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

1 MUSCOGEE (CREEK) NATION DIVISION OF HOUSING,	)	
Plaintiff,	)	
v.	)	**Case No. 10-CV-193-JHP**
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.	)	

MUSCOGEE (CREEK) NATION'S RESPONSE BRIEF TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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

Gregory D. Nellis, OBA #6609
Michael A. Simpson, OBA #21083
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Attorneys for Plaintiff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiff, Muscogee (Creek) Nation, through its counsel, Gregory D. Nellis and Michael A. Simpson of Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., submits its Response Brief to the Defendants' Motion to Dismiss and Opening Brief in Support (Doc. Nos. 21 and 21-1), and states:

I. The narrow "agency discretion" exception to the sovereign immunity waiver in the Administrative Procedures Act does not apply.

A. The Nation also seeks relief pursuant to the *Young* doctrine

In claiming that it retains sovereign immunity in this case pursuant to an exception in the Administrative Procedures Act ("APA"), HUD first overlooks that there is another procedural basis for overcoming HUD's sovereign immunity in this suit – the *Ex parte Young* doctrine. Pursuant to the *Young* doctrine, an aggrieved plaintiff may bring suit for prospective equitable relief against a government officer, in an official capacity, when the officer acts outside statutory (or Constitutional) limits on the officer's powers, which renders the acts in question ultra vires. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 69 S. Ct. 1457, 1461 (1949). That is precisely what the Nation alleges in this case – that HUD has enacted, and is enforcing against the Nation, a regulation and a " notice" that violates the Native American Housing Assistance and Self-Determination Act ("NAHASDA") and, therefore, exceeds HUD's authority.[1] (*See* Compl. ¶¶1-2, 16-18, 20-22.) *See Pence v. Kleppe*, 529 F. 2d 135, 138-140 (9th Cir. 1976) (holding that 5 U.S.C. §701(a)(2) only limits a federal court's jurisdiction through the Administrative Procedures Act "and nothing more").

At this pleading stage, the Nation in only required to set forth allegations that the Defendants are engaged in an ongoing violation of the authority granted to them pursuant to NAHASDA. *See*

---

[1] As explained *infra*, the Notices at issue were also enacted without notice and comment as required by the APA, which states a claim under both the APA and the *Young* doctrine.

Verizon Md., Inc. v. Public Service Comm'n, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760 (2002). The allegations of the Complaint are more than sufficient in explaining how 24 C.F.R. §1000.58(g) and Notice PIH 2007-24 violate NAHASDA.

B. The "agency discretion" exception to the APA's immunity waiver does not apply.

HUD's position that it retains immunity under the APA exception, 5 U.S.C. §701(a)(2), which precludes judicial review under the APA when the agency action in question is "committed to agency discretion by law," is rife with problems. Primarily, as HUD recognizes, this exception to the broad immunity waiver in the APA, is only applied in "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Webster v. Doe*, 486 U.S. 592, 599, 108 S. Ct. 2047, 2051 (1988) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971)). HUD also recognizes that this exception is "very narrow". *Citizens to Preserve Overton Park*, 401 U.S. at 410, 91 S. Ct. at 820.

The cases relied upon by HUD that apply this exception to the APA's broad immunity waiver involve areas traditionally reserved to the Government's full discretion. For instance, in *Heckler v. Chaney* – the primary case relied upon by HUD in its Motion – the Supreme Court held that the Food and Drug Administration could not be ordered to prosecute its regulatory authority under a federal statute that did not require it to do so. *See* 470 U.S. 821, 837-38, 105 S. Ct. 1649, 1659 (1985). In so holding, the Court noted that the decision "*not to* prosecute or enforce ... is a decision generally committed to an agency's absolute discretion." *Id.* at 831, 105 S. Ct. at 1655 (emphasis added). *Cf. Selman v. United States*, 941 F.2d 1060, 1064 (10th Cir 1991) (no jurisdiction under APA because I.R.C. stated, without establishing criteria, that Secretary "may abate" certain interest owed on back

taxes caused by the taxpayer); *American Bank N.A. v. Clarke*, 933 F.2d 899 (10th Cir. 1991) (noting express language that gave Comptroller full authority to appoint bank receiver without notice or hearing because of frequently urgent nature of such appointment).

