2016-2196

United States Court of Appeals for the Federal Circuit

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, HOPI TRIBAL HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY,
Plaintiffs – Appellees,

FORT PECK HOUSING AUTHORITY,
Plaintiff,

v.

UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims in Case No. 08-cv-00848, Judge Eric G. Bruggink

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

John Fredericks III
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Ave.
Mandan, North Dakota 58554
Telephone: (303) 673-9600

Jeffrey S. Rasmussen
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600

Attorneys for Plaintiffs-Appellees

November 28, 2016

CERTIFICATE OF INTEREST

Counsel for Plaintiffs-Appellees certifies the following:

1. The full name of every party or amicus represented by me is:

   Lummi Tribe of the Lummi Reservation;
   Lummi Nation Housing Authority;
   Fort Berthold Housing Authority;
   Hopi Tribal Housing Authority.

2. The name of the real parties in interest represented by me are the same as described in 1 above.

3. There exist no parent corporations or publicly held companies having any interest in the parties represented by me.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or agency or are expected to appear in this court are:

   Frederick Peebles & Morgan LLP and its attorney John Fredericks III (Attorney of Record), have appeared in the trial court.

   Frederick Peebles & Morgan LLP and its attorneys John Fredericks III (Principal Attorney) and Jeffrey S. Rasmussen have filed appearances in this Court.

Dated: November 28, 2016

/s/ John Fredericks III
John Fredericks III

cc: David L. Levitt, Gary A. Nemec, Perrin Wright, David A. Sahli, Benjamin C. Mizer, Robert E. Kirschman, Jr., Steven J. Gillingham, Counsel for Defendant-Appellant

TABLE OF CONTENTS

Certificate of Interest 2

Table of Contents i

Table of Authorities iii

Statement of Related Cases viii

Jurisdictional Statement 1

Statement of Issues 1

Statement of the Case 1

A.Statutory background applicable to both claims 2

B.Facts and procedure regarding illegal exaction claim 4

C.Facts and procedure for claim for payment of amounts due in prior years. 6

Summary of the Argument 7

Argument 11

I. NAHASDA IS A MONEY MANDATING STATUTE. 12

II. HUD'S FAILURE TO FOLLOW ITS RECAPTURE PROCEDURES IS A PER SE ILLEGAL EXACTION REGARDLESS IF THE REGULATION WAS MONEY MANDATING OR IF HUD CORRECTLY APPLIED §1000.318 24

A.HUD May Not Argue The Merits After It Violated A Congressional Mandate And Its Own Regulations Designed To Protect the Tribes' Interests. 37

B.The Undisputed facts established that HUD violated the law when it exacted money from the Tribes without providing the predeprivation hearing required by law. 40

CONCLUSION 40

Certificate of Compliance 42

Certificate of Digital Submission and Privacy Redactions .... **Error! Bookmark not defined.**

Certificate of Service 43

TABLE OF AUTHORITIES

Cases

Aerolineas Argentinas v. United States, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996)..... ..... 11, 31

Bowen v. Massachusetts, 487 U.S. 879 (1988)..... 16, 23

Bowman v. United States, 35 Fed. Cl. 397, 401 (1996), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006).....26

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987) 22

Cencast Servs. L.P. v. United States, 94 Fed. Cl. 425, 451 (Fed. Cl. 2010) 25, 32

Cruz Casado v. United States, 553 F.2d 672, 675 (Ct. Cl. 1977).....34

Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000)....32

Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967)..... 11, 26, 31, 32

Evans v. United States, 74 Fed. Cl. 554, 565 (2006) *aff'd*, 250 F. App'x 321 (Fed. Cir. 2007).....10

Eversharp, Inc. v. United States, 129 Ct. Cl. 772, 776 (1954) 31

Fausto v. Gearan, 1997 U.S. Dist. LEXIS 23680, 34-35 (D.D.C. Aug. 21, 1997).36

Figueora v. United States. 57 Fed. Cl. 488, 496 (Fed. Cl. 2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006) 26

First Multifund for Daily Income, Inc. v. United States, 602 F.2d 332, 35 (Ct. Cl. 1979) 23

Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005) 17, 18, 21, 33

Gratehouse v. United States, 512 F.2d 1104, 1108 (Ct. Cl. 1975) 36

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1336-1337 (10th Cir. 1982) 39

Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir. en banc 1986) ,728 F.2d 1555, 1567 (10th Cir. 1984) 39

Johnson v. Jones, 515 U.S. 304, 319–20 (1995) 6, 24

Kanemoto v. Reno, 41 F.3d 641 (Fed. Cir. 1994) 18, 19

Katz v. Cisneros, 16 F.3d 1204 (Fed Cir. 1994) 16

La. Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 374 (1986) 34

Lummi Tribe of the Lummi Reservation v. United States, 106 Fed. Cl. 623, 624 n.1 (2012) (*Lummi II*) ..... passim

Lummi Tribe of the Lummi Reservation v. United States, 112 Fed. Cl. 353, 357 (Fed. Cl. 2013) (*Lummi III)* 4, 30, 34, 39

Lummi Tribe of the Lummi Reservation v. United States, 99 Fed. Cl. 584, 594 (Fed. Cl. 2011) (*Lummi I*) ..... passim

Martinez v. United States, 333 F.3d 1295, 1302-1303 (Fed. Cir. 2003) 14

Mass. Fair Share v. Law Enforcement Assistance Admin., 758 F.2d 708, 711-12 (D.C. Cir. 1985) 38

Mazaleski v. Treusdell, 562 F.2d 701, 719 (D.C. Cir. 1977).....36

Modoc Lassen Indian Housing Auth. v. HUD, 10th Cir. case no. 14-1313 13

Morton v. Ruiz, 415 U.S. 199, 235 (1974).....38

N. Cal. Power Agency v. United States, 122 Fed. Cl. 111, 116 (2015)..... 26, 27

Nat'l Ctr. For Mfg. Sci. v. United States, 114 F.3d 1997 (Fed. Cir. 1997)13, 18, 22, 23

Norman v. United States, 492 F.3d 1081, 1095-96 (Fed. Cir. 2005).... 25, 30, 31, 32

O'Bryant v. United States, 49 F.3d 340, 346 (7th Cir. 1995) 26, 29, 37

Ontario Power Generation, Inc. v. United States, 369 F.3d 1298, 1301 (Fed. Cir. 2004)..... passim

Pennoni v. United States, 79 Fed. Cl. 552, 561-62 (Fed. Cl. 2007). ..... passim

Samish Indian Nation v. United States, 657 F.3d 1330, 1338-1339 (Fed. Cir. 2011) *vacated in part on other grounds*, 133 S. Ct. 423 (2012) 16

Samish Indian Nation v. United States, 90 Fed. Cl. 122 (2009).....16

Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991) 18

Service v. Dulles, 354 U.S. 363 (1957).....38

Shidaker v. Carlin, 782 F.2d 746, 751 (7th Cir. 1986).....36

Stanley v. United States, 140 F.3d 1023, 1027 (Fed. Cir. 1998) 26, 27, 29, 37

Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 465 (Fed. Cl. 2015) 20, 21

Strategic Hous. Fin. Corp. v. United States, 86 Fed. Cl. 518, 529 (Fed. Cl. 2009) *aff'd* 608 F.3d 1317 (Fed. Cir. 2010) 11

Summit Nursing Home, Inc. v. United States, 572 F.2d 737, 742 (Ct. Cl. 1978)....34

Tisch v. Shidaker, 481 U.S. 1001, on remand, 833 F.2d 627 (D.C. Cir. 1987).....36

United Space Alliance, LLC v. Solis, 824 F. Supp. 2d 68, 83-84 (D.D.C. 2011)....38

