CA No. 13-10510

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

DC No. 2:09-cr-206-KJD-PAL-1
(District of Nevada, Las Vegas)

-vs-

WILLIAM AUBREY,

Defendant/Appellant.
_____/

Appeal from the United States District Court
for the District of Nevada, Southern Division

APPELLANT'S REPLY BRIEF

RENE VALLADARES
Federal Public Defender
Michael J. Kennedy*
Chief Assistant Federal Public Defender
201 West Liberty Street, Suite 102
Reno, Nevada 89501
Telephone: (775) 321-8455*
Attorney for Appellant
Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Page

FEDERAL CASES (CONTINUED)

FEDERAL STATUTES

FEDERAL RULES

CODE OF FEDERAL REGULATIONS

Page

UNITED STATES SENTENCING GUIDELINES

I.

REPLY ARGUMENT

A. The Trial Court Erred In Denying Aubrey's Motion For Judgment Of Acquittal For Counts 5 and 4 Under Federal Rule Of Criminal Procedure 29(a) and 29(c). (*Blue Brief 13-15 & 17-38*)

1. Payments For Verified, Certified And Approved Construction Performance Progress Neither Continue To Belong To The Indian Tribal Organization, Nor Are Intrusted To The Custody Or Care Of An Indian Tribal Organization's Officer, Employee, Or Agent, Nor Are Held In Trust – An Essential Element of Counts Of Conviction Under 18 U.S.C. § 1163 – Once Payments Are Made After Inspection. (*Blue Brief 19-26*)

All payments to Aubrey and his 100% Native American owned company Lodgebuilder, Inc. were "reimbursements" not "advances" and each payment was for construction progress "performance" after inspection, verification, and approval by all tribal organizations prior to payment rather than dollar-for-dollar earmarks based upon costs. CDE177;EOR233-234&273-275 (Bullough); CDE187;EOR903-904 (Shepherd); CDE194;EOR1871-1872 (Porter); CDE180;EOR1871-1872 (Lynch); CDE205;EOR 2409&2417&2453-2454 (Cascaddan). "Reimbursement shall be the preferred method of payment" (as opposed to an "advance" which would be monies "intrusted" or held in trust) to subgrantees and contractors and that "grantees or subgrantee ... may use the percentage of completion method to pay construction

grants." 24 C.F.R. § 85.21(a),(c)&(d); CDE 177;EOR 276 (NAHASDA payments were "reimbursements for work already performed and inspected and approved by the TDHE").[1]

Each of the thirteen requisitions for Indian Housing Block Grant ("IHBG") funds submitted by Fort Defiance Housing Corporation ("FDHC") to the Navajo Housing Authority ("NHA") expressly identified in its documentation that "Lodgebuilder" was the "payee". *Exhibit 40(A)(2),HUD_00652 & SER184 (Requisition#13;06/09/2004* ("Name of Payee: LODGEBUILDER INC."); *Exhibit 39(A),HUD_00637 & 00641 & SER168 & 172 (Requisition#12;05/01/2004*); *Exhibit 37(A),HUD_00890 & SER152 (Requisition#11; 04/01/2014*); *Exhibit 36(A),HUD_00885(Requisition#10;03/01/2004)*; *Exhibit 34(A),HUD_00880(Requisition#9;02/01/2004*); *Exhibit 32(A),HUD_0000873 (Requisition#8;01/01/2004*); *Exhibit 29(A),HUD_00866(Requisition #6;11/01/2003*); *Exhibit 28(A),NHA_04875(Requisition #5;10/01/2003*); *Exhibit 27(A),HUD_00854 (Requisition#4;09/01/2003*); *Exhibit 26(A),HUD_00849(Requisition #3; 08/01/2003*); *Exhibit 25(A);HUD_00844(Requisition #2;06/30/2003*); *Exhibit 24(A), HUD_00039* (*Requisition #1;06/01/2003*).

---

[1] NAHASDA is an abbreviation for the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101, *et. seq*.; TDHE is for Tribally Designated Housing Entity.

Neither Lodgebuilder nor Aubrey received **one penny** of the $9,156,100.00 in NAHASDA funds (budgeted to pay only 70% of the $12,600,000 Chilchinbeto on-site infrastructure and 90 home construction project)[2] from FDHC **before FDHC itself independently inspected the actual % construction performance progress** against the claimed construction progress and verified, certified and approved payment to Lodgebuilder/Aubrey for construction performance progress pursuant to the express terms of the October, 2002 FDHC and Lodgebuilder Agreement, *Exhibits 13 & 500*; CDE189;EOR1246 (*Rowton: Frank Kephart was FDHC independent inspector who provided second inspection for FDHC*); *Blue Brief 19-21 & n.4-5 (contractual provisions*).

The government's conclusion (*Red Brief 2*) that "this case concerns Aubrey's misuse of [IHBG] funds awarded to the Navajo Nation to build affordable homes for its people" depends exclusively on its unsubstantiated premise that somehow, defying economic reality, logic and the governing federal regulations, payments for verified,

---

[2] Aubrey did not gain access to more than 11.5 million in grant funds allocated to that project in fiscal years 2002 and 2003." *Red Brief 3*. Fiscal year 2002 off-site infrastructure payments totaled $2,226,000 and was not a trial issue. CDE182;EOR2480-2481;*Exhibit 526.0002-0003*. Fiscal year 2003 on-site infrastructure and 90 home construction payments totaled $9,156,100 (from a fixed $9,374,000) as NHA failed to pay the remaining $217,900 (*Exhibit 525*) despite certifying, approving and verifying the construction performance progress post-June of 2004. CDE185;EOR790-802.

certified and approved construction performance progress reimbursement draw-downs for percentage of work completed against a fixed amount – are instead dollar-for-dollar "earmarked" funds constituting numerous and individual contracts for items to be paid. *Red Brief 3* (*"the evidence also established that, by the Spring of 2004, Aubrey ceased using the earmarked grant funds for those payments"*) & *Red Brief 20* (*"the relevant grant agreements and witness testimony established that NHA disbursed the grant funds ... in FDHC's hands, therefore, the funds constituted the kind of "earmarked" money that is unlawfully converted if not put to its designated purpose"*).

