Nos. 14-1313, 14-1331, 14-1338, 14-1342, 14-1407, 14-1484, and 15-1060
[Oral Argument Requested]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MODOC LASSEN INDIAN HOUSING AUTHORITY, et al.,

Plaintiffs/Appellees,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
[District Court Case Nos. 05-cv-0018-RPM, 08-cv-0451-RPM, 08-cv-0826-RPM, 08-cv-2572-RPM, 08-cv-2577-RPM, 08-cv-2584-RPM, 07-cv-1343-RPM (Judge Matsch)]

BRIEF FOR APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
DOFA	Date of Full Availability
FCAS	Formula Current Assisted Housing Stock
FRF	Formula Response Form
HUD	U.S. Department of Housing and Urban Development
NAHASDA	Native American Housing Assistance and Self-Determination Act
TAR	Tenant Account Receivable

RELATED APPEALS

Prior Related Appeal

Fort Peck Housing Auth. v. HUD, 367 F. App'x 884 (10th Cir. 2010) (unpublished)

Cross-Appeal (being separately briefed, by order of the Court)

Choctaw Nation v. HUD, No. 14-1340

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1346, and 1362, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *See* Aplt. Appx. 10, 691, 1312, 1975, 2158-59, 2479, 3913. This Court has jurisdiction under 28 U.S.C. § 1291. The dates of the district court's final judgments disposing of all parties' claims and the dates of the corresponding timely notices of appeal are set forth in the footnote below.[1]

STATEMENT OF THE ISSUES

Each year, Congress appropriates a fixed sum of money to help more than 500 Native American tribes provide affordable housing to their low-income members. The Department of Housing and Urban Development (HUD) is responsible for allocating that fixed sum among the tribes. To determine each tribe's share, the

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[1] No. 14-1313: Judgment June 10, 2014. Notice of Appeal August 8, 2014.

No. 14-1331: Judgment June 19, 2014. Notice of Appeal August 15, 2014.

No. 14-1338: Judgment June 25, 2014. Notice of Appeal August 20, 2014.

No. 14-1343: Judgment June 30, 2014. Notice of Appeal August 26, 2014.

No. 14-1407: Judgment August 6, 2014. Notice of Appeal October 3, 2014.

No. 14-1484: Judgments September 22, 2014. Notice of Appeal November 20, 2014.

No. 15-1060: Judgments January 16, 2015. Notice of Appeal February 20, 2015.

See Aplt. Appx. 650-53, 1250-53, 1961-65, 2147-50, 2462-65, 3877-99, 6000-31.

agency applies a regulatory formula that HUD and the tribes developed cooperatively. Under the formula, a tribe's allocation is based on several factors, including, as relevant here, the number of legacy low-income housing units that the tribe owns. In these cases, HUD concluded that the plaintiff tribes received disproportionately high shares of several appropriations, because the tribes had included ineligible housing units in the data HUD used to compute their allocations. HUD recovered the overpayments from the plaintiff tribes and redistributed the recovered funds to the tribes that should have received them. The questions presented are:

1. Whether the criteria HUD uses to determine whether a tribe receives credit in the allocation formula for a particular legacy housing unit are valid, and whether HUD applied those criteria reasonably in these cases.

2. Whether HUD had the authority to recover grant funds erroneously paid to the plaintiff tribes, so that HUD could redistribute those funds to the tribes that should have received them.

3. Whether HUD must provide a formal evidentiary hearing before recovering overpayments, and, if so, whether HUD's failure to provide a formal hearing prejudiced plaintiffs.

4. Whether the district court's orders requiring HUD to repay the tribes out of all available funding sources were orders to pay "money damages," in violation of the Administrative Procedure Act's (APA) limited waiver of sovereign immunity.

STATEMENT OF THE CASE

A. Statutory Background

1. Before 1997, HUD provided financial assistance to Native American housing authorities under a variety of programs. Some programs helped low-income Native American families obtain rental housing. Others were designed to assist families in becoming homeowners, including the rent-to-own programs (known as "Mutual Help" and "Turnkey III") that are relevant here. *See* 42 U.S.C. § 1437bb (1988); 24 C.F.R. § 805.101 & pt. 805, subpts. A & D (1977).

Under the rent-to-own programs, HUD provided annual financial assistance to a tribe to subsidize the cost of developing and operating a specific public-housing project. *See Fort Peck Hous. Auth. v. HUD*, 367 F. App'x 884, 885 (10th Cir. 2010) (unpublished); 42 U.S.C. § 1437c (1976).[2] The tribe then entered into rent-to-own contracts with tribe members who were interested in acquiring units in the project. The rent-to-own contracts required the homebuyer to initially contribute land, labor, or cash and then to make monthly payments for a period of time up to 25 years. *See* 24 C.F.R. §§ 805.103(b), 805.408, 805.410-805.412, 805.416 (1977). The purchase price of the homebuyer's unit was established at the start of the rent-to-own period and declined each year according to a predetermined amortization schedule, reaching

[2] This funding was provided to each tribe's housing authority. For the purposes of this appeal, the distinctions between a tribe and its housing authority are not significant, and we use the term "tribe" (and individual names of tribes and/or their housing authorities) in this brief to refer to both a tribe and its housing authority.

zero at the end of the rent-to-own period. 24 C.F.R. § 805.422(b) (1977). The homebuyer could purchase the unit from the tribe at any point during the rent-to-own period by paying the purchase price listed in the schedule or by waiting until the purchase price reached zero at the end of the period. *Id.* Notably, unlike under many rent-to-own contracts, the decline in a home's purchase price was based on a preset schedule and not on the size of the monthly payments a homebuyer made (the monthly payments were themselves based on a homebuyer's income).

2. Federal housing assistance to tribes changed significantly in 1997, with the enactment of the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (codified as amended 25 U.S.C. § 4101 *et seq.*) (NAHASDA); *Fort Peck*, 367 F. App'x at 885-86. The statute eliminated most of the earlier Indian housing assistance programs and terminated the various types of housing assistance that tribes had received. *See* 63 Fed. Reg. 12,334, 12,334-35 (Mar. 12, 1998); 25 U.S.C. § 4181(a). The statute replaced those various types of assistance with the Indian Housing Block Grant program, under which each tribe receives a single block grant for all of its affordable housing activities. *See* 63 Fed. Reg. at 12,334-35; *Fort Peck*, 367 F. App'x at 885.

The statute tasked HUD and representatives from the tribes with jointly developing a formula for allocating any congressional appropriation made under the new block-grant system across all eligible tribes—i.e., a formula for determining the size of each tribe's share of the total appropriation. *See* 25 U.S.C. §§ 4152(a), 4116.

The statute required that the formula "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." 25 U.S.C. § 4152(a) (Supp. II 1996). Because any appropriated funds must be divided among all eligible tribes, *see* 25 U.S.C. § 4151, the statute creates a zero-sum system in which an increase in the amount allocated to any one tribe necessarily requires reducing the size of the block grants other tribes receive. *See Fort Peck*, 367 F. App'x at 887 (noting that an overpayment made to one tribe "decrease[s] the funds available for the current needs of all Tribal Housing Entities").

B. Implementing Regulations

HUD and the tribes developed the allocation formula through a negotiated rulemaking, as NAHASDA required. *See* 63 Fed. Reg. at 12,334-35; 25 U.S.C. §§ 4116, 4152(a)(1). In addition to ten federal employees, 48 tribal representatives sat on the rulemaking committee that created the formula, including representatives from eight of the plaintiff tribes.[3] The committee acted by consensus, with every committee member having veto power. *See* 63 Fed. Reg. at 12,334.

The formula the committee agreed upon, which is codified at 24 C.F.R. §§ 1000.304-1000.340, has two main components: "Formula Current Assisted

[3] Those plaintiff tribes were Modoc, Tlingit (two representatives); Navajo (two representatives), Oglala Sioux, Lower Brule, Pueblo of Acoma, Aleutian, and Chippewa Cree. 62 Fed. Reg. 3972, 3976-77 (Jan. 27, 1997).

Housing Stock (FCAS)" and "Need." 24 C.F.R. § 1000.310. These appeals focus on the FCAS component.

The FCAS component of a tribe's annual allocation is equal to the number of certain legacy low-income housing units in the tribe's housing stock multiplied by a fixed dollar amount per unit. *See* 24 C.F.R. § 1000.316. As relevant here, a tribe's FCAS unit count for a particular fiscal year includes the number of rent-to-own units that the tribe owned, operated, or had in development when NAHASDA was enacted in 1997, less the following three adjustments. 24 C.F.R. §§ 1000.312, 1000.314, 1000.318. First, a tribe must subtract from its 1997 rent-to-own unit count any unit the tribe "no longer has the legal right to own, operate, or maintain . . ., whether such right is lost by conveyance, demolition, or otherwise." 24 C.F.R. § 1000.318(a). For example, when a tribe conveys a rent-to-own unit to a homebuyer who has purchased the unit, that unit can no longer be included in the tribe's annual FCAS count. Second, a tribe must remove from its 1997 count a legacy rent-to-own unit that the tribe did not "convey . . . as soon as practicable after [the] unit bec[ame] eligible for conveyance by the terms of [a homebuyer's rent-to-own contract.]" 24 C.F.R. § 1000.318(a)(1). In other words, a tribe may not avoid the first adjustment to its FCAS count by simply declining to convey an otherwise conveyance-eligible unit. Finally, a tribe may not count units in its FCAS that the tribe did not convey to a homebuyer at the end of the rent-to-own period because the homebuyer had not fully complied with his or her rent-to-own contract, where the tribe did not "actively

enforce strict compliance by the homebuyer with the terms and conditions of the [rent-to-own contract], including the requirements for full and timely payment." 24 C.F.R. § 1000.318(a)(2); *see also* Aplt. Appx. 221 (NAHASDA Guidance 98-19T, explaining 24 C.F.R. § 1000.318(a)).[4]

The regulatory formula requires that HUD calculate FCAS allocations first. Any remaining unallocated funds are then allocated to all eligible tribes through the formula's "Need" component, which takes into account such factors as the number of tribal households with housing costs that exceed 50 percent of household income, the number of tribal households that are overcrowded or lack a kitchen or plumbing, and the number of households with an annual income below specified thresholds. *See* 24 C.F.R. § 1000.324 ("After determining the FCAS allocation, remaining funds are allocated by need component."); *id.* (explaining how the "need" component is calculated). The net result is that for every housing unit that is erroneously included in a tribe's FCAS count, a tribe receives money that would otherwise have been divided among all eligible tribes. *See Fort Peck*, 367 F. App'x at 887 (noting that a "larger number of current [FCAS] units funded in a particular fiscal year decrease[s] the funds available for the current needs of all Tribal Housing Entities").

[4] Congress amended NAHASDA in 2008 and incorporated 24 C.F.R. § 1000.318 into the statute, affirming the regulation's validity. *See* Pub. L. No. 110-411, 122 Stat. 4319 (2008); 25 U.S.C. § 4152(b)(1) (Supp. II 2008). The events at issue in these appeals took place before 2008. Thus, the validity of 24 C.F.R. § 1000.318 under the pre-amendment version of NAHASDA remains relevant.

Finally, the regulatory formula provides that a tribe's block grant for any year cannot be less than the amount of federal assistance the tribe received for low-income housing in 1996, the year before NAHASDA was enacted. *See* 24 C.F.R. § 1000.340; 25 U.S.C. § 4152(d).

C. Administrative Proceedings

These consolidated appeals involve NAHASDA block grants to twenty-two tribes over several fiscal years.[5] As explained below, HUD concluded that each plaintiff tribe received a disproportionately high share of the NAHASDA allocation in one or more fiscal years, because the tribe's FCAS count for the relevant fiscal year had included ineligible units. HUD then recovered the overpayments from the tribes and redistributed the recaptured funds. The details of the administrative process

[5] The plaintiff tribes/housing authorities are: (1) The Modoc Lassen Indian Housing Authority (Modoc), which is the housing entity for the Grindstone Indian Rancheria of Wintun-Wailaki Indians of California; (2) Tlingit-Haida Regional Housing Authority (Tlingit); (3) Choctaw Nation of Oklahoma and its housing authority (Choctaw); (4) Navajo Housing Authority (Navajo); (5) Fort Peck Housing Authority (Fort Peck); (6) Sicangu Wicoti Awanyakapi Corporation (Sicangu), which is the housing entity for the Rosebud Sioux Tribe; (7) Oglala Sioux (Lakota) Housing (Oglala Sioux); (8) Turtle Mountain Housing Authority (Turtle Mountain) and (9) Trenton Indian Housing Authority (Trenton), both of which are housing entities for the Turtle Mountain Band of Chippewa Indians; (10) Winnebago Housing and Development Commission (Winnebago); (11) Lower Brule Housing Authority (Lower Brule); (12) Spirit Lake Housing Corporation (Spirit Lake); (13) Blackfeet Housing (Blackfeet); (14) The Zuni Tribe (Zuni); (15) Isleta Pueblo Housing Authority (Isleta Pueblo); (16) Pueblo of Acoma Housing Authority; (17) Association of Village Counsel Presidents Regional Housing Authority (AVCP); (18) Northwest Inupiat Housing Authority; (18) Bristol Bay Housing Authority (Bristol Bay); (20) Aleutian Housing Authority (Aleutian); (21) Chippewa Cree Housing Authority (Chippewa); and (22) Big Pine Paiute Tribe.

HUD used when it determined that the tribes had been overpaid due to inaccurate FCAS counts is set forth below.

1. Substance Of Administrative Proceedings

a. Each year, in preparation for applying the allocation formula, HUD mails each tribe a Formula Response Form (FRF) that includes a count of the tribe's FCAS unit inventory by housing project. *See* 24 C.F.R. § 1000.302; Aplt. Appx. 139-51 (sample FRF). The tribes are responsible for reviewing the FCAS unit counts and reporting any corrections to HUD. *See* Aplt. Appx. 139, 220-21; 24 C.F.R. § 1000.315 (2008). Those corrections include identifying units that are no longer eligible for inclusion in FCAS under 24 C.F.R. § 1000.318(a). *See*, *e.g.*, Aplt. Appx. 221.

In the early 2000s, HUD had reason to believe that some tribes were not updating their annual FCAS counts by removing rent-to-own units that the tribe (1) had conveyed to a homebuyer, (2) had never built, or (3) had not conveyed as soon as practicable after the unit became eligible for conveyance.

In many cases, HUD's conclusion that a tribe's FCAS count included ineligible units was based on information that the tribe itself provided. For example, in April 2001, Choctaw notified HUD that its annual FCAS counts for fiscal years (FYs) 1998 through 2001 had erroneously included units that the tribe had conveyed. *See* Aplt. Appx. 2242, 2245-47 (Choctaw document listing "negative adjustments" to its historical FCAS counts to reflect previously unreported conveyances); Aplt. Appx. 2296-2300. Similarly, in September 2001, Oglala Sioux provided HUD with a list of

42 units that the tribe conveyed between 1984 and 2000, all of which had been included in the tribes FCAS counts for FYs 1998 through 2001. *See* Aplt. Appx. 2801-14.

Indeed, almost every plaintiff tribe either informed HUD explicitly that its FCAS counts had improperly included units that the tribe had conveyed (or never built), or submitted information about conveyances to HUD that revealed that the tribe's FCAS counts had been overstated. *See*, *e.g.*, Aplt. Appx. 2613-18; 2662-70 (2003 letter from Sicangu to HUD listing units that the tribe conveyed between 1994 and 2002, many of which were erroneously included in its annual FCAS counts for several years); Aplt. Appx. 3058-63 (2002 letter from Turtle Mountain to HUD listing 40 conveyances and the relevant conveyance dates; although 27 of those conveyances occurred before FY 1998, Turtle Mountain's FCAS counts for FYs 1998-2002 nonetheless included them); Aplt. Appx. 3338, 3350, 3353, 3360 (2002 letter from Winnebago informing HUD that its FCAS counts for FYs 1998-2001 included 14 units that were never constructed); Aplt. Appx. 3522-27 (2002 fax to HUD from Lower Brule reporting that 63 rent-to-own units that were counted in the tribe's FCAS for FYs 1998-2002 had been conveyed before October 1997); Aplt. Appx. 4019-47, 4050-52 (2001 letter and supporting documentation from Blackfeet indicating that many units included in its FYs 1999-2002 FCAS counts had been previously conveyed); Aplt. Appx 4669-72 (2001 letter from Acoma reporting conveyance dates for 15 units, many of which were included in Acoma's annual FCAS

counts long after they had been conveyed); Aplt. Appx. 5258-61, 5271 (letters from Bristol Bay informing HUD that the tribe's FCAS counts for FYs 1998-2000 mistakenly double-counted 20 units and that its FY 2000 FCAS inventory included two units that were never built); Aplt. Appx 5651, 5656 (October 2000 letter from Chippewa reporting that seven units included in its FCAS counts for FYs 1998-2000 had been conveyed in the 1980s); Aplt. Appx 5514-28 (2003 fax from Aleutian Housing Authority notifying HUD of 15 previously unreported conveyances).

HUD also noticed that the FCAS counts for some tribes included housing units whose rent-to-own period had expired, suggesting that the unit's purchase price had reached zero and could have been conveyed to the homebuyer.[6] In such cases, HUD asked the tribes to indicate whether the units had been conveyed and, if not, to explain why the units had not been conveyed, so that HUD could determine whether conveyance had been impracticable. *See*, *e.g.*, Aplt. Appx. 218, 874, 2412, 2703, 2907, 2930, 3443, 3611.

Some tribes did not respond to HUD's inquiries, despite repeated requests from HUD for information. In those cases, HUD informed the tribes that it would

[6] Each housing project constructed by a tribe has a "Date of Full Availability (DOFA)," which is "the last day of the month in which substantially all the units in a housing development are available for occupancy." 24 C.F.R. § 1000.302. Because the maximum rent-to-own period under the Mutual Help programs was 25 years, all units in a Mutual Help project would ordinarily reach the end of the rent-to-own period no later than the project's DOFA plus 25 years. HUD is aware of each Mutual Help project's initial DOFA. Thus, HUD can estimate the latest possible date that each unit in a project would ordinarily reach the end of its rent-to-own period.

assume that the tribe agreed that the identified units should not have been included in the tribe's FCAS counts. *See*, *e.g.*, Aplt. Appx. 2819-23, 2932, 4338, 4585, 4909, 5853.

Other tribes did respond and, with respect to units that the tribes had not conveyed, the tribes provided a variety of reasons why conveyance had not been practicable. In many cases, HUD agreed with the tribes that conveyance had not been practicable on the date the questioned unit became eligible for conveyance. In those cases, HUD acknowledged that the unit could remain in the tribe's FCAS count until the impediment to conveyance lifted. For example, HUD agreed with the tribes that it was not practicable for a tribe to convey a unit until the conveyance was approved by the Bureau of Indian Affairs (BIA). Thus, if a tribe did not convey a unit on its conveyance-eligibility date because it was waiting for the BIA to approve the conveyance (and the tribe had diligently pursued the BIA's approval), HUD gave the tribe credit for the unit until the tribe received the BIA's endorsement. *See*, *e.g.*, Aplt. Appx. 2086 (accepting Modoc's explanation that 13 units that had become conveyance eligible in 1993 could not practicably be conveyed until 1998, when the BIA approved the conveyances).[7]

HUD also agreed that a tribe could continue to count an otherwise conveyance-eligible unit in its FCAS inventory where conveyance was delayed due to

[7] HUD did not accept claims of BIA delay when those claims were unsubstantiated. *See*, *e.g.*, Aplt. Appx. 1864, 1867, 1895 (rejecting Navajo's claim of BIA "delays and circumvention" after Navajo failed to provide documents supporting that claim, despite repeated requests from HUD).

the death or divorce of the original homebuyer. *See*, *e.g.*, Aplt. Appx. 3457 (agreeing with Winnebago that three units could not practicably be conveyed because the units were in probate following the relevant homebuyer's death or divorce); Aplt. Appx. 3688 (letter from HUD agreeing with Spirit Lake that six units "should remain as FCAS due to lease complications resulting from the death of the homebuyer"); Aplt. Appx. 4199-4200 (accepting Blackfeet's explanation that two otherwise conveyance-eligible units could not be conveyed because the units were "in probate").

HUD further agreed with the tribes that the conversion of a unit from one type of low-income housing to another type (for example, from rent-to-own housing to rental housing) could alter the unit's conveyance-eligibility date, thereby extending the time the unit qualified as FCAS. *See*, *e.g.*, Aplt. Appx. 240-41, 290-91, 450, 460, 462, 2091-92, 2860-61, 3268. HUD similarly concluded that a unit continued to count as FCAS where the tribe transferred the unit to a "subsequent homebuyer" during the initial rent-to-own period, thereby resetting the 25-year clock and moving the unit's conveyance-eligibility date further into the future. *See*, *e.g.*, Aplt. Appx. 240-242, 3688, 4308-12, 4689, 5141-42, 5583.

HUD did not accept every explanation the tribes proffered, however. Some tribes argued that it was not practicable to convey otherwise conveyance-eligible units because the units were in need of modernization or repair. *See*, *e.g.*, Aplt. Appx. 876-79, 905-06, 925. HUD rejected that explanation, reasoning that a tribe could convey

such units to the homebuyer and then complete any necessary repairs post-conveyance. *See* Aplt. Appx. 925.

Several plaintiff tribes also claimed that certain questioned units had not been eligible for conveyance (or that conveyance was not practicable) on the units' original conveyance-eligibility dates because the units' homebuyers had not made all of the monthly payments they were required to make under their rent-to-own agreements. *See*, *e.g.*, Aplt. Appx. 876-79, 2059, 3522, 4489, 4971-73. HUD rejected that explanation on the ground that a significant "tenant account receivable (TAR)" would exist only if the tribe had failed to "enforce strict compliance" with the homebuyer's rent-to-own contract, rendering the unit ineligible for inclusion in FCAS under 24 C.F.R. § 1000.318(a)(2). *See*, *e.g.*, Aplt. Appx. 220-21, 2085-86, 2736, 3523, 4974.

b. After HUD collected the necessary conveyance and other information from a tribe, HUD determined whether and to what extent the tribe had erroneously received credit in its FCAS counts for ineligible units. For those years in which a tribe's FCAS count had been overstated, HUD calculated the amount by which the tribe's grant allocation exceeded what the tribe should have received. HUD then asked each tribe either to repay the amount the tribe had received in error or to explain why the tribe should not be required to do so. *E.g.*, Aplt. Appx. 240-42, 449-63, 874-75, 901-04, 1750-1833, 1860-62, 1866-67, 1985, 1897-99, 1905-11,2092-94, 2296-2300, 2622, 2625-27, 2811-14, 3019-21, 3358-61, 3523-25, 3687-89, 4050-52; 4312, 4749-52, 4495, 4836, 5060. Some of the plaintiff tribes responded by agreeing

to repay the amount that they were overpaid, typically by having HUD deduct the amount, in five-year installments, from future grants. *See*, *e.g.*, Aplt. Appx. 2624, 2637, 3064-66, 4870, 5061-63.

Other plaintiff tribes challenged HUD's overpayment decisions on various grounds. Fort Peck and Navajo, among others, asserted that NAHASDA required HUD to use the tribes' 1997 unit counts in perpetuity and that 24 C.F.R. § 1000.318 was invalid because it required HUD to subtract units from the tribes' 1997 FCAS counts when allocating NAHASDA appropriations each year. Aplt. Appx. 348-349, 1863-1864. HUD rejected this interpretation of NAHASDA, deeming it inconsistent with the statute's mandate that the funding formula reflect the tribes' current need for affordable-housing assistance, not their need as of 1997. *See Fort Peck*, 367 F. App'x at 888.

Several plaintiff tribes challenged 24 C.F.R. § 1000.318 on the narrower ground that NAHASDA did not permit the exclusion of units that a tribe had not yet conveyed. *See*, *e.g.*, Aplt. Appx. 349-50, 1863-64. HUD rejected that argument, concluding that the exclusion of units that the tribes had failed to convey as soon as was practicable comported with all applicable statutory and regulatory requirements. *See*, *e.g.*, Aplt. Appx. 354-55.

Finally, some plaintiff tribes argued that, even if they had received overpayments based on inaccurate FCAS counts, HUD could not recover those overpayments, either at all or at least not without first conducting a formal

administrative hearing. *See*, *e.g.*, Aplt. Appx. 345-47, 1864, 2624, 3696. HUD rejected such contentions on the ground that it had common-law authority to recover the overpayments without a formal hearing. In addition, the agency emphasized that recovering the overpayments was critical, because it enabled HUD to redistribute the funds to the tribes that would have received them had the plaintiff tribes' accurately reported their FCAS counts from the start. *See*, *e.g.*, Aplt. Appx. 2627 ("Since funds incorrectly allocated to one tribe reduces [sic] all other tribes' allocations, the Department, to be fair and equitable to all tribes, will require repayment when we discover that a recipient's Formula Response Form incorrectly reports eligible units.").

2. Procedures Used In Administrative Proceedings

In arriving at the conclusion that the plaintiff tribes received overpayments due to inaccurate FCAS counts, HUD applied the administrative procedures set forth in 24 C.F.R. § 1000.336 (1998), which the agency uses to resolve challenges to data used in the allocation formula. *See*, *e.g.*, Aplt. Appx. 353. Under those procedures, HUD first attempts to resolve any data discrepancies through good faith negotiations with the tribe. *See* 24 C.F.R. § 1000.336(b)(1) (1998). If the parties cannot resolve a discrepancy through negotiations and HUD then reaches a conclusion about the data with which a tribe disagrees, the tribe may appeal the decision to HUD's Assistant Secretary for Public and Indian Housing. *See* 24 C.F.R. § 1000.336(b)(1)(1998); 24 C.F.R. § 1000.118. The Assistant Secretary must then issue a written opinion setting

forth the reasons for affirming or denying the agency's conclusion. *See* 24 C.F.R. § 1000.118(b), (d).

In these cases, HUD typically began the administrative process by notifying a tribe that the agency believed that the tribe's FCAS count had been overstated for one or more fiscal years. *See*, *e.g.*, Aplt. Appx 218-19, 2811-14. In each case, HUD asked the tribes if it agreed with HUD's initial view, and, if not, to provide additional information.

