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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * * * *

The Housing Authority of the Te-Moak Tribe of Western Shoshone Indians, **Plaintiff,** **v.** **United States Department of Housing and Urban Development; *et al.*,** **Defendants.**	**Case No. 3:08-cv-00626 LRH-VPC** **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the plaintiff, the Te-Moak Tribe of Western Shoshone Indians of Nevada Housing Authority (Te-Moak Housing Authority or TMHA) and moves pursuant to Rule 56, FRCP, for summary judgment granting the plaintiff the relief it seeks. The motion is based upon the record on appeal filed by the defendants herein, the accompanying points and authorities, the verified complaint, the affidavit of Lynette Piffero, the current Executive Director of the TMHA, and upon all other documents and records on file herein.

WHEREFORE, the plaintiff, TMHA prays as follows:

1. For a declaration that 24 CFR § 1000.318 is inconsistent with the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. §§ 4101, *et seq.*, and in particular, 25 U.S.C. § 4152, and therefore affords no basis for diminishing the federal block grant funding awarded and to be awarded to the TMHA and for therefore

continuing to hold payments made in reimbursement due to an alleged overpayment computed based upon 24 CFR § 1000.318;

2. For an order preventing the defendants from reducing the TMHA's block grant awards without first according the TMHA due process including notice and the opportunity to be heard prior to any reduction in block grant awards under NAHASDA and from retaining the monies already reimbursed to HUD based upon an alleged overpayment based upon HUD's application of 24 CFR § 1000.318 and in the third alternative;

3. For an order declaring that even if HUD may properly rely upon 24 CFR § 1000.318 to calculate the TMHA's block grant funds, it may not recoup and force reimbursement of past over payments because HUD is without any legal authority to recover past grant amounts that HUD had erroneously awarded; and

4. For all other relief deemed appropriate in the premises.

Dated this 7th day of August, 2012.

The Law Offices of Charles R. Zeh, Esq.

By: _____
Charles R. Zeh, Esq.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Introduction

This case requires the court to determine whether by already extracting reimbursements totaling One Hundred Nineteen Thousand One Hundred Eighty-two Dollars ($119,182), from an alleged overpayment of One Hundred Ninety-eight Thousand Six Hundred Thirty-six Dollars ($198,636) and by insisting that HUD be reimbursed the net sum of Six Hundred Fifty Thousand Four Hundred Sixty-three Dollars ($650,463) out of future block grant payments for additional alleged overpayments, the above-named federal defendants (referred to herein as HUD) have unlawfully deprived the plaintiff, the Te-Moak Housing Authority (TMHA), of federal block grant funding for affordable housing awarded pursuant to the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. § 4101, *et seq.* Congress passed NAHASDA in 1996 in order to help 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). Congress found that, "the need for affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities ... is acute." 25 U.S.C. § 4101(6). Congress also found that, "[f]ederal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian Tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 *et seq*)." 25 U.S.C. § 4101(7). Thus, federal trust responsibility, Indian self-determination, self-governance, and direct block grant funding are key components of NAHASDA.[1]

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[1]Prior to NAHASDA, funding was provided to Indian Housing Authorities (IHAs) under the 1937 Housing Act, 42 U.S.C. § 1437, *et. seq*. Under this Act, IHAs were required to sign an Annual Contributions Contract (ACC) for each housing project, which contained certain restrictions on the use of these funds.

Under NAHASDA, block grant funding is provided to each Tribally Designated Housing Entity (TDHE) for affordable housing programs. Congress directed the Secretary to, on or before October 26, 1996, promulgate regulations through negotiated rule making that would establish a formula for allocating block grant amounts made available each fiscal year. 25 U.S.C. § 4152(a). Congress directed that these regulations be based on factors that reflect the need of the Tribes for low-income housing assistance. 25 U.S.C. § 4152(b). Among the three factors that Congress mandated to be a part of this formula was the number of dwelling units each TDHE owned or operated pursuant to an Annual Contributions Contract (ACC) with the Secretary at the time the regulations were implemented. 25 U.S.C. § 4152(b)(1).

In response to 25 U.S.C. § 4152, HUD put together a Negotiated Rulemaking Committee consisting of tribal and federal representatives. 63 Fed. Reg. 12334 (Thursday, March 12, 1998). The final rule was implemented on March 12, 1998. *Id.* The block grant formula, now codified at 24 CFR Part 1000, is based in part upon the number of dwelling units each TDHE has under an ACC as of September 30, 1997. The regulations refer to "Current Assisted Stock" consisting of all of a TDHE's dwelling units under a TDHE's management as of September 30, 1997, and "Formula Current Assisted Stock" consisting of current assisted stock plus all dwelling units "in the development pipeline" as of September 30, 1997, and dwelling units utilized by TDHEs to provide housing assistance under Section 8 of the 1937 Housing Act. 24 CFR §§ 1000.312 and 1000.314.