This unsubstantiated "earmark" premise is refuted by these trial facts.

1. The primary, but not exclusive, source of funding for the $12.6 million dollars Chilchinbeto 90 home budget for construction/on-site improvements was to come from NAHASDA. CDE 177;EOR 217-220 & 245-2500. The $12.6 million dollar budget was based upon historical project construction costs from earlier Church Rock and Kayenta housing construction projects, CDE185;EOR 607-639 & CDE 205;EOR 2384-2397, and well under the 2002 HUD Total Development Cost of $15.1 million. CDE 117;EOR254-289. "Under [NAHASDA, the NHA] and all sub-grantee housing providers must implement leveraged funding." *Exhibit 568, ¶6 & Exhibit 568-1, ¶7*; CDE 185;EOR 639-640 & 761-762; CDE 180; EOR1933-1935.

Matching or leveraged funds were budgeted typically to fund 15% (Church Rock and Kayenta) of the construction progress against the fixed price total budget. CDE 185;EOR 607-639. The NHA initially slashed its portion of this construction budget from $10.8 million to $9.3 million, requiring the difference to be made up in 30% leveraged or matching funds. CDE 185;EOR 631;635-636;645-648;655;669;681;741;772;775 &815.

NHA CFO Lynch testified that NHA eventually determined that its NAHASDA portion was $120,000 per home or $10.8 million dollars. CDE180;EOR1965-1967; *Exhibits 516 & 516-1*. NHA CFO Lynch also testified that the difference between the $9,156,100 NAHASDA monies paid by NHA and the $10,800,000 NAHASDA monies NHA determined were due FDHC and Aubrey/Lodgebuilder – **which were never paid** -- would have paid **all** outstanding amounts owed to Chilchinbeto subcontractors/vendors. CDE180;EOR1965-1967.

2. Construction progress performance reimbursement requests are not contracts for items to be paid but instead percentage (%) draw-downs against a fixed total amount for verified, certified and approved work completed. CDE180;EOR 61&2025; CDE 177;EOR 276; CDE187;EOR 903; CDE205;EOR2409;2417;&2453-2454. The "application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual

elements of cost in arriving at an agreement on the total price" and "the final price accepted by the parties reflects agreement only on the final price." 48 C.F.R. § 31.102. If there is no percentage (%) work completed, then there is no construction progress performance reimbursement, regardless of construction costs.

3. The FDHC Chilchinbeto payroll for 9 out of 10 project workers, including most subcontractor payroll, was paid weekly (by law) out of Aubrey's own funds, as construction progress performance reimbursement payments were paid monthly and are based on construction progress not cost. CDE189;EOR 1174-1189; & 1198-1219. The government's repeated assertion in its answering brief that construction progress performance reimbursement payments are "earmarks" is a false premise as no Chilchinbeto FDHC laborer waited until reimbursement to get their weekly paycheck. The FDHC Payroll Account paid **$1,634,170.06** for the Chilchinbeto project (*Exhibit 581-2* & CDE 205;EOR 2014-2125). In the time period for counts 5 and 4, Aubrey paid weekly Chilchinbeto payroll expenses totaling **$106,553.52** for March, 2004 (*Exhibit* 581-2.118-127,BANK_06522-06531), **$75,046.49** for April, 2004 (*Exhibit 581-2.128-134,BANK_06532-06538*), **$79,783.91** for May, 2004 (*Exhibit 581.2-135-143,BANK_06539-06547*) and **$50,205.06** for June, 2004 (*Exhibit 581-2.144-150,BANk_06548-06554*). Combined these four months total **$311,633.98**.

4. NHA Grants Manager Shepard testified that he knew that the NAHASDA line items do not pay the entire amount and that the project revenue or project funding was $3.5 million more than the $9.1 in NAHASDA funds paid. CDE 185;EOR664&765-772; CDE185;EOR765-772; *Exhibit 511, Shepherd's handwritten notes ("Project Cost $3.5 M more, did not have leveraging; NAHASDA line items does not pay entire amount"*). Every subcontractor contract exceeded the NAHASDA funding. CDE185;EOR689-701 (*Exhibit 650*; $231,587 insulation subcontract with **only $125,000** for insulation in NAHASDA 70% portion of overall budget **yet** Aubrey/ Lodgebuilder **paid $192,387** by 02/29/2004); EOR701-724 (*Exhibit 652*; $459,300 drywall subcontract with **only $390,000** for drywall in NAHASDA 70% portion of overall budget **yet** Aubrey/ Lodgebuilder **paid $437,940.68** by 03/31;2004); *Exhibit 655*; $355,550 subcontract for stucco with **only $320,000** for stucco in NAHASDA 70% portion of overall budget **yet** Aubrey/Lodgebuilder paid **$287,936.25** by 06/15/2004 despite disputed incomplete performance); *Exhibits 58(A)- 58(G) & 57(a) - 57(C)*. CDE 189;EOR1198-1231.

5. NHA and FDHC received 99% verified, certified and approved construction performance progress from Aubrey/Lodgebuilder, even though the failures of NHA and Navajo Tribal Utility Authority ("NTUA") to timely bring power lines 13 miles over the desert to Chilchinbeto was the direct cause which prevented

the payment of the leveraged or matching funds needed to cover remaining non-NAHASDA 30% of the Chilchinbeto project costs. CDE185;EOR 638-641&760-763; CDE189;EOR1095-1122;CDE 205;EOR 2410-2417. The district court's statement (*Red Brief 22*) that the 90 homes were "worthless" as of June of 2004 when the homes/on-site development were 97% complete is easily refuted by *Exhibit 40(A)(2),HUD_00653*, which establishes that NHA inspected as 100% complete the 90 homes except for appliances, 5 homes needing stucco work, and 37 homes needing labor to affix gutters to the homes. Far from "worthless", the 90 Chilchinbeto homes and on-site infrastructure were multi-million dollar assets of the same superior quality of other FDHC homes which received HUD's "Best-of-the-Best" national award. CDE 185;EOR 618&629; CDE 194;EOR 1476; CDE 205;EOR 2421-2425.

