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

REPLY BRIEF FOR THE APPELLANT

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INTRODUCTION

In its opening brief, HUD explained that the decision below cannot survive this Court's more recent decision in Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, 726 F.3d 1099 (9th Cir. 2013). Fort Belknap holds that 25 U.S.C. § 4161 does not apply to the recovery of funds overpaid based on inaccurate FCAS counts, both because such inaccuracies do not constitute "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). HUD also noted that the text of 25 U.S.C. § 4165 does not apply to such a recovery of funds.

Crow responds by arguing that this Court's opinion in Fort Belknap can be treated as dictum. But the holding of Fort Belknap is controlling here. Crow's reliance on two decisions from other courts that address an entirely different statute is unavailing.

ARGUMENT

I. THIS COURT'S DECISION IN FORT BELKNAP IS CONTROLLING.

A. Fort Belknap Housing Dep't v. Office of Pub. & Indian Housing, 726 F.3d 1099 (9th Cir. 2013), held that 25 U.S.C. § 4161 does not confer on courts of appeals jurisdiction to review HUD recovery of NAHASDA overpayments based on inaccurate FCAS counts. The Court stressed that such recovery involves "no action pursuant to [25 U.S.C.] § 4161(a)" and thus cannot be challenged through a petition for review by a court of appeals. 726 F.3d at 1100. Because this suit challenges HUD's recovery of overpayments based on inaccurate FCAS counts, the Court's decision in Fort Belknap is controlling here.

Crow's attempts to distinguish Fort Belknap are unavailing. Crow contends that "[t]he most important difference is that [Fort Belknap] apparently did not

challenge the substance of HUD's disqualification of houses from [its] FCAS." Crow Br. 40. But this factual difference has no bearing on the holding in Fort Belknap and does not alter the applicability of that holding here.

The Court in Fort Belknap held that § 4161(a) applies "only where HUD (1) determines, after reasonable notice and 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." 726 F.3d at 1104; see also Crow Br. 34 (conceding that Fort Belknap holds that § 4161(a) applies "only where HUD determines, after notice and an opportunity for hearing, that a recipient has failed to comply substantially with NAHASDA, and, further, imposes one of the four sanctions listed in § 4161(a)"). The Court further held that § 4161(a) did not apply to HUD's recovery of overpayments based on inaccurate FCAS counts because it met neither of these two statutory requirements. The Court stressed that "HUD neither alleged nor found that Fort Belknap failed to comply substantially with the provisions of NAHASDA," and that "HUD did not impose the remedies listed in § 4161(a)(1)." 726 F.3d at 1104, 1105. These statements are equally applicable here.

Here, as in Fort Belknap, HUD alleged that it made overpayments to the tribe based on inaccurate FCAS counts. Compare 726 F.3d at 1103 (describing HUD letter to Fort Belknap explaining overpayment and requesting repayment),

with E.R. 60-63 (similar letter from HUD to Crow). The holding in Fort Belknap thus squarely governs this case.

Moreover, in Fort Belknap, HUD had specifically determined to recover the overpayments by "withhold[ing] the amount of overpayments from future program payments." 726 F.3d at 1100. Here, HUD has not determined the precise method for recovering the specific overpayments as Crow pursues judicial relief. See E.R. 86. HUD anticipates that it will ultimately recover these overpayments from Crow in precisely the same manner that it recovered previously determined overpayments from Crow, which is also the manner in which HUD is recovering the overpayments from Fort Belknap. The holding in Fort Belknap that "HUD did not impose the remedies listed in § 4161(a)(1)," 726 F.3d at 1105, thus necessarily applies here as well and makes clear that § 4161 cannot apply here.

Crow notes that HUD first raised the issue of its incorrect FCAS count soon (seven weeks) after an Office of Inspector General Audit Report that found widespread noncompliance with NAHASDA regulations. Crow Br. 63. But the question here (as in Fort Belknap) is whether incorrect FCAS constitutes substantial noncompliance and whether recovery of overpayments based on incorrect FCAS counts is one of the remedies listed in § 4161(a)(1). Moreover Fort Belknap cannot be distinguished in this regard; HUD first raised the issue of Fort Belknap's incorrect FCAS count even closer in time to the Audit Report than

HUD did with respect to Crow. Compare E.R. 34-37 (first letter to Crow, dated September 21, 2001) with Fort Belknap, 726 F.3d at 1101 (first letter to Fort Belknap, dated August 1, 2001).

