landlord must provide a separate, later notice to vacate. Therefore, because Andover failed to provide Kennedy with a separate notice to vacate, it did not comply with Section 24.005 and thus constituted an unlawful termination of Kennedy's tenancy.

Andover argued that its single eviction notice was sufficient to comply with Section 24.005 based on language in the lease that indicates that state and HUD notice periods *may* run together as opposed to consecutively. The court rejected this argument because the lease did not state that the HUD notice periods eliminated or replaced the state statutory requirement of providing a second, later notice.

Kennedy reiterates the important point that, under certain circumstances, a landlord's failure to provide a tenant with consecutive eviction notices may invalidate an otherwise lawful forcible detainer action. ■

Victory: Ninth Circuit Allows Residents to Challenge RD Prepayment

The United States Court of Appeals for the Ninth Circuit has ruled that tenants in a Rural Development (RD) Section 515 Rural Rental Housing development whose owner prepaid the RD loan pursuant to a court-approved settlement agreement are entitled to have the prepayment reviewed under the Administrative Procedure Act (APA) to determine whether the government violated the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Goldammer v. United States, 2006 WL 2806691 (9th Cir. Oct. 3, 2006).

The ruling reverses a district court decision that denied the residents the right to seek APA review of the prepayment. It also severely restricts an earlier Ninth Circuit decision that suggests, but does not hold, that owners of Section 515 developments, whose right to prepay their loans was restricted by ELIHPA, are entitled to quiet title to their property if RD refuses to accept their prepayment tender. Kimberly Assocs. v. United States, 261 F.3d 864 (9th Cir. 2001).

Background

Goldammer arose when DBSI Limited Partnership, the owner of six Section 515 developments located in Oregon, prepaid the loan for one of its developments pursuant to an agreement entered between itself and RD to settle a quiet title action suit that DBSI filed against RD in 1998. Prosecution of the lawsuit was suspended pending resolution of *Kimberly*, a case also filed in 1998 by a related partnership in Idaho under the same equitable quiet title theory. When *Kimberly*, which the Ninth Circuit reviewed and reversed on the Idaho district court's initial ruling that the suit could not be maintained, was ultimately decided in the owner's favor, DBSI and RD entered into an agreement in principle in 2003 to settle the Oregon case. Under that agreement, RD and DBSI agreed to negotiate the sale value of six Oregon properties owned by DBSI and to offer the properties for sale to nonprofit entities that would keep them in the RD rental program. If no sale occurred, the agreement provided that RD would accept DBSI's prepayment of the loans and release the properties from the Section 515 restrictions without regard to any prepayment restrictions, including those imposed by ELIHPA.

While RD and DBSI agreed to the value of four Oregon properties owned by DBSI, it did not approve the sale of those properties to a particular nonprofit organization. Acting under its agreement with RD, DBSI prepaid the loan for one of those properties, Seacrest, on October 23, 2003. RD accepted the prepayment and released Seacrest from the Section 515 program. On December 19, 2003, DBSI and RD stipulated to a quiet title judgment with respect to Seacrest, which was later approved by the Oregon District Court. Thereupon, DBSI sold Seacrest to Northwest Real Estate Capital Corporation, a nonprofit corporation. Since the prepayment terminated the RD tenant subsidies, Northwest had to increase rents at the development. To protect residents from displacement, however, it secured HUD vouchers from the local housing authority that enabled some of the residents to pay the higher rents.

The Residents' Case

When residents of Seacrest learned of the impending prepayment in 2003, they filed a lawsuit against RD seeking review of the prepayment under the APA, alleging that the agency violated the law by allowing DBSI to prepay the Section 515 loan without complying with ELIHPA. Residents of another DBSI-owned development, Meadowbrook, joined the lawsuit seeking declaratory relief with respect to DBSI's right to prepay the Meadowbrook loan under the DBSI and RD agreement. DBSI, as owner of the two developments, was named in the residents' lawsuit as a necessary party defendant.

In January of 2004, the same resident plaintiffs filed a motion to intervene as a matter of right in the original DBSI quiet title lawsuit against RD. In their motion, the residents sought an opportunity to set aside the quiet title judgement on the ground that it violated ELHIPA.

The district court denied the residents' intervention motion on the ground that their interests were adequately protected in their previously filed and separate APA case. However, it then denied the residents' motion for preliminary relief in their APA case and ruled in favor of RD and

DBSI on cross motions for summary judgment. The district court held that its decision denying relief to the residents was mandated by the Ninth Circuit's earlier decision in *Kimberly*, which, according to the district court, held that ELIHPA was not a "sovereign act" and therefore was not enforceable. The residents appealed both decisions to the Ninth Circuit.

