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SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE
HOUSING FINANCE
COMMISSION, a public body
corporate and politic of the State
of
Washington,

Petitioner,

v.

NATIONAL HOMEBUYERS
FUND, INC., f/k/a Homebuyers
Fund, Incorporated, a California
nonprofit corporation; *et al.*,

Respondents.

PETITIONER WASHINGTON
STATE HOUSING FINANCE
COMMISSION'S SECOND
STATEMENT OF ADDITIONAL
AUTHORITY

Petitioner, the Washington State Housing Finance Commission (the "Commission"), hereby submits the attached Memorandum in Opposition to Motion for Preliminary Injunction filed by the U.S. Department of Housing and Urban Development ("HUD") in *Cedar Band of Paiutes v. U.S. Dep't of Housing and Urban Dev't*, No. 4:19CV00030DN-PK (D. Utah) on June 5, 2019, available on PACER.

HUD's Memorandum in Opposition ("Mem.") relates to the following issues: (1) whether Respondent National Homebuyers Fund, Inc. is authorized to claim status as an authorized government entity in Washington as part of the federal mortgage insurance program, *see* Mem. at 5-7, 10; *cf.* Pet'r's Supp. Br. at 4-7, 18-19, and (2) whether there is a federal administrative enforcement gap in the mortgage insurance program with regard to state or local governmental authority to provide downpayment assistance, *see* Mem. at 5-7, 10, 23-24 & Ex. A; *cf.* Br. of Resp. at 9-14, 42-43, Supp. Br. of Resp. at 7-13 & n.1.

RESPECTFULLY SUBMITTED this 14th day of June, 2019.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

CEDAR BAND OF PAIUTES;
CEDAR BAND CORPORATION; &
CBC MORTGAGE AGENCY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HOUSING AND HUMAN
DEVELOPMENT; FEDERAL
HOUSING ADMINISTRATION; DR.
BENJAMIN S. CARSON, SR.,
Secretary of the Department of Housing
and Urban Development; BRIAN D.
MONTGOMERY, Acting Deputy
Secretary of Housing and Urban
Development and Assistant Secretary of
Housing and Urban Development for
Housing—Federal Housing
Commissioner;

Defendants,

HOUSING FINANCE AGENCIES OF
IDAHO, PENNSYLVANIA,
TENNESSEE, VIRGINIA,
WASHINGTON, & WYOMING,

Amici Curiae.

Case No. 4:19CV00030DN-PK

**MEMORANDUM IN OPPOSITION
TO MOTION FOR PRELIMINARY
INJUNCTION**

Honorable David Nuffer
Magistrate Judge Paul Kohler

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The Department of Housing and Urban Development (“HUD”), the Federal Housing Administration (“FHA”), HUD Secretary Dr. Benjamin Carson, Sr., and Brian D. Montgomery oppose Plaintiffs’ Motion for Preliminary Injunction. As shown below, HUD’s Mortgagee Letter 19-06 (“Mortgagee Letter”) was well-within the Federal Defendants’ statutory and constitutional authority, and Plaintiffs cannot show irreparable harm or that the public interest favors an injunction. Accordingly, this Court should deny Plaintiffs’ motion.

STATUTORY AND REGULATORY BACKGROUND

To respond to the Great Depression’s housing and financial crisis, Congress enacted, among other things, the National Housing Act.¹ Within the National Housing Act, Congress established FHA and charged it with the “duty of encouraging improvement in housing standards and conditions by making improved credit facilities available to the owners and prospective owners of homes and other property.”²

Around the time of 21st Century’s Great Recession, FHA discovered that those loans receiving seller-funded down payment assistance (“DPA”) defaulted at a rate of “almost three times” that “of other loans.”³ Because the “FHA’s experience [was] that loans made to

¹ Pub. L. No. 73-479, 48 Stat. 1246 (1934).

² David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Admin. & the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1027 (2016) (quoting FED. HOUS. ADMIN., FIRST ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 3 (1935)).

³ Brad Greenburg, *Consolidation After Crisis: How a Few Private Investors Bought Distressed, Federally-Insured Mortgages After the Foreclosure Crisis*, 20 N.Y.U. J. OF LEGIS. & PUB. POL’Y 887, 900 (2017) (quoting U.S. Dep’t of Hous. & Urban Dev., FHA Single-Family

borrowers who rely on these types of seller-funded assistance perform very poorly,” FHA promulgated a legislative rule that expressly stated which sources of DPA were acceptable and which were not.⁴ The rule recognized that government entities, including “a tribal government . . . which is treated as a state or local government under state or local law” could provide funds to assist homebuyers with their FHA-required down payment.⁵

After two courts enjoined this rule,⁶ Congress took matters into its own hands and amended 12 U.S.C. § 1709(b)(9) of the National Housing Act, which requires that every borrower of an FHA-insured loan make a minimum cash investment in the property⁷ and precludes both (1) “the seller or any other person or entity that financially benefits from the transaction” and (2) “any third party or entity that is reimbursed, directly or indirectly, by any of the parties described [in (1)]” from providing any portion of the borrower’s cash investment.⁸ Congress did not exempt government agencies from the prohibition of benefiting financially

Mutual Mortgage Insurance Fund Programs: Quarterly Report to Congress FY 2010, at 15 (2010)); *see also* Standards for Mortgagor’s Investment in Mortgaged Property, 72 Fed. Reg. 56002, 56004 (Oct. 1, 2007) (finding that “loans with downpayment assistance from sellers or other parties with a financial interest in the transaction . . . have a two to three times higher possibility of losing their home”).

⁴ 72 Fed. Reg. 56002 (Oct. 1, 2007).

⁵ *Id.* at 56007.

⁶ *Penobscot Indian Nation v. U.S. Dep’t of Housing & Urban Dev.*, 539 F. Supp. 2d 40 (D.D.C. 2008); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008).

⁷ 12 U.S.C. § 1709(b)(9)(A).

⁸ *Id.* § 1709(b)(9)(C).

from providing DPA.

