

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF THE SECRETARY**

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In the Matter of:	)	<b>MAY - 2 2016</b>
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NAVAJO HOUSING AUTHORITY,	)	HUDOGC 14-JM-0121-IH-002
	)	
Respondent.	)	HUDOHA 14-JM-0121-IH-002
	)	
_____	)	

For the Petitioner:                      Geoffrey L. Patton, Esq.; Joel A. Foreman, Esq.; Joseph J. Kim, Esq.

For the Respondent:                      Craig H. Kaufman, Esq.; Joe V. Patterson, Esq.

**ORDER ON SECRETARIAL REVIEW**

On March 30, 2013, the United States Department of Housing and Urban Development (“HUD”) issued a Letter of Warning to the Navajo Housing Authority (“NHA”), informing it of the potential for an enforcement action. HUD determined that NHA was in substantial noncompliance with the 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 NHA’s failure to comply with the expenditure goals set forth in its Indian Housing Plan (“IHP”). On July 31, 2013, HUD issued a Notice of Intent to Impose Remedies/Offer of Informal Meeting (“NOI”). After receiving the NOI, NHA requested an informal hearing, which took place on November 21, 2013. A second hearing was held on May 6, 2014. On June 27, 2014, HUD issued an Imposition of Remedies (“IOR”) letter against NHA seeking to terminate \$96 million in grant funds because of NHA’s substantial noncompliance with its IHP.

On July 29, 2014, NHA filed a request for an administrative hearing to contest the IOR. A hearing on the matter was conducted from June 16-19, 2015, before Administrative Law Judge Alexander Fernández (“ALJ”). On December 14, 2015, ALJ issued an *Initial Decision and*

*Order* (“Decision”). The ALJ found that NHA was in substantial noncompliance with its IHP and HUD’s decision to impose the remedy of terminating \$96 million in grant funds was supported by a preponderance of evidence. *Decision* at 29-30.

On January 11, 2016, NHA filed an appeal of the Decision (“Appeal”). In the same filing, NHA filed “Respondent’s Alternative Proposed Findings and Conclusions.” *Appeal* at Exhibit 1. On February 1, 2016, HUD filed a brief in opposition to NHA’s appeal (“Response”).<sup>1</sup> HUD disputed all of NHA’s appeal claims and requested that the Secretary, or his designee, affirm the ALJ’s decision. *Response* at 3-21.

On appeal, the Secretary, or his designee, conducts a de novo review and may adopt or reject any of the ALJ’s findings or conclusions of law. *See HUD v. Corey*, HUDALJ 11-M-207-FH-27, at 2, n.2 (July 16, 2012). However, the Secretary, or his designee, may only consider evidence contained in the record and must consider and include in the determination such factors as may be set forth in applicable statutes or regulations. *See* 5 U.S.C. § 557(b); 24 C.F.R. § 26.52. After considering the evidentiary record and applicable law, the Secretary, or his designee, may “affirm, modify, reduce, reverse, compromise, remand, or set aside any relief granted in the initial decision.” 24 C.F.R. § 26.52(k). The Secretary, or his designee has 30 days after receipt of the brief in opposition, if any, to issue a written determination, but he may extend the time in which a written determination is due up to an additional 60 days. 24 C.F.R. § 6.52(l). In this case, I, as Secretarial Designee, issued an order to both parties which extended the time in which a written decision must be issued from March 2, 2016, until May 2, 2016.

In his decision, the ALJ laid out 66 findings of fact. *Decision* at 2-5. After review of the record, I believe that these findings of fact are accurate and affirm them. In light of the facts and based on the analysis of the applicable law, the Respondent’s Petition is **DENIED** for the reasons set forth below. Pursuant to 24 C.F.R. § 26.52, the ALJ’s Decision is **AFFIRMED**.

## **BACKGROUND**

The Indian Housing Block Grant (IHBG) program, created under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), provides block grant funding to Native American tribes or Tribally Designated Housing Entities (TDHE) for

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<sup>1</sup> At the same time, HUD filed a brief requesting leave for its Brief in Opposition to exceed 15 pages. *See* 24 C.F.R. § 26.52(b). NHA filed a brief stating they had no objection to this request. I have accepted this request for permission to file an overlong brief.

affordable housing activities. In order to receive funding, a tribe or TDHE must submit to HUD an annual Indian Housing Plan (IHP) which describes the affordable housing activities that the tribe plans to undertake and how the tribe plans to spend its IHBG funds during that program year. *See* 25 U.S.C. § 4112. At the end of the program year, the tribe must review its progress in carrying out the IHP and submit an Annual Performance Report (APR), which is a report on what the tribe has done over the program year. *See* 25 U.S.C. § 4164; 24 C.F.R. § 1000.512. The APR must be submitted to HUD within ninety days of the end of the program year. 24 C.F.R. § 1000.514.

