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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 N. 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' REPLY**

INTRODUCTION

Beginning with fiscal year 1998, the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 et seq. ("NAHASDA") ended various HUD assistance programs for Indian housing and replaced them with a block grant program, which annually divides appropriated funds amongst all Indian tribes to be used on affordable housing activities as determined by each tribe. *Id.* §§ 4111, 4132.

HUD must allocate NAHASDA block grants in accordance with a formula established in negotiated rulemaking pursuant to statutory guidelines. *Id.* §§ 4151, 4152. Because HUD is dividing one pot of appropriated funds amongst all, if one tribe receives more than it is entitled to under the formula, all other tribes receive less.

Other than certain minimum funding requirements provided by statute, *id.* § 4152(d), the formula must be based on "factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including" the number of dwelling units formerly assisted under a contract with HUD, population and economic distress, and other objectively measurable conditions specified in rulemaking. *Id.* § 4152(b)(1)-(3). The former contract units referenced in the statute are called Formula Current Assisted Stock ("FCAS" or "formula units") in the regulatory formula. They include low-income rentals and lease-to-own homeownership units (named for their pre-NAHASDA programs as "Mutual Help" or "Turnkey III"). *See* 24 C.F.R. §§ 1000.312, 1000.314. In the case of Mutual Help homeownership units, the formula regulations reflect a diminished need for assistance when a unit has been conveyed to its homebuyer or could be, because it is eligible for conveyance under its lease-to-own contract and no reason beyond the tribe's control makes conveyance impracticable. *See* 24 C.F.R. § 1000.318(a). In 2008, Congress integrated § 1000.318(a) into § 4152(b)(1). Non-FCAS factors in the regulatory formula measure each tribe's share of housing need using factors such as population, number of low-income households, and number of households living without kitchens or plumbing. 24 C.F.R. § 1000.324. Over time, as formula unit counts decrease for all tribes, the appropriations freed from that earmark are allocated to all tribes based on the overall need factors in § 1000.324.

The Housing Authority of the Te-Moak Tribe of Western Shoshone Indians ("TMHA") seeks review under the Administrative Procedure Act ("APA") of HUD's decrease of its formula unit count

pursuant to § 1000.318(a) when Mutual Help units conveyed or became eligible for conveyance and no reason beyond TMHA's control made conveyance impracticable. TMHA claims this contravenes section 4152(b)(1) before it was amended in 2008. In some instances HUD discovered it had allocated grant amounts to TMHA based on Mutual Help units that no longer counted as formula factors. These misallocations meant that TMHA was paid more than its formula share of block grant appropriations and all other tribes were paid proportionally less. HUD remedied these misallocations by seeking a refund of the overpaid funds from TMHA so as to reallocate them according to the formula. TMHA also challenges these recoveries as unauthorized and contrary to provisions for remedying recipient noncompliance with NAHASDA, §§ 4161 and 4165.

We explained in previous briefing why § 1000.318(a) validly implements NAHASDA's formula mandate at § 4152(b) and how HUD's right to recoup overpaid NAHASDA funds is supported by long-established precedent.

On the first issue, TMHA replies that the Court should give little weight to the Tenth Circuit's validation of § 1000.318 and even less weight to Congress's 2008 amendment to § 4152(b)(1), which incorporated the regulation in the statute. Nonetheless, the Tenth Circuit's reasoning is sound and persuasive support and Congress's adoption of the challenged regulation is virtually conclusive evidence of its validity. TMHA further attacks the portion of § 1000.318(a) that eliminates conveyance-eligible units from the formula unit count because, as TMHA argues, such units are still owned or operated by TMHA. The salient point, however, is that assistance is not necessary for Mutual Help units that could be conveyed, and so these should not be counted in the formula.

On the second issue, TMHA acknowledges HUD's right to recover overpaid funds, but ignores precedent establishing that the means of such recovery include administrative offset. It argues that 25 U.S.C. §§ 4161 and 4165 preclude this right, but does so in reliance on case law and a regulatory

provision that are inapposite as well as interlocutory decisions that, while on point, contain sparse or flawed reasoning and are not final judgments on the matter.

