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)]

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GLOSSARY

APA	Administrative Procedure Act
CDBG	Community Development Block Grant Act
FCAS	Formula Current Assisted Housing Stock
HUD	U.S. Department of Housing and Urban Development
NAHASDA	Native American Housing Assistance and Self-Determination Act

INTRODUCTION AND SUMMARY

Under the Native American Housing Assistance and Self-Determination Act (NAHASDA), HUD is responsible for allocating annual affordable-housing appropriations across eligible Native American tribes. HUD determines each tribe's share by applying an allocation formula that the agency developed in concert with the tribes. A key factor in the allocation formula is the number of eligible rent-to-own housing units that a tribe owns. HUD therefore asks tribes to report the number of eligible units they own each year, and the agency relies on the reported data to allocate the appropriated funds. If a tribe overstates the number of eligible units it owns, it will receive a greater allocation than it was entitled to receive. And because HUD allocates all available funds, when one tribe receives a greater share than it was entitled to, other tribes necessarily receive less than they should have.

In these cases, HUD determined that it had miscalculated the plaintiff tribes' shares of several NAHASDA appropriations, because the tribes' unit counts in the relevant years had included ineligible units. HUD recovered the funds it overpaid the plaintiff tribes by offsetting their current-year grants and then reallocated the recovered funds across all tribes.

The plaintiff tribes do not dispute most of these points. They do not challenge the validity of the regulatory allocation formula, including the regulation that HUD applies when deciding whether a particular unit is eligible for inclusion in the formula.

For the most part, the tribes also do not dispute that their historical unit counts in fact included ineligible units, including units that the tribes had previously conveyed and no longer owned. The tribes likewise do not contest that, because the allocation process is a zero-sum system, it was other tribes (not HUD or the federal government) that were deprived of funds when the plaintiff tribes were overpaid.

The tribes argue instead that HUD was prohibited from collecting the overpayments because the agency failed to abide by the procedural and other requirements set forth in sections 401 and 405 of NAHASDA. That argument lacks merit. HUD is obligated by statute and regulation to distribute grant funds fairly across all tribes. Like all federal agencies, HUD has the common-law authority to recover, through administrative offset, any payments it makes in error when carrying out its obligations. That well-established common-law authority can be abrogated only by a clear congressional command. Neither § 401 nor § 405 (nor any other NAHASDA provision) contains such a command.

As the text of each provision indicates, sections 401 and 405 apply when HUD seeks to sanction a tribe for misusing funds the tribe otherwise rightfully received. They do not apply when HUD seeks to recoup grant funds the agency erroneously paid to the tribes—*i.e.*, funds the tribes should not have received in the first place.

The error in the tribes' arguments is underscored by the highly problematic consequences that their interpretation of HUD's authority would produce. The tribes argue that a remand would be futile in this case because HUD could not prevail at an

administrative hearing conducted pursuant to § 401 or § 405. In other words, the tribes assert that, under their interpretation of NAHASDA, HUD cannot recover the overpayments the agency made in these cases, even where a tribe acknowledges that it was overpaid. That outcome would enable a tribe that misreported its unit count to keep grant funds it was not entitled to, at the expense of deserving tribes, including tribes which accurately reported their housing unit counts. There is no basis for concluding that Congress intended to permit that result.

The tribes are also incorrect in asserting that HUD's common-law authority to recapture overpayments has no limits. HUD's ability to recover FCAS-related overpayments is cabined by the procedural requirements listed in 24 C.F.R § 1000.336, by the regulations governing the allocation formula, and by the strictures of the Administrative Procedures Act (APA).

In these cases, for example, HUD provided the tribes with notice of its determination that certain units had been improperly included in the tribes' unit counts, encouraged the tribes to submit evidence countering that determination, and considered any evidence and arguments the tribes submitted. If HUD failed to consider relevant evidence or misapplied the regulatory formula, its determination would be subject to reversal under the APA. The tribes nowhere indicate why APA review on the extensive administrative record in these cases is insufficient or what evidence or argument they were unable to present during the administrative proceedings that occurred. Although the tribes argue that they were denied a neutral

decision-maker, HUD is neutral when it comes to NAHASDA allocations. The agency is required to allocate and distribute all NAHASDA funds to the tribes and receives no benefit from any particular allocation.

In short, HUD exercised its common-law authority to recover grant funds it wrongfully paid to the tribes. It did so in keeping with its statutory obligation to fairly and accurately allocate NAHASDA appropriations across all eligible tribes. Nothing in NAHASDA or the agency's implementing regulations precluded HUD from taking the actions that it did.

ARGUMENT

I. THE TRIBES CONCEDE THAT THE REGULATORY ALLOCATION FORMULA IS VALID

The plaintiff tribes no longer dispute the validity of the regulatory allocation formula, including 24 C.F.R. § 1000.318, the regulation that defines when legacy housing units (those developed under a pre-NAHASDA rent-to-own program) are no longer eligible for inclusion in the allocation formula as Formula Current Assisted Stock (FCAS). Thus, the tribes concede that they should not receive credit in the allocation formula for legacy rent-to-own units that the tribe (1) "no longer has the legal right to own, operate, or maintain"; (2) did not convey "as soon as practicable after [the] unit bec[ame] eligible for conveyance"; and (3) did not convey to a homebuyer due to the homebuyer's failure to honor their contractual obligations,

where the tribe did not "actively enforce strict compliance" with those obligations. *See* 24 C.F.R. § 1000.318.

With two exceptions, *see infra* pp. 29-30, the tribes likewise do not challenge HUD's conclusion that they in fact received credit in the allocation formula for many units that should have been excluded under § 1000.318. Of particular note, the tribes nowhere dispute HUD's finding that many plaintiff tribes received credit for housing units that they had previously conveyed or never built (and thus did not have the right "to own, operate, or maintain"). *See* HUD Br. 9-11, 30-33 (citing numerous examples where HUD determined that tribes received credit for units they had previously conveyed or never built).[1] The tribes similarly do not contest that HUD's findings

[1] Without disputing that this case involves overpayments related to homes that tribes had conveyed or never built, the tribes assert (Br. 9-10) that HUD's references to already-conveyed homes are "unrepresentative" and that the "overwhelming majority" of homes at issue are homes that the tribes had not conveyed. The tribes' assertion is incorrect. For several of the plaintiff tribes, HUD's recaptures were based largely or entirely upon a determination that the tribes had improperly received funding for units they had previously conveyed or never built. *See, e.g.*, Aplt. Appx. 2296-2300, 2314 (all $814,316 recaptured from Choctaw was due to the tribe's improper receipt of funding for units that it had conveyed); Aplt. Appx. 4836 ($1.3 million recapture from AVCP due to previously unreported conveyances); Aplt. Appx. 5526-27 (entire recapture from Aleutian due to previous conveyances); Aplt. Appx. 3682-89, 3694 (HUD's recapture of $600,552 from Spirit Lake due to previously conveyed units); Aplt. Appx. 3360, 3379 (entire recapture from Winnebago due to 14 units that Winnebago never constructed); Aplt. Appx. 3061-62 ($342,476 recapture from Turtle Mountain due to the tribe's having improperly received credit for conveyed units); HUD Br. 9-10, 30-34 (providing additional examples). Indeed, this Court's decision in *Fort Peck Housing Authority v. HUD*, 367 F. App'x 884 (10th Cir. 2010), focused on whether NAHASDA authorized HUD to remove units a tribe no longer owns from the tribe's FCAS count, underscoring the significance of conveyed units to these cases.

