No. 18-1720

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-Appellants

FORT PECK HOUSING AUTHORITY
Plaintiff

v.

UNITED STATES
Defendant-Appellee

On Appeal from the United States Court of Federal Claims
In Case 1:08-CV-00848-EGB, Senior Judge Eric G. Bruggink

PLAINTIFFS-APPELLANTS' REPLY BRIEF

John Fredericks III
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Avenue
Mandan, North Dakota 58554
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jfredericks@ndnlaw.com

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

September 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

As shown in the Tribes' opening brief, and as the United States Department of Housing and Urban Development (HUD) does not dispute and could not dispute, no federal court has analyzed: 1) whether the Court of Federal Claims (CFC) has jurisdiction over the Tribes' alternative grounds for recovery of their funds based upon breach of contract, breach of fiduciary duty, and breach of trust; and 2) whether any dismissed claims should be transferred to a district court under 28 U.S.C. § 1631.

The Tribes also showed that in the current context, where HUD had appealed by permission from an interlocutory order, some federal court must analyze the two questions above and issue a reasoned decision on those issues.

From these premises, it plainly follows that this Court must conduct the required analysis in this appeal or must remand to the CFC for the required analysis.

HUD has no on-point responsive argument. Instead it discusses a very different legal question not presented by the procedural posture of this case. It argues that if the prior appeal had been by the Tribes from a final order and judgment against the Tribes, the Tribes would not be able to raise the two issues (CFC jurisdiction over contract, trust, and fiduciary duty claims; and application of 28 U.S.C. § 1631 to the facts of this case) in the current appeal. Resp. Br. at 7. From this inapplicable premise, HUD further asserts that because the Tribes sought to raise those same two issues through a motion for rehearing, and this Court summarily denied the request to rehear, the Tribes are barred from raising the claims in the current appeal. HUD

is wrong on both counts. As explained in the Tribes' opening brief and below, there are unaddressed claims outside the scope of this Court's prior decision for review in the first instance by the CFC, and exceptional circumstances exist that allow for reconsideration of the mandate by this Court, including whether the interests of justice support a transfer to the District Court for the District of Colorado.

ARGUMENT

I. NOT ALL TRIBAL CLAIMS WERE WITHIN THE PRIOR APPEAL.

In Section II of its opening brief, the Tribes discussed in detail the scope of the prior appeal, and showed that: 1) because HUD appealed the prior order by permission under 28 U.S.C. 1292(b), the scope of the appeal was limited to issues decided in that CFC order; 2) neither the appealed order nor this Court's own decision even mentioned, much less analyzed, the Tribe's alternative theories based upon breach of contract, breach of fiduciary duty, and breach of trust; 3) the Tribe's alternative theories are squarely within the CFC's jurisdiction.

In short, there is not even a plausible basis for asserting that the Tribes' alternative theories are outside the scope of the CFC's jurisdiction. The courts in this case did not, and presumably would not, decide that the Tribe's alternative theories are jurisdictionally barred. But the courts in this case have never analyzed the jurisdiction based upon those theories and analysis of those claims was outside the scope of the prior appeal by permission.

This Court reviews *de novo* the CFC's interpretation of this Court's mandate. *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1346 (Fed. Cir. 2001).[1] HUD acknowledges that this Court must interpret its mandate based upon the scope of the prior appeal. Resp. Br. at 7. Although it does not dispute the Tribes' correct discussion of the scope of an appeal by permission under 28 U.S.C. § 1292(b), HUD erroneously bases its argument upon the vastly different rule defining the scope of an appeal or scope of a resulting appellate order from an "appealed judgment," and HUD discusses what issues are waived when "not raised by the appellant in its opening brief" from an appeal from a final judgment. Resp. Br. at 7.

