UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

MUSCOGEE (CREEK) NATION DIVISION OF HOUSING, Plaintiff, v. UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SHAUN DONOVAN, in his official capacity, SANDRA HENRIQUEZ, in her official capacity, and C. WAYNE SIMS, in his official capacity, Defendants.	)	Case No. 10-cv-193 (JHP)

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff has sued the United States Department of Housing and Urban Development ("HUD") challenging regulations, 24 C.F.R. § 1000, *et seq.*, issued pursuant to HUD's authority under the Native American Housing and Self Determination Act ("NAHASDA"), 25 U.S.C. § 4101, *et seq.* Specifically, Plaintiff challenges 24 C.F.R. § 1000.58(g), which limits investment of NAHASDA grant money to a period no longer than two years, and Notice PIH 2009-6, section 7(c), which requires that if grant funds are held in investment accounts beyond the two year limit, investment income

accrued after that point must be returned to the government. As we explain below, Plaintiff's claims should be dismissed.

This Court lacks jurisdiction over Plaintiff's challenge to 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, section 7(c), because Congress has not waived sovereign immunity for Plaintiff's claims. The Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, provides a limited waiver of the United States' sovereign immunity, but that waiver does not extend to challenges of an agency's exercise of its discretion. *See id.*, § 701(a)(2) (excluding review of actions committed to agency discretion by law). In section 204(b) of NAHASDA, Congress has granted the Secretary of HUD broad discretion to approve investments of NAHASDA grant funds. 25 U.S.C. § 4134(b). Plaintiff's challenge to HUD's exercise of that discretion is therefore excluded from the APA's waiver of sovereign immunity. *See* 5 U.S.C. § 701(a)(2).

Even if judicial review was available, Plaintiff's challenge to 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, section 7(c), should be dismissed because it fails to state a claim on which relief can be granted. The two-year limitation on investments in 24 C.F.R. § 1000.58(g), and the requirement in Notice PIH 2009-6, section 7(c), that recipients return income earned on investments beyond two years, are an entirely permissible construction of NAHASDA, and in no way conflict with any of NAHASDA's provisions. Moreover, a finding that Congress intended to prohibit HUD from limiting tribes' investment activity to two-years or requiring that tribes return

income from *ultra vires* investments would be contrary to NAHASDA's text, purpose, and legislative history.

For these reasons, the Court should dismiss Plaintiff's Complaint, pursuant to FED. R. CIV. P. 12(b)(1) and (6).

BACKGROUND

I. Statutory and Regulatory Background

In 1996, recognizing that "the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute," and that "providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status," Congress enacted NAHASDA, to be administered by the Secretary of HUD. 25 U.S.C. § 4101. NAHASDA established a housing-assistance program through annual block grants to tribes or tribally designated housing entities such as Plaintiff "to carry out affordable housing activities." *Id.* § 4111.

Block grant funds provided by NAHASDA are allocated among all eligible Indian tribes based on a formula reflecting each tribe's need for assistance for affordable housing activities. *Id.* §§ 4151, 4152. NAHASDA permits a grant recipient to draw down allocated grant funds for two categories of uses: First, a recipient may draw down funds to spend directly on affordable housing activities, which include maintenance, modernization, or operation of housing previously developed; acquiring or developing

new housing; providing housing-related services such as property management or security services for affordable housing; and providing rental and homeownership assistance in the form of equity investments, loans, and interest subsidies. *Id.*, §§ 4132, 4134(a). Funds may also be drawn down to spend directly on administrative and planning costs. *Id.*, § 4111(h).

