

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

1 MUSCOGEE (CREEK) NATION DIVISION)
OF HOUSING,)

Plaintiff,)

v.)

2 UNITED STATES DEPARTMENT OF)
HOUSING & URBAN DEVELOPMENT,)
3 SHAUN DONOVAN, in his official capacity,)
4 SANDRA HENRIQUEZ,)
in her official capacity, and)
5 C. WAYNE SIMS, in his official capacity,)

Defendants.)

Civil Action No. **CIV** 10 - 193 - JHP

FILED
MAY 25 2010
WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By Deputy Clerk

COMPLAINT

COMES NOW, Plaintiff, Muscogee (Creek) Nation Division of Housing, by and through its counsel, Gregory D. Nellis and Michael A. Simpson, of Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., and for their complaint against the above named Defendants, state and allege as follows:

INTRODUCTION

1. Plaintiff brings this action to challenge a regulation and agency notices issued by the United States Department of Housing and Urban Development (hereinafter "HUD"), which are *ultra vires* under the Native American Housing Assistance and Self-Determination Act of 1996 (hereinafter "NAHASDA"), Pub. L. 104-330, 25 U.S.C. §§ 4101-4243. Specifically, this lawsuit seeks declaratory and injunctive relief to require the Defendants to revise and/or cease enforcement of 24 C.F.R. §1000.58(g) and Notice PIH 2009-6, section 7(c) to the extent they require repayment of investment interest to the Government. In addition, Plaintiff brings a claim for recoupment of

\$1,315,702 in investment income that HUD illegally required Plaintiff to return based on HUD's erroneous interpretation and enforcement of 24 C.F.R. §1000.58(g) and Notice PIH 2009-6.

JURISDICTION AND VENUE

2. This Court has jurisdiction over Defendants and this action pursuant to 5 U.S.C. §§701-706 (judicial review of agency actions), 28 U.S.C. § 1362 (actions brought by Indian tribes); *id.* § 1331 (matters arising under the laws of the United States); and *id.* § 1346 (United States as a defendant). This Court has jurisdiction over Plaintiffs' request for declaratory relief pursuant to 28 U.S.C. § 2201 and for injunctive relief pursuant to 5 U.S.C. § 702 and § 706, and 28 U.S.C. § 2202. The question of whether HUD has acted unlawfully in its administration of NAHASDA is a question of federal law.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events giving rise to Plaintiffs' claims occurred within the Eastern District of Oklahoma, and Plaintiff is headquartered in Okmulgee, Oklahoma. Further, some of Defendants' actions alleged herein affect or have the potential to affect funds held by Plaintiff in this District.

PARTIES

4. Plaintiff Muscogee (Creek) Nation Division of Housing is a division of a federally recognized Indian tribe in Oklahoma and is authorized to receive and administer NAHASDA block grant funding.

5. Defendant HUD is the federal agency within the United States government charged by Congress with the responsibility of administering NAHASDA.

6. Defendant Shaun Donovan, and any successor in office, is the Secretary of Housing and Urban Development, and is responsible for HUD's overall compliance with statutes governing

HUD's housing programs.

7. Defendant Sandra Henriquez, and any successor in office, is HUD's Assistant Secretary for the Office of Public and Indian Housing, and is responsible for HUD's compliance with NAHASDA.

8. Defendant C. Wayne Sims, and any successor in office, is HUD's Administrator for the Southern Plains Office for Native American Programs in Oklahoma City, Oklahoma, which directly oversees Plaintiff's activities under NAHASDA.

9. Defendants Donovan, Henriquez and Sims are joined solely in their official capacity, and references to actions by Defendant HUD and Defendants Donovan, Henriquez and Sims are interchangeable.

COUNT I
(Declaratory Judgment)

10. Congress enacted NAHASDA in 1996 in order to fulfill the federal government's responsibility to Indian tribes and their members "to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition." 25 U.S.C. § 4101(4). Congress found that "the need for affordable homes in safe and healthy environments on Indian reservations [and] in Indian communities. . . is acute." 25 U.S.C. § 4101(6). Through NAHASDA, the federal government provides funding for Indian housing assistance.

11. Pursuant to a monitoring review of Plaintiff's NAHASDA programs in May and June 2006, HUD's Southern Plains Office for Native American Programs determined that Plaintiff should repay \$1,316,425 in investment income earned by Plaintiff on block grant money that Plaintiff had

validly invested pursuant to NAHASDA. HUD demanded this repayment on the basis that the investments at issue had extended beyond the two-year limitation on investments set forth in 24 C.F.R. §1000.58(g). Plaintiff requested a waiver of this finding from HUD, which was rejected by Defendant Henriquez in August 2009.