HUD's argument is immaterial to the issues in this case. The Court must, instead, interpret the mandate based upon the appealed interlocutory order in favor of the Tribes, not a hypothetical judgment against the Tribes. This Court must

[1] As stated by this Court in *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997): "We agree with NEC that the interpretation by an appellate court of its own mandate is properly considered a question of law, reviewable de novo. …Thus, it is no surprise that de novo review appears to be the standard of review that several Circuit Courts of Appeals have adopted. *See Ginett v. Computer Task Group, Inc.*, 11 F.3d 359, 361 (2d Cir. 1993) ("the appellate court retains the power to determine whether the terms of the mandate have been 'scrupulously and fully carried out' " (citation omitted)); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992) ("[appellate] court is vested with the authority to interpret its own mandate"); *Ad-Vantage Tel. Dir. Consultants, Inc. v. GTE Directories Corp.*, 943 F.2d 1511, 1517 (11th Cir. 1991) (no deference shown to trial court interpretation of appellate court mandate); *Caldwell v. Puget Sound Elec. Apprenticeship & Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987) (no deference shown to trial court interpretation of appellate court mandate)."

interpret the mandate based upon the scope of the issues in the prior appeal, which are the issues in the interlocutory order. Those issues simply did not even discuss the Tribe's alternative theories for relief.

Without citing a single on-point case, HUD makes a related, and equally erroneous argument that because this Court denied a motion to rehear, the mandate must be construed as denying the arguments which a party sought to raise in rehearing.

Case law is all contrary to HUD's argument. A decision not to rehear a case is a discretional decision, not a merits decision. Fed. R. App. Proc. 35, 41. It is analogous to a Supreme Court order denying a petition for a writ of certiorari. As such, the issues raised in the motion to rehear are not decided on the merits unless this Court grants the motion to rehear. "The failure of a petition to achieve the necessary votes for rehearing does not . . . imply any judgment on the merits and has no jurisprudential significance. *In re Grand Jury Investigation*, 542 F.2d 166, 173 (3d Cir. 1976). *See also Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 499 n.5 (3d Cir. 2008) (same); *Marshak v. Reed*, 229 F. Supp. 2d 179 (E.D.N.Y. 2002), *aff'd*, 87 F. App'x 208 (2d Cir. 2004) (same); *Crider v. Keohane*, 526 F. Supp. 727, 728 (W.D. Okla. 1981). *Cf. Tecsec, Inc. v. Int'l Bus Machs. Corp.*, 731 F.3d 1336 (Fed. Cir. 2014) (holding that when this Court summarily affirms a lower court's partial

judgment under Federal Circuit Rule 36, the mandate is limited to the decision, not the reasoning of the lower court).

Interpreting its opinion and mandate consistent with the law discussed above, this Court should conclude that it did not rule on the Tribes' alternative theories for relief. While the Tribes believe the above is the correct interpretation of the prior panel order, the Tribe notes that HUD's assertion that this Court dismissed claims that were not even within the scope of the prior interlocutory appeal would lead to the same end result (while causing unwarranted criticism of the prior panel decision). If, as HUD argues, this Court were to interpret the prior decision as containing an order dismissing of breach of contract, breach of trust, and breach of fiduciary duty theories without analysis and without those issues even being before this Court on the interlocutory appeal, such a decision would have been "clearly incorrect and would result in 'manifest injustice.'" *Haggart v. United States*, 131 Fed. Cl. 628, 638 (Fed. Cl. 2017) (citing *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014). Either way, the Court should reach the same result, although the Tribes' view is that this Court can and should interpret the prior decision in a way consistent with the limited scope of the prior appeal, and in a way which would not cause the prior decision to be erroneous.

The prior appeal was interlocutory and by permission, and therefore limited to the issues in the appealed order. 28 U.S.C. § 1292(b). Commentators and courts

have consistently observed that "the scope of the issues open to the court of appeals is closely limited to the order appealed from. *United States v. Stanley*, 483 U.S. 669, 677 (1987). The appeal, and thus the mandate, were limited to the issues of whether NAHASDA is money mandating and whether the illegal exaction claim depended on whether NAHASDA was money mandating. This Court's ruling on those issues do not implicate the Tribes' breach of contract or breach of trust claims, and thus were not before this Court or decided by this Court in the prior interlocutory appeal. *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 951–52 (Fed. Cir. 1997) ("Although the district court cites much authority for the proposition that issues decided implicitly by courts of appeals may not be reexamined by the district court, the rule is actually applicable only to those issues decided by necessary implication."). The scope of the issues presented to this Court on appeal must be measured by the scope of the order appealed from, not by the arguments advanced by the parties. *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999).

