UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:	
NAVAJO HOUSING AUTHORITY,	14-JM-0121-IH-002
Respondent.	December 14, 2015

INITIAL DECISION AND ORDER

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

PROCEDURAL HISTORY

On June 27, 2014, the Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development (HUD or Government), issued an Imposition of Remedies (IOR) letter against the Navajo Housing Authority (Respondent or NHA). HUD determined that Respondent was in substantial noncompliance with requirements imposed by the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 *et seq.* 24 C.F.R. §§ 1000.534(a) and (c). The alleged noncompliance related to Respondent's failure to comply with the expenditure goals set forth in its Indian Housing Plan (IHP).[1]

After receiving the Notice of Intent to Impose Remedies, Respondent requested an informal hearing, which occurred on November 21, 2013. A second informal hearing was held on May 6, 2014. Neither meeting succeeded in rectifying HUD's concerns. On July 29, 2014, Respondent filed a request for an administrative hearing to contest the IOR.[2] Accordingly, HUD issued a *Complaint for Imposition of Remedies* (Complaint) on August 20, 2014. The *Complaint* seeks a determination that HUD's decision to impose remedies against Respondent is supported by a preponderance of the evidence.

Respondent filed a timely *Answer* on September 3, 2014. On December 17, 2014, HUD filed the *Government's Motion for Summary Judgment*, which Respondent countered with *Respondent's Cross-Motion for Summary Judgment*, dated January 2, 2015. Both *Motions* were denied on May 12, 2015.

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[1] The specific remedies were previously proposed in a Notice of Intent to Impose Remedies/Offer of Informal Meeting (NOI) dated July 31, 2013, a copy of which was provided to Respondent. Respondent received a Letter of Warning on March 30, 2013, informing it of the potential for an enforcement action.

[2] The regulations governing the hearing process under NAHASDA are found at 24 C.F.R. Parts 26 and 1000. Upon filing a request for a hearing by a respondent, this Court has jurisdiction over the matter pursuant to 24 C.F.R. §§ 26.2 and 1000.540.

A hearing on the matter was conducted from June 16-19, 2015, in Phoenix, Arizona. *Post-Hearing Briefs* were filed on August 31, 2015, and *Response Briefs* were filed on September 29, 2015. The matter is now ripe for initial decision.

BURDEN OF PROOF

HUD must prove its allegations by a preponderance of the evidence. 24 C.F.R. § 26.25(a). The preponderance standard has been described by the U.S. Supreme Court as the "most common standard in the civil law." Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622, (1993). This standard simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." Id. Accordingly, the preponderance standard is met if "the scales tip, however slightly, in favor of the party with the burden of proof' as to that fact." Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 187 (2d Cir. 1992). Respondent must prove any affirmative defenses by a preponderance as well. 24 C.F.R. § 26.24(g).

FINDINGS OF FACT

The Court has considered all matters presented by the parties, including the *Complaint* and supporting exhibits, the *Answer*, all exhibits admitted during the hearing, and both parties' *Post-Hearing Briefs* and *Response Briefs*. Accordingly, the Court finds the facts as described below and further finds and takes cognizance of facts as described elsewhere in this *Initial Decision*. Any facts or arguments not addressed herein are deemed to lack merit or be otherwise unnecessary to the ultimate outcome.

1. HUD's Office of Native American Programs (ONAP) administers the Indian Housing Block Grant (IHBG) Program as part of HUD's responsibility to provide safe and healthy living environments for members of federally recognized American Indian and Alaska Native tribes and native Hawaiians.

2. There are 566 such tribes today, with memberships ranging from single digits to more than 300,000.

3. The Navajo Nation is the largest single tribe in the United States.

4. Respondent is the authorized Tribally Designated Housing Entity (TDHE) for the Navajo Nation. Aneva J. Yazzie is Respondent's Chief Operating Officer.

5. Approximately 360 tribes participate in the IHBG Program each year.

6. Prior to the enactment of NAHASDA, HUD operated fourteen separate Indian housing-related programs, each with their own deadlines, paperwork, and eligibility requirements.

7. NAHASDA brought nine of the fourteen programs under one umbrella, creating the IHBG Program to streamline the grant process.

8. Under the IHBG Program, HUD provides a single block grant to Program participants, who determine for themselves how best to allocate the grant funds to accomplish their affordable housing goals.

9. ONAP is headquartered in Washington, D.C., and has six field offices throughout the country.

10. In a March 25, 2011, letter from then-Navajo Nation President Ben Shelly to then-HUD Secretary Shawn Donovan, Shelly requested that primary monitoring responsibility over NHA be transferred from HUD's Southwestern Office of Native American Programs (SWONAP) to its Northern Plains Office of Native American Programs (NPONAP) due to the tribe's ongoing concerns about SWONAP.

11. On October 1, 2011, HUD accepted the tribe's request and transferred monitoring responsibility from SWONAP to NPONAP.

12. NPONAP created a Tribal Special Assistance Team (TSAT) to provide technical assistance to Respondent.

13. Between 1998 and 2011, IHBG Program participants completed the Indian Housing Plan prior to the beginning of the relevant Program Year. At the end of the Program Year, they completed a separate Annual Performance Report (APR).

14. Between 1998 and 2011, Program participants were required to submit an Indian Housing Plan and an Annual Performance Report for each open grant.

15. In order to streamline the reporting process, HUD merged the Indian Housing Plan and Annual Performance Report into a single form prior to HUD's 2012 fiscal year. The new form is known as the IHP/APR Form.

16. The introduction of the IHP/APR Form coincided with HUD's decision to shift from a grant-based reporting model to an annual reporting model.

17. Ms. Yazzie was a member of the negotiated rulemaking committee that reviewed and approved the IHP/APR Form prior to its introduction.

18. NHA's Program Year is October 1 – September 30, identical to the federal fiscal year.

19. HUD conducted training sessions in 2011 to educate Program participants about the new reporting requirements.

20. NHA personnel attended one training session in New Orleans in February 2011, and one in Phoenix in March 2011.

21. NPONAP's technical assistance to Respondent included in-person meetings, weekly teleconferences, and detailed discussions about NAHASDA-required forms,

including the IHP/APR Form.

22. Prior to the 2012 Program Year, the IHP Form stated that informal amendments "should be made locally by the recipient and placed in the recipient's files."

23. The IHP/APR Form stated that informal amendments "will be reflected in the APR and do not need to be submitted to HUD."

24. NHA's Program Year 2012 Indian Housing Plan (2012 IHP) was found in compliance on March 15, 2012.

25. The 2012 IHP listed "Estimated funds to be expended during 12-month program year" as $215,989,448.

26. During Program Year 2012, members of the TSAT questioned whether Respondent could realistically meet the expenditure goal identified on its 2012 IHP.

27. HUD and Respondent worked together to create an Expenditure Plan to effectively track Respondent's progress toward its expenditure goals.

28. NPONAP and Respondent engaged in extensive communications about the Expenditure Plan.

29. NPONAP received various draft versions of the Expenditure Plan throughout February and March, 2012.

30. The final version of the Expenditure Plan outlined $97,808,924.42 in expenditures for Program Year 2012.

31. HUD was aware that Respondent considered approximately $164 million in funds to be construction funds that would be spent over the course of two or three years.

32. HUD sought confirmation from Respondent whether the $164 million was included in the $215 million expenditure figure or whether it would be expended over several years.

33. Ms. Yazzie's responses to HUD's questions regarding the $164 million were non-definitive and contradictory.

34. During Program Year 2012, NPONAP staff prioritized the Expenditure Plan over the IHP.

35. HUD did not tell Respondent that the Expenditure Plan amended the IHP.

36. HUD did not tell Respondent that it was unnecessary to amend the IHP.

37. HUD did not tell Respondent that Respondent could amend the IHP after the end of

the Program Year.

38. HUD did not tell Respondent that failure to amend the IHP could subject Respondent to an enforcement action if it failed to substantially meet the IHP's $215 million expenditure target.

39. HUD advised Ms. Yazzie on at least two occasions during the Program Year that Respondent should consider amending its IHP to more accurately reflect the expenditure goals listed in the Expenditure Plan.

40. Respondent did not amend its IHP during the 2012 Program Year.

41. During a telephone conversation between NHA staff and NPONAP personnel in December 2012, NHA staff mentioned adjusting the IHP figures but were told that it was too late to amend the IHP.

42. HUD does not routinely enforce its formal amendment rules.

43. HUD has never initiated an enforcement action against a Program participant for failure to comply with the expenditure goals set forth in its IHP.

44. Respondent submitted its APR on or about December 28, 2012.

45. Under "Actual funds expended during 12-month program year," the APR listed $66,625,332.

46. The IHP/APR Form submitted in December 2012 did not alter any of the figures on the IHP side of the Form.

47. The APR accurately reflects Respondent's affordable housing activities in Program Year 2012 and accurately reflects the funds expended during the Program Year.

HISTORICAL BACKGROUND

It is no great secret that the relationship between the United States and this continent's Native population has often been defined by mistrust and contentiousness. The federal government's efforts to provide housing support for members of the 566 federally recognized American Indian tribes is no exception. Originally, it fell to the U.S. Department of the Interior's Bureau of Indian Affairs to oversee almost all interactions between the United States and the sovereign tribal nations.[3]

[3] To its credit, the BIA readily acknowledges that "For most of its existence, the BIA has mirrored the public's ambivalence towards the nation's indigenous people." *Frequently Asked Questions*, U.S. Department of the Interior Indian Affairs (Sept. 11, 2015), http://www.indianaffairs.gov/FAQs/index.htm. It also accepts the uncomfortable truth that the United States' formal policy towards the American Indian community for much of the country's history was one of subjugation and assimilation. Id. Although one hopes such policies are discarded relics of the past, the scars they left continue to influence the relationship between this country and its indigenous citizens.