12. In a September 14, 2009, letter, HUD demanded that Plaintiff repay this investment income or HUD would impose administrative sanctions for Plaintiff's "noncompliance" with NAHASDA and HUD regulations. (Tillotson letter, attached as "Exhibit 1.") Shortly thereafter, Mr. Sims contacted A.D. Ellis, the Principal Chief of the Muscogee (Creek) Nation and threatened to initiate an investigation by the Department of Justice if the funds were not returned. Based on this threat, the Muscogee (Creek) Nation wired the funds at issue to HUD in November 2009 under protest.

13. Plaintiff had already spent the particular funds in question on affordable housing or housing related purposes in compliance with NAHASDA. Accordingly, the legal issues raised herein create an actual case or controversy ripe for this Court's review as HUD's demands affect or may affect Plaintiff's financial interests.

14. Section 204 of NAHASDA, 25 U.S.C. §4134, allows Indian tribes receiving NAHASDA block grants to invest such grants in investment securities or other obligations approved by HUD as long the investments will be used for the purposes of carrying out affordable housing activities.

15. 24 C.F.R. §1000.58(g) purports to restrict the investment of block grants to no longer than two years. Further, in section 7(c) of Notice PIH-2009-6, issued by HUD's Office of Public and

Indian Housing on March 9, 2009, HUD states that “any interest accrued after the expiration of the 2-year period must be returned to the Department.” (Attached as Exhibit “2”).

16. Congress provided no authority in NAHASDA for HUD to place this two-year restriction on an Indian tribe’s investment activity. Further, in 2008, Congress amended section 203 of NAHASDA to state that “[a]ny amount of a grant provided to an Indian tribe ... for a fiscal year that is not used by the Indian tribe during that fiscal year may be used by the Indian tribe during any subsequent year.” 25 U.S.C. § 4133(f)(2). Accordingly, 24 C.F.R. §1000.58(g) and the above-cited provisions of PIH 2009-6 are illegal and *ultra vires* under NAHASDA.

17. Pursuant to 24 C.F.R. §1000.62(a), HUD treats “any income realized from the disbursement of grant amounts” as “program income.” Under this definition, investment income earned from block grant funds disbursed into an investment is program income. Section 104 of NAHASDA, 25 U.S.C. §4114(a), states that any Indian tribe receiving NAHASDA grants “may retain any program income that is realized from any grant amounts” if the income was earned after the grant was disbursed and the recipient agrees to utilize such income for housing related activities in accordance with NAHASDA.

18. In the initial agency review of 24 C.F.R. §1000.62, the negotiated rule making Committee appointed by HUD agreed with “the right of the [block grant] recipients *to keep all interest earned* on grant amounts.” 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998) (emphasis added). Accordingly, HUD’s implementation and enforcement of 24 C.F.R. §1000.58(g) and Notice PIH 2007-24 are illegal and *ultra vires* because these provisions conflict with NAHASDA and 24 C.F.R. §1000.62.

COUNT II
(Injunctive Relief)

19. Plaintiff hereby realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 18 of this Complaint.

20. Plaintiff will suffer irreparable harm if it is required to repay any additional investment income demanded by HUD. This irreparable harm outweighs any harm to HUD, who has no legal title or right to the investment income earned by Plaintiff.

21. Plaintiff will likely succeed on the merits because HUD's implementation of 24 C.F.R. §1000.58(g) and Notice PIH 2009-6 is *ultra vires*, as set forth above.

22. The public interest is that Plaintiff retain any investment income at issue because they have already been spent, and will be spent, on affordable housing activities, as Congress intended in passing NAHASDA.

COUNT III
(Recoupment)

23. Plaintiff hereby realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 22 of this Complaint.

24. Based on HUD's erroneous interpretation and enforcement of 24 C.F.R. §1000.58(g), Plaintiff was compelled to pay \$1,316,425 in investment income it had earned from block grants to HUD, even though Plaintiff had in fact paid those funds toward affordable housing purposes.

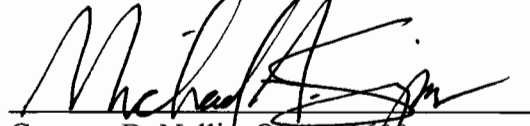
25. For the reasons set forth above, HUD's implementation of 24 C.F.R. §1000.58(g) and Notice PIH 2009-6 is *ultra vires*. Accordingly, the Court should enter an order and judgment requiring Defendants to return the \$1,316,425 in funds to Plaintiff.

WHEREFORE, Plaintiff, Muscogee (Creek) Nation Division of Housing, respectfully demands that the Court enter an order and judgment: (1) declaring 24 C.F.R. §1000.58(g) and HUD Notice PIH 2009-6 illegal and unenforceable; (2) requiring Defendants to repay \$1,316,425 to Plaintiff, plus interest; (3) awarding Plaintiff its costs; and (4) such other relief the Court deems just.

