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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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff WALKER RIVER PAIUTE TRIBE (hereinafter "WRPT" or "Plaintiff"), through its undersigned counsel, hereby submits this brief in support of its motion for summary judgment and in opposition to the Defendants' cross-motion for summary judgment. This reply and response is supported by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED on February 27, 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES

Introductory Statement

The Department of Housing and Urban Development ("HUD") continues both in the tone of its arguments and by its actions to be dismissive of the significant trust obligations it owes to the WRPT. Congress made clear with the passage of NAHASDA that it was seeking to fulfill the federal government's "unique trust responsibility to protect and support Indian tribes and Indian people," and "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(3), (4). Yet, there is nothing in HUD's Response that fairly reflects any recognition of these responsibilities imposed upon HUD by Congress.

Rather than recognizing its duty "to support Indian tribes and Indian people", HUD defends its failure to do so, presenting elaborate *post hoc* rationalizations for its actions. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *Gose v. U.S. Postal Serv.,* 451 F.3d 831, 839 (Fed. Cir. 2006) ("We must ensure that the agency is not now masquerading a *post hoc* rationalization as a then-existing interpretation.") HUD's failure to act with the fidelity of a trustee is garishly displayed when it seeks to recast the 2008 Reauthorization Act as merely "clarifying" NAHASDA's formula allocation provision (25 U.S.C. § 4152(b)), rather than changing it. Defendants' Opposition and Cross-Motion for Summary Judgment ("HUD Brief" or "HUD Br.")(Doc. 21) at 18-23. Its "clarification" argument clearly flies in the face of: (A) HUD's own previous characterization of the 2008 Reauthorization Act as a "change" of law before Congressional committees; and (B) the explicit terms of the 2008 Reauthorization Act itself. Ultimately, any argument over whether Congress merely clarified § 4152(b) or amended it should end in the face of the 2008 Reauthorization Act's "civil action" provision. The "civil action" provision declared that the statutory changes to § 4152(b) 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." P.L. 110-411, § 301(b)(1)(E). HUD, in spite of its quixotic efforts, cannot explain how--if Congress merely clarified the law--the amended formula allocation provision "would not apply" to claims filed within 45 days of the Act's passage. For this "civil action" provision to have any meaning at all, NAHASDA's formula allocation provision as amended must be substantively different than the pre-amendment version. Despite HUD's "clarification" arguments, the plain language of, and context surrounding, the 2008 Reauthorization Act confirm that 24 C.F.R. § 1000.318(a) is invalid as it conflicts with the pre-amendment law.

It is equally problematic that HUD continues to defend its treatment of the WRPT on the basis that this is a "zero sum" game suggesting that this justifies the obviously unfair outcome of this process. HUD Br. at 15. The WRPT understands this game all too well. As a result of HUD's unilateral actions, the WRPT has seen its block grant funding illegally reduced by thousands of dollars. The WRPT is a small tribe with limited financial resources. There is no reservoir of funds to satisfy HUD's unilateral demands; there is only a reservoir of great needs for affordable housing for Tribal members. Indeed, the WRPT understands well the reality of the "zero sum game" requiring it to pay the price for HUD's administration of this program. In filing this case, the WRPT seeks only to compel HUD's compliance with NAHASDA including the federal government's "unique trust responsibility to protect and support Indian tribes and Indian people." All of HUD's arguments ultimately fail.

Argument

I. 24 C.F.R. § 1000.318 Violates NAHASDA.

A. The Tenth Circuit's *Fort Peck II* Decision is Unpublished, Not Precedential and Does Not Consider the Impact of the 2008 Reauthorization Act.

In its Response, HUD repeatedly urges this Court to be bound by the Tenth Circuit's unpublished decision in *Fort Peck II*. *See Fort Peck Housing Authority v. U.S. Dept. of Housing and Urban Development,* 367 Fed. Appx. 884 (10th Cir. 2010)("*Fort Peck II")*. Because the *Fort Peck II* decision is unpublished, it is "*not* precedential . . . ." 10th Cir. R. 32.1(A) (emphasis added). *See Henderson v. Horace Mann Ins. Co*., 560 F. Supp. 2d 1099, 1115 (N.D. Okla. 2008) (holding that an unpublished opinion "is not binding precedent," and declining to follow the

unpublished decision on ground that it was not persuasive); *see also Garrett v. Lowe's Home Ctrs., Inc*., 337 F. Supp. 2d 1230, 1236 n. 1 (D. Kan. 2004). Furthermore, the *Fort Peck II* Court's choice *not* to publish was deliberate and fully informed. After the unpublished *Fort Peck II* decision was handed down on February 19, 2010, HUD filed a "Motion for Publication" on March 5, 2010. *See Fort Peck Housing Authority v. HUD,* Nos. 06-1425 and 06-1447, Doc. No. 01018378489 (10th Cir. March 5, 2010). As part of that Motion for Publication, HUD pertinently stated and argued as follows:

> [T]his case was, in effect, the test case for a significant number of similar challenges to HUD's funding formula under the same (2002) version of NAHASDA. At least 18 such similar challenges are currently pending in the district courts within this circuit, . . . in the Court of Federal Claims . . . and in district courts within the Ninth Circuit . . . . And several of those similar challenges involve multiple plaintiffs . . . . Publication of this Court's decision here would assist the courts hearing these very similar cases. Moreover, with respect to the numerous similar cases pending in the district courts within this Circuit, publication would avoid wasteful duplicative litigation by establishing this Court's decision as binding precedent.

Id. at 2, 3. The *Fort Peck II* Court denied the Motion for Publication on May 6, 2010. *See Fort Peck Housing Authority v. HUD,* Nos. 06-1425 and 06-1447, Doc. No. 01018416418 (10th Cir. May 6, 2010). Curiously, HUD's Brief makes no mention of the Motion for Publication or the *Fort Peck II* Court's rejection of that Motion. In any event, it is clear that the *Fort Peck II* Court made a fully informed decision *not* to publish, even after being presented with HUD's arguments as to why *Fort Peck II* should be binding upon the Colorado Federal Court in considering the cases before it. So informed, the Circuit determined by implication that the Colorado Federal Court is free to take a fresh look at the arguments the Fort Peck Housing Authority, as well as numerous other similarly situated plaintiffs.

Further, though 10th Cir. R. 32.1(A) provides that unpublished decisions may be cited for their persuasive value, the unpublished *Fort Peck II* decision has *no* persuasive value with respect to the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 ("2008 Reauthorization Act"). Particularly, while recognizing the passage of the 2008 Reauthorization Act in *Fort Peck II*, the Circuit explicitly did not address or consider the effect that the amendments to NAHASDA's formula allocation provision have upon the appropriate

interpretation of the pre-amendment formula allocation provision, 25 U.S.C. § 4152(b). *See Fort Peck II,* 367 Fed. Appx. at 885, n. 1. Thus, the unpublished *Fort Peck II* decision cannot be read as providing *any* guidance in determining issues related to the 2008 Reauthorization Act. For whatever reason the *Fort Peck II* Court chose not to address the impact of the 2008 Reauthorization Act, the fact remains that the *Fort Peck II* Court did not consider the effect of the 2008 amendments. *Id.* As demonstrated in the WRPT's Motion for Summary Judgment, the plain language of, and context surrounding, the 2008 Reauthorization Act confirms that 24 C.F.R. § 1000.318(a) could not survive under the old Act.

