CASE NO. 04-35210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU; et al.,
Plaintiffs - Appellants,

vs.

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

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

PLAINTIFFS/APPELLANTS' RESPONSIVE BRIEF TO PETITION FOR REHEARING *EN BANC*

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ATTORNEYS FOR PLAINTIFFS/APPELLANTS

FILED _____

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FILED _____

CERTIFICATE OF INTEREST

Thomas E. Towe, and Jeffrey A. Simkovic, counsel for Appellants certifies the following:

1. The full name of every party or amicus represented by us are:
   Martin Marceau
   Candice Lamott
   Julie Rattler
   Joseph Rattler, Jr.
   John G. Edwards, Jr.
   Mary J. Grant
   Gary Grant
   Deana Mountain Chief
   on behalf of themselves and others similarly situated.

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

   None.

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

   None.

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are:

   Thomas E. Towe, Esq.
   Towe, Ball Enright, Mackey & Sommerfeld, PLLP
   Jeffrey A. Simkovic, Esq.
   Simkovic Law Firm

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I. INTRODUCTION

The Notice of Appeal was filed on March 2, 2004-over four years ago-on this case. It was briefed and argued on June 16, 2005. An initial opinion was filed on July 21, 2006 (hereinafter "Marceau I"). The Blackfeet Housing Authority then petitioned for a rehearing and a rehearing *en banc* on August 31, 2006. A rehearing was granted and oral argument was held on May 9, 2007. An Order and Amended Opinion of this Court was filed on March 19, 2008 (hereinafter "Marceau II").

There are essentially three issues. First, did the Blackfeet Housing Authority or the Tribe on its behalf waive tribal sovereign immunity. Second, is the Department of Housing and Urban Development of the United States government (hereinafter "HUD") responsible under Indian trust responsibility. And third, is HUD responsible under the Administrative Procedures Act.

In Marceau II, the panel unanimously affirmed Marceau I regarding the waiver of sovereign immunity, in a split decision denied the claim of federal trust responsibility, and unanimously reversed on the Plaintiff's Administrative Procedure Act claim.

Presiding Judge Pregerson dissented on the issue of federal trust responsibility claiming that the instant case meets the *Mitchell* doctrine because the federal government's control of housing on tribal land and the Home Ownership Program

was pervasive.

On the third issue, the unanimous panel was certainly correct. Plaintiffs do not seek a monetary relief; they merely want an order requiring HUD to "fix it." No one has requested a rehearing on this issue, so it will not be addressed. In any event a rehearing would not be warranted.

II. SUMMARY OF PLAINTIFF'S POSITION

(Rule 35(b) Statement)

Plaintiffs disagree with Blackfeet Housing (hereinafter "BH") that Marceau II incorrectly ruled BH waived its tribal sovereign immunity. The Amended Class Action Complaint (the operative Complaint in this case) specifically alleges that BH received all the assets and assumed all the liabilities of Blackfeet Indian Housing Authority (hereinafter "BIHA") and BH and its predecessors are both fully liable. For purposes of this Motion to Dismiss, these allegations must be taken as true. Marceau I and Marceau II both correctly determined that adoption of a sued and be sued clause is a clear waiver of sovereign immunity. This position is supported both by case law and logic. Marceau II further correctly holds that BH waived any right to have the tribal sovereign immunity issue decided in Tribal Court first when BH raised this issue for the first time in its motion for rehearing in this Court. The Tribal Court Exhaustion Rule is not jurisdictional and this waiver is completely valid; there is no

authority cited by BH to the contrary. There is no need for further consideration of this issue and Plaintiffs oppose it.

On the issue of federal trust responsibility, however, Plaintiffs agree with BH and join them in seeking rehearing *en banc*. Chief Judge Pregerson is absolutely correct. The federal government control of the design, building standards, approval, and funding of these houses was so pervasive that it is equivalent on all four corners to the timber situation in *Mitchell II*. The Amended Class Action Complaint alleges pervasive control and in the event Plaintiffs should have the opportunity to present evidence to this effect. Further, the majority opinion is indefensible in finding a difference between regulations pervasive on their face and pervasive control from improper administration of valid regulations. It is a distinction without a difference, not supported by the Supreme Court decisions and contrary to the equitable principles that control the Indian trust responsibility. Because of the significance of this principle, an *en banc* hearing is justified, first, because it conflicts with decisions and language of the United States Supreme Court, and second, because the question is one of exceptional importance. The importance of a correct understanding of the Indian trust responsibility to Indian people and to the nation as a whole cannot be underestimated. See Rule 35(b)(1).

III. ARGUMENT

A. The Decisions of This Court in Marceau I and Marceau II on the First Issue Are Unassailable. BH Has Had Plenty of Opportunity to Argue and Reargue Their Points All of Which have Twice Been Rejected.