Because TMHA's arguments do not show that § 1000.318(a) controverts congressional intent nor that NAHASDA's compliance provisions clearly manifest an intent to abrogate HUD's right to recoup overpayments, the Court should deny TMHA's motion and grant summary judgment for HUD.

ARGUMENT

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

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

NAHASDA's statutory text supports 24 C.F.R. § 1000.318(a). Congress stipulated that the formula be "based on" three non-exclusive factors, including the number of "dwelling units owned and operated at the time pursuant to a contract [with HUD]" as well as other objectively measurable conditions determined in negotiated rulemaking. 25 U.S.C. § 4152(b)(1), (3). The regulatory formula takes the number of such units operated at NAHASDA's inception at the end of fiscal year 1997 as a "basis" or "starting point" (24 C.F.R. § 1000.312) to which units in the pipeline are added when operational (*id.* § 1000.314) and from which units are subtracted when no longer operational as low-income rentals or in accordance with their lease-to-own contracts with homebuyers (*id.* § 1000.318). The numerical adjustments employ objective measures to reflect need under this factor based on the current status of a tribe's stock of formula units, and this comports with the Congress's unambiguous mandate that the formula factors reflect current need. *Fort Peck Housing Auth. v. HUD*, 367 Fed. Appx. 884, 891 (10th Cir. 2010), *unpubl., cert. denied*, 131 S.Ct. 347 (2010) ("*Fort Peck II*") (citing *Keetoowah*).

TMHA argues that the formula unit count is "based on" pre-amendment 4152(b)(1) only if it is the count in 1997 and claims that any ambiguity in the phrase should be resolved in TMHA's favor

under the Indian canon of construction. (P. Br. 26). First, ambiguity in isolated phrases like "based on" or "at the time" disappears in the context of Congress's premise that factors for annual formula allocations reflect need, *i.e.*, current need, not some historical need that no longer exists. Second, the Indian canon cannot apply here because TMHA's interpretation does not favor "Indians"; it only favors TMHA at the expense of other Indian tribes whose grant amounts decrease if TMHA's increase. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (Indian canon is inapplicable when competing interests both involve Native Americans); *Fort Peck II* at 892 (canon favoring Indians does not authorize court to "rob Peter to pay Paul").

TMHA's bigger problem with this argument is that the statutory language does not refer to 1997; it says units owned or operated "at the time." The upshot of the formula is that formula units are counted at the time an annual grant is allocated in order to reflect current need conditions. TMHA applies circular logic to argue that the FCAS regulations (referencing 1997, the start date given in § 1000.312) define the statute which therefore repudiates the regulations. This round-about reasoning should in any case be disregarded because it dictates a formula factor unrelated to current need.

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

Congress reauthorized NAHASDA in 2008 and amended 4152(b)(1). (D. Br. 7-8). TMHA asserts that the 2008 amendment was a "change" rather than clarification of the law because, now, certain units must be excluded from the formula by statute rather than merely by regulation. (P. Br. 24-25). But this does not describe a change in the law. And the legislative history to this amendment indicates Congress believed its amendment was to "clarify" § 4152(b)(1). *See* S. Rep. No. 110-238, at 9 (2007).

In implementing §1000.318(a) under the pre-amendment law, HUD advised TMHA that "units conveyed or eligible to be conveyed in any particular [fiscal year] are not eligible as FCAS beginning

the next [fiscal year] unless the tribe can demonstrate that reasons beyond its control have made conveyance not practical." (Administrative Record at 599). Congress initially dictated a formula factor measuring need "at the time," and amended that to clarify the measurement is taken each year before an allocation. Thus, the text of § 4152(b)(1) now provides as a formula factor reflecting need, the "number of low-income housing dwelling units…that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided…" unless "(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or (ii) the unit is lost to the recipient by conveyance, demolition, or other means." 25 U.S.C. § 4152(b)(1)(A). And to further clarify, the provision goes on to explain that a homeownership may be considered lost unless conveyance is delayed for reasons "beyond the control of the recipient." *Id.* at (b)(1)(B) and (D) (listing instances of delays that are "beyond the control of the recipient").

