DANIEL G. BOGDEN
United States Attorney
HOLLY A. VANCE
Assistant United States Attorney
100 West Liberty, Suite 600
Reno, NV 89501
Tel: (775) 784-5438
Fax: (775) 784-5181

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WALKER RIVER PAIUTE TRIBE, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SHAUN DONOVAN, Secretary of Housing and Urban Development; and DEBORAH HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, Defendants.	Case No. 3:08-CV-00627-LRH-VPC **DEFENDANTS' REPLY**

The question before this Court is whether the United States Department of Housing and Urban Development ("HUD") violated the Administrative Procedure Act ("APA") and the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq*. ("NAHASDA"), when it applied 24 C.F.R. § 1000.318(a) in seeking to recover $110,444 overallocated to the Walker River Paiute Tribe ("WRPT") in 2008 for 32 homeownership units, which WRPT admitted were "ineligible" under the allocation formula beginning in 2007. (AR 803-806). As HUD explained in its Opposition and Cross-Motion for Summary Judgment, (Dkt. 21) ("D. Br."), its actions in applying the formula regulation to WRPT fulfill Congress's allocation mandate. The regulation, adopted in collaboration with a cross-section of Indian tribes, properly

implements Congress's directive in 25 U.S.C. § 4152(b) that the allocation formula be based on factors reflecting the need of the Indian tribes for affordable housing activities, including conditions specified in rulemaking. *See* D. Br. 12-26. This position is supported by Congress's amendment of § 4152(b)(1) in 2008 to essentially incorporate the challenged regulation into the statute, as well as by the Tenth Circuit's validation of the regulation under the pre-amendment statute. In addition, HUD's correction of past misallocations by recovering grant overpayments is part of the allocation process, not an enforcement action for grantee noncompliance, and is fully within the power of the federal government to recover funds that have been erroneously paid. D. Br. 26-32.

Faced with the Tenth Circuit's clear rejection of its arguments and congressional action supporting HUD, WRPT argues that the Tenth Circuit holding is not binding precedent and that Congress's incorporation of the regulation in the statute implies that, before incorporation, the regulation violated congressional intent. Opposition to HUD's Cross-Motion for Summary Judgment (Dkt. 28 at 3-11) ("P. Br."). Further, while WRPT acknowledges HUD's authority to recover erroneously paid funds, it misstates the scope of that authority and tries to force fit this case into the compliance provisions of NAHASDA by inaccurately citing statutory and regulatory provisions and citing cases that are either irrelevant or actually support HUD's position. P. Br. 19-27. Because WRPT's arguments are untenable, the Court should deny WRPT's motion and grant summary judgment for HUD.

ARGUMENT

A. 24 C.F.R. § 1000.318 Does Not Violate NAHASDA.

1. The Tenth Circuit's Decision In *Fort Peck II* Determined That 24 C.F.R. § 1000.318 Was Valid Under The Pre-Amendment NAHASDA And Is Persuasive.

The Tenth Circuit upheld 24 C.F.R. § 1000.318 in its entirety in *Fort Peck Housing Auth. v. HUD*, 367 Fed. Appx. 884, 885 (10th Cir. 2010) ("*Fort Peck II*"). While not precedential because unpublished, *Fort Peck II* provides a well-reasoned, persuasive analysis from a circuit

court addressing the same issues before this Court and should therefore be considered in resolution of this case. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also United States v. Lynn*, 636 F.3d 1127, 1136 fn. 9 (9th Cir. 2011) (citing to 10th Cir. R. 32.1(A) and relying on an unpublished Tenth Circuit opinion.). *Fort Peck II* not only reversed the district court's holding that NAHASDA had created a perpetual floor for funding at the level of homeownership units owned or operated on September 30, 1997, it held that HUD's regulations at 24 C.F.R. §§ 1000.316-1000.318 complied with the formula mandate set forth in NAHASDA. *Fort Peck II,* 367 Fed. Appx. at 890-892, D. Br. 8-9.

Contrary to WRPT's suggestion, HUD is not looking to *Fort Peck II* for guidance on the 2008 amendments to NAHASDA. The Tenth Circuit's choice not to address the impact of the Reauthorization Act is of no moment. The Tenth Circuit was certainly aware that NAHASDA had been amended (*Fort Peck II*, 367 Fed. Appx. at 885 n. 1), but it obviously deemed the amended law unnecessary to its judgment because the new law does not controvert its construction of the old law. The new law emphatically supports the Tenth Circuit's construction of the old law because Congress put the language of the regulation into the statute to "clarify" that HUD's interpretation of the statute was correct. *See* D. Br. 16-21.

2. NAHASDA Unambiguously Intended The Formula Current Assisted Stock ("FCAS") Count Reductions Required By 24 C.F.R. § 1000.318(a).

The plain meaning of the statutory text supports 24 C.F.R. § 1000.318(a). Congress stipulated that the formula be "based on" three non-exclusive factors, including the number of "dwelling units owned and operated at the time…" pursuant to contracts with HUD under the United States Housing Act of 1937 (42 U.S.C. § 1437 et seq.). 25 U.S.C. § 4152(b)(1). The Negotiated Rulemaking Committee ("Committee") interpreted "at the time" to be September 30, 1997. 24 C.F.R. § 1000.312. Because the number of homeownership units described in § 4152(b)(1) is the "foundation" or "starting point" from which the formula flows, the regulation complies with the statutory directive when that number is adjusted. *See* D. Br. 12-14; *Fort Peck II*,

Fed. Appx. at 891 (HUD properly included the number of 1997 Units "as the starting point for the allocation formula.").

WRPT claims that § 1000.318(a) replaces or supplants this first factor by categorically eliminating from FCAS units that the tribe "no longer has the legal right to own, operate, or maintain . . . ." P. Br. 11-12, *quoting* 24 C.F.R. § 1000.318. The plain language of the regulation quoted by WRPT makes this argument illogical. The regulations start with all dwelling units owned or operated with pre-NAHASDA assistance as of September 30, 1997. 24 C.F.R. § 1000.312. The regulations add to that number when units in development begin operation. *Id*. § 1000.314. The regulations also subtract from that number when rental units are no longer operated as low-income rentals and when, according to lease-purchase agreements, the tribe "*no longer* has the legal right to own, operate, or maintain" homeownership units. (Emphasis added). *Id*. § 1000.318. The phrase "no longer" makes clear that the regulation is premised on the units owned or operated in 1997. Thus, the factor is not supplanted; it remains the starting point for the allocation formula because the regulation is "based on" prior ownership.