The TMHA is the TDHE for the Te-Moak Tribe of Western Shoshone Indians of Nevada (the Tribe), and receives an annual block grant from HUD to construct, operate, and maintain affordable housing for low-income families on the Tribe's Reservation. Affidavit of Lynette Piffero, current Executive Director of the TMHA, ¶ 3. The TMHA operates two major housing programs, a low rent housing program, and a mutual help home ownership program. Piffero Affidavit, ¶ 4. The home ownership program is a lease-to-own arrangement, under the mutual help home ownership program. Piffero Affidavit, ¶¶ 5,13. Under these programs eligible families may achieve ownership of their single-family homes after leasing over an initial 25-year term, commencing on the unit's "Date of Full Availability" (DOFA). In order to acquire

ownership, the family must make monthly payments based upon a percentage of the client's income over the 25-year term. Piffero Affidavit, ¶ 5, 13.

The TMHA began receiving annual block grant awards under NAHASDA as of 1998. USAO Tab 6. Until 2005, without question, HUD awarded block grants to the TMHA in each year based in significant part upon the total number of units TMHA had under an ACC as of September 30, 1997. Piffero Affidavit ¶ 15; USAO Tab 31, pp. USAO 0593, 0594.

Then, following an Office of Inspector General (OIG) audit, HUD determined that it should not have awarded block grants based upon the total number of dwelling units the TMHA had under its ACC as of September 30, 1997. *Id.*, Tab 31. Instead, HUD decided that the funds that should have been allocated to the TMHA block grant should have been based upon the terms of 24 CFR § 1000.318, wherein the units which the TDHE has conveyed or has lost due to demolition or other means are to be excluded from consideration when calculating the block grant award.

That is to say, HUD regulations exclude TMHA affordable housing units from being counted for block grant purposes once the TMHA conveyed a unit or lost a unit through demolition or other means. 24 CFR § 1000.318. This is the crux, therefore, of this dispute, HUD's reversal of position to retroactively enforce the exclusions of 24 CFR § 1000.318, to determine the amount of the TMHA's block grant award, both past and present. The TMHA contends that the exclusion of these units from the block grant formula is contrary to NAHASDA, in particular, 25 U.S.C. § 4152(a) and (b)(1).

Because the total number of dwelling units the TMHA had under contract with HUD under its ACC as of September 30, 1997, was used to calculate the block grant award to the TMHA, HUD has contended that the TMHA was over funded for fiscal years 2002-2008, USAO Tabs 34, 49 and 52, because certain dwelling units in its home ownership program that were either conveyed or whose 25-year term had expired may not be counted for block grant formula purposes. Thus, the TMHA must pay back funds it received based upon the erroneous inclusion of these dwelling units in its FCAS. Indeed, the TMHA already erroneously agreed to reimburse HUD the sum of One Hundred Ninety-eight Thousand Six Hundred Thirty-six Dollars

($198,636), out of future grant awards and, in fact, has already reimbursed HUD a portion of this amount out of the inadequate and scarce housing resources the TMHA receives from HUD. Comp. ¶¶ 21, 22. HUD insists, also, that the TMHA was over funded for the same reasons, the additional sum of Four Hundred Forty-one Thousand Four Hundred Eighty-four Dollars ($441,484) and insists that these funds be reimbursed out of future grant awards. Comp. ¶ 20.

The TMHA contends, however, that its Mutual Help homes that were under an Annual Contributions Contract as of September 30, 1997, were and should continue to be properly counted under NAHASDA because 24 CFR § 1000.318 impermissibly conflicts with NAHASDA, in particular, 25 U.S.C. § 4125. HUD's determination that the TMHA was overfunded is mistaken.

Alternatively, HUD's policy that requires TDHE's to remove home ownership units from the formula count before the units are actually conveyed should be set aside because it is arbitrary, capricious, and/or unreasonable, and because it is inconsistent with HUD's trust responsibility and the spirit and intent, if not the letter, of NAHASDA. Furthermore, the TMHA claims that the determination of over funding and the demand for recoupment were accomplished in derogation of the TMHA's due process rights. Finally, the TMHA contends that HUD cannot recapture any purportedly over funded grant amounts because such recovery is inconsistent with the federal trust responsibility and is neither warranted nor lawful in this case. Moreover, NAHASDA regulations expressly prohibit HUD from recovering grant amounts that have already been spent on affordable housing activities for previous fiscal years, which is the case, here. Piffero affidavit, ¶¶ 25, 35.

II. Statement of Undisputed Facts

As part of its initial block grant funding process, HUD prepared an initial Formula Response Form for the TMHA, which included a list of all of the housing units counted as FCAS. HUD sent the TMHA its first Formula Response Form in 1997, USAO Tab 0123, for FY (fiscal year) 1998. Each form submitted thereafter was generally the same, and HUD reported, without question, the same number of housing units, Mutual Help and rental units, as FCAS at all pertinent times thereafter. The Formula Response Form did not direct the TMHA to exclude

conveyed home ownership units or even units whose initial 25-year term had expired. (*See, e.g.*, USAO, Tab 6). HUD did not question the accuracy of the number of home ownership units listed during this period. USAO Tab 6, pp. 0121-0123. Instead, HUD requested the TMHA to review the form and make any necessary corrections, without instructing TDHEs to exclude conveyed units or units whose 25-year term had expired. USAO Tab 6, p. 0123.