By contrast, this case involves HUD enacting a regulation and issuing "Notices" that exceeded its statutory powers, which HUD subsequently enforced against the Nation. In that scenario, as the Supreme Court explained in *Heckler*, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. *The action at least can be reviewed to determine whether the agency exceeded its statutory powers*." *Id.* at 832, 105 S. Ct. at 1656 (emphasis added).

Further, in determining whether the §701(a)(2) exception applies, this Court must review NAHASDA's express language and its statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. *American Bank*, 933 F.2d at 902 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345, 104 S. Ct. 2450, 2453-54 (1984)). In this case, a full review of NAHASDA shows that the issues asserted by the Nation in its Complaint are not as "cut and dry" as HUD argues in its Motion because there clearly is law for this Court to apply. For instance:

1. In NAHASDA, Congress found that federal assistance for providing affordable homes to Indians "should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes." 25 U.S.C. §4101(7). *See also* 24 C.F.R. §1000.2 (HUD recognizing this "guiding principle").

2. HUD "***may not*** restrict access to or reduce the grant amount for any Indian tribe based on" whether the Indian tribe "retains program income" or "retains reserve amounts". 25 U.S.C.

§4114(a)(2) (emphasis added). In other words, contrary to HUD's insinuation in its Motion, it has *no authority* to reduce the Nation's funding if the Nation retains program income, including interest income.

3. Also contrary to HUD's argument in its Motion, section 204 of NAHASDA (25 U.S.C. §4134) does not provide HUD with unfettered authority to regulate how Indian tribes invest grant funds. HUD focuses entirely on the phrase "as approved by the Secretary" in section 204(b) to assert that it has full discretion to regulate investment of grant funds and, therefore, no law exists for this Court to apply. Given that NAHASDA's stated purpose is Indian self-determination and tribal self-governance, *see supra*, HUD's reading of section 204(b) makes no sense – under HUD's interpretation, the "governance" and "determination" would belong solely to HUD, not the tribes as NAHASDA intends.

Examining the *whole* statute, section 204(a) states that "*the tribe shall have ... the discretion* to use grant amounts for affordable housing activities *through equity investments*" and other forms of assistance consistent with NAHASDA's purposes. 25 U.S.C. § 4134(a) (emphasis added). Clearly, this provision does not grant broad authority to HUD, such that there is "no law to apply." In fact, the opposite is true — overall, section 204 gives Indian tribes the authority to determine how to invest grant funds, so long as the funds are committed to NAHASDA purposes. HUD recognizes this concept in its own regulations: "Each year funds shall be paid directly to a recipient in a manner that recognizes the right of Indian self-determination and tribal self-governance and the trust responsibility of the Federal government to Indian tribes consistent with NAHASDA." 24 C.F.R. §1000.56(a).

4. As noted in the Complaint at ¶16, Congress amended NAHASDA in 2008 to allow Indian tribes to carry over all unspent block grant funds. 25 U.S.C. §4133(f)(2). ***HUD admits*** in its Motion that the purpose of this carry over provision was to codifying existing practice of allowing carry over of grant funds "given the nature of construction projects which are often completed in subsequent fiscal years." S. Rep. No. 110-238, at 7 (2007). HUD, however, completely ignores a multitude of other statements of Congress's intent in that Senate Report, including – most tellingly – the preliminary statement as to Congress's "purpose" in enacting the 2008 NAHASDA amendments:

> S. 2062 emphasizes tribal authority to design, implement, and administer tribal housing programs and confirms the federal government's commitment to further tribal self-determination by acknowledging a tribe's right to decide how housing, housing-related infrastructure and development are made in its community.
>
> The bill seeks to clarify existing law *while removing unnecessary statutory and regulatory burdens*. The bill would allow tribes to utilize their grant funding in innovative and effective ways to address their distinct housing needs ... .
>
> ...
>
> *... we also heard that refinement was necessary so Indian tribes can maximize the benefits of the program, especially given that funding for the programs over the last couple of years has failed to keep up with the rate of inflation, resulting in fewer programs*. Suggestions including unnecessary bureaucracy by allowing tribes to decide ***when*** *they will use their funds* for operation and maintenance; housing-related infrastructure, including utilities; and housing-related community development.