Moreover, Congress directed that, in reflecting the need of Indian tribes, the formula also include "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. § 4152(b)(3). Through the Committee, HUD and Indian tribes specified various conditions of need for the formula that are not explicitly named in §§ 4152(b)(1) or (2). *See* e.g., 24 C.F.R §§ 1000.320, 1000.325. Similarly, in §1000.318, the Committee specified as a condition a reduced need when homeownership units are conveyed or can and should be conveyed in accordance with the lease-purchase agreement. *See* 63 Fed. Reg. 12333, 12343 (Mar. 12, 1998). As the Tenth Circuit reasoned, § 1000.318(a) properly reflects the interplay of all three need factors identified in §§ 4152(b)(1)-(3). *Fort Peck II*, 367 Fed. Appx. at 890-892.

The Indian canon of construction is unnecessary here because § 1000.318(a) implements the unambiguous intent of Congress. *See* D. Br. 12-16; *Fort Peck II*, 367 Fed. Appx. at 892 ("Because NAHASDA was unambiguous and the final regulations were properly promulgated

within NAHASDA's mandate, we need not address [the canon favoring Indians]."). Moreover, WRPT's interpretation does not favor "Indians"; it only favors WRPT. WRPT is simply wrong that its request in this case will not hurt other tribes because concern about the future is alleviated by the 2008 amendment. P. Br. 30. The Indian Housing Block Grant ("IHBG") funding is a zero-sum game. *Fort Peck II*, 367 Fed. Appx. at 887. Therefore, the overpayments made to WRPT in 2008 came at the expense of the other tribes and should be recovered and returned to them. 24 C.F.R. § 1000.319(b) (HUD shall subsequently distribute the funds to all tribes in the next IHBG allocation). Thus, the Indian canon is inapplicable when the competing interests both involve Native Americans. *See Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334, 340 (9th Cir. 1996).

3. The 2008 Amendment To NAHASDA Confirms The Validity Of 24 C.F.R § 1000.318(a).

To support its argument that Congress would not have needed to amend NAHASDA to reflect HUD's interpretation if NAHASDA's original language supported HUD's interpretation, WRPT reasserts that the 2008 Reauthorization Act amendment was a "change" in the law. P. Br. 5-11. However, as HUD has demonstrated, Congress was clear that the formula should reflect the relative need of all eligible tribes by being based on an interplay of factors as determined by the experts: HUD and the Indian tribes convened in the Committee. D. Br. 12-16. Section 1000.318(a) implemented that intent. *Fort Peck II,* 367 Fed. Appx. at 890-892. And, by integrating § 1000.318(a) into the statute, the 2008 amendments to NAHASDA further affirmed that the regulation implemented congressional intent. Pub. L. No. 110-411, 122 Stat. 4329 (2008). Thus, there is no change in the law. Indeed, Congress stated that it amended § 4152(b)(1) to "clarify" that HUD's regulatory interpretation was correct. S. Rep. No. 110-238, at 9 (2007).

a. The Plain Language Of The Amendment Supports HUD's Interpretation.

WRPT asserts that one need only compare the text of the amendment with the text of the original formula allocation provision to see the substantive change since the amendment to

§4152(b)(1) "is an unconditional elimination of housing units from the FCAS count." P. Br. 6. However, WRPT's conclusion is based on the flawed premise that the pre-amendment § 4152(b)(1) categorically required all units owned on September 30, 1997 in the formula allocation. It did not.

Comparing the statutory text does not help WRPT because the text does not define FCAS counts. It only defines several factors reflecting need that must be bases for the formula that defines FCAS counts. As *Fort Peck II* pointed out, the formula definition of FCAS arises from (b)(1), as well as the other factors in § 4152(b) — specifically including the downward adjustment for conveyed and conveyance eligible units. *Fort Peck II*, 367 Fed. Appx. at 890-892 ("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."). In other words, only the regulations define FCAS. The statute simply guides the development of the regulatory definition. Thus, the guiding factors in the statute do not, as WRPT argues, "unconditionally eliminate housing units from FCAS" or provide that units previously included "must now be excluded." Moreover, WRPT's claim — that the pre-amendment § 4152(b)(1) categorically required all units owned on September 30, 1997 in the formula allocation — implies that Congress intended to use that number of housing units as a floor to prevent a tribe's allocation from falling too low. But that floor already exists. Under 25 U.S.C. § 4152(d)(1), each tribe is guaranteed to receive at least the amount it had received for operation and modernization for units it owned pursuant to a pre-NAHASDA contract in 1996. There is simply no reason to think that, by using generic phrases like "based on" and "factors," Congress implicitly intended — but only before 2008 — that § 4152(b)(1) should set a funding floor when Congress already explicitly provided a floor in § 4152(d)(1).

In addition, Congress's amendment did not change the allocation formula, except to specify that demolished units rebuilt within one year remain eligible for purposes of the formula. As amended, NAHASDA includes, as a formula factor reflecting need, the "number of low-income

housing dwelling units…that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided…" unless "(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or (ii) the unit is lost to the recipient by conveyance, demolition, or other means . . . ." 25 U.S.C. § 4152(b)(1)(A); *see also id.* § 4152(b)(1)(B) (requiring conveyance "25 years from date of full availability" unless delay is "beyond the control of the recipient"), (D) (listing instances of impediments to conveyance that are "beyond the control of the recipient"), (C) (excepting demolished and rebuilt units). In implementing §1000.318(a) under the pre-amendment law, HUD advised WRPT that "units conveyed or eligible to be conveyed in any particular [fiscal year] are not eligible as FCAS beginning the next [fiscal year] unless the tribe can demonstrate that reasons beyond its control have made conveyance not practical." AR 536. Thus, NAHASDA now reflects how HUD implemented the pre-amended §4152(b)(1) through §1000.318. Except with respect to Fort Peck during the brief period while its case was on appeal, the law was and is that homeownership units are eliminated from FCAS over time. And the Tenth Circuit affirmed this under the old law when it reversed the district court. *Fort Peck II*, 367 Fed. Appx. at 890-892. By integrating § 1000.318(a) into the statute, Congress affirmed it under the new law. *See* S. Rep. No. 110-238, at 9 ("This amendment *clarifies* that [certain units] may not be counted in the funding formula. This not only includes conveyed units but those units that are required to be conveyed….") (emphasis added).

