12-278

No.

In the
Supreme Court of the United States

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GARY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,
Petitioner,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioner
PO Box 30457
Billings, MT 59107
(406) 248-7337

Jeffrey Simkovic
Counsel of Record
for Petitioner
20 North 29th St.
Billings, MT 59101
(406) 248-7000

BLANK PAGE

QUESTIONS PRESENTED

1) Whether the Ninth Circuit misconstrued and misunderstood requirements for finding a Federal Trust Responsibility to Indians. Is the pervasive role of the federal government based on the administration of the law as well as the letter of the law?

2) Is there a conflict in the Circuits on this issue? Compare *Brown v. United States,* 86 F.3d 1554, 1560-61 (Fed. Cir. 1996) and other cases in the Federal Circuit with the decision of the Ninth Circuit in this case below (*Marceau III*, 540 F.3d 916, 928 (9th Cir. 2008).

3) Is there a special burden on the federal government as it relates to Indian Housing in view of the Congressional Acts on Housing, the disadvantage to Indians caused by the Indian Allotment Act which prohibits Indians from holding title to their land, and the Indian Trust Responsibility of the federal government?

4) Was the Ninth Circuit wrong in summarily dismissing Plaintiffs' APA claim as time barred when the true state of affairs was not discovered until well within the statute of limitations? Was the Ninth Circuit wrong in not considering the federal Indian Trust Responsibility in connection with this decision?

QUESTIONS PRESENTED CONTINUED

5) Was the Ninth Circuit wrong in holding that HUD had no duty to act on a specific request of the Housing Authority and the Blackfeet Tribe to "fix it?" Was the Ninth Circuit wrong in not considering the federal Indian Trust Responsibility in connection with this decision.

PARTIES

The Petitioners are Martin Marceau; Candice Lamott; Julie Rattler; Joseph Rattler, Jr.; John G. Edwards; Mary J. Grant; Gary Grant; Deana Mountain Chief who are purchasers and residents of Indian Housing built and paid for by Defendants.

Respondents Blackfeet Housing Authority, and its board members; Sandra Calfbossribs; Neva Running Wolf; Kelly Edwards, Ursula Spotted Bear, Melvin Martinez, Secretary; Department of Housing and Urban Development, United States of America are responsible for the funding, construction and maintenance of the houses in question.

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

APPENDIX

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIESCONTINUED

TABLE OF AUTHORITIESCONTINUED

STATUTES

TABLE OF AUTHORITIESCONTINUED

OTHER AUTHORITIES

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIESCONTINUED

TABLE OF AUTHORITIESCONTINUED

1.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of certiorari to review the opinion of the Ninth Circuit Court of Appeals entered on August 22, 2008 and on June 5, 2012.

OPINION BELOW

The Ninth Circuit Court of Appeals filed its Memorandum and Judgment on June 5, 2012 (*Marceau IV)*. This was from an appeal of a Decision of the District Court on Remand. The Ninth Circuit Court of Appeals filed its previous Order and Amended Opinion August 22, 2008 (*Marceau III),* and selected this decision for publication. See 540 F.3d 916 (9th Cir.2008). It had previously filed an Order and Amended Opinion on March 19, 2008 (*Marceau II)*, published at 519 F.3d 838 (9th Cir. 2008) after rehearing before a three-judge panel on May 9, 2007. The initial Order and Opinion of July 21, 2006, *Marceau I)* published at 455 F.3d 974 (9th Cir. 2006)

was replaced in part and adopted in part. The Amended Opinion of March 19, 2008 (*Marceau II*) was replaced in its entirety.

2.

JURISDICTION

The Ninth Circuit filed its decision on June 5, 2012. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

1. United States Housing Act of 1937 and 1949, 42 USC §1437-1437x.
2. The National Housing Act 12 U.S.C §§17151(a) and 1738(a).
3. The Indian Housing Act of 1988 42 U.S.C. §1437aa-ff.
4. The Native American Housing and Self-Determination Act of 1996 (NAHASDA) 25 U.S.C. §§1702-1750.
5. The Administrative Procedures Act, 5 U.S.C. §706(1).
6. The Statute of Limitations, 28 U.S.C. §2401(a).

STATEMENT OF FACTS

Petitioners adopt the Ninth Circuit's Statement of Facts from *Marceau III* as follows:

"The Blackfeet Tribe is a federally recognized Indian tribe. In January 1977, the Tribe established a separate entity, the Blackfeet Housing Authority ["Housing Authority"]. *See* 24 C.F.R. §805.109(c) (1977) (requiring, as a prerequisite to receiving block grant from [United States Department of Housing and Urban Development ("HUD")], that a tribe form a HUD-approved tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance. Blackfeet Tribal Ordinance No. 7, art. II, §§1-2 (Jan. 4, 1977), *reprinted in* 24 C.F.R. §805, subpt. A, app. I (1977). Thereafter, HUD granted the Housing Authority authorization and funding to build 156 houses on the Blackfeet Reservation.

"Construct ion of those houses, and some additional ones, began after the Housing Authority came into being in 1977. Construction was completed by 1980. The houses - at least in retrospect - were not well constructed. They had wooden foundations, and the wood products used in the foundations were pressure-treated with toxic chemicals. The crux of Plaintiff's complaint is that HUD directed the use of pressure-treated wooden foundations, over the objection of tribal members, and that the Housing Authority acceded to that directive.

"In the ensuing years, the foundations became vulnerable to the accumulation of moisture, including both groundwater and septic flooding, and to

structural instability. Some of the houses have become uninhabitable due to contamination from toxic mold and dried sewage residues. The residents of the houses have experienced health problems, including frequent nosebleeds, hoarseness, headaches, malaise, asthma, kidney failure, and cancer.

"Plaintiff s bought or leased the houses, either directly or indirectly, from the Housing Authority. After it became clear that the houses were unsafe or uninhabitable, Plaintiffs asked the Housing Authority and HUD to repair the existing houses, provide them with new houses, or pay them enough money to repair the houses or acquire substitute housing. When they received no help from either entity, Plaintiffs filed this class action... ." 540 F.3d at 919-920, App. 7-8.