Lengthy exchanges of information between the tribe and HUD typically followed HUD's initial correspondence. HUD and the tribes conducted these exchanges through letters, faxes, in-person meetings, and, in a few cases, on-site visits. Through this process, each tribe received essentially unlimited opportunities to provide any evidence or argument it believed relevant to HUD's calculation of the tribe's correct FCAS count and to the agency's determination of any resulting overpayments. *E.g.*, Aplt. Appx. 219, 358, 875, 1834, 2621, 2644, 2717, 2819-22, 2909, 2931, 3020, 3229-30, 3354-55, 3376-77, 3451, 3458, 3519-20, 3613, 3671-72, 4017-18, 4277-78, 4888, 5307. Indeed, although HUD typically asked tribes to respond to its inquiries within 30 days, the agency never denied a tribe's request for an extension of time in which to respond and accepted and analyzed every response it received, no matter how belated. *See*, *e.g.*, Aplt. Appx. 1538, 2625-26, 3457, 3687-3688, 5878. In addition, after HUD reached a final conclusion regarding a tribe's correct FCAS count and calculated any resulting overpayment, it notified each tribe of

its right to file an administrative appeal. *See*, *e.g.*, Aplt. Appx. 457, 982, 1772, 1861, 1899, 1904, 1910, 2087, 2420, 2621, 2739, 2862, 3240, 3270, 3453, 3735, 3739, 4053, 4074, 4132, 4312, 4387, 4507, 4691.

Thus, although no formal evidentiary hearing was conducted before an Administrative Law Judge, HUD provided each tribe with repeated chances to present whatever evidence and argument the tribe had in support of its claim that it had not been overpaid. The final result was a long and detailed administrative process that often lasted years. *See*, *e.g.*, Aplt. Appx. 1324-42 (index of administrative proceedings spanning over 6 years and including an administrative appeal); 4220-30 (similar). After that process was completed, HUD recovered the overpayments from the tribes, usually over a five-year period, and redistributed the funds to the tribes that should have received them. *See*, *e.g.*, Aplt. Appx. 2314, 2326, 2340, 2356, 2371.

D. District Court Proceedings

1. Judicial proceedings culminating in this Court's *Fort Peck* decision. Fort Peck filed the first of these judicial challenges in 2005, asserting, among other things, that the formula set forth in 24 C.F.R. § 1000.318 was invalid because NAHASDA required HUD to use the tribe's 1997 FCAS unit count, without reduction, when calculating the tribe's FCAS allocation each year. Aplt. Appx. 9-17. The district court agreed with Fort Peck that NAHASDA prohibited HUD from subtracting units from the tribe's 1997 unit count when calculating FCAS and therefore declared 24 C.F.R. § 1000.318 invalid. Aplt. Appx. 553-54. The court refused, however, to order HUD

to repay the money it had recovered from Fort Peck, concluding that such a remedy constituted money damages unavailable under the APA. Aplt. Appx. 555-58. Both parties appealed.

This Court reversed the district court's invalidation of 24 C.F.R. § 1000.318. *Fort Peck Housing Auth. v. HUD*, 367 F. App'x 884 (10th Cir. 2010) (unpublished). The Court agreed with Fort Peck that NAHASDA required the allocation formula to include as one of its factors the number of rent-to-own housing units a tribe owned in 1997. *Id.* at 890-91 (citing 25 U.S.C. § 4152(b)(1)). But, the Court held, the allocation formula satisfied that requirement by using each tribe's 1997 unit count as a "starting point." *Id.* at 891. Moreover, the Court emphasized, Congress "explicit[ly] direct[ed]" HUD to incorporate into the allocation formula other factors that reflect the tribe's current need for financial assistance for affordable housing activities. *Id.* Because a reduction in the number of housing units owned or operated by a tribe lowers the tribe's need for federal aid, the Court held that requiring removal of such units from a tribe's FCAS count was permissible under NAHASDA. *Id.* at 891-92.

2. Subsequent judicial proceedings. After the Court's reversal and remand in *Fort Peck*, the district court coordinated its consideration of the seven cases now before this Court. Rather than adjudicate all issues at once, the district court began by ordering the parties to file coordinated briefs addressing only specified common legal issues. *See*, *e.g.*, Aplt. Appx. 573-75. Following that limited briefing, the district court

issued an order in the *Fort Peck* case, Aplt. Appx. 581-593, and adopted that same order in each of the other coordinated cases, Aplt. Appx. 1223, 1938, 2124, 2433, 3802, 5930.

The district court recognized that this Court's decision in *Fort Peck* upheld 24 C.F.R. § 1000.318's requirement that tribes exclude from their FCAS count legacy units that the tribe no longer owns or operates. Aplt. Appx. 583-84, 587-88. But the court nonetheless concluded that HUD's actions in these cases were arbitrary, capricious, and contrary to law, for two reasons. First, the court concluded that 25 U.S.C. §§ 4161 and 4165 and 24 C.F.R. § 1000.532 (1998) required HUD to conduct a formal hearing before reducing a tribe's past FCAS counts and recovering any resulting overpayments. Aplt. Appx. 591-592. Second, the district court held that HUD acted arbitrarily in excluding units that the tribes had not conveyed—i.e., units that HUD was required to remove under 24 C.F.R. § 1000.318(a)(1), (2). The court emphasized that it was ruling only that HUD had "misapplied 24 C.F.R. § 1000.318," Aplt. Appx. 648, 1247, 2144, not that the regulation was invalid, Aplt. Appx. 591. In effect, the district court ruled that HUD acted arbitrarily and capriciously in failing to accept every reason the tribes gave for failing to convey a unit on its conveyance-eligibility date and for assuming, when the tribes provided no explanation, that the units should have been excluded from the tribes' FCAS. *See* Aplt. Appx. 588-91.

The district court next ordered coordinated briefing limited to the question of HUD's authority to recover overpayments, and ordered each tribe to submit its

request for relief and a statement of the court's authority under the Administrative Procedure Act to grant such relief. *See* Aplt. Appx. 594-95. Following that briefing, the court issued an order in the coordinated cases rejecting HUD's contention that the agency had common-law authority to recover overpayments through administrative offset. *Id.* In the court's view, HUD could only collect overpayments after conducting a formal evidentiary hearing. *Id.* The district court also concluded that, under the applicable version of 24 C.F.R. § 1000.532, HUD could "not demand the return of grant funds the [tribes] had already expended on affordable housing activities." Aplt. Appx 609.

In the same order, the district court rejected HUD's arguments that tribes' requests for monetary relief violated the APA. Aplt. Appx. 610-12. The court noted that earlier in the litigation it had held that an order requiring HUD to repay the recovered funds out of future appropriations would constitute money damages not authorized under the APA. Aplt. Appx. 611. But, upon reconsideration, the court concluded that the APA allowed it to order HUD to repay the tribes out of future appropriations, because, in the court's view, HUD treated NAHASDA funds appropriated in different fiscal years "as fungible." Aplt. Appx. 611.

HUD responded by filing motions for further briefing. To that point in the litigation, the district court had limited briefing to a narrow set of legal questions and therefore had not permitted HUD to present argument and evidence regarding whether particular units had been properly excluded from a tribe's FCAS. Aplt.

Appx. 625-29. The further briefing HUD requested would have, for example, allowed HUD to demonstrate that, in many cases, the tribes were not prejudiced by HUD's failure to provide a formal hearing, because HUD's overpayment determination was based entirely on information that the tribes themselves provided about conveyances.

With respect to fifteen tribes, the court declined to order further briefing. *See* Add. B-6, B-10, B-16, B-21, B-23, B-27, B-39, B-49; Aplt. Appx. 648, 1242, 1248, 1957, 1959, 2142, 2460. With respect to the seven other tribes, the court ordered further briefing on the question "whether or to what extent the recaptures [the tribes] challenge were repayments of grant funds received for housing units the Tribes acknowledged did not exist or had been conveyed." Aplt. Appx. 3845.

In their supplemental brief, several of the tribes acknowledged that they had erroneously received grant funds for units that had not existed or had been conveyed. *See*, *e.g.*, Aplt. Appx. 3853 (Sicangu acknowledges that its FCAS counts for FY 1998 had improperly included 18 units that the tribe had previously conveyed); Aplt. Appx. 3866 (Winnebago acknowledges that its FCAS counts for fiscal years 1998 through 2002 included units that the tribe never constructed); Aplt. Appx. 3867 (Lower Brule acknowledges that overpayments it received were related to units that it told HUD had been conveyed prior to NAHASDA's enactment); Aplt. Appx. 3869-70 (same for Spirit Lake).

Despite having ordered supplemental briefing, the district court did not address the parties' supplemental briefs or the tribes' concessions therein. *See* Add. B-41 to B-

43; Aplt. Appx. 3874-76. Instead, the district court issued final judgments in all cases, ordering HUD to repay every dollar that the agency had recovered from the plaintiff tribes. Add. A; Aplt. Appx. 553-54, 650-51, 1250-51, 1961-63, 2147-48, 2462-63, 3877-97, 6000-29. The district court thus required HUD to refund money to tribes even with respect to units the tribes themselves informed HUD had been erroneously included in their FCAS counts.

How the district court ordered HUD to repay the tribes varied slightly. For Tlingit, Navajo, and the ten *Blackfeet* tribes, the court ordered that funds HUD had set aside from Congress's 2008 NAHASDA appropriation be used to pay their damages within 30 days of the judgment. *See* Add. A-4, A-6; Aplt. Appx. 1251, 1962, 6000-29. For the other tribes and to the extent that the funds set aside by the agency were insufficient to repay Tlingit, Navajo, and the *Blackfeet* tribes, the court ordered HUD to repay the recovered funds from "all available sources" within 18 months. The judgments define "all available sources" specifically to include NAHASDA block grant funds from past and future years. *E.g.*, Aplt. Appx. 650-51, 1251, 1962, 2147-48, 2463, 3878, 3881, 3884, 3887, 3890, 3893, 3896, 6000-28. The judgments also prevent HUD from re-recovering overpayments relating to fiscal years 1998 through 2008 without providing the plaintiff tribes with a formal evidentiary hearing. *E.g.*, Aplt. Appx. 651, 1251, 1962, 2148, 2463, 3878, 3881, 3884, 3887, 3890, 3893, 3896, 6000-29.

SUMMARY OF ARGUMENT

1.a. Congress tasked HUD and a representative group of Indian tribes with developing a formula for allocating annual NAHASDA appropriations among all eligible Indian tribes. 25 U.S.C. §§ 4151, 4152. Congress further mandated that the allocation formula's factors "reflect the need of the Indian tribes . . . for assistance for affordable housing activities." 25 U.S.C. § 4152(b) (Supp. II 1996). The allocation formula that HUD and the tribes agreed upon includes among its factors the number of rent-to-own housing units a tribe operated or had in development when NAHASDA was enacted in 1997. *See* 24 C.F.R. §§ 1000.312, 1000.314.

But the formula does not treat the number of housing units a tribe owned in 1997 as an adequate measure of the tribe's current need for assistance with affordable housing activities. Instead, the formula requires HUD to bring the tribe's unit count up-to-date, so that the count reflects the tribe's current need for assistance relative to other tribes. Specifically, the formula requires HUD to remove a rent-to-own housing unit that a tribe operated in 1997 from the tribe's FCAS count in three circumstances: (1) when the tribe no longer owns or operates the unit; (2) when a tribe does not convey the unit as soon as practicable after the unit becomes eligible for conveyance to a homebuyer; and (3) when the tribe has not enforced strict compliance with the terms of a rent-to-own contract and then cites a homebuyer's noncompliance with the contract as the reason for not conveying the unit. *See* 24 C.F.R. § 1000.318.

Despite having participated in the rulemaking committee that adopted 24 C.F.R. § 1000.318 by consensus, plaintiff tribes challenge the regulation's validity. The tribes argue that NAHASDA requires HUD to use their 1997 unit counts, without reductions, when measuring the tribe's current need for financial assistance with affordable housing activities. As this Court explained in *Fort Peck Housing Authority v. HUD*, 367 F. App'x 884, 891 (2010) (unpublished), the tribes' contention "is inconsistent with the statute's plain language and is contrary to Congress's unambiguous intent that the funding formula relate to the [current] needs of all tribal Housing Entities."

Moreover, the formula's three adjustments are each a reasonable means of modifying a tribe's legacy unit count to reflect the tribe's current need for financial assistance relative to other tribes. When a tribe no longer owns or operates a housing unit, it stands to reason that the tribe's need for financial assistance for that unit declines. Thus, as this Court concluded in *Fort Peck*, the allocation formula's exclusion of housing units that a tribe no longer owns or operates appropriately reflects "the ongoing and evolving need[s] of Tribal Housing Entities." 367 F. App'x at 892.

The allocation formula's second and third reductions also have a direct connection to a tribe's current need for financial assistance relative to other tribes. Tribes, not HUD, decide whether and when to convey a unit to a homebuyer. Because the formula's first adjustment requires tribes to remove conveyed units from

their FCAS count (thereby reducing the tribe's share of a NAHASDA appropriation), the adjustment provides tribes with an incentive not to convey otherwise conveyance-eligible units or to take steps to delay a unit's conveyance-eligibility date. That incentive is particularly troublesome given the purpose underlying the rent-to-own programs at the heart of this case: to promote homeownership among low-income Native Americans.

Section 1000.318(a)'s second and third adjustments remove the incentive that the first adjustment creates by requiring HUD to exclude legacy units that the tribe did not convey to homebuyers as soon as the tribe could have. The second and third adjustments thus ensure that a tribe's FCAS count is not artificially inflated, but instead reflects the tribe's true need relative to other tribes.

b. HUD did not act arbitrarily or capriciously when, in applying 24 C.F.R. § 1000.318, the agency determined that the plaintiff tribes' historical FCAS counts had improperly included ineligible housing units. Indeed, HUD's conclusion that the FCAS counts for several tribes had included conveyed units was based largely on conveyance and other information that the tribes themselves provided.

With respect to units that HUD excluded because the tribes did not convey the units as soon as practicable, HUD accepted almost every reason the tribes gave for why they did not convey a unit on the unit's conveyance-eligibility date. The agency only removed non-conveyed units from a tribe's FCAS count when the tribe did not provide an explanation for its failure to convey a unit or offered one of the two

explanations that HUD found unacceptable. HUD's conclusion that certain units had not been conveyed as soon as practicable was thus well-reasoned and far from arbitrary.

2. When it recovered the overpayments through administrative offset, HUD exercised its longstanding, common-law authority to recover payments made by mistake. Neither NAHASDA nor its implementing regulations precluded HUD from using this authority to recover the overpayments in full. Indeed, interpreting the statute to prevent HUD from recovering FCAS-related overpayments would produce perverse and unjust results. Because NAHASDA funding is a zero-sum system, a tribe that does not report corrections to its FCAS inventory receives funds that should have been allocated to other tribes. If HUD is precluded from recovering and redistributing the overpayments, then the tribe that does not report FCAS-count changes would receive a windfall at the expense of other tribes, including those tribes that properly updated their FCAS counts. Neither Congress nor the rulemaking committee intended that result.

3. Contrary to the district court's conclusion, HUD was not required to provide a formal hearing before it recovered the overpayments at issue here. NAHASDA and its implementing regulations require HUD to conduct a formal hearing in certain specified circumstances. The agency's review of a tribe's FCAS count to determine whether the tribe erroneously received NAHASDA funds that should have been allocated to other tribes is not one of those circumstances. In any

event, even if a hearing were required, the plaintiff tribes cannot show that they were prejudiced by HUD's failure to provide one. As noted, HUD's calculations were based in whole, or in large part, on information that the tribes themselves supplied.

4. Finally, the district court's orders requiring HUD to return the grant funds that the agency recovered from the plaintiff tribes do not comport with the APA's limited waiver of sovereign immunity. The APA's waiver does not extend to suits seeking "money damages." 5 U.S.C. § 702. Yet compensatory money damages are precisely what the district court ordered HUD to pay. With one exception, the appropriated funds HUD recovered from the tribes have been redistributed to other tribes. HUD thus cannot return the funds to which the tribes claim an entitlement. Recognizing that fact, the district court ordered HUD to repay the tribes out of other "available sources," including future NAHASDA appropriations. Such "compensatory, or substitute, relief" is not available under the APA. *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261(1999).

STANDARD OF REVIEW

When reviewing agency action under the Administrative Procedure Act, this Court conducts "an independent review of the agency's action and [is] not bound by the district court's factual findings or legal conclusions." *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 823 (10th Cir. 2008) (internal quotation marks omitted). This Court "will not set aside an agency decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C.

§ 706(2)(A)). This "standard of review is very deferential to the agency." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012).

ARGUMENT

I. THE ALLOCATION FORMULA IS VALID AND HUD PROPERLY APPLIED IT

A. HUD Properly Removed Units That The Tribes No Longer Owned Or Operated From The Tribes' FCAS Counts

1. Under the allocation formula developed by the negotiated rulemaking committee, a legacy rent-to-own housing unit must be removed from a tribe's FCAS count in three circumstances. *See* 24 C.F.R. § 1000.318(a). The first is where the tribe "no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise . . . ." *Id.*

In *Fort Peck Housing Authortiy v. HUD*, 367 F. App'x 884, 891-92 (10th Cir. 2010), the Court upheld § 1000.318's removal from FCAS of "units no longer owned or operated by a [tribe]." As the Court explained, § 4152 of NAHASDA mandates that the allocation "formula 'reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities.'" *Id.* at 891 (quoting 25 U.S.C. § 4152(b)); *see also United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235, 1241 (10th Cir. 2009) (NAHASDA "mandates that the factors in HUD's allocation formula reflect—in other words, have some connection or nexus with—the need of Indian tribes."). The formula's requirement that tribes exclude units from

their FCAS that the tribes no longer own or operate satisfies NAHASDA's mandate, the Court held, because "a reduction in the number of [housing] units [a tribe owns or operates] correspond[s] to a measurable reduction in responsibility by the [tribe] for those units." *Fort Peck*, 367 F. App'x at 891. Logically, when a tribe no longer owns or operates a unit, its need for financial assistance for that unit declines.

On remand, the district court accepted this Court's decision in *Fort Peck* upholding § 1000.318(a)'s requirement that tribes exclude housing units that the tribes no longer own or operate from their FCAS counts. *See* Aplt. Appx. 578, 583-84. The tribes did not. *See* Aplt. Appx. 575f, 575k (arguing that this Court's decision in *Fort Peck* is "not binding on Plaintiffs except possibly as to Fort Peck" and asserting that, contrary to this Court's conclusion, all rent-to-own units a tribe owned in 1997 "must be included in each Plaintiff's FCAS"). If the tribes again challenge the validity of the formula's exclusion of units no longer owned or operated by the tribes, this Court should reject that challenge for the reasons stated in its *Fort Peck* decision. The allocation formula's requirement that tribes exclude housing units that the tribes no longer own or operate from their FCAS accords "with the statute's plain language and . . . [with] Congress's unambiguous intent that the funding formula relate to the needs of all Tribal Housing Entities." *Fort Peck*, 367 F. App'x at 891. The plaintiff tribes' suggestion that HUD must use their 1997 unit counts in perpetuity does not. *See id.*

2. HUD's conclusion that many of the plaintiff tribes' annual FCAS counts included housing units that the tribes no longer owned or operated was not arbitrary

or capricious. Indeed, in most cases, HUD's determination that a tribe had included conveyed units (or units that had never been constructed) in its FCAS counts was based entirely on information that the tribe itself provided. That information typically consisted of lists of units and the dates that those units had been conveyed to homebuyers. When HUD received such information, the agency simply compared the list to the tribe's historical FCAS counts and adjusted the tribe's counts by removing units that the tribe had conveyed. HUD's analysis was straightforward and reasonable.

One particularly clear example of the reasonableness of HUD's actions involves plaintiff Choctaw. In 2001, Choctaw sent HUD a letter reporting detailed "corrections to [past FCAS counts]," including "negative adjustments" to its historical FCAS due to previously unreported "conveyances." Aplt. Appx. 2242. In its correspondence, Choctaw included detailed charts identifying units that it had conveyed in fiscal years 1998 through 2001, and noted that the units had been erroneously included in its annual FCAS count for several fiscal years. Aplt. Appx. 2242-46, 2271. HUD accepted Choctaw's representations regarding these conveyances and determined the resulting overpayments that the tribe had received due to the erroneous inclusion of the conveyed units in its FCAS counts. *See* Aplt. Appx. 2296-2300. Choctaw never claimed that any of the units at issue had not been conveyed, nor did it challenge the calculation of the overpayment amount; instead, it asked only that the overpayment amount be reduced to reflect units that had been

erroneously excluded from its FCAS inventory, *see* Aplt. Appx. 2306-07, and HUD agreed, Aplt. Appx. 2314-15.

Plaintiff Aleutian Housing Authority's case provides another representative example. On October 7, 2003, Aleutian sent HUD a fax listing 15 previously unreported conveyances. Aplt. Appx. 5514-20. Seven of the 15 conveyances occurred in 2000, one in 2001, three in 2002, and four in 2003. Aplt. Appx. 5514-20. All 15 had been included in Aleutian's FCAS for fiscal years 2001 through 2004. Aplt. Appx. 5526-27. Upon receipt of Aleutian's information, HUD simply recalculated the tribe's correct FCAS for the relevant years and determined the resulting overpayment of approximately $145,000. *Id.* Aleutian never questioned HUD's determination.

Turtle Mountain's case is another straightforward example. In April 2002, the tribe provided HUD with a list of 40 conveyed units and the dates of conveyance. Aplt. Appx. 3058-59. The list indicated that many of the units had been conveyed before 1997, with some conveyed as early as 1991. *See* Aplt. Appx. 3059. HUD responded by accepting the tribe's representations and determining the amount the tribe had been overpaid due to the erroneous inclusion of the units in the tribe's historical FCAS counts. Aplt. Appx. 3061-62. The tribe did not dispute HUD's determination. Instead, the tribe requested a repayment plan of five or eight years, Aplt. Appx. 3064, and HUD agreed to a 5-year plan, Aplt. Appx. 3065.

In Winnebago's case, the tribe acknowledged that its FCAS counts for several years had included units that the tribe never built. Winnebago's FCAS for fiscal years

1998 through 2002 included 14 units in project NE91B045014. *See* Aplt. Appx. 3283, 3289, 3296, 3299, 3306, 3316, 3319, 3327. In 2002, Winnebago informed HUD that the project "was never built" and that the 14 units had thus been "improperly included in our [FCAS]." Aplt. Appx. 3384; *see also* Aplt. Appx. 3353. HUD's entire recovery of overpayments from Winnebago was based on those 14 units. Aplt. Appx. 3384. Other tribes similarly acknowledged that their annual FCAS counts included units that had not, in fact, existed. *See* Aplt. Appx. 2624, 2626 (Sicangu agrees with HUD that the tribe's FCAS for FYs 1998-2003 included 40 units "that were never built"); Aplt. Appx. 5258-62 (Bristol Bay acknowledges in a June 2000 letter that it had mistakenly double-counted 20 units its FCAS for FYs 1998-2000); Aplt. Appx. 5817 (Big Pine informs HUD that 16 units listed in its FCAS for FYs 1998-2002 were never constructed).[8]

[8] These examples are merely representative. For almost every plaintiff tribe, HUD's overpayment calculation was based in whole, or in large part, on information the tribe provided about conveyances. Other examples include the Navajo, who conceded that 20 of the 30 units in project NM 15-008 had been conveyed, Aplt. Appx. 1412, 1426, yet all 30 were included in the tribe's FCAS counts post-conveyance, Aplt. Appx. 1346, 1371, 1392, 1439. Similarly, Sicangu informed HUD in 2003 of numerous conveyances, including some that had occurred as far back as 1995. Aplt. Appx. 2613-18. Sicangu did not question HUD's subsequent calculation of the overpayments that had resulted from the inclusion of those conveyed units in the tribe's FCAS counts. Aplt. Appx. 2662-70. In September 2001, Oglala Sioux provided HUD with a list of units conveyed between 1984 and 2001, which HUD used to calculate overpayments. Aplt. Appx. 2801-14. In 2002, Northwest Inupiat reported the conveyance of 110 Mutual Help units, including 52 units that had been conveyed before 1998. Aplt. Appx. 5059. HUD adjusted Northwest Inupiat's annual FCAS counts for FYs 1998-2002 in keeping with that information. Aplt. Appx. 5059. HUD's determination that it overpaid Spirit Lake in fiscal years 1998 through 2002

In short, HUD's conclusion that the plaintiff tribes' FCAS counts had erroneously included housing units that the tribes had conveyed (or otherwise did not own or operate) was far from arbitrary and capricious. To the contrary, it was based on information that the tribes themselves provided about the units. Accordingly, HUD's decision to remove such units from the tribes' historical FCAS counts and the agency's calculation of the overpayments that resulted from the erroneous inclusion of such units in the tribes' past counts was proper.

B. HUD Properly Excluded Units The Tribes Did Not Convey As Soon As Practicable After The Units Became Eligible For Conveyance

1. In addition to requiring the exclusion of conveyed and nonexistent units, the regulatory allocation formula mandates that a tribe remove legacy rent-to-own units from its FCAS count that the tribe did not convey as soon as practicable after the units became eligible for conveyance (even if the tribe still owns the units). *See* 24 C.F.R. § 1000.318(a)(1). This requirement also comports with NAHASDA, as it ensures that a tribe's FCAS count accurately reflects the tribe's relative need for federal housing assistance. *See* 25 U.S.C. § 4152(b); *Fort Peck*, 367 F. App'x at 891.

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was based solely on the inclusion in FCAS of units that Spirit Lake later told HUD it had conveyed before 1997. Aplt. Appx. 3682-89. Likewise, HUD's determination that the Association of Village Council Presidents had received $1.3 million in overpayments for FYs 1998-2000 was based entirely on unit-by-unit conveyance information that AVCP provided in letters it sent HUD in August and September 2000. Aplt. Appx. 4845, 4817, 4823-33; *see also supra* pp. 9-11 (providing additional examples).

Decisions about whether and when to convey a unit lie with a tribe, not with HUD. As a result, a tribe seeking to avoid 24 C.F.R. § 1000.318(a)'s requirement that the tribe exclude conveyed units from its FCAS count could do so by simply declining to convey the units. If a tribe were to adopt such a strategy, it would not only subvert § 1000.318(a) (and thereby allow a tribe to capture grant funds that should have been rightfully allocated to other tribes), it would also undermine the purposes of the rent-to-own programs, which are intended to promote homeownership among low-income Native Americans. 42 U.S.C. § 1437bb(a) (1988); H.R. Rep. No. 100-604, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791, 796.

The members of the negotiated rulemaking committee, who included representatives from several plaintiff tribes, recognized the negative incentive that requiring tribes to remove conveyed units from their FCAS count would create. *See* 63 Fed. Reg. 12,334, 12,343 (Mar. 12, 1998). To counter that incentive, the rulemaking committee adopted 24 C.F.R. § 1000.318(a)(1), which requires HUD to exclude a rent-to-own unit from a tribe's FCAS count if that unit was not conveyed "as soon as practicable after [the] unit bec[a]me eligible for conveyance by the terms of the [homebuyer's rent-to-own contract]."