WRPT cites a number of cases that discuss the retroactivity of statutes or provide that the use of the word "clarification" in legislative history is not dispositive. P. Br. 6. On this latter point, HUD agrees that such a statement, standing alone, is not dispositive and must be supported by the actual amendment to the statute. Here we have an amendment integrating the regulation with Congress's statement that it "clarifies" that HUD's regulatory interpretation was correct. *Beverly Community Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1266 (9th Cir. 1997) ("a decision by the current Congress to intervene by expressly clarifying . . . is worthy of real deference."). This said,

the cases that WRPT cites involve criminal statutes or the minutiae of the tax code and are not helpful here.

For example, WRPT relies upon *United States v. Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998), which held that a change in a carjacking statute enacted after trial, and after the initial appeal, could not be applied retroactively for sentencing purposes because the Constitution bars *ex post facto* criminal laws. *Id*. Because this is not a criminal case and HUD does not contend that the Reauthorization Act applies retroactively to WRPT, *Vazquez-Rivera* has no application to this case. The other cases that WRPT cites are similarly unhelpful. *See* P. Br. 6-7 (citing: *United States v. Wright*, 625 F.3d 583, 600 (9th Cir. 2010) (a criminal case involving the expansion of the jurisdiction to consider child pornography cases); *Boddie v. American Broadcasting Companies, Inc*., 881 F.2d 267 (6th Cir. 1989) (holding that an amendment to the wiretapping statute "was not to explain that the 'injurious purpose' clause had never applied to journalists, but to eliminate an offended interviewee's 'right to bring a suit' where no tort or crime is committed by the journalist"); *Fowler v. Unified School Dist. No. 259, Sedgwick County, Kan.*, 128 F.3d 1431, 1435-36 (10th Cir. 1997) (use of the word "clarified" in legislative history did not overcome presumption against retroactive application of statute); *Commissioner of Internal Revenue v. Callahan Realty Corp*., 143 F.2d 214, 216 (2nd Cir. 1944) (amendment to statute that provided it would become operative only after December 31, 1936, did not merely clarify existing law)). None of these cases cited by WRPT undermine the Supreme Court's finding that when Congress ratifies a regulation by integrating it into a statute, such ratification is "virtually conclusive" evidence that the regulation implements congressional intent. *Commodity Future Trading Commission v. Schor*, 478 U.S. 883, 846 (1986).

WRPT also continues to mischaracterize HUD congressional witness testimony claiming that the testimony proves that the Reauthorization Act amendment was a "change" to NAHASDA. P. Br. 8-9. HUD has already put that testimony in proper context. See D. Br. 19-20. The witnesses testified after the district court's decision in *Fort Peck Housing Authority v. HUD*, 435

F. Supp. 2d 1125 (D. Colo. 2006) ("*Fort Peck I*"), but before the Tenth Circuit overruled that decision in 2010. *See Fort Peck II*, 367 Fed. Appx. 884. *Fort Peck I* ruled that HUD could not reduce the number of housing units eligible for inclusion in the allocation formula below the level that the tribe had under contract in 1997. 435 F. Supp. 2d at 1132-35. Although the witness spoke of the (then proposed) amendment as changing the law, taken in context, this statement meant that the law would be changed from the precedent established by *Fort Peck I*. The witnesses explained that "[t]his change would comport with the process established by the original Negotiated Rulemaking Committee that crafted the IHBG regulations."[1] In other words, Congress was "changing" the process back to what had been in place from the enactment of NAHASDA until *Fort Peck I*. Contrary to WRPT's assertion, HUD does not say that the testimony lacks probative value. When fully quoted and placed in context, it supports HUD's position. Nevertheless, its value is overshadowed by the Committee Report (S. Rep. No. 110-238, at 9 (2007)), in which Congress itself said the amendment was a clarification — not a change. *Ileto v. Glock, Inc.*, 565 F.3ed 1126, 1162 (9th Cir. 2009).

b. Congress's Reservation Of The Application Of The 2008 Amendment From WRPT Does Not Affect The Validity Of 24 C.F.R § 1000.318(a).

When Congress amended § 4152(b)(1) in 2008, it added a provision excepting retroactive application of the amended provisions from claims in litigation filed within 45 days of enactment of the amendment. 25 U.S.C. § 4152(b)(1)(E). WRPT argues that would be a "useless act" unless it implicitly invalidated § 1000.318(a) under the pre-amendment version of § 4152(b)(1). P. Br. 10. This infers far too much from what is a limited exception to retroactive application of an amendment that essentially incorporates the regulation into the statute.

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[1] *See* Discussion Draft Legislation to Amend and Reauthorize the Native American Housing Assistance and Self–Determination Act: Hearing Before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. 110–297 at 4, 8 (July 19, 2007) (statement of Rodger J. Boyd, Dep. Asst. Sec. for Native American Programs HUD), *available at* http://www.indian.senate.gov/public/_files/July192007.pdf.

When Congress amended § 4152(b)(1) in 2008, the prior provision had been implemented by regulations with the force of law at 24 C.F.R. §§ 1000.312, 1000.314, and 1000.318, but had also been interpreted in a final judgment of the Colorado district court, to mean something contrary to § 1000.318. In 2006, *Fort Peck I* held § 1000.318 invalid and declared that § 4152(b)(1) established a floor for FCAS counts at the number of units in inventory on September 30, 1997. However, the decision only applied to the Fort Peck tribe. *See Fort Peck I*, 435 F. Supp. 2d at 1136. HUD appealed *Fort Peck I*. *See Fort Peck Housing Auth. v. HUD*, No. 05-18 (D. Colo.) (Doc. No. 49, Oct. 6, 2006) (docketing appeal to Tenth Circuit). Congress amended § 4152(b)(1) in 2008 — while *Fort Peck I* was on appeal and before its reversal by the Tenth Circuit in 2010. *See Fort Peck II*, 367 Fed. Appx. at 892. As a result, Congress was faced with the situation that the law as applied to one tribe in litigation (Fort Peck) was different from that applicable to all other tribes and was undecided. By focusing on Fort Peck-type claims in litigation, § 4152(b)(1)(E) appears to address this indeterminacy and ensure that other tribes had an opportunity to put themselves in a position to be treated the same as Fort Peck, however that litigation based on the pre-amendment statute might ultimately resolve. Thus, inclusion of § 4152(b)(1)(E) was not a useless act, and does not imply that Congress's incorporation of the challenged regulation into the statute invalidated the regulation before its incorporation. Such an argument is simply nonsensical.