In 2012, through a negotiated rulemaking, HUD and IHBG recipients agreed on a new form which combined the IHP and APR into one document. *Joint Exhibit* (Jt. Ex.) 7. Prior to the program year, a tribe will complete and submit the IHP side of the form and after the program year ends, the tribe will complete the APR side of the form and submit it to HUD. *Jt. Ex. 1*. HUD is authorized to conduct an audit to determine whether a tribe is in compliance with its IHP. 25 U.S.C. § 4165(b)(1)(A)(iii). If HUD determines that a tribe has failed to substantially comply with any provision of NAHASDA, HUD is authorized to terminate payments to the tribe. 25 U.S.C. § 4161(a)(1)(A).

On July 1, 2011, NHA submitted its Program Year (PY) 2012 IHP to HUD. *Jt. Ex. 3*. The IHP listed its “estimated funds to be expended during 12-month program year” as \$215,989,448. *Id.* On March 15, 2012, HUD accepted NHA’s initially submitted IHP. *Jt. Ex. 8*. Soon after, HUD became aware that NHA was planning to expend substantially less during PY 2012. On March 28, 2012, HUD and NHA had a meeting in which NHA stated its expenditure goal for PY 2012 would be only approximately \$100 million. *Jt. Ex. 9*. On April 18, 2012, HUD informed NHA that it would notify Congress of NHA’s new goal. *Respondent’s Exhibit* (R. Ex.) 40. On May 15, 2012, HUD informed NHA that Congress was notified of the new expenditure goal, which was then \$97,270,868. *R. Ex. 57*. The program year ended on September 30, 2012.

On December 28, 2012, NHA submitted its APR to HUD. *Jt. Ex. 12*. The APR listed “actual funds expended during 12-month program year” as \$66,625,332. *Id.* In addition, the IHP side of the form had not been amended since it was originally submitted on July 1, 2011. *Id.* Therefore, the amount on the IHP still listed the \$215 million figure as the amount NHA planned to spend over the program year. In addition to not meeting the expenditure targets in the IHP,

NHA had failed to accomplish ten of the proposed projects listed in the IHP. *Id.* None of these ten projects received as much as 40% of the funding proposed in the IHP. *Id.*

HUD sent the Letter of Warning after making the determination that NHA's expenditure of only about \$66 million instead of the approximately \$215 million listed on the IHP put NHA in substantial noncompliance with the requirements imposed by NAHASDA. *Jt. Ex.* 14. On July 31, 2013, HUD issued a Notice of Intent to Impose Remedies/Offer of Informal Meeting ("NOI"), and in response, NHA requested an informal hearing, which took place on November 21, 2013. *Jt. Ex.* 15. A second hearing was conducted on May 6, 2014. Neither meeting rectified HUD's concerns. *Decision* at 1. Accordingly, on June 27, 2014, HUD issued an Imposition of Remedies ("IOR") letter against NHA seeking to terminate \$96 million in grant funds. *Id.*

On July 29, 2014, NHA filed a request for an administrative hearing to contest the IOR, which took place from June 16-19, 2015, before the ALJ. *Id.* On December 14, 2015, the ALJ issued the Decision. The ALJ found that there was no dispute that NHA spent substantially less than originally called for in the IHP. *Decision* at 4. The ALJ further found that NHA had not, either through the APR, expenditure plan, or any other means, expressly or implicitly amended its IHP to indicate that it planned to spend less than originally planned. *Id.* at 11-15. Finally, the ALJ found that no other facts or legal precedents otherwise prohibited HUD from taking the proposed enforcement action. *Id.* at 15-28. Accordingly, the ALJ found that NHA was in substantial noncompliance with its IHP and HUD's decision to impose the remedy of terminating \$96 million in grant funds was supported by a preponderance of evidence. *Id.* at 29-30.

On January 11, 2016, NHA filed an appeal of the Decision. On appeal, NHA raised eight issues:

1. NHA's PY 2012 APR was an express amendment of its PY 2012 IHP.
2. NHA's PY 2012 Expenditure Plan was a *de facto* amendment to its PY 2012 IHP.
3. HUD is estopped from using the \$215 million figure for planned expenditures in NHA's PY 2012 IHP as its basis for the enforcement action.
4. NAHASDA's 2012 implementing regulations defining "substantial noncompliance" is unconstitutionally void for vagueness; does not provide notice of what is required of the regulated parties to avoid enforcement actions by HUD; and authorizes arbitrary

enforcement by HUD, thereby depriving the recipient of its property without reasonable notice and due process of law.

5. NAHASDA allows for the carryover of Indian Housing Block Grant funds not spent in a particular fiscal year.
6. NHA was not provided reasonable notice as required by NAHASDA before HUD initiated this action.
7. NHA is not in substantial noncompliance with NAHASDA.
8. HUD is seeking a remedy not authorized by NAHASDA.

*Appeal* at 1.