Judge Pregerson, in dissent, adds this significant additional fact:

> Plaintiffs allege, as the crux of their claim that HUD *required* the use of wood foundations over the objections of Tribal members, and that the Housing Authority acceded to that directive.

540 F.3d at 930, App. 27.

Judge Pregerson also outlines the home ownership program that is critical to an understanding of this case as follows:

> Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§1437-1440, HUD developed the Homeownership Program. HUD designed the Homeownership Program to meet the housing needs of low-income American Indian families. HUD entered into agreements called 'Annual Contributions Contracts' with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authority and pre-approved by HUD. *See* 24 C.F.R. §805.102 (1979); *id.* §805.206. After securing funding from HUD, a tribal housing authority would then contract with eligible American Indian families. *See id.* §805.406. The program required families to contribute land, labor, or materials to the building of their house, *see id.* §805.408, and after occupying the house, each family made monthly payments in an amount calibrated to their income, *see id.* §805.416(a)(1)(ii). The home-buyers were responsible for maintenance of the house. *See id.* §805.418(a).

540 F.3d at 930, App. 26.

PROCEDURAL BACKGROUND

Plaintiffs, all enrolled members of the Blackfeet Tribe, filed a class action against the Housing Authority, the board members of the Housing Authority, HUD, and the Secretary of HUD. Plaintiffs seek declaratory and injunctive relief and damages for alleged violations of statutory, contractual and fiduciary duties.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Housing Authority and its board members filed a motion to dismiss because of tribal immunity. The district court granted all these motions. 540 F.3d at 919-20, App. 8.

Plaintiffs appealed to the Ninth Circuit Court of Appeals. In its initial opinion Ninth Circuit affirmed the dismissal of HUD and its Secretary, but reversed with respect to the Housing Authority. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974 (9th Cir. 2006)(App.92-121). The Ninth Circuit then granted the Housing Authority's petition for rehearing and issued an amended opinion affirming its reversal with respect to the Housing Authority but further reversing the district court' s dismissal of the Administrative Procedures Act count against HUD. *Marceau v. Blackfeet Hous. Auth. (Marceau II)*, 519 F.3d 838 (9th Cir. 2008)(App. 75-121). The Housing Authority and HUD filed separate petitions for panel rehearing and review en banc. The Ninth Circuit granted a second rehearing (but not en banc) and then issued its second amended opinion that is, in part, the subject of this petition. *Marceau v.*

Blackfeet Hous. Auth. (Marceau III), 540 F.3rd 916 (9th Cir. 2008) (App. 1-45).

In Marceau III, The Ninth Circuit remanded the case against the Housing Authority to the district court with instructions to stay, rather than dismiss, the action against the Housing Authority while Plaintiffs exhaust their tribal court remedies. 540 F.3d at 921, App. 9-10.

Second, over a strong dissent of presiding Judge Pregerson, the Ninth Circuit refused to reverse the district court's dismissal of Plaintiffs' claim that the federal government breached its trust responsibility to Indians. The majority of the panel held that the laws, regulations and handbook requirements failed to establish that the federal government exercised direct control over Indian houses or money. 540 F.3rd 927-28, App. 21-22. By contrast, Judge Pregerson stated that HUD's control of housing on tribal land and the Homeownership Program was so pervasive that the Tribe and its members had little control over how HUD housing would be built and no power to control the materials used. The pervasive regulation of housing on the Blackfeet reservation was exactly like *Mitchell II* and *White Mountain Apache*. Thus, Judge Pregerson would hold that the government breached its fiduciary duty by requiring the tribes to use substandard, hazardous building materials and refusing to repair or rebuild the homes. 540 F.3rd 940, App. 44-45.

As to the Administrative Procedure Act claim that HUD should be ordered to "fix it," the Ninth Circuit unanimously held that the claim was not barred even if it did require money to fix it because the request for an injunction was not a claim for money damages. See *Bowen v. Massachusetts,* 4897 U.S. 879, 895 (1988). Thus, this count was remanded to the district court to determine whether HUD failed to comply with its own regulations and whether arsenic-treated lumber was within industry standards at the time. 540 F.3rd 928-29, App. 23-25.

Lastly, the Ninth Circuit reaffirmed its earlier determination that the district court lacked jurisdiction to hear the breach of contract claims against HUD. 540 F.3rd 929, App. 25.

On remand, Plaintiffs claimed that the construction of 156 homes did not comply with HUD regulations or with the generally accepted practices at the time of construction. Third Amended Complaint, App. 168. Under the regulations and under generally accepted practices wooden foundations were not to be used without special precautions; if Group 4 soils exist the opinion of a qualified engineer that the design was acceptable in view of the soil system is mandatory. 24 C.F.R. part 200, subp. S, §805.212(a)(1976); HUD minimum Property Standards, 1973 edition, Appendix E. This was not done and there is no evidence that HUD or anyone else took the necessary precautions to determine if wooden foundations were appropriate for the area in which the houses were constructed.

The district court, however, dismissed the complaint on the grounds it was time barred even though the overwhelming evidence showed the Plaintiffs did not learn of the health issues connected with the wooden foundations until well within the 6 year statute of limitations.

The district court also dismissed the second issue on remand, namely, that HUD ignored specific written requests to "fix it" by both the Tribe and the Housing Authority. In spite of the Ninth Circuit's specific reference to HUD's obligation to respond to the Housing Authority (*Marceau II, 519 F.3d at 851-52)*, the district court held that HUD had no legal obligation to respond to a written request from either the Tribe or the Housing Authority, and thus the review procedures in 5 U.S.C. §§702-706 do not apply. See also *Marceau III,* 540 F.3rd 916, 928 n.6. In *Marceau IV,* the Ninth Circuit affirmed both counts in an unpublished opinion. (App. 168.)

This Petition addresses the federal trust responsibility to Indians issue as decided in *Marceau III* and both issues decided in *Marceau IV* (statute of limitations and failure of HUD to respond).