6. Substantial monies **beyond $9,156,100** were expended to construct the 90 Chilchinbeto homes based upon project costs for the more than 200 homes built at Kayenta. CDE 205;EOR 2396-2400;2417-2418&2453-2454. Overall construction costs totaled **$12,797,180**. CDE205;EOR2408-2409; CDE 185;EOR 641-649; *Exhibit 574*. Even excluding Lodgebuilder's substantial salaried payroll and job costs for constructing and developing the on-site infrastructure and 90 Chilchinbeto homes (*Exhibit 582-1.0052-120, 582-4, 582-5 & 583*-1; CDE 205;EOR 2126-2134), the FDHC Development Account paid more than **$8,000,000** for the Chilchinbeto project

(*Exhibit 580*-1 & CDE 205;EOR 2019-2013); the FDHC Payroll Account paid **$1,634,170.06** for the Chilchinbeto project (*Exhibit 581-2* & CDE 205;EOR 2014-2125); and the total paid by only these two accounts alone is more than **$9.6 million**. *Exhibit 525*&CDE185;EOR 787-791. Overall construction costs totaled $12,797,180. CDE205;EOR2408-2409; CDE185;EOR641-649; *Exhibit 574*.

7. Contrary to the government's suggestion (*Red Brief 24-27*), neither *United States v Johnson*, 596 F.2d 842 (9th Cir. 1979), nor *United States v. Gibbs*, 704 F.2d 464 (9th Cir. 1983) nor *United States v. Von Stephens*, 774 F.2d 1411 (9th Cir. 1985) nor *United States v Kranovich*, 401 F.3d 1107 (9th Cir. 2003) nor any 18 U.S.C. § 1163 decision holds that verified, certified and approved construction progress performance reimbursement payments **after** payment for actual inspected construction performance progress – somehow continue to **"belong to"** the tribal organizations, or continue to be **"intrusted"** to an employee, officer or agent of the tribal organizations – when there is absolutely no fraud or impropriety raised in any inspection by all tribal organizations. The critical fact overlooked in the government's reliance on the cases cited by the government is that here, **FDHC itself, independently inspected the actual percentage construction progress before it paid Lodgebuilder/Aubrey for that percentage construction progress reimbursement**. CDE189;EOR 1246 (second inspection conducted by Kephart who

was FDHC's independent inspector); *Exhibit 13,NHA-00407-408* (Lodgebuilder's compensation for all progress payments "shall be subject to inspection of work completed by FDHC and the [NHA]"). Inspection provided the supervision and control over payment of the funds.

Therefore, upon reimbursement payment **after** FDHC's second inspection, the $9,156,000 in reimbursement payments no longer belonged to, or were intrusted to, or held in trust by, FDHC or NHA or the Navajo Nation. In its oral pronouncement denying Aubrey release pending appeal, the trial court specifically found that the monies and funds **"belonged to"** ***unpaid subcontractors and not to either NHA or FDHC, as agents of the Navajo Nation***. CDE 173;EOR 117 at 2:14-3:05 (" ... I believe that – once the application was made and the payment was approved it belonged to the subcontractors who – who turned up in this case not receiving payment. ... .").

The trial court's ruling alone on these unique facts compels acquittal for counts 5 and 4 because the monies did not belong to any tribal organization. Instead, the tribal organizations owned the on-site development and 90 home project (99% complete based upon NHA and FDHC independent inspections) which was budgeted to cost more than $12,600,000 (CDE 185:EOR 628;635-636;644) but were now tribal organization property in exchange for $9,156,000.

2. Insufficient Evidence For Count 5 Conviction. (*Blue Brief 27-32*)

The government's argument to uphold Aubrey's count 5 conviction (Red Brief 32-24) conveniently ignores the trial facts. First, the amended 06/09/2004 Requisition #13 construction performance progress reimbursement payment totaling **$133,700** at issue in count 5 (*Exhibit 40(A)(2);HUD_00649& SER181*) -- was **not an earmark payment**.

The FDHC payroll costs associated with the total percentage (%) construction performance progress from May 1, 2004 to June 9, 2004 had already been paid on a weekly basis between May 1, and June 9, 2004 **before** the June 9, 2004 request for construction performance progress payment was even submitted – let alone processed and paid by NHA to FDHC to Lodgebuilder and Aubrey. CDE 189;EOR1199-1200;1202-1205;1207,1214;1216;1219;1234;1243(Rowton: Aubrey/Lodgebuilder paid certified payroll weekly for 9 out of 10 workers with only 1 out of 10 paid by subcontractors). No worker waited for his or her pay until the construction progress performance his or her work generated was inspected, verified, certified and approved for payment.

The government's **earmark** argument misses the mark because it completely ignores weekly certified payroll payments to 9 out 10 workers.

Between May 1 and May 28, 2004, Aubrey and Lodgebuilder paid **$79,783.91** from the Fort Defiance Payroll Account #1007153 in certified weekly payroll and related expenses to/for workers for the Chilchinbeto onsite-infrastructure development and 90 home construction project. *Exhibit 581-2.0135-0143, BANK_06539-06547*. Between June 1 and June 30, 2004, Aubrey and Lodgebuilder paid **an additional $50,205.60** from the Fort Defiance Payroll Account #1007153 in certified payroll and related expenses to workers for the construction performance progress at the Chilchinbeto on-site development and 90 home construction project. CDE 153-1;EOR 2854-2861;*Exhibit* 581-2.0144-0150,BANK_06548-06554). Accordingly, for FDHC labor payroll alone, Aubrey/Lodgebuilder was entitled to reimbursement of **$129,989.51** (**$79,783.91** + **$50,205.60**) from the **$133,700** construction progress performance payment.

