Wes Williams Jr.
Law Offices of Wes Williams Jr.
A Professional Corporation
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
Telephone (775)773-2838
Nevada State Bar # 6864
wwilliams@stanfordalumni.org

Attorney for Plaintiff
Walker River Paiute Tribe

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WALKER RIVER PAIUTE TRIBE, a federally recognized Indian tribe, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD"); SHAWN DONOVAN, Secretary of HUD; DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for the Office of Public and Indian Housing, Defendants.	Case No: 3:08-CV-00627 **WALKER RIVER PAIUTE TRIBE'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff WALKER RIVER PAIUTE TRIBE (hereinafter "WRPT" or "Plaintiff"), through its undersigned counsel, hereby requests that this court enter its order granting summary judgment in favor of the WRPT by granting the relief requested in the Tribe's Amended/Supplemental Complaint. The WRPT is a federally recognized Indian tribe located in Nevada. The WRPT receives annual funding from the United States Department of Housing and Urban Development ("HUD"). HUD has attempted to recapture, or require the Tribe to pay back, certain funding provided to the WRPT by HUD for fiscal year 2008. This action was brought by the WRPT to stop HUD from recapturing any funds from the Tribe. This motion is supported by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED on September 6, 2011.

Law Offices of Wes Williams Jr.

By: /s/ Wes Williams Jr.
Wes Williams Jr.
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
Email: wwilliams@stanfordalumni.org
Attorney for Plaintiff Walker River Paiute Tribe

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The WRPT seeks in this lawsuit declaratory and injunctive relief against any actions by HUD and certain HUD officials (collectively "Defendants") that attempt to offset, reduce and/or limit the amount of federal funding provided to the WRPT under the Native America Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et seq*. Among other things, the WRPT seeks a declaration that any such actions by Defendants violate NAHASDA and the Administrative Procedures Act and seeks a permanent injunction prohibiting Defendants from reducing, denying, offsetting or limiting funding based on HUD's unlawful formula for annual block grant funding.

Under NAHASDA, the WRPT receives annual block grant funding from HUD to provide affordable housing activities for low-income families within the WRPT's service area. The amount of grant funding the WRPT receives is calculated, in part, based upon the number of housing units administered by the WRPT, known as Formula Current Assisted Stock ("FCAS"). The Defendants, relying on an invalid regulation, 24 C.F.R. § 1000.318, plan to unlawfully limit and/or recapture federal block grant funding to the WRPT by improperly eliminating certain housing units from the WRPT's FCAS.

The WRPT maintains that all housing units in its homeownership program that were the subject of an Annual Contributions Contract ("ACC") between HUD and the WRPT as of September 30, 1997 must be included in the WRPT's FCAS for purposes of calculating NAHASDA funding. Alternatively, the WRPT contends that Homeownership units that have not been conveyed to Homebuyers must be included in the WRPT's FCAS for purposes of calculating NAHASDA funding.

II. STATUTORY BACKGROUND

Prior to the enactment of NAHASDA, Indian housing assistance was administered under the United States Housing Act of 1937 ("1937 Housing Act")(42 U.S.C. § 1437, *et seq.)* that included, among other programs, a "Mutual Help" program. The Mutual Help program allowed an eligible Indian family to contribute land, work, materials, or equipment to the construction of a home built pursuant to a Mutual Help and Occupancy Agreement ("MHOA"). (Administrative Record (hereafter "AR") Tab 1 and Tab 2 (AR 1-40, and 41-51).) The MHOA typically provided an option to purchase the home at the end of a 25-year contract period. Under the 1937 Housing Act, HUD provided funding to operate and maintain Mutual Help and other homes constructed under the Act. HUD awarded operation and maintenance funds for each fiscal year in specific amounts set forth in the Annual Contributions Contract ("ACC").

Congress passed NAHASDA in 1996 to continue to fulfill the federal government's responsibility to Indian tribes and their members "to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition." 25 U.S.C. § 4101(4). Congress found that "the need for affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities . . . is acute." 25 U.S.C. § 4101(6). Congress also found that "[f]ederal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self- determination and tribal self-governance by making such assistance available directly to the Indian Tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.)." 25 U.S.C. § 4101(7). Thus, the federal trust responsibility, Indian self-determination, self-governance, and direct block grant funding are key components of NAHASDA.

NAHASDA purported to terminate assistance under the 1937 Housing Act, but Congress recognized its continuing obligation to provide tribes with operation and maintenance funds for housing constructed under the 1937 Housing Act. *See* 25 U.S.C. §§ 4112(c)(4)(D) and 4133(b).

NAHASDA specifically provided for annual block grants to TDHEs[1] in an amount to be determined by an allocation formula to be established by federal regulations developed by HUD. See 25 U.S.C. §§ 4103(22), 4151, 4152, 4116. Congress directed that these regulations be based

[1] Under NAHASDA, tribes are authorized to designate a tribal entity to receive HUD funding. Thes entities are referred to as Tribally Designated Housing Entities, or TDHEs.

on factors that reflect the need of the tribes for low-income housing assistance. 25 U.S.C. § 4152(b). The regulatory formula developed had to comport and comply with the requirements mandated by NAHASDA's formula allocation provision, 25 U.S.C. § 4152(b). As originally passed, and as is relevant to this matter, NAHASDA provided as follows:

> The formula shall be based on factors that reflect the need of the Indian tribes and the areas of the tribes for assistance for affordable housing activities, including the following factors:
>
> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
>
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
>
> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4152(b).