Proper interpretation of this Court's mandate to dismiss the action, limited by the mandate and law of the case doctrine, encompasses only those claims relating to the money-mandating nature of NAHASDA, and leave claims not within the scope of the prior appeal (breach of contract and breach of trust) for the CFC to address. Thus, the Tribes request this Court instruct the CFC that dismissal of the Tribes' breach of contract and breach of trust claims was in error, or to amend its mandate

to avoid dismissal of claims never before this Court or the CFC. The Tribes are entitled to their day in court on the claims which have yet to be addressed.

II. EXCEPTIONS TO THE MANDATE RULE APPLY IN THIS APPEAL

In its opening brief, the Tribe discussed that for the primary issue that this Court decided in the prior appeal—whether the provisions of NAHASDA at issue in that appeal were money-mandating—the Court has authority to apply the exceptions to the mandate rule so that the United States is not able to prevail on contradictory arguments to two different appellate courts.

HUD conveniently omits from its response any reference to the jurisdictional gap resulting which it created through its contradictory arguments in this Court and in the Tenth Circuit regarding whether NAHASDA is money mandating. In *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001), this Court discussed the mandate rule and the exceptions to it.

> "Law of the case and the mandate rule are not always considered an unassailable limit on an appellate court's jurisdiction. Rather, these doctrines are better viewed as prudential doctrines that direct a court's discretion, but do not necessarily limit a court's power. … Accordingly, it may be appropriate in some circumstances for a court to revisit an issue that would otherwise be deemed waived and beyond the scope of an appellate mandate. Such circumstances, however, must be exceptional. … Otherwise, the underlying rationales for the doctrines of law of the case and the mandate rule would be thwarted.[3] However, courts have considered revisiting issues otherwise foreclosed in circumstances where there has been a substantial change in the evidence."

Id. Footnote three of the *Tronzo* opinion illuminates the rationales for the mandate rule, including the need for (and the litigant's right to) finality, judicial economy, the consistency of judicial decisions, the discouragement of piecemeal adjudication, and the prevention of the perverse result of allowing a litigant to be in a better position by failing to raise an issue in an initial appeal. *Id.*

Revisiting this Court's mandate does not thwart any of the rationales for the mandate rule, and in fact, strict enforcement of the mandate rule here would frustrate the goal of consistency of judicial decisions. The Court's decision that NAHASDA is not money mandating is contrary to *Bowen v. Massachusetts*, 487 U.S. 879 (1988); and results in an unworkable gap in jurisdiction because the Tenth Circuit has ruled the Court of Federal Claims has jurisdiction over these types of claims. There was also a glaring factual error by this Court in ruling that the Tribes' grant monies were never in the claimants' possession and therefore the Tribes could not bring an unlawful exaction claim. The record before the CFC showed that the monies were in the Tribes' possession, something HUD even acknowledged when it sought to recapture the funds. To leave the Tribes wholly without a remedy for their claims is certainly a manifest injustice that warrants an exception to the mandate rule, and reconsideration of this Court's earlier conclusions.

III. NEITHER THIS COURT NOR THE CFC HAS EXERCISED THE DISCRETION REQUIRED BY 28 U.S.C. § 1631, WHICH NECESSITATES A REMEDY

As the Tribes discussed in their opening brief, Congress, under 28 U.S.C. § 1631, required that a court, either this Court or the CFC, must consider whether to transfer dismissed claims to a district court. Whether the courts complied with that statute is an issue of law which is reviewed *de novo* based upon the record in this case.

HUD acknowledges that the CFC did not consider whether or not to transfer the dismissed claims to a district court, but it argues that by issuing the standardized one page order denying the motion to rehear, this Court considered the relevant factors under 28 U.S.C. § 1631 and this Court decided to deny transfer. As discussed above, HUD's argument is contrary to all case law regarding denial of appellate court motions to rehear. This Court's denial of the motion to rehear only establishes that this Court chose not to exercise its discretion to rehear. It is not a merits decision on any issues raised in the motion to rehear.

HUD's only other argument is that this Court should deny transfer because, HUD asserts, it is not clear whether the Tribes would be able to collect from HUD under the Tenth Circuit's decision in *Modoc Lassen Indian Housing Authority v. United States Department of Housing and Urban Development*, 881 F.3d 1181, 1196 (10th Cir. 2017) (*Modoc*).