Second, Aubrey authorized and signed (on 6/16/2004) an $84,000 check from Fort Defiance Development Account #1002410 to pay White Mesa Materials, Inc. for the progress from 20% to 50% in the category designated as "streets" for materials and labor associated in the exact amount sought for the construction progress payment in line item #1450 for site improvement directly related to "streets" between the May 1, 2004 Requisition #12 [*Exhibit 39(A), HUD_00638*] and the June 9, 2004 Requisition #13 [*Exhibit 40(A)(2), HUD_00653*]. CDE 185;EOR 724. This $84,000

check cleared on 6/22/2004 before the 6/24/2004 personal check at issue in count 5. *Exhibit 580-1.00101-0102;BANK_06278-06279 &BANK_07082* (underlying original check referenced in Exhibit 580-1.00101-102) & EOR 2853 (C.R. 153-1, Exhibit A, pages 1-4).

When this **$84,000** Aubrey June 16, 2004 payment to concrete subcontractor White Mesa, Inc. is added to the **$79,783.91** Aubrey FDHC May 1 to May 28, 2004 payroll payments, the very records the government's CPA/Auditor expert witness introduced into evidence shows that Aubrey paid **$163,783.91** to workers and concrete subcontractor White Mesa **before** NHA had even issued the **$133,700** construction progress performance reimbursement requisition #13 check (*Exhibit 40(c)*;SER192-193). If you add the **$50,205.60** in June 1 to June 30, 2004 payroll payments paid by Aubrey; the total Aubrey paid to workers and concrete subcontractor White Mesa in May and June of 2004 increases to **$213,989.51**.

Therefore, the **$133,700** was, **in fact, a reimbursement, not an earmark**, and Aubrey's use of $25,400 on June 24, 2004 from that reimbursement could not constitute criminal embezzlement or theft or conversion or misapplication.

The government argues in its response that ditch-and-backfill work was not performed between May 1, 2004 and June 9, 2004 because Four States had installed PVC conduits and high-voltage cables "in those ditches" before May 1, 2004 and

therefore, the ditches were already dug prior to May, 1, 2004. *Red Brief 33-34*. This argument, however, overlooks the fact that "backfill" (i.e, filling up the ditches with dirt after conduits and high-voltage cables were put in place in April 2004, a far more complicated construction activity than the original "ditch" work) was performed by FDHC Chilchinbeto project laborers/workers between May 1, 2004 and June 9, 2004 and the fact that Aubrey paid each worker performing "backfill" as part of the **$79,783.92** May 2004 certified weekly payroll and the **$50,205.60** June 2004 certified weekly payroll. It also ignores that NHA inspectors verified, certified and approved construction progress in the June 9, 2004 construction draw for $36,000 for construction progress from 85% to 100% in "site electrical" [*compare Exhibit 39(A);HUD_00638 – 85%, with Exhibit 40(A)(2);HUD_00653 – 100%*] related specifically to the "backfill" to bring this aspect of the on-site development to 100% complete.

The government asserts that "even if the June requisition payment had been based on Lodgebuilder's ditch and backfill work, that would show only that Aubrey again paid himself before paying a contractor (Four States) that was owed payment for its site electrical work ... ." *Red Brief 34*. False. Aubrey had already paid each and every laborer/worker who performed the "backfill" work so the payment was neither a payment to himself nor an earmark but rather a reimbursement for his monies paid

for the precise work which resulted in the % increase in total construction progress.

The government's count 5 proof centered exclusively on check #2269 and the testimony that $25,400 of the June 17, 2004 reimbursement check was the source of funds for a portion of a June 24, 2004 $50,000 check to Paris Casino by Bill Aubrey. *Exhibit 40(D)*. Yet no rational jury could conclude that the government had proven beyond a reasonable doubt that "monies" paid in reimbursement – when the trial evidence relevant to count 5 established that Aubrey paid all labor, vendor and subcontractor costs directly associated with Requisition #13 – continued to "belong to an Indian tribal organization" or where "intrusted" to and Indian tribal organization employee, officer or agent which is an essential element of 18 U.S.C. § 1163. The court must set aside the verdict and enter an acquittal.

3. Insufficient Evidence For Count 4 Conviction. (*Blue Brief 33-38*)

Recognizing that (a) overall deposits made by Aubrey/ Lodgebuilder into the relevant Aubrey bank account from non-FDHC construction progress performance reimbursement payments **exceeded** expenditures for personal expenses **by more than one million dollars** (therefore non-FDHC sources paid for all personal expenditures), and (b) deposits in the relevant time period for count 4 made by Aubrey/Lodgebuilder into the Chilchinbeto FDHC development and payroll accounts **exceeded** the

construction progress performance reimbursements from Requisitions #11 and #12 **by almost $200,000 ($690,400 -$494,300 = $196,100**) (therefore non-FDHC sources paid for the $141,980 personal expenses between May 20 and June 8, 2004), *see Blue Brief 33-38*, the government makes several unpersuasive arguments to uphold Aubrey's count 4 conviction.

First, the government repeats (*Red Brief 29*) the discredited premise that construction progress performance percentage (%) draw-downs are dollar-for-dollar "earmarks" despite 48 C.F.R. § 31.102 clear direction that "fixed price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at an agreement on the total price" and 24 C.F.R. § 85.21(a),(c)&(d) provision that "grantees or subgrantee ... may use the percentage of completion method to pay construction grants." *See supra at 3-10*.

