NO. 16-2196

IN THE 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.

APPEAL OF INTERLOCUTORY ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS
Case No. 08-cv-00848-EGB (Judge Bruggink)

CORRECTED OPENING BRIEF OF DEFENDANT-APPELLANT

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Dated: September 27, 2016

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STATEMENT OF RELATED CASES

Counsel is unaware of any other appeal in or from this civil action in this or any other appellate court within the meaning of Federal Circuit Rule 47.5(b). However, counsel is aware of cases on appeal in the United States

Courts of Appeals for the Ninth and Tenth Circuits, which were filed under the Administrative Procedure Act for relief other than money damages on allegations similar to the ones in this case[1]

JURISDICTIONAL STATEMENT

The Court of Federal Claims (trial court) filed an interlocutory order affirming its Tucker Act, 28 U.S.C. § 1491(a)(1), jurisdiction on September 30, 2015. Appx1–11. It certified this order for interlocutory review on April 20, 2016. Appx13–18. This Court granted our petition to appeal on June 8, 2016. Dkt. No. 9 (Fed. Cir. No. 16-124). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(d)(2).

STATEMENT OF THE ISSUES

1. The statute at issue, the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4243, provides that "For each fiscal year, the Secretary *shall* (to the extent amounts are made available to carry out this chapter) *make grants* under this section on behalf of Indian tribes – to carry out affordable housing activities . . . . .

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[1] *See Modoc Lassen Indian Housing Authority, et al. v. U.S. Dep't of Housing and Urban Development et al.*, and coordinated cases, Nos. 14-1313, 14-1331, 14-1338, 14-1342, 14-1407, 14-1484, and 15-1060 (10th Cir.); *Walker River Paiute Tribe v. U.S. Dep't of Housing and Urban Development et al.*, No. 16-15937 (9th Cir.); *Housing Authority of the Te-Moak Tribe of Western Shoshone Indians v. U.S. Dep't of Housing and Urban Development et al.*, No. 16-16127 (9th Cir.).

25 U.S.C. § 4111(a)(1) (emphasis added). The question is whether, despite the fact that grant money is subject to extensive conditions, including recoupment for failure to meet those conditions, the statute is money mandating, such that the Court of Federal Claims may exercise jurisdiction over a claim to NAHASDA grant money. *See United States v. Mitchell*, 463 U.S. 206, 217 (1983); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1008 (1967).

2. If NAHASDA's requirement is not money mandating, does the Government's alleged failure to provide a formal hearing under 25 U.S.C. § 4165 when adjusting grant amounts to recoup past overfunding, trigger liability for money on a theory of illegal exaction.

STATEMENT OF THE CASE

I. Statutory Background

NAHASDA, 25 U.S.C. § 4101 *et seq.*, replaced a number of Indian housing assistance programs administered by the United States Department of Housing and Urban Development (HUD) with annual block grants under the Indian Housing Block Grant (IHBG) program beginning in fiscal year 1998. *See* Pub. L. 104-330 (Oct. 26, 1996), §§ 107, 501–508. The block grant program's objective is, *inter alia*, "to assist and promote [housing] for occupancy by low-income Indian families." § 4131(a)(1).

The statute requires HUD to allocate capped annual appropriations among qualified Indian tribes according to a regulatory formula, 25 U.S.C. § 4151, and to "make grants," *id.* at § 4111(a), in the amounts allocated, except as otherwise provided in the Act, *id.* at § 4111(f). *See also e.g.*, Pub. L. 110-161, 121 Stat 2418 (Dec. 26, 2007) (appropriation for fiscal year 2008 NAHASDA block grants).

The formula for allocating available appropriations amongst eligible Indian tribes, upon which grant amounts are based, is established through a negotiated rulemaking procedure involving a committee of representatives of HUD and geographically diverse small, medium, and large tribes, § 4152(a) (cross-referencing § 4116). And it is "based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including [three factors]," § 4152(b). Included factors are (1) the number of housing units that were developed under a subsidy program repealed by NAHASDA; (2) the number of Indian families in the tribal area and the extent of poverty and economic destress within a tribe's area; and (3) "[o]ther objectively measurable conditions as [HUD] and the Indian tribes may specify." 25 U.S.C. § 4152(b)(1)-(3). In accordance with these procedures, HUD established the formula regulations at 24 C.F.R.

§§ 1000.301-1000.340. 63 Fed. Reg. 12,334, 12,364-12,367 (March 12, 1998).[2]

Once awarded, grantees are limited in how and when they may dispense the funds, which may be used only on statutorily specified activities in accordance with program requirements. Thus, grantees are accountable for their proper use of the grants under ongoing Federal oversight. 25 U.S.C. § 4111(g)-(h), for example, provides that "amounts provided under a grant under this section may be used only for affordable housing activities" or limited "administrative and planning expenses." Further requirements define those allowable uses, including, for example, Section 4111(c)–(e), which prohibits use for housing absent an agreement with local taxing authorities; Section 4115, which prohibits release of funds absent certified compliance with national environmental requirements; and Section 4131(b), which restricts the use of funds to activities serving primarily low-income Indian families in Indian areas. Section 4132 sets out what constitutes "eligible affordable housing activities." Section 4133 defines requirements for housing on which grant funds are used, such as

[2] All IHBG regulations are codified in 24 C.F.R. part 1000, and are established and amended from time to time through negotiated rulemaking, as required by § 4116. *See* 63 Fed. Reg. 12,334 (March 12, 1998); 72 Fed. Reg. 20,018 (April 20, 2007); 77 Fed. Reg. 71,522 (Dec. 3, 2012).

rent, maintenance, and insurance requirements. Section 4134 permits use of funds on certain types of loans and investments to carry out affordable housing activities as determined or approved by the Secretary. Section 4135 defines what qualifies as "affordable housing" under the Act.

Grant funds may also be repossessed, post-grant, further limiting grantees access to and use of grant amounts. Section 4161(a)(1), for example, provides that, in the event of a grantee's failure to comply substantially with the Act, the Secretary shall "(A) terminate payments under this Act to the recipient; (B) reduce payments [by the amount not expended in compliance with the Act]; (C) limit the availability of payments [to compliant activities]; or (D) [in cases addressed in section 4162], provide a replacement tribally designated housing entity for the recipient." Section 4165(d) also authorizes the Secretary to adjust amounts granted as a result of various findings of noncompliance with program requirements, providing that "the Secretary may adjust the amount of a grant made to a recipient under this Act in accordance with the findings of the Secretary with respect to . . . reports and audits [submitted to the Secretary under this section]."

II. Facts of The Case

Grantees are an Indian tribe and three tribal housing entities that qualified for and received NAHASDA block grants for the fiscal years at

issue. They allege that they were deprived of the amount of grant funds to which they were entitled for fiscal years 1998 through 2009 because: (1) the formula HUD applied was inconsistent with NAHASDA and, under a correct formula, they would have received larger grants, and (2) HUD did not provide a formal administrative hearing before determining they had erroneously been granted excess funds based on inaccurate formula data and then recovering those funds and basing future grants on corrected formula data. *See* Appx1.[3]

At issue in this case is one step of the multiple-step calculation used in the NAHASDA grant allocation formula. This step is rooted in 25 U.S.C. § 4152(b)(1), and further addressed by 24 C.F.R. § 1000.318, and concerns the exclusion of certain housing units developed with HUD funding under a pre-NAHASDA assistance program. Those units are referred to as Formula Current Assisted Stock or FCAS. *See* Appx2226 (¶20, Second Amended Complaint (SAC)). HUD regulations found at 24 C.F.R. § 1000.312 and 1000.314 establish which units initially count as FCAS in the formula, and Section 1000.318 establishes when those units no longer qualify. The

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[3] The trial court dismissed the claims concerning fiscal years 1998-2002 because they accrued outside the six-year period of the statute of limitations and, therefore, were beyond its jurisdiction. *Lummi Tribe of the Lummi Reservation v. United States,* 99 Fed. Cl. 584, 606 (2011) (*Lummi I).*

regulation prescribes that units no longer may be included in the formula when they have been or could have been conveyed to homebuyers. *See* Appx5; *see also* Appx3 (citing *Lummi Tribe of the Lummi Reservation v. United States*, 112 Fed. 353, 366 (2013) (*Lummi III*) (validating the regulation)).

In 2001, a HUD Office of Inspector General report concluded that, since the enactment of NAHASDA, HUD had improperly allocated NAHASDA funds among various grantees because the formula HUD applied included housing that did not qualify as FCAS. Appx5. Subsequently, HUD determined that the Grantees were among those granted more than their proper formula share because their past allocations included housing units that either did not exist or ceased to qualify as FCAS under 24 C.F.R. § 1000.318. *See* Appx6; *Lummi I,* 99 Fed. Cl. at 588. For the years at issue, HUD concluded that the Grantees had been overfunded by $863,236 (Lummi), $249,689 (Fort Berthold), and $964,699 (Hopi).

For instance, HUD determined that 15 nonexistent units had mistakenly been included in the FCAS data attributed to the Lummi Tribe in each fiscal year 1998 through 2003. Appx6-7. In a later instance, Lummi informed HUD that it had sold several units years previously, so they should not have been counted in FCAS data when HUD calculated formula

allocations in 2008 and 2009. Appx7. In another instance, the Hopi Tribal Housing Authority informed HUD that it had sold two units in 2002, but the units had erroneously been counted in its FCAS data in formula calculations through 2005. Appx7-8. The Fort Berthold Housing Authority informed HUD in 2010 that it had sold 20 units on various dates between 2001 and 2010, although the units had been counted in FCAS data through 2010. Appx8-9.

