Coquille Indian Housing Authority

2678 Mexeye Loop • Coos Bay, OR 97420

March 14, 2022

IHBG Formula Customer Service Center
2614 Chapel Lake Drive
Gambrills, MD 21054

VIA EMAIL TO: IHBGformula@firstpic.org

RE: Coquille Indian Tribe's Request for Reconsideration of HUD's February 14, 2022 Determination Under 24 CFR § 1000.336(e)(2)

Dear Ms. Frechette:

We are in receipt of your correspondence of February 14, 2022, and request reconsideration pursuant to 24 CFR § 1000.336(e)(2) of the decision set forth therein.[1] First, 24 CFR 1000.319 permits the Department of Housing and Urban Development (HUD) only **three years** from the date a Formula Response Form (FRF) is sent out to take action against a Tribe or Tribally designated housing entity (TDHE) that fails to correct or make appropriate changes on the FRF. Though Coquille Indian Housing Authority (CIHA) uncovered and voluntarily disclosed its 2001 bookkeeping error in September of 2021, HUD now seeks $95,299 in over-funding dating back to Fiscal Year (FY) 2014. As CIHA neither appealed nor engaged with HUD on these or other FCAS reporting issues in those years predating the three-year window set forth in 24 CFR 1000.319, we understand 24 CFR 1000.319(d) to permit HUD to recapture only those funds set forth in the past three years' FRFs. Second, where, as here, the discrepancies in the prior FRFs were brought to light not by HUD but by CIHA itself, the appropriate resolution is to negotiate a reasonable solution as between HUD and CIHA. Relying upon 24 CFR 1000.319, CIHA offers as this reasonable solution to repay the last three years of the Formula Current Assisted Stock (FCAS) over-funding, which amount totals $53,003.

Background

In correspondence dated July 16, 2021, CIHA submitted an updated FCAS, which included a Low Rent (LR) count of 52 units. *See* July 16, 2021 Correspondence of Anne F. Cook, at 7. On August 10, 2021, HUD responded, noting that "HUD's records indicated that there were only 51 LR units in project OR97B038001." August 10, 2021 Correspondence of Hilary Atkin, at 1. CIHA

[1] As set forth more fully below, CIHA does not concede that a 24 CFR § 1000.336(e)(2) request for reconsideration is the appropriate vehicle for this appeal.

thereupon undertook a comprehensive review of its Annual Contribution Contracts (ACCs) records, and discovered a 2001 bookkeeping error—committed by a former employee—which attributed eight units to incorrect sources of funds, and upon which both CIHA and HUD have relied ever since. CIHA immediately shared its discovery with HUD, supported by relevant records, a corrected FY 2022 Appendix A-5, and reconciliation data. *See* September 1, 2021 Correspondence of Anne F. Cook.[2]

In its February 14, 2022 response to these communications, HUD issued a Determination (Determination) that based on the eight misattributed units, "[t]he Coquille Indian Tribe was erroneously granted a total of $95,299 more than its proper formula allocations in FY 2014 through FY 2021," and that "[p]ursuant to Section 301 of the NAHASDA . . . and formula provisions 24 CFR § 1000.319 and 24 CFR § 1000.336, HUD is requiring that you remit the erroneously granted amount . . . " February 14, 2022 Correspondence of Heidi J. Frechette at 4. HUD informed CIHA that its only path of appeal was to submit a request for reconsideration under 24 CFR § 1000.336(e)(2). CIHA appeals HUD's Determination insofar as HUD relies upon over- and under-funding data from FY 2014 up through and including FY 2018, and requests that HUD narrow its calculation to account only for FY 2019 through 2021.

Request for Reconsideration

HUD was first apprised—by CIHA itself—of the misreported units in September of 2021. HUD thereupon classified CIHA's September 2021 Correspondence as an "appeal" of prior HUD decisions spanning nearly a decade. HUD now seeks $95,299 as repayment for accumulated over-funding since FY 2014, and states that any objection by CIHA must be framed as a "Request for Consideration." *See* February 14, 2022 Correspondence of Heidi J. Frechette. But CIHA has not yet been afforded the opportunity to 'appeal' HUD's February 14, 2022 Determination, and HUD regulations and public policy limit to **three years** any HUD action as against a TDHE that has committed a reporting error. Ultimately, though CIHA objects to HUD's eight-year reallocation calculation, CIHA does not contest its obligation to remit the prior three years' over-funding as set forth under 24 CFR 1000.319. To this end, CIHA requests HUD reconsider its February 14, 2022 Determination, and offers to repay the $53,003 deriving from over- and under-funding during FY 2019 through 2021.