Contrary to the tribes' assertion below, this provision does not require tribes to convey units. Nor does it in any way alter the tribe's authority to decide whether and when to convey a unit. It merely eliminates an incentive to withhold conveyance of a unit that § 1000.318(a) would otherwise have created, and thereby ensures that the

prospect of obtaining a larger share of a NAHASDA appropriation is not the reason a tribe did not convey an otherwise conveyance-ready unit. Section 1000.318(a)(1) is thus fully consistent with Congress's directive that the regulatory formula accurately "'reflect[] the need of the Indian tribes'" for federal assistance with affordable housing activities. *Fort Peck*, 367 F. App'x at 891; 25 U.S.C. § 4152(b). Without it, a tribe's FCAS might reflect an inappropriately inflated unit count, not the tribe's true need relative to other tribes.

Thus, a tribe can reduce its relative need for assistance by conveying an otherwise conveyance-eligible unit to a homebuyer. If a tribe chooses not to convey the unit, even though conveyance is practicable, then the cost to the tribe of maintaining ownership of the unit is self-imposed. Section 1000.318(a)(1) assures that tribes do not receive credit in the allocation formula, to the detriment of all other tribes, for that self-inflicted burden.

2. Applying § 1000.318(a)(1), HUD reasonably concluded that some plaintiff tribes had included in their FCAS counts rent-to-own units that the tribes had not conveyed as soon as practicable after the units became conveyance-eligible. As discussed *supra* p. 11, HUD observed that several plaintiff tribes had included and were continuing to include in their annual FCAS counts housing units that appeared to have become conveyance eligible. HUD's observation was based on the fact that more than 25 years had passed since the unit's Date of Full Availability, indicating that the unit's rent-to-own period had expired and its purchase price had reached zero. *See*

id. In such cases, HUD notified the tribe that it had concerns about the inclusion of these units in the tribe's FCAS and asked the tribe to explain why the units had not been conveyed on their conveyance-eligibility dates. *See id.*

Some tribes did not respond, despite repeated inquiries from HUD. *See supra* pp. 11-12. In those cases, HUD told the tribes that it would assume the tribes agreed that the identified units should have been excluded from their FCAS counts. This approach was reasonable. HUD does not know whether or when a tribe conveyed a conveyance-eligible unit. Nor does HUD know the reasons why a tribe did not convey an otherwise conveyance-eligible unit. Thus, where a tribe failed to respond to HUD's inquiries, HUD had no choice but to assume that the tribe agreed that the questioned units no longer counted as FCAS. If the agency did not make that assumption, a tribe could maintain an inflated FCAS count (and thereby receive an inflated share of any NAHASDA funding) by simply ignoring HUD's requests for information. In fact, it likely would have been unreasonable for HUD to assume that a unit remained eligible for FCAS under the circumstances. Without any input from the tribe, the only information HUD had about the questioned unit indicated that the unit's rent-to-own period had expired, suggesting that the unit had likely been conveyed.

In those cases where a tribe explained why it had been impracticable to convey a unit on the unit's original conveyance-eligibility date, HUD acted rationally when it accepted the offered explanation in many cases and rejected it in some. HUD agreed

with the tribes that a unit whose original conveyance-eligibility date had passed nonetheless continued to count as FCAS where (1) the original homebuyer had been replaced by a new homebuyer, with a new rent-to-own contract and a later conveyance-eligibility date; (2) delay by the BIA in approving a conveyance made conveyance impracticable; (3) a unit was converted to or from a rent-to-own unit, altering its conveyance-eligibility date; (4) the relevant unit had been demolished and rebuilt, *see* Aplt. Appx. 3045; and (5) clouds on the unit's title (typically resulting from death or divorce) rendered conveyance impracticable. *See supra* pp. 12-13.

But HUD reasonably refused to accept every justification that the tribes offered. In the district court, the plaintiff tribes challenged HUD's refusal to accept two explanations in particular. *See* Aplt. Appx. 575l-575t. The first was the tribes' claim that it could not practically convey a rent-to-own unit to a homebuyer who had failed to pay all of his or her monthly payments to the tribe. *Id.* at 43-46. The reasonableness of HUD's refusal to accept that explanation is discussed in detail below. *See infra* Part I.C.

The second explanation HUD reasonably rejected was the tribe's contention that it could not practically convey a unit that required repairs or modernization. *See* Aplt. Appx 575q-575r; *see supra* p. 13. HUD's reason for disallowing this explanation was simple: Nothing precluded a tribe from performing rehabilitation or repair work *after* the tribe conveyed the unit to the homebuyer. Aplt. Appx. 925. Indeed, NAHASDA expressly allows tribes to use NAHASDA funds for the repair

and improvement of affordable housing units, including units not owned by the tribe. *See* 25 U.S.C. §§ 4131(b), 4132(2), 4145b. Moreover, the plaintiff tribes are assured of receiving NAHASDA funds that they can use to repair a legacy unit, even if the unit is no longer counted in their FCAS. As noted above, the regulatory formula guarantees that each plaintiff tribe will receive at least as much funding as it received the year before NAHASDA was enacted. *See* 24 C.F.R. § 1000.340; 25 U.S.C. § 4152(d). Thus, not only can a tribe perform repairs or rehabilitation after conveying a unit, it will receive NAHASDA funds that it can use to pay for the work. HUD thus reasonably determined that the need to perform repairs on unit did not make conveying the unit impracticable.

In sum, HUD acted rationally when, after receiving no response from a tribe, it assumed that the tribe agreed that a questioned unit either had been conveyed or had not been conveyed as soon as practicable. HUD was likewise reasonable in rejecting the tribes' claim that a unit could not practicably be conveyed to a homebuyer if the tribe needed to modernize or repair the unit.

C. HUD Properly Excluded Units Where The Tribes Did Not Actively Enforce Strict Compliance By The Homebuyer With The Rent-To-Own Agreement

1. The regulatory allocation formula also requires a tribe to remove from its FCAS count any legacy rent-to-own units that a tribe did not convey because the homebuyer did not fully honor his or her rent-to-own contract, if the tribe did not "actively enforce strict compliance" with that contract. *See* 24 C.F.R. § 1000.318(a)(2).

Section 1000.318(a)(2) serves a purpose similar to that of § 1000.318(a)(1). Under the Mutual Help program, a tribe could not convey a unit to a homebuyer "until the [h]omebuyer . . . met all his obligations under" the homebuyer's rent-to-own contract. *See, e.g.*, 24 C.F.R. § 905.422(d)(4) (1989) (Mutual Help program regulations). Thus, a tribe could delay conveyance of a unit by choosing not to strictly enforce the terms of homebuyer's rent-to-own contract and then later citing the unenforced contractual violation as the basis for non-conveyance. Absent § 1000.318(a)(2), the delay would have benefited the tribe at the expense of other tribes, as it would have allowed the tribe to continue to count the non-conveyed unit in its FCAS inventory and thereby receive a higher share of any NAHASDA appropriation.

Section 1000.318(a)(2) removes the incentive to delay conveyance through the lax enforcement of a tribe's rent-to-own contracts. Like § 1000.318(a)(1), it thus ensures that a tribe's FCAS count reflects its true relative need and not an unnecessarily inflated FCAS unit count.

As is the case with respect to § 1000.318(a)(1), § 1000.318(a)(2) does not require tribes to convey units that they do not want to convey. Nor does it require tribes to strictly enforce the terms of their rent-to-own contracts. The provision simply assures that a tribe does not receive credit in the allocation formula for a legacy unit that the tribe still owns only because it did not enforce the unit's rent-to-own contract. In so doing, it ensures that tribes do not receive a benefit, at the expense of other tribes, for actions that were within the tribe's control.

2. HUD reasonably concluded that a number of the units at issue in this case were ineligible for inclusion in FCAS under 24 C.F.R. § 1000.318(a)(2). As noted *supra* pp. 14, 38, one reason the tribes gave for failing to convey otherwise conveyance-eligible units was the existence of "tenant account receivables" – *i.e.*, the tribes claimed that conveying a unit was not practicable because the homebuyer had not made all of the monthly payments he or she was required to make under the parties' rent-to-own contract. HUD properly rejected the tribes' argument as inconsistent with § 1000.318(a)(2).

By definition, a substantial TAR would exist only where the tribe had not enforced, for a significant period of time, the contractual requirement that homebuyers make full and timely monthly payments. Thus, although tribes may have had good reasons for not enforcing compliance with their rent-to-own contracts, there can be no serious dispute that the existence of the TAR reflects a tribe's failure to actively enforce compliance. Accordingly, HUD correctly applied § 1000.318(a)(2) when it excluded units from FCAS that tribes had not conveyed due to TARs.

D. Congress's Incorporation Of § 1000.318 Into NAHASDA Confirms The Regulation's Validity

For the reasons explained above, the factors listed in 24 C.F.R. § 1000.318 reflect tribal need and are therefore consistent with NAHASDA's text and purpose. *See Fort Peck*, 367 F. App'x at 890-91; 25 U.S.C. § 4152(b) (Supp. II 1996). Accordingly, they merit this Court's deference. *See Fort Peck*, 367 F. App'x at 892.

In 2008, Congress confirmed that conclusion and 24 C.F.R. § 1000.318's validity when it incorporated the regulation directly into § 4152. *See* 25 U.S.C. § 4152(b)(1) (Supp. II 2008); Pub. L. No. 110-411, 122 Stat. 4319, 4329 (Oct. 14, 2008). As the Supreme Court has explained, where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation, we cannot but deem that construction virtually conclusive" on the question of the regulation's validity under the original statute. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)) (internal quotation marks omitted).

Moreover, in writing the regulation into the statute, Congress made clear that it was "clarif[ying]" existing law, not making a substantive change. S. Rep. No. 110-238, at 9 (Dec. 7, 2007). That clarification was necessary in light of the district court's 2006 decision in *Fort Peck Housing Authority v. HUD*, 435 F. Supp. 2d 1125, 1134 (D. Colo. 2006), in which the district court invalidated § 1000.318 on the ground that it conflicted with § 4152. *See Herrara v. First Northern Sav. & Loan Ass'n*, 805 F.2d 896, 901 (10th Cir. 1986) (The existence of a "dispute or ambiguity" over a statute's meaning, "such as a split in the circuits," is "an indication that a subsequent amendment is intended to clarify, rather than change, the existing law."). Congress's identification of the 2008 amendment as a necessary clarification of a existing law is additional, "particulary persuasive" evidence that the regulation was valid from NAHASDA's inception. *See Johnson v. HUD*, 911 F.2d 1302, 1308 (8th Cir. 1990) ("The clarifying amendment, although enacted by a subsequent Congress, is

[particularly persuasive] evidence of what Congress intended when it passed the [original] Act in 1987."). In short, to the extent that there is any doubt that 24 C.F.R. § 1000.318 was valid under NAHASDA as enacted, Congress's ratification of the regulation dispels it.

In the district court, the plaintiff tribes noted that Congress declined to make the amended version of 25 U.S.C. § 4152 retroactive in some circumstances. *See* 25 U.S.C. § 4152(b)(1)(E) (stating that the amended version of § 4152 does not apply to "any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after" the amendment's enactment). The tribes then argued that Congress's failure to make the amendment fully retroactive was evidence that Congress thought that 24 C.F.R. § 1000.318 was invalid under the pre-amendment version of § 4152. *See* Aplt. Appx. 575i-575k.

Contrary to the tribes' contention, Congress's decision not to make the revised version of § 4152 fully retroactive does not indicate that it thought 24 C.F.R. § 1000.318 was previously invalid. As noted, at the time the amendment was enacted, Congress needed to confirm the regulation's validity in light of the district court's 2006 decision in *Fort Peck*, which struck the regulation down. Nothing in the amendment's legislative history suggests that Congress agreed with the district court's conclusion. To the contrary, Congress made clear that it viewed the amendment as a

clarification of the regulation's validity since its inception. *See* S. Rep. No. 110-238, at 9. In choosing not to make the amended § 4152 retroactive with respect to tribes who filed civil suits within 45 days of the amendment's enactment, Congress simply allowed the courts to decide whether they agreed that the regulation had been valid all along, as this Court did in *Fort Peck*. *See* 367 F. App'x at 890-91.

II. HUD Properly Exercised Its Common-Law Authority To Recover The Overpayments It Erroneously Made To The Tribes

A. As A Federal Agency, HUD Has An Inherent Right To Collect Payments Made By Mistake

In recovering the overpayments at issue here, HUD exercised the government's longstanding, common-law right to "recover funds which its agents have wrongfully, erroneously, or illegally paid." *United States v. Wurts*, 303 U.S. 414, 415 (1938); *see also Fort Belknap Hous. Dep't. v. Office of Pub. & Indian Hous.*, 726 F.3d 1099, 1105 (9th Cir. 2013) ("[P]ursuant to the common law doctrine of payment by mistake, the Government is entitled to recover payments when it made those payments under an erroneous belief which was material to the decision to pay.") (internal quotation marks omitted); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15-16 & n.16 (1st Cir. 2005) (the federal government has "inherent authority" to recover sums erroneously paid); *LTV Educ. Sys., Inc. v. Bell*, 862 F.2d 1168, 1175 (5th Cir. 1989) ("It is well established that the government, without the aid of a statute, may recover money it mistakenly, erroneously, or illegally paid from a party that received the funds without right.").

Moreover, the government can recover funds paid by mistake through an administrative offset; it need not file a lawsuit to recover the funds. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.") (internal quotation marks omitted); *Grand Trunk W. Ry. v. United States*, 252 U.S. 112, 121 (1920) (The Postmaster General was "under no obligation to establish the [overpayment] by suit. Having satisfied himself of the fact he was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company to which the overpayment had been made.").

Here, HUD determined that it had mistakenly overpaid the tribes on account of the tribes' erroneous FCAS counts. *See supra* Pt. I; *see also Fort Peck*, 367 F. App'x at 885 (noting that "HUD mistakenly overpaid Fort Peck . . . for dwelling units [the tribe] no longer owned or operated"). Having made that determination, the agency then appropriately recovered those overpayments by offsetting them against grant funds that HUD had allocated but not yet distributed to the tribes. *See Munsey Trust Co.*, 332 U.S. at 239; *Grand Trunk W. Ry.*, 252 U.S. at 121.

B. Neither NAHASDA Nor Its Implementing Regulations Abrogated HUD's Common-Law Right To Recover Erroneous Payments

1. The district court concluded that HUD lacked the common-law authority to recover overpayments. *See* Add. C-5 to C-6; Aplt. Appx. 608-09. The

court determined that a subsequently repealed regulation, 24 C.F.R. § 1000.532 (1998), prohibited HUD from recovering grant amounts that a tribe had expended on affordable housing activities, even if the tribe was not entitled to those funds in the first place. *See* Add. C-6; Aplt. Appx. 608. That conclusion was incorrect.

It is well established that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation marks omitted; alterations in original). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). For the reasons explained below, neither NAHASDA nor its implementing regulations "speak directly" to the question of HUD's authority to recover payments it erroneously made to the tribes. Accordingly, HUD retained its common-law authority to recover those payments.

When enacted, Section 405 of NAHASDA (codified at 25 U.S.C. § 4165) included a provision which stated:

> The Secretary may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits of the Secretary under this section [(Section 405)], except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

25 U.S.C. § 4165(c) (Supp. IV 1998). HUD subsequently adopted a regulation implementing § 4165(c), which likewise provided that "HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits [under Section 405 of NAHASDA], except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe." 24 C.F.R. § 1000.532(a) (1998). Congress amended § 4165 in 2000 and, in so doing, removed the clause that precluded HUD from recapturing grant funds that the tribe had already expended on affordable housing activities. *See* Pub. L. No. 106-568, § 1003(f)(2), 114 Stat. 2927. HUD repealed § 4165's implementing regulation in 2012. *See* 77 Fed. Reg. 71,513, 71,529 (Dec. 3, 2012).

Relying on the exception contained in the pre-2000 version of § 4165(c) and the pre-2012 version of 24 C.F.R. § 1000.532(a), the tribes argued in the proceedings below that HUD could not lawfully recover erroneous overpayments if the tribes had already spent the overpayments on affordable housing activities. *See* Aplt. Appx. 575b-575d. That argument lacks merit. As an initial matter, even assuming Congress intended the exception contained in former § 4165(c) to limit HUD's common-law authority to recover overpayments, Congress's repeal of that exception in 2000 would necessarily mean that Congress did not intend to limit HUD's authority for most grant years at issue in this case. In other words, since at least 2000, NAHASDA has

not spoken directly to the question addressed by the common law—*i.e.*, HUD's right to recover payments wrongly made.

While HUD's implementing regulation remained on the books until 2012, that fact is irrelevant. As the First Circuit has explained, the federal government's common-law rights are fully available unless "*Congress* directly spoke to the issue and . . . *Congress* intended to deprive the government of a longstanding power." *Lahey Clinic*, 399 F.3d at 14 (emphasis in original).

In any event, neither former § 4165(c) nor its former implementing regulation limited HUD's common-law authority to recover overpayments made on account of inaccurate FCAS counts. Section 4165 and its implementing regulations apply when HUD conducts a "review" or "audit" to determine whether a tribe lawfully *spent* NAHASDA funds that the tribe rightfully received. They do not apply where, as here, HUD investigates whether a tribe erroneously *received* NAHASDA funds that it should not have.

The text of § 4165 demonstrates that its focus is on whether a tribe spent money in an authorized fashion, not on whether HUD properly allocated funds to the tribe in the first place. Section 4165 audits examine a tribe's "financial statements," "expenditures of Federal awards," "internal controls," and "compli[ance] with the provisions of laws, regulations, and contracts or grants pertaining to Federal awards." 31 U.S.C. §7502(e) (referenced in 25 U.S.C. § 4165(a)). Section 4165 further provides that HUD "may conduct an audit or review of a [tribe] in order to" determine

whether the tribe: (1) "has carried out . . . eligible activities" in accordance with NAHASDA; (2) "has a continuing capacity" to do so; (3) has made required "certifications"; (4) is "in compliance" with its "Indian housing plan"; and (5) has provided accurate information in its "performance report" under 25 U.S.C. § 4164. 25 U.S.C. § 4165(b)(1). Section 4165 contains no references to examinations of a tribe's FCAS count, to the annual allocation formula, or to HUD's review of grant allocations.[9] In short, section 4165 reviews and audits are used by HUD to investigate *how* a tribe spent the NAHASDA funds to which it was entitled, not to investigate the separate question whether the tribe received grants funds that it should not have.

Moreover, interpreting former § 4165(c) or its implementing regulation as limiting HUD's authority to recover FCAS-related overpayments would produce absurd and unjust results. *See In re Overland Park Fin. Corp.*, 236 F.3d 1246, 1252 n.9 (10th Cir. 2001) ("[C]ourts will reject an interpretation of a statute that produces an absurd result."); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). As noted above, NAHASDA funding is a zero-sum system under which an increase in

[9] Notably, tribes do not provide FCAS count information in their performance reports under 25 U.S.C. § 4164. Performance reports, like the reviews and audits HUD conducts under section 4165, address the tribe's "use of grant amounts" it received, not whether the tribe erroneously received NAHASDA funds in the first instance. *See* 25 U.S.C. § 4164(b).

one tribe's share of an annual appropriation reduces the funds available to other tribes. *See supra* p. 5; *see also Fort Peck*, 367 F. App'x at 887. Thus, when a tribe's FCAS count is erroneously inflated and HUD relies on that count when applying the regulatory allocation formula, the tribe receives NAHASDA funds that should have been allocated to others.

If, as the district court found, HUD is prohibited from recovering FCAS-related overpayments as long as the recipient tribe spent the overpayments on affordable housing activities, then the tribe that fails to report changes to its FCAS inventory would receive a windfall at the expense of other tribes, including those tribes that accurately reported FCAS changes. Neither Congress nor the rulemaking committee could have intended that result.

By contrast, interpreting former § 4165(c) and former 24 C.F.R. § 1000.532 as applying when HUD audits a tribe's expenditure of grant funds that the tribe properly received produces the result that Congress and the rulemaking committee likely intended. After conducting a review under § 4165, HUD might determine that a tribe spent money in a manner that was inconsistent with NAHASDA or the tribe's Indian housing plan. *See* 25 U.S.C. § 4165(b)(1)(A). But if the tribe was entitled to receive the funds in the first place and ultimately spent the money on affordable housing activities, then Congress could have reasonably concluded that there was no need for the tribe to return the funds. In such a case, no other tribe was made worse off by the

subject tribe's misuse of the grant funds. The same is not true when a tribe receives funding that should have been paid to others.

In short, the district court's interpretation of § 4165's former implementing regulation as limiting HUD's authority to recover FCAS-related overpayments produces a perverse and inequitable result: It allows a tribe to retain funds it did not deserve and deprives other tribes of funds they were rightfully owed. That interpretation is untenable.

2. The text of § 4165 indicates that it does not apply to HUD's analysis and review of the accuracy of a tribe's FCAS count. Thus, former § 4165(c) and former 24 C.F.R. § 1000.532 do not limit HUD's common-law authority to collect erroneous overpayments. But even if § 4165 were ambiguous and could be construed as applying to HUD's review of FCAS counts, this Court would nonetheless be obligated to defer to HUD's interpretation of the statute, for at least two reasons. First, to abrogate a longstanding right of the government, a statute must do so "directly" and unambiguously. *See United States v. Texas*, 507 U.S. at 534; *see also Lahey Clinic*, 399 F.3d at 16 ("Statutes are presumed not to divest the United States of pre-existing rights, such as the ability to collect wrongfully paid monies, absent a clear congressional command."). Because § 4165 does not clearly and unambiguously limit HUD's right to recover grant funds erroneously paid to tribes, the statute must be presumed not to divest the government of that right.

Second, for the reasons explained above, HUD's conclusion that § 4165 does not apply to its examination of a tribe's FCAS counts is at least reasonable. Accordingly, HUD's interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *See also Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (*Chevron* deference applies to HUD's reasonable interpretation of statutes that the agency is charged with implementing and administering).

3. The Ninth Circuit's recent analysis of § 4165 in *Crow Tribal Housing Authority v. HUD*, 781 F.3d 1095 (9th Cir. 2015), is largely inapplicable here and is, in any event, incorrect. In *Crow*, the Ninth Circuit held that § 4165 and a hearing requirement contained in the provision's now-repealed implementing regulation (*see* 24 C.F.R. § 1000.532(b)(1998)) are triggered when HUD conducts an on-site review as part of its examination of a tribe's FCAS counts. 781 F.3d at 1103 ("[W]e conclude HUD's 2004 on-site FCAS review constituted an audit within the meaning of § 4165."); *see also id.* at 1104-06.[10] Because, with few exceptions, HUD did not conduct an on-site examination in connection with its review of the plaintiff tribes'

[10] Notably, the only subsection of former 24 C.F.R. § 1000.532 that was at issue in *Crow* was subsection (b). *See* 781 F.3d at 1105-06 & n.11. The court of appeals therefore did not consider subsection (a) and its provision barring HUD from recovering grant funds that a tribe "already expended on affordable housing activities." *See id.* at 1106 n.11; 24 C.F.R. § 1000.532(a)(1998). As a result, the Ninth Circuit did not consider, let alone address, the absurd results that would follow from the application of 24 C.F.R. § 1000.532(a) to HUD's review of a tribe's FCAS counts. Nor did the court have occasion to consider the improper intrusion on HUD's common-law right to recover erroneous payments that application of 24 C.F.R. § 1000.532(a) would involve.

FCAS counts, the Ninth Circuit's holding is irrelevant to most of the tribes in this case.

The Ninth Circuit's holding was, in any event, erroneous and should not be followed in the few instances where HUD made an on-site visit as part of its review of a plaintiff tribe's FCAS count. The court of appeals' conclusion that § 4165 and the hearing requirement contained in former 24 C.F.R. § 1000.532(b) apply when HUD conducts an on-site review of the accuracy of a tribe's FCAS inventory was based on two assumptions. Both assumptions are incorrect.

First, the Ninth Circuit erroneously concluded that § 4165(b)(1)(A)(i)(II)—which grants HUD the authority to conduct reviews to determine whether a tribe "has carried out . . . eligible activities and certification in accordance with [NAHASDA]" was ambiguous. *Crow*, 781 F. 3d at 1103. The court based its determination that the provision was ambiguous on the fact that "NAHASDA does not define 'eligible activities and certification.'" *Id.* And because NAHASDA does not define "'eligible activities and certification,'" the court further concluded, it was "ambiguous whether the term[s] encompass[] [FCAS] reporting." *Id.*

The Ninth Circuit's conclusion that NAHASDA does not define "eligible activities and certification" was fundamentally mistaken. In fact, NAHASDA expressly defines both terms. Section 4132, which is entitled "[e]ligible affordable housing activities," provides an itemized and detailed list of "eligible affordable

housing activities" under the Act. *See* 25 U.S.C. § 4132. The list of eligible activities does not include accurate FCAS counts. Thus, HUD's evaluation of the accuracy of a tribe's FCAS count is clearly not a review to determine whether the tribe "carried out . . . eligible affordable housing activities" with the NAHASDA funds it received. *See* 4165(b)(1)(A)(i)(II). Such an evaluation is instead a review to determine whether the tribe erroneously *received* NAHASDA funds it should not have.

NAHASDA similarly identifies the "certification[s]" that § 4165(b)(1)(A)(i)(II) references. Section 4112(b)(2)(D) identifies six "certification[s]" that a tribe must include in the Indian housing plan it submits to HUD each year. Those certifications include that the tribe "will comply with the applicable provisions of title II of the Civil Rights Act of 1968"; that the tribe "will maintain adequate insurance coverage"; and that the tribe has "policies . . . governing the eligibility, admission, and occupancy of families for housing assisted with [NAHASDA] grant amounts." 25 U.S.C. § 4112(b)(2)(D). Another "certification" is required by 25 U.S.C. § 4114(b), which requires a tribe to certify that it will pay prevailing wages to any workers the tribe hires with NAHASDA funds. 25 U.S.C. § 4114(b)(1). Finally, § 4115(c) requires tribes to certify that they will conduct environmental reviews and perform other actions required by the National Environmental Policy Act of 1969 before spending NAHASDA funds. 25 U.S.C. § 4115(c). None of the "certification[s]" identified in the statute require tribes to certify their FCAS counts. Thus, contrary to the Ninth Circuit's determination, HUD's examination of a tribe's FCAS counts is not and

cannot reasonably be viewed as a review under § 4165 to "determine whether the [tribe] has carried out . . . certification[s]" in accordance with NAHASDA. *See Crow*, 781 F.3d at 1103. In sum, the Ninth Circuit incorrectly concluded that § 4165(b)(1)(A)(i)(II) is ambiguous and might encompass examinations of a tribe's FCAS count.

