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UNITED STATES DISTRICT COURT

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 (HUD); SHAUN DONOVAN, Secretary of HUD; DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, HUD; GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs, Office of Public and Indian Housing HUD, Defendants.	Case No. 3:08-CV-00626-LRH-VPC **DEFENDANTS' OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendants (collectively, "HUD") submit this brief in opposition to the Motion for Summary Judgment by the Housing Authority of the Te-Moak Tribe of Western Shoshone Indians ("TMHA") and in support of HUD's Cross-Motion for Summary Judgment.[1]

[1] The Complaint listed other HUD officials as individual-official-capacity Defendants. The caption above reflects the individual-official-capacity Defendants who are the actual current officials in each respective office. These individuals are substituted pursuant to Fed. R. Civ. P. 25(d).

INTRODUCTION

This case concerns HUD's administration of the allocation formula for distributing annual Indian Housing Block Grants ("IHBGs") amongst over 500 tribes under the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101, *et seq.* ("NAHASDA"). The issue is whether, before its 2008 amendment, NAHASDA required that lease-to-own housing units developed under a pre-NAHASDA statute (the United States Housing Act of 1937, or "1937 Act") must be counted for allocation formula purposes even after they have been conveyed to homebuyers or have become conveyance-eligible, *i.e.*, they should have been conveyed according to the terms of a lease-purchase agreement between the homebuyer and the tribe.

These homeownership units are known as Mutual Help units and until they are or should be conveyed to their homebuyers, the units are included in the count of a tribe's Formula Current Assisted Stock ("FCAS") under NAHASDA's allocation formula regulations. 24 C.F.R. § 1000.318. FCAS also includes low rent units developed under the 1937 Act and the number of expired Section 8 rental subsidy contracts. *Id.* § 1000.314. The count of a tribe's FCAS is one data point used to calculate the tribe's annual IHBG. *Id.* § 1000.310.

TMHA claims that the count of its Mutual Help homeownership units as it existed at the inception of NAHASDA must be used in the allocation of its annual IHBG – in perpetuity, regardless of whether the units have been conveyed or should have been conveyed according to the lease-purchase agreement terms. In the alternative, TMHA claims that at least those units that have not been conveyed – although they are eligible for conveyance and no legal impediment prevents conveyance – should continue to count in the calculation of its annual grant. Thus, TMHA argues that HUD's decisions to recover a total of $769,645 over allocated to TMHA in prior fiscal years ("FYs") for 61 homeownership units it conveyed and 17 units that were eligible to be conveyed, but were not timely conveyed, violated the Administrative Procedure Act ("APA") and NAHASDA. TMHA also claims that HUD is without authority to recover past overpayments to TMHA based on an FCAS miscount, and that its decisions to do so are not authorized by NAHASDA's compliance enforcement provisions and barred by HUD's purported trust responsibility to the tribes.

NAHASDA called for HUD and a representative cross-section of Indian tribes to develop regulations to establish the allocation formula according to guidelines provided in the statute. 25 U.S.C. §§ 4151, 4152. Accordingly, a negotiated rulemaking committee (the "Committee") made up of 10 HUD representatives and 48 representatives of geographically diverse small, medium and large tribes established the NAHASDA regulations, including the formula regulation, 24 C.F.R. § 1000.318, at the center of this case. No doubt keenly aware that larger grant allocations to one tribe directly decrease the grants to all other tribes, the Committee properly read § 4152(b) – mandating that the allocation formula reflect the need of all Indian tribes for affordable housing activities – to mean that a homeownership unit developed under the 1937 Act should no longer count in the allocation formula after it has been conveyed or become conveyance-eligible but is being held from the homebuyer without valid justification.

The Tenth Circuit has already held that the Committee's reading is mandated by the statute, and in 2008, Congress confirmed the Committee's and the Tenth Circuit's reading by amending § 4152(b)(1) to "clarify" the statute by including the Committee's reading in 24 C.F.R. § 1000.318. TMHA's arguments for a contrary reading of the statute lack merit, particularly because the Committee's regulation is entitled to deference. Accordingly, HUD's findings under § 1000.318 that 78 of TMHA's homeownership units were ineligible to be counted as FCAS in the allocation formula did not violate the APA and NAHASDA.

Further, HUD's decisions to recover the overfunding to TMHA that resulted from that miscount are an appropriate exercise of HUD's inherent authority to recover funds erroneously paid and are unrelated to NAHASDA provisions for enforcement of grantee program compliance. Finally, TMHA's claim that HUD's authority to recover the funds is abrogated by its trust responsibilities lacks merit because NAHASDA creates neither a fiduciary relationship nor a trust corpus and thus no enforceable trust duty. For these reasons, the Court should grant HUD's cross-motion for summary judgment and deny TMHA's motion.

BACKGROUND

A. Statutory and Regulatory Background

1. NAHASDA and its Indian Housing Block Grant Allocation Formula Regulations

Before 1998, HUD provided Indian housing assistance under the 1937 Act, 42 U.S.C. § 1437, *et seq*. One of its programs, the Mutual Help Homeownership Opportunity ("Mutual Help") program, assisted low-income Indian families in purchasing homes. *See* 42 U.S.C. § 1437bb (1988) (repealed by NAHASDA); 24 C.F.R. part 950, subpart E (1995). The homebuyer entered into a lease-purchase agreement, known as a Mutual Help and Occupancy Agreement ("MHOA" or "lease-purchase agreement"), with the tribe for a period of up to 25 years. *Dewakuku v. Martinez*, 271 F.3d 1031, 1035 (Fed. Cir. 2001); 24 C.F.R.§ 950.416(b) (1995). Under the MHOA, the homebuyer would contribute land, work, cash, materials, or equipment to the home's construction. *See* 24 C.F.R. § 905.419 (1995); *Dewakuku*, 271 F.3d at 1034-35. The MHOA incorporated a purchase price schedule reducing the purchase price to zero by the end of the lease term. 24 C.F.R. § 950.440(a), (e) (1995). The homebuyer made monthly payments "based on income." *Dewakuku*, 271 F.3d at 1035. Monthly payments in excess of the housing authority's administration charge were put in an equity account and accelerated amortization of the purchase price. 24 C.F.R. § 950.437(b) (1995). When the purchase price reached zero at the end of the lease term or earlier if the equity account equaled the amount listed on the purchase price schedule at the time, the home would be conveyed to the family as homeowner. 24 C.F.R. § 950.440(e)(1995). If, when the lease term expires, a homebuyer has become delinquent on payments due under the lease, conveyance of the home is not impracticable because a promissory note can be issued. *See* Administrative Record ("AR") 411-12.

Effective the beginning of fiscal year 1998, NAHASDA replaced a number of separate programs – including rental and homeownership programs under the 1937 Act – primarily with a single block grant program utilizing the IHBG. Pub. L. 104-330, §§ 501-506. IHBGs are made annually to tribes or their tribally designated housing entities ("TDHEs") to carry out affordable housing activities. 25 U.S.C. § 4111. HUD distributes funds to over 500 tribes. *See e.g.,* AR 155-66.

HUD must determine annual IHBG amounts according to a formula that allocates a single lump-sum appropriation among all eligible tribes. 25 U.S.C. § 4151. Congress directed HUD to establish the

formula through negotiated rulemaking by a committee representing HUD and "geographically diverse small, medium and large Indian tribes." *Id.* §§ 4152(a); 4116. Congress specified that the "formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of tribes for assistance for affordable housing activities," including:

> (1) The number of low-income housing dwelling units owned or operated at the time pursuant to a contract between an Indian housing authority for the tribe and the Secretary.
> (2) The extent of poverty and economic distress and the number of Indian families within Indian areas of the tribe.
> (3) Other objectively measurable conditions as the Secretary and the Indian tribes may specify.

25 U.S.C. § 4152(b) (1996).[2] The Committee of 48 tribal representatives and 10 HUD officials developed the formula established at 24 C.F.R. part 1000, subpart D (§§ 1000.301-340). Final Rule, 63 Fed. Reg. 12334 (Mar. 12, 1998).

Each tribe's allocation is the sum of two components: (1) FCAS and (2) need. 24 C.F.R. § 1000.310. The FCAS component is calculated first and multiplies the number of FCAS units by the former 1937 Act subsidy, adjusted for inflation and local costs. *Id.* § 1000.316. The need component divides the remaining annual funds according to each tribe's share of seven criteria such as the number of low-income families or households living in substandard housing. *Id.* § 1000.324. Formula determinations may be appealed administratively. *Id.* § 1000.336.