PREVIOUS PETITION FOR CERTIORARI

Petitioners previously filed a Petition for Certiorari to this Court on November 19, 2008 (Case No. 08-881-CFX). It was denied on May 18, 2009. 129 S. Ct. 2379 (Mem.); 173 L.Ed.2d 1292.

This should cause no impediment to the granting of this Petition. As this Court has said many times, except in extraordinary cases, the writ of certiorari is not issued until final decree. The Petition filed by Petitioners on November 18, 2009, was not final; the Ninth Circuit remanded the case on the Administrative Procedure Act claim. *Marceau III,* 540 F.3d at 928-29. In fact, HUD argued this very point in opposition to that Petition citing *Hamilton-Brown Shoe Company v. Wolf Brothers & Company,* 240 U.S. 251, 258 (1915).

In *Hamilton-Brown Shoe,* this Court was presented with the exact same situation; this Court had previously denied certiorari after the Eighth Circuit denied the damage claim but granted an injunction. On the second petition for certiorari, this Court made it clear it was not limited regarding the damage claim because of its denial of the first petition.

> The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for denial of the application.

240 U.S. at 258. See also *VMI v. United States,* 508 U.S. 946 (1993)(opinion of Scalia, J., respecting the denial of certiorari). As to HUD and the Federal Defendants, the instant case is now final and the ruling in *Hamilton-Brown Shoe* applies.

REASONS FOR GRANTING THE PETITION:

I.

The Federal Trust Responsibility to Indians which is so Important in American Jurisprudence has been Misconstrued and Misunderstood by the Majority of the Ninth Circuit Panel in this Case.

A. The Federal Trust Responsibility.

This Court has established a special remedy for breach of the federal trust responsibility owed by the government to Indians. It is outlined in *Mitchell II,"* 463 U.S. at 224-26, and *White Mountain Apache*, 537 U.S. at 474-76. As summarized in *White Mountain Apache, Mitchell II* found a pervasive role in the government's sale of timber from Indian lands sufficient to trigger the trust responsibility.

> The subsequent case of *Mitchell II* arose on a claim that did look beyond the Allotment Act, and we found that statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by these statutes and regulations were enforceable by damages.

White Mountain Apache, 537 U.S. at 473-74.

The issue is whether or not the government has a "pervasive" role which defines the contours of the United States' fiduciary responsibilities beyond the bare or minimum level.

> The Department of the Interior possessed "comprehen sive control over the harvesting of Indian timber" and "exercise[d] literally daily supervision over [its] harvesting and management" *Mitchell II supra,* at 209, 222, 103 S. Ct. 296 (quoting *White Mountain Apache Tribe v. Bracker*, 448 US 136, 145, 147, 100 S. Ct. 2578, 65 L.Ed.2nd 665 (1980))(internal quotation marks omitted), giving it a "pervasive" role in the sale of timber from Indian lands under regulations addressing "virtually every aspect of forest management," *Mitchell II supra*, at 219, 220, 103 S. Ct. 2961. As the statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians" we held that they "define [d]....contours of the United States' fiduciary responsibilities" beyond the "bare" or minimal level, and thus could "fai rly be interpreted as mandating compensation" through money damages if the government faltered in its responsibility. 463 US, at 224-226, 103 S. Ct. 2961.

White Mountain Apache, 573 U.S. at 474.

White Mountain Apache then added the further clarification that the United States' fiduciary responsibilities included a situation in which the United States occupied the property in question. When it does so, there is a fair inference that an obligation exists to preserve the property improvements and the United States may not allow it to fall into ruin on its watch. 537 U.S. at 475.

B. The Ninth Circuit Misconstrues this Responsibility; A Pervasive Role can come from the Law, the Administration of the Law, or Both.

The two Judges of the Ninth Circuit writing the majority opinion below totally misconstrue this language and these holdings to require that the statutes and regulations in and of themselves create the pervasive role that constitutes the bare or minimum level of federal involvement. They failed to consider how these statutes and regulations *are administered.* They failed to take into consideration the manner in which the statutes and regulations are carried out.

Any law or rule can be either passive and not oppressive or overwhelming and totally pervasive depending on how it is administered. The majority opinion below takes the erroneous position that the statutes and regulations themselves must be pervasive. The majority opinion below takes the

erroneous position that whether or not the people who administer them have acted arbitrarily or capriciously under these statutes and regulations is irrelevant and immaterial. As they so erroneously stated:

> Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the supreme court made clear in *Mitchell I* and *Navajo Nation* 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. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

540 F.3d at 927-28, App. 21-22.

First, such a proposition is wrong ethically, morally, logically and legally. To separate the administration of a statute or regulation from the text and to suggest that a poor, unwise, and over-zealous interpretation of the statute does not count in

determining the existence of a fiduciary duty is ethically and morally unacceptable. To the Indian victims, who have suffered wrongs at the hands of the United States for many years, it is the same, whether the regulations required the wrong or the persons administering the regulations caused the wrong.

Further, it is illogical. We cannot hide our heads in the sand. The result is the same whether an acceptable regulation is administered by an over-zealous administrator or an unacceptable regulation is administered by a prudent administrator. The bottom line is pervasive control. The bottom line is the same control over "virtually every aspect of" housing that exceeds the bare or minimum level of control.

Finally, the proposition is wrong legally. The elaborate control over forest and property belonging to Indians found in *Mitchell II* did not make any such distinction. Control is control whether a corrupt administrator is involved or not. See *Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) *cert.* Granted, October 1, 2008, 129 Sup. Ct. 30, 76 U.S. L. W. 3621; *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996).

For the United States government to absolve itself of responsibility by suggesting that the laws and rules were okay but it's just those administrators who caused your losses and your suffering is wrong. It is contrary to the best notions of fairness and justice that brought about the federal trust

responsibility in the first place. This issue begs for further consideration by this Court.

Second, this proposition 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 obligati on 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 the Ninth Circuit 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. For the Majority of the Ninth Circuit Panel to hang their hat on this distinction is contrary to trust law principles.

II.

A CONFLICT IN THE CIRCUITS EXISTS IN APPLYING THE FEDERAL TRUST RESPONSIBILITY TO INDIANS THAT MUST BE CLEARED UP.