1. *A Request for Reconsideration is Not the Appropriate Vehicle for CIHA's Appeal.*

As a threshold matter, CIHA does not concede it has been afforded the opportunity to file a 24 CFR §1000.336(d) appeal. Therefore, a 24 CFR § 1000.336(e)(2) request for reconsideration, which follows if "HUD denies a challenge or appeal," is an inappropriate vehicle for this objection. It was HUD that retroactively characterized CIHA's communications setting forth CIHA's 2001 bookkeeping error as "appealing" HUD determinations from 2013, 2015, 2019, and 2021, though HUD's own regulation requires "**[a]n Indian tribe or TDHE** [to] appeal the undisbursed funds factor **no later than 30 days after the receipt of the formula determination**." 24 CFR §

[2] HUD thereupon requested supplemental information, which CIHA provided. *See* November 30, 2021 Correspondence of Anne F. Cook; December 10, 2021 Correspondence of Anne F. Cook.

1000.336(d) (emphasis added). Indeed, it is unclear whether HUD has "granted" or "denied" the appeals it now states CIHA submitted under 24 CFR § 1000.336(d). Moreover, CIHA has had no opportunity to appeal in the first instance HUD's February 14, 2022 Determination. CIHA would more appropriately submit this request as a 24 CFR § 1000.336(d) appeal of HUD's over-/under-funding calculation set forth in its February 14, 2022 Determination. In any event, because CIHA seeks a reasonable and timely solution to the matter, it submits this response in the form directed.

2. *HUD's Action is Limited to FY 2019-2021.*

At bottom, HUD seeks to recapture eight years' over-funding when HUD's own regulation limits it to the recapture of three. 24 CFR § 1000.319(d) ("HUD shall have 3 years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form."). An agency is bound by its own regulations and "commits procedural error if it fails to abide [by] them." *Esch v. Yeutter*, 876 F.2d 976, 991 (D. C. Cir 1989); *see Frisby v. HUD*, 755 F.2d 1052, 1055 (3rd Cir. 1995) ("failure on the part of the agency to act in compliance with its own regulations is fatal to such action."). HUD (through negotiated rulemaking with tribes) promulgated 24 CFR §1000.319, and HUD is not free to ignore the letter or intent of this provision. HUD issued its Determination on February 14, 2022, and can therefore only take action against any CIHA FRFs "sent out" after February 14, 2019.

HUD, having promulgated 24 C.F.R. § 1000.319, must abide by it. *See Modoc Lassen Indian Hous. Auth. v. United States Dep't of Hous. & Urb. Dev.*, 881 F.3d 1181, 1194 (10th Cir. 2017) (citing *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 762 F.2d 406, 409 (4th Cir. 1985) for proposition that "grant programs are instead governed by the applicable statutes and implementing regulations")). HUD acknowledges it "has three years from the date a Formula Response Form is sent out to question the eligibility of included units, which may result in recovery of over-paid amounts."[3] February 14, 2022 Correspondence of Heidi J. Frechette at 3. However, HUD appears to define the "action" set forth in 24 CFR § 1000.319(d) expansively, so as to include: (1) removing from project OR97B038002 CIHA's reported conveyed units in 2013 and 2015; and (2) counting the units provided in CIHA's August 26, 2019 correspondence as eligible units to match the Tribe's records. Specifically, HUD contends:

> [t]he first action for units 2615 Mexeye and 2633 Mexeye in project OR97B038002 is HUD's letter of September 17, 2013, which corresponds to the FY 2012 Formula Response Form. The first action for unit 2674 Mexeye in project OR97B038002 is HUD's letter of October 27, 2015, which corresponds to the FY 2014 Formula Response Form. The first action for unit 709 Jis-Ta-Jia in project OR97B038001 is HUD's letter of September 23, 2019, which corresponds to the FY 2018 Formula Response Form.