After enactment of NAHASDA, a committee composed of both HUD and tribal representatives developed a regulatory block grant formula. *See* Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule, 63 Fed. Reg. 12334 (March 12, 1998). Those regulations are found in Part 1000, Subpart D, of Title 24 of the Code of Federal Regulations. See 24 C.F.R. §§ 1000.301 to 1000.340.[2]

As codified, the formula has but two components: (1) FCAS and (2) need. *See* 24 C.F.R. § 1000.310. The FCAS component is based on a tribe's inventory of low-income housing units, including Mutual Help and Turnkey III units. *Id*. at §§ 1000.310, 1000.312 and 1000.314. The FCAS component is calculated by multiplying each type of unit in a tribe's housing inventory by a subsidy factor. *Id*. at § 1000.316. The regulations provide that the beginning point for calculating the FCAS is "Current Assisted Stock," which the WRPT contends is the number of housing units for which a tribe was receiving HUD assistance on NAHASDA's effective date. *Id.* at § 1000.312. The greater the number of units in a tribe's FCAS accounts as of that date, the more funding the recipient receives through the FCAS component of the formula.

Section 1000.318, the primary regulation at issue in this case, was ostensibly

[2] The regulations were subsequently amended again in 2007.

promulgated to delineate when units under FCAS cease to be counted or expire from the inventory used for the formula. That regulation provides:

> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE [tribally designated housing entity], or IHA [Indian Housing Authority] no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:
>
> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy Agreement]; and
>
> (2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.
>
> (b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.
>
> (c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response Form.

Id.

During the years immediately following the promulgation of § 1000.318, in accordance with NAHASDA's formula allocation provision, HUD calculated the FCAS to include all units covered by an Annual Contributions Contract as of September 30, 1997. *See, e.g.,* Audit Report, Office of Inspector General (2001)(AR 275 – 279).

In 2001, HUD's Office of Inspector General ("OIG") conducted a wide-scale audit of NAHASDA program implementation. *Id.* As set forth in its Audit Report, OIG asserted that block grant funds had not been properly allocated in previous years because they were based on housing units that did not qualify as FCAS under § 1000.318. *Id.* ("Since Mutual Help and Turnkey III programs generally do not exceed 25-years, one can reasonably expect that some of these units should be paid-off, and the Housing Entities would no longer have the legal right to own, operate, or maintain these units."). The OIG further recommended that the Office of Native American Programs ("ONAP") audit all TDHEs' FCAS, remove ineligible units from FCAS, recover funding from TDHEs that it had determined to have inflated FCAS and reallocate the

recovery to recipients that were underfunded. *Id.* (AR 279.) The OIG audit announced an interpretation of §1000.318 that was different from both HUD's and the TDHEs'. Indeed, it appears it was the OIG that first interpreted § 1000.318 to impose the absolute 25-year mandatory conveyance and funding ineligibility rule.

ONAP objected to this finding, pointing out that the mere fact that a unit has been in the program for more than 25 years is not proof that the unit is ineligible to be included in the FCAS. ONAP explained:

> There are several situations where the tribe would continue to own, operate and maintain the units after 25 years. Examples include, conveyance being delayed because of lease or title issues, modernization which increased the term or purchase price of the unit, and a subsequent homebuyer.

Id. at p. 58 (AR 326). Nevertheless, and in spite of this disagreement with the OIG audit findings, HUD proceeded to notify TDHEs of: (a) purported overfunding in years past due to the inclusion (in FCAS) of units that HUD had determined to have been no longer qualified under § 1000.318; and (b) HUD's plan to force tribes to repay the allegedly overfunded amounts. For the WRPT, HUD questioned the WRPT's FCAS count for 2008, 2009 and 2010. After working with the WRPT to resolve some disputed issues, HUD determined that the WRPT had been overfunded for 2008 in the amount of $110,444, which is at issue in this case. (AR 803 – 806.) This alleged overfunding came as a result of HUD's position, in line with the OIG finding, that homeownership units that had been conveyed or whose 25-year amortization period had expired could not be counted for grant purposes.

When HUD made its determination that unqualified units had been included in the calculation of a tribe's FCAS, HUD has used a procedure described in NAHASDA Guidance No. 98-19 (AR 702 – 703) in dealing with some of the TDHEs. This Guidance, created out of whole cloth by HUD, provides that when HUD discovers that a tribe/TDHE's grant was based on FCAS units that had been conveyed or were in HUD's view eligible for conveyance, HUD will: (1) inform the tribe/TDHE of that; (2) recoup funds by adjusting upcoming grants; (3) provide the tribe/TDHE an opportunity to present additional information; and (4) proceed to redistribute any recouped funds. *Id*. HUD did not provide an opportunity for a hearing to the affected TDHE, as provided for in 24 C.F.R. §§ 1000.532 and 1000.540.

On October 14, 2008, the 2008 NAHASDA Reauthorization Act was signed into law. PL

110-411, 122 Stat. 4319 (2008). As ultimately enacted, the 2008 Reauthorization Act includes an amendment to the formula allocation provision as urged by HUD. *Id.* at § 301. Under the amendment, NAHASDA's formula allocation provision was changed to incorporate some of the language from 24 C.F.R. § 1000.318(a) (the regulation contested here). In addition, Congress explicitly rendered the amendment inapplicable to TDHEs through fiscal year 2008. Specifically, the 2008 Reauthorization Act provides that the statutory changes to the formula would "not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." *Id.* at § 301(E). The complaint in this case was filed by the WRPT prior to this date, which means that Congress allowed this litigation to proceed under the pre-amendment formula allocation provision.

