IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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.

THE UNITED STATES,

Defendant-Appellant.

APPEAL OF INTERLOCUTORY ORDER OF UNITED STATES COURT OF FEDERAL CLAIMS –CASE NO. 08-cv-00848-EGB (Judge Bruggink)

CORRECTED DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Plaintiff-appellees (the Tribes) contend that NAHASDA is a money mandating statute -- and, therefore, the Court of Federal Claims has jurisdiction over their claim -- because "[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.'"[1] Assessing whether a statute is money-mandating, however, depends not on what a party asserts, but on what the statute intends. In that regard, as our opening brief explains, NAHASDA, the statute at issue, requires only that the Government "make grants," and those grants may be used only on eligible housing activities, under ongoing Government oversight to ensure proper use, and are subject to recapture.[2] In sum, even when the funds at issue are granted, the Tribes enjoy no entitlement to dispense them at their pleasure -- as they would with funds awarded by the Court of Federal Claims.

The Tribes also contend that HUD's alleged misallocation of the grant formula amounted to an illegal exaction. That is so, they assert, because HUD allegedly deprived them of the right to a hearing before offsetting later year NAHASDA allocations with prior year over allocations -- and, therefore, they reason, the Court of Federal Claims has jurisdiction over that claim too. Response Brief at 24-40. The Tribes fail, however, to undertake the necessary analysis and to demonstrate that the hearing regulations upon which they base their claim necessarily imply their right to the payment of money for alleged violations of those regulations.

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[1] Plaintiffs-Appellees' Response Brief (Response Brief), p. 7 (quoting, *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004)).

[2] Opening Brief of Defendant-Appellant (Gov't. Brief) at pp. 4-6 (citing 25 U.S.C. §§ 4111-4165); pp. 31-38.

In none of this do we contend that the Tribes are entitled to no judicial determination of their claim. Indeed, the Administrative Procedure Act provides them that right. The question presented, however, is not a damages question; it is whether the Government erred in applying a grant formula – and the proper remedy for any such error is an APA-based order to correct it, not a Claims Court money judgment.

ARGUMENT

I. NAHASDA Is Not Money Mandating Because Congress Could Not Have Intended Grantees To Be Entitled To Unrestricted Money In Lieu Of Grants

The Tribes' principal argument is that NAHASDA is money mandating because 25 U.S.C. § 4111 provides that 'the Secretary shall . . . make grants" to Indian tribes or their designated housing entities. Response Brief at 12-13. What that statute does not require, however, is that the Secretary make "payments" or in any other way indicate that the Government is to provide a money judgment should it be found to have erred in some programmatic detail – even one involving grant allocation. Moreover, when looking, as we must, "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy,"[3] the inescapable conclusion is that Congress did not, and could not have,

[3] *Crandon v. United States,* 494 U.S. 152, 158 (1990).

intended grant recipients to have a private cause of action for damages pursuant to NAHASDA.

A. NAHASDA Cannot Be Construed To Provide A Private Damage Remedy Because NAHASDA Grants Are Highly Regulated

The principal difficulty with the Tribes' claim to a money judgment is that it would provide a completely unrestricted source of funds, to be used as they wish, unencumbered by the controls they acknowledge apply if the funds were allocated pursuant to a NAHASDA grant agreement.[4] However, the terms and objectives of NAHASDA demonstrate that Congress did not intend and could not have provided a cause of action for unrestricted money for errors in applying those terms and objectives.

For example, as shown in our Opening Brief at pages 31-39, a NAHASDA grant is a restricted use right to Federal money for others' benefit, subject to the Federal Government's retained interest and oversight. While NAHASDA requires HUD to "make grants" to qualifying Indian tribes or their designated housing entities, § 4111(a), its purpose is not to compensate Indian tribes but "to assist and promote" affordable housing for low-income Indian families, 25 U.S.C. § 4111(g). Eligible housing activities are described in § 4132, and further refined in program requirements set out in §§ 4133-4139. Further, notwithstanding the making of a

[4] *See* Response Brief at 21 ("NAHASDA recipients are statutorily required to maintain their housing units as affordable housing").

grant, payments under the Act may be terminated, reduced, or withheld if a grantee has failed to comply substantially with the Act. 25 U.S.C. § 4161. Even the amount of a grant is not fixed. Grants shall be in the formula amount "except as otherwise provided," 25 U.S.C. § 4111(f), and HUD may adjust the amount of a grant, 25 U.S.C. § 4165(d).