In 1937, the passage of the United States Housing Act established the U.S. Housing Authority (USHA) as a sub-agency within the Interior Department. In 1965, the USHA and several other Interior Department housing-related offices were consolidated and spun off into a new, Cabinet-level agency, the U.S. Department of Housing and Urban Development. BIA continues to coordinate many aspects of U.S.-tribal relations to this day. However, Indian housing programs are now almost exclusively within the purview of HUD's Office of Public and Indian Housing, and specifically it's Office of Native American Programs. General Accounting Office, Pub. No. GAO/RCED-97-105, CHALLENGES FACING HUD'S INDIAN HOUSING PROGRAM, p. 3 (March 12, 1997) (GAO Report 97-105).

Unfortunately, many of the Indian housing programs created by the Housing Act of 1937 were designed and implemented independent of one another. The result was as many as 14 separate programs, each with different criteria, different deadlines, and different paperwork. General Accounting Office, Pub. No. GAO/RCED-99-16, NATIVE AMERICAN HOUSING — INFORMATION ON HUD'S FUNDING OF INDIAN HOUSING PROGRAMS, p. 2 (November 30, 1998). A tribe seeking to take advantage of HUD's housing programs was required to expend substantial time and resources navigating a confusing bureaucratic landscape. In many cases, the burden was understandably beyond the tribe's ability to overcome.

Unable to cut through the masses of red tape, many tribes did without crucial funding. The result was critical housing deficiencies on many Indian reservations. For example, an Urban Institute report in 1996 found that 40 percent of tribal residents lived in overcrowded or physically inadequate housing, compared to only 6 percent of the overall United States population. GAO Report 97-105. Also in 1996, the *Seattle Times* published a Pulitzer Prize-winning exposé detailing the abysmal housing conditions on many Indian reservations and uncovering a system "riddled with fraud, abuse, and mismanagement." Eric Nalder et al., *A Seattle Times Special Report*, 1996 SEATTLE TIMES, Dec. 1-5, 1996.

Soon after the GAO report, the U.S. Congress took up the call for Indian housing reform. Representative Rick Lazio (R-NY) introduced NAHASDA as H.R. 3219 on March 29, 1996. Douglas Bereuter (R-NE), John Hayworth (R-AZ), and Tim Johnson (D-SD) immediately joined the bill as co-sponsors. The National American Indian Housing Council (NAIHC) quickly added its support as well.

Overall, NAHASDA enjoyed solid bipartisan support in both houses of Congress. While discussing the bill on the floor of the Senate, U.S. Senator John McCain (R-AZ) quoted studies indicating that 28% of all American Indian and Alaska Native families lived in substandard, overcrowded housing that lacked basic amenities. 142 Cong. Rec. S12405-01, 1996 WL 562340 (1996) (statement of Sen. McCain). On September 28, 1996, the bill passed the U.S. House of Representatives on a voice vote, with no objections. The U.S. Senate voted unanimously in favor of it on October 3, 1996, and it was signed into law by President Bill Clinton on October 26, 1996. NAHASDA formally went into effect on September 1, 1997.

Central to NAHASDA is the tenet that tribal governments should have "the ability and responsibility to strategically plan their own communities' development" and not be "burdened by excessive regulation." 142 Cong. Rec. E502 (March 29, 1996) (statement of Rep. Lazio). To serve that purpose, NAHASDA absorbed HUD's various Indian housing programs, creating a

single point of focus for Indian housing. Rather than issuing grants on an individual basis, NAHASDA also created the Indian Housing Block Grant Program. Speaking in support of the bill, Representative Joseph Kennedy II (D-MA) predicted that NAHASDA would end decades of "overly prescriptive policies and bureaucratic entanglements" and allow the tribes to "be focused on the mission of providing housing, not on networking with rules and regulations and performance standards irrelevant to the communities that they serve." 142 Cong. Rec. H11617 (Sept. 28, 1996) (statement of Rep. Kennedy). The accuracy of Rep. Kennedy's prediction is left for history to decide.

Lazio, Kennedy, McCain, and other NAHASDA supporters also noted that the geographical and cultural realities in Indian Country[4] were distinctly different from those found in metropolitan areas.[5] As a result, policies designed for use in the public housing context were often ineffective when applied to Indian housing programs. See 142 Cong. Rec. E502 (March 29, 1996) (statement of Rep. Lazio) ("Housing on Indian reservations was considered just a derivation of public housing"); 142 Cong. Rec. H11615 (Sept. 28, 1996) (statement of Sen. Bereuter); H11616 (Sept. 28, 1996) (statement of Sen. Bruce Vento, D-MA) ("Indian Country is not the same in culture nor geography nor needs as other entitlement communities and entities that receive grants and housing assistance.").

NAHASDA also emphasized that Indian housing funding should be as flexible as possible to ensure tribal self-determination and autonomy. 142 Cong. Rec. H11617 (Sept. 28, 1996) (statement of Rep. Lazio). The focus on tribal independence is reflected in the name of the legislation itself: "the Native American Housing Assistance and Self-Determination Act."[6] It is also reflected in the Congressional Findings, which states that federal assistance "shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance." 25 U.S.C. § 4101(7). NAHASDA also reaffirmed the existence of "a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people." 25 U.S.C. § 4101(2).

Finally, NAHASDA mandated that HUD's implementing regulations be the product of negotiated rulemaking that involved tribal representatives. 25 U.S.C. § 4116. As the single largest federally recognized American Indian tribe, the Navajo Nation has played a prominent role in the negotiated rulemaking process since NAHASDA's inception. For example, Navajo Housing Authority Commissioner Ervin Keeswood was named to the NAHASDA Reauthorization Act of 2008 Negotiated Rulemaking Committee, and NHA CEO Aneva J. Yazzie was named to the Indian Housing Block Grant Allocation Formula Negotiated Rulemaking Committee in 2013.

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[4] The term "Indian Country" is simultaneously colloquial and a legal term of art. In either context, it refers to all land within the boundaries of a reservation, whether the land is owned by Native or non-Native peoples. See 18 U.S.C. § 1151. More generally, "Indian Country" has referred to any areas inhabited primarily by Native Americans.

[5] A 1994 HUD policy statement expressly committed HUD to "recognize and acknowledge that there are distinct cultural practices, religious beliefs, and jurisdictional rights that must be considered when housing is developed for Native Americans." American Indian and Alaska Native 1994 Policy Statement.

[6] NAHASDA's "long title" is "An act to provide Federal assistance for Indian tribes in a manner that recognizes the right of tribal self-governance, and for other purposes."

NAHASDA has been viewed as a moderate-to-strong success by many in Indian Country, as evidenced by their support of the legislation's reauthorization. In a 2010 report assessing the effectiveness of NAHASDA, the U.S. Government Accountability Office found that "most grantees that we surveyed and interviewed view NAHASDA as effective, largely because it emphasizes tribal self-determination. Grantees feel the program has helped to improve housing conditions and increase access to affordable housing." GAO Report No. GAO-10-326, "NATIVE AMERICAN HOUSING: TRIBES GENERALLY VIEW BLOCK GRANT PROGRAM AS EFFECTIVE, BUT TRACKING OF INFRASTRUCTURE PLANS AND INVESTMENTS NEEDS IMPROVEMENT," (February 25, 2010). The NAIHC has remained a staunch supporter of the legislation, as has the National Congress of American Indians (NCAI) and the Indian Country Today Media Network. NAIHC and NCAI have organized task forces and working groups to ensure NAHASDA's reauthorization, which has passed the U.S. House and is currently before the Senate.

APPLICABLE LAW

The Indian Housing Plan Submission and Amendment Process

NAHASDA's focal point is the Indian Housing Block Grant Program. 24 C.F.R. § 1000.1. Under the IHBG Program, grant funds are distributed by the Secretary each fiscal year directly to federally or state-recognized tribes for the purpose of funding the tribes' affordable housing activities. The tribes then allocate and distribute the funds as they see fit. The only statutory requirements for tribal participation in the IHBG Program are (1) the submission of an Indian Housing Plan, and (2) Secretarial approval of the IHP. 25 U.S.C. § 4111(b)(1). Even these fairly minimal requirements may be waived by the Secretary if he determines that a tribe has not or cannot comply with them due to circumstances beyond the tribe's control. 25 U.S.C. § 4111(b)(2).

An IHP is due at least 75 days before the beginning of the tribe's Program Year,[7] and contains four primary components. First, it must describe the housing activities that will be conducted that year. 25 U.S.C. § 4112(b)(2)(A). The description must include information about the types of housing and assistance to be provided, such as the number of physical housing units to be produced or demolished during the Program Year. It must also describe the tribe's anticipated outcomes for the year. Second, the IHP must explain the means by which the tribe's housing needs will be addressed during the Program Year. 25 U.S.C. § 4112(b)(2)(B). The tribe must provide an estimate of the housing needs of low-income Indian families and the needs of the jurisdiction's Indian families in general. Third, the tribe must identify what projects the grant funds will be used for, why the funds are necessary, and how much the tribe intends to spend per project. 25 U.S.C. § 4112(b)(2)(C). Fourth, 25 U.S.C. § 4112(b)(2)(D) states that a tribe must make several specific certifications. For example, a Tribally Designated Housing Entity may submit an IHP on behalf of a tribe. However, it can only do so if the IHP contains a certification that the tribe has delegated such authority to the TDHE, and that the tribe has had the opportunity to review the IHP prior to its submission. 25 U.S.C. § 4112(c).

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[7] This *Initial Decision* refers to program years and fiscal years interchangeably because Respondent's program year is identical to the federal fiscal year.

After the tribe or TDHE submits the IHP, the HUD Secretary verifies that the Plan complies with the relevant NAHASDA requirements and is consistent with other data provided to HUD. 24 C.F.R. § 1000.230(a). The Secretary is allowed only a "limited review," which occurs "only to the extent that the Secretary considers review is necessary." 25 U.S.C. § 4113(a)(1). If the Secretary finds that the IHP is not in compliance, HUD must notify the tribe and explain the reasons for its determination. HUD must also tell the tribe how to bring its IHP into compliance, and identify the date by which the revised IHP must be submitted. 24 C.F.R. § 1000.230(c).