Thus, NAHASDA now incorporates HUD's implementation of the formula pursuant to § 1000.318(a). The law was and is that homeownership units are eliminated from FCAS over time and the Tenth Circuit affirmed this under the old law when it reversed the district court. *Fort Peck II* at 890-892. By integrating § 1000.318(a) into the statute, Congress confirmed its intent that the formula reflect current measures of need, including current numbers of formula units. *See* S. Rep. No. 110-238, at 9 ("This amendment clarifies that [certain units] may not be counted in the funding formula. This not only includes conveyed units but those units that are required to be conveyed….").

TMHA argues that the law changed because the text and context here override legislative expressions. TMHA's case citations are unhelpful analogs here because they almost exclusively involve the retroactivity of criminal statutes.[1] Even if the text and context could overcome legislative

[1] For example, TMHA relies upon *United States v. Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998), which held that a change in a carjacking statute enacted after trial could not be applied retroactively

expressions, however, they cannot overcome the "virtually conclusive" evidence that the regulation implements congressional intent, which is ratification by integration into the statute. *Commodity Future Trading Commission v. Schor*, 478 U.S. 883, 846 (1986).

As to context, TMHA points to post-amendment § 4152(b)(1)(E). That provision allowed interested parties 45 days from enactment to sue under the pre-amendment language, otherwise the post-amendment language had retroactive effect. *See* 25 U.S.C. § 4152(b)(1)(E). TMHA argues that if the amendment was nothing but a clarification of existing law, there would be no need for this provision permitting tribes to file suit under pre-amendment formula allocation provision of § 4152(b)(1). (P. Br. 25). This infers far too much from what is a limited exception to retroactive application of an amendment that essentially incorporates the regulation into the statute.

When Congress amended § 4152(b)(1) in 2008, Fort Peck Housing Authority's challenge to § 1000.318(a) was pending on appeal. Several other tribes had filed Fort Peck-type claims. In these circumstances, subparagraph (E) affords an opportunity for all tribes to exercise their right of court review, but on equal footing with those that filed before the amendment, such as Fort Peck Housing Authority. In other words, Congress was faced with the situation that the law as applied to one tribe in litigation (Fort Peck) was different from that applicable to all other tribes and was undecided. By focusing on Fort Peck-type claims in litigation, § 4152(b)(1)(E) appears to address this indeterminacy and ensure that other tribes had an opportunity to put themselves in a position to be treated the same as Fort Peck, however that litigation based on the pre-amendment statute might ultimately be resolved. Thus, inclusion of § 4152(b)(1)(E) was not a useless act, and certainly does not imply that Congress's

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because the Constitution bars ex post facto criminal laws. The other cases TMHA cites are similarly unhelpful.

incorporation of the challenged regulation into the statute invalidated the regulation before its incorporation.

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

TMHA argues that subsections (1) and (2) of 24 C.F.R. § 1000.318(a) do not reflect need in accordance with § 4152(b), as construed by the Tenth Circuit in *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235, 1241 (10th Cir. 2009). These subsections specify that FCAS qualification of homeownership units depends upon conveyance "as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA [lease-purchase agreement]," and active enforcement of homebuyer compliance with the MHOA. 24 C.F.R. § 1000.318(a)(1)-(2). In other words, units that are eligible for conveyance, and for which conveyance is not impracticable due to reasons beyond the tribe's control, no longer meet the qualifications for inclusion as formula units.

Subsections (1) and (2) of §1000.318(a) reflect need. This is not only because funding earmarked for defunct formula units is shifted to allocation under factors measuring overall housing need (*e.g.*, measures of population, poverty and housing shortage), but also because a housing entity's need for assistance to operate homeownership units diminishes when it no longer needs to operate the home since it is eligible for conveyance to a homebuyer. That a housing entity may choose to retain ownership of the unit without an objectively measurable need to do so (as by a legal impediment outside its control), does not change the objective measure of need. As *Fort Peck II* recognized, the formula thus properly accounts for objective changes in the housing authority's needs. 367 Fed. Appx. at 891. Here, Congress has affirmed that the funding formula, including § 1000.318's conveyance-eligible provisions, is based on need, stating: "This funding formula was developed by Indian tribes through negotiated rulemaking, and recently reaffirmed in 2007, *to ensure that the funding is allocated based on need*." S. Rep. No. 110-238, at 10 (2007) (emphasis added). Indeed, Congress unambiguously

expressed its view that conveyance-eligibility reflects need when it amended § 4152(b)(1) to include the conveyance-eligibility provision as factors reflecting need. It clarified that homeownership units not conveyed within 25 years (the putative MHOA termination date) cease to count as FCAS unless conveyance is impracticable, *i.e.*, "beyond the control of the recipient." 25 U.S.C. § 4152(b) (1)(B), (D); *see also* S. Rep. No. 110-238, at 9. Accordingly, the conveyance eligible provisions of § 1000.318(a) reflect need as required by the statute.[2]

d. The Tenth Circuit Validated 24 C.F.R. § 1000.318 In Its Entirety, Including Conveyance-Eligible Units.