In all such instances, HUD eliminated the ineligible units from the FCAS data, and later recouped the excess funding by deducting the amount overfunded from subsequent grant allocations to the Grantee, sometimes in installments over a number of years. Appx6; Appx367; *see also Lummi Tribe of the Lummi Reservation v. United Sates*, 106 Fed. Cl. 623, 626 (2012) (*Lummi II*). In 2001, for instance, the credit line HUD granted to the Lummi Tribe was its formula share of appropriations available for block grants, minus the amount by which Lummi's credit lines granted in 1998, 1999, and 2000 exceeded its proper formula share. *Lummi I,* 99 Fed. Cl. at 588 ("HUD would account for the overfunding [in fiscal years 1998-2000] by adjusting the tribe's fiscal year 2001 grant."). Similarly, the record showed a "downward adjustment in the fiscal year 2000 grant allocation [for the Fort Berthold Housing Authority and the Hopi Tribal Housing

Authority] "based on 'FY 1998 and FY 1999 Adjustments'." *Id.* at 589 n.5.

With each determination, HUD informed the respective Grantee of the amount overfunded, the regulations on which HUD based its decision, the housing units that HUD found ineligible for inclusion in FCAS formula data, and provided the Grantee the opportunity to dispute HUD's findings regarding unit eligibility or appeal the determinations of overfunding under 24 C.F.R. § 1000.336. *See Lummi I*, 99 Fed. Cl. at 599.

III. Proceedings In The Trial Court

As relevant to this appeal, Grantees assert that HUD "has unlawfully reduced mandatory congressional grants by eliminating certain eligible units of plaintiffs' FCAS from HUD's grant calculation and otherwise acting unlawfully and in contravention of law." Appx2222, SAC ¶ 5. They claim they are entitled to "damages for those amounts that [HUD] unlawfully recaptured and/or withheld in grant funds." Appx2221-2222, SAC ¶1. They claim that HUD owes them a duty to "account for and compensate the Plaintiffs for the loss of block grant funding" (Appx2235, SAC ¶ 52 (Third Claim for Relief). Plaintiffs purport to bring their claims under the Tucker Act and the Indian Tucker Act, 28 U.S.C. §§ 1491(a)(1) and 1505. Appx2223, SAC ¶ 8.

As explained by the trial court, Grantees' claims rest on two basic

arguments. Appx17. First, the Grantees assert that HUD misapplied NAHASDA when, pursuant to 24 C.F.R. § 1000.318, it removed housing units from the FCAS data used to calculate their formula share of appropriations for annual block grants. *See id.* and Appx1. Second, the Grantees assert that, even assuming the formula complied with NAHASDA, HUD's removal of units and adjustment of the amount of a subsequent annual grant to recover amounts erroneously granted in the past constituted "illegal exactions" because HUD did not offer the Grantees a hearing under 25 U.S.C. § 4165 before doing so. Appx17.[4] The Grantees seek a replacement of the amount of grant funds HUD did not grant but should have, either because HUD did not count all eligible units in the FCAS data when calculating formula allocations amongst all tribes, or because HUD subtracted the amount previously over-allocated to the Grantees from the amount to be granted in a subsequent year. *See* Appx1.

The Government moved to dismiss the claims for lack of jurisdiction, explaining that NAHASDA's provision for block grants is not money-mandating. *See* Appx22. The trial court disagreed, holding that NAHASDA

[4] The trial court ruled in *Lummi II*, 106 Fed. Cl. at 630-34, that HUD's investigations to determine the accuracy of its FCAS data constituted reviews under § 4165 and, therefore, Grantees were entitled to a hearing pursuant to that section's implementing regulation, 24 C.F.R. § 1000.532.

"can fairly be interpreted as mandating the payment of compensation by the government." *Lummi I*, 99 Fed. Cl. at 594 (citing *Eastport S.S. Corp.*, 372 F.2d at 1009). That is so, the court reasoned, because "NAHASDA provides that the Secretary 'shall . . . make grants' and 'shall allocate any amounts' among Indian tribes that comply with certain requirements . . . and directs that the funding allocation be made pursuant to a particular formula." *Id.* The court concluded that "The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula." *Id.*

The trial court agreed with the Government, however, that HUD had provided the Grantees all of the procedural notice and hearing they were due and thus dismissed their second claim for relief, as HUD had provided notice and extensive "paper" hearings and appeals before recovering the overfunding. 99 Fed. Cl. at 598–599. The trial court later vacated that holding and permitted the Grantees to file a second amended complaint, which they did, this time alleging that the administrative procedures did not comply with NAHASDA and asserting a claim of illegal exaction on that basis. *See Lummi II*, 106 Fed. Cl. at 624 n.1.

The Government filed a motion to dismiss the illegal exaction claim, explaining that neither of the hearing provisions the Grantees relied on applied to the circumstances here. *See* Appx25. The court disagreed and

held that 25 U.S.C. § 4165 required HUD to provide a hearing pursuant to its implementing regulation at 24 C.F.R. § 1000.532. *Lummi II,* 106 Fed. Cl. at 631-34. Subsequently, the court held that 24 C.F.R. § 1000.318 was a valid formula regulation, *Lummi III*, 112 Fed. Cl. at 366, and reserved for trial the issue of whether HUD properly determined FCAS units in applying the formula. *Id.* at 355 n.2.

The case was then transferred to Senior Judge Bruggink, who ordered supplemental briefing to address a number of questions, including whether NAHASDA was money-mandating and whether that affected the Grantees' illegal exaction claim. *See* Appx15. On September 30, 2015, the court addressed the parties' supplemental briefs and cross-motions for summary judgment. The trial court reaffirmed its holding that NAHASDA is money-mandating, Appx4. It further rejected plaintiffs' assertion that "the remedy for failure to afford a hearing is, automatically, the return of monies," and so held that "the failure to give a hearing under section 4165 does not, on its own, support an illegal exaction claim." Appx5. The trial court explained that "[w]hat is money mandating are the substantive provisions of NAHASDA, not its procedural elements," and "nothing in the statutory framework . . . suggests that the remedy for failure to afford procedural rights is, without further proof of entitlement, the payment of money." *Id.*

Accordingly, the Government "only committed an illegal exaction if 24 C.F.R. § 1000.318 was improperly applied." *Id.* Because material issues of fact remained as to that question, the court set the case for trial. Appx9–10.

While the Government then sought a certification for interlocutory appeal concerning the court's money-mandating holding, the Grantees sought reconsideration of the court's illegal exaction holding. See Appx35. On April 20, 2016, the trial court denied the reconsideration request, and certified its September 30 order for interlocutory review because the question of whether NAHASDA's provision for housing block grants is money-mandating is a controlling question of law as to which there is substantial ground for difference of opinion given that this Court has never squarely addressed the issue of whether a statutory grant subject to an ongoing relationship and, arguably, to administrative discretion, is money-mandating. Appx17–18.

SUMMARY OF THE ARGUMENT

The trial court erred in holding that NAHASDA's provision that the "Secretary shall . . . make grants" qualifies the statute as "money mandating" for jurisdictional purposes. Taken out of context, that language may seem to resemble other congressional expressions of intent to waive the Government's immunity for Tucker Act claims – generally, statutes

requiring the Government to pay money to compensate for supplies, services, or a specified injury. The remainder of the statute, which provides the purpose and attendant limits of such grants, however, shows NAHASDA has little in common with statutes held to be money mandating.

Indeed, unlike compensatory, money mandating statutes, intended for the specified recipient, NAHASDA requires only that the Secretary make funds available to grantees for specified undertakings for the benefit of others, program beneficiaries. To ensure those purposes are met, the expenditure and management of those funds involves a continuing relationship between the Government and the grantee; the funds are subject to a host of conditions; the funds may be recouped for a variety of reasons; and the funds never become property of the grantee – indeed, the Government retains a beneficial interest in the funds and in items purchased with the funds.

In sum, unlike "money mandating" payments, which compensate for past injuries or services and become the property of the payee in recognition of their past injury or service, NAHASDA grants do no such thing. Under these circumstances, Congress could never have intended the Court of Federal Claims to pay money to a grantee for its unfettered use, over a dispute about whether grant amounts are proper.

