Charles R. Zeh, Esq.
Nevada Bar No. 001739
The Law Offices of Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Phone: (775) 323-5700
Fax: (775)786-8183

Attorneys for plaintiff

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 BRIEF IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, the Housing Authority of the Te-Moak Tribe of Western Shoshone Indians of Nevada (TMHA), submits this brief in Opposition to the defendants' (collectively, HUD) Cross Motion for Summary Judgment and in Reply to HUD's Opposition to the plaintiff's Motion for Summary Judgment.

I. INTRODUCTION

While it is true that HUD's treatment of the 500 Tribes receiving Native American Housing Assistance and Self-Determination Act of 1996, 25 USC §§ 4101, *et. seq.*, ("NAHASDA"), funding is under siege because of HUD's global attempt to recapture funds it claims were overpaid the Tribal Housing Authorities or Tribally Designated Housing Entities ("TDHEs"), at issue in this case is the unlawful treatment accorded the TMHA by HUD. Here, HUD recaptured out of the TMHA's funds earmarked for use on affordable housing activities, the sum of One Hundred Nineteen Thousand One Hundred Eighty-two Dollars ($119,182). HUD Brief (HB) p., 10; 22-26. HUD also seeks to recapture additional funds in the amount of Six Hundred Twenty-four Thousand One Hundred Sixty-five Dollars ($624,165), HB p., 13; 4-5, from the funds intended for affordable housing activities, since the TMHA has no reserve of HUD funds available as a source of recapture that were not used for affordable housing activities. Every penny taken or to be taken by HUD, should it be permitted to do so, reduces the funds the TMHA will have available to satisfy current affordable housing needs. This will continue until HUD believes it has been fully repaid, if HUD has its way.

HUD's recapture and HUD's attempts to recapture are undertaken, furthermore, without regard to the mechanism set forth in 25 USC §§ 4161 and 4165 and related Federal Regulations. HUD has proceeded and intends to proceed, therefore, without according the TMHA notice and the reasonable opportunity to be heard by an impartial tribunal before determining the amount of the exactions imposed upon TMHA funding under NAHASDA. Furthermore, HUD is proceeding without according the TMHA an informal meeting with HUD officials, and HUD is proceeding without any finding of substantial non-compliance by the TMHA with some provision of NAHASDA before recapturing funds. HUD has recaptured and will continue to extract funds also, even though there has been no finding that the funds recaptured or pursued were expended

on activities other than for affordable housing activities under NAHASDA.

This case tracks *Lummi Tribe of the Lummi Nation, et. al. v. The United States*, ___ Fed.Cl. ___, 2012 WL 3597437 (Fed.Cl., 8/21/2012). *(Lummi II)*. Under the same circumstances extant here, the Court said the question for resolution was: "Is HUD permitted to recover grant funds through an administrative offset, without following the procedures set forth in NAHASDA, once those grant funds have been disbursed on affordable housing activities?" *Lummi, II, supra* at *2. The corollary to this question is the disposition of housing units funded prior to the enactment of NAHASDA by HUD and which were in existence as of September 30, 1997, when NAHASDA became effective. At issue is the efficacy of 25 CFR § 1000.318. Should it permit HUD to categorically exclude units from consideration when determining funding levels, including those still owned and operated by the TMHA? Couched alternatively, when does the TMHA lose the right to own and operate or maintain a unit for purposes of inclusion in the FCAS?

Addressing the first issue, the TMHA asserts that Title IV of NAHASDA, 25 USC §§ 4161-4168, requires an answer in the negative on this question. Title IV of NAHASDA and its corresponding regulations bar the summary exactions attempted by HUD. For the second issue, the TMHA asserts that categorical exclusions as a basis for funding levels of the pre-NAHASDA units based upon HUD's determination that the units should have been conveyed upon expiration of the period of occupancy of the Mutual Help and Occupancy Agreements ("MHOAs") under which the TMHA and eligible Indian families intend to convey the home to the Tribal homebuyer, are arbitrary and capricious. They afford no basis for eliminating units from the (FCAS) when determining need and, thus, funding for the TMHA.

HUD strenuously disagrees. HUD claims in main that:

1. HUD has a common law right to recover funds it believes are overpayments and, therefore, HUD may disregard or circumvent the procedures in NAHASDA and proceed with its own remedies. HUD would render nugatory Title IV of NAHASDA.

2. Similarly, the recapture of funds is not an audit issue and, therefore, the protections accorded the TMHA in Title IV of NAHASDA may be disregarded.

3. HUD has no trust responsibility towards Tribes under NAHASDA that would

accordingly otherwise direct its interpretation of NAHASDA.

4. HUD is immune from suit to seek repayment of the funds which have already been recaptured by HUD.

5. The 10th Circuit has already determined that the 2008 Amendments to NAHASDA, are a mere clarification of the preexisting statute in a way that affirms the interpretation HUD gives to 25 CFR § 1000.318.

There are also subsets to these arguments offered by HUD to justify its attempt to avoid Title IV when trying to recapture TMHA funds. In sum, however, HUD believes it may proceed unfettered by Title IV of NAHASDA, to accomplish the recapture of funds it has initiated here. As elucidated further below, Title IV of NAHASDA applies to bar HUD's recapture efforts.

II. STANDARD FOR DECIDING A RULE 56, FRCP MOTION FOR SUMMARY JUDGMENT

There is no dispute between the parties about the universal standard for deciding a motion for summary judgment under Rule 56, FRCP. The TMHA would only add, here, that the only facts which the Court need concern itself with are those material to the legal issues before the Court. *See*, *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). All other facts fall by the wayside, whether or not disputed.

Since the TMHA is capable of showing that there is no genuine dispute over the facts material to the legal issues of this dispute, summary judgment may providently be granted.

III. UNDISPUTED MATERIAL FACTS

The following material and controlling facts are undisputed:

a) HUD never provided the TMHA with notice and an opportunity to be heard before an impartial decision maker as prescribed by 24 CFR Part 26, *Lummi II* and *Fort Peck III.*

b) There was no finding in this dispute between the HUD and the TMHA of substantial non-compliance by the TMHA with a provision of NAHASDA.

c) There was, accordingly, no finding by HUD that the funds recaptured by HUD were expended on activities other than affordable housing activities under NAHASDA.

d) The funds already recaptured by HUD, the sum of One Hundred Nineteen

Thousand One Hundred Eighty-two Dollars ($119,182), represent funds that were expended on affordable housing activities according to NAHASDA.

e) The funds to be recaptured by HUD the sum of Six Hundred Twenty-four Thousand One Hundred Sixty-five Dollars ($624,165), will be extracted from future grants to the TMHA because all funds awarded the TMHA by HUD at issue here were already expended by the TMHA as affordable housing activities under NAHASDA, including, this sum.

f) There is, therefore, no reserve of unexpended or unused funds for HUD to draw upon to recapture the overpayments it claims it is due from the TMHA.

That there is no genuine dispute over any of these material facts as evident from both the HUD briefing before the Court and the record supplied by HUD. Both are devoid of any evidence to the contrary and indeed, HUD's defense is that a hearing before an impartial hearing officer is unnecessary because HUD has inherent authority, apart from 25 USC §§ 4161 and 4165 to recapture funds. In addition, it is clear there is no dispute over any of these material facts as shown in the affidavits of Brady, Piffero and Cassadore, accompanying this pleading.

