

DANIEL G. BOGDEN
United States Attorney

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

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

WALKER RIVER PAIUTE TRIBE, and)	Case No. 3:08-CV-00627-LRH-VPC
THE FALLON PAIUTE-SHOSHONE TRIBE,)	
federally recognized Indian tribes,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
HOUSING AND URBAN DEVELOPMENT)	<u>GOVERNMENT'S BRIEF IN</u>
("HUD"); SHAUN DONOVON, Secretary of)	<u>RESPONSE TO ORDER OF</u>
HUD; DEBORAH A. HERNANDEZ, General)	<u>NOVEMBER 13, 2013</u>
Deputy Assistant Secretary for the Office of)	
Public and Indian Housing,)	
)	
Defendants.)	

COME NOW Defendants United States Department of Housing and Urban Development, Shaun Donovan and Deborah A. Hernandez ("HUD") and respectfully submit this response to the Court's order of November 13, 2013 (ECF No. 37). The Court requested briefing on the issue of subject matter jurisdiction in this case as it relates to the Ninth Circuit's recent decision in *Fort Belknap Hous. Dep't v. Office of Pub. & Indian Hous.*, 726 F.3d 1099 (9th Cir. 2013) ("*Fort Belknap*").

1 *Fort Belknap* establishes that this Court has jurisdiction over the present case precisely because
 2 section 401 of NAHASDA, 25 U.S.C. § 4161, does not apply to the HUD action under review. Here, as
 3 in *Fort Belknap*, plaintiff challenges HUD's decision to recover overpayments under the formula block
 4 grant program established by the Native American Housing Assistance and Self-Determination Act
 5 ("NAHASDA"). Here, as in *Fort Belknap*, HUD determined that the plaintiff grant recipient was
 6 overpaid formula block grant funds due to inaccurate counts of certain housing units known as Formula
 7 Current Assisted Stock ("FCAS") and sought to recover those amounts. Here, as in *Fort Belknap*, HUD
 8 proposed as a method of repayment that the overfunded amount be deducted from subsequent block
 9 grants. In these circumstances, the Ninth Circuit held, HUD possesses the authority to recover the
 10 amount of overpayments received by Fort Belknap. Because HUD was thus not required to, and did not,
 11 resort to § 4161, the Ninth Circuit lacked jurisdiction over Fort Belknap's petition for direct review in a
 12 court of appeals under § 4161(d).

13 Because the same circumstances exist in this case, § 4161 is not implicated. Therefore,
 14 § 4161(d) does not supplant this Court's jurisdiction, under 28 U.S.C. § 1331 and the waiver of
 15 sovereign immunity in 5 U.S.C. § 702, to review the agency action at issue here: HUD's decision that
 16 Walker River Paiute Tribe ("WRPT") incorrectly received credit in its fiscal year ("FY") 2008 formula
 17 block grant for 32 units that were ineligible as FCAS, and must repay the \$110,444 that it was overpaid
 18 as a result.

19 SUMMARY OF BACKGROUND

20 A. NAHASDA's Formula Block Grant Program.

21 HUD's prior briefing explained the legal and factual background to WRPT's claims. (See ECF
 22 No. 21 at 4-11). We summarize that background briefly here for convenience. NAHASDA created a
 23 block grant program providing each eligible Indian tribe with an equitable share, derived by formula, of
 24 annual congressional appropriations. See 24 C.F.R. § 1000.6; *Fort Belknap* at 1100. Congress
 delegated to HUD the task of establishing the formula through negotiated rulemaking. 25 U.S.C. §
 4152. "The formula consists of two parts: '(a) Formula Current Assisted Housing Stock (FCAS); and
 (b) Need.'" *Fort Belknap* at 1100 (quoting 24 C.F.R. § 1000.310). This case involves only the FCAS
 component, which includes certain lease-to-own housing units known as Mutual Help homeownership

1 units until they are conveyed to the lease-purchase homebuyer, or are eligible to be conveyed and
2 conveyance is not beyond the tribe's control. *Id.* at 1100-1101 (citing 24 C.F.R. § 1000.318); *see also*
3 25 U.S.C. § 4152(b)(1). To ensure the accuracy of each year's FCAS calculation, HUD seeks updates
4 from tribes on an annual "Formula Response Form." *Id.* at 1101 (citing 24 C.F.R. §§ 1000.302,
5 1000.315(a)); (*see e.g.*, Administrative Record ("AR"), ECF No. 17 at 641-661).