1. Neither BH nor Any of the Amicus Briefs Have Cited or Can Cite Anything to Suggest that the Comity Principle of Tribal Court Exhaustion is Jurisdictional or Cannot Be Waived.

BH argues vigorously that Marceau II is inconsistent with other decisions of this Court because of the exhaustion of tribal court remedies argument. On this point, the unanimous decision of the panel is correct. BH raised, for the first time, in its Petition for Rehearing before this Court, the question of tribal court exhaustion. See Blackfeet Housing and its Board Members et al. Combined Petition for Rehearing and Rehearing *En Banc* dated August 31, 2006, at 3. The panel of this Court correctly observed in Marceau II that failure to raise this issue at the trial court level constitutes a "forfeiture" of the issue. Marceau II, 519 U.S. 838, 843. Indeed, the law is quite clear and well-settled that this Court will not consider matters on appeal that are not specifically and distinctly raised and argued in a party's opening brief. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726, (9 Cir. 1992); *Talk of the Town v. Department of Finances and Business Services*, 353 F.3d 650, 650 (9 Cir. 2003).

This Court's panel further correctly ruled that Tribal Court exhaustion is not jurisdictional but prudential. The United States Supreme Court has made it very clear that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16, N.8, (1987); *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). BH and amicus parties have not and cannot cite any cases or other authority to contradict these well-established principles. Whether or not Tribal Court exhaustion is mandatary, requires appropriate deference, and requires dismissal if properly raised, is irrelevant to the question of waiver in this case. If it is not jurisdictional it can be waived. This issue has been well-decided by the Ninth Circuit panel and nothing can be gained by reconsideration.

2. Whether or not HB is Separate and Distinct from the BIHA or Whether Either Are Section 17 Corporations Is Premature. At This Stage, the Facts Alleged in the Complaint Must be Accepted as True.

BH and Amicus National American Indian Housing Council claims that BH and BIHA which actually adopted the "sue and be sued" clause are distinct and separate entities. (BH's Petition at 11; Amicus National American Housing Council Brief at 12.) In a Motion to Dismiss, facts pleaded in the Complaint must be accepted as true. *Bernhardt v. County of Los Angeles*, 379 F.3d 862, 867 (2002). In

the Amended Class Action Complaint, plaintiffs allege:

> BLACKFEET HOUSING received all the assets and assumed all the liabilities of BLACKFEET INDIAN HOUSING AUTHORITY.

(Appendix 1 to Plaintiffs' Opening Brief at 3.) See also references in the Complaint to "Blackfeet Housing and its predecessor, Blackfeet Housing Authority in Amended Complaint at 18, ¶75 and 19, ¶80. Plaintiffs have alleged that Blackfeet Housing assumed all the liabilities of Blackfeet Indian Housing Authority and whether or not it is the same entity is irrelevant. Accepting the allegation as true, BH is liable for the obligations of BIHA.

Similarly, any reference by BH or the Amicus parties to a "rescinded ordinance" is misplaced. (BH's Petition at 11-12.) Whether or not the initial ordinance was repealled, BIHA remains liable for claims that arose at the time Tribal Ordinance No. 7 was active. BH is liable for having assumed all of Blackfeet Indian Housing Authority's liabilities. For the purposes of this legal inquiry, all of the facts alleged in the Complaint must be accepted as true.

Similarly, whether or not BH is a Section 17 organization is irrelevant. If BIHA was such an organization or if the activities of either are similar to the corporate activities of a Section 17 organization, the same reasoning does apply. Any contention that Tribal Ordinance No. 7 authorizing BIHA to sue and be sued is an act

of the Tribe in its Constitution rather than business capacity is wrong. A housing authority whose purpose is to receive money from HUD and enter into contracts for the construction of decent, safe and sanitary dwellings and provide employment opportunities through the "construction, reconstruction, improvement, extension, alteration or repair" of low income housing is, in fact, engaged in a corporate function instead and not a constitutional function. See Purposes in Article II of Tribal Ordinance No. 7 at 3, BH's Supplemental Excerpts of Record No. 1.)

The case cited by BH, *Linneen v. Gila River Indian Community*, 276, F.3d 489, 491 (2002) is inapposite. The Defendants in that case were a tribal ranger and other agents **of the tribe** clearly acting in the Tribe's constitutional role. By contrast, in the instant case we have a corporation, BIHA, incorporated in the State of Montana for the specific purpose of entering into contracts with builders and construction companies to built houses. In any event, this too is definitely a decision for the finder of facts and inappropriate at this level of the proceedings.

Similarly, Amicus Navajo Housing Authority's argument that Plaintiffs are not contract obligees and only contract obligees are not exempt from execution, is premature. (Navajo Brief at 5-7.) If BH has assumed all of the liabilities of BIHA, the Plaintiffs who had a claim under the BIHA's charter may be able to claim the same exceptions to the exemptions from levy. That issue has not yet been decided.