4. The Provisions Relating To Conveyance-Eligible Units In 24 C.F.R. § 1000.318 Are Also Valid.

WRPT argues that subsections (1) and (2) of 24 C.F.R. § 1000.318(a) do not reflect need in accordance with § 4152(b), as construed by the Tenth Circuit in *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235, 1241 (10th Cir. 2009). These subsections specify that FCAS qualification of homeownership units depends upon conveyance "as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [lease-purchase agreement]," and active enforcement of homebuyer compliance with the MHOA. 24 C.F.R. §

1000.318(a)(1)-(2). WRPT's reliance on *Keetowah* is misplaced because, in *Fort Peck II*, the Tenth Circuit already applied its prior decision in *Keetowah* to the regulatory interpretation of NAHASDA's allocation provisions and found that § 1000.318 in its entirety properly implements Congress's mandate that the allocation formula reflect need. *See Fort Peck II*, 367 Fed. Appx. at 891-892.

In addition, the district court in *Fort Peck I* directly addressed units retained in inventory after they are eligible for conveyance when it invalidated § 1000.318. *Fort Peck I*, 435 F. Supp. 2d at 1131-32, 1134-35. Accordingly, the Tenth Circuit reversal of that invalidation, in reliance on *Keetowah*, necessarily encompassed subsections 1000.318(a)(1) and (2). Indeed, the Tenth Circuit explicitly considered the lower court's analysis of the conveyance-eligible issue in reaching its decision. *Fort Peck II*, 367 Fed. Appx. At 889 ("Finally, the district court concluded Fort Peck's position furthered NAHASDA's goals [by] removing HUD's paternalistic oversight of whether units should be conveyed or participants evicted."). Moreover, the Tenth Circuit found that "[b]ecause HUD's actions did not violate Congress's mandate, the issues raised in Fort Peck's cross-appeal are moot." *Id*. at 892, n. 15.

WRPT argues that the Tenth Circuit's denial, without opinion, of Fort Peck's petition for rehearing and en banc rehearing in *Fort Peck II* demonstrates that the conveyance-eligible provisions of § 1000.318(a) do not reflect need under *Keetowah*. P. Br. 15. However, as WRPT concedes, the petition explicitly argued that *Fort Peck II* conflicted with the Circuit's decision in *Keetowah*. Plaintiff/Appellees's Petition for Rehearing and for Rehearing En Banc, *Fort Peck Housing Auth. v. HUD*, No. 06-1425 & 1447, Doc. No. 01018397039 (10th Cir., *filed* April 5, 2010) at 4-5. The Tenth Circuit denied the petition noting that it had been transmitted to all active judges on the court and none requested the court be polled for en banc rehearing. Order, *Fort Peck Housing Auth. v. HUD,* No. 06-1425 & 1447 (10th Cir. May 6, 2010). WRPT's conclusion that a silent denial of its arguments implies their validity is absurd.

Moreover, Congress unambiguously expressed its view that conveyance-eligibility reflects need when it amended § 4152(b)(1) in 2008 to include the conveyance-eligibility provisions as factors reflecting need. It clarified that homeownership units not conveyed within 25 years (the putative MHOA termination date) cease to count as FCAS unless conveyance is impracticable, *i.e.*, "beyond the control of the recipient." 25 U.S.C. § 4152(b) (1)(B), (D); *See also* S. Rep. No. 110-238, at 9 ("This not only includes conveyed units but those units that are required to be conveyed based on the homebuyer agreement . . . . Conveyance of each homeownership unit should occur as soon as possible after a unit becomes eligible for conveyance based on the terms of the Agreement.").

Finally, Congress directed that, in reflecting the need of Indian tribes, the formula also include "[o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify." 25 U.S.C. § 4152(b)(3). In the legislative history to the 2008 amendment, Congress reiterated the intent, implicit in § 4152(b)(3), that rulemaking by a committee of representative tribes and HUD is the best venue for establishing formula elements that accommodate the needs of the Indian tribes. S. Rep. No. 110-238, at 4 (2007) ("The shortage of resources has heightened the necessity to accurately determine a tribal grant recipient's true housing need so that funds are allocated to reflect this need. It is the Committee's belief that this issue is best left for resolution by the tribes and HUD through negotiated rulemaking"). Through the Committee, HUD and Indian tribes specified various conditions of need for the formula not explicitly named in §§ 4152(b)(1) or (2), including the reduced need to operate homeownership units when they are conveyed or can and should be conveyed in accordance with a MHOA. *See* 63 Fed. Reg. 12333, 12343 (Mar. 12, 1998). Contrary to WRPT's claim, this was not a last minute addition. Subsections (1) and (2) of §1000.318(a), although not enumerated, were part of the regulatory text in the proposed rule. *See* 62 Fed. Reg. 35718, 35743 (Jul. 2, 1997) (proposed as 24 C.F.R. § 1000.336). And from the multiple pages of public comments and Committee responses that

accompanied the final rule, it is clear that need was the driving consideration in implementing all of the formula regulations. 63 Fed. Reg. 12334, 12341-12345.

Moreover, subsections (1) and (2) of §1000.318(a) reflect need. The Mutual Help program was designed to result in the conveyance of homes to Indian families. *See* 24 C.F.R. Part 905, Subpart E (1995). As *Fort Peck II* explained, Congress unambiguously intended that "the formula be related to the need of *all* tribal Housing Entities." 367 Fed. Appx. at 891 (emphasis added). Thus the rules for shifting formula funding from homeownership units that should have been conveyed towards distribution under factors measuring the need for new affordable housing, relate to need — the need of all Indian tribes. *Keetoowah* considered whether the regulation at issue there related to Congress's intent that funding be allocated based on need. 567 F.3d 1235 (10th Cir. 2009). Here, Congress has affirmed that the funding formula, including § 1000.318's conveyance-eligible provision, is based on need, stating: "This funding formula was developed by Indian tribes through negotiated rulemaking, and recently reaffirmed in 2007, *to ensure that the funding is allocated based on need.*" S. Rep. No. 110-238, at 10 (2007) (emphasis added). Accordingly, the conveyance eligible provisions of § 1000.318(a) reflect need as required by the statute.