With a well-reasoned, persuasive analysis addressing the same issues before this Court, the Tenth Circuit upheld 24 C.F.R. § 1000.318 as a valid implementation of NAHASDA's formula directives. *Fort Peck II* at 885. That opinion should therefore be considered in resolution of this case. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *Absentee Shawnee Housing, et al. v. HUD*, LEXIS 112084 at *12-13 (W.D. Okla. 2012) (finding *Fort Peck II* persuasive and holding § 1000.318 valid).

TMHA argues that *Fort Peck II* is of little weight because it did not explicitly address the conveyance-eligible units still owned though they could be conveyed, which are referred to in § 1000.318(a)(1)-(2). According to TMHA, *Fort Peck II* could not have done so because that would conflict with a prior Tenth Circuit case establishing that formula elements must be need-based. *See* P. Br. at 28 (citing *United Keetoowah Bank of Cherokee Indians of Oklahoma v. HUD*, 567 F.3d 1235 (10th Cir. 2009).

[2] Contrary to TMHA's claim, this was not a "last minute" addition. Subsections (1) and (2) of §1000.318(a), although not enumerated, were part of the regulatory text in the proposed rule. *See* 62 Fed. Reg. 35718, 35743 (Jul. 2, 1997) (proposed as 24 C.F.R. § 1000.336). And from the Committee responses, it is clear that need was the driving consideration in implementing all of the formula regulations. 63 Fed. Reg. 12334, 12341-12345.

But TMHA ignores the substance of the decision, which analyzed the full scope of § 1000.318(a) and affirmed the regulation on that analysis. First, the *First Peck II* court explicitly referenced the regulatory subparagraph requiring that Mutual Help homes be timely conveyed when eligible for conveyance. *See Fort Peck II* at 887 (citing §1000.318(a)(1)). The decision also covered this scope of the regulation in responding to the lower court's discussion about conveyance-eligible units. The district court had addressed units that the plaintiff retained in inventory after they became eligible for conveyance. *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1131-32, 1134-35 (D. Colo. 2006). And the Tenth Circuit, in turn, considered the lower court's analysis of the conveyance-eligible issue. *Fort Peck II* at 889 ("Finally, the district court concluded Fort Peck's position furthered NAHASDA's goals [by] removing HUD's paternalistic oversight of whether units should be conveyed or participants evicted."). Moreover, the Tenth Circuit persuasively reasoned that § 1000.318 in its entirety is valid because it reflects *current* need by reducing the count of formula units when the housing authority no longer needs to own and operate a Mutual Help unit. *Id.* at 891. Thus *Fort Peck II* applied its prior decision in *Keetowah* to find that § 1000.318 in its entirety properly implements Congress's mandate that the allocation formula reflect need. *See id.* at 891-892 (citing *Keetowah* and stating "[t]he same reasoning applies equally here.").

II. HUD Properly Recovered Funds That TMHA Should Never Have Received And Reallocated Them According To The Formula.

a. The Government's Right To Recover Overpaid Funds Through Administrative Offset Is Well-Established.

HUD previously discussed authority establishing that the government has the right to recover funds paid by mistake unless Congress has clearly barred such a recovery. (D. Br. 21-29); *see also, State of California v. Bennett*, 829 F.2d 795, 798 (9th Cir. 1987) (upholding government's common law right to recover over-allocations or other erroneous payments); *Harrod v. Glickman*, 206 F.3d 783, 789

(8th Cir. 2000) ("We have long held that the common law permits the government to recover funds that its agents wrongfully or erroneously paid, even absent specific legislation authorizing the recovery.").

