crow, as it is required to prove that HUD acted arbitrarily, capriciously, or otherwise not in accordance with law. See, e.g., Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1244 (9th Cir. 2013); George v. Bay Area Rapid Transit, 577 F.3d 1005, 1011 (9th Cir. 2009).

received credit" for ineligible units. E.R. 34. The agency's letter explains that the key information leading to this conclusion was the fact that Crow continued to count in its FCAS units that, based on their age, should have previously been conveyed or were eligible for conveyance. Ibid. Although the record does not specifically state the source of this information, we are aware of nothing to suggest that it came from any audit or report, whether under § 4165 or otherwise. Indeed, the logical source of this information is the annual Formula Response Form mailed to (and updated by) Crow each year. See, e.g., E.R. 29-33.

Unlike these Formula Response Forms, the audits and reports addressed in § 4165 do not, as a general matter, relate to FCAS counts. As noted above, FCAS counts are part of the NAHASDA formula that determines the amount of a tribe's annual grant – in other words how much money the tribe receives from the federal government. But § 4165 audits and reports instead relate to a tribe's ability to comply with legal requirements regarding how the tribe spends NAHASDA funds. With respect to audits, § 4165 simply refers to 31 U.S.C. ch. 75, which in turn describes specific, limited audits that examine the subject's: (1) "financial statements," (2) "expenditures of Federal awards," (3) "internal controls," and (4) compli[ance] with the provisions of laws, regulations, and contracts or grants pertaining to Federal awards." 31 U.S.C. § 7502(e). Here, as explained above, Crow does not point to any audit at all, let alone an audit of the type referenced in

§ 4165. Those statutory audits concern whether a recipient of federal funds is capable of properly spending federal funds and has, in fact, done so. But, as this Court has already explained, HUD's recovery of overpayments based on inaccurate FCAS counts relates to the amount of funds "received," not how the funds are "expended." Fort Belknap, at *7.

The same is true of the reviews addressed in § 4165. Those reviews are conducted to determine whether a NAHASDA block grant recipient: (1) "has carried out . . . eligible activities" properly, (2) "has a continuing capacity" to do so, (3) is "in compliance" with its "Indian housing plan," and (4) has provided accurate information in its "performance report" under 25 U.S.C. § 4164. 25 U.S.C. § 4165(b)(1). As with the audits, these issues all relate to a tribe's proper expenditure of NAHASDA funds and its continuing ability to do so; these reports do not relate to FCAS counts, which are not reported to HUD as part of an "Indian housing plan," or a "performance report" under 25 U.S.C. § 4164, but rather as part of the tribe's annual Formula Response Form, which is not mentioned in § 4165.[12] In short, the recovery of overpaid funds based on inaccurate FCAS counts does not

[12] The "Indian housing plan" is submitted annually and describes how the tribe will use its grant funds on eligible activities. 25 U.S.C. § 4112. The "performance report" contains the conclusions of a tribe's review of its own progress in carrying out its Indian housing plan. Id. § 4164(a). This report must: (1) describe the tribe's use of grant funds, (2) assess the relationship of such use to the tribe's planned activities (in the Indian housing plan), and (3) indicate the tribe's programmatic accomplishments. Id. § 4164(b).

fall within the plain language of § 4165, and neither Crow nor the district court has identified any audit or report under § 4165 that played any role here.

Moreover, § 4165 does not require that HUD provide any hearing (formal or otherwise) before taking action. The only possible source of a hearing right was a regulation implementing § 4165, namely 24 C.F.R. § 1000.532(b) (2012). But that regulation has no application here because, for the reasons stated above, § 4165 has no application here. In any event, the regulation merely permitted a tribe to "request, within 30 days of notice of the [disputed HUD] action, a hearing in accordance with § 1000.540." 24 C.F.R. § 1000.532(b) (2012) (emphasis added). Crow did not make such a request, which is an additional, independent reason why the regulation does not give Crow the right to a formal hearing.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully Submitted,

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AUGUST 2013

STATEMENT OF RELATED CASES

Counsel for Respondents are aware of one related case, as defined in Ninth Circuit Rule 28-2.6: Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, No. 12-70221, 2013 WL 4017285 (9th Cir. Aug. 8, 2013) (for publication). Although this Court recently issued its opinion in Fort Belknap, it is our understanding that the mandate has not yet issued.