In its appeal, NHA also provided “alternative proposed findings and conclusions” which reflected its factual assertions based on the eight issues outlined above. *Id.* at Exhibit 1.

On February 1, 2016, HUD filed a brief in opposition to NHA’s appeal. In the brief in opposition, HUD argued that the ALJ was correct to dismiss NHA’s arguments and disputed each section of NHA’s appeal. *See Response*. HUD reiterated the ALJ’s determination that NHA never made an express or *de facto* amendment to its IHP. *Id.* at 5-9. HUD further argued that the ALJ was correct in determining no other facts or precedent prohibited HUD from terminating NHA’s grant. *Id.* at 9-21. Therefore, HUD argued, the ALJ’s decision should be affirmed. *Id.* at 21.

## DISCUSSION

### **I. NHA’s PY 2012 APR Was Not An Express Amendment To Its PY 2012 IHP.**

NHA argued that by filing its APR in December 2012, it expressly amended its IHP. *Appeal* at 1-3. NHA argued that the IHP document itself never needed to be revised because any revision could be effectuated by the APR. *Appeal* at 3. As noted by the ALJ, NHA did not claim that it submitted a new or amended IHP to HUD during PY 2012, so the APR is the only possible way NHA could have amended its IHP. *Decision* at 11. The ALJ rejected this argument, holding that HUD’s guidance on the IHP required amending the IHP separately from the APR. *Id.* at 11-14. HUD agreed with the ALJ’s determination and maintained that the guidance clearly states that the APR does not amend the IHP. *Response* at 5-9. After review of applicable statutes, regulations, HUD guidance and the parties’ arguments, I agree with the ALJ’s holding that NHA’s APR did not modify its IHP.

**a. NAHASDA regulations make clear that the IHP must be amended.**

The NAHASDA regulation specifically states that an Indian tribe or TDHE can amend its IHP. *See* 24 C.F.R. § 1000.232. The regulation further states that “HUD’s review of an amendment and determination of compliance will be limited to modifications of an IHP which adds new activities or involve a decrease in the amount of funds provided to protect and maintain the viability of housing assisted under the 1937 Act.” *Id.* No one argues that the changes NHA needed to make to its IHP met the standard that required HUD review. However, that does not mean an IHP does not need to be amended. If the IHP did not need to be amended, the regulation would explicitly state that only certain changes to a tribe’s plan need to be made on the IHP. Instead, the regulation merely limits “HUD’s review of an amendment.” *Id.* The regulation clearly states that amendments to the IHP always need to be made, but only certain amendments need to be reviewed by HUD. NHA made no argument to counter this clear meaning.

**b. HUD guidance regarding IHPs and APRs requires the IHP to be amended independently of the APR.**

NHA argued the HUD guidance and the IHP/APR form itself make clear that the APR is the proper way to amend an IHP. *Appeal* at 1-3. The ALJ rejected this view, holding that the proper reading of HUD’s guidance is that the IHP must be amended separately from the APR. *Decision* at 11-14. In addition, the ALJ holds that, logically, the APR cannot amend the IHP because the IHP is a plan and a plan for the program year cannot logically be amended after the end of the program year. *Id.* at 13-14. HUD agreed with the ALJ’s reading of the guidance and the nature of the IHP. *Response* at 5-9. After review of the applicable laws, guidance, documents, and parties’ arguments, I agree with the ALJ’s determinations.

Neither NAHASDA nor its implementing regulations state or imply that other forms, such as the APR, can be substituted for an IHP amendment. There are three HUD documents that address the use of the IHP and the APR. NHA claimed these three documents support its contention that the APR may be used to amend the IHP. *Appeal* at 1-3. However, after reviewing all three documents, I find that each document makes clear that the IHP needs to be amended independently of the APR.

The first document NHA referenced is the IHP/APR form itself. In the section on IHP amendments, the 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 has been determined to be in compliance by HUD or (2) to reduce the amount of funding that was 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* (emphasis added). *Jt. Ex. 12* at p. 26.<sup>2</sup>

NHA argued that the guidance means that amendments that do not need to be submitted to HUD may only be made through the APR and not on the IHP itself. *Appeal* at 2-3. The ALJ rejected this view, arguing that the description of IHP amendments means that there must be a revised IHP. *Decision* at 12-13. The form instructions merely explain which types of revised IHPs do not need to be submitted to HUD; it does not state that those IHPs that do not need to be submitted to HUD do not need to be amended. *Id.* at 12-14. HUD agreed with the ALJ's determination that the IHP/APR form and its accompanying guidance make clear references to a revised IHP, which indicates that an amended IHP is required. *Response* at 5-9. I agree with the ALJ's determination.