Second, a grant recipient may draw down grant funds to deposit in proprietary accounts before the funds are needed for expenditure on the activities described above. In 2008, Congress amended NAHASDA to add section 202(9), to permit an Indian tribe to draw down funds to deposit in a "reserve account established for an Indian tribe only for the purpose of accumulating amounts for administration and planning relating to affordable housing activities." *Id.*, § 4132(9). However, a recipient may not place its entire grant allocation in a reserve account. Rather, the reserve account "shall consist of not more than an amount equal to 1/4 of the 5-year average of the annual amount used by a recipient for administration and planning" affordable housing activities. *Id.*

Grant recipients may also create investment accounts to invest in securities and other obligations, but only "for the purposes of carrying out affordable housing activities," and only "as approved by the Secretary." *Id.*, § 4134(b). Exercising his authority under NAHASDA, the Secretary, pursuant to a negotiated rulemaking procedure, promulgated 24 C.F.R. § 1000.58, which prescribes limitations on the investment of grant funds. In particular, 24 C.F.R. § 1000.58(g), which is the heart of this case, provides that "[i]nvestments under this section may be for a period no longer

than two years." *Id.* § 1000.58(g). HUD's Notice PIH 2009-6, section 7(c), clarifies that because the regulation restricts the investment period to two years, any interest accrued after the expiration of the approved investment period must be returned to HUD, and the grant principle must be used for eligible program activities or returned to the Treasury for future use by the recipient. *See Complaint*, Ex. 1.

If a grant recipient does not use all of an annual block grant in one of these two ways, it may carry over any unused funds for use in a subsequent fiscal year. Section 203(f) of NAHASDA provides:

> Use of grant amounts over extended periods.
> (1) In general. To the extent that an Indian housing plan for an Indian tribe provides for the use of amounts of a grant . . . for a period of more than 1 fiscal year, or for affordable housing activities for which the amounts will be committed for use or expended during a subsequent fiscal year, the Secretary shall not require those amounts to be used or committed for use at any time earlier than otherwise provided for in the Indian housing plan.
> (2) Carryover. Any 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 fiscal year.

Id. [1] Pursuant to uniform federal grant administration requirements, carried over grant funds remain in the Treasury until drawn down for an eligible program use. *See* 24 C.F.R. §§ 1000.26(a), 85.20(b)(7), 85.21.

NAHASDA allows a recipient of grant amounts to "retain any program income that is realized from any grant amounts" provided that "such income was realized after

[1] This carry over provision was added in the 2008 amendments to NAHASDA. Pub. L. 110-411, § 203. However, as noted in the legislative history of this amendment, the provision merely codified current practice. *See* H. Rept. 110-295, 6 (Aug. 3, 2007) ("In practice [carryover] already happens.").

the initial disbursement of the grant amounts received by the recipient;" and the "recipient has agreed that it will utilize such income for housing related activities." 25 U.S.C. § 4114. The Secretary, pursuant to his authority to promulgate regulations implementing NAHASDA, *id.* §§ 4102, 4116, has defined "program income" as "any income that is realized from the disbursement of grant amounts," 24 C.F.R. § 1000.62(a).

II. The Complaint

Plaintiff's complaint challenges the legality of 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, section 7(c), pursuant to the APA. *Complaint,* ¶ 1. Plaintiff alleges that "Congress provided no authority in NAHASDA for HUD to place this two-year restriction on an Indian tribe's investment activity." *Id.* ¶ 16. Plaintiff also contends that 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, section 7(c), are in conflict with: (1) section 203 of NAHASDA, which provides 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,'" *id.* (quoting 25 U.S.C. § 4133(f)(2)); (2) section 104 of NAHASDA, which permits a recipient of grant amounts to "'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," *Complaint,* ¶ 17 (quoting 25 U.S.C. § 4114(a)); and (3) a statement by the negotiated rule making committee in the initial agency review of 24 C.F.R. § 1000.62, which "agreed with 'the right of the [block grant] recipients to keep all

interest earned on grant amounts,'" *Complaint*, ¶ 18 (quoting 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998)) (emphasis omitted).