Id. at 1 (emphases added). Given this legislative history behind the 2008 NAHASDA amendments, it is clear that Congress intended 25 U.S.C. §4133(f) to remove "unnecessary ... regulatory burdens" that restrict when an Indian tribe must use grant funds. As Congress explained, this allows those funds to be used over the life of multi-year construction projects, during which an Indian tribe is

allowed to invest those funds in securities and other equity investments, including long-term investments, *to counter inflationary depreciation of the grant funds.*

5. As relevant to this case, the only enforcement mechanism available to HUD when an Indian tribe allegedly does not comply with NAHASDA is to make findings through an administrative process that the Indian tribe is in "substantial noncompliance" and to either "terminate payments," "reduce payments," or "limit the availability of payments". 25 U.S.C. §4161(a). HUD *does not* have authority to directly recapture any grant funds; to do so, it must refer the matter to the Attorney General, who "may" file civil suit against the Indian tribe to collect the funds. *Id.* §4161(c). Thus, according to the plain language of 25 U.S.C. §4161, the only NAHASDA provision directly concerning enforcement as to grant amounts, HUD does not have any statutory power to compel an Indian tribe to repay income earned on grant funds. *See also* 24 C.F.R. §1000.538.

6. Further, as the Complaint alleges, HUD's other NAHASDA-related regulations conflict with the challenged regulation, 24 C.F.R. §1000.58. *See City of Colorado Springs v. Solis*, 589 F.3d 1121, 1129 (10th Cir. 2009) (noting that, in analyzing 5 U.S.C. §701(a)(2), "the 'law to apply' can also be derived from the agency's regulations where the agency is acting pursuant to those regulations" (quoting *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997)).

In particular, since NAHASDA's enactment, 24 C.F.R. §1000.62(a) has consistently defined "program income" as any income realized from the disbursement of grant funds. Section 104 of NAHASDA, 25 U.S.C. §4114(a), has consistently stated that Indian tribes may retain any program income. HUD's corresponding regulation, 24 C.F.R. §1000.62(b), states that program income may be retained by the tribe "provided it is used for affordable housing activities." For this reason, even

HUD itself interpreted NAHASDA, at its inception, to allow Indian tribes like the Nation to keep all interest earned on grant amounts:

> NAHASDA grant amounts will often generate interest funds from investment ... activities. The question of whether recipients could keep interest funds was a nonconcensus issue in the proposed rule. Many commenters and tribal committee members strongly supported the right of the recipients *to keep all interest income earned* on grant amounts. The Committee agrees and has drafted a new §1000.62 to the final rule.

63 Fed. Reg. 12333, 12338 (Mar. 12, 1998) (emphasis added).

Clearly, there is plenty of law for the Court to apply to the Nation's allegations in this case and, therefore, 5 U.S.C. §702(a)(2) does not protect HUD from suit. A thorough review of NAHASDA – and HUD's own regulations – reveals that HUD does not have the broad discretion it claims to have in its Motion. To the contrary, for the reasons set forth above, HUD actually lacks the discretion to implement the two-year investment income restriction in 24 C.F.R. §1000.58(g), including in a manner that requires an Indian tribe, such as the Nation, to repay that income to HUD.

II. HUD is not entitled to *Chevron* deference.

A. NAHASDA and its legislative history show that HUD has no authority to recapture grant investment income earned after two years.