As set forth above, the Ninth Circuit decision specifically holds that the laws and regulations, taken separately from the administration of those laws and regulations, must show a pervasive role of the government to invoke the Indian Trust Responsibility. No matter how arbitrary and capricious the administration of the laws may be,

according to the holding below, only the laws and regulations are to be judged. *Marceau III,* 540 F.3d at 928. In addition to being inconsistent with the language of this Court in previous Indian Trust Responsibility cases, this holding is diametrically opposed to the decisions and case law from the Federal Circuit. This confusion must be clarified.

In *Brown v. United States*, 86 F.3d 1554, 1560-61 (Fed. Cir. 1996), the question was whether the Indian Long Term Leasing Act and action taken under it placed a fiduciary responsibility in the government sufficient to grant jurisdiction for recovery of damages for proof of breach of a specific duty imposed by the regulations. The Federal Circuit cites *Mitchell II* as setting forth the proper test:

> [W]here the Federal Government takes on or has *control or supervision over tribal monies or properties* the federal relationship normally exists with respect to such monies or properties.

Mitchell II, 463 U.S. at 225, quoted with approval in *Brown,* 86 F.3d at 1560.

The Court in *Brown* then concluded the above statement was in the disjunctive - either control or supervision and not both - is required. Furthermore, there are no limiting or clarifying adjectives on either the word "cont rol" or the word "s upervision." From this the Federal Circuit concluded.

> The proper test of whether the government has assumed fiduciary duties in the commercial leasing of allotted

> lands is thus whether, under §415(a) and/or part 162, the Secretary, rather than the allottees, has control or supervision over the leasing programs. All that remains, at this stage of the case, is to apply the test to the statute and regulations at issue.

86 F.3d at 1561.

Clearly there is no room for differentiating whether the control is strictly or solely from the regulations or whether the control is a combination of the regulatory mandate plus the way it is administered. Accord, *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983) *cert.* denied, 467 U.S. 1256 (1984); *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). See generally *Navajo Nation v. United States*, 501 F.3d, 1327, 1343 (Fed. Cir. 2007), Reversed in *Navajo II* (United States v. Navajo Nation), 556 U.S. 287 (2009).

This Court's recent opinion in *Navajo II* (United States v. Navajo Nation), 556 U.S. 287 (2009), does not alter or change the existence of this conflict. First, it is important to note that the leasing act in question in *Brown v. United States*, 86 F.3d at 1561-63 *supra,* was the Indian Long Term Leasing Act (25 U.S.C. §415 (1964)) pertaining largely to leasing of agricultural land but actually lease to a Golf Club in that case, and not the Indian Mineral Leasing Act of 1938 (25 U.S.C. §396a et seq.) that was involved in *Navajo II.* For the reasons set forth in *Navajo II*, they are not the same. 556 U.S. at 293.

Second, the instant case is totally different from *Navajo II.* The instant case, by contrast, involves Indian housing not the leasing of coal. In the Indian Mineral Leasing Act ("IMLA"), Congress has specifically indicated a desire to foster tribal self-determination by giving Indians greater say in the use and disposition of their resources. "W e construe the IMLA in light of its purpose: to 'enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties.'" 556 U.S. at 293. Neither the United States Housing Act (" USHA") nor any of the other housing acts involved in the instant case contain any such purpose.

Unlike the Indian Mineral Leasing Act in *Navajo I* (*United States v. Navajo Nation,* 537 U.S. 488 (2003) and *Navajo II* where Congress intended to transfer the negotiating authority from the government to the tribes leaving the Secretary with certain powers of oversight only, here, Congress directed HUD to provide safe, sanitary conditions to Indians. Compare the language in *Navajo I* concerning the description of IMLA, 537 US at 516 (Souter, dissenting) with the non-precatory language of the USHA at 42 U.S.C. §1437(a)(1)(A) and §1437(a)(3) and NAHASDA at 25 U.S.C. §4101.

Furthermore, unlike the *Navajo* cases, the instant case has its own waiver of sovereign immunity. Federal jurisdiction in this case is based on the explicit waiver of the government's sovereign immunity in USHA of 1937, 42 U.S.C. §1404(a)("The

Secretary of Housing and Urban Development may sue and be sued ... .") See Complaint at 5-6, App. 141-142. The Complaint also cites the National Housing Act of 1934 ("NHA"), 12 U.S.C. §1702 (" The Secretary shall ... be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction"). *Id.*

Indeed the Ninth Circuit majority opinion strays from this test set forth by this Court in *Mitchell II.* It is followed in the Federal Circuit. This Court needs to clarify the ruling and make it clear that federal control or supervision is the key and it doesn't matter how that control or supervision is supported or justified.

III.

A Combination of the Federal Government's Commitment to Indians in Housing, the Congressional Acts on Housing, and the Severe Disadvantage the Indian Allotment Act Causes Indians Seeking to Own Their Own Home, Places an Enormous Burden on the United States. This Burden Further Supports the Application of Federal Trust Responsibility to the Facts of this Case.

A. History of the Obligation of the United States for Indian Housing.

The United States made its first pledges to provide housing assistance to Indian people in the Removal Treaties of the 1820's and 1830's. In those Treaties, it agreed to compensate tribes and help them establish new homes to replace the ones they left behind. (F. Cohen, Handbook of Federal Indian Law, 1387, §22.05(1) (2005 ed.)("Cohen") Promises continued in the Treaties of the 1850's and 1860's particularly when it started focusing on the assimilation desires to encourage Indians to live in permanent houses and engage in agriculture and to inculcate an "Americ an idea" of private property. *Id.* at 1387-88. See also, *Virginia Davis*, a Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation, 18 Harvard Blackletter L. J. 211, 221-225, (2002).1

In 1928, serious deficiencies in Indian Housing and its serious affect on the health and well-being of Indian peoples was revealed in the Meriam Report.