B. HUD Properly Used The Federal Government's Inherent Power To Recover Overpayments.

HUD has the inherent authority to recover funds that have been wrongfully, erroneously or illegally paid. D. Br. 32-34. The enforcement provisions of Title IV of NAHASDA, 25 U.S.C. §§ 4161 and 4165, do not limit HUD's authority to recover overpayments to fulfill the grant allocation requirements of Title III, 25 U.S.C. §§ 4151 and 4152. D. Br. 27-30.

Section 4161(a)(1) states only that *if* HUD finds substantial noncompliance, HUD *must* take enforcement action. HUD has never characterized any of WRPT's actions related to the overpayments as amounting to substantial noncompliance. Nor has WRPT ever contended that the facts upon which HUD has based its intent to recover grant overpayments, if true, amount to

substantial noncompliance under NAHASDA. Moreover, HUD has never taken any of the enforcement actions mandated in § 4161(a) for substantial noncompliance. Likewise, § 4165 requires that a grant recipient provide financial audits and undergo specific reviews of its performance by HUD, but does not require a review of the recipient's FCAS reporting. HUD's actions were neither a financial audit, nor a review envisioned by § 4165.

WRPT never directly addresses these points. Instead, it inaccurately cites NAHASDA and HUD regulations or cites cases that are either irrelevant to the issues before the Court or actually support HUD's position. Because none of WRPT's arguments stands up to close scrutiny, the Court should deny its motion for summary judgment and grant HUD's cross-motion.

1. HUD Has The Authority To Recover Overpayments.

Like all Government agencies, HUD has the inherent authority — long recognized by the Supreme Court — to recover funds that it has wrongfully, erroneously or illegally paid. *United States v. Wurts,* 303 U.S. 414, 415 (1938) (citing *Wisc. Cent. R.R. Co. v. United States*, 164 U.S. 190, 212 (1896)). As the Supreme Court has explained, an agency does not require statutory authorization to recover such overpayments because the right exists independent of statute. *Id.* (citing *United States v. Bank of the Metropolis*, 40 U.S. 377, 401 (1841)). This authority is based on "the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." *Wisc. Cent.*, 164 U.S. at 212. The right to recover funds paid by mistake exists unless Congress has clearly barred it by statute. *Wurts*, 303 U.S. at 416. Moreover, Government officials do not have to file suit to establish the illegality of the payment and may administratively offset the debt from amounts otherwise owed to the debtor. *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112, 121 (1920); *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947).

WRPT ignores the rule that the Government may take administrative action to offset debts. Instead, it states that the cases HUD cited "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'. . . ." P. Br. 24. WRPT is simply wrong. In *Grand Trunk*, the Supreme Court held that the Postmaster General had the authority to recover overpayments and "was under no obligation to establish the illegality by suit." 252 U.S. at 120-21. Once satisfied that there had been overpayments, the Postmaster General "was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company . . . ." *Id*. at 121. Similarly, *Munsey Trust* held that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" 332 U.S. at 239 (quoting *Gratiot v. United States*, 40 U.S. 336 (1841)). *See also DiSilvestro v. United States*, 405 F.2d 150, 155 (2nd Cir. 1968) ("It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary."); *Bechtel v. Pension Ben. Guar. Corp*. 781 F.2d 906, 907 (D.C. Cir. 1986) (holding that Congress's express provision for recouping funds under certain circumstances "[d]oes not negate the existence of more general right of recoupment.").

WRPT nevertheless contends that the right to administrative offset exists only if Congress expressly authorizes the agency to do so, citing *American Bus Association v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000), and *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986). *American Bus*, however, has nothing to do with an agency's right to recover an illegal or mistaken payment. It only considered whether an agency could assess fines against bus companies that violated the Americans with Disabilities Act ("ADA") in addition to the remedies prescribed in the ADA. *Id*. at 4-6. The court of appeals determined that the agency could not do so because Congress had specifically identified all of the "remedies and procedures" that the agency could take in the event of a violation. *Id*. at 4-5. Here, HUD has not assessed fines for grantee violations. A decision concerning whether an agency can assess fines not authorized by Congress is inapplicable to a case where an agency seeks to recover

an overpayment pursuant to a long line of Supreme Court cases permitting such a recovery.[2] *American Bus* is also distinguishable because at issue in that case was whether Congress authorized penalties. In other words, the issue was whether Congress *created* that power. Here, in contrast, the issue is whether Congress *renounced* a power: the inherent power of the federal government to recover improperly distributed funds. Such renunciation must be explicit. *Wurts*, 303 U.S. at 416.

Louisiana Public Service actually supports HUD's position. There, the Supreme Court reviewed a Federal Communications Commission ("FCC") order declaring that federal law preempted a state regulation concerning depreciation of telephone company property. The Communications Act of 1934 authorized the FCC to regulate interstate telecommunications while explicitly preserving local authority over intrastate telecommunications. The Supreme Court held that the Act expressly barred the FCC from regulating the intrastate aspect of telecommunications so that the FCC was forbidden to prescribe depreciation practices and charges in the context of ratemaking for intrastate service. 476 U.S. at 375 ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."). Thus, in *Louisiana Public Service*, Congress explicitly renounced a power. Here, there is no explicit renunciation. HUD maintains its inherent power to recover improperly distributed funds. *Wurts*, 303 U.S. at 416.