The Nation agrees that the rules set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, generally apply to the Nation's claim for relief pursuant to the APA. 467 U.S. 837, 104 S. Ct. 2778 (1984). The Nation disagrees, however, with HUD's argument as to when and how the Court should apply those rules.

Initially, the Nation notes that it is inappropriate for HUD to request the Court to apply *Chevron* at this pleading stage.[2] HUD raises this particular argument pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted. Applying *Chevron* to the Complaint itself, the Nation alleges that HUD's regulation, 24 C.F.R. §1000.58, and the Notices in question directly conflict with the legislative intent of NAHASDA. (Compl. ¶¶10, 14-18.) In other words, the Nation states a claim that Congress's unambiguous intent in NAHASDA requires that Indian tribes be allowed to retain all program income, including investment interest. That is all that the pleading rules require of the Nation at this stage of the proceeding.

Under *Chevron*, if "the intent of Congress [in a statute] is clear, that is the end of the matter" because the Court and HUD must give effect to Congress's unambiguous intent. *Id.* at 842-843, 104 S. Ct. at 2781. Even if the statutory language is ambiguous, the Court must still weigh whether HUD's construction of the statue is "permissible" or otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-844, 104 S. Ct. at 2782. In other words, the court must examine the legislative history of NAHASDA to determine if HUD's interpretation "is not one that Congress would have sanctioned." *Id.* at 845, 104 S. Ct. at 2783.

In this case, Congress's intent is clear for the reasons set forth above in detail. Through NAHASDA, Congress has always intended for Indian tribes to retain their "program income", including investment income, as a matter of tribal self-governance and self-determination. Congress has always given *Indian tribes* the discretion to invest grant funds to earn such income. Finally, even

---

2 Before HUD filed its Motion, the Nation's counsel proposed that HUD answer the Complaint, and then work out a set of stipulated facts for the parties to cross-move for a declaratory (or summary) judgment, which is the primary relief requested by the Nation. This was apparently rejected so that HUD could pursue its spurious jurisdictional argument.

if it was not clear before, Congress made it clear in 2008 that the grant funds, including the investment returns earned on them, should be carried forward by the Indian tribes without "unnecessary" regulatory burdens. By focusing on only a few words in NAHASDA, HUD asks this Court to ignore the full context and purpose of that law and its crucial legislative history.

The Comptroller General opinions cited by HUD do not assist its analysis. First, this Court is not bound to follow those decisions. *See Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (referring to Comptroller General's decisions as "not binding"); *Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1140 n.5 (9th Cir. 1999) (same); *Cleveland Telecomms. Corp. v. Goldin*, 43 F.3d 655, 658 n.1 (Fed. Cir.1994) ("Decisions of the Comptroller General are not precedents that are binding on this court."); *Filipiczyk v. United States*, 99 Fed. Cl. 776, 785 (Fed. Cl. 2009) ("[T]he Court of Claims is not bound by the views of the Comptroller General.") (quoting *MTB Group, Inc. v. United States*, 65 Fed. Cl. 516, 525 (Fed. Cl. 2005)); *Action for Boston Comm. Dev., Inc. v. Shalala*, 983 F. Supp. 222, 234 (D. Mass. 1997) ("Opinions of the Comptroller General and the Attorney General are not binding precedent on this court.").

Second, these opinions involve different statutory schemes and scenarios, and, therefore, are distinguishable. For instance, in 71 Comp. Gen. 387 (1992), the HUD grant funds at issue had been loaned for purposes later "determined to be ineligible" under the particular HUD program. *Id.* at 387-388. That opinion was concerned with recapturing interest accrued *before* the funds were spent for the ineligible purpose. HUD parses the language of this opinion to extrapolate it into a completely different argument in this case. In reality, the Comptroller General agreed in the 1992 opinion that once grant funds are spent on eligible grant purposes, the interest may be kept. *See id.* at 389. In

other words, the controlling factor was what the grant funds were spent on, not when they were spent.