Second, having incorrectly concluded that § 4165(b)(1)(A)(i)(II) is ambiguous, the Ninth Circuit compounded its error by refusing to defer to HUD's reasonable interpretation of the provision as not governing examinations of FCAS data. *See Crow*, 781 F.3d at 1103. Instead of deferring to HUD, the court of appeals applied the canon of statutory interpretation that requires statutes "to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992)). But as this Court noted in *Fort Peck*, the canon does not apply in this context, because an interpretation that benefits one tribe (by allowing the tribe to retain funds it was erroneously paid) necessarily disadvantages other tribes (by depriving them of funds they should have received). *See Fort Peck*, 367 F. App'x at 892. As this Court stated: "[T]he [Indian] canon . . . does not allow a court to rob Peter to pay Paul no matter how well intentioned Paul may be." *Id.*; *see also Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) ("We cannot apply the [Indian] canons of construction for the benefit of the [Chehalis Tribe] if such application would adversely affect Quinault interests.").

Thus, even if § 4165(b)(1)(A)(i)(II) were ambiguous, the Ninth Circuit should have deferred to HUD's conclusion that § 4165 is inapplicable to HUD's review of a tribe's FCAS counts.

For the foregoing reasons, the Ninth Circuit erred when it concluded that § 4165 and the pre-2012 version of 24 C.F.R. § 1000.532 apply when HUD conducts an on-site examination of a tribe's FCAS counts. Properly construed, § 4165 applies when HUD conducts an audit or review of how a tribe spent the NAHASDA funds it received. It does not apply when HUD conducts an on-site review of a tribe's FCAS counts to determine whether a tribe erroneously received funds that should have been allocated to other tribes. Given that HUD repealed 24 C.F.R. § 1000.532 in 2012, the Ninth Circuit's decision will have little long-term significance. To the limited extent the Ninth Circuit's decision might apply here, this Court should decline to follow it.

III. HUD CAN RECOVER OVERPAYMENTS WITHOUT A FORMAL EVIDENTIARY HEARING

A. Neither NAHASDA Nor Its Implementing Regulations Required HUD To Provide A Formal Hearing Before Recovering FCAS-Related Overpayments

The district court also erroneously concluded that HUD was required to hold a formal evidentiary hearing before it recovered the overpayments it made to the tribes. *See* Add. D-11 to D-12; Aplt. Appx 591-92. The district court identified two sources of a purported hearing requirement: (1) the pre-2012 version of 24 C.F.R. § 1000.532, and (2) 25 U.S.C. § 4161(a)(1). Neither provision applies here.

1. 24 C.F.R. § 1000.532 (1998): Section 4165's former implementing regulation, 24 C.F.R. § 1000.532, included a right to request a hearing. Specifically, the regulation provided that, before HUD could adjust a grant amount under § 4165, the agency had to provide the tribe with notice. *See* 24 C.F.R. § 1000.532(b)(1998). The tribe could then "request, within 30 days of notice of the action, a [formal administrative] hearing." *Id.*

For the reasons explained above (in Pt. II.B), 24 C.F.R. § 1000.532 was not implicated here, because HUD did not act pursuant to its § 4165 audit and review authority. As discussed, § 4165 reviews and audits investigate whether a tribe spent NAHASDA funds in an authorized manner. The FCAS reviews HUD conducted were directed at the distinct question whether a tribe received NAHASDA funds it was not entitled to. *See supra* Pt. II.B. The district court therefore erred in concluding that HUD acted pursuant to § 4165 and was thus required to provide a hearing under 24 C.F.R. § 1000.532(b) before it recaptured the overpayments.

2. 25 U.S.C. § 4161(a)(1): The district court also incorrectly concluded that HUD was required to provide a hearing under 25 U.S.C. § 4161(a)(1). Section 4161(a)(1) by its terms applies "only where HUD (1) determines, after reasonable notice and an opportunity for hearing, that a recipient has failed to comply

substantially with NAHASDA's provisions, and (2) imposes one of the four statutorily required sanctions for such failure." *Fort Belknap*, 726 F.3d at 1104.[11]

Neither of these prerequisites was satisfied here. HUD neither alleged nor concluded that any tribe "failed to comply substantially with NAHASDA." *Fort Belknap*, 726 F.3d at 1104. As the Ninth Circuit held in *Fort Belknap*, misreporting FCAS unit counts does not, on its own, constitute "substantial noncompliance" with NAHASDA. *See* 726 F.3d at 1105; *see also Crow*, 781 F.3d at 1100-02 (holding that HUD did not act pursuant to § 4161 when it determined that tribes had been overpaid due to errors in their FCAS counts, because FCAS reporting errors do not constitute "substantial noncompliance"). Generally speaking, a finding that a tribe has failed to substantially comply with the statute is limited to situations where a tribe's noncompliance is willful, is part of a pattern, and/or creates a significant risk

---

[11] Section 4161(a)(1) provides:

> [I]f the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall –
>
> (A) terminate payments under this chapter to the recipient;
> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
> (D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

25 U.S.C. § 4161(a)(1).

that the tribe will be unable to carry out material aspects of its Indian housing plan. *See* 24 C.F.R. § 1000.534. Errors in reporting FCAS do not meet these criteria.

In 2008, Congress confirmed that a tribe's failure to update its FCAS inventory is not a failure to comply substantially with NAHASDA. In that year, Congress amended NAHASDA to clarify that "[t]he failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance . . . ." 25 U.S.C. § 4161(a)(2) (as amended by Pub. L. No. 110-411, § 401, 122 Stat. 4330 (2008)). That amendment is strong evidence of congressional intent with respect to the pre-2008 version of NAHASDA. As it did with respect to the 2008 amendments to § 4152, Congress explicitly described the 2008 revision to § 4161 as a "[c]larification" of existing law. S. Rep. No. 110-238, at 10; *see also Crow*, 781 F.3d at 1101 ("The Senate Report makes clear that the 2008 [NAHASDA] amendment was a clarification, not a substantive change to the statute."); *see supra* Pt. I.D. Thus, Congress itself believed that, under the pre-2008 version of NAHASDA applicable here, inaccurate FCAS count did not constitute "substantial noncompliance" under 25 U.S.C. § 4161.

Section 4161's hearing requirement was not triggered here for the additional and independent reason that HUD did not invoke any of the remedies listed in § 4161(a)(1). The only § 4161 remedy that is similar to the remedy HUD relied on here (recovery of erroneous payments through administrative offset) is

§ 4161(a)(1)(B), which allows HUD to "reduce payments . . . to the recipient [who has failed to substantially comply with the Act] by an amount equal to the amount of such payments that were not expended in accordance with [the Act]." But as the Ninth Circuit explained in *Fort Belknap*, "HUD never alleged nor found that any funds 'were not *expended* in accordance with this chapter.'" 726 F.3d at 1106 (quoting 25 U.S.C. § 4161(a)(1)(B)). "Instead, it found that [the tribe] 'incorrectly received funding' for ineligible units." *Id.* Put another way, HUD did not recover funds it found that the tribes had spent improperly. Rather, it recovered funds that should never have been allocated to the plaintiff tribes in the first place. "HUD's remedy (i.e. the repayment of funds received in error) was [thus] not among those remedies listed in 25 U.S.C. § 4161(a)(1)." *Id.*

B. In Any Event, HUD's Purported Error In Failing To Hold A Formal Evidentiary Hearing Was Harmless

To succeed on their claim that HUD violated the APA when it failed to provide a formal hearing, the plaintiff tribes must establish both that a hearing was required and that they were prejudiced by HUD's failure to hold a hearing. *See* 5 U.S.C. § 706 ("due account" must be given to "the rule of prejudicial error"); *Prairie Band Pottawatomie Nation v. FHA*, 684 F.3d 1002, 1008 (10th Cir. 2012) ("[E]ven if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error."). Here, the tribes must demonstrate that their FCAS counts would not have been reduced (and the resulting overpayments

would not have been recovered) if HUD had held formal evidentiary hearings. *See*, *e.g.*, *Boyd v. United States*, 121 F. App'x 348, 350 (10th Cir. 2005) (unpublished) (IRS's failure to provide a hearing was harmless where the plaintiff failed to present evidence showing that a hearing would have produced "a different result"). The tribes have not made that showing here.

As an initial point, the tribes have never identified any evidence or argument that they would have presented in a formal evidentiary hearing that they were unable to present during the lengthy administrative proceedings that took place here. That is not surprising, as the tribes were given essentially unlimited opportunities to present evidence and argument to the agency. *See supra* pp. 16-18. And when the tribes did present such evidence or argument, HUD responded to it, no matter how belatedly it was submitted. *See supra* p. 17.

Moreover, HUD's conclusion that the tribes' FCAS counts had been misreported was based largely on information that the tribes themselves provided, particularly with respect to conveyed units. *See supra* pp. 9-11, 30-34. The tribes cannot plausibly contend that a hearing would have made a difference to HUD's determination that a particular unit had been conveyed on a particular date (and therefore should have been removed from the tribe's FCAS), when that conclusion was based solely on conveyance information that the tribes supplied. Indeed, in several cases, the plaintiff tribes acknowledged that their FCAS counts had been overstated due to unreported conveyances and other errors. *See*, *e.g.*, Aplt. Appx. 2624

(Sicangu concedes that HUD was "correct" that its FCAS had been overstated by 40 units for FYs 1998-2003); Aplt. Appx. 2242, 2245-48 (Choctaw reports "corrections" to its FYs 1998-2000 FCAS due to previously unreported conveyances); Aplt. Appx. 5271(Bristol Bay reports "retroactive" corrections to FCAS to reflect unreported conveyances and previously reported units that were never built). Given that the tribes self-reported the conveyance information HUD used when it determined that the tribes had improperly included conveyed units in their FCAS, the tribes cannot possibly show that they were prejudiced by HUD's failure to provide a hearing before making that determination.

There were likewise few, if any, factual disputes regarding non-conveyed units that HUD deemed ineligible for inclusion in FCAS under 24 C.F.R. § 1000.318(a)(1) and (2). For example, HUD did not question the veracity of the tribes' reports that particular housing units required repairs or that particular homebuyers had outstanding account receivables. Instead, HUD reasonably concluded, as a matter of law, that the need to perform repairs did not render conveyance impracticable under 24 C.F.R. § 1000.318(a)(1), and that the existence of tenant accounts receivables was not a basis for continued FCAS eligibility under 24 C.F.R. § 1000.318(a)(2). *See supra* Part I.B, I.C. A hearing would not have affected those legal conclusions.

Because the plaintiff tribes cannot establish that a formal hearing would have led HUD to reach a different conclusion regarding the tribes' FCAS errors, their hearing claim necessarily fails.

C. If A Hearing Was Required, The Proper Remedy Is A Remand

It is axiomatic that, when agency action is found to be arbitrary and capricious, the proper course is generally "to remand to the Agency," instead of "jump[ing] ahead to resolve the merits of the dispute." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007); *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002); *see also*, *e.g.*, *Weight Loss Healthcare Ctrs. of Am., Inc. v. OPM*, 655 F.3d 1202, 1212 (10th Cir. 2011); *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 82-83 (D.C. Cir. 2014) (remanding to agency because agency failed to follow statutory procedure). Should this Court conclude that HUD erred in failing to provide the plaintiffs a formal hearing, the appropriate remedy would be to remand to the agency to provide the required hearing. The appropriate approach is not to assume, as the district court did, that a hearing would be "futile" and that the tribes were therefore entitled to the funds that HUD had recouped. *See* Add. C-6; Aplt. Appx. 603 ("[T]he one thing I'm taking off the table is your approach that what I have to do is order administrative hearings, and I don't do that."). For this reason alone, the district court's chosen remedy—orders requiring HUD to repay the tribes—should be reversed. As explained below, those orders should be set aside for the additional and independent reason that they violate the United States' sovereign immunity.

IV. THE DISTRICT COURT'S ORDERS VIOLATE THE UNITED STATES' SOVEREIGN IMMUNITY

Suits against an agency of the United States are barred by sovereign immunity absent a specific waiver of that immunity. *See Utah v. EPA*, 765 F.3d 1257, 1260 (10th Cir. 2014). In this suit, the tribes rely on the waiver contained in the Administrative Procedure Act. *See* Aplt. Appx. 16 ¶¶ 29-30; 5 U.S.C. § 702. The APA's waiver of sovereign immunity is limited, however, and does not encompass suits seeking "money damages." 5 U.S.C. § 702.

Despite this prohibition on money damages, the plaintiff tribes repeatedly exhorted the district court to award "damages" and to "reimburse" the tribes for their losses. *See* Aplt. Appx. 618, 621, 623, 624. And the district court did so when it ordered HUD to pay a fixed sum of money to each plaintiff tribe "from all available sources," including from "funds appropriated in future grant years." *See* Add. A-1, A-6, A-9, A-11, A-13, A-16, A-19, A-22, A-25, A-28, A-31, A-34 to A-61. The district court's orders violate the sovereign immunity of the United States and must be reversed.

"Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Phelan v. Wyoming Associated Builders*, 574 F.3d 1250, 1254 (10th Cir. 2009) (quoting

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002)). The only instance in which an order requiring payment does not constitute "money damages" under the APA is where a court awards the plaintiff "the very thing to which he was entitled." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)). With one exception, *see infra* note 12, the money that the district court ordered the United States to pay is not the "very thing" to which the tribes allege they are entitled.

The essence of the tribes' claims here is that HUD acted improperly when it reduced their NAHASDA block grants in various years between 2000 and 2008, to recover funds that HUD determined had been overpaid in previous years. Thus, the "very thing" the tribes claim entitlement to is a larger share of past-year appropriations. For example, the Aleutian tribe seeks repayment of $145,089 that HUD deducted from its fiscal year 2004 grant, to recover overpayments the Aleutian received in fiscal years 2001, 2002, and 2003. Aplt. Appx. 6025; *see also* Aplt. Appx. 5527, 5530. Thus, the "very thing" that the Aleutian claims it is entitled to is an additional $145,089 from Congress's 2004 NAHASDA appropriation. But all funds from the 2004 NAHASDA appropriation have been distributed. Thus, it is impossible for the United States to pay the Aleutian the very thing to which it claims entitlement. With one exception, *see infra* note 12, the same holds true for all plaintiff tribes. *See, e.g.*, Aplt. Appx. 557 (the district court explaining with respect to Fort Peck that "because the funds repaid have been re-distributed," the judgment payments

"must come from a source of funds other than the appropriations made for the fiscal years in issue in this case").[12]

Because the United States no longer has the funds to which the tribes claim entitlement, an order requiring the United States to pay money to the tribes amounts to an order to pay compensatory damages. Indeed, the conclusion that the district court's orders require HUD to pay compensatory damages could not be plainer. The orders require HUD to pay the tribes money from all "available sources," including from funds appropriated in "future grant years." *See*, *e.g.*, Add. A-1. But the tribes have never contended that HUD deprived them of future grant funds to which the tribes are entitled. An order requiring HUD to repay tribes out of future appropriations is thus unmistakably an order to compensate the tribes for past

[12] The district court's judgments with respect to Tlingit, Navajo, and the ten tribes involved in the *Blackfeet* appeal (No. 15-1060) require HUD to compensate the tribes with fiscal year 2008 NAHASDA funds that the district court ordered HUD to set aside. *See* Add. A-4, A-6, A-34 to A-61. For Tlingit and the ten *Blackfeet* tribes, the district court's judgment violates the United States' sovereign immunity for the reasons stated above. Tlingit and the *Blackfeet* tribes claim that HUD wrongfully reduced their block grants in one or more fiscal years between 1998 and 2007. *See* Add. B-12; Aplt. Appx. 1244, 3918-27. By requiring HUD to repay Tlingit and the *Blackfeet* tribes out of 2008 NAHASDA funds, the district court improperly ordered HUD to use 2008 funds to compensate the tribes for the loss of funds from earlier appropriations. With respect to the Navajo, HUD recovered overpayments by reducing the tribe's 2008 block grant. Thus, the district court's order in *Navajo* requires HUD to return the very thing (fiscal year 2008 appropriated funds) that Navajo claims it was entitled to. The district court's judgment in *Navajo* thus does not appear to present a sovereign immunity issue to the extent that it orders the government to disburse 2008 funds to the tribe.

injuries. Such "compensatory, or substitute, relief" is not available under the APA. *See Blue Fox*, 525 U.S. at 261.

Under almost identical circumstances, the D.C. Circuit held that the type of relief the district court ordered here is not available under the APA. *See City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994). In *City of Houston*, HUD allocated Houston $21.6 million out of a 1986 congressional appropriation. 24 F.3d at 1424. When HUD subsequently reduced the city's grant by $2.6 million, Houston filed an APA suit, arguing that HUD violated the law by failing to hold a hearing before reducing its grant. *Id.* Without deciding whether a hearing was required, the D.C. Circuit rejected the city's APA claim. *Id.* at 1426-28. The court held that Houston's claim failed at the threshold, because the court was powerless to award the relief Houston sought—return of the $2.6 million in 1986 funding. *Id.* at 1426-27. In reaching that conclusion, the court emphasized that the relevant appropriation had been fully obligated. *Id.* at 1428. "When the relevant appropriation has lapsed or been fully obligated," the court explained, "the federal courts are without authority [under the APA] to provide monetary relief." *Id.*

The court of appeals also rejected the city's contention that the judgment could be paid from other available funds that HUD possessed. *City of Houston*, 24 F.3d at 1428. "An award of monetary relief from any source of funds other than the [relevant] appropriation," the court emphasized, "would constitute money damages rather than specific relief, and so would not be authorized by APA section 702." *Id.*;

see also County of Suffolk v. Sebelius, 605 F.3d 135, 141(2d Cir. 2010) ("[I]n cases challenging an agency's expenditure of funds, the *res* at issue is identified by reference to the congressional appropriation that authorized the agency's challenged expenditure. To seek funds from another source is to seek compensation rather than the specific property the plaintiff aims to recover. A claim seeking the former type of relief falls outside the scope of the waiver of sovereign immunity arising from § 702 of the APA.").

Here, the plaintiff tribes, like the city of Houston, seek funds from past appropriations that have been fully obligated. Under these circumstances, federal courts are "without authority to provide [the tribes] monetary relief." *City of Houston*, 24 F.3d at 1428. In particular, a court may not do what the district court did here: order the United States to compensate the tribes out of any available funding source. *Id.*; *see also County of Suffolk*, 605 F.3d at 140-41.

The district court initially adhered to these principles, concluding, with respect to Fort Peck, that the monetary relief the tribe sought constituted "substitute relief" not available under the APA. *See* Aplt. Appx. 557. But the district court later reversed course after concluding that "HUD treats NAHASDA appropriations from different fiscal years as fungible." Add. C-8; Aplt. Appx. 611.

The district court's analysis was fatally flawed. The key question is not whether HUD has the authority to use current or future NAHASDA appropriations to compensate tribes for money the tribes believe they should have received in past

years. Nor is the question whether HUD has non-NAHASDA funds available that the agency could use to compensate the plaintiff tribes. Rather, the decisive inquiry is whether a court can order HUD to pay compensation to the plaintiff tribes for the tribes' past injuries. As explained above, it cannot do so under the APA's waiver of sovereign immunity. The purported "fungible" use of NAHASDA funds is thus irrelevant. *See County of Suffolk*, 605 F.3d at 141 ("Analytically speaking, the fungibility often associated with money obscures, to some extent, the distinction between: (1) relief that seeks to compensate a plaintiff for a harm by providing a *substitute* for the loss, which is unavailable in an action under [the APA]; and (2) relief that requires a defendant to transfer a specific *res* to the plaintiff.").

CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed.

Respectfully submitted,

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JUNE 2015

REQUEST FOR ORAL ARGUMENT

The appellants believe that oral argument would be of assistance to this Court, and respectfully request oral argument.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and this Court's order of December 5, 2014, I hereby certify that the foregoing Brief for the Appellants is in 14-point Garamond font and was produced on Microsoft Word 2010 Version 14. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 17,945 words, according to the word processor's word count.

/s/ Gerard Sinzdak
Gerard Sinzdak

Attorney for the Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made; (2) any required paper copies of this document to be submitted to the court are exact copies of the version filed electronically; and (3) that the electronic submission was scanned for viruses and found to be virus-free.

/s/ Gerard Sinzdak
Gerard Sinzdak

Attorney for the Appellants

CERTIFICATE OF SERVICE

I certify that on June 25, 2015, I electronically filed the foregoing brief with the Clerk of the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Gerard Sinzdak
Gerard Sinzdak

Attorney for the Appellants

ADDENDUM

The Addendum is attached as a separate document.

Nos. 14-1313, 14-1331, 14-1338, 14-1342, 14-1407, 14-1484, and 15-1060
[Oral Argument Requested]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MODOC LASSEN INDIAN HOUSING AUTHORITY, et al.,

Plaintiffs/Appellees,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
[District Court Case Nos. 05-cv-0018-RPM, 08-cv-0451-RPM, 08-cv-0826-RPM, 08-cv-2572-RPM, 08-cv-2577-RPM, 08-cv-2584-RPM, 07-cv-1343-RPM (Judge Matsch)]

APPELLANTS' ADDENDUM

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ADDENDUM INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of Housing and Urban Development,
SANDRA HENRIQUEZ, Assistant Secretary for Public and Indian Housing,

Defendants

FINAL JUDGMENT

Pursuant to the Findings, Conclusions and Order for Judgment entered by Senior District Judge Richard P. Matsch on August , 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Fort Peck Housing Authority the amount of $513,354, for Indian Housing Block Grant ("IHBG") funds that were recaptured illegally from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to the Plaintiff shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for fiscal years through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiff is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: August 6, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-00451-RPM

TLINGIT-HAIDA REGIONAL HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINAL JUDGMENT

Pursuant to the Findings, Conclusions and Order for Judgment entered by Senior District Judge Richard P. Matsch on June 19, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Tlingit-Haida Regional Housing Authority the amount of $1,139,658, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to the funds set aside for Plaintiff's benefit by stipulation of the parties on March 6, 2008 and ordered by this court in an Order entered on March 18, 2008 in the amount of $1,499,887; it is

FURTHER ORDERED that the restoration of grant funds to the Plaintiff from the amount set aside pursuant to the parties' stipulation dated March 6, 2008 shall occur within 30 (thirty) days of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiff is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 19, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

By: s/M. V. Wentz
_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-CV-00826-RPM

NAVAJO HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants

FINAL JUDGMENT

Pursuant to the Findings, Conclusions and Order for Judgment entered by Senior District Judge Richard P. Matsch on June 30, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Navajo Housing Authority the amount of $6,165,842 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from Plaintiff Navajo. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including the funds set aside for the benefit of Plaintiff Navajo pursuant to this Court's Order dated October 9, 2008 in the amount of $5,121,456; and either or both of the IHBG funds carried-forward from previous fiscal years and the IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of those grant funds set aside for Plaintiff Navajo

pursuant to the order dated October 9, 2008, shall occur within 30 (thirty) days of the date of the Judgment; and restoration of the remaining amount required by this Judgment shall be completed and Defendants shall implement restoration of the funds by making adjustments to the Plaintiff's IHBG allocation(s) no later than 18 (eighteen) months from the date of the Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including FY 2008, the Defendants shall refrain from threatening to or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiff is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 30, 2014

FOR THE COURT:
JEFFREY P. COLWELL, CLERK OF THE COURT
By:
s/M. V. Wentz
_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-02573-RPM

MODOC LASSEN INDIAN HOUSING AUTHORITY, the tribally designated housing entity for the Grindstone Indian Rancheria of Wintun-Wailaki Indians of California,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINAL JUDGMENT

Pursuant to the Findings, Conclusions and Order for Judgment entered by Senior District Judge Richard P. Matsch on June 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Modoc Lassen Indian Housing Authority the amount of $146,764 for Indian Housing Block Grant funds that were illegally recaptured from the Plaintiff for FY 1999 through and including FY 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act in a given fiscal year; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous

grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to the Plaintiff shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for fiscal years through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiff is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 10, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/J. Chris Smith

By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-02577-RPM

CHOCTAW NATION OF OKLAHOMA and
HOUSING AUTHORITY OF THE CHOCTAW NATION OF OKLAHOMA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINAL JUDGMENT

Pursuant to the Findings, Conclusions and Order for Judgment entered by Senior District Judge Richard P. Matsch on June 25, 2014, it is

ORDERED that Defendants shall restore to Plaintiffs Choctaw Nation of Oklahoma and Housing Authority of the Choctaw Nation of Oklahoma ("Plaintiff Choctaw") the amount of $841,316.00, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from Plaintiff Choctaw. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Choctaw under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of this Judgment; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, either or both IHBG funds carried-forward from previous fiscal years and IHGB funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Choctaw shall be completed and Defendants shall implement restoration of the funds by making adjustments to Plaintiff Choctaw's IHBG allocation(s) no later than 18 (eighteen) months from the date of this Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including FY 2008, Defendants shall refrain from threatening to or implementing any recapture of IHBG funds from Plaintiff Choctaw and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411; and it is

FURTHER ORDERED that Plaintiff Choctaw is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 25, 2014

FOR THE COURT:
JEFFREY P. COLWELL, CLERK OF THE COURT
By:
s/M. V. Wentz
_____
Deputy Clerk

APPROVED:
s/Richard P. Matsch
_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF SICANGU WICOTI AWANYAKAPI CORPORATION

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Sicangu Wicoti Awanyakapi Corporation ("SWA Corp.") the amount of $1,117,171.00, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff SWA Corp. under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to the Plaintiff shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff SWA Corp. and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff SWA Corp. is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

M. V. Wentz
By:_____
Deputy Clerk

APPROVED:
s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF OGLALA SIOUX (LAKOTA) HOUSING

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Oglala Sioux (Lakota) Housing the amount of $654,053.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Oglala Sioux (Lakota) Housing under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Oglala Sioux (Lakota) Housing shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Oglala Sioux (Lakota) Housing and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Oglala Sioux (Lakota) Housing is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF TURTLE MOUNTAIN HOUSING AUTHORITY

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Turtle Mountain Housing Authority the amount of $1,790,375.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Turtle Mountain Housing Authority under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Turtle Mountain Housing Authority shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Turtle Mountain Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Turtle Mountain Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Winnebago Housing and Development Commission ("Winnebago") the amount of $169,250.00, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Winnebago under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Winnebago shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Winnebago and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Winnebago is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF LOWER BRULE HOUSING AUTHORITY

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Lower Brule Housing Authority ("Lower Brule") the amount of $372,442.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Lower Brule under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Lower Brule shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Lower Brule and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Lower Brule is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF SPIRIT LAKE HOUSING CORPORATION

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Spirit Lake Housing Corporation ("Spirit Lake") the amount of $870,232.00, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Spirit Lake under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Spirit Lake shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Spirit Lake and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Spirit Lake is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