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

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 6,315 words.

/s/ Jonathan H. Levy
JONATHAN H. LEVY

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2013, I electronically filed the foregoing Brief for the Appellant with the Clerk of the Court by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on:

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ADDENDUM OF PERTINENT STATUTORY AND REGULATORY PROVISIONS

Title 25. Indians

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

Subchapter IV. Compliance, Audits, and Reports

§ 4161. Remedies for noncompliance

(a) Actions by Secretary affecting grant amounts

(1) In general

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

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

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

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

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

(2) Substantial noncompliance

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

(3) Continuance of actions

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

(4) Exception for certain actions

(A) In general

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

(B) Procedural requirement

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

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

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

(C) Determination

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

(b) Noncompliance because of technical incapacity

(1) In general

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

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

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

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

(2) Performance agreement

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

(3) Review

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

(4) Effect of review

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

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

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

(c) Referral for civil action

(1) Authority

In lieu of, or in addition to, any action authorized by subsection (a) of this section, if the Secretary has reason to believe that a recipient has failed to comply substantially with any provision of this chapter, the Secretary may refer the matter to the Attorney General of the United States with a recommendation that an appropriate civil action be instituted.

(2) Civil action

Upon such a referral, the Attorney General may bring a civil action in any United States district court having

venue thereof for such relief as may be appropriate, including an action to recover the amount of the assistance furnished under this chapter that was not expended in accordance with it, or for mandatory or injunctive relief.

(d) Review

(1) In general

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

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

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

(2) Procedure

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

(3) Disposition

(A) Court proceedings

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

(B) Secretary

The Secretary--

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

(ii) shall file--

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

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

(4) Finality

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

Title 25. Indians

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

Subchapter IV. Compliance, Audits, and Reports

➞➞ § 4165. Review and audit by Secretary

(a) Requirements under chapter 75 of Title 31

An entity designated by an Indian tribe as a housing entity shall be treated, for purposes of chapter 75 of Title 31, as a non-Federal entity that is subject to the audit requirements that apply to non-Federal entities under that chapter.

(b) Additional reviews and audits

(1) In general

In addition to any audit or review under subsection (a) of this section, to the extent the Secretary determines such action to be appropriate, the Secretary may conduct an audit or review of a recipient in order to--

(A) determine whether the recipient--

(i) has carried out--

(I) eligible activities in a timely manner; and

(II) eligible activities and certification in accordance with this chapter and other applicable law;

(ii) has a continuing capacity to carry out eligible activities in a timely manner; and

(iii) is in compliance with the Indian housing plan of the recipient; and

(B) verify the accuracy of information contained in any performance report submitted by the recipient under section 4164 of this title.

(2) On-site visits

To the extent practicable, the reviews and audits conducted under this subsection shall include on-site visits by the appropriate official of the Department of Housing and Urban Development.

(c) Review of reports

(1) In general

The Secretary shall provide each recipient that is the subject of a report made by the Secretary under this section notice that the recipient may review and comment on the report during a period of not less than 30 days after the

date on which notice is issued under this paragraph.

(2) Public availability

After taking into consideration any comments of the recipient under paragraph (1), the Secretary--

(A) may revise the report; and

(B) not later than 30 days after the date on which those comments are received, shall make the comments and the report (with any revisions made under subparagraph (A)) readily available to the public.

(d) Effect of reviews

Subject to section 4161(a) of this title, after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this chapter in accordance with the findings of the Secretary with respect to those reports and audits.