Congress did not manifest any intent in NAHASDA to relinquish the federal government's inherent right to recover funds that HUD wrongfully paid. D. Br. 33. In 25 U.S.C. § 4161(a)(1), Congress mandated that HUD take certain actions if, after notice and opportunity for a hearing, it

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[2] *Christ v. Beneficial Corporation*, 547 F.3d 1292 (11th Cir. 2008), which WRPT also cites, is comparable to *American Bus* and not useful because it considered the issue of whether private plaintiffs can recover damages beyond those prescribed by Congress in the Truth In Lending Act for a violation of that Act. It had nothing to say about an agency's ability to adjust future grants to account for past overpayments.

finds a recipient failed to comply substantially with NAHASDA. The mandatory enforcement actions include reducing payments in an amount equal to the amount not spent in accordance with NAHASDA. 25 U.S.C. § 4161(a)(1)(B). But they in no way preclude HUD's recovery of overpayments in the absence of substantial noncompliance. In § 4165(d), Congress gave HUD the power to adjust the amount of a grant after certain reviews and audits. But again, § 4165(d) does not prohibit the recovery of overpayments. Congress's decision to establish certain methods to affect a recipient's grant does not mean that Congress prohibited any other methods, such as recovering overpayments. *See, e.g., United States v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 16 (1st Cir. Mass. 2005).* Because Congress did not manifest any intent in NAHASDA to relinquish the federal government's inherent right to recover, the federal government retains that power.

2. HUD's Actions Are Not The Actions Described In § 4161(a)(1)(B).

WRPT's claim that HUD is attempting to use the remedy mandated by 25 U.S.C. § 4161(a)(1)(B) is also wrong. 25 U.S.C. § 4161(a)(1) states only that *if* HUD finds substantial noncompliance, HUD *must* take one of four enforcement actions. Among those required enforcement actions, WRPT claims HUD is invoking § 4161(a)(1)(B), which requires that HUD "shall…reduce payments under [NAHASDA] to the recipient by *an amount equal to the amount of such payments that were not expended in accordance with the Act.*" (Emphasis added). WRPT claims "that is precisely what HUD is attempting to do to WRPT: to wit, reduce several 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." P. Br. 20. But even WRPT's description of HUD's actions clearly does not match the language of the remedy it claims HUD is taking. That HUD seeks the return of grant overpayments equal to the payments HUD made for homes that HUD construed *did not meet the criteria of 24 C.F.R. § 1000.318* does not mean that HUD seeks repayment of grant funds that *were not expended in accordance with the Act* by WRPT. There is simply no logical connection between the remedy in § 4161(a)(1)(B) and WRPT's description of HUD's actions. Section 4161(a)(1) and its subsection (B) are inapplicable.

HUD never invoked 4161(a)(1)(B) because it did not determine that WRPT was in substantial noncompliance and it has never alleged or sought to recover "an amount equal to the amount of such payments that were not expended in accordance with the Act." [3] *See* AR 764-766, 804-806. HUD is simply exercising its inherent right to recover overpayments, and HUD only seeks to recover the amount that was overpaid. *Id*.

WRPT's error in attempting to force fit this case into § 4161 is demonstrated by the actions that HUD actually took. As the record shows, HUD worked with WRPT to devise a means for it to repay overfunding. HUD proposed that the refund could be made from grant funds by adjusting allocations or by another repayment method proposed by WRPT. *See e.g.*, AR 765 ("proposing, as a method of repayment, adjusting allocations."); AR 735. Indeed, HUD did not take any of the prescribed § 4161(a)(1)(A)-(D) enforcement actions. HUD did not terminate payments to WRPT. 25 U.S.C. § 4165(a)(1)(A). It did not reduce payments to WRPT by an amount that WRPT had "not expended in accordance with" NAHASDA. *Id*. at § 4165(a)(1)(B). It did not limit the availability of payments "to programs, projects, or *activities not affected by such failure to comply." Id.* at § 4165(a)(1)(C) (emphasis added). Nor did HUD provide a replacement tribally designated housing entity ("TDHE") for the recipient. *Id*. at § 4165(a)(1)(D). Thus, HUD did not take any § 4161 enforcement actions.

WRPT contends that allowing HUD in any circumstance to recover an overpayment without a formal hearing would render Title IV of NAHASDA (which contains § 4161) a "dead letter" because HUD would never grant hearings. P. Br. 21. However, WRPT fails to cite any

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[3] Indeed, Congress clarified in 2008 that a recipient's failure to report FCAS correctly "shall not, in itself, be considered to be substantial noncompliance for purposes of this title." 25 U.S.C. § 4161(a)(2). Congress's intent is clear: "[I]f a grant recipient is required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301 [amending 25 U.S.C. § 4152], the action does not constitute substantial non-compliance by the grantee and does not automatically trigger a formal administrative hearing process." S. Rep. No. 110-238, at 10 (2007).

evidence that HUD is not providing hearings in cases involving noncompliance and fails to analyze the facts of this case. This case involves a dispute over the allocation provisions in NAHASDA concerning the timing of the removal of housing units from the allocation formula. HUD has interpreted WRPT's actions here as involving a good faith dispute over the proper interpretation of a complex statutory scheme. HUD has never contended that WRPT knowingly misrepresented the number of housing units eligible for inclusion in the allocation formula, a circumstance which, if true, may involve substantial noncompliance and one of the penalties under § 4161(a). And WRPT has never admitted that HUD's factual allegations, if true, would amount to substantial noncompliance, presumably because it does not wish to risk § 4161(a)(1) sanctions. Thus, the Court should see WRPT's case for what is: an attempt to have its cake (a formal hearing) and eat it too (not risking termination of payments or TDHE replacement).

3. HUD's Actions Are Not Actions Under § 4165.

Contrary to WRPT's claims, HUD also did not conduct an audit described in § 4165. 25 U.S.C. § 4165, "Review and Audit by Secretary," provides that tribes are subject to the audit requirements in chapter 75 of title 31 of the United States Code. 25 U.S.C. § 4165(a). Chapter 75 audits examine matters such as whether the financial statements of the audited entity have been prepared in accordance with generally accepted accounting principles. *See* 31 U.S.C. § 7502(e). WRPT has not contended that a title 31, chapter 75, audit was involved in this case.

Section 4165 further provides that tribes are subject to reviews and audits by HUD to determine, among other things, whether the tribe has carried out eligible activities, has a continuing capacity to carry out eligible activities in a timely manner and is in compliance with the Indian Housing Plan submitted pursuant to 25 U.S.C. § 4112. *See* 25 U.S.C. § 4165(b). However, HUD has not alleged that the reason it is seeking to recover overpayments from WRPT is based on its failure to carry out eligible activities or failure to comply with its Indian Housing Plans. D. Br. 29. Thus, § 4165 has no application to this case.