B. The 2008 Reauthorization Act Substantively Changed, Rather Than Merely "Clarified," NAHASDA's Formula Allocation Provision.

Substantially all of HUD's arguments regarding the 2008 Reauthorization Act center on whether the amendments to NAHASDA's formula allocation provision constitute a substantive change, or simply a "clarification," of the pre-amendment law. HUD argues that Congress merely clarified the meaning of the pre-amendment law by its substantial adoption of § 1000.318(a) in the 2008 Reauthorization Act. This argument is belied by the text and context of the 2008 Reauthorization Act. As shown in the WRPT's Motion for Summary Judgment, and *infra*, the substantive change of law is evidenced by: (1) the plain language of the amendment; (2) HUD's own congressional hearing testimony concerning the amendment; and (3) the 2008 Reauthorization Act's "civil action" provision which allowed actions to proceed under the prior statute, if they were timely filed. The 2008 Reauthorization Act clearly and substantively changed the pre-amendment law by categorically excluding a significant class of housing units from FCAS. This change of law confirms that 24 C.F.R. § 1000.318(a) impermissibly violates the pre-amendment version of NAHASDA's formula allocation provision.

In arguing that the 2008 Reauthorization Act amendment merely clarified the law, HUD relies heavily on a 2007 Senate committee report which characterizes the amendment as a "[c]larification." HUD Br. at 18 (quoting S. Rep. No. 110-238, at 9 (2007)). However, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g.,*

United States v. Vazquez-Rivera, 135 F.3d 172, 177; *United States v. Wright,* 625 F.3d 583, 600 (9th Cir. 2010); *Boddie v. Am. Broad. Companies, Inc.,* 881 F.2d 267, 269 (6th Cir. 1989) ("*Boddie II*"); *Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan.,* 128 F.3d 1431, 1435-36 (10th Cir. 1997); *Commissioner of Internal Revenue v. Callahan Realty Corp.,* 143 F.2d 214, 216 (2nd Cir. 1944). As the First Circuit stated in *Vazquez-Rivera*:

> Painting black lines on the sides of a horse and calling it a zebra does not make it one. Similarly, labeling the…amendment [at issue] a "clarification" of Congress's intent in the original law is legally irrelevant . . . .*** [I]t is obvious that the "clarification" is more than merely cosmetic.

Vazquez-Rivera, 135 F.3d at 177. Characterizing the 2008 Reauthorization Act amendment as a "clarification" is also the equivalent of painting black lines on the sides of a horse and calling it a zebra. The so-called "clarification" is much more than "merely cosmetic," it is a substantive and categorical change in the housing units counted for the purposes of the WRPT's FCAS.

1. <u>The Plain Language of the Amendment.</u>

One need only compare the text of the amendment with the text of the original formula allocation provision to see the substantive change. 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) (emphasis added). There is no controversy that the original formula allocation provision included and "explicitly list[ed]…the number of 1997 dwelling units" as one of the FCAS factors. *Fort Peck II,* 367 Fed. Appx. at 890. However, through the 2008 Reauthorization Act, Congress materially altered the formula allocation provision 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 . . . ." P.L. 110-411, § 301. This is far more than a cosmetic clarification. This is an unconditional elimination of housing units from the FCAS count. Housing units that were included under the original formula allocation provision *must* now be excluded. This amendment is a substantive change of law with an enormous financial

impact on the WRPT.

The Sixth Circuit found a substantive change of law under similar circumstances in *Boddie II*. The *Boddie II* case involved 1986 amendments to § 2511(2)(d) of the Omnibus Crime Control and Safe Streets Act ("Title III"). As the *Boddie II* Court explained, under the amendment, nonconsensual interception of a communication for a merely "injurious" purpose was "no longer actionable" under Title III. 881 F.2d at 268. On appeal, the plaintiff, who originally filed the action under the pre-amendment version of § 2511(2)(d), argued that the district court improperly applied the amendment retroactively by denying her a jury trial on whether defendants acted with an "injurious" purpose. Defendants countered that the amendment to § 2511(2)(d) was a mere clarification of the pre-amendment law, and that thus, the district court simply and properly used the amendment as a guide in interpreting the prior law. The Sixth Circuit soundly rejected defendants' "clarification" argument:

> There is some support in the legislative history for the District Court's conclusion that the 1986 amendment was a mere clarification. The Senate report stated that numerous cases--including *Boddie I*--had "misconstrued" the term "other injurious purposes." S.Rep. No. 541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3571. However, a closer look at the substance and history of the 1986 amendment reveals that Congress did not clarify section 2511(2); rather, *Congress acted to eliminate one basis for an action under that section . . . .. [A]ny inference that the amendment merely clarified the "injurious purpose" language is negated by the fact that rather than defining or rephrasing the term, the amendment removed it altogether.*
>
> ***
>
> We conclude that the District Court erred in treating the amendment as a clarification of prior law.

Id. at 269 (emphasis added). Similarly, in the case at bar, after the district court in the *Fort Peck* litigation (*Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125, 1130 (D. Colo. 2006) ("*Fort Peck I*")) held that § 1000.318(a) impermissibly conflicts with the pre-amendment version of the formula allocation provision, HUD maneuvered to secure an amendment of NAHASDA categorically eliminating a class of 1997 units from the FCAS count. In passing the 2008 Reauthorization Act, Congress did just that. By significantly narrowing the scope of the formula allocation provision, the 2008 Reauthorization Act amendment "removed" an entire class of

housing units "altogether" from the WRPT's FCAS.[1] The text and context of the amendment establish that it constitutes a substantive and meaningful change in the law.

2. HUD's Congressional Committee Hearing Testimony.

Moreover, it is important to re-emphasize that HUD itself, in developing and proposing the amendment, testified before congressional committees that the amendment "*would change*" the law by no longer "counting units for FCAS purposes in the year after they are conveyed, demolished or disposed of." *See* Housing Issues in Indian Country: Hearing before the S. Comm. On Indian Affairs, 110th Cong., S. Hrg. NO. 110-65 at 8 (written statement by Rodger J. Boyd (emphasis added). Because Congress enacted the very amendment developed and advocated by HUD, "it may be assumed that the intent voiced [in the committee hearing testimony] was adopted by the legislature." 2A Norman J. Singer, *Sutherland Statutory Construction*, § 48:10 (7th ed.)(emphasis added). Understandably, HUD now wishes to distance itself from the hearing testimony of its designated witnesses.

In its zeal to distance itself from its prior testimony, HUD appears to argue that witness testimony is negligible. HUD Br. at 19-20. While hearing testimony may not be the most persuasive evidence of congressional intent, it must be considered in determining statutory construction.

> *However*, courts have considered hearing statements in the course of statutory construction . . . . *When it appears from the timing of the amendment and the content of the textual addition that Congress was responding to an interested party's proposal, it is permissible to conclude that Congress shared the interested party's intent. S.E.C. v. Robert Collier & Co.,* 76 F.2d 939 (2d Cir. 1935) (relying on hearing testimony to interpret subsequent bill amendment that reflected changes suggested by the witness); 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 48:10 (6th ed. 2000) ("[I]f the legislature adopts an amendment urged by a witness, it may be assumed that the intent voiced was adopted by the legislature."). Although the Supreme Court has cautioned against attributing to Congress "an official purpose based on the motives of a particular group that lobbied for or against a certain proposal," *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), it has also accorded weight to the views of interested parties with a particular expertise in the subject matter at issue. *Chicago & Northwestern Ry. Co. v. United Transp. Union,* 402 U.S. 570, 576, 91 S.Ct. 1731, 29 L.Ed.2d 187 (1971) (according

[1] While the amendment was adopted in 2008, it first applied to fiscal year 2009, not fiscal year

> statements of labor and management representatives "great weight in the construction of the [Railway Labor] Act" because of their role in its enactment). In light of the [National Treasury Employees Union]'s congressionally-recognized role in developing federal-sector labor legislation,[] the hearing statements proposing an amendment to make the negotiated procedures the exclusive administrative procedures are entitled to consideration.