FCAS counts start with the number of "housing units owned or operated pursuant to an ACC . . . under management as of September 30, 1997" including rental and homeownership units. *Id.* § 1000.312. Added to this number are units in the development pipeline as of 1997 when they become operational and Section 8 units when their separate contracts expire. *Id.* § 1000.314. Subtracted from this number are: rental units no longer operated as low-income rentals; homeownership units when conveyed to an Indian family; and homeownership units eligible for conveyance under the lease-purchase agreement where conveyance does not prove impracticable. *Id.* § 1000.318. TMHA objects to the formula provision subtracting homeownership units, which states in relevant part:

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[2] As explained below, because Congress's 2008 amendments to § 4152(b)(1)(A)-(D) do not apply to the claims in this case, references in this brief to 25 U.S.C. § 4152 are to its language as existed before 2008, unless specified.

> (a) Mutual Help . . . units shall no longer be considered Formula Current Assisted Stock when the Indian tribe . . . 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 . . . unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and
>
> (2) The Indian tribe . . . actively enforce[s] strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

Id. § 1000.318(a). Thus, Mutual Help units are included in a tribe's FCAS until they are or should be conveyed to their homebuyers.

Aside from HUD's administration of formula data and allocations under 25 U.S.C. §§ 4151 and 4152, NAHASDA provides for HUD oversight of grantee performance. Specifically, § 4161 requires HUD to take certain enforcement actions when it finds, after notice and a hearing, that an IHBG recipient failed to comply substantially with NAHASDA. 25 U.S.C. § 4161(a). Section 4165 subjects IHBG recipients to certain specific audits and reviews to determine whether they have carried out eligible activities and submitted accurate performance reports. 25 U.S.C. § 4165(b). It does not require grantees to supply formula data. Contrary to TMHA's claims, these provisions of NAHASDA are not applicable to this dispute.

2. The Office of Inspector General's Audit

In 2001, HUD's Office of Inspector General ("OIG") emphasized HUD's duty to apply 24 C.F.R. § 1000.318, finding that HUD had overfunded some tribes and underfunded others by allocating block grants based on units that were or should have been conveyed. AR 308-12. The OIG therefore recommended that HUD recover the overfunding and reallocate the recovery to tribes that were underfunded for current and prior years. *Id.* at 312.

3. *Fort Peck* Litigation

In 2005, the Fort Peck Housing Authority challenged HUD's allocation determinations based on FCAS. *See Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125, 1131 (D. Colo. 2006) ("*Fort Peck I*"). The District Court invalidated 24 C.F.R. § 1000.318 as conflicting with 25 U.S.C. § 4152(b)(1). *Id.* at 1132. The court limited its ruling to the plaintiff in that case, and denied its motion for return of overfunding repayments it had made to HUD. *Id.* at 1135. HUD appealed the invalidation and the plaintiff cross-appealed the denial of its motion.

The Tenth Circuit reversed *Fort Peck I* and denied the plaintiff's cross-appeal because HUD's actions complied with NAHASDA. *Fort Peck Housing Authority v. HUD,* 367 Fed. Appx. 884, 890-91, 892 n.15 (10th Cir. 2010) (unpublished) ("*Fort Peck II*"), *cert. denied*, 131 S.Ct. 347 (2010). The court first reversed the district court's interpretation of § 4152(b)(1), then found that 24 C.F.R. § 1000.318 properly implemented NAHASDA's requirement that the formula be based on its enumerated factors reflecting the ongoing and evolving needs of all tribes. *Id.* at 890-892. NAHASDA required an interplay of all three factors in § 4152(b) and "[24 C.F.R. §] 1000.318's downward adjustment was an example of this interplay." *Id.*[3]

4. Negotiated Rulemaking in 2007 to Review and Reaffirm the Formula

In 2007, a negotiated rulemaking committee promulgated a final rule after reviewing the formula as required by 24 C.F.R. § 1000.306. 72 Fed. Reg. 20,018 (Apr. 20, 2007). It did not alter 24 C.F.R. § 1000.318(a). With newly promulgated § 1000.319, however, it codified HUD's practice of recovering and reallocating overpayments when HUD discovers that amounts were overpaid as a result of expired FCAS units being included in formula allocations. *Id.* at 20,025.

5. Congress's 2008 Amendment of NAHASDA Adopting 24 C.F.R. § 1000.318

In 2008, while *Fort Peck I* was on appeal, Congress reauthorized NAHASDA and amended 25 U.S.C. § 4152(b)(1), by essentially adopting the provisions of 24 C.F.R. § 1000.318(a). Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008) ("Reauthorization Act"). The statute now provides that the formula factors reflecting need include:

> (1)(A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, 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, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if –
> (i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or

[3] On remand, the district court issued a decision in the first phase of a bifurcated briefing schedule. *Fort Peck Housing Authority v. United States Department of Housing and Urban Development et al.*, Case No. 05-cv-000198-RPM, 2012 U.S. Dist. LEXIS 124049 (D. Colo. Aug. 31, 2012) ("*Fort Peck III*"). This interlocutory decision interpreted *Fort Peck II* to have validated § 1000.318 only "to the extent it required exclusion from the formula of units the tribe no longer owned or operated at the time it submitted its Formula Response Form . . . ." *Fort Peck III* at *5. The time for appeal of *Fort Peck III* has not passed.

> (ii) the unit is lost to the recipient by conveyance, demolition, or other means.
> (B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.

25 U.S.C. § 4152(b) (2008). The amendment specifies that "reasons beyond the control of the recipient" mean legal impediments remaining after reasonable efforts to convey. *Id.* § 4152(b)(1)(D) (2008). Finally, if a civil action is filed within 45 days of enactment (by November 28, 2008), subparagraphs (A) through (D) do not apply to claims arising from FCAS counts through FY 2008. *Id.* § 4152(b)(1)(E) (2008). TMHA filed this action before that date; the text of § 4152(b)(1) prior to the 2008 amendments applies in this case. The Reauthorization Act also added a provision specifying that failure to accurately report FCAS does not implicate a recipient's substantial noncompliance. *Id.* § 4161(a)(2) (2008).

B. Material Facts Not Genuinely in Issue: Administrative Proceedings Relating to TMHA

TMHA challenges HUD's actions relating to $769,645 in overpayments with respect to units in six of its Mutual Help housing projects. Compl. ¶¶ 19-23, Doc. 18, Plaintiff's Motion for Summary Judgment ("P. Br.") at 5-6, 8-11. Of the 78 Mutual Help units at issue, 61 were conveyed and 17 were eligible to be conveyed before HUD removed them from FCAS.

On August 18, 1997, HUD informed all tribal leaders that HUD and representatives of tribes from across the United States had developed proposed regulations to implement NAHASDA that included an allocation formula for distributing IHBG funds. AR 91-119. HUD advised further that the group had agreed the best available data for FCAS was from HUD's databases on the Mutual Help, Low Rent, Turnkey III, and Section 8 programs. AR 91.

At the inception of the IHBG program, HUD records indicated that TMHA's FCAS inventory in 10 projects consisted of 59 rental units, 223 Mutual Help units, and 35 units being developed. AR 123, 153. Starting October 15, 1997, and continuing each year, HUD sent TMHA Formula Response Forms each FY requesting corrections to HUD's data, including changes to HUD's count of TMHA's FCAS. AR 120-39, 173-202, 215-31, 247-60, 275-92, 416-40, 485-519, 552-77, 602-25, 648-72, 690-732. The Formula Response Forms advised TMHA not to include Mutual Help units that had been conveyed or reached the end of their 25-year term unless conveyance was beyond the tribe's control. *See, e.g.*, AR 420. On September 11, 1998, HUD issued guidance to the same effect. NAHASDA Guidance No. 98-

19, Tribe/TDHE, "Regulatory Requirements Regarding FCAS as Listed on a Tribe's Formula Response Form" ("Guidance No. 98-19"). The guidance referred to 24 C.F.R. § 1000.318 and advised tribes as follows when correcting FCAS data listed on its Formula Response Form:

> The tribe/TDHE shall not include units that have been paid-off but not conveyed unless the tribe/TDHE can demonstrate that reasons beyond the tribe/TDHE or IHA's control have not made conveyance practical. The tribe/TDHE or IHA must demonstrate that the tribe/TDHE or IHA has actively enforced strict compliance by the homebuyers with the terms and conditions of the MHOA, including the requirements for full and timely payment. Because promissory notes can be issued, Tenant account receivables alone are not adequate for non-conveyance.