with respect to previously conveyed units were based on information that the tribes themselves provided. *See id.*

These concessions are significant and should guide this Court's resolution of these appeals. As HUD explained (and the tribes also do not dispute), the allocation of NAHASDA appropriations is a zero-sum system. HUD Br. 5, 49-50. When one tribe receives a greater allocation than it should have, other tribes necessarily receive less than they were entitled to receive. Thus, it is other tribes, not HUD or the federal government more generally, who lose out when one tribe receives a higher share of a NAHASDA appropriation than it should have. Having conceded that HUD can validly exclude units from a tribes' FCAS count under § 1000.318 and having largely failed to challenge HUD's findings that the tribes' FCAS counts included ineligible units, the tribes have, in effect, agreed that they were overpaid in many cases, at the expense of other tribes.

Nonetheless, the tribes urge this Court to adopt an interpretation of NAHASDA that would make it difficult, and in some cases impossible, for HUD to recover those overpayments and redistribute them. *See supra* pp. 14-16. Indeed, the tribes assert (Br. 84-85) that a remand in these cases would be futile because HUD "can never prevail" under the tribes' interpretation of NAHASDA. The tribes state that their interpretation is in keeping with the Indian canon of statutory interpretation and with the trust obligations the federal government generally owes to the tribes. *See* Tribes Br. 22-23, 33, 35, 55-56, 61.

The tribes' arguments ignore the fact that it is other tribes, not HUD, that will be deprived of funds if HUD is unable to recover FCAS-related overpayments. For that reason, the Indian canon of construction and the federal government's general trust responsibilities (assuming they apply here) are of no help to the tribes. *See Fort Peck Hous. Auth. v. HUD*, 367 F. App'x 884, 892 (10th Cir. 2010) ("[T]he [Indian] canon . . . does not allow a court to rob Peter to pay Paul."). NAHASDA does not permit tribes to keep grant funds they were not entitled to receive; this Court should reject the plaintiff tribes' interpretation of the statute, which would permit the plaintiff tribes to do just that.

II. HUD HAS COMMON-LAW AUTHORITY TO RECAPTURE GRANT PAYMENTS MADE BY MISTAKE

The tribes' case rests on their assertion that HUD lacks common-law authority to recapture funds that the agency paid in error. According to the tribes, once HUD allocates grant funds to a tribe, HUD may only recapture funds it wrongly paid by following the procedures set forth in 25 U.S.C. § 4161 (Section 401 of NAHASDA) and 25 U.S.C. § 4165 (Section 405 of NAHASDA). *See* Tribes Br. 24-52. For the reasons explained below and in HUD's opening brief, the tribes' arguments are without merit.

A. HUD's Recaptures Were An Appropriate Exercise Of Its Common-Law Authority To Recover Payments Made In Error

1. In these cases, HUD determined that it had erroneously overpaid the plaintiff tribes because the agency had relied on inaccurate FCAS counts when

calculating the tribes' shares of the relevant NAHASDA appropriations. After making that determination, HUD recovered the overpayments by administratively offsetting the tribes' current-year grants. This procedure was a proper exercise of the federal 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), a right HUD may exercise through administrative offset, *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). *See also* HUD Br. 44-45; *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 817 (D.C. Cir. 1997) ("[T]he federal government has long possessed the right of offset at common law.").

The tribes erroneously argue (Br. 48-52) that HUD does not have common-law authority to recover overpayments through an administrative offset. According to the tribes, "any authority to recover funds by purely administrative means must come from [an] express statutory delegation," and NAHASDA contains no such delegation. *Id.* at 48; *see also id.* at 49 (arguing that "HUD has no authority to act outside of the boundaries of NAHASDA unless it identifies another statute that gives it such authority").

The tribes get the law exactly backwards. A federal agency does not require an express statutory authorization to exercise a common-law right. To the contrary, a federal agency is presumed to possess such rights unless a "statute . . . expressly abrogate[s]" them. *United States v. Hensha*w, 388 F.3d 738, 743 (10th Cir. 2004); *see also Gallegos v. Lyng*, 891 F.2d 788, 800 (10th Cir. 1989) ("The lack of an express provision

in the Food Stamp Act authorizing the assessment of interest . . . does not preclude the federal agency from [exercising its common-law right to] assess[] interest."); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 16 (1st Cir. 2005) ("Statues 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."); *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 667 (4th Cir. 1996) ("[C]ommon law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights. This principle has been affirmed and re-affirmed many times.") (citing cases); HUD Br. 45-46.

To succeed on their claims, the tribes must therefore show that NAHASDA affirmatively abrogates HUD's common-law right to recover funds it wrongly pays. The tribes cannot make that showing. To abrogate a common-law right, a statute must "speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation marks omitted).

NAHASDA does not "speak directly" to the question of HUD's authority to recover overpayments through offset. NAHASDA sets forth remedies HUD may use when sanctioning a tribe for misusing grant funds the tribe rightfully received. *See* 25 U.S.C. §§ 4161, 4165; *see also* HUD Br. 48-60. But the statute is silent on the question of HUD's authority to recover funds the agency erroneously paid and the means the agency may use to obtain such recoveries. Neither § 4161 nor § 4165 even mentions

HUD's right to collect erroneous overpayments, let alone directly addresses the issue. Such silence "falls far short of an expression of legislative intent to supplant the existing common law in th[ose] area[s]." *Texas*, 507 U.S. at 535; *Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d at 667 ("[C]ommon law remedies possessed by the United States will not be extinguished by congressional failure to re-affirm their validity."); *see also* HUD Br. 45-51.

The tribes cite (Br. 49) *Louisiana Public Services Commission v. FCC*, 476 U.S. 355 (1986); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008); and *California Independent Systems Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004), for the proposition that a federal agency may exercise "only those authorities conferred upon it by Congress." To the extent the tribes suggest that federal agencies have no inherent rights, that suggestion is incorrect. The federal government can only act through its agents. Thus, as the case law indicates, it is typically a federal agency that possesses and exercises the government's common-law rights. *See, e.g.*, *Texas*, 507 U.S. at 531-33 (USDA's exercise of the federal government's common-law right to collect prejudgment interest on debts); *Gallegos*, 891 F.2d at 800 (same); *In re Chateaugay Corp.*, 94 F.3d 772, 779 (2d Cir. 1996) ("[W]e conclude that the DOL possesses a common law right to setoff its nontax debts against tax refunds").

