No. 04-35210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

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,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

PETITION OF THE FEDERAL APPELLEES FOR PANEL REHEARING

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INTRODUCTION

The Court has held that under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., plaintiffs may seek declaratory and injunctive relief against the Department of Housing and Urban Development ("HUD") with respect to the construction and repair of their allegedly defective houses, although HUD did not build their houses and has no legal obligation under any statute or regulation to entertain, let alone to grant, plaintiffs' requests for remedial funding to repair or replace their houses. Perhaps because the Court arrived at its conclusions regarding the declaratory and injunctive claims under the APA without the benefit of full briefing and argument on its ratio decidendi by the parties -- the Court's opinion fails to consider numerous relevant decisions of the Supreme Court, this Court and other circuits, and reflects a misunderstanding of the relevant statutes and regulations. We respectfully urge the Court to correct its erroneous ruling.

STATEMENT

The history of this case is set forth in the Court's most recent opinion (slip op. (reproduced in Addendum) 2550-52), and in the Court's initial opinion. See Marceau v. Blackfeet Housing Auth., 455 F.3d 974, 976-78 (9th Cir. 2006). Briefly, plaintiffs are American Indian homeowners who allege that their houses -- built between 1977 and 1980 by defendant Blackfeet Housing Authority, with grant funds provided by HUD -- are defective and

hazardous, due to toxic chemicals used in pressure-treated lumber in the wooden foundations. They brought this action against both the Blackfeet Housing Authority and HUD.[1]

With respect to HUD, they sought a declaratory judgment that the agency improperly authorized substandard housing, in violation of its own regulations, as well as injunctive relief mandating either the repair or the replacement of their houses. They also contended that HUD breached the government's Indian trust responsibility, and that they were entitled to damages from the federal government for breach of contract.

Defendants moved to dismiss, and the district court dismissed all of plaintiffs' claims. Plaintiffs appealed, and this Court affirmed with respect to the federal defendants, while reversing with respect to the Blackfeet Housing Authority. Marceau, 455 F.3d 974. The Court held that plaintiffs' claims against the Blackfeet Housing Authority are not barred by tribal sovereign immunity (id. at 978-83), but that plaintiffs have no claims against HUD. Id. at 983-86. Regarding HUD, the Court held that the agency had not violated any fiduciary obligations (id. at 893-85), and that plaintiffs' APA claims were in reality claims for money damages that are explicitly barred by 5 U.S.C.

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[1] This petition focuses exclusively upon plaintiffs' claims against HUD for declaratory and injunctive relief under the APA -- the only claims against HUD that the Court has permitted to go forward.

§ 702 and cannot be brought under the APA (Marceau, 455 F.3d at 985-86); the Court further held that plaintiffs' breach of contract claims are exclusively reviewable in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491. Marceau, 455 F.3d at 986-87. Judge Pregerson, the author of the Court's opinion, also filed a special concurrence (id. at 987-89) indicating his unhappiness with the result, and stating that "[we have a moral duty, if not a legal duty, to remedy the harm caused to these plaintiffs." Id. at 987; see also id. at 989 ("Under the theories presented here, we cannot offer Plaintiffs any relief against HUD. But our nation's responsibility to the Blackfeet Tribe and its members is deeper than a legal responsibility; it is also a moral responsibility.").

The tribal defendants filed a petition for rehearing and rehearing en banc regarding the tribal sovereign immunity issue. The Court granted panel rehearing, and revisited all of the issues raised on the appeal. Thereafter, it issued a new opinion (written by Judge Graber), adhering to all of its earlier holdings other than its holding that plaintiffs could not seek relief under the APA. Slip op. 2550-70. Judge Pregerson dissented from the Court's renewed holding that plaintiffs had not stated a cause of action against HUD for breach of its Indian trust responsibility. Id. at 2570-90.

With respect to plaintiffs' APA claims, the Court stated that plaintiffs "request equitable and injunctive relief. Specifically, they seek a declaration that HUD has violated its legal obligations, and they seek equitable relief in the form of repairs (or, where necessary, rebuilding) of their homes." Id. at 2568. The Court further stated that "[a]ccording to Plaintiffs, a judicial declaration that HUD approved the construction designs and materials in a manner that violated HUD regulations could be used as leverage with Congress to enact remedial legislation. In their alternative claim for injunctive relief, Plaintiffs ask that HUD simply 'fix' the construction defects that allegedly cause the health problems suffered by some of the Blackfeet homeowners. On reconsideration, we conclude that Plaintiffs' claims for declaratory and injunctive relief thus are distinct from money damages." Id.