III. FACTUAL AND PROCEDURAL BACKGROUND

The WRPT receives an annual block grant from HUD to construct, operate, and maintain affordable housing for low-income families on the Walker River Paiute Reservation. The WRPT operates two major housing programs, a low rent housing program, and a homeownership program. The homeownership program is best described as a lease-to-own arrangement, which consists of the WRPT's Turnkey or Mutual Help Homeownership Program under which eligible participating families are able to achieve ownership of single-family homes after leasing over an initial 25-year term, commencing on the units "Date of Full Availability" (DOFA). In order to achieve ownership, the family must make monthly payments based upon a percentage of their income over the 25-year term. HUD regulations exclude these units from being counted for block grant purposes once a TDHE conveys a unit or loses the unit through demolition or other means. 24 C.F.R. § 1000.318. The WRPT contends that the exclusion of these units from the block grant formula runs afoul of NAHASDA, in particular, 25 U.S.C. § 4152(a) and (b)(1).

HUD contends that WRPT was overfunded for fiscal year 2008 because certain dwelling units in its homeownership program that were either conveyed or whose 25-year term had expired may not be counted for block grant formula purposes, and that the WRPT must pay back funds it received based upon the inclusion of these dwelling units in its FCAS. (AR 803 – 806.) As will be shown, however, the WRPT's Mutual Help homes that were under an Annual

Contributions Contract as of September 30, 1997, were and continue to be properly counted under NAHASDA, and HUD's determination that the WRPT was overfunded is erroneous.

Alternatively, HUD's policy that requires tribal funding recipients to remove homeownership units from the formula count before the units are actually conveyed should be set aside because it is arbitrary, capricious, and/or unreasonable, and because it is inconsistent with HUD's trust responsibility and the spirit and intent, if not the letter, of NAHASDA. Finally, the WRPT contends that HUD cannot recapture any purportedly overfunded grant amounts because such recovery is inconsistent with the federal trust responsibility and is neither warranted nor lawful in this case.

The Defendants contend that the WRPT received grant "overfunding" as a result of the WRPT's inclusion of certain Mutual Help homes from its homeownership program into the FCAS. (AR 700 - 703; and 803 - 806.) Relying on their regulation, 24 C.F.R. § 1000.318, Defendants claim that certain Mutual Help homes may not be counted for block grant formula purposes, even if the homes were under an ACC as of September 30, 1997. *Id.* It should not be disputed that all of the Mutual Help homes at issue in this case were covered by an ACC as of September 30, 1997. 25 U.S.C. §§ 4152(b)(1) and 4181(a) allow the WRPT the right to include these covered Mutual Help homes in its FCAS count.

IV. ARGUMENT

A. Standard of Review.

The court must determine whether HUD's decision in this case is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Generally, an agency's decision is arbitrary and capricious if it was not "based on a consideration of the relevant factors" or if there was a "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). An agency may not rely on improper factors, ignore important aspects or issues, or base its decision on implausible reasoning. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, agency action is arbitrary when the agency offers insufficient reasons for treating similarly situated entities differently. *See State Farm, supra; Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985); *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996); *County of Los Angeles v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999). Although an agency's discretion in

interpreting a statute may be broad, it "is not a license to . . . treat like cases differently." *County of Los Angeles,* at 1023, quoting *Airmark Corp*., at 691.

As part of its review, the court must determine the extent of HUD's trust responsibility to the WRPT, and the extent to which this responsibility required HUD to more prudently monitor the accuracy of the reported FCAS each year. Moreover, inasmuch as this case turns in large part upon the WRPT's interpretation of NAHASDA, the Canons of Statutory Construction of laws passed for the benefit of Indians will play an important role in the court's analysis. These canons override the traditional deference that courts give to an Agency's interpretation of a statute it is charged with administering.

Statutory construction cases begin with the language of the statute itself. *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992). If the statute is ambiguous, courts generally defer to an agency's interpretation if it is a reasonable construction of the statute. *Chevron U.S.A. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984). However, standard principles of statutory construction and agency deference do not have their usual force in cases involving Indian law. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). One such canon requires that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Id.; United States v. Thompson*, 941 F.2d at 1077; *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989).

In *Muscogee Creek Nation v. Hodel,* 851 F.2d 1439 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia refused to defer to the Secretary of Interior's interpretation of an ambiguous statutory provision under the canons of construction governing Indian law. In that case, the Secretary decided that the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.,* barred the Tribe from establishing a tribal court. The court disagreed, holding that an agency must interpret statutory ambiguities in favor of Indian tribes. *Id.* at 1444-45. ". . . [I]f the OIWA can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Id.* at 1445 (emphasis in original). "It is for that reason that, while we have given careful consideration to Interior's interpretation of the OIWA, we do not defer to it." *Id.* at n.8. *See also, Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58-59 (D.C. Cir. 1991)(Department

of Interior's interpretation of Indian preference statute rejected in favor of the canon of construction favoring Indian tribes); *Confederated Tribe of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 158-159 (D.D.C. 2000).

In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), the Tenth Circuit considered whether the Indian Self-Determination and Education Assistance Act required the federal government to provide funding for indirect costs associated with self-determination contracts. Once the court determined that the statutory provision in question was indeed ambiguous, it applied the rule stated *Muscogee Creek*, holding that:

> . . . [I]t would be entirely inconsistent with the purpose of the [Self-determination] Act, as well as with the federal policy of Native American self-determination in general, to allow the canon favoring Native Americans to be trumped in this case. We therefore conclude, for purposes of this case, that the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretation of ambiguous statutes . . . . The result is that the canon of construction favoring Native Americans necessarily "constrains the possible number of reasonable ways to read an ambiguity in [the] statute." Commonwealth of Massachusetts v. U.S. Dept. of Transp., 320 U.S. App. D.C. 227, 93 F.3d 890, 893 (D.C. Cir. 1996).