Second, the government argues (*Red Brief 31*) that Aubrey was **not** entitled to "front money for certain project costs" and then be reimbursed for the monies he fronted. This argument is nonsensical because under by law Aubrey was required to pay certified weekly payroll for 9 out of the 10 workers and to do he had to front monies as he never received any advances. No worker was required to wait for a "dollar-for-dollar" earmark payment before he or she was paid; instead, it was Aubrey who had to wait until % construction progress performance was paid to offset the

substantial monies he "fronted" for project labor. FDHC Chilchinbeto payroll expenses totaled **$106,553.52** for March, 2004 (*Exhibit 581-2.118-127*), **$75,046.49** for April, 2004 (*Exhibit 581-2.128-134*), and **$79,783.91** for May, 2004 (*Exhibit 581.2-135-143*). Combined these three months total **$261,383.92**. The government's argument thus confuses "paying himself" with "reimbursing for monies already paid" which are two distinct concepts.

Third, the monies to pay unpaid subcontractors (such as Four States Electric) and vendors in bankruptcy came, not from NHA, but from the $1 million in leveraged non-NAHASDA construction funding obtained by Aubrey (the general contractor) on behalf of FDHC (the owner of the 90 Chilchinbeto homes) for 46 of the 90 homes that Aubrey budgeted to use to pay vendors and subcontractors (*Exhibits 511,551& 558-3,USDA 515 contract*) but never funded until after FDHC"s bankruptcy (CDE 185;EOR 766-768 & 780; CDE205;EOR 2396-2426; CDE193;EOR 2737-2741). The additional monies paid came from Aubrey (CDE193;EOR2735-2737) because the remainder of the 30% budgeted leveraged non-NAHASDA construction funding for the other 44 homes was never funded by NHA or FDHC despite its contractual obligations to do so. Amounts were owed subcontractors and vendors due to the shortfall in funding because the $9,156,1000 NAHASDA funding (70% of the budgeted finding) could not pay for 99% construction and development completion.

The government's main argument to uphold Aubrey's count 4 conviction, therefore, centers on the failure to timely pay Four States Electric, a subcontractor, before 100% of the multiple sources of construction funding was received due to NTUA's and NHA's breach of its own regulatory and contractual duty to bring electrical power to Chilchinbeto. *Red Brief 10-11&18-20 &29*. This argument (failure to timely pay Four States Electric) is in direct conflict with NHA's formal determination (*Exhibits 516&516-1*) and NHA CFO Lynch's trial testimony that NHA owed $120,000 per home or $10.8 million dollars, and the difference between the $9,156,100 NAHASDA monies paid and the $10,800,000 NAHASDA monies due FDHC and Aubrey/Lodgebuilder would have paid **all** outstanding amounts owed to Chilchinbeto subcontractors/vendors. CDE180;EOR1965-1967.

Yet, even setting aside NHA's formal determination and trial testimony that NHA owed FDHC and Lodgebuilder/Aubrey $10.8 not $9.1 million dollars for the 99% verified, certified and approved construction performance progress, the failure to timely pay a subcontractor is not the crime set forth in 18 U.S.C. § 1163. The monies must be proven beyond a reasonable doubt to belong to an Indian tribal organization or to be intrusted to an employee, officer or agent of an Indian tribal organization. No one could seriously argue that the Navajo Nation, NHA and FDHC (all three of which are defined under 18 U.S.C. § 1163 as an "Indian tribal

organization") were entitled to **property** consisting of 90 high quality homes which were at 99% verified, certified and approved construction performance progress (and the related on-site infrastructure including streets, street lights, etc.) **yet still owned all** the monies or funds paid for that construction performance progress. To uphold this verdict, that is the position the government takes. This Court should reverse Aubrey's count 4 conviction and remand for entry of judgment of acquittal.

B. The Trial Court Erred In Its Jury Instructions When It Omitted Aubrey's Theory Of Defense Language For Counts 5 And 4 In Its Final Instructions After It Had Given The Same Or Similar Language In Its Preliminary Instructions. (*Blue Brief 15-16 & 39-45*).

The government argues (Red Brief 34-35) that plain error is the standard of review even though the trial court gave preliminary instructions incorporating Aubrey's theory of the case and defense to counts 5 and 4. CDE 123;EOR43-46& 2795-2798; CDE 177:EOR 215-216. Equally important, contrary to the government's assertion and *United States v. Hofus*, 598 F.3d 1171, 1175-1176 (9th Cir. 2010), Aubrey did more than simply cite to a proposed instruction that contained the language omitted. Instead, Aubrey preserved his claim by directing the trial court to the exact language he was requesting [which was previously given by the trial court] and the reasons why. CDE 205;EOR2473-2474 ("With respect to Instruction 16 ... I would object and request the Court give Defendant Aubrey's Proposed Jury

Instruction No. 11 in Court Record 123 with emphasis being lines 11 through 19 ... the first element is the specific intent crimes ... **Then not every conversion or misapplication is a crime under the statute. It has to be money or funds belonging to an Indian Tribal Organization.** And then the third element is the jury has to find as a matter of fact that it is an Indian Tribal Organization.") (emphasis added).

Therefore, the instructions failed to inform the jury that if it found that the monies belonged to someone else (not only Aubrey but a subcontractor or vendor) after payment for certified, verified and approved construction performance progress– it must acquit. Nowhere else in the final jury instructions was this defense adequately covered. CDE 182;EOR2484-2498 & CDE 152;EOR2823-2849.

The government argues that the trial court correctly instructed as to the first element, the meaning of "conversion", "willful misapplication", "embezzlement" and "stealing". *Red Brief 36-37*. True, as the trial court gave Aubrey's proposed instructions. *Compare* CDE123;EOR2818-2821 *with* CDE152;EOR2844-2847& CDE182;EOR2496. While it is also true that each of the first element instructions included the phrase "of another" (*Red Brief 36*), this phrase, without the precise definition tendered by Aubrey, would include vendors and subcontractors, who are **neither** Indian tribal organizations (unlike NHA, FDHC and the Navajo Nation) nor

officers, employees, or agents of an Indian tribal organization.

