

CASE NO. 04 - 35210

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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MARTIN MARCEAU; et. al.,  
Plaintiffs - Appellants,

vs.

BLACKFEET HOUSING AUTHORITY, and  
Its Board Members; et al.,  
Defendants - Appellees.

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On Appeal From the United States District Court  
District of Montana, Great Falls Division  
No. CV 02-00073-GF-SEH – Honorable Sam E. Haddon, Presiding

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AMICUS CURIAE BRIEF OF THE NAVAJO HOUSING AUTHORITY  
IN SUPPORT OF BLACKFEET HOUSING'S  
PETITION FOR REHEARING EN BANC

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1           **STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE**

2           Patterson V. Joe and Luis Ochoa, counsels for amicus curiae Navajo

3  
4           Housing Authority, certify the following:

5           1.       The full name of the amicus curiae we represent is the:

6           Navajo Housing Authority (“NHA”). The NHA is a public body of the  
7           Navajo Nation government.

8           2.       The name of the real party in interest (if the party named in the  
9           caption is not the real party in interest) represented by us is:

10           None.

11           3.       All parent corporations and publicly held companies that own 10  
12           percent or more of the stock of the amicus curiae represented by us are:

13           None.

14           4.       The names of all law firms and partners or associate that appeared for  
15           the amicus now represented by us in the trial court or agency or are:

16           None.

17           Dated: May 16, 2008.

18           By: 

19           Patterson V. Joe



1  
2 In a continuing effort to alleviate the deplorable living conditions of  
3 the vast majority of Native Americans living in the United States, Congress  
4 adopted the Native American Housing Assistance and Self Determination Act in  
5 1996 (“NAHASDA”), 25 U.S.C. § 4101 et. seq. Congress has found that the need  
6 for affordable homes in safe and healthy environments on Indian reservations, in  
7 Indian communities, and in Native Alaskan villages is acute. 25 U.S.C. § 4101 (6).  
8 The Congress, through treaties, statutes, and the general course of dealing with  
9 Indian tribes, has assumed a trust responsibility for the protection and preservation  
10 of Indian tribes and for working with tribes and their members to improve their  
11 housing conditions and socioeconomic status so that they are able to take greater  
12 responsibility for their own economic condition. 25 U.S.C. § 4101 (4).

13  
14  
15  
16 Through NAHASDA, Congress appropriates money for the  
17 construction, maintenance, and operation of safe, decent, and sanitary dwellings  
18 for low and moderate income Native American families in need of housing. The  
19 money appropriated and used pursuant to NAHASDA is not without limitations  
20 and restrictions on its use.  
21

22 NAHASDA disallows the payment of penalties, fines, and damages  
23 by a TDHE. The current regulations implementing NAHASDA are found at 24  
24 C.F.R. part 1000 – Native American Housing Activities. At 24 C.F.R. §1000.26,  
25 the federal regulations describe the administrative requirements under NAHASDA.

1           The regulation at 24 C.F.R. §1000.26(a) states as follows: “[e]xcept as  
2 addressed in §1000.28, recipients shall comply with the requirements and  
3 standards of **OMB Circular No. A-87, ‘Principles for Determining Costs**  
4 **Applicable to Grants and Contracts with State, Local and Federally**  
5 **recognized Indian Tribal Governments’** and with the following sections of 24  
6 C.F.R. part 85 ‘Uniform Administrative Requirements for Grants and Cooperative  
7 Agreements to State and Local Governments.’ For purposes of this part, ‘grantee’  
8 as defined in 24 C.F.R. part 85 has the same meaning as ‘recipient.’” (Emphasis  
9 added). The NHA is the recipient of NAHASDA grants. For the Navajo Nation,  
10 the NHA is the TDHE. For the Blackfeet Nation, Blackfeet Housing is the TDHE.  
11  
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14           OMB Circular A-87 (revised May 10, 2004) has 5 attachments. A  
15 copy of OMB Circular A-87 without the attachments is provided herein as  
16 appendix A. Attachment A is the General Principles for Determining Allowable  
17 Costs. The definitions are in Attachment A. Attachment B is Selected Items of  
18 Cost. The introductory paragraph to Attachment B states “Sections 1 through 42  
19 provide principles to be applied in establishing the allowability or unallowability of  
20 certain items of cost. These principles apply whether a cost is treated as direct or  
21 indirect. A cost is allowable for Federal reimbursement only to the extent of  
22 benefits received by Federal awards and its conformance with the general policies  
23 and principles stated in Attachment A to this Circular. ... ” A copy of the full  
24  
25

1 introductory paragraph to attachment B of OMB Circular A-87 is attached hereto  
2 as appendix B.