24 C.F.R. § 1000.319

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

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

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

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

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

[72 FR 20025, April 20, 2007]

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

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

24 C.F.R. § 1000.336

§ 1000.336 How may an Indian tribe, TDHE, or HUD challenge data or appeal HUD formula determinations?

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG Formula and HUD formula determinations regarding:

(1) U.S. Census data;

(2) Tribal enrollment;

(3) Formula area;

(4) Formula Current Assisted Stock (FCAS);

(5) Total Development Cost (TDC);

(6) Fair Market Rents (FMRs); and

(7) Indian Health Service projections based upon birth and death rate data provided by the National Center for Health Statistics.

(b) An Indian tribe or TDHE may not challenge data or HUD formula determinations regarding Allowable Expense Level (AEL) and the inflation factor.

(c) The challenge and the collection of data and the appeal of HUD formula determinations is an allowable cost for IHBG funds.

(d) An Indian tribe or TDHE that seeks to appeal data or a HUD formula determination, and has data in its possession that are acceptable to HUD, may submit the data and proper documentation to HUD. Data used to challenge data contained in the U.S. Census must meet the requirements described in § 1000.330(a). Further, in order for a census challenge to be considered for the upcoming fiscal year allocation, documentation must be submitted by March 30th.

(e) HUD shall respond to all challenges or appeals not later than 45 days after receipt and either approve or deny the validity of such data or challenge to a HUD formula determination in writing, setting forth the reasons for its decision. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in the formula allocation.

(2) Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy within 30 calendar days of receipt of HUD's denial, the Indian tribe or TDHE may request reconsideration of HUD's denial in writing. The request shall set forth justification for reconsideration.

(3) Within 20 calendar days of receiving the request, HUD shall reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.

(4) Pursuant to resolution of the dispute:

(i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed fiscal year(s); or

(ii) If HUD prevails, it shall issue a written decision denying the Indian tribe or TDHE's petition for reconsideration, which shall constitute final agency action.

(f) In the event HUD questions that the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and to provide a commitment to serve the population indicated in the geographic area.

[72 FR 20025, April 20, 2007]

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

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

24 C.F.R. § 1000.532

§ 1000.532 What are the remedial actions that HUD may take in the event of recipient's substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA or the regulations in this part, HUD shall carry out any of the following actions with respect to the recipient's current or future grants, as appropriate:

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA or these regulations;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in § 1000.542, provide a replacement TDHE for the recipient.

(b) Before undertaking any action in accordance with paragraph (a) of this section, HUD will notify the recipient in writing of the action it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. Before taking any action under paragraph (a) of this section, HUD shall provide the recipient with the opportunity for a hearing no less than 30 days prior to taking the proposed action. The hearing shall be held in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been conducted and HUD has rendered a final decision.

(c) Notwithstanding paragraphs (a) and (b) of this section, if HUD makes a determination that the failure of a recipient to comply substantially with any material provision of NAHASDA or these regulations is resulting, and would continue to result, in a continuing expenditure of funds provided under NAHASDA in a manner that is not authorized by law, HUD may, in accordance with section 401(a)(4) of NAHASDA, take action under paragraph (a)(3) of this section prior to conducting a hearing under paragraph (b) of this section. HUD shall provide notice to the recipient at the time that HUD takes that action and conducts a hearing, in accordance with section 401(a)(4)(B) of NAHASDA, within 60 days of such notice.

(d) Notwithstanding paragraph (a) of this section, if HUD determines that the failure to comply substantially with the provisions of NAHASDA or these regulations is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, if the recipient requests, HUD shall provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA. A recipient's eligibility for technical assistance under this subsection is contingent on the recipient's execution of, and compliance with, a performance agreement pursuant to Section 401(b) of NAHASDA.

(e) In lieu of, or in addition to, any action described in this section, if the Secretary has reason to believe that the recipient has failed to comply substantially with any provisions of NAHASDA or these regulations, HUD may refer the matter to the Attorney General of the United States, with a recommendation that appropriate civil action be instituted.

[77 FR 71529, Dec. 3, 2012]

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

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