IV. ARGUMENT

A. The *Lummi II* and *Fort Peck Housing III* Decisions Are Dispositive and Require an Order Prohibiting HUD from Attempting to Recapture Funds Already Spent, as Here, on Affordable Housing Activities and from Reducing Future Grant Funding by Taking Away Funds Earmarked for Affordable Housing Activities since All Funds Awarded By HUD Have Already Been Expended by the TMHA on Affordable Housing Activities

The Court and parties now have the benefit of two decisions that confront HUD and dispose of its arguments here. *Lummi II*, cited, *supra*, is one of the two cases. The other is *Fort Peck Housing Authority v. United States Department of Housing and Urban Development*, 2012 WL 3778299 (D. Colo., 8/31/2012) (*Fort Peck III*). In both cases, HUD's recapture of NAHASDA funds came in the wake of the OIG audit of tribal housing authorities. HB p., 6; 16-21. The same unilateral and categorical actions of HUD challenged here were taken by HUD in *Lummi II* and *Fort Peck III,* as any fair review of those cases reveal. The same arguments which HUD put forth in this case to justify its actions were also argued in *Lummi II* and *Fort Peck III.* HUD's arguments were clearly also found wanting by the Courts in both cases.

Thus, according to *Lummi II* and *Fort Peck III*, Title IV of NAHASDA (the provisions of 25 USC §§ 4161 and 4165 and corresponding regulations) governs any attempt, as here, to recapture funds which have already been awarded, distributed and spent by a housing authority. Under both 25 USC §§ 4161 and 4165, notice and an opportunity to be heard before an impartial hearing officer must be afforded. In *Lummi II*, in particular, while holding that the procedural safeguards of 25 U.S. C. § 4161 are not wholesale incorporated directly into 25 USC § 4165, the Court further held that the statute stands on its own for the requirement that HUD must, as here, in the face of audit adjustments, according to 24 CFR § 1000.532, provide tribal housing authorities notice and the opportunity to be heard before HUD may attempt to recapture funds. 24 CFR 1000.532 governs recapture attempts by HUD for funds already awarded and spent by the recipient. *Lummi II*, *supra* at *9, *11.

Correspondingly, HUD's theory that it has a common law right to recoup funds from housing authorities, circumventing the requirements of Title IV, was rejected in *Lummi II*. Furthermore, *Lummi II* recognized that HUD has a trust responsibility and must act as a fiduciary towards a Tribe when administering NAHASDA grant funds. *Id.* at *10. Finally, by reason of the determination that Title IV applies to HUD's attempt to recapture funds from Tribal housing authorities, these cases also stand for the proposition that the limitations on recapture apply, even after a hearing has been conducted. Thus, HUD may not recapture funds where the funds were expended on affordable housing activities and where the recapture would result in a corresponding reduction in the availability of funds to be spent on affordable housing activities. *See, Ibid,* and 24 CFR § 1000.532(a). *See also,* 25 USC § 4161(1)(B).

Fort Peck III added that 24 CFR § 1000.318 and its consort, Guidance 98-18, are an arbitrary and capricious abuse of power by HUD, particularly with respect to housing units which have not been conveyed at the time HUD is seeking a categorical disallowance of their inclusion in the number of units used to determine funding under NAHASDA. Such categorical exclusions impermissibly divorce HUD funding from TMHA's housing needs. *Fort Peck III, supra* at *4. Neither the regulation nor the Guidance can be used to circumvent Title IV of NAHASDA.

Therefore, should the Court be inclined to follow either *Lummi II* or *Fort Peck III*, they are

dispositive of HUD's position and fatal to it in this case. First, they make clear that the remedies of Title IV of NAHASDA govern HUD's options when seeking to recapture funds once the grant award has been made and the funds from the grant expended. Then, the undisputed facts show that HUD has never cited the TMHA for the use of funds outside of affordable housing activities. *See,* the entire HUD Brief and record herein. Nothing of the sort is mentioned in either instance. *See also*, affidavits of Brady, ¶¶ 6-10, Cassadore, ¶¶ 6-10 and Piffero, ¶¶ 6-10. Also, the actual recapture of the sum of One Hundred Nineteen Thousand One Hundred Eighty-two Dollars ($119,182), represents the recapture of funds already expended on affordable housing activities. Therefore, recapture contravenes 25 USC § 4161(a)(1)(B) which limits recapture to an amount "...equal to the amount of such payments which were not expended in accordance with this chapter."

Furthermore, the facts are beyond dispute that if the funds are to be recaptured in the future, HUD will be recapturing in derogation of 24 CFR § 1000.532, funds that have already been expended on affordable housing. *See,* affidavits of Brady, ¶¶ 6-10, Piffero, ¶¶ 4, 5, 6 and Cassadore, ¶¶ 6-10. HUD will also be improperly taking funds earmarked to be expended on affordable housing activities, because all funds sought to be recaptured have already been expended on affordable housing activities and, therefore, they may not be deducted from future assistance provided on behalf of an Indian tribe. *See, Lummi II, supra* at *10; *see also*, 24 CFR § 1000.532(a).

Based upon *Lummi II, Fort Peck III* and because the material facts are not in dispute, summary judgment may enter for the TMHA. The funds recaptured were spent on affordable housing activities. All TMHA HUD funds have been spent on affordable housing activities. There is no reserve of funds from which to repay HUD in the future. Any funds taken from the TMHA by HUD to recapture for overpayments would take away from funds earmarked to be spent on further affordable housing activities. Recapture will amount to a deduct from future assistance that would otherwise be devoted by the TMHA to affordable housing activities. *See*, affidavits of Brady, ¶ 6, Piffero, ¶ 5, and Cassadore, ¶ 6.

This is not to detract from HUD's failure to follow the procedures of 25 USC §§ 4161 and

4165. At the end of the day, however, even if an overpayment is shown, HUD would nevertheless be recapturing funds spent on affordable housing activities in accordance with NAHASDA. In the future, HUD would be taking from funds earmarked for expenditure on affordable housing activities in accordance with NAHASDA. Neither of these is HUD permitted to do. The overpayment exacted from the TMHA should be returned to the TMHA by HUD and HUD should be prohibited from the pursuit of the additional recapture efforts.

B. Apart from *Lummi II* and *Fort Peck III*, HUD's Rationale Offered to Justify Recapturing TMHA's Funds Already Expended on Affordable Housing Activities Is Wanting; Plaintiff's Motion for Summary Judgment Should Be Granted on These Additional Grounds on These Additional Grounds

Should the Court require additional rationale, however, for the conclusions reached by the Courts in *Lummi II* and *Fort Peck III*, further elucidation is provided.

1. HUD Does Not Have Inherent Authority to Recapture Funds in this Case

HUD claims "inherent power" to recapture NAHASDA funding which HUD asserts trumps the limitations on recapture contained within NAHASDA and its implementing regulations. *See,* HB pp., 22-27. HUD is mistaken.

HUD lays claim to "inherent power" argument relying upon *United States v. Wurts*, 303 U.S. 414, 416 (1938), *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112, 117 (1920); and *United States v. Munsey Trust Co.*, 332 U.S. 234, 236 (1947). None of these cases support HUD's claim to the inherent power of recapture. Instead, they stand for the mundane proposition that the government retains the inherent authority to bring a civil action in Federal court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment," absent statutory language to the contrary. *See, Wurts, supra,* at 415-416.

Unlike *Wurts*, Congress has foreclosed HUD's inherent authority "through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981). Therefore, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id; accord, Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2537 (2011) ("[I]t

is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest."). As the Court in *Wurts* acknowledged, the inherent authority to recover funds erroneously paid can be limited by Congress. *Wurts, supra* at 415-416. In this case, any inherent authority HUD might enjoy to recapture funds has been limited by the comprehensive remedial scheme of Title IV of NAHASDA, 25 USC §§ 4161-4168.

HUD also misconstrues and inflates the inherent authority recognized in *Wurts* by suggesting that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the TMHA by administrative fiat. There is no such "inherent" authority—any authority to recover funds by purely administrative means must come from express delegation of that authority from Congress, in a statute. *Am. Bus Ass. v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (agency's authority to bring a civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary).

HUD's reliance on *United States v. Texas,* 507 U.S. 529 (1993) is also unavailing. In *Texas*, the Court held that the Debt Collection Act of 1982 did not abrogate the government's common law right to collect pre-judgment interest. *Texas, supra*, at 530. Again, this case does not involve any "inherent right" to assess monetary liability administratively. The case simply reaffirms that the United States has a common law right to prejudgment interest if it files a civil claim that a court ultimately reduces to a judgment.