Moreover, government officials do not have to file suit to establish the illegality of the payment and may administratively offset the debt from amounts otherwise owed to the debtor. *See e.g.*, *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Mt. Sinai Hosp. v. Weinberger*, 517 F.2d 329, 338 (5th Cir. 1975). Nothing in NAHASDA clearly bars such recovery. On the contrary, tribes are entitled only to amounts allocated in accordance with the formula, not by mistake. *See* 25 U.S.C. § 4111(f), cross-referencing § 4151.

TMHA ignores the precedents establishing the government's right to recover overpayments through administrative offset or recoupment and erroneously claims the cases HUD cited "stand for the mundane proposition that the federal government retains the inherent authority to bring a civil action in Federal court to recover funds that were paid by 'mistake'." (P. Br. 7). To the contrary, in *Grand Trunk*, the Supreme Court held that the Postmaster General had the authority to recover overpayments and "was under no obligation to establish the illegality by suit." *Grand Trunk*, 252 U.S. at 120-21. Once the Postmaster General satisfied himself that there had been overpayments, "he was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company . . . ." *Id.* at 121. Similarly, in *Munsey Trust* the Supreme Court held that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" *Munsey Trust*, 332 U.S. at 239 (quoting *Gratiot v. United States*, 40 U.S. 336 (1841)). Although TMHA does not discuss these cases in any meaningful way, it nevertheless contends that the right to administrative offset exists only if Congress has expressly authorized the agency to do so. But this flips the law on its head. The right exists *unless* Congress has clearly withdrawn it by statute. *See* D. Br. 21-29, *citing e.g. United States v. Wurts*, 303 U.S. 414, 416

(1938); *United States v. Texas*, 507 U.S. 529, 534 (1993); *United States v. Lahey Clinic Hosp.*, 399 F. 3d. 1, 16 (1st Cir. 2005).

American Bus Association v. Slater, 231 F.3d 1, 5 (D.C. Cir. 2000), cited by TMHA, does not controvert this authority because it has nothing to do with an agency's right to recover an illegal or mistaken payment. In *American Bus*, the issue was whether an agency could assess fines for violations of the Americans with Disabilities Act, in addition to the remedies prescribed in the Act. *Id*. at 4-6. The court of appeals determined that the agency could not do so because Congress had specifically identified all of the "remedies and procedures" that could be taken in the event of the violation for which the plaintiff was fined. *Id.* That decision did not involve displacement of a preexisting right to recover overpayments; assessing unauthorized fines is no analog of recovering government funds a recipient erroneously received.

b. TMHA's Case Law Does Not Establish That Congress Abrogated The Government's Recoupment Right in NAHASDA.

TMHA argues that the enforcement provisions of Title IV of NAHASDA, 25 U.S.C. §§ 4161 and 4165, govern recovery of overpayments. (P. Br. 4-6). Its argument could only prevail if it shows that these provisions clearly manifest a congressional intent to displace the Government's recoupment right. *See e.g.*, *Bechtel v. Pension Benefit Guaranty Corporation*, 781 F.2d 906, 907 (D.C. Cir. 1986); *Mt. Sinai Hosp. v. Weinberger*, 517 F.2d 329, 338 (5th Cir. 1975). In *Bechtel*, the D.C. Circuit found that provisions in ERISA that specified a right of offset for payments made before the termination of a retirement plan did not specifically abrogate the federal government's right to recover via offset funds inadvertently dispersed. 781 F.2d at 907. In *Mt. Sinai Hospital*, the Fifth Circuit upheld the agency's common law right to recover overpayments via offset against subsequent assistance payments, finding that provisions in the Social Security Act that permitted offset against beneficiaries but not providers "serve important functions that complement rather than displace or supersede the recoupment right." 517

F.2d at 338. In both those cases, even similar remedial provisions in the program statute did not abrogate the recoupment right by implication because they were not specifically addressed to supersede that right. Similarly here, just because NAHASDA contains remedial provisions that can affect grant funds, does not mean Congress addressed much less superseded the Government's right to recoup overpayments.