Once the IHP is approved by the Secretary, the tribe may amend it at any time during the Program Year. 25 U.S.C. § 4113(c); 24 C.F.R. § 1000.232. Neither NAHASDA nor its implementing regulations provide explicit instructions as to how a tribe amends its IHP. Guidance is available, however, on the IHP/APR Form itself and via guidance published on ONAP's web site.

Amendments may be either formal or informal. To formally amend an IHP, a tribe or its authorized TDHE must fill out Section 16 of the IHP/APR Form. INDIAN HOUSING PLAN AND ANNUAL PERFORMANCE REPORT FORM GUIDANCE, February 2012 ("HUD IHP/APR Guidance Letter" or "Guidance Letter"), pg. 30. It must then file the amended IHP with the Secretary for review, just as it would for its initial IHP. Id. The Secretary then reviews the amended IHP at his discretion. 25 U.S.C. § 4113(c)(2). Once the amended IHP is found to be in compliance, the tribe adds the amendment to Section 4 of its initial IHP and adjusts the information in Sections 3 and 5 of the initial IHP. HUD IHP/APR Guidance Letter, pg. 30. Section 16 of the IHP/APR Form states:

> This amendment is only required to be submitted to the HUD Area Office of Native American Programs when (1) the recipient is adding a new activity that was not described in the current One-Year Plan that was determined to be in compliance by HUD; or (2) to reduce the amount of funds previously budgeted for the operation and maintenance of 1937 Act housing under NAHASDA § 202(1). All other amendments will be reflected in the APR and do not need to be submitted to HUD.

Indian Housing Plan/Annual Performance Report, form HUD-52737, p. 46 ("IHP/APR Form").

HUD's 2012 Guidance Letter reiterates that Section 16 "is only filled out if the recipient is making a formal amendment to an IHP that was previously determined to be in compliance by HUD and the recipient is required to send the amended IHP to HUD for review." HUD IHP/APR Guidance Letter.

An informal amendment is made by revising the relevant sections of the tribe's initial IHP Form — again usually Sections 3 and 5. For an informal amendment, the tribe does not fill out Section 16, does not update Section 4, and does not send the revised IHP to HUD. Id. As a result, the Secretary does not become aware of the revisions until after the Program Year ends. The Guidance Letter states that:

> The recipient (a tribe or TDHE) is not required to submit an amended IHP to HUD: if the revisions simply alters the IHBG budget, including moving funds among planned tasks; or if it deletes a planned activity, *unless* the re-programmed funds from the budget amendment or task deletion will be used for a new task not currently in an IHP determined by HUD to be in compliance, or *unless* the change is to reduce the budget supporting 1937 Act units.

Guidance Letter, p. 30 (emphases in original).

Annual Performance Reports and Secretarial Review

Each tribe receiving IHBG funds must submit an Annual Performance Report to HUD within 90 days of the end of its Program Year. 24 C.F.R. § 1000.514. The APR details the tasks completed and the results actually achieved during the Program Year. Beginning in 2012, the IHP and the APR were merged into a single form, allowing the Secretary to determine at a glance how effectively the tribe has met its performance goals. The APR also confirms that the tribe has complied with its IHP and with NAHASDA's requirements. 24 C.F.R. § 1000.520.

Given that the APR is submitted after the end of the Program Year, it reflects any amendments made during the Program Year, whether those amendments were formal or informal. In the case of an informal amendment, the APR represents the first time HUD learns of the revised IHP.[8]

After reviewing the APR, the Secretary must determine if the tribe is in compliance with its IHP. If the tribe is noncompliant, the Secretary must then decide whether the noncompliance was "substantial." Noncompliance is deemed to be substantial if:

> (a) The noncompliance has a material effect on the recipient meeting its major goals and objectives as described in its IHP.
>
> (b) The noncompliance represents a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or the regulations, even if a single instance of noncompliance would not be substantial;
>
> (c) The noncompliance involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity; or
>
> (d) The noncompliance places the housing program at substantial risk of fraud, waste, or abuse.

[8] The tribe may inform HUD at any time that it has informally amended its IHP, but it is not required to. By doing so, the tribe may defuse any potential surprise when HUD receives the APR.

24 C.F.R. § 1000.534

If the tribe is found to be in *substantial noncompliance*, HUD may terminate, reduce, or limit the availability of the tribe's funds received pursuant to NAHASDA. 25 U.S.C. § 4161(a); 24 C.F.R. § 1000.538(a). These funds are then returned to the funding pool and are included in the next NAHASDA formula allocation, thereby making them available to any tribe, including the tribe from whom they were recovered. 24 C.F.R. § 1000.536.

The IHP submission, amendment, and review process therefore creates three possible scenarios once an initial IHP has been filed and approved:

(1) No Amendments: If the tribe did not make any amendments to its IHP during the Program Year, its APR should generally align with the figures in the IHP on file at HUD.

(2) Formal Amendment: If the tribe has formally amended its IHP during the Program Year, HUD will have reviewed and approved the amended IHP and will have a copy of that IHP on file. The tribe's APR should thus generally align with HUD's copy of the amended IHP.

(3) Informal Amendment: If a tribe informally amends its IHP during the Program Year, its APR will not reflect the figures on HUD's copy of the IHP. Rather, the APR should align with the figures on the tribe's amended IHP, which it submits alongside the APR. HUD compares the APR to this revised IHP to determine whether the tribe substantially complied with its objectives.

DISCUSSION

HUD alleges in the *Complaint* that Respondent is in noncompliance with its NAHASDA requirements because it expended only about $66 million of the $215 million budgeted in its 2012 IHP. It therefore failed to substantially meet its targeted expenditure goals. Respondent has raised multiple defenses to HUD's allegation, each of which is addressed in turn.

I. Respondent Did Not Amend its IHP, Either Expressly or *De Facto*

First, Respondent asserts that by filing its APR in December 2012, it expressly amended its IHP. The $215 million expenditure figure in the IHP was thus reduced to $66 million, to correspond with the amount Respondent actually expended in Program Year 2012. According to Respondent, HUD's regulations and guidance not only allow an APR to amend an IHP, but affirmatively require that informal amendments be made on the APR and nowhere else.

There is no dispute whether or not Respondent formally amended its IHP; it did not. Respondent never submitted a new IHP to HUD during Program Year 2012. HUD, therefore,

could not have reviewed and approved it. The only question, then, is whether the submission of an APR three months after the end of the Program Year constitutes an informal amendment.

The rules regarding the informal amendment procedure are found in both the IHP/APR Form and the Guidance Letter. Although Respondent's interpretation of those documents has some merit, it ultimately does not prevail.

The version of the IHP Form in use from 1998 until 2011 stated that informal amendments "should be made locally by the recipient and placed in the recipient's files." When the IHP and APR forms were merged in 2012, the language was revised. The new instructions state that "All other amendments will be reflected in the APR and do not need to be submitted to HUD." In an attempt to give effect to the new language, NHA interpreted the instructions to mean an informal amendment must now be made by changing *only the APR side of the form*, not the IHP side.

It is true that the IHP/APR Form no longer instructs a grant recipient to place anything in its own files, and does not expressly indicate that informal amendments must be made to the IHP itself. Instead, it references the APR alone. There is a natural presumption that, when the government changes the terminology of an official document, it does so for a substantive reason. The Court has seen no post-revision document that unambiguously instructs an IHBG Program participant to alter its IHP when making an informal amendment. Additionally, as HUD acknowledged during the hearing, there was no written guidance at the time expressly indicating that amendments must be made during the program year. Indeed, the Guidance Letter states that a recipient "may amend its IHP at any time." Guidance Letter, p. 30. Respondent's belief that an amendment could be effectuated via the APR rather than the IHP was therefore not without some basis.[9]

HUD counters that Respondent understood the new amendment procedures because Ms. Yazzie had been personally involved in creating the IHP/APR Form as a member of the negotiated rulemaking team. Additionally, NHA staff had received training on the new Form in February and March of 2011, prior to filing Respondent's 2012 IHP. The training sessions were specifically designed to educate would-be grant recipients about the IHP/APR Form. Respondent also received HUD's Guidance Letter, published in May 2011. The Guidance Letter included line-by-line instructions on how to complete the new Form. Unfortunately, the Guidance Letter's discussion of IHP amendments largely parrots the language in the IHP/APR Form. It is thus only marginally more instructive than the Form itself.

The Guidance Letter does provide one crucial insight, however. The fourth page of the Letter states that an informal amendment "can be reflected in the APR submission and the revised IHP should NOT be sent to the Area ONAP." HUD Guidance Letter, p. 4 (emphasis in original). The reference to a "revised" IHP confirms that the IHP changes even though it is not sent to HUD. Under NHA's interpretation of the reporting requirements, there would be no need

[9] The Director of Grants Evaluation at ONAP, Jennifer Ann Bullough, testified at the hearing that, for practical reasons, HUD routinely allows an IHBG participant to amend its IHP after the end of the program year even in cases where a formal amendment would be required. If NHA was aware of this practice in 2012, it would add credence to its belief that the end of the program year was not a hard deadline.

for a revised IHP because the amendment would be made only on the APR side of the form. Respondent contends that their interpretation was informed in part by the instructions contained in the Guidance Letter, meaning Respondent was aware of the Guidance Letter's contents. It therefore should have recognized that the unambiguous reference to a revised IHP was fundamentally incompatible with Respondent's theory.

HUD made another direct reference to a revised IHP in a letter informing Respondent that its Program Year 2012 IHP had been accepted. That letter included the sentence "Any other changes to your IHP should be submitted with and recorded in your Annual Performance Report." Again, under Respondent's interpretation there would be no changes to the IHP and nothing to be "submitted with and recorded in" the APR. The APR itself would be sufficient.

Given the transition from the old IHP Form to the combined IHP/APR Form, the Court recognizes that HUD's instructions were not a model of clarity. Under the circumstances, Respondent's confusion on the issue is somewhat understandable. But that does not mean its interpretation of the requirements is reasonable.