If HUD was serious about or understood the meaning of 24 CFR § 1000.318, however, HUD could easily have made the adjustments for home ownership units whose 25-year term expired simply be adding 25 years to the DOFA, because the Formula Response Form lists the DOFA for each homeownership project on the far right side of the form. (*See, e.g.*, USAO Tab 6, p. USAO 0123.) However, HUD did not begin questioning its formula count until 2002, after an audit by the Office of Inspector General (OIG) dated August 2, 2001, called into question the accuracy of reported homeownership units. (USAO Tab 17). The OIG audit was based on a review of selected TDHEs across the country. The audit opined that the Office of Native American Programs (ONAP) had not accurately allocated NAHASDA Indian housing block grant funds because not all of the dwelling units reviewed by the OIG qualified as FCAS. As a result, according to the OIG, HUD over funded some housing entities and underfunded others. According to the OIG, the oversight:

> [o]ccurred because HUD, (i) did not verify the accuracy of the data used, and (ii) relied on Housing Entities to notify HUD of current assisted stock changes and accuracy. Furthermore, there was no financial incentive for Housing Entities to notify HUD of decreases in their assisted stock. (USAO, Tab 17, OIG audit Finding 1, p.7.)

The OIG also noted that TDHEs:

> [a]re not required by law or regulations to report formula input changes. Additionally, there is little incentive for Housing Entities to report a reduction in the FCAS because it reduces the grant received by the Housing Entity. *Id.* at p.8.

It seems clear then, that the over payment problem occurred, in part, because the TMHA did not receive clear direction for how it should report changes in its FCAS. The alleged over payment issue arose, also, in part because HUD failed to properly monitor its own FCAS count and provide direction on the accuracy of reporting changes in FCAS.

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The OIG audit concluded that once a home ownership unit is paid off it is no longer eligible as FCAS. The basis for the OIG's opinion was 25 CFR § 1000.318(a), which states:

> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:
>
> (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and
>
> (2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment. *See*, 24CFR 1000.318(a).

The OIG concluded its finding by recommending that HUD audit and remove all ineligible FCAS for all TDHEs, and recover overfunding from TDHEs whose FCAS had been overstated. (USAO Tab 17, OIG Audit Finding 1, p. 11).

In the aftermath of the OIG audit, HUD sent Felix Ike, the then Chairman of the Te-Moak Tribe of Western Shoshone Indians of Nevada, a letter dated March 2, 2005, wherein Mr. Ike was advised that based upon 24 CFR § 1000.318, 15 Mutual Help (MH) units of the Tribe's Housing Authority should not have been included under the FACS component of the Indian Housing Block Grant formula in one or more fiscal years. USOA Tab 31. This was followed up with a letter dated July 8, 2005 from HUD addressed to Paula J. Brady, the then Executive Director of the TMHA. In this letter, HUD told the TMHA for the very first time that the "Te-Moak Tribe incorrectly received funding for 15 MH units in FY 2000 through 2005. This resulted in an estimated over payment of $198,636...." USAO, Tab 34, p. USAO 0600. HUD advised further that because of 24 CFR § 1000.340, HUD was not asserting the claim of overpayment for FY 2000 and FY 2001. However, for FY 2002-2005, HUD was pressing the claim of overpayment and for those years, the overpayment totaled as stated, the sum of One Hundred Ninety-eight Thousand Six Hundred Thirty-six Dollars ($198,636).

Then, in a letter dated September 29, 2005, to Paula Brady, HUD confirmed that the Tribe had apparently conceded to the overpayment amount and would reimburse HUD in the amount of One Hundred Ninety-eight Thousand Six Hundred Thirty-six Dollars ($198,636).

HUD then advised that beginning in FY 2006, the over payment would be recouped by a reduction in future grant amounts of Thirty-nine Thousand Seven Hundred Twenty-eight Dollars ($39,728) a year for FY 2006 through FY 2010. USAO Tab 37, p. USAO 0628. As a result of this "arrangement," at the time of the filing of the verified complaint, HUD had deducted from the Tribe's annual block grant award, three (3) installments of Thirty-nine Thousand Seven Hundred Twenty-eight Dollars ($39,728). Comp., ¶¶ 22,23.

Meanwhile, HUD continued funding the TMHA as if 24 CFR § 1000.318 did not exist. Grant awards still were made, based upon the number of homes listed on the ACCs as of September 30, 1997. *See, e.g.*, USAO Tab 26, pp. USAO 0454, 0455; USAO Tab 35, pp. USAO 0605, 0611, USAO USAO, Tab 38, pp., USAO 0632, 0633.

As a result, additional alleged overpayments were identified.[2] Thus, in a letter believed to be dated September 10, 2008, the defendants informed the plaintiff that it had been over funded for Fiscal Years 2006, 2007 and 2008 in the aggregate amount of Four Hundred Forty-one Thousand Four Hundred Eighty-four Dollars ($441,484). Comp., ¶ 20; USAO Tab 49, p. USAO 0799. While HUD offered to work with the Tribe on repayment, HUD stated that repayment may result in a reduction in previous or future year's funding out of the TMHA's block grant awards. *Id.*, at USAO 0799, 0800.

This was followed by a letter from the HUD dated October 23, 2008, wherein for FYs 2007 and 2008, HUD claimed another overpayment of One Hundred Twenty-nine Thousand Five Hundred Twenty-five Dollars ($129,525). For this alleged overpayment, HUD proposed that it be repaid by deduction from the FY 2009 NAHASDA funding to the TMHA. Comp., ¶ 21; USAO Tab 52, p. USAO 0814.

