UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 11-7040

MUSCOGEE (CREEK) NATION DIVISION OF HOUSING,

Appellant,

v.

U.S. 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,

Appellees.

Appeal from United States District Court for the Eastern District of Oklahoma
Honorable James H. Payne, Presiding
Dist. Ct. No. 10-CV-193-JHP

OPENING BRIEF FOR APPELLANT

Oral Argument Requested **August 15, 2011**

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TABLE OF CONTENTS

Table of Authorities. iv

Statement of Related Appeals. viii

Jurisdictional Statement. 1

Statement of the Issues. 2

Statement of the Case. 2

Statement of Facts. 4

A. A history of NAHASDA's relevant provisions. 5

B. The enforcement action taken by HUD against the Nation. 11

Summary of Legal Argument. 13

Legal Argument. 14

I. The district court erred in ruling it lacked subject matter jurisdiction. 14

A. Standard of review. 14

B. The "agency discretion" exception to the APA's immunity waiver does not apply to this case. 14

II. The district's court's dismissal of the Nation's claims was legally flawed. 23

A. Standard of review. 23

B. The complaint sufficiently pleads that 24 C.F.R. §1000.59(g) and the 2009 Notice are illegal. 24

1. NAHASDA and its legislative history show that HUD has no authority to recapture grant investment income earned after two years..... 24

a. *NAHASDA's plain language supports retention of investment income by tribal housing authorities as "program income"* 25

b. *Any ambiguity in NAHASDA §204(B) must be construed in favor of the Nation's reasonable interpretation of that law.*..... 26

2. HUD's issuance of Notice PIH-2007-24 violated the APA's notice and comment procedures..... 34

Conclusion. 37

Oral Argument Statement. 38

TABLE OF AUTHORITIES

Cases **Page(s)**

Abbott Labs. v. Gardner, 387 U.S. 136 (1967). 14

Appalachian Power Co. v. E.P.A., 208 F.3d 1015 (D.C. Cir. 2000). 35, 36

Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937 (2009). 23

Assiniboine & Sioux Tribes of the Ft. Peck Indian Reservation v. Board of Oil & Gas Conservation, 792 F.2d 782 (9th Cir. 1986). 15

Ballesteros v. Ashcroft, 452 F.3d 1153 (10th Cir. 2006). 34

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). 23

Bixler v. Foster, 596 F.3d 751 (10th Cir. 2010). 23

Block v. Community Nutrition Inst., 467 U.S. 340 (1984). 17

Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984)..... 3, 4, 13, 24, 26, 37, 38

Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188 (10th Cir. 2009). 23

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)..... 14, 15

City of Colorado Springs v. Solis, 589 F.3d 1121 (10th Cir. 2009). 16, 21

Cleveland Telecomms. Corp. v. Goldin, 43 F.3d 655 (Fed. Cir.1994). 29

Colorado Environ. Coalition v. Wenker, 353 F.3d 1221 (10th Cir. 2004)..... 17

Heckler v. Chaney, 470 U.S. 821 (1985). 16, 17

Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278 (3rd Cir. 1983)..... 14

Kirby v. HUD, 675 F.2d 60 (3rd Cir. 1982). 18

Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3rd Cir. 1979)..... 15

McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997). 16

Nader v. Civil Aeronautics Bd., 657 F.2d 453 (D.C. Cir. 1981)..... 15

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,
546 F.3d 1288 (10th Cir. 2008). 14

Nevada v. Department of Energy, 400 F.3d 9 (D.C. Cir. 2005). 29

Novato Fire Protection Dist. v. United States,
181 F.3d 1135 (9th Cir. 1999). 29

Pearson v. Callahan, 555 U.S. 223 (2009)..... 14

Ramah Navajo Chapter v. Lujan, 122 F.3d 1455 (10th Cir. 1997)..... 26, 27

Ramah Navajo Chapter v. Salazar, 644 F.3d 1054 (10th Cir. 2011)..... 27, 29, 33

Saucier v. Katz, 533 U.S. 194 (2001). 14

Sorenson Communications, Inc. v. FCC, 567 F.3d 1215 (10th Cir. 2009). 34

United Keetoowah Band of Cherokee Indians v. HUD,
567 F.3d 1235 (10th Cir. 2009). 23, 24