In *National Center For Manufacturing Sciences v. United States,* 114 F.3d 196, 200-201 (Fed. Cir. 1997) (*NCMS*), this Court reviewed a similar claim, concerning a similarly-constrained grant program. There, reviewing a district court order transferring a grant claim to the Court of Federal Claims, this Court concluded that the true nature of the claims presented, as here, was to adjust the continuing funding relationship between the parties, and not a suit for compensation amenable to Claims Court jurisdiction. In reaching that conclusion, the Court noted that the grantee "would not be entitled to a monetary judgment that would allow it to use the funds appropriated under the Act for any purpose, without restriction," *id.* at 201, and that, in light of these "restrictions governing the manner in which money may be allocated to NCMS, it thus seems reasonably clear that a simple money judgment issued by the Court of Federal Claims would not be an appropriate remedy, even if NCMS is entitled to obtain access to the remaining [funds] on some terms." *Id.*

That reasoning applies here. Although this case may have potential money consequences, it is not a suit for Tucker Act damages. *See Samish Indian Nation v. United States,* 90 Fed. Cl. 122, 132 (2009) (holding that "statutes creating federal grant-in-aid programs are not designed to provide for a damages remedy"). Indeed, as plaintiffs admit in the SAC, what they

seek to recover is "those amounts that [HUD] unlawfully recaptured and/or withheld *in grant funds.*" Appx2222, SAC ¶ 5 (emphasis added). In light of the continuing nature of a NAHASDA grant relationship, what plaintiffs seek, in effect, and at best, all they are entitled to seek, is a declaration concerning how their grant ledger is to be adjusted going forward, not an order to put money in their pockets. The trial court erred in concluding otherwise, as the Court of even assuming the Government was required to provide a hearing before recovering the grant amounts it had overfunded, violation of that relationship. *See NCMS,* 14 F.3d at 201-2 (looking behind the complaint to the true nature of the action and concluding that the claimant "would not be entitled to a monetary judgment that would allow it to use the funds appropriated under the Act for any purpose, without restriction.").

Finally, the trial court was correct in rejecting the Grantees' claim that money was illegally exacted when the Government failed to provide a hearing before reducing the amount subsequently granted in order to recover amounts previously granted in excess of the formula amount. The trial court properly held that, even assuming the Government was required to provide a hearing before recovering the grant amounts it had overfunded, violation of that procedural right does not mandate compensation in damages – and until

the Grantees establish that they are entitled to the claimed amounts, they cannot establish that the Government has their money in its pocket. Appx4-5.

ARGUMENT

I. Standard Of Review

Subject matter jurisdiction is a question of law that this Court reviews de novo. *Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353, 1358 (Fed. Cir. 2008). The Court also "reviews without deference the trial court's statutory interpretation." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005). The plaintiff bears the burden of establishing jurisdiction. *Hopi Tribe v. United States*, 782 F.3d 662, 666 (Fed Cir. 2015).

II. Tucker Act Claims and the Money Mandating Requirement

A. Introduction

The jurisdictional statutes at issue here, the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505, which extends the Tucker Act to claims by Indian tribes, authorize the Court of Federal Claims to exercise jurisdiction over claims "'founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort.'" *Hopi Tribe v. United States*, 782 F.3d 662, 666 (Fed. Cir. 2015) (quoting 28 U.S.C. § 1491(a)(1)).

In determining its jurisdiction, the trial court relied on 25 U.S.C. § 4111(a)(1), which provides that:

> For each fiscal year, the Secretary shall (to the extent amounts are made available to carry out his chapter) make grants under this section on behalf of Indian tribes --
>
> **(A)** to carry out affordable housing activities under . . . this chapter; and
>
> **(B)** to carry out self-determined housing activities for tribal communities programs . . . .

25 U.S.C. § 4111(a)(1)*; see Lummi I,* 99 Fed. Cl. at 593-94.

The court further rested its jurisdiction on 25 U.S.C. § 4151, NAHASDA's allocation provision, which states:

> For each fiscal year, the Secretary shall allocate any amounts made available for assistance under this chapter for the fiscal year, in accordance with the formula established pursuant to section 4152 of this title, among Indian tribes that comply with the requirements under his chapter for a grant under this chapter.

25 U.S.C. § 4151; *see Lummi I,* 99 Fed. Cl. at 594.

Analyzing the import of these provisions, the trial court held NAHASDA is "money mandating because it leaves no room for HUD to exercise discretion *in making grants*." *Id.* at 594 (emphasis added). That is

so, the court reasoned, because NAHASDA provides that the "Secretary *shall* … make grants," "*shall* allocate any amounts" among Indian tribes that comply with certain requirements, and directs "that the funding allocation be made pursuant to a particular formula." *Lummi I,* 99 Fed. Cl. 594.

There is, of course, a surface appeal to that logic, inasmuch as this Court has often found statutes to be money mandating on the strength of the word "shall." *E.g., Greenlee County. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007). The problem here is that unlike *Greenlee County.*, unlike the other case cited by the trial court, *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003), and unlike any other case the court could have cited for the same proposition, the statute here nowhere commands that the Secretary "pay" or requires a "payment," a significant distinction.

As discussed below, those statutes that have been deemed "money mandating" are ones where the Government is required to pay money, in exchange for a service or as a substitute for an injury identified by law as compensable. *See, e.g., Eastport S.S. Corp.,* 372 F.2d at 1008; *see also Black's Law Dictionary* (10th ed. 2014), (defining "pay" as "To give money for a good or service that one buys; to make satisfaction;" "To transfer money that one owes to a person, company, etc. <pay the utility bill>;" "To give (someone) money for the job that he or she does; to compensate a

person for his or her occupation; compensate;" "To give (money) to someone because one has been ordered by a court to do so <pay the damages>"); *Bowen,* 487 U.S. 900 n. 31 ("It seems likely that while Congress intended 'shall pay' language in statutes such as the Back Pay Act to be self-enforcing—*i.e.*, to create both a right and a remedy—it intended similar language in § 1396b(a) of the Medicaid Act to provide merely a right, knowing that the APA provided for review of this sort of agency action.").

By contrast, as discussed further below, NAHASDA mandates only that the Secretary "make grants," but "amounts provided under the grant . . . may be used only for affordable housing activities . . . ." 25 U.S.C. §§ 4111(a) and (g). As we discuss in the next section, money transferred to grant recipients is not intended to compensate grantees for anything. Indeed, all that making a grant does is to establish a money-funneling regime or relationship, in which the grantees never own the money, but dispense it over time, under continuing Government oversight, for the benefit of Native Americans in need of decent, affordable housing.

B. The Nature of Tucker Act Claims

The Tucker Acts do not themselves create any substantive right to money. *Hopi Tribe*, 782 F.3d at 666 (citing *United States v. Navajo Nation*,

556 U.S. 287, 290 (2009) (*Navajo II*)). "[T]hey are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *Navajo II*, 556 U.S. at 290. Thus, a claimant seeking a Tucker Act remedy "must assert a claim arising out of other sources of law specified in the Act, such as a statute or contract. *Hopi Tribe,* 782 F.3d at 666. This Court has explained, however, that "not any claim arising out of these sources of law will do." *Id*; *accord Eastport S.S. Corp.,* 372 F.2d at 1007 ("it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here."); *see also Katz v. Cisneros*, 16 F3d 1204, 1207-08 (Fed. Cir. 1994) ("That a payment of money may flow from a decision that HUD has erroneously interpreted or applied its regulation does not change the nature of the case").

In describing what sources of law "will do," this Court and the Supreme Court have consistently described those sources as providing compensation or damages.[5] *E.g., United States v. Navajo Nation, 556* U.S.

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[5] In the APA context, the Supreme Court has defined the term "money damages" as "a sum of money used as compensatory relief . . . . given to the plaintiff to substitute for a suffered loss . . . ."). *Bowen,* 487 U.S. at 895; *see also* Black's Law Dictionary (10th ed. 2014) (defining damages as "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury," and "common-law damages" as a "court-ordered monetary award

287, 290 (2009) (Tucker Act substantive source described as "mandating compensation by the Federal Government") (quoting *United States v. Testan*, 424 U.S. 392, 400 (quoting *Eastport S.S. Corp.* 372 F.2d at 1009)); *United States v. Mitchell*, 463 U.S. 206, 216, 103 S. Ct. 2961, 2968 (1983) (*Mitchell II*) (source described as "mandating compensation . . . for the damages sustained") (quoting same); *Hopi Tribe*, 782 F.3d at 667 (substantive source must mandate "compensation for damages").

Further, the implied right to compensation may not rely on a theory of damages not firmly grounded in the substantive source, as correctly interpreted. This Court's predecessor explained that, for example, an invalidly convicted criminal defendant cannot obtain compensation for his loss under the Tucker Act because the substantive source that voids the conviction does not, as interpreted, "direct the payment of damages for the consequences of the illegality." *Eastport S.S. Corp.*, 372 F.2d at 1008-1009.

Thus, as *Eastport S.S. Corp.* explained, familiar Tucker Act claims include claims such as a reverse eminent domain suit to enforce the Constitutional provision for "just compensation" for a public taking; a "suit by a separated reserve officer for disability retired pay," an "action for back

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intended to return an injured party, as nearly as possible, to the position that party occupied before suffering harm.").

pay occasioned by a wrongful dismissal from the civil service, a "claim for compensation for flood damage authorized by statute." *Id.* at 1008. As the Supreme Court explained in *Bowen*, "these laws attempt to compensate a particular class of persons for past injuries or labors." *Bowen,* 487 U.S. at 905 n.42.[6] "In contrast," the Court noted, "the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures." *Id.*

This Court has consistently applied the rule that a statute is money-mandating where it evinces an intent to compensate the plaintiff for a past service or injury. In *Greenlee County*, 487 F.3d 871, for example, this Court found money mandating the Payment In Lieu Of Taxes Act (31 U.S.C. § 6901 et seq.), a grant statute enacted to "compensate[] local governments for

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[6] The trial court deflected the Court's statement, explaining that the Court's statement was aimed at distinguishing between "suits seeking a 'naked money judgment' and suits seeking the prospective adjustment of an ongoing relationship between the parties . . . noting that 'suits brought under these [compensation] statutes do not require the type of injunctive and declaratory powers that the district courts can bring to bear in suits under the Medicaid Act)." 99 Fed. Cl. 597. This case, the court concluded involved the "naked money judgment" claim, not requiring prospective adjustment. Respectfully, the court's distinction begs the question. Although plaintiffs no doubt purport to seek a "naked money judgment," as we explain, the statute does not afford it precisely because of the prospective nature of its grants and the restrictions placed on those grants.

the loss of tax revenue resulting from the tax-immune status of federal lands located in their jurisdictions, and for the cost of providing services related to these lands."