TMHA relies heavily on recent interlocutory decisions in *Lummi II* (denial of reconsideration on HUD's motion to) and *Fort Peck III* (decision on phase 1 of bifurcated briefing). *See Lummi Tribe v. United States*, No. 08-848C, 2012 U.S. Claims LEXIS 1005 (Fed. Cl. Aug. 21, 2012) ("*Lummi II*"); *Fort Peck Housing Auth. v. HUD*, No. 05-cv-198, 2012 U.S. Dist. LEXIS 124049 (D. Colo. Aug. 31, 2012) ("*Fort Peck III*"). Both decisions found one or both §§ 4161 and 4165 applicable to HUD's actions. Yet their intermediate conclusions conflict with one another; the District Court supplied almost no explanation for its conclusion on this issue, which is currently being separately briefed; and the Court of Federal Claims' decision drew congressional intent from a regulation rather than any statutory provision.

In the *Fort Peck III* decision, the Colorado District Court quoted 25 U.S.C. §§ 4161(a)(1), 4165(d), and 24 C.F.R. § 1000.532 and concluded they "are applicable to the HUD actions now under review." *Fort Peck III* at * 18. According to the court, § 4165 applied because it authorizes HUD "to review and audit the tribes' grant applications." *Id.* at *17. In fact, grant applications in the form of an Indian Housing Plan are reviewed pursuant to § 4113. *See also* 25 U.S.C. § 4111(b)(1) (requiring plan submission and review before a grant may be made). The court did not discuss any interplay between these provisions and the government's recoupment right.

For its part, the Court of Federal Claims in *Lummi II* provided more analysis and addressed the government's recoupment right, but ultimately erred by relying on language in a regulation to establish clear congressional intent to withdraw HUD's right to recoupment. *Lummi II* at *29. According to its

reasoning, because § 4165 authorizes grant adjustments pursuant to compliance reviews under the section and a regulation implementing § 4165 limits those adjustments, Congress manifestly intended to limit HUD's right to recoup overpaid block grant funds when HUD reviewed formula data. *See id.* at *36-*41 ("Section 405 contains its own hearing requirement, set forth in the regulations . . . . Requiring HUD to observe this additional level of procedural protection makes sense since the NAHASDA program is designed to protect the Indians . . . . In conclusion, we read Section 405 as governing HUD's actions and thus as precluding HUD from exercising any common law right the agency might otherwise possess"). This logic is forced and does not support a finding of clear congressional intent to displace HUD's ability to recover and reallocate misallocated block grant funds. In addition, while *Fort Peck III* found §4161 applicable, *Lummi II* found that it was not applicable because no substantial noncompliance was involved. *Lummi II* at *19, n. 10.

Finally, in finding that HUD's recoupment right is precluded by §4165, *Lummi II* did not rely on case law about the government's recoupment right, but on cases about judicial caution in developing new federal common law for the proposition that "[r]esort to federal common law is appropriate only when a statute does not speak to an issue." *Lummi II* at *30 (citing *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) and *American Electric Power Company, Inc., v. Connecticut*, 131 S. Ct. 2527 (2011)). Yet those cases really stand for the proposition that resort to the development of new federal common law is appropriate only in such circumstances, and are uninstructive. Neither case involved a long-standing right of the federal government (where there is no gap to fill), and neither case applied the presumption required by *United States v. Texas* 507 U.S. 529, 534 (1993), in favor of the retention of long established common law principles. Indeed, the *Lummi II* court cited no cases denying the government's right to recover overpaid funds.

c. 25 U.S.C. §§ 4161 and 4165 Do Not Abrogate HUD's Right To Recover Overpayments.

Section 4161, on its face, does not address HUD's authority to recover an overpayment of block grant funds. Rather, it applies only "if the Secretary finds . . . that a recipient of assistance under this chapter has *failed to comply substantially* with any provision of this chapter." 25 U.S.C. § 4161(a) (emphasis added). If this is the case, "the Secretary shall" take one of several specific actions, none of which reference overpaid funds. Thus, it is no "clear and unambiguous expression of Congress" to abrogate HUD's authority to recover overpayments outside of substantial noncompliance. *Lahey Clinic*, 399 F.3d at 16.