Similarly, Crow assigns importance to the fact that HUD obtained information about its incorrect FCAS count pursuant to an on-site monitoring review. Crow Br. 64. But what matters under Fort Belknap is whether HUD "alleged []or found that [the tribe] failed to comply substantially with the provisions of NAHASDA," 726 F.3d at 1104, which has nothing to do with the specific means by which HUD determined that previous FCAS counts were inaccurate.

Crow also stresses that HUD "acknowledged the material amount of funds involved by announcing that successive 'repayment' amounts would be taken on five-year payment plans," and invokes HUD's statement that, because of reductions to grants, "'it may be beneficial to the Tribe to reduce previous years' grants to enable compliance with the 2-year obligation performance measure.'" Crow Br. 64-65. But the same was true in Fort Belknap. See 726 F.3d at 1101, n.5, 1102, 1104, 1106 (referring to the five-year repayment schedule offered to Fort Belknap by HUD); id. at 1106 (quoting HUD letter to Fort Belknap, stating, in part, that "it may be beneficial to you to reduce previous years' grants to enable

compliance with the 2–year obligation performance measure").[1]

B. Crow relies heavily on two decisions from different courts of appeals that do not involve NAHASDA and that pre-date the enactment of that statute. See Crow Br. 35, 47-49, 51-58, 62-63, 65-66 (citing City of Boston v. HUD, 898 F.2d 828 (1st Cir. 1990), and Kansas City v. HUD, 861 F.2d 739 (D.C. Cir. 1988)). Those decisions do not undermine Fort Belknap's controlling weight or otherwise suggest that Crow was entitled to a formal hearing here. Both City of Boston and Kansas City involved the application of 42 U.S.C. § 5311(a), which is similar to 25 U.S.C. § 4161(a) but is part of a different statute that applies in a very different context. In City of Boston, 898 F.2d at 829-30, HUD approved a grant to the City of Boston for rental housing. HUD later determined that Boston had failed to provide required documentation and therefore terminated the grant before the

[1] Crow argues that the panel deciding this appeal is free to disregard as dictum this Court's statement in Fort Belknap that "HUD can recover the amount of overpayment to Fort Belknap pursuant to the [common law] doctrine of payment by mistake." 726 F.3d at 1105. Whether this particular statement is dictum or not is irrelevant because the panel deciding this case is unquestionably bound by Fort Belknap's holding that § 4161(a) does not apply in these circumstances. In any event, the statement in Fort Belknap regarding common law remedies was reached only after reasoned consideration – in three paragraphs of the opinion – and is correct. See, e.g., Li v. Holder, 738 F.3d 1160, 1164 n.2 (9th Cir. 2013) ("Well-reasoned dicta is the law of the circuit."); Garcia v. Holder, 621 F.3d 906, 911 (9th Cir. 2010) (reasoning germane to the resolution of a case and expressly adopted by this Court after reasoned consideration is law of the circuit that cannot be ignored as dictum); Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (same).

disbursement of any funds. Id. at 830. And in Kansas City, HUD determined that the city had made assessments in violation of a HUD regulation and conditioned release of grant money to the city on its repayment of the improper assessments. 861 F.2d at 741. Even assuming, arguendo, that Congress intended 25 U.S.C. § 4161(a) to be interpreted and applied identically to 42 U.S.C.§ 5311(a), the very different facts in City of Boston and Kansas City make them clearly inapplicable here.

First, both City of Boston and Kansas City involved actions by the recipient that constituted a failure to substantially comply with legal requirements. In City of Boston, this point was uncontested, but the First Circuit still made clear that it was a necessary prerequisite to the application of § 5311(a). See 898 F.2d at 832 (suggesting that § 5311(a) applies "whenever a recipient has failed to comply with the controlling law"); id. at 833 (purpose of the formal hearing required by § 5311(a) is "'to determine whether substantial noncompliance has taken place'") (quoting Kansas City v. HUD, 669 F. Supp. 525, 528 n.5 (D.D.C. 1987)). It was similarly uncontested that the legal violations in Kansas City constituted substantial noncompliance, 861 F.2d at 743 ("Kansas City is alleged to have substantially failed to comply with the [statute]."), id. at 742 n.3, and, indeed, the court specifically stated that it would leave to another day the question of how to proceed when an issue of substantial noncompliance is lacking, id. at 743 n.5.