In any event, even if a statutory delegation were required, Congress has delegated HUD the necessary authority. "[C]ourts may take it as a given that Congress has legislated with an expectation that the common law principle will

apply." *Lahey Clinic*, 399 F.3d at 16. In NAHASDA, Congress granted HUD the authority (in fact, the obligation) to allocate any funds Congress makes available under NAHASDA and to distribute those funds to Indian tribes pursuant to that allocation. *See* 25 U.S.C. § 4151. In granting HUD the authority to allocate and distribute NAHASDA funds, Congress granted HUD the corollary common-law authority to recover any funds that the agency wrongfully, erroneously, or illegally pays. *See Texas*, 507 U.S. at 534 ("Statutes . . . are to be read with a presumption favoring the retention of long-established and familiar [common-law] principles"); *see also, e.g.*, *In re Brookover*, 352 F.3d 1083 (6th Cir. 2003) (Where Congress granted the United States Trustee the express authority to replace a bankruptcy trustee, Congress implicitly granted the UST the common-law authority to accept the voluntary resignation of an existing trustee).

The tribes also rely (Br. 48-50) on *American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000), to support their argument that HUD lacks authority to recover overpayments absent an express statutory delegation. That reliance is misplaced. The court in *American Bus* recognized that federal agencies have an "inherent . . . power" to impose monetary sanctions when necessary to protect "the integrity of the agency's administrative processes," *see id.* at 7, directly contravening the tribes' claim that agencies possess no inherent authority.

Moreover, the court in *American Bus* held that the Department of Transportation lacked the authority to impose monetary "fines" on bus companies that violate the Americans with Disabilities Act, because the remedies listed in the

ADA did not include money damages. 231 F.3d at 4-6. In this case, by contrast, HUD has not sought to impose fines or sanctions on the tribes for violating NAHASDA, a situation which may well be governed by particular NAHASDA provisions. Rather, HUD seeks to recover funds it paid to the tribes in error, pursuant to its common-law authority to recover monies wrongfully paid. *American Bus* did not address that common-law right and did not suggest that federal agencies lack such a well-established right.

The tribes urge this Court (Br. 49) to "reject[] the notion that HUD has an independent 'common law'" authority to recover overpayments, because such authority would have "'no apparent rules or limitations.'" *Id.* (citing *Lummi Tribe of the Lummi Reservation v. United States*, 106 Fed. Cl. 623, 631 (2012)). Contrary to the tribes' contention, HUD's exercise of its common-law authority to recapture FCAS-related overpayments is subject to several rules and limitations. First, when evaluating the accuracy of a tribe's past or current FCAS count, HUD is subject to the procedures set forth in 24 C.F.R. § 1000.336, which governs challenges to data used in the allocation formula. *See* HUD Br. 16-17. Under § 1000.336, HUD must attempt to resolve any FCAS data discrepancies through good faith negotiations with the tribe. *See id.* § 1000.336(b)(1)(1998). If those negotiations fail and HUD makes a determination with which a tribe disagrees, the tribe may appeal that decision to HUD's Assistant Secretary for Pubic and Indian Housing, who must then issue a

written opinion setting forth the reasons for affirming or denying the agency's conclusion. *See id.*; *id.* § 1000.118(b)(d).[2] As the lengthy administrative records in these cases indicate, these procedures provide the tribes with ample opportunities to challenge HUD's conclusions regarding the accuracy of their FCAS counts.

Second, HUD's determination that a particular housing unit should not have been included in a tribe's FCAS count is governed by the rules set forth in NAHASDA's implementing regulations, including 24 C.F.R. § 1000.318. Specifically, HUD cannot remove a legacy unit from a tribe's FCAS count unless the unit meets one of the criteria set forth in § 1000.318.

Finally, HUD's conclusion that a tribe's historical FCAS count was inaccurate and that the tribe was overpaid as a result is subject to APA review. To survive such review, HUD "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. States Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). In these cases, for example, HUD determined that several tribes had improperly failed to remove housing units from their FCAS

[2] The tribes assert (Br. 14) that, before it was amended in 2007, § 1000.336 "only addressed challenges to census data, not FCAS corrections." The tribes are mistaken. In 2007, HUD clarified § 1000.336 by providing an itemized list of the formula data that a tribe can challenge under the regulation. But § 1000.336 previously covered challenges to any "data used in the [allocation] formula," including FCAS data. 24 C.F.R. § 1000.336(a) (1998). Indeed, HUD expressly informed the plaintiff tribes of that fact during the administrative proceedings at issue here. *See, e.g.*, Aplt. Appx. 353 (2003 letter to Fort Peck), 981 (2004 letter to Tlingit).

counts that the tribe did not convey "as soon as practicable" after the units became eligible for conveyance, 24 C.F.R. § 1000.318(a)(1). *See* HUD Br. 34-39. The tribes argue (Br. 62-63) that, in the case of two tribes (Tlingit Haida and Big Pine), HUD's conclusion was wrong. Specifically, the tribes assert (*id.*) that HUD failed to consider tribe-specific circumstances that rendered conveyance of the units impracticable. Although HUD disputes the tribes' claim, if the tribes are correct and HUD failed to adequately consider relevant data, HUD's conclusion that the tribes' FCAS counts had included ineligible units would be subject to reversal. In short, the availability of APA review ensures that HUD cannot act arbitrarily when exercising its common-law authority to recover payments it erroneously made.[3]

2. The tribes' interpretation of HUD's authority would produce absurd results. As noted above, the tribes assert that HUD's right to recover misallocated grant funds is subject to §§ 4161 and 4165. The tribes further assert that, under those provisions, HUD may recover misallocated grant funds only if it (1) holds a formal administrative hearing (*id.* at 24, 40); (2) finds that the overfunded tribes failed to "comply substantially with NAHASDA" (*id.* at 24, 84-85); and (3) determines that the tribes have not already spent the misallocated funds on affordable housing activities (*id.* at

[3] The tribes briefly note (Br. 47-48) that, during the administrative process, HUD did not use the phrase "common law authority" in describing its right to recapture overpayments. Although HUD may not have used the phrase "common law authority," it consistently informed the tribes that it was not acting pursuant to Sections 401 and 405 of NAHASDA (as the tribes insisted it must do), but rather under an authority derived from its obligation to allocate NAHASDA funds "equitably and fairly." *See, e.g.*, Aplt. Appx. 352-56.

43-47).