United States ex Rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).....34

United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) 6, 24

United States v. Testan, 424 U.S. 392, 401 (1976).....31

Vigil v. Andrus, 667 F.2d 931, 936 (10th Cir. 1982) 39

Walker River Paiute Tribe v. United States HUD, 68 F. Supp. 3d 1202, 1213 (D. Nev. 2014) 19

Yakama Nation Hous. Auth. v. United States, 102 Fed. Cl. 478, 486-487 (Fed. Cl. 2011) (Smith, J.) 13, 16

Yellin v. United States, 374 U.S. 109 (1963) 35

Statutes

10 U.S.C. § 1201.....17

25 U.S.C § 4165..... 1, 30

25 U.S.C. § 4101.....2

25 U.S.C. §§ 4101-4243 ..... passim

25 U.S.C. §§ 4161.....4

25 U.S.C. §§4135..... 19, 22

25 U.S.C. §4111 ..... passim

25 U.S.C. §4152 ..... 3, 7, 19, 20

25 U.S.C. §4139 ..... 19, 22

25 U.S.C. §4165 ..... 4, 24, 34, 40

28 U.S.C. § 1291 ..... 6, 24

28 U.S.C. § 1491 ..... 11, 14, 22, 23

Other Authorities

Pub. L. 103-139, 107 Stat. 1418, 1433 (1993) 22

Tucker Act ..... passim

Regulations

24 C.F.R. § 1000.532 40

24 C.F.R. §1000.302 4

24 C.F.R. Part 1000 7

24 CFR §§ 1000.501-540 ..... 4, 27, 28

24 CFR §§1000.520-540 ..... 30, 37, 40

24 CFR §§1000.530-532 ..... 4, 27, 28

24 CFR §1000.314 3

24 CFR §1000.316 3

24 CFR §1000.318 ..... passim

STATEMENT OF RELATED CASES

Appellee Tribal Housing Authorities and Tribe (hereinafter the Tribes) agree with Appellant United States' statement of related cases.

JURISDICTIONAL STATEMENT

The Tribes agree with Appellant's Jurisdictional Statement.

STATEMENT OF ISSUES

The Tribes disagree with the statement of issues. The issues are:

1. With regard to the Tribes first claim for relief, whether the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243, which requires the Secretary of Housing and Urban Development (HUD) to make annual block grants directly to Indian tribes in accordance with a statutory formula, is money mandating for purposes of Tucker Act Jurisdiction.

2. With regard to the Tribes' second claim for an illegal exaction, whether the remedy resulting from the violation of 25 U.S.C § 4165 and its underlying regulations is independent of a money mandating source of law, and instead requires a return of the illegally exacted funds where the statute or provision causing the exaction itself provides, either expressly or by "necessary implication," that the remedy for its violation entails a return of money unlawfully exacted.

STATEMENT OF THE CASE

The Tribes disagree with the United States' statement of the case. It contains numerous statements of law or fact which are incomplete or immaterial, or which create a false impression.

A. STATUTORY AND REGULATORY BACKGROUND APPLICABLE TO BOTH CLAIMS

Congress enacted NAHASDA in 1996 in order to fulfill the federal government's responsibility to Indian tribes and their members "to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition." 25 U.S.C. § 4101(4). Congress found that "the need for affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities ... is acute." *Id.* § 4101(6). Congress expressly recognized the Federal government's trust responsibility owed to Indian tribes and their members, a trust responsibility to protect and support Indian tribes and Indian people and to work with tribes and their members to improve their housing conditions. *Id.* §4101(2)-(4). Congress also stated that "providing affordable homes in safe and healthy environments is an essential element" of this special trust responsibility, and that "Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or their tribally designated entities." *Id.*, §4101(5), (7).

Under NAHASDA Congress established an annual block grant system whereby Indian tribes would receive direct funding in order to provide affordable housing. The relevant sections of NAHASDA require HUD to "make grants" to be

provided "directly to the recipient for the Tribe." 25 U.S.C. §4111 (a) (1) and (2).[1] Sections 4151 and 4152 require HUD to make the grants in accordance with the statutory formula which includes "the number of low income housing dwelling units owned or operated" by the Tribes on the effective date of NAHASDA, September 30, 1997. 25 U.S.C. §4152 (b) (1); Appx5. These dwelling units are called Formula Current Assisted Stock (FCAS). 24 CFR §1000.314. Each eligible dwelling unit in the Tribes' FCAS is entitled to a sum certain amount of funding each year based upon a calculated operating subsidy and modernization allocation. 24 CFR §1000.316.

For each year relevant to this matter, 2003-2009, and every year since, Congress did make funds available, thereby triggering the mandate to provide those funds to eligible housing providers, which included each of the Tribes. *E.g.*, Appx5; HUD Br. At 4. The vehicle for calculating the amount which must be paid to eligible housing providers is a mandatory allocation formula which binds HUD.

The funding regulation at issue here, 24 CFR §1000.318(a), does not allow for the recapture of awarded funds when FCAS units are included in violation of its provisions. Instead, that authority is contained in Title IV of NAHASDA,

[1] Appellees Lummi Nation Housing Authority, Fort Berthold Housing Authority and Hopi Tribal Housing Authority are recipients of the direct funding on behalf of their respective Tribes. Appx2223-2224 (SAC ¶¶ 10, 12-13).

specifically 25 U.S.C. §§ 4161 and 4165, and the regulations promulgated thereunder found at 24 CFR §§ 1000.501-540.

Although NAHASDA charged HUD with administering the funding formula, under the regulations HUD put the burden on the Tribes to report FCAS changes due to §1000.318. The mechanism developed to enforce the provisions of §1000.318 is the Formula Response Form. 24 C.F.R. §1000.302, (defining a Formula Response Form as "the form recipients use to report changes to their Formula Current Assisted stock"). The Office of the Inspector General faulted HUD, not the Tribes, for failing to monitor compliance with §1000.318 and the corrections to their FCAS via the Formula Response Forms. Appx4; *Lummi Tribe of the Lummi Reservation v. United States*, 112 Fed. Cl. 353, 357 (Fed. Cl. 2013) (*Lummi III)*.

B. FACTS AND PROCEDURE REGARDING ILLEGAL EXACTION CLAIM

HUD calculated the amount of grant money due each Tribe and then provided that amount to the Tribes for each fiscal year from 1998-2002. It was not until after the Tribes had those funds that HUD, without providing any of the Appellee Tribes their review and hearing rights under 24 CFR §§1000.530-532 and 540, recalculated the number of eligible housing units operated by the Tribes and then recaptured the amounts of mandatory payments previously made under section 25 U.S.C. § 4111. Also without providing a hearing, HUD used self-help to take back the amount which it claimed had been overpaid to each Tribe. Appx5, Appx2228 (SAC ¶ 28).

Had HUD provided a hearing, the Tribes would have disputed the factual predicate upon which HUD sought to take the funds. Appx2221, SAC, *passim*. *E.g.*, Appx2229 (SAC ¶ 29).

The Tribes brought suit for return of the recaptured funds and to recover the underfunding that resulted from the removal of eligible dwelling units from the funding formula. *Id.* Although the Tribes' first claim for relief was dependent upon a finding that NAHASDA was money mandating, the Tribes asserted that their second claim for an illegal exaction did not require a showing that NAHASDA is money mandating, because the issue in the illegal exaction claim was not whether HUD was required to provide the money in the first instance. Appx3-5. Instead, the fact that the funds had been provided was a background fact, and the issue was whether HUD could take the money back without a hearing and all the conditions that preceded it. If HUD could not lawfully take the funds back without complying with the regulatory conditions, the funds at issue in the illegal exaction claim should, under proper legal analysis, still be in the hands of the Tribes.

As part of the order which is currently before this Court on interlocutory appeal, the Court of Claims held that the Tribes could not maintain the claim for illegal exaction unless NAHASDA is money mandating. Appx5. Under the current posture, that pure legal question is presented to this Court in this appeal.