Because Congress did not exempt government entities as “prohibited sources” of DPA, “[u]ncertainty” arose as to whether “State and local governments and their agencies’ and instrumentalities’ homeownership programs that provide funds for the [borrower’s cash investment]” could continue.⁹ To remedy this uncertainty, FHA issued an Interpretive Rule in 2012, which was not subject to the notice-and-comment rulemaking provisions of the Administrative Procedure Act (“APA”).¹⁰ The rule stated that FHA interpreted [12 U.S.C. § 1709\(b\)\(9\)\(C\)](#) not to prohibit FHA from insuring mortgages originated as part of federal, state, and local governments’ homeownership programs “when such [entities] also directly provide funds toward the [borrower’s] cash investment.”¹¹ In explaining its reasoning for this interpretation, FHA noted that state and local housing agencies “provide various services to assist citizens within their jurisdictions in attaining affordable housing options” including DPA.¹² Consequently, a prohibition of government-provided DPA would “undercut” federal, state, and local housing programs.¹³

⁹ Prohibited Sources of Minimum Cash Investment Under the National Housing Act—Interpretive Rule, [77 Fed. Reg. 72219](#), 72219 (Dec. 5, 2012).

¹⁰ *Id.* at 72223 (noting that the interpretive rule “is exempt from the notice and comment requirements of the Administrative Procedure Act”).

¹¹ *Id.* At 72222, 72223 (emphasis added).

¹² *Id.* at 72220 (emphasis added).

¹³ *Id.* at 72222.

In order to provide guidance as to the jurisdictional parameters in which a government entity must operate to avail itself of the 2012 Interpretive Rule, FHA amended Handbook 4000.1 without notice-and-comment rulemaking because the Handbook does not have the force and effect of law.¹⁴ Handbook 4000.1 provides that “HUD does not interpret [12 U.S.C. § 1709(b)(9)(C)] to prohibit Governmental Entities, when acting in their government capacity, from providing the Borrower’s cash investment where the Governmental Entity is originating the insured Mortgage through one of its homeownership programs.”¹⁵

On April 18, 2019, HUD issued the Mortgagee Letter “to clarify documentation requirements . . . that adequately demonstrate the existing requirement that Governmental Entities are operating in their governmental capacity” when providing DPA to FHA borrowers.¹⁶ The Mortgagee Letter further explained that although Handbook 4000.1 “requires Mortgagees to confirm that a Governmental Entity is operating in its governmental capacity,” it “does not specify the necessary documentation that demonstrates support for such a conclusion.”¹⁷ FHA found this documentation clarification necessary because HUD had learned that “certain Governmental Entities may be acting beyond the scope of any inherent or granted governmental

¹⁴ See e.g., *Thorpe v. Housing Authority*, 393 U.S. 268, 275 (1969) (stating that the HUD handbooks contain “mere instructions, technical suggestions, and items for consideration” and therefore, lack force and effect of law (citations and quotations omitted)).

¹⁵ Handbook 4000.1 at 225 (emphasis added).

¹⁶ ECF No. 2-2 at 2 of 8 (emphasis added).

¹⁷ ECF No. 2-2 at 3 of 8.

authority in providing funds towards the Borrower’s cash investment in circumstances that would violate Handbook 4000.1 [and] the National Housing Act.”¹⁸ Therefore, HUD issued the Mortgage Letter to ensure that its interpretive rule was not being abused by entities that used the ruse of governmental authority to create DPA businesses for financial benefit, thus becoming prohibited sources of DPA in violation of the National Housing Act.

THE PLAINTIFFS’ BUSINESS MODEL

The Cedar Band of Paiutes (“the Tribe”) is a federally-recognized Indian Tribe.¹⁹ The Tribe established its Constitution, which the Department of the Interior approved.²⁰ The Tribe’s Constitution recognizes that its “governmental powers . . . extend to all persons, subjects, and property including natural resources, within the exterior boundaries of reservation lands held in trust for the tribe”²¹

In 2012, the Tribe exercised its right under [25 U.S.C. § 5124](#) to create the “Cedar Band Corporation” (“CBC”).²² CBC’s Federal Charter of Incorporation (hereinafter “federal charter”),

¹⁸ [ECF No. 2-2 at 3](#) of 8.

¹⁹ Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, [84 Fed. Reg. 1200 \(Feb. 1, 2019\)](#).

²⁰ [ECF No. 65 at 307](#) of 326.

²¹ [ECF No. 65 at 284](#) of 326 (emphasis added).

²² The CBC’s Charter says that it is incorporated under [25 U.S.C. § 477](#). [ECF No. 2-4 at 2](#) of 34. However, Congress transferred section 477 to section 5124.

which the Department of the Interior approved,²³ subjects CBC to the Tribe’s Constitution and allows the CBC to “carry on the Corporation’s business either within or without the Reservation, as permitted by law.”²⁴ The Tribe is the sole shareholder of the Corporation.²⁵ The purpose of the CBC is to benefit the Tribe.²⁶ When the CBC is operating outside of its Reservation, its charter authorizes it “to transact business in the State of Utah or any other state or jurisdiction as a foreign corporation, and to comply with applicable state law governing foreign corporations, as it deems necessary.”²⁷ Because Utah, among others, requires foreign corporations to register with the State before transacting business therein,²⁸ CBC registered as a “foreign corporation” with the Utah Department of Commerce.²⁹

Under its charter,³⁰ the CBC created a subdivision called the CBC Mortgage Agency (“CBCMA”).³¹ CBC is the sole owner of CBCMA, sole purpose of which is to benefit CBC.³²

²³ ECF No. 2-4 at 19 of 34.

²⁴ ECF No. 2-4 at 5 of 34.

²⁵ ECF No. 2-4 at 4 of 34.

²⁶ ECF No. 2-4 at 34-35.

²⁷ ECF No. 2-4 at 6 of 34 (emphasis added).

²⁸ Utah Code Ann. § 16-10a-1501(1).

²⁹ <https://secure.utah.gov/bes/details.html?entity=9489219-0143>.

³⁰ ECF No. 2-4 at 7 of 34 (stating that CBC may “create subdivisions of the Corporation”).

³¹ ECF No. 2-5 at 2 of 18.

³² ECF No. 2-5 at 3-5 of 18.