Such an interpretation of HUD's authority would provide the plaintiff tribes with an unjustified windfall, while depriving deserving tribes of grant funds those tribes need to meet the affordable housing needs of their members. As the plaintiffs acknowledge (Br. 29), HUD relies on tribes to update their FCAS unit counts each year. *See also* HUD Br. 9. Those updates include identifying and removing units that the tribe has conveyed, as well as units that the tribe has not conveyed, but could have. *See* 24 C.F.R. § 1000.318. If a tribe fails to update its FCAS inventory (by, for example, failing to report that a unit has been conveyed), the tribe will receive undue credit in the allocation formula and a disproportionately large share of the relevant NAHASDA appropriation. *See* HUD Br. 5-7 (explaining allocation process).

Under the plaintiff tribes' theory of the case, if a tribe corrects its inaccurate FCAS count at some later time (by, for example, informing HUD that it had conveyed a particular unit years earlier, *see* HUD Br. 9-11), HUD is almost certain to be barred from recovering the overpayment and correcting the misallocation. According to the plaintiffs, HUD could recover the overpayment only after holding a formal administrative hearing and establishing at the hearing that the tribe's belated report of the conveyed unit amounted to "substantial noncompliance" with NAHASDA, a showing HUD is unlikely to be able to make. *See* HUD Br. 58-59; *infra* pp. 17-18. Moreover, even if HUD could show that the tribe had not substantially complied with NAHASDA, HUD would still be precluded from recovering the

overpaid funds if the tribe had already spent the money on affordable housing activities.

The inequities of the tribes' interpretation of HUD's authority are patent. If HUD is unable to recapture FCAS-related overpayments, the agency cannot redistribute those overpayments to the tribes that should have received the funds in the first place, including tribes that accurately and timely reported updates to their FCAS counts. That improper result is reason alone to reject the tribes' theory of HUD's authority. *See Lahey Clinic*, 399 F.3d at 17 (rejecting argument that the Medicare Act and its implementing regulations displaced the federal government's common-law right to recover overpayments, because such an interpretation "would, in some situations, hinder or preclude the United States from recovering overpayment").[4]

B. Section 4161 Does Not Apply Here

1. Contrary to the tribes' claim, HUD's recovery of misallocated grant payments does not implicate § 4161. As the Ninth Circuit has explained, § 4161

[4] Taken to its logical conclusion, the tribes' assertion that HUD cannot recover overpayments unless it follows the procedures set forth in 25 U.S.C. §§ 4161 and 4165 would prevent HUD from collecting overpayments that resulted from even obvious mistakes. In 1998, for example, HUD inadvertently excluded a required inflation factor when it calculated the FY1998 NAHASDA allocations. *See* Aplt. Appx. 97. As a result of the error, some tribes were overpaid and some were underpaid. *Id.* Under the tribes' theory of the HUD's authority, HUD would be unable to correct the error, because HUD would have no basis for concluding that the error was due to the tribes' noncompliance with NAHASDA, a prerequisite to the remedies set forth in 25 U.S.C. §§ 4161 and 4165.

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 Hous. Dep't v. Office of Pub. & Indian Hous.*, 726 F.3d 1099, 1104 (9th Cir. 2013). Thus, § 4161 speaks to the remedial actions HUD is authorized to take when the agency believes a tribe has failed to comply substantially with NASADA. It does not address HUD's authority to recoup grant funds that the agency wrongly paid to a tribe.

Indeed, HUD neither alleged that the tribes failed to substantially comply with NAHASDA, nor sought to impose one of the sanctions listed in § 4161. *See* HUD Br. 57-60. The tribes imply (Br. 28) that HUD may have deliberately avoided labeling FCAS reporting errors as "substantial noncompliance," so as to avoid § 4161's hearing requirement. That suggestion is without merit. The "substantial noncompliance" standard is a demanding one. *See* HUD Br. 58-59. It is generally reserved for situations in which a tribe's misconduct is so severe that the conduct threatens the tribes' ability to carry out its low-income housing plan. 24 C.F.R. § 1000.534. An error committed by a tribe in reporting its FCAS unit count does not meet that standard, a point Congress made clear when it clarified § 4161(a) in 2008. *See* HUD Br. 59.[5] HUD thus had no basis for alleging "substantial noncompliance."[6]

[5] The tribes note (Br. 36-37) that, when Congress clarified § 4161(a) in 2008, the legislature indicated that a tribe's error in reporting its FCAS count does not "in

Arguing that § 4161 must nonetheless apply here, the tribes emphasize (Br. 24) that the provision authorizes HUD to "terminate, reduce, or limit" a recipient's grant funds and HUD in fact reduced the tribes' grant funds. The tribes' claim that § 4161 applies simply because HUD reduced their grants is fundamentally flawed.

The mere fact that a statutory provision authorizes an agency to take a particular remedial action in a particular circumstance does not mean that the provision applies any time the agency takes that action. A specific remedial action might be authorized under a number of statutory provisions or the common law. As this Court explained in *Henshaw*, common-law remedies are often available "to supplement those remedies found in federal statutes." 388 F.3d at 743. In short, just because § 4161 authorizes HUD to reduce a tribe's grant payments does not mean that § 4161 is the exclusive source of HUD's authority to reduce grant funds.

Moreover, contrary to the tribes' suggestion, HUD did not invoke one of the remedies listed in § 4161(a)(1), which are more specific than the tribes acknowledge.

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itself" constitute substantial noncompliance with NAHASDA. *See* 25 U.S.C. § 4161(a)(2). The tribes therefore assert (Br. 37) that an erroneous FCAS report plus something "more" could constitute substantial noncompliance. Whether correct or not, the tribes' assertion is irrelevant here. HUD determined that the tribes were overpaid in these cases solely because their FCAS counts had been erroneously reported.

[6] Contrary to the tribes' allegation (Br. 24-25), HUD does not have "an institutional history of avoiding any hearings under [§ 4161]." Although HUD does not lightly accuse tribes of substantial noncompliance, the agency has invoked its authority under § 4161 when such an allegation is merited. *See* HUD, *Indian Housing*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/hearings_appeals/oalj/cases/indian-hsg.

Although the tribes assert (Br. 24) that § 4161 authorizes HUD to "reduce" grant funds, the provision in fact authorizes HUD to "reduce payments . . . to the recipient by an amount equal to the amount of such payments that were not expended in accordance with [NAHASDA]." 25 U.S.C. § 4161(a)(1). HUD has never alleged that the funds it recovered were funds that the tribe had failed to spend in accordance with NAHASDA. Rather, HUD recovered grant funds that the tribes should not have received in the first place. Section 4161 does not cover that situation.