An agency's authority is shaped by what Congress has set forth by statute, in this case NAHASDA. *Am. Bus*, *supra*, at 4 (statute's enumerated remedies reveal Congress' unambiguous intent that such remedies be exclusive, and "consequent intent to deny agencies the power to authorize supplementary monetary relief."). The inherent authority rule of *Wurts* and its progeny, to the extent it applies at all in a non-civil action context, is still limited by the rule that Congress may limit an Agency's remedial authority by a comprehensive remedial scheme that defines the Agencies authority to act:

> Where Congress has provided a comprehensive statutory scheme of remedies . . . the interpretive canon of *expressio unius est exclusio alterius* applies. See *Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S.Ct. 1511, 1521-22, 149 L. Ed. 2d

> 517 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62 L. Ed. 2d 146 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

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

Thus, a remedy cannot be implied under Titles I-III of NAHASDA outside comprehensive provisions and the express parameters of Title IV. HUDs' reliance on 25 USC §§ 4151 - 4152[1] to support its notion of some independent authority to adjust or reduce TMHA's grant without complying with the remedies laid out in Title IV must be rejected.

2. The Recapture Here Is Not for a Grant Adjustment but for Post-grant Adjustments Thereby Subjecting HUD to Title IV Limitations

Under 25 USC § 4151, "allocat[ions]" are made on a fiscal year basis. The allocation of funds is made "each year," with that allocation occurring "as expeditiously as practicable." 24 CFR § 1000.56. Once the grants have been disbursed pursuant to the annual allocation process, 24 CFR § 1000.60 makes it clear that any post-grant award effort to "prevent improper expenditure of funds already disbursed to a recipient" must be done:

> *[i]n accordance with the standards and remedies contained in §1000.538 [to wit, Title IV] relating to substantial noncompliance...In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part. Id.* (emphasis added).

HUD cannot seriously argue that funds over allocated and dispersed in violation of 24 CFR §1000.318 are not improperly expended under 24 CFR § 1000.60. If a TDHE receives and spends more funds than it is entitled to under 25 USC § 4152 and 24 CFR § 1000.318, then it obviously has not spent the funds in accordance with NAHASDA. Thus, HUD's own regulation, a regulation conspicuously ignored in HUD's pleadings, draws a clear distinction between the initial "allocation" of grant funds and any later action to recoup funds erroneously included in the recipient's initial allocation.

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[1]Sections 4151 and 4152 are part of Title III of NAHASDA entitled "Allocation and Grant Amounts."

This same distinction was drawn in *City of Kansas City v. U.S. H.U.D.*, 861 F.2d 739 (D.C. Cir. 1988)("*Kansas City*"). There, the Court, dealing with nearly identical counterparts to 25 USC §§ 4161 and 4165, noted that there is a fundamental distinction between adjustments made at the initial stage of a grant award, and withholdings or recaptures made after the grant is awarded. The former could occur without a hearing and finding of substantial noncompliance; the latter could not. *Id.* at 743. The reasons are obvious. As here, years after a grant is made, the recipient may have already spent it, or at least committed funds in reliance on it. *Id.* at 745-746. *See also, City of Boston v. HUD*, 898 F.2d 828, 833 (1st Cir. 1990). In a nutshell, grabbing back funds already spent or obligated is a fundamentally different proposition than computing the initial amount of a grant pursuant to NAHASDA Title III.

Furthermore, the plain language of NAHASDA is distorted if HUD were allowed to contend that NAHASDA does not prohibit HUD from taking any actions to recover overfunding in cases HUD determines do not constitute substantial noncompliance, HB pp., 25-27, and, therefore, HUD is free to administratively recover funds outside the parameters of Sections 4161 and 4165. Such an argument should not be countenanced since it is fundamental that a federal agency has only those powers which have been conferred upon it by Congress. *See, American Bus., supra*, at 8 ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the Constitution.") (emphasis in original); *Louisiana Pub. Ser. Comm'n. v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act…unless and until Congress confers power upon it."). Defendants' "inherent power" argument turns this principle upside down.

Moreover, such an argument is inconsistent with HUD's previous concession on this point during negotiated rulemaking. HUD originally proposed to allow grant recaptures without a hearing under then 25 USC § 4165(c). *See,* 62 Fed. Reg. §§ 35718, 35726 (July 2, 1997). But in response to overwhelming Tribal opposition, HUD agreed, in the final rule, to require a hearing in all cases of grant recoupment--whether under §4161 or §4165. *See,* 63 Fed. Reg. §§ 12334, 12347 (March 12, 1998). HUD's attempt to turn a regulation intended to make the hearing requirement universal into a limitation on a Tribes' hearing rights, and the accompanying right to be free of

funding reductions or adjustments, absent the required finding of substantial noncompliance, ignores both the history and purpose of Congress' intent when enacting Title IV.

3. Title IV of NAHASDA Lays out a Comprehensive Remedial Scheme Which Requires a Hearing and Finding of Substantial Noncompliance in this Case Before HUD May Recapture, Reduce or Adjust Grant Funds

Titles I-III of NAHASDA contain the NAHASDA's substantive provisions, but they contain no provisions providing for the enforcement of those substantive requirements.[2] That is the job of Title IV, which provides a comprehensive suite of remedies—administrative and judicial—for any violation of "any provision of this Act." 25 USC § 4161(a).

HUD's attempt to infer from Titles I-III the power to summarily enforce those titles and their implementing regulations (in this case, 24 CFR § 1000.318) without regard to the procedural protections of Title IV, including the required finding of "substantial noncompliance," reduces Title IV to a dead letter. HUD would rarely invoke either Section 4161 or Section 4165, because both contain the bothersome sort of procedural requirements that the court in *Kansas City* noted HUD has been historically loathe to follow. *See, Kansas City*, *supra*, at 741. ("[In] the 13 years since the [public housing equivalent of §405 of NAHASDA] has been in existence, the Secretary has *never* initiated [those hearing] procedures against any grant recipient." (*emphasis in original*)). HUD would simply claim that it was following its own "duty" to comply with Titles I-III, thereby absolving itself of any requirement to provide any procedural protections to the recipient. Such a position leads to the anomalous result that violators would have greater protection under the statutes than those in compliance, and yet both suffer the same sanction of recapture, except the violators get greater protection than those who are in compliance. This result makes no sense.

Those procedural protections found in Title IV provide a comprehensive array of both sanctions and procedural safeguards including the following:

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[2]Section 209 of NAHASDA (25 USC § 4139) does contain a lone enforcement provision dealing with using grant money for affordable housing activities; however, that section merely provides that a person violating a substantive standard will be dealt with under § 4161(a).

> administratively recapturing misspent revenues under section 4161, if the recipient is guilty of "substantial noncompliance,"[3] and the recipient is given the opportunity for a formal hearing;[4] and
>
> after audit or review, "adjust[ing]" the recipient's grant amount under section 4165 (d).

HUD's authority to "adjust the amount of a grant made to a recipient" pursuant to a report or audit under 25 USC § 4165 (d) is "subject to" the substantial noncompliance and hearing requirements of section 4161(a).[5] Nevertheless, despite the amount of the recaptures involved here (both in absolute terms and in relation to TMHA's total grants), HUD never offered TMHA an opportunity for hearing that met the requirements of 24 CFR § 1000.540, nor has there been a finding that TMHA's alleged noncompliance was "substantial[]." 25 USC § 4161 (a)(1). Piffero affidavit, ¶ 9; Brady affidavit, ¶ 10; and Cassadore affidavit, ¶ 10. *See*, HB p., 5; 17. HUD concedes the point that it never offered TMHA a hearing, HB p., 29; 19-22 (offering the informal, grant challenging process of 24 CFR § 1000.336) and, thus, is forced in defense of this failure, to argue that the lack of a hearing was not prejudicial. HB pp., 29, 30.). Nothing within the comprehensive panoply of remedies set out in Title IV authorized HUD to so summarily deprive the TMHA of the procedural safeguards guaranteed by Title IV. For HUD to now say that its remedies laid out in Title IV do not apply because it does not consider the FCAS funding violations to be substantial, but that it can nevertheless exercise the exact remedies it is accorded under Sections 4161 and 4165 without making the findings those statutes require, is erroneous as further explained. HB pp., 25; 26-28, 26, 27; 1-19.