CBCMA is registered with the State of Utah as a “d.b.a.” entity of CBC.³³ CBCMA’s charter authorizes it to engage in the development, marketing, sale, and management of mortgages, and real estate financing programs,” including those “that comply with Federal Housing Administration loan programs.”³⁴ CBCMA claims to act as a government entity when providing DPA to any person anywhere in the nation and financially benefits therefrom.³⁵

PLAINTIFFS’ LAWSUIT AND MOTION FOR PRELIMINARY INJUNCTION

Because Plaintiffs believe that the geographical scope of their DPA program is not limited to the geographical scope of their governmental jurisdiction in the Tribe’s Constitution, they filed this action on April 22, 2019, challenging HUD’s Mortgagee Letter.³⁶ Simultaneously, Plaintiffs also filed a motion for a temporary restraining order and preliminary injunction.³⁷ In arguing for injunctive relief, Plaintiffs claim that the Mortgagee Letter violated the APA, the Tribes’ charter, and the United States Constitution.³⁸ Additionally, Plaintiffs contend that they have suffered irreparable harm from the Mortgagee Letter and that the balance of harms and public policy favor an injunction.³⁹

³³ <https://secure.utah.gov/bes/details.html?entity=11117546-0151>.

³⁴ ECF No. 2-5 at 4 of 18.

³⁵ ECF No. 6 at 11-12.

³⁶ ECF No. 2.

³⁷ ECF No. 6.

³⁸ ECF No. 6 at 13-21.

³⁹ ECF No. 6 at 10-13; 22-23.

However, as shown below, Plaintiffs' legal arguments lack merit because the Mortgagee Letter does not violate the APA, Plaintiffs' federal charters, or the United States Constitution. To the contrary, the plain language of HUD's 2012 Interpretive Rule and corresponding Handbook provisions clearly limited government entities to providing DPA within their jurisdictional boundaries years before the Mortgagee Letter was issued. But instead of relying on an interpretation of HUD policy that any English dictionary and the Tribe's own Constitution clearly provide, Plaintiffs interpreted "governmental capacity" to include "anywhere in the United States." Plaintiffs' interpretation has made them a congressionally prohibited source of DPA. Given that Plaintiffs are a prohibited source of DPA in violation of the National Housing Act, they cannot succeed on the merits of their claims, establish irreparable harm for losing illegitimate business, or show that the public interest favors them conducting business that Congress clearly precluded. Therefore, this Court should deny Plaintiffs' motion.

STANDARD OF REVIEW

The APA governs judicial review of agency action.⁴⁰ Under the APA, Congress empowered this Court to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; contrary to constitutional right . . . [or] without observance of procedure required by law."⁴¹ However, when

⁴⁰ 5 U.S.C. § 704.

⁴¹ 5 U.S.C. § 706(2)(A), (B), (D).

engaging in this determination, this Court’s review of agency action “is highly deferential.”⁴² Where, as here, HUD interpreted the National Housing Act without the formality of notice-and-comment rulemaking, this Court does not apply the deferential standard under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,⁴³ but, instead, grants deference under *Skidmore v. Swift & Co.*⁴⁴ *Skidmore* deference is appropriate where, as here, “the regulatory scheme is highly detailed, and [HUD] can bring the benefit of specialized experience to bear on the subtle questions in this case.”⁴⁵ Consequently, “[a] presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.”⁴⁶

ARGUMENT

This Court should deny Plaintiffs’ motion because they cannot carry their heavy burden to overcome the presumption in favor of HUD and establish the elements for injunctive relief. A request for preliminary injunctive relief “is an extraordinary and drastic remedy, one that should

⁴² *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (quotations and citations omitted).

⁴³ 467 U.S. 837 (1984).

⁴⁴ 323 U.S. 134 (1944); see *United States v. Mead Corp.*, 533 U.S. 218, 229-31, 234-35 (2001) (holding that agency interpretation of statute Congress gave it to administer is entitled to deference under *Chevron* if agency interpretation done through notice-and-comment rulemaking; otherwise agency interpretation is entitled to deference under *Skidmore*).

⁴⁵ *Mead*, 533 U.S. at 235.

⁴⁶ *Krueger*, 513 F.3d at 1176.

not be granted unless the movant, by a clear showing, carries the burden of persuasion.”⁴⁷ To carry its burden, Plaintiffs “must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to Plaintiffs if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.”⁴⁸ Where, as here, Plaintiffs seek an injunction against the United States, the third and fourth elements merge.⁴⁹ As shown in order below, Plaintiffs fail to overcome the presumption in favor of HUD to establish that: (I) they are likely to succeed on the merits of their claim, (II) they will suffer irreparable harm, or (III) the public interest favors them ignoring the strictures of the National Housing Act.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

This Court should deny Plaintiffs’ motion for injunctive relief because they cannot succeed on the merits of their claims. To satisfy this element of injunctive relief, Plaintiffs bear the burden of making “a strong showing . . . with regard to the likelihood of success on the merits”⁵⁰ Plaintiffs claim that they have made a “strong showing” on the merits because the

⁴⁷ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis added).

⁴⁸ *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

⁴⁹ *Nken v. Holder*, 556 U.S. 418, 435 (2009) (stating that third and fourth elements of injunctive relief merge when the government is a party); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013) (stating that last two elements of preliminary injunction merge when government is a party).

⁵⁰ *McDonnell v. City and County of Denver*, 878 F.3d 1247, 1252 (10th Cir. 2018) (citations and quotations omitted).

Mortgagee Letter purportedly: (A) violates the rulemaking provisions of the APA; (B) is arbitrary and capricious under the APA for HUD's alleged failure to consult the Tribe; (C) conflicts with Plaintiffs' respective federal charters; and (D) violates the Fifth Amendment of the United States Constitution. As shown in order below, Plaintiffs' arguments fail to make any showing of merit, much less a strong one.

A. The Mortgagee Letter Does Not Violate the Rulemaking Provisions of the APA.

The Mortgagee Letter did not violate the rulemaking provisions of the APA because it merely clarified HUD's longstanding policy regarding government-provided DPA. The APA's rulemaking provisions do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁵¹ Although the distinction between legislative and interpretive rules can be "enshrouded in considerable smog,"⁵² legislative rules, which require notice-and-comment rulemaking under the APA, "have the force and effect of law."⁵³ To determine whether an interpretive rule has the force of law, courts consider:

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative,

⁵¹ 5 U.S.C. § 552(b)(3)(A).