2. In arguing that § 4161 applies here, the tribes rely on *City of Kansas City v. HUD*, 861 F.2d 739 (D.C. Cir. 1988), and *City of Boston v. HUD*, 898 F.2d 828 (1st Cir. 1990), two cases interpreting 42 U.S.C. § 5311, a provision after which § 4161 was modeled. Neither case supports the tribe's argument that § 4161 applies to HUD's recovery of grant funds it paid in error. In *Kansas City*, HUD alleged that Kansas City had failed to substantially comply with the Community Development Block Grant (CDBG) Act with respect to its use of certain CDBG funds between 1978 and 1985. 861 F.2d at 740, 742 & n.3. To remedy that past noncompliance, HUD placed two "special conditions" on the city's 1987 grant. *Id.* at 742-43. Those conditions had the "net effect" of reducing the size of Kansas City's 1987 grant. *Id.* at 743.

The D.C. Circuit held that § 5311(a) applied to HUD's actions because HUD had both alleged that the City had "substantially failed to comply with CDBG Act" and "attempted to impose a section [5311] sanction." *Kansas City*, 861 F.2d at 743. With respect to the remedy, the court concluded that HUD's "special conditions"

were equivalent to a "reduction in 'payments to the recipient under this chapter by an amount equal to the amount of such payments which were not expended in accordance with this chapter.'" *Id.* (quoting § 5311(a)(2)). Thus, they were "precisely th[e] type of remedy" covered by § 5311. *Id.* at 742.

In this case, by contrast, HUD has neither alleged that the tribes substantially failed to comply with NAHASDA, nor imposed a § 4161 remedy. Unlike in *Kansas City*, HUD did not reduce the tribes' grants as a sanction for the tribes' past misuse of NAHASDA funds. Rather, it simply recouped funds that it had erroneously paid to the tribes. The D.C. Circuit's conclusion that § 5311(a) applied to the very different circumstances presented in *Kansas City* is thus of no help to the tribes.

For similar reasons, the First Circuit's decision in *City of Boston* does not aid the tribes. In *City of Boston*, HUD withdrew a $530,000 grant it had promised to make to Boston, after the agency determined that the city had failed to comply with certain conditions of the grant. 898 F.2d at 830. As in *Kansas City*, there was no dispute that the city's failure to comply with the conditions (if proven) qualified as substantial noncompliance with the relevant law. *Id.* at 832. HUD argued that § 5311 did not apply because it had not invoked one of the remedies listed in § 5311. *Id.* Specifically, HUD asserted that it had not "terminate[d] payments to the [city]," 42 U.S.C. § 5311(a)(1), because it had not yet begun to pay the city when it withdrew the funds. *Id.* The court rejected HUD's reading of § 5311's remedies as "hyper-technical," and concluded that the withdrawal of grant funds "on the eve of payment" qualified as a

"termination" of payments under § 5311(a)(1). *Id.* at 832-33.

Thus, like the court in *Kansas City*, the court in *Boston* concluded that § 5311 applied because HUD had alleged substantial noncompliance and had invoked one of § 5311's remedies. HUD did neither here. Moreover, as in *Kansas City*, *Boston* did not involve HUD's recovery of grant funds that the agency had erroneously allocated to the plaintiff and that should have been awarded to another party.

As the tribes acknowledge (Br. 28-29), the only court of appeals to address the question whether § 4161 applies to HUD's recovery of FCAS-related overpayments has twice concluded that § 4161 does not apply. *See Fort Belknap*, 726 F.3d at 1105 ("HUD can recover the amount of over payment to Fort Belknap pursuant to the doctrine of payment by mistake. It was not required to resort to § 4161 to recover those amounts, and it did not do so."); *Crow Tribal Hous. Auth. v. HUD*, 781 F.3d 1095, 1102 (9th Cir. 2015) ("We conclude that HUD did not act under § 4161.").

C. Section 4165 Likewise Does Not Apply Here

1. The tribes argue in the alternative (Br. 38-43) that § 4165 displaced HUD's common-law authority to recover payments made in error. That argument lacks merit. Like § 4161, § 4165 does not speak directly to HUD's right to recover payments it wrongly made. Accordingly, it does not abrogate or otherwise limit that right. *See* HUD Br. 45-56.

As its plain text indicates, § 4165 applies when HUD conducts a "review" or "audit" to "determine whether the [grant] recipient . . . has carried out eligible

activities" in a timely manner and in accordance with its approved housing plan and has a "continuing capacity" to do so – *i.e.*, reviews to determine whether the tribe has *spent* grant funds appropriately and has the capacity to do so in the future. *See* HUD Br. 48-52. Section 4165 (and its former implementing regulation, 24 C.F.R. § 1000.532 (1998)[7]) does not apply when HUD examines a tribe's FCAS counts to determine whether the tribe erroneously *received* funds. *See id.*

The tribes assert (Br. 42) that HUD's interpretation of § 4165 is "absurd" because it would mean that "Congress denied HUD the ability to audit a tribe's FCAS counts." The tribes' assertion rests on the spurious notion that § 4165 is the sole source of HUD's authority to conduct reviews and audits and that any activity that might be commonly described as a "review" or "audit" is either authorized by § 4165 or not at all. Nothing in § 4165 suggests that it is the exclusive source of HUD's authority to conduct reviews. Indeed, other NAHASDA provisions also authorize HUD to conduct reviews. *See, e.g.*, 25 U.S.C. § 4113 (requiring HUD to "conduct a limited review of each Indian housing plan"); *id.* § 4115 (describing HUD's role in conducting "environmental reviews").

Like its authority to collect erroneous overpayments, HUD's authority to review a tribe's FCAS counts stems from its statutory obligation to fairly and

[7] As the tribes note (Br. 39), § 4165 does not itself impose any procedural requirements on HUD. Section 4165's original implementing regulation, 24 C.F.R. § 1000.532 (1998), which HUD repealed in 2012, contained certain procedural requirements, including a hearing requirement.

accurately allocate NAHASDA appropriations pursuant to the allocation formula. *See* 25 U.S.C. §§ 4151, 4152. When applying the allocation formula each year, HUD relies on data from various sources, including tribal population data from the U.S. Census Bureau and FCAS unit counts from approximately 500 tribes. HUD's duty to ensure that it applies the allocation formula fairly includes the authority to review the accuracy of the data it receives and to make necessary corrections. There is no basis for concluding that Congress intended to preclude HUD from reviewing and correcting the data without first holding an administrative hearing and producing a public report, both of which are required under § 4165 and its former implementing regulation. *See* 25 U.S.C. § 4165(c); 24 C.F.R. § 1000.532(b) (1998).

In support of their argument that § 4165 applies here, the tribes note (Br. 43) that § 4165(b)(1)(B) authorizes HUD to conduct reviews or audits to "verify the accuracy of information contained in any performance report submitted by the recipient under section [4164]." But, as the tribes recognize (*id.*), FCAS counts are not reported in § 4164 performance reports. Moreover, § 4164 performance reports "describe the *use* of grant amounts provided to [a tribe]" and "assess the relationship of such *use* to the planned activities identified in the [tribe's] Indian housing plan." 24 U.S.C. § 4164 (emphasis added). Thus, § 4164 reports address a tribe's *use* of funds. That the accuracy of their information is subject to review under § 4165 is therefore fully consistent with § 4165's focus on a tribe's use of funds that the tribe has rightfully received.