6 Because the formula allocation distributes a fixed amount of appropriations, any overpayment to
7 one tribe takes away money that should go to other tribes. *See Fort Belknap* at 1101 n.2 (citing 25
8 U.S.C. § 4151). Accordingly, HUD regulations provide for overpaid funds to be repaid and
9 redistributed according to the NAHASDA formula. 24 C.F.R. § 1000.319(b). When it believes a tribe
10 was overpaid for ineligible FCAS units, HUD provides the tribe an opportunity to present additional
11 information and to otherwise appeal the formula determination. 24 C.F.R. § 1000.336; (*see* AR 700-
12 701, 765, 806).

13 WRPT's claims invoke two statutory provisions not implicated by the recovery and
14 redistribution procedure discussed above. The first is 25 U.S.C. § 4161(a)(1), which prescribes specific
15 enforcement actions when HUD finds that a tribe failed to "comply substantially" with NAHASDA.
16 Those actions are (1) termination of payments to the tribe; (2) reduction of payments "by an amount
17 equal to the amount of such payments that were not expended in accordance with" NAHASDA; (3)
18 limiting the availability of payments to certain activities; or (4) providing a replacement recipient of
19 funding for the tribe. *Id.* Misreporting an FCAS count is not substantial noncompliance under this
20 provision. 25 U.S.C. § 4161(a)(2).

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

report.” *Id.* § 4165(a)-(b).¹ Subject to § 4161(a), the Secretary may adjust grant amounts according to findings with respect to the reports and audits submitted to the Secretary under § 4165. *Id.* § 4165(d). By regulation, any tribe could also request an administrative hearing before HUD reduced its grant amount pursuant to an audit or review conducted under § 4165. 24 C.F.R. 1000.532(b) (1998).² The administrative proceedings at issue here arise from the formula data that determine how much of congressional appropriations a tribe is entitled to receive, not the topics addressed in § 4165, which center on a tribe’s management and expenditure of grant funds in compliance with NAHASDA.

B. Administrative Proceedings Regarding WRPT Overpayments.

WRPT challenges HUD’s demand for repayment of \$110,444 in overfunding to WRPT that occurred because 32 ineligible housing units were counted in its FCAS when HUD calculated the FY 2008 block grant allocations. (WRPT’s Motion For Summary Judgment, ECF No. 18 at 1).

In June 2008, HUD notified WRPT that it “may have incorrectly received credit for 46 Mutual Help (MH) units under the Formula Current Assisted Stock (FCAS) component of the Indian Housing Block Grant (IHBG) formula in one or more fiscal years (FY)” and requested information from WRPT that might affect the FCAS eligibility of those units. (AR 700-703). In May 2009, because WRPT had provided no additional information, HUD assumed WRPT agreed with HUD’s information that the 46 units should not have been counted as FCAS beginning in FY 2008 and therefore WRPT had been overfunded as a result. AR 764-766. HUD also advised WRPT of its administrative appeal rights under 24 C.F.R. § 1000.336. *Id.*

¹ The quoted terms are terms of art with specific meanings within the context of NAHASDA. None relates to FCAS counts. Instead, “eligible activities” are defined in 25 U.S.C. § 4132. Tribes must submit an annual “housing plan” and “certifications” defined in 25 U.S.C. § 4112, which HUD reviews under 25 U.S.C. § 4113. Additional certifications of compliance with certain environmental requirements are required by 25 U.S.C. § 4115(c). Tribes must also submit an annual “performance report” under 25 U.S.C. § 4164.

² That regulation was amended effective January 2013 and no longer provides the opportunity for a formal hearing. *See* 24 C.F.R. § 1000.532 (2013).

1 In June 2009, WRPT appealed pursuant to 24 C.F.R. § 1000.336, and provided information
2 showing that 14 of the 46 units still counted as FCAS because those units were still within the terms of
3 their lease-purchase agreements with original or subsequent homebuyers. (AR 767-770). WRPT
4 confirmed that the other 32 units were ineligible as FCAS in 2007. (AR 803).

5 Accordingly, on December 10, 2009, HUD determined that only 32 units were incorrectly
6 counted as FCAS and that WRPT was overfunded \$110,444 in FY 2008. (AR 803-806).