⁵² *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

⁵³ *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citations and quotations omitted).

not an interpretive rule.⁵⁴

No party contends that HUD published the Mortgagee Letter in the Code of Federal Regulations. Therefore, only issues (1), (3), and (4) are discussed in order below, all of which show that the Mortgagee Letter is not a legislative rule and, therefore, Plaintiffs cannot succeed on the merits of their APA rulemaking claim.

1. HUD Policy Limiting Government Providers of DPA to Their Jurisdictions Existed Long Before the Mortgagee Letter.

Years before the Mortgagee Letter, HUD's 2012 Interpretive Rule and Handbook included jurisdictional limitations for governmental providers of DPA. Although the National Housing Act prohibited DPA for financial gain, the 2012 Interpretive Rule allowed government entities to do so "in connection with" their broader governmental homeownership programs.⁵⁵ The Handbook further clarified that to do this, government entities must act within their "governmental capacity."⁵⁶ Plaintiffs do not challenge either the 2012 Interpretive Rule or the Handbook provisions regarding DPA. Therefore, if the 2012 Interpretive Rule and Handbook imposed jurisdictional limitations on government DPA providers, then Plaintiffs' arguments against the Mortgagee Letter necessarily fail.

By requiring government DPA providers to act in their "governmental capacity," HUD's

⁵⁴ *Id.* at 1112.

⁵⁵ 77 Fed. Reg. 72223.

⁵⁶ Handbook 4000.1 at 225.

2012 Interpretive Rule and Handbook—not the Mortgagee Letter—set jurisdictional limitations on government entities providing DPA. When interpreting statutes, legislative rules, or policy, courts begin with the “plain language.”⁵⁷ “[D]ictionary definitions inform the plain meaning” of a policy.⁵⁸ According to Webster’s Third New International Dictionary, to which the United States Supreme Court is partial,⁵⁹ the term “governmental” means, “relating to government or to the government of a particular political unit.”⁶⁰ Similarly, the word “government” is defined in relevant part as,

an area organized as a political unit . . . the continuous exercise of authority over and the performance and function for a political unit . . . the organization, machinery, or agency through which a political unit exercises authority and performs functions and which is usu[ally] classified according to the distribution of power within it . . . the complex of political institutions, laws, and customs through which the function of governing is carried out in a specific political unit; the body of persons that constitute the governing authority of a political unit . . .⁶¹

Thus, by definition, “governmental” and “government,” function “within” a “particular”

⁵⁷ *Mitchell v. Comm’r of Internal Revenue*, 775 F.3d 1243, 1249 (“In interpreting the relevant regulations, we apply the same rules we use to interpret statutes. We begin by examining the plain language of the text, giving each word its ordinary and customary meaning.”); *Fanoele v. United States*, 975 F. Supp. 1394, 1400 (D. Kan. 1997) (“The court agrees with plaintiff that the provisions in the Facilities Standards handbook should be given a plain-language interpretation.”).

⁵⁸ *United States v. Radley*, 632 F.3d 177, 182-83 (5th Cir. 2011).

⁵⁹ A search in Westlaw for “Webster’s Third New International Dictionary” shows that the Supreme Court has cited it in 222 opinions.

⁶⁰ *Governmental*, Webster’s Third New International Dictionary (2002) (emphasis added).

⁶¹ *Government*, Webster’s Third New International Dictionary (2002) (emphasis added).

and “specific” “political unit,” not some undefined, jurisdictionally boundless power.

Indeed, Plaintiffs cannot claim surprise by this plain English reading because the Tribe employs the same definition in its own Constitution. The Tribe’s Constitution recognizes its “governmental powers” to extend to “the exterior boundaries of reservation lands.”⁶² Moreover, CBC’s and CBCMA’s charters both state that when they are operating outside of the Tribe’s reservation, they do so as a “foreign corporation” or a “foreign agency,” respectively, not in a governmental capacity.⁶³ To this end, CBC registered with the State of Utah as a “foreign corporation” so that it could do business in Utah outside of the Tribe’s reservation; and CBCMA registered with the State of Utah as a d.b.a. of the foreign corporation CBC. Registering as a “foreign corporation” is strange if Plaintiffs are truly operating in a “governmental capacity” outside of their reservation. Thus, “governmental” refers to powers that can be exercised within a particular and specific political unit.

Similarly, the term “capacity” denotes a limitation, not unlimited operation. According to the Webster’s Third New International Dictionary, “capacity” means, among other things, “a position, character, or role.”⁶⁴ By adding “capacity” to “governmental,” the Handbook plainly means that a government entity may provide DPA

⁶² ECF No. 65 at 284 of 326.

⁶³ ECF No. 2-4 at 6 of 34.

⁶⁴ *Capacity*, Webster’s Third New International Dictionary (2002).

when it is acting in its “position, character, or role” of exercising authority “within” or “over a particular political unit.” As applied to Plaintiffs, their “governmental authority” applies only within the Tribe’s reservation and to its enrolled members.⁶⁵ This plain English interpretation of HUD policy clearly merits judicial deference under *Skidmore*.⁶⁶

Given the plain meaning of “governmental capacity,” Plaintiffs cannot credibly assert that the Mortgage Letter introduced changes to government-provided DPA that altered legal rights or upset settled expectations. The Mortgage Letter merely clarifies what documents FHA mortgagees need to provide in order to comply with the 2012 Interpretive Rule and Handbook’s pre-existing jurisdictional limitation. Thus, even without the Mortgage Letter, HUD’s 2012 Interpretive Rule and Handbook provisions provide an adequate basis to limit governmental entities to their respective jurisdictions when providing DPA. And where, as here, HUD guidance (i.e., the Mortgage Letter) merely reiterates existing rules, it does not constitute a change in policy requiring rulemaking.⁶⁷ Accordingly, Plaintiffs’ claims that the Mortgage Letter should have undergone rulemaking clearly fail.⁶⁸

⁶⁵ ECF No. 65 at 284-85 of 326.