Plaintiff seeks a declaration that 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, section 7(c) are illegal and *ultra vires* under NAHASDA, *Complaint*, ¶¶ 10-18; an injunction prohibiting HUD from requiring Plaintiff to repay any additional investment income, *id.* ¶¶ 19-22; and recoupment of $1,316,425 of investment income that it paid to HUD based on HUD's enforcement of 24 C.F.R. § 1000.58(g) and Notice PIH 2009-6, *id.* ¶¶ 23-25.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS BECAUSE THE APA DOES NOT PERMIT JUDICIAL REVIEW OF PLAINTIFF'S CHALLENGE TO 24 C.F.R. § 1000.58 AND NOTICE PIH 2009-6, SECTION 7(C)

In order for Plaintiff to maintain a suit against the United States it must be based on a waiver of the United States' sovereign immunity. A waiver of the government's sovereign immunity must be unequivocally expressed in the statutory text, *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992), and will not be implied, *id*. (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). "Moreover, a waiver of the government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* (citing *United States v. Williams*, 514 U.S. 527, 531 (1995), *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), and *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)). The only possible

waiver of sovereign immunity here is the APA, and that waiver does not extend to Plaintiff's claims.

The APA's waiver of sovereign immunity allows any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain "judicial review thereof," 5 U.S.C. § 702, but it precludes judicial review when the "agency action is committed to agency discretion by law." *Id.* § 701(a)(2). An action is committed to agency discretion when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion. . . ." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). As the Supreme Court explained,

> even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706–if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

Id. Thus, only if Congress "has provided meaningful standards for defining the limits of [agency] discretion" is there "law to apply" under section 701(a)(2). *Id.*, at 834. That, in turn, "requires careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). Although the APA's exception to judicial review is "very narrow," it applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to*

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

The Tenth Circuit has found agency action unreviewable under section 701(a)(2) in analogous cases where it found that the language in the controlling statute does not limit the agency's discretion. *See Selman v USA*, 941 F.2d 1060 (10th Cir. 1991); *American Bank, N.A, v. Clarke*, 933 F.2d 899 (10th Cir. 1991); *Cmty. Action of Laramie Cty., Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989); *see also Lower Ark. Valley Water Conservancy Dist. v. United States*, 678 F. Supp. 2d 1315 (D. Colo. 2008). For example, in *Selman*, taxpayers challenged the IRS's refusal to abate interest pursuant to 26 U.S.C. (I.R.C.) § 6404(e)(1) (1988), which provides, in relevant part, that the "Secretary may abate the assessment of all or any part of such interest for any period." 26 U.S.C. § 6404(e)(1); *Selman*, 941 F.2d at 1062. In concluding that judicial review was unavailable, the Court found that the "language of the statute fails to provide a court with any substantive standards by which to review the agency's action" and that "Congressional intent to preclude judicial review is 'fairly discernable in the statutory scheme' of I.R.C. § 6404(e)." *Selman*, 941 F.2d at 1063-64.

> First, the plain language of section 6404(e)(1) suggests that the Secretary's determination is not subject to judicial review. The statute clearly speaks in permissive, not mandatory, language; 'the Secretary *may* abate.' I.R.C. § 6404(e)(1) (emphasis added).
>
> Second, section 6404(e), read in its entirety, demonstrates that Congress carefully distinguished between discretionary and mandatory authority to abate interest. In contrast to subsection (e)(1)'s permissive language, in subsection (e)(2), Congress directed that the 'Secretary *shall*' abate the

> assessment of all interest on any erroneous refund under 6602 until the date demand for repayment is made. I.R.C. § 6404(e)(2) (emphasis added)).

Id.

Similarly, in *Clarke*, the Tenth Circuit held that a decision by the Comptroller of the Currency to close a bank as insolvent was unreviewable in a pre-closure proceeding. 933 F.2d at 901. The controlling statute provided that "whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association." *Id.* at 903 (quoting 12 U.S.C. § 191). In finding that there was no judicial review under the APA, the Court reasoned that the language in 12 U.S.C. § 191 is "highly discretionary" and that "[s]uch permissive language exudes strong deference to the Comptroller's decision." *Clarke*, 933 F.2d at 903.