Id. at 1462 (internal citations omitted).

The court in Ramah Navajo Chapter went on to conclude that the United States' interpretation of the statute was unreasonable because the result would not benefit tribes carrying out self-determination contracts, would harm the tribes by depriving them of necessary funding, and was contrary to the purpose of the Self-Determination Act. *Id. See also, Cherokee Nation of Oklahoma v. United States*, 190 F.Supp.2d 1248, 1258 n.5 (D. Okla. 2001) (canons of construction favoring Indian tribes trump agency deference rule).

The same standard applies in this case. A key component of NAHASDA is Indian self-determination. 25 U.S.C. § 4101(7). Congress adopted NAHASDA in large part to give Indian tribes greater control over their housing programs. Since this case involves a dispute between the WRPT and HUD over what Congress intended when it established the block grant formula under NAHASDA, the court may consider but need not defer to HUD's interpretation. Instead, if the court finds that the WRPT's interpretation of NAHASDA is reasonable, then the court should require that HUD defer to the WRPT's interpretation. *Muscogee Creek, supra*. As shown below, NAHASDA can and should be interpreted to allow TDHEs to include all homeownership units that were under an ACC as of September 30, 1997, to be counted as FCAS for each fiscal year.

B. HUD's Policy Of Excluding The Homeownership Units Covered By 24 C.F.R. § 1000.318 Violates The APA And NAHASDA.

Congress intended that all dwelling units in existence as of a date no later than October 26, 1997 be counted for block grant purposes. Under NAHASDA, HUD is required to allocate the amounts made available by Congress each year in accordance with 25 U.S.C. § 4152, to be allocated to each grant recipient based on need. 25 U.S.C. § 4151- 52. The allocation formula laid out in § 4152 states as follows:

> **(a) Establishment**
>
> The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on October 26, 1996, in the manner provided under section 4116 of this title, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this chapter among Indian tribes in accordance with the requirements of this section.
>
> **(b) Factors for determination of need**
>
> The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:
>
> **(1)** *The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary*.
>
> **(2)** The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
>
> **(3)** Other objectively measurable conditions as the Secretary and the Indian tribes may specify.
>
> . . .
>
> **(e) Effective Date**
>
> This section shall take effect on October 26, 1996.

25 U.S.C. § 4152(a)-(b), (e) (emphasis added).

By its terms, then, § 4152 required the Secretary to establish a grant allocation formula no later than October 26, 1997. One of the mandated factors in this formula is the number of dwelling units "owned or operated at the time." The operative phrase "owned or operated at the

time" refers back to the deadline in § 4152(a), which, by its terms, could be no later than October 26, 1997. Thus, Congress intended to take a snapshot of each TDHE's dwelling unit inventory as of a date certain, and utilize that number as a base line dwelling unit number for purposes of § 4152(b)(1).

This interpretation is certainly reasonable, to the extent § 4152 is ambiguous as to what Congress meant by the phrase "owned and operated at the time." The interpretation becomes compelling, however, when one accounts for the additional fact that HUD does not allow TDHEs to include new dwelling units constructed with NAHASDA funds in its FCAS. 25 C.F.R. §§ 1000.312 and 314. HUD's interpretation (excluding newly constructed homes) is consistent with the WRPT's interpretation of §4152(b)(1). However, HUD's position that homeownership units covered by § 1000.318 may be excluded along with newly constructed dwelling units is patently unreasonable and arbitrary because HUD requires TDHEs to exclude conveyed homeownership units that were in operation under an ACC prior to October 26, 1997, while at the same time prohibiting TDHEs from counting new dwelling units constructed with NAHASDA funds. This puts every TDHE with large homeownership programs at a distinct disadvantage because they must watch their annual grant decline with each conveyance or, even worse, with the expiration of the 25-year term for each project, even though the number of dwelling units they actually operate remains relatively the same when newly constructed units are taken into account. In many cases old homeownership units, particularly those which are demolished or modernized, are replaced with new units built with NAHASDA funds. The reality is that the WRPT's dwelling unit count does not decrease each time it conveys or demolishes a home as HUD apparently assumes. The result is that the WRPT is deprived of funding even though its need remains relative the same.

HUD's policy also has the effect of putting TDHEs with little or no homeownership units at an unfair advantage because their grant increases every time another TDHE conveys or demolishes a homeownership unit, even though the units each TDHE actually operates and their respective need remains relatively the same. It is unreasonable to punish those TDHEs with successful homeownership programs in such a way. The language of § 4152(b)(1) certainly does not support a regulation that requires TDHEs to exclude conveyed homeownership units or even units that are eligible for conveyance. Instead, § 4152(b)(1) speaks in terms of dwelling units

owned or operated on a date certain, in this case on a date that is no later than October 26, 1997. HUD has set this date as September 30, 1997. 24 C.F.R. §§ 1000.312 and 314.

The WRPT's interpretation of § 4152(a)-(b) is supported by a 2000 amendment to § 502(a) of NAHASDA [25 U.S.C. § 4181(a)]. That section, as amended, clearly states that all dwelling units that were covered by a contract for tenant-based assistance as of September 30, 1997, "shall, for the following fiscal year and each fiscal year thereafter, be considered to be a dwelling unit under § 302(b)(1) [25 U.S.C. § 4152(b)(1)] of this title." 25 U.S.C. §4181(a) (emphasis added). The quoted language supports a reasonable interpretation of § 4152(b)(1) to provide that one part of this funding formula must be based on the number of dwelling units in the WRPT's inventory as of a certain date, without exception. The above-quoted language clearly provides that any dwelling unit that was under an ACC as of a date certain, in this case September 30, 1997, must be counted as FCAS. This conclusion is strengthened by § 4181(a) quoted above. There is therefore no plausible basis for HUD to exclude the WRPT's Mutual Help units covered by 24 C.F.R. § 1000.318.