The conclusion that § 4165 is inapplicable here is bolstered by a provision in § 4165's former implementing regulation which provided that HUD, after conducting a § 4165 review, could not recapture any "grant amounts already expended on affordable housing activities." 24 C.F.R. § 1000.532(a) (1998). As HUD explained in its opening brief, that provision makes sense if § 4165 applies to situations in which HUD has determined that a tribe improperly spent grant funds the tribe rightfully received. *See* HUD Br. 49-51. But if, as the tribes argue (Br. 45-47), the provision also applies when a tribe receives funds to which it was never entitled, then the provision produces a serious injustice. A tribe would be permitted to retain money it wrongfully received (at the expense of other tribes) merely because it spent the money before HUD caught the allocation error.

2. Because § 4165 is not applicable here, this Court has no need to reach two additional, erroneous arguments that the tribes make with respect to that provision. If the Court does address those arguments, it should reject them.

First, the tribes point out (Br. 39-40, 45) that § 4165(d)'s introductory clause states that the provision is "subject to section 4161(a)." The tribes wrongly interpret that clause to mean that § 4165 incorporates § 4161(a), including § 4161(a)'s requirement that HUD find a tribe to be in substantial noncompliance with NAHASDA before taking remedial action.

The two courts that have addressed the tribes' argument have properly rejected it. *See Crow*, 781 F.3d at 1105; *Lummi*, 106 Fed. Cl. at 632. When Congress makes a

rule "subject to" exceptions, all Congress means is that the rule does not apply when the exceptions do. *See Shell Oil Co. v. Manley Oil Corp.*, 124 F.2d 714, 716 (7th Cir. 1941) ("The words 'subject to,' used in their ordinary sense, mean 'subordinate to,' 'subservient to,' or 'limited by'"). Thus, that § 4165 is "subject to" § 4161(a) simply means that when § 4161(a) applies, § 4165(d) does not. *See Crow*, 781 F.3d at 1105 ("We agree with the Court of Federal Claims that § 4165(d)'s ['subject to'] phrase . . . 'excludes the scope of Section [4161] from Section [4165].'" (*quoting Lummi*, 106 Fed. Cl. at 632.)). Moreover, adopting the tribes' interpretation would render § 4165(d) a nullity, as the provision would be subsumed within § 4161(a).

Second, citing *Kansas City*, 861 F.2d at 743, the tribes argue (Br. 38-40) that § 4161 applies when HUD seeks to remedy a tribe's past noncompliance, while § 4165 applies when HUD seeks to remedy a tribe's current or future noncompliance. The tribes acknowledge (Br. 40) that this Court has "no need to decide whether to adopt the past/future distinction between § 401 [(§ 4161)] and § 405 [(§ 4165)]." Although HUD agrees that there is no need to reach the question, the tribes' proposed distinction is incorrect.

As explained above and in HUD's opening brief, §§ 4161 and 4165 apply in particular situations not present here. The applicability of either provision does not turn, however, on when a tribe's misconduct occurred. If a tribe is currently in substantial noncompliance with NAHASDA, HUD can act under § 4161. Similarly, if

a tribe has failed to "carr[y] out eligible activities" in the past, HUD can take action under § 4165. In other words, § 4161 is not limited to past noncompliance and § 4165 is not limited to remedying current or future noncompliance.

III. THE TRIBES ARE NOT ENTITLED TO A HEARING AND, IN ANY EVENT, CANNOT SHOW THEY WERE PREJUDICED BY THE ABSENCE OF A HEARING

A. The Tribes Were Not Entitled To A Hearing

The tribes argue that they were entitled to a formal administrative hearing under either § 4161 or § 4165's former implementing regulation. As explained *supra* Pt. II, neither provision applies to HUD's recovery of payments it wrongfully made. Thus, the tribes were not entitled to a formal administrative hearing. But even assuming HUD was required to hold a formal hearing, the tribes' APA claims would nonetheless fail, because the tribes cannot show that they were prejudiced by HUD's failure to hold such a hearing. *See* 5 U.S.C. § 706 (requiring courts to take "due account" of "the rule of prejudicial error" in APA cases).

B. The Tribes Are Required To Show Prejudice

Relying primarily on the Third Circuit's decision in *Leslie v. Attorney General of United States*, 611 F.3d 171 (3d Cir. 2010), the tribes argue (Br. 53-57) that they are not required to show that they were prejudiced by HUD's failure to hold a hearing. That argument lacks merit.

As the Third Circuit explained in *Leslie*, a plaintiff is excused from showing prejudice only where an agency's failure to follow its regulations "implicate[s]

fundamental statutory or constitutional rights." 611 F.3d at 180 (emphasis added). Other courts of appeals have likewise held that the exception to the APA's ordinary prejudice requirement is limited to cases involving "fundamental" rights. *See, e.g.*, *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) ("[W]here an [agency] regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it best to invalidate a challenge proceeding [(in which the agency failed to follow the regulation)] only upon a showing of prejudice."); *Martinez Camargo v. INS*, 282 F.3d 487, 491 (7th Cir. 2002).

The tribes do not have a fundamental right to grant funds they were erroneously paid and should not have received. That is all the more true given that it was the tribes' own failure to timely update their FCAS counts that contributed to the wrongful overpayments. Thus, any hearing requirement that exists here does not implicate a fundamental right.

Contrary to the tribes' contention (Br. 55), this Court has not created an exception to the rule of prejudicial error in cases involving Indians. The tribes mistakenly cite *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), for the proposition that there is an Indian exception. In *Jicarilla Apache*, the district court ruled that the "lessee defendants"—a group of private companies— bore the burden of showing that the Secretary of the Interior's failure to follow a notice regulation had not harmed the tribes. *Id.* at 1336. This Court affirmed the district court's ruling, concluding that the shifting of the burden of proof on the question of prejudice was

"a just and fair assignment" under the circumstances. *Id.* Thus, although this Court concluded that it was reasonable for the district court to shift the burden of proof under the circumstances, this Court affirmed the general principle that the rule of prejudicial error applies to Indians. Indeed, the Court made clear that an automatic reversal of the Secretary's underlying decision was not warranted in response to the Secretary's violation of its notice regulation. *Id.* at 1333-36.