In *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), the Court examined, and found money mandating, a statute designed to "compensate citrus growers for trees destroyed by the State of Florida due to an outbreak of citrus canker."

In *Chula Vista City School District v. Bennett*, 824 F.2d 1573, 1576 (Fed. Cir. 1987), the Court entertained a claim under the Department of Education's "Impact Aid" program, which, as this Court explained, "grew out of the unprecedented mobilization and war production program necessitated by World War II." That, in turn, "often caused hardship to local school districts in the area of the activity because of the large amounts of real property that were removed from the tax rolls at the same time the population increased dramatically." 824 F.2d 1576. The purpose of the statute, therefore, was to "compensate school districts in reasonable amounts for the cost of educating children who, because they reside on tax-exempt Federal property or because their parents are employed on such property, do not in effect pay their own way." *Id.* at 1582.

In *Kanemoto v. Reno*, 41 F.3d 641, 642-43 (Fed. Cir. 1994), the Court found money mandating the Civil Liberties Act of 1988, an act "passed in recognition of the fundamental injustices committed against American citizens and resident aliens of Japanese descent during World War II." As this Court explained, the act "provides for 'restitution to those individuals of Japanese ancestry who were interned," and required a payment of $20,000 to qualified former internees. *Id.* at 643. The very purpose of the Act, therefore, was to compensate former internees with a simply money payment for the harm of internment.

We acknowledge that, in *Kanemato,* this Court rejected the district court's decision characterizing the claims at issue there as "not one for money damages." 41 F.3d at 646. Citing *Bowen* footnote 31 (Court of Federal Claims jurisdiction "not expressly limited to actions for 'money damages,' ... whereas that term does define the limits of the exception to § 702"), this Court held that *Bowen* reaffirmed Claims Court jurisdiction "over causes of action for payment of money other than damages, including statutory causes of action, such as the Back Pay Act." *Id.* As noted, the Court went on to hold that the Act there was money mandating because it provided that the Attorney General "shall pay" eligible individuals. Indeed footnote 31 specifically refers to the "many statutory actions over which the

Claims Court has jurisdiction that enforce a statutory mandate to pay," and *Kanemoto* is one such, but that does not address our point.

Our point is that, in discerning whether Congress intended a particular statute to be money mandating, it is useful to compare that statute to those that have been held to be money mandating. Moreover, it is not clear what the Court meant by "damages," but it was not the compensatory nature of money mandating statutes, which, as we have explained, the grant at issue in *Kanemoto* clearly was. As explained, those statutes are those in which Congress has required a "payment" to compensate for services or supplies provided or specified harm incurred.

As for *Bowen's* footnote 31 itself, it referred to footnote 42, discussed above. It stated that it was not clear in that grant-in-aid case that the Claims Court would have jurisdiction over a disallowance decision. But footnote 42 only reinforces our point, which is that what matters in determining whether a statute is money mandating is what Congress intended. As we discuss further below, nothing in NAHASDA suggests Congress intended to create a money mandating remedy. Unlike those statutes that require compensation for some past service or injury, and the money mandate is intended to ensure the Government will "render prompt justice against itself," NAHASDA simply provides funding to be spent in the future, in

service of a Government objective, which never will become the property of the grant recipient.

III. NAHASDA Does Not Mandate Pay; It Mandates An Offer To Participate In A Program to Provide Decent, Affordable Housing To, Primarily, Low-Income Indian Families

A. Introduction

As noted above, the trial court's error was in too easily equating NAHASDA with established money mandating substantive sources, by virtue of its "shall make grants" provision. As we explain in this section, NAHASDA has nothing in common with those sources. Below, we identify the distinct nature of NAHASDA in two particulars: (1) rather than being a source of compensation for the grantees, it is a source of funding for service to program beneficiaries, in whose service grantees are provided program funds subject to restrictions and continuing Government oversight; (2) those funds are paid subject to appropriations. Thus, we explain, Congress could not have intended NAHASDA to be a "money mandating" source of damages, as the payment of damages would free the Grantees from the very restrictions to which Congress intended to subject them, and exceed Congress's specific limitation of these funds to the appropriated amounts.

B. The Nature of NAHASDA Grants

1. Introduction

Unlike the compensatory nature of established money-mandating sources, NAHASDA does not require HUD to "pay money" to accommodate a loss or injury; indeed, even when paid, the money is not the grantees at all. Rather, it is to be applied by them to prescribed goals, subject to restrictions, for the benefit of others. A Tucker Act judgment does not match this scheme.

This distinction – compensatory payments on the one hand, and those intended to support restricted, continuing governmental purposes on the other -- was central to this Court's holding in *National Ctr. for Mfg. Sciences v. United States*, 114 F.3d 196 (Fed. Cir. 1997) (*NCMS*). There, the Court examined whether a district court possessed jurisdiction to entertain a grant claim under the Administrative Procedure Act (APA) and, therefore, erred in transferring the claim to the Court of Federal Claims – not precisely the question we examine here, but the other side of the same coin. In doing so, the Court considered two elements essential to the district court's jurisdiction: (1) whether the suit sought "money damages (5 U.S.C. § 702); and (2) whether plaintiff had "no other adequate remedy in a court."

At issue was an appropriation act, requiring the Air Force to make available a certain sum to the plaintiff to assist in a particular research program. The Air Force made a portion of the sum available and NCMS sued for the remainder. In reversing the transfer order, the Court first observed that NCMS was seeking release of remaining funds. That, the Court held, was not a "demand for money damages." Invoking the distinction discussed above, the Court held that a damages demand is one for "money in compensation for losses that [plaintiff] has suffered or will suffer as a result of the withholding of those funds." *Id.* Thus, the Court concluded, 5 U.S.C. § 702 was no impediment to APA jurisdiction.

In considering the applicability of 5 U.S.C. § 704, the court noted that NCMS "would not be entitled to a monetary judgment that would allow it to use the funds appropriated under the Act for any purpose, without restriction." 114 F.3d at 201. "Instead," the Court added, "the Act requires that NCMS use any money disbursed from the appropriated funds to perform basic and applied research functions called for in the Act." The Court went on then, to conclude that "[i]n light of the restrictions governing the manner in which money may be allocated to NCMS and spent, it thus seems reasonably clear that a simple money judgment issued by the Court of Federal Claims would not be an appropriate remedy." *Id.* In reaching its

decision, the Court distinguished the case before it with "the kind of statute that the Supreme Court in *Bowen* identified as falling squarely within the competence of the Court of Federal Claims," *i.e.,* one that "provided 'compensation for specific instances of past injuries or labors.'" 114 F.3d at 202 (quoting *Bowen*, 487 U.S. at 905 n.42).[7]

As we explain in section 3, below, NAHASDA is precisely the kind of program that led the Court to conclude that the NCMS claim was not a Tucker Act claim.

2. NAHASDA Payment Controls and Restrictions

The purpose of NAHASDA grants is to help Indian tribes provide affordable housing for primarily low-income Indian families in the tribal area. *See* 25 U.S.C. § 4131(a) (primary objective is "to assist and promote affordable housing activities to develop, maintain, and operate affordable

[7] We expect the Grantees to insist that theirs is a past injury, as they were not provided additional grant funds in the past. But that is simply a consequence of the passage of time (as it was in *Bowen*). The nature of the dispute, however, is the same, whether the Secretary has properly administered this program. The funds at issue are paid in advance, according to available appropriations. If the Grantees are not entitled to possess those funds in the first instance, the fact that they were not provided them is of no moment. Indeed, it is axiomatic that Federal funds may be spent only for the purposes for which they are intended and according to the conditions placed upon them, which as we explain below, are quite detailed. *E.g., OPM v. Richmond,* 496 U.S. 414 (1990).

housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low-income Indian families."). Thus, NAHASDA requires that "amounts provided under a grant . . . may be used only for affordable housing activities." § 4111(g)[8].

In fact, as we explain below, a NAHASDA grant is unlike a "payment" provided under a money mandating statute. The receipt of a money mandated payment effectively balances the books and ends the matter; receipt of a grant opens the books, initiating a fund dispensing and management relationship between HUD and the grantee, in which payments are conditional, paid out over time, may even be rescinded, never become the property of the grantees, and are continually measured and managed to ensure they are spent to achieve grant purposes. Thus, a damages award of the sort Grantees seek, one that would simply deposit unrestricted amounts in Grantees' pockets, to be expended as they wish, could never have been intended by Congress.