Respectfully submitted,

**ATKINSON, HASKINS, NELLIS,
BRITTINGHAM, GLADD & CARWILE**

A PROFESSIONAL CORPORATION

A handwritten signature in black ink, appearing to read 'Gregory D. Nellis', is written over a horizontal line.

Gregory D. Nellis, OBA #6609

Michael A. Simpson, OBA #21083

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Attorneys for Plaintiff

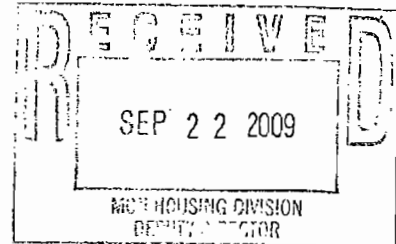


U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Oklahoma City Field Office, Region VI
Southern Plains Office of Native American Programs
301 N.W. 6th Street, Suite 200
Oklahoma City, Oklahoma 73102-2807
Phone (405) 609-8520 - Fax (405) 609-8403

SEP 14 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

The Honorable A.D. Ellis
Principal Chief
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447



Dear Chief Ellis:

SUBJECT: Past Due Notice Letter of Warning on Failure to Respond to the FY 2006 Monitoring Review Final Report

The Southern Plains Office of Native American Programs (SPONAP) conducted a monitoring review of the Muscogee (Creek) Nation beginning May 22, through May 26, 2006 and June 5, through June 9, 2006, to evaluate MCN's performance in implementing the Indian Housing Block Grant (IHBG) program and the Indian Community Development Block Grant Program. The final monitoring report was issued August 15, 2007 with Recommended Corrective Actions, and Target Completion Dates of September 11, 2009 in which to implement the Recommended Corrective Actions to close the open findings. Based on the MCN's failure to respond to Finding Number 11 by returning the investment funds and interest after the expiration of the investment period. **This letter constitutes a formal letter of warning pursuant to 24 CFR §1000.530(a)(1).**

Since the required documentation has not been provided, it will be necessary for HUD to review the Muscogee (Creek) Nation's payment requests through the Line of Credit Control System (LOCCS) before funds can be disbursed. Therefore, before requesting funds from LOCCS, the Muscogee (Creek) Nation must submit to SPONAP for review, the LOCCS

Payment Voucher, form HUD-50080-IHBG, with supporting documentation for the disbursement. Fax transmissions will be accepted. Examples of supporting documentation may include:

- contracts or contract register,
- invoices or check register, and/or
- payrolls.

This will enable SPONAP to verify that the funds the Muscogee (Creek) Nation is requesting will be used for eligible activities and that the activities the Muscogee (Creek) Nation


is conducting are in compliance with statutory and regulatory requirements. The requirement will be discontinued when the Muscogee (Creek) Nation complies with Finding Number 11.

As a grant recipient, the Muscogee (Creek) Nation is responsible for ensuring compliance with all program and OMB Circular A-133 requirements. According to 24 CFR §1000.530, if the Muscogee (Creek) Nation fails to address this identified problem, HUD may impose remedies, as prescribed in 24 CFR §1000.532 and/or 24 CFR §1000.538. Section 1000.532 authorizes HUD to adjust future grant funds to zero. Upon HUD's determination that the Muscogee (Creek) Nation failed to comply substantially with any provision of the Native American Housing Assistance and Self-Determination Act, 24 CFR §1000.538 authorizes HUD to terminate, reduce, or limit grant payments, or replace the recipient.

If the Muscogee (Creek) Nation does not submit the \$1,315,702 which is the interest earned on invested amounts after the two year expiration period through June 19, 2009 based on a review of the documentation for IHBGs 02, 03, 04 and 05 and any additional interest earned after June 16, 2009 until the funds are returned to the Department of Treasury **within 15 days** from receipt of this letter, HUD will consider taking the necessary actions, pursuant to 24 CFR §1000.532 and 24 CFR §1000.538 to enforce this requirement. After that time has expired, in accordance with these regulatory provisions, the Muscogee (Creek) Nation will be provided with an opportunity for an informal meeting; and if the issue remains unresolved, the Muscogee (Creek) Nation will be provided with the opportunity for a hearing.

HUD hopes that the Muscogee (Creek) Nation is able to respond to this matter within the prescribed timeline. If we may provide you with any assistance or you have questions on this matter, please contact Stacy Christoffersen, Lead Grants Evaluation Specialist, at (405) 609-8463 or by email at Stacy.L.Christoffersen@hud.gov.

Sincerely,


for - Garry T. Tillotson
Director
Grants Evaluation Division

Enclosure

cc:

Mr. Claude Sumner, Director
Muscogee (Creek) Nation Division of Housing
Mr. Ron Qualls, Deputy Director
Muscogee (Creek) Nation Division of Housing