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[3]"Substantial noncompliance" means, *inter alia*, noncompliance that involves a "material amount" of the recipient's grant funding, or the imposition of sanctions that have a "material effect on the recipient meeting" the goals of its Indian Housing Plan. 24 CFR § 1000.534.

[4]The form of hearing required by 25 USC § 4161 is structured to provide meaningful due process protections. Pursuant to 24 CFR §§ 1000.532(b) and 1000.540, hearings are governed by the formal hearing procedures of 24 CFR Part 26, which include, *inter alia*, *de novo* review by an Administrative Law Judge or Board of Contracts Appeals Judge; broad discovery rights and the right to secure subpoenas; the right to cross-examination; and the right to a decision based only on the record.

[5]There is a broad range of other remedies made available to HUD under Title IV, including, replacing the recipient (25 USC § 4162), remedial technical training (25 USC § 4161(b)) and referral to the U.S. Attorney for a civil action. *See,* Section 4161(c).

a. 25 USC § 4161(a) Applies Whenever HUD Attempts to Recapture or Adjust Grant Funds That Have Been Awarded and Requires a Hearing and Finding of Substantial Noncompliance in this Case. It Also Bars the Recapture of Funds Expended on Affordable Housing Activities

Section 4161(a) provides, *inter alia*, that:

> (1)…[If] the Secretary finds **after notice and opportunity for hearing that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act,** the Secretary shall—
>
> (B) reduce payments under this Act to the recipient by **an amount of such payments that were not expended in accordance with this Act; …** *Id.* (emphasis added).

Thus, under Section 4161(a), HUD may recapture funds from future grants only "if" the Secretary: (i) provides an "opportunity for hearing"; and (ii) "finds…[that] the recipient has failed to comply substantially" with NAHASDA. *Id.* Such was the holding in *Kansas City*, which involved an interpretation of Section 111 of the Housing and Community Development Act (42 USC § 5311 [1982]) ("CDBG Act"). *Kansas City*, *supra*, at 740. According to HUD, NAHASDA's enforcement provisions "like many others in NAHASDA, [are] patterned after" their CDBG counterparts,[6] and the language of Section 111 of the CDBG Act is essentially identical to Section 4161(a) of NAHASDA.

In *Kansas City*, the court held it was "absolutely clear" that the CDBG Act mandated a hearing before HUD could withhold funding from a recipient based on past noncompliance.[7] *Kansas City*, *supra*, at 742. The *Kansas City* court cited a HUD admission that it had avoided granting hearings under Section 111 for some 14 years because it found hearings to be time consuming. *Id.* at 744. In rejecting administrative burden as a rational for avoiding the plain language of the statute, the court held "[W]hen a statute dictates that parties receive notice and a hearing…the provision of those basic procedural rights is not left to be decided by administrative 'flexibility' or 'discretion'." *Id.* at 744, *quoting RKO General, Inc. v. FCC*, 670 F.2d 215, 233 (D.C. Cir. 1981)). The same holds true when the same statute that mandates notice and a hearing also

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[6]62 Fed. Reg. 35726 (July 2, 1997).

[7]The noncompliance at issue here is the TMHA's alleged failure to accurately report FCAS, which resulted in alleged overfunding and led to the administrative action to reduce or adjust downward the TMHA's future grants.

requires a finding of substantial noncompliance, as did the statute at issue in *Kansas City*, and as does Section 4161 (a). Particularly relevant to this case, the *Kansas City* court found that any claim by HUD that the alleged noncompliance was "somehow insubstantial" (thereby not requiring notice and an opportunity for a hearing) would be "belie[d]" by "the fact that HUD selected a relatively drastic sanction (and one that is expressly authorized for violations under [the statute])…." *Kansas City*, *supra,* at 742, fn 3.

The Court of Appeals for the First Circuit reached the same conclusion in *City of Boston, supra.* There, HUD claimed it had not "terminated" a grant under the CDBG Act because it had not yet made any payment under the grant. In dismissing that argument, the court held:

> That HUD's…reading is hyper-technical in this context is further shown by the obvious purpose of the notice and hearing provision. It was plainly intended to give a recipient a fair chance to respond to the serious charge of noncompliance, and so have the grant maintained if the Secretary's action was ill-conceived. *Id.* at 832-833.

Like in *Kansas City* and the *City of Boston*, here HUD is attempting to creatively argue its way out of its responsibilities under the law. Section 4161 speaks directly to reductions in grant amounts already awarded and provides that such reductions must be preceded by a hearing and finding of substantial noncompliance. HUD is clearly trying to reduce TMHA's grant amounts by future reductions due to the alleged overpayments. Section 4161 must, on its face, apply.

It is also evident that 25 USC § 4161(a)(1)(B) limits HUD's authority to recapture funds to circumstances where NAHASDA funds were misspent by a Tribe, or were "not expended in accordance with the Act." Section 4161 does not provide authority to recapture NAHASDA funds that are improvidently allocated by HUD, but then spent by a housing authority on affordable housing activities in accordance with the Act. One of the important purposes of the notice and hearing requirements is to give a Tribe the opportunity to demonstrate that it has spent its NAHASDA funds in accordance with the Act, which would then serve as a bar to recapture. In circumventing the notice and hearing requirement, HUD has also improperly endeavored to recapture funds without any inquiry into whether they were appropriately spent.

Section 4161 requires summary judgment in favor of the TMHA on both procedural grounds and because there is no showing by HUD that the TMHA spent the funds for reasons other

than affordable housing activities. The facts in support of these circumstances are not in dispute as the affidavits of Piffero, Brady and Cassadore show. No hearing was provided the TMHA pursuant to 24 CFR § 1000.532. None was offered and in addition, the funds sought to be recovered by HUD were spent on affordable housing activities. They were not improvidently expended. Thus, HUD may not recoup them in any event.

b. 25 USC §4165 Applies Whenever HUD Attempts to Recapture or Adjust Grant Funds That Have Been Awarded and Requires a Hearing and Finding of Substantial Noncompliance in this Case

Section 4165[8] of NAHASDA authorizes HUD to audit or review NAHASDA recipients. Section 4165(d) sets out the remedies HUD may pursue if it finds the recipient is noncompliant as a result of an audit:

> *Subject to Section 4161(a)*, after reviewing the reports and audits relating to a recipient…, the Secretary may adjust the amount of a grant made to a recipient under this act in accordance with the findings of the Secretary with respect to those audits and reports. 25 USC § 4165 (d) (emphasis added).

In *Lummi II*, *supra* at *3, *4, the plaintiffs argued that this qualifier, "subject to Section 4161(a)," incorporated the procedural safeguards of Section 4161 into Section 4165. The *Lummi II* court rejected the notion. *Id.* at *9. Nonetheless, *Lummi II* found that HUD was subject to Section 4165 because the OIG audit and subsequent HUD review brought HUD within the purview of Section 4165. *Id.* at *7-*9. The plaintiffs in *Lummi II* also conceded that Section 4165 controlled over Section 4161, *Lummi II, supra,* at *5, fn. 6, under the circumstances where, as here, the attempt to recapture is precipitated by the OIG audit. HB p., 6; 16-21. *Lummi II* concluded that while the safeguards of Section 4161 are not incorporated directly into Section 4165 by the qualifier, "subject to Section 4161(a)," notice, an opportunity to be heard, and the limitations upon recapture of funds applied through Section 4165, itself. *Lummi II, supra*, at *11.