The Court ruled that "[t]he district court erred in dismissing Plaintiffs' claims for declaratory and injunctive relief under the APA before allowing adequate development of the record." Id. The Court discussed the HUD regulations in effect when plaintiffs' homes were built (id. at 2568-69), and acknowledged that the record was silent regarding industry standards at the time, and equally silent "about whether Plaintiffs requested the use of different materials or methods and about whether HUD failed to comply with its own regulations."

Id. at 2569. The Court stressed, however, that in the present posture of the case, "we must accept as true Plaintiffs' allegations that the construction materials and methods were substandard and that HUD improperly mandated the use of the wooden foundations at issue." Id.

The Court further held that "[f]or a similar reason, the district court prematurely dismissed Plaintiffs' claim for injunctive relief." Id. The Court concluded that "Plaintiffs' allegations -- that HUD arbitrarily and capriciously declined to consider requests for remedial funds, as required by 24 C.F.R. § 905.270 before the Indian Housing Act's repeal and by 25 U.S.C. §§ 4111 and 4132(1) under NAHASDA - suffice to bring the claim for injunctive relief under the APA."[2] Slip op. 2569-70.

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[2] "NAHASDA" is the Native American Housing Assistance and Self-Determination Act of 1996, codified at 25 U.S.C. §§ 4101 et seq., the currently applicable statute governing Indian public housing programs.

During the 1970s, there was no specific statutory enactment applicable to public housing on Indian lands. The generic provisions of low-income housing legislation found in the United States Housing Act ("USHA"), 42 U.S.C. §§ 1437-1437j (1976), applied to both public housing located on an Indian reservation, as well as public housing located elsewhere. See 42 U.S.C. § 1437a(6)-(7) (1976) (defining "public housing agency" to include entities "authorized" by, among other governmental agencies, "Indian tribes" to "engage in or assist in the development or operation of low-income housing").

In 1988, well after the completion of the Blackfeet homes in question, Congress enacted specific Indian housing legislation with the passage of the Indian Housing Act. The act moved all Indian public housing programs to a separate "Title II" of the USHA.

REASONS WHY THE PETITION SHOULD BE GRANTED

The Court has held that plaintiffs may seek declaratory and injunctive relief under the APA regarding HUD's handling of the construction and repair of their allegedly defective houses -- built by the Blackfeet Housing Authority between 1977 and 1980, with HUD grant money -- notwithstanding the fact that HUD has no legal obligation under any regulation or statute to entertain, let alone to grant, plaintiffs' requests for remedial funds to repair or replace their houses. The Court's opinion -- issued without the benefit of full briefing and argument on the Court's ratio decidendi -- fails to consider multiple relevant decisions of the Supreme Court, this Court and other circuits with respect to declaratory relief, and rests upon a misunderstanding of the applicable statutes and regulations with respect to injunctive relief.

First, as a threshold jurisdictional matter, plaintiffs cannot have standing to seek a declaratory judgment merely because such relief might help them to secure legislative action; a declaratory judgment under these circumstances fails the redressability prong of the Article III standing test, and is nothing more than an advisory opinion. Second, HUD is not

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Since then, Congress has repealed the Indian Housing Act and moved Indian housing programs out of the USHA altogether, into NAHASDA. HUD involvement with Indian public housing programs is now controlled exclusively by that enactment and its implementing regulations.

legally required to take any action with regard to plaintiffs' requests, and therefore it cannot be compelled to do so under the APA. Accordingly, there is no lawful basis for either declaratory or injunctive relief in an action of this kind.

In addition, the decision that HUD must consider requests for remedial funding from homeowners under the circumstances presented here is troubling as a practical matter. Tens of thousands of houses have been built under HUD's Indian programs, as well as countless private houses built by grantees under similar non-Indian housing programs (see slip op. 2568 n.10). Thus, rehearing is warranted to correct the Court's error.

1. Declaratory Judgment.

In its quest to identify a type of equitable declaratory relief that does not violate the "no money damages" stricture of the APA, the Court concluded that plaintiffs seek equitable relief in the form of a declaratory judgment that might be used to seek future remedial legislation. In so reasoning, the Court has created a serious Article III standing issue to be addressed on remand, and for that reason, the Court should delete the holding that plaintiffs have a basis for declaratory relief to avoid this standing issue.

a. It is axiomatic that the federal courts are without jurisdiction to render advisory opinions, Preiser v. Newkirk, 422 U.S. 395, 401 (1975), and that Article III of the Constitution

"confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). This is a "bedrock requirement." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). As the Supreme Court stated in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Id. at 37.