When closely examined, the language in the last line of the instruction makes it clear that although some amendments to the IHP do not need to be submitted to HUD, such amendments do need to be made to the IHP. First, the instruction specifically talks about amendments. Because the APR will have not yet been created when completing the IHP, the instruction can only be referring to amendments to the IHP. If no amendments were needed, the instructions would state that point explicitly instead of stating that the certain amendments did not need to be submitted to HUD when they were made. In addition, the instructions state that the amendments will be reflected in APR. *Id.* It does not say that the amendments would be made in the APR. The use of the word "reflected" indicates that the amendments are to be made to the IHP and also reflected, or shown, on another form, in this case the APR. The only reasonable reading of these instructions is that, for informal amendments such as the one required in this case, the IHP must be amended, even if it does not need to be submitted to HUD at the time it is made.

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<sup>2</sup> As NHA notes in its Appeal, the instructions in this section used to include a line stating "all other amendments will be reflected in the APR and do not need to be submitted to HUD." *Appeal* at 2. Although this would make the requirement of a local change to the IHP clearer, I believe the plain meaning of the instructions has not changed.

NHA also argued that the language of HUD's "Indian housing plan and annual performance report form guidance" ("Guidance"), issued February 2012, supports its contention that the IHP does not need to be amended and changes can just be placed in the APR. *Appeal* at 2-3. However, this argument also fails. Similar to the IHP/APR form, the Guidance states that amendments "can be reflected in the APR submission and a revised IHP should not be sent to the Area ONAP." *Jt. Ex. 1* at p. 4. Like the IHP/APR form, I believe that the clearest reading of this statement is that the IHP does not need to be submitted to HUD, but does need to be amended. As the ALJ stated, "the reference to a "revised" IHP confirms that the IHP changes even though it is not sent to HUD." *Decision* at 12. In addition, as with the IHP/APR form, the use of the word "reflected" indicates that the APR submission will reflect, or show, amendments made in another document, which in this case is the IHP.

Finally, NHA relied on HUD's letter ("Letter") to NHA advising NHA that its 2012 IHP had been accepted by HUD. *Appeal* at 3. Specifically, the letter stated that submission of a revised IHP should be limited to the addition of new activities or reductions to the amount provided for maintenance and operation of 1937 Act housing units and that "any other changes to your IHP should be submitted with and recorded in your Annual Performance Report." *Jt. Ex. 8* at p. 2. NHA believed that this shows that the APR submission is sufficient to amend the IHP. However, the ALJ and HUD argued that the plain language of this instruction required NHA to amend its IHP in addition to submitting the APR. *Decision* at 13; *Response* at 8. I agree with the ALJ and HUD. The letter clearly states that changes to the IHP need to be "submitted with and recorded in your Annual Performance Report." *Jt. Ex. 8* at p. 2. The words "submitted with" clearly refer to a revised IHP and would not be there if the revisions only needed to be recorded in the APR and submitted that way. The Letter can only be reasonably read to require an amended IHP separate from the APR.

**c. A plan cannot be amended after the fact.**

Plain logic shows that NHA's claim that the APR can amend the IHP is unreasonable. As the ALJ observed, the "Indian Housing Plan is, first and foremost, exactly what its title suggests: a plan." *Decision* at 13-14. The ALJ further noted:

[i]t would be illogical for the tribe to change the plan after the program year ends. 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. *Id.*

One of the uses of the APR is to verify that a tribe follows and executes its IHP. *See* 25 U.S.C § 4164. NHA's argument that an APR can include changes to the IHP completely negates this purpose. A post-Program year amendment would mean that a tribe could never fail to meet its IHP, which would make the IHP a worthless document when submitted. I do not believe this to be a reasonable interpretation.

**d. The Indian Canon of Construction is not applicable in this case.**

NHA claimed that its interpretation of the IHP amendment rules must accepted under the Indian Canon of Construction. *Appeal* at 3. NHA argued that because NAHASDA is legislation enacted for the aid and protection of Indians, the Indian Canon of Construction requires an act to be construed in favor of a reasonable interpretation advanced by a tribe. *Id.* HUD argued that the Indian Canon of Construction is inapplicable in this case because the language of NAHASDA is clear and because applying it in this case would benefit NHA at the expense of other tribes, which legal precedent does not support. *Response* at 8-9. I agree with HUD's position.

Generally, the Indian Canon of Construction requires "that an act be construed in favor of a reasonable interpretation advanced by a tribe." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1057 (10th Cir. 2011); *see also Rama Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) ("federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit"). However, even in cases, such as *Salazar*, which recognized the Indian Canon of Construction, the court noted that the "starting point in any case involving statutory construction is the language of the statute itself." *Salazar*, 644 F.3d at 1460. "When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances." *Id.* (quoting *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir. 1987)). As stated above, I believe that the language of NAHASDA and accompanying regulations and guidance is unambiguous. Accordingly, the Indian Canon of Construction would not apply.