In this case, section 204(b) of NAHASDA, which provides that a "recipient *may* invest grant amounts for purposes of carrying out affordable housing activities in investment securities and other obligations *as approved by* the Secretary," 25 U.S.C. § 4134(b) (emphasis added), is as open-ended as it could be. Section 204 does not in any way limit the Secretary's exercise of discretion when he considers whether to approve an investment of grant funds for purposes of carrying out affordable housing activities. "[I]t neither indicates" how the Secretary shall use his approval authority "nor provides any basis for distinguishing between the instances in which" investments should and should not be approved; it sets forth no factors that the Secretary must consider or abide by in

determining whether to approve an investment. *Selman*, 941 F.2d at 1063. Similar to 12 U.S.C. § 191, which provided that "whenever the Comptroller shall become satisfied," or 26 U.S.C. § 6404(e)(1), which provided that "the Secretary may abate," section 204(b) of NAHASDA "exudes strong deference" to the Secretary's decision, *Clarke*, 933 F.2d at 903, and it includes no standard for a court to apply to determine whether the limitations the Secretary may impose are valid.

Moreover, and contrary to Plaintiff's apparent construction of section 204(b), the Secretary's broad discretion is not limited to a recipient's choice of investment securities and obligations. That conclusion requires the inclusion of language in the statutory text limiting the scope of the Secretary's approval authority to the recipient's choice of investments that does not appear there. Rather, all aspects of a grant investment, including the duration, fall within the discretionary language of section 204(b). As discussed in more detail in section II(B)(ii), below, a more limited interpretation would enable a recipient to transform NAHASDA from an annual block grant program to an endowment program, which would be contrary to NAHASDA's purpose, statutory text and legislative history.

II. Even if Judicial Review was Available, Plaintiff's Challenge to 24 C.F.R. § 1000.58 and Notice PIH 2009-6, section 7(c), Should be Dismissed Because it Fails to State a Claim on Which Relief can be Granted.

A. NAHASDA Granted HUD Authority to Place the Challenged Two-Year Restriction on a Grant Recipient's Investment Activity

Plaintiff's contention that Congress provided no authority in NAHASDA to place the challenged two-year limitation on a grant recipient's investment activity, *Complaint*, ¶ 16, is mistaken. Not only is HUD authorized to promulgate NAHASDA regulations generally through negotiated rulemaking, 25 U.S.C. § 4116, but, as previously explained, it is has been granted explicit discretion to determine the parameters of permissible investment activity, *id.* § 4134(b). A consensus committee of 10 HUD officials and 48 tribal representatives developed the current NAHASDA regulations, including 24 C.F.R. § 1000.58(g), through negotiated rulemaking. *See* Final Rule, 63 F.R. 12333, 12334 (Mar. 12 1998). In producing 24 C.F.R. § 1000.58(g), the consensus committee drew the line between appropriate grant investments for housing activities, and improper investments for income generation, at two years. *See* Proposed Rule, 62 F.R. 35718, 35726 (July 2, 1997); Final Rule, 63 F.R. 12333, 12337-38 (Mar. 12 1998). The two-year limitation is fully consistent with section 204(b) as well as the statutory scheme because it restricts the use of grant funds in proprietary investment accounts so that grants will be used to "carry[] out affordable housing activities," 25 U.S.C. § 4134, and not simply to generate program income. Congress has also implicitly approved the existing investment restrictions by amending NAHASDA seven times since the final rule was

promulgated without altering the investment provisions in any way. *See* Pub L. No. 105-276, 112 Stat. 2461 (1998); Pub. L. No. 106-568, 114 Stat. 2868 (2000); Pub. L. No. 107-292, 116 Stat. 2053 (2002); Pub. L. No. 108-393, 118 Stat. 2246 (2004); Pub. L. No. 109-136, 119 Stat. 2643 (2005); Pub. L. No. 109-58, 119 Stat. 594 (2005); Pub. L. No. 110-411, 122 Stat. 4319 (2008). For all these reasons, there is no basis for a finding that the challenged two-year limitation on investments is not a valid implementation of section 204(b) of NAHASDA.