Because Article III standing requirements implement the constitutional case or controversy requirement, standing goes to the power of a federal court to adjudicate a case, and resolution of the standing question is necessarily antecedent to any decision on the merits. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998); see also United States v. Storer Broad. Co., 351 U.S. 192, 197 (1956) ("Jurisdiction depends upon standing to sue and ripeness."). Moreover, a plaintiff "must demonstrate standing separately for each form of relief sought." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

It is well settled that the standing requirement under Article III of the Constitution requires a plaintiff, "at an irreducible minimum," to show: (1) a distinct and palpable injury, actual or threatened; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3)

that the relief requested is likely to redress the complained-of injury. E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Under the "redressability" prong, a plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561 (citation omitted).

b. The Court wholly failed to take standing principles into consideration in addressing the question of the availability of declaratory relief in this case. With respect to the request for a declaratory judgment, the Court stated that "Plaintiffs seek a declaration that HUD has violated its legal obligations," and that "[a]ccording to Plaintiffs, a judicial declaration that HUD approved the construction designs and materials in a manner that violated HUD regulations could be used as leverage with Congress to enact remedial legislation." Slip op. 2568. This reasoning does not pass muster under the "redressability" prong of the Article III standing test, however, inasmuch as any such declaration would be a classic advisory opinion. See, e.g., Hewitt v. Helms, 482 U.S. 755, 761 (1987) ("At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces -- the payment of damages, or some specific performance, or the

termination of some conduct. * * * The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion -- is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.") (emphasis added); Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952) (Declaratory Judgment "Act was adjudged constitutional only by interpreting it to confine the declaratory remedy within conventional 'case or controversy' limits."); Comite de Apoyo A Los Trabajadores Agricolas (CATA) v. U.S. Department of Labor, 995 F.2d 510, 513 (4th Cir. 1993) ("By itself, a declaratory judgment cannot be the redress that satisfies the third standing prong. Rather, plaintiffs must identify some further concrete relief that will likely result from the declaratory judgment.").

In addition, where, as here, redressability would "depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict," in those circumstances the plaintiff must demonstrate that "those choices * * * will be made in such a manner as to * * * permit redress-ability of injury." Lujan v. Defenders of Wildlife, 504 U.S. at 562. It is highly improbable that any plaintiff could ever show that an otherwise advisory judicial opinion would "likely" prompt a sufficient number of the 535 members of Congress and the

President to exercise their discretionary authority to enact legislation remedying the plaintiff's injury. Even if such a showing were theoretically possible -- but see pp. 9-10, supra -- at the very least a very substantial showing would be necessary to demonstrate that such legislation would "likely" result. The bare assertion of "leverage" with Congress plainly does not satisfy that standard. Cf. Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 701-03 (9th Cir. 1992) (finding substantial likelihood that California legislature would amend statute establishing number of superior court judges if statute were declared unconstitutional).

In short, to satisfy the redressability requirement of the Article III standing test, a declaratory judgment must be likely to give rise to tangible relief directly in the litigation itself. An abstract declaration of law that merely gives rise to the remote, highly speculative possibility of future legislative action does not suffice. The Court thus erred in failing to take standing principles -- and especially the redressability component -- into account in addressing the availability of declaratory relief.

2. Injunctive Relief.

The Court's holding that plaintiffs may seek injunctive relief here is equally wide of the mark. HUD has no legal

obligation to them that could trigger such a claim under § 706 of the APA, 5 U.S.C. § 706.

a. 5 U.S.C. § 706(1) authorizes a reviewing court to "compel agency action unlawfully withheld." Id. As the Supreme Court emphasized in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) ("SUWA") with respect to § 706(1), "the only agency action that can be compelled under the APA is action legally required." Id. at 63. "Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Id. "The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)." Id.; see also Center for Biological Diversity v. Veneman, 335 F.3d 849, 854 (9th Cir. 2003) (under § 706(1), plaintiffs "must identify a statutory provision mandating agency action"); San Francisco BayKeeper v. Whitman, 287 F.3d 764, 770 (9th Cir. 2002) (under § 706(1), "the agency must have a statutory duty in the first place"); accord, ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1137 (9th Cir. 1998) (judicial intervention under § 706(1) is warranted "'[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility'" (citations omitted); Benzman, et al. v. Whitman,

et al., Nos. 06-1166-cv (L), 06-1346-cv (CON), 06-1454-cv (XAP), 2008 WL 1788401, at *7-9 (2d Cir. Apr. 22, 2008) (rejecting, under SUWA, § 706(1) claim concerning post-9/11 cleanup in Lower Manhattan, for lack of discrete agency action required by law).

In the instant case, as we demonstrate in subsection c, infra (at 14-16), HUD was not legally required to take any action in response to plaintiffs' alleged requests for remedial funds to repair or replace their homes. Thus, plaintiffs have no claim against HUD for injunctive relief under 5 U.S.C. § 706(1).

b. Nor is injunctive relief available here under 5 U.S.C. § 706(2), which decrees in pertinent part that a court "shall hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at § 706(2)(A). This section by its terms contemplates only review of discrete agency action, which is to be "h[e]ld unlawful and set aside" if any of the specified criteria are met. Id.; see also Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

The Court is mistaken when it states that "Plaintiffs' allegations -- that HUD arbitrarily and capriciously declined to consider requests for remedial funds, as required by 24 C.F.R.