3  
4 Attachment B – Selected Items of Cost at paragraph 16 addresses  
5 fines, penalties, and damages. Paragraph 16 states: “Fines, penalties, **damages,**  
6 and other settlements resulting from violations (or alleged violations) of, or failure  
7 of the governmental unit to comply with **Federal,** State, local or **Indian tribal**  
8 **laws or regulations are unallowable** except when incurred as a result of  
9 compliance with specific provisions of the Federal award or written instructions by  
10 the awarding agency authorizing in advance such payments.” (Emphasis added).

11  
12 A copy of paragraph 16 in attachment B of OMB Circular A-87 is attached hereto  
13 as appendix C.  
14

15 A “governmental unit” is defined in Attachment A as “... The entire  
16 State, local, or federally recognized Indian tribal government, including any  
17 component thereof. Components of governmental units may function  
18 independently of the governmental unit in accordance with the terms of the  
19 award.” The NHA is a component of a governmental unit. Blackfeet Housing is a  
20 part of the Blackfeet Nation. Pursuant to the foregoing, NAHASDA funds cannot  
21 be used to pay damages awarded by a tribal or federal court for alleged violations  
22 of law. There is also no specific provision in any of the Federal awards’ written  
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1 instructions by the awarding agency authorizing in advance the payment of  
2 damages.

3  
4 The Amended Opinion's non consideration of the federal restrictions  
5 on payments of alleged damages, if left as is, will create the perception that there  
6 are no federal limitations on the use of NAHASDA funds. The non consideration  
7 of federal limitations on the use of NAHASDA funds will embolden many baseless  
8 claims against the NHA and other Indian Housing Authorities.  
9

10 B. THE EXEMPTION FROM EXECUTION IS NOT WAIVED FOR  
11 THE PLAINTIFFS BECAUSE THEY ARE NOT OBLIGEEES AS  
12 DEFINED IN THE PRIOR ORDINANCE.

13 Blackfeet Housing's Petition for Rehearing En Banc correctly points  
14 out that the Amended Opinion interpreted and applied a tribal ordinance that the  
15 Blackfeet Nation repealed in March of 1999. The NHA and many other Indian  
16 Housing Authorities still have ordinances exactly like or similar to the repealed  
17 Blackfeet Nation's tribal ordinance. The NHA and other Indian Housing  
18 Authorities are therefore left in the precarious position of having ordinances that  
19 have been interpreted to their detriment through no fault of their own.  
20

21 Not only did the Court interpret and apply a repealed tribal ordinance,  
22 the Court in *Marceau I* also misread the exemption from execution provisions of  
23 that prior ordinance. While the Court recognized that there were two limitations  
24 on the tribe's waiver of immunity, the Court incorrectly stated that "any" judgment  
25

1 could be satisfied out of the housing authorities “rents, fees, and revenues.” In  
2 reaching that incorrect conclusion, the Court was referring to the second sentence  
3 of Article VII, paragraph 7 of the Blackfeet Nation’s prior ordinance that stated as  
4 follows.  
5

6 “However, the provisions of this section shall not apply to or limit the right  
7 of **obligees** to pursue any remedies for enforcement of any pledge or lien  
8 given by the Authority on its rents, fees, and revenues ...” (emphasis  
9 added). A copy of the relevant section is included as appendix D.

10 In analyzing that provision, *Marceau I* incorrectly stated: “This  
11 section clearly countenances that the Housing Authority would be subject to a  
12 judgment against it, and only limits the funds out of which such a judgment could  
13 be satisfied.”