7 **C. Procedural Background.**

8 On September 6, 2011, WRPT filed a motion for summary judgment arguing: (1) in reliance on
9 an invalid regulation, 24 C.F.R. § 1000.318(a), HUD unlawfully removed 32 Mutual Help units from the
10 FY 2008 count of WRPT's eligible FCAS; and (2) HUD violated procedural requirements by attempting
11 to recover the \$110,444 that WRPT was overpaid based on those units. (ECF No. 18). HUD filed a
12 cross-motion for summary judgment with its opposition. (ECF No. 21). After briefing was completed,
13 the parties filed notices of supplemental authority, including HUD's notice of the decision in *Fort*
14 *Belknap*, ECF No. 36, which precipitated this brief. (See Order (Nov. 13, 2013), ECF No. 37).

15 **ARGUMENT**

16 In *Fort Belknap*, the Ninth Circuit Court of Appeals held that it lacked jurisdiction under
17 NAHASDA's judicial review provision, 25 U.S.C. § 4161(d), because that section lodges review in a
18 court of appeals only when HUD takes enforcement action under § 4161(a), which was not the case
19 there. 726 F.3d 1099, 1104. Instead, HUD had "determined that Fort Belknap was overpaid because of
20 its inaccurate FCAS counts and sought to recover those amounts." *Id.* at 1104-1105. HUD possesses
21 the authority — independent of NAHASDA's compliance enforcement remedies — to recover the
22 amounts of overpayment to a NAHASDA grantee pursuant to the doctrine of payment by mistake. *Id.* at
23 1105 (citing *United States v. Mead*, 426 F.2d 118, 125 (9th Cir. 1970)). So resort to enforcement action
24 under § 4161 was not required. *Id.*

25 The circumstances are nearly identical in this case, so the same conclusion should follow.
26 Jurisdiction to review HUD's action is not vested in the court of appeals under 25 U.S.C. § 4161(d)
27 because § 4161 does not apply to HUD's recovery of overpayments due to a mistaken FCAS count in

the calculation of WRPT's FY 2008 formula grant. In other words, § 4161(d) does not disturb this Court's jurisdiction because 4161(a) does not apply here.

A. The Circumstances of WRPT's Case Mimic the Circumstances Reviewed by the Ninth Circuit in *Fort Belknap*.

In the Ninth Circuit case, the Fort Belknap Housing Department ("Fort Belknap") received formula block grant funds under NAHASDA. *Fort Belknap*, 726 F.3d at 1100. In 2001, HUD sent Fort Belknap a letter stating it "may have incorrectly received credit" in prior years for 171 Mutual Help units under the FCAS component of the block grant formula, which HUD believed were not qualified as FCAS pursuant to 24 C.F.R. § 1000.318(a) because they were conveyed or eligible to be conveyed. *Id.* at 1101. "The letter stated that, if Fort Belknap received funds for ineligible units, HUD would recover those funds." *Id.* In response to further information from Fort Belknap, HUD found that some of those units continued to be eligible as FCAS and determined Fort Belknap had been overpaid by \$330,524 for the ineligible units. *Id.* HUD and Fort Belknap subsequently agreed that this amount would be repaid in roughly equal installments over a five-year period by deductions from its subsequent grant allocations. *Id.* HUD initiated similar proceedings in 2005 and 2007 challenging the FCAS eligibility of designated Mutual Help units it believed were ineligible as FCAS in prior years based on § 1000.318(a). *Id.* at 1102-1103. In 2010, HUD wrote to Fort Belknap that it had been overpaid \$2,858,786 based on ineligible FCAS units between 2000 and 2010, which HUD would recover. *Id.* at 1103. Fort Belknap filed an administrative appeal, which was denied, and a request for reconsideration of the denial, which was also denied. *Id.* Fort Belknap then petitioned for review in the Ninth Circuit Court of Appeals, asserting jurisdiction under 25 U.S.C. § 4161(d). *Id.* at 1104.

Here, as in *Fort Belknap*, plaintiff WRPT is a recipient of formula block grants under NAHASDA. *See e.g.*, AR 685 (showing FY 2008 block grant allocation to WRPT). As in *Fort Belknap*, HUD sent WRPT a letter stating that WRPT "may have incorrectly received credit for" designated Mutual Help units under the FCAS component of the block grant formula in a prior fiscal year. (AR 700-703). As in *Fort Belknap*, HUD believed the units had become ineligible as FCAS in

accordance with 24 C.F.R. § 1000.318(a). *Id.* at 700. As in *Fort Belknap*, HUD determined the amount overfunded based on the ineligible FCAS units, and required repayment. AR 764-766.³ As occurred in *Fort Belknap*, HUD processed the grantee’s administrative appeal before determining the number of ineligible FCAS units and resulting overfunding amount that must be repaid. (AR 767-770; AR 803-806).