JUDGMENT IN FAVOR OF
PLAINTIFF TRENTON INDIAN HOUSING AUTHORITY

Pursuant to the Order for Entry of Judgments dated September 22, 2014, entered by Senior District Judge Richard P. Matsch, and the incorporated findings and conclusions set forth in the Court's Memorandum Opinion and Order dated August 31, 2012; the Memorandum Opinion and Order dated March 7, 2014, and the Order on Disputed Issues dated July 10, 2014, it is

ORDERED that the Defendants shall restore to Plaintiff Trenton Indian Housing Authority ("Trenton") the amount of $413,408.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years FY 1997 through and including FY 2008. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Trenton under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Trenton shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years FY 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Trenton and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Trenton is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: September 22, 2014

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF THE ZUNI TRIBE

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff The Zuni Tribe ("Zuni") the amount of $1,498,090.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years (FY) 1998 through and including FY 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Zuni under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $424,632.00 which was set aside for Plaintiff Zuni pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds set aside for Plaintiff Blackfeet Housing pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of the remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Zuni and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Zuni is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

By: S/M. V. Wentz

Deputy Clerk

APPROVED:
s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF NORTHWEST INUPIAT HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Northwest Inupiat Housing Authority ("NIHA") the amount of $1,656,043.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal years (FY) 2002 through and including FY 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff NIHA under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $1,515,861.00 which was set aside for Plaintiff NIHA pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds set aside for Plaintiff NIHA pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of the remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff NIHA and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff NIHA is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

By: s/M. V. Wentz
Deputy Clerk

APPROVED:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF ISLETA PUEBLO HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Isleta Pueblo Housing Authority the amount of $121,285.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years (FY) 1998 through and including FY 2002. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Isleta Pueblo Housing Authority under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $248,052.00 which was set aside for Plaintiff Isleta Pueblo Housing Authority pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of grant funds from the amount set aside for Plaintiff Isleta Pueblo Housing Authority pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of any remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Isleta Pueblo Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a)

of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Isleta Pueblo Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M. V. Wentz

By:_____

Deputy Clerk

APPROVED:

s/Richard P. Matsch

_____

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF CHIPPEWA CREE HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Chippewa Cree Housing Authority the amount of $656,200.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal years (FY) 2003 through and including FY 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, the amount of $311,688.00 which was set aside for Plaintiff Chippewa Cree Housing Authority pursuant to the stipulation dated March 5, 2008 and order approving it dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds set aside for Plaintiff Chippewa Cree Housing Authority pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of the remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Chippewa Cree Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Chippewa Cree Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M. V. Wentz

By:_____

Deputy Clerk

APPROVED:

s/Richard P. Matsch

_____

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF BRISTOL BAY HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Bristol Bay Housing Authority the amount of $230,145.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal years (FY) 2002, 2005, and 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Bristol Bay Housing Authority under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $1,165,328.00 which was set aside for Plaintiff Bristol Bay Housing Authority pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of grant funds from the amount set aside for Plaintiff Bristol Bay Housing Authority pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of any remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Bristol Bay Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a)

of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Bristol Bay Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

s/M. Virginia Wentz

By:_____

Deputy Clerk

APPROVED:

s/Richard P. Matsch

_____

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF BLACKFEET HOUSING

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Blackfeet Housing the amount of $575,510.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured for fiscal years (FY) 1998 through and including FY 2001. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Blackfeet Housing under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $462,000 which was set aside for Plaintiff Blackfeet Housing pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds set aside for Plaintiff Blackfeet Housing pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of the remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Blackfeet Housing and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Blackfeet Housing is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M.V.WENTZ
By:_____

Deputy Clerk

APPROVED:
S/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF BIG PINE PAIUTE TRIBE

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Big Pine Paiute Tribe ("Big Pine") the amount of $264,832.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal years (FY) 2005 and 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Big Pine under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, the amount of $173,072.00 which was set aside for Plaintiff Big Pine pursuant to the stipulation dated March 5, 2008 and order approving it dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds from the amount set aside for Plaintiff Big Pine pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of the remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Big Pine and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Big Pine is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M. V. Wentz
By:_____
Deputy Clerk

APPROVED:
s/Richard P. Matsch

_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS
REGIONAL HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Association of Village Council Presidents Regional Housing Authority ("AVCP") the amount of $1,402,062.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal years (FY) 2002 through and including FY 2006. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $3,282,900.00 which was set aside for Plaintiff AVCP pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of grant funds from the amount set aside for Plaintiff AVCP pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of any remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff AVCP and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff AVCP is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M. Virginia Wentz
By:_____

Deputy Clerk

APPROVED:

s/Richard P. Matsch
_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF ALEUTIAN HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Aleutian Housing Authority the amount of $145,089.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured during fiscal year (FY) 2004. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Aleutian Housing Authority under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources including, but not limited to, the amount of $465,366.00 which was set aside for Plaintiff Aleutian Housing Authority pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of grant funds from the amount set aside for Plaintiff Aleutian Housing Authority pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of any remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Aleutian Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Aleutian Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

By: S/M. V. Wentz
_____
Deputy Clerk

APPROVED:

s/Richard P. Matsch

_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing.

JUDGMENT IN FAVOR OF
PLAINTIFF PUEBLO OF ACOMA HOUSING AUTHORITY

Pursuant to the Findings, Conclusions and Order for Final Judgment entered by Senior Judge Richard P. Matsch on January 16, 2015, it is

ORDERED AND ADJUDGED that the Defendants shall restore to Plaintiff Pueblo of Acoma Housing Authority the amount of $56,106.00 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured in fiscal years 2002 and 2003. Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Pueblo of Acoma Housing Authority under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without the application of this Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, the amount of $157,320.00 which was set aside for Plaintiff Pueblo of Acoma Housing Authority pursuant to the order dated March 17, 2008, and IHBG funds carried forward from previous grant years, and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that transfer of grant funds from the amount set aside for Plaintiff Pueblo of Acoma Housing Authority pursuant to the order dated March 17, 2008 shall occur within thirty (30) days. Restoration of any remaining amount required by this Judgment shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years 1997 through and including FY 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from Plaintiff Pueblo of Acoma Housing Authority and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that Plaintiff Pueblo of Acoma Housing Authority is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: January 16, 2015

FOR THE COURT:

JEFFREY P. COLWELL, CLERK OF THE COURT

S/M. V. Wentz
By:_____

Deputy Clerk

APPROVED:
s/Richard P. Matsch

_____
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of Housing and Urban Development,
SANDRA HENRIQUEZ, Assistant Secretary for Public and Indian Housing,

Defendants

FINDINGS AND CONCLUSIONS AND
ORDER FOR FINAL JUDGMENT

Fort Peck Housing Authority ("Fort Peck" or "the Tribe") is entitled to declaratory and injunctive relief pursuant to this Court's Memorandum Opinions and Orders dated August 31, 2012 and March 7, 2014, and the following findings and conclusions.

This action arises under Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the Native American Housing Assistance and Self-Determination Act ("NAHASDA") 25 U.S.C. § 4101 et seq. The issues presented are governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008).

Jurisdiction is provided by the APA and by 28 U.S.C. §§ 1331, 1346 and 1362. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and jurisdiction to

grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

The Administrative Record was filed on March 8, 2006. That record reflects that in a letter dated September 21, 2001, HUD questioned whether 238 Mutual Help units included in Fort Peck's Formula Current Assisted Stock ("FCAS") during fiscal years 1998-2001 should have been eligible for funding under the FCAS component of the Indian Housing Block Grant ("IHBG") formula.[1] Citing 24 C.F.R. § 1000.318, HUD asserted that those units were no longer eligible for consideration at part of the Tribe's FCAS, based on the units' dates of full availability. In a letter dated December 20, 2001, HUD informed Fort Peck that the Tribe had received grant overfunding for those units in the estimated amount of $1,298,354 and stated, "We will work with your Tribe to find a suitable way to restructure repayment."[2]

Fort Peck initially did not contest HUD's demands for repayment of the alleged grant overfunding. In February 2002, Fort Peck paid HUD the sum of $251,687, which HUD credited as repayment for funds "over-allocated to the Tribe in FY 1998."[3]

In a letter dated May 30, 2002, HUD informed Fort Peck that the Tribe had received grant overfunding in the amount of $468,922, in addition to the overfunded amount of $1,298,354.[4]

In June 2002, Fort Peck paid $261,667 to HUD for alleged grant overfunding.[5]

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[1]Administrative Record ("AR"), Tab 15 at US000215-16.

[2]AR Tab 18 at US000240-42.

[3]AR Tab 20 at US000248.

[4]AR Tab 25 at US000300-03.

[5]*See* AR Tab 26 at US000305; *see also* AR Tab 28 at US000342-43.

In a letter July 31, 2002, HUD stated that the total amount of the grant overfunding received by Fort Peck was $1,767,276 and recognized that the Tribe had made two repayments totaling $513,354. HUD continued to seek repayment of $1,253,922.[6]

Aided by counsel, Fort Peck disputed HUD's determinations about the Tribe's housing stock. Fort Peck also questioned HUD's interpretation and application of its regulations and HUD's process for resolving FCAS disputes.[7]

In a letter dated December 8, 2003, HUD revised and reduced its calculation of the alleged overfunding to $504,760, which took into account Fort Peck's two previous payments.[8] HUD's letter advised Fort Peck that repayment options included "reducing previous and/or future year's funding."[9]

Fort Peck requested reconsideration of HUD's determinations about the alleged overfunding. In a letter dated March 26, 2004, HUD Assistant Secretary Michael Liu rejected Fort Peck's arguments and stated that his decision was "the agency's final action on this issue."[10]

On January 6, 2005, Fort Peck filed this APA action, challenging HUD's March 26, 2004 determination. Fort Peck claimed that HUD's interpretation and application of 24 C.F.R. § 1000.318 conflicted with 25 U.S.C. § 4152(b). Alternatively, Fort Peck claimed that HUD had

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[6]AR Tab 28 at US000342-43.

[7]*See, e.g.*, AR Tab 33 at US000370-78; Tab 36 at US000390-93.

[8]AR Tab 42 at US000490-98. HUD later corrected that amount to $504,750, recognizing a mathematical error. *See* AR Tab 45 at US 000515.

[9]AR Tab 42 at US000498.

[10]AR Tab 46 at US000531-34.

violated the NAHASDA regulatory scheme by not providing a hearing before it determined that Fort Peck had received grant overpayments and that HUD lacked authority to recover grant overpayments. Fort Peck sought declaratory and injunctive relief requiring HUD to return recaptured funds and prohibiting HUD from implementing threatened recaptures.

On May 26, 2006, this Court entered judgment in favor of Fort Peck, declaring 24 C.F.R. § 1000.318 invalid. The Court rejected Fort Peck's request to amend the judgment to require restoration of the recaptured funds.

HUD appealed the judgment, and Fort Peck cross-appealed this court's denial of Fort Peck's request for monetary relief.

In an Order and Judgment issued on February 19, 2010, the Tenth Circuit reversed this Court's judgment and upheld the validity of 24 C.F.R. § 1000.318. *Fort Peck Housing Auth. v. HUD*, 367 Fed.Appx 884 (10th Cir. 2010) ("*Fort Peck II*"). The Tenth Circuit dismissed Fort Peck's cross–appeal, stating in a footnote: "Because HUD's actions did not violate Congress's mandate, the issues raised in Fort Peck's cross-appeal are moot." *Id.* at 892, n.15.

After remand, Fort Peck filed a supplemental complaint and this action proceeded on a coordinated basis with other similar actions, with rounds of briefing on common legal issues. In Opinions and Orders dated August 31, 2012, and March 7, 2014, this Court held that HUD's recapture of IHBG grant funds without first providing the administrative hearing required by NAHASDA was arbitrary, illegal and in contravention of the pre-amendment versions of 25 U.S.C. §§ 4161 and 4165; that HUD must restore to the plaintiffs all funds that were illegally recaptured for fiscal years through and including FY 2008, and that HUD must refrain from threatening recapture or acting upon any threatened recapture with respect to grant funds

awarded for any fiscal year through fiscal year 2008. The plaintiffs were directed to submit proposed forms of judgment, specifying the amounts to be paid to each Tribe and the asserted sources of payment.

Fort Peck submitted its proposed judgment on April 15, 2014, seeking restoration of $513,344 and injunctive relief.[11] It is assumed that Fort Peck has abandoned claims to any form of relief not identified in its proposed judgment.

HUD argues that the monetary relief requested by Fort Peck is precluded by the Tenth Circuit's opinion in *Fort Peck II*. There is no merit to that argument. The Tenth Circuit's order and judgment addressed only the validity of 24 C.F.R. § 1000.318. There is no Circuit "law of the case" with respect to Fort Peck's procedural claims. The Tenth Circuit's dismissal of Fort Peck's cross-appeal on the ground of mootness cannot be interpreted as an implicit determination that HUD acted lawfully when it recaptured $513,354 from Fort Peck. This Court already has rejected HUD's arguments about the scope of the Tenth Circuit's opinion.

HUD argues that Fort Peck cannot show that it was prejudiced by the lack of a hearing, stating that the recaptures challenged by Fort Peck were based in part on the Tribe's reports to HUD showing that 15 of the disputed units had been conveyed between 1998 and 2001.

Fort Peck responds that the Administrative Record does not support HUD's contention that any of the recaptured funds were attributable to amounts that HUD overpaid for conveyed units. Fort Peck contends that the recaptured amount should be attributed to fiscal years 1998

[11]Fort Peck's proposed judgment seeks $513,344 for restoration of recaptured grant funds. As described above, Fort Peck made two payments to HUD in the amounts of $251,687 and $261,667, for a total recapture of $513,354.

and 1999 and states that the 15 units were not conveyed until after the FCAS reporting periods for those fiscal years.

Disputes about the dates of conveyances and the FCAS eligibility of particular units are matters that should have been resolved at the hearing that HUD should have provided. As discussed in this Court's order dated August 31, 2012, HUD misapplied 24 C.F.R. § 1000.318 when it rejected the Tribes' valid justifications for continued ownership of units beyond their 25-year lease/purchase periods. It is not possible now to determine how the recaptured grant funds correlate to conveyed units, as opposed to other units that Fort Peck continued to own or operate, and it is fair to attribute the recaptured amount ($513,354) to eligible units. It was incumbent upon HUD to follow the NAHASDA's procedural requirements, and the agency's failure to do so was itself prejudicial.

The findings and conclusions set forth above resolve the issues presented by the Defendants' motion for scheduling order [#11] and the Plaintiff's motion to strike [#126].

Based on the foregoing, it is

ORDERED that the Defendants' motion for scheduling order [#11] is moot; and it is

FURTHER ORDERED that the Plaintiff's motion to strike [#126] is moot; and it is

FURTHER ORDERED that the Defendants shall restore to Plaintiff Fort Peck Housing Authority the amount of $513,354, for Indian Housing Block Grant ("IHBG") funds that were recaptured illegally from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to the Plaintiff shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for fiscal years through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Clerk shall enter judgment providing relief to the Plaintiff as set forth above and awarding the Plaintiff its costs upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: August 6, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-00451-RPM

TLINGIT-HAIDA REGIONAL HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINDINGS, CONCLUSIONS AND ORDER FOR JUDGMENT

On March 4, 2008, Plaintiff Tlingit-Haida Regional Housing Authority ("Tlingit-Haida" or "the Tribe") filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4101 et seq., by reducing the number housing units counted as Formula Current Assisted Stock ("FCAS") for the calculation of the Tribe's share of the annual Indian Housing Block Grant ("IHBG") and recapturing IHBG funds which the Tribe had received in past years for those units. Tlingit-Haida filed an amended complaint for declaratory and injunctive relief on June 17,

2010, requesting various and alternative forms of relief, including the disgorgement of recaptured funds.

Jurisdiction is provided by the APA and by 28 U.S.C. §§ 1331, 1346 and 1362. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and jurisdiction to grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

The Administrative Record ("AR") was filed on July 30, 2010.

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, dated August 31, 2012, and March 7, 2014.[1]

The order dated March 7, 2014 required the plaintiffs in the coordinated actions to submit proposed forms of judgment, specifying the amounts to be paid to each tribe or tribal housing entity and the asserted sources of payment. On March 26, 2014, HUD moved for the establishment of scheduling orders, requesting additional briefing before the entry of judgments.

Tlingit-Haida submitted its proposed judgment on April 15, 2014 and a revised proposed judgment on June 9, 2014. In a response to HUD's motion for scheduling order, Tlingit-Haida

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[1]The coordinated cases are *Fort Peck Housing Authority HUD et al.*, No. 05-cv-0018-RPM; *Blackfeet Housing et al. v. HUD et al.*, No. 07-cv-1343-RPM; *Tlingit-Haida Regional Housing Authority v. HUD et al.*, No. 08-cv-0451-RPM; *Navajo Housing Authority v. HUD et al.*, No. 08-cv-0826-RPM; *Modoc Lassen Indian Housing Authority v. HUD et al.*, No. 08-cv-2573-RPM; *Choctaw Nation of Okla. v. HUD et al.*, No. 08-cv-2577-RPM; *Sicangu Wicoti Awanyakapi Corp. et al. v. HUD et al.*, No. 08-cv-2584-RPM.

identified the challenged agency actions and the factual and legal support for the relief it requests.[2]

HUD replied on May 23, 2014, addressing, *inter alia*, the relief requested by Plaintiff Tlingit Haida. HUD's motion for a scheduling order is now moot.

The Administrative Record reflects that in September, 2001, HUD notified Tlingit-Haida that the Tribe "may have incorrectly received credit in Fiscal Years (FY) 1998, 1999, 2000 and 2001 for 155 Mutual Help units under the Formula Current Assisted Stock (FCAS) component of the Indian Housing Block Grant (IHBG) program."[3] In response, Tlingit-Haida disputed HUD's analysis of its FCAS and explained the Tribe's reasons for continuing to include mutual help units in its FCAS after the expiration of the 25-year lease/purchase period.

In a letter to HUD dated November 8, 2001, Tlingit-Haida's Executive Director, Dr. Blake Y. Kazama, explained that before December 1998, Tlingit-Haida had been embroiled in a region-wide class action lawsuit over the condition of the region's HUD-assisted homes.[4] Tlingit-Haida is the Native Alaskan housing authority for most of the Southeast Alaska Panhandle, and the class action lawsuit concerned constructions defects "attributable to the fact that the homes were designed and built for southern lower 48 climates."[5] Dr. Kazama's letter

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[2]The Plaintiff's response and proposed judgment show that the only challenges it is pursuing are challenges to HUD's decisions to take back funds granted in FYs 1998 through 2008 – i.e, the "recaptures" that were accomplished without the hearing required under the pre-amendment version of NAHASDA. It is assumed that other claims alleged in the Plaintiff's complaint are abandoned.

[3]AR Vol. 2, Tab 31 at THRHA000672.

[4]AR Vol. 2, Tab 32 at THRHA00674-77.

[5]*Id.*

stated that the lawsuit had been settled pursuant to a HUD-approved settlement which required repairs to the homes of the class action plaintiffs. Other terms of the settlement required that 354 TKIII [Turnkey III] housing units be converted into mutual help units, which had the effect of accelerating the conveyance-eligibility date of those units. The repairs were extensive and Tlingit-Haida obtained funding from HUD's Comprehensive Grant Program ("CGP") to assist with the financing of the repairs. Dr. Kazama's letter explained that problems arose during the repair process and that angry homebuyers engaged in "payment boycotts," which led to the accumulation of large tenant account receivables ("TARs"). In the letter dated November 8, 2001, Tlingit-Haida asserted that the Tribe was entitled to continued FCAS funding for units being repaired under the Comprehensive Grant Program and units that had accumulated TARs.[6]

HUD rejected the Tribe's reasons for maintaining the disputed units in its FCAS. In a letter dated January 2, 2002, HUD stated that "while we agree that rehabilitation work is an eligible affordable housing activity under the IHBG Program, such activity does not preclude the timely conveyance of 1937 Act units whether it is funded with IHBG or Comprehensive Grant funds. We cannot include such units in FCAS."[7]

Tlingit-Haida protested HUD's response and requested reconsideration in a letter dated January 25, 2002, from Business Manager Ed Phillips to HUD, which stated "It was simply not practical or appropriate for us to convey the units until the work was completed."[8] Phillips' letter enclosed a revised analysis of the Tribe's FCAS, set forth on an 18-page spreadsheet

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[6]*Id.*

[7]AR Vol. 2, Tab 35 at THRHA000701-02.

[8]AR Vol. 2, Tab 36 at THRHA000703-04.

captioned "TLINGIT-HAIDA REGIONAL HOUSING AUTHORITY FCAS ELIGIBILITY As revised 1/25/02."[9]

In a letter dated May 29, 2002, HUD rejected Tlingit-Haida's request for reconsideration.[10] HUD reiterated that "rehabilitation work does not preclude timely conveyance" and also stated that because "[24 C.F.R.] § 1000.318(1)(b) requires that the tribe/TDHE/IHA must actively enforce strict compliance by the homebuyer with the terms and conditions of the [Mutual Help Occupancy Agreement], including the requirements for full and timely payment ... we cannot include these units as FCAS."[11] HUD asserted that the Tribe had received grant overfunding during FYs 1998 through 2002, in the amount of $1,165,299.[12]

In a subsequent letter dated September 19, 2002, HUD notified Tlingit-Haida that HUD would recover the grant overfunding through a 5-year repayment schedule beginning in FY 2003.[13]

HUD actually recouped $1,139,658 from Tlingit-Haida through deductions from Tlingit-Haida's grant awards for FYs 2003 through 2007 as follows: $233,059 in 2003; $207,419 in 2004; $233,060 in 2005; $233,060 in 2006, and $233,060 in 2007, for a total recapture of

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[9]AR Vol. 2, Tab 36 at TRHA00705-722.

[10]AR Vol. 2, Tab 37 at THRHA000723-25.

[11]*Id.* at THRHA000723-24.

[12]*Id.* at THRHA000724.

[13]AR Vol. 2, Tab 43 at THRHA000746.

$1,139,658.[14] HUD did not provide a hearing to Tlingit-Haida before it accomplished those recaptures.

Tlingit-Haida now seeks restoration of the $1,139,658, asserting that the recaptures were illegal according to this Court's prior rulings.[15]

In reply, HUD preserves its prior arguments that the agency had authority independent of NAHASDA to recover grant overpayments that resulted from erroneous formula unit data; that the Court lacks jurisdiction under 5 U.S.C. § 702 to order the monetary relief sought; that any procedural error was harmless, and the only appropriate remedy would be to remand to HUD for a hearing and decision in the first instance. Those arguments were rejected in the orders dated August 31, 2012, and May 7, 2014.

In Section III of its reply, HUD also argues that Tlingit-Haida cannot show that it was prejudiced by the lack of a hearing, stating that Tlingit-Haida told HUD that "hundreds of the overpaid units had already been conveyed at the relevant time." In support of that contention, HUD cites the spreadsheet enclosed with Phillips' January 25, 2002 letter. That spreadsheet lists six columns of information for each of 17 housing projects under the headings: (1) account; (2) homebuyer; (3) move-in; (4) deed; (5) "indefensible for," and (6) justification.[16]

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[14]AR Vol. 2, Tab 46 at THRHA000751; Tab 54 at THRHA00078282; Tab 58 at THRHA000751; Tab 62 at THRHA000808; Tab 67 at THRHA000822.

[15]Tlingit-Haida stipulates that the correct amount of FCAS recaptured is $1,139,658, and not $1,165,299, as requested in its proposed order dated April 15, 2014. (Pl.'s mot. to strike at p. 1, n.1[#83]).

[16]AR Vol. 2, Tab 36 at TRHA000705. The document also includes handwriting of an unidentified person.

HUD draws particular attention to the first page of the spreadsheet, which lists 30 units in the project known as "Angoon I."[17] As an example, HUD points out that the spreadsheet indicates that unit 0129-01 (occupied by Kelly and Peggy Williams) was conveyed on February 4, 1994. HUD contends this shows that Tlingit-Haida was not entitled to FCAS funding for that unit during the years in question (1998 through 2002) because the unit had been conveyed. HUD suggests this evidence shows HUD properly recaptured grant funds that it mistakenly paid for units that the Tribe no longer owned.

Tlingit-Haida moved to strike section III of HUD's reply, arguing that it mischaracterizes the Administrative Record. Tlingit-Haida asserts that HUD has drawn erroneous conclusions about the spreadsheet based on the improper assumption that the units listed are ones for which FCAS was paid in the disputed years and then later recaptured by HUD. To demonstrate that assumption is wrong, Tlingit-Haida shows that for FY 2001, the Tribe claimed that only 24 of the 30 units in the Angoon I Project were FCAS-eligible, and states that Tribe did not include the Williams' unit in its FCAS count. Tlingit-Haida states that there is no record support showing that any home for which disputed FCAS was paid had been conveyed. That is, Tlingit-Haida states that its claims in this action challenge only the recapture of grant funds for units that the Tribe still owned.

The Administrative Record does not contain enough information to resolve this factual dispute. That should have been done at the hearing which HUD should have provided as this court has explained in prior rulings. It would be unjust to further delay the entry of a final

[17] *Id.* at THRHA000705. Angoon I is identified in other documents as Project AK94B004050.

judgment in this six year old case to remand for a hearing to determine whether HUD's argument has merit. Accordingly, the Tribe's explanation is accepted.

As stated in this Court's Memorandum Opinion and Order dated August 31, 2013, HUD acted arbitrarily, capriciously and contrary to law when it eliminated FCAS funding for units undergoing federally-funded repair or modernization work. In addition, the Court has ruled that HUD's policy about TARs expressed in Guidance 98-19 was an arbitrary and capricious exercise of HUD's regulatory authority and contrary to law. In short, HUD misapplied 24 C.F.R. § 1000.318 when it determined that Tlingit-Haida had received grant overpayments for units undergoing repair and units that had not been conveyed because the homebuyers had not paid the full amount due.

The applicable version of 24 C.F.R. § 1000.532 provided that "grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe." When HUD recaptured the purported grant overpayments from Tlingit-Haida, HUD had not considered whether the Tribe had spent those grant amounts on affordable housing activities. Notably, HUD's letter dated January 2, 2002, acknowledged that rehabilitation work is an eligible affordable housing activity under the IHBG Program.

Tlingit-Haida has established its right to an affirmative injunction requiring HUD to restore to it the amount of $1,139,658.

Pursuant to a stipulation dated March 6, 2008 [#3], and court order dated March 18, 2008 [#8], HUD has set aside the amount of $1,499,887 in Fiscal Year 2008 funds to be available for the return of FCAS funding to Plaintiff Tlingit-Haida Regional Housing Authority.