This holding by the Comptroller General parallels the requirement in NAHASDA that a grant recipient may retain all program income and carry over all grant funds as long as they are dedicated to NAHASDA-related purposes. 25 U.S.C. §§ 4114(a), 4133(f). In this case, however, HUD's regulation allows the interest earned before the two-year limitation to be kept, while requiring an Indian tribe to repay it after the two-year limitation without regard to whether the funds have been committed to, or later spent on, a valid NAHASDA purpose. This is contradictory to the requirement in 25 U.S.C. §4114(a) that Indian tribes be allowed to retain program income regardless of when such income is earned.

The other opinion cited by HUD, 42 Comp. Gen. 289 (1962), is also distinguishable because that opinion focused on Congress's intent in the express language of the enabling statute for the grant program in question. The Comptroller General recognized in that decision that Congress may pass laws that make "unconditional grants or gifts" of federal funds, which is determined from the statutory construction and legislative history. *Id.* at 293. The Comptroller found that the particular law at issue did not provide any unconditional grant of the aid in question and that the interest earned on grant funds should therefore be repaid to the Treasury. *Id.* at 294.

In this case, the Comptroller General's reasoning actually supports the Nation's case because, as explained above, NAHASDA's express language and its legislative history support treatment of the grant funds issued to Indian tribes as "unconditional" as to the time in which they are to be spent. Put simply, HUD has no authority to restrict *when* such funds are spent, only *how* they are spent, i.e., on NAHASDA-authorized purposes. This, coupled with NAHASDA's express purpose of

supporting tribal self-government and self-determination, 25 U.S.C. §4101(7), shows that Congress in fact intended for Indian tribes to keep income earned on invested grant funds.

Ultimately, the parties' dispute is over how one should interpret section 204(b) of NAHASDA, particularly the phrase "investment securities and other obligations as approved by the Secretary." The parties agree that this phrase provides HUD with the authority to delineate appropriate investment vehicles for grant funds, which HUD has done in 24 C.F.R. §1000.58(c) since 1998. The policy behind such a regulation is obvious – Congress (and HUD) would not want an Indian tribe to place grant funds in risky investments. Accordingly, the obvious reading of the phrase "as approved by the Secretary" in section 204(b), particularly when read with section 204(a)'s general grant of investment discretion to the Indian tribes, is that the phrase "as approved by the Secretary" modifies "investment securities and other obligations", meaning the *types* of investments securities and obligations.

What HUD overlooks – today – is that it originally agreed with this interpretation – in 1998 – when NAHASDA was newly passed. As noted above, in the Federal Register publication discussing the drafting process of the original NAHASDA regulations, it was stated in reference to 24 C.F.R. §1000.62, which regulates "program income", that HUD ultimately agreed with "the right of the recipients to keep all interest income earned on grant amounts." 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998). The commentary goes on to state that the regulations would still require Indian tribes to use the investment income subject to NAHASDA requirements, but does not mention any time restriction on earning such income. *Id.* Thus, in 1998, the negotiating rule committee, including its HUD representatives, agreed that NAHASDA authorized Indian tribes to retain investment income as "program income" as long as it was dedicated to NAHASDA purposes.

When HUD issued its first Notice regarding 24 C.F.R. §1000.58 in 1999, it did not vary from this interpretation. That particular Notice stated, in relevant part:

> Maturity schedule: Investments may be for a period no longer than two years. The recipient shall maintain a schedule evidencing that the proposed investments will mature on the approximate dates the funds will be needed and that investment maturity dates do not exceed two years.

(HUD Notice PIH 99-4 (Feb. 3, 1999), attached as "Ex. 1.") Noticeably, this provision contained no language requiring an Indian tribe that had invested funds beyond the two-year "maturity schedule" to repay any unused income the investments had generated to HUD. Accordingly, like the regulation determining what types of investments grant funds could be invested in, it appears that HUD put a two-year restriction on the maturity of investments to avoid the funds being placed in investments that would not be available in time for spending on affordable housing purposes. The regulation, and the 1999 Notice, say nothing about HUD's speculative arguments in its Motion that Indian tribes will otherwise create huge "endowments" of money that will not be spent on NAHASDA programming.