Furthermore, even after grant funds are paid to, and expended by, a grantee, the Government retains an interest to ensure long-term benefit only to program beneficiaries, making the grantee more a custodian or trustee of Federal funds than a recipient of compensation for its own pecuniary benefit. *See* Gov't. Brief at 31-38 (discussing statutory and regulatory provisions, and cases analyzing similarly restricted Federal assistance). In other words, NAHASDA grantees acquire no private title to money or its value because grant funds may only inure to program beneficiaries. The nature of this grant relationship contradicts the Tribes' assertion that Congress intended NAHASDA to mandate the payment of an unrestricted money judgment to grantees should the formula be misapplied. This is not to say NAHASDA is unenforceable against the Government, or that grantees have no judicial remedies, but those remedies do not include a cause of action for a naked money judgment without use-restrictions or ongoing accountability.

This analysis and conclusion is no different than that undertaken by this Court in *National Center For Manufacturing Sciences v. United States,* 114 F.3d

196 (Fed. Cir. 1997) (*NCMS*). There, the Court addressed a statute providing that "not less than $40,000,000 of the funds appropriated in this paragraph shall be made available only for the National Center for Manufacturing Sciences." *NCMS*, 114 F.3d at 198.

Recognizing that the question would turn not only on magic words ("shall be made available"), but any further evidence of congressional intent contained in the statute, this Court held that the statute there was not money mandating because of the further conditions it imposed on the release of the funds. In that regard, the Court emphasized that the statute "directs that the appropriated funds be used 'for expenses necessary for basic and applied scientific research, development, test and evaluation, . . . as authorized by law.'" *NCMS*, 114 F.3d at 201 (quoting the Act at issue).[5]

This restriction, the Court explained, "requires that NCMS use any money disbursed from the appropriated funds to perform the basic and applied research functions called for in the Act [and thus] contemplates a cooperative, ongoing

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[5] Here, the Court followed well-established law for discerning money mandatingness. *E.g.*, *United States v. Navajo Nation,* 537 U.S. 488, 490 (2003) (*Navajo I*) (after claimant points to a provision of law allegedly violated, "the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating damages sustained as a result of a breach of the duties [the governing law] imposed" (quoting *United States v. Mitchell,* 463 U.S. 206, 219 (1983) (*Mitchell II*)).

relationship between NCMS and the Air Force in the allocation and use of the funds." *Id.* Therefore, the Court concluded, NCMS was not "entitled to a monetary judgment that would allow it to use the funds . . . for any purpose, without restriction." *Id.* Explaining further, the Court added, "[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, even if NCMS is entitled to obtain access to the remaining $15,875,000 on some terms." *Id.*

As explained further, it should be similarly clear here that the Tribes may not substitute funds that "would be subject to restrictions and constraints," *id.* at 198, for a money judgment that could be used "for any purpose, without restriction," *id.* at 201. The Tribes have little to offer in rebuttal.

First, the Tribes do not deny that NAHASDA grants are, as was the case in *NCMS,* for future use, subject to restrictions and constraints, entailing an ongoing relationship between HUD and the grantees.

Second, the Tribes suggest that this Court should interpret NAHASDA as money mandating because, otherwise, the Government will attempt to "whipsaw the Tribes between the District Court and the Court of Claims" by arguing that money damages are not available under the Administrative Procedure Act (APA). Response Brief at 13-14 (citing HUD's appeal brief in the coordinated cases

brought under the APA and currently on appeal in the United States Court Of Appeals For The 10th Circuit (No. 14-1313), in which the plaintiffs, like the Tribes here, allege that their NAHASDA grants should have been larger).