14 A careful review of the referenced provision in the repealed ordinance  
15 clearly shows that only “obligees” who received a pledge or lien from a housing  
16 authority on its rents, fees, and revenues” can recover on a housing authorities’  
17 rents, fees, and revenues. An “obligee” is specifically defined in the definition  
18 section of Article III of the Blackfeet Nation’s prior ordinance as including a  
19 holder of an obligation. A copy of the relevant section is included as appendix E.  
20 An “obligation” is also specifically defined in the prior ordinance as notes, bonds,  
21 interim certificates, debentures or other forms of obligations issued by the  
22 Authority pursuant to the ordinance. *Id.* The process for obtaining an obligation  
23 from the authority was detailed and specific in the Blackfeet Nation’s prior  
24  
25

1 ordinance. An obligee status therefore requires negotiation and finalization of a  
2 contract between the obligee and the housing authority. Clearly, the plaintiffs in  
3 the case at bar did not negotiate or hold any obligation authorized by Blackfeet  
4 Housing nor are they obligees under any of the definitions contained in the prior  
5 ordinance.  
6

7  
8 The prior ordinance does not authorize any and all judgments to be  
9 enforced against housing authorities' rents, fees, and revenues as stated in the  
10 *Marceau I* decision. Only an obligee who has been authorized by a housing  
11 authority and who receives a pledge or lien on its rents, fees, and revenues can  
12 recover on the housing authorities' rents, fees, and revenue. All other claimants,  
13 including the plaintiffs in the present matter, are subject to the ordinances'  
14 prohibition on levies and executions against a housing authorities' property.  
15

16 The Court's decision lays groundwork for future litigants' claims  
17 against the NHA and other Indian Housing Authorities. The decisions greatly  
18 expand a clearly limited exception to the general prohibition on levies and  
19 executions against the property of housing authorities. It is ironic that the  
20 decisions interpreting an ordinance that was repealed years ago would now  
21 detrimentally affect the NHA and other Indian Housing Authorities who have the  
22 same or similar ordinances when they are not even parties to the underlying  
23 dispute.  
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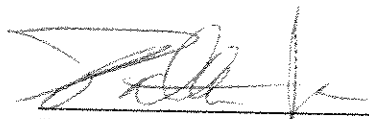
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**CONCLUSION**

For the foregoing reasons, the Blackfeet Housing's Petition For Rehearing En Banc should be granted.

Respectfully submitted this 16 th day of May 2008.

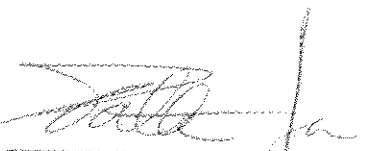
PATTERSON V. JOE, P.C.

  
Patterson V. Joe

**CERTIFICATE OF COMPLAIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9<sup>th</sup> Cir. R. 32, I hereby certify that the foregoing Amicus Curiae Brief of the Navajo Housing Authority in Support of the Blackfeet Housing's Petition for Rehearing En Banc is proportionately spaced, has a 14 point typeface, and as determined by the undersigned's word processing program, contains 1,591 words, not including the Table of Contents, Table of Authorities, and Certificate of Service.

Dated this 16th day of May 2008.

By:   
Patterson V. Joe

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Certificate of Service

A copy of the Amicus Curiae brief of the NHA in Support of Blackfeet Housing's Petition for Rehearing En Banc was mailed by First Class Mail, postage prepaid, this 16 th day of May 2008 to the following:

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The original and 51 copies of the Amicus Curiae brief of the NHA in Support of Blackfeet Housing's Petition for Rehearing En Banc were also sent by Fed Ex on the above date to the following:

Clerk of the Court  
United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, California 94103-1526

By: 

**Office of Management and Budget (OMB)**

**CIRCULAR A-87, "Cost Principles for State, Local, and Indian Tribal Governments"(Revised 05/10/04)**

TO THE HEADS OF EXECUTIVE

DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Cost Principles for Educational Institutions

1. *Purpose.* This Circular establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments (governmental units).

2. *Authority.* This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; the Chief Financial Officers Act of 1990; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. *Background.* As part of the governmentwide grant streamlining effort under see P.L. 106-107, *Federal Financial Award Management Improvement Act of 1999*, OMB led an interagency workgroup to simplify and make consistent, to the extent feasible, the various rules used to award Federal grants. An interagency task force was established in 2001 to review existing cost principles for Federal awards to State, local, and Indian tribal governments; Colleges and Universities; and Non-Profit organizations. The task force studied Selected Items of Cost in each of the three cost principles to determine which items of costs could be stated consistently and/or more clearly. A proposed revised Circular reflecting the results of those efforts was issued on August 12, 2002, at 67 FR 52558. Extensive comments on the proposed revisions, discussions with interest groups, and related developments were considered in developing this revision.