NAHASDA provides that the Secretary "shall make grants," the Act does not specify how much, inasmuch as grants are limited "to the extent

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[8] The statute specifies the "Eligible Affordable Housing Activities" from which grantees may choose. 25 U.S.C. § 4132 ("Eligible Affordable Housing Activities").

amounts are made available," *i.e.,* appropriated. 25 U.S.C. § 4111(a). In addition, the statutory provision defining "grant amounts" states only that amounts shall be allocated according to section 4151, "except as provided in this Act." 25 U.S.C. § 4111(f). Section 4151, in turn, references a regulatory formula, which is established pursuant to section 4152. Grants may be used over extended periods. *See* 25 U.S.C. § 4133(f) (any amount of a grant that is not used by the grantee during that fiscal year may be used in a subsequent fiscal year). Whatever the grant amount, however, the grant does not vest upon being granted, never becomes the property of the grantee, and is subject to continued Government oversight, including rescission.

As noted, this system has several features antithetical to what a damages award would provide. *First*, the funds never become the property of the grantee and are not intended for the grantee's emolument or pecuniary benefit. Rather, the money must flow immediately to costs for public benefits to others, 2 C.F.R. § 200.305(b)(1); interest a grantee might earn on money between the time of payment by the Government and expenditure on an allowable cost belongs to the Government and must be returned to the Treasury, *id.* at § 200.305(b)(9);[9] a grantee is not entitled to a fee or profit

[9] NAHASDA allows for limited investment of block grant funds "for purposes of carrying out affordable housing activities . . . as approved by the Secretary," § 4134(b), and so interest earned by a grantee outside this

from grant-funded activities, *id.* at § 200.316 (property acquired by a grantee with grant funds must be held in trust by the grantee as trustee for the beneficiaries of the program under which the property was acquired). These grant administration regulations are made applicable to NAHASDA block grants by reference in NAHASDA regulation 24 C.F.R. § 1000.26.[10]

Second, the proceeds of a grant (including transferred funds or items purchased with those funds) must continue to be used for grant purposes. *E.g.,* § 4139 (housing assisted with NAHASDA grant funds must remain affordable for its entire "useful life"; if the housing is used for ineligible, non-low-income families, HUD must take action under § 4161(a), which may involve terminating, reducing, or limiting payments under a grant); *see also* 2 C.F.R. § 200.302(b)(4) (grantee must have adequate management

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proscription belongs to the Government and must be returned to the Treasury. *See Muscogee (Creek) Nation Division of Housing v. United States HUD*, 698 F.3d 1276, 1284 (10th Cir. 2012) ("HUD was authorized—indeed, required—to demand remittance of interest earned in violation of [the regulatory requirement that investments of block grant funds not exceed two years in length]").

[10] The NAHASDA regulations also provide for tribally-determined administration standards, but these must "meet or exceed" those referenced in 24 C.F.R. §1000.26. 24 C.F.R. § 1000.28. While the regulatory references to applicable administrative regulations were updated in 2015, the requirements applicable in the years at issue here are substantively the same. *See* 80 Fed. Reg. 75931 (Dec. 7, 2015); 24 C.F.R. § 85.1; 24 C.F.R. § 1000.26 (2014) (cross-referencing 24 C.F.R. part 85).

systems in place to satisfy its continuing accountability for all grant funds, and grant-funded property and assets); 2 C.F.R. § 200.313–314 (as modified by 24 C.F.R. § 1000.26(a)(8)–(9)) (equipment and supplies bought with grant funds must continue to serve NAHASDA or other Federal programs until no longer needed, at which point, residual value of items must be returned to allowable uses as "program income").

Third, the amount of the initial grant may, properly, never be paid to the grantee. For example, even if a grant is made in a sufficient amount and the grantee incurs an allowable cost, the grantee still is not necessarily entitled to grant moneys for that expense because payments under a grant may be terminated or reduced pursuant to § 4161(a) (authority to terminate, after hearing, payments if grantee fails "to comply substantially with any provision of this chapter.").[11]

Similarly, "the Secretary may adjust the amount of a grant made to a recipient," if, pursuant to an audit or review, the Secretary determines that the grantee has not carried out eligible activities in a timely manner, in compliance with NAHASDA, or in accordance with the grantee's "Indian housing plan." 25 U.S.C. § 4165(d). These accountability measures follow

[11] Judicial review of any such termination of payments is in a regional court of appeals. 25 U.S.C. § 4161(d).

from the Government's ongoing monitoring a grantee's activities. For example, at the end of each year, grantee's must submit an Annual Performance Report that sets forth how the grantee's "use of grant amounts provided," "the relationship of such use to the planned activities identified in [its] housing plan," and "indicate programmatic accomplishments." 25 U.S.C. § 4164; *and see* § 4165(a)(1)(B) (Secretary may review to "verify the accuracy of information contained in any performance report submitted [under § 4164]").

Given these restrictions on the payment and expenditure of grants, Congress could not have intended that NAHASDA provide a damages remedy for Grantees, as a result of a dispute for how large a grant should be. The gravamen of Grantees' complaint is that they were not given a sufficient grant award (or awards were trimmed back after initial award), but that complaint is far removed from a right to put money in their pockets, which is precisely what an award of damages would do.

Indeed, even if HUD misapplied the formula and adjusted grant amounts without a hearing, those failures are several steps removed from any entitlement in the Grantees to an amount of money. *First*, NAHASDA creates no fixed legal entitlement to the formula amount. *Second*, there can be no legal entitlement to money absent performance under the grant

generating an allowable cost for an eligible activity. *Third*, even assuming the NAHASDA grants between 2003 and 2009 were properly calculated and should not have been adjusted, Grantees still would have acquired no unconditional right to payment under those grant amounts by virtue of 25 U.S.C. § 4161. *Fourth*, Grantees would not, in any case, have acquired private title to money or its value because the grant funds could only inure to the benefit of others.

As other courts have found, the limited rights afforded grantees over grant funds makes them more akin to intermediary custodians of those funds.[12] *E.g.*, *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 432 (7th Cir. 1988) (Posner, J.) (debtor-grantee is "a trustee, custodian, or other intermediary, who lacks beneficial title" to the funds and items purchased therewith; grants are not "like payment under a contract"); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 243–253 (holding that HUD grant funds were not property of the debtor-grantee in

[12] Criminal cases too have noted the abiding nature of grant funds as Government property. *E.g., Dixson v. United States*, 465 U.S. 482, 486-91 (1984) (grantee official met the definition of a "public official" "acting for or on behalf of the United States," and was therefore subject to conviction for taking bribes from contractors used on grant activities); *Hayle v. United States*, 815 F.2d 879 (2d Cir. 1987) (affirming conviction for embezzlement of Government funds for misusing grant funds).

bankruptcy, discussing *In re Joliet Will* and explaining, *inter alia*, that "a HUD-type grant recipient is not itself the beneficiary, but acts as an intermediary administering those moneys for the benefit of the ultimate recipients of the federal assistance"); *see also Bell v. New Jersey*, 461 U.S. 773, 790 (1983) (state does not own misused grant funds).

3. NAHASDA Funding Limits

In *Greenlee County v. United States*, 487 F.3d 871 (Fed. Cir. 2007), this Court recognized that even when Congress creates a right to compensation, it may limit the Government's liability to the amount of capped appropriations where the obligation is made "subject to appropriations." 487 F.3d at 878.

In NAHASDA, Congress provided that HUD "shall (to the extent amounts are made available to carry out this Act) make grants . . . ." 25 U.S.C. § 4111(a); *see e.g.*, Pub. L. 110-161 (Dec. 2007), 121 Stat 2418 (fiscal year 2008 NAHASDA appropriation). Congress further provided that "[f]or each fiscal year, the Secretary shall allocate any amounts made available for assistance under this Act for the fiscal year" among all qualified Indian tribes according to the formula. 25 U.S.C. § 4151. Thus, Congress has specified that no grantee is entitled to more than a share of the amount appropriated and that all appropriate amounts must be provided to

qualifying tribes. Congress has, therefore, capped the amount of money that may be spent under a grant – and required that it be spent under a grant, leaving no room for out of program adjustments, such as that the Grantees seek here. *See, e.g. Star Glo,* 414 F.3d at 1354 ("[T]he GAO Redbook also recognizes that '[t]he 'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum (both maximum and minimum"); *Greenlee County,* 487 F.3d at 878-79 (appropriation language stating that "amounts are available only as provided in appropriation laws caps the Government's liability to the amount in the appropriation law").

Since NAHASDA reflects a capped appropriation, and the entirety of available appropriations must be directed through the allocation and then to the grants, the statute does not contemplate any authority to provide Federal money except under a grant. This closed universe of funding contradicts any inference that Congress intended additional liability under the Tucker Act.

C. Summary

In sum, NAHASDA grants, like grants under similar restricted-use grant programs, are not so much given *to* a grantee, but made available *for* the grantee's use on activities that are public benefits, subject to the Federal Government's retained interest and the public's trust. The nature of this relationship controverts any inference that, in passing NAHASDA, Congress

intended to mandate the payment of an unrestricted money judgment to grant holders dissatisfied with the agency's administration of the grant program.