As a result of HUD's belated decision to resurrect and enforce 24 CFR § 1000.318 in the manner suggested by the OIG, the TMHA has lost against future grant awards the three (3) installments of Thirty-nine Thousand Seven Hundred Twenty-eight Dollars ($39,728), from its block grant awards under NAHASDA as there were no unexpended funds from prior years that

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[2]Overpayments continue to accrue as HUD continues to claim overpayments. The TMHA is currently working on a response to Project 16008, for FY 2010. Piffero affidavit ¶ 47.

could be used or were used to absorb the repayment installments. Piffero affidavit, ¶¶ 25, 55. Further, the TMHA faces the threat of reductions totaling the sum of Seven Hundred Sixty-nine Thousand Six Hundred Forty-five Dollars ($769,645), less the three (3) installment deductions, or a net of Six Hundred Fifty Thousand Four Hundred Six-three Dollars ($650,463) from future block grant awards, because there are no unexpended funds from prior grant years available to reimburse for the alleged over payments. Comp., ¶ 23; Piffero affidavit, ¶¶ 25, 35, 43. HUD has made clear to the TMHA that the it will either "voluntarily" enter into repayment plans or future funding will unilaterally be adjusted until all over payments have been repaid. Comp., ¶ 24, USAO Tab 49, pp. USAO 0799, 0800; USAO Tab 52, pp. USAO 0813, 0814.

Moreover, the TMHA's grant will be reduced even further each year as homeownership units are conveyed and the TMHA's old ACC projects reach the end of their 25-year term. This is particularly harmful to the TMHA, given its significant homeownership program because HUD regulations do not allow TDHEs to count newer dwelling units constructed with NAHASDA funds as FCAS, even if the new units replace old demolished or conveyed homeownership units. 24 CFR §§ 1000.312, 1000.318. At the same time, HUD allows TDHEs to count, without exception, all of their low rent units in existence as of September 30, 1997, including units that have been demolished.

The last tab in the record supplied by HUD is a letter dated September 21, 2008, from Dana Cassadore, the then Executive Director of the TMHA. He requested a 90-day extension of time to address for the TMHA, the alleged overpayment issue, especially in light of the additional recent demand by HUD for repayment of the additional alleged overpayment of One Hundred Twenty-nine Thousand Five Hundred Twenty-five Dollars ($129,525). USAO Tab 53, p. USAO 0817. There was no response to this letter according to the record provided by HUD.

As matters, therefore, stand, HUD is demanding reimbursement for an alleged overpayment in the net amount of Six Hundred Fifty Thousand Four Hundred Sixty-three Dollars ($650,463). HUD has recouped, already, for alleged overpayments, three installments in the amount of Thirty-nine Thousand Seven Hundred Twenty-eight Dollars ($39,728), each, or a total of One Hundred Nineteen Thousand One Hundred Eighty-four Dollars ($119,184).

The reimbursement for the alleged overpayment, came from future block grant funding and not from unexpended funds from prior year's block grants. Should HUD be able to recoup for the alleged overpayments in the net amount of Six Hundred Fifty Thousand Four Hundred Sixty-three Dollars ($650,463), the reimbursement will necessarily be paid out of future block grant awards as: (a) there will be no unexpended funds from previous grant years to use for reimbursement to HUD, and (b) the reimbursement will result in the reduction of housing funds for housing on the Reservation in the face of unmet needs, thereby necessarily resulting in an erosion in the quality of housing on the Tribe's Reservation.

HUD has not abandoned the pursuit of the alleged overpayments. The decision of HUD to demand recoupment of the alleged overpayments remain final and undiminished.

III. Standard for Deciding Motion for Summary Judgment Under Rule 56, FRCP

Motions for summary judgment shall be granted where there is no genuine dispute over any material fact and the moving party is entitled to judgment as a matter of law. *See*, *Celotex v. Catrett*, 477 U.S. 317, 322-323 (1986). As a corollary, where the plaintiff fails to establish an essential element of the case when opposing the motion for summary judgment, all facts, disputed or not, are rendered "immaterial" and the moving party is entitled to judgment as a matter of law. *Ibid.*

In addition, Rule 56, FRCP, focuses only upon those facts which are material and as to them, the dispute must be genuine to defeat the motion. When the moving party has carried its burden under Rule 56(c), its opponent must "... do more than simply show that there is some metaphysical doubt as to the material facts...[parallel citations omitted]." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 687 (1986). Materiality, in turn, is determined by the substantive law of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Finally, when deciding whether the dispute is genuine, while it is not the function of the Court to weigh the evidence and determine who is telling the truth, it is also true that:

> ...there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party....[internal citations omitted]. If the evidence is merely colorable, ... [internal citation omitted] or is not significantly probative, summary judgment may be granted. *Id.* at 247- 250.

See also, Dubois v. Ass'n. of Apt. Owners, 453 F.3d 1175, 1180 (9th Cir., 2006); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 175, 1161 (9th Cir., 2002) (no "genuine issue" where the only evidence presented is 'uncorroborated and self-serving' testimony).

Consequently, even where a court is confronted with two conflicting stories, summary judgment may lie. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776 (2007).