B. The Two-Year Limitation on Investment Activity is an Entirely Permissible Construction of NAHASDA

Plaintiff challenges HUD's interpretation of NAHASDA, a statute that HUD administers. Plaintiff's challenge therefore should be evaluated under a two-step process for determining the validity of an agency's interpretation of a statute it administers. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). At step one, the Court must first inquire whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has spoken directly to the issue, that is the end of the matter – the Court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, the statute is silent or ambiguous, under step two, the Court must inquire "whether the agency's answer is based on a permissible construction of the statute." *Id.* When the agency decision is based upon its interpretation of a statute that it is charged with administering, a court's deference to the agency's determination is at its apex. *See United States v. Mead Corp.*, 533 U.S. 218,

226-27 (2001). However, in cases involving Native Americans, "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)).

In this case Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Thus, HUD's interpretation of the NAHASDA is entitled to deference and should be upheld if it "is based on a permissible construction of the statute." *Id*., at 843. HUD's interpretation clearly meets that standard because HUD's construction accords with the statutory mission to benefit all Native Americans equally, whereas Plaintiff's construction would deny benefits to the extent it would permit federal housing grant amounts to be sequestered indefinitely in investments and not used on housing.

The unrestricted investment authority posited by Plaintiff would threaten to deny benefits to the low-income Native American families NAHASDA is meant to serve because grant recipients would have an incentive to withhold grants from housing activities in order to produce investment income. Indeed here, Plaintiff earned over $1.3 million dollars through investment of grant amounts beyond two years. *Complaint*, ¶ 11. This suggests that the amount of grant funds withheld from housing activities for needy Native American families must have been substantial.

In addition, unrestricted investment of grants would distort the fair allocation of future annual block grants because NAHASDA's annual block grants are allocated based

on tribes' need for housing assistance, 25 U.S.C. § 4152(b). This means that if a recipient does not use grant money on affordable housing activities because it is being invested, then the tribe's housing needs may increase over time rather than being alleviated by existing grants. This could lead to that tribe being allocated more grants in subsequent years relative to tribes that do not invest their funds for income generating purposes.

The challenged two-year limitation on investment of a grant amount both ensures that grant money will be fairly allocated among tribes with truly acute housing needs, and that NAHASDA's purpose will be served by assuring that grant money actually is spent on affordable housing activities in a timely manner, rather than being indefinitely invested. Accordingly, under *Chevron* and *Blackfeet Tribe,* HUD's interpretation of NAHASDA is entitled to deference.

i. 24 C.F.R. § 1000.58(g) in no way conflicts with section 203(f) of NAHASDA

Section 203(f) of NAHASDA, which provides 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 fiscal year," 25 U.S.C. § 4133(f)(2), is entirely consistent with the two-year limitation on investments.

As an initial matter, there is an important appropriations budgeting difference between grant funds that are carried over for use on program activities planned for a subsequent fiscal year, and grant funds that are invested for income generating purposes.

When a grant is carried over to a subsequent fiscal year, the money remains in the Treasury until needed for expenditure on affordable housing projects. *See* 24 C.F.R. §§ 85.20(b)(7), 85.21 (grant funds remain in the Treasury until just before a grantee needs to use them for a program purpose). By contrast, when a tribe invests its grant money, it withdraws grant amounts from the Treasury. When grants are drawn from the Treasury before they are needed for program activities – e.g., when they are invested for income generating purposes – the federal government loses the use of the money and the grant amount is augmented at the expense of the public fisc. To interpret section 203(f) to prohibit HUD from placing time restrictions on a grant recipient's use of grant funds for investment purposes would be to lump together grant money that remains in the Treasury, and grant money that is withdrawn. There is no support for a finding that Congress, through section 203(f), intended to do so.

The distinction between grant money that remains in the Treasury and grant money that is withdrawn – and Congress' intent not to collapse this distinction – is apparent in section 202(9), which was added to NAHASDA at the same time as section 203(f). *See* 25 U.S.C. § 4132(9). Section 202(9) strictly limits a recipient's authority to hold grant amounts in a propriety reserve account, restricting the purpose of the account to maintaining a reserve for payment of administrative and planning expenses as well as limiting the amount that can be deposited to "1/4 of the 5-year average of the annual amount used by a recipient for administration and planning . . ." *Id.* The limitations on reserve accounts enacted in section 202(9) further demonstrate that Congress intended

these means of grant management to be treated differently: unrestricted with regard to carryover of amounts that remain in the Treasury until they are spent directly on program activities, but strictly limited when grant amounts are to be held in proprietary accounts for a period of time before they are needed for expenditure.