Bailey v. United States, 52 Fed. Cl. 105, 111 (Fed. Cl. 2002) (emphasis added) (footnote omitted). *See also United States v. Am. Trucking Ass'ns.,* 310 U.S. 534, 548 (1940) ("[T]he Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."). Clearly, the hearing statements are more than "negligible." In *Bailey*, representatives of the National Treasury Employees Union ("NTEU") testified before a House subcommittee urging that Congress amend the Whistleblowers Protection Act to clarify the remedies available under that Act. The *Bailey* Court considered the hearing testimony in rendering its decision due to NTEU's "congressionally-recognized role in developing federal-sector labor legislation . . . ."

Here, HUD employees testified and HUD is the agency charged with the administration and implementation of NAHASDA. HUD obviously has significant experience in administering NAHASDA block grant funds. In addition, HUD's role in developing the amendment was paramount. HUD developed, drafted, proposed and advocated the exact amendment language that was ultimately enacted by Congress as part of the 2008 Reauthorization Act. In considering the "timing of the amendment and the content of the textual addition," there is no doubt that Congress was responding to HUD's proposal. HUD cannot run from its admission 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." *See* Housing Issues in Indian Country: Hearing before the S. Comm. On Indian Affairs, 110th Cong., S. Hrg. NO. 110-65 at 8 (written statement by Rodger J. Boyd (emphasis added).

HUD recognized that a substantive change in the statutory counting method was needed in order to comport with 24 C.F.R. § 1000.318(a). This is an admission that § 1000.318(a) violates the pre-amendment version of the formula allocation provision.

3. The 2008 Reauthorization Act's "Civil Action" Provision.

Lastly, the 2008 Reauthorization Act provides that the statutory changes to the formula allocation provision 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." P.L. 110-411, § 301(b)(1)(E). With this "civil action" provision, Congress expressly declined to apply the amendment retroactively to tribal designated housing entities ("TDHE") that filed a timely civil action. If the amendment was nothing but a clarification of existing law, there would be no need for the provision permitting TDHEs to file suit under the pre-amendment formula allocation provision. If the amendment was just a distinction without a difference, there would be no use in drawing lines between the effect of the original statute and the amended statute. Courts do not presume that Congress would perform such "'a useless act.'" *United States v. Phommachanh,* 91 F.3d 1383, 1387 (10th Cir. 1996) (quoting 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.11 at 83 (5th ed. 1992)). The "civil action" provision is a congressional acknowledgment that the formula allocation provision has been materially changed by the amendment and does not apply retroactively.

In sum, the 2008 Reauthorization Act substantively changed the formula allocation provision. And this statutory change confirms that § 1000.318(a) violates the pre-amendment version of the formula allocation provision.[2]

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[2] HUD additionally argues that the 2008 Reauthorization Act is "virtually conclusive" evidence that 24 C.F.R. § 1000.318(a) implements congressional intent as expressed in the pre-amendment law, citing *Commodity Future Trading Com'n. v. Schor*, 478 U.S. 883 (1986), and *Bell v. New Jersey*, 461 U.S. 773 (1983). HUD Br. at 16-17. However, the *Schor* and *Bell* decisions are distinguishable and inapposite. In *Schor*, the relevant portions of the statutes at issue were re-enacted essentially without change. Here, as explained *supra*, the 2008 Reauthorization Act amendment fundamentally changed the pre-amendment formula allocation provision. In *Bell,* the Court found that the plain language and legislative history of the *original* statute at issue there recognized the right made explicit by the amendment. *Bell*, 461 U.S. at 783. By contrast, there is no plain language or legislative history connected with the pre-amendment formula allocation provision which supports the categorical elimination of 1997 housing units from the WRPT's FCAS. Additionally, the language of the original and the re-enacted statutes in both *Schor* and *Bell* was readily susceptible to the administrative interpretations of those statutes. Here, by contrast, the relevant statutory language of the pre-amendment version of the formula allocation provision spoke directly to the FCAS issue and is flatly inconsistent with § 1000.318(a). Moreover, unlike the case at bar, neither *Schor* nor *Bell* involved congressional

C. HUD's Argument That The Pre-Amendment Version of the Formula Allocation Provision Unambiguously Required the FCAS Reductions Under 24 C.F.R. § 1000.318(a) Is Wrong.

In its Brief, HUD argues that, irrespective of any analysis of the 2008 Reauthorization Act, the pre-amendment version of the formula allocation provision unambiguously "supports" the categorical elimination of housing units required by § 1000.318(a). HUD Br. at 12-14. In support of this argument, HUD asserts that the pre-amendment "statute's use of the phrase 'based on' indicates that the one factor identified in § 4152(b)(1), *i.e.*, the number of 1997 units, is only a starting point for the formula, which may be affected by other 'factors.'" HUD Br. at 13. Several courts have held that while the words "based on" do not compel an agency to rest its decision "solely on" a specified factor, such language constrains the agency from "abandon[ing]" or "supplant[ing]" the specified factor. *Catawba County, N.C. v. E.P.A.,* 571 F.3d 20, 37 (D.C. Cir. 2009) (citing *Sierra Club v. EPA,* 356 F.3d 296, 306 (D.D.C. 2004)); *see also Environmental Defense v. E.P.A.,* 369 F.3d 193, 203-04 (2d Cir. 2004); *Nuclear Energy Inst., Inc. v. E.P.A.,* 373 F.3d 1251, 1270 (D.C. Cir. 2004). The regulation renders irrelevant the number of units owned or operated as of September 30, 1997 for the purposes of the formula. More precisely, the regulation categorically eliminates from FCAS units that the TDHE "no longer has the legal right to own, operate, or maintain . . ., whether such right is lost by conveyance, demolition, or otherwise . . . ." 24 C.F.R. § 1000.318. Under the regulation, the Secretary is denied any discretion to include units that were to be included under the statutory

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committee hearing testimony from agency representatives that the amendment would "change" the existing law.

In the case at bar, HUD's interpretation of the pre-amendment version of the formula allocation provision has been irregular and inconsistent. Either implicitly, or explicitly, HUD has at various times acknowledged the conflict between the pre-amendment law and the regulation. Thus, while Congress substantially adopted § 1000.318(a) with the 2008 Reauthorization Act, Congress did not adopt any consistent interpretation expressed by HUD. On the contrary, Congress substantively changed the law consistent with HUD's committee hearing testimony. This is a significantly different scenario than *Schor* or *Bell*, where Congress clarified the law by truly ratifying consistent, long-held and reasonable agency interpretations. Also, it is noteworthy that the statutes at issue in *Schor* and *Bell* did not expressly authorize claimants to file suit against the agency under the pre-amendment version of the statutes.

formula. Hence, the regulation replaces, *i.e.*, supplants, a statutory factor with something materially different. The words "based on"--as used in the formula allocation provision--do not grant HUD the authority to supplant a statutory factor in this manner. And this construction of law is only confirmed and strengthened by the text and context of the 2008 Reauthorization Act. If the pre-amendment formula allocation provision properly granted HUD the authority to promulgate the regulation, the subsequent change of law would have been unnecessary.