Despite *Lummi II*, HUD maintains, here, also that its compliance actions were not the result of any audit or review of the genre contemplated by Section 4165, HB pp., 26, 27, and thus, it may

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[8]HUD claims that TMHA concedes that 25 USC § 4161(a) and 25 USC § 4165 (d) do not apply. TMHA staked out no such position. Furthermore, TMHA now has the advantage of *Fort Peck III* and *Lummi II,* which explain that 25 USC § 4161 and 25 USC 4165 apply and are controlling to prevent HUD from summarily recapturing funds as here.

circumvent the procedural limitations and protections of Title IV. HUD continues to be mistaken. It is wrong to claim that HUD's actions were not of the genre contemplated by Section 4165. HUD's contention is belied by HUD's own Regulations. 24 CFR Section 1000.319 (d) ("Review of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews").

Furthermore, all of the challenged actions in this case came as a result of a nationwide audit of NAHASDA's program implementation by HUD's Office of Inspector General ("OIG"). HB p., 6;16-21. After finding that HUD may have allowed FCAS units to be over counted in light of 24 CFR § 1000.318, the OIG advised HUD to "*audit* all Housing Entities' FCAS, remove ineligible units from FCAS, recover funding from Housing Entities that had inflated FCAS and reallocate the recovery to recipients that were under funded," and "institute control procedures to insure FCAS accuracy for future years." *Fort Peck Hous. Auth. v. HUD*, 435 F. Supp. 2d 1125, 1130 (D.C. Colo. 2006) (*Fort Peck I*) (emphasis added). The use of the word "audit" shows that even HUD's own OIG expected that the procedural safeguards in Sections 4165(d) and 4161(a) would apply to the recommended action. In short, whether HUD's recapture actions are characterized as "reductions" under Section 4161(a), or "adjustments" under Section 4165(d), the result is always the same: HUD unlawfully exacts funds when it recaptures awarded funds without following the requirements of Sections 4161(a) and 4165(d).

The application of Section 4165 to this action is central because as explained, above, Section 4165 brings with it the limitations upon the funding provided by 24 CFR § 1000.532. This regulation allows HUD to recapture funds except where the grant amounts have already been spent on affordable housing activities. In that case, they may not be recaptured or deducted from future assistance provided to the Tribe since 24 CFR§ 1000.532 explicitly attaches to 25 USC § 4165.

Clearly, since Section 405, 25 USC § 4165, applies, by statute and by its own regulation, HUD may not recapture grant amounts already used for affordable housing. Summary judgment must issue in favor of the TMHA, because the amount recaptured, the sum of One Hundred Nineteen Thousand One Hundred Eighty-two Dollars ($119,182), and the amount to be recaptured, the sum of Six Hundred Twenty-four Thousand One Hundred Sixty-five Dollars ($624,165), reflect

amounts expended on affordable housing activities inasmuch as HUD has never notified the TMHA it had not spent these sums on affordable housing activities. Affidavit of Piffero, ¶¶ 6-10; Affidavit of Brady, ¶¶ 7-10, Cassadore, ¶¶ 7-10.

4. NAHASDA Assigns a Trust Responsibility to HUD That it must Observe When Administering to Tribal Housing Needs

Contrary to HUD's view, HB p., 27; 23-27, HUD has trust responsibilities under NAHASDA and, thus, the canons of statutory construction for statutes applicable to Indians should apply to NAHASDA's interpretation. Here, the TMHA is a Tribal block grant recipient designated by Congress as a benefactor of the statute that HUD is entrusted to administer in order to fulfill its unique trust responsibility owed by the United States to Indian Tribes. *See,* 25 USC §§ 4101(1), (2), (3), (4), (5), (6) and (7). *See also*, *Yakama Nation Hous. Auth. v. United States*, 102 Fed.Cl.478 (Fed. Cl. Dec. 5, 2011).

Where this trust obligation is implicated, the United States and its agencies have fiduciary responsibilities. *See, e.g., U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). Here, the Government's conduct must "be judged by the most exacting fiduciary standards." *See, Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The trust responsibility constrains any discretion that HUD may otherwise enjoy in administering NAHASDA, and creates for HUD a fiduciary duty to each Tribe under NAHASDA. TMHA insists that HUD breached these trust duties by unlawfully recapturing and withholding grant funds the Tribe was entitled to under NAHASDA. HUD denies that NAHASDA incorporates this trust obligation. HB pp., 27-29. HUD's theory that NAHASDA funds are "gratuitously" provided and that NAHASDA funds are, therefore, not a "trust corpus" is an over broad view by HUD of its authority.

The U.S. Court of Federal Claims recently considered the trust argument in another *Lummi* decision, *Lummi Tribe v. United States*, 99 Fed.Cl. 584, 594 (2011) (*Lummi I*). There, HUD asked the court to dismiss the Tribes' claims for money damages arising under NAHASDA, arguing NAHASDA is not a "money-mandating" statute. The court rejected HUD's argument expressly holding that NAHASDA is such a statute:

In plaintiffs' view, NAHASDA is money mandating because it leaves no room for

> HUD to exercise discretion in making grants. This court agrees. "In general, a statute will be deemed to be a money-mandating source of law if it compels the government to make a payment to an identified party or group." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (citing *Eastport*, 372 F.2d at 1009 ("Under *Section 1491* what one must always ask is whether the constitutional clause or the legislation which the claimant cites can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.")); See, also *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (observing that "where the statutory text leaves the government no discretion over payment of claimed funds[,]" Congress has provided a money-mandating source for jurisdiction in this court); *Gray v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989) (characterizing a statute as money mandating for the purposes of Tucker Act jurisdiction where the Secretary had no discretion to prevent a qualified applicant from participating in the statutory program).
>
> As indicated above, NAHASDA provides that the Secretary "*shall* . . . make grants" and "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, 25 USC §§ 4111 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 USC § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. *Eastport,* 372 F.2d at 1009. *See, Lummi I, supra* at 594.

See, Lummi I, supra at 594. The *Lummi I* Court's decision on this point is directly contrary to HUD's argument that NAHASDA funds are gratuitously provided.

HUD cites *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) as authority for the proposition that HUD has no trust responsibilities arising under NAHASDA. HB p., 29;2-10. This argument mischaracterizes the ruling in *Marceau*, where the claims presented against HUD were dissimilar from the case at bar. In *Marceau*, the claimants sought to hold HUD liable for construction methods that resulted in black mold problems. The Court concluded that HUD has no trust responsibility in these circumstances because the "federal government did not build, manage, or maintain the housing." *Id.,* at 928. Unlike *Marceau*, the claims at issue in this case arise from HUD's conduct in recapturing or withholding grant money, not an allegation that HUD allowed grant money to be used improvidently. As indicated, HUD could make no such claim in this case since it has not notified the TMHA that it mishandled funds. Piffero affidavit, ¶¶ 6-10, Brady affidavit, ¶¶ 7, 10, Cassadore Affidavit ¶¶ 7, 10. The entire record submitted by HUD is devoid of such notice. HUD's reliance upon *Marceau* to avoid its trust responsibility is, therefore, unavailing.

5. The Denial of a Hearing Was Prejudicial to the TMHA

HUD claims that the absence of a hearing before funding may be exacted from the TMHA is not prejudicial. HB p., 29; 30. HUD argues that it gave notice to the TMHA and it allowed the TMHA to explain itself, including an administrative process unrelated to the procedures mandated by Title IV where, as here, funding subsequent to the award of a grant is impacted. HUD, thus, argues that it received constitutionally adequate notice and that is enough. HB p., 29; 19.23.