⁶⁶ 323 U.S. 134.

⁶⁷ *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1351 (10th Cir. 1987) (stating that policies “that merely reiterate the statutory and regulatory . . . do not constitute a change in any rule or policy”).

⁶⁸ The fact that the Mortgage Letter did not create the jurisdictional limitations about which Plaintiffs complain not only dooms Plaintiffs’ argument that rulemaking was required but also disposes of Plaintiffs’ arguments that HUD failed to: (1) provide a reasoned explanation for its purported change in policy, or (2) “display awareness that it *is* changing position.” ECF No. 6

2. HUD Has Not Invoked Its General Legislative Authority When Issuing the Mortgagee Letter.

Plaintiffs cannot show that HUD invoked its general legislative authority when issuing the Mortgagee Letter. To determine whether an agency invoked its legislative rulemaking authority, courts look at the agency’s characterization of the purported rule. For example, the court in *American Mining Congress* determined that the agency had not invoked its legislative authority because it characterized the purported rules as an “interpretation.”⁶⁹ Similarly, HUD did not invoke its rulemaking authority to issue the Mortgagee Letter. Instead, it provided that the Mortgagee Letter was issued “to clarify documentation requirements that FHA-approved Mortgagees must satisfy” when government-provided DPA is part of the transaction.⁷⁰ The absence of invoking HUD’s rulemaking authority—coupled with the fact that the Mortgagee Letter is not in the Code of Federal Regulations—shows that rulemaking is not required.

3. The Mortgagee Letter Does Not Amend a Prior Legislative Rule.

The Mortgagee Letter is not a rule that required APA rulemaking procedures because it does not amend a prior legislative rule. In fact, the only legislative rule dealing with DPA was set aside on judicial review.⁷¹ Instead of a legislative rule, Congress intervened and amended the

at 17-18. The Mortgagee Letter did not change HUD’s position at all; it simply clarified it in a way that Plaintiffs’ could no longer double down on their bad linguistic bet.

⁶⁹ 995 F.2d at 1112.

⁷⁰ ECF No. 2-2 at 2 of 8.

⁷¹ *Penobscot Indian Nation v. U.S. Dep’t of Housing & Urban Dev.*, 539 F. Supp. 2d 40

National Housing Act to preclude those who benefit financially from providing DPA.⁷² To address government-provided DPA, HUD did not issue a legislative rule but, instead, issued the 2012 Interpretive Rule, which was not subject to notice-and-comment rulemaking.⁷³ The Handbook's provisions on DPA, which further clarified the 2012 Interpretive Rule, are also interpretive in nature and, therefore, are exempt from rulemaking. The Mortgagee Letter simply clarified which documents were needed to comply with these prior policy statements. A policy clarification of a policy does not require rulemaking. Thus, instead of amending a "legislative rule," the Mortgagee Letter further clarified a policy that was never subject to rulemaking.

Nevertheless, Plaintiffs argue that HUD had an obligation to engage in rulemaking because it did so regarding DPA in 2007.⁷⁴ However, the authority that Plaintiffs cite in support of their argument actually disproves it. In *Perez v. Mortgage Bankers Association*, the Supreme Court stated that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."⁷⁵ However, the only "rules" that were promulgated regarding DPA were invalidated,⁷⁶ and, instead, Congress addressed

(D.D.C. 2008); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008).

⁷² 12 U.S.C. § 1709(b)(9)(C).

⁷³ 77 Fed. Reg. at 72223.

⁷⁴ ECF No. 6 at 16.

⁷⁵ 135 S. Ct. 1199, 1206 (1999) (emphasis added).

⁷⁶ *Penobscot Indian Nation v. U.S. Dep't of Housing & Urban Dev.*, 539 F. Supp. 2d 40 (D.D.C. 2008); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008).

prohibited sources of DPA by legislation. Thus, there are no “rules” regarding DPA for HUD to amend; there are only policies none of which required rulemaking. Therefore, the Mortgagee Letter does not require rulemaking either, which dooms Plaintiffs’ argument on the merits.

B. The Mortgagee Letter Does Not Violate the APA Because HUD’s Tribal Consultation and General Consultation Policies Lack the Force and Effect of Law.

Because HUD’s consultation policies do not have the force and effect of law, this Court should disregard Plaintiffs’ claim that HUD’s Mortgagee Letter violated them. Under the APA, Congress empowered this Court to declare unlawful and set aside agency actions that are “not otherwise in accordance with the law.”⁷⁷ Courts interpret the phrase “not in accordance with law” to mean that “[t]here is no right to sue for a violation of the APA in the absence of a ‘relevant statute’ whose violation ‘forms the basis for [the] complaint.’”⁷⁸ “Thus . . . the plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States.”⁷⁹ A statement of agency policy is neither “a statute” nor “a regulation” and, therefore, cannot “appl[y] to the United States” because it is not binding upon the agency.⁸⁰

⁷⁷ 5 U.S.C. § 706(2)(A) (emphasis added).

⁷⁸ *El Rescate Legal Servs. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990)).

⁷⁹ *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (emphasis added).

⁸⁰ *AMREP Corp. v. Fed. Trade Comm’n.*, 768 F.2d 1171, 1178 (10th Cir. 1985) (“It is elementary administrative law that in order for [an agency policy statement] to have binding force there are only two methods that an agency may use in formulating policy. It may establish

This Court cannot set aside the Mortgagee Letter for HUD’s purported failure to consult with the Tribe because, as Plaintiffs concede, consultation with tribes is a “policy.”⁸¹ In addition to calling it a “policy,” HUD included in its policy statement regarding Tribal consultation the following language: “This document. . . does not, create any right to administrative or judicial review, or any other right . . . enforceable by a party against the United States”⁸² Additionally, HUD’s general consultation policy in [24 C.F.R. § 10.1](#) is just that: a policy,⁸³ which HUD created without rulemaking.⁸⁴ Accordingly, Plaintiffs cannot succeed on the merits of their APA claim seeking to set aside the Mortgagee Letter for allegedly failing to follow non-binding consultation policies.