WRPT ignores the statutory language and contends that § 4165 applies to any review or audit — not simply those identified in § 4165(a) and (b). P. Br. 20-21. WRPT focuses on HUD's Inspector General's recommendation that HUD "audit" tribes' housing units included in FCAS. AR 279. However, the mere use of the word "audit" in a recommendation does not make HUD's actions relating to FCAS over-allocations an audit under chapter 75 of title 31, or a review of whether WRPT has carried out eligible activities and is in compliance with its Indian Housing Plan. *See* 25 U.S.C. § 4165(a), (b). The Court should reject WRPT's claim that § 4165 applies.

For the same reasons, WRPT's reliance upon 24 C.F.R. § 1000.532 is also misplaced. Section 1000.532 simply implements § 4165. WRPT argues that it somehow limits HUD's inherent authority to recover funds that have been erroneously paid. As the first sentence of the regulation states: "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 [§4165] of NAHASDA."* 24 C.F.R. § 1000.532(a) (emphasis added). Thus, this regulation, its hearing provisions and its bar on the recapture of grant funds already expended on affordable housing activities have no applicability to HUD exercising its inherent authority to recover grant overpayments. WRPT cannot show that HUD's actions arose from a § 4165 review or audit to determine if WRPT was engaging in eligible activities or complying with its Indian housing plans.

4. WRPT's Attempt to Draw A Distinction Between Pre- And Post-Grant Award Actions Does Not Support Its Claim That HUD's Intent To Recover Past Overfunding Violates Its Rights.

WRPT contends 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, WRPT claims, could occur without a hearing; the latter could not. Pl. Br. 19. In an attempt to distinguish between the timing of these adjustments, WRPT selectively quotes from 24 C.F.R. § 1000.60, a regulation concerning improper expenditure of funds, to suggest that any recovery of overpayments after grants have been dispersed requires the same procedures as

situations involving substantial noncompliance. Section 1000.60 provides in full:

> **Can HUD prevent improper expenditure of funds already disbursed to a recipient?**
>
> Yes. In accordance with the standards and remedies contained in § 1000.538 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.

(bold in original). Despite WRPT's contentions, nothing in § 1000.60 provides that HUD's recovery of overpayments requires § 1000.538 procedures. Rather, §1000.60 merely describes the process for suspending a recipient's expenditure of funds subject to a depository agreement in cases of substantial noncompliance; it does not address the procedures HUD must follow in unrelated circumstances. As a result, § 1000.60 does not provide a basis for a hearing in this case.

WRPT also relies on *City of Kansas City, Missouri v. Dep't of Housing and Urban Development*, 861 F.2d 739 (D.C. Cir. 1988), which involved a statute similar to NAHASDA, to support its claimed distinction between adjustments made pre- and post-award. However, *City of Kansas City* does not support this contention, nor, more significantly, does NAHASDA. NAHASDA's requirement for a hearing is triggered only by an allegation of substantial noncompliance — not by the timing of HUD's attempt to recover the overpayment. *See* 25 U.S.C. § 4161(a). Indeed, *City of Kansas City* supports HUD's position because the case involved a situation where "Kansas City is alleged to have substantially failed to comply with the [Community Development Block Grant Act], and the Secretary has attempted to impose a [sanction specified in that Act for substantial noncompliance]." *Id*. at 743. In fact, the court of appeals based its decision, in part, upon the fact that HUD had not disputed that Kansas City's actions involved substantial noncompliance. *Id*. at 742, fn. 3. Like NAHASDA, the Community Development Block Grant Act required notice and a formal hearing of an allegation of substantial noncompliance. *Id*. at 742-43. Because there was an allegation of substantial noncompliance, and HUD took one of the actions prescribed by Congress for substantial noncompliance, the court held

that Kansas City was entitled to a formal hearing. *Id*. at 743. However, in this case, HUD neither made a finding of substantial noncompliance, nor sought any prescribed remedy for such a finding. Thus, *City of Kansas City* is consistent with HUD's position: when a recovery action involves an allegation of substantial noncompliance, the tribe is entitled to notice and a formal hearing, but it is not otherwise entitled to such a hearing.[4]

5. WRPT Can Show No Harm By The Procedures HUD Used To Question The Eligibility Of The 32 Homeownership Units At Issue.

In this case, WRPT challenges HUD's actions relating to the overpayment of $110,444 in overpayments to WRPT in 2008 for 32 Mutual Help units. P. Br. 1, 6, 21; AR 803-806. WRPT claims HUD failed to follow 24 C.F.R. § 1000.540. P. Br. 22-24. But this regulation does not provide a right to a hearing; it merely specifies the procedures to be followed if a hearing is required. Nevertheless, WRPT claims that "[w]ithout a hearing, there was no opportunity to adjudicate the circumstances behind WRPT's case" and lists seven reasons its homeownership units could have still been under its management. However, WRPT does not claim any of these reasons are applicable. And it does not dispute any of the material facts HUD set forth in this matter. See D. Br. 10-11, 30-31. Nor does WRPT assert how the appeal procedures HUD employed under 24 C.F.R. § 1000.336 failed to take into consideration any reason WRPT actually raised to justify the continued eligibility of the units at issue. To the contrary, HUD not only provided WRPT with the opportunity to justify eligibility for each of the 46 homeownership units it questioned (AR 764-766), it accepted WRPT's justification for 14 units for one of the very reasons WRPT now lists — "there was a new tenant." AR 803-806. Indeed, HUD removed the other 32 units when WRPT verbally confirmed that they "were ineligible [as FCAS] in 2007." *Id*.

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[4] WRPT also cites *City of Boston v. Dep't of Urban Development*, 898 F.2d 828 (1st Cir. 1990), which also involved the same provision of the Community Development Block Grant Act requiring a formal hearing for substantial noncompliance and specified actions upon such a finding. *Id.* at 830-31. But like the *City of Kansas City,* there was no dispute that the grant recipient's actions constituted substantial noncompliance. Rather, HUD strictly argued that the hearing requirement was not triggered until it had begun making payments. *Id.* at 832.

WRPT has never claimed that it presented any other reason to justify retaining any of these 32 units, let alone that HUD denied such a reason. It simply cannot show it was prejudiced by the process HUD used and, under the APA, the aggrieved party must show prejudice by the government's action or inaction. 5 U.S.C. § 706 (requiring courts to take due account of "the rule of prejudicial error"). Thus, there is no available relief under the APA.