Webster v. Doe, 486 U.S. 592 (1988). 14, 16

Statutes **Pages**

5 U.S.C. §553..... 34

5 U.S.C. §701..... 1, 3, 14, 17, 22

5 U.S.C. §§701-706. 1

5 U.S.C. §702..... 22

5 U.S.C. §§702-704. 14

25 U.S.C. §§4101-4243. 1

25 U.S.C. §4101..... 5, 18, 25, 27, 37

25 U.S.C. §4102..... 5

25 U.S.C. §4103..... 5

25 U.S.C. §4111..... 5

25 U.S.C. §4112..... 5

25 U.S.C. §4114..... 6, 20, 22, 25, 29

25 U.S.C. §4116..... 34, 37

25 U.S.C. §4133..... 9, 20, 21, 25, 29

25 U.S.C. §4134..... 4, 6, 18, 19, 22, 25, 30, 33

25 U.S.C. §4161. 21

28 U.S.C. §1291. 1

28 U.S.C. §1294(1). 1

28 U.S.C. §1331. 1

28 U.S.C. §1346. 1

28 U.S.C. §1362. 1

Pub. Law 110-411. 9

Others **Pages**

24 C.F.R. § 1000.2. 18

24 C.F.R. § 1000.56. ..... 8, 19

24 C.F.R. § 1000.58. ..... 2, 3, 4, 9, 11, 12, 13, 16, 18, 21, 23, 24, 25, 27, 30, 31, 32, 33, 34, 37

24 C.F.R. § 1000.62. ..... 7, 8, 22, 25, 28

24 C.F.R. § 1000.538. 21

63 Fed. Reg. 12333, 12338. ..... 7, 8, 22, 25, 31, 36

S. Rep. No. 110-238. ..... 10, 11, 20

Fed. R. App. Proc. 4(a)(1)(B). 1

Fed. R. Civ. Proc. 12(b)(6). 4, 23

71 Comp. Gen. 387 (1992). 28, 29

GAO, A Glossary of Terms Used in the
Federal Budget Process (2005). 28

STATEMENT OF RELATED APPEALS

There are no prior or related appeals to this case.

JURISDICTIONAL STATEMENT

Appellant, Muscogee (Creek) Nation Division of Housing ("the Nation"), brought suit in the United States District Court for the Eastern District of Oklahoma, alleging that the district court had jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. §§701-706, and 28 U.S.C. §§1331 (federal question), 1346 (United States as defendant), and 1362 (Indian tribe as plaintiff). (Apx. at 8.) The complaint sought a declaratory judgment and injunction to prevent the enforcement by the United States Department of Housing and Urban Development ("HUD"), and certain of its officials, of a regulation and "notices" that HUD issued in relation to the Native American Housing and Self-Determination Act, 25 U.S.C. §§ 4101-4243 ("NAHASDA"). (Apx. at 49-51.) All of the defendants moved to dismiss, claiming (1) they are immune from suit pursuant to the 5 U.S.C. §701(a)(2) in the APA, and (2) that the complaint fails to state a claim. (Apx. at 16-44.)

The district court entered an order on May 2, 2011, which agreed with both of HUD's positions. (Apx. at 107-129.) Accordingly, the district court entered a judgment dismissing this case in its entirety. (Apx. at 130.) The Nation timely appealed the order and judgment to this Court as a "final decision" on May 24, 2011. 28 U.S.C. §§ 1291, 1294(1); Fed. R. App. Proc. 4(a)(1)(B). (Apx. at 131.)

STATEMENT OF THE ISSUES

1. The district court erred in ruling that the defendants enjoy immunity from the Nation's APA-related claims because the regulation and "notices" at issue are not matters "committed to agency discretion".

2. The Nation has valid claims for relief from the regulation and "notices" because they conflict with NAHASDA and other HUD regulations.

3. The "notices" were legislative rules improperly issued without the negotiated rulemaking required by NAHASDA or public notice and comment as required by the APA.

STATEMENT OF THE CASE

The Nation brought this suit against (1) HUD, (2) HUD Secretary Shaun Donovan, (3) Sandra Henriquez, who is HUD's Assistant Secretary for the Office of Public and Indian Housing, and (4) Wayne Sims, who administers HUD's Southern Plains Office for Native American Programs in Oklahoma City, Oklahoma (collectively the "Government"). The individual defendants were sued in their official capacities. (Apx. at 8-9.)

The complaint brought claims challenging the authority of HUD to issue a regulation, 24 C.F.R. § 1000.58(g), and "Notice PIH 2009-6" (hereinafter the "2009 Notice"), which limit the ability of Indian housing authorities to retain

interest accrued on money distributed by HUD to tribes for placement in investment accounts. (Apx. at 9-13.) The Nation claimed 24 C.F.R. § 1000.58(g) and the 2009 Notice conflict with: (1) NAHASDA's general purposes of tribal self-determination; (2) other NAHASDA regulations that define investment interest as "program income"; and (3) NAHASDA amendments in 2008 permitting Indian housing authorities to retain such program income indefinitely as long as the income is dedicated to housing program purposes. The Nation also argued to the district court that the 2009 Notice (and its predecessor notice in 2007) was a legislative rule issued without notice and comment as required by the APA. (Apx. at 10-13; 56-65.)

The Government moved to dismiss, claiming an exception to the sovereign immunity waiver in the APA for "agency action ... committed to agency discretion by law" applied. 5 U.S.C. §701(a)(2). The Government also claimed the complaint failed to state a claim based on the standards of review set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), that apply when an agency interprets its own governing statute. The Government argued that NAHASDA was silent as to the issues raised by the Nation and, therefore, it was entitled to deference in issuing 24 C.F.R. §1000.58(g) and the 2009 Notice. (Apx. at 28-43.)

The district court issued an order and opinion on May 2, 2011, which agreed with the Government's positions. The district court determined that the APA immunity exception applied because 25 U.S.C. §4134(b) provides "no judicially manageable standards" as to how HUD should exercise its discretion in "approving" tribal investments of grant funds. (Apx. at 114.) Thus, the district court ruled it lacked subject matter jurisdiction. (Apx. at 112.)