Based on the foregoing findings and conclusions and those stated in the Memorandum Opinions and Orders dated August 31, 2012 and March 7, 2014, it is

ORDERED that the Defendants' motion for scheduling order is moot; it is

FURTHER ORDERED that the Plaintiff's motion to strike Section III of HUD's reply is granted; it is

FURTHER ORDERED that final judgment shall enter requiring the Defendants to restore to Plaintiff Tlingit-Haida Regional Housing Authority the amount of $1,139,658, for Indian Housing Block Grant funds that were illegally recaptured from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to the funds set aside for Plaintiff's benefit by stipulation of the parties on March 6, 2008 and ordered by this court in an Order entered on March 18, 2008 in the amount of $1,499,887; it is

FURTHER ORDERED that the restoration of grant funds to the Plaintiff from the amount set aside pursuant to the parties' stipulation dated March 6, 2008 shall occur within 30 (thirty) days of the Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any

threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Clerk shall enter judgment providing relief to the Plaintiff as set forth above and awarding the Plaintiff its costs upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 19, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-CV-00826-RPM

NAVAJO HOUSING AUTHORITY,

Plaintiff,

v.
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants

FINDINGS AND CONCLUSIONS AND
ORDER FOR JUDGMENT

On April 22, 2008, Plaintiff Navajo Housing Authority ("Navajo" or "the Tribe") filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4101 et seq., by reducing the number of housing units counted as Formula Current Assisted Stock ("FCAS") for the calculation of the Tribe's share of the annual Indian Housing Block Grant ("IHBG") and recapturing IHBG funds which the Tribe had received in past years. Navajo filed an amended

complaint on November 3, 2008, and an amended/supplemental complaint for declaratory and injunctive relief on September 7, 2010.

The Administrative Record ("AR") was filed on November 26, 2008.

Jurisdiction is provided by the APA and by 28 U.S.C. §§ 1331, 1346 and 1362. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and jurisdiction to grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, dated August 31, 2012, and March 7, 2014.

The order dated March 7, 2014 required the plaintiffs in the coordinated actions to submit proposed forms of judgment, specifying the amounts to be paid to each tribe or tribal housing entity and the asserted sources of payment. On March 26, 2014, HUD moved for the establishment of scheduling orders, requesting additional briefing before entry of any final judgments.

On April 15, 2014, Navajo responded to HUD's motion and submitted Navajo's proposed judgment. Navajo has identified the challenged agency actions and the factual and legal support for the requested relief. It is assumed that Navajo has abandoned claims to any form of relief not identified in its proposed judgment.

Navajo challenges the following agency actions, which are evident from the Administrative Record:

In a letter dated January 11, 2008, HUD informed Navajo that the Tribe had received grant overfunding in fiscal years ("FY") 1998 through 2006 in the amount of $6,165,842 for mutual help units that HUD considered ineligible for funding under the FCAS component of the IHBG allocation formula.[1] HUD's letter proposed that Navajo repay that amount through a deduction from Navajo's IHBG for FY 2008.

HUD's January 11, 2008 letter referenced its earlier letters to Navajo dated April 28, 2006, July 6, 2006, and November 9, 2006.[2] In those letters, HUD sought the repayment of $5,674,466, stating that Navajo had "incorrectly received funding for 2,991 MH [Mutual Help] units in FY 1998 through FY 2006."[3] HUD's January 11, 2008 letter advised Navajo that HUD had made errors in its original count of over-funded units and adjusted the repayment amount to $6,165,842.

Navajo refused to voluntarily repay the amount demanded by HUD. HUD reduced the amount of Navajo's FY 2008 grant by the sum of $6,165,842.[4] HUD did not provide any form of hearing to Navajo before it implemented that recapture.

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[1]Navajo Administrative Record ("AR") Vol. 3, Tab 80 at AR001331-33.

[2]*See* AR Vol. 3, Tab 66 at AR000927-1010 (letter dated April 28, 2006 and enclosures); AR Vol. 3, Tab 68 at AR001011-1095 (letter dated July 6, 2006 and enclosures); AR Vol. 3, Tab 72 at AR001121-1208 (letter dated November 9, 2006 and enclosures).

[3]AR Vol. 3, Tab 72 at AR001121.

[4]*See* Navajo Nation Fiscal Year FY 2008 IHBG Allocation and Formula Data, AR Vol. 3, Tab 85 at AR001347.

In a letter dated February 27, 2008, HUD demanded repayment from Navajo of the additional sum of $1,333,447 for housing units included in Navajo's FCAS for FY 2007 that HUD contended should not have been included.[5] HUD has not recaptured that amount because HUD agreed to suspend further recaptures during the pendency of this action. The Plaintiff states that HUD has not withdrawn its demand for repayment of the additional $1,333,447.

After this action was filed, Navajo moved for a preliminary injunction, seeking an order directing HUD to set aside the sum of $6,165,842 (the amount recaptured from Navajo's FY 2008 grant). On October 9, 2008, this Court entered an Order directing HUD "to set aside all unreserved IHBG funds that could have been distributed through the FY 2008 regulatory formula ...up to $5,121,456" to be available "if the Court subsequently orders HUD to provide them for the Plaintiff under federal law."[6] The Plaintiff states that HUD has set aside the sum of $5,121,456 pursuant to that order.

Navajo now seeks restoration of $6,165,842, claiming that HUD's withholding of that amount was illegal according to this Court's prior rulings. Navajo also seeks injunctive relief regarding future recaptures.

In reply, HUD states that because Navajo has limited the scope of requested relief and identified the challenged agency actions, no further briefing by HUD is necessary. HUD's motion for scheduling order is moot.

As explained in this Court's prior rulings, HUD was statutorily obligated to provide the Plaintiff with notice and an opportunity for an administrative hearing to be entitled to the

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[5]AR Vol. 3, Tab 82 at AR001339-45.

[6]Order dated Oct. 9, 2008 [#16].

recapture remedy. In addition, HUD's recapture authority was limited by the applicable version of 24 C.F.R. § 1000.532, which provided that "grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe." HUD did not follow the procedures required by the pre-amendment version of NAHASDA and failed to observe the limitations on its recapture authority.

HUD does not deny that the facts of the challenged agency action fit within the law set out in the Court's orders.

HUD's reply preserves its prior arguments that the agency had authority independent of NAHASDA to recover grant overpayments that resulted from erroneous formula unit data; that the monetary relief sought is not available under 5 U.S.C. § 702; that any procedural error was harmless, and the only appropriate remedy would be to remand to HUD for a hearing and decision in the first instance. Those arguments were rejected in this Courts' Memorandum Opinions and Orders dated August 31, 2012 and March 7, 2014.

In Section III of its reply, HUD argues that Navajo has not shown prejudice from the lack of an administrative hearing, asserting that HUD found that many of the housing units Navajo counted in its FCAS had been conveyed. In support of that contention, HUD cites its letter to Navajo dated April 28, 2006 and the enclosed schedule which listed housing units and information pertaining to the FCAS eligibility of those units.[7]

Navajo moved to strike Section III of HUD's reply, arguing that HUD's arguments about prejudice have been rejected by this Court. Navajo also points out that HUD's subsequent letter dated January 11, 2008 acknowledged that HUD's April 26, 2006 letter contained errors.

[7]AR Vol. 3, Tab 66 at AR000950-AR001008.

The Plaintiff's motion to strike is granted. The Plaintiff has not conceded the accuracy of HUD's determinations about the Tribe's FCAS. Facts underlying HUD's determinations should have been addressed at the hearing which HUD should have provided. HUD had no authority to recapture grant funds that it had already awarded to Navajo without following the procedures required by the pre-amendment version of NAHASDA. Navajo has established that it is entitled to restoration of recaptured funds in the amount of $6,165,842.

Accordingly, it is

ORDERED that the Defendants' motion for scheduling order [#73] is moot; and it is

FURTHER ORDERED that the Plaintiff's motion to strike [#81] is granted, and it is

FURTHER ORDERED that the Defendants shall restore to Plaintiff Navajo Housing Authority the amount of $6,165,842 for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from Plaintiff Navajo. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including the funds set aside for the benefit of Plaintiff Navajo pursuant this Court's Order dated October 9, 2008 in the amount of $5,121,456; and either or both of the IHBG funds carried-forward from previous fiscal years and the IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the transfer of the grant funds set aside for Plaintiff Navajo

pursuant to this Court's order dated October 9, 2008 shall occur within 30 (thirty) days of the date of the Judgment, and restoration of the remaining amount required by this Judgment shall be completed and Defendants shall implement restoration of the funds by making adjustments to the Plaintiff's IHBG allocation(s) no later than 18 (eighteen) months from the date of the Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including FY 2008, the Defendants shall refrain from threatening to or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiff is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 30, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-02573-RPM

MODOC LASSEN INDIAN HOUSING AUTHORITY, the tribally designated housing entity for the Grindstone Indian Rancheria of Wintun-Wailaki Indians of California,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINDINGS, CONCLUSIONS AND ORDER FOR JUDGMENT

On November 25, 2008, Plaintiff Modoc Lassen Indian Housing Authority ("Modoc Lassen" or "the Tribe") filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4101 et seq., by reducing the number housing units counted as Formula Current Assisted Stock ("FCAS") for the FCAS component of the Tribe's share of the annual Indian Housing Block Grant ("IHBG") and recapturing IHBG funds which the Tribe had received in

past years for those units. Modoc Lassen's complaint requested, among other relief, the return of the recaptured funds and an injunction against future recaptures.

Jurisdiction is provided by the APA and by 28 U.S.C. § 1331 and 28 U.S.C. § 1346. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and jurisdiction to grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

The Administrative Record ("AR") was filed on June 30, 2010 [#14].

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, dated August 31, 2012, and March 7, 2014.[1]

The order dated March 7, 2014 required the plaintiffs to submit a proposed form of judgment, specifying the amounts to be paid to each tribe or tribal housing entity and the asserted sources of payment. On March 26, 2014, HUD moved for the establishment of scheduling orders, requesting additional briefing before the entry of judgment.

On April 15, 2014, Modoc Lassen submitted its proposed judgment and a response to HUD's motion which identified the challenged agency actions and the legal support for the

[1]The coordinated cases are *Fort Peck Housing Authority HUD et al.*, No. 05-cv-0018-RPM; *Blackfeet Housing et al. v. HUD et al.*, No. 07-cv-1343-RPM; *Tlingit-Haida Regional Housing Authority v. HUD et al.*, No. 08-cv-0451-RPM; *Navajo Housing Authority v. HUD et al.*, No. 08-cv-0826-RPM; *Modoc Lassen Indian Housing Authority v. HUD et al.*, No. 08-cv-2573-RPM; *Choctaw Nation of Okla. v. HUD et al.*, No. 08-cv-2577-RPM; *Sicangu Wicoti Awanyakapi Corp. et al. v. HUD et al.*, No. 08-cv-2584-RPM.

requested relief. HUD replied, preserving its objections to this Court's prior rulings and addressing the specific relief requested by Modoc Lassen in Section III of it reply. HUD's motion for a scheduling order is now moot.

On June 9, 2014, Modoc Lassen moved to strike section III of HUD's reply, asserting that HUD's reply includes arguments that are untimely and mischaracterize the Administrative Record. The findings and conclusions in this order render that motion moot.

Modoc Lassen's action concerns HUD's determinations about the FCAS eligibility of thirteen mutual help units. Modoc Lassen challenges agency determinations stated in two letters from HUD to Modoc Lassen:

•letter dated January 10, 2003, notifying Modoc Lassen of grant overfunding for fourteen units for fiscal years 1999-2002,[2] and

•letter dated March 17, 2003, revising HUD's previous determination about the number of overpaid units and demanding repayment of $146,764 for grant overfunding for thirteen mutual help units for fiscal years 1999-2002.[3]

The Administrative Record reflects that the 25-year lease/purchase period for the subject units expired in 1993. The units were not conveyed to the tenants/homebuyers at that time due to title impediments that required action by the Bureau of Indian Affairs ("BIA"). Modoc Lassen communicated with the BIA about those matters and on April 21, 1998, the BIA approved the conveyances and provided the Tribe with documents of conveyance.[4]

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[2]AR Vol. 2, Tab 29 at MLIHA000661-63.

[3]AR Vol. 2, Tab 31 at MLIHA000668-70.

[4]AR Vol. 2, Tab 28 at MLIHA000658.

After receiving those documents from the BIA, Modoc Lassen did not complete the conveyances because the tenants/homebuyers still owed rent and/or insurance premiums, and with respect to one unit, the tenant/homebuyer had died and there were unresolved issues regarding an assignment of the lease.[5] The units remained on the Tribe's FCAS inventory on its Formula Response form.

For the period between 1993 and 1998, HUD agreed that the units were still eligible for funding under the FCAS component of the IHBG allocation formula. HUD challenged the FCAS-eligibility of the units for fiscal years 1999 through 2002.[6]

Modoc Lassen reported to HUD that conveyances had not been completed because – under the terms of the Mutual Help Occupancy Agreements – the tenants/homebuyers were not entitled to exercise the purchase option until they had fully complied with their payment obligations. HUD rejected the Tribe's reasons for its continued ownership of the units. In the letter dated January 1, 2003, HUD stated "in accordance with [24 C.F.R.] § 1000.318(a)(2) and NAHASDA Guidance 98-19, ... nonpayment is not a sufficient reason for non conveyance.[7] HUD continued to demand that the Tribe repay the $146,764 for grant overfunding for the thirteen units.

In 2003, Modoc Lassen agreed to repay the $146,764 by using funds from two development projects.[8] By letter dated February 12, 2004, HUD notified Modoc Lassen that

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[5]AR Vol. 2, Tab 28 at MLIHA000639 and MLIHA000660.

[6]AR Vol. 2, Tab 29 at MLIHA000661-63.

[7]AR Vol. 2, Tab 29 at MLIHA000662.

[8]AR Vol. 2, Tab 32 at MLIHA000671; AR Vol. 2,Tab 35 at MLIHA000675.

the recapture had been completed and provided the Tribe with a revised 1999 Indian Housing Plan.[9] HUD did not provide an administrative hearing to Modoc Lassen before it recaptured the funds.

Modoc Lassen requests that HUD be required to restore to it the amount of $146,764 for IHBG funds that were illegally recaptured.

In reply, HUD generally preserves its arguments that HUD had authority independent of NAHASDA to recover grant overpayments that resulted from erroneous formula unit data; that the Court lacks jurisdiction under 5 U.S.C. § 702 to order the monetary relief sought; that any procedural error was harmless, and the only appropriate remedy would be to remand to HUD for a hearing and decision in the first instance. Those arguments were rejected in the Orders dated August 31, 2012 and March 7, 2014.

HUD also argues that Modoc Lassen cannot establish that it was prejudiced by the lack of a hearing. In support of that argument, HUD asserts that the Administrative Record shows that Modoc Lassen told HUD that conveyances of all but one of the overpaid units had already been approved and recorded by BIA at the relevant time. That is, HUD suggests that the record shows that the Tribe no longer owned those units after April, 1998, when the BIA accomplished its title work. To the contrary, the record indicates that during the relevant time period (1999 through 2002), Modoc Lassen had not completed the conveyances to the homebuyers because the homebuyers had not fully complied with their payment obligations.

The Court finds and concludes that HUD misapplied 24 C.F.R. § 1000.318, when it rejected Modoc Lassen's justification for the conveyance delays and disqualified those units

[9]AR Vol. 2, Tab. 37-1 at MLIHA000684-85.

from FCAS funding for fiscal years 1999 through 2002. The Court has already ruled that HUD's directive in Guidance 98-19 was an arbitrary and capricious exercise of HUD's regulatory authority and contrary to law, and HUD's recapture of IHBG grant funds without first providing the administrative hearing required by NAHASDA was arbitrary, illegal and in contravention of the pre-amendment versions of 25 U.S.C. §§ 4161 and 4165.

HUD does not deny that the facts of the challenged agency action fit within the law set forth in this Court's orders.

In sum, Modoc Lassen has established its right to an affirmative injunction requiring HUD to restore to it the recaptured funds and precluding HUD from threatening or implementing any recapture of IHBG grant funds for fiscal years through and including 2008. Based on the foregoing, it is

ORDERED that judgment shall enter requiring the Defendants to restore to Plaintiff Modoc Lassen Indian Housing Authority the amount of $146,764 for Indian Housing Block Grant funds that were illegally recaptured from the Plaintiff for FY 1999 through and including FY 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act in a given fiscal year; it is

FURTHER ORDERED that Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, IHBG funds carried forward from previous grant years and IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to the Plaintiff shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for fiscal years through and including 2008, the Defendants shall refrain from threatening or implementing any recapture of IHBG funds from the Plaintiff and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Clerk shall enter judgment providing relief to the Plaintiff as set forth above and awarding the Plaintiff its costs upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 10, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-02577-RPM

CHOCTAW NATION OF OKLAHOMA and
HOUSING AUTHORITY OF THE CHOCTAW NATION OF OKLAHOMA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
SHAUN DONOVAN, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

FINDINGS AND CONCLUSIONS AND
ORDER FOR JUDGMENT

On November 25, 2008, Plaintiffs Choctaw Nation of Oklahoma and the Housing Authority of the Choctaw Nation of Oklahoma (collectively, "Choctaw" or "the Tribe") filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively "HUD") violated the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4101 et seq., by reducing the number of housing units counted as Formula Current Assisted Stock ("FCAS") for the calculation of the Tribe's share of the annual Indian Housing Block Grant ("IHBG") and recapturing IHBG funds which the Tribe had received in past years. Choctaw filed an

amended/supplemental complaint for declaratory and injunctive relief on September 7, 2010.

Jurisdiction is provided by the APA and by 28 U.S.C. §§ 1331, 1346 and 1362. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and jurisdiction to grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

The Administrative Record ("AR") was filed on June 30, 2010.

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, dated August 31, 2012, and March 7, 2014.

The order dated March 7, 2014 required the plaintiffs in the coordinated actions to submit proposed forms of judgment, specifying the amounts to be paid to each tribe or tribal housing entity and the asserted sources of payment. On March 26, 2014, HUD moved for the establishment of scheduling orders, requesting additional briefing before entry of any final judgments.

Choctaw submitted its proposed judgment on April 15, 2014. Choctaw seeks restoration of grant funds recaptured by HUD and injunctive relief regarding future recaptures. In its response to HUD's motion for scheduling order, Choctaw identified the challenged agency actions and the factual and legal support for the relief it requests. It is assumed that Choctaw has abandoned claims to any form of relief not identified in its proposed judgment.

HUD replied, stating that because the Plaintiffs have limited the scope of requested relief and identified the challenged agency actions, no further briefing by HUD is necessary. HUD generally preserves its prior arguments that the agency had authority independent of NAHASDA to recover grant overpayments that resulted from erroneous formula unit data; that the monetary relief sought is not available under 5 U.S.C. § 702; that any procedural error was harmless, and the only appropriate remedy would be to remand to HUD for a hearing and decision in the first instance. As discussed below, Section III of HUD's reply presents legal arguments unique to Choctaw's request for monetary relief.

The following facts are evident from the Administrative Record:

In a letter to Choctaw dated December 6, 2001, HUD notified Choctaw that the Tribe had received $1,021,099 in excess payments for FYs 1998 through FY 2001, for housing units that HUD determined were not eligible to be counted as FCAS. According to HUD's letter, the revisions to the Tribe's FCAS were based on information that the Tribe had provided about conveyances.[1]

Choctaw objected to HUD's calculation of the Tribe's FCAS, pointing out that HUD had failed to count other eligible units, which resulted in an underpayment to the Tribe.[2] In a letter to HUD dated January 17, 2002, Choctaw stated, "It remains the position of the [the Tribe] that HUD should equitably offset any underpayment against any overpayment in order to resolve this matter quickly and efficiently."[3]

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[1]Choctaw Administrative Record ("AR"), Vol. 2, Tab 36 at CNOK000718-22.

[2]AR Vol. 2, Tab 39 at CNOK000728-29; AR Vol. 2, Tab 40.

[3]AR Vol. 2, Tab 39 at CNOK000728.

In a letter to Choctaw dated February 20, 2002, HUD acknowledged that two housing projects owned by the Tribe had become eligible for funding in FY 2001, and as a result, Choctaw had been underfunded in the amount of $179,783.[4] HUD's letter invited the Tribe to contact HUD to discuss "how your Tribe would like to be compensated for these units" and suggested that options included "increasing your Tribe's FY 2002 allocation; off-setting the increase against the $1,021,099 in over-funding in FY 1998, FY 1999, FY 2000 and FY 2001 or adjusting your Tribe's FY 2003 allocation."[5]

Choctaw apparently chose the offset option. In a letter dated April 9, 2002, HUD stated:

> In our December 6, 2001 letter, we informed the Tribe that they received $1,021,099 of funding for ineligible units in FY 1998, FY 1999, FY 2000 and FY 2001. However, in our February 20, 2002 letter, we informed the Tribe that they were under-funded in FY 2001 in the amount of $179,783. Based on our April 4, 2002, conversation with Ms. Silliman, the Tribe and HUD agreed to offset their debt by the amount underfunded. In addition, based upon standard repayment terms, the Tribe and HUD agreed that the remaining amount due would be paid back over a 5-year repayment period beginning in FY 2003.[6]

HUD's April 9, 2002 letter continued:

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[4] AR Vol. 2, Tab 41 at CNOK000734-35.

[5] *Id.* at CNOK000734.

[6] AR Vol. 2, Tab 42 at CNOK000736.

> Therefore, beginning in FY 2003, we will adjust the Choctaw Nation's IHBG grant in accordance with the following schedule:
>
> | FY | Repayment Amount |
> |---|---|
> | 2003 | $168,264 |
> | 2004 | $168,263 |
> | 2005 | $168,263 |
> | 20006 | $168,263 |
> | 2007 | $168,263 |
> | Total | $841,316[7] |

As described in HUD's letter dated April 9, 2002, HUD reduced its calculation of the grant overfunding to $841,316 (the result of $1,021,099 minus $179,783), and recaptured $841,316 by reducing the Tribe's annual grant award in FYs 2003 through 2007.[8]

Choctaw now seeks monetary relief in the amount of $1,021,099, claiming that HUD's withholding of that amount was illegal according to this Court's prior rulings.

HUD contends that Choctaw's entire claim is barred by the 6-year statute of limitations, 28 U.S.C. § 2401(a). HUD asserts that Choctaw's claim accrued no later than April, 2002, when HUD confirmed that it would recover the $1,021,099 by offsetting $179,783 and taking deductions from the Tribe's future grant awards. Choctaw filed this action on November 25, 2008.

For an action seeking judicial review under the APA, "[t]he right of action first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004). In general, two conditions must be satisfied for agency action to be final: "First, the action must

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[7] *Id.*

[8] AR Vol. 2, Tab 48 at CNOK000801; Vol. 2, Tab 54 at CNOK000824; Vol. 2, Tab 60 at CNOK000955; Vol. 3, Tab 66 at CNOK001034, and Vol. 3, Tab 79 at CNOK001177. Neither Choctaw nor HUD disputes that HUD recaptured $841,316 pursuant to the 5-year repayment plan.

mark the consummation of the agency's decisionmaking process .... And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations and quotations omitted). "[C]ases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Labs. v. Gardner*, 387 U.S.136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

In *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed.Cl. 584 (2011), a case involving the same type of claims presented in this action, the United States Court of Federal Claims measured the timeliness of the plaintiffs' claims from when HUD recaptured the alleged overfunding. The Court of Federal Claims explained:

> Although plaintiffs' cause of action with respect to fiscal years 1998 through 2002 accrued when HUD began its recapture of those funds in 2002, *their cause of action with respect to any subsequent fiscal year did not accrue until plaintiffs received grant funds in that year in an amount less than that to which they allegedly were entitled*. Plaintiffs may therefore pursue claims for fiscal years 2003 through 2008 as those claims did not accrue until plaintiffs suffered damage in those fiscal years.

99 Fed. Cl. at 606, n.20 (emphasis added).

That reasoning is apt. In these related actions, the challenged recaptures occurred after an exchange of correspondence between HUD and the Tribe, and HUD's original determinations were often subject to revision.[9] The administrative process that HUD employed to determine alleged grant overfunding was so fluid and ill-defined that HUD's determinations could not be considered final until HUD actually effected recapture.

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[9]*See, e.g., Navajo Housing Authority v. HUD et al.*, Civil Action No. 08-cv-00826-RPM, AR Vol. 3, Tab 80 at AR001331 (HUD letter dated January 11, 2008, stating "In reviewing our letter dated April 28, 2006, we discovered errors.")

Thus, for claims seeking restoration of grant funds that HUD recaptured through deductions to a Tribe's annual grant, the final agency action occurred when the deductions occurred. Here, HUD took $841,316 from Choctaw by implementing the 5-year repayment plan, beginning in FY 2003. Choctaw's claim for restoration of those funds ($841,316) accrued in 2003 and is not precluded by the 6-year statute of limitations.

With respect to the other $179,783, the Administrative Record shows that in April 2002 Choctaw elected to have HUD offset that amount against HUD's obligation to the Tribe. In essence, HUD recaptured the $179,783 in April 2002, when HUD revised its calculation of the overfunded amount. Choctaw's claim for $179,783 is barred by the 6-year limitation period.

HUD also contends that Choctaw's claim for monetary relief should be limited to no more than $841,316 because Choctaw already received a benefit in the amount of $179,783 when HUD revised its calculation of the overfunding. That argument need not be addressed because Choctaw's claim is timely with respect to $841,316 only.

HUD argues that Choctaw has not shown that it is entitled to restoration of any funds because Choctaw told HUD that the overpaid units had been conveyed. In support of that factual contention, HUD cites a letter dated April 26, 2001, from Choctaw to HUD which described the Tribe's corrections to its FCAS for fiscal years 1998 through 2001.[10] Choctaw's letter enclosed a spreadsheet which listed the Tribe's housing projects, the number and type of units in each project, and changes in the Tribe's FCAS during the period from October, 1997 through September, 2001.[11] The spreadsheet also compared those changes to the Tribe's original FCAS

[10]AR Vol. 2, Tab 26 at CNOK000664.

[11]AR Vol. 2, Tab 26 at CNOK000667-69.

calculations. In its April 26, 2001 letter, Choctaw stated, *inter alia*, "for projects 26 through 77, the negative adjustments equate to conveyances."[12] HUD contends that this evidence shows that HUD's adjustments to the Tribe's FCAS were due to conveyances, and under that factual circumstance, Choctaw was not prejudiced by the lack of a hearing.

Choctaw moved to strike Section III of HUD's reply, arguing that HUD's arguments about prejudice have been rejected by this Court and are wrong.

Choctaw's motion to strike is granted. It is not accepted that the spreadsheet is an acknowledgment that the referenced units had been conveyed and the plaintiffs have not conceded that fact. As this court has explained in prior rulings, the facts underlying adjustments to the Tribe's FCAS should have been addressed at a hearing which HUD should have provided. HUD had no authority to recapture grant funds that it had already awarded to Choctaw without following the procedures required by the pre-amendment version of NAHASDA. Choctaw has established that it is entitled to restoration of the recaptured funds in the amount of $841,316.00.