Accordingly, it is reasonable to interpret NAHASDA to mandate inclusion of all dwelling units that were the subject of an ACC between the WRPT and HUD as of September 30, 1997, for block grant formula purposes. The court should hold that HUD may not exclude Mutual Help units that were covered by an ACC as of September 30, 1997, whether those units have subsequently been conveyed or not. To the extent that 24 C.F.R. § 1000.318 is inconsistent with such a holding, the regulation should be invalidated. *See Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998) (An agency's rule must be within the scope of its authority as well as be a rational interpretation of the statute; courts may "set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.").

Alternatively, even assuming that 24 C.F.R. § 1000.318 is somehow valid despite the WRPT's interpretation of § 4152(b)(1), nothing in the regulation supports the position that Mutual Help units are no longer eligible simply because the original 25- year term has expired. Instead, § 1000.318 speaks in terms of whether or not the WRPT has the "legal right to own, operate or maintain the unit." The WRPT maintains the legal right to own, operate or maintain the units until that unit is actually conveyed. Furthermore, the WRPT retains the legal right to

own, operate, or maintain an old unit that has been demolished if that unit has been replaced with a newly constructed unit.

HUD's letter to the WRPT dated January 10, 2008, took the position, in line with the OIG opinion, that all Mutual Help units became eligible for conveyance after the 25-year amortization period had expired. (AR 700.)[3] HUD's position in this regard was based on the OIG's erroneous assumption regarding the eligibility of Mutual Help units whose 25-year amortization period had expired. In the audit, the OIG states as follows:

> Since Mutual Help and Turnkey III Programs generally do not exceed 25 years, one can reasonably expect that some of these units should be paid off, and the housing entities would no longer have the legal right to own, operate or maintain these units.

(AR 277.)

It is notable that HUD's comments in response to a draft of the OIG audit took exception to the above-quoted statement of the OIG, and correctly noted that there are several situations where the Tribe would continue to own, operate and maintain the units even after the 25-year amortization period had expired:

> There are several situations where the Tribe would continue to own, operate and maintain the units after 25 years. Examples include, conveyance being delayed because of lease or title issues, modernization which increased the term or purchase price of the unit, and a subsequent homebuyer.

(AR 326.)

Nevertheless, HUD continues to insist that homeownership units cannot be counted after 25 years unless the WRPT provides written justification, on a house-by-house basis, as to why each has not been conveyed. HUD then asserts the right to subjectively determine whether the

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[3] Attached to HUD's letter dated January 10, 2008 was a HUD issued "NAHASDA Guidance." (AR 702-703.) HUD issued this "guidance" on September 11, 1998, and entitled it Guidance 98-19, "Regulatory Requirements Regarding FCAS as listed on a Tribe's Formula Response Form" ("Guidance 98-19"). Guidance 98-19 purported in mandatory terms, to unlawfully limit the FCAS units that could be counted in receiving FCAS funding, and further unlawfully denied recipients a right to a hearing with respect to such denial of assistance. HUD purported to give Guidance 98-19 the force of law, and took the unlawful actions as heretofore alleged in material part based upon the requirements and limitations of Guidance 98-19. Guidance 98-19 constituted a rule, the adoption of which violated: (i) 5 U.S.C. §553 because the rule was not adopted in accordance with the procedures set out in such statute; and (ii) Section 106(b)(2) of NAHASDA, 25 U.S.C. § 4116(b), because such rule was not adopted in accordance with the negotiated rulemaking procedures required thereunder.

justification is sufficient to maintain FCAS status. Such an arbitrary and subjective standard violates the APA. More importantly, it violates the intent, if not the letter of NAHASDA. A key component of NAHASDA is the promotion of tribal self-determination and self-government. 25 U.S.C. § 4101(4)(7). The WRPT, not HUD, should be given some discretion to determine when conveyance is justified or not, without having to fear a HUD-mandated reduction in funding. It is not reasonable for HUD to require the WRPT to choose between evicting a homebuyer who may only owe less than $500 on their home or losing a portion of their block grant funding if they allow the homebuyer to remain in the home. A more reasonable, workable alternative, one easier for TDHEs to administer, would be to give TDHEs a set period of time to complete conveyance or eviction.

The WRPT cannot convey a unit until it has been paid off. With respect to homebuyers who are delinquent at the end of the 25-year amortization period, Congress authorized tribes to create policies to address procedure to follow to address the payoff off of the unit. 25 U.S.C. § 4137(b). It is arbitrary and unreasonable for HUD to take a dwelling unit off of the WRPT's FCAS when there is still a homebuyer in the unit. The WRPT should be given a reasonable period of time to either complete conveyance or evict the homebuyer. The WRPT can give a homebuyer an opportunity to payoff a unit or to be evicted. The WRPT submits that this is the more reasonable alternative than one that puts TDHEs at the mercy of HUD subjectively determining whether TDHEs "actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA." 24 C.F.R. § 1000.318(a)(2). Moreover, the principles of NAHASDA require that HUD defer to the WRPT's judgment, within the parameters of its policies, as to when eviction or conveyance is appropriate.