An informal IHP amendment requires a revised IHP, and Respondent does not have one. It's assertion that it revised the IHP by submitting the APR is simply incorrect. Filling out the APR side of the IHP/APR Form does not change the numbers on the IHP side of the Form.[10] In fact, Respondent never altered the numbers on its IHP. Consequently, there is no version of a Program Year 2012 IHP that shows anything other than a $215 million expenditure goal. Moreover, Respondent's belief that an IHP can be amended after the Program Year ends undermines the very purpose of the IHP and APR process.

An Indian Housing Plan is, first and foremost, exactly what its title suggests: a plan. It represents the tribe's plan for a given program year. The APR represents the tribe's results for that year. A tribe may amend its plan at any point during the program year. This is necessary because real-world considerations may force the tribe to alter its expectations for what it can realistically accomplish during the year. But it would be illogical for the tribe to change the plan after the program year ends.[11] A plan is forward looking. It requires time to be executed. A post-Program Year amendment would be stillborn; unable to be carried out because its window for execution would have already expired. Respondent's interpretation thus endorses an

[10] The IHP/APR Form states that the IHP should be submitted "**before** the beginning of the 12-month program year, leaving the APR (shaded) sections blank." IHP/APR Form, p. 1 (emphasis in original). "If the IHP has been updated or amended, use the most recent version when preparing the APR. **After** the 12-month program year, enter the results from the 12-month program year in the shaded sections of the form to complete the APR." Id. (emphasis added). It is evident from these instructions that, when completing the APR side of the Form, a tribe only enters information in the shaded sections. It does not change any of the information on the IHP side.

[11] Respondent has pointed out a glaring loophole in HUD's regulation. Allowing recipients to amend the IHP at any time during the program year means the IHP could theoretically be amended at 11:59:59 p.m. on the last day of that program year. Accordingly, a tribe that has fallen far short of the expenditure goals listed on its IHP could, at the last moment, simply alter the IHP to more closely reflect its actual expenditures. This would be a legitimate informal amendment, even if such a tactic would arguably offend the spirit of the law. Respondent insists that allowing a grant recipient to amend its IHP on the last day of the program year is no more logical than allowing it to amend it in the APR, which is submitted only three months later. The point is well taken. Regardless, the former action is sanctioned by HUD, via the Guidance Letter, and the latter is not.

impossible outcome. It must therefore be rejected.[12]

Respondent's position is the product of a simple linguistic error. It treats "amend" and "submit" as synonyms. They are not. Black's Law Dictionary defines "amend" as "(1) To make right; to correct or rectify; (2) To change the wording of; specif., to formally alter by striking out, inserting, or substituting words." BLACK'S LAW DICTIONARY (10th edition, 2014). Merriam-Webster defines "submit" as "to present or propose to another for review, consideration, or decision; also: to deliver formally." The IHP/APR Form said informal amendments "will be reflected in the APR and do not need to be submitted to HUD." (emphasis added). But just because the Form is not submitted to HUD does not mean that it does not need to be amended. HUD has consistently described only one mechanism for amending an IHP: the recipient must change the numbers on the IHP itself. IHP/APR Form, p. 46; HUD IHP/APR Guidance Letter, p. 30. Thus, "amending" the IHP is mandatory, even when "submitting" it is not. Read in the proper context, HUD's published guidance and its instructions to NHA are consistent with HUD's interpretation of the reporting requirements. Respondent asserts that HUD instructed it not to "submit" any documentation. This was proper advice because Respondent's changes did not fall within the two criteria for a formal amendment.[13] Respondent has presented no evidence, however, that anyone at HUD told it not to "amend" its IHP during the Program Year.[14] To the contrary, Ms. Yazzie testified that she was advised on at least two separate occasions to make such an amendment. Respondent did not do so.

Respondent also argues that HUD's acceptance of an Expenditure Plan during the 2012 Program Year constituted a *de facto* amendment to the IHP. There are numerous references from both parties to an expenditure plan that describes approximately $100 million in expenditures for the 2012 Program Year. The only such Expenditure Plan in the record is dated October 22, 2012, almost a month after the end of the 2012 Program Year. Regardless, e-mail evidence confirms that, in or around February or March 2012, NPONAP received an Expenditure Plan outlining just under $100 million in expenditures.

Despite HUD's awareness of the Expenditure Plan's existence, the Court is not persuaded

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[12] Additionally, allowing a tribe's results to retroactively become its target would mean no tribe could ever miss its expenditure goal. There would thus be no reason to identify a goal at all, and no reason for HUD to review the results.

[13] HUD does allege in its *Post-Hearing Reply Brief* that Respondent reduced its funding for the operation and maintenance of 1937 Act housing during the 2012 Program Year. It therefore was required to submit a formal IHP amendment, which it did not do. The evidence does not support this conclusion. Respondent's IHP allocated approximately $26 million for 1937 Act housing, but the APR showed that Respondent only spent about $15 million. Whether Respondent intended to reduce the funding, or simply failed to expend the allotted funds, is unknown. If Respondent had not planned, during the Program Year, to only expend $15 million on 1937 Act housing, it would not be required to submit a formal amendment. It would instead list the actual expended amount on its APR, and acknowledge that it had missed its spending goal.

[14] Respondent cites a conference call between NHA personnel and HUD staffers in which HUD told NHA not to adjust the numbers on the IHP side of the 2012 IHP/APR Form. Respondent holds this conversation up as an express instruction that contradicts HUD's interpretation of the reporting requirement. As HUD notes, however, the conference call in question occurred in December 2012, three months after the close of NHA's Program Year. The window for amending the IHP had therefore already closed. Accordingly, HUD's instruction that NHA could no longer change the IHP numbers was correct.

that an Expenditure Plan can amend the IHP.[15] Neither NAHASDA, its implementing regulations, nor HUD guidance make any reference to an expenditure plan. There is no enumerated process describing how such a plan acts as an amendment, or what information such a plan must include.[16] The Court has found no evidence — and Respondent has not provided any — that Congress or HUD intended to create a second mechanism for amending an IHP. Accordingly, because the Expenditure Plan was not a revised IHP, it cannot be considered an amendment to the initial IHP. At most, an expenditure plan is a standalone, guiding document. Its value is therefore confined to that context.

II. HUD is Not Equitably Estopped From Pursuing this Enforcement Action

Respondent next contends that even if it did not amend its IHP, the doctrine of equitable estoppel prevents HUD from penalizing NHA for not meeting the IHP's $215 million figure. Specifically, Respondent asserts that HUD accepted the Expenditure Plan (and therefore knew Respondent did not intend to spend $215 million in Program Year 2012), but did not inform Respondent that failing to meet that goal would expose it to an enforcement action.

An equitable estoppel claim against the federal government is exceedingly difficult; only a handful of successful attempts exist. See Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 (1984) ("it is well settled that the Government may not be estopped on the same terms as any other litigant."); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990) (noting that although appellate courts have occasionally applied estoppel against the Government for various reasons, the Supreme Court had "reversed every finding of estoppel that we have reviewed."); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1298 (D.N.M. 1996) ("An equitable estoppel claim asserted against the government . . . will succeed only under extraordinary circumstances."). The Court of Appeals for the District of Columbia Circuit has noted that it has never applied the doctrine against the government, and opines that such application should be "rigid and sparing." ATC Petroleum Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988); see also, U.S. v. Philip Morris et al, 300 F. Supp. 2d 61, 70 (2004) ("Neither the Supreme Court nor this Circuit have ever upheld a finding of equitable estoppel against the government.").

Indeed, it is an unsettled question whether the government can be estopped at all. The U.S. Supreme Court has never affirmed a finding of governmental estoppel, but it has also declined multiple opportunities to say that estoppel against the government is impossible. See Richmond, 496 U.S. at 421-24 ("we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government.")

A party seeking to estop the federal government must, at a minimum, prove the elements of a traditional estoppel action against a private party: (1) a false representation; (2) an intent that the party to whom the representation is made should rely on it; (3) ignorance of the true facts

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[15] Respondent also discusses HUD's knowledge of the Expenditure Plan in the context of Respondent's estoppel argument. The Court will therefore revisit this issue in that portion of the *Initial Decision and Order.*

[16] By comparison, a formal amendment must comply with the same statutory requirements as an initial IHP; i.e., 25 U.S.C. § 4112. Respondent's Expenditure Plan does not contain a certification from the Navajo tribal government, as required by 25 U.S.C. § 4112(c).

by the other party; and (4) reasonable reliance by the other party.[17] ATC, 860 F.2d at 1111. When bringing an estoppel claim against the government, the party seeking estoppel must also show that the government has engaged in affirmative misconduct, that it has been injured by that misconduct, and that estopping the government will not harm the public interest. See Richmond, 496 U.S. at 421; ATC, 860 F.2d at 1111; Santa Ana, 932 F. Supp. at 1298-99; Prieto v. U.S., 655 F. Supp. 1187, 1194 (D.D.C. 1987). Affirmative misconduct means "an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct."[18] In re DePaolo, 45 F.2d 373, 377 (10th Cir. 1995).

Respondent's assertion of equitable estoppel thus requires preponderant evidence that: (1) HUD made a false representation to NHA; (2) HUD intended for NHA to act upon HUD's representation; (3) NHA did not know the facts; (4) NHA reasonably relied on HUD's representation, to NHA's detriment; (5) HUD committed affirmative misconduct; (6) NHA will be seriously injured if HUD isn't estopped; and (7) estopping HUD will not harm the public interest.[19]

1. HUD's Trust Relationship With the Navajo Nation Does Not Affect the Estoppel Analysis

NHA argues in its *Post-Hearing Brief* that the normal requirements of a governmental estoppel claim do not apply in this case. Specifically, Respondent contends that "because of the unique trust relationship HUD has with NHA,[20] the affirmative misconduct requirement does not need to be satisfied in order for NHA to successfully argue estoppel." The *Brief* then goes on to analyze only the four elements necessary to prove estoppel against a private party.[21]

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[17] There is considerable variation in defining the elements of a traditional equitable estoppel claim, even within the same jurisdiction. See, e.g., ATC, 860 F.2d at 111 (D.C. Circuit); In re Gebhart, 621 F.3d 1206, 1212 (9th Cir. 2010); Prieto, 655 F. Supp. 1187, 1194 (D.C. Circuit). Regardless of the vagaries of terminology, it is universally agreed that traditional estoppel requires the party to be estopped to know the facts and misrepresent those facts with the intent that the other party rely on the misrepresentation. The other party, meanwhile, must be ignorant of the facts and rely upon the misrepresentation, to its detriment.