HUD misstates the issue. The question is not whether TMHA received all the constitutionally mandated notice and an opportunity to be heard to which it is entitled. Rather, the question is, whether the TMHA received the opportunity to be heard that NAHASDA requires. The answer to the controlling question is in the negative. The TMHA was not accorded all the procedural safeguards to which it was entitled as it was accorded none of the procedural safeguards imposed upon HUD by 24 CFR § 1000.540, where HUD has obligated itself to use the hearing procedures set out in 24 CFR Part 26. The TMHA also received none of the procedural safeguards invoked by the Court in *Lummi II* under 25 USC § 4165.

Instead, HUD claims it offered the TMHA the "equivalent"--to wit, an opportunity to submit a written response to HUD's demand, which the agency "considered." HB p., 29; 19-23. HUD's equivalency argument is wanting. As the Court in *Reuters* cogently stated:

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

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

HUD next argues that even if the procedural protections required of it were not provided, TMHA has shown no prejudice. Thus, TMHA's argument should be stricken. HB p., 29; 16-18. There are responses to this assertion. First, no case was offered by HUD holding that denial of a hearing guaranteed by regulation or statute is "prejudicial" only if the complainant can show that it would have prevailed if such a hearing had been held. Indeed, were this the case, one would need to hold a hearing, and assess the outcome, to determine if its original denial was "prejudicial."

Then, if given the opportunity, the HUD brief reveals, itself, that there were issues that the TMHA could have raised in the adjudicatory proceedings. HUD acknowledges that the TMHA still owned and maintained units because there was a delay in conveying them due to uncertainty about deed, assignments and releases. HB pp., 3-4. This may have made a difference whether the unit was conveyed, should have been conveyed or was conveyed as expediently as possible.

Also, HUD is trying to recapture funds where all funds have already been spent on affordable housing activities. Whether or not, therefore, the TMHA was overfunded, these are complete defenses to the recapture of funds. In short, it is apparent from the record HUD submitted and the content of HUD's brief that it would not have been an academic exercise for the TMHA to participate in a real adjudicatory proceeding before a neutral third party. These are issues that surely would have been raised. Given the absence of a normal fact-finding record, TMHA has been prejudiced by HUD's refusal to offer a hearing under 24 CFR Part 26.

6. HUD Is Imposing an Exaction upon the TMHA Which Permits Recovery of Funds Already Recaptured

The gravamen of TMHA's complaint is that NAHASDA and its corresponding regulations have been violated by the recapture and continued attempt at recapture of funds that the TMHA has spent on affordable housing activities. HUD's failure to comply with the statutes and regulations (particularly, the taking and continued attempt to take funds expended on affordable housing activities) prior to taking of TMHA's funds constitutes an illegal exaction. As has been explained:

> an illegal exaction claim may be maintained when "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" that "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. . United States,* 178 Ct.Cl. 599, 605, 372 F.2d 1002, 1007 (1967). The Tucker Act provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power. 178 Ct.Cl. at 605, 372 F.2d at 1007-08. See South Puerto Rico Sugar Co. Trading Corp. v. United States, 167 Ct.Cl. 236, 244, 334 F.2d 622, 626 (1964), *cert. denied*, 379 U.S. 964, 85S.Ct. 654, 13 L.Ed.2d 558 (1965) (recovery of "exactions said to have been illegally imposed by federal officials (except where Congress has expressly placed jurisdiction elsewhere)").

Aerolineas Argentinas v. United States, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996). *See also, Pan American World Airways v. United States,* 129 Ct.Cl. 53, 55, 122 F.Supp. 682, 683-84 (1954) ("the collection of money by Government officials, pursuant to an invalid regulation" is an illegal

exaction and not a tort).

Thus, an illegal exaction claim is cognizable where the government's action is the result of the "misinterpretation or misapplication of statutes, regulations, or forms." *Aerolineas*, *supra,* at 1578; *See, Crocker v. United States*, 37 Fed. Cl. 191, 197 (1997)(explaining that one type of non-contract-based money claim envisioned by the Tucker Act is where "the Government, under color of statute, demands and receives money from the claimant," and the parties disagree whether the statute requires such payment).

In a circumstance involving the Internal Revenue Service (IRS) where, as here, the statute set forth specific procedures the IRS had to follow to recover a refund erroneously paid and the plaintiff alleged in the complaint that the IRS failed to follow those statutorily mandated procedures, the court held that the plaintiff properly pled an illegal exaction claim and dismissal was unwarranted:

> [P]laintiff has sufficiently pled an illegal exaction claim in this case. Here, plaintiff has made a prima facie case that the exaction at issue was the direct result of a "misapplication of" the law and that the remedy for such violation is a return of the money unlawfully exacted. As discussed above, plaintiff's claim is based on the IRS' alleged misapplication of the statutory erroneous refund collection procedures. The Federal Circuit, in *Stanley*, held that where the taxpayer has paid the assessed tax, the IRS must either file suit under 26 USC § 7405(b) to recoup the refund or reassess the liability for the relevant tax year under 26 USC §§ 2604 and 6501(a), taking into account the erroneous refund, after which it may recover the reassessed liability under 26 USC § 6502(a)(1). *Stanley*, 140 F.3d at 1027. Here, taking plaintiff's allegations as true, the IRS did not reassess plaintiff's tax liability to account for the erroneous refund, as laid out in 26 USC §§ 2604, 6501(a), and 6502(a)(1), nor did the IRS file suit under 26 USC § 7405(b), as it was arguably required to do. **Because the IRS did not follow the erroneous refund procedures, but instead took the refund through levy and wage garnishment, the IRS appears to have "illegally exacted" the refund**.

Pennoni v. United States, 79 Fed. Cl. 552, 561-562 (Fed. Cl. 2007) (citing *Stanley v. United States*, 140 F.3d 1023, 1027 (Fed. Cir. 1998) (emphasis added).

Just as in *Pennoni*, here the TMHA has pled that HUD's actions in exacting money by recapturing, reducing or adjusting (*i.e.,* exacting or retaining) TMHA's grant funds to recover alleged overpayments, without complying with the statutorily required provisions of 25 USC §§ 4161 and 4165 (which include a finding of substantial noncompliance) and the regulations implemented thereunder, was a misapplication of the relevant law. Further, as in *Pennoni*, return of

the recaptured funds is the "necessarily implicit" remedy when the government violates the applicable statutes and regulations. *Pennoni*, *supra*, at 562. This proposition is further buttressed by the conclusion that NAHASDA is a money mandating statute, such that refund of the funds illegally taken is a proper remedy.

Based on the foregoing, TMHA has met the burden of pleading an illegal exaction or retention claim resulting from HUD's failure to comply with 25 USC §§ 4161 and 4165 and the implementing regulations at 24 CFR §1000.532 and §1000.540. In short, there is no meaningful distinction between this case and *Pennoni*.

HUD asserts, however, that if it were to repay the TMHA for the funding it erroneously took, it would be taking money away from other deserving housing authorities. HB, p., 31; 7-15. The argument, thus, appears to be that because HUD harmed the TMHA by its erroneous taking, the TMHA must continue to suffer to the benefit of others. HUD's argument, however, runs headlong into the problem created when the law requires HUD to comply with certain procedures prior to exacting or retaining TMHA's funds. In such cases "courts have ordered that the money be returned . . . , even where the courts have recognized that this results in a windfall" to the plaintiff. *Pennoni*, *supra*, at 562, (*citing Stanley, supra,* 1024-25, and *O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. 1995)). "Underlying these cases is the understanding that return of the refund is the 'necessarily implicit' remedy when the government violates the erroneous refund statute." *Id.*, (*citing Norman v. United States*, 429 F.3d 1081, 1095, 1096 (Fed. Cir. 2005)).

The TMHA is, therefore, not asking HUD to take funds away from another housing authority that it should otherwise have had. Indeed, there is no proof in the record that if HUD reimbursed the TMHA for the funds erroneously captured, HUD would, perforce, be taking funding away from another housing authority to which that housing authority was entitled. The argument, thus, should be disregarded. The TMHA, however, is simply asking that HUD be required to return the funds to it to which it is lawfully entitled. It is up to HUD to find the source of funds. For the reasons set out herein, however, the TMHA is entitled to be reimbursed for the funds already recaptured.