The flaw in the government's argument (Red Brief 37-40) is that Aubrey's theory of defense was that, upon certified, approved and verified inspection by both NHA and FDHC, the monies paid for that construction performance progress no longer belonged to an Indian tribal organization but instead now belonged to Aubrey, his company Lodgebuilder, or if not him and his company, the vendors and subcontractors his construction foreman hired for the Chilchinbeto 90 home and on-site infrastructure project, pursuant to Lodgebuilders's development, construction and consulting agreement with FDHC. The trial court's preliminary instructions to the jury and Aubrey's proposed instruction included language so instructing but the final jury instruction did not. CDE123;EOR42-55 & CDE205;EOR83-85; CDE 182;EOR 91-95;2493-2495; CDE177;EOR215-216.

The government argues that Aubrey failed to read the instructions "as a whole, and in context" with respect to the "intrusted" statutory language. *Red Brief 37-39*, citing *United States v. Booth*, 309 F.3d 666, 572 (9th Cir. 2002) & CDE88;EOR39. Not true. The "intrusted" statutory language in 18 U.S.C. § 1163 is applicable to a factual scenario where the Indian tribal organization does not own the "monies, funds or properties" but the same is "intrusted" to its "officer, employees or agents" and subsequently converted, stolen, misapplied or embezzled – for instance, an Indian

tribal organization employee steals or embezzles or converts or misapplies a rental or leased vehicle or funds or monies loaned to an Indian tribal organization. That is not the situation with verified, certified, and approved construction performance progress payments which were paid only upon inspection by both NHA and FDHC. And that is why the monies and funds paid for verified, certified and approved construction performance progress belonged to someone else (either Aubrey or subcontractors or vendors) rather than NHA or FDHC, as agents of the Navajo Nation.

Therefore, the jury instructions, read as a whole, impermissibly permitted the jury to convict Aubrey of embezzlement, theft, conversion or misapplication based upon the mere failure to timely pay all subcontractors before 100% of the multiple sources of construction funding was received. That is not the crime set forth in 18 U.S.C. § 1163 as the monies must be proven beyond a reasonable doubt to belong to an Indian tribal organization. 18 U.S.C. § 1163; CDE123;EOR45-54.

C. The Trial Court Erred In Admitting Expert Testimony And Exhibits As Summary Testimony And Exhibits And Rejecting Aubrey's Mistrial Motion. (*Blue Brief 16 & 46-49*)

The government asserts that there "is no merit to Aubrey's ... argument (Br. 48-49) that Hoogoian gave what amounted to expert testimony because, to prepare the summary charts, he performed calculations under a basic accounting method". *Red*

Brief 44. Yet the government points to a case (Red Brief 41) which recognizes similar testimony for what it is, namely, expert testimony. *United States v. Intercontinental Industries, Inc.*, 635 F.2d 1215, 1220 (6th Cir. 1980) ("In order to determine which INI funds were used for payroll it was necessary to trace the funds through the general account to the payroll account. The district court accepted the conclusions of the **government's expert witness**, Robert Campbell, concerning the amount of INI funds that ended in Prebuilt's payroll account. ... The government used a last-in-first-out (LIFO) method to determine whether any INI funds were included in the transfers from the general account to the payroll account.") (emphasis added). The trial court here ruled that "comparing different accounting methods would implicate an area of expertise" (*Red Brief 42*);CDE 203;EOR 2086-2091). This ruling is a telling and implicit recognition that using either LIFO or FIFO or comparing the two, in the complex financial transactions in this criminal prosecution, constituted expert testimony. *Intercontinental Industries*, 635 F.2d at 1220.

The trial court error (*Red Brief 46-47*) was not harmless. The choice of which among several alternative accounting methods to use – and the application of an accounting method such as LIFO – is based upon Federal Rule of Evidence 702 education, training, experience and skill of the person performing the expert forensic accounting application. *United States v. Henshaw*, 388 F.3d 738, 741 (10th Cir. 2004)

("There are several alternative methods, none of which is optimal for all commingling cases; courts exercise case-specific judgment to select the method best suited achieve a fair and equitable result on the facts before them."). The "last- in-first out" (LIFO) method that relates deposits and withdrawals based on temporal contiguity" is one of several choices. *Henshaw*, 388 F.3d at 741.

The choice of which alternative is critical, especially where, as here, **non**-FDHC construction progress performance payment deposits contained in the trial record into the Aubrey/Todd Account #1101419 total **$3,163,134.44** and the "personal expenditures by Aubrey" identified by Hoogoian total **$1,965,341**. Where is the proof beyond a reasonable doubt of misapplication, conversion, embezzlement or theft when deposits of personal funds exceed personal expenditures **by more than one million dollars**? Further, not one of the thousands of calculations implicit in the use of the equitable substitute for specific identification of funds was disclosed. CDE 180;EOR 57-67 & CDE183;EOR2676.

And the identification that LIFO was the method used was made for the first time after objection during trial. Accordingly, Hoogoian's choice of which alternative method among several (comparison of overall deposits from sources or LIFO or FIFO, among others) to use – combined with his choice **not to analyze** either the FDHC Development Account which paid **more than $8 million** (**Defense Exhibit**

580-4) (*Defense Exhibit 580-1.0058, .0060, .0062, .0065, .0069, .0072, .0076, .0080, .0086, .0089, .0093. .0097, .0099, & 0101*) or the FDHC Payroll Account paid **more that $1.6 million** (*Defense Exhibit 581-4*) (*Defense Exhibit 581-2.0004, .0008, .0013, .0020, .0030, .0047, .0065, .0082, .0099, .0108, .0118, .0128, .0135, & 0144*) or the fact that from theses two accounts paid out more than the $9.1 million dollar construction progress performance reimbursements (CDE203;EOR2148-2153&2154-2157) – makes this case nothing like *United States v. Weaver*, 281 F.3d 228 (D.C. Cir. 2002), *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006), and *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985). *Red Brief 45-46*.