Though counterintuitive to its immunity/jurisdiction ruling, the district court also proceeded to rule on the validity of the Nation's complaint pursuant to Fed. R. Civ. Proc. 12(b)(6). In doing so, the district court ruled that NAHASDA "does not speak" as to scope of HUD's authority to regulate the tribes' investments of block grant funds, and, therefore, HUD was entitled to deference under *Chevron*. As such, the district found 24 C.F.R. §1000.58(g) and the Notice to be "permissible constructions" of HUD's authority under NAHASDA. (Apx. at 119-128.) The district court also found that the Notice was not a "legislative" rule that required public notice and comment under the APA. (Apx. at 129.) The Nation filed a timely appeal from this decision. (Apx. at 131.)

STATEMENT OF FACTS

The Muscogee (Creek) Nation is a federally recognized Indian tribe, and maintains a Division of Housing, which is the Nation's "tribally designated

housing entity" pursuant to NAHASDA. 25 U.S.C. §4103(22). NAHASDA is administered by the HUD Secretary through HUD's Office of Native American Programs. *Id.* §4102.

A. A history of NAHASDA's relevant provisions

Congress enacted NAHASDA in 1996 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." *Id.* §4101(6).

NAHASDA seeks to accomplish this goal by providing federal assistance "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 or tribally designated entities[.]" *Id.* §4101(7). Thus, NAHASDA appropriates block grants directly to Indian tribes and tribally designated housing entities for the purpose of providing affordable homes in Indian reservations and territories. *Id.* §4111(a). In order to receive grant funds, a tribe or tribally designated housing entity must provide an "Indian housing plan" each fiscal year to HUD setting forth a 1-year plan as to what the tribe or tribally designated entity will do with the grant funds to achieve housing goals and objectives. *Id.* §4112.

Section 204(b) of NAHASDA, 25 U.S.C. §4134(b), allows Indian tribes receiving NAHASDA block grants to invest such grant funds "in investment securities and other obligations as approved by the Secretary" as long the investments will be used for carrying out affordable housing activities. As explained below in the legal argument, the parties disagree on whether the phrase "as approved by the Secretary" refers solely to the type of investments HUD may approve, or if it also means the Secretary may limit how long such investments may be made.

Also relevant to this appeal, NAHASDA allows block grant recipients to retain any "program income" earned after the distribution of grant funds when such program income is dedicated to housing purposes:

> Notwithstanding any other provision of this chapter, a recipient may retain any program income that is realized from any grant amounts under this chapter if–
>
> (A) such income was realized after the initial disbursement of the grant amounts received by the recipient; and
>
> (B) the recipient has agreed that it will utilize such income for housing related activities in accordance with this chapter.

25 U.S.C. §4114(a)(1). HUD is not allowed to penalize a tribal grant recipient by restricting access to grant funds or reducing future grant amounts when the recipient keeps such program income. *Id.* §4114(a)(2). While NAHASDA itself

does not define "program income", HUD's implementing regulations do provide a definition:

> Program income is defined as any income that is realized from the disbursement of grant amounts. ... Program income includes income from ... payments of principal and interest earned on grant funds prior to disbursement.

24 C.F.R. §1000.62(a).

After NAHASDA's passage, a negotiating rule committee that included HUD and tribal representatives prepared a comprehensive set of regulations to implement NAHASDA, which were finalized in 1998. The above-quoted definition of "program income" was put into place in those regulations and remains unchanged today. Further, as the negotiated rule committee reported in 1998, the issue of whether to include interest income within the regulatory definition of "program income" was a "nonconsensus issue" between the tribes and HUD, with HUD ultimately relenting and allowing such income to be kept by the tribes:

> NAHASDA grant amounts will often generate interest funds from investment and program funds from tribal housing activities. The question of whether recipients could keep interest funds was a nonconsensus 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). Thus, everyone understood in 1998 that Indian tribes receiving NAHASDA grant funds would be able to retain the

interest earned on those funds, **including from investments into which those grant funds were placed by tribes prior to disbursement**.[1] 24 C.F.R. §1000.62(a).

Also implemented in 1998, 24 C.F.R. §1000.58(g) purports to restrict the investment of block grants to no longer than two years. The negotiated rule committee's report does not discuss in any detail why this particular regulation was put into place. *See* 63 Fed. Reg. 12333, 12338.

After the 1998 regulations went into effect, HUD began issuing a series of "notices" relating to various administrative requirements for Indian tribes to follow in investing NAHASDA block grant funds. The first of these notices, Notice 99-4, was issued in 1999 and 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.

(Apx. at 71-72.) Noticeably, this provision contained no language requiring an

[1] 24 C.F.R. § 1000.56(a), which addresses how NAHASDA funds are paid by HUD to recipients, states that: "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."

Indian tribe that had invested funds beyond the two-year "maturity schedule" to repay any unused income the investments had generated to HUD.

The 1999 notice instead focuses on the requirement in 24 C.F.R. §1000.58(g) that investments should not extend beyond two years. This limitation was presumably put into place to ensure tribes would have access to the grant funds as needed to spend on housing purposes by preventing investments from having long-term maturity dates. In other words, the regulatory purpose was to maintain cash flow, not to restrict the tribe's ability to earn additional funds from the grants.