There is no basis for this argument as the Government has not and will not attempt to "whipsaw" the Tribes, should this Court agree the Court of Federal Claims lacks jurisdiction. Indeed, we could not, as it is this Court, not the Government, that will determine -- as a matter of law -- whether the Court of Federal Claims has jurisdiction over this matter – and that will decide the question once and for all. In fact, the similar APA cases currently on appeal in the Tenth Circuit have been in litigation for years and the Government's position there is not that the claims should be heard in the Court of Federal Claims -- or that NAHASDA creates a money cause of action cognizable under the Tucker Act. The Government has argued that the district court is not empowered to issue orders that effectively awarded "money damages," a remedy not permitted by the APA (5 U.S.C. § 702). *See Modoc Lassen Indian Hous. Auth. v HUD*, No. 14-1313, Doc. 01019450524 at pp. 64-69 (June 25, 2015) (HUD opening brief). But that is consistent with what we say here: NAHASDA does not create a right to money damages and, therefore, no court may make such an award. What a district court may do, however, is rule on the correctness of HUD's actions allocating grants, a determination that may have monetary consequences for the Tribes.

In sum, our position is that, while NAHASDA does not create a Tucker Act or compensatory remedy, final agency actions taken under NAHASDA are subject to review under the APA and, therefore, subject to declaratory or other equitable relief.

Third, the Tribes contend that this Court has "rejected the notion advanced by HUD that a statute setting up a federal grant cannot be money mandating . . . ." Response Brief at 16. That, however, is not our contention – and to the extent that the Tribes suggest the converse, they are wrong. That converse assertion would flatten the statute-specific analysis such as this Court undertook in *NCMS,* and substitute for it a one size fits all rule of thumb for determining Congressional intent that enjoys no legal support. The jurisdictional law of this circuit and the nature of grants themselves are more complex than that. *See, e.g., Ely v. Velde,* 497 F.2d 252, 256 (4th Cir. 1974)); ("A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached."); *See* S. Rep. No. 92-1050 pt. 1 (1972), *as reprinted in U.S.C. C.A.N.* 3874, 3876 ("[O]ne of the principal virtues of revenue sharing is the fact that this program is different from the categorical grant programs").

Fourth, the Tribes contend that our argument conflates the merits question with the jurisdictional one, characterizing our argument as asserting that unless the Tribes are entitled to the grants, they are not entitled to seek entitlement to the

grants. Response Brief at 16-18. In fact, we make no such argument and see no reason to characterize our argument further.

Fifth, the Tribes contend that the Court of Federal Claims has jurisdiction to entertain claims other than for money damages, citing *Kanemoto v. Reno,* 41 F.3d 641 (Fed. Cir. 1994). Response Brief at 18. As we pointed out in our Opening Brief at pp. 26-27, however, even though this Court in *Kanemoto* noted that Tucker Act jurisdiction covers claims for the "payment of money other than damages, including statutory causes of action, such as the Back Pay Act," 41 F.3d at 646, it is clear that this reference is to statutory claims for compensation for past labors or injuries. Indeed, as the Supreme Court observed in *United States v. Testan,* 424 U.S. 392, 403-404 (1976), statutory claims for compensation such as under the Back Pay Act are "money damages as a remedy against the United States in carefully limited circumstances . . . ."

Finally, the Tribes argue that this case is not controlled by *NCMS* for several insubstantial reasons. The Tribes stress that, there, the plaintiff sought jurisdiction in the district court and the "issue was whether the District Court has jurisdiction." In fact, at issue was the correctness of the district court's order to transfer the case *to* the Court of Federal Claims under 28 U.S.C. § 1631. Necessarily, then, the jurisdiction of the Court of Federal Claims was at issue. 114 F.3d at 198 ("the propriety of the transfer turns on whether this case properly belongs before the

district court under the APA, or before the Court of Federal Claims under the Tucker Act. . . .").[6]

In addition, the Tribes assert that "[t]his Court stressed [in *NCMS*] . . . that it was highly possible NCMS would benefit from the equitable remedies available in district court." Response Brief at 23. The Court's analysis was not that simple, however. The Court noted that the complaint itself was of two minds, suggesting it sought both a "naked money judgment" and "injunctive relief." 114 F.3d at 201. To resolve the question of whether a Tucker Act suit would provide an adequate remedy, however, the Court "look[ed] behind the complaint," *id.*, noting that the funding was subject to conditions, and subject to an "ongoing relationship," and concluding that "it is doubtful that a simple money judgment in NCMS's favor would be appropriate, even if NCMS is correct in its claim that it is entitled to have the remaining $15,875,000 referred to in the Appropriations Act allotted to its account." *Id.*

Further oversimplifying the matter, the Tribes maintain that, in the present matter, the Court of Federal Claims "will only need to determine whether HUD wrongly removed eligible housing units which resulted in past funding losses."