In addition, the Tenth Circuit found that the Indian Canon of Construction cannot be used by one tribe to the detriment of other tribes. *See Fort Peck Hou. Auth. v. U.S. HUD*, 367 Fed. Appx. 884, 892 (10th Cir. 2010) (observing that "the canon does not allow a court to rob Peter to pay Paul, no matter how well intentioned Paul may be"). *Fort Peck* did not involve an alleged deficient IHP, but did involve recapturing overpaid funds under NAHASDA. *Id.* Like in *Fort Peck*, recaptured funds in this case would be distributed to other tribes. 24 C.F.R. § 1000.536.

Therefore, like in *Fort Peck*, utilizing the Indian Canon of Construction would allow NHA to benefit at the expense of other tribes and should not be permitted.

**e. Conclusion**

As the ALJ determined, NHA appears to treat “amend” and “submit” as synonyms. *Decision* at 14. NHA is correct that the NAHASDA regulations and the HUD guidance all confirm that NHA was not required to submit an IHP amendment to HUD. However, I agree with the ALJ that the applicable statutes, regulations and HUD guidance confirm that NHA was required to amend its IHP and that it failed to do so. *Id.*

**II. NHA’s PY 2012 Expenditure Plan Was Not A De Facto Amendment To Its PY 2012 IHP.**

NHA argued that its Expenditure Plan (EP) was a *de facto* amendment to its IHP. *Appeal* at 4. NHA argued that the EP stated that NHA only planned to spend \$100 million and that HUD was aware of this fact throughout the program year. *Id.* The ALJ rejected this argument. *Decision* at 14. After review, I agree with the ALJ that the EP was not a *de facto* amendment to NHA’s IHP.

Although there does not appear to be an EP on record with the \$100 million spending amount, as the ALJ noted, there is ample evidence through emails that HUD did receive an EP at some point in March or February of 2012. *Id.* However, I agree with the ALJ that even a properly submitted EP would not amend an IHP. *Id.* at 14-15. As the ALJ noted, “neither NAHASDA, its implementing regulations, nor HUD guidance makes any reference to an expenditure plan.” *Id.* at 15. NHA provided no authority to show that an EP could be used to amend an IHP and I found no evidence “that Congress or HUD intended to create a second mechanism for amending an IHP.” *Id.* Therefore, I affirm the ALJ’s determination that NHA’s EP did not amend its IHP.

**III. HUD Is Not Estopped From Using the \$215 Million Figure for Planned Expenditures In NHA’s PY 2012 IHP As Its Basis For An Enforcement Action.**

NHA argued that because HUD employees knew NHA only planned to spend \$100 million, HUD is estopped from using the \$215 million figure in the IHP to bring an enforcement action against NHA for substantial noncompliance. *Appeal* at 4. As part of this argument, NHA

claimed that because NAHASDA creates a trust between tribes and the government, the standard for private estoppel should be used instead of the more burdensome standard for government estoppel. *Id.* at 4-8. The ALJ rejected this argument holding that NAHASDA does not create a “true trust” that would allow NHA to use private estoppel against the government. *Decision* at 15-25. The ALJ went on to find that even if the estoppel test was used, HUD’s actions had not met the standard for estoppel used against private parties or the government. *Id.* After review, I agree with the ALJ’s determination that HUD is not estopped from using the \$215 million planned spending amount outlined in NHA’s IHP to bring the enforcement action for substantial noncompliance.

**a. NAHASDA does not create a true trust relationship.**

There are two types of estoppel actions; an estoppel action against a private party and an estoppel action against the government. In order initiate an estoppel action against a private party, a party has to prove four elements: (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 by the other party; and (4) reasonable reliance by the other party. *Id.* at 15-16 (*citing 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. *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).

As the ALJ stated, “an equitable estoppel claim against the federal government is exceedingly difficult; only a handful of successful attempts exist. *Heckler v. Cmtv. 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”).

NHA argued that the trust relationship between the tribes and government negates the requirement of affirmative misconduct and NHA should only have to meet the standard for estoppel against a private party. *Appeal* at 4-8. To show that the affirmative misconduct requirement is not required in this case, NHA relies on two cases: *Prieto v. United States*, 655 F. Supp. 1187 (D.D.C. 1987) and *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284 (D.N.M. 1996). *Appeal* at 6-7. In *Prieto*, because of the fiduciary trust relationship between the tribe and the government in relation to tribal trust property, the court did not require affirmative misconduct for estoppel. *Prieto* 655 F. Supp. at 1194-1195. In *Pueblo*, the court recognized that affirmative misconduct is not required where there is a trust relationship. *Pueblo*, 932 F. Supp. at 1299. However, a closer reading of *Pueblo* fatally undermines NHA’s case. In *Pueblo*, the court found that, although in some cases affirmative misconduct was not required, affirmative misconduct was required in that particular case because there was no fiduciary duty owed by the United States to the tribes as it relates to the Indian Gaming and Regulatory Act (IGRA). *Id.* The Court found that the IGRA does not grant the United States a “detailed, comprehensive management role over Indian gaming” and thus no fiduciary relationship existed to warrant waiving the affirmative misconduct requirement for estoppel. *Id.*