See AR 595-96.

1. Overfunding of $198,636 for 15 Units in Project NV99B016002 for FYs 2002, 2003, 2004 and 2005

On March 2, 2005, HUD questioned the FCAS eligibility of 15 Mutual Help units in Project NV99B016002 for past FYs, and requested information from TMHA to determine if the units had erroneously been counted as FCAS. AR 593-96. Based on their date of full availability ("DOFA"),[4] HUD believed the units would have been conveyed by 2003 when their self-amortizing lease-purchase agreements ("MHOAs") reached the end of their 25-year term. *Id.* HUD notified TMHA:

> In accordance with 24 CFR 1000.318(a)(1) and (a)(2), [Mutual Help] units are no longer considered part of FCAS if that unit has been conveyed to the homebuyer or if it has become eligible for conveyance and the tribe, tribally designated housing entity (TDHE) or Indian Housing Authority (IHA) cannot show sufficient evidence demonstrating that reasons beyond its control have made conveyance impractical.

Id. (enclosing Guidance No. 98-19).[5] "To ensure that all tribes are treated fairly," HUD asked TMHA to provide the date each Mutual Help unit became conveyance eligible, the date each unit conveyed, an explanation for any delays in conveyance, and the date and term of any new MHOAs for units with subsequent homebuyers. AR 594.

TMHA responded on April 11, 2005, informing HUD that 14 units in Project NV99B016002 had a DOFA of 2003. AR 597. (Since DOFA refers to the beginning of the term, it appears TMHA intended to refer to the date the 25-year term of the MHOA ended.) TMHA advised that one unit had a

[4] A project's DOFA is the date substantially all of its units became available, *i.e.* the beginning of the typically 25-year lease term of units in that project. 24 C.F.R. § 1000.302. The DOFA is the best evidence of a unit's lease term absent more specific information. *See e.g.*, 24 C.F.R. § 950.419(b).

[5] TMHA was also reminded of and provided Guidance No. 98-19 in March of 2002. AR 409-12.

subsequent homebuyer in 1984, but its term had not changed. *Id.* TMHA reported that it was working with the Bureau of Indian Affairs ("BIA") to finalize conveyances on all 15 units by an anticipated date of May 31, 2005, and indicated that the delay in conveyance was due to TMHA having been "unsure on the Deed, Assignment and Releases and resolutions" needed for conveyance. *Id.*

On May 4, 2005, following up on a telephone conversation, HUD's formula contractor reminded TMHA of its agreement to provide pay-off information for all units except the one with a subsequent homebuyer, and anticipated and actual conveyance dates. AR 598. On June 7, 2005, TMHA responded with the dates in which the last payments on six units had been made by owners: four in 1999, one in 2000, and one in 2001. *Id.* TMHA provided other relevant information by phone that day. *See* AR 599 (referring to a June 7, 2005 phone call).

As a result of its correspondence and discussions with TMHA, on July 8, 2005, HUD determined that 13 units in Project NV99B016002 were paid off and conveyance eligible as of FY 1999, one unit as of FY 2000, and one unit as of FY 2001. AR 599-601. HUD noted TMHA's admission that it had not submitted the necessary paperwork for conveyance to the BIA until several years after the units were eligible to be conveyed. *Id.* Because the delay in conveyance was within TMHA's control, HUD found the units ineligible as FCAS so that TMHA's count of eligible FCAS should have been 13 fewer units in FY 2000, 14 fewer in FY 2001, and 15 fewer in FYs 2002-2006. *Id.* Based on these count changes, HUD calculated that TMHA had "incorrectly received funding" for those unqualified units and was thus overfunded by $47,445 for FY 2002, $48,934 for FY 2003, $50,552 for FY 2004, and $51,705 for FY 2005, for a total of $198,636. *Id.* HUD requested that TMHA respond to discuss repayment, and informed TMHA of its right to appeal. *Id.*

On September 20, 2005, TMHA agreed to repay the overfunded $198,636. AR 628-29. Repayment would be made over five years from TMHA's IHBG allocation – $39,728 in FY 2006, and $39,727 in FYs 2007, 2008, 2009, and 2010. *Id.* Under this agreement, HUD recovered $39,728 from TMHA's FY 2006 allocation, and $39,727 from its FY 2007 and FY 2008 allocations. AR 632, 675, 739.

TMHA's assertion that "HUD continued funding the TMHA as if 24 C.F.R. 1000.318 did not exist," P. Br. 9, is unfounded because, consistent with its determination that units in Project

NV99B016002 were no longer FCAS, the FY 2006 Formula Response Form HUD sent to TMHA removed the project from the its FCAS count. AR 605.

2. Overfunding of $441,484 for 49 Units in Projects NV99B016003 and NV99B016006 for FYs 2006, 2007 and 2008

On June 10, 2008, HUD informed TMHA it may have incorrectly received credit for 16 Mutual Help units in Project NV99B016003 and 55 Mutual Help units in Project NV99B016006, and requested information to determine if the units had been erroneously counted. AR 754-755. Based on their DOFAs of December 1980 (NV99B016003) and July 1982 (NV99B016006), HUD believed the units should have been conveyed in FYs 2006 and 2007. Using essentially identical language to its March 2, 2005 letter, HUD again notified TMHA: that under § 1000.318, Mutual Help units that have or should have been conveyed were no longer FCAS; of Guidance No. 98-19; that tenant account receivables are not adequate justification for non-conveyance; and that HUD will continue to count as FCAS units whose MHOA term has not expired that TMHA continues to operate, including units with subsequent homebuyers, provided TMHA submits the date each MHOA was signed and verifies the units were not paid off. *Id.*

TMHA responded in a letter dated July 16, 2008. AR 756-766. Of the 16 units in Project NV99B016003, TMHA reported 14 had been conveyed with actual dates of conveyance of 1999 (one unit), 2000 (two units), 2002 (one unit), 2003 (three units), 2004 (four units), and 2006 (three units). *Id.* The remaining two units had subsequent homebuyers and new MHOAs indicating they would be eligible for conveyance in 2024 and 2031. *Id.* Of the 55 units in Project NV99B016006, TMHA reported 33 had been conveyed on various dates between 1994 and 2008, and that the remaining 22 had subsequent homebuyers. AR 760-764. Two of these 22 units had new dates of conveyance eligibility between 2005 and 2006, and 20 had new dates of conveyance-eligibility between 2010 and 2032. *Id.*

Based on TMHA's information, on September 10, 2008, HUD determined 47 units were ineligible as FCAS because they had been conveyed and the two units in Project NV99B016006 were ineligible because they should have been conveyed in 2007. AR 797-800. However, HUD determined that the two units in Project NV99B016003 and 20 units in Project NV99B016006 with subsequent homebuyers and new MHOAs were within their 25-year term, and could continue to be

FCAS. *Id.* HUD then corrected TMHA's annual FCAS count starting in FY 1998, determining that TMHA was overfunded $106,743 for 30 units in FY 2006, $153,665 for 41 units in FY 2007, and $181,076 for 47 units in 2008, for a total adjustment of $441,484. *Id.* Again, HUD requested that TMHA respond to discuss repayment and informed TMHA of its right to appeal under 24 C.F.R. § 1000.336. *Id.*

On October 9, 2008, TMHA requested a 30-day extension to review repayment options. AR 811. On October 23, 2008, HUD gave TMHA an extension until November 23, 2008. AR 814. On November 21, 2008, TMHA asked for an additional extension. AR 817.

3. Overfunding of $129,525 for 14 Units in Projects NV99B016008, NV99B016009 and NV99B016010 for FYs 2006, 2007 and 2008

On October 1, 2008, after receiving the FY 2009 estimated allocation letter, AR 768-96, TMHA responded with changes to its attached FY 2009 Formula Response Form. AR 801-09. TMHA informed HUD that 11 units in Project NV99B016008 had been conveyed between 1999 and 2008, and that one unit in that project was converted to a low-rent unit in 2008; that six units in Project NV99B016009 had been conveyed between 2000 and 2008, and another one was in the process of being conveyed; and that one of the units in Project NV99B016010 had been conveyed in 1999 while conveyance of an additional unit was in progress. AR 807-09.