B. In These Circumstances, HUD Can Recover Overpayments Independent of Its Power to Find Substantial Noncompliance under § 4161.

Here, as in *Fort Belknap*, HUD found that the grantee — WRPT in this case — had been overpaid because of HUD’s mistaken belief that certain Mutual Help units were eligible as FCAS when they were not. *See Fort Belknap* at 1105. Hence, just as *Fort Belknap* had “incorrectly received funding” for ineligible FCAS units, WRPT had “incorrectly received credit for” ineligible FCAS units. *Compare id.* at 1106 with AR 700. In both cases, HUD neither “*alleged* that [the tribe] had failed to comply substantially with NAHASDA” nor “*found* [the tribe] to be in substantial noncompliance with NAHASDA’s provisions.” *Id.* at 1104. And HUD’s remedy here for the overpayment to WRPT based on mistaken FCAS counts is indistinguishable from the remedy at issue in *Fort Belknap*: “HUD sought merely to recover the amounts it paid by mistake.” *Id.* at 1105. This is not one of the remedies listed in 25 U.S.C. § 4161(a)(1). *Id.* at 1106.

HUD possesses authority in these circumstances to recover overpayments pursuant to the common law doctrine of payment by mistake. *Id.* at 1105 (citing *United States v. Mead*, 426 F.2d 118, 125 (9th Cir. 1970)). The only circumstance in which the government may not “recover funds from a person who received them by mistake” is when “Congress has clearly manifested its intention to raise a statutory barrier.” *Mead*, 426 F.2d at 124 (internal quotation marks and citations omitted). Here, the Ninth Circuit has already made clear that no such statutory barrier exists. It explained that, “[l]ike the Government in *Mead*, HUD can recover the amount of over payment to [the tribe] pursuant to the

³ Although here, unlike in *Fort Belknap*, HUD suspended collection during this litigation of the amount overpaid to WRPT for FY 2008 and tolled the time for WRPT to administratively appeal its overfunding determination, *see* AR 765, 805, and Stipulation and Order (ECF No. 6), HUD nonetheless seeks repayment of the overfunding in accordance with 24 C.F.R. § 1000.319, (*see* AR 764, 804-805).

1 doctrine of payment by mistake.” *Fort Belknap* at 1105. And it emphasized that this common-law
 2 recovery authority is “independent of [HUD’s] power to find substantial noncompliance under § 4161.”
 3 *Id.*; cf. *Muscogee (Creek) Nation Div. of Housing v. HUD*, 698 F.3d 1276, 1284 (10th Cir. 2012)
 4 (validating HUD remedy authorized by “longstanding principles of federal appropriations law”).
 5 Accordingly, in the circumstances here, as in *Fort Belknap*, HUD “was not required to resort to § 4161
 6 to recover those [overpaid] amounts, and it did not do so.” *Id.*⁴

7 Fort Belknap had sought review of HUD’s action directly in the Ninth Circuit Court of Appeals
 8 under § 4161(d), which provides that “[a]ny recipient who receives notice under subsection (a) . . . of the
 9 termination, reduction, or limitation of payments under this chapter” may file a petition for review “with
 10 [a] United States Court of Appeals.” 25 U.S.C. § 4161(d)(1)(A); *Fort Belknap* at 1104. Because
 11 nothing in HUD’s action implicated § 4161(a), the Ninth Circuit lacked jurisdiction under § 4161(d). *Id.*
 12 From this it follows that, here as in *Fort Belknap*, jurisdiction to review HUD’s action is not lodged in a
 13 court of appeals under § 4161(d) because § 4161 simply does not apply.

14 **C. This Court’s Jurisdiction Is Undisturbed By § 4161(d) Because § 4161(a) Does Not Apply.**

15 As shown above, HUD’s action here — the finding and recovery of overpayments to WRPT
 16 resulting from mistaken FCAS counts — does not trigger the statutory review provision in § 4161 to
 17 lodge jurisdiction in a court of appeals. Therefore, § 4161(d) does not disturb this Court’s jurisdiction
 18 for review of final agency action pursuant to the judicial review provisions of the Administrative
 19 Procedure Act. *See e.g., Gallo Cattle Co. v. United States Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir.
 20 Cal. 1998) (APA provides a limited waiver of sovereign immunity and standard of review in suits for
 21 review of federal agency action under 28 U.S.C. § 1331).