At a minimum, then, assuming that HUD even has the authority to remove homeownership units that are eligible for conveyance from the FCAS (and it is the WRPT's position that HUD does not have that authority under NAHASDA), then those units whose homebuyers are delinquent at the end of the 25-year amortization period must be given a reasonable period of time in which to pay off their homes. That would mean, logically, that the 25-year term must be extended for this reasonable period of time, to take account for the repayment period in accordance with the WRPT's policies. The WRPT may also be providing other services to the homebuyer that would extend the amortization period. Other reasons may

also exist to extend this period. Again, this is all assuming that HUD has the authority to exclude these units pursuant to 24 C.F.R. § 1000.318 in the first place.

In short, to the extent that 24 C.F.R. § 1000.318 authorizes HUD to exclude conveyed units, while §§1000.312 and 314 simultaneously prohibit TDHEs from including newly constructed dwelling units, the regulation violates NAHASDA because it does not realistically reflect the WRPT's housing need. More importantly, it is not consistent with Congress' intent regarding the dwelling unit component of the allocation formula. Congress intended that 25 U.S.C. § 4152(b)(1) be based on a snapshot of each TDHE's inventory of dwelling units on a date certain. The WRPT's interpretation of § 4152(b)(1), which would otherwise authorize TDHEs to include all of their homeownership units under an ACC contract as of September 30, 1997, is reasonable. The canons of construction of Indian statutes required HUD to defer to the WRPT's interpretation if it is reasonable. The court should therefore order HUD to allow the WRPT to count all of its homeownership units as FCAS regardless of whether these homes have been conveyed, demolished, or otherwise lost, and order that HUD's regulation 24 C.F.R. § 1000.318 is invalid to the extent it is inconsistent with the foregoing interpretation of § 4152.

C. Congress Amended NAHASDA to Adopt HUD's Interpretation of 25 U.S.C. § 4152(b)(1) for Future Years, But Not Retroactively

In 2007, Congress amended NAHASDA to adopt HUD's interpretation of 25 U.S.C. § 4152(b)(1).[4] HUD played a key hand in lobbying Congress for this amendment. However this demonstrates that HUD's interpretation of the 1996 language was incorrect. Congress would not have needed to amend NAHASDA to reflect HUD's interpretation if NAHASDA's original language supported HUD's interpretation. Perhaps more importantly, the fact that Congress declined to apply the amended language retroactively to 1996 demonstrates that HUD's interpretation of 25 U.S.C. § 4152(b)(1) was and is incorrect and not at all what Congress clearly and explicitly stated in 1996: HUD "shall" create a formula based on the needs of the Indian tribes "for assistance for affordable housing" and that formula must include the "number of low-income housing dwelling units owned or operated" as of September 30, 1997.

[4] The WRPT filed its complaint in this case prior to the amendment, so the WRPT's claims must be analyzed under the pre-amendment version of NAHASDA's block grant formula provision.(§ 302(b)(1) of NAHASDA, 25 U.S.C. § 4152(b)(1)).

Applying basic rules of statutory construction, the 2008 amendment to the formula allocation provision confirms that 24 C.F.R. § 1000.318(a) is invalid because it violates the provision as it existed prior to enactment of the 2008 Reauthorization Act. There are several general and specific rules of statutory construction that are pertinent here. The Court's primary task in construing statutes is to "determine congressional intent, using 'traditional tools of statutory interpretation.'" *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). As stated in Sutherland Statutory Construction:

> [I]n search for legislative intent, courts look to the objective to be attained, the nature of the subject matter and the contextual setting. The statute is construed as a whole with reference to the system of which it is part ...[L]egislative intent must prevail if it can be reasonably discovered in the language used and that language must be construed in the light of the intended purpose.

2A Norman J. Singer, *Sutherland Statutory Construction* § 45.05 (7th ed.) (citations omitted).

Beginning with an analysis of the language of the amendment to the formula allocation provision, it is clear the amendment constitutes a substantive and material change in the way that housing units are to be counted for FCAS purposes. Again, the pre-amendment version of the provision included "[t]he number of low-income housing dwelling units owned or operated at the time [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary" as a mandatory FCAS factor. 25 U.S.C. § 4152(b)(1). Now, through the 2008 Reauthorization Act, the provision has been materially altered so that housing units are only counted for FCAS purposes if they "are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided" and have not been "lost to the recipient by conveyance, demolition, or other means...". PL 110-411, § 301. The amended provision incorporates the very regulatory provision relied upon by HUD to recapture funding - 24 C.F.R. § 1000.318(a).

Looking simply at this statutory language, it is apparent that Congress has made a substantive change in the way that housing units are to be counted for FCAS purposes. It is well-established that "[w]hen Congress acts to amend a statute, [courts are to] 'presume it intends its amendment to have real and substantial effect.'" *Pierce County, Washington v. Guillen,* 537 U.S. 129, 145 (2003) (quoting *Stone v. INS,* 514 U.S. 386, 397 (1995)). If the amendment did *not* constitute a substantive change in the way that housing units are to be counted for FCAS

purposes, then the amendment would have no "real and substantial effect." If the formula allocation provision had not originally mandated the inclusion of 1997 units, the amendment would have been unnecessary. Thus, the amendment confirms that, until the effective date of the amendment (2008), the formula allocation provision mandated the inclusion of units owned or operated as of September 30, 1997.

The context in which the amendment was passed further bolsters the conclusion that the pre-amendment provision required inclusion of units owned or operated as of September 30, 1997. Sutherland provides that "if the legislature adopts an amendment urged by a witness [at a committee hearing], it may be assumed that the intent voiced was adopted by the legislature." 2A *Sutherland, supra*, at § 48:10 (emphasis added). Here, HUD developed and proposed the amendment to the formula allocation provision.