Furthermore, courts have held that the phrase "based on" is ambiguous. *See, e.g., Sierra Club,* 356 F.3d at 306; *Environmental Defense,* 369 F.3d at 204; *Catawba County,* 571 F.3d at 37. To the extent such ambiguity exists, it should be resolved in the WRPT's favor under the Indian Canon of Construction. Under the Indian Canon of Construction, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians.").[3] The Canon further provides "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan,* 276 F.3d 1186, 1194 (10th Cir. 2002) (citing *Bryan v. Itasca County, Minnesota,* 426 U.S. 373 (1976)). Additionally, the familiar "*Chevron* deference" is trumped by the Canon in this case. *See Ramah Navajo Chapter v. Lujan, supra,* 112 F.3d at 1462. While

[3] HUD argues that the Canon does not apply because the WRPT"s interpretation of NAHASDA will not favor Indians, but only the WRPT. HUD Br. at 15. Two circuits have rejected that proposition in the context of this case. *Ramah Navaho Chapter v. Salazar*, 644 F.3d 1054, 1062, 1065, 1066 (10th Cir. 2011)(holding that Indian canons apply to Indian Self-Determination and Education Assistance Act such that, "if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way"); *accord Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). In any event, on balance, the WRPT's construction of the formula allocation provision benefits all tribes. Any negative impact is attenuated by the fact that the WRPT is part of are a subset of TDHEs who timely filed suit under the 2008 Reauthorization Act's "civil action" provision and because going forward, the 2008 Amendments change the way FCAS is counted. Therefore, the relief the WRPT requests in this case will not hurt any other tribes.

there may be questions as to what exactly "based on" means, it is clear what "based on" does *not* mean. It does not mean that HUD was authorized to supplant the first factor of the formula allocation provision by regulatory fiat. Indeed, whether the Canon is applied or not, this is an eminently reasonable and amply supported interpretation. And while HUD should not benefit from *Chevron* deference, even if *Chevron* balancing were applied in this case, HUD's interpretation would not prevail as the regulation is "arbitrary, capricious" and "manifestly contrary to the statute**."** *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)("*Chevron*").

Lastly, the WRPT's interpretation of the pre-amendment formula allocation provision and 24 C.F.R. § 1000.318 is consistent with NAHASDA's overall goals and purposes. Congress passed NAHASDA with the recognition 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." 25 U.S.C. § 4101(4). Congress determined that "the need for affordable homes and healthy environments on Indian reservations [and] Indian communities is acute." *Id.* § 4101(6). The WRPT's interpretation is consistent with these goals and benefits Indian tribes by setting a fixed baseline for each tribe's housing inventory to be counted for formula purposes. The WRPT"s interpretation treats all tribes equally, regardless of how the tribes' housing units are distributed between rental and homeownership and regardless of whether they were demolished and replaced or converted from Mutual Help to low rent. Additionally, contrary to HUD's interpretation, the WRPT's interpretation does not discourage tribes from developing new homeownership units to replace older ones that have been demolished or conveyed. Simply put, 24 C.F.R. § 1000.318 violates the pre-amendment version of NAHASDA's formula allocation provision.

II. HUD Violated The Pre 2008 Version of NAHASDA, 24 C.F.R. § 1000.318 and the APA By Excluding and Reducing Funding for Units That Were Not Actually Lost By Conveyance to a Third Party, Demolition or Otherwise.

HUD misconstrues the WRPT's argument regarding unlawfully excluding FCAS or recapturing funding for FCAS that have not actually been lost by conveyance, demolition or

otherwise and argues that 24 C.F.R. § 1000.318(a)(1) and (2) properly reflect need and are not impermissibly vague. HUD is wrong.

Initially, HUD sets up a house of mirrors in an attempt to argue that §§ 1000.318(a)(1) and (2) reflect need and to detract from the *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dept. of Hous. & Urban Dev.,* 567 F.3d 1235 (10th Cir. 2009) ("*Keetoowah")* decision which is squarely on point on this issue. HUD Brief at 23. HUD relies heavily on *Fort Peck II*, which addressed only the exclusion of units no longer owned or operated by a TDHE. As previously pointed out, not only is *Ft. Peck II* dubious authority on any of these matters, but there is absolutely no basis for reading *Fort Peck II* as encompassing units that were still owned and operated by a TDHE at the time they were disqualified for funding.

HUD's expansive interpretation of *Fort Peck II* to authorize the exclusion of units that a TDHE still owns and operates simply cannot be reconciled with the decision in *Keetoowah, which* struck down a similar regulation that was not based on need. Nor should the court give *Fort Peck II* such an expansive reading because to do so would render Fort Peck II in direct conflict with *Keetoowah*. *Fort Peck II* did not address, either expressly or implicitly, whether these dwelling units, though still owned and operated by a TDHE, could lawfully be excluded from FCAS by HUD, or whether HUD could recapture funding for these units under § 1000.318. Instead, the court's decision upheld the regulation as one that validly excluded units a TDHE "no longer owned or operated". *Fort Peck II*, 367 Fed. Appx. at 885, 887, 891, and 892. Specifically, the court in *Fort Peck II* held that:

> A reduction equal to the number of dwelling units *no longer owned or operated* by a Tribal Housing Entity recognized the ongoing and evolving needs of Tribal Housing Entities. NAHASDA clearly required interplay between all three factors in the determination of a Tribal Housing Entity's need, including those HUD identified in the rulemaking process. *Section 1000.318*'s downward adjustment was an example of this interplay. It was not arbitrary or capricious.

367 Fed. Appx. at 892 (emphasis added).[4]

[4] Such a characterization of § 1000.318(a) is consistent with the regulation's plain language. However, it is notable that § 1000.318 does not expressly authorize HUD to remove units from FCAS or recapture funds for units which a TDHE continues to own and operate,

In this regard, it is significant that the plaintiff in *Fort Peck II* asked the Tenth Circuit panel to clarify its decision in its Petition for Rehearing as to whether the units that it still owned and operated were covered by or outside the scope of § 1000.318 (a). The *Fort Peck II* plaintiff sought this clarification in light of the fact that § 1000.318 does not explicitly address HUD's authority to remove such units from FCAS, and in light of the Tenth Circuit's published decision in *Keetoowah.* The clarification was sought because the Order and Judgment limited its characterization of § 1000.318 as excluding dwelling units no longer owned or operated by the *Fort Peck II* plaintiff.[5] The Petition for Rehearing was denied without opinion. Consequently, the WRPT's' claim that HUD may not lawfully exclude FCAS units it still owns and operates could not be foreclosed by the mandate in *Fort Peck II*.[6] The Colorado district court still must determine whether or not HUD may, consistent with § 1000.318 and the Tenth Circuit's decision in *Keetoowah*, exclude units that the plaintiffs continue to own and operate. *See Doran v. Petroleum Management Corp*., 576 F.2d 91, 93 (5th Cir. 1978) (holding that a circuit court's remand permitted any resolution not inconsistent with circuit court's opinion, and denial of rehearing without opinion was not a determination of an issue raised in rehearing petition; it merely relegated the initial decision of that issue to the trial court).