[3] More accurately, "HUD shall have 3 years from the date a Formula Response Form is sent out **to take action against** any recipient that fails to correct or make appropriate changes on that Formula Response Form." 24 CFR § 1000.319(d) (emphasis added).

Id. HUD seems to believe any HUD letter proclaiming itself an "action" constitutes "action" under 24 CFR. § 1000.319, and furthermore holds open the possibility of any future action *ad infinitum*. But simply terming something an action, *see, e.g.*, September 17, 2013 Correspondence of Glenda N. Green at 2 ("HUD is **taking action** to establish the Coquille Tribe's FY 2014 FCAS") (emphasis added); October 27, 2015 Correspondence of Glenda N. Green at 2 ("As a result of the information you have submitted, HUD is **taking action** to establish the Coquille Tribe's FY 2016 FCAS") (emphasis added), does not make it so. Were this the case, HUD might include the term 'action' in each of its correspondences with Tribes or TDHEs to ensure the three-year limitation set forth in 24 C.F.R. § 1000.319 would never run. Such an interpretation would upend the purpose of the regulation itself.

Moreover, because it was CIHA that informed HUD of the misreported units in 2021, HUD could not have taken action against CIHA on those grounds at any point beforehand. None of the 'actions' cited in HUD's February 14, 2022 Correspondence alleges—much less puts CIHA on notice for—CIHA's failure "to correct or make appropriate changes on the Formula Response Form," *see* 24 CFR § 1000.319(d). Nor do these 'actions' constitute "action **against**" CIHA. *Id.* (emphasis added). To the contrary: the September 17, 2013 HUD letter informs CIHA that "[a] review of our files indicated that **our** letter dated March 12, 2013, contained an error . . . As a result the **Tribe will receive** a grant adjustment of $7,253 in its FY 2014 grant," September 17, 2013 Correspondence of Glenda N. Green at 2-3 (emphasis added); the October 27, 2015 HUD letter informs CIHA only that "[y]our office reported the conveyance of two MH units," which conveyance would be reflected in FY 2016, *see* October 27, 2015 Correspondence of Glenda N. Green at 2; and the September 23, 2019 letter informs CIHA that the "Tribe's count of units in each project differs with HUD's count of units," but that HUD would add one LR unit to the correct project in FY 2020. September 23, 2019 Correspondence of Hilary Atkin. Nevertheless, HUD appears to interpret these communications as having tolled the three-year recovery limitation, such that HUD may now seek recovery for over-funding since FY 2014. Pursuant to the plain language of the regulation HUD promulgated, it may not.

3. CIHA's Voluntary Self-Disclosure Merits a Quick and Reasonable Resolution.

24 C.F.R. § 1000.319(d) provides that "[r]eview of FCAS will be accomplished by HUD as a component of A–133 audits, routine monitoring, FCAS target monitoring, or other reviews." By its own regulations, then, HUD was charged with monitoring CIHA's FCAS. Yet HUD did not initiate the review of CIHA. Rather, CIHA made a voluntary self-disclosure following a thorough internal investigation. In so doing, CIHA anticipated and prepared for the three-year recapture set forth in 24 CFR § 1000.319(d)—which CIHA accepted as the regulatory consequence of mistaken FRF reporting—regardless of the manner of disclosure. Given CIHA's rightful reliance upon the regulation HUD itself promulgated, CIHA did not and could not anticipate the eight-year recapture set forth in HUD's February 14, 2022 Determination. Such recapture, which goes five years beyond HUD's regulatory limitations, punishes CIHA for voluntarily disclosing its 2001 bookkeeping error. By the same token, an eight-year recapture period will serve as a deterrent for any Tribe or TDHE that may in the future contemplate similar voluntary self-disclosure.

CIHA does not seek to mitigate HUD's recapture as a result of its voluntary self-disclosure. Rather, CIHA seeks only the resolution contemplated under HUD's own regulations. To this end, CIHA does not object to HUD's recapture of those funds overpaid in the three years preceding HUD's February 14, 2022 Determination, and asks HUD to reconsider its Determination so that the parties may reach a reasonable resolution as contemplated under 24 CFR § 1000.319(d).

Thank you for your time and attention to this request for reconsideration, and should you have any questions or need additional information, please do not hesitate to contact me at annecook@coquilleiha.org or (541) 888-6501.

Sincerely,

Anne F. Cook

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