[18] The Supreme Court has never defined the term "affirmative misconduct." The D.C. Circuit finds affirmative misconduct when a government agent engages — by commission or omission — in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result." Morris Communications, Inc. v. F.C.C., 566 F.3d 184, 191 (D.C. Cir. 2009). Although the actual terminology may differ between circuits, the concepts expressed within are identical.

[19] It could be argued that affirmative misconduct is not an independent factor, but rather is part of the false representation. See Prieto, 655 F. Supp. 1187, 1194 (governmental estoppel contains six elements, specifically including false representation but not including affirmative misconduct.) To be sure, a deliberate misrepresentation could theoretically constitute affirmative misconduct, but it would be incorrect to use the two elements interchangeably. The alleged misconduct could be something other than a misrepresentation. The case at bar is one such example. Here, Respondent alleges that HUD has conspired against it. HUD's representations to Respondent are but one component of a broader plan.

[20] The Court notes that the trust relationship described in NAHASDA is between the United States and the federally recognized Indian tribes as a whole. The government's obligations therefore relate to the entire Indian community, not specifically to the Navajo Nation, and certainly not to NHA itself.

[21] Even assuming, *arguendo*, that the trust relationship eliminates the affirmative misconduct element, Respondent's own formulation of the relevant governmental estoppel test would still require it to prove injustice and lack of damage to the public interest. However, Respondent offers no discussion of these two elements. By analyzing only

NAHASDA does confirm that a "unique trust responsibility" exists between HUD and Indian tribes. 25 U.S.C. § 4101(2)-(4); see also, 24 C.F.R. § 1000.2-1000.4. The parties disagree, however, on the consequences of that relationship. Respondent believes the trust status fundamentally alters the nature of its dealings with HUD, and thereby changes the test for estoppel. For its part, HUD contends that the relationship has no bearing on the estoppel analysis.

The Restatement (Second) of Trusts defines a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts § 2 (1959); Tsosie ex rel. Estate of Tsosie v. U.S., 441 F. Supp. 2d 1100, 1103 (D.N.M. 2004). The Supreme Court has held, however, that when it comes to America's indigenous population, the definition of a trust is not that simple. Three levels of trust relationships have emerged. First, and least, is a "general" trust, which does little more than acknowledge its own existence. A general trust imposes no obligations on the government. U.S. v. Mitchell, 463 U.S. 206 (1983) ("Mitchell II"). Second is a "bare" or "limited" trust, established for a narrow purpose. The government is obligated to faithfully carry out the purpose of the trust, but no more. Gila River Pima-Maricopa Indian Cmty. v. United States, 427 F.2d 1194 (Ct. Cl. 1970). Finally, there is a "full fiduciary trust."[22] Only a full trust invokes the obligations and liabilities of the traditional trustee/beneficiary relationship.[23] The question here is thus two-fold: Is the "unique relationship" between HUD and the Navajo Nation actually a trust? If so, what kind of trust is it?

The answers to these questions can be found in the Mitchell Doctrine, which states that a True Trust is created only when a statute, regulation, or combination thereof unambiguously expresses the existence of such a trust and gives the government comprehensive and pervasive control of Indian property. Mitchell II, 463 U.S. 206, 225. NAHASDA and HUD's implementing regulations do reveal the presence of trust language, but neither creates a system of overarching control. Accordingly, NAHASDA creates a limited trust, at most. An examination of almost 40 years of Mitchell Doctrine caselaw is illustrative.[24]

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the four general elements, Respondent advances the implausible theory that the trust relationship transforms the government into a private party.

[22] For purposes of this *Decision and Order*, the Court will refer to a full fiduciary trust as a True Trust.

[23] As stated in a 1985 case before the U.S. Claims Court: "The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States." Montana Bank of Circle, N.A. v. United States, 7 Cl. Ct. 601, 613-14 (1985). The Claims Court's name was subsequently changed to the U.S. Court of Claims, and is now referred to as the U.S. Court of Federal Claims.

[24] The Mitchell Doctrine has primarily been used to determine whether the government can be held liable for the breach of its fiduciary responsibilities. U.S. v. Navajo Nation, 537 U.S. 488, 503 (2003) ("Navajo I"). The cases surveyed here therefore all involve lawsuits against the federal government. In this case, however, Respondent attempts to use the trust relationship to defend itself from government action. The Mitchell Doctrine is equally applicable in this defensive context because it determines what kind of trust relationship exists. It thus defines the nature of the parties vis-à-vis each other. Although neither party identifies the Mitchell Doctrine by name or cites to

Beginning in 1972, the Quinault Tribe and many of its members and associated groups sued the federal government for mismanagement of timber resources on land allotted to tribal members. United States v. Mitchell, 445 U.S. 535 (1980) ("Mitchell I"). The Indian General Allotment Act of 1887 provided that the United States would retain title to the allotted land "in trust for the sole use and benefit" of the allottees." Mitchell I, 445 U.S. at 540-41. The tribe argued — and the U.S. Court of Claims agreed — that this language created a fiduciary duty on the part of the United States to manage the timber resources properly. The Supreme Court disagreed. Despite the presence of the word "trust" in the statute, the Supreme Court found that the General Allotment Act "created only a limited trust relationship ... that does not impose any duty upon the Government." Id. at 542. A review of the statute showed that it was the individual allottees, not the government, who made actual use of the lands. Moreover, the legislative history revealed that the trust language was inserted to protect tribal members by preventing the state of Washington from taxing the land. The General Allotment Act was therefore not intended to place the allotted land in the government's control, and so "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." Id. at 546. The case was therefore remanded back to the Court of Claims.

Upon remand, the Court of Claims held that although the General Allotment Act did not create a True Trust relationship with the United States, a combination of other statutes and regulations did. Specifically, the Act of June 25, 1910 ("the 1910 Act"), the Indian Reorganization Act of 1934, and the 1964 amendments to the 1910 Act mandated extensive governmental involvement in the day-to-day operations of the Quinault Tribe's timber operations. The U.S. Interior Department's Office of Indian Affairs introduced regulations that "addressed virtually every aspect of forest management," from contract procedures and advertising to "allowable heights of stumps." Mitchell II, 463 U.S. 206, 220 (1983). This time, the Supreme Court found that "the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." Id. at 223-24. Central to its decision was the pervasive and comprehensive control assigned to the Secretary of the Interior. Indeed, the Supreme Court found that the Bureau of Indian Affairs "exercises literally daily supervision over the harvesting and management of tribal timber." Id. at 223. When the government asserts such control, "a fiduciary relationship necessarily arises."[25] Id. at 225.

The same year that the Supreme Court announced the Mitchell Doctrine, the Federal Circuit applied it in the case of Short v. U.S., 719 F.2d 1133 (Fed. Cir. 1983). There, residents of the Hoopa Valley Reservation sued the government for discriminatory distribution of proceeds from the sale of timber on the reservation. The same panoply of laws that informed the Mitchell

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either Mitchell case, the cases they do cite and the arguments they present are inextricably tied to the Mitchell framework.

[25] Mitchell II also held that if comprehensive control or supervision is present, the fiduciary relationship exists "even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." Mitchell II, 463 U.S. at 225. A True Trust can therefore be inferred even if the word "trust" never appears in print. As discussed *infra*, however, future Supreme Court pronouncements call into question the continued validity of this position.

II decision were at play in Short as well, and brought about the same result. As the court noted, "the comprehensive control by the Interior Department is precisely the same for both [Short and Mitchell]... and that is the primary reason for finding a fiduciary duty on the part of the Government. Short, 719 U.S. at 1136.

A True Trust relationship was also found in two 1987 cases. See, Pawnee v. U.S., 830 F.2d 187 (Fed. Cir. 1987); Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393 (8th Cir. 1987). In Pawnee, the Federal Circuit concluded that the Indian Long-Term Leasing Act and the Federal Oil and Gas Royalty Act gave the Secretary of the Interior "elaborate powers" to dominate the plaintiff's oil and gas leases. The LTLA specifically "places the Secretary of the Interior at the center of the leasing of Indian mineral lands." Id. The court in Red Lake found that the Act of May 18, 1916;[26] as amended by the Act of August 3, 1956; and the Act of August 28, 1958; combined to create a fiduciary relationship under the Mitchell II framework. Among many other tasks, the Act of 1916 authorized the Secretary of the Interior to harvest, sell, and manufacture timber; establish nurseries; construct and operate sawmills; and employ workers to accomplish the Act's goals. Red Lake, 834 F.2d at 1396. The court drew a clear parallel with the facts of Mitchell II, noting that "As in Mitchell, all the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Band), and a trust corpus (Indian timber, lands, and funds). Id. at 1398-99.

The District Court of New Mexico found no such comprehensive control when it examined the Indian Gaming Regulatory Act in 1996. Santa Ana, 932 F. Supp. 1284. That statute allowed the Secretary to do nothing more than review and approve gaming contracts. Id. at 1297-98. It did not envision or authorize "comprehensive control over the daily management of the casino or the money earned by such operations." Id. at 1298. Accordingly, the relationship was only a limited trust. Notably, the court found that "the Secretary's obligation to review and approve contracts is not comparable in purpose or degree to the control and supervision of tribal monies or properties that has been found to establish a complete fiduciary relationship with a duty to account as a trustee." Id.