C. The Tribes Have Not Shown That They Were Prejudiced By The Lack Of A Formal Hearing

The tribes have not shown that they were prejudiced by HUD's failure to conduct a formal administrative hearing. The tribes assert (Br. 62) that "[w]ithout a hearing, there was no opportunity to adjudicate the individual circumstances of each case." That assertion is false. HUD's conclusion that the tribes' FCAS counts had included ineligible housing units was based on a unit-level analysis of the tribes' FCAS inventory. When HUD suspected that a particular unit had been improperly included in a tribe's FCAS count, HUD encouraged the tribes to provide information about that specific unit. *See, e.g.*, Aplt. Appx. 3672 (letter from HUD to Spirit Lake questioning the FCAS eligibility of 33 units in project ND10B008002 and 40 units in project ND10B008003 and seeking additional information about the units). When tribes provided information about individual units, HUD considered that information and frequently agreed with the tribe that a particular unit had been properly included in the tribes' FCAS inventory. *See, e.g.*, Aplt. Appx. 3688 (based on unit-level

information provided by Spirit Lake, HUD agrees that 11 units in project ND10B008002 and 3 units in project ND10B008003 remained eligible for FCAS).

Nothing prevented the tribes from submitting as much information to HUD as they desired. And, indeed, the tribes fail to identify any evidence they would have provided in a hearing that they were unable to submit to HUD during the administrative process that occurred here.

The tribes cite (Br. 62-63) HUD's determinations with respect to two tribes, Tlingit Haida and Big Pine, as evidence that HUD's failure to hold a hearing was prejudicial. Neither example supports the tribes' argument.

In both cases, HUD determined that the tribes had failed to convey certain rent-to-own housing units as soon as practicable after the units became eligible for conveyance, and thus had received credit for units that should have been excluded from their FCAS counts. Aplt. Appx. 926-28, 5837. During the administrative process, Tlingit argued that conveying the units had not been practicable because the units required modernization and repair work. Aplt. Appx. 876-79; Tribes Br. 12-13. Tlingit also stated that the units had been the subject of a class-action settlement and a rent strike by tenants. *Id.* After considering this information, HUD rejected the tribe's arguments. HUD explained that, because the tribe could use NAHASDA funds to repair the units after they were conveyed, conveyance had not been impracticable. Aplt. Appx. 926-28.

Tlingit argues (Br. 62) that, had HUD conducted a hearing, the tribe would

have presented evidence explaining the consequences of evicting the rent strikers and the difficulties it would have had performing the repair work post-conveyance. But Tlingit provided those explanations to HUD in its detailed correspondence with the agency. Aplt. Appx. 877-78, 905-06. Thus, the absence of a hearing did not in any way preclude the tribe from presenting its evidence. Moreover, if HUD failed to consider relevant evidence relating to Tlingit's circumstances or reached an irrational conclusion, its decision would be subject to reversal under the APA. Tlingit nowhere explains why such APA review on the agency record would be insufficient.

Big Pine similarly fails (Br. 63) to explain how the absence of a hearing prejudiced its case. In the administrative proceedings, Big Pine argued that it had not been practicable to convey certain units because the tribe had left its former Housing Authority and did not have access to the tenant files associated with those units. Aplt. Appx. 5835-36.[8] HUD rejected that argument, reasoning that a tribe is responsible for maintaining its tenant files and a tribe's failure to locate those files does not justify allowing the tribe to continue to receive credit in the allocation formula for the units. *Id.* Although Big Pine asserts (Br. 63) that a "rational and neutral finder of fact" would have reached a different conclusion after a hearing, it does not explain why. Nor does it indicate why APA review on the record would fail to root out an

[8] Big Pine did not contest HUD's conclusion that its FCAS counts for FYs1998-2002 had included units the tribe never constructed or had previously conveyed. *See* Aplt. Appx. 5833-34. Most of the $528,715 that HUD overpaid Big Pine was due to Big Pine having received credit for those never-constructed or previously conveyed units. *See* Aplt. Appx 5837.

irrational or biased decision.

The tribes cite (Br. 18) the district court's statement that it could not conduct an APA review in the case of the Sicangu tribe because, according to the court, it could discern "no factual findings supporting [HUD's] recaptures" in Sicangu's administrative record. Aplt. Add. B-42. The district court's conclusion, which the tribes make no effort to defend, is perplexing. HUD's factual findings with respect to the Sicangu tribe—including HUD's identification of the units the agency found to be ineligible for inclusion in the tribe's FCAS and the reasons for those ineligibility determinations—are clearly set forth in the record. *See* Aplt. Appx. 2607, 2619-22, 2662-65.[9]

In support of their prejudice argument, the tribes also offer (Br. 63-64) a lengthy quotation from a district court decision in *Walker River Paiute Tribe v. HUD*, 68 F. Supp. 3d 1202, 1213 (D. Nev. 2014). *Walker River* does not aid the tribes. In that case, the district court rejected Walker River's argument that HUD was required to hold a hearing before recovering FCAS-related overpayments. *See id.* at 1214. The court determined that HUD could recover such overpayments through the exercise of its common-law authority to recoup payments wrongfully made. *See id.* Thus, the

[9] The tribes contend (Br. 15) that the "parties abandoned any potential factual issues in the District Court." The tribes are incorrect and misunderstand the nature of APA review. "[W]hen a party seeks review of agency action under the APA . . ., [t]he entire case on review is a question of law." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). Moreover, this Court independently reviews the agency's action, with no deference to the district court's conclusions. *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 823 (10th Cir. 2008).

district court rejected the main arguments the tribes make here. More to the point, having concluded that a hearing was not required, the court had no reason to consider whether the tribe was prejudiced by the lack of a hearing, and did not do so.[10]

The tribes assert (Br. 56, 62-63) that HUD's failure to conduct a formal hearing deprived them of a "neutral decision-maker." In making that assertion, the tribes again ignore the nature and purpose of HUD's actions in these cases. HUD uses FCAS data to allocate NAHASDA funds among the tribes. When HUD determines that a tribe has been overpaid due to an inaccurate FCAS count, it collects the overpayment and redistributes it. It keeps no money for itself and receives no benefit from the recovery. As a practical matter, then, HUD is a neutral decision-maker. HUD has a statutory obligation to allocate NAHASDA funds fairly and accurately. But it has no financial interest in any particular allocation.