C. FACTS AND PROCEDURE FOR CLAIM FOR PAYMENT OF AMOUNTS DUE IN PRIOR YEARS.

Under the current procedural posture, for the first issue presented (whether the provisions of NAHASDA at issue is money mandating), this Court is required to assume for purposes of the current appeal that the United States erroneously undercounted the number of eligible housing units operated by each Tribe during each of the relevant years. *E.g.*, 28 U.S.C. § 1291; *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Because of this, the fact for purposes of the current appeal is that each Tribe received less during each year than the grant amount that Congress mandated that HUD "shall" provide to each of the Tribes.

The Tribes brought suit under the Tucker Act, seeking judgment for the amount of underfunding that Congress mandated they should have received for the relevant years. Appx2221, Appx2235 ¶ 1.

HUD argued in response that the relevant provision of NAHASDA was not money mandating; and the Court of Claims, through Judge Wiese, rejected HUD's argument. *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 594 (Fed. Cl. 2011) (*Lummi I*). When a new judge was assigned to this case, the United States sought, and obtained a second bite at the same apple; but the second judge, Judge Bruggink agreed in toto with Judge Wiese: as concerns plaintiffs first

claim for relief, the relevant provisions of the NAHASDA, 25 U.S.C. §§ 4111, 51 and 52, are money mandating. Appx4.

SUMMARY OF THE ARGUMENT

The Tribes' claim for money which the United States wrongly failed to pay the Tribe under 25 U.S.C. § 4111 and the implementing allocation formula is based upon provisions of NAHASDA that are money mandating. A statute is money mandating if "money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004). 25 U.S.C. § 4111 exactly meets that requirement. Where, as here, Congress has allocated funds, one can exactly calculate, using the mathematical formula contained in 24 C.F.R. Part 1000, the exact amount which HUD was statutorily required to provide to the Tribes based upon the eligible FCAS housing units each Appellee Tribe had available in each of those years.

In its opening brief, HUD cleverly attempts to sidestep the issue presented—whether the section of the NAHASDA is money mandating, by discussing whether the amount which the Secretary is mandated to pay under the NAHASDA, as calculated under the allocation formula in the CFR, can be categorized as "damages" or "payment for services rendered." It can, but more important, that is not the issue. The applicable legal test is well-established: the test is whether "money has not been

paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Ontario Power Generation*, 369 F.3d at 1301.

Independent from whether 25 U.S.C. § 4111 is money mandating, this Court should remand with instructions to grant judgment to the Tribe for return of money which the Tribe possessed, and which the United States illegally exacted.

The Tribe's position is that this Court is required to order the return of the unlawfully exacted tribal funds. The United States took the Tribes' funds without compliance with applicable regulations that restrict HUD's recapture authority. Appx3-4. Under applicable law this constitutes an illegal exaction, and those funds should be returned to the Tribes.

The United States' position is that any time it is willing to claim that money in a tribe's hands should be in federal hands, it can use very broad and heavy-handed self-help—it can simply go and take any money to which it has a disputed claim, without even providing the predeprivation safeguards that HUD promised it would comply with before taking the Tribes' funds, and then when a tribe brings a claim based upon that violation of law, this Court is to skip over the United States violation of its own laws and forgive liability if it finds, after-the-fact, that HUD would in the end have been able to recover some or all of the funds had it complied with the law.

If this Court were writing on a blank slate, or if we were not dealing with a statutory and regulatory scheme which the United States violated, this Court would

have before it a more difficult task when picking between those two alternative positions. But we are not writing on a blank slate, and under the case law applicable to the present matter, the Court must order the United States to return the money which the United States unlawfully took from the Tribes.

It is unfortunately not surprising that the United States asks this Court to give it this extremely broad self-help authority—that the United States takes what it wants from Indian Tribes, and then shifts to the Tribes whose rights were violated the burden to try to get it back, with no downside at all to the United States for its violation of the process due under the statute and regulations. But the United States' attempt to limit suits for illegal exaction is contrary to the controlling case law cited by the Tribes. Under that case law, there is a downside to the United States taking the money without providing the process due under the statute and regulations, and that downside is that it is required to return the money that it took contrary to the applicable regulatory scheme.

The United States is correct in its premise that if the United States withholds money in violation of a money mandating law or misapplication §1000.318, then an illegal exaction claim is viable. But then, contrary to the case law, it illogically jumps from that premise to an assertion—upon which its whole argument is grounded–that claims for illegal exaction are <u>limited to</u> violations of a money-

mandating law or to the misapplication of §1000.318. This Court's illegal exaction jurisprudence is not as narrow as the United States asserts:

> The species of claim known as an illegal exaction has several variations. A plaintiff may sue for a sum "improperly exacted or retained" in violation of the Constitution, a statute, or a regulation. *United States v. Testan*, 424 U.S. 392, 401, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *see also Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967) (overruled on other grounds by *Malone v. United States*, 849 F.2d 1441, 1444-45 (Fed.Cir.1988)). Alternatively, a plaintiff may pursue an allegation that a "particular provision of law relied upon grants [him], expressly or by implication, a right to be paid a certain sum" and that he has not been so paid. *Eastport S.S. Corp.*, 372 F.2d at 1007; *see also Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed.Cir.1996) (an airline could seek reimbursement of costs borne by it for transporting aliens who had sought political asylum in the United States, because the costs were paid "at the direction of the government to meet a governmental obligation"). An illegal exaction constitutes a compensable violation of the Fifth Amendment's Due Process Clause.

Evans v. United States, 74 Fed. Cl. 554, 565 (2006) *aff'd*, 250 F. App'x 321 (Fed. Cir. 2007).

The Tribes' claim for an illegal exaction based on the violation of NAHASDA § 405 and its implementing regulations is based on the first variation quoted above. The United States is attempting to convince the court that illegal exaction claims are limited to the second variation, and therein lies the fallacy of the argument.

The Tribes are seeking return of funds that the Court of Federal Claims has already determined were taken by the United States in contravention of the Constitution, a statute, or a regulation. Appx2221. The Tribe has met that predicate

for an illegal exaction claim. *Aerolineas Argentinas*, 77 F.3d 1564, 1572-73; *Pennoni v. United States*, 79 Fed. Cl. 552, 561-62 (Fed. Cl. 2007).

ARGUMENT

28 U.S.C. § 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either [A] upon the Constitution, or any Act of Congress or any regulation of an executive department, or [B] upon any express or implied contract with the United States, or [C] for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (internal numbering added).

In the substantial body of case law created by this Court interpreting this jurisdictional grant, this Court has described three types of monetary claims that fall within the Tucker Act's waiver of sovereign immunity: claims (1) "alleging the existence of a contract between the plaintiff and the government"; (2) where "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum"; and (3) where "money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Ontario Power Generation, Inc.*, 369 F.3d at 1301 (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-08, 178 Ct. Cl. 599 (Ct. Cl. 1967)). Illegal exaction claims fall within the second category. *Strategic Hous. Fin. Corp. v. United States*, 86 Fed. Cl. 518, 529 (Fed. Cl. 2009) *aff'd* 608 F.3d 1317 (Fed. Cir. 2010). The third category "is commonly referred to as claims brought under a 'money-

mandating' statute." *Ontario Power,* 369 F.3d at 1301. The Tribes' money-mandating claim is discussed in section I of this brief, immediately below, their illegal exaction claim is discussed in section II. Both constitute separate bases of relief.

I. NAHASDA IS A MONEY MANDATING STATUTE.

The Trial Court has jurisdiction over a claim that "money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Ontario Power Generation,* 369 F.3d at 1301. Despite HUD's attempt to distract with discussions of immaterial issues, this is a straightforward case. The Tribes are asserting they are entitled to payment of the amount which was due them under the NAHASDA for the prior years; and their claim is firmly grounded in §§ 4111, 4151 and 4152 of NAHASDA.