IV. Grantees Fail To State An Independent Illegal Exaction Claim

Grantees contend that HUD "unlawfully exacted" the funds sought by "recaptur[ing], adjust[ing] and/or exclu[ding]" them "without (1), finding that plaintiffs 'failed to comply substantially' with any provision of NAHASDA . . . and (2) providing notice and opportunity for a hearing," pursuant to HUD regulations. Appx2233-2234; SAC ¶ 48, 47. Before the trial court, Grantees argued that reducing their funding without following these prerequisites automatically entitled them to the funds sought under a theory of illegal exaction. The trial court summarized the question presented as "whether HUD's failure to provide plaintiffs with a section 4165 hearing resulted in a *per se* illegal exaction. Appx4–5.

In *Lummi IV,* the court answered that question in the negative, explaining that, "[t]here is nothing in the statutory framework which suggests that the remedy for failure to afford procedural rights is, without further proof of entitlement, the payment of money." *Id.* at 5. The court explained that "[t]he government only has plaintiffs' money in its pocket, and therefore only committed an illegal exaction, if 24 C.F.R. § 1000.318 was improperly applied." *Id.*; *and see Eastport S. S. Corp.*, 372 F.2d at 1008

(describing illegal exaction cases as those in which "the Government has the citizen's money in its pocket") (quoting cases); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996) (same).

In its order of April 20, 2016, the court summarized its earlier finding as follows: "In other words, HUD only illegally exacted the funds if plaintiffs were substantively entitled to them pursuant to NAHASDA's implementing regulations." Appx31. The court then noted, "fact issues are present" that precluded the resolution of that issue. In certifying the question, the court further explained, "[a]n illegal exaction occurs when the government, in violation of law or regulation, exacts from plaintiffs money to which plaintiffs are substantively entitled. However, plaintiffs are entitled to the grant funds only if NAHASDA mandates that entitlement. Thus, if NAHASDA is not money-mandating, then plaintiffs have no substantive entitlement to the grant funds, and their illegal exaction claim also fails." Appx34.

This simple, but we think, inescapable logic, requires little explanation. Indeed, the court was only following this Court's instruction that "[t]o invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that 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.'" *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).[13]

Plaintiffs have failed to identify any basis that might support the "gotcha" remedy they propose: that if the agency erred administratively in failing to conduct a hearing to determine whether Grantees should have been awarded any funds, Grantees' prize is they get them automatically. If anything, the logical remedy would appear to be a remand to the agency for the hearing, where program administrators familiar with the program's details might determine whether Grantees "substantially complied" with NAHASDA.[14] As we do not appeal the trial court's holding on this issue, we await plaintiffs showing before saying further.

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[13] The Court held as much against the general background "[t]he Court of Federal Claims ordinarily lacks jurisdiction over due process claims under the Tucker Act, 28 U.S.C. § 1491." *Norman*, 429 F.3d at 1095 (citing *Murray v. United States*, 817 F.2d 1580, 1582 (Fed. Cir.1987)); *see also Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (rejecting conclusion that agency's failure to observe procedural requirement voids the agency action, especially when public interest in grant purposes are at stake and APA remedies are available).

[14] We note the trial court stated, "For the same reason, the remedy for failure to afford a hearing is not a remand to the agency, the substantive entitlement of grant funds stands on its own." Appx23. We understand that the court was referring to the fact that if Grantees demonstrated they were

IV. Jurisdiction Also Fails Because This Court Lacks Authority Under The Tucker Act To Provide The Remedy Plaintiffs Require, An Order To Adjust Allegedly Underfunded Grants

As this Court has noted, in determining whether jurisdiction exists in the Court of Federal Claims pursuant to the Tucker Act, the court must look to the "essence [of the] suit." *Katz,* 16 F.3d at 1207; *see, e.g., Chula Vista School District,* 824 F.2d at 1579 (the Court of Federal Claims has jurisdiction under the Tucker Act only where "the prime effort of the plaintiff is to obtain money from the Government"). Where the essence of the suit is to challenge regulatory action, rather than to seek damages as compensation for a past statutory violation, the proper forum is a U.S. District Court rather than the Court of Federal Claims. *Katz,* 16 F3d at 1207-10; *see, e.g., Suburban Mortgage Associates, Inc. v. U.S. Department of Housing and Urban Development,* 483 F.3d 1116, 1125 (Fed. Cir. 2007) (To be justiciable under the Tucker Act, "the true nature of a plaintiff's claim [must be] a claim for money").

As we have noted, the Grantees alleged in the SAC that HUD "has unlawfully reduced mandatory congressional grants by eliminating certain

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entitled to funds, the lack of a hearing would be irrelevant, as the award "stands on its own." If the court were suggesting that a finding that a hearing was required automatically means Grantees are paid the money they seek, we respectfully disagree.

eligible units . . . from HUD's grant calculation." Appx2222, SAC §5. They also claim they are entitled to "those amounts that [HUD] unlawfully recaptured and/or withheld in grant funds." Appx2222, SAC §1. While they use the term "damages" to describe the relief they seek, "[r]egardless of the characterization of the case ascribed by [the plaintiffs], we look to the true nature of the action in determining the existence or not of jurisdiction." *Katz*, 16 F.3d at 1207.

In this case, because the Grantees seek amounts they claim should have been granted, and, as we have already demonstrated, these grants were only to provide forward-looking program benefits rather than as compensation for the Grantees, the "true nature of the action" – indeed, the only one to which NAHASDA might be amenable – is one for equitable relief. *Katz,* 16 F.3d at 1207-08 ("That a payment of money may flow from a decision that HUD has erroneously interpreted or applied its regulation does not change the nature of the case").

The trial court thus erred in holding that it was empowered to adjudicate the Grantees' claims on the basis that "[e]nforcement of a claim for money owed, *i.e.,* a claim for money damages is therefore the only relief plaintiffs seek. . . ." *Lummi I*, 99 Fed. Cl. 597. Indeed, the Court acknowledged that the claim was secondary and incidental to the claim to

rectify regulatory action. As it described the complaint, the suit was brought "to challenge actions by [HUD] in calculating and seeking the repayment of grant funds paid to the tribes pursuant to NAHASDA." *Lummi I*, 99 Fed. Cl. at 587. In other words, the essence of the case is HUD's regulatory actions and that the plaintiffs were seeking "the repayment of grant funds." That is not to say that the Grantees cannot seek to have their accounts adjusted or that they cannot forego equitable relief, but where, as here, the statute is not money mandating, a Tucker Act suit is not an option and this case is far more like *Katz,* where this Court dismissed a case just like this, inasmuch as the essence of the case was a challenge to regulatory action. 16 F.3d at 209 (no jurisdiction because the plaintiff "has challenged HUD's actions as a regulator").

CONCLUSION

For these reasons, the trial court's ruling that it possessed jurisdiction should be reversed, and the case should be remanded with instructions to dismiss the Second Amended Complaint for lack of jurisdiction.

Respectfully submitted,
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Dated: September 9, 2016

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ADDENDUM

In the United States Court of Federal Claims

No. 08-848C
(Filed: September 30, 2015)

* *

LUMMI TRIBE OF THE LUMMI RESERVATION, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* *

ORDER

Plaintiffs, three Indian tribes, bring this case under the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), seeking recovery of grant funds paid to them pursuant to NAHASDA but subsequently recaptured by the United States Department of Housing and Urban Development ("HUD" or "the agency") after it determined that the allocation formula upon which payment of the grant funds was based had been misapplied. In addition to the recaptured funds, plaintiffs also seek recovery of additional unpaid grant funds corresponding with the fiscal years following the recoupment, which plaintiffs allege they are entitled to under the correct application of the allocation formula. Currently pending are those remaining portions of the parties' cross-motions for summary judgment on which the court has not yet ruled. For the reasons set forth below, we deny the remaining elements of plaintiffs' March 25, 2013 motion for summary judgment and grant in part and deny in part the remaining elements of defendant's May 24, 2013 cross-motion for summary judgment.

BACKGROUND

I. Procedural History

Several rounds of dispositive motions and court rulings have preceded today's decision, and a brief discussion of the earlier holdings is necessary before examining the issues currently before the court. Pursuant to the United States Housing Act of 1937, currently codified at 42 U.S.C. §§ 1437-1437x (1994), plaintiffs oversaw various housing programs on their lands to assist low-income Indian families become homeowners. To consolidate these programs, Congress enacted the NAHASDA, as amended, 25 U.S.C. §§ 4101-4212 (2012). NAHASDA terminated the programs established under the Indian Housing Act of 1937 and instituted a system of annual block grants. The statute charged HUD to create an allocation formula that would reflect the needs of the Indian tribes, including:

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

25 U.S.C. § 4152(b) (2006).

The Secretary is given statutory enforcement authority to review adherence to the terms of the grant programs in at least two ways. 25 U.S.C. § 4161 gives the Secretary, among other powers, the ability to terminate or reduce grant payments as to which the recipient has failed to comply substantially with any provision of NAHASDA. Under 25 U.S.C. § 4165, the Secretary is obligated to conduct reviews and audits on an annual basis to determine whether recipients have carried out eligible activities in accordance with the requirements and the primary objectives of this Act and with other applicable laws, whether the recipient has complied with the Indian housing plan of the grant beneficiary, and whether the performance reports are accurate. Both provisions offer certain procedural rights to recipients whose grants are affected by the Secretary's actions.

Although it is disputed whether the agency acted under one or both of these provisions, plaintiffs have argued that, under either scenario, they were entitled to a hearing prior to the government's demand for repayment of grant

amounts and that the failure to afford such a hearing entitled them to a return of those funds automatically.