There are multiple obvious flaws with HUD's argument. First, the Tribes adamantly disagree with HUD's claim that the Tribes would be unlikely to prevail upon transfer. Second, this Court is not required to predict whether or not the Tribes are likely to prevail. Instead, the inquiry in this Court is whether the Tribes' claims "could have been brought [in the district court] at the time it was filed." 28 U.S.C. § 1631. The Tenth Circuit's decision in *Modoc* establishes, and HUD admits, that the Tribes' claims could have been brought in the district court at the time they were filed. Third, and closely related to the second point, the *Modoc* case is still ongoing in both the District Court and the Supreme Court, and the case is complicated. This Court need not predict, and cannot predict with assurance, how that case will come out, or how the final decisions in that case would apply to the Tribes' claims in this case. Instead, the district court will decide, after transfer, whether the Tribes will prevail, based upon the facts and law shown in that court.

Illustrative of all of these points, after HUD submitted its brief to this Court, the Federal District Court for the District of Colorado held, contrary to HUD's interpretation of the Tenth Circuit's decision, that the tribes in *Modoc* do have an effective remedy for recovering their funds. *Modoc*, D. Col. Case 08-cv-00451-RPM, Dkt. 124.

The interest of justice, indeed avoiding manifest injustice, requires a transfer to the District Court to avoid the time-barring of claims and to avoid HUD

successfully making two opposite jurisdictional arguments against the Tribes. All elements for transfer pursuant to 28 U.S.C. § 1631 are present. This Court must consider whether the interests of justice require this case be transferred to the District Court for the District of Colorado, or instruct the CFC to exercise its discretion in doing so. The consideration must take place before dismissal, either here or on remand. *Taylor v. Soc. Sec. Admin.*, 842 F.2d 232 (9th Cir. 1988).

CONCLUSION

For the reasons above and those stated in the Tribe's opening brief, the CFC order dismissing the whole of the case before the CFC, and its failure to consider whether to transfer claims to a district court were erroneous. The Tribes request this Court (1) revisit the CFC's overly broad interpretation of this Court's mandate, and instruct the CFC to consider the breach of contract and breach of trust claims, (2) reconsider its rulings as it relates to NAHASDA and illegal exaction, and (3) transfer any dismissed claims to the District Court for the District of Colorado.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Lummi Tribe of the Lummi Reservation, et al. **v.** The United States

Case No. 18-1720

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☒ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Lummi Tribe of the Lummi Reservation	None	None
Lummi Nation Housing Authority	None	None
Fort Berthold Housing Authority	None	None
Hopi Tribal Housing Authority	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Jeffrey S. Rasmussen, Fredericks Peebles & Morgan LLP, 1900 Plaza Drive, Louisville, Colorado 80027

Respectfully submitted this 5th day of September, 2018.

s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

John Fredericks III
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Avenue
Mandan, ND 58554
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jfredericks@ndnlaw.com

Counsel for Lummi Tribe of the Lummi Reservation, Washington, Lummi Nation Housing Authority, Hopi Tribal Housing Authority, Fort Berthold Housing Authority, Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2018, a copy of this PLAINTIFFS-APPELLANTS' REPLY BRIEF was filed and served through this Court's CM/ECF system. 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 Defendant-Appellee United States by U.S. mail, postage prepaid, within five (5) days of the Court's acceptance of the brief in ECF. Service on counsel for the Defendant-Appellee shall be addressed as follows:

David A. Levitt
Trial Attorney
Department of Justice
Commercial Litigation Branch
Civil Division
Ben Franklin Station
P.O. Box 480
Washington, DC 20044

By: /s/ *Debra A. Foulk*
Debra A. Foulk
Legal Assistant to Jeffrey S. Rasmussen

CERTIFICATE OF COMPLIANCE

Per Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure (FRAP), I, Jeffrey S. Rasmussen, hereby certify that the foregoing Plaintiffs-Appellants' Reply Brief complies with the type-volume limitations of the FRAP. Pursuant to FRAP Rule 32(a)(5), the brief contains 2,846 words and was prepared using Microsoft Word, 14 Point Times New Roman proportionately faced typeface.

s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen

Counsel for Lummi Tribe of the Lummi Reservation, Washington, Lummi Nation Housing Authority, Hopi Tribal Housing Authority, Fort Berthold Housing Authority, Plaintiffs-Appellants