In this dispute, however, the facts related above are not in meaningful dispute. The questions this case raises, therefore, are squarely matters of law, ripe for disposition under Rule 56, FRCP.

IV. ARGUMENT

Beginning in 1997, HUD notified the TMHA of its eligibility for block grant awards and then issued the Indian Housing Block Grant awards based upon the number of units the TMHA had in stock under ACCs as of September 30, 1997, as if either 24 CFR § 1000.318 did not exist or had a meaning other than the meaning being attributed to it now by HUD after the 2002 OIG Audit. USAO Tab 17. Assuming that HUD knew what it was doing, the TMHA did not challenge the basis upon which the award of block grant housing funds was being calculated in the FCAS, because to do so, would have resulted in a reduction in funding for housing on the Reservation in the face of need that exceeded available funding under the best of circumstances. Moreover, HUD continued to calculate grant awards based upon the number of units the TMHA had in stock under ACCs after it started belatedly to enforce 24 CFR § 1000.318.

The bottom line of this dispute is, therefore, whether, after creating the conditions upon which an overpayment could be alleged in the first place, HUD should be permitted under NAHASDA to force the TMHA to reimburse for the alleged over payments when: (a) there are no unexpended funds for use to offset or repay the overpayments; and (b) the repayments of the alleged over payments must come from a reduction in future block grant awards, when the block grant award, itself, is inadequate in the face of unmet housing needs on the Reservation. As

developed below, the reason for NAHASDA in the first place as well as by reason of specific provisions in NAHASDA preclude HUD from recovering the alleged overpayments.

A. Standard Of Review.

The Court must determine whether HUD's decision in this case is: "...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Generally, an agency's decision is arbitrary and capricious if it is not "based on a consideration of the relevant factors" or if there was a "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). An agency may not rely on improper factors, ignore important aspects or issues, or base its decision on implausible reasoning. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, agency action is arbitrary when the agency offers insufficient reasons for treating similarly situated entities differently. *See State Farm, supra; Airmark Corp. v. FAA,* 758 F.2d 685, 691 (D.C. Cir. 1985); *Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C. Cir. 1996); *County of Los Angeles v. Shalala,* 192 F.3d 1005 (D.C. Cir. 1999). Although an agency's discretion in interpreting a statute may be broad, it "is not a license to ... treat like cases differently." *County of Los Angeles, supra* at 1023, quoting *Airmark Corp., supra* at 691.

As part of its review, the Court must determine the extent of HUD's trust responsibility to the TMHA, and the extent to which this responsibility required HUD to more prudently monitor the accuracy of the reported FCAS each year. Moreover, inasmuch as this case turns in large part upon the Tribes' interpretation of NAHASDA, the canons of statutory construction of laws passed for the benefit of Indians will play an important role in the Court's analysis.

Statutory construction cases begin with the language of the statute itself. *See, Satterfield v. Simon Schuster*, 569 F.3d 946, 951 (9th Cir., 2009); *United States v. Thompson,* 941 F.2d 1074, 1077 (10th Cir. 1991), *cert. denied,* 503 U.S. 984 (1992). If the statute is ambiguous, courts generally defer to an agency's interpretation if it is a reasonable construction of the statute. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). However, standard principles of statutory construction and agency deference do not have their usual force in cases involving Indian law. "The canons of construction applicable in Indian law

are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet* Tribe, 471 U.S. 759, 766 (1985). One such canon requires that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Id.; United States v. Thompson,* 941 F.2d at 1077; *E.E.O.C. v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir. 1989). *See also, White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144, 100 S.Ct. 2578, 2584 (U.S.Ariz.,1980) "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

In *Muscogee Creek Nation v. Hodel,* 851 F.2d 1439 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia refused to defer to the Secretary of Interior's interpretation of an ambiguous statutory provision under the canons of construction governing Indian law. In that case, the Secretary decided that the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.,* barred the Tribe from establishing a tribal court. The court disagreed, holding that an agency must interpret statutory ambiguities in favor of Indian tribes. *Id.* at 1444-45. "[I]f the OIWA can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." *Id.* at 1445 (emphasis in original). "It is for that reason that, while we have given careful consideration to Interior's interpretation of the OIWA, we do not defer to it." *Id.* at n.8. *See also, Albuquerque Indian Rights v. Lujan,* 930 F.2d 49, 58-59 (D.C. Cir. 1991) (Department of Interior's interpretation of Indian preference statute rejected in favor of the canon of construction favoring Indian tribes); *Confederated Tribe of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt,* 116 F.Supp.2d 155, 158-159 (D.D.C. 2000).