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including mutual help units that have not been conveyed. Indeed, no regulation authorized recapture of FCAS funds until the promulgation of 24 CFR § 1000.319 in April, 2007. Even then, this regulation may only authorize recapture after compliance with the requirements of NAHASDA sections 4161(a) and 4165 and the Regulations promulgated thereunder.

[5] *See Fort Peck Housing Authority v. HUD,* Civil Action No. 05-cv-00018-RPM, Doc. Nos. 62, 64.

[6] "The mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). The circuit court panel in *Fort Peck II* remanded the case to this court "for action consistent with this Order and Judgment." 367 Fed. Appx. at 892. This is considered to be a general remand. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 711 (10th Cir. 2004); *Republican Party of Minn. v. White*, 361 F.3d 1035, 1042-1043 (8th Cir. 2004), citing *Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998). "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993); *accord Copart, Inc. v. Admin. Review Bd*., 495 F.3d 1197, 1201 (10th Cir. 2007); *Pittsburg County*, *supra*, 358 F.3d. at 711.

HUD also argues that excluding units under § 1000.318(a) properly reflects need. HUD Brief at 22-23. However this is simply another *post hoc* rationalization by HUD. Here HUD is attempting to withdrew funds not because of a drop in needy households but because of an arbitrary and vague standard. HUD is making funding contingent on whether tribes have "actively enforce strict compliance" with terms of the MHOA or convey those units "as soon as practicable," but this does not relate to a tribes' need for housing. The WRPT is not aware, and HUD has not cited, any case standing for the proposition that an administrative agency may ignore Congress' mandate. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) ("[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law . . . ."); *Levine v. Apker*, 455 F.3d 71, 85 (2d Cir. 2006) ("Categorical rulemaking, like all forms of agency regulation, must be consistent with unambiguous Congressional instructions. And, an agency may not promulgate categorical rules that do not take account of the categories that are made significant by Congress."). Here, that delegation is clear: 25 U.S.C. § 1452(b) unambiguously states that the amount of IHBG funding must be based on housing need. *Keetoowah,* 567 F.3d at 1240, 1241. HUD's ends cannot justify its means--exclusion under §§ 1000.318(a)(1) and (2) of units still owned or operated by tribes is unrelated to need and is unlawful under NAHASDA. *Id*.

HUD contends that the Negotiated Rulemaking Committee determined that the elimination of conveyance eligible FCAS units reflected need when § 1000.318(a) was promulgated. HUD Br. at 22. Nothing in the administrative record supports such an assertion. The Negotiated Rulemaking Committee made no finding that the requirements laid out in subsections (1) and (2) were reflective of housing need. In fact, the Record shows that these subsections were added at the last minute, in response to a comment that was not reflective of need. *See* 63 Fed. Reg. 12343 (March 12, 1998). Moreover, the Negotiated Rulemaking Committee also approved a regulation struck down by the Tenth Circuit in the *Keetoowahca* case, which was not deterred from finding that the regulation did not reflect housing need. Nor should it; the law is clear that a regulation promulgated pursuant to negotiated rulemaking has no special force. 5 U.S.C. § 570.

Nor should the court give any weight to the fact that Congress did not address § 4152(b)(1) in its previous eight amendments of NAHASDA, with the exception of the one time that Congress actually amended § 4152(b)(1), in 2008. The fact that Congress did not address the flaws in § 1000.318 in amendments previous to the 2008 Reauthorization Act is irrelevant because Congress was not aware of the issue until HUD called it to their attention after the *Fort Peck I* decision. HUD's reliance on *Schor*, 478 U.S. at 846 is misplaced. Congress' failure to revise a statute in response to an Agency interpretation, unaccompanied by any evidence of congressional awareness of the interpretation, is not persuasive evidence. *Catron County Bd. of Comm'rs. v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996). Something more than passivity is required. *Id*., citing *Schor,* 478 U.S. at 846. Moreover, the congressional acquiescence theory applies only where Congress has revisited the language subject to the administrative interpretation. *Catron County*, 75 F.3d at 1438 (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994)). The only amendment to the statute that is relevant to this issue is the 2008 amendment, whereby subsection (b)(1) was rewritten to accommodate most of § 1000.318. As shown previously, the fact that Congress saw the need to rewrite the statute to accommodate the flawed regulation is strong evidence that the regulation could not stand without the amendment. *Callahan Realty*, 143 F.2d at 216.

III. HUD Must Be Held to a Higher Standard.

HUD must be held to a high standard. Here the federal government, acting through HUD, is not merely providing discretionary benefits to a class of people. Rather, it is acting pursuant to its long-recognized trust responsibility, described as a guardian-ward relationship, with Indian tribes. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974)(striking down the Secretary of Interior's *ad hoc* denial of benefits to Indians as "inconsistent with the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.") (quotations omitted). *See also Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982) ("the government has assumed almost a guardian-ward relationship with the Indians by its treaties with the various tribes and its assumption of control over their property. This suggests that the withdrawal of benefits from Indians merits special consideration."). These same trust

principles are codified in NAHASDA, 25 U.S.C. §§ 4101(2)-(4). In promulgating §§ 1000.318(a)(1) and (2), HUD must do more than merely provide guidance so that a reasonable person would know what the law prohibits or allows. Pursuant to basic rules of contract law, within its unique trust relationship with Indian tribes, HUD must provide tribes with sufficient clear standards so that they are fully aware of the consequences of failing to comply with HUD's notion of what constitutes "conveyance as soon as practicable" or "strict compliance with" the MHOA. Furthermore, the regulations HUD promulgates under NAHASDA must be consistent with its obligation to respect tribal sovereignty and self-determination. Subsections 1000.318(a)(1)-(2) fail miserably in this regard. *See N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) ("Courts are consistently guided by the purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow. We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty . . .)(quotations/citation omitted).[7]

In short, because the conditions attached to the receipt and use of federal funds under §§ 1000.318(a)(1) and (2) are not plainly stated, do not reflect the WRPT's housing needs, and unreasonably intrude upon the sovereign right of the WRPT to determine how to enforce its housing agreements without the ever present threat of a loss of funding, sub-sections (1) and (2) must be held unlawful.[8]

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[7] Similarly, the federal government is held to a higher standard when placing conditions on federal appropriations made to states. *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept those conditions "voluntarily and knowingly.") (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Comparable inter-sovereign concerns mandate the same result here.

[8] If the Court finds the WRPT's interpretation of NAHASDA and §§ 1000.318(a)(1) and (2) reasonable, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes... The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar*, *supra*, 644 F.3d at 1062 (*quoting Ramah Navajo Chapter v. Lujan*, *supra,* 112 F.3d at 1462).

IV. HUD Lacks the Power to Recapture Thousands of Dollars from the WRPT With Neither a Hearing nor a Finding of Substantial Noncompliance.

A. HUD's Actions Were Enforcement Actions Under Title IV of NAHASDA.

HUD asserts that its effort to recapture funds from the WRPT were not enforcement actions pursuant to Title IV of NAHASDA. HUD Br. at 27. However HUD attempted to reduce the funding for years after 2008, which is 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.

1. HUD's Actions Were Taken After the Grant Funds Were Allocated Under Title III of NAHASDA.

Under Section 301 of NAHASDA (25 U.S.C. § 4151), "allocat[ions]" are made on a fiscal year basis. The allocation of funds is made "each year," with that allocation occurring "as expeditiously as practicable." 24 C.F.R. § 1000.56. Once the grants have been disbursed pursuant to the annual allocation process, 24 C.F.R. § 1000.60 makes it clear that any later effort to "prevent improper expenditure of funds already disbursed to a recipient" must be done "*[i]n accordance with the standards and remedies contained in §1000.538 [to wit, Title IV] relating to substantial noncompliance…In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.*" *Id*. (emphasis added).