Subsequent notices in 2000-2004 simply extended the 1999 notice. (Apx. at 73-76.) HUD, however, "reissued" Notice 99-4 on August 10, 2007 through Notice PIH-2007-24 (the "2007 Notice"). (Apx. 77.) Section 7(c) of the 2007 Notice pronounced for the first time that "any interest accrued after the expiration of the 2-year period must be returned to the Department." (Apx. 81.) The 2007 Notice was issued without any public notice and comment.

Congress re-authorized NAHASDA in 2008, and, in the process, made substantial amendments to the law. Pub. Law 110-411, Title II, §203. Among the changes implemented was the addition of 25 U.S.C. §4133(f)(2), entitled "Carryover", which states: "**Any** amount of a **grant provided to an Indian tribe**

under section 4111 of this title 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." (Emphasis added.)

The purpose of this carryover provision was to codify the existing practice of allowing carryover 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). Further, a Senate Report discussing the 2008 NAHASDA amendments noted the "purpose" of enacting these amendments as a whole:

> 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). After the 2008 Amendments were enacted, HUD's Office of Public and Indian Housing issued the 2009 Notice on March 9, 2009, which continued to require the repayment of interest earned after the two-year investment window despite the carryover provision. (Apx. at 87.)

B. The enforcement action taken by HUD against the Nation.

As set forth in the Nation's complaint, HUD's Southern Plains Office for Native American Programs performed a monitoring review of Plaintiff's NAHASDA programs in May and June 2006. (Apx. at 9-10; 94-96.) Following this review, HUD issued a report on August 15, 2007, which, coincidentally was five days **after** the 2007 Notice was issued. The report made findings about the Nation's retention of investment income for more than the two-year window in 24 C.F.R. §1000.58(g), although it does not indicate that the investment vehicles were inappropriate in any way. (Apx. at 94-96.)

After concluding that review, HUD determined that the Nation should repay $1,316,425 in investment income it had earned on block grant money that the Nation 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). The Nation requested a waiver of this finding from HUD, which was rejected by Ms. Henriquez in August 2009. (Apx. at 9-10.)

In a September 14, 2009, letter, HUD demanded the Nation repay this investment income or HUD would impose administrative sanctions for the Nation's "noncompliance" with NAHASDA. Shortly thereafter, Mr. Sims contacted 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. HUD took all of these actions even though the Nation informed HUD it had already spent the funds at issue on housing related purposes as required by NAHASDA. (Apx. at 10.)

Since these events occurred, HUD initiated another negotiated rule committee review of the NAHASDA regulations, which was required by the 2008 amendments to NAHASDA. Though not yet published in the Federal Register for notice and comment, the rule committee proposed a change to 24 C.F.R. §1000.58(g) on January 14, 2011, that would extend the two-year restriction on investments to five years. In proposing this change, the committee noted the change would "provide recipients greater flexibility in their financial management of [block grants] funds pending their expenditure" on housing activities. (Committee Report (excerpt) at p.9, attached as Ex. B in the Brief Appx.)

SUMMARY OF LEGAL ARGUMENT

The district court incorrectly ruled that it lacked subject matter jurisdiction under the APA. The "agency discretion" immunity exception simply does not apply when an "agency action" is challenged as an ultra vires act. Further, given the extensive legislative and regulatory history noted above, there was significant "law to apply" to determine whether HUD properly acted within its discretion in implementing 24 C.F.R. §1000.58(g) and the Notice.

The complaint states a valid claim against the Government for equitable relief and recoupment. The Government is not entitled to *Chevron* deference as Congress has in fact "spoken" on the ability of Indian tribes to keep investment income earned on block grants by (1) authorizing tribes in NAHASDA to keep all program income, including investment interest, and (2) adding the 2008 amendments to allow carryover of all block grants. Further, as NAHASDA is a statute affecting Indian tribes, the Nation, not HUD, is not entitled to deference in its reasonable interpretation of the law. As the Nation's interpretation of NAHASDA's income retention provisions is supported by other HUD regulations and the 2008 NAHASDA amendments, the district court should have allowed this case to proceed on the merits.

LEGAL ARGUMENT

I. The district court erred in ruling it lacked subject matter jurisdiction.

A. Standard of review

Issues related to immunity are questions of law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). Accordingly, the legal underpinnings of questions of immunity and subject matter jurisdiction are reviewed by this Court *de novo*. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1293 (10th Cir. 2008).

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

The APA generally waives the Government's immunity for agency actions that aggrieve parties by allowing judicial review of such actions. 5 U.S.C. §§702-704. The APA, however, provides an exception to the judicial review provisions when the "agency action is committed to agency discretion by law." *Id.* §701(a)(2).

The United States Supreme Court has held that 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 (1988) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). This exception is "very narrow". *Citizens to*

Preserve Overton Park, 401 U.S. at 410. This is because the "APA's 'generous review provisions must be given a "hospitable" interpretation.'" *Hondros v. United States Civil Serv. Comm'n*, 720 F.2d 278, 293 (3rd Cir. 1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). Accordingly, the Government's position that the legislative intent of a federal statute restricts any judicial review of agency action under the APA requires "clear and convincing evidence" of that intent. *Id.*; *accord Citizens to Preserve Overton Park*, 401 U.S. at 410.