Additionally, while carryover of grant amounts permits a tribe to accumulate sufficient funds to expend on program activities, an investment can be used solely to augment a recipient's grant amount and to generate income. If NAHASDA is read to prohibit time limitations on investment of grant amounts, not only could a recipient choose not to expend grant amounts on affordable housing activities, but it would have an incentive to hold the grant amount for the purpose of producing income. When Congress enacted the carryover provision in 2008, it could have added that unused annual grant amounts may be augmented by unrestricted investment while they are accumulating. The absence of anything to this effect in the statutory text or the legislative history of NAHASDA indicates that Congress chose to authorize accumulation, rather than augmentation of grant appropriations.

The legislative history of section 203(f) is also clear that the provision has nothing to do with tribes' investment of grant amounts. Specifically, Congress was simply codifying current practice and intended to ensure recipients' ability to expend grants on meaningful construction projects, which often require obligations and expenditures over extended time periods and, in the case of small tribes with relatively small annual grants, require the accumulation of grant amounts over multiple years. *See, e.g.* S. Rept. No.

110-238, 7 (2007) ("Under this new language, grant recipients would be allowed to carry over those funds, not committed for use or expended, for subsequent fiscal years. . . . Grant recipients requested this change *given the nature of construction projects, which are often completed in subsequent fiscal years.*" (emphasis added)). Nothing in the legislative history NAHASDA could support a finding that, in codifying this practice, Congress intended to overrule 24 C.F.R. § 1000.58(g)'s challenged two-year limitation on investments. Reading section 203(f) to preclude the Secretary from limiting the investment of grant amounts to two-years would impute congressional intent to limit the Secretary's discretion to set parameters regarding investment activity that is nowhere to be found in Congress' enactment of the provision.

Finally, section 203(f) was passed *after* the Secretary promulgated 24 C.F.R. § 1000.58(g). "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is one intended by Congress." *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *see also Rosillo-Puga v. Holder*, 580 F.3d 1147, 1157 (10th Cir. 2009). Thus, the fact that Congress chose not to alter the statutory treatment of investments in section 204(b) when it adopted section 203(f) indicates congressional approval of 24 C.F.R. § 1000.58(g) as written.

ii. A finding that NAHASDA prohibits HUD from placing time limitations on investment activity would impermissibly enable a grant recipient to create an endowment out of allocated grant money

Plaintiff's position would also impermissibly allow a grant recipient to transform NAHASDA from an annual block grant program, based on current housing need, into an endowment program. According to Plaintiff, investments "for the purposes of carrying out affordable housing activities," 25 U.S.C. § 4134(b), require only that the investment income be spent on affordable housing activities, and that HUD approval applies only to the choice of investment securities and obligations. In other words, recipients could elect not to use grant money on affordable housing activities in favor of indefinitely investing all NAHASDA grant funds since HUD would have no authority to place time limitations on investments. Recipients could hold all grant amounts in permanent investment accounts, and spend only investment income on affordable housing activities – e.g., create endowments.

Plaintiff's position also conflicts with that of the Comptroller General, who has determined that the creation of endowments out of federal grant program funds must be explicitly authorized by statute. 42 Comp. Gen. 289 (1962). NAHASDA provides no such authorization. Plaintiff has not identified any statutory authority to the contrary.