On October 23, 2008, HUD responded that it was removing 20 units in Projects NV99B016008, NV99B016009 and NV99B016010 from TMHA's FCAS counts for FYs 2000 through 2009, and that the unit converted to low-rent would remain in FCAS. AR 812-815. After adjusting TMHA's FCAS count, HUD determined that TMHA had been overfunded for 14 units in FY 2007 by $52,471, and 20 units in FY 2008 by $77,504, for a total of $129,525. AR 814. Again, HUD requested TMHA's response to discuss repayment and informed TMHA of its right to appeal in accordance with 24 C.F.R. § 1000.336. *Id.* On February 10, 2009, HUD advised TMHA it made a mistake in its October 23, 2008 letter; that the correct number of units overfunded was 13 in FY 2007 and 14 in FY 2008; and that TMHA was overfunded by $103,227, not $129,525. Exhibit 1. All 14 of the units removed from Projects NV99B016008, NV99B016009 and NV99B016010 had been conveyed.

On November 23, 2008, TMHA requested a 90-day extension to respond. AR 817. On November 26, 2008, TMHA filed this action. Doc. 1. On January 21, 2009, HUD advised THMA that it was suspending collection of repayments for FCAS over-counts through FY 2008 pending this litigation. Exhibit 2. Thus there remains $624,165 in overfunding to TMHA that has yet to be repaid and redistributed.

ARGUMENT

A. Standard of Review

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quotation marks omitted). But the movant need not support its motion with evidence negating the opponent's claim. *Id.* Further, the mere existence of any factual dispute is insufficient to bar summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier of fact could find for the movant. *Id.* at 251-52.

An agency's decision may be set aside under the APA only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). "Although this factual inquiry is to be 'searching and careful' the ultimate standard of review is narrow. 'The court is not empowered to substitute its judgment for that of the agency.'" *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1158 (9th Cir. 1980) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

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

To determine whether 24 C.F.R. § 1000.318(a) violates 25 U.S.C. § 4152(b)(1), the Court applies the two-part test for statutory construction in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court determines whether Congress has spoken directly to

the question at issue; if so, the agency's regulation must implement that intent. *Id.* at 843-44; *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 732 (9th Cir. 2007). Second, if instead the statute is ambiguous, the Court considers whether the regulation is a "permissible construction" of the statute. *Id.*

1. 24 C.F.R. § 1000.318(a) Unambiguously Implements Congress's Allocation Mandate.

TMHA claims that HUD's exclusion of homeownership units covered by 24 C.F.R. § 1000.318 violates the APA and NAHASDA. P. Br. 16-19. "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Fort Peck II*, 367 Fed. Appx. at 890 (quoting *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)). Here, rather than specify a precise formula, "Congress set forth criteria to act as the formula's basis and allowed HUD [through the Committee] to identify other criteria." *Fort Peck II*, 367 Fed. Appx. at 890. These criteria – (1) 1997 dwelling units, (2) poverty and economic distress, and (3) other "objectively measurable conditions as the Secretary and Indian tribes may specify" – arise in the context of Congress's explicit mandate that the formula be based on factors reflecting all tribes' need for affordable housing assistance. 25 U.S.C. § 4152(b). To further contextualize, Congress directed representatives of HUD and diverse tribes to establish the formula. 25 U.S.C. §§ 4152(a), 4116(b). The Committee was "much larger than usually chartered" because of "the diversity of tribal interests" and "the number and complexity of the issues." 62 Fed. Reg. 35,719. It operated by consensus and HUD agreed to use its decisions to the maximum extent feasible as the basis for the rule. *Id.* at 35,719-20.

The formula comports with Congress's explicit mandate that it be based on the three enumerated factors in § 4152(b)(1)-(3). "Applying the ordinary definition of 'based on' means the factors form the basis, beginning, or starting point, of the formula." *Fort Peck II*, 367 Fed. Appx. at 890. *Accord McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) (citations omitted). As the Tenth Circuit held, § 1000.318(a) properly reflects the interplay of the three need factors in 25 U.S.C. § 4152(b). *Fort Peck II*, 367 Fed. Appx. at 890-891. As to the first factor, the formula "clearly included the entire [25 U.S.C. § 4152](b)(1) factor as the starting point." *Id.* at 892. "However, this number was but one factor required to meet the statute's overarching mandate that the formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Id.*

at 891 (citing 25 U.S.C. § 4152(b)). HUD's "adjustment" from that number "was accomplished through 'other objectively measurable conditions' that reflected the need of Indian tribes," and "Congress's explicit direction allowed for this." *Id.* (citing 4152(b)(3)). Thus the formula is also based on the second and third factors, as it includes various additional need conditions not explicitly named in §§ 4152(b)(1). *See, e.g.*, 24 C.F.R §§ 1000.320, 1000.325 (adjusting formula for local area costs), 1000.324 (adjusting for households that are overcrowded, lack kitchens or plumbing). The Committee's reduction of FCAS by removing units that cease to be the low-income housing they were developed to be is consistent with the mandate in all three factors. Homeownership units such as Mutual Help units are not unique in this regard; rental units and Section 8 units, too, cease to count as FCAS when no longer operated as such under their respective programs. 24 C.F.R. § 1000.318(b), (c). Similarly, 24 C.F.R. §1000.318(a) specifies that homeownership units no longer count as formula units when they are no longer operated so as to be timely conveyed to eligible homebuyers, or are in fact conveyed.

The Indian canon of construction asserted by TMHA, P. Br. 13-15, is inapplicable because § 1000.318(a) implements Congress's unambiguous intent. *See 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]"); *Rice v. Rehner*, 463 U.S 713, 732 (1983) (Indian canon does not supplant congressional intent).

2. Even If Ambiguous, NAHASDA Permits 24 C.F.R. § 1000.318(a).

Under *Chevron* step two, the Court determines whether HUD's construction is "a reasonable interpretation of the statute." *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-844). Even if the statute were ambiguous, it permits § 1000.318 because the criteria specified therein reflect need as required by § 4152(b). *Cf. Chevron*, 467 U.S. at 844. Great weight should be given to the Committee's determination because, not only is HUD an expert in disbursing funds for low-income housing assistance for Indian tribes, but the Committee also consisted of a cross-section of Indian tribes. *See Fort Peck II*, 367 Fed. Appx. at 886, 892; 63 F.R. 12334. The Committee specified that homeownership units expire from the formula not only when conveyed, but also when they should have been conveyed according to proper operation under their lease-purchase

agreements. The Committee's determination of these objective measures of expiration is entitled to significant weight under both *Chevron* and Congress's intent as expressed in §§ 4152(b)(3) and 4116(b).

The Indian canon of construction would not require a different analysis because it cannot be applied for the benefit of one tribe when the competing interests also involve Native Americans. *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir.1996) ("We cannot apply the canons of construction for the benefit of the [Chehalis] if such application would adversely affect Quinault interests") (citations omitted). TMHA's narrow classification of this dispute as one "between the TMHA and HUD over what Congress intended," P. Br. at 15-16, ignores Congress's intent that representatives of HUD and a cross-section of tribes devise the formula in negotiated rulemaking. 25 U.S.C. § 4116(b)(2)(B)(ii)(I). In the legislative history to the 2008 amendment of NAHASDA, Congress explained the purpose of the negotiated rulemaking requirement as to § 4152(b)(3): the factors determining tribes' true housing needs in relation to one another "is best left for resolution by the tribes and HUD through negotiated rulemaking." S. Rep. No. 110-238, at 4 (2007). Moreover, TMHA's reading of NAHASDA will not favor "Indians;" it will just favor tribes like TMHA that choose neither to enforce nor satisfy their MHOAs with Indian homebuyers. NAHASDA allocates one annual lump-sum appropriation amongst all tribes; a judgment favoring TMHA just because it has FCAS would disfavor other Indian tribes without FCAS – not represented in this litigation – whose need allocations have been reduced as a result of TMHA's overfunding.[6] As the Tenth Circuit framed it, the Indian canon "does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Fort Peck II*, 367 Fed. Appx. at 892.

In 2008, Congress further sanctioned § 1000.318(a) by essentially incorporating its provisions in NAHASDA. *See* 25 U.S.C. § 4152(b)(1), as amended by Pub. L. No. 110-411, 122 Stat. 4329 (2008).