As the United States acknowledges, HUD Br. at 7, the Tribes are seeking money which has not been paid to them but for which the Tribes assert that they are entitled to payment for the years 2003-2009. During those years the United States was mandated to pay amounts to the Tribes based upon, *inter alia*, the number of eligible FCAS units which the Tribes owned and operated. The United States failed to make those payments and the Tribes then brought suit for payment of those overdue amounts based upon the number of units which were eligible in those prior years. Appx2221.

The Tribes' claims are based upon statutory language which mandates the payment: "the Secretary shall . . . make grants under this section on behalf of Indian tribes." 25 U.S.C. § 4111. Those claims for those payments fall squarely within the scope of the Court of Federal Claims' jurisdiction, as three senior judges of that court have already determined. *Lummi I*, 99 Fed. Cl. at 602 ("[P]laintiffs seek funding to which they claim a present entitlement if the statute [NAHASDA] is correctly applied. Such a claim falls squarely within this court's jurisdiction.") (Wiese, J); *accord*, *Yakama Nation Hous. Auth. v. United States*, 102 Fed. Cl. 478, 486-487 (Fed. Cl. 2011) (Smith, J.); *Lummi IV*, Appx4 (Bruggink, J.).

HUD repeatedly acknowledges that the Tribes' claims appear to fit squarely within the Trial Court's jurisdiction over money-mandating claims, HUD Br. at 14, 20, but HUD claims that the Trial Court erred by reading the statute "out of context." *Id*. at 14. In actuality, it is HUD that is trying to re-write the statute and this Court's prior decisions and to whipsaw the Tribes between the District Court and the Court of Claims. *Cf. Modoc Lassen Indian Housing Auth. v. HUD*, 10th Cir. case no. 14-1313, HUD Opening Br. at 28, 64-69 (Doc. 01019450524) (in the related APA suit, HUD is currently arguing that claims like those at issue in this case are for "compensatory money damages" which are "not available under the APA."*); Nat'l Ctr. For Mfg. Sci. v. United States*, 114 F.3d 1997 (Fed. Cir. 1997) (the United States argued successfully to the District Court that the claims were for compensatory

monetary damages, which could only be brought in the Court of Claims, but the United States then admitted that if this Court affirmed on appeal, the United States would, on remand to the Court of Claims, move to dismiss, switching to an argument that the Court of Claims lacked jurisdiction because the claims were not for compensatory monetary damages).

HUD spends much of its opening brief on an illogical argument: it provides pages and pages of detailed discussion of cases in which the government was "required to pay money, in exchange for a service or as a substitute for an injury identified by law as compensable." HUD Br. at 20-29. HUD is correct that such claims are within the scope of 28 U.S.C. § 1491. But it is wrong when it then asserts that 28 U.S.C. § 1491 is limited only to those claims. Its illogical argument is: if A, then B. Not A, therefore not B. If something is a cat, then it is a mammal. A dog is not a cat, and therefore a dog is not a mammal.

The applicable legal standard is whether the claim seeks "monetary relief" *Martinez v. United States*, 333 F.3d 1295, 1302-1303 (Fed. Cir. 2003), and is "founded . . . upon the Constitution, or any Act of Congress or any regulation of an executive department," 25 U.S.C. § 1491. The United States proposed standard that a statute is money mandating if but only if it requires the United States to pay money in exchange for a service or as a substitute for an injury, is simply too narrow. *Lummi I* squarely rejected this argument. 99 Fed. Cl. at 597. So too should this Court.

The Tribes' claims here are for payment in exchange for a service or as a substitute for an injury under the cases discussed by HUD, and so the Tribes would prevail even if Congress had adopted the standard that the United States now proposes, but discussion of whether the Tribes would prevail under the United States' proposed standard is unproductive because the United States' proposed standard is not the applicable legal standard. It is clear why the United States tries to shift from that legal standard, on which it cannot win, to a different standard, on which it can at least make a colorable argument. But contrary to HUD's argument, this Court does not need to review dictionary definitions of the word "pay" or determine whether the Tribes' provision of eligible housing units between 2003 and 2009 was a "service." HUD Br. at 20-21. As shown above, § 1491grants jurisdiction over "any claim" founded on a statute or regulation seeking monetary relief.

HUD asserts that NAHASDA is not a money mandating statute because, HUD claims to this Court (contrary to its argument to the Tenth Circuit, noted above), the judgement in this case would subsidize future expenditures rather than compensate for past injuries or labor. *Lummi I* correctly rejected that argument. It determined that NAHASDA was a money mandating statute due to its mandatory payment language. Specifically, the Court held:

> As indicated above, NAHASDA provides that the Secretary "**shall** . . . make grants" and "**shall** allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111, 4151 (emphasis added), and directs that the funding allocation be made pursuant to a

> particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. *Eastport*, 372 F.2d at 1009. Such mandatory language is sufficient to confer jurisdiction on this court. *Greenlee Cnty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (observing that the Federal Circuit has "repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating" (quoting *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)); *Wolfchild v. United States*, 96 Fed. Cl. 302, 339 (2010) ("[c]onsistent use of the word 'shall' throughout the statute favors a finding that the [statute is] money-mandating")

Lummi I, 99 Fed. Cl. at 13-14; accord, *Yakama*, 102 Fed. Cl. 478, 486-487 (Fed. Cl. 2011).

Lummi I and *Yakama* also rejected the notion advanced by HUD that a statute setting up a federal grant cannot be money mandating, thus rejecting HUD's narrow readings of *Bowen v. Massachusetts*, 487 U.S. 879 (1988), *Katz v. Cisneros*, 16 F.3d 1204 (Fed Cir. 1994), and *Samish Indian Nation v. United States*, 90 Fed. Cl. 122 (2009). *Lummi I*, at 597; *Yakama*, at 486-87. This Court has rejected the same notion. *Samish Indian Nation v. United States*, 657 F.3d 1330, 1338-1339 (Fed. Cir. 2011) *vacated in part on other grounds*, 133 S. Ct. 423 (2012); *see Lummi Tribe of the Lummi Reservation v. United States*, 106 Fed. Cl. 623, 624 n.1 (2012) (*Lummi II*).

The essence of HUD's argument is, because NAHASDA imposes conditions on how grant funds can be spent, and because the Tribes are not entitled to the funds

unless their FCAS are eligible for funding, NAHASDA is not money mandating. This is a different shade of the same argument HUD has made throughout this litigation, that the Tribes are not entitled to recover anything unless they can show prejudice by proving they would have prevailed at a § 532 hearing had one been held. This Court rejected such contentions in *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005). The issue in *Fisher* was whether 10 U.S.C. § 1201, which provided payment of disability benefits, was money mandating. Section1201 (b) required the Secretary to make certain determinations prior to making payment, including that "the disability is of a permanent nature and stable," and that "the disability is not the result of the member's intentional misconduct or willful neglect." 402 F.3d at 1174. As it does here, the government argued that the statute was not money mandating unless the claimant could show he met the eligibility requirements of the statute. This Court rejected the argument as perverse:

> According to the Government, § 1201 is money-mandating only for service members who qualify for benefits under the statute, i.e., those members who have been found by the Secretary to be unfit for duty. But that understanding turns the law on its head--according to the Government the only persons entitled to judicial relief are those who do not need it because they were awarded disability status; those who were denied that status cannot get relief because they were denied what they sought.
>
> Such a perverse understanding of Congress's purpose cannot be the law; it is inconsistent with the literal language of the statute and with our construction of the statute in *Sawyer*. The fact that the statute imposes requirements for the payment of money does not mean that only claimants who have been determined by a Government official to meet

> those requirements have a right to the money the statute provides. It is the statute, not the Government official, that provides for the payment. If the Government official's determinations under the statute are in error, the court is there to correct the matter, and to have the proper determinations made.

Fisher, 402 F.3d at 1175, citing *Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991)).