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[6] *See also* 114 F.3d at 199 ("Thus, if a Tucker Act suit in the Court of Federal Claims provides an adequate remedy, APA review in the district court is not available."); *id* at 201 (discussing whether a Tucker Act suit would provide an adequate remedy)`; *id.* at 202 ("the Tucker Act, however, does not empower the Court of Federal Claims to grant that kind of equitable relief.").

Response Brief at 23. That may be so. Should the trial court so conclude, however, unrestricted Treasury funds will be released, completely free of NAHASDA's conditions and contrary to the statute's purpose.

In sum, NAHASDA is not money mandating because it allocates restricted-use funds to satisfy prescribed program objectives and does not authorize the payment of funds to compensate for past harms or services.

II. The Alleged Procedural Violations Of NAHASDA Do Not Support Tucker Act Jurisdiction

The Tribes also argue that, even if NAHASDA's "shall make grants" language is not a ground for a Tucker Act claim, HUD's reduction of certain of the Tribes' grant allocations to offset overpayments of prior allocations transforms that very same grant making dispute into a Tucker Act claim, under the guise of an illegal exaction. Response Brief at 24-41.

The premise of the Tribes' argument is that in reducing certain NAHASDA grants to correct for prior year overpayments, HUD failed to afford the Tribes a hearing to which they contend they were entitled pursuant to 25 U.S.C. § 4165 and its associated regulations. Response Brief at 27-28, 37. As we explained in our opening brief and further below, the Tribes' argument fails in three particulars.

First, the Tribes assert, *ipse dixit*, that violation of the regulations requires compensation because Federal "agencies cannot ignore their own regulations, or congressional mandates to recapture funds and consequently trample the due

process rights of the original recipients." Response Brief at 25. The law is well established, however, that Tucker Act jurisdiction cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages. Labelling their claim an illegal exaction provides no escape, as the Tribes still must demonstrate that the source of law on which they rely necessarily implies a cause of action with a monetary remedy.

Second, although they assert, generally, that "[t]he return of funds is necessarily implied, Response Brief at 25, they undertake no analysis to demonstrate that either section 4165 or the regulations to which the Tribes point imply as much -- or have anything in common with other laws held to have implied as much.

Third, even assuming the regulations do imply a monetary remedy, their violation cannot support an illegal exaction claim, unless the property "exacted" belongs to them. Here, the Tribes claim the grant money is theirs because NAHASDA mandates the grant be paid to them. But, as the trial judge recognized, that simply conflates their money mandating claim with their illegal exaction claim.

A. The Failure To Follow Procedural Rules Alone Cannot Give Rise To An Illegal Exaction Claim

It is well-established that a violation of procedures alone does not create a right to compensation under the Tucker Act. This is because the provision of law

on which such claims are based, namely the due process clause of the Fifth Amendment, does not mandate monetary compensation for a violation. *See, e.g., Collins v. United States*, 67 F.3d 284, 288 (Fed. Cir. 1995) (citing numerous Federal Circuit and predecessor cases establishing there is no Tucker Act jurisdiction "over money claims that are based upon an alleged violation by the government of the due process clause . . . because [it] does not obligate the government to pay money damages.").

The trial court's discussion in *Lark v. United States*, 17 Cl. Ct. 567 (1989), is instructive. There, the claimant alleged that the Government's seizure and forfeiture of cash in connection with a drug investigation under the Controlled Substances Act was illegal because he was not given proper notice and procedural protections required by the Constitution. 17 Cl. Ct. at 569. Following ample precedent, the court held there was no jurisdiction. First, the court explained: "It is well settled that 'this court has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages.'" *Id.* at 569 (quoting *Carruth v. United States*, 224 Ct. Cl. 422, 445 (1980)).

The claimant argued "that *Eastport* granted jurisdiction to any claimant who merely alleged that the government had improperly exacted or retained its money."