[6] Similarly, TMHA's argument that the rule punishes tribes with successful homeownership programs, while unfairly advantaging other tribes, merits little attention. *See* P. Br. at 18. TMHA's complaint that its annual grant is declining "even though the need for affordable housing does not diminish," *id.* at 17, ignores that FCAS is only a portion of its allocation. Reductions in a tribe's FCAS funding get redistributed to all tribes – including the tribes with such reductions – according to need. 24 C.F.R. § 1000.324. In this way, the gradual transition away from FCAS units that are or should be conveyed is a transition toward demographic measures reflecting current need. And, while lamenting that new units developed under NAHASDA are not FCAS, *see* P. Br. at 17, TMHA forgets that the criteria by which money is allocated under the need component explicitly account for the loss of FCAS by increasing the need allocation when the measurements of "housing shortage" increase. 24 C.F.R. § 1000.324(c) (need component consists of low-income Indian households reduced by the number of FCAS plus newer assisted units). Likewise, TMHA cannot claim disparate treatment with respect to new units constructed under NAHASDA since all tribes, with and without FCAS, are subject to this negotiated rule. *Id.* §§1000.312, 1000.314.

By integrating § 1000.318(a) into the statute, Congress affirmed that the regulation implemented its intent that the formula reflect 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 a Committee. The Supreme Court has held that when Congress ratifies a regulation "with positive legislation" 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). "Where, as here, Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation, we cannot but deem the construction virtually conclusive." *Id.* (internal quotation omitted).

Before passing the 2008 amendments, Congress was aware of the controversy regarding § 1000.318 and, specifically, of *Fork Peck I*. *See, e.g.,* Housing Issues in Indian Country: Hearing before the S. Comm. on Indian Affairs, 110th Cong., S. Hrg. No. 110-65 at 69-70 (March 22,2007) (letter from Committee to HUD and HUD's response regarding *Fort Peck I*).[7] In the face of this controversy, Congress put the language of the regulation into the statute. This alone is strong evidence that Congress intended the pre-amendment provision to encompass the Committee's interpretation in § 1000.318(a). Congress provided further evidence of its intent in the committee report accompanying enactment and stated that it amended § 4152(b)(1) in order to "clarify" that HUD's regulatory interpretation of the statute was correct:

> Clarification of Units Eligible Under Funding Formula (Amends Section 302 of current law [25 U.S.C. § 4152]): 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 based on the homebuyer agreement; units demolished and not rebuilt within a specific time frame; or units no longer being operated as low-income units. 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. The recipient has not lost the legal right to own, operate or maintain the unit if it has not been conveyed for reasons beyond the control of the recipient, as enumerated in the provision.

S. Rep. No. 110-238, at 9 (2007). The statement by a subsequent Congress that it is "clarifying" a former statute is entitled to great weight. *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

[7] Available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg34266/content-detail.html.

worthy of real deference"); *United States v. Luster*, 889 F.2d 1523, 1529 (6th Cir. 1989) (amendment "intended to clarify the existing guideline [] should be given substantial weight in determining the meaning of the existing guideline") (citations omitted).

3. The 2000 Amendment to 25 U.S.C. § 4181(a) does not Support TMHA's Interpretation of §4152(b).

TMHA claims that a 2000 amendment to 25 U.S.C. § 4181(a) shows Congress's intent to allocate grant funds based on the perpetually fixed number of units that existed in 1997. P. Br. 18. TMHA ignores the pertinent fact that that amendment does not address homeownership units at all and is limited to "housing that is the subject of a contract for tenant based assistance." 25 U.S.C. § 4181(a), Pub. L. No. 106-568, 114 Stat. 2930. That means Section 8 rental assistance provided to tenants under the 1937 Act. *See Fort Peck I*, 435 F. Supp. 2d at 1133 (citing 42 U.S.C. § 1437f(o)). The purpose of the amendment was to remove any question about whether a "contract" for tenant-based assistance is the equivalent of a "dwelling unit" for purposes of 25 U.S.C. § 4152(b). *Id.* It does not, however, support the position that the count of any FCAS units, much less homeownership units, will be a permanent floor for IHBG funding. Instead, as the Tenth Circuit noted:

> The amendment did not require the funding of these dwelling units in perpetuity, nor did it require any other alteration of how HUD had interpreted the statute in its regulatory program. It only required the terminated housing be considered a dwelling unit under § 4152(b)(1) and included as part of the block grant formula's basis-no more. It did not remove or amend the other two factors of § 4152(b) which also formed the basis for the block grant formula, nor did it limit HUD's discretion to include other objectively measurable conditions in the formula according to § 4152(b)(3). Because HUD included all terminated housing in § 4152(b)(1), it satisfied the requirement of § 4181(a).

Fort Peck II, 367 Fed. Appx. at 890-891.

Moreover, Congress was closely examining § 4152(b)(1) when this amendment was enacted. 24 C.F.R. § 1000.318(a) already existed at the time. Congress could have altered the treatment of homeownership units when it enacted this provision relating to rental units. The fact that it did not indicates approval of the regulation. *See Schor*, 478 U.S. at 846.

C. HUD Correctly Applied 24 C.F.R. § 1000.318(a) to Exclude Conveyance-Eligible Units.

Assuming the validity of 24 C.F.R. § 1000.318(a), TMHA argues in the alternative that HUD should not exclude Mutual Help units from FCAS purely because their original 25-year term has

expired. P. Br. 19. TMHA asserts the legal right to Mutual Help units until they are actually conveyed, and claims that HUD does not count them 25 years after the DOFA "unless the TMHA provides written justification, on a house-by-house basis, as to why each has not been conveyed." *Id.* Initially, it should be noted that this challenge applies to only 17 of the 78 Mutual Help units at issue because TMHA admitted that 61 were conveyed before HUD removed them. AR. 756-66, 801-809. Nevertheless, HUD properly applied 24 C.F.R. § 1000.318 for all units at issue.

24 C.F.R. § 1000.318(a) provides that homeownership units are no longer considered FCAS when the tribe loses the legal right to own, operate or maintain the unit, "provided that" the units are operated in compliance with their MHOAs. Specifically, eligibility as FCAS depends upon the provisos that the tribe has "actively enforced strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment," and conveyed the unit "as soon as practicable after [it] becomes eligible for conveyance by [those] terms." 24 C.F.R. § 1000.318(a)(1)-(2). As discussed above, the MHOAs for the Mutual Help units had a term of no more than 25 years with the purchase price decreasing over the lease period according to a pre-determined schedule. 24 C.F.R. § 950.440 (1995). A homebuyer could make equity payments to accelerate pay-off and conveyance of the home or could wait until the purchase price reached zero at the end of the lease term. *Id.* § 950.440(a). A properly operated Mutual Help unit would thus be conveyed at early pay-off or at the end of the 25 year lease-purchase term, and only properly operated units qualify as FCAS under § 1000.318(a)(1) and (2). Accordingly, § 1000.318(a) requires expiration from FCAS when a Mutual Help unit is legally lost by the tribe, as well as when its lease-purchase agreement would indicate "conveyance-eligibility" at early pay-off or after 25 years when no unrelated impediment makes conveyance impracticable.

"An agency's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation." *Kraus v. Presidio Trust Facilities Division/Residential Mgmt. Branch*, 572 F.3d 1039, 1045 (9th Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (internal quotation marks and citation omitted); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). As demonstrated above, HUD's interpretation is neither. Indeed, the reasonableness of HUD's interpretations was fortified by Congress when it amended § 4152(b)(1) in 2008 to "clarify" that homeownership units "not conveyed within 25 years of the date of full availability" 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 (clarifying that not only conveyed units, but also "those units that are required to be conveyed based on the homebuyer agreement," may not be counted in the funding formula).

As explained above, the Tenth Circuit found the full scope of § 1000.318(a) valid. *Fort Peck II*, 367 Fed. Appx. at 891-92. ("[W]e REVERSE the district court's invalidation of § 1000.318."). Its reversal reached the regulation's elimination of conveyed as well as conveyance-eligible units, as *Fort Peck I* directly addressed conveyance-eligible units, 435 F. Supp. 2d at 1131-32, 1134-35, and the Tenth Circuit explicitly considered the district court's analysis of that issue. *Fort Peck II*, 367 Fed. Appx. at 889, 892. Indeed, the Tenth Circuit explicitly included the subparagraph provisos in its analysis of the regulation. *Id.* at 887 (citing §1000.318(a)(1)). The Tenth Circuit provided persuasive reasoning in upholding § 1000.318 in its entirety and, like other courts, this Court should follow *Fort Peck II* in this case. *See, e.g. Absentee Shawnee Housing, et al. v. HUD*, No. CIV-08-1298-HE 2012 U.S. Dist. LEXIS 112084 at *13 (W.D. Okla. 2012) (following *Fort Peck II* to conclude § 1000.318 is a valid implementing regulation).