The Supreme Court took up the question yet again in 2003, noting that "[T]he two Mitchell cases give us a sense of when it is fair to infer a fiduciary duty ... and when it is not." U.S. v. White Mountain Apache Tribe, 537 U.S. 465, 473 (2003). A 1960 statute stated that the Fort Apache Military Reservation would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land ... for as long as they are needed for the purpose." Pub.L. 86-392, 74 Stat. 8. The Secretary eventually took physical possession of about 30 buildings on the reservation, leading the tribe to bring suit demanding that the government pay for maintenance and renovation of those buildings

The Supreme Court found that "the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in Mitchell II." Apache, 537 U.S. at 475. The government was therefore obligated to maintain the corpus, and was liable for damages when it did not. Id.

[26] Not to be confused with the Act of May 16, 1918, known by its infamous title, "the Sedition Act."

Another case, decided the same day as Apache, illustrates the opposite end of the trust analysis spectrum. After applying the Mitchell Doctrine to the Indian Mineral Leasing Act of 1938, the Supreme Court concluded that the statute did not create even a limited trust relationship. Of critical importance was the statutory language expressing IMLA's goal to foster tribal independence and self-determination. Navajo I, 537 U.S. 488, 507-08. The statute's emphasis on tribal autonomy was incompatible with a trust relationship premised on governmental control. Moreover, the Secretary was limited to reviewing and approving coal mining leases, much like his role under IGRA. The case was therefore reversed and remanded back to the Court of Federal Claims.

Upon remand, the lower court found no evidence of a governmental intent to assume full fiduciary responsibilities with regard to the Navajo Nation. The Court of Appeals for the Federal Circuit reversed, finding that even if IMLA did not create a True Trust, a "network of other statutes, treaties, and regulations could provide the basis" for the Navajo Nation's trust claims. U.S. v. Navajo Nation, 556 U.S. 287, 296 (2009) ("Navajo II") (quoting Navajo Nation v. U.S., 501 F.3d 1327 (Fed. Cir. 2007)) (internal quotation marks omitted). It was the same theory that carried the day for the Quinault Tribe in Mitchell II. It did not fare as well for the Navajo Nation.

In dismantling the network argument, the Supreme Court focused its attention on two sections of the Navajo-Hopi Rehabilitation Act of 1950 and one section of the Surface Mining Control and Reclamation act of 1977. None of the three provisions specifically related to the type of coal lease at issue. Accordingly, the Supreme Court determined that they could not be used to prove a fiduciary responsibility related to such leases. Navajo II, 556 U.S. at 296-301.

Navajo II also held that the investigation into the existence of a True Trust must begin with a search for "specific, rights-creating or duty-imposing statutory or regulatory prescriptions." Id. at 301. If there is no such statement, a trust relationship cannot be inferred based on governmental control or any other circumstance. Id. ("Neither the Government's 'control' over coal nor common-law trust principles matter.") Having failed to identify any trust-creating language in any relevant statute, the Supreme Court reversed once again.

In 2004, the same court that decided Santa Ana also found that the Snyder Act of 1921 and the Indian Health Care Improvement Act of 1976 did not create a True Trust. Tsosie, 441 F. Supp. 2d 1100, 1104. Even when read together, the statutes "do not provide that virtually every stage of the process of delivering health care to Native Americans be under [Indian Health Service] control." The plaintiffs therefore enjoyed only a limited trust relationship.

NAHASDA itself has not escaped scrutiny under the Mitchell Doctrine. Two related cases fatally undermine Respondent's cause here. In 1977, the Blackfeet Tribe established the Blackfeet Housing Authority ("BHA") in order to receive block grant funding from HUD. The housing authority used the funding to build somewhere between 153 and 225 homes for tribal members. See Marceau v. Blackfeet Housing Authority, 540 F.3d 916 (2008) ("Marceau"); Blackfeet Housing Authority v. U.S., 106 Fed. Cl. 142 (2012) ("Blackfeet"). Unfortunately, the

houses used pressure-treated wood for their foundations, rather than concrete.[27] Perhaps predictably, many of the wood foundations eventually failed, leading to structural instability and the growth of toxic mold. Homeowners suffered a litany of health problems as a result, including cancer, kidney failure, and asthma. See Marceau, 540 F.3d at 920. The homeowners then filed a class action lawsuit against BHA and HUD.

The Ninth Circuit looked to the U.S. Housing Act of 1937 and NAHASDA for specific duty-creating language, as required by the Mitchell Doctrine. It found none. Instead, it found language expressing Congress' intent to increase tribal self-sufficiency and independence. Id. at 924-25 ("The express intent of Congress was to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs."). The court specifically emphasized NAHASDA's congressional findings, which stated that housing assistance was to be provided "with the goals of economic self-sufficiency and self-determination for tribes and their members." Id. at 927 (quoting 25 U.S.C. § 4101(6)-(7)). The statutes were thus deemed to be akin to the IMLA, which was found to create only a bare trust in Navajo I.

Additionally, the court's examination of HUD's role under NAHASDA found that "HUD's responsibility consists primarily of oversight and audit, to ensure that federal funds are spent for the intended purpose." Id. The HUD Secretary was "generally confined to a limited review of each Indian housing plan." Id., (quoting 25 U.S.C. § 4113(a)(1)). Again, the court echoed Navajo I and Santa Ana, noting that "such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory." Id. The pervasive, comprehensive control that spawned a True Trust relationship in Mitchell II, Apache, Short, Pawnee, and Red Lake was completely absent from NAHASDA. As the Ninth Circuit concluded, "the federal government held no property — land, houses, money or anything else — in trust. The federal government did not exercise direct control over Indian land, houses, or money ... the federal government did not build, manage, or maintain any of the housing." Accordingly, the trust language found at the beginning of NAHASDA created no fiduciary duties for HUD.

After the Ninth Circuit's decision in Marceau, the BHA sued HUD, seeking $30 million in damages for HUD's alleged breach of its trust responsibilities. The Court of Federal Claims dismissed the case for the same reasons cited by the Ninth Circuit. The references to a trust relationship in NAHASDA's congressional findings simply do not impose full fiduciary responsibilities. As the court stated, "although the language [of the congressional findings] does announce a unique trust relationship between the federal government and the tribes, plaintiff neglects to heed the relevant interpretation of the effect of such language by the Supreme Court. 'Congress may style its relations with the Indians as a trust without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is "limited" or "bare" compared to a trust relationship between private parties at common law.'" Blackfeet, 106 Fed.Cl. at 150-51 (quoting U.S. v. Jicarilla Apache Nation, 131 S.Ct. 2313, 2323 (2011)).

[27] The BHA maintained that the use of wood foundations was mandated by HUD. The Court of Federal Claims' opinion, however, appears to suggest that the wood foundations were used out of economic necessity brought about by the BHA's failure to heed HUD's budget advice. Blackfeet, 106 Fed. Cl. at 143-44.

To review, statutes or regulations that expressly give the government pervasive or comprehensive control over tribal property create fiduciary obligations, as do statutes that put the government in physical control of tribal property. A network of statutes and regulations that combine to create pervasive control also bring about a True Trust relationship. However, when the government's obligations consist only of oversight and review, the trust relationship is limited or non-existent.

Respondent here asserts that a special trust relationship exists between HUD and NHA, based on the congressional findings in NAHASDA. As a result of that relationship, it insists, common law trust principles apply. That, in turn, would allow Respondent to argue equitable estoppel without having to prove affirmative misconduct. Respondent is incorrect. The existence of a trust relationship only creates common law fiduciary duties if it is a True Trust. NAHASDA's congressional findings were deemed insufficient to create a True Trust relationship in Marceau and Blackfeet. The result is no different here. The statute does not impose pervasive control or management obligations on HUD or its Secretary. To the contrary, NAHASDA unambiguously expresses Congress' interest in improving tribal self-sufficiency and autonomy.[28] The Secretary's role under NAHASDA is primarily one of oversight and review, like his counterparts' roles under IMLA and IGRA. Consequently, the Court finds that NAHASDA creates, at best, a limited trust relationship. Respondent's estoppel argument therefore cannot omit the affirmative misconduct factor.

2. NHA Has Not Met All Factors of the Governmental Estoppel Test

Having found that no True Trust relationship exists, Respondent must prove that: (1) HUD made a false representation to NHA; (2) HUD intended for NHA to act upon HUD's representation; (3) NHA did not know the facts; (4) NHA reasonably relied on HUD's representation, to NHA's detriment; (5) HUD committed affirmative misconduct; (6) NHA will be seriously injured if HUD isn't estopped; and (7) estopping HUD will not harm the public interest. An analysis of each factor reveals that Respondent cannot meet the high standard for governmental estoppel.

Respondent contends that HUD should be estopped from pursuing this action because HUD personnel conspired to remove NHA from the IHBG Program out of personal enmity. To accomplish this goal, Respondent alleges that HUD deliberately advised NHA not to amend its IHP despite knowing NHA would not meet the IHP's expenditure goals. Respondent thus argues that HUD tricked it into violating NAHASDA.

The burden is on Respondent to identify what representations HUD made that Respondent believes were false. Respondent does not do so. Instead, it alleges that "HUD, in bad faith, led NHA 'down the garden path' until HUD believed it had NHA trapped." HUD allegedly did this by accepting the Expenditure Plan without informing Respondent that it would still be held accountable for the $215 million if it did not amend the IHP. As evidence, Respondent's relies on: (1) the instructions on the IHP/APR Form; (2) the instructions in the

[28] NHA does not contend that HUD enjoys pervasive control over the tribe's housing program. It could not plausibly raise such an argument. In a February 2013 letter to Mr. Akers objecting to NPONAP's heavy-handed oversight, NHA's Board of Commissioners reminded Mr. Akers that "intensive monitoring by HUD frustrates self-determination and self-governance of NHA." Joint Exhibit 13.

Guidance Letter; (3) a March 20, 2012, e-mail from NPONAP administrative head Randy Akers to Ms. Yazzie; (4) conversations and e-mail correspondence between NHA staff and NPONAP personnel, and; (5) technical assistance from HUD during Program Year 2012.