C. The Requirement that Recipients Return Income Earned on Investments Beyond Two Years is an Entirely Permissible Construction of NAHASDA and NAHASDA Regulations

i. Income from unauthorized investment of grant amounts, such as investments beyond two-years, is not "program income" and must be returned to the federal government

The general rule of federal appropriations law is that "interest earned by a grantee on funds advanced by the United States belongs to the United States rather than to the grantee and must be paid to the United States." 71 Comp. Gen. 387, 388 (1992) (citing 64 Comp. Gen. 96 (1984); 42 Comp. Gen. 289 (1962)); *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-79 (3d ed., Feb. 2006) ("GAO Redbook"). "Once grant funds have been applied to authorized grant purposes, . . . the income earned on the funds is called 'program' or 'grant-related' income and, in contrast with income earned on grant advances, may generally be retained by the grantee for grant-related uses." 71 Comp. Gen. 387, 388 (citing 44 Comp. Gen. 87 (1964)). However, "any interest earned on grant funds when *those funds are not used for authorized grant purposes* must be considered interest earned on grant advances, and hence, belongs to the United States." *Id.* (emphasis added). In other words, any interest earned on the investment of grant funds beyond two years must be returned to the United States because investment of grant amounts beyond two years is an unauthorized use of grant funds in light of 24 C.F.R. § 1000.58(g).

It does not suffice to argue that Congress can legislatively make exceptions to the rule that interest earned on unauthorized use of grant funds belongs to the United States,

see 71 Comp. Gen. 387, and did so in NAHASDA by allowing tribes to make investments, 25 U.S.C. § 4134, and providing that a recipient "may retain any program income that is realized from any grant amounts. . . ." *id.* § 4114(a)(1). The Redbook provides the following example that is instructive: although a grantee may make loans and retain interest earned on the loans as program income under HUD's Community Development Block Grant program, "if a loan is later found to be ineligible under the program, the funds were never used for an authorized grant purpose, and interest earned by the grantee must be paid over to the United States. . . ." GAO Redbook, p. 10-79 (citing 71 Comp. Gen. 387). Thus, even though section 104(a) permits a grant recipient to retain program income, interest earned from funds used for an unauthorized grant purpose – here, investments beyond two years – must be paid over to the United States.

Clearly, then, the requirement that recipients return income earned on investments beyond two years is consistent with section 104(a) of NAHASDA, and 24 C.F.R. § 1000.62. While HUD does not dispute that program income as defined by 24 C.F.R. § 1000.62 includes income from *authorized* investments, and that section 104 of NAHASDA permits a recipient to retain program income, income from unauthorized investments, such as investments made in contravention of 24 C.F.R. § 1000.58(g), cannot logically or in accordance with federal appropriations law be construed as program income. Plaintiff's claim that Notice PIH 2009-6, section 7(c), is unlawful because it requires recipients to return income from unauthorized investments therefore fails.

ii. Investment income does not fall within section 104 because it is not earned after the initial disbursement of the grant amount received

Even if the Court construes program income under section 104(a) to include income realized from investments after two-years, section 104 still does not conflict with the challenged two-year limitation on investments. Section 104(a) only requires that a recipient be entitled to retain program income that "was realized *after the initial disbursement* of the grant amount received. . . ." 25 U.S.C. § 4114(a)(1)(A) (emphasis added). An investment should not be considered an initial disbursement of the grant amount received because investments are made prior to expenditure on a housing activity. This interpretation is consistent with the definition of a disbursement, which is an amount paid to liquidate an obligation. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 45 (September 2005). Using grant amounts for affordable housing activities fits within this definition because grant funds are being disbursed to pay bills and assistance obligations incurred on affordable housing activities. By contrast, use of grant amounts for investment purposes does nothing to discharge a recipient's obligations tied to affordable housing activities; if anything, it avoids using grant money to pay housing bills.

Conclusion

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint pursuant to FED. R. CIV. P. 12(b)(1) and (6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2010, I electronically filed the foregoing "Opening Brief in Support of Defendants' Motion to Dismiss Plaintiff's Complaint" with the Clerk of Court using the ECF System. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: Gregory D. Nellis and Michael A. Simpson, Attorneys for Plaintiff, email: gnellis@ahn-law.com and msimpson@ahn-law.com.

s/ Jennifer Kaplan
JENNIFER KAPLAN