Like the IGRA, NAHASDA does not create a fiduciary trust relationship that negates the requirement to show affirmative misconduct in an estoppel action. As the ALJ noted, “NAHASDA does confirm that a ‘unique trust responsibility’ exists between HUD and Indian tribes.” *Decision* at 17 (*citing* 25 U.S.C. § 4101(2)-(4); *see also* 24 C.F.R. § 1000.2-1000.4). However, the Supreme Court has recognized that there are different levels of trust relationships between the government and Native American tribes. *U.S. v. Mitchell*, 463 U.S. 206 (1983). The *Mitchell* Court recognized that a fiduciary duty is only created when the federal government is given “full responsibility to manage” the particular Native American program. *Id.* at 224.

Subsequent cases have examined NAHASDA under the *Mitchell* test and have not found the required fiduciary relationship that would allow an entity to only prove the lower level of estoppel. In *Marceau v. Blackfeet Housing Authority*, the Ninth Circuit held that, instead of full government control, the Congressional intent for NAHASDA was to increase tribal self-

sufficiency and independence. 540 F.3d 916, 924-25 (9th Cir. 2008) (“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 recognized that HUD maintained some oversight of the tribes, but held 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.* at 927. Based on legal precedent and the lack of any evidence that NAHASDA gave HUD a detailed, comprehensive management role, I find that NHA is required to meet the higher standard for recovery under estoppel and must prove affirmative misconduct.

**b. NHA did not show affirmative misconduct.**

NHA only provided one piece of evidence that could be construed as showing affirmative misconduct. *Appeal* at 5. It argued that the following email from one HUD employee to another HUD employee shows affirmative misconduct on behalf of HUD:

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 Exhibit* 111.

Although the email may appear impolite, I believe that the ALJ is correct in finding that, without more, it is impossible to use this email to prove misconduct. *Decision* at 25-26. The employee who sent the email was not a member of the Tribal Special Assistance Team that worked with NHA and the email is clear that it is the personal opinion of the particular employee. NHA has provided no evidence that any employee acted on the opinions in this email or even agreed with them. Absent any further evidence, I believe that NHA has not shown affirmative misconduct.

**c. NHA's estoppel claim fails even under private standard of estoppel.**

Even if NHA did not have to show affirmative misconduct, I find that NHA has failed to prove the elements of the estoppel test against a private party. Specifically, NHA has failed to show that HUD made any false representations.

NHA claimed HUD made false representations on the IHP/APR Form, the Program Guidance, and the Letter accepting NHA's IHP. Additionally, NHA argued that HUD made

false representations because HUD was aware of NHA's plan to only spend \$100 million and never mentioned to NHA that it would be an issue. *Appeal* at 4-8. I have previously shown why I do not believe that any of the three documents falsely claim that the IHP did not need to be amended. As previously discussed, each of the documents clearly states that the IHP needs to be amended. Additionally, upon examination, HUD's knowledge of NHA's plan to spend a lesser amount also cannot be said to be a false representation.

NHA provided ample evidence that HUD was aware of NHA's plan to only spend \$100 million. *Id.* That is not in dispute. However, HUD's awareness of the lower spending amount and its work with NHA to implement NHA's projections, does not constitute a false representation. NHA's problem was not that it spent the lesser amount; it was that it did not modify its IHP to reflect the plan to spend less money. As the ALJ stated, there is no evidence that anyone at HUD told NHA that the IHP did not need to be amended. *Decision* at 23. HUD's awareness of the lower planned spending amount does not negate the requirement to amend the IHP because the IHP could be amended at any time during the program year. HUD employees could have easily assumed that NHA was modifying its IHP to match the lower numbers. This is especially true because NHA's amendments did not need to be submitted to HUD. This is not a false representation. Because NHA has not shown any evidence of a false representation, I find that even under the private estoppel test, NHA has failed to meet the necessary elements.

#### **IV. This Administrative Forum Does Not Have Jurisdiction to Decide a Constitutional Question.**

NHA claimed that NAHASDA's implementing regulations defining "substantial noncompliance" at 24 C.F.R. § 1000.534(a) and (c) are unconstitutionally vague and cannot serve as the basis for HUD's enforcement action. *Appeal* at 8. In denying this claim, the ALJ stated that the general rule was that "administrative courts lack the authority or competence to rule upon constitutional issues." *Decision* at 25 (citing *Oestereich v. Selective Serv. Svs. Local Bd. No. 11, Cheyenne, Wyo.*, 393 U.S. 233, 242 (1968)). After review, I agree with the ALJ that HUD does not have jurisdiction to determine a constitutional argument.