Under these standards, ***any*** agency action is subject to judicial review when the plaintiff challenges the action based on a claimed violation of the Constitution, or conflicting statutory or regulatory authority. *Id.* (citing *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 580 (3rd Cir. 1979)). "Courts have widely held that claims that an agency has acted outside its statutory authority are reviewable even though its decision on the merits might be unreviewable as committed to agency discretion." *Assiniboine & Sioux Tribes of the Ft. Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 791-792 (9th Cir. 1986) (citing multiple cases). *Accord Nader v. Civil Aeronautics Bd.*, 657 F.2d 453, 456 (D.C. Cir. 1981) (when a plaintiff claims "it was beyond the province of an agency to adopt [] a rule" the non-reviewability doctrine "is simply

inapplicable"). Challenges to agency action also must proceed under the APA when the plaintiff alleges that the agency has failed to follow its own regulations. *Webster*, 486 U.S. at 602 n.7. This Court recognizes that the "'law to apply' can also be derived from the agency's regulations where the agency is acting pursuant to those regulations." *City of Colorado Springs v. Solis*, 589 F.3d 1121, 1129 (10th Cir. 2009) (quoting *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997)).

These are precisely the type of claims bought by the Nation against the Government in this case. The complaint sets forth that 24 C.F.R. § 1000.58(g) and the 2009 Notice exceed HUD's authority based on the plain language and legislative intent of NAHASDA, and also conflict with HUD's long-standing regulatory definition of "program income." The complaint further alleges the Government's actions against the Nation violates those same provisions. As such, the district court was simply incorrect in ruling that the Nation's facial challenge to 24 C.F.R. §1000.58(g) and the 2009 Notice were not justiciable under the APA.

Further, in this case, the Government did not present "clear and convincing" evidence that the regulation and the 2009 Notice at issue are matters committed to agency discretion. By comparison, in *Heckler v. Chaney* – the primary case relied upon by HUD in the district court – the Supreme Court held that the Food and Drug Administration could not be ordered by a court to prosecute its regulatory

authority under a federal statute that did not require it to prosecute. *See* 470 U.S. 821, 837-38 (1985). In so holding, the Court noted an agency's decision "*not to* prosecute or enforce ... is a decision generally committed to an agency's absolute discretion." *Id.* at 831 (emphasis added).

By contrast, this case involves HUD enacting a regulation and issuing notices that exceeded its statutory powers in NAHASDA, which HUD subsequently enforced against the Nation. 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**." 470 U.S. at 832 (emphasis added).

Ultimately, in determining whether the §701(a)(2) immunity 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. *Colorado Environ. Coalition v. Wenker*, 353 F.3d 1221, 1228 (10th Cir. 2004) (quoting *Block v. Community Nutrition Inst.,* 467 U.S. 340, 345 (1984)). In fact, in another case involving HUD, the Third Circuit has held that, even when federal statutes gives HUD "broad discretion", that discretion "must be exercised in a manner consistent with national housing objectives set forth in the ...

applicable statutes," which is subject to judicial review. *Kirby v. HUD*, 675 F.2d 60, 68 (3rd Cir. 1982).

In this case, a full review of NAHASDA's plain text, its objectives and its legislative history, shows that 24 C.F.R. §1000.58(g) and the 2009 Notice are in conflict with NAHASDA's objectives and intent, namely to maximize the construction and maintenance of affordable housing for Native Americans through block grants, and the interest earned by tribes on those grants.

For instance, in NAHASDA's opening section, 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). HUD recognizes this intent as a "guiding principle" of NAHASDA in 24 C.F.R. §1000.2.

An examination of related provisions in NAHASDA as a whole supports the Nation's analysis that HUD has acted outside its authority. First, contrary to the Government's argument to the district court, the key statutory provision at issue in this case – section 204 of NAHASDA (25 U.S.C. §4134) – does not give HUD unfettered authority to regulate tribal investments of grant funds. The Government focuses solely 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 standards exist to judge that discretion. Given that NAHASDA's stated purpose is tribal self-determination and self-governance, *see supra*, the Government's reading of section 204(b) makes no sense because 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 housing related purposes. In fact, 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).

Another relevant provision is section 104 of NAHASDA, which states that 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, HUD has *no authority* to reduce the Nation's funding if the Nation retains program income, including interest income.

Further, Congress amended NAHASDA in 2008 to allow Indian tribes to carryover all unspent block grant funds. 25 U.S.C. §4133(f)(2). As even HUD recognized in the district court, the purpose of this carryover provision was to codify 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) (cited in Apx. at 39).

The Government, however, completely ignores a multitude of other statements of Congress's intent in that Senate Report. This includes the preliminary statement in the report as to Congress's "purpose" in enacting the 2008 amendments (quoted at length in the Statement of Facts), particularly the amendments sought "to clarify existing law while removing unnecessary statutory and regulatory burdens" including "by allowing tribes to decide **when they will use their funds**" for housing related purposes. *Id.* at 1 (emphases added).