The Ninth Circuit is in accord. In *Artichoke Joe's California Grand Casino,* the Ninth Circuit stated:

> Application of the *Blackfeet* presumption is straightforward. We are confronted by an ambiguous provision in a federal statute that was intended to benefit Indian tribes. One construction of the provision favors Indian tribes, while the other does not. We faced a similar situation in the context of Indian taxation in *Quinault Indian Nation v. Grays Harbor County,* 310 F.3d 645 (9th Cir.2002). In choosing between two characterizations of a tax law "plagued with ambiguity," we adopted the construction that favored the Indian Nation over the one that favored Grays Harbor County, noting that "it is not enough to be persuaded that the County's is a permissible or even the better reading" *Id.* at 647. *Artichoke Joe's California*

> *Grand Casino v. Norton,* 353 F.3d 712, 730 (2003). *But see, Confederated Salish and Kootenai Tribes v. U.S. ex rel. Norton,* 343 F.3d 1193 (9th Cir., 2003) decided prior to *Grand Casino.*

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

> ... [I]t would be entirely inconsistent with the purpose of the [Self-determination] Act, as well as with the federal policy of Native American self-determination in general, to allow the canon favoring Native Americans to be trumped in this case. We therefore conclude, for purposes of this case, that the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretation of ambiguous statutes .... The result is that the canon of construction favoring Native Americans necessarily "'constrains the possible number of reasonable ways to read an ambiguity in [the] statute.'' *Commonwealth of Massachusetts v. U.S. Dept. of Transp.,* 320 U.S. App. D.C. 227, 93 F.3d 890, 893 (D.C. Cir. 1996).

Id. at 1462 (internal citations omitted). *See also, Williams v. Babbitt,* 115 F.3d 657, 660 (C.A.9 (Alaska),1997) "we are required to construe statutes favoring Native Americans liberally in their favor."

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

The same standard applies in this case. A key component of NAHASDA is Indian self-determination. 25 U.S.C. § 4101(7). Congress adopted NAHASDA in large part to give Indian tribes greater control over their housing programs. Since this case involves a dispute between the TMHA and HUD over what Congress intended when it established the block grant

formula under NAHASDA, the Court should acknowledgment that it is not enough that HUD's interpretation of 25 U.S.C.§ 4125 is permissible or even a better reading of the statute than supplied by the Tribe. *Artichoke Joe's California Grand Casino, supra* at 730. Instead, where, as here, the TMHA's interpretation of NAHASDA is reasonable, it should be followed. As shown below, NAHASDA can and should be interpreted to allow TDHEs to include all homeownership units that were under an ACC as of September 30, 1997, to be counted as FCAS for each fiscal year.

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

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

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

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(e) Effective Date

This section shall take effect on October 26, 1996.

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

By its terms, then, 25 U.S.C. § 4152 required the Secretary to establish a grant allocation formula no later than October 26, 1997. One of the mandated factors in this formula is the number of dwelling units "owned or operated at the time." The operative phrase "owned or operated at the time" refers back to the deadline in 25 U.S.C. § 4152(a), which, by its terms, could be no later than October 26, 1997.[3] Thus, Congress intended to take a snapshot of each TDHE's dwelling unit inventory as of a date certain, and utilize that number as a base line dwelling unit number for purposes of 25 U.S.C. § 4152(b)(1).

This interpretation is certainly reasonable, to the extent that 25 U.S.C. § 4152 is ambiguous as to what Congress meant by the phrase "owned and operated at the time." The interpretation becomes compelling, however, when one accounts for the additional fact that HUD does not allow TDHEs to include new dwelling units constructed with NAHASDA funds in its FCAS. 24 CRF §§ 1000.312 and 314. HUD's interpretation (excluding newly constructed homes) is consistent with the TMHA's interpretation of 25 U.S.C. § 4152(b)(1). However, HUD's position that homeownership units covered by 24 CFR § 1000.318 may be excluded along with newly constructed dwelling units is patently unreasonable and arbitrary because HUD requires TDHEs to exclude conveyed homeownership units that were in operation under an ACC prior to October 26, 1997, while at the same time prohibiting TDHEs from counting new dwelling units constructed with NAHASDA funds. This puts every TDHE with significant home ownership programs at a distinct disadvantage because they must watch their annual grant decline with each conveyance or with the expiration of the 25-year term for each project, even though the need for affordable housing does not diminish on the Reservation. Piffero affidavit ¶¶36, 49.

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[3]The TMHA is aware of the Tenth Circuit decision holding otherwise than the meaning argued, here, by TMHA. *See, Fort Peck Housing Authority v. HUD,* 367 Fed. Appx. 844 (10th Cir.) *cert. denied*, 131 S.Ct 347, 178 L.Ed.2d 148 (2010). The TMHA urges this Court to chart it own course.

HUD's policy also has the effect of putting TDHEs with little or no homeownership units at an unfair advantage because their grant increases every time another TDHE conveys or demolishes a homeownership unit, even though the units each TDHE actually operates and their respective need remains relatively the same. It is unreasonable to punish those TDHEs with successful homeownership programs in such a way. The language of 25 U.S.C. § 4152(b)(1) certainly does not support a regulation that requires TDHEs to exclude conveyed homeownership units or even units that are eligible for conveyance. Instead, 25 U.S.C. § 4152(b)(1) speaks in terms of dwelling units owned or operated on a date certain, in this case on a date that is no later than October 26, 1997. HUD has set this date as September 30, 1997. 24 CFR §§ 1000.312 and 314.

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

Accordingly, it is reasonable to interpret NAHASDA to mandate inclusion of all dwelling units that were the subject of an ACC between the TMHA and HUD as of September 30, 1997, for block grant formula purposes. The Court should hold that HUD may not exclude Mutual Help units that were covered by an ACC as of September 30, 1997, whether those units have subsequently been conveyed or not. To the extent that 24 CFR § 1000.318 is inconsistent with such a holding, the regulation should be invalidated. *See, Allentown Mack Sales & Serv. v.*

NLRB, 522 U.S. 359, 374 (1998) (An agency's rule must be within the scope of its authority as well as be a rational interpretation of the statute; courts may "set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.").