Furthermore, Navajo's read on the definition of an obligee is flawed; there is nothing in the definition to limit an obligee to a contract obligee. (See Tribal Ordinance No. 7 at 5, BH's Supplemental Excerpts of Records No. 1; Navajo Appendix E.) Furthermore, the collectibility of a Judgment is not relevant to the question of jurisdiction.

3. BH's and Amicus' Contentions that Marceau I and Marceau II Conflict With This Court's Cases, Cases from Other Circuits, and Supreme Court Cases Has Been Carefully and Completely Dealt With by the panel.

There is no need to revisit and reconsider matters that have already been well-outlined and responded to. BH contends that Marceau I and Marceau II are in conflict with other cases decided by this Court (BH's Petition at 2-5), with cases in other Circuits (*Id.* at 5-7), and with cases decided by the Supreme Court (*Id.* at 7-9). These issues have already been dealt with extensively. First, nothing in the *Sibley* case, 1997 U.S. App. LEXIS 6709, and *Linneen* case, 276 F.3d 489, 492-93 (9 Cir. 2002) are inconsistent with this panel's decision. As Marceau II clearly outlines, the Tribal Court Exhaustion Rule is prudential rather than jurisdictional and since BH failed to raise this issue until their Petition for Rehearing, they have effectively waived any such claim. There is nothing in either case to the contrary.

In Marceau I, the panel effectively and convincingly deals with cases cited from other districts and the Supreme Court. (455 F.3d at 979-983.) BH has lost this argument twice by a well-reasoned and thorough analysis of the cases and further discussion is unnecessary. Furthermore, it is hard to avoid the plain meaning of the Ordinance which authorizes BH's predecessor to "sue and be sued." The unfairness of authorizing a housing authority to sue but prevent it from being sued should be obvious. The whole purpose of establishing a new corporation, namely, BIHA, is to deal in the commercial world with other business entities. (See 455 F.3d at 979.) It is not commercially reasonable for the Tribe, at the urging of HUD to have intended anything different.

To the extent that BH and the Amicus parties claim the Tribe was forced into adopting Tribal Ordinance No. 7, this is addressed in Argument B herein regarding the trust responsibility.

B. Presiding Judge Pregerson Is Exactly Right in His Dissent. The Federal Government Control of the Design, the Building Standards, the Approval Requirements, and the Funding Was so Pervasive that the *Mitchell II* Standard Was Met. To Blame this on Over Zealous Bureaucrats Is Contrary to the Supreme Court's Language and to recognized Trust Law.

Plaintiffs agree with BH and the amicus parties on the second issue (Indian

Trust Responsibility) and join with them in requesting a rehearing *en banc*.

The panel's decision on this issue was split with presiding Judge Pergerson writing a very strong and thorough dissent. His analysis is excellent and his conclusion is exactly correct. Because of the General Allotment Act that denied alienation of land (and prevented home mortgages), the Indians themselves were totally dependent on the federal government to provide decent, safe, and sanitary housing. The government undertook to do so, but in doing so, they developed such a pervasive control that the *Mitchell II* case applies. In reaching this conclusion, Pregerson cited and analyzed the three principle cases of the United States Supreme Court on this point, namely, (*Mitchell II (United States v. Mitchell*, 463 U.S. 206 (1983); *Navajo Nation* (*United States v. Navajo Nation*, 537 U.S. 488 (2003); and *White Mountain Apache (United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)).

The other two members of the panel, tried to overcome that clear and controlling legal analogy by stating the laws and regulations do not, in and of themselves, require elaborate control, and the factual situation alleged in the Complaint could only have happened because of unwise oversight authority or arbitrary and capricious action by government official **implementing** these statutes and regulations. The statutes and regulations, by themselves, cannot impose a trust

relationship. It is respectfully submitted this majority opinion is wrong. First, it is specifically inconsistent with the United States Supreme Court decisions on the Indian trust responsibility. Second, it is inconsistent with elementary trust law. Third, it is simply against all common sense and genuinely bad law.

First, it is inconsistent with the legal opinions in the United States Supreme Court cases. In *White Mountain Apache*, the Supreme Court specifically stated that the statute cited does not have to expressly subject the government to the duties of management and conservation. This can be implied. Actual occupancy supports a fair inference that an obligation to preserve the property improvements was incumbent upon the United States as a trustee. 537 U.S. at 475-76.

Consequently, it is not just the statutes that determine whether a breach of fiduciary responsibility has occurred. It is whether the statutes have been implemented properly as well. Moreover, the initial language used in *Mitchell II* makes no such distinction between the statutes and regulations on the one hand and the implementation on the other.

> "[W]here the federal government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) 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." *Navajo*

> *Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980).