---

[1] There does not appear to be a direct reference to housing in the treaties with the Blackfeet Indians. See the treaty with Blackfeet, October 17, 1885 (11 Stat. 657), which provides for an annual sum of money to be expended for useful goods and provision and other articles as the President may determine (Article IX) and another sum of money annually for instructing Indians in agriculture and mechanical pursuits and other educational endeavors (Article X). Article X specifically requires that the annual fund be used "in any other resp ect promoting their civilization." The C ourt of Claims has held that treaty language such as the requisites to "promote civiliza tion" includes a covenant to provide housing. *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446-67 (1992). See Pregerson in *Marceau I*, specially concurring, App. 119.

Inst. for Gov't Research, the Problem of Indian Administration 553-561 (1928) (Lewis Meriam, Technical Director) (Johnson Reprint Corp. 1971); Cohen at 1387-88. No real assistance, however, was provided to Indians until 1961 after a devastating report on the state of Indian Housing by a Task Force on Indian Affairs to the Secretary of the Interior (July 10, 1961). The Public Housing Administration then initiated programs to permit Indian Housing Authorities to participate in the United States Housing Act of 1937.

The United States Housing Act of 1937 was enacted to help all Americans find decent, safe and sanity living conditions. PL 75-412, 50 Stat. 888 (1937), current version at 42 U.S.C. §1437-1444. In order to benefit, a local housing authority had to be created but it was generally considered that tribes had no authority to do so. See, Staff of Senate Committee on Interior and Insular Affairs, 94th Cong. First Sess., Staff Report on Indian Housing Effort in the United States with Selected Appendences 3 (Comm. Print 1975); see also Mark K. Almer, the Legal Origin of Indian Housing Authorities and the HUD Indian Housing Programs, 13 Am. Indian L. Rev. 109-110-11 (1988).

As Cohen states there then developed a proliferation of programs providing housing assistance to Indian people and tribes culminating with the 1988 Indian Housing Act which created a separate office of Native American programs within the Department of Housing and Urban Development.

Cohen at 1388-89. Even this effort, however, was not effective and its success was admittedly "limited." Remarks of Congressman Lazio, 142 Congressional Record H. 11603, 11613 (Daily edition, September 28, 1996). See also, an Excellent History of Congress' efforts to assist Indian housing in *Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1121-24 (2000) (*"Dewakuku I"*). The final case in this series is *Dewakuku III,* 226 F. Supp. 2d 1199 (D. Ariz. 2002).

The Mutual Help and Homeownership Program ("MHHO Program") was developed to assist low income Indian families in purchasing their own homes administered through regulations promulgated by HUD and the "Indian Housing Handbook". However, because Indian lands are held in trust by the government and alternative financing is not available, a total funding was required through HUD. See a description of this program in *Dewakuku I* at 1122. Even this program proved ineffective to remedy the Indian housing crisis. As the District Court states in *Dewakuku I,* the housing needs of Native Americans were radically different from the needs of low income Americans in urban areas. *Id.*

In 1987, according to a congressional report, 23.3% of the Native Americans, as compared to 6.4% of the total American population, continued to live in substandard housing. "H. R. Rep. #100-604 (1988), reprinted in 1988 U.S.C.C.A.M. 791, 795. On some reservations, the percentage rose as high as 75%. Remarks of Senator Cranston, 135 Congressional Record, S7608 (Daily Ed. June 10, 1988).

Then in 1996, Congress consolidated many of the HUD's programs under the Native American Housing Assistance and Self-Determination Act ("NAHASDA "), 110 Stat. 4018 (1996), 25 U.S.C. §4101 et seq. The Bureau of Indian Affairs developed its own housing improvement program under the authority of the Snyder Act, 42 U.S.C. §5302 (17); 24 C.F.R. §1003.5. Cohen at 1397-98, §2205[3][a]. In addition, the Department of and the Department of Veterans Affairs also designed programs to benefit Indians. 42 U.S.C. §1471-1490s; 38 U.S.C. §3761-3764. However, because of the enormous difficulty of operating the program on trust lands where the Indian does not own fee title to the land, it has met with limited success. Cohen at 1399, §22.05[5].

Notwithstanding all of these efforts, housing in Indian country remains far below the national standard. According to the U. S. Commission on Civil Rights, 40% of on reservation housing was inadequate, a figure six times the national average in 2003. Over 30% of reservation households were crowded, 18% severely so and all of this leads to ill-health and family abuse. Twenty percent of the reservation homes lacked complete plumbing. Less than half were connected to a public sewer system and 32% lacked telephone service.

Only about half as many Indian people own their own homes. U.S. Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 51, 53, 63 (2003); Cohen at 1389.

Clearly one of the most telling reasons for this difficulty and poor result is the General Allotment Act of 1887 ("D awes Act") 24 Stat. 388, 25 U.S.C. §331 et seq. which specifically prevents Indians from transferring title to trust lands they own. See, presiding Judge Pregerson, dissenting in opinion below, App. 29, 37. As Cohen states:

> Difficulties foreclosing on real property on trust land discourage conventional lenders from making home finance loans on reservations.

Cohen at 1389. See also U.S. General Accounting Office, Native American Housing; Home Ownership Opportunities on Trust Lands are limited, GAO-RCED-98-49, at 6-7 (1998).

Obviously, when the entire basis for safe, sanitary and decent housing in the United States is based on homeownership with federally guaranteed loans, this system doesn't work in Indian country where the individual Indians give a mortgage to a lender because of the Indian Allotment Act of 1887.

Cohen cites another factor contributing in the inadequacy of Indian housing.

> Federal housing often failed to comply with basic minimum standards, and might be uninhabitable almost as soon as it was built.

Cohen at 1389, 90 §2205[1]. This is exactly what is involved in the instant case.

Cohen also cites lack of basic infrastructure such as roads, sewage, water and electrical systems and the failure to take into account the cultural standards of the various Indian tribes. He concludes by stating "these problems are exasperated by persistent under-funding of Indian housing program." *Id.*

B. Facts of this Case.

The District Court granted Defendants' Motion to Dismiss for lack of jurisdiction under Rule 12(b). When a 12(b) Motion to Dismiss is made, whether for lack of jurisdiction or failure to state a claim for relief, the Court must take as true, all well-pled facts alleged in the Complaint and construe the Complaint liberally in favor of the Plaintiff. *Dudnikov v. Chalk and Vermilion Fine Hearts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008); *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). This point is acknowledged in the 9th Circuit Opinion below. App. 21.