C. NAHASDA Does Not Create A Trust Relationship Enforceable In This Court.

WRPT's claims for breach of trust should be denied because WRPT has identified no statutory or regulatory prescription creating a fiduciary duty. P. Br. 34-37. Supreme Court precedents establish that an enforceable trust claim requires: more than the general trust responsibility alleged by WRPT; more than a statutory or regulatory duty untethered to any trust corpus (land, resources, money or other property belonging to Indians); and, even where a trust corpus is created — such as through the General Allotment Act's specific prescription that land be held "in trust" — an enforceable trust duty requires full responsibility for management of the trust property to distinguish it from a "bare" or limited trust. *See e.g., United States v. Navajo Nation*, 556 U.S. 287, 290-291, 301-302 (2009) (describing the multi-step analysis required for trust liability and rejecting trust liability premised on "comprehensive control" alone). The Ninth Circuit, applying these principles, has rejected a trust claim based on NAHASDA. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008).

WRPT downplays the significance of *Marceau*, contending that *Marceau* dealt with HUD's liability for home construction while this case arises from HUD's attempt to recapture or withhold grant money. WRPT claims that a grant, prior to being made, is subject to HUD's control and falls within the trust responsibility. Pl. Br. 29. *Marceau* cannot be read so narrowly. In rejecting the trust claim based upon NAHASDA, the Ninth Circuit was definitive:

> No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the

> property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property.

Marceau, 540 F.3d at 927. Nothing in the Ninth Circuit's opinion suggests that it is limited to trust claims based upon construction liability. Under NAHASDA, the Court found "the federal government held no property — land, houses, money, or anything else-in trust." *Id*. at 928

Marceau follows other Ninth Circuit precedent finding funds appropriated for the benefit of Indians are not held in trust. *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970), *cert. denied,* 400 U.S. 942 (1970). For fiduciary duties to arise in a breach of trust claim, the Supreme Court has explained that there must be a trustee, a beneficiary and a trust corpus. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). In *Scholder*, individual Indians challenged the authority of the Bureau of Indian Affairs to expend funds appropriated for Indian irrigation systems to build an irrigation lateral on non-Indian owned land. The Ninth Circuit rejected the claim that the expenditure was an unconstitutional taking of funds held in trust for Indians. *Scholder,* 428 F.2d at 1129. Like NAHASDA appropriations, "[t]he funds in question were 'gratuitous appropriations of public moneys'; they were not treaty or tribal funds 'belonging really to the Indians' and held in trust by the United States. Use of public funds to benefit non-Indians is not a taking of Indian property." *Id., quoting Quick Bear v. Leupp*, 210 U.S. 50, 81(1908). *Marceau* and *Scholder* unequivocally demonstrate that NAHASDA-appropriated funding does not constitute a critical element of a trust — a trust corpus. *Mitchell II*, 463 U.S. at 225.

Moreover, *Lummi Tribe v. United States*, 99 Fed. Cl. 584 (2011) and its holding that NAHASDA is money-mandating is of no significance to this issue. It simply found that the Court of Federal Claims had jurisdiction over the case under 28 U.S.C. § 1491, the Tucker Act. *Id.* at 594, *citing ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (finding the American Recovery and Reinvestment Tax Act was a money-mandating source of law for damage claims by

solar energy producers.).[5] Indeed, *Lummi* clearly supports HUD's trust argument in this case:

> Because we are exercising jurisdiction on the basis of a money-mandating statute, we need not address plaintiffs' alternate contention claiming relief on the ground that the government breached a duty of trust owed them. We note, however, that the government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," *United States v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S. Ct. 2313, 2325 (2011) — a requirement that plaintiffs have not shown has been satisfied here. "When 'the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's "control" over [Indian assets] nor common-law trust principles matter.'" Id. at 2316 (quoting *United States v. Navajo Nation*, 556 U.S. 287, ___, 129 S. Ct. 1547, 1558 (2009)). We are additionally unconvinced that grant funds to which a tribe claims entitlement are properly construed as "Indian assets" for the purposes of trust law or that the Secretary's limited responsibilities in allocating those funds under NAHASDA create the common-law trust duties envisioned by the Supreme Court in *United States v. Mitchell*, 463 U.S. at 226.

99 Fed. Cl. At 598. N. 12. WRPT has not identified any statutory responsibilities comparable to those in *Mitchell II* where the Government managed Indian forest resources, obtained revenue thereby and paid proceeds to the Indian landowners. *Mitchell II*, 463 U.S. at 224-25. As a result, its "breach of trust" claim based on the funds appropriated for IHBGs relates neither to a trust corpus nor to any substantive law creating fiduciary duties and should be denied.

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[5] A determination that a statute is money-mandating does not mean it creates a trust relationship. *See e.g. Bormes v. United States*, 626 F.3d 574 (Fed. Cir. 2010) (finding Little Tucker Act jurisdiction for an action by an attorney under the Fair Credit Reporting Act); *Schooner Harbor Ventures, Inc. v. U.S.*, 569 F.3d 1359 (Fed. Cir. 2009) (finding Tucker Act jurisdiction for a developer's taking claim based on money-mandating provision, the Fifth Amendment.); *Bevevino v. United States*, 87 Fed. Cl. 397 (2009) (finding the Prevailing Rate Systems Act was money-mandating source of law supporting Bureau of Prison employees' back pay claim under the Tucker Act.)

CONCLUSION

For the foregoing reasons, the Court should deny WRPT's Motion for Summary Judgment and grant HUD's Cross-Motion for Summary Judgment.

DANIEL G. BOGDEN
United States Attorney

/s/ Holly A. Vance
HOLLY A. VANCE
Assistant United States Attorney

CERTIFICATE OF SERVICE

WALKER RIVER PAIUTE TRIBE, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SHAUN DONOVAN, Secretary of Housing and Urban Development; and DEBORAH HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, Defendants.	)	Case No. 3:08-CV-00627-LRH-VPC

I certify that I am an employee in the Office of the United States Attorney for the District of Nevada and that on April 27, 2012, service of **DEFENDANTS' REPLY** was made through the Court's electronic filing and notice system, or, if such service was not available, by sending a copy of the same by first class mail, addressed to the person(s) below.

Addressee(s):

WES WILLIAMS
3119 Pasture Road
P.O. Box 100
Schurz, NV 89427

/s/ Holly A. Vance