By contrast, in Fort Belknap, this Court determined that when HUD seeks to recover overpayments based on inaccurate FCAS counts, there is no allegation or finding that the tribe "fail[s] to comply substantially with the provisions of NAHASDA," and therefore § 4161(a) does not apply. 726 F.3d at 1104. The facts here are materially indistinguishable from the facts in Fort Belknap with respect to "substantial noncompliance."

Second, both City of Boston and Kansas City involved HUD's imposition of one of the remedies listed in the applicable statute. In City of Boston, the First Circuit concluded that HUD's termination of the grant agreement before the distribution of any grant funds constituted "terminat[ing] payments to the recipient," which is one of the remedies listed in § 5311(a). 898 F.2d at 833 ("HUD's termination of Boston's . . . grant was a 'termination, reduction, or limitation of payments,' requiring an opportunity for a hearing under section 5311(a)."). And, similarly, the D.C. Circuit concluded in Kansas City that HUD's placing conditions on the release of grant money was one of the sanctions listed under § 5311(a). 861 F.2d at 742-743 & n.4. But here Crow does not allege the termination of a grant (as in City of Boston) or the placing of conditions upon the release of grant money (as in Kansas City), or any of the remedies listed in § 4161(a). Crow alleges precisely the same remedy at issue in Fort Belknap, namely the "the repayment of funds received in error," which this Court

specifically held is "not among those remedies listed in 25 U.S.C. § 4161(a)(1)." 726 F.3d at 1106. In short, the remedies at issue in City of Boston and Kansas City were different from the remedy at issue here and were listed in § 5311(a), but, in contrast, the remedy at issue here is identical to the remedy at issue in Fort Belknap and is not listed in § 4161(a). Accordingly, neither Boston nor Kansas City provides any basis to deviate from the holding of Fort Belknap here.

II. THE REMEDIES LISTED IN TITLE IV OF NAHASDA ARE NOT EXCLUSIVE.

Crow's brief contains a single substantive argument: that HUD's action to recover the overpayments must be under Title IV of NAHASDA because the remedies within that title are "exclusive." Crow Br. 42-78. But this contention is foreclosed by Fort Belknap. Crow contends that "NAHASDA is unambiguous as to the exclusive nature of Title IV's compliance provisions." Crow Br. 45; accord Crow Br. 60 ("Congress unambiguously intends that Title IV will govern alleged failure to comply with FCAS requirements"). The Court in Fort Belknap, however, made clear that Title IV's compliance provisions are not exclusive, and that "HUD possesses the authority to recover the amounts of overpayment [a tribe] received [as a result if inaccurate FCAS counts] independent of its power to find substantial noncompliance under § 4161" and "can recover the amount of over payment to [the tribe] pursuant to the [common law] doctrine of payment by mistake." Fort Belknap, 726 F.3d at 1105.

Crow points to nothing in the language of Title IV of NAHASDA to suggest that its remedies are exclusive, and it does not identify any cases stating that these remedies are exclusive. To the contrary, the language of § 4161(a) provides limited remedies for a limited situation – that in which a recipient "fail[s] to comply substantially" with the statute. And this Court has made clear that the statute does not apply in the circumstances presented here, where overpayments were made based on inaccurate FCAS counts. Fort Belknap, 726 F.3d at 1104. Indeed, the statute by its terms does not apply when a tribe fails to comply with NAHASDA but that failure is not "substantial[]." And Congress has made clear that remedies provided in § 4161 are not comprehensive by stating 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).

Section 4165 – the only other provision of NAHASDA's Title IV upon which Crow relies – is also limited, as it applies only when the Secretary "adjust[s] 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 [under this section]." 25 U.S.C. § 4165(d). This provision applies to a single narrow remedy (adjustment of grant amount) and only when that remedy is in accordance with a

specific type of report or audit.[2]

Because the only remedies addressed specifically in NAHASDA Title IV are in sections 4161 and 4165, and because those two provisions are both quite narrow, there is no reason to presume that Congress intended Title IV to exclude all other remedies, including the common-law remedy this Court found survived in Fort Belknap. See United States v. Muniz, 374 U.S. 150, 160 (1963) (evidence that a compensation system is "not comprehensive" supports conclusion that it is not exclusive).