A subsequent negotiated rulemaking committee has also affirmed HUD's application of the full scope of § 1000.318(a) as well as HUD's recovery practice. Pursuant to 24 C.F.R. § 1000.306, HUD convened a negotiated rulemaking committee in 2003 to review the formula regulations and make necessary modifications. Revisions to the Indian Housing Block Grant Program Formula; Final Rule, 72 Fed. Reg. 20,018 (Apr. 20, 2007). Notably, it elected not to alter § 1000.318(a). But with newly promulgated § 1000.319, it codified HUD's recovery and reallocation of overpayments when it discovers overpaid amounts due to expired FCAS units being included in a formula allocation. *Id.* at 20,025.

HUD's interpretation accounts for a tribe's incentive to delay conveyances, while respecting NAHASDA's promotion of self-determination. If the tribe wishes not to enforce the homebuyer's MHOA, it could still choose to convey the unit at the end of the term with a promissory note for any amounts due. *See* Guidance No. 98-19. Or, it may retain ownership and continue to collect payments. Thus, if TMHA, in the exercise of self-determination, chooses not to terminate an MHOA at the end of

its term for "a homebuyer who may only owe less than $500 on their home" (P. Br. 19), it could still convey or retain the unit. However, the other tribes, also dependent on limited appropriations, should not have to subsidize the unit's indefinite retention. Indeed, the Committee, which included representatives from diverse tribes, specified they should not when including subsections (1) and (2) in § 1000.318(a). *See* 63 Fed. Reg. 12343. As *Fort Peck II* explained, Congress unambiguously intended that "the formula be related to the need of *all* tribal Housing Entities." 367 Fed. Appx. 891 (emphasis added).

In contrast, TMHA's proposal for a "reasonable period of time to either complete the conveyance or evict the homebuyer," P. Br. 20, creates a vague and subjective standard leading to arbitrary decisions. And its simultaneous request for a "set period of time," P. Br. 19, is confusing since the standard MHOA already gives the TDHEs a set period of 25 years to convey.

In practice, HUD's application of 24 C.F.R. § 1000.318(a)(1)-(2) to TMHA's IHBGs has been abundantly fair. Before removing FCAS, HUD allowed TMHA to identify units that had reached their 25-year term – and thus were presumed to be conveyance-eligible – but had been assigned to subsequent purchasers with new MHOAs and new terms. AR 760-64. HUD agreed to continue to include 22 of those units as FCAS. AR 797-800. In the case of the 15 Mutual Help units in TMHA's Project NV99B016002 with 25-year terms ending in 2003, in contrast, the record shows all were paid off early by 2001 and yet TMHA could articulate no legal impediments to the delay in their conveyance. AR 597-601. HUD's reasonable interpretation of 24 C.F.R. § 1000.318(a) justifies removal of these units.

D. HUD Exercised the Government's Inherent Authority To Recover NAHASDA Funds Erroneously Overpaid To TMHA.

HUD recovered funds that TMHA erroneously received based on inaccurate counts of FCAS. AR 599-601, 797-800, 812-15. TMHA argues that this action was unlawful for two reasons: (1) NAHASDA does not provide authority for recovery of funds erroneously received by a grant recipient; and (2) any authority HUD might have is barred by principles of trust law. HUD agrees with TMHA's first proposition; however, HUD's authority to recover overpaid grant funds lies elsewhere. TMHA's second proposition lacks merit for several reasons.

1. HUD's Authority To Recover Funds Overpaid By The Government Is Well-Established and Independent of NAHASDA.

HUD is not limited to the provisions of NAHASDA when it discovers that a recipient has been paid funds erroneously and contrary to the distribution of appropriated funds between Indian tribes required by Congress in 25 U.S.C. §§ 4151 and 4152. The Supreme Court has long recognized and frequently reaffirmed the "Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier." *United States v. Wurts*, 303 U.S. 414, 416 (1938). Agencies 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 Railway Co. v. United States*, 252 U.S. 112, 121 (1920). The "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.'" *United States v. Munsey Trust Company of Washington*, 332 U.S. 234, 239 (1947) (citing *Gratiot v. United States*, 40 U.S. 336, 370 (1841)).

Courts have applied the principles set forth in *Wurts* and *Munsey Trust* broadly to allow the Government to act upon its right to recover debts absent specific statutory language to the contrary. In *United States v. Texas*, 507 U.S. 529 (1993), the Government sought to recover for lost or stolen food stamp coupons provided to the state, along with prejudgment interest. The case involved the Debt Collection Act, which required "persons" to pay prejudgment interest on their debts to the Government. The case is precisely on point here because it involved: (1) the Federal Government; (2) its relationship with a sovereign entity; (3) an attempt to collect a debt; (4) an entitlement program; and (5) a statute that, like NAHASDA, was silent as to whether the Government retained a right that it possessed before enactment of the statute. The statute was silent as to whether states are obligated to pay such interest but at least suggested they were not because it excluded states from the definition of "persons." *Id.* at 534-35. The Supreme Court explained that, when reviewing such statutes "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Id.* at 534. (quoting *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). Applying a presumption in favor of retaining common law rights, the Court held that "Congress's mere refusal to legislate with respect to the prejudgment-

interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area." *Id.* at 535. The Court concluded that, under the circumstances, the state was liable to pay interest. *Id.* at 535.

The Fourth Circuit Court of Appeals subsequently addressed a case involving the Government's efforts to use its common law authority to obtain forfeiture of funds paid to a law firm by a drug trafficker. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 667 (4th Cir. 1996). The Court held that, notwithstanding the Comprehensive Forfeiture Act of 1984, the "unmistakable import of *Texas* . . . is that common law remedies possessed by the United States will not be extinguished by congressional failure to re-affirm their validity." *Id.* at 667. As the Fourth Circuit explained, "*Texas* is not alone in holding that common law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights. This principle has been affirmed and re-affirmed many times." *Id.* at 667-68 (citing *Wisconsin Central Railroad Co. v. United States*, 164 U.S. 190, 210-11 (1896) (common law remedy of offset to recoup monies already paid not abrogated by statutory authorization of fraudulent payment remedy); *Cecile Indus. Inc. v. Cheney.*, 995 F.2d 1052 at 1054-56 (common law remedy of offsetting contract debts against contract payments not abrogated by Debt Collection Act's statutory remedies); *United States v. Kearns*, 595 F.2d 729, 732-33 (D.C. Cir. 1978) (common law remedy of breach of fiduciary duty not abrogated by bribery and fraud statutes); *Continental Management, Inc. v. United States*, 527 F.2d 613, 620 (Ct. Cl. 1975) (same); *United States v. Mead*, 426 F.2d 118, 124-25 (9th Cir.1970) (common law remedy of payment by mistake not abrogated by False Claims Act's statutory remedies); *United States v. Borin*, 209 F.2d 145, 148 (5th Cir.) (common law remedy of fraud not abrogated by False Claims Act's statutory remedies); *United States v. Silliman*, 167 F.2d 607, 610-11 (3d Cir.) (common law remedies not abrogated by False Claims Act)).

Similarly, in *United States v. Lahey Clinic Hospital*, 399 F.3d 1 (1st Cir. 2005), the First Circuit rejected the notion that the Medicare Act barred a Government suit under the common law to recover payments made for unnecessary lab tests. *Id.* at 6. The First Circuit held that, to show displacement of the Government's common law cause of action to recover wrongful payments, the defendant had to overcome the presumption that the Government retained its common law rights and demonstrate that

Congress directly addressed the issue in the Medicare Act. *Id.* at 6. The First Circuit determined that "[i]nconsistency . . . of a statute with common law[] is not enough: 'where two seemingly inconsistent acts can reasonably stand together, a court must interpret them in a manner which gives harmonious operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary.'" *Id.* at 10 (quoting *United States v. Kenaan*, 557 F.2d 912, 917 (1st Cir.1977)).