The Amended Complaint in the instant case alleges the construction of the houses was under close supervision at the direction of HUD through their instrumentality, the Housing Authority. Further, it is alleged that in order to save money "HUD directed" that all homes be constructed with chemically-treated wooden foundations even though they were in violation of state and local building codes and even though HUD knew such foundations were

substandard and in violation of state and local building codes and would eventually produce contamination that would lead to uninhabitability. As a result, the Complaint alleges, pathogenic mold, septic sewage contamination, and other toxic and dangerous substances had developed causing various health and medical conditions subjecting the Plaintiffs and their children to unsafe conditions for human habitation, including requiring children to sleep in rooms with mold and septic sewage contamination.

Amended Complaint, ¶¶ 17-23, App. 137-138.

Presiding Judge Pregerson, in *Marceau I*, states: "for a more vivid description of Plaintiffs' plight, see *Jessie McQuillan Rotten Deal, Missoula Indep.*, April 6, 2006, available at: http://www.Missoulanews.com/news/newsasp?no=5625." App. 97, note. 1.

Clearly, this is another confirmation of what Cohen refers to as failing to comply with basic minimum standards making the houses uninhabitable.

C. The Congressional Mandate to Provide Safe, Sanitary and Decent Housing to All Americans.

Starting with the United States Housing Act of 1937, it is clear that Congress gave the Administration the mandate to provide safe, sanitary

and decent housing for every American family, including Indians. The purpose was clearly stated in the Declaration of policy:

> It is the policy of the United States . . . to promote the general welfare of the nation by employing the funds and credit of the Nation, as provided in this act (A) to assist states and political subdivision of states to remedy the unsafe housing condition and the acute shortage of decent and safe dwellings for low-income families . . . .

42 U.S.C. §1437(a). See also, 42 U.S.C. §1437(a)(4)(the goal of providing decent and affordable housing), and the nondiscrimination clause in 42 U.S.C. §1437(b)(3).

At least one District Court has stated that this direction is a mandate and not a precatory desire. *Commonwealth of Pennsylvania v. Lynn,* 501 F.2d 848, 855 (C.A.D.C. 1974).

A separate program called Mutual Help Ownership Opportunity Program was developed under the Housing Act of 1937, which was intended to assist the Indians to obtain homeownership. As previously indicated, however, this did not work very well because Indian Lands are held in Trust by the government and alternative financing is just not available. *Duwakuku I* at 1122. The home ownership program was then codified in the Indian Housing Act of 1988 which, for the first time established a

separate office of Native American programs within the Department of Housing and Urban Development. 102 Stat. 676 (1988); 42 U.S.C. §§1437aa-ff.

Indian Housing Act of 1988 was not very successful and was, in turn, repealed in 1996 by the Native American Housing Assistance and Self-Determination Act of 1996, Pl. 104-330, 110 Stat. 4016 (1996), 25 U.S.C. §4101 et seq. ("NAHSDA "). The primary objective of NAHASDA is "t o assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low income Indian families. . . ." 25 U.S.C. § 4131(a)(1).

Among other things, under this Act, HUD has the duty to repair the houses that are under its supervision. 25 C.F.R. §905.270. See *Dewakuku III* at 1203-04. In NAHASDA, Congress reinforced its trust obligation to Indian people stating that Congress, through treaties, statutes and historical relations "... has a unique trust responsibility to protect and support Indian tribes and Indian people." That trust is discharged, in part, by "provid ing affordable homes in safe and healthy environments." 25 U.S.C. §4101. As it relates to this case, it is significant that the houses were constructed in 1979 before both the Indian Housing Act of 1988 or NAHASDA were adopted. Nevertheless, the reference in NAHASDA to the trust responsibility is an acknowledgement of the existence of a previously

existing trust responsibility with regard to Indian Housing. See 25 U.S.C. §4101.

D. The Control Exercised by HUD on Indian Housing is Plenary; It is Pervasive.

The Amended Complaint alleges that the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish HUD's goals and purposes. App. at 51-52. Further, the Amended Complaint alleges that Blackfeet Housing submitted to the mandates and directions of HUD, including the use of wooden foundations even though they knew such foundations were substandard. *Id.* In other words, HUD held and exercised total control of the construction of these houses.

These allegations are not made in a vacuum. In addition to Cohen's comment that federal housing "often failed to comply with basic minimum standards, and might be uninhabitable almost as soon as it was built" (Cohen at 1389-90) the same thing is also found in the case law. Thus, in *Dewakuku I,* the District Court in Arizona stated:

> Although technically an exercise of tribal sovereignty, the Indian Housing Authority is, in reality, a creature of HUD. HUD's regulations "pe rmit" a tribal government to create an Indian Housing Authority. See 24 C.F.R. §§905.108(a), 905.109 (1990). In every instance where a tribal government creates a housing authority, it

> must follow the exact format prescribed by HUD. See 24 C.F.R. §1905.109. Furthermore, HUD will not enter into a contract with an Indian Housing Authority unless the tribal ordinance creating the Housing Authority is submitted to and approved by it. See *id.* Moreover, the ordinance must be submitted with evidence that the tribal government's enactment was either approved by the Secretary of the Interior or that the Secretary of the Interior has reviewed the ordinance and does not object to it. See *id.* The model tribal ordinance, first conceived by HUD in 1962, sets out the functions of the Indian Housing Authority and lifts its primary purpose as the eradication of unsafe and unsanitary housing conditions on the reservation.

Dewakuku I, 107 F. Supp. 2d at 1121-22. The same thing is also related in *Dewakuku III*.