The Court went on to explain the flaw in the government's argument, which confused jurisdiction with a determination on the merits of a claimant's case:

> Assuming that the Court of Federal Claims has taken jurisdiction over the cause as a result of the initial determination that plaintiff's cause rests on a money-mandating source, the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: plaintiff loses on the merits for failing to state a claim on which relief can be granted. Certainly it does not follow that, after deciding the case on the merits, the court loses jurisdiction because plaintiff loses the case.

Id. at 1175-76.

This Court has also repeatedly rejected the United States argument that the Tucker Act only grants jurisdiction over claims for damages. *Nat'l Center for Mfg. Sci.*, 114 F.3d 1997 (*NCMS*) (discussed infra); *Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994). In *Kanemoto*, the United States asserted, and prevailed on, the very position that it is currently arguing against. In *Kanemoto*, this Court agreed with the United States that the applicable standard is whether there is a statutory mandate to pay money, not whether that mandate is based upon "damages."

> "There are, of course, many statutory actions over which the [Court of Federal Claims] has jurisdiction that enforce a statutory mandate for the

> payment of money rather than obtain compensation for the Government's failure to so pay.... The jurisdiction of the [Court of Federal Claims], however, is not expressly limited to actions for 'money damages,' ... whereas that term does define the limits of the exception to § 702." *Bowen*, 487 U.S. at 900 n. 31, 108 S.Ct. at 2735 n. 31 (internal references omitted). Thus the Court recognized that the Tucker Act is not limited to suits for money damages. Indeed, *Bowen* reaffirmed the Court of Federal Claims' jurisdiction over causes of action for payment of money other than damages, including statutory causes of action, such as the Back Pay Act, 5 U.S.C. § 5596(b).

Kanemoto v. Reno, 41 F.3d 641, 646 (Fed. Cir. 1994).

Here, the failure to comply with NAHASDA's money mandate occurred when funds were withheld due to the removal of eligible FCAS units still owned and operated by the Tribes, and also recaptured for units that were still owned and operated.[2] NAHASDA required continued funding for units that the Tribes continued to own and operate as affordable housing. 25 U.S.C. § 4152 (b) (1); *see* 25 U.S.C. §§4135(a) (2) and 4139; *see also Walker River Paiute Tribe v. United States HUD*, 68 F. Supp. 3d 1202, 1213 (D. Nev. 2014) (a NAHASDA grant recipient "maintains the legal right to own, operate or maintain the unit until it is actually conveyed"). Despite this mandate, HUD wrongly removed units from

[2] Under their first claim for relief, the Tribes' claim that **portion** of the recaptured funds attributable to FCAS units that were still owned and operated, and thus still eligible, when the funds were recaptured because NAHASDA mandated funding for those units. 25 U.S.C. § 4152 (b) (1). This is distinct from the Tribes' second claim for relief, for **all** of the recaptured funds which were illegally exacted in violation of § 4165 and it's implementing regulations at 25 CFR 1000.520-540. The distinction is important because a claim for violation of a money mandate has different elements of proof than a claim for illegal exaction.

FCAS while they were still owned and operated, which resulted in a sum certain loss of funding between 2003 and 2009.

Thus, the recapturing of funds and the removal of FCAS units while they were owned and operated resulted in two separate failures to pay monies under NAHASDA's mandate. First, HUD recaptured funds for units that were in fact eligible for FCAS funding because they were still owned and operated. Second, for years subsequent to the recaptures, HUD's removal of the eligible FCAS units from the funding formula while they were still owned and operated violated the funding mandate. Both caused the Tribes to receive less NAHASDA funding than that to which they were entitled under 4152 (b) (1).

HUD's other primary argument is that under other factual scenarios, not applicable to this matter, it would have not have been required to provide the Tribes the amounts that the Tribes are seeking. It asserts it would not have been required to provide the Tribes' shares of the congressional allocation if Congress had not allocated the funds. But Congress did allocate the funds, under a statutory scheme that then mandated that allocated funds be disbursed in accordance with the statutory funding formula. *Cf. Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 465 (Fed. Cl. 2015) (once the government allocated money, it had to abide by the restrictions Congress placed on governments' ability to impose conditions on that money, and the government could be liable under the Tucker Act for violating statutory

restrictions).[3] HUD discusses whether the Tribes would have a Tucker Act claim if the Tribes were seeking funds for future years; whether the Tribes would have been entitled to mandatory payments if the Tribes were not "qualified tribes" between 2003 and 2009; or whether HUD could have reduced the amount due in other factual scenarios not present here. But the Tribes here are not seeking funds for future years: they are seeking the funds which, under the statute and allocation regulation, were required to be paid in the past. Appx2221, Appx2228 ¶ 1. And the Tribes were qualified tribes in the relevant years. Appx5, HUD Br. at 4.

In fact, as HUD itself argued in the Court of Claims in this matter, the question of whether HUD was required to make the payments reduces down to a single factual dispute: how many eligible FCAS units did the Tribes have available in the years 2003-2009. While HUD notes that the amount which it was required to pay could only be used for affordable housing activities, this restriction on the use of the funds **after they are awarded** goes to the merits of a non-compliance case, not the issue of whether the statute is money mandating. *Fisher, supra*. Moreover, at all times relevant the Tribes provided the pivotal "affordable housing activity" at issue—the operation and maintenance of the FCAS units.[4] That is what the payment at issue

[33] Although *Starr* was an illegal exaction case, its reasoning in this regard applies equally here.

[4] NAHASDA recipients are statutorily required to maintain their housing units as affordable housing. 25 U.S.C. §§4135 (a) (2). The failure to do so results in HUD taking action under §4161. 25 U.S.C. § 4139.

here is based upon. Once we know how many eligible units were available, we can apply the mathematical formula and compute the amount which was due to the Tribes in those past years.

HUD asserts that the present matter is indistinguishable from *Nat'l Ctr. for Mfg. Sci.*, 114 F.3d 1997 (*NCMS*). In one way, not beneficial to HUD, it is indistinguishable: in *NCMS*, this Court refused to let the United States whipsaw the plaintiff between the District Court and the Court of Claims. This Court rejected the United States argument, which the United States repeats in the present case, HUD Br. at 16-17, that a case can only be cognizable under the APA or 28 U.S.C. § 1491, never under both.

But the aspect for which HUD cites *NCMS* is easily distinguishable. In *NCMS*, the plaintiff brought suit in the District Court, seeking amounts which Congress had "made available only for the National Center for Manufacturing Sciences." *Id.* at 198 (quoting Pub. L. 103-139, 107 Stat. 1418, 1433 (1993)). Because a plaintiff is the master of its own complaint, and can pick any Court which has jurisdiction, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987), the issue was whether the District Court had jurisdiction. In contrast to *NCMS*, where the jurisdiction of the District Court was at issue, the Tribes here brought suit in the Court of Federal Claims, and the issue is whether the Court of Claims has jurisdiction. *E.g.*, *First Multifund for Daily Income, Inc. v. United States*, 602 F.2d

332, 35 (Ct. Cl. 1979) (holding that where a plaintiff invokes the Court of Claims jurisdiction under the Tucker Act, the Court has "an obligation to exercise it and decide the case).