After noting that the Supreme Court's *Texas* decision clarified that there is a presumption for retention of the common law right, the First Circuit held that this "presumption may be even *stronger when a longstanding power of the United States is involved.* In the context of overpayments, the government has broad power to recover monies wrongly paid from the Treasury, even absent express statutory authorization to sue." *Id.* (citing *Wurts*, 303 U.S. at 414) (emphasis added). The court also cited the Supreme Court's decision in *United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947) that "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges *will not be applied to the sovereign* without express words to that effect." *Id.* at 16 (emphasis added). Applying this precedent, the First Circuit observed that the Medicare Act provided the agency with the authority to reopen payment determinations administratively and to recoup overpayments but held that this did "not displace the United States' long standing power to collect monies wrongfully paid through an action independent of the administrative scheme . . . ." *Id.* The court held that allowing the Government to pursue collection independently of the administrative scheme was consistent with the statutory purpose of recovering overpayments. *Id.*

Thus, two factors that bear upon the present matter emerge from *Lahey Clinic*. First, the presumption in favor of the retention of long established powers is particularly strong when it involves the Government and, second, even if it seems that HUD's retention of its established authority to recover overpayments is inconsistent with NAHASDA, the Court must conclude that the Government retains its authority "in the absence of clear and unambiguous expression of Congressional intent to the contrary." *Lahey Clinic*, 399 F.3d at 10, 16.

NAHASDA is void of such expression, as Congress did not clearly abrogate this inherent authority to recover funds. While NAHASDA mandates that HUD take certain actions, one of which is reducing payments, if a grantee failed to comply substantially with NAHASDA, 25 U.S.C. § 4161(a)(1),

that mandate does not preclude HUD's recovery of overpayments outside of substantial noncompliance. Similarly, its grant of power permitting HUD to adjust IHBGs after certain reviews and audits, 25 U.S.C. § 4165(d), does not prohibit HUD from recovering overpayments. Establishing certain methods to adjust grants does not mean that Congress prohibited other methods. *Lahey Clinic*, 399 F.3d at 16. Congress manifested no intent to relinquish HUD's inherent right to recover wrongfully paid funds; HUD retains that right.

HUD's use of this authority to recover overpayments resulting from inaccurate FCAS was codified in the formula regulations in 2007. *See* 24 C.F.R. § 1000.319(b); 72 Fed. Reg. 20025 (Apr. 20, 2007). When Congress amended NAHASDA in 2008, it acknowledged HUD's recovery of overpayments. *See, e.g.,* S. Rep. No. 110-238, at 9-10 (2007) (noting that in response to the OIG audit, "grant recipients who had included ineligible units in their count have paid or are in the process of paying back these funds" and recognizing grantees are "required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301"). If Congress disagreed with HUD's recoveries, as expressed in § 1000.319(b), Congress could have acted in 2008 to cut off that power. But Congress did not. Thus, deference to HUD's implementation of NAHASDA in this regard is "especially warranted." *Schor*, 478 U.S. at 846 (deferring to administrative interpretation where subsequent statutory amendments did not overrule regulatory interpretation).

TMHA asserts that HUD is not entitled to recover overfunded grant amounts erroneously awarded under the circumstances of this case because NAHASDA's remedial authority, under 25 U.S.C. § 4161(a), in the event of significant non-compliance with any provision of NAHASDA as well as its authority to adjust grant amounts in accordance with audit findings or performance reports, under 25 U.S.C. § 4165(d), do not apply. P. Br. 22. HUD agrees that neither of these compliance provisions applies to the circumstances of this case. And it is because these provisions do not apply to the recovery of funds erroneously paid that HUD relies on the inherent authority long recognized by the Supreme Court to recover funds wrongfully, erroneously or illegally paid. *Wurts*, 303 U.S. at 415.

25 U.S.C. § 4161 of NAHASDA is directed toward one specific situation: where a tribe has engaged in "substantial noncompliance" with NAHASDA. Pursuant to § 4161(a)(1), HUD must terminate, reduce payment or limit payments to a tribe or TDHE if the Secretary finds after reasonable

notice and opportunity for a hearing that the recipient failed to comply substantially with any provision of NAHASDA. Thus, § 4161 applies only if HUD contends that the tribe acted in substantial noncompliance with NAHASDA. TMHA does not claim that reduction of its FCAS resulted from a contention that it failed to comply substantially with NAHASDA, nor that HUD took any of the enumerated enforcement actions in § 4161(a)(1)(A)-(D). *See* P. Br. at 22. Indeed, HUD's actions did not enforce TMHA's compliance with NAHASDA, but rather ensured HUD's own compliance with the allocation mandate of 25 U.S.C. § 4151 ("[f]or each fiscal year, [HUD] shall allocate any amounts made available . . . in accordance with the formula established pursuant to section [§ 4152] . . . ."). *See e.g.*, AR 593-96, 599-601, 754-55, 797-800, 912-15 (advising TMHA it received incorrect credit for FCAS, not of substantial noncompliance). Moreover, when amending NAHASDA in 2008, Congress was well aware of HUD's recovery of overpayments due to FCAS overcounts. *See* S. Rep. No. 110-238 at 9 (2007) (referencing tribes' repayment of funds resulting from inclusion of ineligible units in funding formula calculations). Rather than curtailing these recoveries, Congress added § 4161(a)(2) to clarify that even a tribe's failure to report the ineligibility of units HUD has counted as FCAS does not constitute substantial noncompliance.[8] Thus "in the absence of clear and unambiguous expression of Congressional intent to the contrary," §4161 does not abrogate HUD's authority to recover overpayments erroneously made. *Lahey Clinic*, 399 F.3d at 16.

25 U.S.C. § 4165 is similarly inapplicable here. It addresses HUD's oversight of specific grantee performance requirements not at issue in this case. Under § 4165(a), tribes are subject to the financial audit requirements in chapter 75 of title 31 of the United States Code which examines matters such as whether financial statements were prepared according to generally accepted accounting principles. *See* 31 U.S.C. § 7502(e)(1). By its plain language, § 4165(b) applies only to reviews and audits to determine whether a tribe has (timely) carried out "eligible activities" and "certifications," to determine whether a tribe is in compliance with its "Indian Housing Plan," and to verify the accuracy of a tribe's "annual performance report." 25 U.S.C. § 4165(b)(1). Section 4165 thus involves specific audits and reviews to determine whether a tribe is spending its IHBG appropriately. TMHA does not contend that either

[8] Because, as TMHA agrees, substantial noncompliance is not implicated, TMHA cannot invoke procedural rights under 24 C.F.R. § 1000.538(a), P. Br. 21, as that regulation is limited to the question of: "What remedies are available for substantial noncompliance?"

Chapter 75 audits or HUD's review of these performance criteria were involved in this case. And nothing in the record shows that the reason HUD sought to recover overpayments from TMHA is based upon its failure to carry out eligible activities or its failure to comply with their Indian housing plan or because of financial mismanagement shown in a Chapter 75 audit. *See* AR 599-601, 797-800, 812-15 (determinations based solely on eligibility of FCAS under the formula). Indeed, § 4165 lacks any clear indication that Congress intended that HUD utilize this section to analyze the number of eligible formula units and to use it as a means to correct funding errors. It certainly does not mention any HUD examination of the formula response form, which is "the only mechanism that a recipient shall use to report changes to the number of FCAS." 24 C.F.R. § 1000.315(b). Thus, § 4165 has no application to this case and manifests no intent to limit HUD's inherent right to recover wrongfully paid funds.

As a result, TMHA's reliance on 24 C.F.R. § 1000.532 is therefore misplaced. It explicitly implements 25 U.S.C. § 4165. *See* 24 C.F.R. § 1000.532(a) (referring to audits and reviews under section 405 of NAHASDA, 25 U.S.C. § 4165). In any event, relying on a HUD regulation to manifest Congress's intent to abrogate HUD's inherent authority to recover grant fund overpayments is unhelpful to TMHA. A regulation cannot manifest *Congress's* intent. But more importantly, questions of separation of powers would be implicated if HUD's regulation were considered to have power to abrogate the Government's inherent authority to recover overpayments. *See Lahey Clinic*, 399 F.3d at 14 (holding that to permit "an agency by its actions to . . . displace a long standing power of the United States would pose grave constitutional questions of violation of separation of powers.").