Alternatively, even assuming that 24 CFR § 1000.318 is somehow valid despite the TMHA's interpretation of 25 U.S.C. § 4152(b)(1), nothing in the regulation supports the position that Mutual Help units are no longer eligible simply because the original 25year term has expired. Instead, 24 CFR § 1000.318 speaks in terms of whether or not the TMHA has the "legal right to own, operate or maintain the unit." The TMHA maintains the legal right to own, operate or maintain the units until that unit is actually conveyed. Furthermore, the TMHA retains the legal right to own, operate, or maintain an old unit that has been demolished if that unit has been replaced with a newly constructed unit

HUD's present position with the Tribe is that homeownership units cannot be counted after 25 years unless the TMHA provides written justification, on a house-by-house basis, as to why each has not been conveyed. USAO Tab 31, p. USOA 0593. HUD then asserts the right to subjectively determine whether the justification is sufficient to maintain FCAS status. *Id.,* at USOA 0593-0594. Such an arbitrary and subjective standard violates the Administrative Procedures Act. More importantly, it violates the intent, if not the letter of NAHASDA. A key component of NAHASDA is the promotion of tribal self-determination and self-government. 25 U.S.C. § 4101(4)(7). The TMHA, not HUD, should be given some discretion to determine when conveyance is justified or not, without having to fear a HUD-mandated reduction in funding. It is not reasonable for HUD to require the TMHA to choose between evicting a homebuyer who may only owe less than $500 on their home or losing a portion of their block grant funding if they allow the homebuyer to remain in the home. A more reasonable, workable alternative, one easier for TDHEs to administer, would be to give TDHEs a set period of time to complete conveyance or eviction.

The TMHA cannot convey a unit until it has been paid off. With respect to homebuyers who are delinquent at the end of the 25-year amortization period, the TMHA's practice is to allow

homebuyers who are delinquent at the expiration of the 25 year term to remain in the unit, continuing to make payments to the TMHA. It is arbitrary and unreasonable for HUD to take a dwelling unit off of the TMHA's FCAS when there is still a homebuyer in the unit. The TMHA should be given a reasonable period of time to either complete the conveyance or evict the homebuyer. The TMHA has chosen to allow homebuyers, delinquent at the expiration of the 25 year term, to occupy the premises as long as they are paying something, as opposed to eviction and turning the homebuyers into homeless persons. Piffero affidavit ¶ 44. The TMHA submits that this is the more reasonable alternative than one which puts TDHEs at the mercy of HUD subjectively determining whether TDHEs "actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA." 24 CFR § 1000.318(a)(2). Moreover, the principles of NAHASDA require that HUD defer to the TMHA's judgment, within the parameters of its TMHA Policy, as to when eviction or conveyance is appropriate.

C. HUD Violated TMHA's Right To Due Process By Failing To Give TMHA Notice And The Right To A Hearing Prior To Making The Determination That The TMHA Must Repay Over $650,463 In Alleged Grant Overpayments.

HUD's action in this case clearly concerns NAHASDA compliance issues, *i.e.,* whether or not the TMHA's FCAS were accurately stated under NAHASDA and its implementing regulations, and whether, as a result, HUD is entitled to reduce the TMHA's grant payments or recapture the alleged past overpayments. Section 401 of NAHASDA, 25 U.S.C. § 4161, requires notice and a hearing before the Secretary can take any action against a TDHE for failure to "comply substantially" with any provision of NAHASDA. Although, 25 U.S.C. § 4161(a) is arguably limited to cases of substantial non-compliance with NAHASDA, principles of due process and the underlying intent of NAHASDA mandate notice and a hearing opportunity before HUD deprived the TMHA of funding that it had already received. HUD's demand that the TMHA repay Six Hundred Fifty Thousand Four Hundred Sixty-three Dollars ($650,463) in grant funding was clearly an adverse grant decision.

In particular, 24 CFR § 1000.532(b) requires not only prior notice, but the opportunity for the TMHA to informally meet with HUD in an attempt to resolve the discrepancy, after which

the TMHA should have had the opportunity for a formal hearing and appeal rights pursuant to 24 CFR §§ 1000.532(b), 1000.538(a), and 1000.540. These rights should have been accorded before the TMHA was deprived of its funding. Furthermore, HUD should have notified the TMHA of its appeal rights in the letters that deprived the TMHA of funding. The fact that HUD did not do so violated procedural due process. *Kapps v. Wing,* 404 F.3d 105, 123-24 (2d Cir. 2005); *Miller v. Donovan,* 620 F.Supp. 712, 716 (Ct. Int'l Trade 1985).