NHA cited two cases to support the claim that HUD's administrative forum has jurisdiction to decide a constitutional question: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 2000 (1994) and *Sturm Ruger & Co. Inc. v. Herman*, 131 F. Supp. 2d 211 (D.D.C. 2001). *Appeal* at 11-12. NHA argued that the ALJ was wrong to decline to decide the constitutional question in

this case because these cases hold that administrative forums can decide constitutional questions. *Id.* The ALJ disagreed with this argument, finding that the general rule was that administrative forums could not decide constitutional issues and that the cases NHA relied upon were distinguishable from the instant case because they involved independent commissions. *Decision* at 25-26. HUD agreed with these distinctions and noted that NHA provided no other authority to prove that the administrative court in the instant case had jurisdiction over a constitutional question. *Response* at 13-14. After review of the cases, I agree with the ALJ's determination.

The Court in *Thunder Basin* reviewed a case related to the Federal Mine Safety & Health Review Commission and stated that the rule in *Oestereich* holding that administrative courts lack the authority to rule on constitutional issues was not applicable when "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 situation is similar in *Sturm Ruger*, where the independent commission at issue was the Occupational Safety & Health Review Commission, which was established to adjudicate appeals of Occupational Safety and Health Act actions brought by the Department of Labor. 131 F.Supp. 2d at 217, *citing* 29 U.S.C. §§ 659(c), 661. As the ALJ noted, although the Office of Hearing and Appeals that heard this case is outside of HUD's general command structure, it is still a HUD office. *Decision* at 25-26. HUD's administrative law system is not an independent entity created to hear NAHASDA cases. *Decision* at 26. To further differentiate the present case from *Thunder Basin* and *Sturm Ruger*, statutory schemes of both the Federal Mine Safety & Health Review Commission and the Occupational Safety & Health Review Commission expressly state that the independent commissions are the only venues in which to raise constitutional questions. *Thunder Basin*, 501 U.S. at 208; *Sturm Ruger*, 131 F. Supp. 2d at 216. Therefore, the exception outlined in *Thunder Basin* and *Sturm Ruger* that allows independent agency reviewing bodies to review constitutional questions does not apply here. Therefore, the rule outlined in *Oestereich* is applicable and thus, HUD does not have jurisdiction to decide the constitutional question of whether NAHASDA is unconstitutionally vague.

**V. NAHASDA's Allowance For The Carryover of IHBG Funds Is Irrelevant In This Case.**

NHA claimed that NAHASDA provides that IHBG funds awarded to a grant recipient which are not used in a fiscal year may be carried over and used by the recipient during

subsequent fiscal years. *Appeal* at 12. The NAHASDA statute states “[a]ny 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)(2). The ALJ rejected this claim. *Decision* at 28. After review, I agree with the ALJ that the carryover provision has no impact on the substantial noncompliance determination.

NHA argued that because grant funds may be carried over if not spent during the program year, HUD has no basis for bringing this enforcement action. *Appeal* at 12. NHA argued it must be permitted to use the funds in PY 2013. *Id.* The ALJ rejected this claim, stating that the enforcement action was not initiated because NHA did not spend funds it actually received in PY 2012, it brought the action because NHA did not spend the \$215 million it said it would spend in its IHP and was therefore taken because NHA was not in compliance with its IHP. *Decision* at 28.

Pursuant to 25 U.S.C. § 4133(f)(2), an Indian tribe is only permitted to carryover money already provided to it during the program year. NHA was only given approximately \$90 million in PY 2012. *Response* at 17. Therefore, NHA would only be permitted to carryover the balance of the \$90 million. *See* 25 U.S.C. § 4133(f)(2). However, HUD did not bring the enforcement action because NHA failed to spend this \$90 million in full. *Response* at 17. HUD began the enforcement action because NHA spent approximately \$149 million less than was required by the IHP and for only completing seven of the seventeen projects listed in the IHP. *Id.* Even if HUD only brought the action for failure to spend funds, NHA’s spending deficit of \$149 million was far more than it was eligible to carry over under 25 U.S.C. § 4133(f)(2).<sup>3</sup> Therefore, even though carryover is permissible under NAHASDA that does not prevent NHA from being in noncompliance in this case.

#### **VI. NHA Was Provided Reasonable Notice of the Enforcement Action.**

NHA argued that HUD did not provide it with the “reasonable notice and [an] opportunity for hearing” as required by the NAHASDA before imposing a remedy for being in substantial noncompliance with its IHP. *Appeal* at 12-13 (*citing* 25 U.S.C. § 4161(a)(1)). NHA claimed that HUD waited until after PY 2012 ended before notifying NHA that HUD was taking

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<sup>3</sup> NHA received approximately \$90 million and spent approximately \$66 million, so NHA could theoretically carryover the \$24 million difference. However, that would still leave an approximately \$125 million deficit with its IHP.

enforcement action even though HUD knew NHA was planning on spending much less than listed in its IHP. *Appeal* at 12-13. As a result, NHA argued that it had no opportunity to fix the problem before the end of the program year. *Id.* ALJ rejected this claim for several reasons, most notably stating that the claim misreads the notice requirement of NAHASDA. *Decision* at 26. HUD agreed with the ALJ determination and noted that the statutory provision at 25 U.S.C. § 4161 is titled “Remedies for Noncompliance” and that HUD cannot know there was noncompliance until after the program year ends. *Response* at 26. After review, I agree with the ALJ’s determination that NHA was provided reasonable notice.