In any event, even if these policies were binding, HUD did not violate them. Because the Mortgagee Letter did not make any substantive changes to pre-existing policy, there were neither “tribal implications”⁸⁵ about which to consult with tribes nor a “rulemaking” to invoke

binding policy either through rule-making procedures or through adjudications that create binding precedents.” (emphasis added); *Vietnam Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (“A binding policy is an oxymoron.”).

⁸¹ [ECF No. 6 at 17](#).

⁸² *Tribal Government-to-Government Consultation Policy*, [81 Fed. Reg. 40893](#), 40897 (June 23, 2016).

⁸³ [24 C.F.R. § 10.1](#) (entitled “Policy”).

⁸⁴ *Public Participating in Rulemaking; Policy and Procedures*, 44 Fed. Reg. 1605-06 (Jan. 5, 1979) (stating that exempt from rulemaking); *Rulemaking: Policy and Procedures*, [47 Fed. Reg. 56624](#) (Dec. 20, 1982) (stating that it is a policy exempt from rulemaking).

⁸⁵ [81 Fed. Reg. at 40893](#).

the consultation requirements under [24 C.F.R. § 10.1](#). Therefore, Plaintiffs lose on the merits.

C. The Mortgagee Letter Does Not Conflict With Plaintiffs' Federal Charters.

The Mortgagee Letter does not conflict with either Plaintiffs' federal charters or the APA. Plaintiffs claim that the Mortgagee Letter ignores their federal charters' authorization to conduct business nationwide. However, the Mortgagee Letter does not ignore Plaintiffs' federal charters because, as shown above, the Mortgagee Letter does not impose any jurisdictional limitations on government DPA providers. The jurisdictional limitations about which Plaintiffs complain existed prior to the Mortgagee Letter under the Handbook and the 2012 Interpretive Rule, which Plaintiffs do not challenge here. Therefore, the Mortgagee Letter does not affect Plaintiffs' federal charters at all, which dooms Plaintiffs' claim on the merits.

In any event, Plaintiffs' argument also fails because federal charters are subject to federal law; it is not the other way around. Congress provided that a federal charter granted to Indian Tribes may include “powers as may be incidental to the conduct of corporate business, not inconsistent with law”⁸⁶ The Housing Act specifically precludes any entity from profiting from a transaction in which that entity provides DPA.⁸⁷ Plaintiffs are clearly profiting from providing DPA, which would make them a prohibited source unless, subject to HUD's 2012

⁸⁶ [25 U.S.C. § 5124](#).

⁸⁷ [12 U.S.C. § 1709\(b\)\(9\)\(C\)](#); *United States ex rel. Hastings v. Wells Fargo Bank, Nat'l Ass'n.*, Case No. 12-CV-03624, 2014 WL 3519129 5 (C.D. Cal. July 15, 2014) (unpublished) (stating that section 1709(b)(9)(C) “effectively barred DAPs by prohibiting a seller from reimbursing ‘directly or indirectly’ any third party contributing to a borrower’s down payment”).

Interpretive Rule and Handbook, Plaintiffs provide DPA in their “governmental capacity.” The plain meaning of “governmental capacity” limits a DPA provider to the “position, character, or role” of exercising authority “within” or “over a particular political unit,” which, in Plaintiffs’ case, is the Tribe’s reservation and enrolled members. Because Plaintiffs interpret their charters to ignore their jurisdictional boundaries, Plaintiffs’ interpretation of their charters must yield to federal law. Therefore, Plaintiffs’ claims fail again.

Additionally, Plaintiffs’ challenge to the Mortgagee Letter under their federal charters again fails because although Plaintiffs’ charters authorize them to operate nationally: (1) the charters recognize that Plaintiffs operate in a governmental capacity only within the “exterior boundaries” of their reservation or with their tribal members;⁸⁸ and (2) CBCMA’s charter expressly subjects it to “comply with Federal Housing Administration loan programs anywhere in the United States.”⁸⁹ Therefore, Plaintiffs’ arguments fail again.

Nevertheless, Plaintiffs contend that their charters allow them to provide for-profit DPA nationally because HUD purportedly received Plaintiffs’ charters and approved CBCMA as a mortgagee.⁹⁰ However, this argument fails because the United States cannot be estopped by the acts of its officers if they permit something that a government agent lacks authority to do.⁹¹

⁸⁸ ECF No. 2-4 at 5 of 34.

⁸⁹ ECF No. 2-5 at 4 of 18.

⁹⁰ ECF No. 6 at 7.

⁹¹ *United States v. Lilly*, 810 F.3d 1205, 1210 (10th Cir. 2016) (holding that government

When HUD reviews an application from a potential FHA Mortgagee, HUD does not look at whether the applicant is going to provide DPA, much less determine whether the applicant's DPA plan would comply with the National Housing Act and HUD policy.⁹² Thus, those who approve FHA Mortgagees lack authority approve a mortgagee's DPA program, which precludes Plaintiffs from arguing that HUD is estopped here.

Moreover, that Plaintiffs have operated their nationwide DPA program as a prohibited source for close to four years does not establish HUD's agreement that Plaintiffs' federal charters allow them to provide DPA outside of their governmental capacity. Lack of enforcement, without more, is not enough to conclude that an agency has definitively and authoritatively adopted an interpretation of the law.⁹³ Plaintiffs cannot point to any statements or deliberate actions from HUD supporting Plaintiffs' view that HUD embraced Plaintiffs' nationwide DPA program as consistent with the National Housing Act and HUD policy. Indeed, Plaintiffs' Complaint shows just the opposite.⁹⁴ Thus, no HUD action justifies the claim that Plaintiffs'

cannot be bound by agents who lack authority to take a particular action).

⁹² Exhibit A at ¶¶ 15-17 (Declaration of Volky Garcia, Director of the Lender Approval and Recertification Division).

⁹³ *Warshauer v. Solis*, 577 F.3d 1330, 1339-40 (11th Cir. 2009) (citing *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) and *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509-11 (D.C. Cir. 2009)).