This legislative history behind the 2008 NAHASDA amendments, clearly indicates 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, the changes allow grant 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**.

Next, 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 recapture any grant funds directly; to do so, it must refer the matter to the Attorney General, who is the only party empowered to file suit against the Indian tribe to collect the funds. *Id.* §4161(c). Thus, according to the plain language of 25 U.S.C. §4161, which is the only NAHASDA provision 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.

Finally, as the complaint alleges, 24 C.F.R. §1000.58(g) also conflicts with HUD's other NAHASDA-related regulations. *See City of Colorado Springs*, 589

F.3d at 1129 (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"). 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 also stated since 1996 that Indian tribes may retain all program income. HUD's corresponding regulation, 24 C.F.R. §1000.62(b) has consistently stated since 1998 that all program income may be retained by the tribe "provided it is used for affordable housing activities." Thus, even HUD agreed at the inception of the NAHASDA regulations that Indian tribes should be able "to keep **all** interest income earned on grant amounts." 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998) (emphasis added).

All of these provisions in NAHASDA show, first, that HUD has acted outside its authority, and, therefore, the Government is not entitled to the immunity exception in the APA. In addition, these various legal provisions show there is in fact "law to apply" for a federal court to analyze the Nation's allegations in this case. Thus, 5 U.S.C. §702(a)(2) does not protect HUD from suit because section 204(b) of NAHASDA is not completely "committed to agency discretion". A complete review of NAHASDA – and HUD's own regulations – reveals that HUD

does not have the unlimited discretion it claims to have. 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. The district court's dismissal of the Nation's claims was legally flawed.

A. Standard of review

This Court reviews a district court's dismissal of a case via Fed. R. Civ. Proc. 12(b)(6) de novo. *E.g., Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir. 2009)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Further, in a case challenging agency action, a federal appellate court makes an "independent review of the agency's action" and is not bound by the district court's decision. *United Keetoowah Band of Cherokee Indians v. HUD*, 567 F.3d 1235, 1239 (10th Cir. 2009).

B. The complaint sufficiently pleads that 24 C.F.R. §1000.58(g) and the 2009 Notice are illegal.

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

The standards set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, may be applied to the Nation's claim for relief pursuant to the APA with certain limitations explained below. 467 U.S. 837 (1984). 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.[2] Applying *Chevron* to the Nation's allegations in the complaint, the Nation clearly states a claim that 24 C.F.R. §1000.58, and the 2009 Notice directly conflict with the legislative intent of NAHASDA. (Apx. at 9-11.) 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.

[2] In performing this analysis, the standard rules of statutory construction apply. The Court must "begin with the plain language of the law" and "assume the ordinary meaning of the words Congress uses conveys its intent." If the statutory language is unambiguous, the construction ends there. *United Keetoowah Band*, 567 F.3d at 1241.

a. NAHASDA's plain language supports retention of investment income by tribal housing authorities as "program income".

In this case, Congress's intent is clear. 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. 25 U.S.C. §4114(a)(1). Congress has always given **Indian tribes** the discretion to invest grant funds to earn such income. *Id.* §4134. HUD itself agreed in 1998 that the NAHASDA regulations would treat investment income earned on grant funds as "program income" and that the Indian tribes could keep and utilize that income for housing purposes. 24 C.F.R. §1000.62(a); 63 Fed. Reg. 12333, 12338 (Mar. 12, 1998). Finally, even 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. *Id.* §4133(f). Thus, at a minimum, the 2008 amendments obviated the restriction in 24 C.F.R. §1000.58(g) on two-year (or less) maturity dates for investments.

By focusing on only a few words in section 204(b) of NAHASDA, the Government and the district court ignored the full context and purpose of NAHASDA and its legislative history. (*See* Apx. at 35, 122.) The express language as a whole and the legislative intent expressed in 25 U.S.C. §4101(7) do

in fact show that Congress "has spoken" in favor of Indian tribes exercising self-determination by figuring their own method to utilize interest income for housing purposes. These points have been throughly explained above in Part I.B and only bear repeating to show that Congress's intent "is the end of the matter".

b. Any ambiguity in NAHASDA §204(b) must be construed in favor of the Nation's reasonable interpretation of that law.

Even if this Court agrees with the district court's analysis that the statutory language is inconclusive, the district court nonetheless erred by focusing solely on whether HUD's regulations were a reasonable interpretation of NAHASDA's purpose. According to *Chevron*, if a court determines the statutory language is ambiguous, the court must weigh whether the agency's construction of the statue is "permissible" or otherwise "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-844. In other words, in this case, 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.

At the same time, however, federal statutes favoring Indian tribes "are to construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." *Ramah Navajo Chapter v. Lujan*, 122 F.3d 1455, 1462 (10th Cir. 1997). While the district cited this principle in its opinion (Apx. at 122), the district court failed to recognize that when the tribe and the federal

agency each put forth reasonable interpretations of a statute, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, __, 2011 WL 1746138, at *7 (10th Cir. 2011) (citing *Ramah Navajo Chapter*, 112 F.3d at 1462). In fact, in the 1997 *Ramah* decision, the Court pointed out that this policy of deference to the Indian tribe's reasonable statutory interpretation is especially important when the "the policy of self-determination ... is the driving purpose behind" the act in question (in that case, the Indian Self-Determination and Education Assistance Act). 112 F.3d at 1462. That same analysis clearly applies to NAHASDA, which is also driven by a policy of Indian self-determination. 25 U.S.C. §4101(7).