Ninth Circuit Decision

In its decision, the Ninth Circuit first ruled on the residents' right to intervene in the DBSI case. Addressing that issue, it upheld the district court's decision and denied the residents the right to intervene in the DBSI case. According to the court, to intervene as a matter of right the residents had to meet all the elements of a four-part test: (1) the application to intervene had to be timely; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit. Like the district court, the Ninth Circuit found that the residents failed to meet the third factor in that the relief that they sought in their APA case was essentially the same that they sought to secure through intervention. Finding that the district court had authority to set aside the prepayment under the residents' APA case, it held that the third test had not been met and upheld the district court decision with respect to the denial of the residents' motion to intervene.[1]

Moving to the residents' APA case, the Ninth Circuit next addressed a number of justiciability issues raised by both DBSI and RD. Specifically, RD suggested that the plaintiff residents lacked standing because they had not suffered an injury, given that the Meadowbrook development had not been prepaid and that the Seacrest tenants were protected by vouchers. The Ninth Circuit agreed with RD with respect to the Meadowbrook plaintiff, concluding that the plaintiff had not been harmed and that the prepayment of the Meadowbrook loan was not sufficiently imminent to provide the plaintiff with standing.[2]

With respect to the Seacrest tenants, the Ninth Circuit came to a different conclusion. While noting that the Seacrest residents' rents had not in fact been raised,[3] it found that residents in the Section 515 program had noneconomic protections that were terminated when Seacrest was removed from the Section 515 program and were not available under the voucher program. For example, a landlord under the voucher program may terminate participation in the program at the end of the lease term without good cause. Section 515 landlords cannot terminate resident leases except for good cause. The Ninth Circuit also noted that tenants under the Section 515 program had a statutory right to a grievance process that was not available to persons participating in the voucher program. Finding that the residents had suffered non-economic injury as a result of the prepayment, the court concluded that the Seacrest residents had standing to pursue their claim.[4]

The Ninth Circuit also rejected DBSI's argument that the Seacrest tenants' claims were mooted by the sale of Seacrest to Northwest. It explained that federal courts are authorized to void a property transfer when necessary. Accordingly, it concluded that since the sale to Northwest could be undone and the prepayment reversed, the residents' claim was not moot.[5]

Turning to the main argument, the Ninth Circuit noted that the district court decided the APA case against the residents, believing that such a decision was mandated by the Ninth Circuit's earlier decision in *Kimberly*. The *Goldammer* panel disagreed:

> There is a critical distinction between *Kimberly* and the present case. *Kimberly* was a quiet title action in which borrowers claimed to be entitled to pay off their loans in accordance with their contracts. In the present case, the question is entirely different—whether the agency acted contrary to federal law in failing to comply with ELIHPA to the detriment of the residents.[6]

Noting the factual similarity between *Goldammer* and *Kimberly*, the court proceeded to explain how the legal issues in the two cases differed. Kimberly involved a dispute between an owner and RD in which the owner sought to quiet title to the property when the agency failed to accept the owner's prepayment tender. The government moved to dismiss the *Kimberly* case raising two initial defenses, waiver of sovereign immunity and the unmistakability doctrine.[7] The district court in that case ruled that the government had waived sovereign immunity but that the unmistakability doctrine barred the owners from any remedy under its contract with the government.

On appeal from the *Kimberly* district court's approval of the government's motion to dismiss, the Ninth Circuit reversed. It agreed with the district court that sovereign

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[1]*Goldammer* at 17235.
[2]*Id.* at 17237.
[3]The panel's conclusion that the residents' rents had not been raised is incorrect. In fact, rents at the project had been raised by Northwest. It is just that the vouchers covered the increased rent on behalf of the plaintiffs.

[4]*Id.*
[5]*Id.* at 17238.
[6]*Id.* at 17239.
[7]The unmistakability doctrine is one of two doctrines that bars relief against the government in contract damage actions. A discussion of the unmistakability doctrine is beyond the scope of this article. For more information on the doctrine, see *United States v. Winstar,* 518 U.S. 839 (1996).

immunity had been waived, but held that the unmistakability doctrine did not apply to the case because ELIHPA was "not a sovereign act" as interpreted for the purposes of determining whether the unmistakability doctrine operated as a bar to the owner's case. Accordingly, *Kimberly* held that the government could not use the unmistakability doctrine as an initial defense warranting dismissal of the case.

While the *Goldammer* panel allowed that *Kimberly* remains good law as far as it goes, it further stated:

> nowhere does *Kimberly* hold that ELIHPA is invalid or that the governement is free to disobey it. Bearing in mind that *Kimberly* was a quiet title action, we had no occasion then to opine on whether the government violated the APA by affirmatively allowing borrowers to ignore ELIHPA's statutory requirements.[8]

Thus, the panel in *Goldammer* concluded that the district court erred in relying on *Kimberly* as the basis for granting summary judgement on the tenants' APA claim. Therefore, it remanded the case to the district court to decide whether RD acted contrary to law.[9]

The panel also noted that DBSI would not be deprived of relief should the residents prevail in setting aside the prepayment in the subsequent proceeding before the district court. The panel stated that DBSI may have relief by way of a damage action under the Tucker Act to compensate it for the breach of contract caused by the passage of ELIHPA.[10]

Goldammer now returns to district court for a determination of whether RD violated ELIHPA when it accepted the prepayment of the Seacrest loan. If it did, it is likely that the development will be brought back into the Section 515 inventory.[11]

The *Goldammer* decision's distinction of *Kimberly* is particularly significant because three district courts, all within the Ninth Circuit's jurisdiction, have interpreted *Kimberly* as sanctioning owners' right to circumvent ELIHPA by bringing a quiet title action. The decision should put this to an end and force owners and RD to follow ELIHPA's prepayment restrictions. ■

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[8] *Goldammer* at 17241.
[9] *Id.*
[10] *Id.* at 17241-2.
[11] *See Lifgrin v. Yeutter,* 767 F. Supp. 1473 (D. Minn. 1991).