Id. Rejecting that argument, the court explained, "[t]he holding and the language of *Eastport* are very explicit: '[u]nder section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained . . . .'" *Lark*, 17 Cl. Ct. at 569-570 (quoting *Eastport,* 372 F.2d at 1009).

To be sure, the courts have not required the money mandate to be explicit and have recognized the existence of Tucker Act jurisdiction over so-called illegal exactions, 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.'" *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)) (emphasis added).

Because waivers of sovereign immunity are not to be lightly construed,[7] this implication is not to be gleaned lightly. In *Cyprus Amax*, for example, this Court conducted an extensive textual and historical analysis of the Export Clause, including an examination of its purpose and whether that purpose could be met

[7] *See, e.g., United States v. King*, 395 U.S. 1, 4 (1969) (A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"); *Mitchell* II, 463 U.S. at 218 ("Of course, in determining the general scope of the Tucker Act, this court has not lightly inferred the United States' consent to suit").

absent a damages remedy, to conclude that the Export Clause could support an illegal exaction claim. 205 F.3d at 1373. It could, the Court explained, because the "necessary implication of [its] unqualified proscription is that the remedy for its violation entails a return of the money unlawfully exacted." *Id.* Further, the Court explained, "given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy." *Id.*

As we discuss next, NAHASDA cannot meet that test.

B. The Regulations Upon Which The Tribes Rely Neither Express Nor Imply A Monetary Remedy

The Tribes concede that they have no substantive right to the amount of grant funding HUD recaptured if the statute required it to be allocated to other tribes under a proper formula calculation. Response Brief at 19 n. 2. Yet, that is immaterial, they argue, because the "recapture" adjustments to their annual grant amounts were effected without following certain procedures, particularly those requiring a hearing, found in 24 C.F.R. § 1000.532.[8] Response Brief at 27-28.

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[8] At the time relevant to the Tribes claims (2002-2009), 24 C.F.R. § 1000.532 read in pertinent part:

> (a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section [4165] of NAHASDA. . . .

That elevates their claim to a Tucker Act claim, they say, regardless of what the hearing outcome might have been, because "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," *id.* at 26 -- presumably, a civil analog to the failure to read Miranda rights in the criminal context: fail to follow procedure at your peril.[9]

For this proposition, they rely on several cases – none involving NAHASDA or anything analogous -- all involving a peculiar area of tax law, erroneous tax refunds. Indeed, as this Court has explained, a tax refund suit is a "classic illegal exaction claim." *Norman,* 429 F.3d at1095. In any event, these cases do not establish a general rule that the failure to follow money recapture procedures necessarily implies the return of the funds at issue. If anything, they establish that

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> (b) Before undertaking any action in accordance with paragraphs (a) and (c) of this section, HUD will notify the recipient in writing of the actions it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. In the event the deficiency is not resolved, HUD may take any of the actions available under paragraphs (a) and (c) of this section. However, the recipient may request, within 30 days of notice of the action, a hearing in accordance with § 10000.540. . . ." 24 C.F.R. § 1000.532 (2009).

[9] In addition to ignoring the established law, the argument overlooks the fact that the logical remedy for a failure to afford process is an order to afford that process. *See, e.g., Boero v. DEA,* 111 F.3d 301, 305-307 (2nd Cir. 1997) (the failure to follow procedures required to exact funds or property by civil forfeiture does not necessarily imply the return of the property but, rather, restoration of the right lost, namely the right to contest the forfeiture).

when the Internal Revenue Code authorities at issue authorize recapture for a limited time, once that time has expired, the Government lacks tax code authority to claim what becomes by then, those taxpayers' money. *See, e.g., O'Bryant v. United States,* 49 F.3d 340, 346 (7th Cir. 1995) ("Because the agency did not (and now cannot) use those procedures, we must hold in the O'Bryant's favor); *Stanley v. United States*, 140 F.3d 1023, 1034 (Fed. Cir. 1998) ("it was the IRS that failed to *timely* bring suit or reassess the relevant tax year once the error was discovered"). Here, there seems to be no debate that HUD's right to offset overpayments still exists. *See, e.g.,* Response Brief at 38-39 (complaining not that HUD's right under 25 U.S.C. § 4165 does not exist, but that conducting the hearing would engender "delay").