4. *Rescissions.* This Circular rescinds and supersedes Circular A-87, as amended, issued May 4, 1995.

5. *Policy.* This Circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and

Appendix **A**

governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular.

6. *Definitions.* Definitions of key terms used in this Circular are contained in Attachment A, Section B.

7. *Required Action.* Agencies responsible for administering programs that involve cost reimbursement contracts, grants, and other agreements with governmental units shall issue regulations to implement the provisions of this Circular and its Attachments.

8. *OMB Responsibilities.* The Office of Management and Budget (OMB) will review agency regulations and implementation of this Circular, and will provide policy interpretations and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB. Exceptions will only be made in particular cases where adequate justification is presented.

9. *Information Contact.* Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Financial Standards and Reporting Branch, Office of Management and Budget, Washington, DC 20503, telephone 202-395-3993.

10. *Policy Review Date.* OMB Circular A-87 will have a policy review three years from the date of issuance.

11. *Effective Date.* This Circular is effective as follows:

- Except as otherwise provided herein, these rules are effective June 9, 2004.

## **OMB CIRCULAR NO. A-87 – COST PRINCIPLES FOR STATE, LOCAL AND INDIAN TRIBAL GOVERNMENTS**

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Attachment A -- General Principles for Determining Allowable Costs

Attachment B -- Selected Items of Cost

Attachment C -- State/Local-Wide Central Service Cost Allocation Plans

Attachment D -- Public Assistance Cost Allocation Plans

Attachment E -- State and Local Indirect Cost Rate Proposals

Sections 1 through 43 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

Appendix **B**



16. *Fines and penalties.* Fines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with, Federal, State, local, or Indian tribal laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the Federal award or written instructions by the awarding agency authorizing in advance such payments.

Appendix C

any trust indenture, or to utility services the rates for which are fixed or controlled by a governmental agency, or to membership on the Board as provided in Article IV, Section 1(a)(4).

3. Each project developed or operated under a contract providing for Federal financial assistance shall be developed and operated in compliance with all requirements of such contract and applicable Federal legislation, and with all regulations and requirements prescribed from time to time by the Federal government in connection with such assistance.
4. The Authority shall obtain or provide for the obtaining of adequate fidelity bond coverage of its officers, agents, or employees handling cash or authorized to sign checks or certify vouchers.
5. The Authority shall not construct or operate any project for profit.
6. The property of the Authority is declared to be public property used for essential public and governmental purposes and such property and the Authority are exempt from all taxes and special assessments of the Tribe.
7. All property including funds acquired or held by the Authority pursuant to this ordinance shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same nor shall any judgment against the Authority be a charge or lien upon such property. However, the provisions of this section shall not apply to or limit the right of obligees to pursue any remedies for the enforcement of any pledge or lien given by the Authority on its rents, fees or revenues or the right of the Federal government to pursue any remedies conferred upon it pursuant to the provisions of this ordinance or the right of the Authority to bring eviction actions in accordance with Article V, Section 3(1).

purposes. The term "housing project" or "project" also may be applied to the planning of the buildings and improvements, the acquisition of property or any interest therein, the demolition of existing structures, the construction, reconstruction, rehabilitation, alteration or repair of the improvements or other property and all other work in connection therewith, and the term shall include all other real and personal property and all tangible or intangible assets held or used in connection with the housing project.

"Obligations" means any notes, bonds, interim certificates, debentures, or other forms of obligation issued by the Authority pursuant to this ordinance.

"Obligee" includes any holder of an obligation, agent or trustee for any holder of an obligation, or lessor demising to the Authority property used in connection with a project, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal government when it is a party to any contract with the Authority in respect to a housing project.

"Persons of low income" means persons or families who cannot afford to pay enough to cause private enterprise in their locality to build an adequate supply of decent, safe, and sanitary dwellings for their use.