Also in contrast to the present matter, NCMS did not allege that it had already provided the goods or services in prior years, and in fact it brought suit just prior to the end of the year in which the congressional earmark would expire, and it acknowledged that it was seeking funds that, upon receipt, would be used for such services and would be subject to contract conditions between NCMS and the United States. The District Court held that the claim could be brought as a contract claim under 28 U.S.C. § 1491 but could not be brought under the APA. This Court reversed, holding that that APA jurisdiction was proper for the plaintiff's suit to command the government to release appropriated funds because a naked money judgment under those facts was not an adequate remedy. 114 F.3d at 200-202 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). This Court stressed that NCMS had chosen to bring its suit in a court which could impose broader equitable remedies than the Court of Claims could impose, and that it was highly possible NCMS would benefit from the equitable remedies available in the district court. By contrast, in the present matter, the Court of Claims will only need to determine whether HUD wrongly removed eligible housing units which resulted in past funding losses. Appx5, Appx6-10. Because the Court of Claims held it could not resolve that issue

on summary judgment, this Court must assume for the current appeal that HUD did wrongly remove eligible units. *E.g.*, 28 U.S.C. § 1291; *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). And then as undisputed, this reduced by a sum exactly ascertainable by mathematical calculation, the amount that the Tribes received between 2003 and 2009. The Tribes do not need equitable remedies in this matter. They need, and deserve, a judgment for the amount which Congress mandated HUD would pay to them based upon the number of eligible units between 2003 and 2009. This is a claim for monetary relief that is within the court's Tucker Act jurisdiction.

II. HUD'S FAILURE TO FOLLOW ITS RECAPTURE PROCEDURES IS AN ILLEGAL EXACTION REGARDLESS IF THE REGULATION WAS MONEY MANDATING OR IF HUD CORRECTLY APPLIED §1000.318

As stated in footnote 2 *supra*, the Tribes' claim for an illegal exaction is for all of the recaptured funds, regardless of whether the FCAS units in dispute were eligible or not. The lower court held that the Tribes' illegal exaction claim is not viable unless NAHASDA is money mandating. Appx17. The Ruling incorrectly applies illegal exaction case law in two separate manners. First, it requires § 4165 and its underlying regulations to be money mandating. Second, it assumes an illegal exaction can only occur if 24 CFR §1000.318 was misapplied by HUD. The correct reading of the law requires the return of each Tribe's recaptured funds due to HUD's

failure to comply with its own regulations, which prohibit recapture until after the conditions laid out in the regulations are met. Under that correct reading, the undisputed facts establish an illegal exaction, Appx4-5; *Lummi II*. 106 Fed. Cl. At 633-34. This Court therefore should remand with instructions to enter judgment in favor of the Tribes on their illegal exaction claim.

When dealing with illegal exaction cases the Federal Circuit has determined that using a different remedy for the recapture of funds other than the prescribed statutory or regulatory procedure requires return of those funds. The return of funds is "necessarily implied" because agencies cannot ignore their own regulations, or congressional mandates, to recapture funds and consequently trample the due process rights of the original recipients. The failure to follow the proper procedure for recapture requires return of the funds regardless if §1000.318 was applied correctly.

An illegal exaction claim is not required to be based upon a money mandating statute or regulation. *Cencast Servs. L.P. v. United States*, 94 Fed. Cl. 425, 451 (Fed. Cl. 2010); *Norman v. United States*, 492 F.3d 1081, 1095-96 (Fed. Cir. 2005); *Figueora v. United States.* 57 Fed. Cl. 488, 496 (Fed. Cl. 2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006); *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006).

The Court of Federal Claims has recently explained that:

> Even though [cited provision] does not contain an express statement that the remedy for violating the statute's proportionality provision is a return of the money paid over to the Government, the lack of express money-mandating language in the statute does not defeat Plaintiffs' illegal exaction claim. *See, e.g., Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000) (Court had jurisdiction over an illegal exaction claim based upon the Export Clause of the Constitution because the language of the clause led "to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy."). Otherwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse for recouping the money overpaid.

N. Cal. Power Agency v. United States, 122 Fed. Cl. 111, 116 (2015).

As defined, an illegal exaction claim involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). When a government agency fails to follow the statutory or regulatory procedures established for the recapture of funds, the return of those exacted funds is necessarily implied. *Stanley v. United States*, 140 F.3d 1023, 1027 (Fed. Cir. 1998); *O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. Ill. 1995); *N. Cal. Power Agency*, 122 Fed. Cl. at 116. *Stanley* boiled down the determination of "necessary implication" to a single question: "Has the Government proceeded to recover what rightfully belongs to it in a manner authorized by law"? *Stanley* at 1027.

Contrary to what the government suggests, an illegal exaction case does not turn on whether the Tribes owed HUD money. "A mere assertion by the Government that it acted legally under the statute upon which Plaintiffs base their illegal exaction claim does not bar Plaintiffs from their right to have their claim adjudicated by the Court." *N. Cal. Power*, 122 Fed Cl. at 113. Instead, the question is whether the government recouped the money in accordance with procedures defined by law. Here it is undisputed that HUD did not recapture the funds in accordance with §4165 and its underlying regulations. Specifically, HUD violated 24 CFR §§1000.530, 532 and 540.

Section 1000.530 (a) (1) expressly prohibited HUD from recapturing the funds under §1000.532 (b) unless it first measured the Tribes' performance under the standards laid out in §1000.524 and then gave the Tribes the right to correct the deficiency which caused the overpayment, in this case the failure of the Tribes to correct their annual Formula Response Forms by removing the units that were conveyed, demolished or never built. In turn, §1000.532 itself contained important protections for the Tribes' benefit. Section 1000.532(a) authorized HUD to make "appropriate adjustments in the amount of the annual grants" but only if the adjustments were made "in accordance with the findings of HUD pursuant to reviews and audits". In other words, HUD could make downward adjustments only after it completed the review process laid out in §§1000.520-530, something it

refused to do here, instead choosing an ill-defined process with "no apparent rules or limitations." *Lummi II* at 106 Fed. Cl. at 631. Section 1000.532(a) also expressly prohibited HUD from recapturing amounts already spent on affordable housing activities. Section 1000.532(b) required HUD to "notify the recipient in writing" of the actions it intends to take pursuant to the findings resulting from its § 4165 review, "before undertaking any action" to adjust or recapture the plaintiff's grant funds. The notice must provide the recipient "an opportunity for an informal meeting to resolve the deficiency." Obviously, the "deficiency" is a performance deficiency identified in accordance with §§1000.520–530. This notice, had it been given, would have given the Tribes fair warning that their performance was being evaluated under § 4165 and their implementing regulations. Section 1000.532(b) goes on to state that, if the deficiency is not resolved, only then can HUD take action to adjust or reduce the recipient's grant funding. Implicit in §1000.532 is the requirement that HUD provide notice to the recipient if the deficiency is not resolved, including notice that the recipient may request a hearing in accordance with §1000.540. Both as a matter of its trust responsibility and fundamental principles of due process of law, HUD was required to provide sufficient notice so that the Tribes had a meaningful opportunity to exercise their rights under the Section 4165 regulations. Its refusal to do so resulted in an illegal exaction or retention of the Tribes' grant funds. The

return of the recaptured funds is the necessarily implicit remedy for HUD's violation of the applicable collection procedures.

Pennoni v. United States, 79 Fed. Cl. 552 (Fed. Cl. 2007), provides an illuminating insight into where the lower court Ruling ran astray of the established jurisprudence. In *Pennoni,* the Internal Revenue Service attempted to recollect an erroneous refund through levy and wage garnishment. *Id.* at 562. However, the tax code was clear that an erroneous refund must be recollected through certain procedures which did not include levy and wage garnishment. *Id.* The *Pennoni* Court concluded that the agencies failure to follow the procedure for proper recapture meant that the IRS illegally exacted the alleged erroneous refund. *Id.*[5] *See also O'Bryant*, 49 F.3d at 346 (Congress gave the IRS specifically delineated collection authority, and the IRS must act within that authority); *Stanley*, 140 F.3d at 1024-25,1027 (Upholding summary judgment in favor of Plaintiff when the IRS failed to follow its own procedures for the recapture of funds). Accordingly, the lesson to be learned is that the return of the funds is the "necessarily implicit" remedy

[5] *Pennoni v. U.S.* was overturned on other grounds in *Pennoni v. U.S.,* 79 Fed. Cl. 552 (2007). The overturning decision dealt with whether the claim of the taxpayer was subject to a separate Internal Revenue Code provision in light of a recent Supreme Court decision. Accordingly, the overturning decision did not address the analysis of the necessary implication of the return of funds as a result of the government's failure to follow its own procedures.

when the government fails to follow the correct procedure for the recapture of funds. *Norman,* 492 F.3d at 1095.