⁹⁴ ECF No. 2-7 at 2-4 of 10 (questioning in 2016 and 2017, respectively, whether Plaintiffs could provide DPA either as a nonprofit or governmental entity).

charters render their nationwide DPA business anything other than a prohibited source of DPA.⁹⁵

D. Plaintiffs Cannot Show that the Mortgagee Letter Violated the Constitution.

Plaintiffs cannot establish that the Mortgagee Letter caused a regulatory taking or a procedural Due Process violation. Plaintiffs base their regulatory takings claim on an incomplete citation of the Supreme Court’s decision in *Lucas v. South Carolina Coastal Council*.⁹⁶ Specifically, Plaintiffs argue that “the Mortgagee Letter ‘deprives [the Cedar Band] of all economically beneficial use’ of CBCMA without compensation.”⁹⁷ The complete passage from *Lucas* provides: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use,” then a takings analysis is appropriate.⁹⁸ Plaintiffs make no attempt, nor could they, to show how the Mortgagee Letter’s requirement to merely provide additional documents for FHA loans renders Plaintiffs’ land bereft of “all economically beneficial use.” Thus, Plaintiffs’ takings argument fails on that basis alone.

⁹⁵ Plaintiffs also include an undeveloped argument warning that if Plaintiffs’ authority is limited to tribal members, then violations of the housing discrimination statutes will occur because Plaintiffs will have to consider race in determining to whom to give DPA. However, Plaintiffs misunderstand that making a loan based on tribal membership is a legally distinct issue from “race.” *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (“The [BIA’s hiring] preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”). Therefore, Plaintiffs’ argument fails.

⁹⁶ 505 U.S. 1003 (1992).

⁹⁷ ECF No. 6 at 19 (quoting *Lucas*, 505 U.S. at 1027).

⁹⁸ *Lucas*, 505 U.S. at 1027 (emphasis added).

Had Plaintiffs really wanted to make a regulatory takings claim, they should have relied on *Penn Central Transp. Co. v. New York City*.⁹⁹ However, even that would fail. “[L]aws meant to support the health, safety, morals, and general welfare of the entire community are generally upheld even if they destroy or adversely affect private property interests.”¹⁰⁰ Congress’s prohibition against third-party funding of a borrower’s cash investment for direct or indirect “financial benefit,” 12 U.S.C. § 1709(b)(9)(C), promotes the public welfare by protecting the federal insurance fund that makes FHA-insured loans possible from losses due to increased loan defaults. Bolstering underwriting standards through the requirement of minimum cash investment from the borrower necessarily minimizes harm not only to the FHA insurance fund, but also to borrowers for whom a riskier mortgage can result in default, foreclosure, and long-term credit impairment. Against this backdrop, plaintiffs cannot show that interference with their profit from such risky loans rises to the level of a taking under *Penn Central*.

Plaintiffs’ procedural due process argument is equally deficient. Although Plaintiffs do not misstate the law in support of their due process claim—as they do with their regulatory takings claim—Plaintiffs simply provide no legal standard at all by which to evaluate their “fair notice” argument.¹⁰¹ Instead, Plaintiffs claim that the Mortgagee Letter “all but destroyed

⁹⁹ 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (stating that the “polestar” for regulatory takings analysis is *Penn Central* and its progeny).

¹⁰⁰ *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009) (citing *Penn Central*, 438 U.S. at 125).

¹⁰¹ ECF No. 6 at 19.

CBCMA’s business without fair notice and by changing its long-standing approach to the provision of DPA by tribal entities.”¹⁰² However, as shown amply above, the Mortgagee Letter did not impose any jurisdictional change because long before the Mortgagee Letter, HUD’s policy stated in plain English that a government had to provide DPA in its “governmental capacity.” Accordingly, Plaintiffs should have known for years that they lacked any protected property interest in operating as a “foreign corporation” outside the reach of their governmental powers. That Plaintiffs chose to ignore the plain meaning of “governmental capacity” and bet on their own counter-textual interpretation neither creates a protected property interest nor, *a fortiori*, establishes a due process violation. Therefore, Plaintiffs’ constitutional claims fail on their merits. Because all of Plaintiffs’ claims fail on their merits, this Court should deny their motion for injunctive relief on that basis alone.¹⁰³

II. PLAINTIFFS CANNOT CLAIM IRREPARABLE HARM FOR ALLEGEDLY LOSING PROFITS TO WHICH THEY ARE NOT ENTITLED.

Plaintiffs claim irreparable harm to what they should not have in the first place. However,

¹⁰² [ECF No. 6 at 19](#).

¹⁰³ In addition to the foregoing, Plaintiffs add a passing, undeveloped argument claiming that the Mortgagee Letter creates “unreasonable secondary retroactivity,” which causes their past investment to become worthless. [ECF No. 6 at 19-20](#). Other than this isolated statement from the late Justice Scalia’s concurring opinion, Plaintiffs fail to provide any authority that this standard is actually the law. However, even assuming that it is, the Mortgagee Letter does not completely devalue Plaintiffs’ prior investments because it only affects documentation that must be provided for loans going forward. There is no retroactive effect here. Thus, this argument fails too.

Plaintiffs can only claim irreparable harm to a legally-protected right.¹⁰⁴ As shown below, because Plaintiffs lack a lawful right to profit directly or indirectly from providing DPA in a non-governmental capacity, they cannot claim the loss of those profits as irreparable harm.

In connection with mortgages that FHA is authorized to insure, Congress expressly forbade the provision of DPA by any entity that directly or indirectly benefits financially from the transaction.¹⁰⁵ Plaintiffs concede that they profit significantly from the transactions in which they provide DPA.¹⁰⁶ Consequently, they are a prohibited source of DPA funds unless they provide these funds in conformity with the 2012 Interpretive Rule and Handbook (i.e., in their “governmental capacity” as part of their existing housing programs). The plain meaning of “governmental capacity” is an entity acting in the role of exercising authority over a particular political unit, which in Plaintiffs’ case is their reservation lands and their enrolled members. Plaintiffs concede that they rarely, if ever, provide DPA within their reservation or to their members and that their profits come from operating nationwide with those who are not members of the Tribe. Because Plaintiffs are not providing DPA in their “governmental capacity,” they are

¹⁰⁴ *Colo. Wild Horse v. Jewell*, 130 F.Supp. 3d 205, 220 (D.D.C. 2015) (holding that plaintiffs could not show irreparable harm to a right they did not have); *Friends of Animals v. Bureau of Land Mgmt.*, Case No. 2:15CV00118CW, 2015 WL 803169 *4 (D. Utah Feb. 26, 2015) (holding that plaintiffs could not show irreparable harm to rights that the law did not recognize); *United States v. RX Depot, Inc.*, 297 F.Supp. 2d 1306, 1310 (N.D. Okla. 2003) (holding that loss of income from illegal business activity is not irreparable harm).