In developing and proposing the amendment, HUD plainly sought a change in NAHASDA's formula allocation provision that would bring it into conformity with the existing regulation in dispute – 24 C.F.R. § 318. By inference, HUD acknowledged the irreconcilable conflict between the statutory formula allocation provision and § 1000.318. Ultimately, in passing the 2008 Reauthorization Act, Congress adopted the amendment as proposed by HUD. *See* PL 110-411, § 301. Therefore, it must be assumed that the intent voiced by HUD--that the amendment "would change the way that housing units in management are counted for formula purposes" by not "counting units...in the year after they are conveyed, demolished or disposed of"--was adopted by Congress. 2A *Sutherland, supra*, at § 48:10.34.

Sutherland further provides that "[w]here a former statute is amended, or a doubtful meaning clarified by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent of the first statute." 2B *Sutherland, supra*, at § 49:11. "A number of cases have held that where an act is amended or changed so that doubtful meaning is resolved such action constitutes evidence that the previous statute meant the contrary." *Id.* (emphasis added). "This theory is based on the fact that the legislature is not presumed to perform a useless act." *Id.* Furthermore, an "amended statute should be interpreted in light of the court decisions that may have prompted the amendment." 1A *Sutherland, supra*, at § 22:29.

The timing of HUD's development of the amendment to the formula allocation provision cannot be ignored. The amendment was developed by HUD in close temporal proximity to a

number of lawsuits contesting HUD's regulation. As the amendment was clearly intended to change the existing law to bring it into conformity with § 1000.318, it is apparent that the amendment was developed in response to address these lawsuits. In making this change, it is presumed that Congress did not perform a "useless act." 2B *Sutherland* at § 49:11. Congress was attempting to statutorily "fix" the problem. This provides additional confirmation that the amendment plainly has a contrary meaning from that of the prior formula allocation provision at issue in the cases at bar. This can only mean that the pre-amendment formula allocation provision required FCAS to include the 1997 housing units.

Additionally, by authorizing the filing of civil actions under the pre-amendment formula allocation provision (see PL 110-411, § 301(E)), Congress further demonstrated its intent. If the amendment constituted nothing but a clarification of existing law, there would be no need for the provision permitting tribes to file suit under the pre-amendment formula allocation provision, as the WRPT did. This "civil action" provision would be yet another "useless act". If the amendment was merely a clarification, there would be no use in distinguishing between the effect of the original statute and the amended statute in any manner. Instead, with the "civil action" provision, Congress made clear that TDHEs, such as the WRPT, were to have the benefit of the pre-2008 Reauthorization Act language as to the historic operation of their programs. This constitutes a Congressional acknowledgment that the formula allocation provision has been materially changed by the amendment.

The Second Circuit faced analogous circumstances in *Commissioner of Internal Revenue v. Callahan Realty Corp*., 143 F.2d 214 (2nd Cir. 1944). There, the United States Tax Court invalidated an IRS regulation that used the term "sale or exchange of stock or securities", while the pertinent section of the authorizing statute was limited to the "sale of stock or securities". 143 F.2d at 215 (emphasis added). Congress subsequently amended the authorizing statute to incorporate the regulation, but explicitly made the effective date prospective. On appeal, the commissioner continued to argue that the regulation was valid. The Second Circuit rejected the commissioner's argument, however, relying largely on Congress' decision to limit the effect of the amendment to a prospective time period:

> This limitation upon the effect of the amendment seems to us to show that it plainly was not made merely to clarify existing law. Had the intent of Congress been only to state more clearly what the statute had meant from its original enactment, there would have been no point in limiting the effect of the

> restatement to the period following December 31, 1936. We think such a limitation shows that it did realize that the amendment enlarged the scope of the original enactment and made sure that taxpayers would understand that it was not to be applied retroactively....
>
> *We think it now tips the scales in favor of the respondent and leads to the conclusion that the regulation was a broadening of the original statute involving legislation beyond the power of the treasury. Until Congress itself amended the statute the regulation went beyond its scope and was invalid.* The decision of the Tax Court was therefore right.

Id. at 216 (emphasis added).

For the foregoing reasons, this Court should find and conclude that all FCAS units that were the subject of an Annual Contribution Contract between HUD and the WRPT as of September 30, 1997 must be included in the WRPT's FCAS for purposes of grant funding calculations, for all applicable fiscal years through fiscal year 2008.

HUD's interpretation is unreasonable to the extent that it excludes WRPT's housing units, whether or not conveyed, and violates the APA.

D. HUD Failed to Give the WRPT Notice and an Opportunity for a Hearing.

HUD's attempt to recapture past funding provided to the WRPT is also unlawful because HUD may only reduce a NAHASDA recipient's grant amounts by complying with the notice and opportunity for hearing requirements of Sections 401 and 405 of NAHASDA (25 U.S.C. §§ 4161 and 4165), 24 C.F.R. §1000.532, and the due process clause of the United States Constitution. The remedies Congress laid out in sections 401-405 of NAHASDA are exclusive and leave no room for HUD to adopt and enforce any additional remedy for the recapture of NAHASDA funding. To the extent 24 C.F.R. §1000.319(d) authorizes a remedy outside of Sections 401 and 405 of NAHASDA, the regulation is invalid.

Title IV of NAHASDA provides both a comprehensive array of sanctions and procedural safeguards, including, inter alia: (a) administratively recapturing misspent revenues under Section 401(a), if the recipient is guilty of "substantial noncompliance," and the recipient is given the opportunity for a formal hearing; and (b) after an audit or review, adjusting a recipient's grant amount under Section 405(d), provided that, according to a 2000 amendment to Section 405, HUD's authority to adjust the recipient's grant amount is "subject to" the substantial noncompliance and hearing prerequisites of Section 401(a).