The *Dewakuku* case is quite similar to the instant case. Dewakuku purchased a home through the Mutual Help Program authorized by the Indian Housing Act. She alleges the home was in such poor condition and so poorly constructed that it had a malfunctioning electrical system, cracking walls and floors, leaky roof, popping nails, and is both unsafe and overly expensive to heat in the winter. *Dewakuku III*, 226 F. Supp. 2nd at 1201. After several wins at the District Court and one set back in the D.C. Circuit, the case disappears indicating that the

matter was obviously settled or otherwise a satisfactory resolution was obtained. In *Dewakuku III*, the Federal District Court specifically held that HUD violated the Administrative Procedures Act by failing to supervise the Hopi Housing Authority and provide the tribal member with a decent, safe and sanitary home. *Id.* at 1206. The Secretary was ordered to cure the defects in the design and construction of Dewakuku's home. *Id.* In reaching that conclusion, the Federal District Court stated that:

> [T]he duty to build standard housing was absolute under the Indian Housing Act. It was only the *method* of doing so that was committed to agency discretion. All parties concede that this duty was not met in the case of Dewakuku's home.

Id. at 1202.

In that case, as in the instant case, HUD insisted that the responsibility for Dewakuku's home ultimately rested with the local Housing Authority. The Court answered that contention as follows:

> While at first glance this argument makes sense, a more probing analysis leads the court to reject it. HUD's supervisory powers over tribal authorities when implementing the mutual help program are substantial; indeed, they can be properly termed as near total control. Nothing could have been done on this project without HUD's explic it approval.

226 F. Supp. 2d 1202. The Court then stated the Tribal housing authorities have never been viewed as whole independent.

> Congress, when it passed the Indian Housing Act, anticipated that HUD would provide the requisite technical and supervisory assistance. . . . More concretely, any analysis of the Indian Housing Acts implementing regulations makes clear that HUD maintains oversight over virtually everything the Hopi Housing Authority did regarding the construction of housing under the mutual help program-from cite selection 24 C.F.R. §905.230 (1991) and production method 24 C.F.R. §905.215(a) (1991), to the design 24 C.F.R. §905.250 (1991) and development budget 24 C.F.R. §905.255(a)(2)(1991)....
>
> In sum, assuming the Hopi Housing Authority's plan met all applicable standards, construction on a home like Dewakuku's could never have begun without HUD's prior approval. These standards included the use of "structura lly sound" building materials and "cost-eff ective energy" 42 U.S.C. §1437bb(c)(B) .... HUD's oversight capacities did not stop there. HUD had a substantial role in overseeing post construction inspection and certification.

226 F. Supp. 2d 1202-03.

> Further, the Court stated:
>
> The Hopi Housing Authority is not, in any sense, it own agency or a nonprofit organization with access to contributions, nor is it a private, for profit corporation with capital sufficient to cure the defects in Dewakuku's home. It was created solely to administer the public housing monies received from HUD for Hopi lands. It is an offshoot of HUD - HUD's administrator of public housing construction on Hopi reservations and nothing more.

Id. at 1204. The Court concluded that by asking Dewakuku to sue the Housing Authority, HUD is essentially asking Dewakuku to sue an empty shell in order to avoid direct liability itself. *Id.*

This is precisely the Plaintiffs' contention in the instant case. Suit against the Blackfeet Housing Authority is an empty remedy. HUD made all the decisions. HUD required substandard construction by insisting on wooden foundations where wooden foundations were simply inappropriate. HUD should not be allowed to avoid its responsibility. To do so is one more strike in the breach of responsibilities of the United States to its Indian citizens.

While this issue was made on a motion to dismiss before any evidence was received, the Administrative Record submitted by HUD on remand provided ample confirmation of these facts. It was

abundantly clear that, when the construction contract came in over budget, HUD would not allow the project to proceed until the Housing Authority, against their better judgment, agreed to use wooden foundations.

E. Because Indian Land is Held in Trust, Indian People Are at a Great Disadvantage in Housing.

Presiding Judge Pregerson put his finger directly on the main problem of this case. Indian housing is substandard because of Congress. It is Congress's decision to hold tribal land in trust thereby making it practically impossible to obtain home financing like all other citizens.

As Judge Pregerson so eloquently stated:

> Congress's decision to hold tribal land in trust has the practical result of eliminating the private housing market on tribal land because neither individual members of the tribe nor the tribe itself has an ownership interest that can be used as security. The government's decision to hold tribal land in trust shows Congress' intent to maintain pervasive control over the resource at stake and gives rise to a fiduciary duty in the government-created tribal housing market.

540 F.3d at 936, App. 37.

Judge Pregerson then refers to the adverse consequences of the government decision to take tribal land in trust.

> [B]y holding tribal land in trust and preventing alienation, the federal government foreclosed many options that exist in most private housing markets.

Id. Tribal land simply cannot be used as collateral.

Not only does this single factor contribute more than anything to the pervasive control that the government exercises over Indian housing but Judge Pregerson makes a persuasive point that the regulations and statutory scheme itself is also pervasive.

> On their face, these statutes only establish a mechanism for lending money to tribal housing authorities. However, a review of the statutory framework and the homeownership program reveals a much more pervasive and controlling framework, as detailed above. The homeownership program details the requirements for the housing and connected contracts. There is no language indicating that the goal of the homeownership program is merely to help Indian tribes in managing their land and resources. The regulations do not defer to tribal authorities or tribal decision making, but instead explicitly detail what the tribal authorities are to do each step

of the way. **Federal control over the funds and the program is pervasive.**
540 F3d at 940, App. 44. (Emphasis supplied.)

It is respectfully submitted the majority opinion on this point is very weak. Indeed, it is illogical to think that in a trust situation one can only consider the cold statutes and regulations without looking at how they are implemented in fact. Judge Pregerson, on the other hand, is exactly right and has precedent to support him.

The Indian Housing Authorities are nothing but a straw person established by the United States Department of Housing and Urban Development. The statutes and regulation, particularly when considered with the Indian Housing Handbook, and when considered as actually implemented in the instant case leaves no question but that the federal control and supervision over Indian housing is pervasive. A federal district court judge has so found regarding these regulations. *Dewakuku III.* The presiding judge of the Ninth Circuit panel has so found. It is respectfully submitted the federal control over Indian housing is even more pervasive than the federal control over Indian timber lands in *Mitchell II.* The case begs for further consideration by this Court.