Thus, HUD's own regulation draws a clear distinction between the initial "allocation" of grant funds, and any later action to recoup funds erroneously included in the recipient's initial allocation. It is the same distinction drawn in *City of Kansas City v. U.S.H.U.D.*, 861 F.2d 739 (D.C. Cir. 1988)("*Kansas City*")

In *Kansas City,* the court, dealing with nearly identical counterparts to NAHASDA §§401 and 405, noted that there is a fundamental distinction between adjustments made at the initial stage of grant award, and withholdings or recaptures made after the grant is awarded. The former could occur without a hearing; the latter could not. *Id.* at 743, n. 6. The reasons are obvious: years after a grant is made, the recipient may have already spent it, or at least

committed funds in reliance on it. *Id.* at 745-46; *see also City of Boston v. HUD*, 898 F.2d 828, 833 (1st Cir. 1990).

Here HUD is attempting to recapture funds received by the WRPT in 2008. Most of these funds have been expended. In a nutshell, grabbing back thousands already spent or obligated is a fundamentally different action than computing the initial amount of a grant.

2. HUD's Actions Were Exactly the Actions Described in §401(a)(1)(B) of NAHASDA.

Section 401(a)(1)(B) of NAHASDA empowers HUD, upon a finding of "substantial noncompliance" and an opportunity for a 24 C.F.R. Part 26 hearing, to "reduce [future grants]….by an amount equal to the amount of such payments that were not expended in accordance with this Act." However, and without either a finding of substantial noncompliance or an opportunity for a hearing, that is precisely what HUD is attempting to do to the WRPT: to wit, reduce future years' grants by an amount equal to the amount previously granted to the recipient for homes that, as construed by HUD, did not meet the criteria of 24 C.F.R. § 1000.318.

Moreover, HUD made it clear that it was taking enforcement action because of the WRPT's alleged noncompliance with § 1000.318. HUD claims that its compliance actions were not the result of any audit or review. HUD Br. at 29. That is not true. HUD's challenged action came as a result of a nationwide audit of NAHASDA's program implementation by HUD's Office of Inspector General ("OIG"). After finding that HUD may have allowed FCAS units to be overcounted in light of § 1000.318, the OIG advised HUD to "*audit* all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years." *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125, 1130 (D. Colo. 2006) ("*Fort Peck I*") (emphasis added). The use of the word "audit" shows that even HUD's own OIG expected that the procedural safeguards in §§405(d) and 401(a) would apply to the recommended action. In short, whether HUD's recapture actions are characterized as "reductions" under §401(a), or "adjustments" under §405(d), the result is always the same: HUD acts unlawfully when it recaptures awarded funds without

following the requirements of §§401(a) and 405(d).

3. HUD's New Statutory Paradigm Would Render Title IV of NAHASDA Superfluous.

Titles I-III of NAHASDA contain the Act's substantive provisions, but they contain no provisions providing for the enforcement of those substantive requirements.[9] That is the job of Title IV, which provides a comprehensive suite of remedies--administrative and judicial--for any violation of "any provision of this Act." §401(a); 25 U.S.C. § 4161(a).[10]

HUD's proposal--to imply, within Titles I-III, the power to summarily enforce those titles and their implementing regulations (in this case, 24 C.F.R. § 1000.318) without regard to the procedural protections of Title IV, including the required finding of "substantial noncompliance"--would make Title IV a dead letter. HUD would never invoke either §401 or §405, because both contain the bothersome sort of procedural requirements that the court in *Kansas City* noted HUD has been historically loathe to follow. *See Kansas City*, 861 F.2d at 741 ("[In] the 13 years since the [public housing equivalent of §405 of NAHASDA] has been in existence, the Secretary has *never* initiated [those hearing] procedures against any grant recipient." (*emphasis in original*)). HUD would simply claim that it was following its own "duty" to comply with Titles I-III, thereby absolving itself of any requirement to provide any procedural protections to the recipient.

HUD is right in one respect. It does have a duty to police compliance with Titles I-III. But that is true of every agency administering any statute. The point is this: as HUD's statutes and regulations make clear (24 C.F.R. § 1000.60), HUD discharges that duty by bringing enforcement actions under Title IV.

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[9] Section 209 of NAHASDA (25 U.S.C. § 4139) does contain a lone enforcement provision dealing with using grant money for affordable housing activities; however, that section merely provides that a person violating a substantive standard will be dealt with under §401(a).

[10] Titles I-IV of NAHASDA are found in 25 U.S.C. §§ 4111-4168, Chapter 43, Subchapters I-IV.

B. Under NAHASDA and Its Implementing Regulations, HUD Has a Duty to Afford the WRPT a Formal Adjudicatory Hearing and to Find "Substantial Noncompliance," and HUD's Claims of Substitute Performance and Harmless Error Do Not Excuse HUD's Failure to Discharge that Duty.

Under 24 C.F.R. § 1000.540, HUD has obligated itself to use the hearing procedures set out in 24 C.F.R. Part 26. Those procedures are to be used for any required hearing "under NAHASDA", *id.*, whether the hearing is held under Section 401 of NAHASDA (24 C.F.R. § 1000.534) or Section 405. *See* 24 C.F.R. § 1000.532 (b) (the recipient is entitled to "a hearing in accordance with § 1000.540)."

24 C.F.R. Part 26 sets out eight pages of procedural protections for recipients, including:

- appointment of a neutral administrative law judge or Board of Contract Appeals Judge. 24 C.F.R. § 26.2;
- prohibition on *ex parte* contacts. 24 C.F.R. § 26.3;
- broad discovery rights, including document production and oral depositions. 24 C.F.R. §§ 26.17-26.22; and
- a public adjudicatory hearing and a decision on the record. 24 C.F.R. §§ 26.23-26.25.

While HUD did not offer the WRPT the opportunity for any such hearing or found the existence of "substantial noncompliance," HUD claims that it offered the WRPT the "equivalent"--to wit, an opportunity to submit a written response to HUD's demand, which the agency considered. HUD Br. at 30-31.

To begin with, allowing a written response is not the equivalent of an adjudicatory hearing on the record. More fundamentally:

> …it is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated…is required to those whom Congress has entrusted the regulatory missions of modern life.

Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986)(citation omitted).

HUD next argues that, even if it did violate its own regulations, the WRPT "shows no

prejudice by it." HUD Br. at 30. However HUD does not cite to any caselaw supporting holding that denial of a hearing guaranteed by regulation or statute is "prejudicial" only if the complainant can show that it would have prevailed if such a hearing had been held. To accept HUD's formulation, one would need to hold a hearing, and assess the outcome, to determine if its original denial was "prejudicial." The hearing rights established by NAHASDA and its regulations were, as the courts in *Kansas City* (861 F.2d at 744-45) and *City of Boston* (898 F.2d at 831-32) stressed, intended to provide Indian tribes with vital procedural protections against otherwise unfettered action by HUD that could cripple tribes' ability to meet their housing needs. *See Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (denial of core hearing rights guaranteed by regulation, and intended to protect private citizens, was "more than mere procedural irregularities.") In sum, HUD's arguments that it can, without the opportunity for a hearing required by the statutes, take thousands of dollars from the WRPT without creating prejudice is flat wrong.