HUD's planned recapture from the WRPT is approximately $110,000. Despite the amount involved, HUD has neither offered the WRPT an opportunity for a hearing nor found that the WRPT's alleged noncompliance was "substantial." Nothing within the comprehensive panoply of remedies set out in Title IV authorized HUD to so summarily deprive recipients of the procedural safeguards guaranteed by NAHASDA

E. HUD Must Administer NAHASDA in a way that Comports with the Federal Government's Trust Responsibility to the WRPT.

A trust responsibility exists under NAHASDA that requires HUD to administer NAHASDA grant funds in a manner that is consistent with the federal government's responsibility as the trustee of the WRPT. While interpreting statutes, the familiar Indian law canons of construction provide that statutes are to be construed liberally in favor of Indian tribes; ambiguities are to be resolved in favor of Indian tribes. *See Choctaw Nation v. United States,* 119 U.S. 1, 28 (1886); *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 200 (1999); *see also* Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law*, 5.04[4][a] (2006 ed.). As indicated previously, the relevant portions of NAHASDA and associated regulations must be understood and interpreted in light of both the trust responsibility and the canons of construction. HUD ignored its trust responsibility in seeking recapture from the WRPT.

In determining whether a trust relationship exists, courts have had to determine whether the applicable statutes, regulations and management by the federal government create fiduciary responsibilities. *See, e.g., United States v. Mitchell,* 463 U.S. 206, 225, 226 (1983). NAHASDA's language, Congress' intent, and the history of Indian housing clearly provide that HUD has a trust responsibility. The federal government recognized the problem of substandard, unsanitary housing conditions in Indian Country over one hundred and fifty years ago. *See* Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. BlackLetter L.J. 211, 232 (Spring, 2002) (citing Arnold C. Sternberg & Catherine M. Bishop, *Indian Housing: 1961-1971, A Decade of Continuing Crisis*, 48 N. D. L. REV. 593, 593 (1972)). The historical importance of an act is significant when determining whether a trust responsibility exists. *Wolfchild v. United States,* 96 Fed. Cl. 302, 341 (2010) (court found that the historical importance of the Appropriations Act and Congress' intent for the statute was to serve as substitutes for the obligations that the federal government took upon itself).

Congress has specifically set out its purpose for NAHASDA. In 25 U.S.C. § 4101, setting out the Congressional Findings, the legislature recognized that "the Federal Government has a responsibility to promote the general welfare of [Indian tribes]"; that there "exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people"; that "the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people"; that "the Congress . . . has assumed *a trust responsibility* for the protection and preservation of Indian tribes and for *working with tribes and their members to improve housing conditions and socioeconomic status"*; that "*providing affordable homes in safe and healthy environments is an essential element in the special role* of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status"; and that "*Federal assistance to meet these responsibilities shall be provided* in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to Indian tribes or tribally designated entities. . .". 25 U.S.C. § 4101(1), (2), (3), (4), (5), (6) and (7) (emphasis added). Congress recognizes its existing trust responsibility and has tasked HUD with upholding the trust relationship by controlling and managing housing funds for Indian tribes.

The fact that HUD has pervasive control and authority over grant funds also establishes that HUD has a trust responsibility. *U.S. v. Navajo Nation*, 566 U.S. 287, 292 (2009). Not only does HUD administer the allocation of such funds, but HUD has authority to terminate payments to a recipient, reduce payments, limit their permitted uses, limit the availability of payments, or provide a replacement tribally designated housing entity in the event of non-compliance. 25 U.S.C. § 4161. HUD monitors compliance, establishes performance measures, and conducts onsite inspections. 25 U.S.C. § 4163. HUD also reviews reports from the recipients that include a description of the use of the funds and then submits to Congress a progress report, a summary of funds used, and description of the outstanding loan guarantees. 25 U.S.C. § 4167. HUD also has authority, when it determines such action to be appropriate, to conduct an audit or review for various purposes. 25 U.S.C. § 4165.

The trust responsibility constrains any discretion that HUD may otherwise enjoy in administering NAHASDA, and creates for HUD a fiduciary duty to the WRPT. HUD breached

these trust duties by unlawfully attempting to recapture grant funds the WRPT is entitled to and mandated by NAHASDA.

V. CONCLUSION

The WRPT respectfully requests that the court declare that 24 C.F.R. § 1000.318 violates the APA and NAHASDA, and enjoin HUD from any recapture of WRPT NAHASDA grant funding. Additionally or alternatively, the WRPT respectfully requests that this court grant such further relief as requested in the WRPT's Amended/Supplemental Complaint and as the court deems just and equitable.

RESPECTFULLY SUBMITTED on September 6, 2011.

Law Offices of Wes Williams Jr.

By: /s/ Wes Williams Jr.
Wes Williams Jr.
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
Email: wwilliams@stanfordalumni.org
Attorney for Plaintiff Walker River Paiute Tribe

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September 2011, I electronically filed the foregoing "Walker River Paiute Tribe's Motion for Summary Judgment" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

Mitchell C. Wright
mitchwright@wrightlawoffices.com

Holly A. Vance Holly.A.Vance@usdoj.gov, doriayn.olivarra@usdoj.gov, eunice.jones@usdoj.gov, Joanie.Silvershield@usdoj.gov, Judy.Farmer@usdoj.gov, sue.knight@usdoj.gov

DATED: September 6, 2011

By: /s/ Wes Williams Jr.
Wes Williams Jr.