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

If this Court concludes that a hearing was required and that the tribes were

[10] The court in *Walker River* concluded that HUD acted arbitrarily and capriciously when the agency found that Walker River's FCAS counts had included ineligible units. 68 F. Supp. 3d at 1212-13. The district court made two fundamental errors in reaching that conclusion. First, the court erroneously assumed that legacy rent-to-own units remain eligible for FCAS until they are "actually conveyed." *Id.* at 1213. Under 24 C.F.R. § 1000.318(a), a unit is no longer eligible for FCAS, even if the tribe still owns it, if the unit was eligible for conveyance and conveyance was not impracticable. Second, the district court in *Walker River* wrongly found that HUD "categorical[ly] exclu[ded] . . . units past their initial twenty-five year lease period." *Id.* HUD did not do so. Where a tribe provided a valid reason for not conveying a unit that was past its initial twenty-five-year lease period, HUD allowed the tribe to continue to include the unit in its FCAS. *See* HUD Br. 11-14.

prejudiced by HUD's failure to hold a hearing, the appropriate remedy is a remand. *See* HUD Br. 63. The tribes' contention (Br. 84-85) that a remand would be "futile" because HUD could "never prevail at any hearing" only serves to underscore the implausibility of their arguments. Congress did not intend to deprive HUD of any means of recovering funds that HUD erroneously paid to the tribes. To the contrary, Congress has stressed the importance of ensuring that NAHASDA funds are correctly allocated. *See* S. Rep. No. 110-238, at 4 (2007) (report accompanying 2008 reauthorization of NAHASDA) (noting that "[t]he shortage of resources has heightened the necessity to accurately determine a tribal grant recipient's true housing need so that funds are allocated to reflect this need.").

IV. THE DISTRICT COURT IMPROPERLY AWARDED MONEY DAMAGES

A. The district court improperly awarded the tribes money damages, in violation of the APA's limited waiver of sovereign immunity. *See* HUD Br. 64-69. Because HUD redistributed the grant funds it recovered from the plaintiff tribes and fully allocated all relevant NAHASDA appropriations, it was not possible for the district court to award the tribes the "very thing to which [they were] entitled." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999). The district court's orders requiring HUD to reimburse the tribes "from all available [funding] sources" was thus an unauthorized award of compensatory damages.

Contrary to the tribes' contention (Br. 70-80), *City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994), and *County of Suffolk v. Sebelius*, 605 F.3d 135 (2d Cir. 2010), demonstrate the impropriety of the district court's order. *See* HUD Br. 67-68. As both courts of appeals concluded, once "the funds sought by private litigants have been lawfully distributed—and therefore exhausted—by a federal agency, courts lack authority to grant effectual [monetary] relief." *Sebelius*, 605 F.3d at 138; *Houston*, 24 F.3d at 1428.

The tribes argue (Br. 73-77) that *Houston* and *Sebelius* are distinguishable because the appropriations at issue in those cases were temporally limited—i.e., the appropriations expired after a particular date—while NAHASDA appropriations are "no-year" appropriations that do not expire. According to the tribes, the courts' decisions in *Houston* and *Sebelius* turned on the fact that the relevant appropriations had expired by the time the plaintiffs' appeals were heard, preventing the courts from ordering the government to pay the plaintiffs out of those appropriations.

The tribes are incorrect. In *Houston*, the D.C. Circuit emphasized that its inability to award Houston the relief it sought—grant funds from a 1986 appropriation—rested on "two independent grounds." 24 F.3d at 1427. One of those grounds was, as the plaintiffs suggest, the lapse of the 1986 appropriation. *Id.* But the other *independent* ground, which the tribes entirely ignore, was that HUD had "contractually obligated" the entire appropriation, "either through initial allocations or reallocations." *Id.*; *see also id.* at 1428 ("When the relevant appropriation has lapsed *or*

been fully obligated, . . . the federal courts are without authority to provide monetary relief.") (emphasis added).

The Second Circuit in *Sebelius* similarly emphasized that it could not grant the plaintiff its requested relief because "the congressional appropriations relating to the funds sought by private litigants have been lawfully distributed." 605 F.3d at 138. The court did not rest its decision on the ground that the relevant appropriation had lapsed. In fact, the court expressly noted that the case "did not require [the court] to consider the implications of lapsed—as opposed to exhausted—appropriations." *Id.* at 141 n.8. In short, the tribes' claim that *Houston* and *Sebelius* turned on the time-limited nature of the relevant appropriation badly misreads both cases.

As in *Houston* and *Sebelius*, HUD has fully redistributed the grant funds it recovered from the tribes, as well as the other NAHASDA funds Congress appropriated in the years HUD recovered funds from the tribes. (For example, in those cases where HUD recovered money from a tribe by reducing the tribe's FY2004 grant, the agency has redistributed those funds and obligated all other FY2004 funds). *See* Decl. of Deborah Lalancette ¶ 14, *Lummi Tribe of the Lummi Reservation v. United States*, No. 8-cv-848 (Fed. Cl. Dec. 17, 2010) (explaining that NAHASDA funds are fully obligated within two years of their appropriation).

The tribes erroneously contend (Br. 78-80) that their cases are similar to *Fletcher v. DOI*, 160 F. App'x 792 (10th Cir. 2005); *Normandy Apartments, Ltd. v. HUD*, 554 F.3d 1290 (10th Cir. 2009); and *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th

Cir. 2008). Unlike here, the plaintiffs in all three cases sought prospective injunctive relief. *See Fletcher*, 160 F. App'x at 797 (plaintiffs "did not seek the payment of royalties that had been withheld in the past," but rather an "order directing the defendants to comply with the requirements of the 1906 act from date of the filing of the complaint"); *Normandy Apartments*, 554 F.3d at 1297 ("[T]he focus of Normandy's claim, when filed, was entirely prospective."); *Marceau*, 540 F.3d at 929 (plaintiffs requested "an injunction ordering HUD to repair or rebuild their homes"). Here, the tribes seek the repayment of money that HUD withheld in the past. Because the funds plaintiffs seek have been fully allocated, the only monetary relief a court can award is compensatory relief.

B. With one exception, the district court also violated the government's sovereign immunity when it ordered HUD to repay several tribes out of escrowed funds. HUD Br. 66 n.12. In 2008, pursuant to the terms of an injunction and the parties' stipulations, the district court ordered HUD to set aside part of the FY2008 NAHASDA appropriation to compensate twelve of the plaintiff tribes in the event those tribes prevailed in this litigation. *See id.* Because HUD had recaptured overpayments from the Navajo's FY2008 grant, the funds HUD set aside for the Navajo were the very thing to which Navajo claimed an entitlement. *See Houston*, 24 F.3d at 1427 (indicating that a plaintiff should seek an injunction to prevent the disbursement of the funds it seeks).

The escrowed funds were not, however, the very thing the other eleven tribes

sought. HUD recovered overpayments from those tribes by reducing their grants in years prior to FY2008. *See* HUD Br. 66 n.12. Thus, the escrowed FY2008 funds were not the funds to which the tribes claimed an entitlement. The district court's award of the escrowed funds was therefore an impermissible award of compensatory monetary damages. The tribes' suggestion (Br. 82-83) that a court's equitable authority can overcome the federal government's sovereign immunity is without merit.

CONCLUSION

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

Respectfully submitted,

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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 Reply 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 9,892 words, according to the word processor's word count.

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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.

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CERTIFICATE OF SERVICE

I certify that on March 14, 2016, 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.

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