Section 4161(a)(1) of Title 25 of the U.S. Code states that “if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter,” the Secretary may impose one of four remedies. As the ALJ stated, this notice and hearing is not required to take place before the bad conduct has taken place; “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.” *Decision* at 26. NHA received the required notice via the Letter of Warning dated March 20, 2013, and the NOI issued on July 31, 2013. The hearing before the ALJ is the opportunity for a hearing that is required by the statute. *Id.* Therefore, the statutory language outlines a reasonable notice requirement, which NHA was provided in this instance.

In addition, NHA’s argument that notification should have been given prior to the end of the program year is unreasonable. As noted by the ALJ, this desired requirement of prior notification of a violation would be impossible. *Id.* NHA had the ability to amend its IHP up until the last day of the program year. As a result, there would have been no way for HUD to know prior to the end of the program year that NHA was in substantial noncompliance with its IHP. The notice requirement that NHA seeks would render any remedial actions for failing to meet an IHP void because the tribe could always amend its IHP and thus would never fail to meet its IHP goals. Such a process is illogical and unreasonable. Therefore, for the above reasons, I find that HUD gave proper notice under the NAHASDA.

**VII. NHA was in Substantial Noncompliance with NAHASDA.**

NHA claimed that it is not in substantial noncompliance with NAHASDA. However, most of NHA's arguments stem from the assumption that either the APR or EP amended its IHP. *Appeal* at 13-14. As I have stated above, I do not believe that NHA amended its IHP. Therefore, NHA's arguments that it was not in substantial noncompliance fail. NHA was in substantial noncompliance with IHP as it did not meet the goals outlined in its IHP.

Noncompliance is considered 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. 24 C.F.R. § 1000.534. NHA's noncompliance clearly met factors (a) and (c).

Under its IHP, NHA planned to expend \$215,989,448. *Jt. Ex. 3*. As listed in its APR, NHA only expended \$66,625,332. *Id.* In the course of failing to meet the spending goals of its IHP, NHA failed to meet the major goals and objectives of its IHP. As noted by the ALJ, NHA planned to complete seventeen discrete housing activities, but only completed seven. *Decision* at 29. None of the incomplete projects received 40% of their estimated funding and six of the projects received less than 10%. *Id.* The reduced funding levels clearly had a material effect on NHA meeting the goals and objectives of its IHP. This failure to meet its overall funding level and the minimal funding for a majority of its proposed projects also clearly involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted. Based on these two factors, I believe that NHA is in substantial noncompliance with NAHASDA.

**VIII. HUD's Remedy is Authorized by NAHASDA.**

NHA claimed that the NAHASDA regulations do not permit HUD to impose the remedy of reducing NHA's LOCCS<sup>4</sup> balance by \$96 million. *Appeal* at 14-15. In the complaint, HUD

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<sup>4</sup> The Line of Credit Control System (LOCCS) is HUD's primary grant disbursement system, handling disbursements for the majority of HUD programs.

proposed to “terminate” these funds. *Response* at 20. NHA argued that “terminate” is a forward looking action so it cannot include the retrieval or recapture of funds. *Appeal* at 14-15. After review, I agree with the ALJ that HUD is authorized to pursue this remedy.

Under 24 C.F.R. § 1000.532(a), if HUD finds substantial noncompliance, HUD shall carry out any of the following actions with respect to the recipient’s current or future grants, as appropriate: (1) Terminate payments under NAHASDA to the recipient; (2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA or these regulations; (3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or (4) In the case of noncompliance described in § 1000.542, provide a replacement TDHE for the recipient. As the ALJ noted, the plain language of the regulation is fatal to NHA’s argument. *Decision* at 28. The regulations specifically state these remedies may be taken with respect to a recipients “current or future” grants. 24 C.F.R. § 1000.532(a). If the termination of funds, or any of the other remedies, were intended to only be forward looking, then the regulation would only have proposed remedies for future grants. Because the regulation specifically states that the remedies can be for current grants, the only reasonable interpretation is that HUD has the authority to terminate and take back current funds. Therefore, I find that HUD is authorized to retrieve the \$96 million from LOCCS.

### CONCLUSION

Upon review of the entire record of this proceeding as well as the applicable statutes and regulations, the *Petition* is **DENIED** for the reasons set forth above. Pursuant to 24 C.F.R § 26.52, the ALJ’s December 14, 2015, Initial Decision and Order is **AFFIRMED**.

Dated this 2 day of May, 2016

  
Frances A. Gonzalez  
Secretarial Designee