Second, the government characterizes as "dubious" Aubrey's contention that "specific identification is required as an element" of a Section 1163 offense and "the use of 'last-in-first-out' is an impermissible "equitable substitute for" such identification. *Red Brief 44-45*. Far from dubious, 18 U.S.C. § 1163 explicitly provides as an element of the offense that the "monies or funds" must "[belong] ... to ... [an] Indian tribal organization, or be "intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization." 18 U.S.C. § 1163. Contrary to the government's assertion (*Red Brief 45 n.7*), Aubrey did request a jury instruction containing a specific identification element (*see supra* at 19-21 because the "goal of

'tracing' is not to trace anything at all in many cases, but rather [to] serve [ ] as an equitable substitute for the impossibility of specific identification." *Henshaw*, 388 F.3d at 740-741. *United States v Lequire*, 672 F.3d 724, 731 ("money can be converted despite commingling if the funds can be identified, segregated, and an obligation to treat it in a specific manner can be established").

Unlike the Veterans Affairs benefit payments which by congressional statute retain special status even after payment, *United States v. Griffith*, 584 F.3d 1004, 1021 (10th Cir. 2009), construction performance progress payments are not contracts for items to be paid but instead construction draw-downs for work completed. The government's answering brief recognizes that, given that neither NHA nor FDHC were required and did not maintain separate accounts and instead commingled funds – together with the fact that only 70% of the Chilchinbeto construction funding for 90 homes and on-site infrastructure came from NAHASDA funding – Aubrey had no regulatory duty under 24 C.F.R. § 85.21(h)(2) and no contractual duty to maintain multiple separate construction accounts for each individual project.

Third, while *United States v. Anekwu*, 695 F.3d 967, 981-982 (9th Cir. 2012) does stand for the proposition that there is no "bright-line rule against the admission of summary charts as evidence" (*Red Brief 44*), the case also should be limited to its facts because "the district court ... found no risk of undue prejudice under Rule 403,

especially since Anekwu did not object to the accuracy of the summary chart." *United States v. Anekwu*, 695 F.3d 967, 981-982 (9th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 2379 (2013). Here, in contrast, Aubrey made a continuing objection to government exhibits 24(D), 25(D), 26(D), 27(D), 28(D), 29(D), 30(D), 32(D), 34(D), 36(D), 37(D), 39(D), 40(D), and 42 based upon there inaccuracy and made a mistrial motion based upon the use of an accounting method as an equitable substitute for the requisite specific identification of trial organization monies and funds. CDE180;EOR2012-2051;CDE203;EOR2065-2158. This Court should reverse and remand for a new trial.

D. The Trial Court Erred In Its Advisory Guideline Sentencing Calculation. (*Blue Brief 16-17 & 50-58*)

1. The Trial Court Erred In Imposing Over Aubrey's Objection A 16 Level Specific Offense Characteristic Increase For Loss Under USSG 2B1.1(b)(1) (Nov. 2012). (*Blue Brief 52-56*)

While a calculation of the amount of loss under USSG § 2B1.1(b)(1) (2012) is a factual finding reviewed for clear error, *United States v. Garro*, 517 F.3d 1163, 1167 (9th Cir. 2008), a guideline enhancement based upon uncharged conduct which increases the advisory guideline range from 27-33 months to 51-63 months requires that the trial court use a clear and convincing evidence standard, *United States v. Munoz*, 233 F.3d 1117, 1126-1127 (9th Cir. 2000), which it did not do here.

CDE183;EOR 103;2645-2714. In response, the government argues (*Red Brief 47-52*) that two measures provide the requisite clear and convincing evidence.

First, while NHA claimed that it spent "an additional 1.1 million dollars to pay subcontractors and vendors in full for their work on the Chilchinbeto project", PSR ¶ 23, absolutely no proof was presented during trial (Shepherd: CDE117;EOR 291-382; CDE178:EOR392-592;&CDE185;EOR 604-833); (Porter: CDE194;EOR1262-1555); (Lynch: CDE180;EOR1858-2012), or during the sentencing hearing (CDE183:EOR 2645-2714), or during the restitution hearing (CDE:193;EOR2722-2764), to back up this unsupported claim of NHA monies spent to pay subcontractors and vendors.

Instead, the monies to pay unpaid Chilchinbeto subcontractors and vendors in bankruptcy came from (a) the $1 million in leveraged non-NAHASDA construction funding obtained by Aubrey (the general contractor) on behalf of FDHC (the owner of the 90 Chilchinbeto homes) for 46 of the 90 homes that Aubrey budgeted to use to pay vendors and subcontractors (*Defense Exhibits 511, 551 & 558-3, USDA 515 contract*) but was never funded until after FDHC's bankruptcy (CDE 185;EOR 766-768 & 780; CDE 205;EOR 2396-2426; CDE 193; EOR 2737-2741); and (b) Aubrey's own monies (CDE 193;EOR 2735-2737).

///

Additional monies from Aubrey were necessary because the remainder of the 30% budgeted leveraged non-NAHASDA construction funding for the remainder of 44 homes was never funded (despite FDHC's contractual obligation to do so). The 1.1 million NHA claim is for NHA's untimely payment to NTUA to extend the power lines 13 miles to Chilchinbeto despite the Navajo Nation Council Resolution requiring that NTUA "shall ensure that all homes ... have power ... within seven (7) calendar days from the date of the contractor's request, once the buildings are substantially completed." *Defense Exhibit 568-1, ¶ 4*; *Defense Exhibit 606.0023 (2004 FY IHBG, electrical upgrade, 90 homes, Chilchinbeto)*. Prior to NHA's July, 2004 direct involvement in the Chilchinbeto 90 home and on-site housing development, NHA's own inspectors verified and certified 97% total progress completion from June, 2003 to June 2004 (and 99% by January, 2005). CDE187;EOR939. However, without power (no fault of Aubrey or Lodgebuilder or FDHC) the Chilchinbeto homes could not be given certificates of occupancy.