In the first round of litigation, the court held that NAHASDA is a money-mandating statute pursuant to which this court has jurisdiction to hear the plaintiffs' claim, and that this suit is not in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A). *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 597, 605 (2011) ("Lummi I").[1]

In *Lummi II*, we held, contrary to defendant's argument, that HUD did not have a common law right to use the remedy of administrative offset to recoup the grant funds, but rather, NAHASDA provided the applicable procedure. *Lummi Tribe of the Lummi Reservation v. United States,* 106 Fed. Cl. 623, 631-34 (2012) ("Lummi II"). Therefore HUD was required to proceed in compliance with section 4165 by offering notice and opportunity for a hearing prior to the recapture of grant funds. *Id.*

Following *Lummi II*, the parties filed cross-motions for partial summary judgment, briefing whether the allocation formula provided in 24 C.F.R. § 1000.318 was contrary to 25 U.S.C § 4152(b)(1), which would render the regulation invalid, and whether the agency adhered to section 4152(b) and properly applied the allocation formula set out in 24 C.F.R. § 1000.318 when computing the amount of grant funds to which plaintiffs were entitled. The court upheld the agency's use of 24 C.F.R. § 1000.318 as an allocation formula. *Lummi Tribe of the Lummi Reservation v. United States*, 112 Fed. Cl. 353, 366 (2013) ("Lummi III"). The court left undecided the issue of whether HUD acted unlawfully in its application of 24 C.F.R. § 1000.318. *Id.* at 353 n.2. After *Lummi III*, the parties filed subsequent briefs in support of the remaining issue, and posing a new question for the court to resolve: whether failure to hold the hearing contemplated by section 4165 amounted, *per se*, to an illegal exaction for which the plaintiffs are entitled to recover the recouped funds.

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[1] *Lummi I* also held that plaintiffs failed to show that NAHASDA § 4161 was violated, and in any event, plaintiffs' failure to assert their procedural rights at the relevant time constituted a waiver, but the court later vacated this holding. CM/ECF No. 41.

There thus were two issues remaining: (1) whether the agency adhered to 25 U.S.C. § 4152(b) by properly applying the allocation formula set out in 24 C.F.R. § 1000.318 when it computed the amount of grant funds to which plaintiffs were entitled; and (2) whether failure to hold the § 4165 hearing resulted in a *per se* illegal exaction. Subsequently, the court asked for briefing on these questions and also allowed the parties to reopen our earlier rulings.

After this latest round of briefing, we can isolate the following matters to be resolved: (1) defendant asks us to reverse our prior ruling that NAHASDA mandates the payment of money; (2) defendant also asks the court to revisit our ruling that the agency did not have a common law right of recoupment; (3) it also contends that enforcement of the administrative protections of section 4165 belongs in the district court under the Administrative Procedure Act ("APA"); (4) whether the proper remedy for failure to afford a 4165 hearing is, as defendant argues, to remand for a hearing or, as plaintiffs contend, to award plaintiffs a money judgment for the amount of the requested funds; (5) plaintiffs ask us to reconsider our ruling that 24 C.F.R. § 1000.318 is valid, and finally, (6) whether, assuming the court can review the merits of the agency's recoupment and non-payment decisions, there are any material facts still in dispute.

Although recognizing that we agreed to entertain the parties' challenges to our prior rulings, after considering their additional arguments, we reaffirm our prior rulings in toto. We conclude first, therefore, that NAHASDA is money mandating. We also reaffirm our rulings that 24 C.F.R. § 1000.318 is valid and that the agency has no independent right of common law recoupment. These reaffirmances have the effect of resolving all six of the issues isolated above and one of the two questions remaining on summary judgment. The fact that NAHASDA is money mandating means not only that failure to enforce properly its substantive provisions, including 24 C.F.R. § 1000.318, entitles plaintiffs to make an affirmative claim for new monies, but that they also may argue that improper recoupment of past grant amounts was an illegal exaction based solely on NAHASDA itself, with no further need for statutory support. The agency was either correct or incorrect in calculating the amount of grant support to which the tribes were entitled. If it was incorrect HUD should return any monies improperly exacted and should pay any amounts due.

Of the issues resolved by reaffirming our prior rulings, only one merits further discussion—whether HUD's failure to provide plaintiffs with a section

4165 hearing resulted in a *per se* illegal exaction. We conclude that it did not, and therefore must reject plaintiffs' assertion that the remedy for failure to afford a hearing is, automatically, the return of monies. What is money mandating are the substantive provisions of NAHASDA, not its procedural elements. There is nothing in the statutory framework which suggests that the remedy for failure to afford procedural rights is, without further proof of entitlement, the payment of money. Thus, the failure to give a hearing under section 4165 does not, on its own, support an illegal exaction claim. The government only has plaintiffs' money in its pocket, and therefore only committed an illegal exaction, if 24 C.F.R. § 1000.318 was improperly applied. For the same reason, the remedy for failure to afford a hearing is not a remand to the agency; the substantive entitlement to grant funds stands on its own.

Thus, the only question remaining is the merits of the agency's calculation of the proper grant amounts; namely, whether there are disputed issues of fact. We find that there are.

In concert with representatives from various tribes, HUD promulgated a final rule detailing how the annual grant amount would be calculated. 24 C.F.R. §§ 1000.301-340 (1999) (regulations containing the allocation formula upon which grant funds are based). The formula contains two components: (1) the number of rental units and lease-to-own units owned by each tribe under the Housing Act of 1937 as of the effective date of NAHASDA, September 30, 1997, known as the Formula Current Assisted Stock ("FCAS"), and (2) each tribe's need. These components have an inverse relationship: the more FCAS units reported, the less funding the tribe would receive under the need component. Furthermore, HUD's regulations specified that a housing unit would not be considered as part of FCAS "when the Indian tribe . . . no longer has the legal right to own, operate, or maintain the unit" so long as such units are conveyed "as soon as practicable after a unit becomes eligible for conveyance." *Id.* § 1000.318.

Plaintiffs received NAHASDA housing grants from 1998 through 2009. A nationwide audit performed by HUD's Office of Inspector General ("OIG") in 2001 revealed that funds had not been properly allocated because there were housing units included in the calculations that did not qualify as FCAS units. Specifically, the audit report noted that HUD failed to enforce 24 C.F.R. § 1000.318, explaining that because Mutual Help and Turnkey III programs do not usually exceed 25 years, it is expected that some of the units should be paid

off and the tribe would no longer have the legal right to own, operate, or maintain the units. *See Lummi I*, 99 Fed. Cl. at 588. After a further internal investigation, HUD determined that it had overpaid grant funds to plaintiffs. Accordingly, HUD sent letters to plaintiffs informing them of the overpayments. To remedy this, HUD decided to adjust the grant amounts plaintiffs would receive in the ensuing years to, in effect, recoup previous overpayments and to reflect an updated FCAS.

Grant funds not distributed on the basis of FCAS are distributed on the basis of need. Therefore, the more FCAS units reported, the less funds allocated based on the need component. The specific regulation at issue here, specifies when a housing unit will no longer be considered FCAS:

> (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:
>
> > (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and
> >
> > (2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

24 C.F.R. § 1000.318. This leads us to examine the particulars of the plaintiffs here.

HUD's Recoveries from Lummi

HUD recovered $845,667 in alleged overpayments to Lummi for Fiscal Years ("FY") 1998 to 2003, which were based on a communication from a Lummi representative informing HUD that Lummi project WA-11 had 39 Low Rent and 15 Mutual Help units. According to a later determination by HUD, this project only had 39 Mutual Help units, and therefore HUD had calculated the grant amount with 15 more units than existed and paid Lummi at the higher Low Rent subsidy. Lummi accepted the subsidy. After HUD determined that

it had made an error, it recovered the amount from Lummi. Def.'s Cross Mot. for Summ. J. 41-43, (May 24, 2013) ("Def.'s Cross Mot.").

For FY 2008 and 2009, Lummi reported to HUD that it had conveyed certain units and identified the fiscal years it had done so. However, this report was one year late, resulting in an alleged overpayment of $14,029 and $3,540 in FY 2008 and 2009, respectively. The allocation formula for FY 2008 included four units that Lummi had already conveyed, and the formula for FY 2009 contained one extra unit. Accordingly, HUD sought recovery because it believed that Lummi was not entitled to funding for those units. *Id.* At 43.

During all of these recoveries, Lummi had sufficient funds to repay HUD, and Lummi never requested a formal hearing. Furthermore, Lummi had spent some of its grant funds on administration and planning.

HUD's Recoveries from Hopi

On September 5, 2002, Hopi informed HUD that it had conveyed more than 70 units in three projects. These conveyances were delayed for more than three years due to disagreements between the Hopi Realty Office and the Hopi Tribal Housing Authority. The delay resulted in an alleged overfunding of $558,169 for FY 1998 to 2002, and HUD subsequently recovered that amount. Def.'s Cross Mot. 43-44.

HUD calculated an additional overpayment of $26,735 for FY 2002 to 2005. This overpayment was the result of Hopi admitting that it had conveyed two units in FY 2002, but had continued to receive funding for them through FY 2005. Additionally, Hopi had one unit that was eligible for conveyance in FY 2001, but it did not convey it until 2005. Thus, HUD sought to recover the amount attributable to that unit. Def.'s Cross Mot. 44-45.