7. HUD's Arguments In Support of Its Use of 24 CFR § 1000.318 Do Not Pass Muster

HUD offers multiple excuses for its use of 24 CFR § 1000.318 as applied to the TMHA. They are wanting as *Lummi II* and *Fort Peck III* reveal as discussed above. In addition, the TMHA points out the following:

a. HUD's Reliance Upon *Fort Peck II* Is Misplaced

HUD relies upon the Tenth Circuit's decision in *Fort Peck II*, *Fort Peck Housing Authority v. U.S. Department of Housing and Urban Development*, 367 Fed.Appx. 844, 892, n. 15 (10th Cir., 2010). HUD contends *Fort Peck II* supports its position that under 24 CFR § 1000.318, it has the authority to recapture funds under NAHASDA, and including the recapture of funds for units HUD determines were conveyed or should have been conveyed, HB pp., 6; 23-29, 7; 1-8, 14; 20-28, whether or not the funds to be recaptured were spent on affordable housing activities.

The Tenth Circuit did not address in *Fort Peck II* the issue of whether HUD could recapture funds already spent on affordable housing activities. Recapture of such funds was not an issue on appeal. Footnote 15 of the *Fort Peck II* decision addresses the dismissal of Fort Peck's cross-appeal. The cross-appeal was determined to be moot. HUD is prohibited from recapturing IHBG grant funds that have already been spent on affordable housing activities pursuant to the restrictions in 25 USC §4165 and 24 CFR § 1000.532 and the Tenth Circuit has not ruled to the contrary. In seeking recapture of funds previously spent on affordable housing activities, HUD violates 25 USC §§ 4161(a) and 4165 along with 24 CFR § 1000.532 of the implementing regulation, turns the remedial scheme in NAHASDA on its head and stakes out a position that flies in the face of the principles of self-determination that are at the heart of NAHASDA.[9]

Lastly, *Fort Peck II* should be of little help to HUD because the Court in *Fort Peck III*, made clear that *Fort Peck II* addressed only that situation where the housing authorities no longer

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[9] *Fort Peck II* should also be of little precedential value in any event, as it is an unpublished decision and, therefore, it is "*not* precedential . . . ." 10th Cir. R. 32.1(A) (emphasis added). Furthermore, the *Fort Peck II* Court's choice *not* to publish was deliberate. The Tenth Circuit denied HUD's motion to have the opinion published. *See, Fort Peck Housing Authority v. HUD,* Nos. 06-1425 and 06-1447, Doc. No. 01018416418 (10th Cir. May 6, 2010).

owned and maintained the housing units. Left for disposition, therefore, were those units where HUD had determined that the units should have been conveyed and for that reason, no longer counted in the FCAS. *Fort Peck III, supra* at 2.

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

HUD asserts that the NAHASDA 2008 Reauthorization Act simply "clarified" HUD's view of 25 USC § 4152, as written, the statute which HUD believes vindicates its view of 24 CFR § 1000.318, allowing for HUD's summary, sweeping disqualification of units and its attempt to recapture funds based upon those disqualifications. HB pp., 16, 17, 25. HUD argues that its view of 24 CFR § 1000.318 through the window of 25 USC § 4152 must be sustained because Congress substantially adopted 24 CFR § 1000.318(a) into the 2008 Reauthorization Act.

This argument is defeated, however, by the text and context of the 2008 Reauthorization Act. The substantive change of law is evidenced by: (1) the plain language of the amendment to 25 USC §§ 4152(b)(1), and (2) the 2008 Reauthorization Act's "civil action" provision which allowed actions to proceed under the prior statute, if they were timely filed. The 2008 Reauthorization was anything but a mere "clarification" of existing law.

To argue that the 2008 Reauthorization Act amendment merely clarified the law, HUD draws upon 2007 Senate committee report which characterizes the amendment of 25 USC § 4152(b)(1) as a "[c]larification." (quoting S. Rep. No. 110-238, at 9 (2007)). HB p., 17; 18-24. However, where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional labels of "clarification" are given little weight, or no weight at all. *See, e.g., United States v. Vazquez-Rivera,* 135 F.3d 172, 177,(1st Cir, 1998); *United States v. Wright,* 625 F.3d 583, 600 (9th Cir. 2010); *Boddie v. Am. Broad. Companies, Inc.,* 881 F.2d 267, 269 (6th Cir. 1989); *Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan.,* 128 F.3d 1431, 1435-36 (10th Cir. 1997); *Commissioner of Internal Revenue v. Callahan Realty Corp.,* 143 F.2d 214, 216 (2nd Cir. 1944).

The substantive nature of the amendment to 25 USC § 4152(b)(1) is readily apparent from a comparison of the text of the amendment with the text of the original formula allocation. The pre-

amendment version of the provision included "*[t]he number* of low-income housing dwelling units owned or operated *at the time* [September 30, 1997] pursuant to a contract between an Indian housing authority for the tribe and the Secretary" as a mandatory FCAS factor. 25 USC 4152(b)(1) (emphasis added). There is no controversy that the original formula allocation provision included and "explicitly list[ed]…the number of 1997 dwelling units" as one of the FCAS factors. *Fort Peck II, supra*, at 890.

However, through the 2008 Reauthorization Act, Congress materially altered the formula allocation provision so that housing units are only counted for FCAS purposes if they "are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided" and have not been "lost to the recipient by conveyance, demolition, or other means . . . ." P.L. 110-411, 301. This is far more than a cosmetic clarification. This is an unconditional elimination of housing units from the FCAS count. Housing units which were included under the original formula allocation provision *must* now be excluded. This amendment is a substantive change of law with an enormous financial impact on the TMHA.

Additionally, the 2008 Reauthorization Act provides that the statutory changes to the formula allocation provision would "not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." P.L. 110-411, § 301(b)(1)(E). With this "civil action" provision, Congress expressly declined to apply the amendment retroactively to TDHEs that filed a timely civil action. If the amendment was nothing but a clarification of existing law, there would be no need for the provision permitting tribes to file suit under the pre-amendment formula allocation provision.

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

HUD also argues that the pre-amendment version of the formula allocation provision unambiguously "supports" the categorical elimination of housing units required by § 1000.318(a). HB, pp., 14-15. In support of this argument, HUD asserts that the pre-amendment statute's use of the phrase "based on" indicates that the one factor identified in § 4152(b)(1), *i.e.*, the number of

1997 units, is only a starting point for the allocation formula, which may be affected by other factors. HB, p., 14; 21. Several courts have held that while the words "based on" do not compel an agency to rest its decision "solely on" a specified factor, such language constrains the agency from "abandon[ing]" or "supplant[ing]" the specified factor. *Catawba County, N.C. v. E.P.A.,* 571 F.3d 20, 37 (D.C. Cir. 2009) (citing *Sierra Club v. EPA,* 356 F.3d 296, 306 (D.D.C. 2004)); *See, also Environmental Defense v. E.P.A.,* 369 F.3d 193, 203-04 (2d Cir. 2004); *Nuclear Energy Inst., Inc. v. E.P.A.,* 373 F.3d 1251, 1270 (D.C. Cir. 2004). The regulation renders irrelevant the number of units owned or operated as of September 30, 1997 for the purposes of the formula. More precisely, the regulation categorically eliminates from FCAS units that the TDHE "no longer has the legal right to own, operate, or maintain . . ., whether such right is lost by conveyance, demolition, or otherwise . . . ." 24 CFR § 1000.318.

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

Furthermore, courts have held that the phrase "based on" is ambiguous. *See, e.g., Sierra Club, supra,* at 306; *Environmental Defense, supra,* at 204; *Catawba County, supra,* at 37. To the extent such ambiguity exists, it should be resolved in plaintiff's favor under the Indian Canon of Construction. Under the Indian Canon of Construction, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). *See also, South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians."). The Canon further provides "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 276 F.3d 1186,

1194 (10th Cir. 2002) (citing *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976)).