Mitchell II, 463 U.S. at 225. Clearly the focus is on government assumption of control not statutory or regulatory control. The distinction made by the panel majority on this point cannot be squared with the United States Supreme Court decisions.

Second, it is inconsistent with fundamental trust law. It is, after all, trust law to which we must look. *Mitchell II* refers to the necessary elements of a common law trust. 463 U.S. at 225. "Elementary trust law" is what we must look to in the final analysis. *White Mountain Apache*, 537 U.S. at 475.

The whole concept of trust arose as an equitable remedy in courts of equity. The English Court of Chancery developed this notion. The Courts of Chancery administered the rules and applied principles of equity. While the there is no longer a division between courts of law and courts of equity, the trustee's obligation is still an equitable one.

> "The trustee's obligation is said to be equitable." Originally it was recognized only by the English Court of Chancery, which alone administered the rules and applied the principles of equity. ... [T]he trustee's obligation [is] equitable.

Bogert, Law of Trusts 5, §1 (1973). Accord Restatement 3d Trusts 1, (Introductory

Note.)

The requirement to do equity is not uncommon as it relates to trusts. See *Matter of Kuehn*, 308 N.W.2d 398, 399 (S.D. 1981); *Kurowski v. Burch*, 290 N.E.2d 401, 406 (Ill. App. Ct. 1972); see generally Restatement (First) of Trusts §240. Indeed, even this Court has recognized the importance of equitable remedies in applying traditional trust remedies. *Standard Insurance Company v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997); *Donovan v. Mazzola*, 716 F.2d, 1226, 1239 (9th Cir. 1983) cert. den. 1984, 104 S. Ct. 704.

It is certainly not equitable to the beneficiary to deny relief because the trustee's agents (government agents) have not acted wisely or acted arbitrarily and capriciously. The impact to the beneficiary (the Plaintiff Indians) is the same whether the action was directed by an abusive regulation or the action was directed by an agent abusing his authority under a valid regulation. It is totally inequitable to deny relief because of such a distinction. To hang their hat on this distinction is contrary to trust law principles.

The allegations of the Complaint, which must be accepted as true, are very strong on this point:

> 17. The construction of these houses was under the close supervision, mandate, and direction of HUD. In this regard, the Blackfeet Housing Authority

> became the arm or instrumentality of HUD to accomplish the goals and purposes of HUD.

Amended Class Action Complaint at 6, Appendix 1:

> 49. As trustee, HUD breached the fiduciary relationship when it constructed houses that were not only substandard but dangerous to the Indian occupants, and therefore, HUD plainly acted adversely to the beneficiaries' interest.

Id. at 13. Finally:

> 75. Blackfeet Housing and its predecessor, Blackfeet Housing Authority were created by and under the auspices and direction of HUD. They each became an instrumentality for the accomplishment of goals of HUD. They remained and still remain under the total dominance and direction of HUD. As such, they each have become an agent, an arm, and an instrumentality of HUD and, as such, are fully liable, along with HUD, for all of the actions and omissions previously alleged.

Id. at 18. See also the same allegations in ¶80 *Id.* at 19.

Third, this Court should not be allowed to hide behind a legal distinction that causes no difference. Whether the results of the allegations in Plaintiffs' Complaint were caused by defective or over-zealous and controlling regulations or over-zealous and controlling agents working under those regulations is a distinction without a difference. It is unequitable to give such a distinction a legal effect. Furthermore, it is unreasonable and lacks all common sense. The beneficiary is effected in the same

manner regardless of which is true. At the very least, Plaintiffs should be permitted to prove the facts as alleged in its Complaint and, if true, HUD should be held liable as a trustee who has breached its trust towards these Indian beneficiaries.

The holding of the panel on Issue No. 2 is, therefore, inconsistent with this Court's prior rulings. It is inconsistent with the decisions and mandates of the United States Supreme Court. It has enormous consequences throughout Indian Country and throughout the United States. Rehearing should be granted *en banc* on this issue.

CONCLUSION

Thus, Plaintiff opposes a rehearing *en banc* for issue number one and joins with BH and the Amicus parties in urging rehearing *en banc* on issue two. As of this time, there is no request for rehearing on issue three. Plaintiffs would oppose it.

Dated this 3rd day of June, 2008.

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By: 

Thomas E. Towe
Counsel of Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32, I hereby certify that the foregoing Responsive Brief to Petition for Rehearing *En Banc* is proportionally spaced, has a 14-point typeface, and has determined by the undersigned's word processing program, contains 3,345 words, not including Certificate of Interest, The Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

Dated this 3rd day of June, 2008.

By: Thomas E. Towe

Thomas E. Towe

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of June, 2008, a true and accurate copy of the foregoing Responsive Brief to Petition for Rehearing *En Banc* of Appellants was duly served by U.S. First Class Mail, postage prepaid, upon the following counsel of record:

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