This initial reading of 24 C.F.R. § 1000.58(g) as simply restricting the investment maturity date was maintained by HUD in its Notices until eight years later on August 10, 2007. (*See* PIH Notices 2000-21, 2001-21, 2003-14, and 2004-21, attached collectively as "Ex. 2"). On that date, without any notice and comment period, HUD significantly changed its view in Notice PIH-2007-24, ¶7(c), by adding a sentence that states: "Because the regulation at 24 CFR §1000.58(g) restricts the investment period to 2 years, any interest accrued after the expiration of the 2-year period must be returned to the Department." (Attached as "Ex. 3"). This new, self-granted power was restated in Notice PIH-2009-6, ¶7(c) as well. (Attached as "Ex. 4"). The date Notice PIH-2007-24 was issued,

August 10, 2007, is crucial in this case because it was issued *only five days before* HUD sent its August 15, 2007, draft monitoring report to the Nation. (Draft Monitoring Report (excerpt), attached as "Ex. 5"; *see also* Joint Status Rpt. (Doc. No. 23) at §3(C), ¶6.) Obviously, at that time, the investment interest at issue had been earned on investments made well before PIH-2007-24 was issued. In fact, that monitoring report itself makes no mention of repaying any interest earned on the grant funds in question. (*See id.* at 29-31.)[3]

Applying *Chevron* to this case, this history shows that HUD's sudden change in view as to its enforcement powers disregards Congress's mandate in NAHASDA that Indian tribes be allowed to retain program income, including interest – a position that HUD had apparently agreed with from 1998 to 2007. In addition, any interpretation by HUD that NAHASDA, in its initial form, somehow allowed HUD to recapture investment income was clearly addressed in the 2008 NAHASDA amendments that allow for indefinite carry over of grant funds. These points have been throughly explained above and only bear repeating to show that Congress has spoken and that "is the end of the matter".[4] Adding to this point, however, even HUD's August 15, 2007 monitoring report to the

---

[3] The report actually states that HUD expected the Nation to repay the unspent grant funds in their entirety unless the Nation could document that they had already been spent. That demand was clearly obviated by the 2008 NAHASDA amendments that allowed tribes to carry over grant funds to later years for uses set forth in the tribe's Indian housing plan. 25 U.S.C. §4134(f).

[4] In an attempt to confuse the issues, HUD also argues that the 2008 NAHASDA amendment that added reserve accounts to the list of NAHASDA purposes in 25 U.S.C. § 4132(9) shows that Congress intended to restrict investment into such accounts. As that provision indicates, however, reserve accounts are intended solely for administrative and planning costs (e.g. salaries), and not for direct spending on affordable housing costs. *Id.* Investment accounts, by contrast, are intended for all "grant amounts", including grant funds dedicated to housing construction and repair costs. *Id.* §4134. In fact, the Nation has never held a reserve account; any initially unspent grant funds have always been held in investment accounts for future use on NAHASDA-related expenditures.

Nation does not specifically mention the return of interest income earned on invested grant funds that had not been spent beyond HUD's two-year window.

B. HUD's issuance of Notice PIH-2007-24 and its progeny violated the APA's notice and comment procedures.

Even if the Court deems 24 C.F.R. §1000.58(g) to be a valid regulation, HUD's Motion overlooks the most crucial aspect of the Nation's Complaint. The Nation's concern is not just HUD's two-year restriction on investment income, but also HUD's attempts to enforce that restriction by recapturing interest income. This power is nowhere to be found in NAHASDA, and *not in HUD's regulations* either. HUD's attempt to self-impose interest recapture powers comes solely from Notice PIH 2007-24. Accordingly, HUD's self-imposed power suffers from another serious defect- this and later Notices actually created a "legislative rule" without the negotiated rulemaking required by NAHASDA, 25 U.S.C. § 4116(b)(2)(A), or any notice and comment period as required by the APA. 5 U.S.C. §553.