The district court's ruling that HUD's interpretation of NAHASDA was reasonable in implementing 24 C.F.R. §1000.58(g) and the Notices hinges largely on the court's assumption that any grant funds maintained in an investment account beyond the two-year window is an "unauthorized" use of funds that have not yet been "disbursed". That reasoning is incorrect.

First, the district court erroneously reasoned that the deposit of grant funds into a tribal investment account "is not an initial disbursement of the grant amount because investments are made prior to expenditure on a housing activity." (Apx.

127.) In making this statement, the court relied on the Government Accountability Office's definition of "disbursement", which the court construed as "an amount paid to liquidate an obligation." (*Id.*) In reality, the GAO defines disbursement as "[a]mounts **paid by federal agencies**, by cash or cash equivalent, during the fiscal year to liquidate government obligations." GAO, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 45 (2005) (emphasis added) (courtesy copy in Brief Apx. C). Contrary to the district court's insinuation, this definition is based on when the federal agency transfers money and says nothing about expenditures by a tribe after a federal agency has disbursed grant funds to the tribe.

Equally important, this analysis by the district court also overlooks HUD's own definition of "program income" in 24 C.F.R. §1000.62(a), which includes all post-distribution income and "payments of principal and interest earned on grant funds **prior to disbursement**." (Emphasis added.) Thus, even if the district court correctly reasoned that investment of grant funds are "prior" to disbursement, that reasoning is still irrelevant because HUD's regulation treats any interest earned on that investment as program income whether it is earned pre- or post-disbursement.

Further, in reaching this conclusion, the district court relied heavily on a Comptroller General opinion, 71 Comp. Gen. 387 (1992) (also cited by HUD),

which, in reality, is distinguishable and does not support the court's ruling.[3] In this opinion, HUD grant funds had been loaned for purposes later "determined to be ineligible" under the particular HUD program. *Id.* at 387-388. The opinion concerned recapturing interest accrued on funds actually spent on an ineligible purpose. The Comptroller General agreed in this 1992 opinion that if grant funds are ultimately 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 also 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 housing related purposes. 25 U.S.C. §§ 4114(a), 4133(f). The 2007 and 2009 Notices, however, require an Indian tribe to repay interest after the two-year limitation without regard to whether the funds have been committed to, or later spent on, a valid NAHASDA purpose. This contradicts the requirement in 25 U.S.C. §4114(a) that Indian tribes be allowed to

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[3] Federal courts are not bound by Comptroller General decisions. *Ramah Navajo Chapter*, 2011 WL 1746138 at *10, n. 4&5 (Comptroller General opinions are not binding, but may be considered persuasive); *accord Nevada v. Department of Energy,* 400 F.3d 9, 16 (D.C. Cir. 2005) (Comptroller General's decisions are "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.").

retain program income regardless of when such income is earned, provided the income is spent on NAHASDA purposes. In this case, the Nation pled in the complaint that it had spent the interest earned from the grant funds in question on housing purposes, which are clearly "eligible" purposes under NAHASDA. (Apx. at 10.)

Ultimately, the parties' dispute is over how one should interpret the phrase "investment securities and other obligations as approved by the Secretary" in section 204(b) of NAHASDA. The parties agree that this phrase provides HUD with the authority to delineate appropriate investment vehicles for grant funds, which HUD has regulated 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 ordinary 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 the phrase modifies "investment securities and other obligations", meaning the *types* of investments securities and obligations.

As noted at length in Part I.B above, the Government overlooks in this case that HUD originally agreed with this interpretation in 1998 after NAHASDA was newly passed. In the Federal Register publication discussing the drafting process

of the original NAHASDA regulations, it was stated that HUD 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 ultimately spent on NAHASDA purposes.

When HUD issued its first notice regarding 24 C.F.R. §1000.58 in 1999, it did not vary from this interpretation. While the 1999 notice stated discussed the two-year restriction on investments, the provision noticeably lacked language requiring an Indian tribe to repay to HUD any unused income the investments had generated beyond the two-year "maturity" date.[4] Accordingly, like the regulation determining what types of investments grant funds could be invested in, it appears

[4] The regulation and the 1999 Notice say nothing about HUD's speculative argument in this case that Indian tribes will otherwise create huge "endowments" of money that will not be spent on NAHASDA programming. (Apx. at 40.) Unfortunately, the district court accepted HUD's argument in its order in stating that allowing tribes to keep interest income earned beyond the 2-year limitation would serve only to "generate income" for tribes. (Apx. at 123-124.) NAHASDA clearly does not allow such practice, and the Nation is not advocating for such capability.

HUD put a two-year restriction on the maturity of investments as a guideline to avoid the funds being placed in long-term investments that would not be readily accessible for spending on affordable housing purposes.