D. HUD Is Not Entitled To Recover The Alleged Overfunded Grant Amounts Under The Circumstances Of This Case.

The OIG recommended that HUD undertake to recover overfunded grant amounts as a result of the alleged overfunding. However, there is no legal authority that would authorize HUD to recover past grant amounts that it had erroneously awarded. Indeed, the OIG's audit does not refer to any legal authority and, in fact, acknowledges that housing entities "are not required by law or regulations to report formula input changes" in their FCAS calculations. (USOA Tab 17 OIG audit, Finding 1, p.8.) NAHASDA specifically states that the federal government has a trust responsibility to protect and support the Indian Tribes and their members, and to work with the Tribes to improve the Tribes' housing conditions and its socioeconomic condition. 25 U.S.C. §§ 4101(3)-(4). HUD, not the TMHA, prepared the Formula Response Forms for fiscal years each of the years in question, listing the TMHA's FCAS. It was HUD's responsibility to ensure that the forms were accurate.

This is part and parcel of HUD's trust responsibility to the Tribes. When HUD failed to verify the accuracy of the unit count prior to each year's allocation, the TMHA was entitled to rely on HUD's own calculations. It is inconsistent with the federal trust responsibility to allow a trustee to require its beneficiary to repay funds that the trustee itself was responsible to account for accurately in the first place. Allowing HUD to require repayment under these circumstances prejudices the TMHA because it deprives the TMHA of needed funding for housing programs, *see,* Piffero affidavit, ¶¶ 35, 36, 47, and ultimately punishes families in need of housing. In this regard, the Restatement (Second) of Trusts states:

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> d. *Change of position.* If the trustee by mistake or otherwise makes an overpayment to the beneficiary, he cannot recover the amount of the overpayment from the beneficiary personally or out of the beneficiary's interest in the trust estate, if the beneficiary had no notice that he was overpaid and has so changed his position that under all the circumstances it is inequitable to the beneficiary to permit such recovery. Among the circumstances which may be of importance in determining whether it is inequitable to allow the trustee indemnity are the following: (1) what disposition has been made by the beneficiary of the amount by which he was overpaid; (2) the amount of the overpayment; (3) the nature of the mistake made by the trustee, whether he was negligent or not; (4) the time which has elapsed since the overpayment was made.

Restatement (Second) of Trusts, § 254 (Illustration 2.d)(1959).

It is HUD, the trustee, not TMHA, the beneficiary, who bore the responsibility for accurately reporting FCAS. It is, therefore, the trustee who should bear the liability for failing to do so in a timely manner.

Although NAHASDA sets forth the remedial authority of the Secretary in the event of non-compliance with any of its provisions, it does not authorize the type of remediation that was suggested by the OIG audit and sought by HUD in this case. Under NAHASDA, if HUD finds "after reasonable notice and opportunity for a hearing" that a recipient has failed to substantially comply with any provision of NAHASDA (including the regulations), HUD is given certain remedial authority therein, including the termination or reduction of grant payments to the recipient. 25 U.S.C. § 4161(a). But nowhere in 25 U.S.C. § 4161 is HUD authorized to recapture grant amounts that HUD itself mistakenly awarded. Section 405(d) of NAHASDA, 25 U.S.C. § 4165(d), gives HUD the authority to adjust the amount of a grant made to a recipient in accordance with audit findings or performance reports. That provision, however, would authorize the Secretary to adjust grant amounts found to be mistaken in the current year, or prospectively adjust grant amounts based on a corrected grant formula, but it does not authorize the Secretary to require TDHE's to repay grant amounts awarded in previous years.

Unless HUD can demonstrate that it has the legal authority to recapture the grant funds in question, no TDHE should be required to repay any of the amounts that were mistakenly awarded in the past. Furthermore, absent a showing that HUD is legally authorized to recapture the grant

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funds in question, the Court should order that the amounts paid by the TMHA to date be returned. This is especially appropriate where the TMHA was required to repay these funds without being accorded procedural due process.

Even if HUD were legally authorized to seek the relief that it seeks in this case, *i.e.*, require the TMHA to repay the alleged excess grant funds it received for fiscal years 1998-2002, there are express limitations on this authority contained in HUD's own regulations. In particular, NAHASDA regulations expressly prohibit HUD from recapturing grant amounts that have already been spent on affordable housing activities for previous fiscal years. 24 CFR § 1000.532(a) authorizes HUD to adjust future years grant amounts subject to compliance with the due process procedures set forth in § 1000.532(b). The relevant language of subsection (a) states that, "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.*" 24 CFR § 1000.532(a), (emphasis added). If, indeed, some or all of these funds have been spent on affordable housing activities, then the above-quoted regulation would prohibit HUD from recapturing these amounts. In accordance with its trust obligation, HUD should be required to verify that the TMHA has not spent its funds on affordable housing activities before it requires the TMHA to repay any funds.

CONCLUSION

The TMHA respectfully requests that the Court reverse and/or modify HUD's decision in accordance with the foregoing argument, and grant such further relief as the Court deems just and equitable as set forth in its motion for summary judgment.

Dated this 7th day of August, 2012.

The Law Offices of Charles R. Zeh, Esq.

By: _____
Charles R. Zeh, Esq.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the The Law Offices of Charles R. Zeh, Esq., and that on this date I served the **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, on those parties identified below by:

√	Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada Holly Vance U.S. Attorney's Office 100 West Liberty Street, Suite 600 Reno, NV 89501
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this 7th day of August, 2012.

Karen Kennedy

An Employee of The Law Offices of Charles R. Zeh, Esq.

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