Accordingly, it is

ORDERED that the Defendants' motion for scheduling order [#64] is moot; and it is

FURTHER ORDERED that the Plaintiffs' motion to strike [#72] is granted, and it is

FURTHER ORDERED that the Defendants shall restore to Plaintiffs Choctaw Nation of Oklahoma and Housing Authority of the Choctaw Nation of Oklahoma ("Plaintiff Choctaw") the amount of $841,316.00, for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from Plaintiff Choctaw. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Choctaw under the Native American Housing

[12]AR Vol. 2, Tab 26 at CNOK000664.

Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including, but not limited to, either or both IHBG funds carried-forward from previous fiscal years and IHGB funds appropriated in future grant years; it is

FURTHER ORDERED that the restoration of funds to Plaintiff Choctaw necessitated by this order shall be completed and Defendants shall implement restoration of the funds by making adjustments to Plaintiff Choctaw's IHBG allocation(s) no later than 18 (eighteen) months from the date of the Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including FY 2008, the Defendants shall refrain from threatening to or implementing any recapture of IHBG funds from Plaintiff Choctaw and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411; and it is

FURTHER ORDERED that Plaintiff Choctaw is awarded its costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

Date: June 25, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Court Judge Richard P. Matsch

Civil Action No. 08-cv-02584-RPM

SICANGU WICOTI AWANYAKAPI CORPORATION,
OGLALA SIOUX (LAKOTA) HOUSING,
TURTLE MOUNTAIN HOUSING AUTHORITY,
WINNEBAGO HOUSING AND DEVELOPMENT COMMISSION,
LOWER BRULE HOUSING AUTHORITY,
SPIRIT LAKE HOUSING CORPORATION, and
TRENTON INDIAN HOUSING AUTHORITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
JULIAN CASTRO, Secretary of Housing and Urban Development;
DEBORAH A. HERNANDEZ, General Deputy Assistant Secretary for Public and Indian Housing; and
GLENDA GREEN, Director, Office of Grants Management, Office of Native American Programs,

Defendants.

ORDER FOR ENTRY OF JUDGMENTS

Upon review of the Plaintiffs' Supplemental Brief Pursuant to the Court's Order dated July 10, 2014 [#82] and the Defendants' Response [#83], the Court finds and concludes that the amounts of money that HUD actually recovered from the Plaintiff Tribes are as the Plaintiffs claimed in their proposed form of judgment submitted on April 15, 2014 [#74-1]. SWA Corp., Oglala Sioux and Turtle Mountain sought increases and HUD asserted that nothing is owed to

SWA, Oglala Sioux and Winnebago and that the amounts sought by other plaintiffs must be reduced by substantial amounts because the exchanges in the administrative record show that these Tribes admitted or acknowledged that units had been conveyed or did not exist and instances in which a Tribe failed to provide requested information or did not object to recapture, impliedly acknowledging conveyances.

The plaintiffs assert that the recaptures were precluded by 24 C.F.R. § 100.532 prohibiting recapture of funds already expended on affordable housing activities. They point to pages printed from HUD's Line of Credit Control System ("LOCCS") showing approval of expenditures. Those pages were submitted with the Statement of Relief Requested and Motion to Supplement, filed on March 14, 2013 [#59]. The proposed submission is rejected because these pages show approved withdrawals from the accounts but not the purposes of the expenditures.

This Court has made a considerable effort to examine the administrative record to resolve these disputes and is unable to do so. As previously observed the process used was so informal, fluid and ill defined that no factual findings supporting the recaptures can be discerned. The deference given to factual findings by an agency required under APA review is not possible.

There would be no such difficulty if HUD had provided the hearings that were required as this Court has previously ruled. The decision making process used to effect these recaptures was arbitrary and capricious. Accordingly, the recaptures were final agency actions which must be vacated and the plaintiffs are entitled to recovery of those funds.

Accordingly, final judgments will be entered for each of the Tribes as they requested in their filing made on April 15, 2014.

SO ORDERED.

Date: September 22, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 07-cv-01343-RPM

BLACKFEET HOUSING,
THE ZUNI TRIBE,
ISLETA PUEBLO HOUSING AUTHORITY,
PUEBLO OF ACOMA HOUSING AUTHORITY,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY,
NORTHWEST INUPIAT HOUSING AUTHORITY,
BRISTOL BAY HOUSING AUTHORITY,
ALEUTIAN HOUSING AUTHORITY,
CHIPPEWA CREE HOUSING AUTHORITY, and
BIG PINE PAIUTE TRIBE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD),
SHAUN DONOVAN, Secretary of HUD,
DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing, and
GLENDA GREEN, Director, HUD's Office of Grants Management, National Office of Native American Programs, Department of Housing and Urban Development, Office of Public and Indian Housing,

Defendants.

FINDINGS, CONCLUSIONS AND ORDER FOR FINAL JUDGMENT

Pursuant to this Court's Memorandum Opinions and Orders dated August 31, 2012 and March 7, 2014, and the following findings and conclusions, the Plaintiffs are entitled to declaratory and injunctive relief as described below.

This civil action arises under Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), and the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 et seq. The issues presented are governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008).

Jurisdiction is provided by the APA and by 28 U.S.C. §§ 1331, 1346 and 1362. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201 and jurisdiction to grant injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202.

The Administrative Record was filed on October 11, 2007. This action has proceeded on a coordinated basis with the other similar actions, with rounds of briefing on common legal issues.

In Opinions and Orders dated August 31, 2012, and March 7, 2014, this Court held that HUD's recapture of Indian Housing Block Grant ("IHBG") grant funds without first providing the administrative hearing required by NAHASDA was arbitrary, illegal and in contravention of the pre-amendment versions of 25 U.S.C. §§ 4161 and 4165; that HUD must restore to the Plaintiffs all funds that were illegally recaptured for fiscal years through and including FY 2008, and that HUD must refrain from threatening recapture or acting upon any threatened recapture with respect to grant funds awarded for any fiscal year through fiscal year 2008.[1] In an opinion and order dated August 31, 2012, the Court also addressed issues unique to Plaintiff Big Pine Paiute Tribe.

[1]The Opinions and Orders dated August 31, 2012 and March 7, 2014 in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05-cv-00018-RPM, were made applicable in this civil action on those same dates.

The Court's Order dated March 7, 2014, required the Plaintiffs to submit a proposed form of judgment specifying the amount HUD must pay to each Plaintiff and the sources of such payment. The order also stated: "For any plaintiff who claims entitlement to payment for underfunding because HUD excluded units from that plaintiff's FCAS in a particular fiscal year, the proposed form of judgment should include a separate itemization for those amounts and may be submitted by May 15, 2014. An Appendix may be provided to explain the calculation of the amount owed and the record support for the claim."

On March 26, 2014, HUD moved for an order establishing a briefing schedule, arguing that the Plaintiffs had not adequately identified the challenged agency actions and that additional briefing was necessary before entry of final judgment. The Plaintiffs opposed HUD's motion and filed their proposed judgment on June 3, 2014. HUD's reply in support of its motion for scheduling order included objections to the Plaintiffs' proposed judgment. Among other issues, HUD disputed some of the Plaintiffs' statements of the amounts HUD had actually recaptured from them.

At a hearing on September 22, 2014, the Court directed HUD to provide the Plaintiffs with the financial documents that confirm the recapture amounts. HUD complied with that order, and Plaintiffs have verified the accuracy of HUD's evidence of the amounts actually recaptured. There is no ongoing dispute about the amounts of the challenged recaptures. Accordingly, on November 26, 2014, the ten Plaintiffs submitted an amended proposed judgment, seeking the following amounts for restoration of grant funding that HUD recaptured illegally:

Blackfeet Housing – $575,510.00;

The Zuni Tribe – $1,498,090.00;

Isleta Pueblo Housing Authority – $121,285.00;

Pueblo of Acoma Housing Authority – $56,106.00;

Association of Village Council Presidents Regional Housing Authority – $1,402,062.00;

Northwest Inupiat Housing Authority – $1,656,043.00;

Bristol Bay Housing Authority – $230,145.00;

Aleutian Housing Authority – $145,089.00;

Chippewa Cree Housing Authority – $656,200.00, and

Big Pine Paiute Tribe – $264,832.00.

The Plaintiffs seek restoration of those amounts from all available sources, including but not limited to, those funds set aside pursuant to the stipulation dated March 5, 2008, which was approved by court order on March 17, 2008 (docketed March 18, 2008, #30). According to that stipulation and order, HUD set aside IHBG funds from fiscal year 2008 funds "so that the funds will be available if the Court subsequently orders HUD to provide them for the Plaintiffs under federal law."

HUD continues to dispute its obligation to return the recaptured funds, arguing that the Plaintiffs have failed to show that they were prejudiced by the lack of an administrative hearing. That argument fails. As explained in this Court's prior Memorandum Opinions and Orders, HUD had no authority to recapture previously awarded grant funds without observing the procedural protections provided to the Tribes by the NAHASDA regulatory scheme. It was

incumbent upon HUD to follow the NAHASDA's procedural requirements, and the agency's failure to do so was itself prejudicial.

HUD also contends that the application of the limitations period provided by 28 U.S.C. § 2401(a) precludes recovery of $1,340,126 of the total amount claimed by Plaintiff Association of Village Council Presidents Regional Housing Authority ("AVCP"). HUD argues that the accrual date is the date when HUD notified the Tribe of its decision to seek repayment of the alleged grant overfunding. That argument is rejected. The accrual date is the date of recapture. *See, e.g., Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 606, n.20 (Fed. Cl. 2011) ("[P]laintiffs' cause of action ... did not accrue until plaintiffs received grant funds in that year in an amount less than that to which they allegedly were entitled.")

In sum, each Plaintiff is entitled to restoration of the entire amount that HUD recaptured from it, as identified in the Plaintiffs' amended proposed judgment.

The Plaintiffs are also entitled to injunctive relief prohibiting HUD from acting upon any threatened recapture or implementing any recovery of funds granted for fiscal years 1998 through 2008 without first complying with the requirements of Section 401(a) of the NAHASDA as that subsection existed prior to the effective date of Public Law 110-411.

Six Plaintiffs (Blackfeet Housing, the Zuni Tribe, Isleta Pueblo Housing Authority, Pueblo of Acoma Housing Authority, AVCP, and Chippewa Cree Housing Authority) seek additional monetary relief for grant underfunding for certain homeownership units, stating that such units continued under the Tribe's operation after HUD eliminated the units from the Tribe's FCAS. Three Plaintiffs (Blackfeet Housing, Pueblo of Acoma Housing Authority and Aleutian

Housing Authority) also seek payment for grant underfunding for certain units that they state were converted from homeownership units to low rent units.

The Plaintiffs' requests for payment of alleged grant underfunding for "operated units" and "converted units" are rejected. The Plaintiffs' factual support for those categories of requested relief consists of extra-record information that HUD did not consider during the underlying administrative process. Consequently, the Court's APA jurisdiction does not include authority to determine whether any Plaintiffs are in fact entitled to ongoing funding for the units they describe as "operated units" and "converted units."

The findings and conclusions set forth above resolve the issues presented by the Defendants' motion for scheduling order.

Based on the foregoing, it is

ORDERED that the Defendants' motion for scheduling order [#106] is moot; and it is

FURTHER ORDERED that the Defendants shall restore the following amounts to the Plaintiffs for Indian Housing Block Grant ("IHBG") funds that were illegally recaptured from the them:

Blackfeet Housing – $575,510.00;

The Zuni Tribe – $1,498,090.00;

Isleta Pueblo Housing Authority – $121,285.00;

Pueblo of Acoma Housing Authority – $56,106.00;

Association of Village Council Presidents Regional Housing Authority – $1,402,062.00;

Northwest Inupiat Housing Authority – $1,656,043.00;

Bristol Bay Housing Authority – $230,145.00;

Aleutian Housing Authority – $145,089.00;

Chippewa Cree Housing Authority – $656,200.00, and

Big Pine Paiute Tribe – $264,832.00.

Such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiffs under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") in a given fiscal year as calculated without application of the amount of the Judgment; it is

FURTHER ORDERED that the Defendants shall make restoration of the IHBG funds from all available sources, including the funds set aside for the benefit of the Plaintiffs pursuant this Court's Order dated March 17, 2008, and either or both of the IHBG funds carried-forward from previous fiscal years and the IHBG funds appropriated in future grant years; it is

FURTHER ORDERED that restoration by transfer of grant funds from amounts set aside for the Plaintiffs pursuant to this Court's order dated March 17, 2008 shall occur within thirty (30) days of the date of Judgment, and restoration of any remaining amounts shall be completed as soon as administratively feasible, but in no event later than eighteen (18) months from the date of Judgment; it is

FURTHER ORDERED that with respect to grant funding for those fiscal years from FY 1997 through and including FY 2008, the Defendants shall refrain from threatening to or implementing any recapture of IHBG funds from the Plaintiffs and shall not act upon any threatened recapture without first complying with the requirements of Section 401(a) of the

NAHASDA [25 U.S.C. § 4161(a)] as that subsection existed prior to the effective date of Public Law 110-411, and it is

FURTHER ORDERED that the Plaintiffs are awarded their costs to be taxed upon the filing of a Bill of Costs pursuant to D.C.COLO.LCivR 54.1.

A separate Judgment shall enter for each Plaintiff.

Dated: January 16, 2015

BY THE COURT:

s/Richard P. Matsch

_____

Richard P. Matsch, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
SHAUN DONOVAN, Secretary of Housing and Urban Development, and
GLENDA GREEN, Director, Housing Management Div. Office of Native American Programs,
Department of Housing and Urban Development, Office of Public and Indian Housing

Defendants.

MEMORANDUM OPINION AND ORDER
For this action and the following coordinated cases:
Civil Action No. 07-cv-01343-RPM; Civil Action No. 08-cv-00451-RPM;
Civil Action No. 08-cv-02570-RPM; Civil Action No. 08-cv-02573-RPM;
Civil Action No. 08-cv-02577-RPM, and Civil Action No. 08-cv-02584-RPM

On May 25, 2006, this court issued a Memorandum Opinion and Order, exercising jurisdiction granted by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA), invalidating HUD's determination that Fort Peck Housing Authority received excess block grant housing for low income families living on the Fort Peck Indian Reservation for the years 1998 through 2002, and ordering the defendants to take such administrative action as necessary to implement that ruling. The order declared 24 C.F.R. § 1000.318 invalid as contrary to 25 U.S.C. § 4152(b)(1), section 302 of the Native American Housing Assistance and Self-Determination

Act of 1996 (NAHASDA). This court also ruled that even if the regulation could be reconciled with the statute, the policy of applying the regulation was an impermissible interference with the principles of Indian self-determination and tribal self governance. This court did not address the plaintiff's arguments that HUD's demands for repayment made by its audit procedure denied the plaintiff a statutory right to a hearing and that HUD had no authority to recapture amounts already spent on affordable housing activities.

Almost four years later, on February 19, 2010, the Tenth Circuit Court of Appeals entered an Order and Judgment, reversing this court on the statutory interpretation to the extent that it was construed to establish a funding floor based upon the 1997 units.[1] The appellate court said that a reduction equal to the number of dwelling units no longer owned or operated by a Tribal Housing Entity was valid. The Tenth Circuit's ruling did not address HUD's elimination of units which were still owned by the plaintiff but which in HUD 's view should have been conveyed. In a footnote, the Circuit Court acknowledged that NAHASDA was amended in 2008 but did not comment on it.

In a Petition for Rehearing and for Rehearing En Banc dated April 10, 2010, Fort Peck pointed out that the Tenth Circuit's decision did not consider HUD's exclusion of units still owned and operated by Tribal Housing Entities, including those converted to low rent units, units not conveyed and demolished units that were replaced. (#62-2). Fort Peck also argued that because Congress expressly declined to apply the amendment retroactively and essentially

[1]*Fort Peck Housing Auth. v. HUD*, No. 06-1425 & 06-1447, 367 Fed.Appx. 884 (10th Cir. Feb. 19, 2010) (unpublished), *cert. denied,* —— U.S. ——, 131 S.Ct. 347, 178 L.Ed.2d 148 (2010).

validated the regulation by legislation there is a strong inference that Congress recognized that the prior statute did not authorize the regulation.

The petition was denied by the Tenth Circuit without comment.

In amending the factors for determination of need in 25 U.S.C. § 4152(b)(1), Congress included the following paragraph:

> Subparagraphs (A) through (D) shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008.

25 U.S.C. § 4152(b)(1)(E).

Multiple civil actions were filed by other tribal housing entities and tribes before that deadline and all of the civil actions have been managed by coordination to address common issues. On August 31, 2012, this court issued a Memorandum Opinion and Order deciding those issues. (#89). Based on the administrative record, this court concluded that using the auditing authority in 25 U.S.C. § 4165 [NAHASDA section 405] and following Guidance 98-19, HUD arbitrarily and capriciously determined that the tribes should not have included in the FCAS units that they still owned and operated after expiration of the term provided for payment in the MHOA contracts without regard for the tribes' reasons for not conveying the property. Those agency decisions disregarded the terms of those contracts and rights of the tribes and tenants to interpret and apply the contract provisions.

Such arbitrary disallowance was contrary to the right to a hearing provided by 25 U.S.C. § 4161 [NAHASDA section 401] which was applicable to the disputed adjustments as HUD itself recognized in 24 C.F.R. § 1000.532. HUD's contention that no hearing was required because the inclusion of these disputed units is not a substantial non-compliance requiring a

hearing is wrong as it is contrary to a common sense reading of the statute and regulation. As described in the Memorandum Opinion and Order, there are differing factual circumstances justifying continued ownership of MHOA units which the tribes could have presented at a hearing.

On November 19, 2012, the court held a coordinated hearing to address procedures for determining the remaining issues. Following that hearing, the court ordered simultaneous briefing on the issues of HUD's recapture authority and the scope of this court's authority under the APA. The Court also ordered the Plaintiffs to file statements describing the relief being requested and ordered HUD to respond to the Plaintiffs' statements.

That briefing is now complete and a coordinated hearing was held on February 12, 2014. This opinion and order addresses the issues discussed at that hearing.

There is no merit to HUD's contention that 25 U.S.C. § 4161(d) [NAHASDA section 401(d)] divests this court of jurisdiction over the Plaintiffs' claims and provides for exclusive, original jurisdiction in the circuit courts of appeal. Notably, in 2004 Fort Peck had filed a petition for review in the Ninth Circuit Court of Appeals, and that action was dismissed pursuant to a Stipulation dated December 3, 2004, in which HUD agreed that "proper venue lies in the United States District Court for Colorado" and that it would "not dispute that 28 U.S.C. § 1331 confers jurisdiction over Fort Peck's APA claims." (#109-1). HUD now acknowledges that it is bound by that stipulation with respect to Fort Peck, but asserts that the stipulation does not preclude it from arguing that 25 U.S.C. § 4161(d) deprives this court of jurisdiction over the claims of other Plaintiffs. That argument lacks candor and, contrary to HUD's argument, the circuit courts of appeal do not have exclusive, original jurisdiction over any of these actions.

Circuit court jurisdiction under § 25 U.S.C. § 4161(d) is available only after HUD has provided a grant recipient with an opportunity for hearing on the question of substantial noncompliance, which HUD denied to these plaintiffs. "[S]ection 4161 merely authorizes the circuit court to hear challenges to determinations made under section 4161(a), following the requisite notice and hearing procedures set forth in that section." *Yakama Nation Housing Auth. v. United States*, 102 Fed. Cl. 478, 488 (Fed. Cl. 2011); *see also Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 599 (Fed. Cl. 2011) (stating that it would be "anomalous" to conclude that section 4161 deprived it of jurisdiction "even where its terms – the filing of a record with a circuit court – have not been met.").

This court has jurisdiction under the APA to review the disputed agency actions. HUD's argument that the applicable statute of limitations is the four-year period found in 28 U.S.C. § 1658 is denied. APA actions are governed by the six-year limitations period provided in 28 U.S.C. § 2401(a). *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000).

There is no merit to HUD's contention that it had inherent authority to recoup grant overpayments from these Plaintiffs through administrative action. An agency has the inherent authority to seek recovery of funds mistakenly paid by filing a court action. *See United States v. Wurts*, 303 U.S. 414 (1938). That would provide due process to adjudicate disputed facts. Here, HUD has acted unilaterally and arbitrarily in demanding money from the Tribes through administrative action without a hearing. This court already determined that HUD's recapture authority was constrained by the pre-amendment version of 25 U.S.C. § 4161 and by 25 U.S.C. § 4165 and 24 C.F.R. § 1000.532. HUD has no authority to determine and collect overpayments by its own arbitrary action.

The applicable version of 24 C.F.R. § 1000.532 provides that "grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe." HUD's own regulation recognizes that it could not demand return of grant funds the recipients had already expended on affordable housing activities.[2]

In sum, for Indian Housing Block Grant funds that HUD awarded to the Plaintiffs for fiscal years 2008 and earlier, HUD's recapture of purported grant overpayments was arbitrary, contrary to law, and in excess of its statutory authority.

HUD disputes that conclusion and alternatively argues that if HUD misapplied 24 C.F.R. § 1000.318 or failed to follow appropriate administrative process then this court should remand these actions to HUD for further proceedings. During oral argument on February 12, 2014, HUD's counsel represented that the process that the agency would make available upon remand would be the process set forth in 24 C.F.R. § 1000.336. That regulation does not provide for a hearing – it provides for an exchange of written information. That is the same process which HUD provided previously and which this court found was inadequate under the statutory scheme that existed before NAHASDA's amendment in 2008. Remand for further proceedings under 24 C.F.R. § 1000.336 would be futile and would further delay the resolution of these disputes.[3]

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[2]24 C.F.R. § 1000.532 was amended on December 3, 2012. *See* 77 Fed.Reg. 71513-01 (Dec. 3, 2012), 2012 WL 5986952. The pre-amendment version of the regulation applies to these actions.

[3]24 C.F.R. § 1000.336 was amended as of May 21, 2007. The pre-amendment version applies to these disputes and that version did not address FCAS disputes.

The Plaintiffs seek orders requiring HUD to restore the grant funds that HUD recaptured illegally and injunctive relief prohibiting HUD from future recaptures. HUD disputes this court's authority to grant such relief.

With respect to the requested prospective relief, HUD argues that because the Plaintiffs' claims concern violations of the pre-2008 version of NAHASDA, their requests for prospective relief are moot. HUD asserts that the alleged unlawfulness of HUD's FCAS count determinations ended with the 2008 amendment to 25 U.S.C. § 4152(b)(1) [NAHASDA section 302(b)(1)]. HUD also argues that the court must apply the law in effect at the time the relief is granted. Those arguments fail. The amended version of NAHASDA does not govern these actions, which were filed before the deadline described in 25 U.S.C. § 4152(b)(1)(E). Because HUD exceeded its statutory authority under the pre-amendment version of NAHASDA, HUD must refrain from threatening recapture from the Plaintiffs and shall not act upon any threatened recapture with respect to grant funds that HUD awarded to the Plaintiffs for any fiscal year through fiscal year 2008.

HUD contends that this court lacks authority to order the restoration of grant funds already recaptured, arguing that such relief is unavailable because the APA's waiver of sovereign immunity, 5 U.S.C. § 702, does not encompass claims for money damages against the Government.

The scope of § 702's waiver of sovereign immunity depends on the distinction between "specific relief" and "compensatory, or substitute relief." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261-62 (1999). "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff

the very thing to which he was entitled." *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (citations and internal quotation marks omitted).

Throughout this litigation, HUD has asserted that the specific funds that were recaptured from the Plaintiffs cannot be returned because those funds were distributed to other grant recipients. HUD argues that providing the Plaintiffs with monetary relief from any other source would constitute "substitute relief" rather than "specific relief." HUD thus characterizes the Plaintiffs' request for the monetary relief as a claim for "money damages."

In 2006, this court accepted that argument and found that Fort Peck's request for monetary relief was "not an available remedy under the APA because it constitutes money damages contrary to the restriction in 5 U.S.C. § 702." (Order, Aug. 1, 2006, #46).

Upon reconsideration, this court finds that its authority under the APA includes the authority to require HUD to restore NAHASDA funds recaptured illegally from the Plaintiffs. The Plaintiffs have established that HUD's arguments rest on a faulty factual premise. That is, the Plaintiffs have shown that HUD's own practices and regulations demonstrate that HUD treats NAHASDA appropriations from different fiscal years as fungible. HUD does not dispute that unused appropriations remain in the program. The Plaintiffs asserted and HUD did not dispute that HUD routinely carries forward NAHASDA funds from a fiscal year and distributes such funds in subsequent fiscal years. The Plaintiffs asserted and HUD did not dispute that in FY 2008, HUD utilized over $26 million in FY 2008 funds to pay for underfunding that occurred prior to FY 2003.

HUD's own regulations are consistent with its practice of treating all NAHASDA funds as fungible. 24 C.F.R. 1000.536 addresses the question, "What happens to NAHASDA grant

funds adjusted, reduced, withdrawn, or terminated under § 1000.532?" and provides the following answer:

> Such NAHASDA grant funds shall be distributed by HUD in accordance with the next NAHASDA formula allocation.

24 C.F.R. § 1000.536.

The Plaintiffs' request for monetary relief is not a claim for damages for breach of a legal duty. Rather, the Plaintiffs are seeking the return of funds that were taken from them and to which they remain entitled. Under these circumstances, this Court's authority under the APA includes authority to order restoration of all funds illegally recaptured from the Plaintiffs.

HUD shall restore to the Plaintiffs the funds that HUD recaptured for any fiscal year through 2008. Where funds have been set aside through escrow for a Plaintiff's benefit, HUD shall make restoration from the escrow funds. For Plaintiffs with monetary claims exceeding the amount set aside or without funds set aside, HUD shall take action to restore the unlawfully recaptured funds through grant funding adjustments.

To determine the amount of funds to be restored, all low rent units shall be funded as rental units, without regard to whether such units were converted from Mutual Help Units or homeownership units to rental units. HUD's policy of calculating funding for converted units according to a unit's pre-1997 status is arbitrary and capricious. At the hearing on February 12, 2014, HUD's counsel attempted to justify HUD's policy by stating that when NAHASDA was enacted, there was an intention to continue funding according to contract rights in effect under the prior statute. That explanation is contrary to the statutory interpretation that HUD advocated during the 2006 proceedings in this action and that HUD successfully argued on appeal to the United States Court of Appeals for the Tenth Circuit. It is incongruous for HUD to rely on the

pre-1997 status quo as a rationale for imposing a funding limit with respect to converted units.