Likewise, section 4165 lacks any clear indication that Congress intended the section to withdraw the government's right to recoup overpaid funds. Rather, it calls for periodic HUD monitoring of a recipient's use of grant funds according to specified criteria. These criteria are "the audit requirements[3] that apply to non-Federal entities under [the Single Audit Act]," and certain performance measures, including carrying out eligible activities in a timely manner, following its Indian Housing Plan, complying with certifications that it is operating under certain written policies and in accordance with civil rights and environmental laws, and accurately reviewing its own performance. 25 U.S.C. § 4165(a), (b); *see also id.* § 4112 (describing the Indian Housing Plan), § 4164 (describing requirement that recipient annually review its progress and submit a report to HUD), and §§ 4112(b)(2)(D), 4114, 4115 (listing required certifications). Section 4165 does not mention any HUD examination of the data used in formula calculation, such as the count of formula units, or review of the accuracy of its own allocations according to the formula.

[3] The Single Audit Act, 31 U.S.C. § 7501 *et seq.*, requires recipients of Federal grants to have independent audits of their financial statements completed according to generally accepted accounting principles. *See e.g.*, 31 U.S.C. § 7502(e)(1).

Because § 4165 addresses HUD's authority to take action in response to its evaluation of recipient compliance with specific requirements for the use of grant funds, it neither addresses nor manifestly curtails HUD's authority to act when it discovers an error in its formula data and a consequent overpayment under the formula. Thus, the section does not abrogate HUD's right to recoup overpayments even if these arise from HUD's discovery of errors in formula data through monitoring. *Lahey Clinic*, 399 F.3d at 16.

Because § 4165 does not abrogate HUD's right to recover overpaid funds, its implementing regulation, 24 C.F.R. § 1000.532, could not do so. And whether or not it implemented § 4165, an agency regulation could not provide a clear manifestation of *congressional* intent to abrogate the government's right to recover overpayments. For a federal agency to abrogate through regulation the government's right to recoup improvidently paid funds would implicate serious constitutional issues of separation of powers that should be avoided. *Lahey Clinic*, 399 F.3d at 14. Accordingly, §1000.532, should not be considered to abrogate HUD's right to recoup overpaid federal funds.[4]

City of Kansas City, Missouri, v. Department of Housing and Urban Development, 861 F.2d 739 (D.C. Cir. 1988), cited by TMHA, does not refute the analysis above. That case reviewed HUD's action when it found substantial noncompliance by a recipient of block grants under the Housing and Community Development Act of 1974, which has similar provisions to NAHASDA's §§ 4161 and 4165.

[4] In furtherance of its §1000.532 claim, TMHA submits affidavits contending prior funding has been spent on "affordable housing activities." Because it has no applicability to HUD's actions, § 1000.532(a) was not applied. Thus, the facts regarding whether TMHA's grants were "spent on affordable housing activities" are not part of the administrative record under review. Under long-standing principles of APA review, the Court should disregard TMHA's affidavits and not create a substitute record even if the Court believes the agency should have considered these issues. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that "[t]he task of the reviewing court is to apply the appropriate standard of review * * * based on the record the agency presents to the reviewing court [and] not some new record made initially in the reviewing court."). Rather, if the Court finds that HUD was required to determine whether § 1000.532(a) barred recovery, then it should remand to HUD to make that determination. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002).

See Id. at 742, n. 3. In those circumstances, the court held that HUD must follow the requirements of the statutory provision covering substantial noncompliance (analogous to § 4161 of NAHASDA) and could not ignore its notice and hearing requirements in favor of the more informal procedures in the section analogous to § 4165 of NAHASDA. *Id.* at 744. The case is inapposite here where substantial noncompliance is not an issue. Moreover, the case had no occasion to address the effect of the Community Development Act on HUD's inherent right to recover overpayments. Thus, *Kansas City* speaks only to situations where HUD is charging a recipient with substantial noncompliance and would not be applicable where, as here, no one has raised such an allegation.[5]

Finally, TMHA argues that another formula regulation indicates Congress precluded overpayment recoveries except pursuant to § 4161. Not only is a regulation insufficient for such a task, as discussed above, but the regulation cited clearly fails to address any issues here. TMHA selectively quotes from 24 C.F.R. § 1000.60 to suggest that HUD's right to recover overpayments is precluded because it is accomplished after funds have been disbursed. Section 1000.60 provides in full:

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

Despite TMHA's contentions, nothing in § 1000.60 provides that HUD's recovery of overpayments requires § 1000.538 procedures. Rather, §1000.60 merely describes the process for suspending a recipient's expenditure of funds subject to a depository agreement in cases of substantial

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

noncompliance; it does not address the procedures HUD must follow in unrelated circumstances. As a result, § 1000.60 cannot support TMHA's argument that §§ 4161 and 4165 displace the government's right to recoup overpaid funds.