"Under the APA, legislative rules can be issued only following notice and comment procedures. A rule is legislative when it has the force of law, and creates new law or imposes new rights or duties." *Sorenson Communications, Inc. v. FCC,* 567 F.3d 1215, 1222 (10th Cir. 2009) (quotations omitted). When a challenged agency action creates a legislative rule, the agency ***must*** comply with the notice and comment process in the APA. *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1158 (10th Cir. 2006). Notice PIH-2007-24 and its progeny obviously violate these requirements because they create "law" that does not exist in NAHASDA, and impose new "duties" on Indian tribes, by compelling tribes to repay investment income earned after two years.

The United States Court of Appeals for the District of Columbia Circuit has addressed this trend best:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 85 (1995). The agency may also think there is another advantage - immunizing its lawmaking from judicial review.

Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1020 (D.C. Cir. 2000) (footnote omitted). In this case, as the legislative – and administrative – history explained above shows, HUD is now engaging in *exactly* the same behavior feared by the D.C. Circuit in *Appalachian Power*. HUD has created its own "law" in Notice PIH-2007-24, enforced it unfairly against the Nation, and now attempts to "duck and cover" by arguing that this Court cannot review these actions. Adding to this questionable behavior, HUD issued these Notices presumably knowing that they conflict with HUD's initial promise that Indian tribes would be allowed "to keep ***all*** interest income earned on grant amounts." 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998) (emphasis added).

At a minimum, the Nation pleads a case that the Notices are illegal because they were issued in violation of the APA's notice and comment requirements. If HUD believes that NAHASDA

provides it with the discretion to force repayment of investment income – which NAHASDA does not state – HUD was still required to set forth such power in its regulations after a proper notice and comment period. Further, NAHASDA itself requires that any such regulation be issued through a negotiation rulemaking process, which, as to the Notices, never occurred. 25 U.S.C. §4116. HUD has failed to comply with all of these requirements, and the Notices, therefore, cannot stand.

III. Conclusion

HUD is not entitled to immunity from the Nation's claims to the extent they are based on violations of the APA. As alleged in the Complaint, in enforcing its regulations and policies on investment income, HUD acts outside the scope of powers that Congress has bestowed upon HUD through NAHASDA. Such an allegation clearly states a claim under the *Ex parte Young* doctrine and the APA, and HUD's jurisdictional argument should accordingly be denied.

In addition, HUD's *Chevron* "deference" argument is inappropriate at this pleading stage, and incorrect. The Nation alleges that 24 C.F.R. §1000.58(g) and the Notices at issue exceed the scope of HUD's powers as set forth in NAHASDA. Ignoring the obvious, HUD fails to recognize that the "SD" in NAHASDA stands for "Self-Determination" and that the law's basic premise is to promote tribal self-governance. 25 U.S.C. §4101(7). HUD apparently understood that premise for nine years before reversing course and requiring Indian tribes to repay investment income earned after the two-year window that HUD imposes on investments, without any authority. In addition, the Notices that require this repayment were issued in obvious violation of NAHASDA's requirement of negotiated rulemaking, and the APA's requirement for notice and comment.

For all of these reasons, the Court should deny HUD's Motion to Dismiss.

Respectfully submitted,

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

/s/ Michael A. Simpson
Gregory D. Nellis, OBA #6609
Michael A. Simpson, OBA #21083
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
Attorneys for Plaintiff

CERTIFICATE OF MAILING

This is to certify that on this, the 28th day of September, 2010, a true, correct, and exact copy of the above and foregoing instrument was sent via ECF to:

Jeanette P. Windsor jeanette.windsor@usdoj.gov, susie.mounts@usdoj.gov, usaoke.civil@usdoj.gov

Jennifer B. Kaplan jennifer.b.kaplan@usdoj.gov

/s/ Michael A. Simpson

S:\Files\220\4\Resp-MTD-mas-acm.wpd