Whether HUD correctly applied §1000.318 is immaterial to the analysis of illegal exaction in the context of the Tribes' second claim for relief. Section 1000.318 says nothing about HUD's authority to recapture the Tribes' funds, the authority is instead found in the regulations implementing NAHASDA §4165, 24 CFR §§1000.520-540. As described above illegal exactions occur when an agency recaptures or takes money due to its failure to follow its own regulations or procedures. As this Court previously stated "HUD's recapture of grant funds without conducting a compliance hearing [under the §4165 regulations] did not comport with the applicable procedures governing the recovery of such funds". *Lummi III,* 112 Fed. Cl. at 355, n. 1. Independently, if HUD correctly applied §1000.318 but failed to provide a §4165 hearing, then it committed an illegal exaction. If HUD incorrectly applied §1000.318 and failed to provide a hearing, it committed an illegal exaction. The question before this Court is not whether HUD applied §1000.318 correctly but whether HUD followed its own procedures in recapturing grant funds.

As shown above, a claim for illegal exaction is separate from a claim for the violation of a money mandating statute or regulation. *Ontario Power,* 369 F.3d at 1301. Although the two claims have been said to be "somewhat overlapping",

Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967), they remain separate bases for jurisdiction with different elements of proof. An illegal exaction claim, for example, can be established when the Government has exacted or withheld money due to the "misinterpretation or misapplication of statutes, regulations, or forms". *Aerolineas Argentinas v. United States*, 77 F.3d at 1564, 1572-73 (Fed. Cir. 1996). The Court of Claims has also retained jurisdiction where the government illegally exacted money by enforcement of a regulation that was invalid or contrary to statute. *Eversharp, Inc. v. United States*, 129 Ct. Cl. 772, 776 (1954). Additionally, the Court of Claims would continue to extend jurisdiction over illegal exaction claims based on violation of Constitutional provisions, without explicit language requiring repayment or return of funds, "when the exaction 'is based on an asserted statutory power.'" *Norman*, 429 F.3d at 1095 *(*quoting *Aerolineas Argentinas*, 77 F.3d at 1573); *United States v. Testan*, 424 U.S. 392, 401 (1976) (An illegal exaction claim under the Due Process clause exists only if money has been improperly exacted or retained by the government).

HUD argues that the Tribes must show, as an element of an illegal exaction claim, that the United States had been required to provide the money to the plaintiff in the first instance. HUD Br. at 16. To make this an element of an illegal exaction claim would subsume an illegal exaction claim into a claim for the violation of a money mandating statute. This Court's precedents are contrary to HUD's argument.

Instead, a claimant "must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation," *Eastport S.S. Corp.*, 178 Ct. Cl. at 605, and that the statute or provision itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000) (concluding that the Tucker Act provided jurisdiction over an illegal exaction claim based upon the Export Clause of the Constitution because the language of that clause "leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy")); *see Cencast Servs., L.P. v. United States*, 94 Fed. Cl. 425, 451 (Fed. Cl. 2010) ("to maintain an illegal exaction claim in this court, plaintiffs must demonstrate that a "statute or [regulatory] provision caused an exaction," and that the statute implies that the remedy is the return of the money." (citations omitted)).

This Court's precedents show that a money mandating statute is not an element of an illegal exaction claim. In fact, this Court has noted that the "classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the government." *Norman*, 429 F.3d at 1095. In that "classic illegal exaction claim" the United States never possessed the funds prior to the illegal exaction, and the plaintiffs in that classic example are, of course, not

required to show that the there was a money-mandating statute. Instead, as *Norman* states, the core of an illegal exaction claim is that the plaintiff has money and the United States takes that money without compliance with federal law. That is exactly what occurred here.

In the present matter, HUD claims that if it had followed its procedures, it would have been able to establish grounds to take the money at a hearing. Appx3-4. Hence, says HUD, there was no illegal exaction. That is the same sort of "perverse" reasoning that the Court rejected in *Fisher*, 402 F.3d at 1175. It is particularly inappropriate in illegal exaction claims where the focus is not on whether the government had the right to recover the money, but on whether the government followed the required procedures in effecting the recovery. In any case, the Tribes, of course, disagree that they could not have prevailed had HUD followed its required procedures (and, under the current procedural posture, this Court is required to assume that the United States is wrong). But the material issue here is that the United States did not follow the law. It is incorrectly attempting to escape the consequences of its unlawful action by arguing that the Tribes' right to the money in the first instance is an element of an illegal exaction claim. HUD does not cite any case from any Court which makes payment of the money by the United States in the first instance an element of a claim of illegal exaction, and as discussed numerous cases from this Court show that it is not an element.

The Tribes have made the required showing that the United States illegally exacted money from the Tribes. *Lummi II*, 106 Fed. Cl. at 633; *Lummi III*, 112 Fed. Cl. at 355, n.1. The Defendant has never disputed that it failed to follow the regulations under §4165, indeed it refused to do so. Where, as here, the government exacts money illegally in violation of a statute or regulation that confers a right upon the claimant to certain protections before that money is taken, return of that money is the "necessarily implicit" remedy for the violation of law. *Pennoni*, 79 Fed. Cl. at 561-62.

It is axiomatic that a federal agency must follow its own regulations and follow the mandate established by Congress. So long as a regulation is in existence it has the force of law. *United States ex Rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Accordingly, an action undertaken in violation of a regulation is invalid and must be undone. *Cruz Casado v. United States*, 553 F.2d 672, 675 (Ct. Cl. 1977). Similarly, administrative agencies are not free to ignore the mandate of Congress. *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737, 742 (Ct. Cl. 1978). In addition to following the command of Congress, agencies only hold those powers that have been delegated to them. *La. Pub. Ser. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act…unless and until Congress confers power upon it.").

Furthermore, even assuming *arguendo* that HUD could argue on the merits that each Plaintiff was not prejudiced by a lack of hearing, that avenue of discourse has been foreclosed. For example, in *Yellin v. United States*, 374 U.S. 109 (1963), the Court considered a Congressional Committee's violation of its own rules regarding a witness' right to request an executive session and the requirement that the Committee consider injury to the witness' reputation if an executive session were not granted. Relying on the prejudicial error decision discussed above, the Court expressly rejected the notion that the Committee's violation of its rules could be excused on the basis that the witnesses might not have prevailed even if the committee had followed its rules:

> Although the Court recognized that Accardi might well lose, even if the Board ignored the Attorney General's list of unsavory characters, it nonetheless held that Accardi should at least have the chance given him by the regulations... The same result should obtain in the case at bar. *Yellin might not prevail*, even if the Committee takes note of the risk of injury to his reputation or his request for an executive session. *But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV.*

374 U.S. at 120-21 (emphasis added).

Thus, the *Accardi* doctrine requires that HUD's illegal exaction be invalidated irrespective of whether a hearing would have produced the same result that HUD took in violation of its own regulations and the congressional

mandate. In this Court's illegal exaction cases, the focus is is likewise on whether the government followed the collection procedures required by law.[6]

The litmus test for whether HUD may argue the merits is not whether the agency would reach a certain conclusion had a proper hearing been held, but whether HUD's failure to abide by a congressional mandate and its own regulations caused harm to the Tribes' interest which the statutes and regulations were designed to protect. Clearly it did, and the failure to follow the protections mandated by Congress in sections 4161 and 4165 and in HUD's own regulations constituted an illegal exaction for which the remedy is clear. *Pennoni*, 79 Fed. Cl. at 561-62.