Crow invokes the canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985), as a basis to deviate from

[2] Crow suggests that § 4165 applies because HUD's effort to determine Crow's correct FCAS were somehow linked to its Inspector General's August 2001 audit report. See Crow Br. 63-64. This suggestion is wrong for two reasons. First, the August 2001 audit report does not implicate § 4165 because it is not a report "submitted to the Secretary under this section." 25 U.S.C. § 4165(d). Indeed, the report does not mention § 4165. And its express purpose was to test "the accuracy of HUD's FCAS data" and "to assess NAHASDA program performance as a whole," Crow's Excerpts E.R. 124 (emphasis added), while an audit or review under § 4165 focuses on an individual tribe's performance. See 25 U.S.C. § 4165 (b)(1); HUD Opening Brief 7, 24-27. Similarly, HUD's subsequent efforts to determine the correct FCAS were not activities under § 4165 because they involved efforts to determine the accuracy of HUD's own data, not Crow's (or any other tribe's) performance. Second, HUD's attempts to recover overpayments made to Crow were not (and could not have been) "in accordance with the findings" of the August 2001 audit report because that audit did not include any findings (or any data) about Crow. See Crow's Excerpts E.R. 124 (map showing that the scope of the audit included no tribe in Montana, where Crow is located).

Fort Belknap's conclusion that NAHASDA leaves HUD's common-law remedies intact. But the canon only applies to ambiguous statutes, see Crow Br. 45-47, and, as this Court made clear in Fort Belknap, NAHASDA is not ambiguous in this regard. Second, the canon calls for interpretations "in favor of the Indians," not "in favor of Crow." The funds that Crow was overpaid here should have been given to other tribes, and those tribes are currently being deprived of them. While it might benefit Crow to require a formal hearing because it would delay HUD's recovery and redistribution of the overpayments, every day that Crow retains those funds (and is thereby benefited) other tribes are deprived of those very same funds (and thereby harmed). The interests of Native Americans are best served by redistributing overpaid funds to the rightful recipients as quickly as possible.

Crow also argues that NAHASDA Title IV must be interpreted as providing exclusive rights, contrary to Fort Belknap, to preserve "procedural rights granted by Congress," which it argues include a formal hearing. Crow Br. 33. But that argument is circular. NAHASDA must be interpreted in a manner that effectuates congressional intent, but that does not answer the question of whether Congress intended to require a formal hearing for every reduction in NAHASDA payments. The only statutory provision cited by Crow that requires a hearing is § 4161, and this Court in Fort Belknap determined that Congress did not intend that provision to apply to the recovery of overpayments based on incorrect FCAS. When it

amended NAHASDA in 2008, Congress made clear that it did not intend tribes in Crow's situation to have a right to a formal hearing, whether under § 4161 or otherwise. S. Rep. No. 110-238, at 10 (2007) ("[I]f a grant recipient is required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under [25 U.S.C. § 4152], the action does not . . . automatically trigger a formal administrative hearing process."). Congress also stated that the absence of a right to a formal hearing in this situation was not a change to be implemented from 2008 forward, but was rather a "[c]larification" of NAHASDA as originally enacted. Ibid.[3]

Crow also argues that Title IV is comprehensive and exclusive because no distinction should be drawn between the improper expenditure of funds and the improper receipt of funds. Crow Br. 65-69. But the expenditure of funds is very different from the receipt of funds, and this Court has already validated the importance of this distinction in NAHASDA Title IV. In Fort Belknap, this Court noted that, in recovering funds overpaid based on inaccurate FCAS counts, HUD

[3] The district court stated that the 2008 Amendment to NAHASDA "cannot be read as a clarification of pre-existing law." E.R. 22. But the only basis cited for this statement is an unpublished district court decision, which, in turn, provides no basis for its conclusion. See E.R. 22 (citing Fort Peck Housing Auth. v. HUD, 2012 WL 3778299 (D. Colo. 2012)). And the statement is at odds with Congress's own explicit statement that the amendment was a "[c]larification" of pre-existing law on this issue. S. Rep. No. 110-238, at 10 (2007).

had found that the tribe "'incorrectly received funding' for ineligible units," but, at the same time, had "never alleged nor found that any funds 'were not expended in accordance with this chapter.'" 726 F.3d at 1106 (quoting 25 U.S.C. § 4161(a)(1)(B), emphasis in Fort Belknap).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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FEBRUARY 2014

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 3,280 words.

/s/ Jonathan H. Levy
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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I electronically filed the foregoing Brief for the Appellant with the Clerk of the Court by using the appellate CM/ECF system.

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