IV.

The 9th Circuit's Denial of Plaintiffs' APA Claim on the Basis of the Statute of Limitations is Wrong (See *Wind River Mining Corp.*). The True State of Affairs

was not Discovered until Well Within the Six Year Statute.

On remand, Plaintiffs' claimed the right to appeal HUD's decision to approve the use of wooden foundations under the APA. Plaintiffs contended the approval of wooden foundations by HUD was in excess of HUD's statutory authority because wooden foundations were contrary to HUD's own standards as provided in its own regulations, constituted substandard construction, and is contrary to industry standards. HUD raised the statute of limitations on the grounds the houses were approved and constructed in 1977 and therefore the case was time-barred under 28 U.S.C. §2401(a).

Plaintiffs responded that the true facts, namely approval by HUD in violation of their own regulations and the serious health risk the wooden foundations presented to Plaintiffs was not known until 1997 at the earliest, well within the 6 year statute of limitations in 28 U.S.C. §2401(a).[2] The district court disagreed and granted summary judgment on the grounds that the discovery rule was not applicable in the context of an APA claim for judicial review.

The Ninth Circuit affirmed but claimed instead that the Plaintiffs knew about the decisions to use wooden foundations and that it affected them at the time the decision was made in 1977. Acknowledging that statute would not commence until the Plaintiffs knew the true facts based on their decision in *Wind*

[2] The case was initially filed on August 2, 2002.

River Mining Corp v. United States, 946 F.2d 710, 715-16 (9th Cir. 1991) they simply stated:

> That Plaintiffs may not have immediately grasped the full impact that HUD's decision might eventually have on them does not mean they knew too little in 1980 to bring an APA challenge.

Marceau v. Blackfeet Housing Authority, 473 Fed. Appx. 764, 765 (2012) (App. at 170.)

It is respectfully submitted the 9th Circuit makes little sense and is totally inconsistent with the spirit and the letter of its own case in *Wind River Mining Corp.*, 946 F.2d 710, 715 (9th Circuit 1991.) That case clearly states that the statute commences when there is a discovery of the true state of affairs. That the government agency's decision was beyond the agency's authority and, thus, illegal, is certainly a part of the true state of affairs. There is simply no evidence in this case that HUD failed to follow their own regulations or industry standards were violated. There is no evidence that the decision exceeded HUD's statutory authority.

More importantly, the true facts regarding the serious health risk was simply not known to the Plaintiffs until 1997. This is not in dispute.

This is not a challenge to a mere procedural violation or a policy based facial challenge but a challenge that the agency decision exceeded its constitutional or statutory authority. Under these circumstances the discovery rule applies and the true

state of affairs in this case was clearly not known to the Plaintiffs until the health risk caused by mold and moisture conditions became apparent in 1997 and later. *Wind River Mining Corp.*, 946 F.2d at 715. There was no adverse application of this regulation to the Plaintiffs until they discovered the true health impact of the wooden foundations. *Northwest Environmental Advocates v. U.S.E.P.A.*, 537 F.3d 1006, 1018-19 (9th Cir. 2008.) This Court has referred to the importance of "the search for truth" in context of a statute of limitations. *United States v. Kubrick*, 444 US 111, 117 (1979.) The Ninth Circuit violated that principle.

When combined with the mandate of Congress that HUD must provide safe, decent and sanitary housing to Indians (42 U.S.C. §1441) the application by the 9th Circuit under these circumstances is simply wrong and indefensible. Telling Plaintiffs they must file suit before they have grasped the full impact of HUD's decision makes no sense, denies due process, and certainly does not help HUD to comply with the congressional mandate toward Indians.

V.

A Direct Request By The Housing Authority To "Fix It" Was Totally Ignored And The 9th Circuit's Response That Hud Was Under No Specific Obligation Makes No Sense In View Of The Actual Requests To Do So.

The second issue on remand was whether HUD failed to respond to numerous requests for assistance to, in effect, " fix it." See such a request clearly existed from the Housing Authority. App. 216-17. A letter from the Chairman of the Blackfeet Tribe to the Secretary of HUD was almost verbatim.

The district court dismissed these requests as not "prope rly formed request[s] for assistance." The district judge seemed to think only a request for an appropriation would be a properly formed request for assistance." App. 7 at 15-17. Plaintiffs then pointed to requests for appropriations for the same thing.

The Ninth Circuit, however, simply referred to these requests as alerting HUD to the problems and then stating they were not instances in which HUD failed to comply with a "speci fic obligation imposed by the law." 43 Fed. Appx. at 765, App. 6 at 170.

Conclusion of Ninth Circuit is completely contrary to its earlier statement in *Marceau II*, repeated in *Marceau III*, that evidence a properly formed request for assistance by the Blackfeet Housing Authority and evidence that HUD failed to act is actionable. *Marceau II*, 519 F.3d at 852, *Marceau III*, 540 F.3d at 928, n.6.

When the Chairman of the Tribe and the appropriate person from the Housing Authority specifically state, "the Tribe and Housing are requesting assistance in remedying this problem," in a letter to the Secretary of HUD, it is pretty hard to

deny that a properly formed request for assistance existed. (App. 217.) It certainly is inconsistent with HUD's obligation to provide safe, decent, and sanitary housing to Indians. 42 U.S.C. §1441; 25 C.F.R. §905.270. See *Dewakuku III,* 226 F.Supp 2d at 1203-04. Consequently, the congressional mandate has clearly been avoided and denied and it's one more indication of a breach of the government's fiduciary obligation to the Indian people.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

DATED this 31st day of August, 2012.

Thomas E. Towe
Towe, Ball, Enright, Mackey
Sommerfeld, PLLP
2525 Sixth Avenue North
PO Box 30457
Billings, MT 59107-0457
406-248-7337
Jeffrey Simkovic
Simkovic Law Firm
20 North 29th Street
Billings, MT 59101
406-248-7000
Counsel of Record for Petitioners