Without a hearing, there was no opportunity to adjudicate the circumstances behind the WRPT's case. The WRPT was prejudiced in its inability to factually develop, through the fact-finding processes of 24 C.F.R. Part 26 (or anything similar to it), its claims relating to the facts of each residence. Each residence could have still been under the WRPT's management for numerous reasons, including

- the MHOA precluded termination for arrearages;
- repairs were still ongoing;
- the homes had been demolished and replaced;
- there was a new tenant;
- trust land, lease or probate issues were delaying conveyance;
- the homes had been converted to the low rent program; and
- the funds HUD is attempting to recapture has already been spent on NAHASDA-eligible activities.

Given the absence of a normal fact-finding record, the WRPT has been prejudiced by HUD's refusal to offer a hearing under 24 C.F.R. Part 26. Moreover, it should be obvious that

HUD's invocation of the harsh remedy of recapture without the requisite notice and procedural safeguards in Part 26 and the congressionally mandated finding that that the WRPT "failed to comply substantially with any provision" of NAHASDA, 25 U.S.C. §§ 4161(c), 4165d), is itself prejudicial. HUD's administrative recapture of funds amounts to thousands of dollars and significant portions of the WRPT's annual funding.

Finally, there was clear actual prejudice in the failure to provide the opportunity for a neutral decision-maker (either an ALJ or Board of Contract Appeals Judge under 24 C.F.R. Part 26), forcing the WRPT to plead its case, in mere letter correspondence, to HUD itself.

V. HUD Has No "Inherent Power" to Recapture Funds.

HUD contends that it enjoys "inherent power" to recapture the NAHASDA funding at issue in this case, irrespective of any limitations on recapture that are created within NAHASDA or its implementing regulations. See HUD Br. at 32 ("The federal government has the power, independent of statute, to recover funds that have been erroneously paid."). HUD's notion of its "inherent power" is overbroad, frightening, and lacking in merit.

HUD relies on the following cases in support of its "inherent power" argument: (1) *U.S. v. Wurtz*, 303 U.S. 414, 415 (1938); (2) *U.S. v. Texas*, 507 U.S. 529, 532 (1993); (3) *U.S. v. United Mine Workers of America*, 330 U.S. 258, 272 (1947); and (4) *U.S. v. Lahey Clinic Hosp., Inc*., 399 F.3d 1, 15 (1st Cir. 2005). None of these cases support HUD's characterization of its "inherent power" to recapture funds. Rather, these cases demonstrate that the federal government retains the inherent authority to bring a civil common law action in an Article III court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment", absent statutory language to the contrary. *See Wurtz*, 303 U.S at 415-16; *Lahey Clinic*, 399 F.3d at 16. The WRPT does not quarrel in the slightest with HUD's inherent recourse to the judiciary. Indeed, §401(c) of NAHASDA expressly reserves that right.

But HUD misconstrues and inflates this authority by suggesting that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the WRPT as a matter of administrative sanction. There is no such "inherent" authority--any authority to recover funds by purely administrative

means must come from express delegation of that authority from Congress, in a statute. *See generally Am. Bus Ass. v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (agency's authority to bring a civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary).

HUD's reliance on *U.S. v. Texas* and *U.S. v. Mine Workers* is also unavailing. In *Texas*, the Court held that the Debt Collection Act of 1982 did not abrogate the government's common law right to collect pre-judgment interest. 507 U.S. at 530. Again, this case does not involve any "inherent right" to assess monetary liability administratively; the case simply reaffirms that the United States has a common law right to prejudgment interest if it files a civil claim that a court ultimately reduces to a judgment. *U.S. v. Mine Workers* falls even further afield. There, the United States filed a civil action seeking a declaration that the Mine Workers Union and its president, John L. Lewis, lacked authority to unilaterally terminate an agreement concerning terms and conditions of employment with respect to mines in possession of the Government. This required the Court to consider whether the Norris-LaGuardia Act divested the Court of jurisdiction to adjudicate the controversy. 330 U.S. at 272-73. This precedent sheds no light on the case at bar and, in any event, does not support HUD's overbroad claim to "inherent power."

HUD is correct, however, in allowing that the agency's authority is shaped by what Congress has set forth in statute (in this case NAHASDA). HUD Br. at 33. Nevertheless, HUD's application of the rule goes astray in the process of analyzing Congress' intent as revealed by the plain language of NAHASDA. HUD essentially tortures the plain language of the statute in support of its thesis that "Congress did not manifest any intent in NAHASDA to relinquish the federal government's inherent right to recover funds that HUD wrongfully paid." HUD Br. at 33. It is fundamental that a federal agency has only those powers that have been conferred upon it by Congress. *See American Bus*, 231 F.3d at 8 ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the Constitution.")(emphasis in original); *Louisiana Pub. Ser. Comm'n. v. FCC,* 476 U.S. 355, 374 (1986)("an agency literally has no power to act…unless and until Congress confers power upon it."). HUD's "inherent power"

argument turns this principle upside down.

VI. NAHASDA and Its Implementing Regulations Bar HUD From Recapturing Funds Spent on Affordable Housing Activities.

24 C.F.R. § 1000.532 provides as follows:

> § 1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?
>
> (a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, *except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.*

Id. (emphasis added).

This regulation was implemented in 1998 at the conclusion of the first round of negotiated rule making, where the terms of the regulation were discussed at length between the tribes and HUD. *See* 63 Fed. Reg. 12334-01 (March 12, 1998). Section 1000.532 plainly bars the recapture of "grant amounts already expended on affordable housing activities." In pursuing the recaptures at issue in this case, HUD gave no regard to this provision.

HUD cannot rely upon its "inherent powers" to argue that that the recapture bar set out in Section 405 of NAHASDA, and its implementing regulation at 24 C.F.R. § 1000.532, does not pertain to the recaptures at issue in this case. As discussed above, the inherent power claimed to exist under *Wurtz* that HUD relies on is limited to a common law right to bring a civil action.

Any power to recapture funds must be found in Title IV of NAHASDA. No statutory authority to recapture funds exists under Title III. In addition to the right to file a civil action, Title IV delegates to HUD certain authority to recapture funds subject to due process and expenditure limitations as set out in §§ 401 and 405. As previously discussed, any remedy of recapture under the NAHASDA statute lies under Title IV, not Title III. A remedy cannot be implied under Titles I-III outside comprehensive provisions and the express parameters of Title IV:

> Where Congress has provided a comprehensive statutory scheme of remedies, as it did here, the interpretive canon of *expressio unius est exclusio alterius* applies. See Alexander v. Sandoval, 532 U.S. 275, 290, 121 S.Ct. 1511, 1521-22, 149 L. Ed. 2d 517 (2001)("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L. Ed. 2d 146 (1979)("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

Christ v. Ben. Corp., 547 F.3d 1292, 1298 (11th Cir. 2008).

HUD also cannot argue that the 2000 and 2008 NAHASDA amendments changed the applicability of § 1000.532. At § 401(a)(1)(B), the post-2000 version of NAHASDA indicates that HUD's authority to recapture is limited to circumstances where NAHASDA funds were misspent by a Tribe or "not expended in accordance with the Act." This provision of the statute dovetails with the enduring restriction within § 1000.532 on recapturing "grant amounts already expended on affordable housing activities." Similarly the contemporaneous (2000) amendment to § 405 clearly indicates that HUD's authority to recapture under § 405(d) is "subject to" the substantial noncompliance and hearing prerequisites of § 401(a). *See* P.L. 106-568, Sec. 1003.