On October 18, 2005, HUD informed Hopi that it had also been overfunded for FY 2004 and 2005 in the amounts of $10,796 and $11,166, respectively. Knowledge of this overfunding was gleaned from Hopi's admission that it had conveyed four units in FY 2003 but continued to receive funding for them through FY 2005. Def.'s Cross Mot. 45.

A fourth recovery of $251,692 occurred after Hopi informed HUD that 56 units in two projects had become conveyance eligible at various times between FY 2003 and 2006. Hopi did not explain why the conveyances were

delayed. As such, HUD determined that Hopi was overfunded during FY 2004 to 2006. Hopi responded to HUD's request for repayment by saying that Hopi had no basis for an appeal and authorized HUD to deduct the overpayments from its FY 2007 grant allocation. *Id.* at 46.

HUD also determined that Hopi was overfunded for FY 2006 and 2007 by $93,094. According to HUD, this overfunding was the result of the inclusion in Hopi's FCAS of two non-existent units and several other units that had become conveyance eligible but Hopi failed to convey. Hopi acknowledged the overfunding and authorized HUD to recover the funds from its FY 2008 grant. *Id.* at 47.

Finally, Hopi reported to HUD on October 27, 2009, that four units were conveyance-eligible in FY 2008, but had not been conveyed due to tenant accounts receivable issues. HUD determined that these units should have been ineligible for funding and had resulted in an overpayment of $13,047 in FY 2009. Hopi did not challenge HUD's determination. *Id.* at 47-48.

As with the recoveries from Lummi, Hopi had excess grant funds available to repay HUD for the overfunding. Hopi never requested a formal hearing, and it also had spent funds on administration and planning.

HUD's Recoveries from Fort Berthold

Between October 2002 and December 2003, HUD wrote to Fort Berthold three times inquiring about eight units that were conveyance eligible in 2001 but had not been conveyed. When Fort Berthold did not respond, HUD concluded that the units were ineligible for funding and that Fort Berthold had been overfunded by $35,491 for FY 2002 and 2003. HUD consequently sought recovery, and Fort Berthold did not appeal or request a hearing. *Id.* at 48.

On September 30, 2010, Fort Berthold's attorney reported that it had conveyed 20 units in project ND-08 on various dates between FY 2001 and 2010. Accordingly, HUD determined that Fort Berthold had been overfunded for FY 2001 to 2008. However, HUD only sought recovery of $91,956 from FY 2006 to 2008. *Id.* at 49.

On April 7, 2011, Fort Berthold's attorney informed HUD that it had conveyed five units in project ND-10 between FY 2001 and 2009, and 11 units

in project ND-13 between FY 2001 and FY 2010. HUD calculated that Fort Berthold received funding for 12 ineligible units in FY 2008 and 13 ineligible units in FY 2009, resulting in a total overpayment of $67,043. HUD sought recoveries for those two years, but did not seek recoveries for FY 2001 to 2007. *Id.* at 50.

Similar to the recoveries from Lummi and Hopi, Fort Berthold had excess grant funds with which they could repay HUD for the overfunding in each of these scenarios.

All three tribes contend that HUD acted unlawfully by excluding units which they still owned or operated and by excluding units that had not actually been lost by conveyance, demolition, or otherwise. In their supplemental brief, in response to the court's question of whether there are any facts in dispute that prevent summary judgment, plaintiffs argue that there are numerous factual disputes regarding whether HUD's removal of FCAS units was lawful. Using *Fort Peck Housing Auth. v. United States*, 2012 U.S. Dist. LEXIS 124049 (D. Colo. Aug. 31, 2012) ("Fort Peck III") as support, plaintiffs point out a number of scenarios in which *Fort Peck III* held that HUD removed units still eligible for FCAS: (1) tenant is in arrears on payments or other obligations required for conveyance; (2) homes awaiting federally-funded repair or modernization work; (3) Mutual Help units were demolished and replaced; (4) Mutual Help units were converted to Low Rent units; (5) a new tenant occupied the unit during the pendency of the initial contract term; (6) conveyance was delayed due to legal impediment; and (7) conveyance cannot be undertaken due to clouds on title due to probate or intestacy. According to plaintiffs in this case, the tribes owned units which fell within several of these categories, but were removed from plaintiffs' FCAS anyway.

Specifically, plaintiffs argue that both Hopi and Fort Berthold had units with tenants who were in arrears on payments or who had failed to meet other obligations under their homebuyer agreements, and therefore plaintiffs faced legal impediments to conveyance even though HUD considered the units "eligible for conveyance" under the allocation formula. Moreover, plaintiffs argue that Hopi had a unit removed which was demolished. Because HUD policy prior to 2008 was to exclude demolished units even if they were rebuilt, plaintiffs argue that they had no incentive to replace the demolished unit. Plaintiffs contend that there are issues of material fact remaining concerning whether plaintiffs would have replaced some or all of the demolished units had they known they could continue to include the units in their FCAS. Plaintiffs

also argue that both Lummi and Hopi had funding withheld due to conversion of homes from Mutual Help to Low Rent because HUD funded these units at the lower Mutual Help amount. Plaintiffs further allege that Fort Berthold had a unit removed from its FCAS that had been returned to the tenant by the tribe and accordingly was not eligible for conveyance. Additionally, plaintiffs contend that Hopi had a large number of units removed from its FCAS that had various other legal impediments preventing conveyance. Lastly, plaintiffs argue that both Fort Berthold and Hopi had homes removed from their FCAS featuring issues related to probate or intestacy, resulting in clouds on title that made it impractical or illegal to convey the homes

In response, defendant argues that the record is clear that HUD removed the majority of the units from plaintiffs' FCAS because the units never existed or the tribe reported to HUD that it had conveyed the units. With regard to the unit that Hopi had removed from its FCAS due to demolition, defendant contends that it was removed because Hopi told HUD that the unit was demolished and not rebuilt. Defendant argues that Hopi's incentives for replacing or not replacing the unit do not raise genuine issues of material fact. Defendant characterizes several of plaintiffs' disputes as legal disputes rather than factual disputes and further argues that, with regard to the rest of the units, the facts are clear as to why the units were removed from plaintiffs' FCAS.

After an examination of the parties' briefs and supporting documentation, we find that plaintiffs have set forth a number of factual issues regarding whether some of the excluded units were actually eligible for conveyance and thus were properly excluded under the formula. They allege that housing units removed from their FCAS were subject to legal constraints that prevented conveyance. Pls.' Supp. Br. at 26; Pls.' Resp. To Def.'s Prop. Findings of Uncontroverted Fact ¶¶ 79, 89, 92, 98. Although defendant contends that the Hopi tribe failed to present such arguments to HUD in the administrative process, that is immaterial. If these units were in fact subject to legal impediments that prevented conveyance, then they should not have been excluded from FCAS because they were never "eligible for conveyance" under 24 C.F.R. § 1000.318(a)(1). Whether they were subject to such legal impediments is an issue of fact that the parties dispute and which cannot be decided on summary judgment. Some of the remainder of plaintiffs' excluded units present similar factual issues. We find, therefore, that summary judgment with respect to the final remaining issue–whether the agency properly calculated plaintiffs' grant amounts–is not possible.

CONCLUSION

Plaintiffs' remaining arguments in support of summary judgment are denied; defendant's remaining arguments in support of summary judgment are granted in part and denied in part as explained above. The parties are directed to consult and propose a pretrial schedule on or before October 30, 2015.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Corrected Opening Brief Of Defendant-Appellant United States was filed and served through this Court's CM/ECF system this 27th day of September, 2016. I further certify that six paper copies of the foregoing brief will be delivered to this Court, and two copies of the foregoing brief will be served on counsel for plaintiff-appellee by U.S. mail, postage prepaid, within five days of the Court's acceptance of the brief in ECF. Service on counsel for the plaintiff-appellee shall be addressed as follows:

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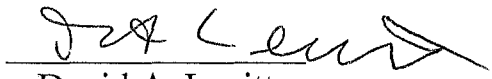

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CERTIFICATE OF COMPLIANCE

Per Rule 32(A)(7)(C) of the Federal Rules of Appellate Procedure (FRAP), I, David A. Levitt, hereby certify that the foregoing Opening Brief Of Defendant-Appellant, the United States, complies with the type-volume limitations of the FRAP. The brief contains 9,025 words and was prepared using Microsoft Word 14 Point Times New Roman proportionately faced typeface.

s/David A. Levitt by Martin F. Hockey
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 16-2196

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.

DECLARATION OF MARTIN F. HOCKEY, JR.

1. I am an attorney with the Commercial Litigation Branch of the Civil Division, United States Department of Justice. I am not counsel of record; however, I have supervisory responsibility in our office and possess authority to sign documents upon behalf of the attorneys in our office, including counsel of record.

2. Pursuant to Rule 47.3(d) of the Rules of the Court, I submit this declaration.

3. Counsel of record for the Government in this matter, David Levitt, is out of town on official leave. Because we desire to timely submit our principal brief in this case, I am filing this brief on behalf of counsel of record, David Levitt.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on September 9, 2016.

/s/ Martin F. Hockey, Jr.
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