Similarly, in *Pennoni v. United States*, 79 Fed. Cl. 552 (Fed. Cl. 2007) (*Pennoni I*), another tax refund case cited by the Tribes, the court followed *Stanley* in holding that the tax law on which the Government justified its claim to the taxpayer's money did not apply. The court went on to hold that the taxpayer had sufficiently pled an illegal exaction due to the Government's violation of the applicable tax law. In *Pennoni II,*[10] however, the court dismissed the illegal exaction on the basis of an intervening Supreme Court case – a case that did not concern illegal exactions *per* se, but held that the refund at issue was subject to the

[10] *Pennoni v. United States*, 86 Fed. Cl. 351, 358-64 (2009).

tax code's refund claim requirements. *Pennoni II* thus underscores the dependence of the refund theories in those cases upon the tax code – and further undermines the Tribes' reliance on those cases for its overly broad proposition that a failure to observe procedures in the NAHASDA setting automatically requires compensation in the amount of the funds at issue.

C. The Tribes Illegal Exaction Claim Also Fails Because It Was Not Their Money That Was Allegedly Exacted

In the cases where this Court has found an illegal exaction, the property at issue belonged to the claimant, before it was wrongly taken. *E.g., Stanley*, 140 F.3d at 1034 (plaintiff's money paid to IRS); *Crocker v. United States,* 125 F.3d 1475, 1476 (Fed. Cir. 1997) (plaintiff's savings bonds forfeited to Government); *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1568 (Fed. Cir. 1996) (airline's money paid to house asylum-seekers); *Casa de Cambio Comdiv S.A. de C.V. v. United States,* 291 F.3d 1356, 1364 (Fed. Cir. 1998) (money indisputably in plaintiff's bank account sent to Treasury); *Suwanee S.S. Co. v. United States,* 279 F.2d 874 87-75 (Ct. Cl. 1960) (plaintiff's money paid to U.S. Maritime Administration); *N. Cal. Power Agency,* 122 Fed. Cl. 111 (2015) (power customers' payments to the Department of Interior's Bureau of Reclamation); *Figueroa v. United States,* 57 Fed. Cl. 488, 496 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006) (plaintiff's money paid to the U.S. Patent Office to register a patent); *Pennoni,* 79 Fed. Cl. at 562 (taxpayer's money captured by levy and wage

garnishment).[11] Thus, the issue in those cases was not whether *the claimant's* money is at issue – the issue was whether the Government was correct in retaining it or having forced the claimant to spend it, thus saving a commensurate amount of its own money.

As the trial court recognized, HUD did not take the money at issue here; it recouped previously excessive grant amounts by adjusting subsequent grant funding. *See Lummi v. United States,* 106 Fed. Cl. 623, 625 (Fed. Cl. 2012) (*Lummi II)* ("In count two of their second amended complaint, plaintiffs assert that HUD's recapture of overpaid grant funds through the reduction of subsequent years' grants was accomplished without legal authority and therefore amounts to an illegal exaction"). Indeed, unlike the tax rules at issue in *Stanley* and *Pennoni*, no rule vested the Tribes' ownership of that money – in fact, as we have explained, NAHASDA grantees never "own" the money, they are custodians of funds intended for NAHASDA beneficiaries, and the custodial balances are always subject to adjustment.

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[11] As the Court explained in *Stanley,* 140 F.3d 1023, had the taxpayer remitted his money to the Government voluntarily, "the Government is entitled to retain the money." 140 F.3d at 1028. As to the taxpayer's original entitlement to the money, however, that was resolved by the principle that when tax assessments are extinguished, the IRS lacks the authority to levy on the taxpayer's assets (*i.e.,* what might have been the Government's money before the assessment expired was no longer the Government's money or subject to assessment). *Stanley,* 140 F.3d at 1027-28; *see also Pennoni I v. United States,* 79 Fed. Cl. at 559-560.