§ 905.270 before the Indian Housing Act's repeal and by 25 U.S.C. §§ 4111 and 4132(1) under NAHASDA -- suffice to bring the claim for injunctive relief under the APA." Slip op. 2569-70. The "arbitrary and capricious" language of § 706(2)(A) adds absolutely nothing to the analysis with respect to the availability of injunctive relief under § 706(1). See subsection a, supra. HUD was under no legal obligation "to consider requests for remedial funds" (slip op. 2570) made by plaintiffs, and mandatory injunctive relief therefore is equally unavailable under § 706(2)(A).

c. Crucially, in the instant case there is no applicable housing legislation or regulation that imposes any duty upon HUD to consider any requests from individual homeowners for assistance in repairing homes.[3] The Court cites a regulation under the Indian Housing Act, 24 C.F.R. § 905.270 (1991), and two sections under NAHASDA, 25 U.S.C. §§ 4111 and 4132(1), to support its conclusion that HUD was required to consider plaintiffs' requests for remedial funds. Slip op. 2569-70. However, none of these sections imposes any obligation upon HUD to respond to plaintiffs' request for remedial action or funding.

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[3] The Court appears to correctly recognize that no statute or regulation requires HUD to construct or build a house for anyone, to repair and/or maintain anyone's home, or to pay money to any individual for those purposes. And without such a specific duty, any such relief would constitute prohibited money damages, as the Court acknowledged in its original opinion.

The Indian Housing Act regulation, 24 C.F.R. § 905.270 (1991), was part of the development regulations for housing built under that Act. The regulation addressed the procedure for correction of any construction deficiencies, and provided that the relevant Indian Housing Authority ("IHA") had the responsibility to "pursue correction of any deficiencies against the responsible party (e.g., architect, contractor, or the * * * home buyer) as soon as possible after discovering the deficiencies." Id. It further provided that if the cost of correcting the deficiency could not be recovered from the responsible party, the IHA could apply to HUD for amendment of the development budget to provide the necessary funds required. In this regard, the regulation stated:

> Where the costs of correcting deficiencies cannot be recovered from the responsible party and/or the deficiency requires immediate correction to protect life or safety or to avoid further damage to the project unit(s), the IHA may apply to HUD for amendment of the development budget to provide the funds required, or may request that operating receipts be authorized to be used to cover the costs. In any case, program funds shall not be used for this purpose without prior HUD approval.

Id.

The foregoing section plainly does not impose a duty upon HUD to respond to requests from individual homeowners seeking to have HUD repair or maintain houses constructed under the Indian Housing Act. It imposes a duty upon the housing authority to

pursue correction of any deficiencies, and merely provides a mechanism where the housing authority may seek amendment of the development contract for the inclusion of funds to remedy construction deficiencies where the cost cannot be recovered from the responsible party. Further, it clearly does not obligate HUD to act pursuant to a request for remedial funding (or other remedial action) from any individual homeowner(s). HUD's only legal relationship under the Indian Housing Act was with the local housing authority, not with the individual home buyer.

The same is true with respect to the NAHASDA provisions cited by the Court, 25 U.S.C. §§ 4111 and 4132(1). Under NAHASDA, HUD makes block grants, in amounts entirely determined by formula, directly to the recipient of a tribe to carry out "affordable housing activities" every fiscal year. 25 U.S.C. §§ 4111(a), 4132. A recipient may be a tribe, or a tribe may designate a recipient, known as a Tribally Designated Housing Entity, which can be an Indian housing authority. 25 U.S.C. §§ 4103(18) and (21). In this case, the recipient for the Blackfeet Tribe is the Blackfeet Housing Authority.

In order to receive a block grant, an Indian tribe must submit to HUD an Indian Housing Plan that meets certain requirements. 25 U.S.C. § 4111(b). The eligible "affordable housing activities" are described in 25 U.S.C. § 4132, and include "the provision of modernization or operating assistance

for housing previously developed or operated pursuant to a contract between the Secretary and an Indian housing authority." Id.

In sum, 24 C.F.R. § 905.270 (1991), and 25 U.S.C. §§ 4111 and 4132 clearly do not provide support for the Court's conclusion that HUD was required to consider requests by plaintiffs for remedial funds. That Congress imposed no such duty is not surprising, because it has imposed no duty upon HUD itself to repair or maintain plaintiffs' homes. That should be the end of the matter, and the Court's mistaken ruling to the contrary should be rectified.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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JUNE 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2008, I served two copies of the Petition for Panel Rehearing of Appellee United States of America upon counsel by causing them to be mailed, via first class mail, postage prepaid, to:

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