¹⁰⁵ 12 U.S.C. § 1709(b)(9)(C).

¹⁰⁶ ECF No. 6 at 12.

a prohibited source of DPA funds and, under the National Housing Act, should not be profiting therefrom. Thus, Plaintiffs' loss of unlawful profits cannot be irreparable harm.

Moreover, to the extent Plaintiffs rely on the rights of their DPA customers to assert irreparable harm, Plaintiffs' reliance fails because Plaintiffs cannot raise the rights of others. A litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."¹⁰⁷ Although the Supreme Court recognizes third-party standing where "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship)," that exception only applies where the "third party has a legal entitlement (typically a constitutional entitlement)" to that "relationship."¹⁰⁸ As shown above, Plaintiffs' customers who receive their DPA when Plaintiffs act in their non-governmental capacity have no statutory or constitutional entitlement to that transaction. Therefore, Plaintiffs cannot show irreparable harm, which is another reason to deny their motion for preliminary injunctive relief.

III. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST FAVOR DENYING A PRELIMINARY INJUNCTION.

Plaintiffs cannot show that the public interest favors a preliminary injunction. Plaintiffs bear the burden of proving that the issuance of an injunction is not adverse to the public

¹⁰⁷ *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

¹⁰⁸ *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

interest.¹⁰⁹ Plaintiffs cannot do so here because “the public interest lies in the enforcement of the Acts of Congress.”¹¹⁰ As shown above, by providing DPA outside of their governmental capacity, Plaintiffs are violating the National Housing Act’s prohibitions. Allowing them to continue to do is not in the public interest. Therefore, Plaintiffs cannot prevail on this element of injunctive relief, and this Court should deny their motion.

CONCLUSION

As shown above, Plaintiffs can neither carry their burden to overcome the presumption in favor of HUD’s action nor show that they are entitled to injunctive relief. Accordingly, this Court should deny Plaintiffs’ motion for preliminary injunction.

DATED this 5th day of June 2019.

JOHN W. HUBER
United States Attorney

/s/ Jared C. Bennett
JARED C. BENNETT
Assistant United States Attorney

¹⁰⁹ *City of Chanute v. Kan. Gas & Elec. Co.*, 754 F.2d 310, 312 (10th Cir. 1985).

¹¹⁰ *Gayle Martz, Inc. v. Sherpa Pet Group, LLC*, 651 F.Supp. 2d 72, 85 (S.D.N.Y. 2009) accord *Builders Tr. of N.M. v. Resolution Assurance Grp., Inc.*, Case No. 09-CV-0249, 2010 WL 11597294 *9 (D.N.M. March 12, 2010) (unpublished).

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CEDAR BAND OF PAIUTES,
et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT, *et al.*,

Defendants.

Civ. Action No. 4:19-cv-30-DN

Judge David Nuffer

DECLARATION OF VOLKY GARCIA

I, Volky Garcia, do hereby make the following declaration based on personal knowledge or good faith belief.

1. I currently serve as the Director of the Division of Lender Approval and Recertification within the Office of Single Family Lender Activities and Program Compliance in the Office of Housing at the U.S. Department of Housing and Urban Development (“HUD”).
2. As the Director of the Lender Approval and Recertification Division, I am responsible for overseeing the activities of the division, including the approval of Title I lenders and Title II mortgagees. I also oversee the review of annual recertifications from approved mortgagees.
3. I have held this position since 2011.
4. I have been employed by HUD since 1999.

5. The Office of Lender Activities and Program Compliance provides oversight and enforcement within the Federal Housing Administration's (FHA) Office of Single Family Housing and uses risk management strategies to implement process changes for FHA-approved lenders. Additionally, the Office takes enforcement actions against mortgagees in manners pertaining to recertification or non-compliance with approval requirements.
6. The Lender Approval and Recertification Division is one of three divisions within the Office of Housing's Office of Lender Activities and Program Compliance. The other two divisions are the Quality Assurance Division and the Mortgagee Review Board Division.
7. A mortgagee must obtain approval from FHA to originate, service, or hold FHA-insured mortgages.
8. The Lender Approval and Recertification Division is responsible for reviewing applications from lenders for approval to originate, service, or hold mortgages with FHA insurance, as well as annual recertifications for continued approval.
9. FHA approves mortgagees as one of the following four types: Supervised, Nonsupervised, Government, or Investing.
10. Application requirements and activities authorized for approved mortgagees vary depending upon mortgagee type.
11. In my capacity as Director of the Lender Approval and Recertification Division, I oversee a staff of approximately 15 employees, including four mortgagee approval analysts and eleven auditors.
12. My office reviews approximately 400 applications for initial approval and 2230 recertifications each year.
13. FHA-approved mortgagees currently number approximately 2600.

14. My employees in the Lender Approval and Recertification Division review applications for FHA mortgagee approval, which entails review of mortgagees' application packages for completeness, consistency, and accuracy.
15. Approval as a Title II mortgagee does not constitute approval to provide downpayment assistance (DPA) in conjunction with FHA insured financing.
16. When reviewing an application, my staff does not consider whether the applicant contemplates providing DPA in connection with any FHA-insured mortgage.
17. When reviewing an application, my staff does not consider, much less determine, whether the entity applying for approval to participate in FHA programs would be a prohibited or permissible source of DPA pursuant to 12 U.S.C. § 1709(b)(9)(C).

Pursuant to the authority of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Dated: _____

6/5/19



VOLKY GARCIA

Director, Lender Approval and Recertification Division

Office of Lender Activities and Program Compliance

Office of Housing

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 14th day of June, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon all parties of record via electronic mail.

Dated this 14th day of June 2019.



Tricia O'Konek

PACIFICA LAW GROUP

June 14, 2019 - 1:24 PM

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