There is no doubt that HUD was aware of the Expenditure Plan, and recognized the inconsistencies between that plan and the IHP. The Expenditure Plan was the subject of several e-mails in March of 2012, and was a frequent topic of discussion during weekly teleconference calls between NPONAP and NHA, as well as during in-person meetings between the parties. Mr. Akers and other HUD staff testified that the technical assistance HUD provided NHA during the 2012 Program Year was generally intended to help NHA meet the Expenditure Plan's $100 million goal rather than the IHP's $215 million target. Mr. Akers also testified that he was primarily focused on implementing the Expenditure Plan, and so did not emphasize the IHP.

None of these statements are false. As discussed on pages 11-13 of this *Initial Decision and Order*, the IHP/APR Form and the Guidance Letter accurately, if ineloquently, describe the methods for amending an IHP. Respondent misinterpreted the instructions; the government did not misrepresent them. Additionally, Mr. Akers' March 20 e-mail did not suggest that HUD would ignore Respondent's IHP in favor of its Expenditure Plan. The e-mail stated that "while the IHP can always be amended as the year goes on, once NHA provides a number in the expenditure plan to Congress, they will hold NHA accountable for reaching that number." "They" is a personal pronoun used to modify the preceding noun. In this case, the noun was "Congress." Accordingly, Congress, not HUD, would hold NHA accountable for the figure in its Expenditure Plan. This is an accurate statement.

Similarly, the interactions and correspondence between HUD and NHA do not indicate that HUD personnel had any intention to trap Respondent, or that they misrepresented anything in hopes of luring Respondent into such a trap. The acceptance of the Expenditure Plan had no effect on Respondent's right to amend its IHP, either formally or informally. There is simply no evidence that anyone at HUD ever told anyone at NHA that the Expenditure Plan amended or superseded the IHP, or that the IHP did not need to be amended. There is thus no statement that can reasonably be deemed to be false.

Having failed to identify a false representation, the Court cannot find that HUD intended for NHA to rely upon a false representation, for there were none for NHA to rely upon. The Court must conclude that Respondent's action stemmed not from any deception by HUD, but rather from NHA's own misunderstanding of the IHP amendment process.[29]

[29] Respondent also contends that it cannot be held responsible for failing to expend the $215 million identified in its IHP because HUD was aware that the figure included multi-year construction projects. Although the IHP does not identify these projects as multi-year projects, Respondent insists that HUD knew of their multi-year nature based on communications with NHA personnel.

Respondent believes HUD's knowledge precludes it from pursuing remedial action. In essence, then, this is simply another estoppel claim. As such, it must fail because it does not address the elements for governmental estoppel.

In fact, the claim does not even meet the elements necessary for estoppel against a private party. Respondent must prove that HUD knew the pertinent facts and Respondent did not. It has shown neither here. The same e-mail correspondence that discussed the Expenditure Plan also made repeated reference to multi-year construction projects. This shows that HUD personnel were aware of these projects. The e-mail discussion also shows, however, that HUD was unsure what to make of them.

This does not mean, however, that HUD's conduct was exemplary in this instance. Central to Respondent's affirmative misconduct argument is an e-mail exchange between two NPONAP employees: Katie Starcevich and Carol Quinlan. In the exchange, Starcevich declared:

> My personal opinion is that people resent Navajo — until NHA goes away, I don't think the mood will improve. NHA affects the ability of management to be managers and to check in with their staff. It impacts the workload of everyone in the office in one way or another. And it seems to me that the mood has been declining since the announcement of NHA coming to NPONAP. Unless there is a solution to reduce the impact NHA has had on the office, I don't think there is much that can be done.

Respondent presents this e-mail as damning evidence of animosity towards NHA by HUD personnel. Respondent maintains that the e-mail provides the context necessary to see conspiracy in NPONAP's actions.

The e-mail is certainly disturbing, particularly because it appears to disparage the very individuals the office is designed to support. Such disdain is unbecoming of a federal government office. It is even more inappropriate here because NHA sought NPONAP's involvement specifically because it felt it could not work productively with SWONAP. The e-mail is just another insult for a Native American community that already has ample cause to distrust the federal government's promises of benevolent aid.

That said, Respondent strains to read an injury into the insult. The e-mail stands as the lone piece of evidence suggesting any discord between HUD and Respondent. It is circumstantial evidence, at best. Had Ms. Starcevich been asked to testify, she could perhaps have elaborated on the meaning behind the e-mail. However, Respondent did not call her to the stand. The Court therefore must examine the e-mail on its own terms. Notably, Ms. Starcevich, who was not a member of the Tribal Special Assistance Team, states in the e-mail that it is "my personal opinion," "merely my perspective," and that she "can't speak for others." The record includes several internal e-mails among TSAT members, but those e-mails contain no whiff of animosity against NHA. Unlike Ms. Starcevich, several TSAT members did testify at the hearing. The Court discerned no undercurrent of dislike in their testimony. Overall, there is nothing to

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For example, at 4:23 a.m. on March 20, 2012, e-mail, Deana O'Hara, the senior advisor for the deputy assistant secretary, sent an e-mail to several HUD staff stating: "I would say that NHA plans to spend a minimum of $260 million" but "for this year's expenditure plan, $160 [million] are construction funds which will take 2-3 years to expend." Five hours later, she sent another e-mail to Mr. Akers, among others, seeking "a conversation with NHA to clarify if the contracts let [sic] this year will expend $160 this year or during the term of the contract." The information received from NHA, and specifically from Ms. Yazzie, did not resolve the confusion. At 11:29 a.m. the same day, Ms. Yazzie responded to the e-mails, stating "our 2012 IHP ... shows we will expend 215,989,448 by sept. 30 2012." Later in the same paragraph, Ms. Yazzie reiterated that the "latest revised 2012 IHP ... shows the 215M planned expenditure in fy 2012 which ends 093012."

Subsequent e-mails among HUD staff show that their confusion as to the actual expenditure amounts continued after the e-mail exchange. Absent any more conclusive evidence, the contradictions are fatal to Respondent's argument.

corroborate Ms. Starcevich's opinion. There is thus no reason to believe that her e-mail accurately described the feelings of the entire NPONAP office toward NHA.

Even assuming, *arguendo*, that the e-mail does accurately diagnose resentment towards NHA, resentment is not conduct. The conduct Respondent has alleged is a conspiracy to force NHA out of the IHBG Program. The e-mail hints at a motive for that conspiracy, but it goes no farther. It does not imply that anyone at NPONAP or any other HUD office actually formulated or engaged in any plan to act on their resentment. It does not name the alleged co-conspirators. It also does not explain why HUD staff repeatedly advised NHA to amend its IHP when such advice, if followed, would sabotage their alleged conspiracy. A lone e-mail from a non-participant expressing vague resentment is an insufficient foundation to support a claim of governmental conspiracy.[30]

Finally, as previously noted, Respondent presents no evidence supporting the last two factors – a showing of injustice and a lack of undue damage to the public interest. Accordingly, the estoppel argument must fail.

III. Constitutional Arguments

Next, Respondent contends that HUD's regulations do not define "substantial noncompliance." As a result, tribes and their TDHEs do not know if or when they may face an enforcement action from HUD. The regulations are thus unconstitutionally vague.

By asking this Court to declare HUD's regulations unconstitutional, Respondent runs squarely into the general rule that administrative courts lack the authority or competence to rule upon constitutional issues. Oestereich v. Selective Serv. Sys. Local Bd. No. 11, Cheyenne, Wyo., 393 U.S. 233, 242 (1968). Although Respondent acknowledged the rule in its *Post-Hearing Brief*, it argues that agencies may still decide constitutional issues because the rule is "not mandatory."[31] As support, Respondent cites one Supreme Court case and one case from the District of Columbia Circuit. Thunder Basin Coal Co. v. Reich, 510 U.S. 2000 (1994) (holding that administrative review process was exclusive means for challenging validity of a regulation); Sturm Ruger & Co., Inc. v. Herman, 131 F. Supp. 2d 211 (D.D.C. 2001) (same).

Neither case presents a persuasive argument that the rule in Oestereich is inapplicable here. Thunder Basin suggested that the Oestereich rule was "perhaps of less consequence where . . . like here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." Thunder Basin, 510 U.S. at 215. The reviewing body in that case was the Federal Mine Safety & Health Review Commission. In Sturm Ruger, it was the Occupational Safety & Health Review Commission. Both of these commissions are the sorts of independent bodies referenced in Thunder Basin. This Court is not such a commission. The Office of Hearings and Appeals exists outside of HUD's general

[30] Respondent's counsel admitted at the hearing that Ms. Starcevich's e-mail was the only evidence of animosity he could uncover, despite searching through approximately 100 boxes' worth of discovery documents. It is not nearly enough to show, by a preponderance of the evidence, that HUD initiated a vindictive conspiracy against Respondent.

[31] Respondent's *Response Brief* suggested that Thunder Basin "implicitly overruled Oestereich." This claim is refuted by the text of the decision itself. The Supreme Court specifically quoted Oestereich when reciting the general rule, and stated that "we agree" with that rule. Thunder Basin, 510 U.S. at 215.

command structure, as it must to retain impartiality. But it is a HUD office nonetheless. It was not created specifically to hear Indian housing cases. The Court has jurisdiction to hear a broad range of HUD-related causes of action.

Additionally, the statutory schemes in question in Thunder Basin and Sturm Ruger expressly precluded district court jurisdiction in favor of the FMSHRC. Thunder Basin, 510 U.S. at 208 ("The structure of the Mine Act . . . demonstrates that Congress intended to preclude challenges such as the present one."); Sturm Ruger, 131 F. Supp. 2d at 216 (the administrative and judicial review procedures in the OSH Act were "nearly identical" to those in the Mine Act). The commissions were therefore the only venues in which to raise constitutional questions. If Respondent believes NAHASDA contains similarly preclusive language, it has not brought that language to the Court's attention. The circumstances in Thunder Basin and Sturm Ruger are therefore not analogous to the case at bar. There is thus no basis to stray from the general rule.

IV. NHA Received Reasonable Notice of HUD's Enforcement Action

Next, Respondent alleges that HUD waited until after the end of the 2012 Program Year to inform Respondent that failure to expend the amounts identified in its IHP could lead to the present enforcement action. Accordingly, Respondent concludes, HUD did not provide the statutorily required reasonable notice.