22 ⁴ By the same reasoning, HUD has authority to recover overpayments resulting from mistaken FCAS
 23 counts independent of its power under 25 U.S.C. § 4165 to make findings based on audits and reports of
 24 a grantee’s financial management of funds, *see* 25 U.S.C. § 4165(a) (citing 31 U.S.C. § 7501 et seq.),
 and spending of funds on eligible activities, *see id.* § 4165(b). Nothing in § 4165, which concerns a
 grantee’s management and spending of funds, clearly manifests a Congressional intent to address the
 situation where a grantee has mistakenly *received* more than it should, much less to bar HUD’s recovery
 of amounts a grantee mistakenly received.

1 Yet WRPT claims that HUD violates §§ 4161 and 4165, 24 C.F.R. § 1000.532, and
 2 constitutional Due Process by attempting to recover \$110,444 in overpayments WRPT received in FY
 3 2008 without the administrative hearing and finding of substantial noncompliance under § 4161(a). (*See*
 4 Amended/Supplemental Complaint (ECF No. 7) at ¶ 16; WRPT's Motion for Summary Judgment (ECF
 5 No. 18) at 20; WRPT's Reply (ECF No. 27) at 22). If this procedural claim had merit, this Court would
 6 lack jurisdiction in favor of the court of appeal's exclusive jurisdiction under § 4161(d).⁵

7 However, *Fort Belknap* makes clear that WRPT's procedural claim lacks merit because § 4161 is
 8 not implicated in these circumstances. So this Court's jurisdiction to review HUD's action remains
 9 undisturbed by § 4161(d) *because* § 4161(a) does not apply.

10 CONCLUSION

11 For the foregoing reasons, the Court retains jurisdiction to review HUD's December 10, 2009,
 12 decision requiring repayment of \$110,444 that WRPT was overpaid due to the erroneous inclusion of 32
 13 ineligible units in WRPT's FCAS in FY 2008. Accordingly, the Court should grant HUD's Cross-
 14 Motion for Summary Judgment and deny WRPT's Motion for Summary Judgment for the reasons
 15 explained here and in HUD's prior briefing.

16 DANIEL G. BOGDEN
 17 United States Attorney

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

21 ⁵ The special statutory review provision in § 4161(d) mimics provisions that the United States Supreme
 22 Court and Ninth Circuit, among others, have held to vest exclusive jurisdiction in the court of appeals.
 23 *See e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-336 (1958) (Federal Power Act's
 24 review provision is written in "simple words of plain meaning [that] leave no room to doubt the
 congressional purpose and intent" to give the courts of appeals exclusive jurisdiction); *Nevada Airlines,
 Inc. v. Bond*, 622 F.2d 1017, 1019-1020 (9th Cir. Nev. 1980) (Federal Aviation Act's review provision
 is exclusive). Moreover, the Ninth Circuit generally treats a special review statute as a grant of
 exclusive jurisdiction "[e]ven where Congress has not expressly conferred exclusive jurisdiction."
Edwardsen v. United States DOI, 268 F.3d 781, 790 (9th Cir. 2001) (quoting *City of Rochester v. Bond*,
 603 F.2d 927, 935 (D.C. Cir. 1971)).

CERTIFICATE OF SERVICE

WALKER RIVER PAIUTE TRIBE, and)	Case No. 3:08-CV-00627-LRH-VPC
THE FALLON PAIUTE-SHOSHONE TRIBE,)	
federally recognized Indian tribes,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
HOUSING AND URBAN DEVELOPMENT)	
("HUD"); SHAUN DONOVON, Secretary of)	
HUD; DEBORAH A. HERNANDEZ, General)	
Deputy Assistant Secretary for the Office of)	
Public and Indian Housing,)	
)	
Defendants.)	
)	

I certify that I am an employee in the Office of the United States Attorney for the District of Nevada and that on December 6, 2013, service of **GOVERNMENT'S BRIEF IN RESPONSE TO ORDER OF NOVEMBER 13, 2013** 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
HOLLY A. VANCE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24