Based on the foregoing it is

ORDERED that defendants shall restore to the plaintiffs all funds that were illegally recaptured for fiscal years through and including FY 2008. The defendants' obligation to restore such funds is subject to the 6-year limitations period provided by 28 U.S.C. § 2401(a); it is

FURTHER ORDERED that with respect to grant funding for those fiscal years, HUD shall refrain from threatening recapture from the plaintiffs and shall not act upon any threatened recapture; it is

FURTHER ORDERED that on or before April 15, 2014, the plaintiffs in each civil action shall submit a proposed form of judgment, specifying the amounts to be paid to each tribe or tribal housing entity and the asserted sources of payment; and it is

FURTHER ORDERED that for any plaintiff who claims entitlement to payment for underfunding because HUD excluded units from that plaintiff's FCAS in a particular fiscal year, the proposed form of judgment should include a separate itemization for those amounts and may be submitted by May 15, 2014. An Appendix may be provided to explain the calculation of the amount owed and the record support for the claim.

The plaintiffs' requests for attorney's fees and costs will be addressed after entry of judgment.

Date: March 7, 2014

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 05-cv-00018-RPM

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN, Secretary of Housing and Urban Development, and DEBORAH A. HERNANDEZ, Assistant Secretary for Public and Indian Housing.

Defendants.

MEMORANDUM OPINION AND ORDER

On January 6, 2005, Fort Peck Housing Authority ("Fort Peck") filed this civil action for judicial review under the authority of the Administrative Procedure Act ("APA") of the action of the United States Department of Housing and Urban Development ("HUD"), determining that Fort Peck had received excess money paid in annual grants pursuant to the Native American Housing Assistance and Self Determination Act of 1996, 25 U.S.C. § 4101, *et seq.* ("NAHASDA") for the years 1998 through 2002 and must repay the over funded amounts.

The core of the complaint was that HUD's decision, based on a regulation, 24 C.F.R. § 1000.318(a), was inconsistent with the statutory requirement in 28 U.S.C. § 4152(b) that set out the following parameters for the formula to be developed through a negotiated rulemaking process for the allocation of annual block grants of funds for providing affordable housing for low income families among Indian tribes:

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

The time referred to in paragraph (1) was September 30, 1997, the day before the effective date of NAHASDA which replaced the previous practice of funding by contracts under the Housing Act of 1937.

After review of the administrative record this Court agreed with that claim and held the regulation invalid in a Memorandum Opinion and Order dated May 25, 2006. The judgment entered on that date was modified on June 30, 2006, clarifying that the Court's ruling was limited to Fort Peck.[1]

HUD appealed to the Tenth Circuit Court of Appeals in 2006. While the appeal was pending, Congress enacted the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (the "Reauthorization Act," Pub. L. No. 110-411, 122 Stat. 4319 (2008)). Section 301(2) of the Reauthorization Act amended 25 U.S.C. § 4152(b). As amended, § 4152(b) now reads:

> (b) Factors for determination of need
> The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

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[1] *Fort Peck Housing Auth. v. HUD*, 435 F. Supp. 2d 1125, 1127-28 (D. Colo. 2006) (*Fort Peck I*), *rev'd* 367 Fed. Appx. 884 (10th Cir. 2010) (unpublished) (*Fort Peck II*), *cert. denied*, 131 S.Ct. 347 (2010).

> (1)(A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if–
>
> > (i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or
> > (ii) the unit is lost to the recipient by conveyance, demolition, or other means.
>
> (B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.
>
> (C) If the unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be considered a low-income housing dwelling unit for the purpose of this paragraph.
>
> (D) In this paragraph, the term "reasons beyond the control of the recipient" means, after making reasonable efforts, there remain--
>
> > (i) delays in obtaining or the absence of title status reports;
> >
> > (ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;
> >
> > (iii) clouds on title due to probate or intestacy or other court proceedings; or
> >
> > (iv) any other legal impediment.

25 U.S.C. § 4152(b).

By Order and Judgment, entered on February 19, 2010, a panel of the Tenth Circuit reversed the judgment by concluding that this Court erred in its literal reading of § 4215(b) and holding that § 1000.318 was valid to the extent that it required exclusion of units that the tribe no

longer owned or operated at the time it submitted its Formula Response Forms in the process of determining the annual allocation of funds by HUD.

The appellate court did not determine the validity of HUD's denial of funds for units that were still owned and operated by Fort Peck on HUD's determination that those units should have been conveyed upon the expiration of the period of occupancy under the terms of Mutual Help and Occupancy Agreements ("MHOAs") entered into between the tribe and eligible Indian families. That court recognized the 2008 amendments in a footnote but did not consider them.

The Reauthorization Act became effective on October 14, 2008. Congress provided that the amendments set forth in Subparagraphs (b)(1)(A) through (D) "shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after October 14, 2008." 25 U.S.C. § 4152(b)(1)(E).

Before that deadline, other tribes and tribally designated housing entities filed actions in this court and other courts, alleging claims similar to those alleged by Fort Peck. The following related actions are now pending in this court:

Civil Action No. 05-cv-00018-RPM, *Fort Peck Housing Authority v. HUD*;

Civil Action Number 06cv01680-RPM, *Northern Arapaho Tribe et al. v. HUD*;[2]

[2]There are four Plaintiffs in Civil Action No. 06cv01680: the Northern Arapaho Tribe and Intervenor Plaintiffs Jicarilla Apache Housing Authority, Mescalero Apache Housing Authority, and Ute Indian Tribal Housing. The named defendants, which include HUD and individual HUD officials, are referred to collectively as "HUD."

Civil Action Number 07cv01343-RPM, *Blackfeet Housing et al. v. HUD*; [3]

Civil Action No. 08cv00451-RPM, *Tlingit-Haida Regional Housing Authority v. HUD*;

Civil Action No. 08cv00826-RPM, *Navajo Housing Authority v. HUD*;

Civil Action No. 08cv02570-RPM, *Yakama Nation Housing Authority v. HUD*;[4]

Civil Action No. 08cv02573-RPM, *Modoc Lassen Indian Housing Authority v. HUD*;

Civil Action No. 08cv02577-RPM, *Choctaw Nation of Oklahoma v. HUD*, and

Civil Action No. 08cv02584, *Sicangu Wicoti Awanyakapai Corporation et al. v. HUD*.[5]

Another related action, Civil Action No. 11-cv-01516-RPM, *Nambe Pueblo Housing Entity v. HUD*, was filed on June 10, 2011.

Because there were issues raised by Fort Peck that were not decided by the Order and Judgment and the tribes in the other civil actions in this court had raised common issues, a coordinated conference was held with counsel in all of the cases, resulting in an agreement to file amended or supplemental complaints with coordinated briefing on the common issues raised by those pleadings and the relevant portions of the administrative records.

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[3]There are ten Plaintiffs in Civil Action No. 07cv01343: Blackfeet Housing; the Zuni Tribe; Isleta Pueblo Housing Authority; Pueblo of Acoma Housing Authority; Association of Village Council Presidents Regional Housing Authority; Northwest Inupiat Housing Authority; Bristol Bay Housing Authority; Aleutian Housing Authority; Chippewa Cree Housing Authority, and Big Pine Paiute Tribe.

[4]Yakama Nation Housing Authority also filed suit in the United States Court of Federal Claims, where the action is proceeding as Civil Action No. 08-839C. *See Yakama Nation Housing Auth. v. United States*, 102 Fed. Cl. 478 (Fed. Cl. 2011) (granting in part and denying in part the defendant's motion for dismissal).

[5]There are seven Plaintiffs in Civil Action No. 08cv02584: Sicangu Wicoti Awanyakapi Corporation; Oglala Sioux (Lakota) Housing; Turtle Mountain Housing Authority; Winnebago Housing and Development Commission; Lower Brule Housing Authority; Spirit Lake Housing Corporation, and Trenton Indian Housing Authority.

The change from the housing assistance provided under the 1937 Act to the block grant funding under NAHASDA is described in *Fort Peck I*. The home ownership opportunities described as Mutual Help and Turnkey III are essentially lease to purchase agreements. There are variations in the terms of these agreements which are embodied in forms provided by HUD at different times. For present purposes these are all included in the term MHOA.

The controversy in these cases is the exclusion of MHOA units still owned or operated by the tribes from the Formula Current Assisted Stock (FCAS), the first component of the formula for determining a tribe's allotment, because HUD determined that they were no longer eligible under 24 C.F.R. § 1000.318, reading in relevant part as follows:

> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE [Tribally Designated Housing Entity], or IHA [Indian Housing Authority] no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise provided that:
>
> > (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA and
> >
> > (2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA including the requirements for full and timely payment.
>
> (b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.
>
> (c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response Form.

24 C.F.R. § 1000.318(a).

HUD initiates the annual allocation process by sending Formula Response Forms to the tribes to report changes in their FCAS. HUD's direction to the tribes is contained in Guidance 98-19, issued in 1998. The Guidance instructed that:

> ... The tribe/TDHE shall not include units that have been conveyed, demolished, or otherwise lost in a year prior to the fiscal year that the Formula Response Form reports. The tribe/TDHE shall not include units that have been paid-off but not conveyed unless the tribe/TDHE can demonstrate that reasons beyond the tribe/TDHE or IHA's control have not made conveyance practical. The tribe/TDHE or IHA must demonstrate that the tribe/TDHE or IHA has actively enforced strict compliance by the homebuyers with the terms and conditions of the [Mutual Help and Occupancy Agreement], including the requirements for full and timely payment. Because promissory notes can be issued, Tenant account receivables alone are not adequate for non-conveyances.

(Pls.' RA 4).

HUD also directed that for purposes of the IHBG formula, units that were converted from Mutual Help to low rent units on or after October 1, 1997, should be counted as the type of unit specified on the original Annual Contributions Contract. (*Id.* at THRHA000101).

Guidance 98-19 also informed the Tribes that if HUD discovered a tribe had received formula funds for FCAS units they did not have in management during that fiscal year, HUD would:

> • Notify the tribe/TDHE of this information.
> • Inform the tribe/TDHE that HUD will recoup these funds by adjusting the upcoming fiscal year's grant.
> • Provide the tribe/TDHE with the opportunity to present additional information regarding the status of the units for HUD's consideration.
> • Distribute any recouped funds through the formula mechanism in the upcoming fiscal year.

(*Id*. at THRHA000102).

Accepting that the pre-amendment language in § 4152(b) did not require HUD to use the 1997 units as a funding floor in the FCAS, the issue to be addressed is when does the tribe lose

the legal right to own, operate or maintain a MHOA unit? HUD answers that question simplistically, saying that it is at the expiration of the term provided for payment in the MHOA, generally 25 years, even if the occupant has not made payment or is otherwise in default of the contract. That is what is required by Guidance 98-19.

That directive is an arbitrary and capricious exercise of HUD's regulatory authority and is contrary to law.

The legal right to own, operate or maintain a MHOA unit is measured by the terms of the contract between the tribe and the occupant of the unit. There are at least four variations of the forms for those contracts, provided by HUD, and, as in all contract matters, their provisions must be interpreted within the context of their performance.[6] HUD has usurped the right of the tribe to determine how to enforce the contract and when the property should be conveyed.

HUD has disregarded the fact that the homebuyer has contract rights under the MHOA. They include the opportunity to request a repayment schedule for a delinquent balance for up to three years and the right to respond to a notice of termination with a right to hearing and consideration under state, local or tribal law as applicable in the location of the property. *See, e.g.* 1993 Form § 10.5(h) and §12.2.

The briefing and the administrative record reveal multiple scenarios which make HUD's categorical exclusions of MHOA units arbitrary and capricious.

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[6]Plaintiffs' Non-Record Appendix (NRA) Exhibit 20 is a compilation of four versions of HUD's MHOA form: (1) Form HUD-53044 dated July 1967; (2) Form HUD-53056 dated March 1976; (3) revised Form HUD-53056 for "all Mutual Help Projects placed under ACC on or after October 1, 1990," and revised Form HUD-53056 for "all Mutual Help Projects placed under ACC on or after October 1, 1992."

The Exclusion Of Units That Were Not Conveyed Because Federally-Funded Repair Or Modernization Work Was Being Conducted When The Units Were Otherwise Eligible For Conveyance

When HUD reviewed the Plaintiffs' FCAS inventories, it eliminated units that tribes had not conveyed at the end of the 25-year period because the units were undergoing rehabilitation. HUD's policy was that such units are "conveyance-eligible" and thus ineligible for FCAS funding. (*See, e.g.*, Pls.' RA 13). The Plaintiffs assert that in many cases homebuyers refused to accept conveyance until modernization work was complete, and under those circumstances HUD's elimination of FCAS funding for such units was arbitrary, capricious and unlawful.

HUD's Counting Policy Regarding Units Converted From Homeownership Units To Rental Units

Under the IHBG formula, tribes receive higher funding for rental units than for homeownership units. In Guidance 98-19, HUD stated that units that were converted from Mutual Help to low rent units on or after October 1, 1997, must be counted as the type of unit specified on the original Annual Contributions Contract. The practical effect of this policy inhibits tribes from making those conversions.

The Exclusion Of Units Occupied By New Tenants/Homebuyers

When a Mutual Help unit is occupied by a new tenant/homebuyer during the initial contract term, the tribe has the legal right to establish a new purchase price and a new contract. In some cases, HUD determined that a unit was eligible for conveyance (and thus ineligible for FCAS funding) based on the original 25-year period, even though the original agreement had been replaced by a new contract with a new homebuyer.

The Exclusion Of Demolished Units That Were Scheduled For Replacement

Before the 2008 Reauthorization Act, HUD's policy was to eliminate demolished units

from FCAS, unless some part of the original structure remained intact. The amended version of 25 U.S.C. § 4152(b)(1) provides that if a unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be included in FCAS. That statutory change in itself demonstrates that HUD's prior policy of eliminating units that were demolished and scheduled for replacement was arbitrary and capricious.

The Exclusion of Units That Were Not Conveyed Due To Title Impediments

Some tribes (most notably, Nambe Pueblo) encountered difficulties in conveying units to homebuyers due to title impediments and delays attributable to the Bureau of Indian Affairs ("BIA"). HUD nevertheless determined that such units should be eliminated from the tribe's FCAS, based on HUD's assessment that the tribe had not made sufficient efforts to convey the units. These exclusions were arbitrary, capricious and unlawful.

These examples of the effects of HUD's following Guidance 98-19 lead to the conclusion that it is invalid as contrary to NAHASDA. A fundamental premise of NAHASDA is that federal assistance for affordable housing to Indian tribes "shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance." 25 U.S.C. § 4101(7). That principle requires that the tribes, rather than HUD, should determine when a homeownership unit should be conveyed to a homebuyer who has not fulfilled the MHOA obligations and only the tribe has the legal right to proceed with such action as may be necessary to evict the occupant under applicable law. That procedure may involve a right to cure a delinquency and a substantial period of delay.

While the statutory and regulatory formula is to be followed, it is fundamental that the tribe have latitude in determining the need for subsidized housing among its people. Ultimately

that is a subjective evaluation of human factors that must be considered. Is the tribe obligated to disregard illness, disability, unemployment, dysfunctional families and other economic stressors in assessing human needs? The existence of a formula for determining the totality of the need for federal housing assistance funding does not justify HUD's formulaic approach to the tribe's decision to abstain from exercising judgment as to eviction of a family from a MHOA residence upon a delinquency in payment.

There is no reason to give any deference to HUD with respect to Guidance 98-19. It is not a rule established under the rule making procedure required by NAHSDA and the APA.

It is not necessary to invalidate 24 C.F.R. § 1000.318 itself as unauthorized by § 4152(b) before the enactment of the 2008 amendments to find that HUD's application of it to the plaintiff tribes now under judicial review was arbitrary and capricious.

HUD failed to comply with the statutory requirement for a hearing provided by the pre-amendment version of 25 U.S.C. § 4161(a)(1), reading in relevant part:

> . . . if the Secretary finds *after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter*, the Secretary shall–
>
> (A) terminate payments under this chapter to the recipient;
> (B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;
> (C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or
> (D) in the case of [noncompliance because of technical incapacity], provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.
>
> (emphasis added).

HUD's authority to review and audit the tribes' grant applications is in 25 U.S.C. § 4165.

Under §4165(d) the Secretary's authority to adjust the amount of a grant based on the findings made in those audit reports is expressly made subject to the hearing in section 4161(a). HUD has recognized that limitation in its regulation at 24 C.F.R. § 100.532:

> (a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.
>
> (b) Before undertaking any action in accordance with paragraphs (a) and (c) of this section, HUD will notify the recipient in writing of the actions it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. In the event the deficiency is not resolved, HUD may take any of the actions available under paragraphs (a) and (c) of this section. However, the recipient may request, within 30 days of notice of the action, a hearing in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been held and HUD has rendered a final decision.
>
> (c) Absent circumstances beyond the recipient's control, when a recipient is not complying significantly with a major activity of its IHP [Indian Housing Plan], HUD shall make appropriate adjustment, reduction, or withdrawal of some or all of the recipient's subsequent year grant in accordance with this section.

These provisions are applicable to the HUD actions now under review.[7] That legal conclusion is supported by the action of Congress in adding the following paragraph to § 4161(a) in the 2008 amendments:

> (2) Substantial noncompliance
> The failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in

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[7]Because *Nambe Pueble Housing Authority v. HUD*, Civil Action No. 11-cv-01516-RPM, was filed after the deadline set forth in the Reauthorization Act, that action presents some unique issues which were the subject of separate briefing and are addressed in a separate opinion and order.

> itself, be considered to be substantial noncompliance for purposes of this subchapter.

25 U.S.C. § 4161(a)(2)(2008).

The Reauthorization Act of 2008 was a substantive change in the statutory framework. It cannot be read as a clarification of pre-existing law and it cannot be given retroactive effect to these disputes.

HUD has asserted the statute of limitations in 28 U.S.C. § 2501 bars some of the claims now under review. The plaintiffs' argument that the savings clause in § 42152(b)(1)(E) creates an exception is rejected as it was by the Court of Federal Claims in *Lummi Tribe v. United States*, 99 Fed. Cl. 584, 606-07 (Fed. Cl. 2011). The factual question of when the statute began to run is reserved for the next phase of this litigation.

The legal conclusions made in this case will be adopted by reference in orders to be entered in all of the other cases pending in this court and will guide the mixed questions of fact and law remaining to be adjudicated pursuant to a procedure to be determined at another coordinated scheduling conference.

SO ORDERED.

Dated: August 31, 2012

BY THE COURT:

s/ Richard P. Matsch

Richard P. Matsch, Senior District Judge

C

Effective: October 14, 2008

United States Code Annotated Currentness

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

Subchapter IV. Compliance, Audits, and Reports

➡➡ § 4161. Remedies for noncompliance

(a) Actions by Secretary affecting grant amounts

(1) In general

Except as provided in subsection (b) of this section, if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary shall--

(A) terminate payments under this chapter to the recipient;

(B) reduce payments under this chapter to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this chapter;

(C) limit the availability of payments under this chapter to programs, projects, or activities not affected by such failure to comply; or

(D) in the case of noncompliance described in section 4162(b) of this title, provide a replacement tribally designated housing entity for the recipient, under section 4162 of this title.

(2) Substantial noncompliance

The failure of a recipient to comply with the requirements of section 4152(b)(1) of this title regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this subchapter.

(3) Continuance of actions

If the Secretary takes an action under subparagraph (A), (B), or (C) of paragraph (1), the Secretary shall continue such action until the Secretary determines that the failure to comply has ceased.

(4) Exception for certain actions

(A) In general

Notwithstanding any other provision of this subsection, if the Secretary makes a determination that the failure of a recipient of assistance under this chapter to comply substantially with any material provision (as that term is defined by the Secretary) of this chapter is resulting, and would continue to result, in a continuing expenditure of Federal funds in a manner that is not authorized by law, the Secretary may take an action described in paragraph (1)(C) before conducting a hearing.

(B) Procedural requirement

If the Secretary takes an action described in subparagraph (A), the Secretary shall--

(i) provide notice to the recipient at the time that the Secretary takes that action; and

(ii) conduct a hearing not later than 60 days after the date on which the Secretary provides notice under clause (i).

(C) Determination

Upon completion of a hearing under this paragraph, the Secretary shall make a determination regarding whether to continue taking the action that is the subject of the hearing, or take another action under this subsection.

(b) Noncompliance because of technical incapacity

(1) In general

If the Secretary makes a finding under subsection (a) of this section, but determines that the failure to comply substantially with the provisions of this chapter--

(A) is not a pattern or practice of activities constituting willful noncompliance, and

(B) is a result of the limited capability or capacity of the recipient,

the Secretary may provide technical assistance for the recipient (directly or indirectly) that is designed to increase

the capability and capacity of the recipient to administer assistance provided under this chapter in compliance with the requirements under this chapter, if the recipient enters into a performance agreement with the Secretary that specifies the compliance objectives that the recipient will be required to achieve by the termination date of the performance agreement.

(2) Performance agreement

The period of a performance agreement described in paragraph (1) shall be for 1 year.

(3) Review

Upon the termination of a performance agreement entered into under paragraph (1), the Secretary shall review the performance of the recipient that is a party to the agreement.

(4) Effect of review

If, on the basis of a review under paragraph (3), the Secretary determines that the recipient--

(A) has made a good faith effort to meet the compliance objectives specified in the agreement, the Secretary may enter into an additional performance agreement for the period specified in paragraph (2); and

(B) has failed to make a good faith effort to meet applicable compliance objectives, the Secretary shall determine the recipient to have failed to comply substantially with this chapter, and the recipient shall be subject to an action under subsection (a) of this section.

(c) Referral for civil action

(1) Authority

In lieu of, or in addition to, any action authorized by subsection (a) of this section, if the Secretary has reason to believe that a recipient has failed to comply substantially with any provision of this chapter, the Secretary may refer the matter to the Attorney General of the United States with a recommendation that an appropriate civil action be instituted.

(2) Civil action

Upon such a referral, the Attorney General may bring a civil action in any United States district court having venue thereof for such relief as may be appropriate, including an action to recover the amount of the assistance furnished under this chapter that was not expended in accordance with it, or for mandatory or injunctive relief.

(d) Review

(1) In general

Any recipient who receives notice under subsection (a) of this section of the termination, reduction, or limitation of payments under this chapter--

(A) may, not later than 60 days after receiving such notice, file with the United States Court of Appeals for the circuit in which such State is located, or in the United States Court of Appeals for the District of Columbia, a petition for review of the action of the Secretary; and

(B) upon the filing of any petition under subparagraph (A), shall forthwith transmit copies of the petition to the Secretary and the Attorney General of the United States, who shall represent the Secretary in the litigation.

(2) Procedure

The Secretary shall file in the court a record of the proceeding on which the Secretary based the action, as provided in section 2112 of Title 28. No objection to the action of the Secretary shall be considered by the court unless such objection has been urged before the Secretary.

(3) Disposition

(A) Court proceedings

The court shall have jurisdiction to affirm or modify the action of the Secretary or to set it aside in whole or in part. The findings of fact by the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may order additional evidence to be taken by the Secretary, and to be made part of the record.

(B) Secretary

The Secretary--

(i) may modify the findings of fact of the Secretary, or make new findings, by reason of the new evidence so taken and filed with the court; and

(ii) shall file--

(I) such modified or new findings, which findings with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole; and

(II) the recommendation of the Secretary, if any, for the modification or setting aside of the original action of the Secretary.

(4) Finality

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

CREDIT(S)

(Pub.L. 104-330, Title IV, § 401, Oct. 26, 1996, 110 Stat. 4037; Pub.L. 106-568, Title X, § 1003(h), (i), Dec. 27, 2000, 114 Stat. 2928, 2929; Pub.L. 106-569, Title V, § 503(g), (h), Dec. 27, 2000, 114 Stat. 2964, 2965; Pub.L. 110-411, Title IV, § 401, Oct. 14, 2008, 122 Stat. 4330.)

Effective: December 27, 2000

United States Code Annotated Currentness

Title 25. Indians

Chapter 43. Native American Housing Assistance and Self-Determination (Refs & Annos)

Subchapter IV. Compliance, Audits, and Reports

➡➡ § 4165. Review and audit by Secretary

(a) Requirements under chapter 75 of Title 31

An entity designated by an Indian tribe as a housing entity shall be treated, for purposes of chapter 75 of Title 31, as a non-Federal entity that is subject to the audit requirements that apply to non-Federal entities under that chapter.

(b) Additional reviews and audits

(1) In general

In addition to any audit or review under subsection (a) of this section, to the extent the Secretary determines such action to be appropriate, the Secretary may conduct an audit or review of a recipient in order to--

(A) determine whether the recipient--

(i) has carried out--

(I) eligible activities in a timely manner; and

(II) eligible activities and certification in accordance with this chapter and other applicable law;

(ii) has a continuing capacity to carry out eligible activities in a timely manner; and

(iii) is in compliance with the Indian housing plan of the recipient; and

(B) verify the accuracy of information contained in any performance report submitted by the recipient under section 4164 of this title.

(2) On-site visits

To the extent practicable, the reviews and audits conducted under this subsection shall include on-site visits by the appropriate official of the Department of Housing and Urban Development.

(c) Review of reports

(1) In general

The Secretary shall provide each recipient that is the subject of a report made by the Secretary under this section notice that the recipient may review and comment on the report during a period of not less than 30 days after the date on which notice is issued under this paragraph.

(2) Public availability

After taking into consideration any comments of the recipient under paragraph (1), the Secretary--

(A) may revise the report; and

(B) not later than 30 days after the date on which those comments are received, shall make the comments and the report (with any revisions made under subparagraph (A)) readily available to the public.

(d) Effect of reviews

Subject to section 4161(a) of this title, after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this chapter in accordance with the findings of the Secretary with respect to those reports and audits.

CREDIT(S)

(Pub.L. 104-330, Title IV, § 405, Oct. 26, 1996, 110 Stat. 4040; Pub.L. 106-568, Title X, § 1003(f)(2), Dec. 27, 2000, 114 Stat. 2927; Pub.L. 106-569, Title V, § 503(e)(2), Dec. 27, 2000, 114 Stat. 2963.)

Current through P.L. 113-163 (excluding P.L. 113-128) approved 8-8-14

END OF DOCUMENT

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 24. Housing and Urban Development
Subtitle B. Regulations Relating to Housing and Urban Development
Chapter IX. Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (Refs & Annos)
Part 1000. Native American Housing Activities (Refs & Annos)
Subpart D. Allocation Formula

➞ § 1000.318 When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?

(a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:

(1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and

(2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

(b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.

(c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response Form.

SOURCE: 63 FR 12349, March 12, 1998, unless otherwise noted.

AUTHORITY: 25 U.S.C. 4101 et seq.; 42 U.S.C. 3535(d).

24 C. F. R. § 1000.318, 24 CFR § 1000.318

Current through Sept. 18, 2014; 79 FR 56215.

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