Accordingly, with respect to the Tribes' illegal exaction claim, this Court should not hold that the illegally exacted money must have come into the plaintiff's hand under a money-mandating statute, as to do so would render the fundamental protection afforded by Title IV of NAHASDA a dead letter. It would allow HUD to

[6] Other cases are in accord, *Eg.*, *Fausto v. Gearan*, 1997 U.S. Dist. LEXIS 23680, 34-35 (D.D.C. Aug. 21, 1997) (even if a person challenging an agency's failure to follow its hearing regulations "would have been ultimately unsuccessful if a hearing had been provided, denial of the procedural protections was not harmless error", *citing Gratehouse v. United States*, 512 F.2d 1104, 1108 (Ct. Cl. 1975) ("A prejudicial procedural error is not rendered harmless, however, because the merits of the dispute appear to be clearly against the employee")); *Mazaleski v. Treusdell*, 562 F.2d 701, 719 (D.C. Cir. 1977) ("a procedural error is not made harmless simply because the government employee appears to have had little chance of success on the merits anyway"); *Shidaker v. Carlin*, 782 F.2d 746, 751 (7th Cir. 1986) ("We are unconcerned with whether, absent the [procedural error], Koenigs would have reached the same decision"), vacated on other grounds and remanded, *Tisch v. Shidaker*, 481 U.S. 1001, on remand, 833 F.2d 627 (D.C. Cir. 1987).

escape its obligations by simply claiming that it would have reached the same result had it complied with its obligations under the law. This Court has never held illegal exaction claimants to such a standard. The focus instead is on whether HUD exacted or retained the Tribes' grant funds without complying with the prescribed procedures. As shown below, this is so even if returning the unlawfully exacted funds would result in a windfall.

A. HUD MAY NOT ARGUE THE MERITS AFTER IT VIOLATED A CONGRESSIONAL MANDATE AND ITS OWN REGULATIONS DESIGNED TO PROTECT THE TRIBES' INTERESTS.

HUD may not be permitted to argue the merits after failing to give a hearing under §4165 and the regulations thereunder. To do so would deprive the Tribes of their right to this court's defined remedy for an illegal exaction. Indeed, where there has been an illegal exaction, return of the exacted or retained funds is mandated even if it would result in a windfall to the claimant. *Pennoni,* 79 Fed. Cl. at 561-562 (citing *Stanley v. United States*, 140 F.3d 1023, 1024-25 (Fed. Cir. 1998); *O'Bryant v. United States*, 49 F.3d 340, 346 (7th Cir. Ill. 1995)). The fact that claimants can receive windfalls itself indicates that HUD is precluded from arguing the merits if it failed to follow the regulations under §4165 in the first instance. Further, it is both unfair and acts to violate the rights of the Tribes to be accorded their rights under 24 CFR §§ 1000.520-532 and 540 *before* their funds were recaptured.

The requirement that an agency follow and appropriately administer its own regulations is grounded in common sense and acts a safeguard against unfair treatment. The Supreme Court has declared that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). This rule has an even greater force when an agency violates its own published regulations. *E.g., Service v. Dulles*, 354 U.S. 363 (1957) (invalidating agency action where the agency failed to comply with its regulations granting procedural safeguards). From this understanding there has evolved a rule that prejudicial error analysis, or the argument that an individual or grantor was not prejudiced by an agency's failure to adhere to its own regulations, is not appropriate in cases where an agency violates a statutory mandate or its own procedural rules designed to protect the rights of individuals.[7]

These rules underscore why the remedy for HUD's failure to accord the protections accorded by §4165 and its underlying regulations is the return of the funds. Moreover, they underscore the appropriateness of this court's defined remedy where the government's failure to follow mandated procedures results in an illegal exaction of funds, which is the return of the funds. *Pennoni*, 79 Fed. Cl. at 561-62.

[7] This rule also applies to grant recipients. *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711-12 (D.C. Cir. 1985); *see United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 83-84 (D.D.C. 2011) (explaining *Massachusetts Fair Share*).

The delay caused by a remand, or belatedly allowing the government to justify its failure by asserting that it would have won on the merits anyway, belittles the rights of the Tribes, for whom the statute and regulations were designed to protect. *Lummi II*, 106 Fed. Cl. at 634.

There is an additional cogent reason why the court should order the prompt return of the funds without a remand and without affording HUD the belated opportunity to accord the hearing rights it has, to date, steadfastly refused to recognize. In cases where the federal government acts in the role of trustee for Indians, the rule of prejudicial error (i.e., you did not get a hearing because the government would have won anyway) has no place. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1336-1337 (10th Cir. 1982); *see Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982) (The trust responsibility owed by the federal government to Indians "suggests that the withdrawal of benefits from Indians merits special consideration"); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. en banc 1986) (adopting Judge Seymour's dissenting opinion in the initial panel decision, 728 F.2d 1555, 1567 (10th Cir. 1984)). In *Morton v. Ruiz*, the Supreme Court implicitly recognized that "stricter standards apply to federal agencies when administering Indian programs."

B. THE UNDISPUTED FACTS ESTABLISHED THAT HUD VIOLATED THE LAW WHEN IT EXACTED MONEY FROM THE TRIBES WITHOUT PROVIDING THE PREDEPRIVATION HEARING REQUIRED BY LAW.

As shown above, the correct source for procedural rights afforded to the Tribes would be found at 24 C.F.R. § 1000.520-532 and 540, and it is undisputed that the Tribes were not accorded those rights prior to HUD's action to reduce their funding. *Lummi II*, 106 Fed. Cl. At 633-34. 25 U.S.C. 4165, and the cited regulations, which further defines the Tribes rights under §4165, applies to the case at bar. *Lummi II*, 106 Fed. Cl. at 634. HUD failed to afford the Tribes their rights under 24 C.F.R. § 1000.532. *Id.* at 633 ("Providing plaintiffs with the opportunity for a hearing in this case before adjusting their grant amounts was therefore something HUD was required—but failed—to do."). The undisputed facts showed HUD's failure to provide the Tribes their procedural rights under NAHASDA and its implementing regulations.[8] Appx1632.

CONCLUSION

The Tribes respectfully request that this Court affirm the decision of the Court of Federal Claims, that 25 U.S.C. § 4111 and the implementing allocation formula are money mandating, which is then within the jurisdiction of the Court of Claims.

[8] Plaintiffs also contend that the procedural protections of § 4161 apply. The issue of the protections of both 4161 and 4165 applying was briefed in detail. Appx1084-1087.

The Tribes further request that this Court reverse the Court of Federal Claims' holding that a plaintiff cannot bring an illegal exaction claim unless the money unlawfully taken had initially been provided to the Plaintiff by the United States under a money-mandating statute. Instead, the United States is required to return the money to the Tribes because it took that money without following the procedures and conditions required by law and without establishing through those procedures that it had any right to take the money.

Dated: November 28, 2016

By: */s/ John Fredericks III*

John Fredericks III
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Ave.
Mandan, North Dakota 58554
(303) 673-9600
(701) 663-5103 Facsimile
jfredericks@ndnlaw.com

Jeffrey S. Rasmussen
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
(303) 673-9600
(303) 673-9155 Facsimile
jrasmussen@ndnlaw.com

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e).

__X__ The brief contains 10,526 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6)

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using _____ _____in a ___ characters per inch_____ font.

November 28, 2016 By: /s/ *John Fredericks III*
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I, Debra A. Foulk, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On **November 28, 2016**, counsel has authorized me to electronically file the foregoing **Plaintiffs-Appellees' Response Brief** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

David L. Levitt
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
Ben Franklin Station
P.O. Box 480
Washington, D.C. 20044
E-mail: david.levitt@usdoj.gov
Counsel for Defendant-Appellant
United States of America

Paper copies will also be mailed to the above principal counsel at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

November 28, 2016 */s/ Debra A. Foulk*
Debra A. Foulk, Legal Assistant