III. NAHASDA Does Not Support TMHA's Claims Based on Breach-of-Trust.

HUD previously argued that TMHA's claims for relief on a breach of trust theory should be denied because TMHA has identified no statutory or regulatory prescription creating a fiduciary duty. (D. Br. 27-29) (citing, *inter alia*, the Ninth Circuit's rejection of a breach of trust claim under NAHASDA in *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 928 (9th Cir. 2008)). TMHA appears to respond that an enforceable fiduciary duty nevertheless exists, which bars HUD from "recapturing and withholding grant funds the Tribe was entitled to under NAHASDA." (P. Br. at 17). As an initial matter, even if NAHASDA created a fiduciary duty, that would arguably mandate HUD's recovery and reallocation of misallocated grant funds rather than abrogate HUD's right to do so. In any case, TMHA's breach-of-trust arguments are not persuasive.

TMHA downplays the significance of *Marceau*, contending that it dealt with HUD's liability for home construction while this case arises from HUD's attempt to recapture or withhold grant money. (P. Br. 18). *Marceau* cannot be read so narrowly. In rejecting the trust claim based upon NAHASDA, the Ninth Circuit was definitive:

> No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property.

Marceau, 540 F.3d at 927 (*citations omitted in original*). Nothing in the Ninth Circuit's opinion suggests that it is limited to trust claims based upon construction liability.

Marceau follows other Ninth Circuit precedent finding funds appropriated for the benefit of Indians are not held in trust. *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970) (holding funds appropriated for Indian irrigation systems were "gratuitous appropriations of public moneys" not held in trust by the United States). *Marceau* and *Scholder* unequivocally demonstrate that NAHASDA appropriated funding does not constitute a critical element of a trust — a trust corpus. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

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

> We are additionally unconvinced that grant funds to which a tribe claims entitlement are properly construed as "Indian assets" for the purposes of trust law or that the Secretary's limited responsibilities in allocating those funds under NAHASDA create the common-law trust duties envisioned by the Supreme Court in *United States v. Mitchell*, 463 U.S. at 226.

99 Fed. Cl. at 598. n. 12. TMHA has not identified any statutory responsibilities comparable to those in *United States v. Mitchell* where the Government managed Indian forest resources, obtained revenue thereby, and paid proceeds to the Indian landowners. 463 U.S. 206, 224-225 (1983). As a result, any "breach of trust" claim based on the funds appropriated for IHBGs relates neither to a trust corpus nor to any substantive law creating fiduciary duties and should be denied.

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

TMHA argues that it has met its burden of pleading an illegal exaction claim. (P. Br. 20-22). However, illegal exaction is a basis for a damage claim in the Court of Federal Claims under 28 U.S.C.

§ 1491, the Tucker Act. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572. (Fed. Cir. 1996). While the Little Tucker Act gives district courts concurrent jurisdiction with the Court of Federal Claims, it applies to money claims not exceeding $ 10,000. 28 U.S.C.S. § 1346. For money claims that exceed $ 10,000, the "Big" Tucker Act grants the Court of Federal Claims exclusive jurisdiction. 28 U.S.C.S. § 1491. In this case, TMHA is seeking $119,182. (P. Br. 22). Because TMHA is seeking more than $ 10,000 in monetary relief, the district court lacks jurisdiction under 28 U.S.C. § 1346(a)(2). *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983).

Moreover, as noted in its Cross-Motion Brief, HUD has already redistributed the funds collected from TMHA to all eligible tribes. 24 C.F.R. § 1000.319(b) (recovered overpayments distributed to all tribes in accordance with IHBG formula allocation). Because HUD has already awarded the disputed funds to other IHBG recipients, the Court cannot grant any order that HUD repay the recovered funds. *See* D. Br. 31, *citing City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). *Accord Fort Peck I*, 2006 WL 219043, *2.

CONCLUSION

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

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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), ET AL. 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 February 5, 2013, I served a copy of **DEFENDANTS' REPLY** 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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