Further, NHA Grants Manager Shepherd testified that NHA "never paid" Requisition #14 from Aubrey and his company Lodgebuilder for verified, certified and approved progress by NHA's own inspectors and a contractual duty to make such payments. CDE187;EOR939. These facts are why NHA sought **no** restitution. CDE 193;EOR2645-2714.

Second, the government is wrong when it asserts (*Red Brief 50*) that "the trial testimony and summary exhibits of auditor Hoogoian showed that, over the course of the Chilchinbeto project, Aubrey paid more than 1.9 million in personal expenses from money that is traceable to grant payments." SER 197(*Exhibit 42*). Construction progress proceeded at the 90 home Chilchinbeto project from 0% total progress in June, 2003 to 88% total progress verified, inspected and approved through January, 2004 (*Exhibit 34(A)*) with **no** unpaid invoices to vendors or subcontractors (*Exhibit 44*) hired by Lodgebuilder on behalf of FDHC in accordance with the parties 2002 Development/Consultant Agreement (*Exhibit 500; Exhibit 13*).

Therefore, assuming for the sake of argument only that *Exhibit 42*, Requisitions #1-#8, accurately "trace" grant funds (which it does not as it ignores non-grant fund deposits of Aubrey's and Lodgebuilders' monies), then Aubrey and his company paid **all** Requisition #1-#8 invoices to vendors or subcontractors with his own monies (as the trial evidence conclusively showed none were unpaid between June, 2003 through January, 2004) before Aubrey and Lodgebuilder received, based upon NHA and FDHC inspection, construction performance progress payment associated with the labor, vendors, and subcontractors. Reimbursements for prior payment is not "loss" and the total for Requisitions #1 through #8 is **$1,727,128.00, which is most of the $1,965,341 total**. *Exhibit 42*; SER 197 (adding final two columns for Requisitions #1-

#8). Including this amount as "loss" is clear error based upon flaw methodology.

Similar problems exist with *Exhibit 42*, Requisition #9 ($50,791) and Requisition #11 ($10,000 + $10,042 = $20,042) because the methodology does not account for the March 17, 2004, $800,000 (*Exhibit 599-2;BANK_01868*) deposit into the Aubrey/Todd Account #1101419 from a **non**-FDHC source which more than covers the personal expenditures claimed to have been "traced" to grant funds. Overall deposits in the relevant Aubrey bank account from non-FDHC source construction progress performance payments exceeded expenditures for personal expenses by **more than one million dollars**. And over $4 million for the FDHC Development Account (*compare Exhibit 580-4 with 580-5*) and over $600,000 for the FDHC Payroll Account (*compare Exhibit 581-4 with 580-5*) came from sources other than Chilchinbeto construction performance progress reimbursement payments. For all these reasons, this Court should reverse and remand to the trial court for an evidentiary hearing and re-sentencing.

2. The Trial Court Erred In Imposing Over Aubrey's Objection The 2 Level Enhancement For Abuse Of Private Or Public Trust Under USSG § 3B1.3 (Nov. 2012). (*Blue Brief 57-58*)

Aubrey neither held a position of public or private trust within the meaning of the advisory sentencing guidelines nor did his position significantly facilitate the

commission of the crime. *See United States v. Contreras*, 581 F.3d 1163, 1164-1165 (9th Cir. 2009), *opinion adopted in part and vacated in part*, 593 F.3d 1135 (9th Cir. 2010) (*en banc*) (reversed) (two step inquiry). The government's argument conveniently ignores that Aubrey did not receive one penny of NAHASDA funds until and unless both the NHA inspector and FDHC inspector independently verified, certified and approved the construction performance progress as a predicate to FDHC's contractual obligation to make reimbursement payments to Aubrey and his company Lodgebuilder. Aubrey had no access to any FDHC funds except when paid for verified, certified and approved construction progress. Therefore, verified, certified, and approved construction performance progress inspection by NHA and FDHC – rather than "professional or managerial discretion", *see United States v. Laurienti*, 731 F.3d 967, 973 (9th Cir. 2013), triggered all NAHASDA payments and provided oversight. FDHC did not simply hand Aubrey millions in grant funds. *Red Brief 54*. Instead, the economic reality was no construction performance, no construction progress, no construction payment - irrespective of construction costs.

The gist of the misapplication convictions was the timely failure to pay all vendors and subcontractors. The commentary to USSG § 3B1.3 (2012) provides that "[f]or this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of

the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult)." USSG § 3B1.3, comment. (n.1) (2012). Non-payment to some vendors and subcontractors was an activity easy to observe and easily detected. Aubrey's position made it easier, not more difficult, to detect and assign responsibility. *See Laurienti*, 731 F.3d at 874 ("That position 'provide[d] the freedom to commit a difficult-to-detect wrong.").

IX.

CONCLUSION

Aubrey respectfully requests this Court reverse the judgment of the trial court and remand for entry of judgment of acquittal on all counts, or alternatively, remand for a new trial or a re-sentencing.

DATED this the 25th day of November, 2014.

Respectfully Submitted:

/s/ Michael J. Kennedy
Michael J. Kennedy
Chief Assistant Federal Public Defender

X.
CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 13-10510

I certify that:

The Opening Brief is

__X__ **Proportionately spaced, has a typeface of 14 points or more and contains 6939 words.**

or is

___ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ____ lines of text

or is

__ In conformance with the type specifications set forth at Fed. R. App. P. 32a(a)(5) and does not exceed _____ pages

/s/ Michael J. Kennedy
Michael J, Kennedy
Chief Assistant Federal Public Defender
Counsel for William Aubrey

XI.
CERTIFICATE OF SERVICE

When all Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on November 25, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael J. Kennedy
Signature