In essence, Respondent contends that HUD was required to warn it that noncompliance with NAHASDA's requirements could carry negative consequences. This is incorrect on three grounds. First, NAHASDA itself warns program participants of the potential consequences for noncompliance. Indeed, Respondent need look no further than the very section it cites as authority for its position. Section 4161 is titled "Remedies for noncompliance." Respondent therefore not only knew that noncompliance could result in remedial action, it knew from the language of Section 4161 what those remedial actions could be.

Second, HUD is not required to intervene before a program participant actually violates NAHASDA. Any attempt to do so during the program year would be premature, given that a TDHE can amend its IHP on the last day of the program year. There can be no reasonable notice of violation until there is a reasonable belief that a violation has occurred. HUD would have no ability to form such a belief prior to the end of the relevant program year, particularly in the event of an informal amendment. HUD does not learn of any tribe's actual expenditures until it receives that tribe's annual APR, which is submitted three months after the end of the program year. Respondent's theory is therefore chronologically impossible.

Third, Respondent misreads the procedure described in Section 4161. The section states that the Secretary shall utilize one of four remedial avenues, but only "after reasonable notice and opportunity for hearing." 25 U.S.C. § 4161(a)(1). This does not mean HUD must give notice of the *possibility* of remedial action. Rather, HUD must provide notice and hearing prior to actually engaging in any of the enumerated remedial actions. In other words, HUD is prohibited from terminating Respondent's IHBG grant without warning. Respondent received that warning – literally titled "Letter of Warning" – on March 30, 2013, followed by the NOI on July 31, 2013. The current proceeding is the "opportunity for hearing" promised in the statute. Accordingly, HUD has met its notice obligations.

V. NAHASDA's Carryover Provision Does Not Invalidate HUD's Enforcement Action

Respondent next argues that the current enforcement action is improper because NAHASDA allows a tribe to roll unused grant funds from one fiscal year into the next fiscal year. 25 U.S.C. § 4133(f). Accordingly, Respondent argues that because it was not required to spend its entire $215 million grant in Program Year 2012, it cannot be penalized for not doing so.

The Government agrees that funds may be carried over into the next fiscal year. However, it counters that those funds must have been described as multi-year funds in the IHP. Respondent's 2012 IHP did not include any such multi-year projects. HUD thus contends that 25 U.S.C. § 4133(f) is inapplicable.

Both parties are correct, in part. Section 4133(f) states, in its entirety:

> (1) IN GENERAL – To the extent that the Indian Housing Plan for an Indian tribe provides for the use of amounts of a grant under section 101 [25 U.S.C. § 4111] for a period of more than 1 fiscal year, or for affordable housing activities for which the amounts will be committed for use or expended during a subsequent fiscal year, the Secretary shall not require those amounts to be used or committed for use at any time earlier than those provided for in the Indian Housing Plan.
>
> (2) CARRYOVER — Any amount of a grant provided to an Indian tribe under section 101 for a fiscal year that is not used by the Indian tribe during that fiscal year may be used by the Indian tribe during any subsequent fiscal year.

25 U.S.C. § 4133(f)

Section 4133(f)(1) unambiguously protects each tribe's right to determine for itself when to utilize grant funds. It is also clear that, to obtain those protections, the multi-year nature of the funds must be indicated in the IHP. The requirement is entirely reasonable. The IHP informs the Secretary of the tribe's expected expenditures in that fiscal year. It therefore creates the context within which the Secretary defines substantial compliance. By warning the Secretary that grants received in 2011, for example, would not be fully expended until 2013, the tribe alters the Secretary's expectations when reviewing the year-end APR. This allows the tribe to proactively disarm the very sort of conflict present here.

Respondent argues that the section applies here because HUD personnel knew that many of NHA's projects were multi-year construction projects. HUD cannot legitimately dispute that NPONAP personnel were aware of Respondent's expenditure plans. Several e-mails entered into evidence confirm this knowledge. However, Respondent is also unable to dispute that none of those projects were listed as multi-year projects in Respondent's 2012 IHP. Respondent never amended its IHP. Accordingly, HUD is correct that 25 U.S.C. § 4133(f)(1) is not applicable.

Section 4133(f)(2) presents a different scenario. Where Section 4133(f)(1) was limited to funds that had been designated as multi-year projects, Section 4133(f)(2) applies equally any part of a grant that is not used in the given fiscal year may be used in any subsequent year. Respondent thus contends that, "the basis of HUD's enforcement action — that NHA did not spend $215 million in PY 2012 — is contrary to NAHASDA because NAHASDA specifically allows NHA to carryover those unspent funds to the next program year."

The argument is unavailing. The enforcement action was not initiated because Respondent failed to fully expend its Program Year 2012 funds. A tribe may have unspent funds, yet still be in compliance with its IHP. HUD alleges that Respondent was not in compliance with its IHP. Section 4133(f)(2) has no impact on the compliance determination. It therefore does not alter the present analysis in either direction.

VI. NAHASDA Allows HUD to Pursue Already-Allocated Grant Funds

Finally, Respondent contends that NAHASDA's remedies do not allow HUD to strip grant recipients of funds that have already been awarded. HUD is therefore prohibited from reclaiming the $96,003,830 remaining from the Program Year 2012 IHBG award.

The *Complaint* states that HUD intends to "terminate" the grant award. Respondent, meanwhile, labels the action as an attempt to "recapture" or "reduce" the award. Both termination and reduction are remedies specifically enumerated in 25 U.S.C. § 4161(a)(1). However, Respondent insists that both terms are prospective only. The statute refers to the termination or reduction of "payments under this chapter." Respondent insists that it is not possible to terminate a payment after the payment has been made. Accordingly, "the most HUD can do is reduce NHA's IHBG balance." Even a reduction in future payments would be inappropriate here, Respondent continues, because HUD can only reduce payments "by an amount equal to the amount of such payments that were not expended in accordance with this chapter." 25 U.S.C. § 4161(a)(1)(B). Here, HUD alleges only that Respondent did not spend sufficient funds, not that the funds it did spend were unauthorized.

Whether couched in terms of termination or reduction, HUD is permitted to recover funds already disbursed to the tribes. HUD regulation specifically states that "HUD shall carry out any of the following actions with respect to the recipient's **current** or future grants…." 24 .C.F.R. § 1000.532(a) (emphasis added). If Respondent's definitions were accurate, there would be no need to reference "current" grants in the regulation.[32] Its inclusion is thus proof that HUD intended to give itself the right to reclaim grant funds from noncompliant recipients.[33] The Court therefore finds that HUD's preferred remedy is authorized by the implementing regulation.

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[32] Respondent's theory operates under the assumption that a tribe would choose to participate in the IHBG Program every year. An unethical or opportunistic tribe could theoretically turn this to its advantage. After receiving its annual grant award, the tribe could immediately withdraw from the Program. It would then have no obligation to expend the funds on housing, and the government would have no statutory ability to recapture the funds. The tribe would thus obtain a one-time multimillion dollar windfall at the expense of American taxpayers.

[33] NAHASDA states that it is to be administered by ONAP. 25 U.S.C. § 4102. It is therefore within HUD's purview to interpret the statute and resolve any ambiguities as it sees fit. Those interpretations must be afforded due deference, unless they are unreasonable. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

CONCLUSION

The Court reaches its decision today because the facts and law demand an outcome in HUD's favor. It does not arrive at this conclusion lightly, or gladly. The Navajo Nation, like many American Indian tribes, struggles with economic disadvantages that are almost unparalleled in American society. There is a critical need for affordable housing in the Navajo community. HUD's termination of $96 million in grant funds therefore takes resources away from those who need it most. Prior to this proceeding, no IHBG Program participant had ever faced an enforcement action for failing to comply with its IHP. Additionally, HUD does not accuse Respondent of fraud, abuse, or mismanagement by NHA. Rather, the record shows that Respondent simply misunderstood what was required of it. HUD asks the Navajo to pay a heavy price for that confusion. The Court cannot overlook the fact that NHA's confusion was due, at least to some degree, by HUD's imprecise instructions.

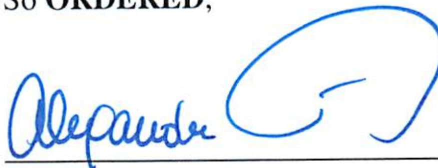
Notwithstanding these concerns, it is apparent from the evidence in the record that Respondent did not substantially meet its stated performance goals for Program Year 2012. It planned to expend $215 million that year, but actually spent less than 31 percent of that amount. It also intended to complete seventeen discrete housing activities, but only completed seven.

Respondent disputes the $215 million expenditure target, but it does not dispute that it never filed an IHP revising that target. Accordingly, it remained obligated to substantially reach that goal. There is also no dispute that Respondent failed to accomplish ten of its proposed projects. Of the $1,357,933 it planned to spend on rehabilitation of non-1937 Housing Act units, it spent $0. Of the $198,000 it planned to spend on rental housing acquisition, it spent $0. None of the ten projects received even 40 percent of their estimated funding, and six projects received less than 10 percent of their funding.

Accordingly, Respondent's failure to expend the grant monies awarded to it prevented it from achieving the goals it set forth in its IHP. It has therefore violated 24 C.F.R. § 1000.534(a)

and (c). HUD's decision to impose a remedy against NHA, as described in the June 27, 2014 IOR, is supported by a preponderance of the evidence.

So **ORDERED**,



Alexander Fernández
Administrative Law Judge

Notice of Appeal Rights. The appeal procedure is set forth in detail in 24 C.F.R. § 26.52 (2009). This order may be appealed to the Secretary of HUD by either party within 30 days after the date of this decision. The Secretary (or designee) may extend this 30-day period for good cause. If the Secretary (or designee) does not act upon the appeal within 90 days of its service (30 days for cases brought under the Program Fraud Civil Remedies Act), this decision becomes final.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Hearings and Appeals.

Judicial review of final decision. Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 25 U.S.C. § 4161(d). The petition must be filed within 60 days after the date the HUD decision becomes final.