2. Congress Did Not Abrogate HUD's Authority To Recover Overpaid NAHASDA Funds In The Act's Findings.

TMHA supplies no authority or reasoning to support its claim that common law trust principles inferred from Congress's reference to the general trust relationship between the United States and the Indian tribes in the findings that preface NAHASDA imply that HUD is a fiduciary bound by common law trust principles. The operative provisions of NAHASDA do not manifest a congressional intent to create an enforceable fiduciary duty with NAHASDA. *See e.g.*, *Lummi Tribe v. United States*, 99 Fed. Cl. 584, 598 n.12 (2011). Therefore, they cannot support TMHA's argument for a clearly manifest intent to abrogate HUD's inherent authority to recover and redistribute overpaid funds.

First, the language TMHA cites in the congressional findings section of NAHASDA, 25 U.S.C. § 4101, describe the Government's "undisputed" general trust relationship with Indian tribes, which does not alone create fiduciary duties. *See United States v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S. Ct. 2313, 2324 (2011) (citing cases); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) (explaining that a "congressional statement of policy fails to create the necessary trust relation" because it did not "confer on the government pervasive or elaborate control over a trust corpus"). NAHASDA does not require HUD to hold money "in trust" for Indian tribes, as the statute did in *United States v. White Mountain Apache*, 537 U.S. 465, 475, 480 (2003). Instead, NAHASDA requires HUD to make grants directly to tribes with which to carry out affordable housing activities. 25 U.S.C. § 4111(a)(1).

Second, NAHASDA block grant appropriations are not a trust corpus. In *United States v. Mitchell*, the Supreme Court explained that a fiduciary duty arose when the Government assumed "elaborate control over forests and property belonging to Indians" because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds)." 463 U.S. 206, 225 (1983). A congressional appropriation distributed by an agency to Indian tribes is not a trust corpus unless designated by Congress to pay a treaty debt. *Quick Bear v. Leupp*, 210 U.S. 50, 79-81 (1908) (distinguishing "public moneys gratuitously appropriated" from "moneys belonging to the Indians themselves" and finding that money to pay a treaty belonged to the Indians). TMHA does not contend that NAHASDA funds are appropriated to pay a treaty debt. As with other federal grant programs to benefit Indians, NAHASDA grants are not trust property. *See e.g., Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 68-69 (2008) ("[F]unding appropriated by Congress for the benefit of the Indian people via the [Tribal Priority Allocation] system and [Indian Health Service] funding process is not trust property."); *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 148 (2009) (finding that the only "property" at issue, the funds that plaintiff might have received if it was treated as a Federally recognized Indian tribe between1969 and 1996, are not trust property); *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970), *cert. denied,* 400 U.S. 942 (1970) (holding funds appropriated for Indian irrigation systems were "gratuitous appropriations of public moneys" not held in trust by the

United States) (*quoting Quick Bear*, 210 U.S. at 81).

Indeed, the Ninth Circuit has already rejected a breach of trust claim under NAHASDA because "the federal government held no property—land, houses, money, or anything else—in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms." *See Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 928 (9th Cir. 2008); *see also Lummi Tribe,* 99 Fed. Cl. at 598 n.12 ("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.").

E. TMHA Can Show No Prejudice Because HUD Provided Adequate Process and, Therefore, Any Remedy Sought is Futile.

TMHA complains that HUD failed to offer it a hearing, but shows no prejudice by it. TMHA cites neither facts nor authority and articulates no argument based on the due process requirements of the Fifth Amendment to the Constitution.[9] Any such claims should therefore be considered waived. *See Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir.2001); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments…, and a bare assertion does not preserve a claim….").

Nevertheless, HUD provided TMHA notice of the facts and grounds for its determinations, provided opportunity for TMHA to put its case to HUD for a different conclusion, and explicitly advised TMHA of available administrative appeal procedures. *See e.g.*, AR 593-96, 599-601, 754-55, 797-800, 912-15 (citing 24 C.F.R. § 1000.336). TMHA thus received constitutionally adequate notice and opportunity for hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental

[9] With no explanation, TMHA cites to *Kapps v. Wing*, 404 F.3d 105, 123-24 (2d. Cir. 2005), and a Court of International Trade case, *Miller v. Donovan*, 620 F.Supp. 712, 716 (1985). These cases stand for no more than the principle that due process requires notice and the opportunity to be heard, which HUD provided. TMHA demonstrates no protected property interest necessary to substantiate a due process claim. Nor could it, since recipients of erroneously granted funds generally possess no such interest in those funds. *See Evelyn v. Schweiker*, 685 F.2d 351, 353 (9th Cir. 1982). Even if it had a property interest in IHBGs, it has no property interest in funding greater than the formula provides. *See Painter v. Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996).

requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner").

TMHA has never argued that HUD failed to consider its relevant evidence, information, or arguments. Indeed, as demonstrated above, HUD accepted its claim for the continued eligibility of 22 FCAS with subsequent homebuyers. AR 797-800. Nor does TMHA argue how a hearing could have led to a different substantive result. In short, TMHA argues a lack of procedure but shows no prejudice. Lack of a hearing even if one were required would therefore be harmless error. Under the APA, due consideration must be given to the rule of prejudicial error which requires that the aggrieved party show that it was prejudiced by the government's action or inaction. 5 U.S.C. § 706 (requiring courts to take due account of "the rule of prejudicial error"); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (quoting § 706); *Cal. Wilderness Coalition v. United States DOE*, 631 F.3d 1072, 1108 (9th Cir. 2011) (§ 706 "requires courts to apply the harmless error rule in reviewing challenges to administrative agency proceedings"). TMHA shows no prejudice for lack of an administrative hearing, and so there is no available relief under the APA.

F. HUD Cannot Be Compelled To Refund IHBG Funds That It Has Already Recovered And Redistributed To Other Tribes.

TMHA cannot force a refund through this lawsuit. First, TMHA seeks monetary relief not available under the APA. Second, it could not be granted now since the funds at issue have been redistributed to other tribes. In *Fort Peck I*, the plaintiff requested that HUD repay it the over allocated IHGB funds HUD had recovered. Despite invalidating § 1000.318, the Court held that "[t]he relief requested is not an available remedy under the APA because it constituted money damages contrary to the restriction in 5 U.S.C. § 702." *Fort Peck Housing Auth. v. HUD*, No. 05-cv-00018-RPM, 2006 WL 2192043, *2 (Aug. 1, 2006). That same holding applies here.

The waiver of sovereign immunity in this action is the APA, 5 U.S.C. § 701, *et seq*. It "must be construed strictly in favor of the sovereign and may not be enlarge[d] . . . beyond what the language requires." *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (internal quotation marks omitted). In an APA action, a plaintiff may not seek money damages. 5 U.S.C. § 702. Generally, claims seeking payment of money should be viewed as claims for money damages: "Almost invariably

. . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for money damages, as that phrase has traditionally been applied. . . ." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (internal quotations omitted).

Here, TMHA is claiming money damages. Doc. 1 at ¶ 4 ("deliver grant funds which have been unlawfully withheld and/or recaptured."). To date, HUD has recovered $119,182 from TMHA for overfunding in FYs 2002-2005. AR 632, 675, 739. But HUD did not "retain" these recovered funds; rather, HUD has redistributed those funds through the IHBG formula to eligible tribes for FYs 2002-2005. 24 C.F.R. § 1000.319(b) (recovered overpayments distributed to all tribes in accordance with IHBG formula allocation). Thus, the only money HUD could provide to TMHA is substitute money from another appropriation and, as such, TMHA is making a claim for money damages that is impermissible under the APA or otherwise moot and should be denied. Because HUD has already awarded the disputed funds to other IHBG recipients, the court cannot grant monetary relief. *City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). *Accord Fort Peck I*, 2006 WL 219043, *2. Accordingly, the Court cannot grant any order that HUD repay the recovered funds that have already been reallocated.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The HOUSING AUTHORITY OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, Plaintiff v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD); SHAUN DONOVAN, Secretary of HUD; DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing, HUD; TED KEY, Acting Director, Office of Grants Management, Office of Native American Programs, Office of Public and Indian Housing HUD, Defendants	Case No. 3:08-CV-00626-LRH-VPC

I hereby certify that I am an employee in the office of the United States Attorney, Reno, Nevada and I am of such age and discretion as to be competent to serve papers. On October 9, 2012, I served a copy of **DEFENDANTS' OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT** electronically or by U.S. Mail in a postpaid envelope, as appropriate, to the person named below at the stated address.

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