This initial reading of 24 C.F.R. § 1000.58(g) in HUD's 1999 notice as simply restricting the investment maturity date was maintained by HUD in its recurring notices until eight years later on August 10, 2007. (*See* Apx. at 73-76.) On that date, without any notice and comment period, HUD significantly changed its view in the 2007 Notice ¶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." (Apx. at 81). The 2007 Notice overlooked that the apparent original purpose of 24 C.F.R. §1000.58(g) was to ensure access to the grant funds through short-term investments, not to keep tribes from earning income on them.

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. (Apx. at 89.) 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 specific

mention of repaying any interest earned on the grant funds in question or that the investment types were somehow inappropriate. (*See* Apx. at 96.)[5]

This background shows that the district court applied an incorrect analysis in deferring to HUD's interpretation of NAHASDA while giving little consideration for the Nation's interpretation. HUD itself agreed at the outset of NAHASDA that tribes could retain all investment interest as "program income". HUD also did not implement any notice or other means to require tribes to repay such interest until 2007, which was after the Nation had allegedly overextended its grant investments. Finally, since these events, HUD has now apparently recognized that the two-year investment window in unworkable and, accordingly, has proposed to amend 24 C.F.R. §1000.58(g) to allow investment to be kept for up to five years. (Brief Apx. B.) Given these facts, the Nation's interpretation that it may retain all investment income despite the two-year window in 24 C.F.R. §1000.58(g), is a reasonable interpretation of NAHASDA, which is entitled to deference. *Ramah Navajo Chapter*, 2011 WL 1746138 at *7. Simply put, the district court erred in

[5] 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. (*Id.*) 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).

completely disregarding the Nation's reasonable interpretation of 24 C.F.R. §1000.58(g) and the 2007 and 2009 Notices.

2. HUD's issuance of Notice PIH-2007-24 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, the most crucial aspect of the Nation's complaint 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 particular power cannot be found in NAHASDA **or even in HUD's regulations**. HUD's attempt to self-impose interest recapture powers comes solely from the 2007 and 2009 Notices. Accordingly, these Notices suffer from another serious defect - they actually create a "legislative rule" without the mandatory negotiated rulemaking required by section 106 of 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). The 2007 and 2009 Notices obviously violated these requirements because they created "law" that does not exist in NAHASDA, and imposed new "duties" by compelling Indian 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:

> 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 history explained above shows, in issuing the 2007 and 2009 Notices, HUD engaged in **exactly** the same administrative behavior criticized by the D.C. Circuit in *Appalachian Power*, by creating a legislative rule that compels tribes to repay interest income, after simply posting the Notices on the Internet without public notice and comment. HUD also issued these Notices presumably knowing that they conflict with HUD's original 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).

The district court summarily rejected this argument by simply stating that the Notice "makes no substantive change in recipients' legal duties regarding grant investments." (Apx. at 129.) To the contrary, before the Notice was issued, the Nation clearly would not have had any express requirement to repay the $1.3 Million in interest income the Nation had generated from the grant fund investments after the two-year window. In fact, HUD did not even ask for the Nation to repay the interest in its initial monitoring report (Apx. at 94-96.) The district court's opinion provides no detailed explanation or analysis to the contrary.

At a minimum, 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 2007 and 2009 Notices, also never occurred. 25 U.S.C. §4116. HUD has failed to comply with these requirements, and the 2007 and 2009 Notices should have been overturned by the District Court.

CONCLUSION

The district court clearly had subject matter jurisdiction over this case. The Government is not entitled to immunity from the Nation's claims because they are based on HUD taking actions outside its statutory authority. As alleged in the Nation's complaint, in enforcing its regulations and policies on investment income, HUD exceeded its statutory powers that Congress bestowed in NAHASDA. This type of claim is always allowed to proceed under the APA and the "committed to agency discretion" exception to the APA's sovereign immunity waiver, therefore, does not apply.

In addition, the district court erroneously agreed with the Government's *Chevron* "deference" argument. First, 24 C.F.R. §1000.58(g) and the 2007 and 2009 Notices exceed the express scope of HUD's powers in NAHASDA. Further, the district court failed to recognize that the most basic premise of NAHASDA is tribal self-determination and 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 statutory 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.

Accordingly, the Court should reverse the decision of the district court and remand with instructions to proceed with this case.

ORAL ARGUMENT STATEMENT

The issues presented by this appeal involve a detailed analysis of NAHASDA's legislative intent and its impact on the regulation and Notices. In addition, while the Government's APA immunity waiver and *Chevron* arguments, in general, are not questions of first impression, the application of those arguments to the specific provisions of NAHASDA at issue do appear to be questions of first impression. Oral argument would allow the Court to inquire of the parties any additional facts or law, or resolve any complicated issues, to assist its analysis of these questions.

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Certificate of Compliance

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 8,515 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in Times New Roman 14-point font.

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Certificate of Service

This is to certify that on the 15th day of August 2011, a true, correct, and exact copy of the above instrument was sent via ECF to:

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APPENDICES TO THE BRIEF

A. District Court's Order

B. HUD, Native American Housing and Self-Determination Act Reauthorization Act of 2008: Amendments to Program Regulations (Jan. 14, 2011 draft) (excerpt)

C. GAO, A Glossary of Terms Used in the Federal Budget Process (2005) (excerpt)

D. Pertinent Statutes and Regulations for the Court's Review