Additionally, the familiar "*Chevron* deference," *see, Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), is trumped by the Canon in this case. *See, Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1462 (10th Cir. 1997). While there may be questions as to what exactly "based on" means, it is clear that "based on" does *not* mean that HUD was authorized to supplant the first factor of the formula allocation provision by regulatory fiat. Indeed, whether the Canon is applied or not, this is an eminently reasonable and amply supported interpretation. While HUD should not benefit from *Chevron* deference, even if *Chevron* balancing were applied in this case, HUD's interpretation would not prevail as the regulation is "arbitrary, capricious" and "manifestly contrary to the statute." *Chevron.*

Lastly, TMHA's interpretation of the pre-amendment formula allocation provision and 24 CFR § 1000.318 is consistent with NAHASDA's overall goals and purposes. Congress passed NAHASDA with the recognition that providing "affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status." 25 USC § 4101(4). Congress determined that "the need for affordable homes and healthy environments on Indian reservations [and] Indian communities is acute." *Id.* § 4101(6). TMHA's interpretation is consistent with these goals and benefits the tribes by setting a fixed baseline for each tribe's housing inventory to be counted for formula purposes. Simply put, 24 CFR § 1000.318 violates the pre-amendment version of NAHASDA's formula allocation provision.

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

HUD argues that 24 CFR § 1000.318(a)(1) and (2) properly reflect need, HB p., 15; 21-22, 21; 6, and its use of these sections was abundantly fair. HB p., 21;13. HUD is once again mistaken.

For this argument, HUD returns to *Fort Peck II*, which addressed only the exclusion of units no longer owned or operated by a TDHE. As previously pointed out, beyond any possible application to Fort Peck Housing Authority, not only is *Fort Peck II* dubious authority on any of

these matters, but there is absolutely no basis for reading *Fort Peck II* as encompassing units that were still owned and operated by a TDHE at the time they were disqualified for funding--a *crucial* distinction.

HUD's expansive interpretation of *Fort Peck II* to authorize the exclusion of units that a TDHE still owns and operates simply cannot be reconciled with the decision in *Keetoowah* which struck down a similar regulation that was not based on need. *See, United Keetwoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't. Of Hous. & Urban Dev.*, 567 F.3d 1235 (10th Cir., 2009). Nor should the court give *Fort Peck II* such an expansive reading because to do so would render *Fort Peck II* in direct conflict with *Keetoowah*. *Fort Peck II* did not address, either expressly or implicitly, whether these dwelling units, though still owned and operated by a TDHE, could lawfully be excluded from FCAS by HUD, or whether HUD could recapture funding for these units under 24 CFR § 1000.318. Instead, the court's decision upheld the regulation as one which validly excluded units which a TDHE "no longer owned or operated". *Fort Peck II*, *supra*, at 887, 891, and 892. Consequently, at the very least, HUD may not lawfully exclude FCAS units the TMHA still owned and operated.

HUD argues that the exclusion of units under 24 CFR § 1000.318(a), as HUD reads it, is a proper reflection of need. HUD buttresses this view with the claim that: 1) since need must account for all Indian tribes, and 2) because unlawfully excluding FCAS or recapturing funding for FCAS from one or more tribes leaves more funds for others then, 3) the needs test is met. *See,* HB pp., 17, 20, 21. This *post hoc* rationalization was rejected in *Keetoowah*. As in *Keetoowah*, here HUD withdrew funds not because of a drop in needy households but because of an arbitrary and vague "practicable" or "actively enforce[ing] strict compliance" standard. 567 F.3d. at 1240. Making funding contingent upon whether tribes "actively enforce strict compliance" with terms of the MHOA or convey those units "as soon as practicable" does not relate to a tribe's housing needs.

"[A]n agency may not promulgate categorical rules that do not take into account the categories that are made significant by Congress." *Levine v. Apker,* 455 F.3d 71, 85 (2nd Cir., 2006). Here, that delegation is clear: 25 USC § 1452(b) unambiguously states that the amount of Indian Housing Block Grant (IHBG) funding must be based on housing need. *Keetoowah, supra*, at 1240,

1241. HUD's ends cannot justify its means--exclusion under 24 CFR §§ 1000.318(a)(1) and (2) of units still owned or operated by tribes is unrelated to need and is unlawful under NAHASDA. *Id.*

HUD contends that the Negotiated Rulemaking Committee determined that the elimination of conveyance eligible FCAS units reflected need when 24 CFR § 1000.318(a) was promulgated. HB, pp. 16,17, 20, 21. This assertion is without support. The Negotiated Rulemaking Committee made no finding that the requirements laid out in subsections (1) and (2) were reflective of housing need. In fact, these subsections were added at the last minute, in response to a comment that was not reflective of need. *See,* 63 Fed. Reg. 12343 (March 12, 1998). Moreover, the Negotiated Rulemaking Committee also approved the regulation struck down in *Keetoowah*, and yet this did not deter the court from finding that the regulation did not reflect housing need. Nor should it. The law is clear that a regulation promulgated pursuant to negotiated rulemaking has no special force. 5 USC § 570.

HUD additionally argues that the 2008 Reauthorization Act is "virtually conclusive" evidence that 24 CFR § 1000.318(a) implements congressional intent as expressed in the pre-amendment law, citing *Commodity Future Trading Commission v. Schor*, 478 U.S. 883 (1986). HB p. 17; 1-9. *Schor* is distinguishable and inapposite. In *Schor*, the relevant portions of the statute at issue were virtually re-enacted without change. Here, as explained, the 2008 Reauthorization Act changed the pre-amendment formula allocation provision. Additionally, the language of the original and re-enacted statutes in *Schor* were readily susceptible to the administrative interpretation of those statutes. By contrast the relevant statutory language of the pre-amendment version of the formula allocation provision speaks directly to the FCAS issue incorporated with 24 CFR § 1000.318. Moreover, unlike the case at bar, *Schor* did not involve congressional committee hearing testimony from agency representative that the amendment would change existing law.

9. 24 CFR § 1000.318 is Impermissibly Vague.

HUD argues that 24 CFR §§ 1000.318(a)(1) and (2) are not impermissibly vague. The vagaries of 24 CFR § 1000.318 are outlined in IV.B.7(c), *ante.*

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10. Guidance 98-19 is an Invalid Substantive Rule That Was Not Promulgated Pursuant to Informal and Negotiated Rulemaking Procedures

HUD relies upon Guidance 98-18, throughout to justify its actions against the TMHA. This reliance must be unavailing since the 1998 Guidance was not promulgated pursuant to required informal rulemaking and negotiated rulemaking procedures until 2007. *See,* 24 CFR § 1000.319. *See also, Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *NRDC v. EPA*, 643 F.3d 311, 323 (D.C. Cir. 2011).

CONCLUSION

Summary judgment may providently be granted where, as here, there is no genuine dispute over any material fact and the TMHA is entitled to relief as a matter of law. *Anderson, supra* at 248; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). It is beyond dispute that HUD similarly extracted and intends to summarily recapture the TMHA's NAHASDA funds by reason of an alleged overpayment. These funds have been recaptured and will be recaptured even though all funds were expended on affordable housing activities under NAHASDA. There is no reserve of unused or leftover NAHASDA funds from which HUD might recapture the overpayments. HUD is acting in derogation of 25 USC §§ 4161 and 4165 and their companion regulations. For the reasons set out herein, and in the TMHA's motion for summary judgment, the TMHA's motion for summary judgment should be granted and HUD's cross motion for summary judgment denied. The relief prayed for by the TMHA should be granted and the Court should grant the TMHA such further relief as the Court deems just and equitable in the premises.

Dated this 7th day of December, 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 Law Offices of Charles R. Zeh, Esq., and that on this date I served the *PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO 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 December, 2012.

Karen Kennedy

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

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