The Tribes' answer, which is no answer at all, is that they *claim* the reduced grant funding is their money *and* that the Government is wrong in not paying it. Thus, the Tribes characterize our argument as being that, if HUD had held a hearing, it "would have been able to establish grounds to take the money at a hearing [and presumably been able to establish the money was not the Tribes]," Response Brief at 33 -- in effect, a prejudicial error argument, *id.* at 35. That is not, however, what we are arguing. Nonetheless, the Response Brief goes to some length knocking down this strawman, insisting that our argument is a perverse conflation of jurisdiction with merits that demands that the Tribes have won their suit before they file their suit, and that "this Court is required to assume that the United States is wrong." *Id.* at 33-37 (citing *Fisher v. United States,* 402 F.3d 1167, 1175 (Fed. Cir. 2005)).

But, as the Court of Federal Claims observed, the merits and illegal exaction claims those are merely two sides of the same coin. *See Lummi V,* April 20, 2016 Order, Appx17 ("An 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 only entitled to the grant funds if NAHASDA mandates that the funds be paid to them.") Thus, if the Tribes are correct that the formula requires they be paid those funds, then, subject to all applicable controls, if NAHASDA is money-mandating, the grant amount at issue

will be restored and their separate illegal exaction claim will add nothing to the Tribes' merits claim and subtract nothing from the Government's defenses.

In short, the illegal exaction claim is bootstrapped on the underlying "money mandating" claim and has no independent basis of its own. Indeed, the Tribes' position makes no more sense than it would for a Government contractor asserting a Contract Disputes Act claim to assert that the agency's failure to adjust the contract is an illegal exaction because the contractor was entitled to the adjustment all along and the Government's failure to pay sooner means the contractor's money had been exacted.

The Tribes' is not an illegal exaction claim at all.

D. The Tribes Remaining Arguments Are Inapposite

The Tribes argue that even assuming we "could argue on the merits that Plaintiff was not prejudiced by a lack of a hearing, that avenue of discourse is foreclosed." Response Brief at 35. But again, we do not make this argument. As noted, we do find perplexing the idea that the remedy for a failure to afford a grant hearing is an automatic entitlement to the grant; but lack of prejudice is not our argument and none of the cases the Tribes cite on pages 34-39 in that regard affect our argument.

For example, the Tribes point out that, in *Yellin v. United States,* 374 U.S. 109 (1963), the Supreme Court reversed the petitioner's contempt conviction

where the House Committee On Un-American Activities failed to follow its internal rules to allow an executive session. They also point out that, in *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954), the Supreme Court held that the alien had to be released, even if he was unlikely to qualify for asylum, because the Attorney General branded him as undesirable before he could appear for a hearing. The Tribes claim that these and similar cases "require 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 . . . ." Response Brief at 35.

Those cases simply do not apply here. Although these cases approved a form of injunctive relief to remedy procedural prejudice that could affect personal rights, they do not provide for a damages remedy for violating procedural rights and do not involve organizational rights.

The Tribes also argue that "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." Response Brief at 38. But, as noted, that is not our argument, nor does any such rule apply here

Finally, the Tribes contend that "[i]n 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." Response Brief at 39. Again, that is not our argument and the cases cited have no bearing on our actual argument.

For example, the brief cites *Morton v. Ruiz,* 415 U.S. 199, 235 (1974), for the proposition that "stricter standards apply to federal agencies when administering Indian programs." It cites *Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982), for the proposition that the "trust responsibility owed by the federal government to Indians 'suggests that the withdrawal of benefits from Indians merits special consideration' (quoting *Vigil,* 667 F.2d at 936). The brief does not provide an explanation of how these concepts apply to the jurisdictional question before the Court, nor can we discern one. Certainly the cases they cite do not support the claims they make for a *per se* right to the allegedly underfunded or recaptured grants at issue.

CONCLUSION

For these reasons, and those stated in our Opening Brief, we respectfully request that this Court hold that the Court of Federal Claims lacks jurisdiction, vacate the decisions below, and remand for dismissal or other appropriate disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Corrected Defendant-Appellant's Reply Brief was filed and served through this Court's CM/ECF system this 27th day of January 2017. 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 plaintiffs-appellees by U.S. mail, postage prepaid, within five days of the Court's acceptance of the brief in ECF. Service on counsel for the plaintiffs-appellees shall be addressed as follows:

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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 Defendant-Appellant's Reply Brief complies with the type-volume limitations of the FRAP. The brief contains 5936 words and was prepared using Microsoft Word 14 Point Times New Roman proportionately faced typeface.

s/ David A. Levitt
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