Furthermore, § 1000.532 was adopted in the negotiated rule making process that HUD relies upon as the basis for the implementation of NAHASDA. *See, e.g.,* HUD Br. at 3 (heralding the significance of negotiated rule making). Section 1000.532 is a product of that rule making, and the record developed in that process supports the WRPT's position. The need for a "standard that applies when HUD makes a determination to adjust a future grant" was debated at the negotiated rulemaking. 63 Fed. Reg. 12334-01, 12348 (March 12, 1998). Section 1000.532 emerged from this process. The regulation clearly bars recapture of "grant amounts already expended on affordable housing activities." Yet, HUD ignores this rule.

In seeking recapture of funds previously spent on affordable housing activities, HUD violates §401(a) and § 1000.532 of the implementing regulation, turns the remedial scheme in NAHASDA on its head and flies in the face of the principles of self-determination that are at the heart of the statute.

VII. HUD Shirks Its Trust Responsibility.

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 trustee of the WRPT. *See* 25 U.S.C. §§ 4101(1), (2), (3), (4), (5), (6) and (7); WRPT Motion for Summary Judgment at 21-23. Where this trust obligation is implicated, the United States and its agencies have fiduciary responsibilities. *See, e.g., U.S. v. Mitchell*, 463 U.S. 206, 225 (1983)("*Mitchell II*"). Here, the Government's conduct must "be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The trust responsibility constrains any discretion that HUD may otherwise enjoy in administering NAHASDA, and creates for HUD a fiduciary duty to the WRPT. The WRPT avers that HUD breached these trust duties by unlawfully attempting to recapture and withhold grant funds the WRPT is entitled to under NAHASDA. HUD denies that NAHASDA incorporates this trust obligation, or that HUD should be held to the exacting standard that attaches to the trust obligation. HUD Br. at 34, *et seq*. HUD's theory that NAHASDA funds are "gratuitously" provided and that NAHASDA funds are therefore not a "trust corpus" is yet another example of HUD's overbroad notion of its authority.

The U.S. Court of Federal Claims recently considered an analogous argument from HUD in *Lummi Tribe v. United States*, 2011 U.S. Claims LEXIS 1664 (Fed. Cl. Aug. 4, 2011) ("*Lummi*"). In *Lummi*, HUD asked the court to dismiss the Tribes' claims for money damages arising under NAHASDA arguing NAHASDA is not a "money-mandating" statute. The court rejected HUD's argument expressly holding that NAHASDA is a "money-mandating" statute:

> In plaintiffs' view, NAHASDA is money mandating because it leaves no room for HUD to exercise discretion in making grants. This court agrees. "In general, a statute will be deemed to be a money-mandating source of law if it compels the government to make a payment to an identified party or group." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (citing *Eastport*, 372 F.2d at 1009 ("Under *Section 1491* what one must always ask is whether the constitutional clause or the legislation which the claimant cites can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.")); see also *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (observing that "where the statutory text leaves the government no discretion over payment of claimed funds[,]" Congress has provided a money-mandating source for jurisdiction in this court); *Gray v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989) (characterizing a statute as money mandating for the purposes of Tucker Act jurisdiction where the Secretary had no discretion to prevent a qualified applicant from participating in the statutory

program).

> As indicated above, NAHASDA provides that the Secretary "*shall* . . . make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. *Eastport,* 372 F.2d at 1009.

2011 U.S. Claims LEXIS 1664 at 27-28. The *Lummi* court's decision on this point is directly contrary to HUD's argument that NAHASDA funds are gratuitously provided.

HUD cites *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) as authority for the proposition that the Ninth Circuit has established that HUD has no trust responsibilities arising under NAHASDA. HUD Br. at 35. This argument mischaracterizes the ruling in *Marceau*, where the claims presented against HUD were dissimilar from the case at bar. In *Marceau*, the claimants sought to hold HUD liable for construction methods that resulted in black mold problems. The Court concluded that HUD has no trust responsibility in these circumstances because the "federal government did not build, manage, or maintain the housing." *Id*. at 928. Unlike *Marceau*, the claims at issue in this case arise from HUD's conduct in attempting to recapture or withhold grant money, not an allegation that HUD allowed grant money to be used improvidently. However a grant, once made, is subject to tribal control. The opposite is also true: that the grant, prior to being made, is subject to HUD's control, and therefore within the trust responsibility. More broadly, HUD's contention that it lacks a sufficient quantum of control for the trust responsibility to attach is fraught with contradiction. This argument cannot be squared with HUD's other argument: that HUD has "inherent power" to recapture NAHASDA funds by any means it deems necessary.

The fact that NAHASDA is a money-mandating statute which gives rise to the trust obligation also serves to clarify that the familiar Indian law canons of construction are applicable to the WRPT's claims. While interpreting statutes, these canons provide that statutes are to be construed liberally in favor of Indian tribes, and that ambiguities are to be resolved in favor of the Indians. *See Minnesota v. Mille Lacs Band*, 526 U.S. 172, 200 (1999). Therefore, to the

extent that the Court finds portions of NAHASDA or associated regulations ambiguous, those ambiguities should be construed in favor of the Tribes.

HUD makes much of the fact that the NAHASDA funding formula presents "a zero-sum game" where, if one Tribe receives more, the others receive less. *See, e.g.*, HUD Br. at 15. HUD contends that because of this "zero sum" circumstance, the Court should suspend the application of the canons of construction and deny the WRPT relief. HUD's argument suffers from the fallacy of circular reasoning. HUD begins from the premise that HUD's administration of the formula comports perfectly with what Congress intended, then cautions that any change in the way the formula is administered would damage those tribes who have benefitted from HUD's approach. This logic is flawed. The 2008 amendments to NAHASDA alleviated concern about effects on future funding. The claims at bar arise under the previous statute and therefore cannot prospectively affect the funding of other tribes under the current statute.

Furthermore, HUD misconstrues the economic reality of this "zero sum" circumstance. If the WRPT is correct that HUD's implementation of the formula has unlawfully deprived the WRPT of funding that is mandated by NAHASDA, it necessarily follows that certain other tribes enjoyed a windfall of excess NAHASDA funding. If this is the case, will HUD attempt to recapture this windfall? Evidently not.

While it may be true that the canons of construction do not require HUD to "rob Peter to pay Paul," this homily misperceives the nature of the claims at bar, and miscasts the WRPT as Paul. The WRPT bore the brunt of HUD's attempt at recapture and is therefore akin to Peter. Ultimately, as the WRPT's trustee, HUD should remain accountable to any tribe that was damaged by unlawful conduct by HUD in administering funding under NAHASDA, a money-mandating statute. *See Mitchell II*, 463 U.S. at 227.

CONCLUSION

In light of the foregoing and the arguments set forth in WRPT's Motion for Summary Judgment, the WRPT asks the Court to enter its order granting the WRPT's Motion for Summary Judgment and denying HUD's Cross-Motion for Summary Judgment.

RESPECTFULLY SUBMITTED on February 27, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2012, I electronically filed the foregoing "**WALKER RIVER PAIUTE TRIBE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO DEFENDANT'S CROSS-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:

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DATED: February 27, 2012

By: /s/ Wes Williams Jr.
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